DISTRICT COURT, COUNTY OF WELD, STATE OF COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631 Court Telephone: 970-351-7300	
Plaintiffs: PRESTON BOLINGER, BLYTHE BOLINGER, DAVE MATHIESEN, BRENDA SHELTON, EDWIN COULTER, DONNA COULTER, GLENN WOLLAM, BONNIE SCHOENSTEIN and THE MILL CREEK SUBDIVISION HOMEOWNERS ASSOCIATION, a Colorado Nonprofit Corporation, v. **Defendants:** WALT DEWOLF, CAROL DEWOLF, DENNIS NEAL, PLAINS VIEW DEVELOPMENT, a Colorado Limited Liability Company, and COLORADO OPEN LANDS, a Colorado Nonprofit Corporation.	**▲COURT USE ONLY▲** Case No. 07CV1084 Division No. 1

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came before the court for a bench trial on January 14, 15, and 16, 2009. Jennifer Lynn Peters and Brett Payton of Otis, Coan & Peters appeared on behalf of the Plaintiffs. Thomas J. Moore, of Warren Carlson & Moore appeared on behalf of Defendants Dennis Neal ("Neal") and Plains View Development ("PVD"). Patrick M. Groom and Timothy P. Brynteson of Witwer, Oldenburg Barry & Johnson appeared on behalf of Defendants Walt and Carol DeWolf (the "DeWolfs"). Laurence W. DeMuth, III, and Jacy T. Rock of Faegre & Benson appeared on behalf of Defendant Colorado Open Lands ("COL").

The court**,** having heard the testimony, received the evidence, viewed the real property that is the subject of this matter, and considered the arguments of counsel and the proposed orders submitted by all parties, and being otherwise fully advised, hereby finds and concludes as follows:

I. BACKGROUND

Plaintiffs have brought two categories of claims. First, Plaintiffs seek a decree quieting title to an easement located on or declaring their rights in real property known as Lot 10, Amended Mill Creek PUD, County of Weld, State of Colorado ("Lot 10"). Second, Plaintiffs seek a judgment for money damages against the developer of the Mill Creek Subdivision located in Berthoud, Colorado for misrepresentation and failure to complete the subdivision.

Prior to trial, the court ruled on summary judgment that whether the Plaintiffs have an easement or a license on Lot 10 and whether the DeWolfs may make changes to that easement or license were issues of fact to be determined at trial. The court found that the terms of the

Conservation Easement were not necessarily inconsistent with the terms of easement claimed by the Plaintiffs. The court stated that if it found that the Plaintiffs were entitled to an easement, the court would order the DeWolfs to comply with the Plaintiffs' easement. As part of that compliance, the DeWolfs would be required to comply with the Conservation Easement.

Defendants COL and DeWolfs contend that the Plaintiffs do not possess an easement on Lot 10 and any rights the Plaintiffs have in Lot 10 are defined by the Recreational Licenses granted to the Plaintiffs by their predecessor in interest and by the conservation easement granted by Dennis Neal ("Neal") to Colorado Open Lands. Because a license is not an interest in real property, they argue that this court has no authority in a Quiet Title action to order a location for the trail or otherwise determine the parties' right of use to whatever trail may exist on the property.

Defendants Neal and PVD raise the same defenses as COL and Dewolfs with regard to the quiet title claims. Defendants Neal and PVD assert general denials and some affirmative defenses to the misrepresentation and breach of contract claims.

II. FINDINGS OF FACT

1. This case arises out the development of Mill Creek Subdivision, a planned unit development (PUD) in Berthoud, Colorado, by Defendant Dennis Neal ("Neal") and his company, Plains View Development, LLC ("PVD"). Neal first worked with Todd Hodges Design, LLC in September 2000 to prepare a conceptual "PUD Sketch Plan Application" ("Sketch Plan") to guide the Development. The Sketch Plan refers to 102 acres of open space, which includes buffer zones and preservation of low lying natural areas. Neal's idea at that time was for the common open space to remain privately owned by the homeowners association. It also points out the potential for a trail should the homeowners' association desire one to be built. It does not define the trail as an "easement." This was not Neal's first subdivision as a developer. He was involved in the development of at least two subdivisions or PUDs before and has been a real estate broker for approximately 25 years.

2. As part of the development of the PUD, Neal obtained a recorded exemption from the county on November 30, 2000. On that day, Neal sold Lot A of that recorded exemption to Plaintiffs Glenn Wollam and Bonnie Schoenstein and reserved Lot B for the PUD. The recorded exemption permitted Neal to separate the parcel with the farm house from the rest of the property. Prior to selling the farm house to Mr. Wollam and Ms. Schoenstein, Neal repeatedly told them that they would have open access to Lot 10 for as long as they owned the property. Mr. Wollam testified that but for this representation, and his review of the PUD Sketch Plan prepared for Neal by Todd Hodges Design, LLC, which depicted the open space and trails to which Mr. Wollam and Ms. Schoenstein would have access, he and Ms. Schoenstein would not have purchased this property.

3. On or about the time that Mr. Wollam and Ms. Schoenstein purchased Lot A, Dennis Neal provided Mr. Wollam and Ms. Schoenstein with a handwritten note that said, "If Weld

County allows the twelve lot subdivision with an outlot to be deaded [sic] to the subdivision, I will make sure that you have access to the outlot also."

4. On December 28, 2001, a Deed of Conservation Easement granted by Dennis Neal to Colorado Open Lands was recorded in Weld County. The Conservation Easement states that the Grantor of the Conservation Easement "may grant access to ten property owners located in the vicinity of the Property comprised of the owners of Lots 1 through 9 of the Mill Creek Subdivision as well as the owner of Lot A . . . (collectively, the "Adjacent Landowners") for recreational uses permitted pursuant to Section 5.D."

