

# High Vista Special Report – April 12, 2016

## • Introduction

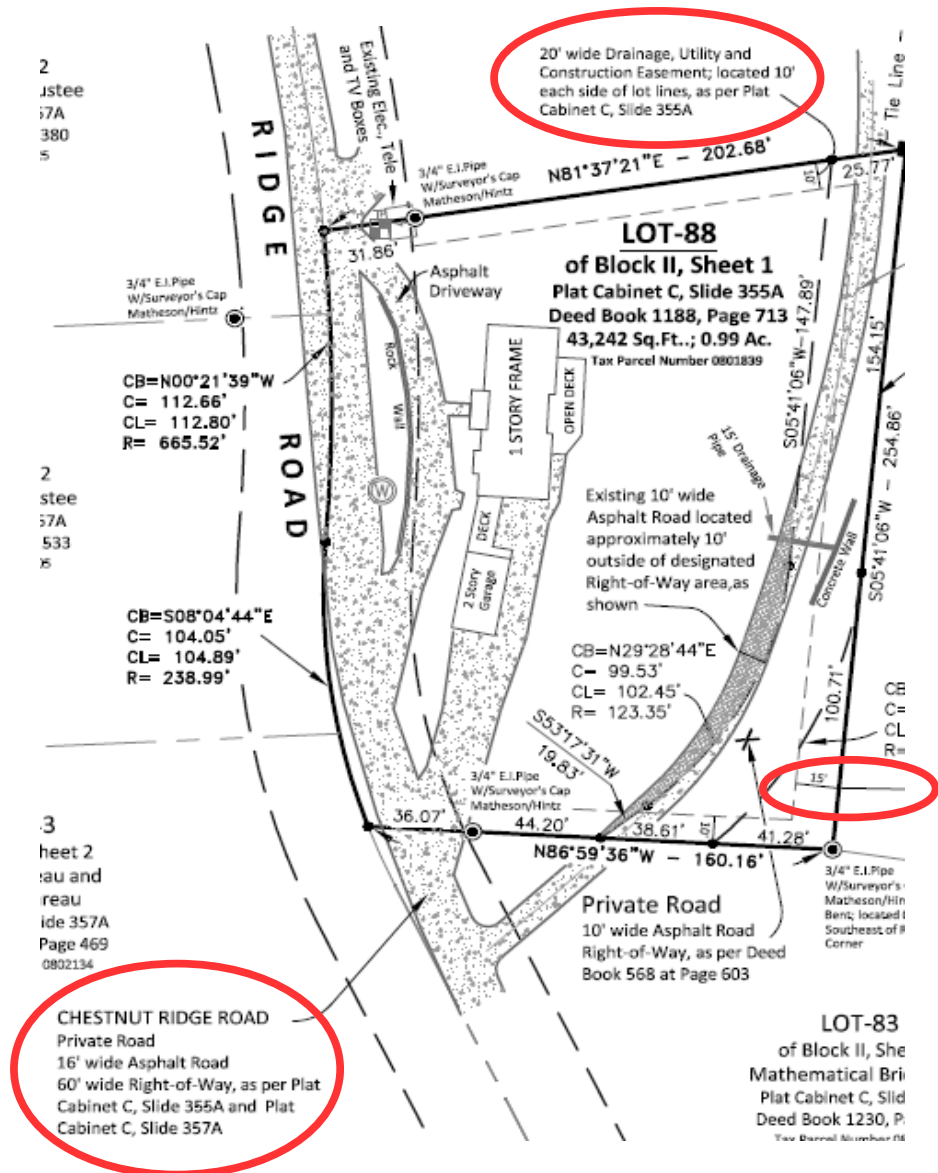
- Mr. Forrest Merithew

## • References

- Plats
- Surveys
- HV HOA Covenants

