The Rule against Perpetuities reflects the public policy of the State. Granting the relief requested by defendants would thus be contrary to public policy, since it would lead to the same result as enforcing the option and tend to compel performance of contracts violative of the Rule. Similarly, damages are not recoverable where options to acquire real property violate the Rule against Perpetuities, since that would amount to giving effect to the option (see, 5A Powell, Real Property P 771 [3]).

Accordingly, the order of the Appellate Division should be [*486] affirmed, with costs, and the certified question answered in the affirmative.

III. LOS DERECHOS NO POSESORIOS

A. LOS *EASEMENTS*

LA CREACIÓN DE *EASEMENTS*

DONALD E. WILLARD et al., Plaintiffs and Respondents, v. FIRST CHURCH OF CHRIST, SCIENTIST, PACIFICA, CALIFORNIA, Defendant and Appellant. Supreme Court of California 7 Cal. 3d 473; 498 P.2d 987, July 11, 1972

OPINION BY: PETERS

[*474] In this case we are called upon to decide whether a grantor may, in deeding real property to one person, effectively reserve an interest [*475] in the property to another. We hold that in this case such a reservation vests the interest in the third party.

Plaintiffs Donald E. and Jennie C. Willard filed an action to quiet title to a lot in Pacifica against the First Church of Christ, Scientist (the church). After a trial, judgment was entered quieting the Willards' title. The church has appealed.

Genevieve McGuigan owned two abutting lots in Pacifica known as lots 19 and 20. There was a building on lot 19, and lot 20 was vacant. McGuigan was a member of the church, which was located across the street from her lots, and she permitted it to use lot 20 for parking during

services. She sold lot 19 to one Petersen, who used the building as an office. He wanted to resell the lot, so he listed it with Willard, who is a realtor. Willard expressed an interest in purchasing both lots 19 and 20, and he and Petersen signed a deposit receipt for the sale of the two lots. Soon thereafter they entered into an escrow, into which Petersen delivered a deed for both lots in fee simple.

At the time he agreed to sell lot 20 to Willard, Petersen did not own it, so he approached McGuigan with an offer to purchase it. She was willing to sell the lot provided the church could continue to use it for parking. She therefore referred the matter to the church's attorney, who drew up a provision for the deed that stated the conveyance was "subject to an easement for automobile parking during church hours for the benefit of the church on the property at the southwest corner of the intersection of Hilton Way and Francisco Boulevard . . . such easement to run with the land only so long as the property for whose benefit the easement is given is used for church purposes. " Once this clause was inserted in the deed, McGuigan sold the property to Petersen, and he recorded the deed.

Willard paid the agreed purchase price into the escrow and received Petersen's deed 10 days later. He then recorded this deed, which did not mention an easement for parking by the church. While Petersen did mention to Willard that the church would want to use lot 20 for parking, it does not appear that he told him of the easement clause contained in the deed he received from McGuigan.

Willard became aware of the easement clause several months after purchasing the property. He then commenced this action to quiet title against the church. At the trial, which was without a jury, McGuigan testified that she had bought lot 20 to provide parking for the church, and would not have sold it unless she was assured the church could thereafter continue to use it for parking. The court found that McGuigan and Petersen intended to convey an easement to the church, but that the clause [*476] they employed was ineffective for that purpose because it was

invalidated by the common law rule that one cannot "reserve" an interest in property to a stranger to the title.

The rule derives from the common law notions of reservations from a grant and was based on feudal considerations. (1) A reservation allows a grantor's whole interest in the property to pass to the grantee, but revests a newly created interest in the grantor. (4 Tiffany, The Law of Real Property (3d ed. 1939) § 972.) While a reservation could theoretically vest an interest in a third party, the early common law courts vigorously rejected this possibility, apparently because they mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin. (See Harris, Reservations in Favor of Strangers to the Title (1953) 6 Okla. L. Rev. 127, 132-133.) Insofar as this mistrust was the foundation of the rule, it is clearly an inapposite feudal shackle today. Consequently, several commentators have attacked the rule as groundless and have called for its abolition. (See, e.g., Harris, supra, 6 Okla. L. Rev. at p. 154; Meyers & Williams, Oil and Gas Conveyancing; Grants and Reservations by Owners of Fractional Mineral Interests (1957) 43 Va. L. Rev. 639, 650-651; Comment, Real Property: Easements: Creation by Reservation or Exception (1948) 36 Cal. L. Rev. 470, 476; Annot., Reservation or exception in deed in favor of stranger, 88 A.L.R.2d 1199, 1202; cf. 4 Tiffany, supra, § 974, at p. 54; 2 American Law of Property (Casner ed. 1952) § 8.29, at p. 254.)

(2a) California early adhered to this common law rule. (Eldridge v. See Yup Company (1860) 17 Cal. 44.) In considering our continued adherence to it, we must realize that our courts no longer feel constricted by feudal forms of conveyancing. (3) Rather, our primary objective in construing a conveyance is to try to give effect to the intent of the grantor. (Boyer v. Murphy (1927) 202 Cal. 23, 28-29 [259 P. 38]; Burnett v. Piercy (1906) 149 Cal. 178, 189 [86 P. 603]; Barnett v. Barnett (1894) 104 Cal. 298, 301 [37 P. 1049].) In general, therefore, grants are to be interpreted in the same way as other contracts and not

according to rigid feudal standards. (Civ. Code, § 1066; Dandini v. Johnson (1961) 193 Cal. App. 2d 815, 819 [14 Cal. Rptr. 534]; Kraemer v. Kraemer (1959) 167 Cal. App. 2d 291, 300-301 [334 P.2d 675]; Biescar v. Czechoslovak-Patronat [*477] (1956) 145 Cal. App. 2d 133, 142-143 [302 P.2d 104].) (2b) The common law rule conflicts with the modern approach to construing deeds because it can frustrate the grantor's intent. Moreover, it produces an inequitable result because the original grantee has presumably paid a reduced price for title to the encumbered property. In this case, for example, McGuigan testified that she had discounted the price she charged Petersen by about one-third because of the easement. Finally, in some situations the rule conflicts with section 1085 of the Civil Code .

In view of the obvious defects of the rule, this court has found methods to avoid it where applying it would frustrate the clear intention of the grantor. In Butler v. Gosling (1900) 130 Cal. 422 [62 P. 596], the court prevented the reserved title to a portion of the property from vesting in the grantee by treating the reservation as an exception to the grant. In Boyer v. Murphy, supra, 202 Cal. 23, the court, noting that its primary objective was to give effect to the grantor's intention (id., at pp. 28-29), held that the rule was inapplicable where the third party was the grantor's spouse. (See Fleming v. State Bar (1952) 38 Cal. 2d 341, 345, fn. 2 [239 P.2d 866].) Similarly, the lower courts in California and the courts of other states have found [*478] ways of circumventing the rule.

The highest courts of two states have already eliminated the rule altogether, rather than repealing it piecemeal by evasion. In Townsend v. Cable (Ky. 1964) 378, S.W.2d 806, the Court of Appeals of Kentucky abandoned the rule. It said: "We have no hesitancy in abandoning this archaic and technical rule. It is entirely inconsistent with the basic principle followed in the construction of deeds, which is to determine the intention of grantor as gathered from the four corners of the instrument." (Id., at p. 808.) (See also Blair

v. City of Pikeville (Ky. 1964) 384 S.W.2d 65, 66; Combs v. Hounshell (Ky. 1961) 347 S.W.2d 550, 554.) Relying on Townsend, the Supreme Court of Oregon, in Garza v. Grayson (1970) 255 Ore. 413 [467 P.2d 960], rejected the rule because it was "derived from a narrow and highly technical interpretation of the meaning of the terms 'reservation' and 'exception' when employed in a deed "(id., at p. 961), and did not sufficiently justify frustrating the grantor's intention. Since the rule may frustrate the grantor's intention in some cases even though it is riddled with exceptions, we follow the lead of Kentucky and Oregon and abandon it entirely.

Willard contends that the old rule should nevertheless be applied in this case to invalidate the church's easement because grantees and title insurers have relied upon it. He has not, however, presented any evidence to support this contention, and it is clear that the facts of this case do not [*479] demonstrate reliance on the old rule. There is no evidence that a policy of title insurance was issued, and therefore no showing of reliance by a title insurance company. Willard himself could not have relied upon the common law rule to assure him of an absolute fee because he did not even read the deed containing the reservation. This is not a case of an ancient deed where the reservation has not been asserted for many years. The church used lot 20 for parking throughout the period when Willard was purchasing the property and after he acquired title to it, and he may not claim that he was prejudiced by lack of use for an extended period of time.

The determination whether the old common law rule should be applied to grants made prior to our decision involves a balancing of equitable and policy considerations. We must balance the injustice which would result from refusing to give effect to the grantor's intent against the injustice, if any, which might result by failing to give effect to reliance on the old rule and the policy against disturbing settled titles. The record before us does not disclose any reliance upon the old common law rule, and there is no problem of

an ancient title. Although in other cases the balancing of the competing interests may warrant application of the common law rule to presently existing deeds, in the instant case the balance falls in favor of the grantor's intent, and the old common law rule may not be applied to defeat her intent.

Willard also contends that the church has received no interest in this case because the clause stated only that the grant was "subject to" the church's easement, and not that the easement was either excepted or reserved. In construing this provision, however, we must look to the clause as a whole which states that the easement "is given." Even if we assume that there is some ambiguity or conflict in the clause, the trial court found on substantial evidence that the parties to the deed intended to convey the easement to the church. (Coast Bank v. Minderhout, 61 Cal. 2d 311, 315 [38 Cal. Rptr. 505, 392 P.2d 265]; see Estate of Russell, 69 Cal. 2d 200, 206-214 [70 Cal. Rptr. 561, 444 P.2d 353].)

The judgment is reversed.

David HAMRICK, Maggie HAMRICK, Sue BERTRAM and Steve BERTRAM, petitioners and cross-respondents, v. Tom WARD and Betsey WARD, respondents and cross-petitioners. Supreme Court of Texas 57 Tex. Sup. J. 1297, August 29, 2014, Opinion Delivered

OPINION BY: GUZMAN

This case presents the Court with an opportunity to provide clarity in an area of property law that has lacked clarity for some time: implied easements. For over 125 years, we have distinguished between implied easements by way of necessity (which we refer to here as "necessity easements") and implied easements by prior use (which we refer to here as "prior use easements"). We created and have utilized the necessity easement for cases involving roadway access to previously unified, landlocked parcels. Roadways by nature are typically substantial encumbrances on property, and we accordingly require strict, continuing necessity to maintain necessity easements. By contrast, we created and have

primarily utilized the prior use easement doctrine for lesser improvements to the landlocked parcel, such as utility lines that traverse the adjoining tract. We have required, to some degree, a lesser burden of proof for prior use easements (reasonable necessity at severance rather than strict and continued [*2] necessity) because they generally impose a lesser encumbrance on the adjoining tract (e.g., a power line compared to a roadway). Today, we clarify that the necessity easement is the legal doctrine applicable to claims of landowners asserting implied easements for roadway access to their landlocked, previously unified parcel.

Here, a party claims a road that was necessary for access to its landlocked, previously unified parcel is a prior use easement. The trial court and court of appeals agreed. We hold the necessity easement doctrine governs this claim. Because we clarify the law of easements, we reverse the court of appeals' judgment and remand to the trial court for the party to elect whether to pursue such a claim.

I. Background

In 1936, O. J. Bourgeois deeded 41.1 acres of his property in Harris County, Texas to his grandson, Paul Bourgeois. During Paul's ownership, a dirt road was constructed on the eastern edge of the 41.1 acre tract, providing access from the remainder of the land to a public thoroughfare, Richardson Road. In 1953, Paul deeded two landlocked acres of the tract to Alvin and Cora Bourgeois, severing the 41.1 acres into two separate parcels. Alvin and Cora used the [*3] dirt road to access their two acres. The two acre tract was subsequently transferred to Henry and Bettie Bush in 1956, who sold the land to Henry Gomez in 1957. In 1967, Henry Gomez and his wife, Anna Bell, built a house on the two acre tract with a listed address of 6630 Richardson Road. Anna Bell became the sole owner of the two acre tract when Henry died in 1990.

In the late 1990s, developer William Cook began construction of the Barrington Woods subdivision on the remaining acreage of Paul Bourgeois' property. Cook planned to close the dirt road Anna Bell used to access her

two acres and to construct a paved driveway for her to directly access her property from a newly added paved street. But Anna Bell's land was not platted, and Harris County required a one foot reserve and barricade between her property and the new street, which rendered the dirt road her only means of access. In February 2000, Cook unilaterally filed a special restriction amendment to the subdivision's deed restrictions. The special restriction purported to create a "Prescriptive (Rear Access) Easement" along the southeast property line of Lots 3 and 4. It further stated, "[t]his Prescriptive Easement will also be [*4] used by Annabelle [sic] Gomez," and allowed Anna Bell a fifteen foot wide easement along the dirt road for herself, her family, social guests, and service vehicles under 6,200 pounds. Anna Bell was not a party to the special restriction, never discussed its contents with Cook, and did not learn of the existence of the document until September 2005.

David and Maggie Hamrick, as well as Sue and Steve Bertram, (collectively "the Hamricks") purchased homes on Lots 3 and 4 in Barrington Woods—the property Anna Bell's access easement traversed to reach Richardson Road. The developer told the Hamricks initially and at closing that when Anna Bell sold her home, the property would be platted, her access to the main road would open, and the Hamricks would recover full use of the dirt road.

In February 2004, before the Hamricks closed on their home, Anna Bell sold her property to Tom and Betsey Ward (collectively "the Wards"), subject to a life tenancy. After purchasing the property, the Wards continued to use the dirt road. The Wards then reinforced the dirt road with gravel and made use of the road to construct a new home on the land. The Hamricks sued to enjoin the Wards from using the dirt [*5] road. The trial court granted the Hamricks a temporary injunction in April 2006, which prevented the Wards from using the easement for construction of their home. As a result, the Wards platted the property, the barrier and reserve were removed, and a

driveway was built to provide the Wards access to the paved road and allow them to complete construction. Nonetheless, the Wards pursued a counterclaim, arguing they had an implied, prior use easement to use the dirt road and requesting the trial court enter a judgment declaring an unrestricted twenty-five foot easement connecting their property to Richardson Road.

The trial court granted the Wards' motion for summary judgment, finding they conclusively proved the existence of a prior use easement running from the Wards' property across the rear of the Hamricks' property to Richardson Road. The trial court did not specifically designate a width for the easement. The trial court denied the Hamricks' motion for summary judgment, which raised affirmative defenses of bona fide purchaser, estoppel, and waiver. Finally, the trial court awarded attorney's fees of $215,000 to the Wards and $200,000 to the Hamricks.

The Hamricks appealed, arguing [*6] the Wards failed to prove both beneficial use of the easement prior to severance and continuing necessity of the easement. The Hamricks further argued that the trial court erred in denying summary judgment on their bona fide purchaser, estoppel, and waiver defenses. The Wards cross-appealed, contending the trial court failed to designate a width for the easement and erroneously awarded attorney's fees to the Hamricks.

The court of appeals found the summary judgment evidence conclusively established beneficial use of the road prior to severance as well as the necessity of the road, affirming the trial court. 359 S.W.3d 770, 776-79. The court unanimously held that the Wards were required to prove necessity at the time of severance, not a continuing necessity as the Hamricks proposed. Id. at 777. The court similarly overruled the Hamricks' arguments concerning the affirmative defenses of estoppel and waiver. Id. at 786-87. But the court of appeals determined a fact issue remained with respect to the bona fide purchaser defense, such that the trial court erred in denying the Hamricks'

motion for summary judgment and granting the Wards' motion. Id. at 785. The dissent noted that reasonable jurors would not have differed concerning the fruits [*7] of an investigation, so the trial court's summary judgment should stand. Id. at 789-90 (Frost, J., concurring and dissenting).

With respect to the Wards' issues on cross appeal, the court of appeals declined to consider whether the trial court erred by failing to specify an easement width, and instead left this issue for the trial court to re-examine on remand. Id. at 787. It also reversed and remanded the attorney's fees award. Id. Both parties petitioned this Court for review.

II. Discussion

The parties raise three distinct issues: (1) whether the Wards have an implied easement over the Hamricks' land despite a lack of continued necessity; (2) whether the Hamricks qualify as bona fide purchasers so as to take the land free of any easement the Wards may have; and (3) the propriety of the trial court's award of attorney's fees. Our disposition of the first issue precludes us from reaching the remaining two.

A. Implied Easement

The Hamricks argue the court of appeals erred by concluding the Wards were only required to demonstrate the necessity of the easement at the time of severance. The Wards counter that we have never before required continued necessity for prior use easements. As explained below, we determine [*8] the applicable doctrine for roadway access to previously unified, landlocked parcels is the necessity easement.

Under Texas law, implied easements fall within two broad categories: necessity easements and prior use easements. See Koonce v. J.E. Brite Estate, 663 S.W.2d 451, 452 (Tex. 1984) (necessity easement); Bickler v. Bickler, 403 S.W.2d 354, 357 (Tex. 1966) (prior use easement). But the unqualified use of the general term "implied easement" has sown considerable confusion because both a necessity easement and a prior use easement are implied and both arise from the severance of a previously unified parcel of

land. Seber v. Union Pac. R. Co., 350 S.W.3d 640, 648 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Further contributing to this confusion, courts have used a variety of terms to describe both necessity easements and prior use easements. Despite imprecise semantics, we have maintained separate and distinct doctrines for these two implied easements for well over a century. Today, we clarify that a party claiming a roadway easement to a landlocked, previously unified parcel must pursue a necessity easement theory.

1. Necessity Easement

"Anyone who grants a thing to someone is understood to grant that without which the thing cannot . . [*10] . exist." James W. Simonton, Ways by Necessity, 25 COLUM. L. REV. 571, 572 (1925). With similar emphasis on this ancient maxim, we recognized in 1867 that a necessity easement results when a grantor, in conveying or retaining a parcel of land, fails to expressly provide for a means of accessing the land. Alley v. Carleton, 29 Tex. 74, 78 (1867). When confronted with such a scenario, courts will imply a roadway easement to facilitate continued productive use of the landlocked parcel, rather than rigidly restrict access. Id.

To successfully assert a necessity easement, the party claiming the easement must demonstrate: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the claimed access is a necessity and not a mere convenience; and (3) the necessity existed at the time the two estates were severed. Koonce, 663 S.W.2d at 452. As this analysis makes clear, a party seeking a necessity easement must prove both a historical necessity (that the way was necessary at the time of severance) and a continuing, present necessity for the way in question. Id. Once an easement by necessity arises, it continues until "the necessity terminates." Bains, 182 S.W.2d at 399 ("[A] way of necessity is a temporary right, which arises from the exigencies of the case and ceases when the necessity [*11] terminates."); see also Alley, 29 Tex. at 76 (providing "if

the necessity for its use ceases, the right also ceases"). The temporary nature of a necessity easement is thus consistent with the underlying rationale; that is, providing a means of roadway access to land only so long as no other roadway access exists. Alley, 29 Tex. at 78 ("A way of necessity, however, must be more than one of convenience, for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own."). Accordingly, it is no surprise that the balance of our jurisprudence on necessity easements focuses on roadway access to landlocked, previously unified parcels. See Koonce, 663 S.W.2d at 452 (assessing a roadway easement by the standard of an easement by necessity); Duff v. Matthews, 158 Tex. 333, 311 S.W.2d 637, 641 (Tex. 1958) (same); Othen v. Rosier, 148 Tex. 485, 226 S.W.2d 622, 626 (Tex. 1950) (same); Bains, 182 S.W.2d at 399 (same); Alley, 29 Tex. at 78 (same).

2. Prior Use Easements

Two decades after we established the necessity easement doctrine for roadways in Alley, we found that framework to be ill suited for other improvements that nonetheless are properly construed as implied easements. In Howell v. Estes, we addressed use of a stairwell to access two buildings. 71 Tex. 690, 12 S.W. 62, 62 (Tex. 1888). In Howell, a father had constructed adjoining two-story buildings that jointly used a stairwell in one building. [*12] Id. When he died, he left one building to his son and the other to his daughter. Id. In the wake of a familial dispute, the sibling who owned the building with the stairwell denied use of it to the other sibling. Id.

Our preexisting doctrine for necessity easements could not adequately address such a situation. The party seeking the easement likely could not claim strict necessity, as he was still able to access his land and the bottom floor of his building. Id. But recognizing that the law should afford a remedy, we established an alternate doctrine for assessing whether to recognize implied easements for improvements across previously unified adjoining property as follows:

[I]f an improvement constructed over, under, or upon one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both be open and usable and permanent in its character . . . the use of such improvement will pass as an easement, although it may not be absolutely necessary to the enjoyment of the estate conveyed.

Id. at 63. Unlike necessity easements, which are implied out of the desire to avoid the proliferation of landlocked—and therefore, unproductive—parcels of land, the rationale underlying [*13] the implication of an easement based on prior use is not sheer necessity. Rather, as this Court has expressly recognized, "[t]he basis of the doctrine [of prior use easements] is that the law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration." Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163, 167 (Tex. 1952). There is a presumption that parties contracting for property do so "with a view to the condition of the property as it actually was at the time of the transaction," and therefore, absent evidence to the contrary, such conditions which openly and visibly existed at the time are presumed to be included in the sale. Miles v. Bodenheim, 193 S.W. 693, 696-97 (Tex. Civ. App.—Texarkana 1917, writ ref'd).

This Court has explained the requirements for establishing a prior use easement as "fairly standardized," such that the party claiming a prior use easement must prove: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended that [*14] its use pass by grant; and (4) the use must be necessary to the use of the dominant estate. Drye v. Eagle Rock Ranch, 364 S.W.2d 196, 207-08 (Tex. 1962). Because the actual intent of the parties at the time of severance is often elusive, these factors effectively serve as a proxy for the contracting parties' intent.

It is worth noting that we have elevated the proof of necessity for a subset of prior use easement cases. A prior use easement may arise either by reservation (where the grantor of the previously unified parcel retains the landlocked parcel) or by grant (where the grantor conveys the landlocked parcel). We have expressly held that to establish a prior use easement implied by reservation, a party must demonstrate strict necessity with respect to the easement claimed. Mitchell, 246 S.W.2d at 168. But, with respect to a prior use easement implied by grant, some ambiguity remains as to whether a party must demonstrate strict necessity or reasonable necessity for a party to succeed. See Drye, 364 S.W.2d at 208-09. Because we hold below that the Wards must pursue an implied easement by way of necessity theory, we need not reach this question.

The factual circumstances in which we have discussed the prior use easement illuminate its purpose. We have used the prior use easement doctrine to [*15] assess situations such as use of a stairwell in an adjacent building, grazing cattle, and recreational use of adjoining property. In addition to access, we have also discussed the application of the prior use easement doctrine to "a part[ition] wall," "a drain or aqueduct," "a water [gas] or sewer line into the granted estate," "a drain from the land," "light and air," "lateral support," and "water." Drye, 364 S.W.2d at 207-08. In light of the history and the purpose behind these two types of implied easements, we clarify when parties should pursue each type of easement.

3. Roadway Easements to Landlocked, Previously Unified Parcels Must Be Tried as Implied Easements by Way of Necessity

The Hamricks claim that we should inject continued necessity as a requirement for prior use easements. The Wards claim that, despite the confusion between necessity easements and prior use easements, we have never required continued necessity for prior use easements. We view the pertinent question not as whether continuing necessity is required of prior use easements but rather as whether the

Wards' use of the roadway is appropriate to assess under the prior use easement doctrine.