5. The Conservation Easement goes on to explain that nothing in the instrument creating the easement "shall be construed as affording the public access to any portion of the Property, although the Grantor may permit access to the Property to the Adjacent Landowners for recreational uses permitted pursuant to Section 5.D."

6. Section 5.D of the Conservation Easement states, "Recreational uses such as bird watching, hiking, horseback riding, mountain biking, cross country skiing, hunting and fishing not inconsistent with the Conservation Values [as defined in the Conservation Easement] are permitted."

7. The Conservation Easement also states:

> Grantor may construct ***non-paved footpaths*** on the Property to be used for permitted recreational uses as described in Paragraph 5.D so long as these improvements are not inconsistent with the protection and preservation of the Conservation Values. ***Grantor shall submit to [COL] for approval proposed locations for footpaths prior to constructing such footpaths.*** Grantee's approval shall not be unreasonably withheld, conditioned, or delayed. Should more than 30 days elapse after [COL's] receipt of ***such written notice from Grantor*** without any response from [COL], the construction of footpaths shall be deemed approved. (Emphasis added).

8. According to the Colorado Secretary of State's website, an official record of which this court takes judicial notice pursuant to Rule 201, C.R.E. Neal formed Plains View Development, LLC (PVD) on February 10, 2003. At least two sets of parties asked the court to take judicial notice of the website in their proposed rulings and no other party has objected to the court doing so. Mill Creek PUD-PF-553 was recorded on March 28, 2003. No trails were shown on the original plat.

9. On April 8, 2003, after recording the first plat, Neal recorded a Declaration of Covenants, Conditions and Restrictions for the Mill Creek subdivision. The Covenants state that the common areas of the subdivision would contain "trails, the ditches, common open space, the entrance area (including a sign and landscaping), and the landscaping and fence and other commonly owned real property and improvements thereon as located and shown on the Plat." The original plat shows a specific design of a sign consisting of sturdy wooden posts and a significant size for the entrance of the "Mill Creek Estates." The Covenants specifically state

that easements for installation and maintenance of trails are reserved as shown on the Plat or may be recorded at a later date, and describe the use of the trails within the subdivision. The Covenants further provided that the Developer "shall install a water conveyance system for the purpose of delivering water to the Commons Facilities." Although the Covenants were recorded after the date Neal formed PVD, the Covenants indicate that the Declarant and Developer of the subdivision is Dennis Neal.

10. On June 9, 2003, Plaintiffs Ed and Donna Coulter ("Coulters") purchased Lot 6 of the Mill Creek Subdivision. Prior to their purchase of Lot 6, Neal represented to the Coulters that they would have open, unfettered access to Lot 10 and that such access was permanent. Mr. Coulter testified that this access was the key component of why they purchased property in this subdivision, and that but for the promises by Neal that this access would be granted, they would not have purchased this property. Mr. Coulter further testified that they had located another property similar in size but without the open space access. This property was valued at $50,000 less than the Mill Creek property. He therefore estimated that he and his wife, Donna, paid a premium of $50,000 for the benefit they expected to receive based on Neal's representations of open access.

11. On August 5, 2004, Plaintiffs Preston and Blythe Bolinger ("Bolingers") purchased Lot 5 of the Mill Creek Subdivision. Neal made specific representations to the Bolingers regarding the fact that their property would come with open, unrestricted access to Lot 10. The Bolingers testified that as with the Coulters and Mr. Wollam and Ms. Schoenstein, the open space access was the primary reason the Bolingers chose to purchase their Mill Creek property. Mrs. Bolinger estimated they paid $80,000 more for this property than others they were considering because of the open space access. The Bolingers expected to receive an $80,000 benefit from the open space when they purchased Lot 5.

12. On August 14, 2004, Neal and PVD recorded the Amended Mill Creek PUD-PF 553 for Mill Creek Subdivision ("Amended Plat") in Weld County. The Amended Plat references several easements, for example a "15' Utility Easement," a "70' Access Easement," and a 30' dedication for a right-of way for Weld County Road 40. The Amended Plat slightly changed the location of the main road into the subdivision to reflect a change in location of the road entering the subdivision required by Weld County. The only other change from the first recorded plat was the notation of a trail location which roughly followed the utility easement around the perimeter of the subdivision. The Amended Plat shows a dashed-line following the utility easement around the subdivision and refers in "Note 10" to a "20.00' wide horse, bicycle & hiking path." It does not indicate who can access the path or whether the path is an easement, right-of-way, or any other kind of property right. Neal also testified that when he had the Amended Plat prepared, he instructed his surveyor, Ken Alles, to go ahead and include the trail on it.

13. Once the Amended Plat was prepared, Neal had each of the then-existing owners in the subdivision come to his office to review and sign it. Despite telling each of them he would be there to answer questions, Neal was not present when the owners came to sign the Amended Plat. The Amended Plat was executed by all of the then-existing owners in the Mill Creek Subdivision, including the Bolingers and the Coulters who believed the Amended Plat did not

affect their rights to access to Lot 10. After approval by the Weld County Planning Commission and the Weld County Board of County Commissioners, the Amended Plat was recorded in the real property records of the Weld County Clerk and Recorder on August 14, 2004.

