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September 13, 2021

VIA EMAIL: jegalt755@gmail.com

John E. Galt
Hearing Examiner
927 Grand Avenue
Everett, WA 98201

Re: *Yang / Niederman Residences*
Mercer Island No. APL21-006

Dear Mr. Galt:

This letter is Applicants Christopher and Nicole Niederman's[1] hearing brief for the September 20, 2021 appeal in the above-referenced matter.

INTRODUCTION

This appeal presents the following issues:

1. To prevail on their appeal, the Yangs must meet their burden and demonstrate that the City issued the Niedermans Access Gate Permit 2105-227 in violation of applicable law. As the City explained in its Staff Report to Hearing Examiner, the City followed all applicable law. And in fact, the access gate is a necessary step in addressing the Yangs' pattern of illegal activities. The appeal should thus be denied.

2. The Yangs premise their appeal on a "deeded access easement." However, the Yangs' interpretation of the Short Plat Dedication establishing the alleged "deeded easement" violates Washington law, as does their interpretation of a subsequent Lot Line Adjustment. The Yangs' appeal should be denied on this basis as well.

Upset that they were unable to force the Niedermans to move their driveway to a location other than exactly where it has been located for decades, and the City expressly allowed the Niedermans to keep it during their recent remodel project, the Yangs have embarked in a pattern of harassment and illegal activities that continue to this day. This appeal is merely the latest example.

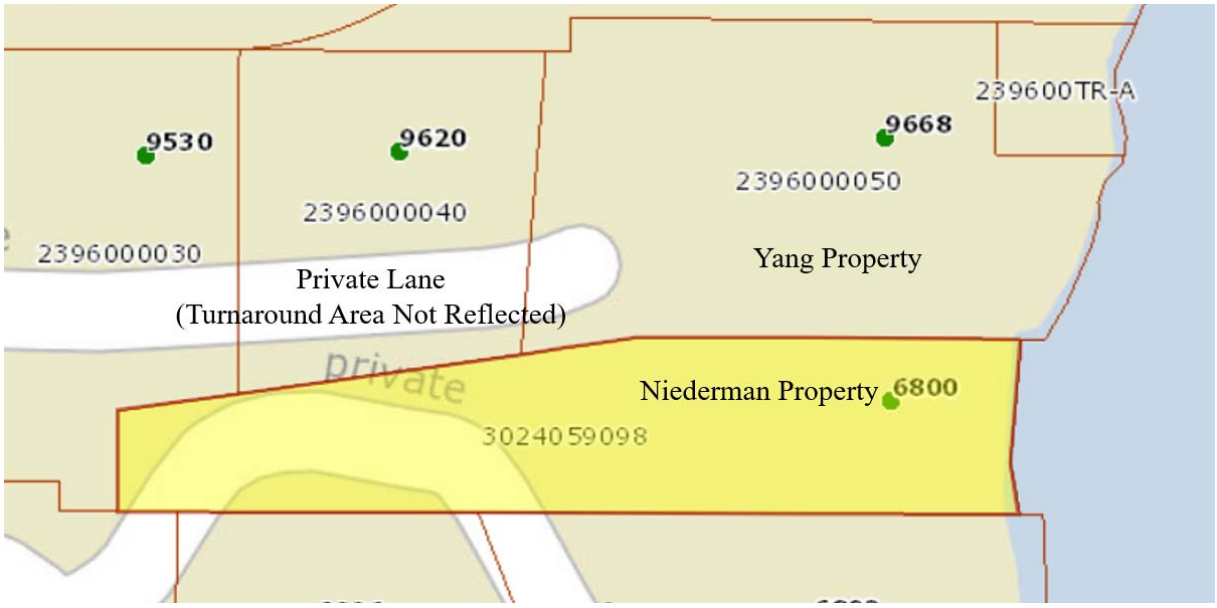
[1] Applicants Christopher and Nicole Niederman will collectively be referred to as the Niedermans. Appellants Steve and Sophy Yang will collectively be referred to as the Yangs. The City of Mercer Island will be referred to as the City. Where appropriate, the parties will be referred to by their first names for clarity. No disrespect is intended.

But the City appropriately interpreted and applied the Mercer Island Municipal Code ("MICC") and other applicable law in granting the Niedermans Permit No. 2105-227 for an automatic electric gate at their residence. The Yangs have not and cannot meet their burden to show that the City erred in any way. This appeal should accordingly be denied.

