

Honorable Johanna Bender
Hearing: September 30, 2021; 1:30 pm
With oral argument

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

CHRISTOPHER A. NIEDERMAN and
NICOLE L. NIEDERMAN, husband and
wife, and the marital community composed
thereof,

Plaintiffs,

v.

STEVE YANG and SOPHY YANG, husband
and wife, and the marital community
composed thereof; UMPQUA BANK, a
foreign bank corporation,

Defendants.

NO. 20-2-08679-7 SEA
MOTION FOR PARTIAL SUMMARY
JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

The Niedermans¹ request that the Court narrow the issues for trial and grant them summary judgment on three issues:

Easement Rights. A Short Plat Dedication recorded in 1976 created a 10-foot private road and turnaround easement for five lots and gave the owners of the property now owned by the Niedermans the express right to use the easement. The Yangs contend the Niedermans should be restricted to a different easement not mentioned in the Short Plat Dedication. Should the Court grant declaratory relief that the Niedermans can use the entire easement created in the Short Plat?

¹ Plaintiffs Christopher and Nicole Niederman will collectively be referred to as the Niedermans. Defendants Steve and Sophy Yang will collectively be referred to as the Yangs. Where appropriate the parties will be referred to by their first names for clarity. No disrespect is intended.

1 *Private Nuisance.* The Yangs, without legal authority, eliminated a portion of the
2 turnaround area created in the 1976 Short Plat Dedication, and now routinely block the
3 remainder. As a result, vehicles that need to turn around at the bottom of the private road are
4 forced to trespass on the Niedermans’ property. Should the Court eliminate this private
5 nuisance?

6 *Easement Relocation.* Washington law allows parties to continue using existing
7 easements and have title quieted to formally recognize easements established by prescription,
8 but not to unilaterally relocate an existing easement. The Niedermans allege they have the
9 right to use an existing easement in whole without alteration of any kind, or in the alternative
10 that they have acquired additional rights by prescription. Should the Court dismiss the Yangs’
11 legally irrelevant easement relocation counterclaim?

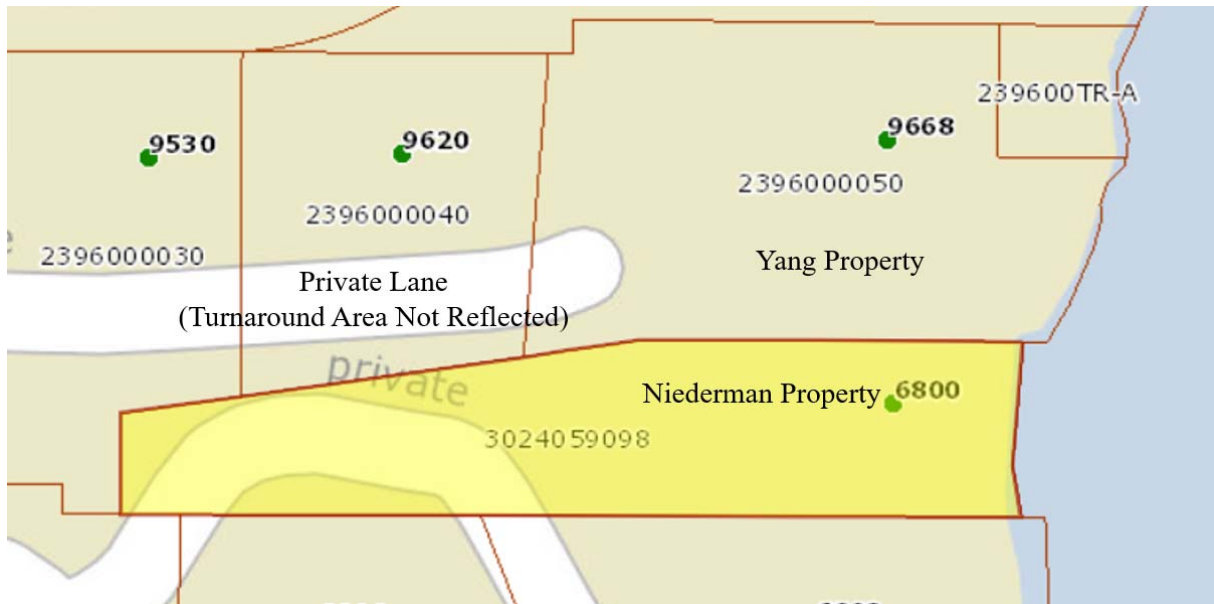
12 In 1976 a predecessor to the Niedermans and Yangs recorded a Short Plat Dedication
13 that gave the owners of both properties the right to use the entire area of “THE 10’ PRIVATE
14 ROAD & UTILITY” easement that consists of a 10-foot wide private lane and a turnaround
15 area at the bottom of the private lane. That easement is the only vehicle easement mentioned
16 in the Short Plat Dedication. The Yangs are engaged in a campaign designed not only to
17 prevent the Niedermans from using all of “THE 10’ PRIVATE ROAD & UTILITY”
18 easement, but even worse to force vehicles to use the Niedermans’ property to safely turn
19 around, a right never mentioned in any written document or otherwise provided for under
20 Washington law. Partial summary judgment preventing the Yangs from continuing this
21 wrongful course of action is appropriate and justified.

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1 **II. STATEMENT OF FACTS**

2 **A. The Niedermans and Steve Own Adjoining Lake-Front Lots on the East Side of**
3 **Mercer Island**

4 The Niedermans own the real property located at 6800 96th Ave. SE, Mercer Island,
5 WA (the “Niederman Property”).² Steve owns as his separate property adjacent real property
6 immediately to the north located at 6660 E Mercer Way (9668 68th St. SE), Mercer Island,
7 WA (the “Yang Property”).³ Both lots border Lake Washington, and the entire neighborhood
8 slopes steeply down towards the water. The following map from the King County parcel
9 viewer shows the parties’ property:⁴



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² Compare Complaint, ¶3.1 with Answer, ¶3.1. The Niederman Property is King County Parcel No. 30240-59098. The other road shown on the map to the south of the Private Lane that crosses the Niederman Property is at the top of an extremely severe slope that bisects the Niederman Property, and as such cannot be used to access the Niederman Property. Declaration of Christopher Niederman, ¶6.

26 ³ Compare Complaint, ¶¶1.3, 3.1, 3.4, and 3.9 with Answer, ¶¶1.3, 3.1, 3.4, and 3.9.

⁴ C. Niederman Decl., ¶4.

1 **B. In the 1970s, When the Yang Property Was Developed as Part of the Evans**
2 **Addition, the Short Plat Dedication Established a Single Private Road Easement**
3 **and Vehicle Turnaround for the Benefit of the Five Lots in the Evans Addition**
4 **and the Niederman Property**

5 In December of 1976, what is now the Yang Property, together with four other parcels,
6 were developed as part of the “Evan’s Addition” as reflected in a recorded Short Plat
7 Dedication.⁵ The Yang Property is referred to as Lot 5 in the Short Plat Dedication. As
8 illustrated by the Short Plat Dedication, the Niederman Property borders the Evans Addition,
9 but pre-existed and was not a part of it.⁶

10 The five lots that make up the Evan’s Addition, as well as the Niederman Property,
11 can only be accessed by “THE 10’ PRIVATE ROAD & UTILITY ESMT” that runs from 68th
12 Street SE down the hill towards Lake Washington as reflected on the face of the Short Plat
13 Dedication, and consists of a private lane and a hammerhead shaped turnaround area at its
14 bottom.⁷ The reference to 10 feet relates to the fact that the private lane, with the exception of
15 the hammerhead turnaround area, is 10 feet wide. That the hammerhead shaped turn around
16 area was included makes sense, as without it there is no safe way for emergency vehicles,
17 garbage trucks, delivery vehicles, and anyone else who drives to the bottom of the private lane
18 to turn around.⁸ The “Restrictions” portion of the Short Plat Dedication further provides that:
19 “Access to all lots shall be limited to the 10’ private road easement,” and includes the
20 following map:⁹

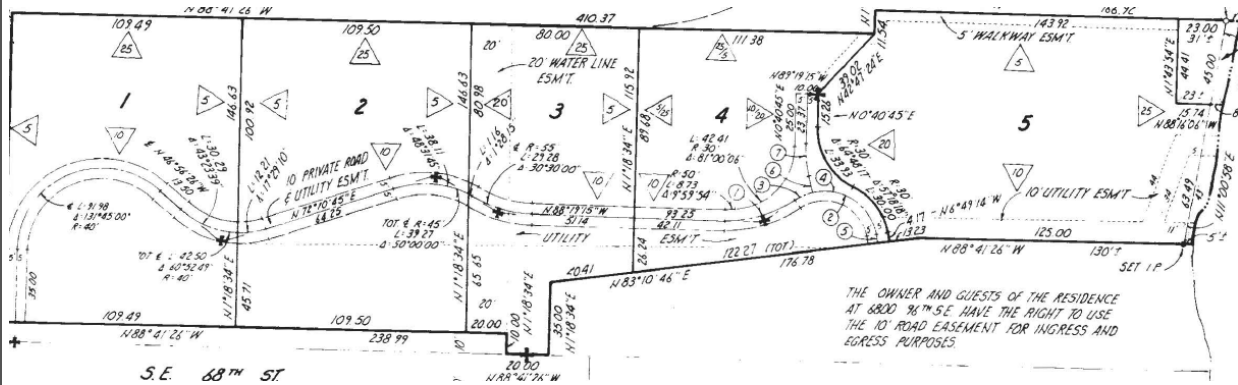
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23 ⁵ Compare Complaint, ¶¶3.11-3.16 and Ex. A with Answer, ¶¶3.11-3.16. A copy of the Short Plat Dedication
24 is attached for the Court’s convenience as Exhibit A.

25 ⁶ *C. Niederman Decl.*, ¶7.

26 ⁷ Compare Complaint, ¶3.12 with Answer, ¶3.12.

⁸ Complaint, Ex. A; *C. Niederman Decl.*, ¶8; Declaration of Nicole Niederman, ¶5.

⁹ Exhibit A.



Presumably, because the Niederman Property would be landlocked without access to “THE 10’ PRIVATE ROAD & UTILITY ESMT”,¹⁰ as shown on the above map, the Short Plat Dedication provides that:

THE OWNER AND GUESTS OF THE RESIDENCE AT 6800 96TH SE [the Niederman Property] HAVE THE RIGHT TO USE THE 10’ ROAD EASEMENT FOR INGRESS AND EGRESS PURPOSES.¹¹

This language is notable because it mentions “**THE** 10’ ROAD EASEMENT,” not a “10’ ROAD EASEMENT.” That reality is critical, because as discussed below, easements are construed with the same rules as contracts, and “THE 10’ PRIVATE ROAD & UTILITY ESMT” is the *only* access or road easement referenced on the Short Plat Dedication. Further, the Short Plat Dedication contains seven points of bearing describing the “THE 10’ ROAD EASEMENT” that describe the hammerhead turnaround area and then run well up into the private lane portion of the easement where it narrows to 10 feet. The only other easement referenced in the Short Plat Dedication is a “10’ UTILITY EASEMENT” that runs over what is now the Yang Property that has nothing to do with the Niederman Property.

