

No. 100308-1
Court of Appeals No. 81482-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES W. CHERBERG, et ux.,

Respondents,

v.

HAL E. GRIFFITH, et ux.,

Petitioners.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The Griffiths, defendants and appellants, are petitioners.

II. COURT OF APPEALS DECISION

The Griffiths seek review of the Court of Appeals' decision in *Cherberg v. Griffith*, No. 81482-6-I (Sept. 20, 2021) (Decision), which superseded an earlier decision upon motion by the Cherbergs, who were the plaintiffs and respondents. *See* Appendix 1, 21.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Decision conflicts with decisions of this Court because it affirmed an order of specific performance and finding of breach (a) contrary to the only reasonable interpretation of the contract and (b) requiring the Griffiths to do something materially different even from what the trial court (erroneously) found the Griffiths had agreed to do.

2. Whether the Decision conflicts with a decision of the Court of Appeals because the fees awarded to the Cherbergs should have been offset by the fees the Griffiths incurred

prevailing on the Cherbergs' \$1-1.2 million misrepresentation claim, and the Cherbergs should have been required to segregate fees incurred on that failed claim.

IV. STATEMENT OF THE CASE

A. Relevant Facts

For many years the Griffiths lived next door to the Dunns, sharing a jointly-built dock that landed on the Dunns' property. RP 693-97; CP 677-78 ¶ 1.1. After Mr. Dunn died, the Griffiths purchased the Dunn home, created an exclusive dock easement on the Dunn property in the Griffiths' favor, and advertised the Dunn home for sale as a "no dock" property. RP 92, 694-96; CP 677-78 ¶¶ 1.1-1.5.

Through their joint realtor Robbs and without direct discussions, the parties negotiated the Cherbergs' purchase of the property, including discussions with Robbs about a possible Cherberg dock. CP 678 ¶ 1.8. Robbs advised the Griffiths that the Cherbergs sought only "to build a small dock, only large enough to support a boat lift for his water ski boat [A]

small dock . . . which would not interfere with the Griffiths' use of their own dock." Ex. 460. Such a dock would not impact the Griffiths' use of their dock, including a floating dock. The trial court found, "[t]he Griffiths said they would support a dock that did not significantly interfere with the use of their existing dock. The parties' agreements regarding the dock were essential provisions of the PSA." CP 678 ¶¶ 1.9-1.10.

In June 2012, the parties executed a Purchase and Sale Agreement (PSA) and two addenda (Addendum 1 and Addendum 2) drafted by Robbs. All communications before and for some time after closing were via Robbs.

Addendum 1 obligated the Griffiths "to assist" the Cherbergs "in their effort to obtain a dock permit" and "not to challenge in any way [their] solicitation of said permit." App. 23-24; CP 685 ¶ 1.58. This addendum also provided that the Griffiths would "allow Buyers to encroach into the normal 35 setback," i.e., to place a dock within 35 feet of the Griffiths dock, a setback otherwise required under the City code. App.

23-24; *see also* CP 679 ¶ 1.13. Neither a dock nor the extent of permitted intrusion was specified. App. 23-24. I.e., absolute compliance with the 35-foot setback rule would not be required, but there was no agreement on the extent of intrusion.

Burns Sketch Dock (App. 30)

In Addendum 2, executed one week after Addendum 1, the Griffiths “acknowledge[d] receipt of the NEW DOCK email copy from Ted Burns outlining the proposed dock” the Cherbergs “intend[] to pursue.” App. 25-26; CP 679-80 ¶ 1.15. Addendum 2 did not otherwise define “[t]he proposed dock.” The Griffiths acknowledged only receipt of the email. The Griffiths also reiterated the non-specific setback provision of Addendum 1 by agreeing “to sign a Joint Use Agreement as attached which will allow the” Cherbergs “to place the proposed dock within the 35 foot setback usually required” to an unspecified extent. App. 25-36; CP 679-80 ¶ 1.15-.16. The Joint Use Agreement (JUA) referred to was not attached, only a blank form was provided, and none was signed. CP 679 ¶ 1.13.

The “proposed dock” depicted in the sketch in the “NEW DOCK” email (App. 30) entailed removing, or severely obstructing use of, the Griffiths’ floating dock (App. 51), as the Cherbergs knew (App. 35; RP 281). The Griffiths, who had told Robbs that no dock that interfered with their own would be allowed, struck from proposed Addendum 2 provisions that the Griffiths would (1) “remove the[ir] floating dock” and (2) “cooperate with Buyers and the piling company to pursue a permit in order to obtain the dock.” CP 679-80 ¶ 1.15; App. 25-26. I.e., the Griffiths declined to support a permit for “the dock” and refused to remove their floating dock. Mr. Cherberg initialed these strikeouts. *Id.*

Mr. Cherberg was not in doubt about the consequences of the Griffiths’ strikeouts. He had proposed the draft Addendum 2 “believ[ing] that the Griffiths would remove their floats” (RP 281). In view of the strikeouts, on June 24, he wrote to Robbs, “If floating dock stays, how close will he allow us to encroach? . . . Are the Griffeths [sic] willing to move it if necessary? . . .

My prostate is prostrate and I do not want to get into a pissing match. Now or later.” App. 35. I.e., Cherberg knew he now had no agreement to the Burns sketch dock, which called for removal of or substantial encroachment on the Griffiths’ floating dock. Without raising or seeking to negotiate this issue, he simply allowed the transaction to close. RP 267.

The Cherbergs knew after closing that no dock agreement had been reached, and immediately began making substantive changes to the configuration. *E.g.*, Ex. 365 (July 2012: “I’d really like to propose this to Hal Griffith [sic]: Remove not only the floating pontoons and lift, but also the little ‘el’ that points south off his southerly main pier”); Ex. 373 (Nov. 2012: “I like the new configuration”; “it is the Griffith dock . . . that is bugging up this whole process”; “Let me know as soon as your drawing is done.”).

From late 2012 through early 2015, the Cherbergs repeatedly presented to the Griffiths dock designs larger and more intrusive than the Burns sketch dock. *See* App. 47; Exs.

7, 365, 369, 373-74, 376-78, 382-83, 385, 387, 415, 422, 427.

Meanwhile, in a carefully protected effort kept secret from the Griffiths, the Cherbergs sought a permit from the Army Corps of Engineers (Corps) for one of those larger, more intrusive docks. *E.g.*, Ex. 398 (“[I]f [Kris Robbs] tell[s] Griffith” that “we submitted for the federal permit . . . is there any way Griffith could bugger up the Corps permit?”).

The Corps had serious concerns with the impact of the proposed Cherberg dock on the Griffiths. The Corps noted that “[t]he proposed drawing does not show” the Griffiths’ dock’s “canopy and some finger piers and/or platforms” and asked whether they had been or would be “removed” because, “[i]f not, . . . [it] looks like it’ll be pretty close” (Ex. 422). Burns misleadingly answered as Cherberg directed (Ex. 419):

- Corps: “Does Mr. Griffith have any objections to the proposed pier?”

Burns: “Mr. Cherberg provided the following response as to Mr. Griffith’s understanding of the location and construction of the proposed pier: ‘Mr. Cherberg intends to construct dock

included in the [PSA] between himself and Mr. Griffith.” Ex. 422.

- Corps: “It seems that 18.5 feet would be **insufficient room for the Griffith family to use their pier.**”

Burns: “[T]he proposed pier location was discussed with the Griffiths as part of purchasing the property and they agreed with the location. . . . The Griffiths currently don’t use the south side of their dock except to store floats and a boatlift.” App. 57 (emphasis added).

The Corps approved the dock without contacting the Griffiths, believing that the Griffiths had approved it.

During this same period, in March 2014, the Cherbergs threatened the Griffiths with the loss of all use of the Griffiths’ dock based on an obvious error by the Griffiths’ attorney, who mistakenly reversed the easement descriptions. The Cherbergs’ lawyer wrote, “it is the Cherbergs that currently have the right to exclusive use and possession of your existing dock.” Ex. 396. This threat persisted. In the eventual lawsuit the Cherbergs sought “an order quieting title extinguishing both Easements . . . and ejecting Griffiths from the Landscape

Easement and the portion of the Griffith dock that falls on the Cherberg Property.” CP 6.

**Griffiths’ May 2014 and February 2016 Proposals
(App. 38, App. 61)**

In the meantime, the Griffiths—motivated in part by the threat of losing all rights in their own dock because of a lawyer mistake—were trying to come up a solution.

In May and November 2014 and again in February 2016, the Griffiths proposed dock designs exceeding the modest objectives the Cherbergs had identified during the negotiations. App. 38; Ex. 435; App. 61. The Cherbergs’ boating expert testified at trial that the Griffiths’ proposals would have met the Cherbergs’ “diagnosed boating issues” (RP 150) and would have allowed the Griffiths’ floating dock to remain and be useable. The designs did so because they called for a single dock instead of two parallel dock arms stemming from a single connection to shore. *Compare* App. 61 (one arm) *with* App. 45 (two arms). The two-arm design entirely prevented the use of

the floating part of the Griffiths' dock. *See* RP 587-88, 599-602. The Cherbergs rejected the Griffiths' proposals. RP 370-74; Ex. 529 ¶ 7.

The Cherbergs' only explanation (at the time or at trial) for rejecting the Griffiths' proposals was provided by the Cherbergs to the Corps. A Corps representative asked Mr. Cherberg why he had rejected the Griffiths' proposals; he explained that he "wanted to have a larger pier structure with two arms, like his neighbors." RP 567; Ex. 529.

Cherbergs' January 2015 Proposal (App. 50)

In January 2015, the Cherbergs asked the City of Mercer Island to issue a permit for a dock that was 100 feet over the water, compared to the Burns sketch dock that was only 75 feet over the water. *Compare* App. 30 (Burns sketch dock) *with* App. 50 (Jan. 2015 proposal). The Griffiths submitted a "comment" to the City, "support[ing] the Cherbergs' goal of obtaining a dock" (App. 62) and again proposing the compromise dock they had offered before (App. 64). The

proposal the Griffiths opposed was for a dock 100 feet over the water (App. 50), not the more modest one the Cherbergs earlier had submitted to the City (App. 40).

B. Trial Court Proceedings and Findings

1. Misrepresentation Claim and Fee Award

The Cherbergs made several claims against the Griffiths, only two of which resulted in judgments. The Griffiths prevailed on the Cherbergs' negligent misrepresentation claim (CP 275); the Cherbergs prevailed on their breach of contract claim (CP 692).

The Cherbergs' misrepresentation claim asserted that the Griffiths had concealed that they held an easement burdening the Cherbergs' land. *See* CP 8-9 ¶¶ 3.14-20. The Cherbergs sought the difference in value between the property as allegedly represented (i.e., with dock access and no easement) and as sold (i.e., with no dock access and the easement). CP 8-9 ¶¶ 3.14-20. That claim was dismissed on summary judgment before the Griffiths' first appeal: "The Court finds that the Griffiths did

not negligently misrepresent by omission the existence of the easements because the Cherbergs were on notice of the easements” (CP 275), a ruling the Cherbergs did not appeal. But, likely in order to maintain the title company’s financial support for their litigation against the Griffiths, the Cherbergs’ counsel repeatedly introduced the previously resolved easement issue into the trial testimony. *E.g.*, RP 102, 109, 113 (direct examination of Mr. Cherberg); RP 35, 36 (Cherbergs’ opening statement); RP 845-47 (Cherbergs’ closing argument).

At trial, the Cherbergs’ expert testified that the difference in value between dock and no-dock property on Mercer Island was \$1-1.2 million. RP 312. This was the sum potentially at stake on the failed negligent misrepresentation claim.

The trial court found that the Cherbergs were the prevailing party (CP 979), did not require the Cherbergs to segregate fees incurred prosecuting failed claims, and did not offset the fees the Griffiths incurred successfully defending the

misrepresentation claim on summary judgment and warding off attempts to reintroduce the issue at trial (CP 1599).

2. Contract Interpretation

The trial court found that the Griffiths had agreed to the Burns sketch dock: “The parties’ proposed dock agreement is fully defined and enforceable: This dock is 21 feet from the Griffiths’ dock at the closest point, it is 75 feet over the water, and it has a U-shape at the water end.” CP 691 ¶ 2.5.

3. Findings Relative to Corps Permit Application

Rather than hold that the Cherbergs had acted in bad faith in pursuing a Corps permit for a dock larger and more intrusive than the Burns sketch dock they claimed (and the trial court held) was agreed to, the trial court found only that “[t]he Griffiths’ [sic] did not breach the PSA” by objecting to “the dock permitted by the Corps” in June 2014 because it “is different than, and not as favorable to, the Griffiths as the proposed dock in the New Dock email and sketch.” CP 682 ¶ 1.36; CP 692 ¶ 2.8.

4. Findings Relative to City Permit Application

The trial court found that “[t]he Griffiths . . . breach[ed] the PSA beginning April 23, 2015, by objecting to” the dock the Cherbergs “proposed to the City” because it was “fully consistent with the New Dock email and sketch.” CP 689-90, 692 ¶¶ 1.80 1.81, 2.9, 2.10 (citing Ex. 431, appended here as App. 40). *But see supra* pp. 10-11 (it was not consistent).

5. Specific Performance Order

The court awarded money damages to the Cherbergs and ordered specific performance of any dock design no closer to the property line or the Griffiths’ dock than the Burns sketch dock:

The Griffiths shall sign the JUA and are ordered not to object to any dock that is no closer to their property line than agreed to in the New Dock email sketch, and no closer to the Griffiths’ dock at any point than agreed to in the New Dock email sketch, and no closer to any part of the ELL at the end of their dock than agreed to in the New Dock email sketch.