We clarify that courts adjudicating implied easements for [*16] roadway access for previously unified, landlocked parcels must assess such cases under the necessity easement doctrine. Admittedly, the express elements required for prior use easements do not restrict themselves to certain easement purposes. Drye, 364 S.W.2d at 207-08. As a result, we have previously encountered a party asserting a prior use easement for a roadway to access his previously unified, landlocked parcel. See Bickler, 403 S.W.2d at 357. But we developed the two types of implied easements for discrete circumstances. The less forgiving proof requirements for necessity easements (strict and continuing necessity) simply serve as acknowledgment that roadways typically are more significant intrusions on servient estates. By contrast, improvements at issue in prior use easements (e.g., water lines, sewer lines, power lines) tend to involve more modest impositions on servient estates. Accordingly, for such improvements, we have not mandated continued strict necessity but instead carefully examine the circumstances existing at the time of the severance to assess whether the parties intended for continued use of the improvement. Our clarification today in no way should impact the continued ability of such improvements to qualify as [*17] prior use easements.

4. Remand

The Wards only pleaded theories of a prior use easement and easement by prescription in the trial court. The trial court and court of appeals held [*18] that the Wards conclusively established a prior use easement. Ordinarily, "parties are restricted in the appellate court to the theory on which the case was tried in the lower court." Safety Cas. Co. v. Wright, 138 Tex. 492, 160 S.W.2d 238, 245 (Tex. 1942). Accordingly, we procedurally cannot hold that the Wards prevailed on a theory they have not advanced in the trial court. However, we will not foreclose the Wards from bringing a necessity easement claim in light of our

clarification of the law. "We have broad discretion to remand for a new trial in the interest of justice where it appears that a party may have proceeded under the wrong legal theory." Boyles v. Kerr, 855 S.W.2d 593, 603 (Tex. 1993). Moreover, "[r]emand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled." Id. As we have indicated, we have encountered at least one situation in which a party pursued a prior use easement (rather than a necessity easement) for roadway access to a previously unified, landlocked parcel. Bickler, 403 S.W.2d at 357. Although we refrain from opining as to whether the Wards will ultimately prevail on a necessity easement claim, our clarification of the law entitles them to the opportunity to plead and prove such a claim.

In addition to the [*19] issue of what type of easement the Wards must claim, the parties raise the issues of the Hamricks' bona fide purchaser defense and the trial court's award of attorney's fees. Our remand for the Wards to pursue a necessity easement claim precludes us from reaching either issue. We note that the court of appeals held the bona fide purchaser defense is an appropriate defense to prior use easements. 359 S.W.3d at 782. It did not address whether the bona fide purchaser defense applies to a claim the Wards had not yet raised. Accordingly, that issue remains unresolved and is before the trial court on remand. Likewise, we need not assess the propriety of the trial court's award of attorney's fees because that question will also be within the scope of the remand to the trial court.

III. Conclusion

In sum, we have long recognized a distinction between necessity easements (which have elevated proof requirements due to the more significant encumbrance typified by roadway easements) and prior use easements (which have relaxed proof requirements due to the typically lesser encumbrance of other improvements such as utility lines). Today, we clarify that one claiming an implied easement for roadway access to a landlocked, [*20]

previously unified parcel must pursue a necessity easement rather than a prior use easement. Because the Wards seek an implied easement for roadway access to their landlocked, previously unified parcel, we remand for them to elect whether to pursue a necessity easement claim. TEX. R. APP. P. 60.3. We reverse the portion of the court of appeals' judgment affirming summary judgment on the Wards' prior use easement claim, and remand to the trial court for dismissal of that claim and for further proceedings consistent with this opinion.

Albert OTHEN v. Estella ROSIER et al. Supreme Court of Texas 148 Tex. 485; 226 S.W.2d 622, January 11, 1950, Decided

OPINION BY: BREWSTER

[*487] Petitioner, Albert Othen, brought this suit to enforce a roadway easement on lands of respondents, Estella Rosier et al., claiming the easement both of necessity and by prescription.

The land of both parties is a part of the Tone Survey of 2493 acres, all of which was formerly owned by one Hill. Othen owns tracts of 60 and 53 acres, respectively. The 60 acres was deeded by Hill to one O'Harlan on Feb. 20, 1897, and by mesne conveyance Othen acquired it on Dec. 12, 1904. Hill sold the 53 acres on Jan. 26, 1899, and Othen acquired it on Nov. 15, 1913. The Rosiers own tracts of 100 and 16.31 acres, respectively. The 100 acres was conveyed by Hill to one Woosley on Aug. 26, 1896, and the 16.31 acres was sold by Hill on Jan. 26, 1899; thereafter by mesne conveyance both tracts were acquired by one Penn, who on Jan. 29, 1924, conveyed them to the Rosiers. Along its west side the 100 acres abuts on the [*488] Belt Line Road, a public highway running north and south. The 16.31 acres joins the 100 acres on the south, the northeast corner of the smaller tract being in the south line of the 100 acres at a point west of its southeast corner. Othen's 53 acres lies immediately east of Rosier's 100 acres. His 60 acres lies south of and adjoining his 53 acres and immediately east of

Rosiers' 16.31 acres but extends beyond the south line of that tract. The Tone Survey touches three roads: the Belt Line Road, which runs along its west side; the Duncanville Road, which borders it on the south; and the Fish Creek Road, which is its north boundary. But Othen's 113 acres is not contiguous to any of them; so he must cross somebody else's land to get out to a highway. That he had accomplished before the happening which precipitated this litigation by going through a gate in the west line of his 60 acres and in the east line of Rosiers' 16.31 acres, a short but unproved distance south of the south line of Rosiers' 100 acres; thence west-northwesterly across the 16.31 acres into a fenced lane which runs along the south side of Rosiers' 100 acres; thence through this lane to a gate, which opens into the Belt Line Road. Near this gate and in the southwest corner of the 100 acres was the Rosiers' dwelling house, orchard, stock lots and barns. The Rosiers travel and use the lane above described for such purposes as go with the operation of a farm, as well as for their stock to travel to and from the 16.31 acres, which they use as a pasture and from which they get fire wood. On the 16.31 acres is a tenant house, which has been occupied some of the 18 or 20 years previous to the trial by tenants of the Rosiers; and they have made the same use of the lane as Othen has made. The south fence of this lane was built about 1895. Its north fence and the outside gate were constructed about 1906. Before Othen bought his 60 acres in 1904 he had lived on it for two years as a tenant and had moved away for about a year; and he has continuously used the disputed roadway to get to and from the highway from and to his home.

It seems undisputed that the Rosiers made whatever repairs were necessary to keep the lane usable. And, so far as the record shows, nobody else recognized any obligation or claimed any right so to keep it. The surface waters flowing into the lane had cut out a large ditch which threatened to encroach across the roadway and rended it impassable unless a bridge should be built across it, and these waters

threatened erosion damage to Rosiers' cultivated land. To remedy that situation the Rosiers caused a levee 300 feet long to be constructed as close as possible to the south fence of the lane, with something like half [*489] of it in the lane and the other half curving southeasterly into the 16.31 acres. This levee impounded the waters draining southward off Rosiers' 100 acres and made the lane so muddy that for weeks at a time it was impassable except by horseback, thereby, Othen alleged, depriving him of ingress and egress to and from his farm. So he filed this suit praying a tempoarry writ of injunction enjoining the Rosiers from further maintaining this levee and a "mandatory writ of injunction commanding and enjoining and restraining the said defendant from further interfering with" his "use of such easement and roadway" and for damages.

The trial court found that Othen had an easement of necessity and adjudged it to him "upon, over and across" land of the Rosiers beginning at the northeast corner of the 16.31 acres and extending westward "along the said 16.31 acre tract and having a width of approximately 40 feet" to a point in its north boundary immediately east of the nortwest corner of the 16.31 acres, thence across that boundary line and westward along the south boundary line of Rosiers' 100 acres to its southwest corner and into the Belt Line Road. The judgment further ordered the Rosiers "to take such action as is necessary to put said easement and roadway, so described, in as usable a condition as same was prior to the erection of said levee."

The Court of Civil Appeals first affirmed the judgment in so far as it decreed Othen a roadway easement of necessity but reversed the injunction phase of it because that order is too vague and uncertain to be enforceable. However, on rehearing the majority concluded that Othen has no easement either of necessity or by prescription and rendered judgment for the Rosiers, Chief Justice Bond dissenting. 221 S.W. (2d) 594. That conclusion is attached here in two points of error.

In support of his claim to an easement of necessity, Othen quotes from 15 Tex. Jur., Sec. 16, p. 785, as follows: "Furthermore, the grantor impliedly reserves for himself a right of way where he sells land surrounded by other land of which he is owner, and to which he can have access or egress only through the granted premises, and the servient estate is charged with the burden in the hands of any vendee holding under the conveyance." That statement is in line with the recent holding by this court in Bains v. Parker, 143 Texas, 57, 182 S.W. (2d) 397: "Where a vendor retains a tract of land which is sursounded partly by the tract conveyed and partly by the lands of a stranger, there is an implied reservation of a right of way [*490] by necessity over the land conveyed where grantor has no other way out." In 28 C.J.S., Easements, Secs. 34 and 35, pp. 694 et seq., it is made clear that before an easement can be held to be created by implied reservation it must be shown: (1) that there was a unity of ownership of the alleged dominant and servient estates; (2) that the roadway is a necessity, not a mere convenience; and (3) that the necessity existed at the time of severance of the two estates. And see 17 Am. Jur., Easements, Secs. 43 and 49, pp. 953 and 963.

Under the foregoing authorities, Othen's claim to an implied reservation of an easement in a roadway means that when Hill, the original owner, sold the 116.31 acres to the Rosiers it was then necessary, not merely convenient, for him to travel over it from the 113 acres now owned by Othen in order to get to and from the Belt Line Road. In determining that question we shall ignore the Duncanville Road to the South, which was established in 1910, as well as the Fish Creek Road to the north, although the record is silent as to when the latter came into existence.

As already stated, the entire Tone Survey of 2493 acres was owned by one Hill, in whom was unity of ownership of the lands now owned by the parties to this suit. On August 26, 1896, he sold the 100 acres in question to Rosiers' predecessors in title, retaining the south 60 acres now owned by Othen, which he conveyed on February 20, 1897.

In the deed of date August 26, 1896, did he impliedly reserve the roadway easement from the 60 acres, which he retained over and across the 16.31 acres which he did not convey until January 26, 1899, thence on and along the south side of the 100 acres to the Belt Line Road? Obviously, no such easement arose as to the 16.31 acres over which the trial court decreed Othen a roadway, because Hill did not part with his title to it until two years and five months after he sold the 100 acres and about two years after he sold the 60 acres which Othen now owns; one cannot be said to have an easement in lands, the fee simple title to which is in himself. Alley v. Carleton, 29 Texas, 74, 94 Am. Dec. 260. Under the record before us we cannot hold that petitioner has shown any implied easement as to the 100 acres by reason of the deed of August 26, 1896, because the record nowhere shows that the roadway along the south line of the 100 acres was a necessity on the date of that deed, rather than a mere convenience. The burden to prove that was on Othen. Bains v. Parker, supra. There was testimony that it was the only outlet to a public road since about 1900 and for the "last [*491] 40 years"; but there was none as to the situation on August 26, 1896. One Posey did testify that the owner of the "Othen land" (necessarily the 60 acres) in 1897 "came out up across the south side of the place to the road there", but he did not testify that it was then the only roadway out. On that proposition his testimony was: "Q. Now, then, is there any other outlet from Mr. Othen's place to a highway, outside of the road — to a public road? A. Well, I don't know of any." (Italics ours.) The record does not show just how much of the Tone Survey Hill owned when he conveyed the 100 acres on August 26, 1896, but it does appear from a stipulation of the parties that he owned as much as 1350 acres of it until January 26, 1899; and Othen's 53 acres and Rosiers' 16.31 acres were a part of that tract. So, for all the record shows, Hill may easily have been able to cross the 53 acres and around north of the 100 acres on to the Belt Line Road, or he may as easily have been able to go from

the 16.31 acres southwesterly to that road across land which he still owned. Certainly Othen should have excluded any such possibility by proof if he would raise an implied reservation in derogation of the warranties in Hill's deed of date August 26, 1896. Rights claimed in derogation of warranties are implied with great caution, hence they should be made clearly to appear. Sellers v. Texas Cent. Ry. Co., 81 Texas, 458, 17 S.W., 32, 13 L.R.A. 657; Scarborough v. Anderson Bros. Const. Co. (Civ. App.), 90 S.W. (2d) 305 (er. dism.).

What we have said determines Othen's claim to a way of necessity; such as easement necessarily can arise only from an implied grant or implied reservation. 17 Am. Jur., p. 959, Sec. 48. This results from rule that the mere fact that the claimant's land is completely surrounded by the land of another does not, of itself, give the former a way of necessity over the land of the latter, where there is no privity of ownership. Neblett v. R.S. Sterling Inv. Co. (Civ. App.), 233 S.W., 604 (er. ref.); Parker v. Bains (Civ. App.), 194 S.W. (2d) 569 (er. ref., N.R.E.); Brundrett v. Tarpley (Civ. App.), 50 S.W. (2d) 401; Texas & N.O.R.R. Co. v. Millard (Civ. App.), 181 S.W. (2d) 842. "It is dependent upon an implied grant or reservation, and cannot exist unless it is affirmatively shown that there was formerly unity of ownership of the alleged dominant and servient estates, for no one can have a way of necessity over the land of a stranger. Necessity alone, without reference to any relations between the respective owners of the land, is not sufficient to create such a right." Ward v. Bledsoe (Civ. App.), 105 S.W. (2d) 1116.

Petitioner's other point complains of the holding of the Court [*492] of Civil Appeals that, as a matter of law, he has no easement by prescription.

An important essential in the acquisition of a prescriptive right is an adverse use of the easement. "Generally, the hostile and adverse character of the user necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession.

If the enjoyment is consistent with the right of the owner of the tenement, it confers no right in opposition to such ownership." 17 Am. Jur., Easements, Sec. 63, p. 974, citing cases from 22 jurisdictions, among which are Weber v. Chaney (Civ. App.), 5 S.W. (2d) 213 (er. ref.), and Callan v. Walters (Civ. App.), 190 S.W. 829. Therefore, the same authority declares in Sec. 67, at page 978, "The rule is well settled that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking", citing, among other cases, Klein v. Gehrung, 25 Texas Supp., 232, 78 Am. Dec. 565.

In Klein v. Gehrung, it is said: "The foundation of prescriptive title is the presumed grant of the party whose rights are adversely affected; but where it appears that the enjoyment has existed by the consent or license of such party, no presumption of grant can be made."

In Weber et ux. v. Chaney, supra, the Webers sued to require Chaney to reopen a road through his farm to public use. Before Chaney closed it such of the public as had occasion to do so used the road as if it had been an established highway. Chaney, his family, tenants and employees likewise used it. Although Chaney never made any objection to the public using the road, he at all times maintained three closed gates across it and the public usually closed them after passing through. It was held that this use by the public was a permissive use which, in the absence of any adverse claim of right against Chaney, could never ripen into a prescriptive right against him so as to constitute the road a public highway.

Callan v. Walters, supra, holds that where both the owner and the claimant were using a common stairway, each to get into his own building, the claimant's use was not adverse because not exclusive. "The use of a way over the land of another when the owner is also using the same is not such adverse possession as will serve as notice of a

claim of right, for the reason that the same is not inconsistent with a license from the owner."

[*493] In Sassman v. Collins, 53 Texas Civ. App., 71, 115 S.W., 337 (er. ref.), Collins sued to enforce a roadway across Sassman's land, alleging that he had an easement therein both of necessity and by prescription. Collins and others did use the roadway to get to a public road but Sassman and his predecessors in title likewise used it for the same purpose. The court held that under those circumstances the use of the roadway by the claimant and others is presumed to be with the consent of the owner and not adverse.

In Tolbert et al. v. McClellan (Civ. App.), 241 S.W., 206, it was sought to enforce the public right to a road across McClellan's land by prescription based on 30 years' use. It was shown that the road was entered through gaps in the fence around McClellan's farm; and that during the greater part but not all of the 30 years these gaps were closed by gates provided by McClellan. It was held that the use made of the road by the public was only permissive and did not exclude any individual right of McClellan inconsistent therewith.

To the same effect is Williams v. Kuykendall (Civ. App.), 151 S.W., 629, citing Texas West. Ry. v. Wilson, 83 Texas, 153, 156, 18 S.W., 325.

There is a criticism of the foregoing authorities in Foster et al. v. Patton (Civ. App.), 104 S.W. (2d) 944 (er. dism.), wherein it is said that a use by the owner should not be regarded as of itself sufficient to show that a corresponding user by the claimant is merely permissive. However, as the opinion itself frankly recognizes, the holding is dictum, so we must give effect to the authorities above discussed.

It is undisputed that the road along the Rosiers' 100 acres has been fenced on both sides since about 1906; that the gate opening from the lane into the Belt Line Road was erected at the same time and has been kept closed by the Rosiers and Othen as well as by all parties using the lane as an outlet to the road; that the Rosiers and their tenants have

used the lane for general farm purposes as well as to haul wood from the 16.31 acres and to permit their livestock to get to and from the pasture. Under those facts, we conclude that Othen's use of the roadway was merely permissive, hence constituted only a license, which could not and did ripen into a prescriptive right.

But Othen insists that he had prescriptive title of 10 years [*494] to the easement before the lane was fenced and the gate opening into the Belt Line Road was erected in 1906, because "at least since 1895 and probably since 1893 said roadway has been established and claimed by petitioner and others." Othen testified that about 1900 he moved onto the 113 acres in question as a tenant and lived there two years, moved away for about 11 months, then "bought it and moved back." It is obvious that he did not use the roadway in any way for any period of 10 years prior to 1906. The testimony as to its use by Othen's predecessors is, in our opinion, too vague and uncertain to amount to any evidence of prescriptive right to the roadway decreed by the trial court. For example, when Othen was asked to "tell the court what the condition of that passageway was there," he answered: "Well, in that day and time it was just prairie and there were some hog wallows which would hold water. You would just pick your place round about; if there was a hog wallow, go around it and come on in. But that was the general direction through there." Another witness, asked whether in 1901 there was a road "by the side of the present Rosier property", replied: "It was on the present Rosier property, and at that time went up through the edge of the field." When asked by Othen's counsel, "Do you know anything about where this road used to run?", Mrs. Rosier said: "Well, it didn't run up exactly next to the Belt Line like it is running now." It cannot be said that this showed only a slight divergence in the directions taken by the roadway before 1904, therefore Othen did not discharge his burden of showing that his predecessors' adverse possession was in the same place and within the definite lines claimed by him and fixed by the trial court. Sassman

v. Collins et al., supra; Williams v. Kuykendall, supra; Murff v. Dreeben (Civ. App.), 127 S.W. (2d) 577 (er. dism.).

Moreover, since Hill did not part with his title to Othen's alleged dominant estate until 1897 (as to the 60 acres) and until 1899 (as to the 53 acres) and did not part with his title to 16.31 acres of the Rosiers' alleged servient estate until 1899, Othen could not under any circumstances have perfected prescriptive title to a roadway easement on the 16.31 acres prior to 1906. "Since a person cannot claim adversely to himself, the courts uniformly maintain that the prescriptive period does not begin to run while the dominant and servient tracts are under the same ownership." 17 Am. Jur., Easements, Sec. 69, p. 980.

It follows that the judgment of the Court of Civil Appeals is affirmed.

APERTINENTES Y EN GRUESO

JAME W. VAN SANDT, Appellant, v. LOUISE H. ROYSTER, MARGARET ROYSTER, WILLIAM M. GRAY and LAEL BAILEY GRAY, Appellees. Supreme Court of Kansas 148 Kan. 495; 83 P.2d 698, November 5, 1938, Filed

OPINION BY: ALLEN

[*495] The action was brought to enjoin defendants from using and maintaining an underground lateral sewer drain through and across plaintiff's land. The case Was tried by the court, judgment was rendered in favor of defendants, and plaintiff appeals.

In the city of Chanute, Highland avenue, running north and south, intersects Tenth street running east and west. In the early part [*496] of 1904 Laura A. J. Bailey was the owner of a plot of ground lying east of Highland avenue and south of Tenth street. Running east from Highland avenue and facing north on Tenth street the lots are numbered respectively, 19, 20 and 4. In 1904 the residence of Mrs. Bailey was on lot 4 on the east part of her land.

In the latter part of 1903 or the early part of 1904, the city of Chanute constructed a public sewer in Highland avenue, west of lot 19. About the same time a private lateral drain was constructed from the Bailey residence on lot 4 running in a westerly direction through and across lots 20 and 19 to the public sewer.

On January 15, 1904, Laura A. J. Bailey conveyed lot 19 to John J. Jones, by general warranty deed with usual covenants against encumbrances, and containing no exceptions or reservations. Jones erected a dwelling on the north part of the lot. In 1920 Jones conveyed the north 156 feet of lot 19 to Carl D. Reynolds; in 1924 Reynolds conveyed to the plaintiff, who has owned and occupied the premises since that time.

In 1904 Laura A. J. Bailey conveyed lot 20 to one Murphy, who built a house thereon, and by mesne conveyances the title passed to the defendant, Louise H. Royster. The deed to Murphy was a general warranty deed without exceptions or reservations. The defendant Gray has succeeded to the title to lot 4 upon which the old Bailey home stood at the time Laura A. J. Bailey sold lots 19 and 20.

In March, 1936, plaintiff discovered his basement flooded with sewage and filth to a depth of six or eight inches, and upon investigation he found for the first time that there existed on and across his property a sewer drain extending in an easterly direction across the property of Royster to the property of Gray. The refusal of defendants to cease draining and discharging their sewage across plaintiff's land resulted in this lawsuit.

The trial court returned findings of fact, from which we quote:

"1. The plaintiff and the defendants Louise Royster and Lael Bailey Gray are the present owners, respectively, of properties adjoining one another in Bailey's addition to the city of Chanute, Kan., on each of which properties there is a residence, the plaintiff being the owner of part of lot 19, the defendant Louise Royster being the owner of part of lot 20, and the defendant Lael Bailey Gray being the owner of

lot 4, part of original lot 9 in block 3, in said addition. All of said properties front to the north on Tenth street. Plaintiff's property is farthest west. Immediately adjoining it on the east is the Royster property and immediately adjoining the Royster property on the [*497] east is the Gray property. Immediately adjoining plaintiff's property on the west is Highland avenue, a public street.

"2. Laura A. J. Bailey was originally the owner of all the above-described properties and other land adjacent thereto, and prior to the summer of 1904 the only residence or dwelling house on any of said properties was the house on the property farthest east, namely lot 4, being the property now owned by Gray.

"3. On January 15, 1904, Laura A. J. Bailey sold to John J. Jones said lot 19 (and other land) and conveyed same to him by general warranty deed, with usual covenants against encumbrances, and containing no exceptions or reservations whatsoever. The deed was duly recorded. John Jones erected a dwelling house on the north 156 feet of lot 19. On January 12, 1920, John Jones conveyed the north 156 feet of lot 19 to Carl D. Reynolds by general warranty deed containing usual convenants against encumbrances, and containing no exceptions or reservations whatsoever, but also included the 'appurtenances thereunto belonging,' etc. This deed was duly recorded. On November 7, 1924, Carl D. Reynolds conveyed said last-described property to plaintiff by general warranty deed with usual covenants against encumbrances excepting only a mortgage thereon, but also including the 'appurtenances thereunto belonging,' etc. Plaintiff has owned and occupied said property ever since.