14. On March 4, 2005, Plaintiffs Brenda Shelton ("Shelton") and Dave Mathiesen ("Mathiesen") purchased Lot 2 of the Mill Creek Subdivision. Prior to the sale, Mr. Mathiesen and Neal were good friends, often spending time together hunting. Mr. Mathiesen described how close they were prior to this dispute arising, and how much he trusted Neal because of their friendship. When Neal told Mr. Mathiesen that he should buy a lot in the Mill Creek Subdivision, an area Mr. Mathiesen knew well from his use of Lot 10 with Neal and with Neal's permission before the subdivision was developed. Neal represented to Dr. Shelton and Mr. Mathiesen that they would have access to Lot 10 as depicted on the flyer Neal showed them. Mr. Mathiesen testified that Neal had explained to him that when PVD sold Lot 10, his access would be limited to a trail around the Lot. Neal even went so far as to draw for Mr. Mathiesen where the trail would be located on Lot 10, drawing the trail as it was depicted on the Amended Plat, looping around the interior ponds. Relying on these representations, Dr. Shelton and Mr. Mathiesen purchased Lot 2. Dr. Shelton testified that they paid a premium of $100,000 for this lot because of Neal's promise of permanent access to the trails.

15. On September 6, 2005, Defendants Walt and Carol DeWolf purchased Lots 7 and 10 of the Mill Creek Subdivision. Neal led them to believe that the other subdivision owners' access to the property would be limited to a trail around the perimeter of the property. In their negotiations with PVD, the DeWolfs conditioned their purchase of Lots 7 and 10 on moving the trail so that it did not circle the ponds, and also that the trail be terminated directly behind their lot so they could have access from Lot 7 to Lot 10 without concern of either gates or interference by other property owners. They were concerned about the liability of people being injured using the trail around the ponds. They also desired to graze horses and raise hay and did not want people to be able to roam around the interior of the lot. Neal, on behalf of PVD, agreed to their demands and prepared the Second Amended Plat, which moved the proposed location of the trail to the perimeter of Lot 10.

16. On or about September 6, 2005, Neal and PVD recorded the Second Amended Mill Creek PUD-PF 553 ("Second Amended Plat") in Weld County. Neal did not sign the Second Amended Plat, did not have it approved by the county, and did not have the other lot owners sign it.

17. On September 6, 2005, Neal PVD recorded two recreational licenses (the "Licenses").

a. One recreation license (the "HOA License") granted to the Mill Creek Subdivision Homeowner's Association (the "HOA") and their members, owners, agents, successors and assigns, "a non-exclusive, renewable, recreational license for reasonable use as a hiking trail of the 20' wide area described on Amended Plat PUD-PF 553, Weld County, Colorado as a horse, bicycle, dog, and hiking path. The HOA immediately forfeited the license if it failed to maintain liability insurance as required by the license, or if it abandoned the Recreation Area (as defined by the license) for a period of one year.

b. The other recreation license granted to Mr. Wollam and Ms. Schoenstein only, and not their successors or assigns, "a non-exclusive, renewable, recreational license for reasonable use as a hiking trail of the 20' wide area described on Amended Plat PUD-PF 553, Weld County, Colorado as a horse, bicycle, dog, and hiking path." Mr. Wollam and Ms. Schoenstein immediately forfeited the license if they failed to pay for one-tenth of the liability insurance premium as required by the HOA License, if they sold Lot A, or if Wollam, Schoenstein, or the HOA abandoned the Recreation Area (as defined by the license) for a period of one year.

18. At or around the same time as Neal sold Lot 2 to Dr. Shelton and Mr. Mathiesen, Neal turned over the management of the Mill Creek Subdivision Homeowners' Association (HOA) to the owners, and appointed Mr. Mathiesen President of the HOA. Neal told Mr. Mathiesen all he had to do was keep the insurance policies paid, which would cover the use of Lot 10.

19. Other than the Licenses, the Amended Plat, Second Amended Plat, and the note from Neal to Wollam, none of the Plaintiffs received anything in writing that could be construed as describing or otherwise confirming the existence of a right in Lot 10.

20. Plaintiffs Shelton and Bolinger did not recall discussing with Neal whether their access to Lot 10 could go away. Plaintiff Bolinger understood that when she purchased her property, she was not paying for a specific right to use Lot 10, but instead received permission to use Lot 10.

21. Plaintiffs admitted that any interest that the Plaintiffs have in Lot 10 is subject to the Conservation Easement, and to COL's rights thereunder.

22. Mo Ewing, the former Director of Land Stewardship at COL testified that he approved a footpath submitted to him by Neal, but at the time Neal requested that Ewing approve the footpath location, Neal did not own Lot 10. Neal did not submit the footpath location to Ewing in writing. Ewing noted that three culverts had been built over the three drainages on the property to make way for the foot/horse path around the property. He noted that Dennis Neal had recorded recreational "leases" with the HOA and Glenn Wollam giving them access to the path and optimistically noted that the path will be constructed that summer. Mr. Ewing made a follow-up visit on April 12, 2006, and noted that a trail had been built around the easement without COL approval.

23. Ewing and Cheryl Wagner, the current Director of Land Stewardship at COL who also testified on behalf of COL, have authority to approve a footpath on behalf of COL. At no time did either of them approve a specific footpath. The testimony of both Ewing and Wagner indicated that a footpath allowed by the Conservation Easement would be nothing more than one-foot wide, single file, dirt or grass path.

24. On May 6, 2006, PVD transferred by Quitclaim deed the "Mill Creek Open Space Mill Creek PUD" and the "20' trail common facility" to the Mill Creek Subdivision Homeowners Association. Under the Covenants, the HOA was now responsible for whatever trail may be on Lot 10.