CP 693 ¶ 2.19.

C. The Court of Appeals Affirmed.

The Court of Appeals found no error and affirmed the judgment.

The Court of Appeals included in its fact section the Griffiths' strikeouts (App. 4) but ignored them in determining whether the trial court had erred in finding that the Griffiths agreed to the Burns sketch dock (App. 8-9). The Court of Appeals said the trial court found the Cherbergs "more credible" than the Griffiths (App. 9), but the trial court made no such finding. The Court of Appeals said that "unchallenged findings of fact support the trial court's conclusions" but identified none (App. 9), and the Griffiths challenged 33 findings and 23 conclusions (Brief of Appellant, 2020 WL 6588022, at *3).

The Court of Appeals ignored that the trial court granted specific performance of something materially different from what the trial court found was the "fully defined and enforceable" dock agreement. The Court of Appeals affirmed

the finding that the “fully defined and enforceable” dock “is 21 feet from the Griffiths’ dock at the closest point, it is 75 feet over the water, and it has a U shape at the water end” (App. 7) but incongruously affirmed the order of specific performance requiring the Griffiths to agree to any dock a set distance from three points (App. 12-13).

The Court of Appeals affirmed the order awarding all fees without offset finding, “the actual dispute between the parties was resolved in the breach of contract claim.” App. 19. The Court of Appeals did not explain how the fact that the Griffiths prevailed on a \$1 million claim was not part of the “actual dispute.”

V. ARGUMENT

The Decision conflicts with decisions of this Court and with published decisions of the Court of Appeals.

A. **Only One Reasonable Inference Can Be Drawn Once the Court Considers All of the Extrinsic Evidence.**

The Court of Appeals’ affirmance of the trial court’s

contract interpretation conflicts with this Court’s requirement that when “only one reasonable inference can be drawn from the extrinsic evidence,” interpretation of a contract presents a question of law. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

The PSA itself did not define (by words or a diagram) what sort of dock the Griffiths had agreed to support, other than that they would allow the dock to be built somewhere (unspecified) within the 35-foot setback. That meant that, to determine if the Griffiths had agreed to a dock defined sufficiently to determine breach (let alone to order specific performance), the trial court had to look outside the words of the document—to extrinsic evidence. *See Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 509, 115 P.3d 262 (2005) (“extrinsic evidence may be used only to determine the meaning of specific words in the agreement”).

The Burns sketch dock itself was extrinsic to the PSA: not only was it not incorporated into the PSA, it was not even

specifically referenced. Rather, in Addendum 2 the Griffiths “acknowledge[d] receipt of the NEW DOCK email copy from Ted Burns outlining the proposed dock Buyer intends to pursue.” App. 25-26 (emphasis added). Robbs’ transmission of this email (which contained the Burns sketch) to the Griffiths stated “[t]his . . . is not binding.” App. 27. In Addendum 2, the Griffiths did nothing more than acknowledge receipt of this transmission.

The trial court fixated on one piece of extrinsic evidence (the Burns sketch). Other evidence is compelling: the Griffiths had rejected the Burns sketch dock, refused to support a permit for it, and had agreed to no defined dock. The Griffiths struck the provisions requiring them (1) to remove the floating dock (because of the obvious collision between the two docks) and (2) to “cooperate” with the “pursu[it of] a permit in order to obtain the dock.” App. 25-26. And the Burns sketch dock “is 21 feet from the Griffiths’ dock at the closest point” as the trial court found (CP 691 ¶ 2.5) only if the Griffiths’ floating dock is

removed. *See* App. 30 (21-foot measurement includes shaded floating dock).

The Griffiths struck these provisions for the same reasons they had told Robbs that they would support only a dock that did not interfere with their use of their own dock—a position that coincided with Robbs’ report that the Cherbergs desired a dock “only large enough to support a boat lift for his water ski boat [A] small dock . . . which would not interfere with the Griffiths’ use of their own dock.” Ex. 460. The Griffiths’ refusal in Addendum 2 to support a permit for the Burns sketch dock or to remove their floating docks was entirely consistent with these pre-PSA communications and was a far more specific expression of intent than any other language in Addendum 2 or any other extrinsic evidence. *See Hearst Comm’cs, Inc.*, 154 Wn.2d at 502 (“If relevant for determining mutual intent, extrinsic evidence may include . . . all the circumstances surrounding the making of the contract”) (emphasis added)).

The only reasonable conclusion from “all the circumstances surrounding the making of the contract,” *id.*, is that the parties understood that the Griffiths would sign a JUA for a dock that gave the Cherbergs the benefits they had advised Robbs they needed but would lead neither to removal of the floating dock nor “substantial interfer[ence]” with the use of the floating dock.

The trial court completely ignored the strikeouts, failing in its analysis to even mention these specific, unmistakable rejections, and relied instead on language in Addendum 2 that was substantially the same as language in Addendum 1 (that the Griffiths would allow a dock to be placed an unspecified extent within the 35-foot setback).

In affirming, the Court of Appeals made the same error.

B. The Court Erred in Affirming an Order of Specific Performance When the Terms of the PSA Showed That There Was No Agreement on a Dock or at a Minimum Great “Doubt” as to the Terms, Character, and Existence of a Contract.

A court may not order specific performance unless there

is “‘clear and unequivocal’ evidence that ‘leaves no doubt as to the terms, character, and existence of the contract.’” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (citation omitted). There must be “no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel to be done.” *Haire v. Patterson*, 63 Wn.2d 282, 287, 386 P.2d 953 (1963) (citation omitted). “It is unthinkable that courts should undertake the writing of contracts for sellers and buyers who have failed or refused, rightly or wrongly, to come to terms between themselves.” *Id.*

The order of specific performance was error because there was no agreement on a specific dock for which the Griffiths would support a permit and clear rejection of the only specific dock put forward. The failure is aggravated by what the trial court did find—which is indefensible. Compare (1) what the court said were the defining characteristics of the Burns sketch dock (it “is 21 feet from the Griffiths’ dock at the closest point, it is 75 feet over the water, and it has a U-shape at

the water end” (CP 691 ¶ 2.5)) with (2) a design the court found the Griffiths were obligated to accept, and were in breach for not accepting: the dock submitted to Mercer Island, 100 feet over the water, i.e., 25 feet beyond the Burns sketch dock (*see supra* p. 10) and (3) what the court ordered the Griffiths to sign (a document for any dock design that is a specified distance from three reference points (CP 693 ¶ 2.19)).

In other words, despite erroneously finding that both parties agreed to the Burns sketch dock, the trial court (1) found the Griffiths breached the PSA by rejecting a dock 25-feet longer over the water than the Burns sketch dock; and (2) ordered specific performance of something entirely different even from that: binding the Griffiths to accept any dock the Cherbergs choose that is a specified distance from various points.

If the agreement was definite enough to support specific performance, then neither party had discretion to modify it. But the court gave the Cherbergs the power to unilaterally modify

the contract by allowing them to choose any potential dock design so long as it was a specified distance from three points. The ruling violates basic contract law principles, *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998) (“one party may not unilaterally modify a contract”), and exceeding its authority to order specific performance, *Lager v. Berggren*, 187 Wash. 462, 466-67, 60 P.2d 99 (1936) (performance may be ordered only of agreed-to terms).

At most, both parties had a mutual obligation pursuant to the duty of good faith and fair dealing to work toward a dock design maintaining both “faithfulness to [the] agreed common purpose and consistency with the justified expectations of” both parties. *Restatement (Second) of Contracts* § 205 cmt. a (1979); *see also Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (duty of good faith obligates the parties to “perform in good faith the obligations imposed by their agreement”). This meant that they both had an obligation to make a “good faith” offer of a design consistent with the

exchanges: a dock meeting the boating needs that Robbs had presented to the Griffiths and that would not significantly interfere with the Griffiths' dock.

After closing, only the Griffiths proposed any such dock. *See supra* pp. 9-10. Rather than find breach based on the erroneous view that the Burns sketch dock controlled (or, incomprehensibly, the dock the Cherbergs had proposed to the City of Mercer Island), the trial court and the Court of Appeals should have assessed the Griffiths' dock proposals to determine if they were good faith offers. They were, as they met the criteria Robbs had provided to the Griffiths. In contrast, the Cherbergs secretly secured a Corps permit for a dock that the trial court found was "materially different" from the Burns sketch because it was "not as favorable to[] the Griffiths." CP 689 ¶ 1.79; *see also* CP 692 ¶ 2.8. The Cherbergs, with considerable deliberation and calculation, concealed their permit application from the Griffiths and led the Corps to believe the Griffiths had approved it (*supra* pp. 6-8), breaching

the duty of good faith.

The Decision conflicts with established law of this Court barring an order of specific performance when there is reasonable doubt as to what the parties intended and regarding the specific thing to be done.

C. The Court Erred in Affirming the Fee Award.

The Court of Appeals' affirmance of the fee award conflicts with *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217-19, 130 P.3d 892 (2006).

The Griffiths prevailed on the misrepresentation claim, yet the trial court and the Court of Appeals refused to consider that outcome in determining the fee award. This was error because a misrepresentation claim that arises "out of the parties' agreement to transfer ownership of" property is "on the contract" and subject to the contract's prevailing party attorney fee provision. *Brown v. Johnson*, 109 Wn. App. 56, 59, 34 P.3d 1233 (2001).

The PSA was central to the Cherbergs' failed

misrepresentation claim: the Cherbergs pled that the Griffiths “knowingly failed to disclose the Exclusive Landscape and Dock Easements” and that they “relied on these misrepresentations and/or omissions in agreeing to purchase the Property for the price they paid.” CP 8 ¶¶ 3.15, 3.17.

The Griffiths prevailed on one claim with entitlement to fees, the Cherbergs on another, requiring the court to engage in a “detailed consideration of what actually happened in the litigation” to determine whether “the extent of the relief afforded the parties” meant that (1) “both parties prevail[ed] on major issues” such that each should “bear their own costs and fees” or instead (2) fees should be “offset” because “multiple distinct and severable contract claims are at issue.” *Transpac*, 132 Wn. App. at 217-19. Awarding all fees to the Cherbergs, without offset, was error.

The claim the Griffiths defeated entailed the difference in value between the property as allegedly represented (i.e., with dock access and no burden on the land) and as sold (i.e., with

no dock access and burdened land) (*see* CP 8-9 ¶ 3.14-20). At trial, the Cherbergs' expert valued part of that claim: that the value difference between dock and no-dock property was \$1-1.2 million. RP 312. The Cherbergs also sought damages for the allegedly unrevealed landscape easement (the one that was expressly referred to in Addendum 1). The consequence: the trial court failed to consider that the Griffiths were the prevailing party on a claim worth more than \$1 million. The Griffiths prevailed on a substantial claim and are entitled to fees.

D. The Griffiths Are Entitled to Fee Awards on Appeal and at the Trial Court.

The Court should award the Griffiths their attorneys' fees and costs on appeal and remand for an order granting attorneys' fees and costs in the trial court pursuant to the PSA (Ex. 330) and RCW 4.84.330.

VI. CONCLUSION

For the foregoing reasons, the Griffiths requests that the Court accept review, vacate the judgment, reverse, award the Griffiths attorneys' fees and costs on appeal, and remand directing entry of judgment in the Griffiths' favor including an award of attorneys' fees and costs incurred at the trial court.

I certify that this memorandum contains 4,661 words, in compliance with the RAP 18.17(b).

SUBMITTED this 20th day of October, 2021.

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APPENDIX

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¹ These retyped versions of the addenda were referred to by both parties in their briefing at the Court of Appeals because the original versions are difficult to read.

CERTIFICATE OF SERVICE

I, Erin Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On October 20, 2021, I caused a true and correct copy of the foregoing document to be served on the person(s) listed below in the manner indicated:

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DATED this 20th day of October, 2021.

s/Erin Fujita

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES W. CHERBERG AND NAN)	No. 81482-6-I
CHOT CHERBERG,)	
)	
Respondents,)	
	)	DIVISION ONE
v.)	
)	
HAL E. GRIFFITH and JOAN L.)	
GRIFFITH, husband and wife,)	
	)	UNPUBLISHED OPINION
Appellants.)	
<hr/>		

MANN, C.J. — Hal and Joan Griffith appeal the trial court’s findings of fact and conclusions of law following a bench trial arising from a dock dispute between the Griffiths and their neighbors, James and Nan Cherberg. The Griffiths argue that substantial evidence does not support the trial court’s finding that the Griffiths agreed to the proposed dock or the finding that the Griffiths breached the purchase and sale agreement (PSA). The Griffiths also contend that the trial court erred in awarding specific performance, erred in awarding damages unreasonably incurred by the Cherbergs, and erred in its attorney fee award. We affirm.

Citations and pin cites are based on the Westlaw online version of the cited material.

FACTS

The Griffiths have lived on Mercer Island's northern shore since 1996. In February 2012, the Griffiths purchased the next-door property from their neighbor Sandra Dunn. Prior to purchasing the Dunn property, the Griffiths and Dunns shared the use of a dock that straddled their common property boundary under a joint dock agreement. After buying the former Dunn property, the Griffiths burdened the property with two exclusive-use easements that benefitted the Griffiths' property: an easement securing the use of the existing dock and an easement securing the exclusive use of a small promontory between the two properties.