## • Presentation

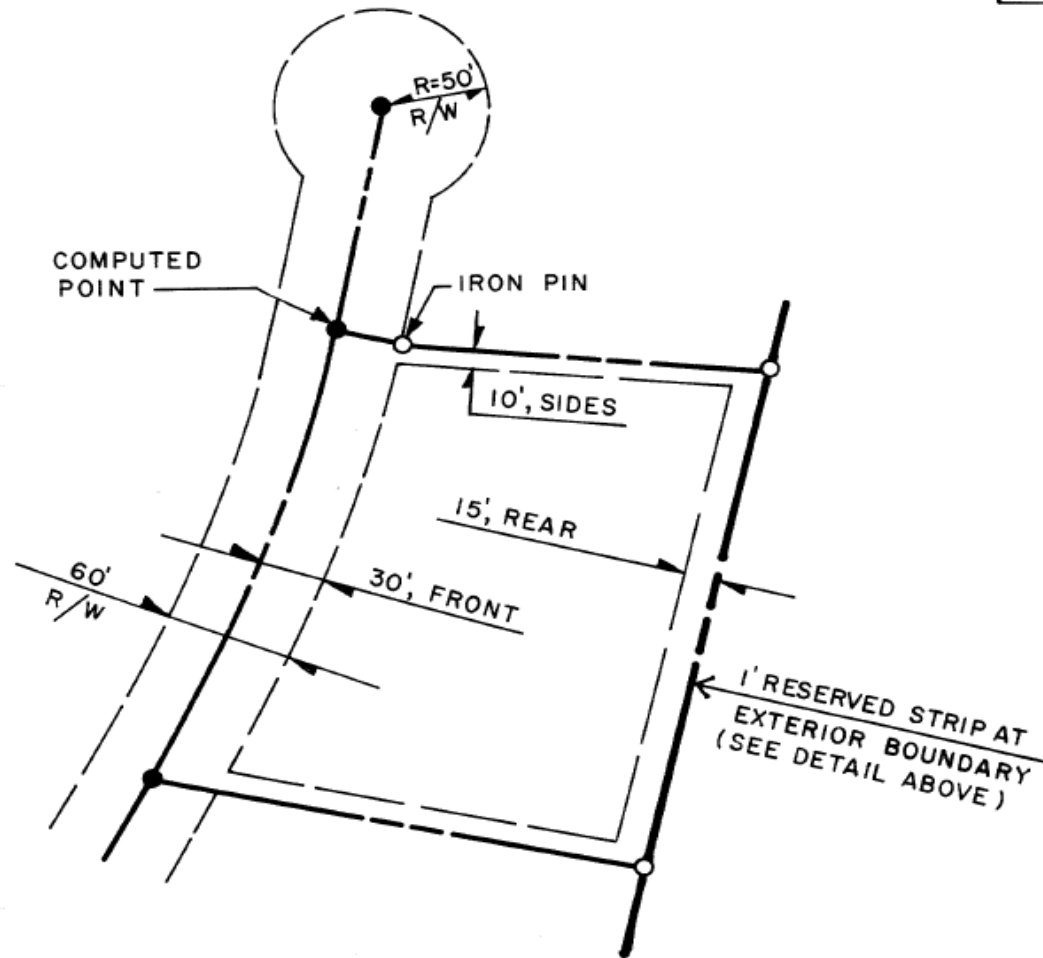
- Easements
- Right of Ways
- Drainage and Utility Easements
- Drainage Maint. Responsibilities
- Conclusion