STATEMENT OF FACTS AND PROCEDURE

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

The Niedermans own the real property located at 6800 96th Avenue SE, Mercer Island, WA (the "Niederman Property").[2] Steve owns as his separate property adjacent real property immediately to the north located at 6660 E. Mercer Way (9668 68th St. SE), Mercer Island, WA (the "Yang Property"). Both lots border Lake Washington, and the entire neighborhood slopes steeply down towards the water. The following map from the King County parcel viewer shows the parties' property:



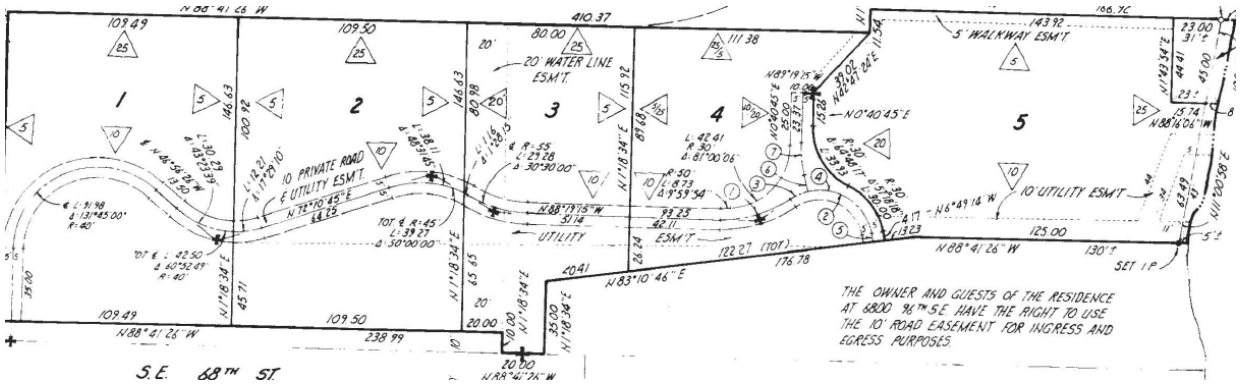
B. In the 1970s, When the Yang Property Was Developed as Part of the Evans Addition, the Short Plat Dedication Established a Single Private Road Easement and Vehicle Turnaround for the Benefit of the Five Lots in the Evans Addition and the Niederman Property

In December of 1976, what is now the Yang Property, together with four other parcels, were developed as part of the "Evan's Addition" as reflected in a recorded Short Plat Dedication. The Yang

[2] 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 steep slope that bisects the Niederman Property, and as such cannot be used to access the Niederman Property.

Property is referred to as Lot 5 in the Short Plat Dedication. As illustrated by the Short Plat Dedication, the Niederman Property borders the Evans Addition, but pre-existed and was not a part of it.

The five lots that make up the Evans Addition, as well as the Niederman Property, can only be accessed by "THE 10' PRIVATE ROAD & UTILITY ESMT" that runs from 68th Street SE down the hill towards Lake Washington as reflected on the face of the Short Plat Dedication, and consists of a private lane and a hammerhead shaped turnaround area at its bottom. The reference to 10 feet relates to the fact that the private lane, with the exception of the hammerhead turnaround area, is 10 feet wide. That the hammerhead shaped turn around area was included makes sense, as without it there is no safe way for emergency vehicles, garbage and recycling trucks, delivery vehicles, and anyone else who drives to the bottom of the private lane to turn around. The "Restrictions" portion of the Short Plat Dedication further provides that: "Access to all lots shall be limited to the 10' private road easement," and includes the following map:[3]



Presumably because the Niederman Property would be landlocked without access to "THE 10' PRIVATE ROAD & UTILITY ESMT", 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.[4]

This language is notable because it mentions "***THE*** 10' ROAD EASEMENT," not ***a*** "10' ROAD EASEMENT" or some other "deeded easement." Further, "THE 10' PRIVATE ROAD & UTILITY ESMT" is the *only* access or road easement referenced on the Short Plat Dedication. To that end, 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

[3] Exhibit 2001. The embedded image is a portion of the exhibit.

[4] Exhibit 2001 (capitals in original).

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.

Those realities are critical, because: "The rules of contract interpretation apply to interpretation of an easement."[5] If the language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists."[6] Similarly, parties cannot unilaterally change contractual terms mid-stream.[7] And, we "must construe a contract to give meaning to every term."[8]

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 hammerhead shaped turnaround area at the bottom of the lane, as both are part of a single easement. There is no other way to interpret the Short Plat Dedication in accordance with Washington law. To accept the Yangs' contention that what is now the Niederman Property received a separate easement that does not include the hammerhead turnaround area would require the addition of additional language as well as an additional legal description. Making such additions is strictly prohibited by Washington law.

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

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

[5] *Hendrickson v. Murphy*, 8 Wn. App. 2d 150, 156 (2019) (citing *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 864 (2018)).