After recording the easements, the Griffiths listed the property for sale through real estate agent Kris Robb. The listing specifically stated that it was a "no dock property." Robb's former clients, the Cherbergs, expressed interest in buying the property. The Cherbergs asked Robb to serve as a dual agent. The Cherbergs wanted to build a small dock and would need the Griffiths' cooperation to do so. Robb relayed to the Griffiths the Cherbergs' interest in building a small dock. The Griffiths indicated that they would have no objection to a modest dock as long as it did not interfere with the use of their own dock.

On June 5, 2012, the Cherbergs submitted an offer through a PSA. The next day, the Griffiths accepted the offer by countersigning the purchase and sale agreement, putting the property under contract pending inspection. The signed purchase and sale agreement included an addendum providing in part:

Sellers hereby agree to assist Buyers in their effort to obtain a dock permit. They agree not to challenge in any way the Buyers solicitation of said permit.

Sellers hereby agree to allow Buyers to encroach into the normal 35 foot setback between ~~docks to no closer than 25 feet.~~^[1] This may entail changing the easement which is in place regarding the landscape on the Western most property along the waterfront. Sellers agree to cooperate with Buyers in order to obtain a permit for a dock along the Western line of the property.

On June 6, the same day that the parties executed the purchase and sale agreement, the Cherbergs' dock contractor, Ted Burns, e-mailed the Cherbergs to inform them that they would need to enter into a joint use agreement (JUA) with the Griffiths in order to build a dock:

[T]he Joint Use Agreement with the [Griffiths] should allow us to be within 20' of their existing dock, and it would be even better if we could be within 15'. In addition, it should address either the removal of the [existing floating dock] or the ability to locate within 5' of the floats.

Burns's e-mail included a sketch of the proposed dock (New Dock Sketch), a plot showing the lot lines, and a blank form JUA from the City of Mercer Island.

On June 13, 2012, the Cherbergs sent the Griffiths a new proposed addendum. The June 6 e-mail from Burns to Cherberg accompanied the addendum, including the plot showing the property lines, the New Dock Sketch, and the blank form JUA. The copy of Burns's e-mail that the Griffiths received was annotated by Robb with the words, "This is a general proposal but is not binding but nothing will happen but to code."

On June 23, 2012, the parties agreed to and finalized the second addendum, which provided in part:

Seller acknowledges receipt of the NEW DOCK email copy from Ted Burns outlining the proposed dock Buyer intends to pursue. Seller further acknowledges the receipt of a copy of the lateral lines plot from King County Records and the proposed Dock sketch.

¹ The Griffiths struck this language before signing.

~~Seller agrees to remove the floating dock at such time as the Buyer asks for it to be removed but not prior to that time and cooperate with Buyer and the piling company to pursue a permit in order to obtain the dock.^[2]~~
Seller further agrees to sign a Joint Use Agreement as attached which will allow the Buyer to place the proposed dock within the 35 foot setback usually required.

The PSA closed on June 29, 2012. The parties did not execute a JUA at closing.

Over the next six months, the Cherbergs and Griffiths continued to discuss the size and location of the Cherbergs' proposed dock without reaching agreement. On January 11, 2013, the Cherbergs' attorney, Charlie Klinge, e-mailed the Griffiths' attorney, Shannon Sperry, with an update:

Dock: The dock issues are complex which is typical due to the multiple agencies and regulations involved, and of course the narrow site is challenging. I talked to Jim [Cherberg] about getting a final dock layout that Griffith can review and then make comments on and/or approve. Jim has been going through various options with the dock designer to balance all the issues: personal desires, neighbors, and agencies. It seemed to me that Jim needed to come to conclusions and then present that to the Griffiths. So, that will take a bit more time. I think we should let Jim focus on finalizing a dock plan. Once Cherberg and Griffith are agreed on the dock location, then we can look at the Joint Use Agreement, etc.

On January 21, James Cherberg wrote to the Griffiths to update them about the status of the dock's design:

I have asked [the dock builder] Seaborn to provide a detailed scaled drawing of this location and access to the dock and its acceptability to you. In this location it would still be necessary, however, to meet Mercer Island's Joint Agreement Use (on both sides of the dock). I have Cc'cd this e-mail to my attorney to keep him in the loop, as you have requested Shannon Sperry review M.I.'s Agreement with him after we've agreed on the dock location and access.

² The Griffiths struck this language before signing.

In April 2013, the Cherbergs applied for a permit with the U.S. Army Corps of Engineers (Corps) to build a dock, install two ground-based boatlifts, and plant native shoreline vegetation.³ The proposed dock drawing submitted to the Corps was similar to the sketch provided to the Griffiths with the second addendum, but was larger and approximately 5 feet closer to the Griffiths' dock.

In January 2014, the Corps questioned the size and proximity of the proposed dock to the Griffiths' dock and resulting interference with the Griffiths' use of their dock:

It appears that the Griffiths['] pier north of the project is on the Cherberg property, as you stated. It seems that 18.5 feet would be insufficient room for the Griffith family to use their pier, especially since a large pier like that could accommodate a larger vessel.

On January 29, Burns replied that “[t]he Proposed pier location was discussed with the Griffiths as part of purchasing the property and they agreed with the location.”

In May 2014, the Corps again asked about the proximity: “Does Mr. Griffith have any objections to the proposed pier?” Burns forwarded this question along to James Cherberg and asked him for “the wording you’d like me to use in responding to [the Corps].” Cherberg responded, “Like we talked before, this language to [the Corps] is fine: ‘Mr. Cherberg intends to construct [a] dock included in the Purchase and Sale Agreement between himself and [Griffith].’” In July 2014, the Corps issued the permit.

In November 2014, the Cherbergs' attorney sent a demand letter for the execution of a joint use agreement. The demand letter included a proposed joint use agreement and a copy of the new dock design submitted to the Corps and City of Mercer Island. The Griffiths refused to sign the proposed joint use agreement. Instead,

³ Proposals to construct new docks are subject to review by the Corps as well as the City of Mercer Island. The Corps reviews proposed docks for, among other factors, their impact on navigability and feasibility of vessels to approach and tie up to existing docks.

the Griffiths proposed the Cherbergs build a smaller dock with greater separation from their own dock. The Cherbergs rejected the Griffiths' proposed dock.

The Cherbergs filed suit in May 2015, seeking specific performance to compel the Griffiths to sign the joint use agreement. Following discovery and briefing, in April 2016 the trial court granted the Cherbergs' motion for summary judgment, finding that the Griffiths had breached the PSA. The trial court then denied the Griffiths' motion for reconsideration and granted the Cherbergs' motion for specific performance. The Griffiths appealed. We reversed the order granting the Cherbergs' motion for summary judgment and ordering specific performance, and remanded for trial.⁴

Following a bench trial, the court concluded that the Griffiths agreed to the New Dock Sketch design provided by Burns. The court also found that the Griffiths breached the PSA. The court awarded \$121,346.10 in damages to the Cherbergs. The court also awarded the Cherbergs \$502,935.00 in attorney fees and \$27,739.90 in costs. The Griffiths appeal.

ANALYSIS

Following a bench trial, we review whether the findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. Pub. Util. Dist. No. 2 of Pacific County. v. Comcast of Wash., 184 Wn. App. 24, 48, 336 P.3d 65 (2014). Substantial evidence means sufficient evidence sufficient to persuade a rational, fair-minded person that the premise is true. Pub Util. Dist., 184 Wn. App. at 48.

⁴ Cherberg v. Griffith, No. 75276-6-I (Wash. Ct. App. Nov. 20, 2017) (unpublished), <https://www.courts.wa.gov/opinions/pdf/752766.pdf>.

Unchallenged findings of fact are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

We review the evidence in the light most favorable to the prevailing party and this court defers to the trier of fact on questions of witness credibility or conflicting testimony. Weyerhaeuser v. Tacoma-Pierce County Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). "The trial court's determination on conflicting evidence is decisive, and this court cannot substitute its judgment for that of the trial court, even if we were of the opinion that the factual dispute should have been resolved the other way." Du Pont v. Dep't of Lab. & Indus., 46 Wn. App. 471, 479, 730 P.2d 1345 (1986).

A. Substantial Evidence — New Dock Sketch

The Griffiths challenge the trial court's determination that they agreed to the New Dock Sketch, arguing that substantial evidence does not support findings 1.63, 1.66, and 1.68. We disagree.

The trial court found:

1.63 The second addendum uses the word "proposed" three times: "Seller acknowledges receipt of the New Dock email copy from Ted Burns outlining the proposed dock"; Seller further acknowledges the receipt of a copy of the lateral lines plot from King County records and the proposed dock sketch"; "Seller further agrees to sign a Joint Use Agreement as attached which will allow the Buyer to place the proposed dock within the 35-foot setback usually required."

. . . .

1.65 . . . There are four, separate clauses in the written, signed, second addendum, say that this is the dock that is being proposed and this is the dock that the buyer intends to pursue.

1.66 The proposed dock agreement is fully defined: This dock is 21 feet from the Griffiths' dock at the closest point, it is 75 over the water, and it has a U-shape at the end.

1.67 The PSA was voluntarily signed by all parties; the Griffiths cannot now claim they did not read it or were ignorant of its contents.

1.68 By signing the second addendum, acknowledging receipt of the proposed dock and the details related to the dock, the parties understood the proposal and agreed that the terms of the PSA would apply to the proposal.

When reviewing contracts on appeal, “[t]he touchstone of contract interpretation is the parties’ intent.” Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Washington follows the “objective manifestation theory” of contract interpretation. Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712-13, 334 P.3d 116 (2014). We give “words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Viking Bank, 183 Wn. App. at 713.

We also apply the “context rule” from Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) to determine the parties’ intent. This rule allows the court to consider the context surrounding the execution of the contract, including the consideration of extrinsic evidence. Viking Bank, 183 Wn. App. at 713. “The court may consider (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties’ respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties.” Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, 129 Wn. App. 303, 311, 119 P.3d 854 (2005).

When interpreting the contract between the Cherbergs and the Griffiths, the court followed the context rule from Berg to consider the parties' intent, concluding that the Griffiths agreed not to object to the proposed dock as indicated in the two addendums and the New Dock e-mail and sketch. The court relied on the PSA, the first addendum, the second signed addendum, and the e-mails between the parties. Both the Cherbergs and Griffiths testified at trial about the execution of the second addendum, and the court found the Cherbergs' versions of events more credible. The court concluded that all of the negotiations between the Cherbergs and Griffiths were not attempts to define an undefined agreement, but rather attempts by the Cherbergs to enforce the agreement.

Ultimately, the court's decisions about the intent of the parties was a credibility determination that we will not disturb on appeal. The Griffiths agreed to allow the Cherbergs to build a dock, and the two parties negotiated the terms of that contract before signing the second addendum, including a plan for the parameters of the dock.

Further, the unchallenged findings of fact support the trial court's conclusions that the Griffiths agreed to assist, cooperate with, and not challenge a final version of the New Dock Sketch, for a dock within the 35-foot setback and near the westernmost property line, which may require alteration of the easement. No evidence suggests that the parties needed a fully engineered drawing of the proposed dock to execute the PSA. When we consider the evidence in the light most favorable to the Cherbergs, there is substantial evidence to support the finding that the Griffiths agreed to the proposed dock.

B. Substantial Evidence — Breach of PSA

The Griffiths next argue that substantial evidence does not support the court's finding that they breached the PSA. We disagree.

The court found:

1.80 When the appropriate request was made, the specific language in the PSA is that "we will not object" and "we will agree," and the Griffiths did not comply with that promise. As such, any objection to the dock ultimately proposed to the City (Exhibit 421), was a breach because this proposal was fully consistent with the New Dock email and sketch.

1.81 The dock the Cherbergs proposed to the City (Exhibit 431) is fairly close to the New Dock email and sketch; it is 66 feet or less over water, which is shorter than agreed to in the PSA as acknowledged by receipt of the New Dock email and sketch, and further away from the Griffiths' dock than the New Dock email and sketch. In sum it is better for the Griffiths than the dock in the New Dock email and sketch, yet they still objected to it.

Based on its findings, the court concluded:

2.8 The Griffiths' did not breach the PSA by their initial objection to the Corps, because the dock permitted by the Corps is different than, and not as favorable to, the Griffiths as the proposed dock in the New Dock email and sketch.

2.9 The Griffiths did breach the PSA beginning on April 23, 2015, by objecting to the dock proposed to the City (Exhibit 431; Exhibit 446) as it is 66 feet or less over water, shorter than agreed to in the New Dock email and sketch, and further away from the Griffiths' dock than the New Dock email and sketch.

2.10 On July 27, 2015, the Griffiths breached the PSA by Rich Hill, the Griffiths' attorney, writing to the City to reiterate the Griffiths' objections to the proposed dock and their unwillingness to sign the JUA.

The Griffiths contend that they cannot be liable for breach of contract, because the Cherbergs first breached the contract by pursuing permits for a dock that was bigger than the New Dock Sketch.

Contracts have an implied covenant of good faith and fair dealing which requires each party to fully cooperate with the other so that each party may obtain the full benefit of the performance. Metro. Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986). The Griffiths' argument that the Cherbergs acted in bad faith, thus precluding their own breach, is without merit. Testimony on both sides supports the Cherbergs' good faith belief that the New Dock Sketch and the dock that the Cherbergs presented to the Corps were similar.⁵

The Griffiths contend that they acted in good faith by proposing dock designs that fell within the criteria agreed upon by the parties. This agreement centers on their contention that there was no agreement on the specific dock. As discussed above, however, there is substantial evidence to support the trial court's findings. Because the trial court found that the New Dock Sketch was agreed upon by the parties, the Griffiths' continued objection to the City over the Cherbergs' proposed dock, and the Griffiths' continued refusal to sign the JUA, provide substantial evidence to support the trial court's finding of breach.