As such, the Niederman Property received, by way of the Short Plat Dedication, the right to use the 10-foot private lane running down to the homes from SE 68th Street *and* the turn-around area at the bottom of the lane, as both are part of a single easement. As discussed below, there is no other way to interpret the Short Plat Dedication in accordance with

¹⁰ C. Niederman Decl., ¶9; N. Niederman Decl., ¶6.

¹¹ Exhibit A (capitals in original).

1 Washington law. To accept the Yangs' contention that what is now the Niederman Property
2 received a separate easement that does not include the hammerhead turnaround area would
3 require the addition of additional language as well as an additional legal description.

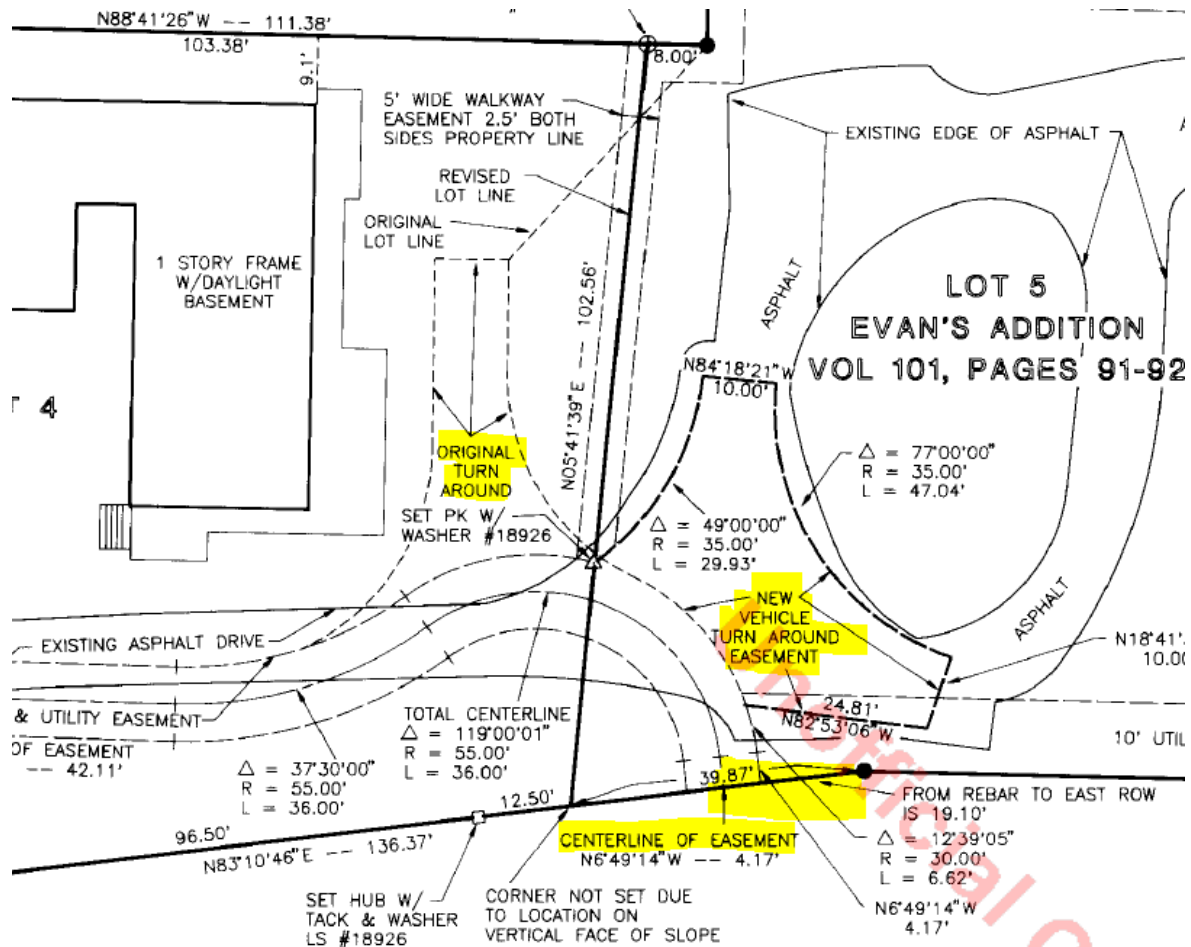
4 **C. In 1994 a Lot Line Adjustment Relocated the "Turnaround Area" at the Bottom**
5 **of the "10' PRIVATE ROAD & UTILITY" but Did Not Otherwise Alter the**
6 **Already Existing Easement**

7 In 1994 Steve's Parents, who then owned the Yang Property, and the then owners of
8 Lot 4 agreed to the Evans/Yang Lot Line Revision (the "Lot Line Revision").¹² The Lot Line
9 Revision served to increase the square footage of Lot 5 (the Yang Property) and decrease the
10 size of Lot 4. It also relocated the "Vehicle Turn Around Easement" that is used and needed
11 by the Niedermans and the owners of Lots 1-5, as well as garbage, delivery, and mail trucks
12 and other vehicles to, *inter alia*, turn vehicles around so they can drive back up the private
13 lane, as illustrated in the following map from the recorded document:¹³

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¹² Complaint, ¶¶3.16-3.18 and Ex. B; Answer and Counterclaims. p. 9, at ¶¶7-8.

¹³ C. Niederman Decl., ¶8; N. Niederman Decl., ¶¶5-7.



16 The Lot Line Revision had no adverse effect in any rights the Niederman Property
 17 might have, and in fact expressly explains that it is: "SUBJECT TO: ALL EASEMENTS,
 18 RESTRICTIONS AND RESERVATIONS OR RECORD, IF ANY."¹⁴

19 **D. The Niedermans' Driveway Has Been in Exactly the Same Place for Decades**

20 When the original residence on what is now the Niederman Property was constructed
 21 in the 1970's, it included a 15-foot wide driveway that overlapped the east half of the south
 22 arm of the turnaround area as set forth in the Short Plat Dedication and continued another 10
 23

24 ¹⁴ Complaint, Ex. B (capitals in original). A copy is attached for the Court's convenience as Exhibit B.
 25 Steve's parents and the owners of Lot 4 lacked the right to unilaterally revise "THE 10' PRIVATE ROAD &
 26 UTILITY" easement without the written agreement of the other affected parties, but for the purposes of this
 motion the Niedermans will concede that ultimately the Lot Line Adjustment operated to modify the original
 easement through the doctrine of mutual recognition and acquiescence. See 17 Stoebuck & Weaver, WASH.
 PRAC., REAL ESTATE § 8.25 (2d ed. May 2021 Update).

1 feet to the east toward Lake Washington. Referencing the above map, the west edge of the
2 Niedermans' driveway begins at the "CENTERLINE OF THE EASEMENT" at bottom of the
3 map, and then proceeds 15 feet to the east. The approximately location of the driveway is
4 highlighted in yellow.

5 The location of the driveway has never changed.¹⁵ And, at all times since the original
6 residence was constructed on the Niederman Property, the owners of the Niederman Property
7 have used a 15-foot wide path to access the turnaround area and private lane.

8 When the Lot Line Revision was recorded in 1994, the preexisting driveway on the
9 Niederman Property ran across the southern arm of the hammerhead as reflected in the "NEW
10 VEHICLE TURN AROUND EASEMENT."¹⁶ This appears to have been done to reflect the
11 historic usage of the property by owners of what are now the Niederman and Yang Properties.

12 **E. During the Niedermans' Recent Remodel, the Yangs Had the Opportunity to**
13 **Object to the Location of the Niedermans' Driveway, but Twice Failed to do so**
14 **Within Applicable Deadlines**

15 The Niedermans purchased their property in 2015 with the intention of remodeling the
16 existing home due to its age and condition.¹⁷ In 2017, prior to beginning construction, the
17 Niedermans applied for and obtained all required building permits from the City of Mercer
18 Island.¹⁸ The permit application included submitting plans that, *inter alia*, reflected the
19 location of their driveway as being exactly where it had been located for decades, and
20 certainly where it was located at the time the Niedermans purchased their home. The Yangs
21 had a 30-day period between August 21, 2017 and September 19, 2017 to submit a public
22 comment addressing or objecting to the driveway's location. Despite receiving proper notice
23 of the Niedermans' project, the Yangs submitted no comments.¹⁹ Following the City's

24 ¹⁵ C. Niederman Decl., ¶11; N. Niederman Decl., ¶8.

25 ¹⁶ Exhibit B.

26 ¹⁷ C. Niederman Decl., ¶11; N. Niederman Decl., ¶8.

¹⁸ C. Niederman Decl., ¶9; N. Niederman Decl., ¶12.

¹⁹ C. Niederman Decl., ¶12; N. Niederman Decl., ¶9.

1 approval of the Niedermans’ building permit, the Yangs had 14 days to file an appeal with the
2 City of Mercer Island pursuant to Mercer Island Municipal Code Section 19.15.130(B), or 21
3 days to file a LUPA petition under RCW 36.70C.040(3) challenging the City’s decision. The
4 Yangs did neither, and lost the ability to object.²⁰ The Niedermans then proceeded with
5 repouring their driveway in its historic location.

6 **F. The Yangs Then Submitted Building Plans to the City That Misrepresented the**
7 **Location of the Niedermans’ Driveway, Which if Approved Would Have**
8 **Eliminated the Niedermans’ Ability to Use Their Driveway**

9 The Yangs subsequently submitted an application to the City to tear down the existing
10 residence on Steve’s property and to build a new home.²¹ The Niedermans examined the
11 Yangs’ permit materials during the 30-day open comment period prior to the permit being
12 issued – just as the Yangs could have done with the Niedermans’ application – and noticed
13 that the Yangs’ plans were problematic.²²

14 In sum, the Yangs’ plans, without explanation, called for relocating and reducing the
15 width of the Niedermans’ pre-existing and already approved driveway away from where it has
16 long been located.²³ As a result, the Yangs’ plans presumed that the Niedermans did not have
17 direct access to the “NEW VEHICLE TURN AROUND EASEMENT,” which contradicted
18 the very document Steve’s parents had signed and recorded years earlier as part of the Lot
19 Line Adjustment. In fact, the Yangs’ architect included in the proposed plans submitted to the
20 City a paved road where no such road ever existed in contradiction to a survey previously
21 prepared by the Niedermans’ surveyor Terrane.²⁴ The Yangs’ architect further stated in his
22 plans that the Yangs intended to remove a portion of the existing road to give back permeable
23 space while incorrectly showing a driveway to the Niedermans’ house as “existing paved

24 ²⁰ See *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 382 (2009).

25 ²¹ Yangs’ Answer and Counterclaim, p. 11, ¶20.

26 ²² *C. Niederman Decl.*, ¶13; *N. Niederman Decl.*, ¶10.

²³ *C. Niederman Decl.*, ¶11 and Ex. A.

²⁴ *C. Niederman Decl.*, ¶14.

1 road” that has never existed.²⁵ The Yangs apparently did this to comply with permeable lot
2 coverage requirements.