# References: Plat Example 1/3 (Estates Partial)



# References: Plat Example 2/3



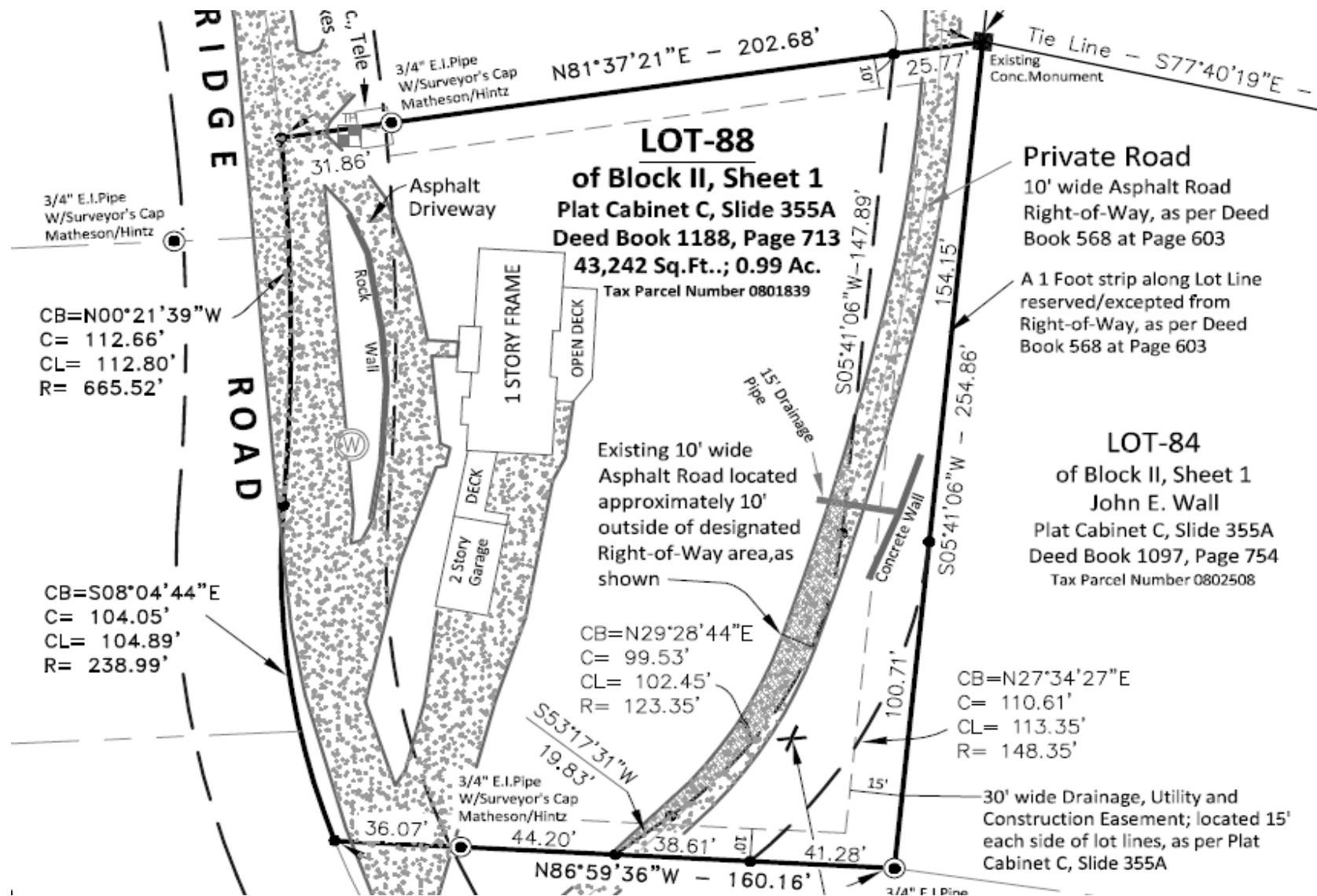
LEGEND  
&  
TYPICAL EASEMENTS

# References: Plat Example 3/3 (Falls)





# References: Lot Survey



# References: Covenants (select)

## COVENANT # 4

## COVENANT #15

## COVENANT #18

Easements for installation and maintenance of utilities, drainage facilities and other public conveniences are reserved as shown on the recorded plat above referred to. Within these easements, no structures, planting or other materials shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of utilities and other public conveniences, or which may change the direction of flow of drainage channels in the easements, or which may obstruct or retard the flow of water through the drainage channels in the easements. The easement area of each lot and all improvements within said area shall be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible. The Association shall have and is hereby granted the right to erect a perimeter fence around portions of or all of the subdivision, such fence to be located along lot property lines abutting such perimeter and the Association is hereby granted such rights of way and access as shall be reasonably necessary to construct and maintain such fence.