C. Specific Performance

The Griffiths argue that the court erred by awarding specific performance. We disagree.

The trial court found that:

⁵ Hal Griffith stated, "They're very similar in most regards." A professional engineer, Jeffrey Layton, retained by the Cherbergs' attorneys testified as follows:

[PLAINTIFF'S ATTORNEY]: So the dock that was permitted by the Corps is actually virtually identically long to the Ted Burns PSA dock; is that right?

[LAYTON]: Yes, I agree with that.

[PLAINTIFF'S ATTORNEY]: Not virtually, it is?

[LAYTON]: It is. It's the same.

2.15 The Cherbergs are not entitled to have a dock pursuant to the PSA. They are entitled to have the Griffiths support the proposed dock in the New Dock email and sketch, to refrain from obstructing the permitting process and building of the dock, and to sign the JUA.

The court ordered specific performance consistent with this finding:

2.19 The Griffiths shall sign the JUA and are ordered not to object to any dock that is no closer to their property line than agreed to in the New Dock email sketch, and no closer to the Griffiths' dock at any point than agreed to in the New Dock email sketch, and no closer to any part of the ELL at the end of their dock than agreed to in the New Dock email sketch.

2.20 The Griffiths are also ordered to agree to modification of the easement as necessary to accommodate the Cherbergs' dock within the exclusive landscape easement area as stated in the first addendum and in accordance with the "New Dock" email and sketch and the terms of these findings.

When a party seeks specific performance of a contract, rather than damages, a higher standard of proof must be met: "clear and unequivocal evidence that leaves no doubt as to the terms, character, and existence of the contract." Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). "Specific performance is a proper remedy only if a valid contract exists, a party has or is threatening to breach the contract, the terms of the contract are clear, and the contract is not the product of fraud or unfairness." Pardee v. Jolly, 163 Wn.2d 558, 569, 182 P.3d 967 (2008).

If a court cannot adequately compensate a party's loss with monetary damages, then a court may use its broad equitable powers to compel a party to specifically perform its promise. Crafts v. Pitts, 161 Wn.2d 16, 23-24, 162 P.3d 382 (2007). Within these equitable powers, the court can order a party to convey a unique parcel of land. Pitts, 161 Wn.2d at 25.

The court found that the Griffiths agreed to assist with and not challenge the New Dock Sketch, and that the dock is specifically defined. Substantial evidence supports

these terms of the contract. Specific performance is the logical way to enforce the terms of the PSA. The area for a potential dock is unique to the Cherbergs, as they purchased the property with the specific intention of building a dock on that property. Monetary damages cannot remedy the Cherbergs, only the pursuit of their dock can.

As the court correctly found, the PSA does not guarantee the Cherbergs a dock. The dock is ultimately subject to permitting requirements. Rather, the terms of the agreement require the Griffiths to support the proposed dock, not to challenge the permitting process, modify the easement as needed, and to sign the JUA. Therefore, the trial court properly ordered specific performance.

D. Damages

The Griffiths next contend that the trial court erred by awarding damages as they were unreasonably incurred by the Cherbergs. We disagree.

After the Griffiths refused to sign the JUA on April 23, 2015, the Cherbergs attempted to permit a dock through a new Mercer Island law that repealed the requirement of a JUA but only allowed one noncommercial, resident dock per residential waterfront lot. MICC 19.07.110(E)(4). Mercer Island, the Shoreline Hearings Board, and the King County Superior Court rejected the proposed permit. The Griffiths challenged the permit in each venue.

The trial court awarded the Cherbergs damages for their efforts to obtain permitting after the Griffiths breached the JUA on April 23, 2015. This included an award to the Cherbergs: \$87,866.30 for their attorney, Charles Klinge's, assistance in seeking and then appealing the decisions denying the permit; \$28,127.00 for Jeffrey Layton's expert engineering services; \$1,366.00 for Scott Holsapple's landscape

architecture fees; and \$3,986.75 for Triad Engineering's engineering surveying fees. The total damages award was \$121,346.10. The court awarded the damages under the prevailing party fees clause, and under the theory of equitable indemnity.

The Griffiths argue that this award was unreasonable because the pursuit of this permit was futile under the City of Mercer Island's new law. The Griffiths also contend that the \$87,866.30 awarded to the Cherbergs for their land use attorney was improper. They rely on Maytown Sand & Gravel, LLC v. Thurston County, 191 Wn.2d 392, 437, 423 P.3d 223 (2018) (attorney fees not available as damages absent a contract, statute, or recognized ground in equity), abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.3d 694 (2019).

We review de novo the question of whether damages were proper for the cause of action. Bill & Melinda Gates Found. v. Pierce, 15 Wn. App. 2d 419, 436, 475 P.3d 1011 (2021). We review the reasonableness of a damage award for an abuse of discretion. Aecon Bldgs. Inc. v. Vandermolen Constr. Co., 155 Wn. App. 733, 742, 230 P.3d 594 (2009).

1. Basis for Damages

While the trial court relies on the PSA as a basis for damages, we disagree. The PSA provides "if Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorney's fees and expenses." This provision, relied on by the trial court, does not support the award of damages. The Cherbergs sought alternative permitting through the new statute, which did not relate to the parties' agreement in the PSA. Further, these damages awarded were not attorney fees and expenses.

Alternatively, the trial court awarded damages under the theory of equitable indemnity. When the natural and proximate consequences of a wrongful act of a defendant involve the plaintiff in litigation with others, there may be a recovery of damages for reasonable expenses incurred in the litigation, including attorney fees. Manning v. Loidhamer, 13 Wn. App. 766, 769, 538 P.2d 136 (1975). This theory of indemnification requires that “the original suit generating the expenses must be instituted by a third party not connected with the original transaction.” Loidhamer, 13 Wn. App. at 769. To create liability, three elements are necessary: (1) a wrongful act or omission by A toward B; (2) the act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event. Loidhamer, 13 Wn. App. at 769. Because the Cherbergs themselves initiated the permitting processes, the doctrine of equitable indemnification does not apply.⁶

The Cherbergs contend that equitable principles support their award of damages. “Generally, the measure of damages for breach of contract is that the injured party is entitled to recovery of all damages naturally accruing from the breach, and to be put in

⁶ In Wharf Rest., Inc. v. Port of Seattle, 24 Wn. App. 601, 614, 605 P.2d 334 (1979), a restaurant sued the Port of Seattle when the Port leased its premises to another operator after the restaurant failed to timely exercise its option to renew its lease. The restaurant commenced and prevailed in an action against the Port and its new lease, but the court did not award the restaurant fees based on equitable indemnity:

The Wharf does, however, cite our decision in Manning v. Loidhamer, 13 Wn. App. 766, 538 P.2d 136 (1975) in support of its argument that it is entitled to attorneys’ fees and actual costs because it was the Port’s refusal to negotiate with it or to renew the Wharf’s old lease that caused the Wharf to become embroiled in litigation with The Wharfside Companies. In Wilber v. Western Properties, 22 Wn. App. 458, 467, 589 P.2d 1273, (1979), we held: “(a)s we made clear in Manning v. Loidhamer, Supra, in order to recover attorneys’ fees and . . . costs, the suit generating them must be instituted by a third party unconnected with the transaction.” That was not the situation here. It was the Wharf itself, and not a third party that instituted the present action. The Wharf is not entitled to recover actual costs and attorneys’ fees.

Wharf Rest., Inc., 24 Wn. App. at 614.

as good a position as he would have been in had the contract been performed. Nw. Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n, 57 Wn. App. 32, 43, 786 P.2d 324 (1990). The trial court has broad discretion in fashioning equitable relief, which includes awarding consequential damages in addition to specific performance. Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 230, 242 P.3d 1 (2010).

“Consequential damages awarded in addition to specific performance are not awarded for breach of the contract. Rather, they are awarded at the equitable discretion of the trial court in an attempt to make the nonbreaching party whole.” Cornish Coll. of the Arts, 158 Wn. App. at 228.⁷

The damages from the Cherbergs' pursuit of an alternative permitting process naturally occurred from the breach. After the Griffiths continually challenged the Cherbergs' attempts to obtain a dock pursuant to the signed PSA, the Cherbergs found a new potential avenue to obtain a dock permit without the Griffiths' ability to interfere. Jim Cherberg attended a Mercer Island City Council meeting to obtain clarification of how the new permitting rules would be applied. Based on questioning by a councilman who was aware of complications with particular docking circumstances on Mercer Island, and because the Cherbergs were unable to use the dock on their property due to the exclusive landscape easement, the Cherbergs had a good faith belief that they could obtain a permit under the new code.

But for the Griffiths' breach of the PSA, the Cherbergs would not have had to pursue the alternative permitting. If the Cherbergs had been granted the new permit,

⁷ See also Rekhi v. Olason, 28 Wn. App. 751, 757, 626 P.2d 513 (1981) (“The damages are not awarded for breach of contract, but are awarded so that the purchaser, unable to have exact performance because of the delay, may have an accounting of any losses caused by the delay, so that he can be restored as nearly as possible to the position he would have been in had the seller performed.”).

they would not have sought specific performance of the PSA. The Griffiths challenged the Cherbergs through both avenues. To put the Cherbergs in the position had the breach not occurred, both specific performance and damages were necessary to ensure that the Cherbergs could apply for the agreed-upon dock, and to compensate them for their previous attempts to permit that dock. The court's broad equitable discretion to award those damages, including the cost of the Cherbergs' attorney, form an appropriate basis for damages.

2. Reasonableness of Award

The damages awarded to the Cherbergs were also reasonable. The Cherbergs provided stipulated exhibits of the invoices of their land use attorney, their engineer, their architect, and their surveyor. The court determined that the Griffiths' first breach—April 23, 2015—was the trigger for the award, and thus limited the damages to those incurred after the trigger. Because there was a legal basis for awarding damages, and because the Griffiths cannot prove an abuse of the court's discretion in awarding damages, we affirm the damages award.

E. Attorney Fees Award

The Griffiths argue that the court erred by awarding the Cherbergs attorney fees based on the prevailing party theory. We apply a two-part standard of review to a trial court's award of attorney fees: "(1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion." Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). We will not award attorney fees as part of the cost of

litigation in absence of a contract, statute, or recognized ground of equity. Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014).

The Cherbergs originally brought causes of action for quiet title, ejectment, breach of contract, and negligent misrepresentation. The court dismissed the negligent misrepresentation claim on summary judgment. After the court granted the Cherbergs' motion for summary judgment in 2016, the parties agreed to dismiss the balance of the claims.

In addition to the damages awarded, the trial court also awarded the Cherbergs reasonable attorney fees. In their motion for prevailing party fees, the Cherbergs argued that the dismissal of any claims before trial does not entitle the Griffiths to a proportionality offset, and that the allegations and evidence were integral to trial. The Cherbergs requested: \$507,980.15 for Frey Buck's attorney fees; \$140,942.25 for Klinge's attorney fees, and \$27,739.90 in costs. The Griffiths opposed the fee award, contending that the Cherbergs did not segregate the recoverable fees from those incurred in prosecuting the dismissed claims.

The trial court conducted a lodestar⁸ analysis and found the Cherbergs' attorney hourly rates were reasonable. The trial court awarded the Cherbergs: Frey Buck's attorney fees of \$487,522.00; Klinge's attorney fees of \$15,413.00,⁹ and costs of \$27,739.90 as "reasonable and necessary and directly related to the Cherbergs' efforts

⁸ The court determines reasonable attorney fees by calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 734, 281 P.3d 693 (2012).

⁹ The court noted that these fees awarded to Klinge had not been previously awarded as damages.

to overcome the Griffiths' breach of contract." In sum, the court awarded \$502,935.00 in attorney fees and \$27,739.90 in costs.

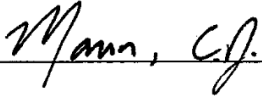
The PSA provides for attorney fees and costs to the prevailing party. The prevailing party is the one who receives judgment in that party's favor. Blair v. Washington State Univ., 108 Wn.2d 558, 571, 740 P.2d 1379 (1987). If attorney fees are recoverable for only a portion of the party's claims, "the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues." Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.), 119 Wn. App. 665, 690, 82 P.3d 1199 (2004). An exception is available if no reasonable segregation can be made. Loeffelholz, 119 Wn. App. at 691. If "the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees." Loeffelholz, 119 Wn. App. at 691.

The Griffiths' claim that the Cherbergs were not entitled to fees is without merit. Although the court did dismiss the negligent misrepresentation claim on summary judgment, the actual dispute between the parties was resolved in the breach of contract claim. The Cherbergs prevailed on that claim and, under the PSA, are entitled to prevailing party fees.

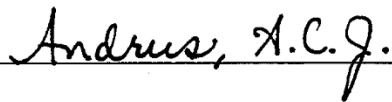
The trial court "must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." SentinelC3, Inc., 181 Wn.2d 127, 144, 331 P.3d 40 (2014). Although the court trial did not enter detailed findings of fact outlining its calculation of the fee award, the court did not abuse its discretion in the amount of attorney fees awarded. The

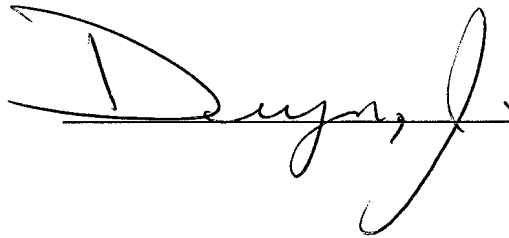
Cherbergs provided extensive evidence to support their motion for fees, and the court clearly considered what amount was appropriate, ultimately awarding the Cherbergs less fees than requested and reducing Klinge's fees based on the damage award.¹⁰

Affirmed.



