

Ballard Escrow News

BOUNDARY TREES

By Gregory J. Lawless

Spring Edition, 2008

From the Real Estate Dictionary:

Mineral Rights

Ownership of minerals (coal, gold, iron, etc.) under the ground, with or without ownership of the surface of the land.

Surface Rights

The rights (easements) to use the surface of land, including the right to drill or mine through the surface when subsurface rights are involved.

You may read our newsletters any time at:

www.ballardescrow.com

You would think that trees would have the common decency to recognize surveyed boundary lines, but alas, a tree planted on one person's property has the annoying tendency to grow and if the tree was planted right on a boundary line, eventually the trunk will grow into and over that boundary line. The questions that arise when that happens are: who owns the tree, who can cut the tree and what happens if just one property owner takes matters into their own hands and cuts that tree.

A tree that straddles a boundary line is known as a "boundary tree" and up until approximately six months ago if a lawyer in this state was asked who owns the tree and who can cut it, lawyers in Washington could confidently say "we do not know" because there is no statute and there is no case that defines our law with respect to boundary trees. For reasons that I cannot discern, often that answer was not satisfactory to most clients. Yet it was an honest one because in fact Washington, famous for its trees, did not have a rule of law concerning boundary trees.

Six months ago a case finally made it up to the Court of Appeals on the issue of boundary trees. Unfortunately the rule of law is now going to be made in a case with a moderately ridiculous name, but the fact is the law was established in the Washington case of [Happy Bunch, LLC v. Grandview North](#).

The Happy Bunch, LLC had property which adjoined property held by Grandview North. Along the boundary line and over the boundary line were a number of boundary trees. Grandview North, wishing to develop their property, contacted Happy Bunch to seek their consent to cut the trees. Happy Bunch declined to give that consent. The owner of Grandview North then did the only neighborly thing available to him, he waited until the owners of Happy Bunch went on vacation and then cut all of the boundary trees. The Happy Bunch were not happy about that and brought a lawsuit which they won, ultimately giving us the boundary tree rule.

Washington adopted the rule of law originally crafted in a case decided in Connecticut. The rule in Washington is now that a tree that stands directly on a boundary line is the common property of both parties and that trespass will take place if just one party cuts and destroys a tree without the consent of the other.

continued from page 1

If someone willingly cuts a boundary tree without the consent of their neighbor, the neighbor will be entitled to damages for their share of the tree, as well as triple damages under the Washington State Timber Statute.

I do not know if the new rule in Washington is a victory for landowners or not, but it certainly is a great victory for trees.

EASEMENTS AND MERGER

By Shelley Smith

An easement is a right of use over the property of another. The easement is generally for the benefit of an adjoining owner. The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement. *Black's Law Dictionary Abridged 5th Edition 1983.*

The doctrine of merger refers to the merging of separate estates into common ownership and a pre-existing easement that is extinguished. *Heg v. Alldredge, 124 Wn.App. 297 99 P3 914.* Unless limited by the terms of creation or transfer, appurtenant easements follow ownership of the dominant estate through successive transfers. *Green v. Lupo, 32 Wn.App. 318, 322, 647 P.2d 51 (1982).* The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement. *Clippinger v. Birge, 14 Wn. App. 976, 547 P.2d 871 (1976).*

The courts have held that no particular words are necessary to constitute or grant an easement, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect the purpose, providing the language was sufficiently definite and certain in its terms. *Beebe v. Swerda, 58 Wn. App. 375, supra, at 381, 793 P. 2d 442 (1990).* The Beebe court does not rely on one factor to establish that an easement is intended, but also cites the language used, the description of the easement, and the mention of "covenant running with the land" as consistent with the intent to create an easement.

Closing Teams:

- ◆ *Shelley Smith, assisted by:*

Dawn Schaffer

Maureen Wood

Ariana Davies

- ◆ *Ivy Brunskill, assisted by:*

Krista Williams

- ◆ *Danette Johnson, assisted by:*

Jackie Hegedus

- ◆ *Elmer Ray, assisted by:*

Cindee Johnson

continued from page 2



In *Beebe*, a single owner sold a single piece of property “subject to” an easement for a road which dissected that single piece of property. After some time and several conveyances, the single piece of property was split up into differing lots, all subject to the same easement. Without the easement originally created by the single owner across his own property, some of the successors’ properties would have been landlocked. One of the successors in interest to one of the lots burdened by the easement, argued in court that there could have been no easement created because there was only one estate in existence when the easement came to be. The court in *Beebe*, however, affirmed and found that the easement was properly created, even though no dominant or servient estate existed at the time of its creation.

The most recent decision *Zunino, et al. v. Rajewski*, 140 Wn. App. 215 (2007) involved a case that addresses the fundamental issue of what is necessary to create an easement and held that the document simply did not create the easements because it lacked the required statement of intent to transfer property. In the *Zunino* case, the seller of a large parcel of property divided up the parcel and sold off a number of smaller parcels to successors’ in interest. Prior to each conveyance, the original owner prepared and recorded a “private road and utility easement” reserving the right of access for roads and utilities with the intent to allow the larger property sold (to *Rajewski*) to be further developed into smaller residential parcels. Without the “private road and utility easement,” *Rajewski*’s land would not be suitable for further subdivision as there was no access for roads and utilities. The original owner, when deeding out, had properly shown on each successors’ deed that the conveyance was “subject to” the easement that was recorded earlier. Unfortunately, the original owner had failed to utilize the services of an attorney in drafting the easement, and instead used a county provided form and filled in the blanks. The *Zunino* court has shaken the land development and title insurance process.