"4. On April 14, 1904, Laura A. J. Bailey conveyed part of lot 20 to W. P. Murphy, who erected a dwelling house on the lot and later sold that property to W. E. Royster, conveying the same by general warranty deed without reservation, but including the 'appurtenances thereunto belonging,' etc., and from said W. E. Royster the property passed to the defendant Louise Royster.

"5. The defendant, Lael Bailey Gray, has succeeded to the title to lot 4 upon which the old Bailey house stood at the time Laura Bailey sold the other lots.

"6. In the latter part of the year 1903 or the early part of 1904 the city of Chanute extended its public sewer system and constructed a public sewer running north and south in Highland avenue immediately west of lot 19 above mentioned. When this public sewer was constructed a private sewer was laid from the old Bailey house on lot 4 in a general westerly direction across lots 20 and 19 to the public sewer in Highland avenue, and the old Bailey house was connected through this private sewer to the public sewer. When the houses were erected on lot 19 and lot 20, respectively, these houses were connected with this private sewer, and the same has been in continuous use for all of said properties ever since.

"7. At the time Laura A. J. Bailey sold lot 19 to Jones she owned lot 18, which lies south of lots 19 and 20, extends in an east-and-west direction from the west boundary of lot 4 (or original lot 9) near the southwest corner thereof to Highland avenue. The east boundary of lot 18 is contiguous with the west boundary of original lot 9 for a distance of at least twenty feet north from the southwest corner of said lot 9. Lot 18 was not sold by Mrs. Bailey until November, 1905.

"8. There is not now and was not at the time plaintiff purchased his property anything on record in the office of the register of deeds of the county pertaining to the private sewer above referred to.

[*498] "9. At the time plaintiff purchased his property he and his wife made a careful and thorough inspection of the same, knew that the house they were buying was equipped with modern plumbing and knew that the plumbing had to drain into a sewer, but otherwise had no further knowledge of the existence of said lateral sewer.

"10. That the lateral sewer in controversy was installed prior to the sale of the property by Mrs. Laura A. J. Bailey to John J. Jones on January 15, 1904; but if not, the said

lateral sewer certainly was installed shortly after the sale to John J. Jones and with the knowledge and acquiescence of said John J. Jones, and that the said John J. Jones paid the said Mrs. Laura A. J. Bailey one third of the cost of the installation of the said sewer.

"11. That all of the original owners of the three properties in controversy, to wit, Laura A. J. Bailey, John J. Jones and W. P. Murphy, had notice and knowledge of the existence of the lateral sewer in controversy, and all acquiesced in the use of the sewer by all parties, and the use of the sewer by the said parties and their successors in interest has been continuous from the time of its installation to the present time—a period of more than thirty-three years—and has been a mutual enterprise, and the said lateral sewer was an appurtenance to the properties belonging to plaintiff and Louise Royster, and the same is necessary to the reasonable use and enjoyment of the said properties of the parties."

The drain pipe in the lateral sewer was several feet under the surface of the ground. There was nothing visible on the ground in the rear of the houses to indicate the existence of the drain or the connection of the drain with the houses.

As a conclusion of law the court found that "an appurtenant easement existed in the said lateral sewer as to all three of the properties involved in the controversy here." Plaintiff's prayer for relief was denied and it was decreed that plaintiff be restrained from interfering in any way with the lateral drain or sewer.

Plaintiff contends that the evidence fails to show that an easement was ever created in his land, and, assuming there was an easement created as alleged, that he took the premises free from the burden of the easement for the reason that he was a bona fide purchaser, without notice, actual or constructive.

Defendants contend: (1) That an easement was created by implied reservation on the severance of the servient from the dominant estate of the deed from Mrs. Bailey to Jones; (2) there is a valid easement by prescription.

In finding No. 11, the court found that the lateral sewer "was an appurtenance to the properties belonging to plaintiff and Louise Royster, and the same is necessary to the reasonable use and enjoyment of the said properties of the parties."

[*499] As an easement is an interest which a person has in land in the possession of another, it necessarily follows that an owner cannot have an easement in his own land. (Johnston v. City of Kingman, 141 Kan. 131, 39 P.2d 924; Ferguson v. Ferguson, 106 Kan. 823, 189 P. 925.)

However, an owner may make use of one part of his land for the benefit of another part, and this is very frequently spoken of as a quasi easement.

"When one thus utilizes part of his land for the benefit of another part, it is frequently said that a quasi easement exists, the part of the land which is benefited being referred to as the 'quasi dominant tenement' and the part which is utilized for the benefit of the other part being referred to as the 'quasi servient tenement.' The so-called quasi easement is evidently not a legal relation in any sense, but the expression is a convenient one to describe the particular mode in which the owner utilizes one part of the land for the benefit of the other.

"If the owner of land, one part of which is subject to a quasi easement in favor of another part, conveys the quasi dominant tenement, an easement corresponding to such quasi easement is ordinarily regarded as thereby vested in the grantee of the land, provided, it is said, the quasi easement is of an apparent continuous and necessary character." (2 Tiffany on Real Property, 2d ed., 1272, 1273.)

Following the famous case of Pyer v. Carter, 1 Hurl. & N. 916, some of the English cases and many early American cases held that upon the transfer of the quasi-servient tenement there was an implied reservation of an easement in favor of the conveyor. Under the doctrine of Pyer v. Carter, no distinction was made between an implied reservation and an implied grant.

The case, however, was overthrown in England by Suffield v. Brown, 4 De G. J. & S. 185, and Wheeldon v. Burrows, 12 Ch. 31. In the former case the court said:

"It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances. . . . But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor." (pp. 190, 194.)

[*500] Many American courts of high standing assert that the rule regarding implied grants and implied reservations is reciprocal and that the rule applies with equal force and in like circumstances to both grants and reservations. (Washburn on Easements, 4th ed. 75; Miller v. Skaggs, 79 W. Va. 645, 91 S.E. 536, Ann. Cas. 1918 D. 929.)

On the other hand, perhaps a majority of the cases hold that in order to establish an easement by implied reservation in favor of the grantor the easement must be one of strict necessity, even when there was an existing drain or sewer at the time of the severance.

Thus in Howley v. Chaffee et al., 88 Vt. 468, 474, 93 A. 120, L. R. A. 1915 D. 1010, the court said:

"With the character and extent of implied grants, we now have nothing to do. We are here only concerned with determining the circumstances which will give rise to an implied reservation. On this precise question the authorities are in conflict. Courts of high standing assert that the rule regarding implied grants and implied reservation of 'visible servitudes' is reciprocal, and that it applies with equal force

and in like circumstances to both grants and reservations. But upon a careful consideration of the whole subject, studied in the light of the many cases in which it is discussed, we are convinced that there is a clear distinction between implied grants and implied reservations, and that this distinction is well founded in principle and well supported by authority. It is apparent that no question of public policy is here involved, as we have seen is the case where a way of necessity is involved. To say that a grantor reserves to himself something out of the property granted, wholly by implication, not only offends the rule that one shall not derogate from his own grant, but conflicts with the grantor's language in the conveyance, which, by the rule, is to be taken against him, and is wholly inconsistent with the theory on which our registry laws are based. If such an illogical result is to follow an absolute grant, it must be by virtue of some legal rule of compelling force. The correct rule is, we think, that where, as here, one grants a parcel of land by metes and bounds, by a deed containing full covenants of warranty and without any express reservation, there can be no reservation by implication, unless the easement claimed is one of strict necessity, within the meaning of that term as explained in Dee v. King, 73 Vt. 375, 50 A. 1109."

See, also, Brown v. Fuller, 165 Mich. 162, 130 N.W. 621, 33 L. R. A., n. s. 459, Ann. Cas. 1912 C 853. The cases are collected in 58 A. L. R. 837.

We are inclined to the view that the circumstance that the claimant of the easement is the grantor instead of the grantee, is but one of many factors to be considered in determining whether an easement will arise by implication. An easement created by implication arises as an inference of the intentions of the parties to a conveyance [*501] of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. The easement may arise in favor of the conveyor or the conveyee. In the Restatement

of Property, tentative draft No. 8, section 28, the factors determining the implication of an easement are stated:

"SEC. 28. FACTORS DETERMINING IMPLICATION OF EASEMENTS OR PROFITS. In determining whether the circumstances under which a conveyance of land is made imply an easement or a profit, the following factors are important: (a) whether the claimant is the conveyor or the conveyee, (b) the terms of the conveyance, (c) the consideration given for it, (d) whether the claim is made against a simultaneous conveyee, (e) the extent of necessity of the easement or the profit to the claimant, (f) whether reciprocal benefits result to the conveyor and the conveyee, (g) the manner in which the land was used prior to its conveyance, and (h) the extent to which the manner of prior use was or might have been known to the parties."

Comment j, under the same section, reads:

"The extent to which the manner of prior use was or might have been known to the parties. The effect of the prior use as a circumstance in implying, upon a severance of possession by conveyance, an easement or a profit results from an inference as to the intention of the parties. To draw such an inference, the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at the time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in a considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation. The degree of necessity required to imply an easement in favor of the conveyor is greater than that required in the case of the conveyee (see comment b). Yet, even in the case of the conveyor, the implication from necessity will be aided by a

previous use made apparent by the physical adaptation of the premises to it."

Illustrations:

"9. A is the owner of two adjacent tracts of land, Blackacre and Whiteacre. Blackacre has on it a dwelling house. Whiteacre is unimproved. Drainage from the house to a public sewer is across Whiteacre. This fact is unknown to A, who purchased the two tracts with the house already built. By reasonable effort, A might discover the manner of drainage and the location of the drain. A sells Blackacre to B, who has been informed as to the manner of drainage and the location of the drain and assumes that A is aware of it. There is created by implication an easement of drainage in favor of B across Whiteacre.

"10. Same facts as in illustration 9, except that both A and B are unaware [*502] of the manner of drainage and the location of the drain. However, each had reasonable opportunity to learn of such facts. A holding that there is created by implication an easement of drainage in favor of B across Whiteacre is proper."

At the time John J. Jones purchased lot 19 he was aware of the lateral sewer, and knew that it was installed for the benefit of the lots owned by Mrs. Bailey, the common owner. The easement was necessary to the comfortable enjoyment of the grantor's property. If land may be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the grantor or grantee on the basis of necessity alone. This is the situation as found by the trial court.

Neither can it be claimed that plaintiff purchased without notice. At the time plaintiff purchased the property he and his wife made a careful and thorough inspection of the property. They knew the house was equipped with modern plumbing and that the plumbing had to drain into a sewer. Under the facts as found by the court, we think the purchaser was charged with notice of the lateral sewer. It was an apparent easement as that term is used in the books.

(Wiesel v. Smira, 49 R.I. 246, 142 A. 148, 58 A. L. R. 818; 19 C. J. 868.)

The author of the annotation on Easements by Implication in 58 A. L. R. 832, states the rule as follows:

"While there is some conflict of authority as to whether existing drains, pipes, and sewers may be properly characterized as apparent, within the rule as to apparent or visible easements, the majority of the cases which have considered the question have taken the view that appearance and visibility are not synonymous, and that the fact that the pipe, sewer, or drain may be hidden underground does not negative its character as an apparent condition; at least, where the appliances connected with and leading to it are obvious."

As we are clear that an easement by implication was created under the facts as found by the trial court, it is unnecessary to discuss the question of prescription.

The judgment is affirmed.

 Will H. BROWN, et al, Petitioners, v. Fred R. VOSS, et al, Respondents. Supreme Court of Washington 105 Wn.2d 366; 715 P.2d 514, March 6, 1986

OPINION BY: BRACHTENBACH

[*368] The question posed is to what extent, if any, the holder of a private road easement can traverse the servient estate to reach not only the original dominant estate, but a subsequently acquired parcel when those two combined parcels are used in such a way that there is no increase in the burden on the servient estate. The trial court denied the injunction sought by the owners of the servient estate. The Court of Appeals reversed. Brown v. Voss, 38 Wn. App. 777, 689 P.2d 1111 (1984). We [*369] reverse the Court of Appeals and reinstate the judgment of the trial court.

[SEE ILLUSTRATION IN ORIGINAL]

A portion of an exhibit depicts the involved parcels.

In 1952 the predecessors in title of parcel A granted to the predecessor owners of parcel B a private road easement across parcel A for "ingress to and egress from" parcel B.

Defendants acquired parcel A in 1973. Plaintiffs bought parcel B on April 1, 1977, and parcel C on July 31, 1977, but from two different owners. Apparently the previous owners of parcel C were not parties to the easement grant.

When plaintiffs acquired parcel B a single family dwelling was situated thereon. They intended to remove that residence and replace it with a single family dwelling which would straddle the boundary line common to parcels B and C.

Plaintiffs began clearing both parcels B and C and moving fill materials in November 1977. Defendants first sought to bar plaintiff's use of the easement in April 1979 by which time plaintiffs had spent more than $ 11,000 in developing their property for the building.

Defendants placed logs, a concrete sump and a chain link fence within the easement. Plaintiffs sued for removal of the obstructions, an injunction against defendant's interference with their use of the easement and damages. Defendants counterclaimed for damages and an injunction against plaintiffs using the easement other than for parcel B.

The trial court awarded each party $ 1 in damages. The award against the plaintiffs was for a slight inadvertent trespass outside the easement.

The trial court made the following findings of fact:

VI

The plaintiffs have made no unreasonable use of the easement in the development of their property. There have been no complaints of unreasonable use of the roadway to the south of the properties of the parties by other neighbors who grant easements to the parties to this action to cross their properties to gain access to the property of the plaintiffs. Other than the trespass there [*370] is no evidence of any damage to the defendants as a result of the use of the easement by the plaintiffs. There has been no increase in volume of travel on the easement to reach a single family dwelling whether built on tract B or on Tacts [sic] B and C. There is no evidence of any increase in the

burden on the subservient estate from the use of the easement by the plaintiffs for access to parcel C.

VIII

If an injunction were granted to bar plaintiffs access to tract C across the easement to a single family residence, Parcel C would become landlocked; plaintiffs would not be able to make use of their property; they would not be able to build their single family residence in a manner to properly enjoy the view of the Hood Canal and the surrounding area as originally anticipated at the time of their purchase and even if the single family residence were constructed on parcel B, if the injunction were granted, plaintiffs would not be able to use the balance of their property in parcel C as a yard or for any other use of their property in conjunction with their home. Conversely, there is and will be no appreciable hardship or damage to the defendants if the injunction is denied.

IX

If an injunction were to be granted to bar the plaintiffs access to tract C, the framing and enforcing of such an order would be impractical. Any violation of the order would result in the parties back in court at great cost but with little or no damages being involved.

X

Plaintiffs have acted reasonably in the development of their property. Their trespass over a "little" corner of the defendants' property was inadvertent, and de minimis. The fact that the defendants counter claim seeking an injunction to bar plaintiffs access to parcel C was filed as leverage against the original plaintiffs' claim for an interruption of their easement rights, may be considered in determining whether equitable relief by way of an injunction should be granted.

Relying upon these findings of fact, the court denied defendant's request for an injunction and granted the plaintiffs the right to use the easement for access to parcels B and C "as long as plaintiffs [sic] properties (B and C) are

[*371] developed and used solely for the purpose of a single family residence." Clerk's Papers, at 10.

The Court of Appeals reversed, holding:

In sum, we hold that, in denying the Vosses' request for an injunction, the trial court's decision was based upon untenable grounds. We reverse and remand for entry of an order enjoining the use of the easement across parcel A to gain access to a residence any part of which is located on parcel C, or to further the construction of any residence on parcels B or C if the construction activities would require entry onto parcel C. Washington Fed'n of State Employees v. State, [99 Wn.2d 878, 887, 665 P.2d 1337 (1983)]. Brown v. Voss, supra at 784-85.

The easement in this case was created by express grant. Accordingly, the extent of the right acquired is to be determined from the terms of the grant properly construed to give effect to the intention of the parties. See Zobrist v. Culp, 95 Wn.2d 556, 561, 627 P.2d 1308 (1981); Seattle v. Nazarenus, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). By the express terms of the 1952 grant, the predecessor owners of parcel B acquired a private road easement across parcel A and the right to use the easement for ingress to and egress from parcel B. Both plaintiffs and defendants agree that the 1952 grant created an easement appurtenant to parcel B as the dominant estate. Thus, plaintiffs, as owners of the dominant estate, acquired rights in the use of the easement for ingress to and egress from parcel B.

[1] However, plaintiffs have no such easement rights in connection with their ownership of parcel C, which was not a part of the original dominant estate under the terms of the 1952 grant. As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant. E.g., Heritage Standard Bank & Trust Co. v. Trustees of Schs., 84 Ill. App. 3d 653, 405 N.E.2d 1196 (1980); Kanefsky v. Dratch Constr. Co., 376 Pa. 188, 101 A.2d 923 (1954); S.S. Kresge Co. v. Winkelman Realty

[*372] Co., 260 Wis. 372, 50 N.W.2d 920 (1952); 28 C.J.S. Easements § 92, at 772-73 (1941).

Plaintiffs, nonetheless, contend that extension of the use of the easement for the benefit of nondominant property does not constitute a misuse of the easement, where as here, there is no evidence of an increase in the burden on the servient estate. We do not agree. If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement. Wetmore v. Ladies of Loretto, Wheaton, 73 Ill. App. 2d 454, 220 N.E.2d 491 (1966). See also, e.g., Robertson v. Robertson, 214 Va. 76, 197 S.E.2d 183 (1973); Penn Bowling Rec. Ctr., Inc. v. Hot Shoppes, Inc., 179 F.2d 64 (D.C. Cir. 1949). As noted by one court in a factually similar case, "[I]n this context this classic rule of property law is directed to the rights of the respective parties rather than the actual burden on the servitude." National Lead Co. v. Kanawha Block Co., 288 F. Supp. 357, 364 (S.D. W. Va. 1968), aff'd, 409 F.2d 1309 (4th Cir. 1969). Under the express language of the 1952 grant, plaintiffs only have rights in the use of the easement for the benefit of parcel B. Although, as plaintiffs contend, their planned use of the easement to gain access to a single family residence located partially on parcel B and partially on parcel C is perhaps no more than technical misuse of the easement, we conclude that it is misuse nonetheless.

[2] [3] However, it does not follow from this conclusion alone that defendants are entitled to injunctive relief. Since the awards of $ 1 in damages were not appealed, only the denial of an injunction to defendants is in issue. Some fundamental principles applicable to a request for an injunction must be considered. (1) The proceeding is equitable and addressed to the sound discretion of the trial court. (2) The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion. (3) One of the essential

criteria for [*373] injunctive relief is actual and substantial injury sustained by the person seeking the injunction. Washington Fed'n of State Employees, Coun. 28 v. State, 99 Wn.2d 878, 665 P.2d 1337 (1983); Port of Seattle v. International Longshoremen's Union, 52 Wn.2d 317, 324 P.2d 1099 (1958).

The trial court found as facts, upon substantial evidence, that plaintiffs have acted reasonably in the development of their property, that there is and was no damage to the defendants from plaintiffs' use of the easement, that there was no increase in the volume of travel on the easement, that there was no increase in the burden on the servient estate, that defendants sat by for more than a year while plaintiffs expended more than $ 11,000 on their project, and that defendants' counterclaim was an effort to gain "leverage" against plaintiffs' claim. In addition, the court found from the evidence that plaintiffs would suffer considerable hardship if the injunction were granted whereas no appreciable hardship or damages would flow to defendants from its denial. Finally, the court limited plaintiffs' use of the combined parcels solely to the same purpose for which the original parcel was used — i.e., for a single family residence.

Neither this court nor the Court of Appeals may substitute its effort to make findings of fact for those supported findings of the trial court. State v. Marchand, 62 Wn.2d 767, 770, 384 P.2d 865 (1963); Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Therefore, the only valid issue is whether, under these established facts, as a matter of law, the trial court abused its discretion in denying defendants' request for injunctive relief. Based upon the equities of the case, as found by the trial court, we are persuaded that the trial court acted within its discretion. The Court of Appeals is reversed and the trial court is affirmed.

DISSENT BY: DORE

Dore, J. (dissenting)

The majority correctly finds that [*374] an extension of this easement to nondominant property is a misuse of the easement. The majority, nonetheless, holds that the owners of the servient estate are not entitled to injunctive relief. I dissent.

The comments and illustrations found in the Restatement of Property § 478 (1944) address the precise issue before this court. Comment e provides in pertinent part that "if one who has an easement of way over Whiteacre appurtenant to Blackacre uses the way with the purpose of going to Greenacre, the use is improper even though he eventually goes to Blackacre rather than to Greenacre." Illustration 6 provides:

6. By prescription, A has acquired, as the owner and possessor of Blackacre, an easement of way over an alley leading from Blackacre to the street. He buys Whiteacre, an adjacent lot, to which the way is not appurtenant, and builds a public garage one-fourth of which is located on Blackacre and three-fourths of which is located on Whiteacre. A wishes to use the alley as a means of ingress and egress to and from the garage. He has no privilege to use the alley to go to that part of the garage which is built on Whiteacre, and he may not use the alley until that part of the garage built on Blackacre is so separated from the part built on Whiteacre that uses for the benefit of Blackacre are distinguishable from those which benefit Whiteacre.

The majority grants the privilege to extend the agreement to nondominant property on the basis that the trial court found no appreciable hardship or damage to the servient owners. However, as conceded by the majority, any extension of the use of an easement to benefit a nondominant estate constitutes a misuse of the easement. Misuse of an easement is a trespass. Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231, 167 A.L.R. 785 (1946); Selvia v. Reitmeyer, 156 Ind. App. 203, 295 N.E.2d 869 (1973). The Browns' use of the easement to benefit parcel C, especially if they build their home as planned, would involve a continuing trespass for which damages

would be difficult to measure. Injunctive relief is the appropriate remedy under [*375] these circumstances. Selvia, at 212; Gregory v. Sanders, 635 P.2d 795, 801 (Wyo. 1981). In Penn Bowling Rec. Ctr., Inc. v. Hot Shoppes, Inc., 179 F.2d 64, 66 (D.C. Cir. 1949) the court states:

It is contended by appellant that since the area of the dominant and nondominant land served by the easement is less than the original area of the dominant tenement, the use made by appellant of the right of way to serve the building located on the lesser area is not materially increased or excessive. It is true that where the nature and extent of the use of an easement is, by its terms, unrestricted, the use by the dominant tenement may be increased or enlarged. McCullough et al. v. Broad Exchange Company et al., 101 App.Div. 566, 92 N.Y.S. 533. But the owner of the dominant tenement may not subject the servient tenement to use or servitude in connection with other premises to which the easement is not appurtenant. See Williams v. James, Eng.Law.Rep. (1867), 2 C.P. 577. And when an easement is being used in such a manner, an injunction will be issued to prevent such use. Cleve et al. v. Nairin, 204 Ky. 342, 264 S.W. 741; Diocese of Trenton v. Toman et al., 74 N.J.Eq. 702, 70 A. 606; Shock v. Holt Lumber Co. et al., 107 W.Va. 259, 148 S.E. 73. Appellant, therefore, may not use the easement to serve both the dominant and nondominant property, even though the area thereof is less than the original area of the dominant tenement.

