MEMORANDUM

DATE:August 30, 2009

TO: Judith Maier

FROM: Allison Durazzi

SUBJECT: Beausoleil Cruising Club – Implied Easement

STATEMENT OF FACTS

Paul Gamin comes to us on behalf of Beausoleil Cruising Club, of which he is the president, regarding the club's property in Washington State. The club is concerned because the company that owns the adjoining property, Acme Tool and Die Co., has barred access to the driveway that serves Beausoleil's property.

The lots presently owned by Beausoleil and Acme were purchased in 1971 by Andrew Rolly. Upon purchasing the land, Mr. Rolly built the driveway. In 1983, Mr. Rolly short platted the parcel into lots A and B. He sold lot B in 1985, to Acme's predecessor, and Acme acquired the lot in 1986. Mr. Rolly continued to use the driveway to serve his property.

In 1991, Beausoleil purchased lot A from Andrew Rolly; the club was aware that the driveway was located on Acme's property—indeed, there are lot stakes along the property line. Deeds to the properties are silent on easements, but the driveway has been in continuous use by all owners of the lots since the time it was built.

Beausoleil is a membership club whose members enjoy boating in the Pacific Northwest. The club has enjoyed strong membership since its establishment in 1954. Most of the club's 150 members own some type of boat, ranging in size from 16 to 30 feet and including both sail and power boats. Club members pay annual dues of $100. In recent years, Beausoleil undertook two

projects to upgrade their lot and facilities. In 2004, the club rebuilt the dock at a cost of $52,500. This was financed by club funds and a general membership assessment of $250 per member. In 2005, Beausoleil remodeled the clubhouse at a cost of $50,000. For this project, club members contributed materials and labor, and paid an assessment of $300 per member. Beausoleil incurred no debt for either project.

Acme bought its land to use as a company camp for its employees. Over time, Acme's employees have lost interest in using it.

In 2007, four accidents occurred on the driveway. The total property damage was about $30,000, all covered by insurance, and three people sustained injuries. Two were seriously injured and hospitalized for about two weeks each. The third person was critically injured, hospitalized for six weeks, and has spent several months in a rehab facility. No claims were made against any of Acme's insurance policies, but Mr. Gamin has heard that the third person sought legal counsel and may be considering litigation.

As a result of these accidents, Acme notified Beausoleil in a letter dated September 1, 2008, that they will restrict driveway traffic to only Acme employees in order to prevent an increase to their insurance premiums. The gate was padlocked on September 15, 2008, and has remained locked since then. Beausoleil's members have no access to their property except by way of a steep bank, which vehicles cannot navigate, and over which it is quite difficult for people to climb.

Shortly thereafter, Beausoleil hired the engineering firm Banks & Banks to ascertain the feasibility of building a driveway on the property. The firm determined that there is only one area of the lot where a driveway could be constructed, and it would be at a minimum cost of $150,000. Furthermore, the project would not be straightforward. Part of the slope would have to

be removed. The slope is rock, and will likely have to be blasted away to create a surface flat enough for vehicular traffic. Cutting into the slope will significantly change the surface water drainage, which in turn would cause problems for the adjoining property. This issue must be adequately addressed, and doing so will incur additional expense. Banks also noted its concern about vehicles with boat trailers being able to safely negotiate the 47 degree turn that will be required where the new driveway would meet the boat launch ramp.

To mitigate the concern about the turn into the boat launch ramp, they could move the dock and ramp. Unfortunately, it would be nearly impossible to move them now because of the Shorelines Management Act. The club would be required to obtain permits, a process that requires holding public hearings and preparing an environmental impact statement, adding even more to the project cost.

Building a new driveway on Beausoleil's lot is well beyond the financial reach of the club. After listening to the membership at a club meeting, Mr. Gamin and the other officers concluded that another assessment more than triple the amount of, and so close in time to, the past two assessments is beyond the means of nearly all the club members. Beausoleil has tried to secure financing but no banks are willing to lend funds to the club.

ISSUE

Under Washington's common law doctrine of easements, will the court grant Beausoleil an implied an easement when the alternative for Beausoleil 1) is expensive, starting at $150,000; 2) is only possible in one location that would create surface water drainage problems on an adjoining lot, and require vehicles with boat trailers to negotiate a driveway with a hazardous 47 degree turn in order to reach the boat launch; 3) necessitates a difficult project with engineering

and permitting challenges; and 4) is beyond the financial means of the club members?