3 On a practical level, the Yangs seemed to want to relocate the Niedermans’ driveway
4 such that it would run into a previously existing concrete wall located on the Niedermans’
5 property and not line up with the location of the Niedermans pre-existing and newly City-
6 approved and permitted driveway, thus intentionally cutting off access to the Niedermans’
7 house.²⁶

8 The Niedermans then filed an official comment with the City pointing out these
9 inaccuracies and conflicts.²⁷ After a review, the City required the Yangs to correct their plans
10 and reflect the Niedermans’ driveway in its current, approved location. The City also granted
11 the Yangs an exception to their lot coverage requirement such that the Yangs no longer
12 needed to remove additional non-permeable surface to meet City building code
13 requirements.²⁸

14 In apparent retaliation, the Yangs began a campaign to persistently block the
15 Niedermans’ driveway with cars, pots, cones, construction tape, and other obstacles.²⁹ And, in
16 a plan note submitted to the City, the Yangs’ architect admitted the Yangs still intended to
17 tear up the road in front of the Niedermans’ driveway, thus cutting off access.³⁰ The City
18 again investigated the situation, and ultimately instructed the Yangs that doing so would not
19 be permitted, that the Yangs could not perform any “construction activity” in front of the
20 Niedermans’ driveway, and that the paved road must remain as drawn on the permit plan set
21 during the project and after completion of the Yangs’ house.³¹

22 ²⁵ *C. Niederman Decl.*, ¶14 and Ex. A.

23 ²⁶ *C. Niederman Decl.*, ¶15; *N. Niederman Decl.*, ¶12.

24 ²⁷ *C. Niederman Decl.*, ¶16; *N. Niederman Decl.*, ¶13.

25 ²⁸ *C. Niederman Decl.*, ¶18 and Ex. C, D.

26 ²⁹ *C. Niederman Decl.*, ¶17; *N. Niederman Decl.*, ¶14 and Ex. A.

³⁰ *C. Niederman Decl.*, ¶18 and Ex. B.

³¹ *C. Niederman Decl.*, ¶¶17, 18 and Ex. C.

1 The City then suspended the Yang’s building permit until they properly reflected the
2 Niedermans’ driveway in its current location as constructed and access to it on new plans,
3 removed all language to the contrary, and agreed that the paved access road in front of the
4 Niedermans’ driveway was not to be touched. No good reason existed for the Yangs’ behavior
5 or actions, and it certainly appears their actions were driven by spite to continue to harass the
6 Niedermans for simply calling out inaccuracies in the Yangs’ original plans.³²

7 The City’s position on these issues was aptly summarized in its October 24, 2019
8 letter, in which Senior Planner Nicole Gaudette wrote:

9 During a telephone conversation yesterday, we discussed a note located on
10 Sheet A1.0 of the [Yangs’] building permit plans. Said note states “NOTE:
11 RECORDED EASEMENT – DRIVEWAY ACCESS TO REMAIN WITHIN
12 EASEMENT.” You stated that your intention of this note is to allow the
13 property owners to remove the portion of the neighbors [Niedermans’]
14 driveway that is located outside of the access easement that is recorded with the
15 plat. I disagree with your interpretation of this note. To avoid any
16 misunderstandings, I am withdrawing approval of Planning review of building
17 permit 1902-005 until said note is removed from the plans. The building permit
18 is not active until this matter is resolved and Planning approval has been
19 granted.³³

20 **G. Following the City Ordering the Yangs to Recognize the Niedermans’ Approved
21 Driveway, the Yangs Began a Pattern of Unwarranted Retaliation Designed to
22 Prevent the Niedermans From Using Their Legally Permitted Driveway**

23 Unfortunately, the City’s directives to the Yangs have had limited effect. The Yangs
24 have persisted in a pattern of activity directed at the Niedermans in which they have blocked
25 access to the Niedermans’ driveway, parked cars in all portions of the turn-around easement,
26 and routinely park cars in the north arm of the turn-around easement. The following
photographs illustrate recent examples:³⁴

32 C. Niederman Decl., ¶18; N. Niederman Decl., ¶14.
33 C. Niederman Decl., Ex. B at CMI001030.
34 N. Niederman Decl., ¶17 and Ex. D.

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The above photograph shows the Yangs blocking the north arm of the turnaround area with refuse cans.

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1 The above photograph shows the Yangs blocking the north arm
2 of the turnaround area with a car.



16 The above photograph shows the Yangs using a pot, sign, and caution tape
17 to block a portion of the Niedermans' driveway.

18 The Yangs' recent actions in parking cars in the north arm of the turn-around
19 easement – which as discussed below is a violation of the Mercer Island Municipal Code and
20 the International Fire Code – is part of a larger plan to wrongfully deny the Niedermans any
21 use of the turn-around area. In the Spring of 2021, the Yangs submitted an application to the
22 City of Mercer Island seeking approval to revise their building plans so they could remove the
23 entire existing turnaround area, relocate the north arm, and permanently eliminate the south
24 arm and replace it with irrigated landscaping.³⁵ Worse, despite still not having final approval

25 ³⁵ *C. Niederman Decl.*, ¶20; Declaration of Mark Rosencrantz, ¶3 and Ex. A. It is unclear how or why the
26 Yangs believe, as the burdened estate, they as a matter of law have the right to remove a portion of a recorded
easement without the recorded approval of any, much less all, of the benefited landowners.

1 from the City of Mercer Island for their permit revision,³⁶ and despite the existence of this
2 lawsuit, the Yangs went ahead and implemented their plan. The Niedermans never agreed to
3 this alteration of their easement rights.³⁷

4 The Yangs also relocated the location of the north arm of the turn-around easement,
5 again without even seeking the Niedermans' approval.³⁸ While the relocation alone would not
6 be a tremendous problem, the fact that the Yangs now routinely park in the north arm (which
7 as discussed below is illegal) means that they have completely eliminated any use of the turn-
8 around easement.³⁹ Further, as indicated on the plan submitted as part of the Yang's
9 application, a portion of the now relocated north arm is not on their property, which means
10 that their blocking of the north arm involves property that does not belong to them.⁴⁰

11 The end result is that cars and trucks are now forced to routinely use the Niedermans'
12 driveway to safely turn around despite the fact that no easement rights exist for anyone to do
13 so.⁴¹ This seems to be the Yangs' intention in eliminating and blocking the Turn Around
14 Area.

15 However, because the City granted the Niedermans a permit to put up a car gate across
16 their driveway, something the Niedermans have long planned,⁴² soon there will be no safe
17 way for cars and trucks to turn around at the bottom of the private lane, in violation of the
18 express terms of the Short Plat Dedication and the Lot Line Adjustment.

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22 ³⁶ *Rosencrantz Decl.*, ¶3 and Ex. A.

23 ³⁷ *C. Niederman Decl.*, ¶20; *N. Niederman Decl.*, ¶16 and Ex. C.

24 ³⁸ *C. Niederman Decl.*, ¶21; *N. Niederman Decl.*, ¶17.

25 ³⁹ *C. Niederman Decl.*, ¶21; *N. Niederman Decl.*, ¶17.

26 ⁴⁰ *Rosencrantz Decl.*, ¶4 and Ex. B.

⁴¹ *C. Niederman Decl.*, ¶22; *N. Niederman Decl.*, ¶18.

⁴² The Yangs recently filed an appeal of the Niedermans' gate permit. The appeal will be heard on September 20, 2021. *Rosencrantz Decl.*, ¶5.

1 **III. STATEMENT OF ISSUES**

2 Should this Court grant partial summary judgment and rule as a matter of law that the
3 Niederman Property has the right to use all of “THE 10’ PRIVATE ROAD & UTILITY”
4 easement pursuant to the clear language of the 1976 Short Plat Dedication? **YES.**

5 Should this Court grant partial summary judgment and hold that the Yangs’ actions
6 constitute a private nuisance, order that it be abated, and command the Yangs to restore the
7 south arm of the turnaround area? **YES.**

8 Should this Court grant partial summary judgment and dismiss the Yangs’ easement
9 relocation counterclaim, given that the legal theory is wholly inapplicable to the facts at issue
10 in this case? **YES.**

11 **IV. EVIDENCE RELIED UPON**

12 The declarations of Christopher Niederman, Nicole Niederman, and Mark Rosencrantz
13 and attached exhibits together with and the content of the Court’s file.

14 **V. LEGAL STANDARDS**

15 The purpose of summary judgment “is the avoidance of long and expensive litigation
16 productive of nothing.”⁴³ The Niedermans are entitled to summary judgment if the “pleadings,
17 depositions, answers to interrogatories, and admissions on file, together with the affidavits”
18 show that the matter does not involve any genuine issue of material fact.⁴⁴ A fact is material if
19 the outcome of the litigation depends on it in whole or in part.⁴⁵

20 Once the Niedermans meet their burden, the burden shifts to the Yangs, as the non-
21 moving parties, to produce “specific facts showing that there is a genuine issue for trial.”⁴⁶
22 And, although the evidence is viewed in the light most favorable to the nonmoving party, if
23 that party like the Yangs is the party advancing a claim and fails to make a factual showing

24 ⁴³ *Padron v. Goodyear Tire & Rubber Co.*, 34 Wn. App. 473, 475 (1983).

25 ⁴⁴ CR 56(c); *Kesigner v. Logan*, 113 Wn.2d 320, 325 (1989).

26 ⁴⁵ *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117 (2015).

⁴⁶ *Kesigner*, 113 Wn.2d at 324.

1 sufficient to establish an element essential to their case, summary judgment is warranted.⁴⁷ “A
2 nonmoving party in a summary judgment may not rely on speculation, argumentative
3 assertions that unresolved factual issues remain, or in having its affidavits considered at face
4 value.”⁴⁸

5 **V. LEGAL ANALYSIS**

6 **A. The Niedermans Are Entitled to Declaratory Relief Confirming Their Right to**
7 **Use “THE 10’ PRIVATE ROAD & UTILITY” Easement, as Well as Relief**
8 **Declaring That the Yangs Must Keep the Turnaround Area Clear for Vehicle**
9 **Turnaround Use, and Restore the South Arm They Removed Without Authority**

10 **1. The parties’ clear and present disputes justify application of**
11 **Washington’s Declaratory Judgment Act.**

12 As evidenced by the parties’ competing claims in this lawsuit, a current and present
13 dispute exists between the parties regarding the scope of “THE 10’ PRIVATE ROAD &
14 UTILITY” easement established in the Short Plat Dedication and their resulting respective
15 rights. The Niedermans believe and allege that by virtue of the Short Plat Dedication they
16 received rights to use all of “THE 10’ PRIVATE ROAD & UTILITY” easement, which
17 includes the entirety of the 10-foot wide private lane, and the hammerhead turnaround area at
18 the bottom of the private lane. In contrast, the Yangs contend, without support, that the Short
19 Plat Dedication vested in the Niederman Property a separate 10-foot easement from the
20 Niederman Property to the most easterly portion of the private lane where it is 10 feet across.
21 Accordingly, this issue is ripe for determination pursuant to RCW Ch. 7.24.

22 **2. The Short Plat Dedication vested in the owners of the Niederman**
23 **Property the right to use the entire 10’ PRIVATE ROAD & UTILITY”**
24 **easement, which includes both the private lane and the turn-around area.**

25 The Yangs’ claim that “the Niedermans have no right to relocate the Access Easement
26 or expand its width from 10 feet to 15 feet”⁴⁹ is made irrelevant by the Short Plat Dedication’s

⁴⁷ *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 (1989).

⁴⁸ *Martin v. Gonzaga University*, 191 Wn.2d 712, 722 (2018) (citing *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13 (1986)).

⁴⁹ Yangs’ Answer and Counterclaim, p. 12, ¶22(a).

