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VIA ELECTRONIC MAIL: **[*abright@monroe.wa.gov, tgathmann@monroe.wa.gov*]**
City Review Staff
City of Monroe
806 West Main St.
Monroe, WA 98272

Re: SAFE HARBOR TRUST 9-Lot Short Plat – Right to Develop 30′ Right of Way

Ladies and Gentlemen:

This firm represents Gary Hajek, in his capacity as the Trustee for the Safe Harbor Trust for Agnes V. Firth ("***Trust***"), in connection with the Trust's application to the City of Monroe ("***City***") for preliminary approval of the proposed 9-lot short plat ("***Short Plat***") of the property located at 16096 174th Drive SE, Monroe, WA ("***Property***"), which Property comprises in whole Snohomish County Assessor Parcel Numbers 270602-004-121-01 ("***North Parcel***") and 270602-004-130-01 ("***South Parcel***").

We understand that the City has asked for confirmation that the Trust has the right to improve the right of way ("***Right of Way***") serving the Property, which Right of Way encumbers the property located at 16150 174th Drive SE, Monroe, WA, Snohomish County Assessor Parcel Number 27060200412000 ("***Servient Property***"). Our view is that the Trust clearly has the unqualified right to improve the Right of Way to serve the Short Plat for ingress, egress and utilities purposes because (i) the Right of Way was legally established for ingress, egress and utilities purposes pursuant to that certain Declaration of Short Subdivision and of Covenants, Snohomish County Planning Department File No. SP308 (6-78), recorded in the Snohomish County Auditor's records ("***Official Records***") under recording number 7809290383 ("***1978 Short Plat***") to serve the entire Property; (ii) that portion of the Right of Way located upon the Servient Property was relocated from its original location to its current location pursuant to that certain Firth Short Plat, City File No. SP 196001, recorded in the Official Records under recording number 9605025005 ("***1996 Short Plat***") with a clear intent to serve the Property; (iii) as the Trust's need to use the balance of the Right of Way is only now just arising, the current use of the Servient Property cannot undermine the Trust's rights in the Right of Way by adverse possession or otherwise; and (iv) there is nothing in the

1978 Short Plat, the 1996 Short Plat, or any other governing document limiting the Trust's right to use the Right of Way for its stated purposes and the Trust's proposed improvement of the Right of Way will not overburden it under applicable Washington law.

The Creation of the Right of Way

The 1978 Short Plat was declared by Charles L. Ames and Katsuka B. Ames and recorded in the Official Records September 29, 1978. The Ames' signatures on the 1978 Short Plat were notarized by Paula Gonzales, a notary public in and for the State of Texas. The Director of Planning for Snohomish County executed the 1978 Short Plat, approved it, and certified that it complied with the conditions as set forth in the then-current Snohomish County Short Subdivision Code. *See* RCW 58.17.060.

The 1978 Short Plat depicts within Lot 1 thereof "Easement A" (referred to herein as "***Easement A***"). Easement A is shown to run from south to north, beginning a at the south line, with 15' on each side of the centerline of the pan handle portion of Lot 1. It then dog-legs to the east such that runs along the east 30' of Lots 1, 2 and 3 beginning at the north line of the pan handle. Beginning on page 7 of 9 of the 1978 Short Plat is the description of "Easement A," providing a relevant part for "[a]n easement 30 feet wide for ingress, egress and utilities over, under and across a strip of land . . . ." The foregoing documentation, depiction and description legally establish "Easement A," under applicable Washington law, as an easement for ingress, egress, and utilities serving all of the lots of the 1978 Short Plat. *See Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442, 444 (1990) (noting that per RCW 64.04.010, an express conveyance of an easement must be made by deed with words which clearly show the intention to give an easement).

Relocation of the Right of Way

In 1996, Robert and Agnes Firth owned Lots 1 and 2 of the 1978 Short Plat and completed the 1996 Short Plat, which divided said Lot 1 into two lots by separating the pan handle (referred to herein as the "***Panhandle Lot***") from the rest of the lot. The 1996 Short Plat does not show the southern portion of Easement A in its original location. Rather, it shows a "30' ROAD AND UTILITY EASEMENT" over the east 30' of the Panhandle Lot and continuing north through Lot 2 of the 1996 Short Plat all the way to the south line of Lot 2 of the 1978 Short Plat.