WE CONCUR:





¹⁰ Both parties request attorney fees on appeal. Pursuant to the prevailing party provision of the PSA, the prevailing party is entitled to reasonable attorney fees and costs on appeal. We award reasonable attorney fees and costs on appeal to the Cherbergs subject to their compliance with RAP 18.1(d).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES W. CHERBERG AND NAN CHOT CHERBERG,	)	No. 81482-6-I
)	
Respondents,	)	DIVISION ONE
)	
v.	)	ORDER GRANTING
	)	RESPONDENTS' MOTION
	)	TO MODIFY OPINION AND
HAL E. GRIFFITH and JOAN L. GRIFFITH, husband and wife,	)	ORDER WITHDRAWING AND
	)	AND SUBSTITUTING OPINION
	)	AND ORDER DENYING APPELLANTS'
Appellants.	)	MOTION FOR RECONSIDERATION
_____)		

Respondents James and Nan Chot Cherberg filed a motion to modify the court's opinion filed on August 16, 2021. Appellants Hal and Joan Griffith also moved to reconsider the court's August 16, 2021 opinion. The panel has determined that the respondents' motion to modify the opinion should be granted and that the opinion filed on August 16, 2021 shall be withdrawn and substituted with a new unpublished opinion. The panel has also determined that the appellants' motion for reconsideration is denied.

Now, therefore, it is hereby

ORDERED that the respondents' motion to modify the opinion is granted and that the opinion filed on August 16, 2021 shall be withdrawn and substituted with a new unpublished opinion. It is also

ORDERED that the appellants' motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

Andrus, A.C.J.

Duyn, J.

DocuSign Envelope ID: 66BA5051-C734-49E3-867B-4DE0A66C81C2

Jun 06 12 09:44a James W. Oberberg, DDS 2068242033
06/06/2012 WED 11:25 FAX 206 232 2409 SWING & CLARK KI

p.2
002/002

Jun 06 12 01:16p James W. Oberberg, DDS 2068242033
06/06/2012 WED 11:47 FAX 206 232 2409 SWING & CLARK KI

p.12
012/015

Form 34
Addendum/Amendment to RES
Rev. 7/03
Page 1 of 1

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ADDENDUM / AMENDMENT TO PURCHASE AND SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated JUNE 5, 2012
between James W Oberberg ("Buyer")
and Hal Griffith and Joan Griffith ("Seller")
concerning 9418 SE 33rd St., Mercer Island, WA 98040 (the "Property").

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

Sellers hereby agree to assist Buyers in their effort to obtain a dock permit. They agree not to challenge in any way the Buyers' solicitation of said permit.

Sellers hereby agree to allow Buyers to encroach into the normal 35 foot setback between docks as shown on the attached. This may entail changing the easement which is in place regarding the landscape on the Western most property along the waterfront. Sellers agree to cooperate with Buyers in order to obtain a permit for a dock along the Western line of the property.

The closing on this offer is conditioned upon the closing of Buyers present home no later than June 30, 2012, at 3229 106th Ave SE, Bellevue, WA 98004.

Seller hereby discloses that they are currently in the process of legally describing an easement for landscaping through adverse possession with the Grower's on the south side of the property. From the date of closing the Buyers agree to assume all financial obligations to complete the Agreement.

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged.

Initials: BUYER: [Signature] Date: 6/5/12 SELLER: [Signature] Date: 6/6/12
BUYER: [Signature] Date: 6/5/12 SELLER: [Signature] Date: 6/6/12

Handwritten notes and signatures on the right margin, including dates like 6/6/12 and initials.

Addendum 1 (dated June 5 and 6, 2012)

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

Sellers hereby agree to assist Buyers in their effort to obtain a dock permit. They agree not to challenge in any way the Buyers solicitation of said permit.

Sellers hereby agree to allow Buyers to encroach into the normal 35 foot setback between ~~docks to no closer than 25 feet~~. This may entail changing the easement which is in place regarding the landscape on the Western most property along the waterfront. Sellers agree to cooperate with Buyers in order to obtain a permit for a dock along the Western line of the property.

The closing on this offer is conditioned upon the closing of Buyers present home no later than June 30, 2012, at 3229 106th Ave SE, Bellevue, WA 98004.

Seller hereby discloses that they are currently in the process of legally describing an easement for landscaping through adverse possession with the Graue's on the southside of the property. From the date of closing the Buyers agree to assume all financial obligations to complete the Agreement.

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged.

Form 34
Addendum/Amendment to P&S
Rev. 7/19
Page 1 of 1

342

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ADDENDUM / AMENDMENT TO PURCHASE AND SALE AGREEMENT

The following is part of the Purchase and Sale Agreement dated June 5, 2012 1
between James and Nan Cherberg ("Buyer") 2
and Hal and Joan Griffith ("Seller") 3
concerning 9418 SE 33rd, Mercer Island, WA 98040 (the "Property"). 4

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

Seller acknowledges receipt of the NEW DOCK email copy from Ted Barnes outlining the proposed dock
Buyer intends to pursue. Seller further acknowledges the receipt of a copy of the lateral lines plot from King
County Records and the proposed Dock sketch.
Seller agrees to remove the floating dock at such time as the Buyer asks for it to be removed but not prior to
that time and cooperate with Buyer and the piling company to pursue a permit in order to obtain the dock.
Seller further agrees to sign a Joint Use Agreement as attached which will allow the Buyer to place the
proposed dock within the 35 foot setback usually required.

Seller agrees to forward to Buyer a copy of the agreement/easement that the seller is working to complete
regarding the property on the Eastside of the lot next to Gesme's.
Seller will work to complete the filing of this agreement/easement prior to closing of the home and will
continue to complete the negotiations to complete the agreement/easement after the closing if it is not
recorded prior. Buyer will be responsible for any financial obligations incurred after closing, up to but not
more than \$2000. 15,000

If the Seller decides to remove the Swastream Lift that is in place on the Eastside of the dock, Sellers agree to
allow Buyers to have it at no cost. Buyer will be responsible to store it until their new dock is complete. In the
event the Buyer does not want the lift then the Sellers may remove it and dispose of it in any way they see fit.

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged.

Initials: BUYER: [Signature] Date: 6/13/12 SELLER: [Signature] Date: _____
BUYER: _____ Date: _____ SELLER: _____ Date: _____

Addendum 2 (dated June 13, 2010)

IT IS AGREED BETWEEN THE SELLER AND BUYER AS FOLLOWS:

Seller acknowledges receipt of the NEW DOCK email copy from Ted Burns outlining the proposed dock Buyer intends to pursue. Seller further acknowledges the receipt of a copy of the lateral lines plot from King County Records and the proposed Dock sketch.

~~Seller agrees to remove the floating dock at such time as the Buyer asks for it to be removed but not prior to that time and cooperate with Buyers and the piling company to pursue a permit in order to obtain the dock.~~ Seller further agrees to sign a Joint Use Agreement as attached which will allow the Buyer to place the proposed dock within the 35 foot setback usually required.

Seller agrees to forward to Buyer a copy of the agreement/easement that the seller is working to complete regarding the property on the Eastside of the lot next to Graue's.

Seller will work to complete the filing of this agreement/easement prior to closing of the home and will continue to complete the negotiations to complete the agreement/easement after the closing if it is not recorded prior. Buyer will be responsible for any financial obligations incurred after closing, up to but not more than \$2000. [\$5000]

~~If the Seller decides to remove the Sunstream Lift that is in place on the Eastside of the dock, Sellers agree to allow Buyers to have it at no cost. Buyer will be responsible to store it until their new dock is complete. In the event the Buyer does not want the lift then the Sellers may remove it and dispose of it in any way they see fit.~~

ALL OTHER TERMS AND CONDITIONS of said Agreement remain unchanged.

CenturyLink Webmail

can-cherberg@q.com

± Font Size ±

New dock

This is a general proposal but is not binding but nothing will happen but to code

From : Ted Burns <tedeburns@yahoo.com> **Subject :** New dock **To :** can-cherberg@q.com, kris@mercerisland.com Wed, Jun 06, 2012 01:19 PM
1 attachment

Jim,
I'm attaching the King County Section Map (SE-07-24-05) for the property which shows the property and lateral lines. Note that the lateral lines into the lake turn to the NE at the high water line. I then enlarged the lateral lines for clarity.

Since the seller is at the property to the west, I focused on the lateral line to the east to ensure the proposed dock meets the city set-back requirements on that side of the property. I determined the lateral line is at a 30 deg angle to the property line at the high water line; and based our proposed dock calculations from this reference. In fact, I was conservative in all measurements. I also reduced the proposed dock's moorage area from 12' wide to 11' wide as the boatlift is 10' wide at the feet, and 11' is plenty.

I reduced the dock length to 75' as the eastern lateral line migrates towards your prospective property so the longer the dock, the less room we have between property lines and the further we need to locate the dock from the eastern lateral line. I'm comfortable at this length that we have plenty of water depth; and my calculations have been conservative. I feel comfortable we can extend the dock another 10' if needed and still meet the required set-backs.

I contacted the city to confirm whether a float was a fixed structure and whether it needed to be included in the set-back rules. George Steirer, the lead planner; said he didn't know if a float did or didn't need to be in the set-back calculations. I read the code and it does say that "floating platforms" are considered for set-back calculations. Thus, we need the seller to allow us to be within 5' of the floats. Or they need to remove the floats to as well as sign an agreement.

In summary, the Joint-Use Agreement with the seller should allow us to be within 20' of their existing dock, and it would be even better if we could be within 15'. In addition, it should address either the removal of the floats or the ability to locate within 5' of the floats.

Thanks,

Ted Burns
Seaborn Pile Driving Company
ESTABLISHED 1947
9311 SE 36th Street - Suite 204
Mercer Island, WA. 98040
www.seabornpiledriving.com
206-236-1700 - office
206-947-4010 - mobile

From: Ted Burns <tedeburns@yahoo.com>
Date: Monday, June 4, 2012 6:52 PM
To: <can-cherberg@q.com>, <kris@mercerisland.com>
Subject: Joint-Use Agreement

Please see the attached example of a Mercer Island Joint-Use Agreement. It appears that you would want to agree to a distance of 20' from the dock to the west; and you would have plenty of room to construct a 75' - 85' dock with an ELL and a boatlift. I've also attached a potential configuration that should meet the set-back requirements for the neighbor to the east.

Thanks,

Ted Burns
Seaborn Pile Driving Company
ESTABLISHED 1947
9311 SE 36th Street - Suite 204
Mercer Island, WA. 98040

- County
- Municipality
- Parcel
- Easement
- Project/Assessment
- Point
- L&L
- Easement
- Survey
- Governmental
- Utility
- Delineation in Chain
- Proposed
- Parcel Number
- L&L Number

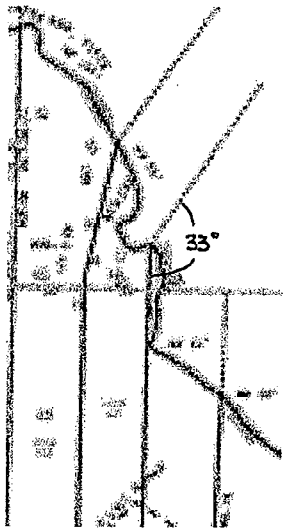
This map is a reproduction of the original map on file in the King County Assessor's Office. It is not to be used for legal purposes. The Assessor's Office is not responsible for any errors or omissions on this map.

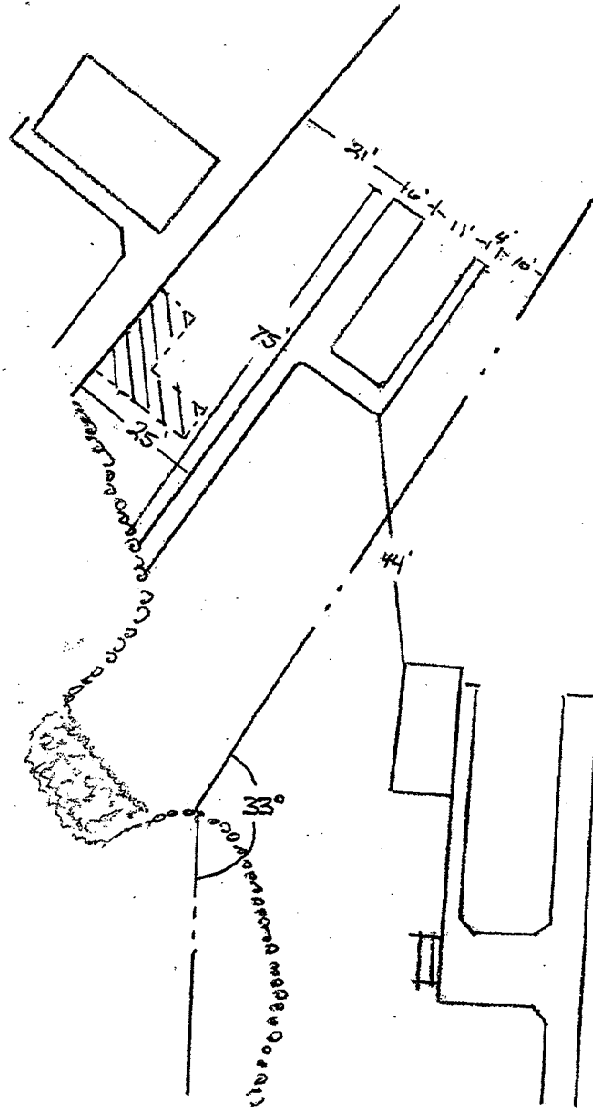


SE 07-24-05

Dec 13, 2011
1:00 - 1:30 PM
1:00







Scaborn Pile Driving Co.
 The Ogden Building
 9311 S.E. 36th St. #204
 Mercer Island, WA 98040
 Phone: 206-236-1700
www.scabornpiledriving.com

Return Address:

City of Mercer Island
Attn: City Attorney
9611 SE 36th Street
Mercer Island, WA 98040

**JOINT AGREEMENT
For
ADJACENT MOORAGE FACILITY AND BOAT LIFT**

Licensor: *Name of parcel owner* (Parcel A)

Licensee: *Name of parcel owner* (Parcel C)

Properties Legal Description:

Full legal on Attachment A for Licensee & Attachment B for Licensor.