## COVENANT #19

# Easements

## Easements:

- Easements are a right reserved in the property someone else owns. Easements do not create an ownership right in the property, but simply a right to access or do something on or with the prescribed area of property, and/or a negative prevention that disallows the property owner from doing something on or with the prescribed section of property.
- The Covenants of High Vista Estates secure easements within the Community for “utilities, drainage and other public conveniences” under Covenant 18.
- In addition to the Covenants, the deeds, surveys and plats of High Vista Estates’ properties contain Right of Way, Drainage, and Utility Easements.
- Covenant 14 discusses that easements may not be encroached or built upon.
- A property owner subject to such an easement cannot build structures or otherwise block easement areas. A property owner will be liable for costs related to clearing or accessing an easement area if it is blocked, and any such obstructions removed will not be replaced by the accessing party. This is further supported by Covenant 18.

# Right of Ways (1/2)

## Right of Ways:

- Right of Ways are easements that allow for transportation and movement over right of way corridor described and outlined.
- The High Vista Estates' property surveys and plats outlined that the roads of the Community have a 60' wide right of way (30 feet to each side of the center of the roadway).
- An important aspect of right of ways are allowing room for emergency vehicle access.
- Movement over a right of way can be vehicular, vehicular travel off the paved roadway is not expected or reasonable, except for emergencies. Use of right of way corridor also includes, walking, walking of dogs, running, biking, etc., unless otherwise specified or limited by right of way grant language or Community Covenants.
- A right of way easement does not allow for others using the prescribed easement corridor to do so in such a way that they cause damage to the actual property (outside of emergency vehicle access and use, which is a big reason for such reservations of



# Right of Ways (2/2)

property/space). If such damage is caused then the user responsible for that damage, or the entity contracting that specific user, remains responsible and liable for such repairs. For example, agents of the HOA may create liability on themselves in their position or to the HOA. Similarly, if someone walks their dog along a right of way, then they are responsible to pick up after the dog.

- However, if damage along the right of way occurs to property, but the source is unknown, then the right of way reservation does not create liability in the HOA or others, it would be viewed as damage to private property just like would occur outside of a planned community.
- Outside of the right to move through the right of way corridor, over a prescribed set of property, the remaining rights lie with the property owner(s), but that owner cannot do anything with that property that is counter to the intention of the easement, particularly having anything on the property that blocks the right of way and, if there is, the property owner is liable for cost to remediate problem. This includes impediments that would not allow emergency vehicle or other free travel over the right of way corridor, or something that could be a danger to people attempting to use the right of way corridor.
- The terms of right of way use can be curtailed or otherwise specified in governance documents, such as Covenants of the Community, through amendment or any other formal processes.

# Drainage and Utility Easements (1/2)

## Drainage and Utility Easements:

- Drainage and Utility Easements reserve the right for the prescribed area of property to be used for the uses and/or access expressly outlined. So, for drainage, the property outlined in an easement is reserved to be used for drainage systems and, similarly, for utility easements that area is reserved to be used for utilities, whether this be installation, maintenance, or simply access.
- A drainage easement reserves the identified section of land for the purposes of drainage. This does not mean that it is simply a route for drainage towards which water flow from private property should be directed, unless there is a system in place to handle such flow constructed by the HOA, or previously by the Developer. That being said, if there are drainage problems on private property along the easement, the HOA should work with property owners to find resolutions for such problems/issues.
- Once drainage systems exist in the outlined drainage easement area, then water can be directed to and through such systems, and the systems, including the maintenance and effect use thereof, is the responsibility of the holder of the easement (i.e. the HOA). It may be important for landowners to work with the HOA to make sure that directed drainage from private property is properly tied into the formal drainage system.
- If owner has placed something in an easement area that prevents use, access or otherwise affects the water flow and results in damage, then that can create liability for the private property owner. Once this situation is known, the HOA should notify property owner of the situation, and require such impediment to be removed and the system to be returned to the normal operating situation that existed before, at the property owner's expense

# Drainage and Utility Easements (2/2)

(also outlined in Covenant 18). If the homeowner does not take such action or refuses to do so, then the HOA should take action and bill the costs to property owner. This may need to be done to avoid further damage downstream.