The provisions of the 1996 Short Plat declare, in relevant part, "[a]n easement 30 feet wide for ingress, egress, and utilities over, under, and across a strip of land [thereafter described] . . . ." The 1996 Short Plat also notes the Firths' intent to relocate Easement A, stating in relevant part: "[r]elocation of the easement shall be shared by the owner(s) of Lots 1 and 2 in this Short Plat in equal proportion." *See Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 671, 343 P.3d 746, 750 (2015) ("In construing easements in a plat, the dedicator's intent controls). It is apparent from the nature of the 1996 Short Plat, and the subsequent residential development thereof, that the purpose of the short plat was to create an additional building lot out of the pan handle lot. The original location of Easement A would have precluded that result, so Easement A was preserved, but relocated to the eastern 30' of the Panhandle Lot. *See id*. at 671. (Noting that the declarant's intent is determined from the marks and lines on the plat itself and in case of ambiguity, from surrounding circumstances). Therefore, taken together, the 1978 Short Plat and the 1996 Short Plat established the 30' Right of Way easement for ingress, egress, and utilities purposes along the east edge of the Panhandle Lot.

Further, the described Right of Way benefits the Property, including both the South Parcel (Lot 2 of the 1996 Short Plat) and the North Parcel (Lot 2 of the 1978 Short Plat), even though the latter is not depicted in the 1996 Short Plat. Under Washington law, easements established pursuant to plats are interpreted and construed with reference to the marks and lines on the plat. *See Roeder Co. v. Burlington N.*, 105 Wn.2d 269, 273, 714 P.2d 1170, 1173 (1986). An easement extending to the end of a servient property is consistent with an intent to serve the adjacent property. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 655, 145 P.3d 411, 416 (2006); *Kirk v. Tomulty*, 66 Wn. App. 231, 240, 831 P.2d 792 (1992).

In *Kirk v Tomulty*, the parties' predecessors in interest entered an agreement in which mutually beneficially easements were granted across their respective properties. The burdened owners used the easement across the benefitted owners' property but sought to interfere with their use of the easement across the burdened property because it was not conveyed in accordance with the Statute of Frauds and was not entirely depicted in the short subdivision creating the parties' lots. Still the court affirmed the existence of the easement and concluded that it was appurtenant to the land outside of the subdivision that created it:

> Even though the map attached to the short plat application did not depict the entire easement, a comparison of the description of the easement with the property description contained in their deeds alone would have revealed that the easement extended all the way to the boundary . . . . While that in itself would not have put the appellants on notice of . . . the easement, ***the fact that the easement was described as extending to the eastern boundary of the subdivision is consistent only with an intent that it serve the adjacent property***. If it were intended merely for access to the lots within the subdivision, there would be no reason for it to extend to the boundary of Moon's property.

Id. at 231, 240-41 (emphasis added).

Here, there are no defects in the creation of the Right of Way and it is depicted in the both the 1978 Short Plat and 1996 Short Plat. There is no question that the owners of all of the property, including the Panhandle Lot, had constructive, if not actual notice of the Right of Way. Further, under *Kirk*, the Right of Way, as relocated, must be construed to serve the North Parcel because it is shown to extend all the way to the north boundary of the South Parcel. If the Right of Way was not intended to serve the North Parcel, there would have been no reason to show it encumber the South Parcel.

The Trust's Rights to Develop the Right of Way Have Not Been Diminished

Based on the foregoing, the Right of Way clearly exists for the benefit of the North Parcel and South Parcel for purposes of ingress, egress, and utilities. The Trust's rights in the Right of Way include the right to improve the entire 30' thereof. *See* Deaver v. Walla Walla Cty., 30 Wn. App. 97, 100, 633 P.2d 90, 92 (1981) (Finding that easement holder had the right to improve the entire 30' easement because there was nothing in the applicable plat indicating an intent to limit the easement holder's use to something less). Here, the 1978 Short Plat expressly contemplates that the Right of Way may be "improved to Snohomish County Standards, and dedicated to and accepted by Snohomish County." It is hard to imagine under these circumstances that the Trust's would not have the right to improve the Right of Way in connection with the proposed 9-lot subdivision unless it had conveyed those rights away (and we have not been presented with any evidence of such a conveyance) or those rights had been terminated through adverse possession by the owner of the Panhandle Lot.