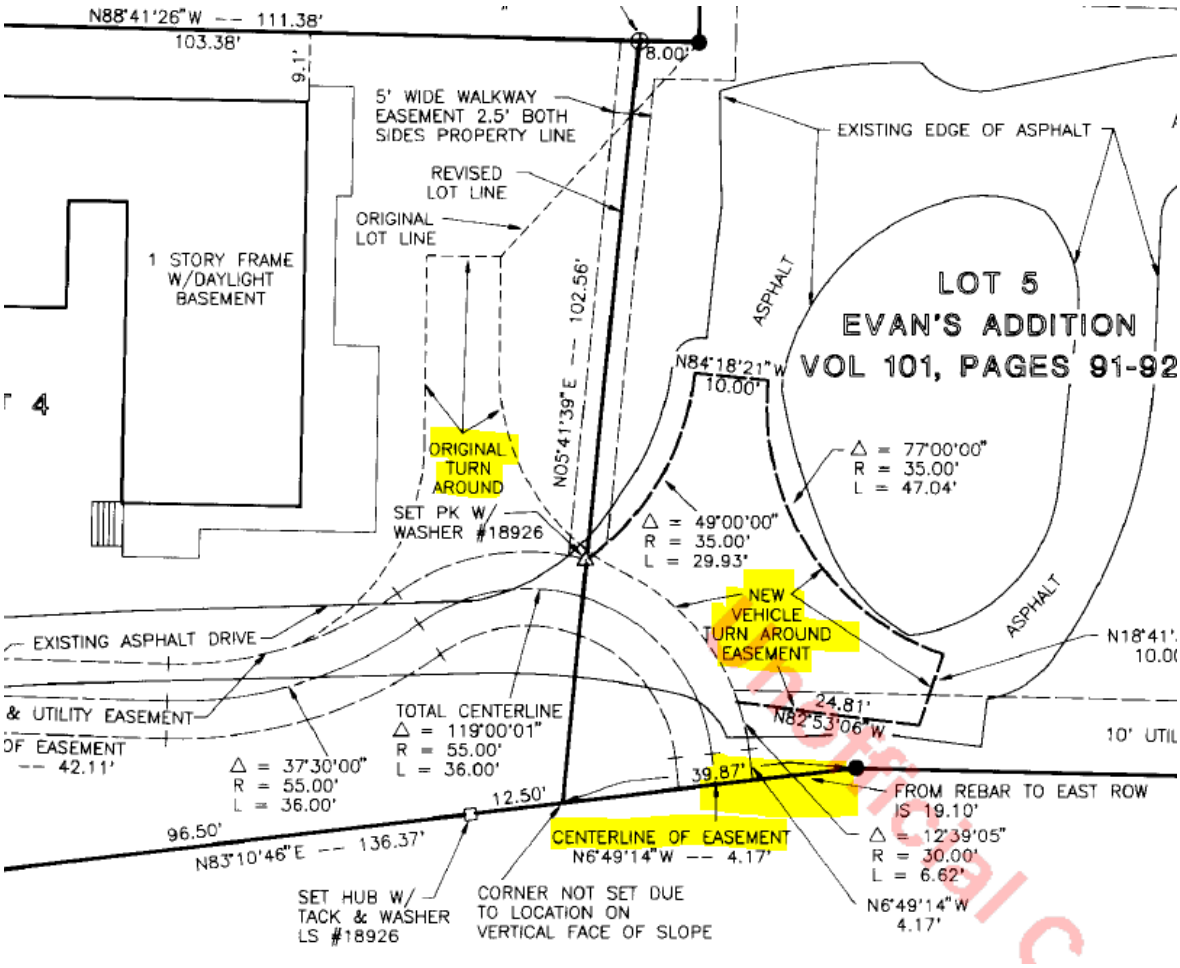
[6] *Lehrer v. DSHS*, 101 Wn. App. 509, 515-16 (2000) (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733 (1992)).

[7] *Yaw v. Walla Walla Sch. Dist.*, 106 Wn.2d 408, 417 (1986) ("The District, however, could not unilaterally change bargained for contractual terms.").

[8] *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)).

[9] Exhibit 2002.

[10] Exhibit 2002. The embedded portion of the Exhibit is blown up and highlighted for clarity. The yellow rectangular block above and slightly to the right (west) of the "CENTERLINE OF EASEMENT" shows the location of the Niedermans' driveway.



The Lot Line Revision had no adverse effect in any rights the Niederman Property might have, and in fact expressly explains that it is: "SUBJECT TO: ALL EASEMENTS, RESTRICTIONS AND RESERVATIONS OR RECORD, IF ANY."[11]

[11] Exhibit 2002 (capitals in original). Steve's parents and the owners of Lot 4 lacked the right to unilaterally revise "THE 10' PRIVATE ROAD & UTILITY" easement without the written agreement of the other affected parties, including the then owners of the Niederman Property, but for the purposes of this hearing 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).

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

When the original residence on what is now the Niederman Property was constructed in the 1970's, it included a 15-foot-wide asphalt driveway that overlapped the east half of the south arm of the turnaround area as set forth in the Short Plat Dedication and continued another 10 feet to the east toward Lake Washington. Referencing the above map, the west edge of the Niedermans' driveway begins at the "CENTERLINE OF THE EASEMENT" at bottom of the map, and then proceeds 15 feet to the east. The approximate location of the driveway is highlighted in yellow.

The location of the driveway has never changed.[12] And, at all times since the original residence was constructed on the Niederman Property, the owners of the Niederman Property have used a 15-feet wide path to access the turnaround area and private lane.

When the Lot Line Revision was recorded in 1994, the preexisting driveway on the Niederman Property ran across the southern arm of the hammerhead as reflected in the "NEW VEHICLE TURN AROUND EASEMENT."[13] This appears to have been done to reflect the historic usage of the property by owners of what are now the Niederman and Yang Properties.