25. Plaintiffs testified at trial that they expected some sort of continuing access to Lot 10 into the future. Mr. Wollam, Mr. Coulter and Ms. Bolinger testified that they believed it would be open and "unfettered." The Plaintiffs, while acknowledging that some work on a trail may have been done by Neal, assert that no trail was ever fully constructed and there is no trail they can use presently around the perimeter of the property.

III. CONCLUSIONS OF LAW

A. Quiet Title Action.

26. Plaintiffs' only claim against DeWolfs and COL is a quiet title claim. C.R.C.P. 105 authorizes "[a]n action . . . brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession."

27. The plaintiff in a quiet title action bears the burden of establishing title in the property superior to that of the defendant or defendants. *Hutson v. Agricultural Ditch & Reservoir Co.*, 723 P.2d 736, 738 (Colo. 1986); *Hinjos v. Lohmann*, 182 P.3d 692, 697 (Colo. App. 2008). The "plaintiff must rely on the strength of his own title rather than on the weakness in or lack of title in defendants." *Hutson*, 723 P.2d at 738; *Hinjos*, 182 P.3d at 697. To prevail on their quiet title claim against COL and DeWolfs, the Plaintiffs had to show that they not only have a property interest in Lot 10, but also that the property interest is *superior* to COL's and DeWolfs'. Plaintiffs received a license to use Lot 10 and not an easement. Even if they had an easement in Lot 10, it would be subject to the pre-existing Conservation Easement.

28. Plaintiffs have failed to show that they have any property interest in Lot 10. Plaintiffs claim that Neal and/or PVD granted them a 20-foot wide easement for a trail. But any instrument that creates an easement "must identify with reasonable certainty the easement created and the dominant and servient tenements." *Hornsilver Circle Ltd. v. Trope*, 904 P.2d 1353, 1356 (Colo. App. 1995). The language creating the easement must be "sufficiently definite and certain in its terms." *Id*. The mere outline of a path on the Amended Plat does not meet these criteria. Plaintiffs cite to case law that holds, which holds that the intent of the parties determines whether an interest in land is a license or an easement. *See, e.g., Finn v. Saffer*, 208 P. 249, 250 (Colo. 1922). Neal claims he only intended to create a revocable license, and Plaintiffs should have understood this. This court gives no weight to the testimony of Neal on this issue because that he was motivated by his own self interest to sell the lots, he would say anything to get the lots sold, and he made representations and promises to the purchasers that he should have known that he could not keep.

29. The Amended Plat specifically identifies the easements on the Mill Creek Subdivision, such as a 15' Utility Easement, a 70' Access Easement, and a 30' dedication for a right-of way. It does not identify a 20' *easement* for a footpath; it only refers to a "20.00' wide horse, bicycle & hiking path." The only written documents actually describing the Plaintiffs' interest in Lot 10 are the Recreation Licenses. The express language of the Licenses establishes that they are just that- licenses, and not easements. The Conservation Easement, a prior recorded interest to any of

the Plaintiffs' alleged interests only states that the Grantor—Neal—may grant access to Lot 10, but gives no authority to the Grantor to convey a property right in Lot 10. Several Plaintiffs testified that it was their understanding they would have permanent access to Lot 10, but at least two of these same Plaintiffs did not recall conversations with Neal about whether that access could be revoked. In fact one Plaintiff admitted that she did not pay for a property right in but instead merely received *permission* to use Lot 10. The court does not doubt that the Plaintiffs expected various forms of access to the property. It is apparent that many of the Plaintiffs did not have a clear understanding of the distinction between a license and an easement at the time they purchased their lots**.** It is not likely, however, that Plaintiffs paid tens of thousands of dollars more for their property based on a perpetual, irrevocable right in Lot 10 (for a footpath or otherwise), without every obtaining any agreement evidencing this right in writing in a form sufficient to meet the statute of frauds. *See e.g.*, C.R.S. §§ 38-10-106, 108; *Schreck v. T & C Sanderson Farms, Inc.*, 37 P. 3d 510, 513 (Colo. App. 2001).

30. In addition to failing to show they have an easement in Lot 10, Plaintiffs have also failed to show that any property right they might have is superior to COL's right. Plaintiffs have admitted that any interest they have in Lot 10 is subject to COL's rights in the Conservation Easement. Other than Mr. Wollam and Ms. Schoenstein, Plaintiffs purchased their Lots after the recording of the Conservation Easement. The written document that Plaintiffs Mr. Wollam and Ms. Schoenstein offer as evidence of their purported right in Lot 10 does not create any legally enforceable property interest in Lot 10, and Mr. Wollam admitted at trial that COL has a superior right to enforce the Conservation Easement on Lot 10. *See e.g.*, C.R.S. §§ 38-10-106, 108; *Schreck*, 37 P. 3d at 513; *Trope*, 904 P.2d at 1356.

31. The Plaintiffs cite *Allen v. Nickerson*, 155 P.3d 595 (Colo.App.2006), for the proposition that a plat evidencing a common plan of development can operate to create an easement. The Court in *Allen* states, "[a] servitude is created . . . if the owner of the property to be burdened . . . conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community." *Id*. at 598 (citing 1 Restatement (3d) Prop. —Servitudes § 2.1(1)(b)(2000)). The Court goes on to quote further from the Restatement:

> Recording a declaration or plat setting out servitudes does not, by itself, create servitudes. So long as all the property covered by the declaration is in single ownership, no servitude can arise. Only when the developer conveys a parcel subject to the declaration do the servitudes become effective.

Id., § 2.1 cmt. c.