- If a drainage system has not been created on the land outlined in an easement and/or the property owner has not been made to think that the drainage easement is for the purpose of drainage, then North Carolina's "reasonable use" rule may apply as to between private property owners, which makes one property owner potentially responsible unreasonable water flow onto the private property of another that results in substantial damage.

# Drainage Maintenance Responsibilities (1/3)

## Drainage Maintenance Responsibilities and Resulting Liability:

- While North Carolina has adopted and applies the “reasonable use” rule for surface water rights, the rule is not completely applicable for private communities subject to restrictive covenants and HOA maintenance responsibilities.
- When roads or drainage systems are created by developer for the community and under the responsibility and maintained by a HOA, the HOA is then generally responsible for the upkeep of those systems. Such responsibilities lie with the developer until the authority is transferred over to a HOA entity, from which point forward the HOA takes over those duties.
- Similarly where the HOA installs drainage systems, it is then responsible for those systems.
- Where property developed by developer was then transferred to private property owners, such as driveways, driveway drainage or culverts, and other private property systems, those systems the responsibility of the private property owner. That being said, if the property owners are failing properly maintain those systems adjacent to HOA maintained property, resulting in improper surface water flow and/or drainage, then the HOA can step in and do the work needed, and then bill the property owner the respective cost for such work. This may be important for the HOA to avoid further downstream damages caused by systems which are working improperly upstream.



# Drainage Maintenance Responsibilities (2/3)

- Prior conduct by parties is also used to establish or clarify responsibility for surface water management. In this theme, the HOA for High Vista Estates has historically maintained the roads, ditches, and culverts under and along the public roads of the community. However, the HOA has not maintained culverts under driveways, as the driveways are the property of the private landowners and historically their responsibility to maintain, further supporting that these systems are the responsibility of the respective property owners.
- Another option is that the HOA takes over the maintenance of these culverts (but not driveways) formally by amending its operating documents and increases such assessments or levies a special assessment for the increased costs of doing so.
- Since the HOA is generally responsible for common area, roadway, and drainage easement systems maintenance, it may be liable for any damages caused by failure of

# Drainage Maintenance Responsibilities (3/3)

those systems and/or unreasonable runoff from those common and easement areas, which causes substantial damage to private property.

- When it comes to potential liability, the expectations are that the systems should be maintained with the plan to handle foreseeable and reasonable rainfall and avoid unreasonable or substantial damages. Unforeseen problems or larger than standard rainfall, may not result in liability for the HOA, but simply require the parties to work together on a solution moving forward.
- If a HOA or developer has not established a drainage system in an area under or subject to a drainage easement, any such responsibilities of maintenance or, thereafter, liabilities may not exist for the HOA and instead liabilities for runoff from private property would belong to the property owner.
- Property owners and the HOA need to realize that the HOA is a community group and for the HOA to perform work for the community funds have to be present. If property owners want the HOA to take on responsibilities the cost will have to come from property owners' contribution.

# Conclusion

## CONCLUSION:

- Right of way allows all general use for movement of persons over it, as long as it is not damaging to property or unreasonable. Right of ways cannot be blocked by property owner and if they are the property owner is liable for cost to remediate problem.
- Drainage and utility easements reserve the right for HOA and utility companies to access and use prescribed area for outlined needs and uses, but do not transfer ownership interests. Property owner of parcel subject to easement cannot build structures in easement area and is responsible for costs to remove any other obstacles in easement area if access or use as prescribed is needed.
- HOA and community is responsible for common area, roadway, and drainage system maintenance, including drainage from and along those areas. As such, HOA can be liable when unreasonable surface water and storm water drainage from common areas causes substantial damage to private property. Private property owner is responsible for maintenance of private property and preventing unreasonable surface water runoff and/or drainage from their property.