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

The Niedermans purchased their property in 2015 with the intention of remodeling the existing home due to its age and condition. In 2017, prior to beginning construction, the Niedermans applied for and obtained all required building permits from the City of Mercer Island. The permit application included submitting plans that, *inter alia*, reflected the location of their driveway as being exactly where it had been located for decades.[14] The only contemplated change was to remove preexisting asphalt and replace it with concrete.

The Yangs had a 30-day period between August 21, 2017 and September 19, 2017 to submit a public comment addressing or objecting to the driveway's location. Despite receiving proper notice of the Niedermans' project, the Yangs submitted no comments. Following the City's approval of the Niedermans' building permit, the Yangs had 14 days to file an appeal with the City of Mercer Island pursuant to MICC Section 19.15.130(B), or 21 days to file a LUPA petition under RCW 36.70C.040(3) challenging the City's decision. The Yangs did neither and lost the ability to object.[15] The Niedermans then replaced the preexisting asphalt driveway with a concrete driveway in its historic location as approved by the City.

[12] Exhibits 2005 and 2009.

[13] Exhibit 2002.

[14] Exhibit 2005.

[15] *See Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 382 (2009).

The Niedermans' construction project is complete and received all required approvals and signoffs from the City despite the Yangs asserting approximately 16 separate code violations, all of which were rejected by the City.

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

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

In sum, the Yangs' plans, without explanation, called for relocating and reducing the width of the Niedermans' pre-existing and already approved driveway away from where it has long been located.[16] As a result, the Yangs' plans presumed that the Niedermans would not have direct access to the "NEW VEHICLE TURN AROUND EASEMENT," which contradicted the very document Steve's parents had signed and recorded years earlier as part of the Lot Line Adjustment. In fact, the Yangs' architect included in the proposed plans submitted to the City a paved road where no such road ever existed in contradiction to a survey previously prepared by the Niedermans' surveyor, Terrane. The Yangs' architect further stated in his plans that the Yangs intended to remove a portion of the existing road to give back permeable space while incorrectly showing a driveway to the Niedermans' house as "existing paved road" that has never existed.[17] The Yangs apparently did this to comply with permeable lot coverage requirements.

On a practical level, the Yangs seemed to want to do two things. First, to relocate the Niedermans' driveway such that it would run into a previously existing concrete wall located on the Niedermans' property and not line up with the location of the Niedermans pre-existing and newly City-approved and constructed driveway, thus intentionally cutting off access to the Niedermans' house. Second, to eliminate a portion of the turnaround area and in the process unilaterally reduce easement rights granted to the other lots in the Evans Addition and the Niederman Property.

The Niedermans then filed an official comment with the City pointing out these inaccuracies and conflicts. After review, the City required the Yangs to correct their plans and reflect the Niedermans' driveway in its current, approved location. The City also granted the Yangs an exception to their lot coverage requirement such that the Yangs no longer needed to remove additional non-permeable surface to meet City building code requirements.[18]

[16] Exhibit 2005.

[17] Exhibit 2005.

[18] Exhibits 2006 and 2007.

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

The City then suspended the Yangs' building permit until they properly reflected on new plans the Niedermans' driveway in its current location as constructed, and with access to "THE 10' ROAD EASEMENT," removed all language to the contrary, and agreed that the paved access road in front of the Niedermans' driveway was not to be touched. No good reason existed for the Yangs' behavior or actions, and it certainly appears their actions were driven by spite to continue to harass the Niedermans for simply calling out inaccuracies in the Yangs' original plans.

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

> During a telephone conversation yesterday, we discussed a note located on Sheet A1.0 of the [Yangs'] building permit plans. Said note states "NOTE: RECORDED EASEMENT – DRIVEWAY ACCESS TO REMAIN WITHIN EASEMENT." You stated that your intention of this note is to allow the property owners to remove the portion of the neighbors [Niedermans'] driveway that is located outside of the access easement that is recorded with the plat. I disagree with your interpretation of this note. To avoid any misunderstandings, I am withdrawing approval of Planning review of building permit 1902-005 until said note is removed from the plans. The building permit is not active until this matter is resolved and Planning approval has been granted.[22]

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

Unfortunately, the City's directives to the Yangs have had limited effect. The Yangs have persisted in a pattern of activity directed at the Niedermans in which they have blocked access to the Niedermans' driveway, parked cars in all portions of the turnaround easement, and routinely park

[19] Exhibit 2012.