Licensor Property Tax Parcel ID No.: _____

Licensee Property Tax Parcel ID No.: _____

THIS JOINT AGREEMENT (“Agreement”) is entered into this _____ day of May, 2012. The parties (“Parties”) to this Agreement are *Name of parcel owner* (as the owner of Parcel A) (Licensee), and *Name of parcel owner* (as the owner of Parcel C) (Licensor).

A. Description of Properties. The Licensee owns certain subject real property commonly known as Tax Parcel No. _____ (*street address*), Mercer Island, WA, 98040, and legally described in Attachment A (“Licensee Property”). The Licensor owns certain adjacent real property next to subject site commonly known as *street address*, Mercer Island, WA, and legally described in Attachment B (“Licensor Property”).

B. Improvements. Licensee wishes to construct, make alterations to or has constructed the private improvements described as a dock structure or moorage facility located as shown in Attachment C (“Improvements”). The Improvements that currently exist or will be constructed and located according to Attachment C on property owned by Licensee are located within 35’-0” setback of the adjacent moorage structure.

MICC 19.07.080 D.2. Table B. Note B. requires 35 feet setback between adjoining moorage structures except where moorage facility (referenced herein as Improvements) is built pursuant to the joint agreement that includes the area of permitted covered moorage and moorage facilities, two adjoining single family lots. The Licensor is the property owner adjacent to the Improvements.

NOW, THEREFORE the Parties agree as follows:

- 1. Approval of Improvements.** The Licensor and Licensee hereby agree that the Improvements may remain or be constructed on the subject Property.
- 2. Termination.** The Licensor may terminate this Agreement within 120 days notice to the Licensee delivered by certified mail, provided, however, that this Agreement shall terminate and the Improvements removed no later than January 1, 2019.
- 3. Removal Upon Termination of the Agreement.** In the event the Improvements fail to meet requirements for a moorage facility structure eligible for a joint agreement as set forth in Section 19.07.080 D. of the Mercer Island City Code; or threaten public health, safety or welfare, the Licensee shall remove the improvements within sixty (60) days of receiving notice from the City, at Licensee's sole cost and expense.
- 4. Maintenance of Improvements.** Maintenance of the Improvements shall be the sole cost and responsibility of Licensee. The Licensee shall maintain the Improvements according to this Agreement.
- 5. Indemnification.** The Licensee and Licensor hereby agree to indemnify and hold the City, its elected officials, officers, employees, agents and assigns harmless from any and all claims, demands, losses, actions, liabilities (including all costs and attorney fees) arising out of damages to persons or property resulting from the construction, location or removal of the Improvements. The provisions of this Section shall survive the expiration or termination of this Agreement.
- 6. Recording Requirement.** The Licensee shall record this Agreement against their Property and the Licensor's Property with the King County Recorder's Office and pay all recording fees. This Agreement shall run with the land, and therefore bind Licensee and Licensor, Licensee's and Licensor's heirs, assigns and any subsequent owners of the Properties. Conformance with the code exists when the City receives a copy of the recorded Agreement from the Recorder's Office.
- 7. Joint Agreement Review Fee.** The Licensee shall obtain approval of this Agreement from the City Attorney and pay the applicable fee for a Joint Agreement as established by the City, prior to recording.
- 8. General Provisions.** This Agreement contains all of the agreements of the Parties with respect to any matter covered or mentioned in this Agreement. No provision of the Agreement may be amended or modified except by written agreement signed by the Parties. This

Page 2

Agreement shall be binding upon and inure to the benefit of the Parties' successors in interest, heirs and assigns. Any provision of this Agreement which is declared invalid or illegal shall in no way affect or invalidate any other provision. In the event either of the Parties defaults on the performance of any terms of this Agreement or either Party places the enforcement of this Agreement in the hands of an attorney, or files a lawsuit, each Party shall pay all its own attorney fees, costs and expenses. The venue for any dispute related to this Agreement shall be King County, Washington. Failure of the City to declare any breach or default immediately upon the occurrence thereof, or delay in taking any action in connection with, shall not waive such breach or default. Time is of the essence of this Agreement and each and all of its provisions in which performance is a factor.

PROPERTY OWNER, PARCEL A (LICENSOR):

By: _____
Name of parcel owner Trustee,

PROPERTY OWNER, PARCEL C (LICENSEE):

By: _____
Name of parcel owner

LICENSOR:

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this day personally appeared before me _____, to me known to be the property owner of _____, Mercer Island, Washington, Tax Parcel No. _____, the person that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said person, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

GIVEN my hand and official seal this ____ day of _____, 2007.

Notary Name: _____
NOTARY PUBLIC in and for the State of Washington.
My commission expires: _____

LICENSEE:

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this day personally appeared before me _____, to me known to be the property owner of Tax Parcel No. _____, Mercer Island, Washington, the person that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said person, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

GIVEN my hand and official seal this ____ day of _____, 2007.

Notary Name: _____
NOTARY PUBLIC in and for the State of Washington.
My commission expires: _____

Exhibit 10 Date 1-29-16

Witness Cherberg Mandy Suurs 6/24/12 12:19 PM

CenturyLink Webmail

CenturyLink Webmail

can-cherberg@q.com

± Font Size -

Re: Authentisign invitation to review and sign documents Jim Cherberg

From : can-cherberg@q.com
Subject : Re: Authentisign invitation to review and sign documents Jim CHERBERG
To : Kris Robbins <krisrobbs.ml@gmail.com>

Handwritten notes: Nam's initials needed? Kris will forward in 3000.00 for it "outcrop of property" + 3000.00

Sun, Jun 24, 2012 03:18 PM

External images are not displayed. Display images below

Handwritten note: case

Hi Kris. I'll go in reverse order: - some thoughts very private and not to be shared -

1. Easement issue: I realize this is to our ultimate benefit that it be completely resolved, and I'm grateful he pursued it further. But I think he would have anyway. But if we close this week, and the easement issue is delayed just a matter of days (unintentionally or intentionally), \$5,000.00 reverts back. I want to close this week so we can go on to painting and moving smaller items. But maybe we should extend closing date until following week, but allow access to paint if you are moving stuff out this week. The easement seems like it has been almost complete since we made the offer.

2. I was operating under Impression they were going to remove the floating dock and move it elsewhere, and not just reconfigure it and leave in same place. I have some notes from a conversation you and I had about Mr. and Mrs. Griffeth "have no problem" to "take away floating dock." A couple of sub-issues here:

a. The most important one to me is the encroachment Hal has agreed to. Leaving the floating dock in place might make the permitting more difficult. As Ted Burns said it might be used as mitigation in its removal; i.e.: move to different location (west side). It would certainly look nicer to us that it is gone.

b. If floating dock stays, how close will he allow us to encroach? Does the Corps have any say in this?

Are the Griffeths willing to move it if necessary?

c. Are his sons getting involved more now knowing that a sale is imminent?

3. We need to address the Termination clause in Ted's sample Joint Use Agreement - clarification.

4. We need to address the outcrop of the property where the dock will go - clarification. need to talk

Handwritten note: "never involved" any legal work sign

This is a bit off-color and perhaps my neuroses are creeping in: But my prostate is prostate and I do not want to get into a pissing match. Now or later. Maybe give me a call. My fingers are tired. Thanks....Jim

From: "Kris Robbins" <krisrobbs.ml@gmail.com>
To: can-cherberg@q.com
Sent: Sunday, June 24, 2012 10:20:37 AM
Subject: Re: Authentisign invitation to review and sign documents Jim CHERBERG

Just taking off for Church but wanted to answer these issues before I leave,

On the floating dock and the lift they do not have an intention to move them to the Westside of the dock. Their son is bringing his runabout over and will put his on the lift eventually. As for the floating dock it may or may not be removed. They agree to work with you to obtain a dock and will re-design if necessary, They may remove but as requested by Ted they will do nothing until asked to do it.

Handwritten note: case

Hal told me that the easement is almost complete. He had asked the the approved document be sent to us asap and you do not need to close until you see a copy of it. As for the money. This is what he said to me. This easement with Graue has cost him over \$15,000. When he got the offer he could have just dropped it. (I knew nothing of it so we would not have known). Instead he told me about their efforts to obtain resolution on the property so there would never be an issue. Anyway: you are limited to that amount so that is your exposure. If you are not comfortable with it I can try to go back again. He did agree to the \$10,000 so that helps anyway.

Off with the fam. I will be back online after 1 or so as we will grab a bite first

Kris

On Sun, Jun 24, 2012 at 10:01 AM, <can-cherberg@q.com> wrote:
Kris. OK with pages 1 and 3. Questions regarding page 2 and other details:

Handwritten note: I did not understand (Mrs understood)

Page 2:

A. Line out of "Seller agrees to remove the floating dock..." is OK. But, I'd prefer it be removed sooner than later. MORE IMPORTANTLY though, I'd like it stipulated that when the floating dock and lift are removed that they be moved to the west (or other side) of his yacht and dock. Is that their intention?

B. I'm uncomfortable with the potential \$5,000.00 legal expense with no knowledge of the current status of litigation with Graue. What is the status? Why did Griffeth want to raise this?

Other details:

C. In Ted Burns' example of Joint Use Agreement, item #2 -Termination - the language is unclear. "The licensor (Griffeth) may terminate this Agreement within 120 days of notice....". Within 120 days of what? What does this mean?

And, "...this Agreement shall terminate and Improvements removed no later than January 1, 2019". What does this mean? Does this mean if the dock is not done by January 1, 2019 the Agreement terminates? Or even if the dock is done, the dock will need to be removed? This really cannot be the case, but the legalese is very unclear.

I think we need some language of just how the real property outcrop which is landscaped is going to be modified to allow us to access the proposed new dock. We would do it in an esthetic way in keeping with what is already there. but who has control over this issue?

May 15, 2014

*Hal and Joan Griffith
9410 SE 33rd Street
Mercer Island, WA 98040*

Dear Nan and Jim:

I am writing to you about our dock situation. I know our attorneys have been sending letters back and forth, but I am hoping it will be more constructive for me to reach out to you personally to see if we can arrive at a neighborly compromise that results in an outcome that allows each of us to achieve our goals. In this letter, I summarize my understanding of the background of this situation, and then I propose a concept that offers a solution. I hope that concept can serve as a basis for us to work things out as neighbors.

Prior to receiving your offer on our property, Kris Robbs called and told us she had a wonderful family she would be showing the property to. She said "they will be great neighbors" and we would be very fortunate if they bought the house. When Kris presented your offer to us, she said that you wanted our cooperation so you could build a dock on the property. Kris was concerned that the water area was not large enough for another dock but said you had a small water ski boat and only needed a dock large enough to access a boat lift and access the water. Kris further commented how much you and Nan loved the house, location and accessibility. She also said you intended to buy the house regardless of whether you could build a dock or not. As you are aware, the only reason we purchased this property in the first place was to secure the exclusive right to our existing dock and the landscaped area. We accepted your offer and agreed to cooperate with you, but we always understood that we would be retaining the full extent of our existing dock and its needs for reasonable access.

Shortly after your purchase of the property, we started a dialogue regarding your plans for a new dock. Approximately ten months ago you presented plans for your proposed new dock, along with an "adjacent joint dock agreement" for us to sign. In reviewing your dock plans with you, I expressed that I thought it was too close to our dock and would require the removal of our boat lift and float, and would severely restrict the access and use of the south side of our dock. I expressed these concerns and suggested an alternate location for your dock, adjacent to your beach area. I also suggested that from my perspective your proposed dock could be reduced in size while still providing you with uses that were consistent with my understanding of your goals. After our conversation, it was my understanding you would consider my suggestions and let me know your thoughts after exploring the idea with your dock builder. As it turned out, of course, I never heard back from you directly.

Instead, after returning home from a trip we opened our mail to find the letter from your attorney, Ms. Cobbs. We were disappointed that you chose to hire an attorney rather than continue the dialogue we had going.

*Hal and Joan Griffith
9410 SE 33rd Street
Mercer Island, WA 98040*

We now understand your continued interest to build a dock, but I'm sure you understand our interest in ensuring that a dock on your property does not interfere with the use and enjoyment of our dock and landscape area.

To see if there was a possible compromise that would address both of our interests, we have asked Waterfront Construction to design a dock that would fit between the Graues' dock and our dock. A dock large enough to support a water ski boat lift and enough deck area at the end for swimming and diving, etc. Waterfront has come up with such a design. Please find enclosed the conceptual design from Waterfront. This design seeks to address your stated desires for a dock. This design will still have a negative impact on our dock due to its proximity, but we are willing to compromise, and accept this proposal's design and location as a matter of neighborly accommodation. We will also support you in your permitting process with the City.