32. *Allen* fails to support the Plaintiffs' argument in several ways. Unlike the property owner in *Allen*, Neal did not have the authority to grant an easement across Lot 10 at the time the Amended Plat was recorded. In the Conservation Easement, Neal reserved the right to grant "*access* to ten property owners located in the vicinity of the Property comprised of Lots 1 through 9 of the Mill Creek Subdivision as well as the Owner of Lot A, #1061-29-3-RE-2835, Weld County . . . for recreational uses permitted pursuant to Section 5.D." (Emphasis added). In addition, even if he had authority to grant an easement, the location, nature, and characteristics of

such easement would be subject to approval by COL. Plaintiffs have failed to show how a plat can create a contingent easement, i.e., an easement contingent upon the approval of a party who is not a signatory on the plat.

33. In addition, while *Allen* stands for the proposition that a declaration of covenants and a recorded plat can create servitudes, the court in that case held that the intent to create a servitude must be unambiguously expressed. *Allen*, 155 P.3d at 600. This holding is consistent with the basic premise that to create an easement, the dominant and servient estates must be clearly defined so as to put subsequent purchasers on notice of burdens to their property. Here, the PUD plat does not clearly identify the dominant and servient estates.

34. Testimony at trial from both Plaintiffs and Defendants was consistent on one general point. It was the Plaintiffs' expectation and Neal's intent to grant *access* to Lot 10. Unfortunately, the precise nature of this access was subject to widely divergent views and the parties' expectations apparently changed over time. Early in the process, Neal apparently intended to own Lot 10, along with another lot on which he would build his home. As the owner of Lot 10, he would be free to permit whatever access to Lot 10 he was willing to give. By the time Neal sold a lot to Plaintiff Mathieson, Neal knew he would not purchase Lots 7 and 10 together for his personal use. Therefore, to fulfill his commitment to the homeowners, Neal drafted the Recreational Licenses to ensure continued, but limited access to Lot 10. The Recreational Licenses reflect the first written evidence of the Neal's intent at the time of execution concerning the grantees' rights in Lot 10, but these licenses are evidence that Neal and PVD did not create an easement in Lot 10.

35. The Conservation Easement—a perpetual and legally enforceable interest in real property—gave to the Plaintiffs and the world notice of the existence of COL's interest in Lot 10. After Neal granted the Conservation Easement, all subsequent purchasers, including Plaintiffs except Mr. Wollam and Ms. Schoenstein, take any interest in Lot 10 subject to the terms of the Conservation Easement. *See* C.R.S. §§ 38-30.5-103(1), (3); -106; -108 (establishing that conservation easements are perpetual and legally enforceable interests in real property that must be recorded); § 38-35-106 (all persons claiming an interest in real property have notice of any written instrument required or permitted to be acknowledged affecting title to real property once the instrument is recorded in the office of the county clerk and recorder where the real property exists).

36. Under the Conservation Easement, Plaintiffs only have the right to unfettered access to Lot 10 if the Grantor—first Neal, and now the DeWolfs—permits, and then only as long as the recreational uses of the property are not inconsistent with the Conservation Values of Lot 10, as defined by the Conservation Easement. Plaintiffs have admitted that they do not have a right to open access to Lot 10.

37. Though Plaintiffs do not have an easement in Lot 10, they have a license to access a footpath of some kind on Lot 10. By the terms of the Conservation Easement, the location and COL must approve characteristics of that footpath before it can be constructed. Plaintiffs failed to prove COL properly approved any footpath. The Conservation Easement requires, "Grantor shall submit to [COL] for approval proposed locations for footpaths prior to constructing such

footpaths . . . . Should more than 30 days elapse after [COL's] receipt of such written notice from Grantor without any response from [COL], the construction of footpaths shall be deemed approved." Mo Ewing, former Director of Land Stewardship at COL, testified that he approved a footpath submitted to him by Neal, but at the time, Neal did not own Lot 10 and therefore was not a legal "Grantor" according to the Conservation Easement's terms. Neal also submitted the footpath location to Ewing verbally, not in writing, as required by the language of the Conservation Easement. Neal's attempts to comply with the terms of the Conservation Easement by discussing a possible footpath with Ewing orally failed because he did not submit his proposal in writing and he was not the legal Grantor at the time.

38. As the current owners of Lot 10, the DeWolfs are the current "Grantors" under the terms of the Conservation Easement. Any footpath constructed on Lot 10 must be submitted by the DeWolfs as the Grantors to COL for approval. Though neither has approved a footpath, the testimony of both Ewing and Wagner indicated that any footpath allowable under the Conservation Easement would be nothing more than a one-foot wide dirt or grass path. Plaintiffs may only access Lot 10 if their access complies with the Conservation Easement, which requires the DeWolfs to submit for COL's approval the design of any footpath constructed on the lot.

39. In addition to arguing that the PUD plats created an express easement, the Plaintiffs also argue that the court could imply an easement by estoppel, citing the Restatement (Third) of Property—Servitudes:

> If injustice can be avoided by the establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:
>
> 1. The owner or occupier permitted another to use that land under circumstances in which is was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or
>
> 2. The owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.

Restatement (3d) of Property; Servitudes, § 2.10.

40. However, the Restatement cautions, "Courts should be very cautious in establishing servitudes on the basis of estoppel because they tend to penalize neighborly cooperation, and they undercut the policies encouraging the use of written documents for land transactions."