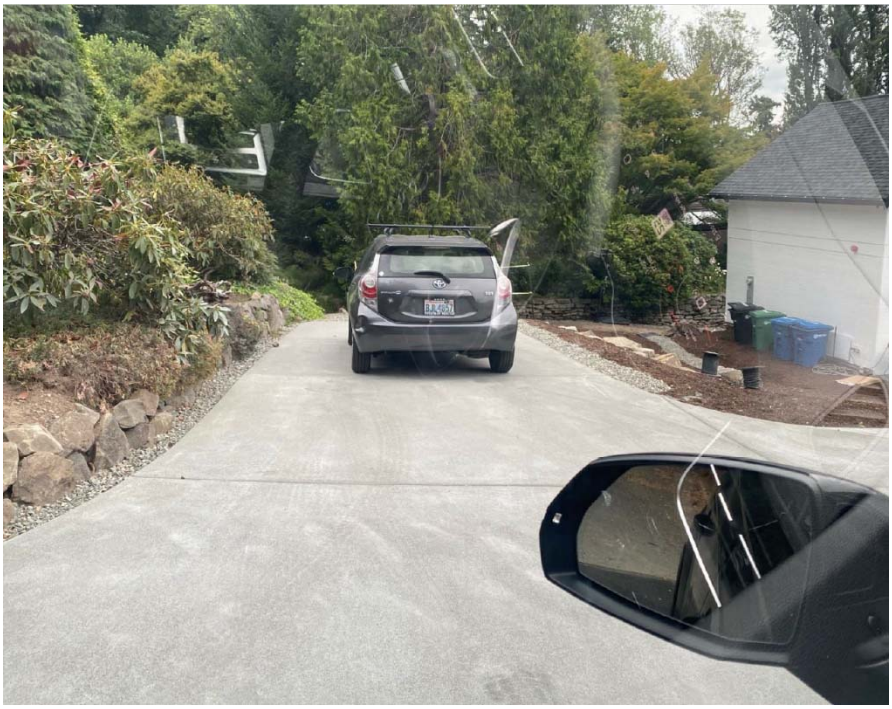
[20] Exhibit 2007.

[21] Exhibit 2006.

[22] Exhibit 2007, at NIE 2021.

cars in the north arm of the turnaround easement. The following photographs illustrate recent examples:[23]

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



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

[23] *See generally* Exhibits 2012 and 2015.

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

The Yangs' recent actions in parking cars in the north arm of the turnaround easement – which is a violation of the MICC and the International Fire Code – is part of a larger plan to wrongfully deny the Niedermans any use of the turnaround area. In the Spring of 2021, the Yangs submitted an application to the City seeking approval to revise their building plans so they could remove the entire existing turnaround area, relocate the north arm, and permanently eliminate the south arm and replace it with irrigated landscaping.[24] Worse, despite still not having final approval from the City for their permit revision,[25] and despite the existence of a lawsuit, the Yangs went ahead and implemented their plan. The Niedermans never agreed to this alteration of their easement rights.[26]

The Yangs also relocated the location of the north arm of the turnaround easement, again without even seeking the Niedermans' approval. While the relocation alone would not be a tremendous problem, the fact that the Yangs now routinely park in the north arm (which is illegal) means that they have completely eliminated any use of the turnaround easement. Further, as indicated

[24] *See* Exhibits 2004 and 2005. It is unclear how or why the 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.

[25] Exhibit 2008.

[26] Exhibit 2006.

on the plan submitted as part of the Yang's application, a portion of the now relocated north arm is not on their property, which means that the Yangs' blocking of the north arm involves property that does not belong to them.

The end result is that cars and trucks are now forced to routinely use the Niedermans' driveway to safely turn around, despite the fact that no easement rights exist for anyone to do so. This seems to be the Yangs' intention in eliminating and blocking the turnaround area.

H. The Lawsuit

Given the Yangs' wrongful actions, the Niedermans filed suit in King County Superior Court on May 11, 2020.[27] The Niedermans allege that as a result of the Short Plat Dedication, or failing that through a prescriptive easement, they have the right to use the entire turnaround area and private lane. They also allege that the Yangs' actions constitute a private nuisance, and that the Yangs should be ordered to restore the south arm of the turnaround area they landscaped over without a valid permit. The Yangs are defending the case in two primary ways, First, by alleging that the Niedermans somehow have a separate 10-foot access easement not actually described in the Short Plat Dedication that does not include the turnaround area. Second, the Yangs allege that the Niedermans are wrongfully attempting to relocate the fictitious separate 10-foot access easement in violation of Washington law. The parties recently filed cross-motions for summary judgment that will be heard on September 30, 2021.[28]

I. The Niedermans' Gate Application

On July 15, 2021 the City issued the Niedermans a permit to install an automatic electric gate across their long-standing, permitted driveway. The Yangs appealed, arguing that:

> While the physical construction may be on the Niederman Property, the proposed gate installation is being installed in a manner that obstructs the deeded access easement and forces the Niedermans to access their property through the Yang Property, in areas where the Niedermans do not have a deeded easement. Approval of this permit violates the purpose of the Mercer Island Code, including but not limited to Section 19.150.060(8). The Yangs are involved in active litigation with the Niedermans, and the City, by approving the permit, may have some role in determining the outcome of the litigation, which is inappropriate and runs contrary to Washington State caselaw.

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

[27] Exhibit 2010.

[28] Exhibit 2011.