In closing Jim, I just want to express my sincere desire to work with you and Nan to come up with a reasonable plan for your proposed new dock, for both of us and the Graues. If this proposal is acceptable, it is our understanding your permitting could be promptly completed and the dock constructed in the near future.

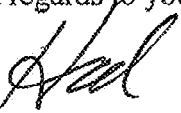
When you consider that the total cost of your new proposed dock will not exceed \$100,000, it doesn't seem to be prudent to spend considerably more on lawyers.

We trust that you will agree that we should be able to come up with a reasonable solution between us, without needing attorneys. After all, we are neighbors and will be for a long time.

If you are open to what I am proposing, let's get together and further discuss. Once we are in agreement, I will draft whatever documentation is needed to clear up all outstanding issues, including a new "joint dock agreement" for our signatures. This would then allow you to proceed with the new dock permit process.

Joan and my schedule is the following: here until Thursday, May 22, returning June 8. I believe we could get this issue resolved before we leave. I will make myself available, looking forward to hearing from you. Cell (best way) 206-396-8097.

Best regards to your family,

Hal  5/15/14

JOB SITE
9410 SE 33rd ST

N 13°-26' E

PAVERS

PLAN VIEW

SCALE: 1"=30'

NORTH
695' ±

NORTH
450' ±

10' SETBACK

10' SETBACK

BOAT LIFT
(22'x10')

EXISTING
PIER

Jim + Nan Cherberg

DUPLICATE DUPLICATE DUPLICATE DUPLICATE
CITY OF MERCER ISLAND
CITY HALL
9611 SE 36TH STREET
MERCER ISLAND, WA 98040
206-275-7600

Reg# #/Rcpt#: 001-001420 [Bill]
Accounting Date: Wed, 01/15/2014
Date/Time: Wed, Oct 15, 2014 3:10 PM

LAND USE ACTIONS

GENERAL
ACCT #: DS0000-99999
REF #: SHL14-031

FEE AMOUNT: \$ 2,642.51

LAND USE ACTIONS

GENERAL
ACCT #: DS0000-99999
REF #: SEP14-025

FEE AMOUNT: \$ 518.09

PREAPPLICATION CONFERENCE

GENERAL
ACCT #: DS0000-32211
REF #: 9418 SE 33RD STREET

FEE AMOUNT: \$ 441.87

RECEIPT TOTAL = \$ 3,602.47

Payment Data:

Pmt# :1
Payer: SEABORN PILE DRIVING CO.
METHOD: CK \$ 2,642.51
Ref#: 09800

Payment Data:

Pmt# :2
Payer: SEABORN PILE DRIVING CO.
METHOD: CC \$ 959.96
Ref#: N/A

RECEIPT SUMMARY

TOTAL TENDERED = \$ 3,602.47
RECEIPT TOTAL = \$ 3,602.47

CHANGE DUE = \$ 0.00

HAVE A NICE DAY!

DUPLICATE DUPLICATE DUPLICATE DUPLICATE

v:1.0.4279



City of Mercer Island
 9611 SE 36th Street • Mercer Island, WA 98040-3732
 PHONE (206) 275-7605 • FAX (206) 275-7726
 www.mercerisland.gov • www.mvbuildingspermit.com

Development Application

CITY USE ONLY		
PERMIT #	RECEIPT #	FEE
JPL 14-09		2640.51
SEP 14-026		518.09
DATE RECEIVED		10/15/14
BY		TS

STREET ADDRESS/LOCATION 9418 SE 33rd Street		ZONE
COUNTY ASSESSOR PARCEL #'S 4139300405		PARCEL SIZE (SQ. FT.)
PROPERTY OWNER James Cherberg	ADDRESS 9418 SE 33rd Street	CELL/OFFICE: E-MAIL: can-cherberg@comcast.net
PROJECT CONTACT NAME Ted Burns-Seaborn Pile Driving	ADDRESS 9311 SE 36th Street - Suite 204	CELL/OFFICE: 206-947-4010 E-MAIL: tedeburns@yahoo.com
TENANT NAME None	ADDRESS	CELL PHONE: E-MAIL:

DECLARATION: I HEREBY STATE THAT I AM THE OWNER OF THE SUBJECT PROPERTY OR I HAVE BEEN AUTHORIZED BY THE OWNER(S) OF THE SUBJECT PROPERTY TO REPRESENT THIS APPLICATION, AND THAT THE INFORMATION FURNISHED BY ME IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

SIGNATURE

Oct. 9, 2014

DATE

PROPOSED APPLICATION(S) AND CLEAR DESCRIPTION OF PROPOSAL:

Construct a new residential pier with a 80' X 4' walkway, a 8' X 15' connector, a 22' X 4' finger pier, and a 12' X 2' finger pier. The proposed dock will be supported by (15) 8" steel piles and will be fully grouted. Install two ground based boatlifts.

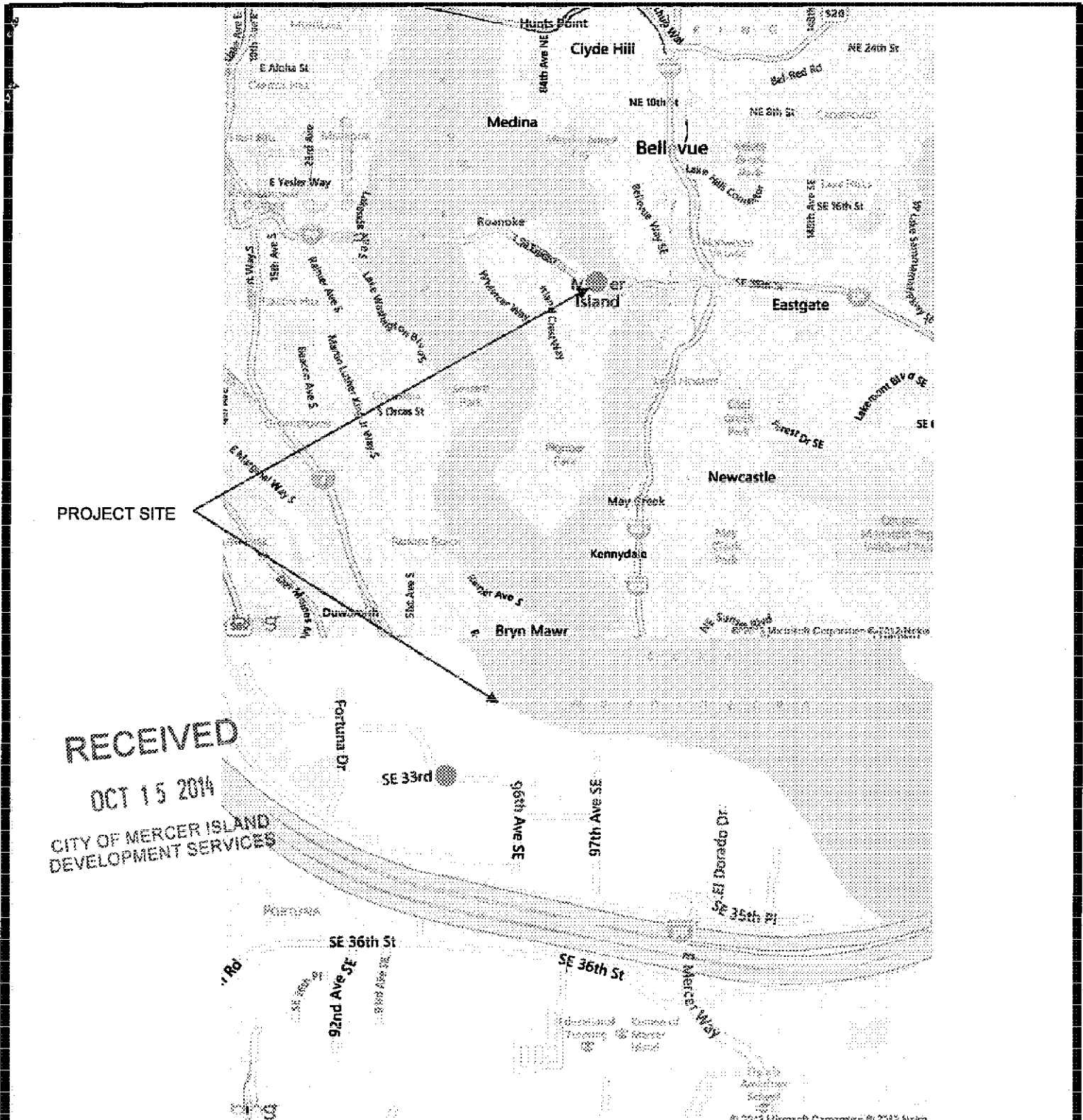
(Please use additional paper if needed) ATTACH RESPONSE TO DECISION CRITERIA IF APPLICABLE

CHECK TYPE OF USE PERMIT(S) REQUESTED (3% Technology Fee is included in fees below):

APPEALS <input type="checkbox"/> Building (+cost of file preparation) \$837.39 <input type="checkbox"/> Land use (+cost of verbatim transcript) \$837.39 CRITICAL AREAS <input type="checkbox"/> Determination \$2,591.48 <input type="checkbox"/> Reasonable Use Exception \$5,185.02 DESIGN REVIEW <input type="checkbox"/> Administrative Review (of sign & colors) \$415.09 <input type="checkbox"/> Administrative Review (of other than sign & colors) \$692.16 <input type="checkbox"/> Change to Final Design Approval \$692.16 <input type="checkbox"/> Design Commission Study Session \$692.16 DESIGN REVIEW & WIRELESS COMMUNICATIONS FACILITIES <input type="checkbox"/> \$0-\$5,000 \$692.16 <input type="checkbox"/> \$5,001-\$25,000 \$1,728.34 <input type="checkbox"/> \$25,001-\$50,000 \$2,592.51 <input type="checkbox"/> \$50,001-\$100,000 \$3,974.77 <input type="checkbox"/> Over \$100,001 Valuation \$6,913.36 DEVIATIONS <input type="checkbox"/> Changes to antenna requirements \$1,728.34 <input type="checkbox"/> Change to Open Space \$1,728.34 <input type="checkbox"/> Fence Height \$864.17	DEVIATIONS (Continued) <input type="checkbox"/> Setback Critical Areas \$2,592.51 <input type="checkbox"/> Impervious Surface (5% Lot coverage) \$2,592.51 <input type="checkbox"/> Shoreline \$3,456.68 <input type="checkbox"/> Wet Season Construction Moratorium \$901.25 ENVIRONMENTAL REVIEW (SEPA) <input checked="" type="checkbox"/> Checklist: Single Family Residential Use \$518.09 <input type="checkbox"/> Checklist: Non-Single Family Residential Use \$1,728.34 <input type="checkbox"/> Environmental Impact Statement \$2,592.51 (Revision = 40% of Fee) SHORELINE MANAGEMENT <input type="checkbox"/> Exemption \$419.21 <input type="checkbox"/> Permit Revision \$692.16 <input type="checkbox"/> Semi-Private Recreation Tract (modify) \$692.16 <input type="checkbox"/> Semi-Private Recreation Tract (new) \$1,728.34 <input checked="" type="checkbox"/> Substantial Dev. Permit \$2,592.51 SUBDIVISION LONG PLAT <input type="checkbox"/> 2-3 Lots \$8,641.70 <input type="checkbox"/> 4-5 Lots \$12,098.38 <input type="checkbox"/> 6 or greater \$15,555.06 <input type="checkbox"/> Subdivision Alteration to Existing Plat \$4,320.85 <input type="checkbox"/> Final Subdivision Review \$3,456.68	SUBDIVISION SHORT PLAT <input type="checkbox"/> Two Lots \$1,190.85 <input type="checkbox"/> Three Lots \$5,185.02 <input type="checkbox"/> Four Lots \$6,913.36 <input type="checkbox"/> Deviation of Acreage Limitation \$1,190.85 <input type="checkbox"/> Short Plat Amendment \$1,190.85 <input type="checkbox"/> Final Short Plat Approval \$864.17 VARIANCES (Plus Hearing Examiner Fee) <input type="checkbox"/> Type 1* \$3,456.68 <input type="checkbox"/> Type 2** \$1,913.74 OTHER LAND USE <input type="checkbox"/> Accessory Dwelling Unit (ADU) \$173.04 <input type="checkbox"/> Code Interpretation Request (+\$139.05/hr over 6 hrs) \$838.42 <input type="checkbox"/> Comp Plan Amendment (CPA) \$3,974.77 <input type="checkbox"/> Conditional Use Permit (CUP) \$6,913.36 <input type="checkbox"/> Lot Line Revision \$2,592.51 <input type="checkbox"/> Lot Line Consolidation \$864.17 <input type="checkbox"/> Noise Variance (+\$139.05/hr over 3 hrs) \$419.21 <input type="checkbox"/> Reclassification of Property (Rezone) \$4,320.85 <input type="checkbox"/> Right-of-Way Encroachment Agreement (Requires Separate ROW Use Permit) \$512.94 <input type="checkbox"/> Zoning Code Text Amendment \$3,974.77
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* Includes all variances of any type or purpose in all areas other than single family residential zone: B-C-O,PB,MF-2,MF2,MF-2L, MF-3,TC,F
 ** Includes all variances of any type or purpose in single family residential zone: R-8, R-9, R-12, R-15

SEPA Categorically Exempt: SEPA Checklist Required:	Yes	<input type="radio"/>	Permit Fee:	
	<input checked="" type="radio"/>	No	Permit Fee:	
			Total Fees:	



PROJECT ADDRESS: 9418 SE 33RD STREET MERCER ISLAND, WA. 98040 LAT: 47.580478 N. LONG: 122.212243 W.
 PARCEL NUMBER: 4139300405
 APPLICANT: TED BURNS - SEABORN PILE DRIVING CO. 9311 SE 36TH STREET SUITE 204 MERCER ISLAND, WA. 98040 206.236.1700

PURPOSE: PROVIDE ACCESS TO LAKE WASHINGTON FOR RECREATIONAL ACTIVITIES AND SMALL BOAT MOORAGE.