1 plain language, the 1994 Lot Line Adjustment, and Washington law. “The rules of contract
2 interpretation apply to interpretation of an easement.”⁵⁰ “The intent of the original parties to
3 an easement is determined from the deed as a whole. If the plain language is unambiguous,
4 extrinsic evidence will not be considered.”⁵¹ Further, “If the language is clear and
5 unambiguous, the court must enforce the contract as written; it may not modify the contract or
6 create ambiguity where none exists.”⁵² Similarly, parties cannot unilaterally change
7 contractual terms mid-stream.⁵³ And, “[the court] must construe a contract to give meaning to
8 every term.”⁵⁴ Against this backdrop, it must be recognized that neither the Yangs nor Steve’s
9 Parents were signatories to the Short Plat Dedication and had no role in its creation or
10 recording. As such, their intent regarding and beliefs concerning the Short Plat Dedication are
11 wholly irrelevant, and should not be considered by the Court.

12 The language of the recorded Short Plat Dedication makes two things abundantly
13 clear. First, the map depicts a single “10’ PRIVATE ROAD & UTILITY” easement that
14 includes not only a road, but also a hammerhead shaped turn-around area at its easterly end.
15 The boundaries, specific reference points, and distances are all included as one unified area.
16 Because the “10’ PRIVATE ROAD & UTILITY” easement is the *only* easement that refers to
17 road access, there is no way to construe a separate and different easement right benefiting
18 only the Niederman Property. Put another way, there is no “Access Easement” as alleged by
19 the Yangs – it is a fiction they invented for the purposes of this lawsuit.

21 ⁵⁰ *Hendrickson v. Murphy*, 8 Wn. App. 2d 150, 156 (2019) (citing *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 864
22 (2018)).

23 ⁵¹ *Hendrickson*, 8 Wn. App. 2d at 156 (citing *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 880
24 (2003)).

25 ⁵² *Lehrer v. DSHS*, 101 Wn. App. 509, 515-16 (2000) (citing *McDonald v. State Farm Fire & Cas. Co.*, 119
26 Wn.2d 724, 733 (1992)).

⁵³ *Yaw v. Walla Walla Sch. Dist.*, 106 Wn.2d 408, 417, 722 P.2d 803, 808 (1986) (“The District, however,
could not unilaterally change bargained for contractual terms.”).

⁵⁴ *Diamond B Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 165 (2003) (citing *City of
Seattle v. Dep’t of Labor & Indus.*, 136 Wn.2d 693, 698 (1998)).

1 In fact, to reach the conclusion that the Niederman Property does not have the right to
2 use all of “THE 10’ PRIVATE ROAD & UTILITY” easement, including the turnaround area,
3 the Court would have to do at least two things prohibited by Washington law. First, it
4 would have to change the phrase “**THE** 10’ ROAD EASEMENT FOR INGRESS AND
5 EGRESS PURPOSES” to “A 10’ ROAD EASEMENT FOR INGRESS AND EGRESS
6 PURPOSES.”⁵⁵ However, courts must enforce easements as written,⁵⁶ and the Yangs
7 similarly have no right to change the language of the Short Plat Dedication.⁵⁷ And, the Court
8 would have to add language to the Short Plat Dedication to describe the alleged 10 access
9 easement the Niederman Property received, which is also prohibited.

10 Second, the Court would have to write in a restriction to the Short Plat Dedication that
11 contradicts the explicit language that: “THE OWNER AND GUESTS OF THE RESIDENCE
12 AT 6800 96TH SE [the Niederman Property] HAVE THE RIGHT TO USE THE 10’ ROAD
13 EASEMENT FOR INGRESS AND EGRESS PURPOSES.”⁵⁸ The Short Plat Dedication
14 contains no such restriction, and in fact in the Short Plat Dedication’s “RESTRICTIONS” it
15 expressly provides that: “Access to all lots shall be limited to the 10’ private road
16 easement,”⁵⁹ which means that the five lots in the Evans Addition, plus the Niederman
17 Property, have full rights to use the entire 10’ private road for ingress and egress, which by
18 necessity involves using the turnaround area.

19 In sum, the Short Plat Dedication only describes one road easement. The Niederman
20 Property was given co-extensive rights to use all of “THE 10’ PRIVATE ROAD &
21 UTILITY” easement, which includes ingress, egress, and turn-around rights. That is the only
22 way to read the Short Plat Dedication to give meaning to all of its terms. To hold otherwise
23

24 ⁵⁵ Exhibit A (emphasis added, all caps in original)

25 ⁵⁶ *Lehrer*, 101 Wn. App. at 515-16, 5 P.3d 722, 726 (2000) (citing *McDonald*, 119 Wn.2d at 733.

26 ⁵⁷ *Yaw*, 106 Wn.2d at 417; *Backman v. Nw. Publ’g Ctr., LLC*, 147 Wn. App. 797.

⁵⁸ Exhibit A (all caps in original).

⁵⁹ Exhibit A.

1 would require the Court to add substantial additional language providing for a new, second
2 road easement not previously included and restricting the Niedermans' use of the turnaround
3 area in a way not described in the Short Plat Dedication.

4 **3. The 1994 Lot Line Adjustment recognizes the original easement, and**
5 **purports to adjust the turnaround area, but does not otherwise reference**
6 **a separate easement for the Niederman Property.**

7 The plain language of the 1994 Lot Line Revision, to which Steve's parents were a
8 party, only reinforces the above conclusions. Initially, it recognizes the "ORIGINAL TURN
9 AROUND," and then specifically created a "NEW VEHICLE TURN AROUND
10 EASEMENT" adjacent to the old one that in fact provides access to the entire Niederman
11 driveway as constructed both before and after the Niedermans' remodel.⁶⁰ Next, it specifically
12 provides that it is: "SUBJECT TO: ALL EASEMENTS, RESTRICTIONS AND
13 RESERVATIONS OF RIGHT, IF ANY."⁶¹ Thus, it expressly recognizes the existence of the
14 original Short Plat Dedication and its related easements.

15 And, perhaps most significantly, as with the Short Plat Dedication, the 1994 Lot Line
16 Revision neither references nor purports to create a separate easement benefiting the
17 Niederman Property, or to otherwise effect the long-standing rights given to the Niederman
18 Property. Again, to construe a separate easement right for the Niederman Property would
19 require both changing the language of the Short Plat Dedication and the addition of an entirely
20 new section and legal description, something no one has ever done.

21 In fact, as noted above, unless the doctrine of recognition and acquiescence applies,
22 the 1994 Lot Line Adjustment illegally relocated the turnaround area created in the Short Plat
23 Dedication. The result dictated by Washington law for the wrongful relocation of the
24 turnaround area would be that Yangs return the turnaround area to its original location as it

25 ⁶⁰ Exhibit B.

26 ⁶¹ Exhibit B. (capitals in original).

1 existed prior to the 1994 Lot Line Adjustment, because case law establishes that easements
2 cannot be reconfigured without the agreement of all parties with rights under the easement.⁶²

3 Accordingly, the 1994 Lot Line Adjustment only reinforces the reality that the
4 Niedermans have the right to use the entire turn-around easement, and that summary
5 judgment in their favor is appropriate and justified.

6 **4. A stone wall located on the Niederman Property has long blocked the**
7 **alleged 10-foot easement the Yangs contend the Niedermans should be**
8 **using.**

9 For many years, the Niederman Property had a short stone wall on the west side of the
10 driveway bordering the Yang Property. That wall blocked use of the 10-foot easement the
11 Yangs now claim the Niedermans should be required to use.⁶³

12 As part of their remodeling project, the Niedermans removed the old block wall, and
13 replaced it with landscaping.⁶⁴ However, despite being fully aware of the Niedermans' actions
14 in this regard, the Yangs' only objection was that, because the old block wall encroached onto
15 their Property by a few inches, removing it allegedly constituted a "trespass."⁶⁵

16 Subsequently, as part of their construction project, the Yangs landscaped their
17 property in front of what was the block wall, meaning that they have now blocked the location
18 in which they allege the Niedermans' driveway should be located.⁶⁶ Therefore, the Yangs'
19 recent actions further support the notion that they have long understood that the Niedermans
20 have the right to access "THE 10' PRIVATE ROAD & UTILITY" easement from their 15-
21 foot driveway.

22
23 ⁶² See *Crisp v. VanLaecken*, 130 Wn. App. 320, 323-25 (2005); *MacMeekin v. Low Income Hous. Inst.*, 111
24 Wn. App. 188, 207 (2002).

25 ⁶³ *C. Niederman Decl.*, ¶15; *N. Niederman Decl.*, ¶12.

26 ⁶⁴ *C. Niederman Decl.*, ¶24; *N. Niederman Decl.*, ¶21.

⁶⁵ *Rosencrantz Decl.*, ¶6 and Ex. C.

⁶⁶ *N. Niederman Decl.*, ¶15.

1 **5. The Yangs without approval or authority eliminated the southern arm of**
2 **the turnaround area, and wrongfully block the north arm, which**
3 **eliminates the ability to use the turnaround area to turn vehicles around.**

4 Unfortunately, as part of their construction project, the Yangs have not only failed to
5 comply with their approved building plans but have also taken affirmative steps to prevent the
6 Niedermans from enjoying the rights granted to the owners of their property. The Yangs have
7 done so in two primary ways.

8 First, the Yangs eliminated the south arm of the turnaround area by replacing it with
9 dirt, landscaping, an irrigation system, a curb, and large decorative rocks that completely
10 prevent vehicles from travelling across it. The south arm as it presently exists is as follows:⁶⁷



23
24 Second, the Yangs routinely block vehicle access to the north arm of the turnaround
25 area, which as discussed below violates the Mercer Island Municipal Code and the

26 ⁶⁷ *N. Niederman Decl.*, ¶16 and Ex. C; *C. Niederman Decl.*, ¶20.

1 International Fire Code. For example, the following photograph shows the Yangs blocking the
2 north arm with refuse cans on the evening of August 26, 2021.⁶⁸



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25 ⁶⁸ For the Court’s reference, this photograph was taken from the Niedermans’ driveway. The car shown on
26 the right side of the picture is located at the very top of the Yangs’ driveway and eliminates anyone from using
their driveway to turn around. *N. Niederman Decl.*, ¶17 and Ex. D; *C. Niederman Decl.*, ¶21.

1 Similarly, the Yangs park cars in the north arm of the turnaround area with regularity,
2 as shown in the following photograph:⁶⁹



17 The above photographs are illustrative and demonstrate the common status of the
18 north arm of the turnaround area.⁷⁰ As can be readily seen from the above photographs, with
19 the north arm of the turnaround area blocked, and the south arm now landscaped, the only
20 way for fire trucks, ambulances, delivery vehicles, and automobiles to safely turn around at
21 the bottom of the private lane is to use the Niederman’s driveway. But no one has easement or
22 other rights to do so other than the Niedermans themselves, and even then, it is extremely
23 difficult for a car, much less a large truck, to safely turn around.⁷¹

24
25 ⁶⁹ *N. Niederman Decl.*, ¶17 and Ex. D; *C. Niederman Decl.*, ¶21.

26 ⁷⁰ *C. Niederman Decl.*, ¶21; *N. Niederman Decl.*, ¶17.

⁷¹ *C. Niederman Decl.*, ¶22; *N. Niederman Decl.*, ¶18.