LEGAL ANALYSIS

A. The Yangs Cannot Show That the City's Decision to Grant the Niederman's Permit Violated MICC Section 19.15.060(8)

Mercer Island Code Section 19.15.060(8)[29] provides that:

> A. The department shall not commence review of any application until the applicant has submitted the materials and fees specified for complete applications. An application shall contain all information deemed necessary by the code official to determine if the proposed permit or action will comply with the requirements of the applicable development regulations. The applicant for a development proposal shall have the burden of demonstrating that the proposed development complies with the applicable regulations and decision criteria. All land use applications shall include, at a minimum, the following:
>
> * * *
>
> 8. Verification that the property affected by the application is in the exclusive ownership of the applicant, or that the applicant has a right to develop the site and that the application has been submitted with the consent of all owners of the affected property; provided, that compliance with subsection (A)(9) of this section shall satisfy the requirements of this subsection

The Yangs cannot meet their legal burden of establishing the City wrongfully issued the Niedermans' Automatic Gate Permit. There is no dispute but that the Niedermans submitted the necessary application and paid the required fees. Second, even the Yangs' Appeal concedes that the gate will be located entirely on real property owned by the Niedermans. Third, the gate will not affect the owners of any other property – once installed the Niedermans will simply continue to use the driveway in the same place it has been located for decades and that the City permitted and allowed the Niedermans to install. The Niedermans further agree with and incorporate the City's September 10, 2021 Staff Report to Hearing Examiner and urge that it alone justifies denial of this appeal.

B. The Niedermans Need to be Able to Prevent Other Vehicles From Trespassing on Their Driveway

Issuance of the Niedermans' Automatic Electric Gate permit is an important step in allowing the Niedermans to address the Yangs' illegal activities in removing and eliminating use of the turnaround area. Initially, blocking the north arm of the turnaround area, whether it be with a car, refuse containers, or otherwise, violates MICC 10.36.227, which provides that:

[29] The Yangs' Appeal cites to Mercer Island Code Section 19.150.060(8). Given that no such code section exists, the Niedermans assume (as the City did in the Staff Report to Hearing Examiner) that the Yangs intended to reference Mercer Island Code Section 19.15.060(8).

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

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

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

Additionally, under the 2018 International Fire Code,[30] which has been adopted by Mercer Island, fire lanes must always be kept unobstructed.[31] Likewise, both MICC 10.74.020 and WAC 132N-156-550(8) prohibit parking in a fire lane. And MICC CH. 10.36.226 prohibits parking in a manner that interferes or obstructs the free movement of traffic.

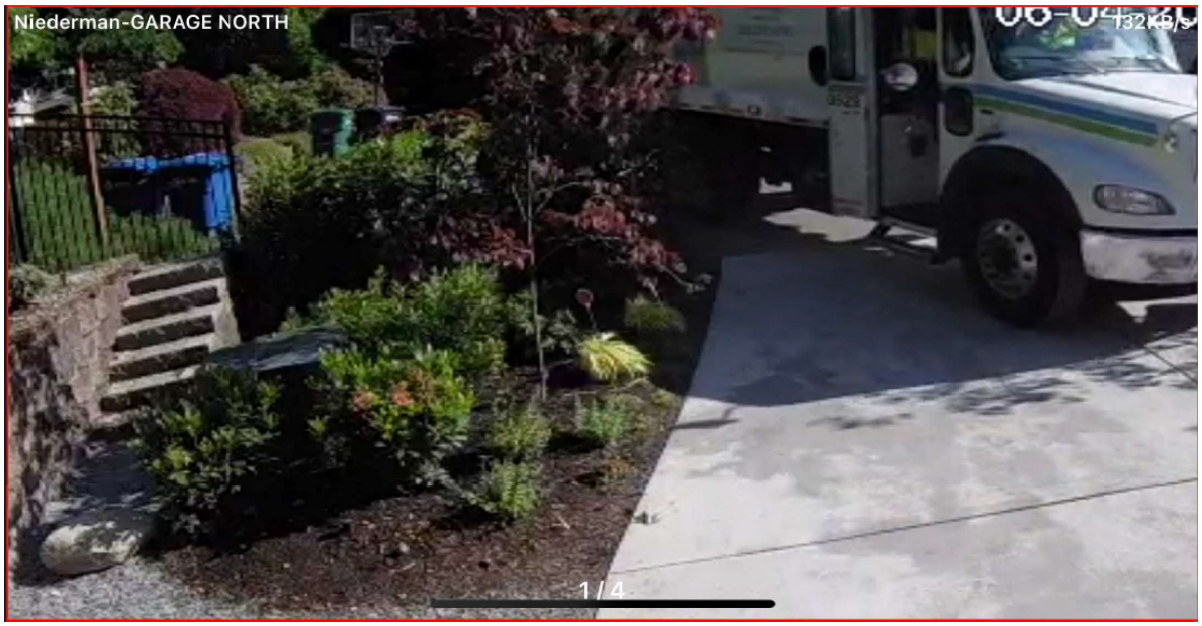
Unfortunately, the Yangs' actions in regular blocking the north arm of the turnaround area is a clear violation of applicable law that is routinely causing vehicle drivers to trespass on the Niedermans' driveway to turn around. Below are illustrative photographs showing vehicles that visit the area using the Niedermans' driveway to turn around:[32]

[30] As noted in the City's Staff Report to Hearing Examiner, the IFC is adopted with amendments by the State Building Code Council under WAC Chapter 51-54 as the Washington State Fire Code. The Washington State Fire Code is adopted with local amendments by the City of Mercer Island by MICC Ch. 17.07.