See also Kanefsky v. Dratch Constr. Co., 376 Pa. 188, 101 A.2d 923 (1954). Thus, the fact that an extension of the easement to nondominant property would not increase the burden on the servient estate does not warrant a denial of injunctive relief.

The Browns are responsible for the hardship of creating a landlocked parcel. They knew or should have known from the public records that the easement was not appurtenant to parcel C. See Seattle v. Nazarenus, 60 Wn.2d 657, 670, 374

P.2d 1014 (1962). In encroachment cases this factor is significant. As stated by the court in Bach v. Sarich, 74 Wn.2d 575, 582, 445 P.2d 648 (1968): "The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without [*376] knowledge or warning that his structure encroaches upon another's property or property rights."

In addition, an injunction would not interfere with the Browns' right to use the easement as expressly granted, i.e., for access to parcel B. An injunction would merely require the Browns to acquire access to parcel C if they want to build a home that straddles parcels B and C. One possibility would be to condemn a private way of necessity over their existing easement in an action under RCW 8.24.010. See Brown v. McAnally, 97 Wn.2d 360, 644 P.2d 1153 (1982).

I would affirm the Court of Appeals decision as a correct application of the law of easements. If the Browns desire access to their landlocked parcel they have the benefit of the statutory procedure for condemnation of a private way of necessity.

WILLIAM D. WAHL, Appellant, v. MICHAEL L. RITTER ET AL., Respondents. Court of Appeals of Washington, Division One 2014 Wash. App. LEXIS 1174, May 12, 2014, Filed

OPINION BY: SPEARMAN

This lawsuit concerns an easement dispute between the owners of two adjacent residential properties, William Wahl and Michael and Horomi Ritter. Wahl filed suit against the Ritters, seeking to quiet title and asserting claims and damages for trespass, timber trespass/waste, and assault. After a bench trial, the trial court interpreted the easement agreement in favor of the Ritters, dismissed all of Wahl's claims, and awarded attorney fees and costs to the Ritters under the small claims settlement statute, RCW 4.84.250 et seq. We affirm the trial court's dismissal of Wahl's claims, [*2] with the sole exception of his challenge to the number of boats that may be permanently moored at his dock. And because the record shows that the Ritters had notice prior to trial that Wahl was seeking more than $10,000 in damages, we reverse the attorney fee award.

FACTS

In 1976, William and Patricia Wahl purchased a parcel of real property on Lake Washington in Bellevue. The Podls (predecessors in interest to the Ritters) owned the property directly upland from the Wahls. The Wahls' property was burdened by a 1955 recreational easement that benefited the Podl property by providing access to the waterfront. In 1978, while the Wahls' home was under construction, the Podls filed a lawsuit against the Wahls regarding the easement.

In October 1978, the Wahls and the Podls resolved the dispute by executing and recording a new easement agreement which replaced the 1955 easement. This easement agreement describes six easement areas (EA), including four "areas of mutual concern" (EA I, EA II, EA III, and EA IV) and two additional "common interest areas" (EA V and EA VI). Three of these easement areas are at

[*3] issue in this lawsuit. EA I is located directly west of the Ritter residence on a steep slope. EA II runs along the north boundary of the Wahl property, connecting EA I with the waterfront. Its narrowest point is a 5-foot-wide strip adjacent to Wahl's circular driveway. EA III is a dock, which is accessed by land via EA II.

In 1999, the Ritters purchased the Podl property. Shortly thereafter, the Ritters discovered a leaking underground storage tank (UST) on their property. In 2000, contractor TerraSolve removed the UST and began a large scale soil and groundwater remediation project. This required removal and replacement of landscaping and other improvements on portions of the Wahl and Ritter properties, including Wahl's driveway. In February 2004, the Washington State Department of Ecology refused to approve TerraSolve's remediation work. The Ritters' insurance company then retained a new contractor, Sound Environmental Strategies (SES), to resume the remediation project. A few months later, the Ritters had the area surveyed. A dispute then arose between the parties regarding the location of Wahl's driveway in relation to EA II. In August 2008, when Wahl was on vacation, the Ritters [*4] hired a contractor to remove the northernmost strip of Wahl's driveway which encroached on EA II. Wahl asserted that this action shortened the turning radius of his driveway and made it difficult to enter and exit his garage.

In July 2009, SES commenced large-scale cleanup and removal of the remaining contaminated soil. In May 2010, the permit for the remediation work was finalized. Contractors for the Ritters then installed sand, concrete pavers, bushes and lights in EA II; a retaining wall topped with a concrete patio and planters which encroach onto EA I; and five-foot wide stairs in EA I. Wahl objected to the location and configuration of many of these improvements. Wahl also revoked permission he had previously granted to the Ritters to attach a hydraulic boat lift and two jet ski lifts to the dock (EA III) and to run power and water from their home across EA I and II to operate the boat lifts.

Wahl filed a complaint against the Ritters on March 23, 2011 to quiet title and asserting claims and damages for trespass, timber trespass/waste, and assault. The Ritters denied these claims and also asked the court to quiet title. Following discovery, a bench trial commenced on September [*5] 12, 2012. On October 26, 2012, the trial court issued a memorandum decision denying all of Wahl's claims and requests for damages. On February 21, 2013, the trial court entered its findings of fact, conclusions of law, and order. The trial court subsequently granted the Ritters' request for a partial award of attorney fees and costs under the small claims statute, limited to the portion of fees and costs attributable to the damages claims. RCW 4.84.250 et seq. Wahl appeals.

DISCUSSION

"The interpretation of an easement is a mixed question of law and fact." Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law" (citing Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)). Sunnyside Valley, 149 Wn.2d at 880. Findings of fact are reviewed under the substantial evidence standard, defined as a quantum of evidence sufficient to persuade a fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Questions of law and conclusions of law are reviewed de novo. Sunnyside Valley, 149 Wn.2d at 880 [*6] (citing Veach, at 573).

In determining the scope of an easement created by express grant, the court looks to the original grant language to determine the permitted uses. Brown v. Voss, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). "The intent of the original parties to an easement is determined from the deed as a whole." Sunnyside, 149 Wn.2d at 880 (citing Zobrist v. Culp, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981)). "If the plain language is unambiguous, extrinsic evidence will not be considered." Sunnyside, 149 Wn.2d at 880 (citing City

of Seattle v. Nazarenus, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962)). "If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions." Sunnyside, 149 Wn.2d at 880 (citing Nazarenus, 60 Wn.2d at 665.

Recreational Easement

Wahl argues that the trial court erred in concluding that EA II is a recreational easement path for pedestrian use only, thereby ignoring his right to use EA II for parking and navigating his circular driveway. The agreement regarding EA II provides:

This Easement [*7] shall be for recreational use, including but not limited to access, gardening, lawns, rockeries, boating, picknicking, fishing, swimming, lawn sports, ingress and egress, or any other recreational use. [Ritter] has priority use of Easement II. It is intended that the use of this Easement does not unreasonably interfere with the privacy of [Wahl] in the enjoyment of his residence. [Ritter] shall have the responsibility and authority for the maintenance of landscaping, rockeries, etc. on Easement II in accordance with paragraph 6. Temporary storage by [Ritter] of small equipment used in the abovementioned recreational activities is allowed so long as it does not detract from the aesthetics of the landscaping. It is understood that this use does not include storage of items such as boats, trailers, automobiles, etc. [Wahl] shall have the right to the use of Easement II for ingress and egress and landscape maintenance, and such other non-recreational uses which do not unreasonably interfere with [Ritter's] priority use of this easement. In the event of a conflict between [Wahl and Ritter] over use of Easement II, [Ritter] shall have priority with the understanding that Easement II is [Ritter's] [*8] private area, to the extent provided herein.

Trial Exhibit (Ex.) 1 at 5. (Emphasis added.)

The trial court concluded that "Easement Area II is a recreational easement," and that "[g]iven the pedestrian use of the easement path, which use could occur at any time, night or day, rain or shine, and in light of priorities granted to [Ritter's] use, and the identification of [Ritter's] use as a privacy right within the terms of EA II... and the express intent of the parties that the privacy of each is of 'paramount importance', together with the primacy of recreational use of EA II, this Court interprets EA II as providing that the use of the easement path in EA II cannot be used by motor vehicles for ingress or egress, or for parking for any period of time." Clerk Papers at 636-37. The court noted that Wahl presented evidence of difficulty in turning vehicles from the driveway into his garage without crossing EA II, but found "it is clear that such conflicts are resolved in favor of [Ritter's] scope of use, the recreational nature of the primary use, and [Ritter's] privacy rights." CP at 633.

Despite evidence that it is difficult to use Wahl's driveway without crossing EA II, we conclude that [*9] the trial court properly ruled that the Ritters' recreational use controls. The language in the easement agreement creates an extremely broad grant of recreational use rights in EA II to the Ritters, limiting Wahl to non-recreational uses which do not unreasonably interfere with the Ritters' priority use. Wahl contends that his continuous use of EA II for turning vehicles, which he exercised without complaint from 1979-2004, indicates that the parties intended to allow this use. However, the easement agreement expressly provides that the Ritters have priority use in the event of a conflict. Wahl's reliance on York v. Cooper, 60 Wn.2d 283, 373 P.2d 493 (1962) is misplaced. In York, the court upheld the plaintiffs' right to drive and park on an easement that had been historically used for that purpose by the owners and occupants of both properties. Id. at 285. Here, the easement is expressly recreational, and only Wahl drove on it.

Wahl also argues that the trial court erred by ordering that the Ritters may prevent vehicles from going onto the

easement path by installing concrete traffic barriers, because Paragraph 6 of the easement agreement provides that mutual consent is required to [*10] change the original landscaping plan, "which will not be unreasonably withheld." Trial Ex. 1 at 8. We conclude that Paragraph 6 does not control where, as here, the concrete barriers are being installed for safety purposes. Moreover, even if Paragraph 6 controlled, it would not be reasonable for Wahl to withhold consent under the circumstances.

Patio and Stairs

Wahl argues that a narrow strip of the Ritters' new concrete patio and planter boxes (138 square feet in total) encroaches on EA I and constitutes a trespass. The trial court found that the patio and planter boxes encroach on EA I, but concluded that the encroachment was permissible.

The agreement regarding EA I provides:

This Easement shall be for ingress and egress (pedestrian only and shall not include parking or storage of anything), and to permit view control by [Ritter] and safety of their property by installing and maintaining rockeries, like retaining devices[,] and steps and paths. [Ritter] shall have control over the landscaping and rockeries, etc., of Easement I and shall be responsible to maintain the same in accordance with paragraph 6 in a manner mutually agreeable to [Ritter and Wahl] at [Ritter's] sole expense. Neither [*11] [Ritter] nor [Wahl] will construct any fence or gate over this Easement I without [Ritter's] prior written consent.

Wahl contends that the patio and planter boxes serve no safety purpose and therefore fall outside the scope of EA I. But Wahl does not challenge the location of the retaining wall that underlies the patio and planter boxes, even though it too encroaches on EA I. Rather, he appears to argue that nothing whatsoever should have been installed on top of the encroaching portion of the retaining wall. We disagree.

The plain language of EA I permits installation of "rockeries, similar retaining devices, and steps and paths,"

for both view control and safety purposes. CP at 634. It also gives Ritter "control over the landscaping and rockeries, etc." in EA I. The project manager who built Ritter's patio testified on cross examination that the patio and planter boxes could have been placed further back on the property so as not to fully cover the top surface of the retaining wall. However, the court found that doing so would create "a flat open semi-circular area approximately 40' in length, with a width of 4' at its widest part and less than [*12] 1' at each end, which could conceivably be a safety hazard as the area is at the top edge of a steep slope." Id. The court also found that the encroachment of the patio does not interfere with any other use of EA I. These findings are supported by substantial evidence.

Wahl further contends that the patio and planters violate the easement agreement because EA I requires "mutual consent" for construction and maintenance of landscaping and rockeries, which he did not provide. The trial court concluded that Wahl's consent was not required, based on its finding that EA I expressly gives Ritter "control over the landscaping and rockeries" and that the reference in EA I regarding consent refers only to maintaining the landscaping in accordance with Paragraph 6. This finding is supported by substantial evidence.

Wahl also argued that the trial court erred in allowing the Ritters to violate EA I by expanding the width of the new steps from three feet to five feet. He contends that the original parties did not intend to allow future expansion of the original landscape design into new areas without Wahl's consent. Again we disagree. The trial court found "[t]here was no showing at trial that extending [*13] the width of the steps within EA I from 3 to 5 feet in any way interfered with or impaired use by [Wahl], and were done for safety reasons, all clearly within the authority granted [Ritter] in EA I." CP at 628. This interpretation was proper, and supported by substantial evidence.

Dock

Wahl argues that the trial court erred in permitting the Ritters to exceed the scope of EA III by mooring two jet skis at the dock, in addition to their boat. The agreement regarding EA III provides:

This Easement shall be for recreational use, including but not limited to the use of the dock, for the permanent mooring of not over two boats belonging to [Ritter], neither of which shall exceed 50 feet, access, swimming, boating, fishing, ingress, egress or any other recreational use. [Ritter] shall have priority use of Easement III. It is intended that the use of this Easement does not unreasonably interfere with [Wahl's] privacy in the use and enjoyment of his residence. Maintenance of the New Dock to be built on Easement III ... shall be the joint responsibility of [Wahl and Ritters]. [Wahl] shall have the right to use Easement III for ingress and egress, short-term or occasional boat moorage (on a space [*14] available basis) and maintenance so long as the same do not unreasonably interfere with [Ritter's] priority use of this easement. In the event of a conflict between [Wahl and Ritter] over use of Easement III, [Ritter] shall have priority with the understanding that Easement III is [Ritter's] private area, to the extent provided herein.

Trial Ex. 1 at 6. (Emphasis added.)

The trial court concluded that "two jet skis can be one boat for the purposes of the vessel limitation of EA III, in part due to their smaller size." CP at 638. This conclusion was based in part on the trial court's finding that the Bellevue Municipal Code counts one jet ski as half of a boat for storage purposes. Wahl contends that there is no such provision in the Bellevue Municipal Code. He is correct. The Ritters failed to provide a citation to the alleged code provision, and our research revealed none. The sole reference in the record in support of this finding is hearsay testimony from Ritter. This finding is not supported by substantial evidence. Accordingly, given clear language in the easement limiting Ritter's use to "not over two boats... neither of which shall exceed 50 feet," we conclude that the

trial [*15] court erred in interpreting EA III to allow the Ritters to moor more than two boats (including jet skis) at the dock.

Wahl also argues that the Ritters exceeded the scope of EA III by attaching boat lifts to the dock without his express agreement. He relies primarily on Paragraph 4 of the easement agreement, which provides that it was Wahl's responsibility to construct [*16] the dock, and that "[a]ny additional improvements to the New Dock shall be as mutually agreed by [Wahl] and [Ritter]." Trial Ex. 1 at 7. However, EA I expressly provides for the permanent mooring of two boats. The trial court found that although boat lifts are not expressly mentioned in the easement agreement, they are "a recognized aspect of mooring boats" and that EA I cannot be expected to specify all the details of mooring, given that new methods and accessories are constantly changing. CP at 635. The trial court also found that the boat lifts do not expand the scope of the moorage or interfere with any other use or activity of EA III. Given the broad grant of authority to the Ritters in EA III and the difficulty of accomplishing permanent moorage without the use of boat lifts, we conclude that the trial court's findings are supported by substantial evidence. Because we conclude that EA III limits the Ritters to two boats, it follows that they are limited to two boat lifts as well.

Wahl further argues that the Ritters exceeded the scope of the easement agreement by running electrical cords, water hoses, and power lines from their house across EA I and II to the dock. He contends [*17] that nothing in the easement agreement permits "utilities," only "recreational use." The trial court found this use permissible, finding that "there is no basis in EA II for limiting Owner B [the Ritters] from running power lines . . . ." CP at 634. The court also found that without access to water and power, which are necessary to operate the boat lifts, Ritter would be deprived of full use of EA III, which would be an absurd result. We agree, and conclude that these findings are supported by substantial evidence.

Wahl, citing Castanza v. Wagner, 43 Wn. App. 770, 719 P.2d 949 (1986), argues that the Ritters have no right to run power and water to EA III in the absence of an express grant. The Castanza court held that an easement of right of way for "road purposes" authorized ingress and egress, but in the absence of an express grant, did not include the right to place utility lines. Id. at 776-777. But here, unlike in Castanza, the easement agreement contains very broad language in favor of the Ritters' recreational use, including the permanent mooring of boats.

Attorney Fees

The trial court initially denied the Ritters' request for an award of attorney fees and costs in excess of $180,000 [*18] based on the small claims settlement statute, RCW 4.84.250 et seq. However, upon reconsideration, the trial court concluded:

While the litigation in this case primarily involved a dispute over the interpretation of the scope and use of a written easement that does not contain an attorney-fee clause, Plaintiff, in addition to the petition for enforcement of the easement, included in his complaint a demand for damages of less than $10,000, which invokes RCW 4.84.250. Pre-trial litigation and trial focused almost, if not exclusively, on issues arising out of the interpretation of the written easement. As Defendants accurately point out, this court, following a bench trial, found that the damage claims were not supported by evidence at trial, which is accurate, though it was not because evidence was offered and rejected, but because, based on the court's recollection at this time, no evidence at all was presented in support of the damage claims.

Accordingly the trial court invited the Ritters to resubmit a fee petition limited to the hours attributable to defending against Wahl's damages claims. The Ritters did so, and the trial court issued an order awarding $22,288 in total [*19] reasonable attorneys' fees and costs.

We review the legal basis for an award of attorney's fees de novo. Hulbert v. Port of Everett, 159 Wn. App. 389, 407,

245 P.3d 779 (2011). The general rule is that each party in a civil action must bear its own fees and costs. Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 296, 149 P.3d 666 (2006). "A trial court may award attorney fees only where there is a contractual, statutory, or recognized equitable basis." Riss v. Angel, 80 Wn. App. 553, 563, 912 P.2d 1028 (1996).

RCW 4.84.250 et seq. authorizes a trial court to award attorney's fees to the prevailing party where the amount pleaded is $10,000 or less. The small claims settlement statute has "multiple purposes of encouraging out-of-court settlements, penalizing parties who unjustifiably bring or resist small claims, and enabling a party to pursue a meritorious small claim without seeing the award diminished by legal fees." Williams v. Tilaye, 174 Wn.2d 57, 62, 272 P.3d 235 (2012) (citing Beckmann v. Spokane Transit Auth., 107 Wn.2d 785, 788, 733 P.2d 960 (1987)).The defendant is deemed the prevailing party if the plaintiff recovers nothing or a sum not exceeding [*20] that offered by the defendant in settlement. RCW 4.84.270; Reynolds v. Hicks, 134 Wn.2d 491, 502, 951 P.2d 761 (1998).

The Ritters contend that they are entitled to a fee award under RCW 4.84.270 because, following requests for production directed to Wahl during discovery, his claims for actual damages at trial were less than $10,000 and he rejected their pretrial offer to settle for $9,900. Wahl citing Reynolds, argues that RCW 4.84.250 et seq. does not apply because he pleaded an open-ended "award of treble damages caused by the wrongful acts of defendants in an amount to be proven at trial" rather than a specific amount. CP at 1332.

In Reynolds, the Washington Supreme Court rejected the defendants' request for a fee award as the prevailing party under RCW 4.84.250 because "[n]o specific amount was pleaded in the complaint; rather, the amount was set to be proven at trial. Thus, the Plaintiffs did not limit their award

and based on their claim for damages and relief could have received well above $10,000 in damages." Reynolds, 134 Wn.2d at 502. However, a defendant is entitled to attorney fees, [*21] even if the plaintiff did not plead an exact amount, if he or she had constructive knowledge that the amount of the claim was $10,000 or less. Schmerer v. Darcy, 80 Wn. App. 499, 510, 910 P.2d 498 (1996). Thus, the fact that Wahl did not expressly plead damages in excess of $10,000 is not fatal to the Ritters' claim for attorney fees. The question is whether the Ritters had notice prior to trial that Wahl's damages claims exceeded $10,000. The Ritters insist that Wahl failed to articulate or disclose any actual damages prior to trial other than a $4,400 driveway bid, a $2,000 dock repair estimate, and a $659.32 repair estimate for alleged electrical damage, for a total of $7,059.32. The Ritters are incorrect. The record before us also includes a certified arborist's report finding that the value of Wahl's property decreased by $68,000 - $113,500 based on the alleged timber trespass, and a professional land value market study reporting an estimated property value of $163 to $165 square feet, in support of Wahl's claim for land trespass based on the 138 square feet of encroaching patio and planter boxes in EA I. Counsel for the Ritters expressly acknowledged having received the arborist's [*22] damages report approximately two weeks prior to trial. Thus, the Ritters clearly had notice prior to trial that Wahl's damages claims exceeded $10,000. Moreover, there is no evidence in the record that Wahl retreated from his request for an award of treble damages in an amount to be proven at trial. Even if Wahl only submitted evidence of damages in the amount of $7,059.32, when tripled, this would be sufficient to exceed the threshold.

The Ritters appear to argue that any evidence of damages that was deemed inadmissible at trial does not count towards the $10,000 threshold. But the ultimate admissibility of the evidence has no bearing on the question of whether the Ritters were on notice that Wahl's damages

claims exceeded $10,000. The record shows that they were. Accordingly, we hold that the trial court erred in awarding attorney fees to the Ritters under RCW 4.84.270, and we reverse the award.

The Ritters [*23] request reasonable attorney fees and costs under RAP 18.1 and RCW 4.84.290. "We may award attorney fees under RAP 18.1(a) if applicable law grants to a party the right to recover reasonable attorney fees and if the party requests the fees as prescribed by RAP 18.1." Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 493, 200 P.3d 683 (2009). Because RCW 4.84.250 et seq. has no applicability to this case, we decline the Ritters' request for an award of fees on appeal. We also deny Wahl's request for fees on appeal pursuant to RAP 18.1 and RCW 4.24.630(1) based on the location of the Ritters' concrete patio, as he is not the prevailing party.

Affirmed and reversed.

MILLER et al. v. LUTHERAN CONFERENCE AND CAMP ASSOCIATION, Appellant. Supreme Court of Pennsylvania 331 Pa. 241; 200 A. 646, June 30, 1938

OPINION BY: STERN

This litigation is concerned with interesting and somewhat novel legal questions regarding rights of boating, bathing and fishing in an artificial lake.

Frank C. Miller, his brother Rufus W. Miller, and others, who owned lands on Tunkhannock Creek in Tobyhanna Township, Monroe County, organized a corporation known as the Pocono Spring Water Ice Company, to which, in September, 1895, they made a lease for a term of ninety-nine years of so much of their lands as would be covered by the backing up of the water as a result of the construction of a 14-foot dam which they proposed to erect across the creek. The company was to have "the exclusive use of the water and its privileges." It was chartered for the purpose of "erecting a dam . . ., for pleasure, boating, skating, fishing and the cutting, storing and selling of ice." The dam was

built, forming "Lake Naomi," somewhat more than a mile long and about one-third of a mile wide.