1 Put another way, the Yangs built their new home contrary to their approved building
2 plans and routinely block the north arm of the turnaround area to prevent the Niedermans
3 from using the turnaround area and to force all visitors instead to use the Niedermans'
4 driveway to turn around. Such actions are in clear violation of the rights granted in the Short
5 Plat Dedication to the owners of the Niederman Property. And as discussed below, blocking
6 the north arm of the turnaround area violates applicable law.

7 Summary judgment declaring that the Niedermans have the right to use and enjoy the
8 entire "10' PRIVATE ROAD & UTILITY" easement, including the entire turnaround area, is
9 the appropriate remedy, together with declaratory relief ordering the Yangs to, at their own
10 expense, restore the south arm, is appropriate and justified.

11 **B. The Yangs' Actions in Unilaterally Eliminating the South Arm of the**
12 **Turnaround Area and Blocking the North Arm Constitute a Private Nuisance the**
13 **Court Should Summarily Order be Eliminated**

14 The Yangs' actions in eliminating the south arm of the turnaround area and blocking
15 the north arm constitutes a private nuisance that should be abated, as does the Yangs' actions
16 forcing vehicles to use the Niedermans' driveway to turn around. The Yangs should be
17 ordered to restore the south arm of the turnaround, and to cease blocking the north arm.

18 A nuisance is an "unreasonable" activity on the defendant's land that "substantially" or
19 "unreasonably" interferes with the use of the plaintiff's land.⁷² Washington's nuisance law is
20 codified in chapter 7.48 RCW:

21 Nuisance consists in *unlawfully doing an act, or omitting to perform a duty,*
22 *which act or omission either annoys, injures or endangers the comfort, repose,*
23 *health or safety of others, offends decency, or unlawfully interferes with,*
24 *obstructs or tends to obstruct, or render dangerous for passage, any lake or*
navigable river, bay, stream, canal or basin, or any public park, square, street
or highway; or in any way renders other persons insecure in life, or in the use
*of property.*⁷³

25 ⁷² See W. Stoebeck & D. Whitman, *Law of Property* § 7.2 (3d ed. 2000); *Grundy v. Thurston County*, 155
26 Wn.2d 1, 6 (2005).

⁷³ RCW 7.48.120 (emphasis added).

1 RCW 7.48.010 defines an actionable nuisance as:

2 *The obstruction of any highway* or the closing of the channel of any stream used
3 for boating or rafting logs, lumber or timber, or whatever is injurious to health or
4 indecent or offensive to the senses, *or an obstruction to the free use of property,*
5 *so as to essentially interfere with the comfortable enjoyment of the life and*
6 *property, is a nuisance and the subject of an action for damages and other and*
7 *further relief.*⁷⁴

8 The Niedermans are within the that class of persons entitled to bring an action to
9 eliminate this nuisance, as provided for in RCW 7.48.020:

10 Such action may be brought by any person whose property is, or whose
11 patrons or employees are, injuriously affected or whose personal enjoyment is
12 lessened by the nuisance. If judgment be given for the plaintiff in such action,
13 he or she may, in addition to the execution to enforce the same, on motion,
14 have an order allowing a warrant to issue to the sheriff to abate and to deter or
15 prevent the resumption of such nuisance.

16 In considering the Niedermans' private nuisance claim, two things must be kept in
17 mind. First, although landowners like the Yangs have the right to use their property as they
18 wish, they cannot do so in a such a manner that interferes with the use of easements that
19 burden their property. Second, possessors of land like the Niedermans have the right not only
20 to be free from nuisance, which allows them to, in effect, extend their rights as possessors
21 beyond the boundaries of their land by imposing duties on other landowners not to interfere
22 with that right, but also the quiet enjoyment of their own property.⁷⁵

23 **1. The Yangs' actions in blocking the north arm of the turnaround area
24 constitutes a private nuisance.**

25 Although the Yangs will no doubt argue that they should be able to park wherever
26 they want on their own property, regardless of whether doing so violates the "NEW
VEHICLE TURN AROUND EASEMENT," for multiple reasons this position ignores
controlling law. Initially, doing so eliminates the ability of the Niedermans and the other lots

24 ⁷⁴ See also *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 923 (2013).

25 ⁷⁵ See W. Stoebeck & J. Weaver, 17 WASH. PRACTICE, REAL ESTATE: PROPERTY LAW §10.1 (2d ed. May
26 2021 update); see also *id.* at §10.3 (citing W. Stoebeck & D. Whitman, LAW OF PROPERTY § 7.2 (3d ed. 2000)
("If we must give a general definition of a "nuisance," it is that a nuisance is an "unreasonable" activity on the
defendant's land that 'substantially' or 'unreasonably' interferes with the use of the plaintiff's use of land.").

1 in the Evans Addition from using the turnaround area, which is a violation of easement rights,
2 and nothing in Washington law allows the Yangs or for that matter the City of Mercer Island
3 to alter private easement rights.

4 Next, blocking the north arm of the turnaround area, whether it be with a car or refuse
5 containers, violates Chapter 10.36.227 of the Mercer Island Municipal Code, which provides
6 that:

7 A. No person shall park a vehicle within an alley or private road in such a
8 manner or under such conditions as to leave available less than eight feet
9 of the width of the roadway for the free movement of vehicular traffic.

10 B. No person shall stop, stand or park a vehicle within an alley or private road
11 in such a position as to block the driveway entrance to any abutting
12 property.

13 So even if the Yangs did own the entire area encompassing the fire access lane, and
14 they do not, given that the turnaround easement as they have currently constructed it includes
15 a portion of Lot 4, under applicable law they still cannot park or take any other action that
16 leaves less than eight feet for vehicles to freely use.

17 Additionally, the Yangs' obstruction of the designated fire access lane violates the
18 Mercer Island Municipal Code and Washington law. Under the 2018 International Fire Code,
19 which has been adopted by Mercer Island, fire lanes must always be kept unobstructed.⁷⁶
20 Likewise, both Chapter 10.74.020 of the Mercer Island Municipal Code and WAC 132N-156-
21 550(8) prohibit parking in a fire lane. Fourth, Chapter 10.36.226 of the Mercer Island
22 Municipal Code prohibits parking in a manner that interferes or obstructs the free movement
23 of traffic.

24 ⁷⁶ See Mercer Island Municipal Code, §17.07.010; 2018 International Fire Code, Ch., 503.4. The Yangs'
25 counsel has repeatedly asserted that the new north arm was constructed to comply with fire access
26 requirements, and information available on www.mybuildingpermit.com, a website used by Mercer Island and
other municipalities to track the status of building permits, indicates that the fire department reviewed and
preliminary approved the new north arm. *Rosencrantz Decl.*, ¶¶3, 7.

1 **2. The Yangs’ actions in forcing traffic to use the Niedermans’ driveway to**
2 **turn around separately constitutes a private nuisance.**

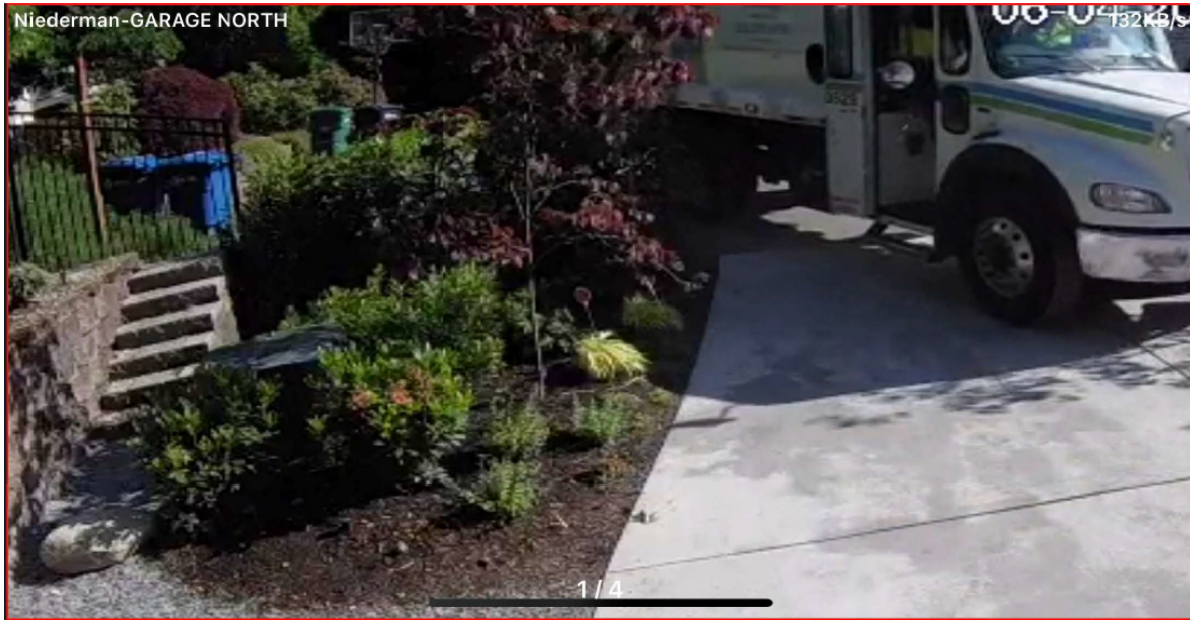
3 In eliminating the south arm of the turnaround area, and blocking the north arm, the
4 Yangs are also creating a private nuisance by forcing vehicles who come down the private
5 lane to use the Niedermans’ driveway to turn around. In fact, delivery trucks and other visitors
6 who come down the private lane are now routinely forced to use the Niedermans’ driveway to
7 turn around or must back up the entire private lane, which is both difficult and dangerous.⁷⁷

8 For example, the following photograph shows a truck delivering supplies to the
9 Yangs’ construction project that used the Niedermans’ driveway that backed up so far it hit
10 the gutter on the Niedermans’ garage and nearly hit the garage door:



26 ⁷⁷ *N. Niederman Decl.*, ¶18 and Ex. E.

1 And here is another example of a Recology truck that came down the private lane to
2 collect refuse for the neighborhood that previously used the turnaround area, but is now
3 forced to pull into the Niedermans' driveway to turn around.⁷⁸



15 That vehicles must use the Niedermans' driveway to turn around is problematic on
16 two levels. First, doing so constitutes a trespass, as no easement allows vehicles to use any
17 portion of the Niedermans' property to turn around. Second, the situation has created
18 dangerous situations where, for example, a delivery truck nearly backed into the Niedermans'
19 garage, and trucks have nearly damaged the Niedermans' landscaping. This private nuisance
20 should be summarily abated by the Court.

21 **C. The Niedermans Are Not Attempting to Relocate an Easement, and the Yangs'**
22 **Counterclaim Should Be Dismissed**

23 The Yangs are defending this case in part on an irrelevant line of cases holding that
24 easements cannot be relocated. As alleged in the Yangs' Counterclaim:

25 18. It is blackletter law that relocation of existing easements is not allowed at
26 common law....

⁷⁸ *N. Niederman Decl.*, Ex. E.

1 19. Contrary to the stated purpose of the no-unilateral relocation rule the
2 Niedermans have attempted to relocate the Access Easement which has
3 operated to “incite litigation and depreciate the value” of the Yang
4 Property.

5 20. During the course of the Yangs’ efforts to obtain building permits for their
6 own home, Christopher Niederman contacted the City of Mercer Island and
7 attempted to cause the City to withhold permits unless the Yangs agreed to
8 the Niedermans [*sic.*] demands for an expanded easement. This conduct
9 was wrongful.