[31] *See* Mercer Island Municipal Code, §17.07.010; 2018 International Fire Code, Ch., 503.4. The Yangs' counsel has repeatedly asserted that the new north arm was constructed to company with fire access 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.

[32] Exhibit 2016; *see also* Exhibit 2019.

This photograph shows a truck delivering construction materials to the Yangs' residence. The truck hit the gutter on the Niedermans' garage and nearly hit the garage door.



This photograph shows a Recology truck that came down the private lane to collect refuse for the neighborhood that previously used the turnaround area but is now forced to pull into the Niedermans' driveway to turn around.

This situation has been exacerbated by the fact that Yangs unilaterally eliminated the south arm of the turnaround area without even receiving a final permit from the City to do so, as shown the following photograph:[33]

[33] Exhibit 2014.

In sum, the Yangs are engaging in a pattern of illegal activities with no apparent design other than to force vehicles that travel to the bottom of the private lane to somehow remove the Yangs' obstructions in the north arm of the turnaround area or be forced to trespass on the Niedermans' driveway. The Niedermans' gate is an important part of their mitigation of such illegal activities.

C. The Short Plat Dedication Vested in the Owners of the Niederman Property the Right to use the Entire 10' PRIVATE ROAD & UTILITY" Easement, Which Includes Both the Private Lane and the Turnaround Area

The Yangs assert in their Appeal that: "the proposed gate installation is being installed in a manner that obstructs the deeded access easement and forces the Niedermans to access their property through the Yang Property, in areas where the Niedermans do not have a deeded easement." This argument is incorrect.

"The rules of contract interpretation apply to interpretation of an easement."[34] "The intent of the original parties to an easement is determined from the deed as a whole. If the plain language is unambiguous, extrinsic evidence will not be considered."[35] Further, "If the language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists."[36] Similarly, parties cannot unilaterally change contractual terms mid-stream.[37] And, we "must construe a contract to give meaning to every term."[38] Against this backdrop, it must be recognized that neither the Yangs nor Steve's Parents were signatories to the Short Plat Dedication and had no role in its creation or recording. As such, their intent regarding, and beliefs concerning, the Short Plat Dedication are wholly irrelevant and should not be considered.

The plain language of the recorded Short Plat Dedication makes two things abundantly clear. First, the map depicts a single "10' PRIVATE ROAD & UTILITY" easement that includes not only a road, but also a hammerhead shaped turnaround area at its easterly end. The boundaries, specific reference points, and distances are all included as one unified area. Because the "10' PRIVATE ROAD & UTILITY" easement is the *only* easement that refers to road access, there is no way to construe a separate and different easement right benefiting only the Niederman Property. Put another way, there is no "Access Easement" as alleged by the Yangs – it is a fiction they invented for the purposes of litigation.

In fact, to reach the conclusion that the Niederman Property does not have the right to use all of "THE 10' PRIVATE ROAD & UTILITY" easement, including the turnaround area, at least two things prohibited by Washington law would need to occur. First, the phrase "***THE*** 10' ROAD EASEMENT FOR INGRESS AND EGRESS PURPOSES" would have to be altered to read to "***A***

[34] *Hendrickson*, 8 Wn. App. 2d at 156 (citing *Pelly*, 2 Wn. App. 2d at 864 (2018).

[35] *Hendrickson*, 8 Wn. App. 2d at 156 (citing *Sunnyside Valley Irrig. Dist.*, 149 Wn.2d at 880).

[36] *Lehrer*, 101 Wn. App. at 515-16 (citing *McDonald* \, 119 Wn.2d at 733).

[37] *Yaw*, 106 Wn.2d at 417 ("The District, however, could not unilaterally change bargained for contractual terms.").

[38] *Diamond B Constructors, Inc.*, 117 Wn. App. at 165 (citing *City of Seattle*, 136 Wn.2d at 698).

10' ROAD EASEMENT FOR INGRESS AND EGRESS PURPOSES."[39] However, courts must enforce easements as written,[40] and the Yangs similarly have no right to change the language of the Short Plat Dedication.[41] And, to reach the conclusion erroneously urged by the Yangs, language would have to be added to the Short Plat Dedication to describe the alleged separate 10 access easement the Niederman Property received, which is also prohibited.

Second, to sustain the Yangs' argument a restriction to the Short Plat Dedication would need to be added that contradicts the explicit language 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."[42] The Short Plat Dedication contains no such restriction, and in fact in the Short Plat Dedication's "RESTRICTIONS" it expressly provides that: "Access to all lots shall be limited to the 10' private road easement,"[43] which means that the five lots in the Evans Addition, plus the Niederman Property, have full rights to use the entire 10' private road for ingress and egress, which by necessity involves using the turnaround area. It is also notable that the Yangs' argument fails to consider the fact that several homes in addition to the Niedermans have driveways that are more than 10-feet wide, which only lends further credence to the reality that the "10' ROAD EASEMENT" refers to the fact that the private lane is 10 feet wide.