41. While the Plaintiffs may be disappointed that their access to the trail is limited to a license rather than an easement, the court need not imply an easement to avoid the kind of grave injustice contemplated by the Restatement. No such implied easement can be imposed upon COL because its conservation easement predates all but Mr. Wollam and Ms. Schoenstein's lot purchase. As owners of the existing easement, COL made no representations to Mr. Wollam and Ms. Schoenstein. Furthermore, The DeWolfs, as the owners or occupiers of the property, never represented that the land was burdened, or permitted the plaintiffs to use the land in any way contemplated by the Restatement. In addition, it would be unjust to penalize the DeWolfs, as subsequent purchasers, with an easement or burden which was not of record when they purchased.

42. In conclusion, Plaintiffs do not possess an easement in Lot 10 but Plaintiffs have a license to use Lot 10.

B. Neal and PVD Liability

43. In addition to the quiet title action, Plaintiffs have brought claims for fraudulent misrepresentation and breach of contract against Neal and PVD. Plaintiffs base their fraudulent misrepresentation claims on the alleged false representations of Neal and, by extension, PVD. To the Bolingers, the Coulters, and Mr. Wollam and Ms. Schoenstein, Neal and PVD allegedly represented he would grant them open, unfettered access to Lot 10, which they did not receive. Neal and PVD allegedly represented to Dr. Shelton and Mr. Mathiesen that they would have access to a specific type of trail in the location depicted on the Amended Plat, a trail that Neal and PVD failed to construct. Plaintiffs seek an award of damages equal to the value they each paid for the bargain they did not receive. In other words, Plaintiffs seek damages in the amount of the difference between the actual value of their properties and the value of their properties had Neal's false representations been true.

44. Plaintiffs base their claims for breach of contract on Neal's and PVD's agreement with Mr. Wollam and Ms. Schoenstein, and PVD's agreements with the other Plaintiffs. In those agreements, Neal and PVD promised to construct a trail as depicted on the Amended Plat and described in the planning and sales a sign of a certain size and design, and a system that would convey water to the common entrance area. Neal also made these promises in the Mill Creek Subdivision Declaration of Covenants he prepared, executed, and recorded, and in exchange for the development exemption he received from Weld County. Mr. Wollam and Ms. Schoenstein seek damages against Neal and PVD, and the other Plaintiffs against PVD, for the damages they incurred as a result of these breaches, which are equal to the value of their properties that has been lost because these things were not completed. The lost value is equal to the cost to complete these items.

1. Fraudulent Misrepresentation

45. Plaintiffs Bolingers, Coulters, and Mr. Wollam and Ms. Schoenstein have each proven the elements necessary for a fraudulent misrepresentation claim. They have each shown by a preponderance of the evidence that Neal made specific representations to them that they would have permanent, open, and unfettered access to Lot 10, that these representations were material

to the transactions between these Plaintiffs and Neal, that these Plaintiffs reasonably relied upon these representations in purchasing their properties and paid a premium because of their belief that the representations were true, and that these representations were false. The evidence further shows that Neal had no intention of granting these Plaintiffs permanent, open, and unfettered access to Lot 10, and that he knew these representations were false at the time they were made. Neal established a pattern of saying whatever was necessary to make a sale, regardless of whether his representations were true or false. Neal made these false statements to induce Plaintiffs to purchase their properties, resulting in a profit to Neal of significant sums. Plaintiffs did not know these statements were false, nor did they receive the benefit of their bargain. The Plaintiffs therefore suffered damages as a direct result of Neal's false statements, paying a higher price for their properties than they would have paid or than what the properties were worth without the open access they were promised. Plaintiffs have established each of the five elements necessary for a fraudulent misrepresentation claim. *See Farhad Ebrahimi v. E.F. Hutton & Co.*, 794 P.2d 1015 (Colo. Ct. App. 1989). Accordingly, plaintiffs are entitled to damages from Neal and PVD, for which Neal was acting. The measure of damages to which Plaintiffs are entitled is the difference between the actual value of their property at the time of purchase and the value of the property as of that time had the representations been true. *See Denver Business Sales Co. v. Lewis*, 365 P.2d 895, 897 (Colo. 1961).

46. Plaintiffs Ed Coulter and Glenn Wollam testified they paid a premium of $50,000 each for their properties, and that they have lost this value as a result of the false representations by Neal. Plaintiff Blythe Bolinger testified that she and her husband paid a premium of $80,000 for their property, and that they lost this value as a result of Neal's false representations. There is no doubt that Coulter and Wollam received less value than they bargained for when they purchased their lots from Neal and PVD; however, the evidence of last market value is not sufficient for the court to award anything other than nominal damages. It is customary for the court to be presented with expert opinion on the loss of value of real property using either a cost approach or comparable sales approach. Although an owner's opinion of the fair market of his or her property is admissible evidence, it must be shown that the owner's opinion was derived from an adequate knowledge of nature, kind, and value of the property. *In re Marriage of Plummer*, 709 P.2d 1388 (Colo. App. 1985). There was insufficient foundation laid by Coulter and Wollam on the specific comparable property sales used in forming the owners' opinions for this court to make a reasoned decision on lost market value. Therefore the court must award nominal damages on the fraudulent misrepresentation claims in the amount of $1.00 for each for the Coulter and Wollam lots. *See* CJ Inst Civ. 4th Ed. 13.A.