10 However, this is not an easement relocation case, and the doctrine is inapposite to this
11 matter. An apt summary of the legal theory the Yangs’ advance is as follows:

12 In *MacMeekin v. Low Income Housing Institute, Inc.*, Division One of this court
13 adhered to the traditional rule at common law that a trial court has no equitable
14 authority to order relocation of an easement without the express consent of the
15 owners of both the dominant and servient estates. 111 Wn. App. 188, 207, 45
16 P.3d 570 (2002). In *Crisp v. VanLaecken*, this court agreed with *MacMeekin*
17 and held that the owner of the servient estate could not relocate an easement
18 without consent of the dominant estate owner. 130 Wn. App. 320, 324-26, 122
19 P.3d 926 (2005). Both cases rejected the minority rule adopted by the
20 Restatement (Third) of Property: Servitudes § 4.8(3) (2000) that would allow a
21 servient estate owner to relocate an easement without the dominant estate
22 owner’s consent. *MacMeekin*, 111 Wn. App. at 207, 45 P.3d 570; *Crisp*, 130
23 Wn. App. at 321, 122 P.3d 926.⁷⁹

24 The recent case of *Kave v. McIntosh Ridge Primary Rd. Ass’n* provides an excellent
25 backdrop to contrast the inapplicability of easement relocation cases to this case. In *Kave*, the
26 court considered “a trail easement and a community recreation easement.”⁸⁰ There was no
disagreement on the location of the easements, but improvements had been constructed
partially within the easement and partially outside the easement.

The Court of Appeals summarized what happened at the trial court as follows:

But McIntosh did not request that the trial court quiet title to the legally
described easement. During oral argument on McIntosh’s summary judgment
motion, the trial court asked McIntosh’s counsel, “What exactly are you asking
for with respect to the trail easements?” CP at 2108. Counsel replied:

⁷⁹ *Kave v. McIntosh Ridge Primary Rd. Ass’n*, 198 Wn. App. 812, 821 (2017).

⁸⁰ *Kave*, 198 Wn. App. at 815.

1 That *wherever the trails are right now*, if that's not where the legal
2 easements are, that we do some sort of adjustment to say those are the trails,
and we'll do a boundary line adjustment.

3 CP at 2108 (emphasis added). Counsel then confirmed that McIntosh was
4 requesting to quiet title to the existing location. In its summary judgment order,
the court granted what McIntosh requested: quiet title to the existing location of
5 the trail, regardless of the easement's legal description.⁸¹

6 After discussing Washington law on the relocation of easements, the Court of Appeals
7 ruled:

8 We hold that the trial court did not have authority to quiet title in McIntosh to
9 an easement based on the existing location of the trail to the extent that the
10 existing location differed from the easement's legal description. The record is
unclear how the trail's existing location compared with the easement's legal
description. Therefore, we remand this claim for further proceedings consistent
with this opinion.⁸²

11 The *Kave* opinion as well as others in the same line of cases, is thus irrelevant for at
12 least two distinct reasons. First the Short Plat Dedication in no way references a 10-foot
13 easement solely benefiting the Niederman Property. Instead, it establishes a single easement
14 that consists of a private lane that is 10 feet wide and at its bottom is a wider hammerhead
15 shaped area for vehicles to turn around. The Niedermans are not in this case attempting to
16 relocate the easement, but rather are seeking to enforce their rights to use the entire easement
17 as drafted and recorded.

18 Second, even if that were not true, notably missing from the *Kave* opinion is any
19 mention, much less a discussion of, prescriptive rights. The doctrine is simply not mentioned
20 in any way. To the extent the Niedermans did only receive a 10-foot access to the "10'
21 PRIVATE ROAD & UTILITY," the Niedermans allege that they acquired a *new* easement
22 that should be quieted in their favor, something the plaintiff in *Kave* expressly disclaimed as a
23 requested remedy.

24
25 _____
⁸¹ *Id.*, at 820 (italics in original) (footnote omitted).

26 ⁸² *Id.* at 822-23.

1 Those facts are critical. The Niedermans are not asking that the 10-foot easement
2 created in the 1970's be relocated. They believe that easement is valid and should remain in
3 place. They do contend, however, in the alternative, that they satisfy the requirements to
4 obtain prescriptive rights to an additional 10 feet to the east of the original easement in order
5 that they are able to utilize the entire 15-foot width of their driveway, and directly contrary to
6 the plaintiffs in *McIntosh*, the Niedermans allege title should be quieted as stated in paragraph
7 5.8 of the Niedermans' Complaint:

8 As a result of the above-described actions, the Niedermans have acquired a
9 15-foot wide easement by prescription in an exact location to be established at
10 trial, and are entitled to a Judgment quieting title over such easement by
11 prescription.

12 As such, the Niedermans allege that if they do not have the right to use the entire
13 original "10' PRIVATE ROAD & UTILITY" easement, they have the right to an
14 approximately 20-foot path to the private lane consisting of the original 10-foot easement
15 (about five feet of which is to the west of their driveway) plus an additional 10 feet that
16 matches eastern the two-thirds of their driveway. Neither theory involves the relocation of a
17 pre-existing easement. As such, as a matter of law the *Kane* line of cases has no applicability
18 to this case, and summary judgment dismissing the Yangs' counterclaims is appropriate.

19 VI. CONCLUSION

20 The Niederman Property has had the right to use the entire "10' PRIVATE ROAD &
21 UTILITY" easement since 1976. The Yangs' recent attempt to restrict the Niedermans' use of
22 that easement is contrary to Washington law and directives issued by the City of Mercer
23 Island.
24
25
26

1 The Court should avoid an unnecessary trial on that issue, and grant summary
2 judgment confirming the Niedermans have exactly those rights enjoyed by the owners of their
3 property since 1976.

4 DATED this 2nd day of September, 2021.

5 CARNEY BADLEY SPELLMAN, P.S.

6
7 By 

8 Mark Rosencrantz, WSBA #26552
9 Kenneth W. Hart, WSBA #15511
10 Attorneys for Plaintiff

11 I certify that this memorandum contains 8,389 words of the
12 allowable 8,400 allowable in compliance with the Local
13 Civil Rules.

1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years,
4 not a party to nor interested in the above-entitled action, and competent to be a witness herein.
5 On the date stated below, I caused to be served a true and correct copy of the foregoing
6 document on the below-listed attorney(s) of record by the method(s) noted:

- 7 Email and first-class United States mail, postage prepaid, to the following:
- 8 Legal messenger service, for delivery on _____,
9 to the following:
- 10 Overnight mail service, for delivery on _____,
11 to the following:
- 12 Via court e-filing website, which sends notification of such filing to the following:

13 **Attorneys for Attorneys for Defendants Yang**

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21 larry.glosser@acslawyers.com

22 Other _____

23 DATED this 2nd day of September, 2021.

24 /s/ Lana Ramsey
25 Lana Ramsey, Legal Assistant

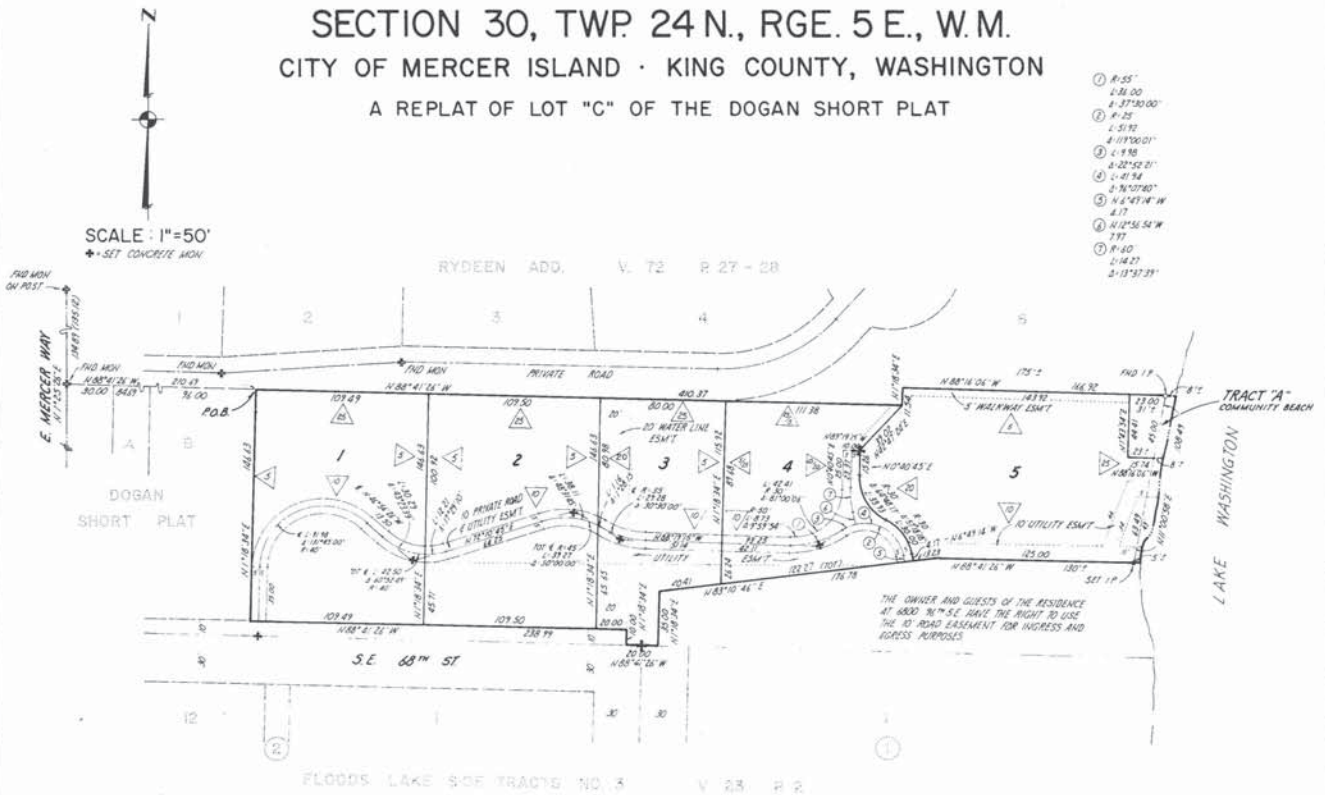
Exhibit A

EVAN'S ADDITION

SECTION 30, TWP. 24 N., RGE. 5 E., W.M.

CITY OF MERCER ISLAND · KING COUNTY, WASHINGTON

A REPLAT OF LOT "C" OF THE DOGAN SHORT PLAT



DESCRIPTION

This Plat of Evan's Addition is a replat of Lot "C" of the Dogan Short Plat, located in Section 30, Township 24 North, Range 5 East, W.M., filed with the City of Mercer Island in May, 1974, more particularly described as follows:

Commencing at a brass monument marked with an "X" on the intersection of E. Mercer Way and the north property line of the said Dogan Short Plat extended westerly, thence S 88° 41' 26" E along the south line of the Plat of Rydeen Addition, recorded in Volume 72, pages 27 and 28, records of King County, Washington, a distance of 210.69 feet to the northeast corner of Lot "B" of said Dogan Short Plat, and the Point of Beginning; thence continuing along the south line of said Rydeen Addition S 88° 41' 26" E a distance of 410.37 feet; thence N 01° 18' 34" E a distance of 11.54 feet; thence S 88° 16' 06" E a distance of 166.92 feet to an existing iron pipe; thence continuing S 88° 16' 06" E a distance of 7.0 feet more or less to the shoreline of Lake Washington; thence southwesterly along said shoreline to the southerly line of said Dogan Short Plat extended easterly; thence along said southerly line N 88° 41' 26" W a distance of 5.0 feet more or less to an iron pipe; thence continuing N 88° 41' 26" W a distance of 125.00 feet; thence S 83° 10' 54" W a distance of 176.78 feet; thence S 01° 18' 34" W a distance of 35.00 feet; thence N 88° 41' 26" W a distance of 20.00 feet; thence N 01° 18' 34" W a distance of 10.00 feet; thence N 88° 41' 26" W along the north right-of-way of S.E. 68th St. a distance of 238.99 feet to the southeast corner of said Lot "B"; thence N 01° 18' 34" E along the east line of said Lot "B" a distance of 146.63 feet to the Point of Beginning.