By deed dated March 20, 1899, the Pocono Spring Water Ice Company granted to "Frank C. Miller, his heirs and assigns forever, the exclusive right to fish and boat in all the waters of the said corporation at Naomi [*243] Pines, Pa." On February 17, 1900, Frank C. Miller (his wife Katherine D. Miller not joining) granted to Rufus W. Miller, his heirs and assigns forever, "all the one-fourth interest in and to the fishing, boating, and bathing rights and privileges at, in, upon and about Lake Naomi . . .; which said rights and privileges were granted and conveyed to me by the Pocono Spring Water Ice Company by their indenture of the 20th day of March, A.D. 1899." On the same day Frank C. Miller and Rufus W. Miller executed an agreement of business partnership, the purpose of which was the erection and operation of boat and bath houses on Naomi Lake and the purchase and maintenance of boats for use on the lake, the houses and boats to be rented for hire and the net proceeds to be divided between the parties in proportion to their respective interests in the bathing, boating and fishing privileges, namely, three-fourths to Frank C. Miller and one-fourth to Rufus W. Miller, the capital to be contributed and the losses to be borne in the same proportion. In pursuance of this agreement the brothers erected and maintained boat and bath houses at different points on the lake, purchased and rented out boats, and conducted the business generally, from the spring of 1900 until the death of Rufus W. Miller on October 11, 1925, exercising their control and use of the privileges in an exclusive, uninterrupted and open manner and without challenge on the part of anyone.

Discord began with the death of Rufus W. Miller, which terminated the partnership. Thereafter Frank C. Miller, and the executors and heirs of Rufus W. Miller, went their respective ways, each granting licenses without reference to the other. Under date of July 13, 1929, the executors of the Rufus W. Miller estate granted a license for the year 1929

to defendant, Lutheran Conference and Camp Association, which was the owner of a tract of ground abutting on the lake for a distance of about 100 feet, purporting to grant to defendant, its members, guests and campers, permission to boat, bathe [*244] and fish in the lake, a certain percentage of the receipts therefrom to be paid to the estate. Thereupon Frank C. Miller and his wife, Katherine D. Miller, filed the present bill in equity, complaining that defendant was placing diving floats on the lake and "encouraging and instigating visitors and boarders" to bathe in the lake, and was threatening to hire out boats and canoes and in general to license its guests and others to boat, bathe and fish in the lake. The bill prayed for an injunction to prevent defendant from trespassing on the lands covered by the waters of the lake, from erecting or maintaining any structures or other encroachments thereon, and from granting any bathing licenses. The court issued the injunction.

It is the contention of plaintiffs that, while the privileges of boating and fishing were granted in the deed from the Pocono Spring Water Ice Company to Frank C. Miller, no bathing rights were conveyed by that instrument. In 1903 all the property of the company was sold by the sheriff under a writ of fi. fa. on a mortgage bond which the company had executed in 1898. As a result of that sale the Pocono Spring Water Ice Company was entirely extinguished, and the title to its rights [*245] and property came into the ownership of the Pocono Pines Ice Company, a corporation chartered for "the supply of ice to the public." In 1928 the title to the property of the Pocono Pines Ice Company became vested in Katherine D. Miller. Plaintiffs therefore maintain that the bathing rights, never having passed to Frank C. Miller, descended in ownership from the Pocono Spring Water Ice Company through the Pocono Pines Ice Company to plaintiff Katherine D. Miller, and that Frank C. Miller could not, and did not, give Rufus W. Miller any title to them. They further contend that even if such bathing rights ever did vest in Frank C. Miller, all of the boating, bathing and fishing privileges were easements

in gross which were inalienable and indivisible, and when Frank C. Miller undertook to convey a one-fourth interest in them to Rufus W. Miller he not only failed to transfer a legal title to the rights but, in attempting to do so, extinguished the rights altogether as against Katherine D. Miller, who was the successor in title of the Pocono Spring Water Ice Company. It is defendant's contention, on the other hand, that the deed of 1899 from the Pocono Spring Water Ice Company to Frank C. Miller should be construed as transferring the bathing as well as the boating and fishing privileges, but that if Frank C. Miller did not obtain them by grant he and Rufus W. Miller acquired them by prescription, and that all of these rights were alienable and divisible even if they be considered as easements in gross, although they might more properly, perhaps, be regarded as licenses which became irrevocable [*246] because of the money spent upon their development by Frank C. Miller and Rufus W. Miller.

Plaintiffs have filed a motion to dismiss the present appeal on the ground that defendant's license from the estate of Rufus W. Miller was only for the year 1929, and in 1930 defendant constructed another lake on a property of its own, distant about one-half mile from Lake Naomi, and has discontinued the trespasses which are the subject of the bill; it is claimed that the questions involved have thus become moot. This motion cannot be sustained. The controversy may flare up again if defendant obtains another license from the Rufus W. Miller estate, and under such circumstances the court will entertain an appeal: Werner v. King, 310 Pa. 120, 124, 125. Moreover, the decree of the court below would render defendant ineligible to obtain a license from the estate hereafter: Revocation of Wolf's License, 115 Pa. Superior Ct. 514, 522. Nor is the question moot merely because, since the institution of the proceedings, defendant has not persisted in the actions complained of: Commonwealth v. Benton Township School District, 277 Pa. 13, 17.

Coming to the merits of the controversy, it is initially to be observed that no boating, bathing or fishing rights [*247] can be, or are, claimed by defendant as a riparian owner. Ordinarily, title to land bordering on a navigable stream extends to low water mark subject to the rights of the public to navigation and fishery between high and low water, and in the case of land abutting on creeks and non-navigable rivers to the middle of the stream, but in the case of a non-navigable lake or pond where the land under the water is owned by others, no riparian rights attach to the property bordering on the water, and an attempt to exercise any such rights by invading the water is as much a trespass as if an unauthorized entry were made upon the dry land of another: Baylor v. Decker, 133 Pa. 168; Smoulter v. Boyd, 209 Pa. 146, 152; Gibbs v. Sweet, 20 Pa. Superior Ct. 275, 283; Fuller v. Cole, 33 Pa. Superior Ct. 563; Cryer v. Sawkill Pines Camp, Inc., 88 Pa. Superior Ct. 71.

It is impossible to construe the deed of 1899 from the Pocono Spring Water Ice Company to Frank C. Miller as conveying to the latter any privileges of bathing. It is clear and unambiguous. It gives to Frank C. Miller the exclusive right to fish and boat. Expressio unius est exclusio alterius. No bathing rights are mentioned. This omission may have been the result of oversight or it may have been deliberate, but in either event the legal consequence is the same. It is to be noted that the mortgagee to whom the company mortgaged all its property in 1898 executed in 1902 a release of the fishing and boating rights to the company and to Frank C. Miller, thus validating the latter's title to these rights under the company's deed of 1899, but in this release also the bathing rights are omitted.

But, while Frank C. Miller acquired by grant merely boating and fishing privileges, the facts are amply sufficient to establish title to the bathing rights by prescription. True, these rights, not having been granted in connection with, or to be attached to, the ownership of [*248] any land, were not easements appurtenant but in gross. There is, however, no inexorable principle of law

which forbids an adverse enjoyment of an easement in gross from ripening into a title thereto by prescription. In Tinicum Fishing Co. v. Carter, 61 Pa. 21, it was questioned whether a fishing right could be created by prescription, although there is an intimation (p. 40) that some easements in gross might so arise if there be evidence sufficient to establish them. Certainly the casual use of a lake during a few months each year for boating and fishing could not develop into a title to such privileges by prescription. But here the exercise of the bathing right was not carried on sporadically by Frank C. Miller and his assignee Rufus W. Miller for their personal enjoyment but systematically for commercial purposes in the pursuit of which they conducted an extensive and profitable business enterprise. The circumstances thus presented must be viewed from a realistic standpoint. Naomi Lake is situated in the Pocono Mountains district, has become a summer resort for campers and boarders, and, except for the ice it furnishes, its bathing and boating facilities are the factors which give it its prime importance and value. They were exploited from the time the lake was created, and are recited as among the purposes for which the Pocono Spring Water Ice Company was chartered. From the early part of 1900 down to at least the filing of the present bill in 1929, Frank C. Miller and Rufus W. Miller openly carried on their business of constructing and operating bath houses and licensing individuals and camp associations to use the lake for bathing. This was known to the stockholders of the Pocono Spring Water Ice Company and necessarily also to Katherine D. Miller, the wife of Frank C. Miller; no objection of any kind was made, and Frank C. Miller and Rufus W. Miller were encouraged to expend large sums of money [*249] in pursuance of the right of which they considered and asserted themselves to be the owners. Under such circumstances it would be highly unjust to hold that a title by prescription to the bathing rights did not vest in Frank C. Miller and Rufus W. Miller which is just as valid, as far as Katherine D. Miller is concerned, as that to

the boating and fishing rights which Frank C. Miller obtained by express grant.

We are thus brought to a consideration of the next question, which is whether the boating, bathing and fishing privileges were assignable by Frank C. Miller to Rufus W. Miller. What is the nature of such rights? In England it has been said that easements in gross do not exist at all, although rights of that kind have been there recognized. In this country such privileges have sometimes been spoken of as licenses, or as contractual in their nature, rather than as easements in gross. These are differences of terminology rather than of substance. We may assume, therefore, that these privileges are easements in gross, and we see no reason to consider them otherwise. It has uniformly been held that a profit in gross — for example, a right of mining or fishing — may be made assignable: Funk v. Haldeman, 53 Pa. 229; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 39; see cases cited 19 C.J. 870, note 25. In regard to easements in gross generally, there has been much controversy in the courts and by textbook writers and law students as to whether they have the attribute of assignability. There are dicta in Pennsylvania that they are non-assignable: Tinicum Fishing Co. v. Carter, supra, 38, 39; Lindenmuth v. Safe Harbor Water Power Corporation, 309 Pa. 58, 63, 64; Commonwealth v. Zimmerman, 56 Pa. Superior Ct. 311, 315, 316. But there is forcible expression and even definite authority to the contrary: Tide Water Pipe Co. v. Bell, 280 Pa. 104, 112, 113; Dalton Street Railway Co. v. Scranton, 326 Pa. 6, 12. Learned articles upon the subject are to be found in 32 Yale Law Journal 813; 38 Yale Law Journal 139; 22 Michigan [*250] Law Review 521; 40 Dickinson Law Review 46. There does not seem to be any reason why the law should prohibit the assignment of an easement in gross if the parties to its creation evidence their intention to make it assignable. Here, as in Tide Water Pipe Company v. Bell, supra, the rights of fishing and boating were conveyed to the grantee — in this case Frank C. Miller — "his heirs and assigns," thus showing that the grantor, the

Pocono Spring Water Ice Company, intended to attach the attribute of assignability to the privileges granted. Moreover, as a practical matter, there is an obvious difference in this respect between easements for personal enjoyment and those designed for commercial exploitation; while there may be little justification for permitting assignments in the former case, there is every reason for upholding them in the latter.

The question of assignability of the easements in gross in the present case is not as important as that of their divisibility. It is argued by plaintiffs that even if held to be assignable such easements are not divisible, because this might involve an excessive user or "surcharge of the easement" subjecting the servient tenement to a greater burden than originally contemplated. The law does not take that extreme position. It does require, however, that, if there be a division, the easements must be used or exercised as an entirety. This rule had its earliest expression in Mountjoy's Case, which is reported in Co. Litt. 164b, 165a. It was there said, in regard to the grant of a right to dig for ore, that the grantee, Lord MOUNTJOY, "might assign his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stock." In Caldwell v. Fulton, 31 Pa. 475, 477, 478, and in Funk v. Haldeman, 53 Pa. 229, that case was followed, and it was held that the right of a grantee to mine coal or to prospect for oil might be assigned, but if to more than one they must hold, enjoy and convey [*251] the right as an entirety, and not divide it in severalty. There are cases in other jurisdictions which also approve the doctrine of Mountjoy's Case, and hold that a mining right in gross is essentially integral and not susceptible of apportionment; an assignment of it is valid, but it cannot be aliened in such a way that it may be utilized by grantor and grantee, or by several grantees, separately; there must be a joint user, nor can one of the tenants alone convey a share in the common right: Grubb v. Baird, Federal Case No. 5849 (Circuit Court, Eastern

District of Pennsylvania); Harlow v. Lake Superior Iron Co., 36 Mich. 105, 121; Stanton v. T. L. Herbert & Sons, 141 Tenn. 440, 211 S.W. 353.

These authorities furnish an illuminating guide to the solution of the problem of divisibility of profits or easements in gross. They indicate that much depends upon the nature of the right and the terms of its creation, that "surcharge of the easement" is prevented if assignees exercise the right as "one stock," and that a proper method of enjoyment of the easement by two or more owners of it may usually be worked out in any given instance without insuperable difficulty.

In the present case it seems reasonably clear that in the conveyance of February 17, 1900, it was not the intention of Frank C. Miller to grant, and of Rufus W. Miller to receive, a separate right to subdivide and sublicense the boating, fishing and bathing privileges on and in Lake Naomi, but only that they should together use such rights for commercial purposes, Rufus W. Miller to be entitled to one-fourth and Frank C. Miller to three-fourths of the proceeds resulting from their combined exploitation of the privileges. They were to [*252] hold the rights, in the quaint phraseology of Mountjoy's Case, as "one stock." Nor do the technical rules that would be applicable to a tenancy in common of a corporeal hereditament apply to the control of these easements in gross. Defendant contends that, as a tenant in common of the privileges, Rufus W. Miller individually was entitled to their use, benefit and possession and to exercise rights of ownership in regard thereto, including the right to license third persons to use them, subject only to the limitation that he must not thereby interfere with the similar rights of his co-tenant. But the very nature of these easements prevents their being so exercised, inasmuch as it is necessary, because of the legal limitations upon their divisibility, that they should be utilized in common, and not by two owners severally, and, as stated, this was evidently the intention of the brothers.

Summarizing our conclusions, we are of opinion (1) that Frank C. Miller acquired title to the boating and fishing privileges by grant and he and Rufus W. Miller to the bathing rights by prescription; (2) that he made a valid assignment of a one-fourth interest in them to Rufus W. Miller; but (3) that they cannot be commercially used and licenses thereunder granted without the common consent and joinder of the present owners, who with regard to them must act as "one stock." It follows that the executors of the estate of Rufus W. Miller did not have the right, in and by themselves, to grant a license to defendant.

LOS PACTOS SOBRE COSAS

TULK v MOXHAY. Lord Chancellor's Court All ER Rep 9, 22 December 1848

OPINION BY: LORD COTTENHAM

That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it that the purchaser shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. Here there is no question about the contract. The owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden. It is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be

able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that, if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from that of the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute, but looking at the ground on which Lord Eldon disposed of Duke of Bedford v British Museum Trustees (1) it is impossible to suppose that he entertained any doubt of it. In Mann v Stephens (2) before me, I never intended to make the injunction depend upon the result of the action, nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment on the ground that it was not clearly proved that any breach had been committed, but, there being a doubt whether part of the premises on which the defendant was proceeding to build, was locally situated within what was called the Dell, on which alone he had under the covenant a right to build, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of LORD BROUGHAM in Keppell v Bailey (3) he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it. I think this decision of the Master of the Rolls perfectly

right, and, therefore, that this motion must be refused with costs.

 SANBORN v. McLEAN. Supreme Court of Michigan 233 Mich. 227; 206 N.W. 496, December 22, 1925, Decided

OPINION BY: WIEST

[*228] Defendant Christina McLean owns the west 35 feet of lot 86 of Green Lawn subdivision, at the northeast corner of Collingwood avenue and Second boulevard, in the city of Detroit, upon which there is a dwelling house, occupied by herself and her husband, defendant John A. McLean. The house fronts Collingwood avenue. At the rear of the lot is an alley. Mrs. McLean derived title from her husband and, in the course of the opinion, we will speak of both as defendants. Mr. and Mrs. McLean started [*229] to erect a gasoline filling station at the rear end of their lot, and they and their contractor, William S. Weir, were enjoined by decree from doing so and bring the issues before us by appeal. Mr. Weir will not be further mentioned in the opinion.

Collingwood avenue is a high-grade residence street between Woodward avenue and Hamilton boulevard, with single, double and apartment houses, and plaintiffs who are owners of land adjoining, and in the vicinity of defendants' land, and who trace title, as do defendants, to the proprietors of the subdivision, claim that the proposed gasoline station will be a nuisance per se, is in violation of the general plan fixed for use of all lots on the street for residence purposes only, as evidenced by restrictions upon 53 of the 91 lots fronting on Collingwood avenue, and that defendants' lot is subject to a reciprocal negative easement barring a use so detrimental to the enjoyment and value of its neighbors. Defendants insist that no restrictions appear in their chain of title and they purchased without notice of any reciprocal negative easement, and deny that a gasoline station is a nuisance per se. We find no occasion to pass

upon the question of nuisance, as the case can be decided under the rule of reciprocal negative easement.

This subdivision was planned strictly for residence purposes, except lots fronting Woodward avenue and Hamilton boulevard. The 91 lots on Collingwood avenue were platted in 1891, designed for and each one sold solely for residence purposes, and residences have been erected upon all of the lots. Is defendants' lot subject to a reciprocal negative easement? If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the [*230] owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends. It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan. If a reciprocal negative easement attached to defendants' lot it was fastened thereto while in the hands of the common owner of it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it. This leads to inquiry as to what lots, if any, were sold with restrictions by the common owner before the sale of defendants' lot.

While the proofs cover another avenue we need consider sales only on Collingwood.

December 28, 1892, Robert J. and Joseph R. McLaughlin, who were then evidently owners of the lots on Collingwood avenue, deeded lots 37 to 41 and 58 to 62, inclusive, with the following restrictions:

"No residence shall be erected upon said premises, which shall cost less than $2,500 and nothing but residences shall be erected upon said premises. Said residences shall front on Helene (now Collingwood) [*231] avenue and be placed no nearer than 20 feet from the front street line."

July 24, 1893, the McLaughlins conveyed lots 17 to 21 and 78 to 82, both inclusive, and lot 98 with the same restrictions. Such restrictions were imposed for the benefit of the lands held by the grantors to carry out the scheme of a residential district, and a restrictive negative easement attached to the lots retained, and title to lot 86 was then in the McLaughlins. Defendants' title, through mesne conveyances, runs back to a deed by the McLaughlins dated September 7, 1893, without restrictions mentioned therein. Subsequent deeds to other lots were executed by the McLaughlins, some with restrictions and some without. Previous to September 7, 1893, a reciprocal negative easement had attached to lot 86 by acts of the owners, as before mentioned, and such easement is still attached and may now be enforced by plaintiffs, provided defendants, at the time of their purchase, had knowledge, actual or constructive, thereof. The plaintiffs run back with their title, as do defendants, to a common owner. This common owner, as before stated, by restrictions upon lots sold, had burdened all the lots retained with reciprocal restrictions. Defendants' lot and plaintiff Sanborn's lot, next thereto, were held by such common owner, burdened with a reciprocal negative easement and, when later sold to separate parties, remained burdened therewith and right to demand observance thereof passed to each purchaser with notice of the easement. The restrictions were upon defendants' lot while it was in the hands of the common

owners, and abstract of title to defendants' lot showed the common owners and the record showed deeds of lots in the plat restricted to perfect and carry out the general plan and resulting in a reciprocal negative easement upon defendants' lot and all lots within its scope, and defendants [*232] and their predecessors in title were bound by constructive notice under our recording acts. The original plan was repeatedly declared in subsequent sales of lots by restrictions in the deeds, and while some lots sold were not so restricted the purchasers thereof, in every instance, observed the general plan and purpose of the restrictions in building residences. For upward of 30 years the united efforts of all persons interested have carried out the common purpose of making and keeping all the lots strictly for residences, and defendants are the first to depart therefrom.

When Mr. McLean purchased on contract in 1910 or 1911, there was a partly built dwelling house on lot 86, which he completed and now occupies. He had an abstract of title which he examined and claims he was told by the grantor that the lot was unrestricted. Considering the character of use made of all the lots open to a view of Mr. McLean when he purchased, we think he was put thereby to inquiry, beyond asking his grantor whether there were restrictions. He had an abstract showing the subdivision and that lot 86 had 97 companions; he could not avoid noticing the strictly uniform residence character given the lots by the expensive dwellings thereon, and the least inquiry would have quickly developed the fact that lot 86 was subjected to a reciprocal negative easement, and he could finish his house and, like the others, enjoy the benefits of the easement. We do not say Mr. McLean should have asked his neighbors about restrictions, but we do say that with the notice he had from a view of the premises on the street, clearly indicating the residences were built and the lots occupied in strict accordance with a general plan, he was put to inquiry, and had he inquired he would have found of record the reason for such general conformation, and the benefits thereof

[*233] serving the owners of lot 86 and the obligations running with such service and available to adjacent lot owners to prevent a departure from the general plan by an owner of lot 86.

While no case appears to be on all fours with the one at bar the principles we have stated, and the conclusions announced, are supported by Allen v. City of Detroit, 167 Mich. 464 (36 L.R.A. [N.S.] 890); McQuade v. Wilcox, 215 Mich. 302 (16 A.L.R. 997); French v. White Star Refining Co., 229 Mich. 474; Silberman v. Uhrlaub, 116 N.Y. App. Div. 869 (102 N.Y. Supp. 299); Boyden v. Roberts, 131 Wis. 659 (111 N.W. 701); Howland v. Andrus, 80 N.J. Eq. 276 (83 Atl. 982).

We notice the decree in the circuit directed that the work done on the building be torn down. If the portion of the building constructed can be utilized for any purpose within the restrictions it need not be destroyed.

With this modification the decree in the circuit is affirmed, with costs to plaintiffs.

Chester RICK et al., Plaintiffs, v. Catherine WEST, Defendant. Supreme Court of New York, Westchester County 34 Misc. 2d 1002; 228 N.Y.S.2d 195, April 24, 1962

OPINION BY: HOYT

[*1003] Plaintiffs, the owners of some 62 acres of vacant land in the Town of Cortland, Westchester County, New York, bring this action against the defendant, the owner of a one-family house situated on a one-half acre parcel conveyed to her by plaintiffs' predecessor in title, for a declaratory judgment to permit the sale of 15 acres from the tract for a community hospital in spite of restrictive covenants limiting the land to residential use.

Plaintiffs' predecessor in title, Chester Rick, in 1946, purchased the tract which at the time was free of restrictions and covenants and subject to no zoning ordinances. Mr. Rick, in 1947, filed in the Westchester County Clerk's office a "Declaration of Covenants,

Restrictions, Reservations and Agreements" which voluntarily imposed upon the 62 acres covenants restricting them to exclusive residential use, with single-family dwellings and provided for elaborate restrictions as to the location of houses, preservation of views, planting and road layout to conform to a community plan, whose purpose and intent was described in the declaration "to establish a community of good character and appeal to people of culture and discriminating taste at a minimum cost". In October of 1955 defendant contracted to purchase from Rick a half-acre lot for the sum of $ 2,000 and in September of 1956 Rick delivered his deed to the defendant conveying said premises, and about a year later defendant built her house upon this lot where she now resides.

In the period between the contract with and the conveyance to the defendant, Rick filed a revision of the declaration of covenants, restrictions and agreements which repeated the original declaration purposes, intent, exclusive residential use, minimum size plot, etc., but deleted a declaration for the construction of bathing and play sites and certain roads, and [*1004] deleted provision for the formation of a community association for plot owners to control such areas. The revision thus indicates that some of the development features originally envisioned were abandoned, but the declaration as revised still clearly restricted the whole tract to residential use with no more than one detached single-family dwelling unit not exceeding one and one-half stories in height on each lot. These restrictions were in effect when the defendant acquired title, and they were referred to in her deed and the proof shows that she discussed these restrictions with Rick when purchasing, and relied upon them, and was influenced by them in deciding to buy the lot and erect and make her home thereon.