Washington law does not favor termination of easements. *Cole v. Laverty*, 112 Wn. App. 180, 186, 49 P.3d 924, 927 (2002). The Washington State Court of Appeals articulated the rules regarding adverse possession of easements as follows:

> As with any possessive interest in property, an easement can be extinguished through adverse use. In such a case, however, the servient estate owner who seeks to extinguish the easement is already in possession of the property. Consequently, to start the prescriptive period, the adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice. Hostile use is difficult to prove. The servient estate owner has the right to use his or her land for any purpose that does not interfere with enjoyment of the easement. Proper use by the servient estate owner is generally a question of fact that depends largely. If the dominant estate has established use of an easement right of way, obstruction of that use clearly interferes with the proper enjoyment of the easement. However, if an easement has been created but has not yet been used by the dominant estate, adverse use by the servient estate is more difficult to prove. Mere nonuse, no matter how long, will not extinguish an easement. ***During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement's future use. For example, if an easement has been created and no occasion has arisen for its use, the owner of the servient estate may fence the land and that use will not be considered adverse until (1) the need for the right of way arises, (2) the owner of the dominant estate demands that the easement be opened, and (3) the owner of the servient estate refuses to do so***.

Id. at 180, 184-85 (internal citations omitted, emphasis added). *See also Thompson v. Smith*, 59 Wn.2d 397, 403, 367 P.2d 798, 801 (1962) (construction of concrete slab in unused right of way not sufficiently hostile to dominant owner's rights); *Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442, 447 (1990) (noting that the right of the servient estate owner to use property encumbered by an easement during periods of nonuse means that such use is not adverse to the owner of the dominant estate); *Edmonds v. Williams*, 54 Wn. App. 632, 637, 774 P.2d 1241, 1244 (1989) (holding that even construction and maintenance of a fence around a right of way during period of nonuse is not sufficient to constitute adverse possession).

Here, the Trust (and other beneficiaries of the Right of Way) has accessed its properties via a narrow drive and have had no occasion to use the full breadth of the Right of Way.

The use of the Panhandle Lot by its owner within the Right of Way during such period of nonuse did not diminish the Trust's rights in the Right of Way, by adverse possession or otherwise, because such use is not hostile to the dominant estate under Washington law.

Nothing in the Short Plats Limits the Trust's Right to Use the Right of Way

The governing documents establish the 30' Right of Way for ingress, egress, and utilities. It is axiomatic that the Trust, as owner of benefiting properties, has the right to develop the Right of Way to its fullest extent. Further, the language of those documents clearly contemplate the ultimate development of the Right of Way for public road purposes. *See* 1978 Short Plat, paragraph 3; 1996 Short Plat, paragraph 6.

Moreover, Washington law is clear that increased use of an easement commensurate with natural development of the dominant estate will not constitute an overburdening of the easement. *Logan v. Brodrick*, 29 Wn. App. 796, 800, 631 P.2d 429, 432 (1981) (approving lower courts reasoning that increased use of easement was justified in light of local population increase). Here, the Property has been upzoned in accordance with the Growth Management Act to address housing needs arising from the increase in our local population. Certainly, a legal subdivision of the Property is a paradigmatic example of the natural development of the dominant estate.

It is true that the short plats *obligate* all of the property owners taking access from the Right of Way to share in the cost of maintenance, repair, and improvement. However, such obligations are separate and distinct from the *rights* of any such owner or owners acting individually or together to improve the Right of Way. *See Hanson Indus. v. Cty. of Spokane*, 114 Wn. App. 523, 533-34, 58 P.3d 910, 917 (2002) (noting that the rights and obligations under an easement are distinguishable). In other words, neither the Trust, nor any other beneficiary of the Right of Way, can be prevented from improving the Right of Way simply because a servient owner does not want to participate. Any other rule would produce absurd results as a servient owner could, essentially, subvert the declarant's intent for the Right of Way by refusing to satisfy such servient owner's obligations.

Here, the Trust is willing to shoulder the initial cost to improve the Right of Way. In addition, the Trust will establish a homeowners association with respect to the Property to maintain the specific improvements constructed in connection with the proposed

subdivision to the extent the costs exceed the cost to maintain the existing improvements in the Right of Way.

Very truly yours,

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