Together With the second class shorelands adjoining and lying between the northerly and southerly lines of the above described plat produced easterly.

RESTRICTIONS

Maintenance and repair of the private road, the community beach tract "A" and all storm drainage facilities located within the utility easement, shall be the responsibility of the owners of each lot herein and each lot owner shall pay one fifth (1/5) of the cost thereof. In the event that maintenance and repair of the storm-water drainage facilities is not performed to the satisfaction of the City Engineer, after a timely demand has been made for such action, the City shall have the right to enter upon the premises and perform the necessary maintenance and repair and charge the owner of each lot for his pro rata share of the total cost of such maintenance and repair. In addition, the City or the owner of any lot shall have the right to bring an action in superior court to require such maintenance and repair to the storm water drainage facilities as is deemed necessary by the City Engineer.

The engineered street, water, sanitary sewer, and storm drainage designs are on file with the City of Mercer Island.

All footing and roof drains shall be signlined directly to the storm drainage system.

Access to all lots shall be limited to the 10' private road easement.

No land clearing permits will be issued prior to the issuance of building permits for individual single family houses.

No land clearing, filling, or building construction shall be allowed in that portion of land lying south of the 10' private road easement except with the expressed approval of the Planning Commission.

All lots in this plat are subject to the protective covenants as recorded in volume _____ page _____ Auditors' File No. _____ Records of King County, Washington

106 1599

EVAN'S ADDITION

SECTION 30, TWP. 24 N., RGE. 5 E., W.M.

CITY OF MERCER ISLAND · KING COUNTY, WASHINGTON

A REPLAT OF LOT "C" OF THE DOGAN SHORT PLAT

DEDICATION

KNOW ALL MEN BY THESE PRESENTS that I, the undersigned, owner in fee simple of the land hereby platted, hereby declare this plat and dedicate to the public forever all roads and ways shown hereon, except Tract A and the 10 foot private road, with the right to make all necessary slopes for cuts and fills and the right to continue to drain said roads and ways over and across any lot where water might take a natural course, in the original reasonable grading of the roads and ways shown hereon.

Jon Evans
Notary Public in and for the State of Washington

PLANNING COMMISSION

Examined and approved this 15th day of December, 1976.

Chairman Sam Fry Secretary Stephen H. Carlough

ACKNOWLEDGMENTS

STATE OF WASHINGTON ss
COUNTY OF KING

This is to certify that on the 17th day of January, 1976, before me, the undersigned a Notary Public, personally appeared JON EVANS and JOYCE EVANS his wife, to me known to be the individuals who executed the within dedication and acknowledged to me they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year first above written.

Notary Public in and for the State of Washington residing at _____

STATE OF WASHINGTON
COUNTY OF KING

This is to certify that on the 11th day of January, 1976, before me, the undersigned, a Notary Public, personally appeared IRENE DOGAN to me known to be the individual who executed the within dedication and acknowledged to me she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned. WITNESS my hand and official seal hereto affixed the day and year first above written.

Notary Public in and for the State of Washington residing at _____

CITY COUNCIL

Examined and approved this 15th day of January, 1977.

Mayor Bob D. Lewis Attest: Robert E. Lewis
Clerk

TREASURER'S CERTIFICATE

I hereby certify that all city assessments on the property herein contained are paid in full. This 11th day of January, 1977.

Robert E. Lewis
City Treasurer

DEPARTMENT OF ASSESSMENTS

Examined and approved this _____ day of _____, 19____.

King County Assessor _____ Deputy King County Assessor _____

LAND SURVEYOR'S CERTIFICATE

I hereby certify that this plat of Evan's Addition is based upon an actual survey and subdivision of Section 30, TWP 24N, RGE. 5 E. W.M., that the courses and distances are shown correctly thereon; that the monuments will be set, and the 101, 400-block corners staked correctly on the ground as construction is completed, and that I have complied with the provisions of the platting regulations.



Howard E. Cornell
Howard E. Cornell
Professional Land Surveyor
Certificate No. 10927

COMPTROLLER'S CERTIFICATE

I hereby certify that all property taxes are paid, that there are no delinquent assessments certified to this office for collection and that all special assessments, certified to this office for collection on any of the property contained, dedicated as streets, alley or for other public use, are paid in full. This 26th day of JAN., 1977.

HUGH JAMES W. B. Martin
KING Co. COMPTROLLER DEPUTY KING Co. COMPTROLLER

DEPARTMENT OF SYSTEMS ENGINEERING

Examined and approved this 11th day of January, 1977.

Philip D. Kneibler
City Engineer

RECORDING CERTIFICATE 7701260554

Filed for record at the request of the Mercer Island City Council this 26 day of JANUARY, 1977, at 16 minutes past 12:00 P.M., and recorded in Volume 101 of Plats, pages 91,92, records of King County, Washington.

DEPARTMENT OF RECORDS AND ELECTIONS

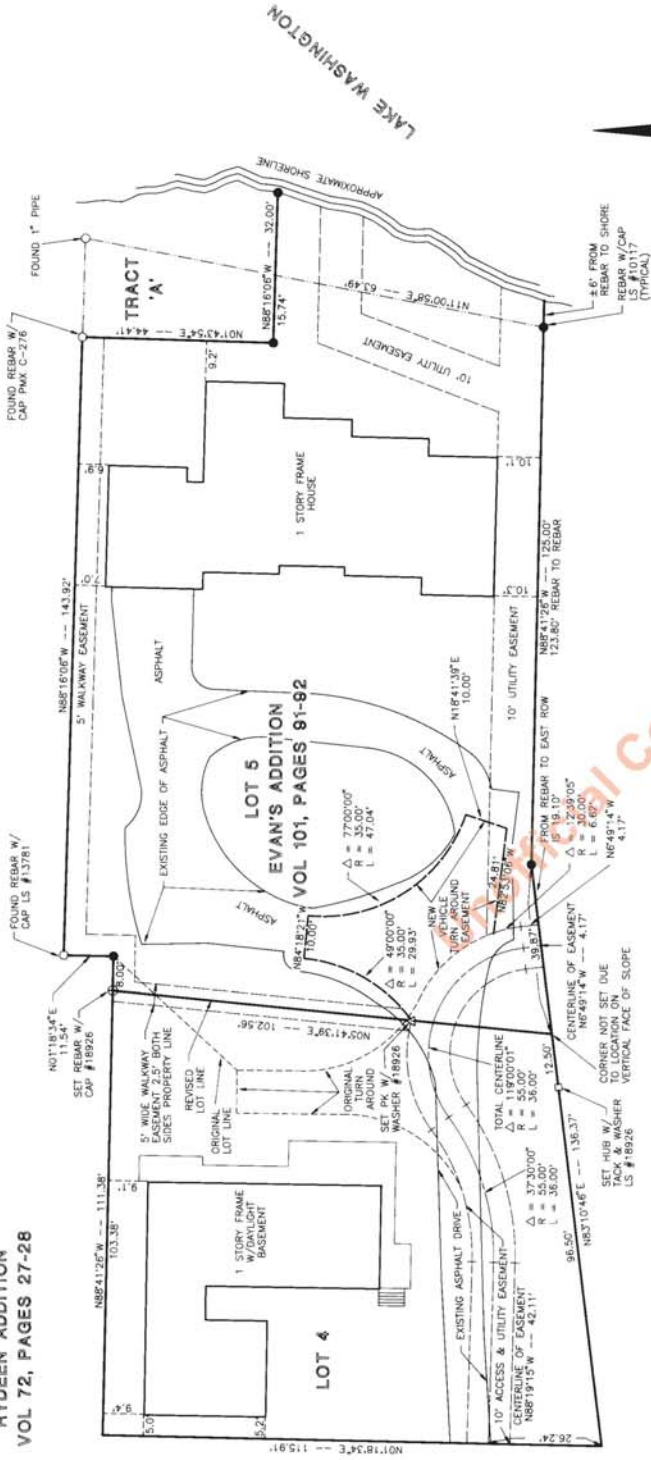
Manager _____ Superintendent of Records _____

Exhibit B

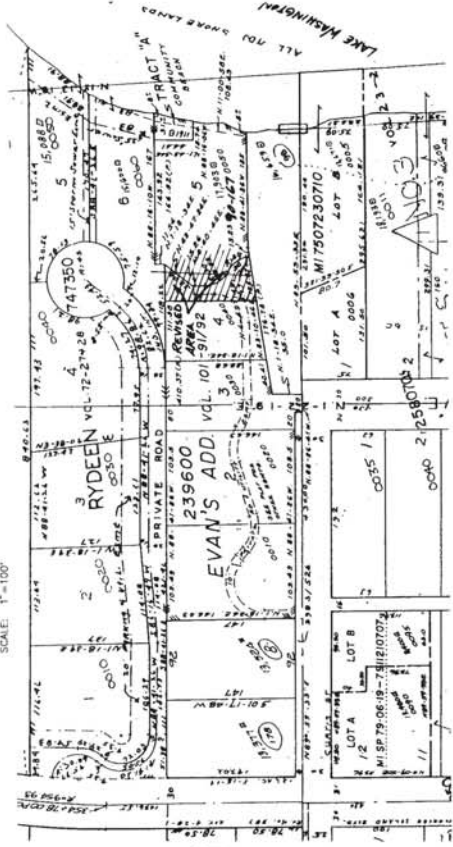
EVANS/YANG LOT LINE REVISION

MI-94-1039

RYDEEN ADDITION
VOL 72, PAGES 27-28



VICINITY MAP
SCALE: 1"=100'



BASIS OF BEARING
THE PLAT OF EVANS' ADDITION



LOT AREAS

ORIGINAL LOT 4 AREA	1082394 ft
GROSS LESS ROAD EASEMENT)	1082394 ft
GROSS	1082394 ft
NET (LESS ROAD EASEMENT)	981094 ft
ORIGINAL LOT 5 AREA	1810894 ft
GROSS	1810894 ft
NET	1810894 ft
REVISED LOT 4 AREA	1810894 ft
REVISED LOT 5 AREA	1810894 ft

OWNERS

RYDEEN AND JEANETTE D. EVANS
 9200 E. 60th STREET
 MERCER ISLAND, WASHINGTON 98040

I-HONG YANG AND YANG HSI PEI-YU
 6860 E. MERCER WAY
 MERCER ISLAND, WASHINGTON 98040

NOTE:
 THIS SURVEY EXCEEDS CURRENT FIELD TRAVERSE STANDARDS CONTAINED IN WAC 332-130-090. PER WAC 332-130-100, A SIX SECOND TOTAL ALLOWABLE ERROR WAS USED IN THIS SURVEY. THIS INSTRUMENT HAS BEEN MAINTAINED IN ACCORDANCE WITH THE STANDARDS OF THE ASSOCIATION OF PROFESSIONAL SURVEYORS AND HAS BEEN RECALIBRATED ON A N.C.S. BASELINE WITHIN THE LAST YEAR.