47. Dr. Shelton and Mr. Mathiesen also seek damages against Neal and PVD based upon the lost value of their property and their loss of use of the trails they were promised by Neal at the time of purchase. Dr. Shelton and Mr. Mathiesen have proven by a preponderance of the evidence that Neal unambiguously and falsely represented to them that they would have access to the specific type of trail shown on the sales brochure Neal gave them, discussed with them, and on which he even drew. The evidence shows that Dr. Shelton and Mr. Mathiesen reasonably relied upon Neal's representations in deciding to purchase their property, and that but for such representations, they would not have made the purchase. His statements were therefore material to the transaction. The evidence, including Neal's own testimony, showed that Neal never had any intention of constructing trails as shown on his sales brochure and that his statements

regarding the access to trails to Dr. Shelton and Mr. Mathiesen were false and he made them solely to procure the sale. Dr. Shelton and Mr. Mathiesen did not know these statements were false, nor did they receive the benefit of their bargain. Therefore, these Plaintiffs also suffered damages as a direct result of Neal's false statements, paying a higher price for their property than they would have paid or than what the property was worth without the trail access they were promised. These Plaintiffs have therefore established each of the five elements necessary for a fraudulent misrepresentation claim. *Farhad Ebrahimi*, 794 P.2d 1015. Dr. Shelton and Mr. Mathiesen are entitled to the difference between the actual value of their property at the time of purchase and the value of the property as of that time had the representations been true. *Denver Business Sales Co*, 365 P.2d at 897.

48. Dr. Shelton testified that she believed the value of her and Mr. Mathiesen's property was $100,000 less than the value of the property with access to trails on Lot 10. There is no doubt that the value of the Shelton and Mathiesen lot was less than they paid; however, there was insufficient foundation laid on the owner's opinion for the court to make a reasoned determination of loss of market value. Plaintiffs Shelton and Mathiesen are awarded nominal damages on the fraud claim in the amount of $1.00 for the loss of value on their lot.

49. Neal and PVD argued at trial that the Plaintiffs did not show they sustained any damages and that their claims were barred by the statute of limitations because they should have known of their claims from the time the Amended Plat was recorded at the latest. Taking the latter argument first, Plaintiffs established that they did not know nor should have known of the facts supporting their claims against Neal and PVD until January 2006 at the earliest, when the first HOA meeting was held and at which it became clear that there was an issue about the Plaintiffs' rights in Lot 10. Recording the Amended Plat did not put Plaintiffs on notice that their rights in Lot 10 had changed. If recording the Amended Plat did anything, it merely confirmed Plaintiffs had rights in Lot 10, which included a trail. Since Plaintiffs brought their claims within two years of January 2006, their claims are timely and not barred by any applicable statute of limitations.

50. Plaintiffs' reliance on Neal's statements was reasonable and not so utterly unreasonable as to have caused their own losses. See Restatement (2d) of Torts, § 537. Plaintiffs had no duty under the circumstances of this case to investigate all facts and information related to a transaction. *See American Safety Equip. Corp. v. Winkler*, 640 P.2d 2216, 2223 (Colo. 1982) (the justifiable reliance standard that contemplates reasonable exercise of knowledge and intelligence in assessing represented facts imposes no real duty of investigation upon the claimant). In this case, Neal was a real estate broker with more than 25 years of experience and the developer f the subdivision. Plaintiffs, on the other hand, were inexperienced individuals, with no real knowledge of the real estate industry. Plaintiffs' reliance on Neal's, the broker and developer, representations to each of them that they would have access to Lot 10 was reasonable. There was no evidence at trial demonstrating that the Plaintiffs had information available to them prior to January 2006 from which they could have ascertained that Neal's statements were false.

51. Neal and PVD also argue that the statements relied upon by the Plaintiffs cannot support a fraudulent misrepresentation claim because they were a promise to do something in the future and not a present fact. The fact that Neal's representations were about something he would do in

the future does not preclude a fraud claim. *See H&H Distributors, Inc. v. BBC Intern, Inc.*, 812 P.2d 659 (Colo. Ct. App. 1990) (promise concerning future act, when coupled with present intention not to fulfill that promise, can be actionable fraud). Plaintiffs have established by a preponderance of the evidence that Neal made promises in order to induce them to purchase lots in the Mill Creek Subdivision, never intending to follow through on those promises.

52. The Plaintiffs are entitled to recover the damages they sustained as a result of Neal, and by extension PVD's fraudulent conduct.

2. Breach of Contract

53. To recover on their breach of contract claims, Plaintiffs must show there was an agreement that Neal or PVD breached, and that Plaintiffs have suffered damages as a result of that breach. *Spencer Investments, Inc. v. Bohn*, 923 P.2d 140 (Colo. Ct. App. 1995).

54. In this case, Plaintiffs have established by a preponderance of the evidence that Neal and PVD orally agreed to make repairs to the irrigation system and then failed to complete those repairs, leaving the Plaintiffs with $5,800 of repairs left to be done. Neal hired a contractor who started the repair work, but the contractor testified that Neal asked him to hold off on completing the repairs while the lawsuit was pending. The repairs have not been completed.

55. Plaintiffs have also established by a preponderance of the evidence that Neal and PVD committed in written agreements with Weld County, of which Plaintiffs were third party beneficiaries, to install a street light at the subdivision entrance. Neal and PVD did not install the street light, resulting in lost value to the Plaintiffs equal to the cost of installation, $8,000.

56. Plaintiffs have further established by a preponderance of the evidence that Neal and PVD agreed and covenanted to install a system conveying water to the common entrance area. Neal and PVD did not install any such system. As a result, Plaintiffs had to pay $27,750 to install such a system and Plaintiffs a loss in value to their property in that amount.

57. Plaintiffs have not established by a preponderance of the evidence that Neal and PVD agreed to install a sign as depicted on the plats. As a result, Plaintiffs have not shown that they are entitled to damages of $790, the cost to install that sign.