A few days prior to Rick's conveyance to the defendant he contracted for the sale of 45 acres of the parcel to an industrialist, the sale being conditioned upon a rezoning of the parcel (the parcel had been zoned residential in 1957)

and a release of the restrictive covenants. A few days after the conveyance to the defendant, Rick made application to the Planning Board for the zoning change and the Planning Board was not advised of the restrictive covenants affecting the premises and the defendant was not notified of the application for a hearing thereon. The Town Board, on the recommendations of the Planning Board, amended the Zoning Ordinance to rezone the 45 acres to light industrial use. The defendant did not release the covenants in her favor affecting the 45 acres and the sale was not consummated.

In 1959 Rick conveyed to plaintiffs the 62-acre parcel, being all the original tract less the plot sold to the defendant and a few other plots sold by him.

In May of 1961 the plaintiffs contracted to sell to the Peekskill Hospital 15 acres from the plot and defendant's refusal to consent to the same is the basis of this litigation.

The original declaration and the revision thereof each contained the identical paragraph eighth. "Eighth: — These covenants and conditions are prepared to clearly indicate the character of the Community to be established, but it is understood that special unforseen conditions may require exceptions in certain cases, which may be permitted by the written consent of the seller providing the spirit and intent of these covenants and restrictions are adhered to."

The plaintiffs contend that the proposed sale to the Peekskill Hospital is a "special unforeseen condition" requiring an exception and the plaintiffs' grantor and the plaintiffs have executed a consent and execution pursuant to said paragraph eighth to permit the erection of the hospital.

[*1005] The plaintiffs further claim that since Rick's acquisition of the property in 1947 the neighborhood and area has changed, that zoning is now in effect where none existed, that a gas transmission line making portions unusable for residential purposes has bisected the property and that a lumber yard, manufacturing and commercial establishments have come into being adjacent to the

property and that because of the changed conditions the declaration and amended declaration imposing these restrictions are no longer enforcible and that the restrictions are of no actual or substantial benefit to the defendant.

A declaratory judgment is sought to permit the sale of the 15 acres for the hospital, to declare the restrictions no longer enforcible or of actual or substantial benefit, and to declare the defendant be limited to pecuniary damages, if any, for any violations of the restrictions.

The plaintiffs called two witnesses to testify as to the pecuniary damages, if any, that might be sustained by defendant were the proposed hospital to be erected. One witness indicated there would be no depreciation in value and the other indicated a $ 5,000 depreciation. In view of the court's ruling, this testimony is not of any significance.

Defendant contends and alleges as an affirmative defense that the plaintiffs' claim should be defeated because of the bad faith shown by Chester Rick. The claim of bad faith is based upon Rick's petitioning to rezone the 45 acres adjacent to defendant's home without defendant's knowledge and without notice to the Planning Board of the existence of the covenants. The court need not consider this to determine that plaintiffs are not entitled to the relief they seek since other grounds more substantial and determinative exist.

Plaintiffs' contention that the written contract of the sellers, herein given, permit exceptions to the covenants and conditions when required by special unforeseen circumstances is untenable. The exception here sought would permit the erection of a hospital on a 15-acre plot on an elevation close to defendant's property toward which elevation the front of defendant's property faces. To sustain this contention would mean that all the covenants and conditions would be subject to repeal by the simple written consent of the sellers. The character and use of the entire 62-acre parcel could thus be changed by the sellers.

The revised declaration, although omitting the original elaborate plans for bathing and play areas and a community

association, repeated the original restrictions that "all plots in the tract of land * * * shall be used exclusively for residential [*1006] purposes and no structure shall be rented, allowed, placed or permitted to remain upon any plot other than one detached single family dwelling".

This paragraph eighth, which plaintiffs would treat as an escape clause, by its very terms shows the unsoundness of that position since it states: "these covenants and conditions are prepared to clearly indicate the character of the community to be established".

Many provisions in the restrictions could be modified without changing "the character of the community to be established," such as minimum lot size, angle of lots or plantings. The written consent of the sellers could waive or modify these provisions. It cannot, however, unincumber a 15-acre tract in the parcel from the residential restrictions.

Plaintiffs contend that substantial changes have occurred in the neighborhood since the filing of the covenants. This, they say, warrants the court in declaring the covenants unenforcible. This contention is equally untenable. The only changes to be considered are those occurring after January 31, 1956, when the revised restrictions and convenants were filed. The gas transmission line and certain commercial establishments which it is claimed changed the neighborhood came into being before the filing of the revised restrictions.

The only changes since the refiling were two commercial establishments not visible from defendant's property and on the far side of a highway not abutting defendant's lot and not even abutting plaintiffs' tract.

There is no evidence of any substantial change in the general neighborhood since the last affirmation of the restrictions and there is no change at all within the parcel owned by the plaintiffs.

In Cummins v. Colgate Props. Corp. (2 Misc 2d 301, 305, affd. 2 A D 2d 749) there is found an enforcement of restrictions on these conditions. Mr. Justice Eager held: "In order that an alleged change in neighborhood shall be a

defense to this type of action, the change must be substantial and such as to support a finding that the usefulness of the covenant has been destroyed. Equity may refuse to enforce a restrictive covenant upon the ground of conditions only where it is established that the change is such that the restriction has become valueless to the property of the plaintiffs and onerous to the property of defendants (see Todd v. North Ave. Holding Corp., 121 Misc. 301, 305, affd. 208 App. Div. 845). * * * Ordinarily where the protected area, itself, has not deteriorated, such covenant is enforcible in equity despite a change in the surrounding area."

[*1007] The rezoning of a large part of the 62-acre parcel to an industrial use, including the area upon which it is desired to build the hospital, and omitting any consideration of the time and manner in which the rezoning was accomplished, cannot be considered as affecting the restrictive covenants (Lefferts Manor Assn. v. Fass, 28 Misc 2d 1005).

The parcel in question would doubtless by its togography and proximity to fast-growing suburban areas make a desirable location for the hospital. The hospital authorities would like to acquire it, and the plaintiffs would like to sell it, and it may be asked why should defendant owning a most respectable, but modest, home be permitted to prevent the sale, or in any event why should the covenants be not determined nonenforcible and the defendant relegated to pecuniary damages.

Plaintiffs' predecessor owned the tract free and clear of all restrictions. He could do with the parcel as he saw best. He elected to promote a residential development and in the furtherance of his plan, and as an inducement to purchasers he imposed the residential restrictions. The defendant relied upon them and has a right to continue to rely thereon. It is not a question of balancing equities or equating the advantages of a hospital on this site with the effect it would have on defendant's property. Nor does the fact that defendant is the only one of the few purchasers from

plaintiffs' predecessor in title who has refused to release the covenants make defendant's insistence upon the enforcement of the covenants no less deserving of the court's protection and safeguarding of her rights.

The opinion of Judge Cardozo in Evangelical Lutheran Church of the Ascension, of Snyder, N. Y. v. Sahlem (254 N. Y. 161, 166, 168) is quoted at length since the questions therein presented are so similar to those in the case at bar.

"By the settled doctrine of equity, restrictive covenants in respect of land will be enforced by preventive remedies while the violation is still in prospect, unless the attitude of the complaining owner in standing on his covenant is unconscionable or oppressive. Relief is not withheld because the money damage is unsubstantial or even none at all (Trustees of Columbia College v. Lynch, 70 N. Y. 440, 453; Trustees of Columbia College v. Thacher, 87 N. Y. 311, 316; Rowland v. Miller, 139 N. Y. 93, 103; Forstmann v. Joray Holding Co., Inc., 244 N. Y. 22, 31; Star Brewery Co. v. Primas, 163 Ill. 652; Lord Manners v. Johnson, L. R. 1 Ch. Div. 673).

* * *

[*1008] "Here, in the case at hand, no process of balancing the equities can make the plaintiff's the greater when compared with the defendant's, or even place the two in equipoise. The defendant, the owner, has done nothing but insist upon adherence to a covenant which is now as valid and binding as at the hour of its making. His neighbors are willing to modify the restriction and forego a portion of their rights. He refuses to go with them. Rightly or wrongly he believes that the comfort of his dwelling will be imperilled by the change, and so he chooses to abide by the covenant as framed. The choice is for him only. Neither at law nor in equity is it written that a license has been granted to religious corporations, by reason of the high purpose of their being, to set covenants at naught. Indeed, if in such matters there can be degrees of obligation, one would suppose that a more sensitive adherence to the demands of plighted faith might be expected of them than

would be looked for of the world at large. Other owners may consent. One owner, the defendant, satisfied with the existing state of things, refuses to disturb it. He will be protected in his refusal by all the power of the law."

For the reasons stated in the above-quoted portion of Judge Cardozo's opinion, and since section 346 of the Real Property Law provides no basis for awarding pecuniary damages when the restriction is not outmoded and when it affords real benefit to the person seeking its enforcement, no consideration can or should be given to any award of pecuniary damages to the defendant in lieu of the enforcement of the restrictions. The plaintiffs, thus, have not established their proof under either cause of action, and are not entitled to the declaratory judgment they seek.

Patrick CROWELL, Appellant, v. Walter L. SHELTON; Trustee of the April 24, 1970 Revocable Inter Vivos Trust of Mildred B. Newlin, as amended June 28, 1989; and the Unknown Heirs, Executors, Administrators, Trustees, Devisees, Successors, and Assigns, Immediate and Remote of Mildred B. Newlin, deceased; and Boston Avenue Methodist Church, Tulsa, Oklahoma, Appellees.

Supreme Court of Oklahoma 1997 OK 135; 948 P.2d 313, November 4, 1997, Filed

OPINION BY: HODGES

[*1] The issue in this case is whether restrictions on the use of land which prohibit commercial and residential development are valid. The trial court rendered summary judgment in favor of the defendants. We find that the validity of such restrictions is dependent on facts not before this Court. Therefore, the trial court improperly found as a matter of law such restrictions valid.

I. Facts

[*2] In June of 1989, Mildred B. Newlin (Ms. Newlin) executed a revocable inter vivos trust naming herself and Walter L. Shelton (trustee) as co-trustees. The trust provided for the distribution of her property upon her death. As part of this distribution, the Boston Avenue United

Methodist Church (the Church), which was not located on Ms. Newlin's property, was to receive approximately 43.9 acres including the residence with the specific restriction that the property not be used for residential or commercial development but that it be used only for religious purposes. The trust also provided that if the Church declined the gift that the property be distributed to Patrick Crowell (Crowell) "with the specific restriction that [all of] said 43.9 acres [would] never be used for residential or commercial development." The trust made no provision for the distribution of the land in the event that Crowell declined the gift.

[*3] Ms. Newlin died October 10, 1992, leaving Delorce Boyington, her niece, as her sole heir at law. The Church declined the gift of the land. Pursuant to the terms of the trust, the trustee conveyed the land to Crowell by a warranty deed. In accordance with the trust instrument, the deed contained the following restrictive provision: "All of said property to be subject to the restriction that the same shall never be used for residential or commercial development." Crowell accepted the deed, was aware of the restrictions, and did not object to them at the time of accepting the deed.

[*4] Crowell brought suit in the District Court of Tulsa County seeking to have the restrictions declared invalid. Thereafter, Crowell filed a motion for summary judgment arguing the restrictions were ambiguous and unreasonable. In the trial court, Crowell sought to introduce parol evidence of Ms. Newlin's intent that only part of the land be restricted. The Church maintained the restrictions were unambiguous, applied to the entire parcel, and were justified. The trustee argued that the material facts showed that Ms. Newlin's intent was clear from the terms of the trust, the restrictions were reasonable and applied to the entire parcel, and the property should remain subject to the restrictions. The Church and trustee (collectively appellees) moved for summary judgment in their favor.

[*5] The trial court found the restrictions to be clear and reasonable and granted summary judgment in favor of the appellees. The Court of Civil Appeals found the restrictions were clear, and parol evidence was inadmissible to determine Ms. Newlin's intent. The Court of Civil Appeals upheld the trial court's decision. This Court granted certiorari.

II. Analysis

[*6] Summary judgment is proper when there is no material issue of genuine fact. Okla. Stat. tit. 12, ch.2, app., rule 12 (1991). In this case there is no genuine issue as to the intent of the testator. However, a material issue of fact exists as to whether the restrictions were reasonable.

[*7] In determining the effect of the language in a trust instrument, the intent of the grantor is paramount when the "intention is not in conflict with established principles of law". In re Testamentary Trust of Dimick, 531 P.2d 1027, 1030, 1975 OK 10. Where the language of the instrument is free from ambiguity, the resort to parol evidence is prohibited, and the intent of the grantor must be ascertained from the terms of the instrument as a whole. Id. In the present case, the intent of Ms. Newlin is clear from the language of the trust instrument. The language of the deed - "all of said property [is] to be subject to the restriction that the same shall never be used for residential or commercial development"— clearly indicates Ms. Newlin did not want any part of the property to be used for residential or commercial development.

[*8] Although Ms. Newlin's intent to restrict the use of the land is clear, the restrictions are in conflict with the following established principle of law. Although not favored, restrictions on "the use of real property . . . will be enforced [only] where . . . the restrictions are confined within reasonable bounds." Christ's Methodist Church v. Macklanburg, 198 Okla. 297, 177 P.2d 1008, 1010 (Okla. 1947).

[*9] In the present case, there is a material dispute of facts as to whether the restrictions were reasonable. "Restrictions

and limitations which may be put on property . . . derive their validity from the right which every owner of the fee has to dispose of his estate." Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751, 755 (Ariz. 1958). Furthermore, one who takes with notice of a restriction affecting it cannot equitably refuse to abide by that restriction. Frey v. Poynor, 369 P.2d 168, 173, 1962 OK 5. Crowell took the deed without objection and with knowledge of Ms. Newlin's intent as reflected in both the deed and her will.

[*10] Conversely, the right to dispose of one's estate is subject to the rule that, "restrictions and prohibitions in the use of real property are not favored by law, . . . and every doubt should be resolved in favor of the unencumbered use of the property." Public Service Co. v. Home Builders Ass'n of Realtors, Inc., 554 P.2d 1181, 1185-86, 1976 OK 120. Whether the restrictions in this case are reasonable depends on several factors not presented to this Court or to the trial court. The record does not establish such material facts as the use of the lands adjoining the property, for what purposes other than commercial and residential development the property could be used, the benefit of the restriction to an individual or the public, and other facts which indicate the reasonableness of the restriction. Because there are material facts in dispute regarding the validity of the restrictions from residential and commercial development, summary judgment was not proper.

[*11] Once the material facts are established, the court must balance the facts and surrounding circumstances of Ms. Newlin's deed to determine if the restrictions are reasonable. If the court finds the restrictions unreasonable, it must then balance the equities and decide "'whether a lesser degree of restraint can be fashioned without impairing the public interest and causing the parties undue hardship.'" Bayly, Martin & Fay, Inc. v. Pickard, 780 P.2d 1168, 1176-77, 1989 OK 122 (Opala, V.C.J., dissenting); see Ceresia v. Mitchell, 242 S.W.2d 359, 364 (Ky. 1951); Raimonde v. Van Vlerah, 42 Ohio St. 2d 21, 325 N.E.2d

544, 547 (Ohio 1975); Wood v. May, 73 Wash. 2d 307, 438 P.2d 587, 591 (Wash. 1968).

[*12] On remand, the trial court is first to determine if the restrictions were reasonable by assessing evidence the use of the land in the area. For example, if the use of the area surrounding the property is comprised of shopping centers, a commercial-development restriction is more likely to be unreasonable than if the surrounding property is made up of residences on large acreages.

[*13] If the trial court determines that the restrictions are reasonable, then they will be upheld. If the trial court determines that the restrictions are unreasonable, then it must balance the equities. In weighing the equities, the trial court may consider such evidence as Ms. Newlin's use of her property including the evidence that she only used one tract of the property as a bird sanctuary. Although not admissible for purpose of constructing the terms of the will, one factor in weighing the equities is Ms. Newlin's intent as to the use of the property after her death.

[*14] In balancing the equities, the trial court may refashion the restrictions so that they are reasonable. For example, the trial court might uphold the restrictions on one tract of land while finding that they are unreasonable as to the remaining tracts. By considering all the circumstances, balancing the equities, and refashioning the restrictions so that they are reasonable, the court gives effect to the deed by enforcing its reasonable terms without completely invaliding the restrictions. Southwest Petroleum Co. V. Logan, 180 Okla. 477, 71 P.2d 759, 765 (Okla. 1937).

[*15] Crowell asserts several other arguments not raised in the trial court. In reviewing the decision of the trial court, we are limited to the record on appeal. Frey v. Independence Fire and Casualty Co., 698 P.2d 17, 1985 OK 25. Like the Court of Civil Appeals, we reject Crowell's effort to raise issues not raised in the trial court and his effort to supplement the record on appeal.

[*16] We conclude, Ms. Newlin's intention was clear in restricting the use of the property from residential and

commercial development. However, because there is a material issue of fact as to the validity of these restrictions, the trial court improperly granted summary judgment. The Court of Civil Appeals' decision is vacated. The trial court's opinion is reversed and the cause remanded.

MALCOLM MATHESON, JR., et al. Appellants, v. METROPOLITAN DADE COUNTY, Appellee. Court of Appeal of Florida, Third District 563 So. 2d 117, May 22, 1990, Filed

OPINION BY: GERSTEN

[*120] Amid the turmoil attendant to living in an urban environment, on an island off an island, called Key Biscayne, there exists a sylvan spot of tranquility—Crandon Park. Key Biscayne, which is actually a barrier island protecting Biscayne Bay from the Atlantic Ocean, was originally owned by a Dade County pioneer family surnamed Matheson. In 1940, the Mathesons gave the people of Dade County, Florida, access to and enjoyment of that portion of Key Biscayne which came to be known as Crandon Park.

The Mathesons' deed to Dade County contained the following simple deed restriction: "for public park purposes only." In spite of the limitation contained in the deed restriction, Dade County took part of the land deeded by the Mathesons and used it for the development of the Lipton International Tennis Center. Two Matheson family heirs, together with residents of Dade County, sought to enjoin the construction of the center for: (I) violating the restriction in the original deed; (2) violating Dade County's Comprehensive Development Master Plan; and, (3) failing to conform to the requirements of state law with respect to review of developments of regional impact concerning a proposed tennis stadium.

The trial court held an evidentiary hearing and found that: (1) appellants were not the proper parties to raise the deed restriction issue; (2) the use of the park for a commercial enterprise did not negate the main purpose of the park

property under these facts; (3) Dade County had complied with its Comprehensive Development Master Plan (CDMP) in the construction of the tennis complex; and (4) "Development of Regional Impact" (DRI) review, as it pertained to the proposed stadium, was outside the ambit of the action. The court issued a final judgment denying injunctive and declaratory relief from: (1) the development of the Lipton International Tennis Center on Key Biscayne; and (2) the holding of the Lipton International Players Championship Tennis Tournament on Key Biscayne. It is from that final judgment that this appeal follows. We reverse.

I. FACTS

In 1940, several members of the Matheson family deeded three tracts of land located [*121] on the northern portion of Key Biscayne to Dade County. This land, consisting of 680 acres, came to be known as Crandon Park. In the recorded deeds, the grantors expressly provided:

This conveyance is made upon the express condition that the lands hereby conveyed shall be perpetually used and maintained for public park purposes only; and in case the use of said land for park purposes shall be abandoned, then and in that event the said [grantor], his heirs, grantees or assigns, shall be entitled upon their request to have the said lands reconveyed to them.

Since that time, several amendatory deeds have been issued by the grantors to allow ancillary uses which may have been otherwise violative of the deed restriction. The additional uses permitted were the construction of public roads, public utilities, and "houses, apartments and facilities for the use of employees engaged in [the] care, maintenance and operation" of Crandon Park. The last amended deed permitted the building of a firehouse on the property. However, the grantors' heirs refused to allow the building of a cable satellite dish. The grantors, their heirs, or assigns, have not waived the deed restriction as to any other construction or use. In 1963, a section of the park was

utilized as a dump. This use was never approved or sanctioned by the grantors, their heirs, or assigns.

In 1986, the Dade County Board of County Commissioners passed Resolution R-891-86, which authorized the execution of an agreement with Arvida International Championships, Inc., (Arvida), and the International Players Championship, Inc., (IPC), to construct a permanent tennis complex. The construction of the court facilities and infrastructure began in the summer of 1986, and terminated in 1987. Initially, the tennis complex consisted of fifteen tennis courts, service roads, utilities, and landscaping, all located on 28 acres.

The agreement provided that for two weeks each year, subject to a renewal provision, the tennis complex would become the site of the Lipton International Players Championship Tennis Tournament (Lipton tournament). This renowned tournament is only open to world class players who compete for two weeks.

In February 1987, the first Lipton tournament was held before approximately 213,000 people. The county manager considered the Lipton tournament to be such a tremendous success that he recommended, and the County Commission approved in Resolution R-827-87, the construction of "Phase II," a permanent clubhouse/fitness facility. This 15,000-to-33,000-square-foot facility was to house locker rooms, training and exercise equipment, meeting rooms, food and beverage concessions, and a sporting goods store. As a result of "community input," the clubhouse was ultimately reduced to 9,800 square feet. This "community input" consisted of informal meetings with residents and one public hearing.

During the four Lipton tournaments held thus far on Key Biscayne, temporary seating has been provided. Appellants contend that a 12,000-seat permanent stadium is part of the future development plans. Although Dade County admits that "[a] stadium is a future possibility," it asserts that "no unified plan of development for a stadium exists, and no approvals or permits for any stadium have been issued."

The record reveals only one public hearing has been held regarding the tennis facilities. In July 1987, a public hearing was held pursuant to section 33-303 of the Metropolitan Dade County Code (1987). Section 33-303 requires a hearing be held before the construction of any new government facility. This hearing involved only the approval of the site plan for the proposed clubhouse. No other public hearing has been held either for the previous construction or the projected stadium.

Although the site is classified as "environmentally sensitive parkland" in Dade County's Comprehensive Development Master Plan (CDMP), no hearings have been held to change that designation in the CDMP. In 1989, the clubhouse was completed.

The facilities are closed to the public for specified periods of time both before and [*122] after the two-week Lipton tournament. Dade County's agreement with the tournament sponsors, Arvida and IPC, gives them control of the tennis complex during what is called the "Tournament Period." The "Tournament Period" is defined in the agreement as the:

three weeks prior to the beginning of the calendar week in which the qualifying rounds of the Tournaments . . . are to be played . . . and continuing until the date occurring one (1) week after the completion of such Tournaments concerned.

In addition, the contract gives the tournament sponsors "reasonably necessary" time before the "Tournament Period" for site preparation. Arvida and IPC are also each afforded 45 days and 30 days, respectively, after the "Tournament Period" for site dismantling.

With respect to the 1987 tournament, the agreement specifically provided for Arvida to have "Priority Use" of the "grandstand and stadium court areas from November 1, 1986 through a period ending 45 days after the conclusion of the Tournament." The agreement defines "Priority Use" as "[t]he unimpaired right of [Arvida and IPC] . . . to

permit, reasonably restrict and control access to the Site . . . ."

Dade County offered testimony at trial that the public was only excluded from using the facilities for some three to four weeks. However, under the clear wording of the agreement, relative to the 1987 tournament, Arvida had the right to exclude the public from the tennis complex for as long as five months.