C & T SURVEYING
 2630 116th AVE. N.E., SUITE 101
 Bellevue, WA 98004-1459
 (206)822-0667

DWN BY	WILA	DATE	9-27-94	JOB NO.	90167
CHKD BY	FT	SCALE	1" = 20'	SHEET	1
				OF 2	

NE/4, NE/4, SEC 30, T24N, R5E, W.M.

LOT LINE REVISION
 FOR
 EVANS/YANG
 LOTS 4 & 5, EVANS' ADDITION



SURVEYOR'S CERTIFICATE
 This map correctly represents a survey made by me or under my direction with the requirements of the Survey Recording Act at the request of EVANS/YANG
 Certificate No. 18926 in SEPT 1994.
 Signature

RECORDER'S CERTIFICATE
 Filed for record this 23rd day of DEC 19 94
 at 8:45 A.M. in book 191 of PAGE 28
 In the request of FRANK R. TARVER, Supt. of Records
 Signature

EVANS/YANG LOT LINE REVISION

MI-94-1039

LOT LINE REVISION

FILE NO. 237400-0040 & 6650
CITY OF MERCER ISLAND
KING COUNTY, WASHINGTON
AFFIDAVIT OF OWNERSHIP

KING COUNTY
Department of Assessments
Examinated and approved this 21 day
of Dec 1994
City Engineer Scott R. Wilcox

Department of Records
Filed for record at the request of:

STATE OF WASHINGTON } ss. (INDIVIDUAL)
COUNTY OF KING }
ON THIS DAY PERSONALLY APPEARED BEFORE ME E-HSING YANG
TO ME KNOWN TO BE THE INDIVIDUAL(S) DESCRIBED HEREIN AND WHO
EXECUTED THE WITHIN AND FOREGOING INSTRUMENT AND ACKNOWLEDGED
VOLUNTARY ACT AND DEED, FOR THE USES AND PURPOSES THEREIN
MENTIONED.

GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS 25th DAY OF October,
1994
L.S.
WITNESSETH:
NOTARY PUBLIC IN AND FOR THE
STATE OF WASHINGTON
RESIDING AT:
MY COMMISSION EXPIRES: 12/31/1997



ACKNOWLEDGMENTS
STATE OF WASHINGTON) ss. (CORPORATE)
COUNTY OF KING)
ON THIS DAY OF October, 1994, THE UNDERSIGNED, A NOTARY
PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND
SWORN, PERSONALLY APPEARED TO ME, TO BE THE PRESIDENT AND OFFICER
RESPECTIVELY, OF WASHINGTON MUTUAL SAVINGS BANK THE CORPORATION
INSTRUMENT BEING VOLUNTARILY ACT AND DEED, FOR THE USES AND
PURPOSES THEREIN MENTIONED, AND ON OATH STATED THAT THEY WERE
AUTHORIZED TO EXECUTE THE SAID
INSTRUMENT AND THAT THE SEAL AFFIXED IS THE CORPORATE SEAL OF
SAID CORPORATION.

WITNESS MY HAND AND OFFICIAL SEAL HERETO AFFIXED THE DAY AND YEAR
FIRST ABOVE WRITTEN.

L.S.
NOTARY PUBLIC IN AND FOR THE
STATE OF WASHINGTON
RESIDING AT:
MY COMMISSION EXPIRES: 12/31/97



ACKNOWLEDGMENTS
STATE OF WASHINGTON) ss. (CORPORATE)
COUNTY OF KING)
ON THIS 25th DAY OF October, 1994, THE UNDERSIGNED, A NOTARY
PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND
SWORN, PERSONALLY APPEARED TO ME, TO BE THE PRESIDENT AND OFFICER
RESPECTIVELY, OF COUNTY OF KING PLANNING CORPORATION,
INSTRUMENT TO BE THE FREE AND VOLUNTARY ACT AND DEED OF SAID
CORPORATION THAT THEY WERE AUTHORIZED TO EXECUTE THE SAID
INSTRUMENT AND THAT THE SEAL AFFIXED IS THE CORPORATE SEAL OF
SAID CORPORATION.

WITNESS MY HAND AND OFFICIAL SEAL HERETO AFFIXED THE DAY AND YEAR
FIRST ABOVE WRITTEN.

L.S.
NOTARY PUBLIC IN AND FOR THE
STATE OF WASHINGTON
RESIDING AT:
MY COMMISSION EXPIRES: 12/31/97



DECLARATION: Know all men by these presents that we, the undersigned, owners
in interest of the land herein described do hereby make a lot line revision thereof
pursuant to RCW 58.17.060 and declare this lot line revision to be the graphic
representation of some, and that said lot line revision is made with the free consent
of the owners, in witness whereof we have set
our hands and seals.

Evans Yang
Donald L. Evans
Signature

MAP ON FILE IN VAULT
Return to: City of Mercer Island Planning Department
P. O. Box 1440
Mercer Island, WA 98040-1440

STATE OF WASHINGTON } ss. (INDIVIDUAL)
COUNTY OF KING }
ON THIS DAY PERSONALLY APPEARED BEFORE ME DONALD L. EVANS
AND JEANETTE D. EVANS
TO ME KNOWN TO BE THE INDIVIDUAL(S) DESCRIBED HEREIN AND WHO
EXECUTED THE WITHIN AND FOREGOING INSTRUMENT AND ACKNOWLEDGED
VOLUNTARY ACT AND DEED, FOR THE USES AND PURPOSES THEREIN
MENTIONED.

GIVEN UNDER MY HAND AND OFFICIAL SEAL THIS 28th DAY OF October,
1994
L.S.
NOTARY PUBLIC IN AND FOR THE
STATE OF WASHINGTON
RESIDING AT:
MY COMMISSION EXPIRES:



LEGAL DESCRIPTION OF REVISED LOT 5
THAT PORTION OF LOTS 4 AND 5, EVANS' ADDITION ACCORDING TO THE PLAT THEREOF
RECORDED IN VOLUME 101 OF PLATS, PAGES 91 AND 92, IN KING COUNTY,
WASHINGTON, LYING WESTERLY OF THE FOLLOWING DESCRIBED LINE:

BEGINNING AT A POINT ON THE NORTH LINE OF SAID LOT 4, EVANS' ADDITION WHICH
BEARS S88°41'26"E, DISTANT 103.38' FROM THE NORTHWEST CORNER OF SAID LOT 4;
THENCE S05°41'39"W A DISTANCE OF 102.56' TO THE SOUTH LINE OF SAID LOT 4;
AND THE TERMINUS OF THIS LINE.

TOGETHER WITH SECOND CLASS SHORELANDS ADJOINING AS DELINEATED ON THE FACE
OF THE PLAT;
TOGETHER WITH AN UNDIVIDED INTEREST IN TRACT A (COMMUNITY BEACH) AND SECOND
CLASS SHORELANDS ADJACENT TO AND ABUTTING THEREON;
AND TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AND UTILITY PURPOSES
OVER THE 10 FOOT PRIVATE ROAD AS DELINEATED ON THE FACE OF THE PLAT.

SUBJECT TO: ALL EASEMENTS, RESTRICTIONS AND RESERVATIONS OF RECORD, IF ANY.

LEGAL DESCRIPTION OF ORIGINAL LOTS
LOT 4, EVANS' ADDITION, ACCORDING TO THE PLAT THEREOF IN VOLUME 101 OF PLATS,
PAGES 91 AND 92, IN KING COUNTY, WASHINGTON;
TOGETHER WITH AN UNDIVIDED INTEREST IN TRACT A (COMMUNITY BEACH) AND SECOND
CLASS SHORELANDS ADJACENT TO AND ABUTTING THEREON;
AND TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AND UTILITY PURPOSES
OVER THE 10 FOOT PRIVATE ROAD AS DELINEATED ON THE FACE OF THE PLAT.

SUBJECT TO: ALL EASEMENTS, RESTRICTIONS AND RESERVATIONS OF RECORD, IF ANY.

LOT 5, EVANS' ADDITION, ACCORDING TO THE PLAT THEREOF IN VOLUME 101 OF PLATS,
PAGES 91 AND 92, IN KING COUNTY, WASHINGTON;
TOGETHER WITH SECOND CLASS SHORELANDS ADJOINING AS DELINEATED ON THE FACE
OF THE PLAT;

TOGETHER WITH AN UNDIVIDED INTEREST IN TRACT A (COMMUNITY BEACH) AND SECOND
CLASS SHORELANDS ADJACENT TO AND ABUTTING THEREON;

AND TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AND UTILITY PURPOSES
OVER THE 10 FOOT PRIVATE ROAD AS DELINEATED ON THE FACE OF THE PLAT.

SUBJECT TO: ALL EASEMENTS, RESTRICTIONS AND RESERVATIONS OF RECORD, IF ANY.

LEGAL DESCRIPTION OF REVISED LOT 4
THAT PORTION OF LOTS 4 AND 5, EVANS' ADDITION ACCORDING TO THE PLAT THEREOF
RECORDED IN VOLUME 101 OF PLATS, PAGES 91 AND 92, IN KING COUNTY,
WASHINGTON, LYING WESTERLY OF THE FOLLOWING DESCRIBED LINE:

BEGINNING AT A POINT ON THE NORTH LINE OF SAID LOT 4, EVANS' ADDITION WHICH
BEARS S88°41'26"E, DISTANT 103.38' FROM THE NORTHWEST CORNER OF SAID LOT 4;
THENCE S05°41'39"W A DISTANCE OF 102.56' TO THE SOUTH LINE OF SAID LOT 4;
AND THE TERMINUS OF THIS LINE.

TOGETHER WITH AN UNDIVIDED INTEREST IN TRACT A (COMMUNITY BEACH) AND SECOND
CLASS SHORELANDS ADJACENT TO AND ABUTTING THEREON;

AND TOGETHER WITH AN EASEMENT FOR INGRESS, EGRESS AND UTILITY PURPOSES
OVER THE 10 FOOT PRIVATE ROAD AS DELINEATED ON THE FACE OF THE PLAT.

SUBJECT TO: ALL EASEMENTS, RESTRICTIONS AND RESERVATIONS OF RECORD, IF ANY.

RECORDER'S CERTIFICATE

Filed for record this ___ day of ___ 19___
at ___ M in book ___ of ___ at pg ___
at the request of FRANK R. TARVER
Mgr. Supt. of Records

SURVEYOR'S CERTIFICATE

This map correctly represents a survey made by me or
under my direction with the requirements of the Survey
Recording Act at the request of EVANS/YANG
in SEPT 1994.
Certificate No. 18926 Signature



LOT LINE REVISION
FOR
EVANS/YANG
LOTS 4 & 5 EVANS' ADDITION

C & T SURVEYING
2630 116th AVE. N.E., SUITE 101
Bellevue, WA 98004-1459
(206)822-0667

Table with 4 columns: DWN BY, DATE, JOB NO., SHEET 2 OF 2. Values: WIA, 9-27-94, 90167, NONE.