DISCUSSION

An easement is a limited interest under which one person is permitted to use another's property in a specific way in connection with his or her own property. Bushy v. Weldon, 30 Wn.2d 266, 269, 191 P.2d 302 (1948). There are several types of unwritten easements; implied easement is one type, and is the subject of this memo. An implied easement requires 1) unity of title and severance; 2) apparent and continuous use benefiting one part of the property to the detriment of the other part prior to the severance; and 3) a certain degree of necessity for the continued use after the severance. Adams v. Cullen, 44 Wn.2d 502, 505, 268 P.2d 451 (1954). Generally, implied easements are not favored by the court because they erode the standard that written instruments "speak for themselves." MacMeekin v. Low Income Hous. Inst., 111 Wn. App. 188, 196, 45 P.3d 570 (2002). The party claiming an implied easement must establish the three elements. MacMeekin, 111 Wn. App. 188, 195. The first element, that of unity of title and severance, is absolutely necessary—if this element is not met, the court does not proceed to consider a claim of implied easement. Adams, 44 Wn.2d at 505-6. The second and third elements aid the court in presuming the intended use of the property and how the separated parts relate to each other. Adams, 44 Wn.2d at 505-6. Depending on how the parts were separated tells the court which type of implied easement is claimed—if the dominant lot is severed first, then the easement is implied by grant; if the servient lot is severed first, the easement is implied by reservation. Adams, 44 Wn.2d at 506.

The first element, unity and severance, is satisfied in this case. Lots A and B were owned as one lot by Andrew Rolly. Mr. Rolly divided the property into two lots in 1983, and sold one of

the lots in 1985 to Western Storage Corporation. Western sold its lot to Acme in 1986. Mr. Rolly sold lot A to Beausoleil in 1991. The second element, apparent and continuous use, is also satisfied. Upon purchase of the lot in 1971, Mr. Rolly built the driveway. From that time until September 15, 2008, the driveway had been used by Rolly, Western, Acme, and Beausoleil. But the third element, necessity, will be disputed by the parties in this case.

Necessity

There are two levels of necessity for the two types of implied easements: reasonable necessity is required for easements implied by grant; a higher level, strict necessity, is required for easements implied by reservation. Adams, 44 Wn.2d at 508 Reasonable necessity is whether the party claiming the easement can, at a reasonable cost, on his or her own property, and without trespassing on her or neighbors', create a an alternative. Berlin v. Robbins, 180 Wash. 176, 189, 38 P.2d 1047 (1934).

Strict necessity is not defined, but it is needed because the court presumes the greater the need for the easement, the more likely the grantor intended to convey the easement. Adams, 44 Wn.2d at 505, 508. Because the grantor is best positioned to protect his or her right to the easement by including it in the deed to the lot of the dominant estate, the court is reluctant to intervene. Adams, 44 Wn.2d 502.

In cases where the courts have found the element of necessity was satisfied, they considered the cost of the alternative, the acceptability of the alternative, the difficulty in creating the alternative, and the claimant's ability to pay for the alternative. See Adams, 44 Wn.2d 502; Evich v. Kovacevich, 33 Wn.2d 151, 204 P.2d 839 (1949); Bushy, 30 Wn.2d 266; Hubbard v. Grandquist, 191 Wash. 442, 71 P.2d 410 (1937); Bailey v. Hennessey, 112 Wash. 45, 191 P. 863 (1920); MacMeekin, 111 Wn. App. 188.

For example, in Adams, the only Washington case involving an easement implied by reservation, hence strict necessity, the court required satisfaction of three factors. There, the claimant's only alternative to a shared driveway would have been construction of a new driveway with a 30 degree slope. Given the steep slope, construction would be very costly and difficult. Finally, the court found that even if the driveway were built, the steep slope would be hazardous in winter months, making it an unacceptable alternative. Adams, 44 Wn.2d 502.

In cases where the courts found reasonable necessity, they considered fewer factors. For example, the court required satisfaction of two factors in Evich. There, the court found that the alternative of paving a walkway around three sides of the house and relocating the rear door would be difficult and that even if the claimant undertook this effort, there would still be an unacceptably narrow space between the claimant's house and the fence at the property line. Evich, 33 Wn.2d at 162.

Similarly, in Bushy and Bailey, the court required satisfaction of two factors. In Bushy, the alternative would have been placing a new driveway on the other side of the claimant's lot. The resulting driveway would be unacceptable because it lacked a view of oncoming traffic; it necessitated destruction of the careful landscaping; and it would significantly devalue the claimant's property. Additionally, the court found that the claimant, a woman of modest means, would likely not be able to pay for the expense of relocating the driveway. Bushy, 30 Wn.2d at 271. In Bailey, the alternative to a shared alleyway for receiving deliveries at a business would have been modifying the front entrance and lowering the floors at great cost to the claimant. Additionally, this alternative would require the front entrance to be used for deliveries and customers alike, resulting in what the court deemed would be an unacceptable loss of income. Bailey, 112 Wash. at 52.

In Hubbard and MacMeekin, the courts required only one factor to be satisfied. In Hubbard, the alternative was again to relocate a driveway, requiring the claimant to fill in the remainder of his lot and move his garage, at great cost. Hubbard, 191 Wash. at 451. In MacMeekin, the alternative proposed was a driveway starting in a parking lot and including three 90 degree turns. The proposal was unacceptable to the court because it would have been difficult for the claimant's caregivers and service vehicles to navigate, and would require the claimant to grant a larger easement to a third party. MacMeekin, 111 Wn. App. at 194, 198, 207.