During the tournament, the sponsors are given most of Crandon Park's parking spaces to provide parking for the tournament spectators. The agreement provides that the "County will designate adequate parking facilities in the currently existing Crandon Park parking areas . . . for Priority Use in connection with the Tournament."

The contract estimated that the parking needs of the tournament would "not exceed 4,000 spaces per day." These 4,000 spaces were not sufficient to satisfy the needs of tournament spectators and other park visitors. At trial, Earl Buchholz, Jr., the tournament operator, testified that tournament spectators parked not only at Crandon Park, but at the Marine Stadium, as well. Correspondingly, Dr. Charles Pezoldt, Deputy Director of Dade County Parks and Recreation Department, testified that during the final Saturday and Sunday of the tournament, the parking lots were temporarily closed to the public.

In 1987 and again in 1988, Dade County attempted to obtain the consent of one of the heirs, Hardy Matheson, for the operation of the Lipton tournament. Hardy Matheson refused to give his consent, and informed the County that the tennis complex and the operation of the Lipton tournament was contrary to the deed restriction.

Appellants, joined by the Friends of the Everglades in an amicus brief, raise three issues on appeal: (1) that the trial court erred in refusing to declare that the placement of the tennis complex and the holding of the Lipton tournament in Crandon Park violated the Matheson family deed restriction; (2) that the trial court erred in ruling that the construction of the tennis complex in Crandon Park was

consistent with Dade County's CDMP; and (3) that the trial court erred in ruling it was premature to require the projected stadium to undergo DRI review and that the tennis complex, including the projected stadium, should be required to undergo DRI review.

Dade County responds that: (1) the tennis facility is consistent with the deed restriction limiting use to a public park; (2) the tennis complex is consistent with its CDMP; (3) any question relating to DRI review is premature; and (4) appellants lack standing to raise the issues they have brought on appeal.

We will address each issue separately.

II. THE DEED RESTRICTION

A. STANDING

Dade County contends appellants do not have standing to enforce the deed restriction. In order to enforce a deed restriction, [*123] plaintiffs must show that they sustained an injury that was greater in degree than that sustained by the general public, Town of Flagler Beach v. Green, 83 So.2d 598 (Fla. 1955); Henry L. Doherty & Co., Inc. v. Joachim, 146 Fla. 50, 200 So. 238 (1941), or that the restriction in the deed was intended for the plaintiffs' benefit, Bessemer v. Gersten, 381 So.2d 1344 (Fla. 1980); Rea v. Brandt, 467 So.2d 368 (Fla. 2d DCA), review denied, 476 So.2d 675 (Fla. 1985).

Two of the appellants, Margaret Matheson Randolph and Malcolm Matheson, Jr., are heirs of the original grantors. The deed by which the land was transferred to Dade County included the provision that in the event the stated purpose was thwarted, "the said [grantor], his heirs, grantees, or assigns" were entitled to have the lands reconveyed to them. Since this restriction in the deed was intended for the benefit of the heirs of the grantors, we conclude that the appellant/heirs have the requisite standing to enforce the deed restriction.

We rule, however, that there exists a lack of standing as to the other appellants to raise the deed restriction issue. These other appellants have not shown that they sustained

an injury greater in degree from that sustained by the general public or that the deed restriction was intended for their benefit. We will therefore determine whether Dade County has violated the deed restriction solely as it pertains to the claims of the appellant/heirs of the grantors.

B. DADE COUNTY'S VIOLATION OF THE DEED RESTRICTION

Appellant/heirs first contend that the construction of the tennis complex violates the deed restriction. As previously stated, the deed provides that the "lands hereby conveyed shall be perpetually used and maintained for public park purposes only."

" In construing restrictive covenants the question is primarily one of intention and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant." Thompson v. Squibb, 183 So.2d 30, 32 (Fla. 2d DCA 1966). Similarly, "the terms of dedications of lands for park purposes where the lands are conveyed by private individuals are to be construed more strictly than is the case where the lands are acquired by the public body by purchase or condemnation." Hanna v. Sunrise Recreation, Inc., 94 So.2d 597, 600 (Fla. 1957).

Appellant/heirs argue that it was the intent of the Matheson family to limit the use of Crandon Park to passive activities such as picnicking, swimming, and the like. We glean no such intention from the language of the deed. Further, the Florida Supreme Court has adopted a very broad definition for what a "park" encompasses. The court has stated:

[A] park is considered not only as ornamental but also as a place for recreation and amusement. Changes in the concepts of parks have continued and the trend is certainly toward expanding and enlarging the facilities for amusement and recreation found therein.

Hanna, 94 So.2d at 601. The court further explained that the permissible uses for a public park include:

[T]ennis courts, playground and dancing facilities, skating, a swimming pool and bathhouse, horseshoe pitching,

walking, horseback riding, athletic sports and other outdoor exercises . . . golfing and baseball . . . parking facilities . . . provided always that a substantial portion of the park area remains in grass, trees, shrubs and flowers, with seats and tables for picnicking, for the use by and enjoyment of the public.

Hanna v. Sunrise Recreation, Inc., 94 So.2d at 601 (quoting McLauthlin v. City and County of Denver, 131 Colo. 222, 280 P.2d 1103 (1955), with approval). We conclude, based on the Florida Supreme Court's broad definition of "park" contained in Hanna, that the construction of the tennis complex did not violate the "public [*124] park purposes only" provision of the deed restriction.

Appellant/heirs next argue that turning the tennis complex over to a commercial operator violates the deed restriction. We do not agree. Florida courts have consistently ruled that commercial benefit does not defeat a park purpose. Hanna v. Sunrise Recreation, Inc., 94 So.2d at 601; State v. Daytona Beach Racing and Recreation Facilities District, 89 So.2d 34 (Fla. 1956); Sunny Isles Fishing Pier, Inc. v. Dade County, 79 So.2d 667 (Fla. 1955).

Finally, appellant/heirs contend that the operation of the Lipton tournament violates the deed restriction because it deprives the public of the use and enjoyment of Crandon Park, including the use and enjoyment of the tennis facilities. We are persuaded by this argument and rule that the holding of the Lipton tournament violates the deed restriction because it virtually bars the public use of Crandon Park during the tournament, and does bar public use of the tennis complex, for extended periods of time.

Courts have unfailingly guarded against encroachments on public parkland where such parkland is under the protection of a deed restriction or restrictive covenant. Fairhope Single Tax Corporation v. City of Fairhope, 281 Ala. 576, 206 So.2d 588 (1968) (construction of civic center or recreation building was not consistent with the dedication that the property be used for "park purposes"); City of Wilmington v. Lord, 378 A.2d 635 (Del. 1977)

(construction of water tower in park violated deed restriction, limiting use of property to "public park purposes"); City of Miami Beach v. Kirsner, 178 So.2d 65 (Fla. 3d DCA 1965), cert. denied, 385 U.S. 920, 87 S. Ct. 231, 17 L. Ed. 2d 144 (1966) (city's use of part of park for a dump violated deed restricting use of area for park purposes); Village of Croton-on-Hudson v. County of Westchester, 30 N.Y.2d 959, 335 N.Y.S.2d 825, 287 N.E.2d 617 (1972) (use of public park for solid waste disposal site violated dedication); Borough of Ridgway v. Grant, 56 Pa. Commw. 450, 425 A.2d 1168 (Commw. Ct. 1981)(placing of firehouse in a public park violated terms of deed restriction).

In ruling that the holding of the Lipton tournament violates the deed restriction, we note that a distinction must be made between "park purposes" and "public purposes." Assuming arguendo that the Lipton tournament is an economic success which brings innumerable benefits to Dade County and its citizens, such an undeniable public purpose is not consistent with a deed restriction mandating the narrower "public park purposes only." See Fairhope Single Tax Corporation v. City of Fairhope, 206 So.2d at 589.

In addition, the word "only" in the deed restriction at issue further buttresses our ruling that the operation of the Lipton tournament, as presently constituted, violates the restriction. As the court in Thompson v. Squibb explained, "the word only' is synonymous with the word solely' and is the equivalent of the phrase and nothing else.'" Thompson, 183 So.2d at 32.

Dade County contends that the tennis complex is consistent with the "public park purposes" restriction provided for in the deed. In support, Dade County argues that the complex is open to the public when the tournament is not being held, the site of the tennis complex utilizes less than 5 percent of Crandon Park, and that a valid park purpose is served by "spectating." Dade County also points to the benefits

derived by Dade County from having the Lipton tournament in Dade County.

Dade County relies on Hanna v. Sunrise Recreation, Inc., 94 So.2d at 597, as support for its contention that the tennis complex is consistent with the deed restriction. The facts of the present action are different from those in Hanna, in which a lessee was given the right to construct and operate golfing, tennis, refreshment, and other recreational facilities on land deeded to the state for "State park purposes." Hanna, 94 So.2d at 600-601. The facilities and use at issue in Hanna were to serve public recreational purposes.

Here, the public, in fact, is deprived from using these tennis facilities for a period of [*125] three to four weeks during the Tournament Period. Further, under the contract as to the 1987 tournament, Arvida had the right to exclude the public for as long as five months.

In addition, the court in Hanna noted that the recreational use "would not amount to an ouster of the public therefrom." Hanna, 94 So.2d at 601. Here, the operation of the Lipton tournament, for all practical purposes, does amount to the virtual ouster of the public from the park for periods of time during the two-week tournament.

The contract gives the sponsors "Priority Use" of the parking areas of Crandon Park during the tournament. The contract estimated that the tournament needs "would not exceed 4,000 spaces per day." The amount of parking spaces was not adequate to meet the needs of tournament spectators and other park visitors as the testimony was uncontroverted that people were turned away from parking lots at the park. There was also uncontroverted testimony that some people found it necessary to park at the Marine Stadium.

We recognize that many legitimate park events, such as softball or golf tournaments, might fill up lots and make it difficult for latecomers to find a parking space at a certain area within the park. This, however, is not simply a case of a filled parking lot within a certain area of the park. The testimony demonstrates that the tournament apparently

takes up all the available public parking spaces at Crandon Park for periods of time during the tournament. This is a public park parking nightmare.

We also recognize that the agreement between the tournament sponsors and the County required the County to provide shuttle services, if necessary, to transport tournament spectators. The parties' agreement, however, provides only for the County's shuttle transportation of spectators from the parking facilities in "Crandon Park parking areas."

In none of the cases which Dade County has cited to this court, see e.g., Ocean Beach Realty Co. v. City of Miami Beach, 106 Fla. 392, 143 So. 301 (1932); Kosanke v. City of St. Petersburg Beach, 256 So.2d 395 (Fla. 2d DCA 1972); Florida Little Major League Association, Inc. v. Gulfport Lion's Little League, Inc., 127 So.2d 707 (Fla. 2d DCA 1961), was the public's use and enjoyment of the public park infringed upon, as in the present case. In Ocean Beach Realty, for example, the plaintiff sued to recover possession of city property which had been conveyed to the city to be used exclusively for park purposes. The city had used a portion of the property to widen an abutting street. The court found that the use of a portion of the property to widen a roadway was not an abandonment of the park purpose. The court found:

The result is to make the park accessible to, and usable by, a greater portion of the public than it would have been accessible to, or could have been used by, had not this improvement been made. . . .

Ocean Beach Realty Co. v. City of Miami Beach, 143 So. at 302. Here, the result in effect, is to make the park inaccessible to, and unusable by the public for periods of time.

Dade County argues that the use of the property as a tennis complex is better than its previous use as a dump. While we agree that a tennis complex in a public park, is better than a dump in a public park, we note that the County's previous use of the site as a dump, was also in violation of the deed

restriction. City of Miami Beach v. Kline, 189 So.2d 503 (Fla. 3d DCA 1966); City of Miami Beach v. Kirsner, 178 So.2d at 65-66. Dade County, in fact, conceded before the trial court that the dump was inconsistent with a public park purpose. We do not congratulate Dade County for shifting from one impermissible use to another.

Finally, Dade County argues, and we agree, that it is well settled that "equity abhors a forfeiture," that "such restrictions are not favored in law if they have the effect of destroying an estate," and that they "will be construed strictly and will be most strongly construed against the grantor." Dade County v. City of North [*126] Miami Beach, 69 So.2d 780, 782-783 (Fla. 1953).

Appellant/heirs, however, clearly represented to this court and the trial court that they were not seeking a reversion. What appellant/heirs want is a declaratory judgment that the present use of the park is in violation of the deed restriction and an injunction to prevent any further erosion of the "public park purposes only" deed restriction.

Florida's declaratory judgment statute gives courts of this state jurisdiction to declare the rights of parties when there is a dispute over the interpretation of a deed. § 86.021, Fla. Stat. (1989). Further, injunctive relief has long been recognized as an appropriate remedy for violation of a deed restriction or restrictive covenant. Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933); City of Miami Beach v. Kline, 189 So.2d at 505-506; Thompson v. Squibb, 183 So.2d at 33-34.

We therefore declare Dade County to be in violation of the deed restriction. We reverse the trial court order as to the deed restriction, and remand for entry of an order enjoining Dade County from permitting the Lipton tournament to proceed as it is presently held. Our ruling does not prevent Dade County from using the tennis complex for tennis tournaments. It merely seeks to insure that in holding such tournaments, public access to the rest of Crandon Park is not infringed; and use of the tennis complex is not denied to the public for unreasonable periods of time.

III. COMPREHENSIVE DEVELOPMENT MASTER PLAN

A. STANDING AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

Dade County contends that appellants have no standing to pursue a CDMP challenge and further argues appellants' CDMP claim is barred for failure to exhaust their administrative remedies. In order to resolve these issues, some background on the laws governing master plans must be provided.

Dade County was required, pursuant to Florida's "Local Government Comprehensive Planning and Land Development Regulation Act," to adopt a comprehensive plan for future development applicable to all of Dade County. §§ 163.3161 - .3215, Fla. Stat. (1989). The purpose of the act is "to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state." § 163.3161(7), Fla. Stat. (1989). CDMP's are approved by the state and local governments, and developments undertaken or approved by local governments are required to be consistent with such master plans. §§ 163.3161, .3194, Fla. Stat. (1989).

In 1984, the Florida Supreme Court clarified the standing requirements for plaintiffs to pursue a master plan challenge under Florida's "Local Government Comprehensive Planning and Land Development Regulation Act." The court held " only those persons who already have a legally recognizable right which is adversely affected have standing to challenge a land use decision on the ground that it fails to conform with the comprehensive plan." Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc., 450 So.2d 204, 208 (Fla. 1984); see also, § 163.3215(1), Fla. Stat. (1989)("[a]ny aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government

from taking action on a development order . . . that is not consistent with the comprehensive plan"). In applying the standing requirements enunciated in Citizens Growth Coalition, the Fourth District Court of Appeal has ruled that property owners whose land adjoined a proposed development and who stood to be directly affected by the development, had standing to pursue a master plan challenge. Southwest Ranches Homeowners Association, Inc. v. Broward County, 502 So.2d 931 (Fla. 4th DCA), review denied, 511 So.2d 999 (Fla. 1987).

[*127] In the present case, we rule that the two appellant/heirs of the grantors have standing to pursue a master plan challenge under the act because they have a legally protected property interest which was directly affected by the County's action. By including language in the deed providing for the grantor, his heirs, grantees, or assigns, to have the property reconveyed to them in the event the stated purpose was thwarted, the grantors created a "reversionary future estate" in land. See R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 3.1, at 91 (1984) [hereinafter cited as The Law of Property]. This future estate is a "presently existing, legally protected property interest." See The Law of Property § 3.1, at 91.

We conclude, however, that the other appellants have not established the requisite standing to raise such challenge. No testimony was offered before the trial court that they were directly or adversely affected by the County's action. Nor did they show that they had a legally recognizable interest in the property. See Citizens Growth Management Coalition of West Palm Beach v. City of West Palm Beach, Inc., 450 So.2d at 208.

We next turn to the administrative remedies issue as it pertains to appellant/heirs. Dade County argues that appellants' CDMP claim is barred because they failed to exhaust their administrative remedies. Dade County contends that since it held the public hearing mandated by the CDMP and appellants failed to raise an objection at the hearing, appellants' CDMP claim is now precluded.

We are not persuaded by Dade County's argument on this point. The public hearing Dade County refers to was held in July of 1987. By the time of the hearing, Dade County had already ripped out the area necessary to construct the tennis complex. The County had also installed tennis courts and parking lots, all without holding public hearings.

Further, the first of the four planned Lipton tournaments had already been held. Since a significant portion of the damage had already been done by the time of the hearing, the administrative remedy available to appellant/heirs could not have afforded adequate or timely relief. Under these circumstances, we conclude that appellant/heirs' CDMP claim is not precluded for failure to exhaust their administrative remedies. See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978); Warner v. City of Miami, 490 So.2d 1045 (Fla. 3d DCA 1986); School Board of Leon County v. Mitchell, 346 So.2d 562 (Fla. 1st DCA 1977), cert. denied, 358 So.2d 132 (Fla. 1978).

Having found that appellant/heirs have standing to pursue their CDMP challenge and that they are not precluded from raising their claim for failure to exhaust administrative remedies, we next determine whether Dade County has violated its CDMP.

B. DADE COUNTY'S VIOLATION OF ITS COMPREHENSIVE DEVELOPMENT MASTER PLAN

Appellant/heirs contend that Dade County failed to comply with the County's CDMP with respect to the development of the tennis complex at Crandon Park. Dade County asserts that it has complied with every requirement, has obtained every permit required, and is not in violation of its CDMP. Dade County further responds that the trial court's ruling that the complex is consistent with the CDMP, is supported by competent, substantial evidence.

The tennis complex is located in a zone, which is designated as "environmentally sensitive parkland" under Dade County's CDMP. The key guidelines for zones designated as environmentally sensitive, provide in part:

Activities which remove organic soils or scarify native rock formations should be minimized to the extent possible and should not disrupt the environmental functions of the zone.
Removal of native vegetation should be minimized, and further removal of bay heads or tree islands particularly avoided.
[*128] No rock pits, borrow pits, roadways, building pads, or other development should be permitted to displace primary nesting, roosting, or feeding habitats for endangered, threatened, or rare wildlife, or species of special concern.
Anthony Clemente, former Director of Dade County's Department of Environmental Resources Management (DERM), testified that he had direct responsibility for applying the County's environmental criteria and for ensuring that the tennis complex was consistent with the County's CDMP. He testified that DERM conducted an evaluation of the proposed tennis complex and found that it would have no significant impact on environmentally sensitive areas, and the complex was consistent with the CDMP.
However, Clemente stated that certain requisite evaluations should have been done, such as the impact of the development on bird nesting and related environmental issues, before commencing construction. Clemente admitted that he could not find these evaluations in the file or verify that they had been completed.
This court has recognized that developments challenged as contrary to master plans must be strictly construed and that the burden is on the developer to show by competent and substantial evidence that the development conforms strictly to the master plan, its elements, and objectives. Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987), review denied, 529 So.2d 693, 694 (Fla. 1988). We find that Dade County has not met this burden of proof. Dade County did not present sufficient evidence to the trial court to demonstrate that the complex conforms strictly to the CDMP, its elements, and objectives. We rule that the

construction of the parking lots, access roads, tennis courts, and clubhouse for the complex cannot be justified under the strict standard of review enunciated by this court in Machado.

We note that the County also argues that the area was improved from an environmental standpoint when Dade County cleaned up the dump site. Assuming this to be true, it still does not establish that the tennis complex is in compliance with the master plan.

Because Dade County has failed to show by competent and substantial evidence that the tennis complex complies with the guidelines for environmentally sensitive zones, as prescribed in the master plan, we find that the tennis complex is in violation of the CDMP. We reverse the trial court order on this point and remand for entry of an order enjoining any further development at the site.

IV. DEVELOPMENT OF REGIONAL IMPACT REVIEW

A. STANDING

Dade County contends that appellants do not have standing to enforce the statutes governing developments of regional impact review, and that enforcement of these statutes vests exclusively in the Florida Department of Community Affairs (FDCA). We do not agree.

Chapter 380 of the Florida Statutes (1989), mandates developments of regional impact to undergo a review and approval process. § 380.06, Fla. Stat. (1989). Nothing in chapter 380, Florida Statutes, however, has abrogated "the rights of citizens to challenge local zoning decisions in circuit court." Friends of the Everglades, Inc. v. Board of County Commissioners of Monroe County, 456 So.2d 904, 909 (Fla. 1st DCA 1984), review denied, 462 So.2d 1108 (Fla. 1985); see Caloosa Property Owners Association, Inc. v. Palm Beach County Board of County Commissioners, 429 So.2d 1260 (Fla. 1st DCA), review denied, 438 So.2d 831 (Fla. 1983). Persons with a legally recognized interest which will be directly affected by a zoning decision have standing to seek declaratory and injunctive relief with respect to the statutes governing DRI. See Friends of the

Everglades, Inc. v. Board of County Commissioners of Monroe County, 456 So.2d at 909; Caloosa Property Owners Association, Inc. v. Palm Beach County Board of County Commissioners, 429 So.2d at 1264-1265.

[*129] We recognize that the appellants who are not heirs of the grantors do not have standing under this test. We conclude, however, as we did with respect to the issue of appellants' standing to raise the violation of the CDMP; that the appellant/heirs do have standing to enforce the statutes governing developments of regional impact. Appellant/heirs are not just citizens who have sustained damages similar to that suffered by the community. Appellant/heirs hold a "reversionary future estate" in the property and they seek to safeguard that estate. See The Law of Property § 3.1, at 91. We will therefore consider whether the tennis complex, including the stadium, should be required to undergo DRI review solely as it applies to the claims of the appellant/heirs…

V. CONCLUSION

We rule that the holding of the Lipton tournament in Crandon Park violates the deed restriction. Accordingly, we reverse the trial court order as to the deed restriction and remand for entry of an order enjoining the holding of the Lipton tournament as it is presently held. In addition, we declare that the tennis complex is in violation of the County's CDMP. We reverse the trial court order on this point and remand for entry of an order enjoining any further development at the site until Dade County is in compliance with its own CDMP.

Further, we declare that the development of the tennis complex was and is subject to DRI review. We therefore reverse the trial court order as to the DRI and remand for entry of an order enjoining Dade County from any further development at the site, unless the development is in accordance with the DRI review and approval process.

It is undisputed that the Lipton tournament and the tennis complex in which it is held serve a public purpose, that it brings tourism to Dade County, and attracts international

and national media coverage, thereby enhancing Dade County's image. Dade County may wish to continue its sponsorship of the Lipton tournament at the tennis complex. It just cannot continue to do so by violating the deed restriction, its own CDMP, or Florida law.

Reversed and remanded with instructions.

DISSENT BY: NESBITT

In 1940, the Matheson family deeded to Dade County some 680 acres on Key Biscayne. The deed contained a restriction which stated that the land was to be used "for public park purposes only." The site, named Crandon Park, over the years has developed into a recreational area offering numerous and varied activities to the public. These include expansive beaches and picnic areas; a marina with a restaurant and bait and tackle shop; a championship eighteen-hole golf course constructed in 1970 with pro shop, locker room/clubhouse, snack bar and restaurant (the site of an annual professional golf championship tournament); boat ramps; bicycle paths; diving facilities; berths for charter deep sea fishing vessels; sports playing fields; an annual professional athletes' "Superstars" competition; and tennis courts. The park also contains maintenance facilities and numerous parking lots. Crandon Park was the site of the Metro Zoo until that attraction moved to new facilities off Key Biscayne in 1980.