58. Finally, Plaintiffs have established by a preponderance of the evidence that Neal and PVD agreed to construct a trail around the northern perimeter of the subdivision and on Lot 10 as depicted on the Amended Plat, which the evidence showed that Neal and PVD failed to do. Plaintiffs claim that the failure to construct the trails as agreed and represented has damaged the Plaintiffs' properties in an amount not less than $143,000: $63,000 for the northern trail and $80,000 for the trail on Lot 10. The Plaintiffs, however, have not established that they will be able to construct a perimeter trail because it will require the approval of COL, which they do not have at this time. Furthermore, Plaintiffs gave various accounts of what type trail would be constructed, whether it would be an all weather trial, a foot path or a 20 foot wide trail to accommodate horses and bikes. It appears unlikely that COL will permit Plaintiffs to construct the type of trail that Neal represented to some lot owners he would construct for them. Plaintiffs

have failed to prove readily quantifiable damages on their claims for failure to construct a trail. Therefore, each set of lot owner Plaintiffs and the HOA are entitled to nominal damages of $1.00 for construction of a trail that requires COL approval for a total of $5.00.

59. Based upon these findings and conclusions, and on this court's Order Granting in Part Neal and PVD's Motion for Summary Judgment, entered December 15, 2008, the court concludes that Plaintiffs Preston and Blythe Bolinger, Ed and Donna Coulter, Brenda Shelton, Dave Mathiesen, and the HOA are entitled to recover these amounts, totaling $41,550 for the incomplete items and repairs to be made, and $5.00 for the failure to construct the trails, from PVD. The court further concludes that Plaintiffs Glenn Wollam and Bonnie Schoenstein are entitled to recover the $1.00 for the failure to construct the trail as agreed and to allow them open access as agreed from both Neal and PVD.

IV. JUDGMENT AND DECREE

For the foregoing reasons, it is ordered and judgment enters as follows:

1. Plaintiffs' Quiet Title Claim against Defendant Colorado Open Lands and DeWolfs is dismissed with prejudice;

2. The Second Amended PUD-PF-553, recorded September 6, 2005 at reception number 3320808 in the real property records of the Weld County Clerk and Recorder, is invalid and of no force or effect. Plaintiffs shall have 15 days to submit a proposed decree quieting title with respect to this recorded document;

3. Defendants Colorado Open Land and DeWolfs, as prevailing parties, are entitled to recover their costs from Plaintiffs in this case pursuant to Colo. R. Civ. P. 54(d) and Rule 121, § 1-22. Defendant Colorado Open Lands shall submit its Bill of Costs within fifteen (15) days of this Order;

4. Judgment is hereby entered in favor of Plaintiffs Preston Bolinger and Blythe Bolinger and against Defendants Dennis Neal and Plains View Development, LLC, jointly and severally, in the amount of one dollar ($1.00) for the fraud claim. Interest shall accrue on this judgment at the statutory rate of eight percent (8%) per annum from August 5, 2004, until paid in full;

5. Judgment is hereby entered in favor of Plaintiffs Glen Wollam and Bonnie Schoenstein and against Defendants Dennis Neal and Plains View Development, LLC, jointly and severally, in the amount of one dollar ($1.00) for the fraud claim. Interest shall accrue on this judgment at the statutory rate of eight percent (8%) per annum from November 30, 2000, until paid in full;

6. Judgment is hereby entered in favor of Plaintiffs Edwin Coulter and Donna Coulter and against Defendants Dennis Neal and Plains View Development, LLC, jointly and severally, in the amount of one dollar ($1.00) for the fraud claim. Interest shall accrue on this

judgment at the statutory rate of eight percent (8%) per annum from June 9, 2003, until paid in full;

7. Judgment is hereby entered in favor of Plaintiffs Dave Mathiesen and Brenda Shelton and against Defendants Dennis Neal and Plains View Development, LLC, jointly and severally, in the amount of one dollar ($1.00) for the fraud claim. Interest shall accrue on this judgment at the statutory rate of eight percent (8%) per annum from March 4, 2005, until paid in full;

8. Judgment is hereby entered in favor of Plaintiffs Preston Bolinger, Blythe Bolinger, Dave Mathiesen, Brenda Shelton, Edwin Coulter, Donna Coulter and the Mill Creek Subdivision Homeowners Association, Inc. and against Plains View Development, LLC in the amount of $41,555 for the breach of contract claim. Interest shall accrue on this judgment at the statutory rate of eight percent (8%) per annum from the date of this order, until paid in full;

9. Judgment is hereby entered in favor of Plaintiffs Glenn Wollam and Bonnie Schoenstein and against Dennis Neal in the amount of $1.00, which judgment is joint and several with that entered in Paragraph 5 above and not in addition to that judgment. Interest shall accrue on this judgment at the statutory rate of eight percent (8%) per annum from the date of this order, until paid in full; and

10. Judgment is hereby entered in favor of Plaintiffs Preston Bolinger, Blythe Bolinger, Dave Mathiesen, Brenda Shelton, Edwin Coulter, Donna Coulter, and the Mill Creek Subdivision Homeowners Association, Inc. and against Dennis Neal in the amount of $41,555. Interest shall accrue on this judgment at the statutory rate of eight percent (8%) per annum from the date of this order, until paid in full.

11. Plaintiffs are the prevailing parties in this action and are entitled to recover their costs pursuant to Rule 54(d), C.R.C.P. from Defendants PVD and Neal, jointly and severally. Plaintiffs shall file a Bill of Costs within fifteen (15) calendar days of the date of this order.

Dated: March 12, 2009.

By the court:

Roger A. Klein
District Court Judge

This document was filed pursuant to C.R.C.P. 121, § 1-26. A printable version of the electronically signed order is available in the Court's electronic file.