Developers, when platting, must impose easements as part of their plan to have a valid subdivision. Further, Washington State statute requires that the easements must be shown on the plat to have a valid subdivision. It seems unlikely that the courts intend to use the doctrine of merger to cause easements to be extinguished when both the dominant and servient estates are in the same owner. The court in *Zunino* was asked to interpret an instrument that was poorly drafted. It was extremely vague and did not contain the basic elements of intent to convey a right in real property. The instrument did not use the word “grant or convey” nor did the instrument state that the easement “runs with the land.” The court in *Zunino* simply affirmed that easements must be drafted with care and the words used to create the easement must clearly show the drafter’s intent to create and convey a right in real property. *Zunino* is distinguishable from *Beebe* in that the document in *Beebe* was properly drafted and did contain sufficient language to establish the owner’s intent to convey their right in real property.

There are several ways that a builder can protect themselves from falling victim to the circumstances in *Zunino*. First, always reserve the easement in the deed out and always show that the successors’ in interest takes title to the property “subject to” the earlier recorded easement. Second, although practitioners may vary in their opinion as to the need to have the Grantee acknowledge the easement in a separate writing, it is always a good idea to include the easement as an Exhibit to the contract of sale on the first deed out from the original owner. Finally, when drafting an easement, laymen should retain the services of a qualified real estate attorney. It is not advisable to rely on documents that may be found at the county offices when using them without the review of a qualified real estate attorney.

Please let us know if you have topics to suggest or questions you’d like answered in our next newsletter!

Please email: Maureen@ballardescrow.com

WRAPAROUND MORTGAGES

By Shelley Smith

Although wraparound mortgages have been relatively non-existent over the past decade, it may be a good time for a discussion on the topic of wraparound financing. Typically, wraparound financing becomes more prevalent in an escalating interest rate environment when borrowers are either unable to qualify for conventional financing or choose to hold onto an existing low interest rate note. Although the Federal Reserve has recently reduced rates to an all time low with no expectation of significant changes to these low rates in the near future, economists do expect that the rates will rise, possibly sharply, as soon as the underlying financial crisis is more stable. Our economy is severely strained by the costs of the war and by the recent financial crisis. To boost the dollar and improve our over-all economy, we expect that the Federal Reserve will raise rates as soon as possible.

In essence, a wraparound mortgage is just like it sounds - a new loan is given whereby the new lender, typically the seller of the property, "wraps" their new purchase money loan around their existing loan of record. The borrower, typically the buyer, then pays one payment to the seller, their new lender, who is then responsible for making the payment to the underlying lender out of payments received under the terms of the new loan.

This type of loan can be very attractive for some borrowers, primarily those who are unable to get conventional financing and are unable to sell their homes without looking at alternate financing options. One must take caution when dealing with wraparound financing, however. Although wraparound financing is a creative way of deal making in some limited circumstances, it is extremely important to understand that the underlying (existing) loan may have a "*due on sale clause*". If the underlying note states that the property may not be sold without paying off the note holder (i.e., the first position bank), then the note is *due on sale*. In this event, the seller of the property will be in default under the terms of their existing loan if they sell the property on a wraparound note without getting consent from the underlying lender (the first position bank).

There are risks to both the buyer and the seller with wraparound financing. For the seller, the risk is losing the property in the event that the existing lender accelerates the debt and forecloses on the property. With today's advanced technology and easy access to information, where anyone can go online and find public record of changes in ownership without the need of paying a title company to prepare a title commitment, lenders may be more likely than in the past to make periodic checks of the public record to confirm that their borrowers have not sold the property in breach of the due on sale provision. Due on sale provisions exist in literally ALL conventionally financed notes and deeds of trust. In the event that the underlying loan does have a due on sale provision and the lender does call the note, accelerate the debt and commence foreclosure, the seller is faced with the prospect of losing their investment. The buyer (the new property owner) is the only party who can cure the debt by refinancing the property and if the buyer is either unwilling or unable to refinance, the seller will be faced with the prospect of advancing payment to cure the underlying debt and then foreclosing on the buyer under the new wraparound debt to regain ownership of the property.

It is also extremely important to note that all parties to wraparound financing may be participants in loan fraud as they are voluntarily and knowingly participating in documentation with the intent of breaching the underlying due on sale provision in order to retain the low interest rate with the expectation of profit. The lender could bring suit for loan fraud against all parties alleging that they intentionally violated the due on sale provisions in the underlying contract with the preparation of documents intended to hide the fact that the property had been sold. To date, we know of only one state that has prosecuted the parties under the theory of loan fraud. It is uncertain whether other states including Washington would elect to pursue legal action against the buyer, seller, escrow agent, attorney, title company or real estate agents who prepared the documents to allow the wrap around financing. The possibility of legal action is certainly within the realm of possibility and should be considered by all parties before entering into a contract involving wraparound financing. Even if the buyer and seller elect to accept the risk of loss involved in wraparound financing, it is possible that the courts could elect to prosecute all participants in the process, not just the buyer and the seller, with extreme penalties including loss of licensing. When advising clients on wrap-around financing, make sure that they have the opportunity to seek legal counsel and that they understand the risks involved.