In 1986, Dade County undertook construction of a tennis center on twenty-eight acres of Crandon Park. Even though most of the site selected was zoned environmentally sensitive park land, the area had previously been the site of a dump (landfill) and park maintenance yard. The center, initially consisting of fifteen tennis courts, service roads, and utilities, was built after the Board of Dade County Commissioners entered into a license agreement with sponsors of the two-week Lipton International Players Championship Tennis Tournament whereby the center would become the site of a yearly tennis tournament. Over 200,000 spectators have attended each year since the tournament began in 1987.

In 1988, Dade County commissioners proposed that a 33,000 square foot clubhouse, locker room, restaurant, pro shop complex be constructed at the center. After various informal hearings with Key Biscayne residents, as well as a public hearing mandated by section 33-303, Dade County Code, the county decided to reduce the size of the project to a locker room/clubhouse of 9,800 feet. Soon after the county commission authorized this project, several Key Biscayne residents, as well as other Dade County residents and two members of the Matheson family, filed this suit. Plaintiffs sought a declaratory judgment as to whether construction of the tennis center and its use for the Lipton Tournament violated the deed restriction requiring that the park be used for public park purposes only. Moreover, they sought to enjoin the county from further construction at the center based on allegations that the existing center, the approved clubhouse and a proposed 12,000 seat permanent stadium violated the Dade County Comprehensive Development Master Plan and Chapter 380 of the Florida Statutes which governs the grant of permits to build certain developments which will impact the state's natural environment. Plaintiffs requested that the court order the removal of all existing structures and the immediate review of the tennis center's compliance with Chapter 380, Development of Regional Impact requirements.

A hearing was held to decide whether or not the facts and allegations entitled plaintiffs to a temporary injunction. At that hearing, the county moved, and the plaintiffs agreed, to take testimony and evidence in order to make a final disposition of the case. The evidence adduced, viewed in the light most favorable to the county as the prevailing party, will be set out within the discussion of each of the three issues which this case requires us to address.

I. The Alleged Violation of the Deed Restriction

Plaintiffs allege that the tennis center was built strictly for the purpose of accommodating the Lipton Tournament which is a commercial enterprise, and thus the center is a violation of the deed restriction which requires the land

deeded be used for public park purposes only. I agree with the reasoning and holding set forth by the majority that according to Florida law, construction of the tennis complex and the yearly tournament's management by a commercial operator do not defeat the public park purpose. However, I disagree with the majority's holding that the tournament [*135] violates the deed restriction because it a) virtually bars the public's use of the entire Crandon Park facilities during the tournament period and b) does bar the public's use of the tennis complex itself for extended periods of time. I base my disagreement on the evidence set forth in the record.

First, the majority bases its conclusion that the public is denied use of the entire 680 acres of Crandon Park during the two-week tournament on its finding that people who want to attend the park in order to enjoy recreational pursuits other than the tournament cannot find a parking place. My colleagues hold that the tournament "does amount to the virtual ouster of the public from the park for periods of time during the two-week tournament." Slip op. at 13. There is a total lack of competent evidence in the record to support this holding.

Earl Buchholtz, Jr., the tournament organizer, testified that one of the primary reasons the Crandon Park site was selected was because of the parking facilities there. According to the contract between the county and the tournament organizer, the estimated parking needs during the tournament are 4,000 spaces per day to be provided in currently existing Crandon Park lots. The parties agreed that the county is to provide shuttle services to transport spectators from other parking facilities, if necessary, to the site of the event. The contract also provides that the county will provide public transportation to the tournament site from the Vizcaya and Brickell Metrorail stations and other key points in the county.

Dr. Charles Pezoldt, Deputy Director of the Dade County Parks and Recreation Department, testified that essentially four primary parking areas, located to the east side of

Crandon Boulevard, are utilized to park the cars of those attending the tennis tournament. Pezoldt said that during non-tournament times, those lots are used for beach-goers' parking and special activity parking. Pezoldt further testified that park attendance at the time of year the tournament is held (late winter/early spring) is light as compared to the summer time when many people visit the beach. According to his testimony, "Normal use [of the lots designated for tournament parking] is very, very light" during the weeks when the tournament takes place. "That's why the tournament works so well on the site," he said. Pezoldt went on to say that increased park attendance during this light season is "an asset because it's performing a recreational need for the people in the community to enjoy tennis as a spectator and for fulfilling their recreational pursuits."

Pezoldt stated that the county is currently studying parking uses at the park and that if there is a problem the county will modify the amount of parking at the park. He said that one consideration is to have the 600 to 800 volunteers who work at the tournament park off the island and be brought in by bus. He made clear that "the primary use" for the park will remain "the beach or any other recreational use." He emphasized that these activities "will have priority" over parking.

The record shows that on the Saturday and Sunday afternoons of the tournament's final matches of 1987 and 1988, the parking areas which normally serve the beach might have been temporarily full for certain periods with the vehicles of both tournament spectators and beach-goers; however, the testimony was that the lots would reopen as people left and parking became available. There was no testimony that the public was prevented from enjoying the myriad activities which Crandon Park has to offer in addition to the tennis tournament for even one day, much less for the full two weeks the tournament runs. The most that can be said is that for a few hours on two days, people arriving after a certain time of day may have found it

difficult to find parking at the beach lots across from the tennis center site. Many legitimate park events — softball tournaments, professional golf tournaments, the Superstars competition as well as others — might fill up lots and make it difficult for latecomers to find a parking space at a certain area within the park. Accordingly, I emphatically disagree with the majority's [*136] finding that the testimony shows that "apparently all the available public parking spaces at Crandon Park", slip op. at 14, were taken up with the vehicles of tournament goers during certain periods. The record clearly does not prove this. There was absolutely no proof that any Crandon Park facilities were closed due to the tournament or that the public was ousted from any facilities during any time the tournament took place.

In short, the record simply does not support a finding that the deed restriction was violated because the public was ousted from the park; the public can and does use Crandon Park during the tennis tournament. In fact, during the tournament, so many people appear to be using the park that it could be said that a public park "nirvana" is reached. Consequently, I find it incomprehensible that the majority could find that the operation of the tournament amounts to an ouster of the public from Crandon Park.

Second, I disagree with the holding that the record demonstrates that the tournament bars public use of the tennis complex itself for extended periods. The record shows that Dade County controls programming at the tennis center for forty-six weeks of the year and that the commercial operator controls the center program for the other six weeks in order to operate the tournament. Simply because a commercial operator conducts the tennis center program, situated on a mere five per cent of the entire park, for a period of six weeks a year, it cannot be concluded that the tennis center is closed to the public's use during that entire time. Hanna v. Sunrise Recreation, Inc., 94 So.2d 597, 601 (Fla. 1957). It was established at the hearing that spectating at sporting events is one of the most popular

recreational activities in the country. Throughout the tournament itself, while tennis enthusiasts cannot get on the courts and play tennis, spectators can enjoy watching the professional tennis matches which take place for the public's benefit. In its opinion, however, the majority chooses to ignore this evidence completely. Instead, the court holds that the tournament "virtually bars the public use of Crandon Park during the tournament, and does bar public use of the tennis complex, for extended periods of time." Slip op. at 11. This holding is based on a clearly impermissible reevaluation of the evidence. E.g., Marshall v. Johnson, 392 So.2d 249 (Fla. 1980) (appellate court may not substitute its judgment for that of the trial court by reeevaluating the evidence in the cause).

Although the plaintiffs alleged that the tennis complex is totally closed to the public for some eight to nine weeks due to pre-qualifying matches and the set up and take down of commercial booths, bleachers, and other appurtenances, the evidence adduced does not support this statement. According to the terms of the contract between the county and tournament operator, Arvida International Championships, Inc. (AIC), the "Tournament Period," during which time the AIC has full use of the site and facilities runs from three weeks before the qualifying tennis rounds, through the two weeks of the tournament and until one week after the tournament's completion. The tournament itself lasts for two of those six weeks. During the tournament, as the majority found, the center is put to public park use. Consequently, from the face of the contract itself, it appears that the park could feasibly be closed for some three to four weeks while the site is under AIC control but the tournament is not taking place. According to the testimony of tournament chairman Buchholtz, the complex can be utilized forty-nine weeks a year.

Appellants presented two witnesses in an attempt to prove their allegation that the tennis center is closed for public use for eight to nine weeks. Both were Key Biscayne residents who frequently passed by the tennis center site.

One said that the center "was closed for a few weeks before and a period of time after" the tournament. The other said that the courts were closed during the weeks of the tournament. When asked by plaintiffs' counsel if the front gate leading to the center was locked for nine weeks, Deputy Parks and Recreation Director Pezoldt said, "I don't know the exact amount of weeks. I think it was [*137] longer than it will be over time." This evidence does not prove the plaintiffs' allegations. Based on the testimony presented and the unambiguous language of the contract involved, the clear weight of the evidence permitted the trial judge to hold, as he did, that the tennis center is open to the public for forty-eight weeks a year. The remaining ninety-five per cent of the Crandon Park facilities are available to the public at all times.

The record shows that the public flocks to the tournament events, that the tournament operator makes every effort to maintain the courts open to the public during those times when the tournament is being set up and taken down; in sum, that the complex is not inaccessible to the public for eight to nine weeks out of the year. In addition, it is uncontroverted that most of the twenty-eight acre site devoted to the Lipton Tennis Tournament, which comprises some five per cent of the entire park, was previously an illegal dump which has been made accessible and converted to a public park use. Consequently, with the elimination of the dump more usable land has been devoted to the park. The fact that this newly available recreational facility is closed to public use for three to four weeks in order to prepare for a tennis tournament which some 200,000 park-goers can enjoy does not amount to a violation of the deed restriction. The closing of the tennis center to public play for a brief period in order to prepare it for an event that is enjoyed by tens of thousands is most assuredly a fair trade-off. Even if the evidence in this record is considered in a light most favorable to the appellants, rather than the appellees, it will in no way support a determination that the public has been ousted or

will be ousted from the park or the tennis facility. Obviously then, the majority has impermissibly substituted its judgment as to the weight of the evidence presented to the trial court. E.g., Marshall, supra.

II. The Alleged Master Plan Violation

I disagree with the majority's holding that the record lacks competent and substantial evidence, see Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987), review denied, 529 So.2d 693 (Fla. 1988), to prove that the county complied with master plan guidelines for the development of those environmentally sensitive portions of land upon which the tennis center sits. In point of fact, it is questionable whether the Machado strict scrutiny standard of review is even applicable here. Machado applies to situations where a landowner seeks a rezoning which is inconsistent with a master plan's zoning designation. The case at hand does not involve a rezoning. The majority acknowledges that the site at issue, zoned park land, is being permissibly used as park land. The issue here, as it regards the master plan, is whether the park land, concededly environmentally sensitive, was developed in accordance with the master plan's guidelines for such land. Consequently, this case is more analogous to Hillsborough County v. Putney, 495 So.2d 224 (Fla. 2d DCA 1986), which involved a conservation element written into that county's comprehensive plan. There, the court ruled that the standard of review in such cases is whether the zoning authority (county commission) abused its discretion or was clearly erroneous in its decision to approve or disapprove a development. Id. at 226. I would thus apply the abuse of discretion standard here and hold that the trial court acted totally within its discretion in holding that the evidence showed that the Dade County master plan's environmental guidelines have been complied within in the construction of the tennis center up to now.

Nevertheless, even if the Machado strict scrutiny test is applied, plaintiffs did not prove that Dade County violated the master plan. Plaintiffs alleged in their amended

complaint that the property upon which the center stands is not zoned for commercial [*138] use and the use of the property for commercial purposes is incompatible with its designation as an environmentally sensitive area. They allege that this "spot zoning" is inconsistent with the master plan. This allegation will not stand up to scrutiny. In Hanna the supreme court held that private parties may enter contracts to operate public park facilities for commercial profit. 94 So.2d at 601. Furthermore, the court today holds that the tennis center maintains a public park purpose and that its use for commercial benefit does not defeat the added restriction: "For public park purposes only."

A. The Bird Studies

Plaintiffs' only arguable point on the master plan issue is that the county failed to prove that it developed the facility following the strict guidelines contained in the Dade County Comprehensive Development Master Plan for developing environmentally sensitive areas. Relying on Machado, the majority finds that the county failed to prove by competent and substantial evidence that it followed the guidelines. To support this determination, the majority cites the former director of the Dade County Department of Environmental Resources Management (DERM), Anthony J. Clemente, who testified that certain evaluations of the project's impact on bird nesting were required; the majority then states that this witness admitted that he could not find these evaluations in the file or verify their completion. However, a reading of the record demonstrates that Clemente testified only that he could not find the evaluation after looking through one-quarter of the files stacked before him. His perusal of the files on the witness stand was cut short; the record shows that he never had an opportunity to completely search the files. Consequently, this witness's testimony was utterly incompetent to prove any disputed question of fact favorable to the plaintiff.

Furthermore, this evidence is incompetent to permit an inference that if Clemente had been given time to go through all the files, he would not have been able to locate

any study which evaluated the impact of the project on birds. As the witness later testified, at least three evaluations of the center's environmental impact were done: one by Dade County, one by the State of Florida, and another by the federal Corps of Engineers. All of these evaluations recommended that the project permit be granted. Consequently, construing the evidence in the light most favorable to the county as the prevailing party, it must be inferred that the permits would not have been granted if any of these evaluations had found that bird nests and habitats at the old dump site and small surrounding area of mangrove had been observed. Plaintiffs presented no evidence whatsoever to the contrary.

B. Mitigation of Environmental Impact

The record is replete with evidence that the county took extensive measures to mitigate the impact on the environment caused by the tennis center's construction. In fact, much of the environmental concern of the responsible agencies portrayed in the record deals with the sealing off of the landfill and its effect on the water supply rather than with any damage done to wildlife habitats, native vegetation and the like. The unrebutted testimony of Peter Kerwin, Dade County's Chief Engineer for the Parks and Recreation Department and the man in charge of design and construction, was that the cleanup of the dump site actually improved the area from an environmental standpoint.

While 1.89 acres of mangrove which had concealed the dump and maintenance yard from Crandon Boulevard had to be destroyed, the county mitigated this by installing 3.98 acres of seedlings destined to become mangroves in another area within the project boundary. In order to receive permits to undertake the tennis center project, the county was required by the local DERM and the state Department of Environmental Resources (DER) to carry out a mitigation plan which would guarantee the re-seeding and an eighty percent survival rate of new mangroves. The plan

required monitoring on a quarterly basis [*139] over a two-year period by both the DERM and the DER.

Moreover, the county pledged to set aside 220 acres of mangrove growing adjacent to the project site as a conservation area. To insure this, the Corps of Engineers required as a condition of granting its permit that the county furnish the corps with an executed copy of the conservation easement. As a condition of the DER permit, the county was required to submit within ninety days of the permit's grant, the legal documents pursuant to section 704.06, Florida Statutes (1987), necessary to create and enforce the conservation easement of mangroves.

A review of the numerous studies, evaluations, exchange of letters between environmental agencies, and the mitigation plan undertaken by the county to insure compliance with the master plan abundantly supports the trial court's finding that the master plan has not been not violated in the construction of the tennis center up to now. While it is true that monitoring of the project by the DER showed that the county failed to comply with two aspects of its mitigation plan: namely, proper periodic testing of the ground water to insure it had not become contaminated by the sealing of the dump as well as the removal of a pathway crossing a small section of the newly planted mangroves, the county entered into a consent order with the DER to guarantee future compliance with its obligations.

Based on the above facts, I must dissent from the majority's holding that the county is to be enjoined from further development of the tennis center because of its violations of the master plan.

III. The Alleged Regional Impact Review Violation

Finally, I dissent from the holding that the Matheson heirs have standing to require the county to undergo Chapter 380, Florida Statutes, review of the tennis center. According to the clear terms of the applicable statute, only the Florida Department of Community Affairs (FDCA), the state land planning agency, has the power to require a developer, here the county, to undergo a Development of

Regional Impact (DRI) review. § 380.032(1); § 380.06(5)(b), Fla. Stat. (1987). There is no private right to enforce this statutory provision.

The primary legislative intent behind DRI review was to involve local zoning officials and regional and state environmental authorities with property owners and developers in a comprehensive land use review technique which would have as its aim the preservation of Florida's natural resources. Caloosa Property Owners Ass'n v. Palm Beach County Board of County Commissioners, 429 So.2d 1260 (Fla. 1st DCA 1983). As the administrating state agency of Chapter 380, the FDCA monitors developments which meet the statutorily set thresholds defining a development of regional impact. See §§ 380:06(2)(a); 380.0651, Fla. Stat. (1987). When the agency determines that the threshold has been met, it is required by state statute to coordinate an extensive review assessing the regional impact of the project on the natural environment. § 380.06. Carey Lee Rawlinson, Jr., the Coordinator of the Dade County Development Impact Committee, testified that as the coordinator of the development review committee in Dade County, [*140] it is his job to oversee projects, both private and public, to insure that the projects are in compliance with Chapter 380. In this case, the applicable guideline states that any sports facility that will provide more than 10,000 permanent seats requires DRI review. § 380.065l(3)(b)1.b, Fla. Stat. (1987). However, up to now, there has been no request for a permit to build such a stadium even though such a project is planned for the future.

Rawlinson testified that his department questioned whether the tennis center on Key Biscayne would be required to undergo a DRI review. He said, "The state [FDCA] had asked us by telephone call to clarify for them what was presently approved and proceeding for development on the Key in regard to the tennis facility." The county wrote to the FDCA to advise that the clubhouse project had been approved by the Dade County Board of County

Commissioners and that a stadium facility with more than 12,000 permanent seats was projected to be developed at the site at some future time. The county sought to ascertain whether and/or at what point in time DRI review should be undertaken. The FDCA responded that the construction of the clubhouse did not meet the threshold requirements for DRI review; however, the agency reserved its right to require such review should the county seek to obtain a permit to build the stadium. While the majority discusses this letter in terms of whether or not it constitutes a binding letter or preliminary agreement which would permit the county to forever forego any DRI review, the letter is more correctly viewed, as testified to by Rawlinson, as a clearance letter — a determination on the part of the statutorily authorized state agency that the statutorily mandated thresholds for DRI review had not been met as of the date of the letter. At the least, the trial judge who heard and weighed the evidence was clearly permitted to reach this conclusion.

The majority's finding that the May 27 correspondence could not have been a clearance letter because such letters are not provided for by statute or FDCA rule is ingenuous; however, it fails to recognize a well-settled principle of administrative law known as free-form agency action. Agencies, such as the FDCA, commonly use such procedure to transact day-to-day business. "Without summary letters, telephone calls, and other conventional communications, the wheels of government would surely grind to a halt." Capeletti Bros. v. State, Dept. of Transp., 362 So.2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So.2d 1374 (Fla. 1979). Clearly, the "clearance letter" which Dade County received from the FDCA was proper administrative procedure.

Case law holds that in specific instances, certain private parties may have a private cause of action when a development order has been granted or may be able to intervene in a proceeding where the grant of a development permit is being considered; e.g., Friends of the Everglades,

Inc. v. [*141] Board of County Comm'rs of Monroe County, 456 So.2d 904, 909 (Fla. 1st DCA 1984), review denied, 462 So.2d 1108 (Fla. 1985); Caloosa Property Owners Ass'n, 456 So.2d at 1264-1265; however, such is not the case here where the FDCA has determined that no DRI permit proceedings are necessary at this time.

In sum, nothing in Chapter 380 grants a private party the right to pursue a cause of action requesting the courts to require the FDCA to find that DRI review threshold requirements have been met and that DRI review must be undertaken. In this preliminary stage, private citizens are not afforded standing: when the development order is sought, concerned neighbors and the public at large will have a statutorily conferred opportunity to be heard. The administrative action of an agency charged with the enforcement of a statute or rule is entitled to great persuasive force and effect when that action is not in plain conflict with the statute. Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So.2d 987, 989 (Fla. 1985). In this case, the county amply established before the trial judge that it placed the FDCA on notice of its contemplated action and that the agency determined the construction of the clubhouse did not require a DRI permit. For the plaintiffs to argue, and the majority to agree, that DRI review is now required in the face of the FDCA's decision that the project did not trigger the threshold requirements for such review is to say that the state agency was blind to its obligation and oblivious to its responsibility to enforce the statute.

Finally, appellants argue and the majority holds that, in effect, the FDCA did not do its statutory duty and find that the threshold for DRI review has been met because the aggregation rules, detailed in the majority opinion, have in fact been satisfied. The majority states that the construction of the tennis center courts, clubhouse, and proposed permanent stadium are each separate projects which, when considered as a whole, constitute a unified plan of development subject to the aggregation rules which can

require DRI review. As I have set out above, I believe that resolution of this issue is premature; moreover, I disagree that those rules would even be applicable to the specific factual situation before us. The aggregation rules clearly apply to situations where a developer (or developers) is ostensibly planning to build two separate developments which, if considered as the two halves of one whole, would require DRI review. The plain language of the aggregation rules states that the rules apply to "two or more developments." Fla. Admin. Code Chap. 27F-18.003. Those rules contemplate the acquisition and development of distinct pieces of property. They do not address the phases of development on one piece of property. In a situation such as that before us, where the developer intends to develop one piece of property over a period of time, the developer apparently has at least two options if the DRI thresholds may be implicated. He can submit a master plan for the complete development and seek approval and building permits all at once, or he can build those phases of the project which do not trigger the DRI threshold, then seek permission to build those portions which do require DRI review. In the second instance, the developer is building at the risk that his entire project will never reach fruition should a DRI permit be denied. The county has apparently chosen to proceed into the gaping jaws of the FDCA by choosing the second option. It could well be that when a building permit is sought for construction of the stadium, a DRI permit will be denied. This is the risk the county has undertaken. Regardless, the plaintiffs will have their opportunity to voice concerns when a permit to build the stadium is sought. Based on this analysis, the majority's holding that the May 27, 1988 letter the county received from the FDCA is not a binding letter or a preliminary agreement is eminently correct. Of course, the letter is neither of those things because the review process has never been triggered.

In conclusion, I disagree with the majority's decision that the holding of the Lipton Tennis Tournament violates the

deed restriction because I believe the evidence [*142] shows: first, that Crandon Park remains open and accessible to the public at all times during the tournament and, second, that the temporary closing of the tennis center to prepare the site for the tournament does not amount to the public's ouster from that small section of the park much less the remaining ninety-five percent of the park. I further disagree that the construction of the tennis center violates the Dade County Comprehensive Master Plan. The county presented substantial, competent evidence to prove that proper steps were taken, within the dictates of the master plan, to protect the environmentally sensitive aspects of the site. The trial judge did not abuse his discretion in holding that the county complied with environmental guidelines. Furthermore, even applying a strict scrutiny analysis, plaintiffs did not prove Dade County violated the master plan. Finally, I do not believe that the Matheson heirs have standing or that this court has subject matter jurisdiction to require the FDCA, the state agency statutorily mandated to enforce Chapter 380, to undertake a Development of Regional Impact review. The FDCA has ruled that the threshold requirements for DRI review will not be met at least until the county seeks a permit to build the proposed 12,000 seat stadium. I would cede to that agency's authority to interpret the applicable statutes and rules.

In practical terms, the winners of today's decision are the tennis-playing residents of the Key who will continue to enjoy the tennis facility twelve months out of the year. Ironically, however, it is the public that is ousted from complete use of the tennis facility.

Accordingly, I respectfully dissent.