In cases where the court found the element of necessity was not satisfied, there lacked evidence that an easement was necessary. Rogers v. Cation, 9 Wn.2d 369, 115 P.2d 702 (1941); Silver v. Strohm, 39 Wn.2d 1, 234 P.2d 481 (1951). For example, In Rogers, claimant's property had a creek and well, and could reasonably access water from his own land, therefore did not require use of the water from would-be servient lot. Rogers, 9 Wn.2d at 378-380. In Silver, the claimant's property had two means of ingress and egress at the time of severance, one of which was contained on the claimant's property. The claimant later sold the portion of his property containing his deeded roadway, and claimed an implied easement of a more convenient roadway on another's property. The court found that, although he sold it, the claimant had a reasonable alternative to the claimed easement, and there was not sufficient evidence of reasonable necessity. Silver, 39 Wn.2d at 5-8.

In reviewing Beausoleil's situation, it is clear that Beausoleil will argue it can demonstrate necessity because Mr. Rolly intended the driveway be used by both lot owners. He built the driveway on the flattest part of the lot and connected it to the shoreline. Building a new driveway would incur difficulty, engineering and permitting challenges, great cost, and would trespass on another property because of water drain issues that would stem from creating a flat

enough surface for a new driveway. Moreover, all lot owners, including Mr. Rolly, have used the driveway since it was built.

Beausoleil can argue that policy supports a finding of strict necessity. The court uses necessity as a way to determine the grantor's intent, which is the cardinal consideration in such cases. Here, Rolly's intent is apparent because he built the driveway, then drew the property line knowing the relation of the driveway to the property line. He sold the lot with the driveway, yet continued to use the driveway until he sold his lot to Beausoleil. When Beausoleil purchased the property, it observed the driveway was not on its property, but it, too, continued to use the driveway. Therefore, the grantor's intent is shown and necessity is satisfied.

We can argue that Beausoleil's situation satisfies all four factors considered by the courts in determining necessity. In Bailey, Hubbard, and Evich, the claimants would have to undertake difficult excavations on their lots to make way for the modified entrance, new driveway and new walkway, just as our client would have to blast away the slope to make way for a driveway.

And, just as the claimant in MacMeekin would have to make three 90 degree turns and drive through a parking lot in order to get to his garage, our client would have to direct vehicles with boat trailers to negotiate a 47 degree turn in order to reach the dock and boat launch ramp.

Likewise, in Bushy, the claimant, a woman of modest means, would have to build a new driveway, relocate her garage, and destroy significant, mature, and beautiful landscaping. Our client is similarly positioned, with 150 members who are small boat owners, not wealthy people. A $1,000 assessment to each member would exceed their ability to pay.

In Adams, the claimant would have to build a new driveway with a 45-foot drop from the lot to the street, just as our client would have to blast away the slope, build a new driveway, and negotiate a 47 degree turn to reach the boat launch ramp. Additionally, the existing driveway in

Adams was in place before the lots were divided and its location on the servient lot was and continued to be clearly visible. Similarly, the driveway our client uses was in place before its lot was severed from that of Acme, and its location has been and continues to be clearly visible.

On the other hand, Acme will argue that our clients fail to demonstrate necessity. Mr. Rolly could easily have written the easement into the contract when he severed the lots. Additionally, Beausoleil members have demonstrated their ability to pay for construction assessments, and could do so again.

Acme will also argue that policy does not support finding strict necessity. The easiest way for Mr. Rolly to have demonstrated his intent would have been to write the easement into the contract when he short-platted the lots. He did not, and so there is no intention that his successors in interest would use the driveway.

Acme will argue that our client's situation is similar to those in Silver and Rogers, in which claimants failed to demonstrate necessity. In both Silver and Rogers, the claimants had existing alternatives, the stream and the roadway the claimant sold, which could have been made useable with reasonable expense and effort. Our client can build a new driveway, and at a cost of only $1,000 per club member. Although the project requires some engineering, the experts state the project can be done. Therefore, Beausoleil, like the claimants in Silver and Rogers, has no need for the easement.

In short, Beausoleil can demonstrate satisfaction of the four elements required for strict necessity.

CONCLUSION

The court will probably grant Beausoleil an implied easement. The facts bear out that

Beausoleil's situation satisfies all the elements required to demonstrate strict necessity.

Despite this likelihood, Beausoleil may wish to explore alternatives to litigation. The cost associated with a lawsuit might also be beyond the club's modest financial situation. Therefore, our office may wish to explore with the club possibilities such as purchasing the driveway from Acme, assuming some or all the cost of insuring the driveway, paying the property damage, or negotiating with the accident victim who may be suing Acme.