In sum, the Short Plat Dedication only describes one road easement. The Niederman Property was given co-extensive rights to use all of "THE 10' PRIVATE ROAD & UTILITY" easement, which includes ingress, egress, and turnaround rights. That is the only way to read the Short Plat Dedication to give meaning to all of its terms. To hold otherwise would require the addition of substantial additional language providing for a new, second road easement not previously included and restricting the Niedermans' use of the turnaround area in a way not described in the Short Plat Dedication.

D. The 1994 Lot Line Adjustment Recognizes the Original Easement, and Purports to Adjust the Turnaround Area, but Does Not Otherwise Reference a Separate Easement for the Niederman Property

The plain language of the 1994 Lot Line Revision, to which Steve's parents were a party, only reinforces the above conclusions. Initially, it recognizes the "ORIGINAL TURN AROUND," and then specifically created a "NEW VEHICLE TURN AROUND EASEMENT" adjacent to the old one that in fact provides access to the entire Niederman driveway as constructed both before and after the Niedermans' remodel.[44] Next, it specifically provides that it is: "SUBJECT TO: ALL EASEMENTS,

[39] Exhibit 2021 (emphasis added, all caps in original)

[40] *Lehrer*, 101 Wn. App. at 515-16 (citing *McDonald*, 119 Wn.2d at 733).

[41] *Yaw*, 106 Wn.2d at 417; *Backman*, 147 Wn. App. at 797.

[42] Exhibit 2021 (all caps in original).

[43] Exhibit 2021.

[44] Exhibit 2002.

RESTRICTIONS AND RESERVATIONS OF RIGHT, IF ANY."[45] Thus, it expressly recognizes the existence of the original Short Plat Dedication and the rights extended to the Niederman Property.

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

In fact, as noted above, unless the doctrine of recognition and acquiescence applies, the 1994 Lot Line Adjustment illegally relocated the turnaround area created in the Short Plat Dedication. The result dictated by Washington law for the wrongful relocation of the turnaround area would be that Yangs return the turnaround area to its original location as it existed prior to the 1994 Lot Line Adjustment, because case law establishes that easements cannot be reconfigured without the agreement of all parties with rights under the easement.[46] Accordingly, the 1994 Lot Line Adjustment only reinforces the reality that the Niedermans have the right to use the entire turnaround easement.

Put another way, while the Niedermans remodeled their home in accordance with their approved building plans, the Yangs built their new home contrary to their approved building plans and now routinely and illegally block the north arm of the turnaround area to prevent the Niedermans and everyone else from using the turnaround area and to force all visitors instead to use the Niedermans' driveway to turn around. Such actions are in clear violation of the rights granted in the Short Plat Dedication to the owners of the Niederman Property and blocking the north arm of the turnaround area violates applicable law.

CONCLUSION

The Niedermans respectfully request that the Yangs' appeal be denied, and they be allowed to proceed with installation of their access gate as approved by the City.

Very truly yours,

CARNEY BADLEY SPELLMAN, P.S.

Mark Rosencrantz

Enclosures
c: Ryan Sternoff / Cassidy Ingram
Eileen Keiffer
Bio Park / Mary Swan

[45] Exhibit 2002 (capitals in original).

[46] *See Crisp v. VanLaecken*, 130 Wn. App. 320, 323-25 (2005); *MacMeekin v. Low Income Hous. Inst.*, 111 Wn. App. 188, 207 (2002).

INDEX OF EXHIBITS

Exhibit No.	Description	Bates No.
2001	Evan's Addition	NIE 001 - 002
2002	1994 Lot Line Revision	NIE 003 - 004
2003	2007 Aerial Photograph	NIE 005
2004	R. A. Fisher Turnaround Revision Submittal on Behalf of the Yangs	NIE 006
2005	Blow-up of R. A. Fisher Plan Submittal on Behalf of the Yangs	NIE 007
2006	08/27/2019 Email	NIE 008 - 016
2007	10/24/2019 Email	NIE 017 - 021
2008	Permit #SUB21-003 Details	NIE 022 - 023
2009	2019 Aerial Photograph	NIE 024
2010	Complaint	NIE 025 - 046
2011	Niederman's Motion for Summary Judgment	NIE 047 - 086
2012	Photographs	NIE 087 - 095
2013	Photograph	NIE 096
2014	Photographs	NIE 097 – 098
2015	Photographs	NIE 099 - 103
2016	Photographs	NIE 104 – 109
2017	Video of the Niedermans driving down the private lane to their home and showing the North Arm of the turnaround area blocked by the Yangs	
2018	Video of the Niedermans driving down the private lane to their home and showing the North Arm of the turnaround area blocked by the Yangs	
2019	Video of Recology picking up refuse and using the Niedermans' driveway to turn around	