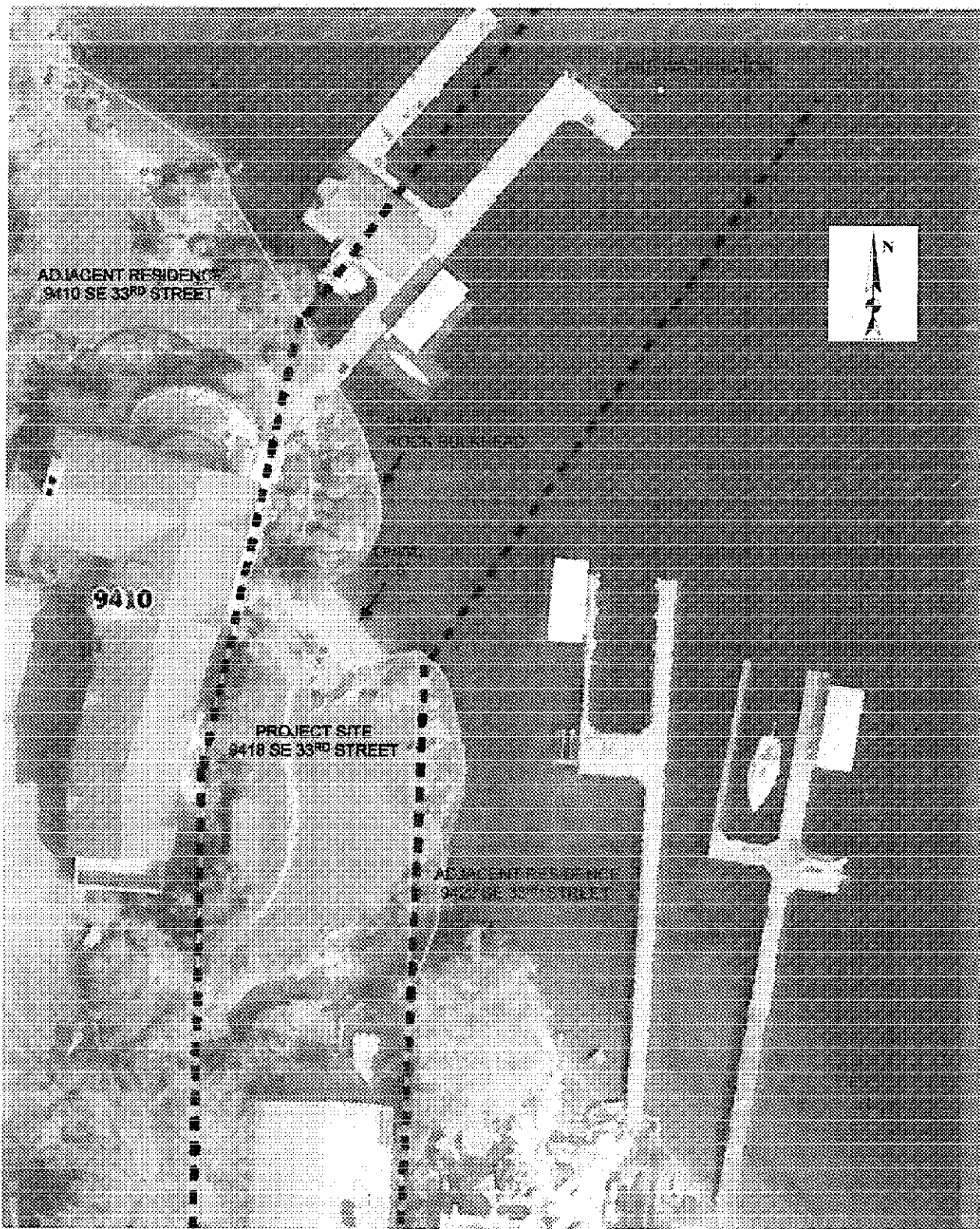


PROPOSED: Construct a new residential pier with a 80' X 4' walkway, a 8' X 15' connector, a 22' X 4' finger pier, and a 12' X 2' finger pier. The proposed dock will be supported by (15) 8" steel piles and will be fully grated. Install two ground based boatlifts.

DATUM: CORPS OF ENGINEERS 1919
ADJACENT OWNERS:
 HAL GRIGGITH JT GRAUE
 9410 SE 33RD ST 9422 SE 33RD STREET
 MERCER ISLAND, WA. 98040 MERCER ISLAND, WA. 98040

IN: LAKE WASHINGTON NWS-2013-0565
 AT: MERCER ISLAND
 COUNTY: KING APPLICANT: JAMES CHERBERG
 9418 SE 33RD STREET
 MERCER ISLAND, WA. 98040

DATE: 10/3/14 PAGE 1 OF 8



EXISTING SITE MAP
SCALE 1" = 50'

PURPOSE: PROVIDE ACCESS TO LAKE WASHINGTON FOR RECREATIONAL ACTIVITIES AND SMALL BOAT MOORAGE.



PROPOSED: Construct a new residential pier with a 80' X 4' walkway, a 8' X 15' connector, a 22' X 4' finger pier, and a 12' X 2' finger pier. The proposed dock will be supported by (15) 8" steel piles and will be fully grated. Install two ground based boatlifts.

DATUM: CORPS OF ENGINEERS 1919

ADJACENT OWNERS:

HAL GRIGGITH	JT GRAUE
9410 SE 33 RD ST.	9422 SE 33 RD STREET
MERCER ISLAND, WA. 98040	MERCER ISLAND, WA. 98040

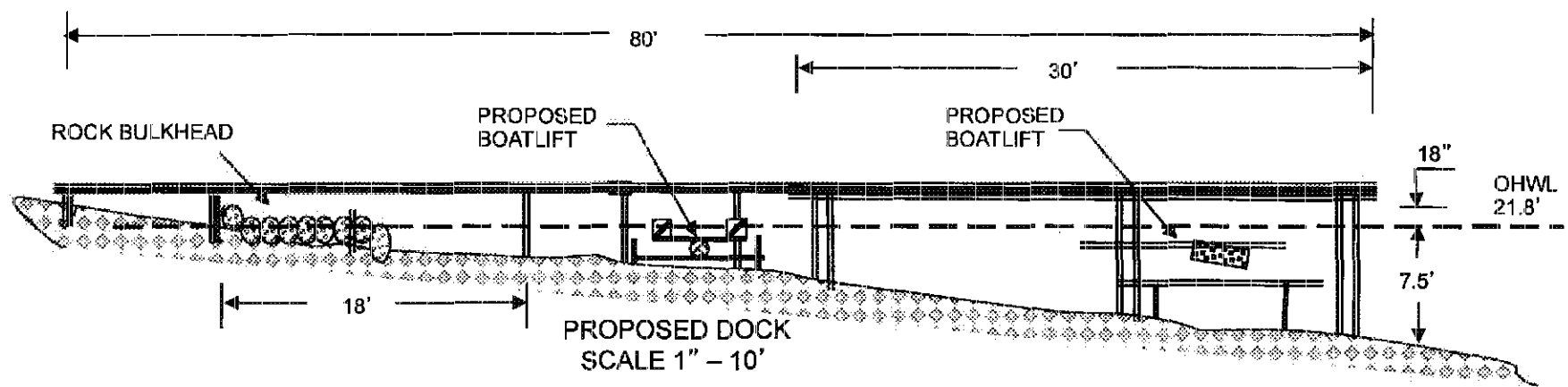
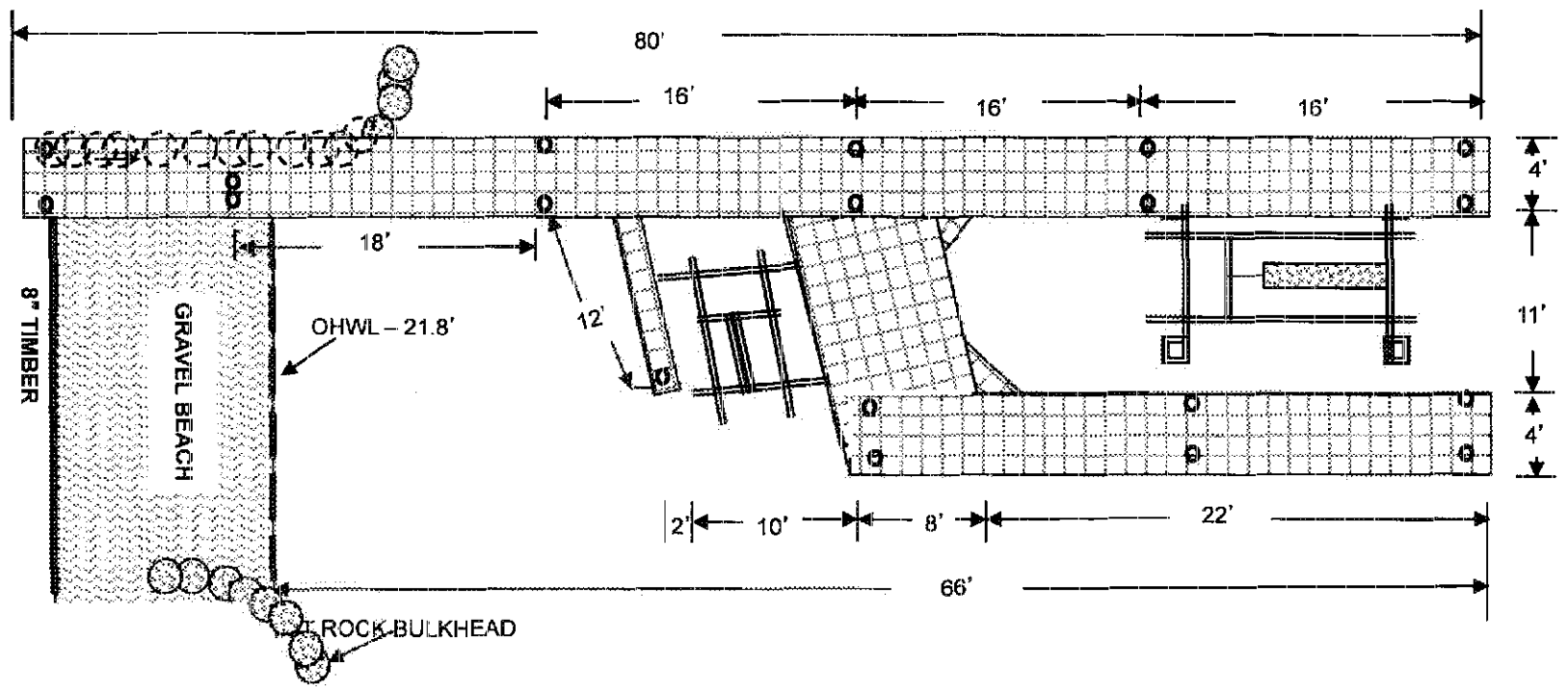
IN: LAKE WASHINGTON
AT: MERCER ISLAND
COUNTY: KING

NWS-2013-0565

APPLICANT: JAMES CHERBERG
9418 SE 33RD STREET
MERCER ISLAND, WA. 98040

DATE: 10/3/14

PAGE 2 OF 8



PURPOSE: PROVIDE ACCESS TO LAKE WASHINGTON FOR RECREATIONAL ACTIVITIES AND SMALL BOAT MOORAGE.



PROPOSED: Construct a new residential pier with a 80' X 4' walkway, a 8' X 15' connector, a 22' X 4' finger pier, and a 12' X 2' finger pier. The proposed dock will be supported by (15) 8" steel piles and will be fully grated. Install two ground based boatlifts.

DATUM: CORPS OF ENGINEERS 1919

ADJACENT OWNERS:

HAL GRIGGITH
9410 SE 33RD ST.
MERCER ISLAND, WA. 98040

JT GRAUE
9422 SE 33RD STREET
MERCER ISLAND, WA. 98040

IN: LAKE WASHINGTON
AT: MERCER ISLAND
COUNTY: KING

APPLICANT: JAMES CHERBERG NWS-2013-0565
9418 SE 33RD STREET
MERCER ISLAND, WA. 98040

DATE: 10/3/14

PAGE 4 OF 8



CITY OF MERCER ISLAND
9611 SE 36th Street • Mercer Island, WA 98040-3732
PHONE (206) 275-7605 • FAX (206) 275-7726
www.mercer.gov

Concurrent Review

I am requesting that my permit submittal be accepted and reviewed concurrently during the review of our land use action (File # SHL14-031/SEP14-025). I fully understand that the land use application must be approved prior to the issuance of the permit. I take full responsibility for all fees incurred for the permit review and understand that the fees are payable to the City of Mercer Island regardless of the land use outcome. I hold the City harmless for any actions arising from the concurrent review of the permit application, including but not limited to the potential denial of the permit if the land use action is denied.

Signed James Cherberg Date 1/15/15

RECEIVED

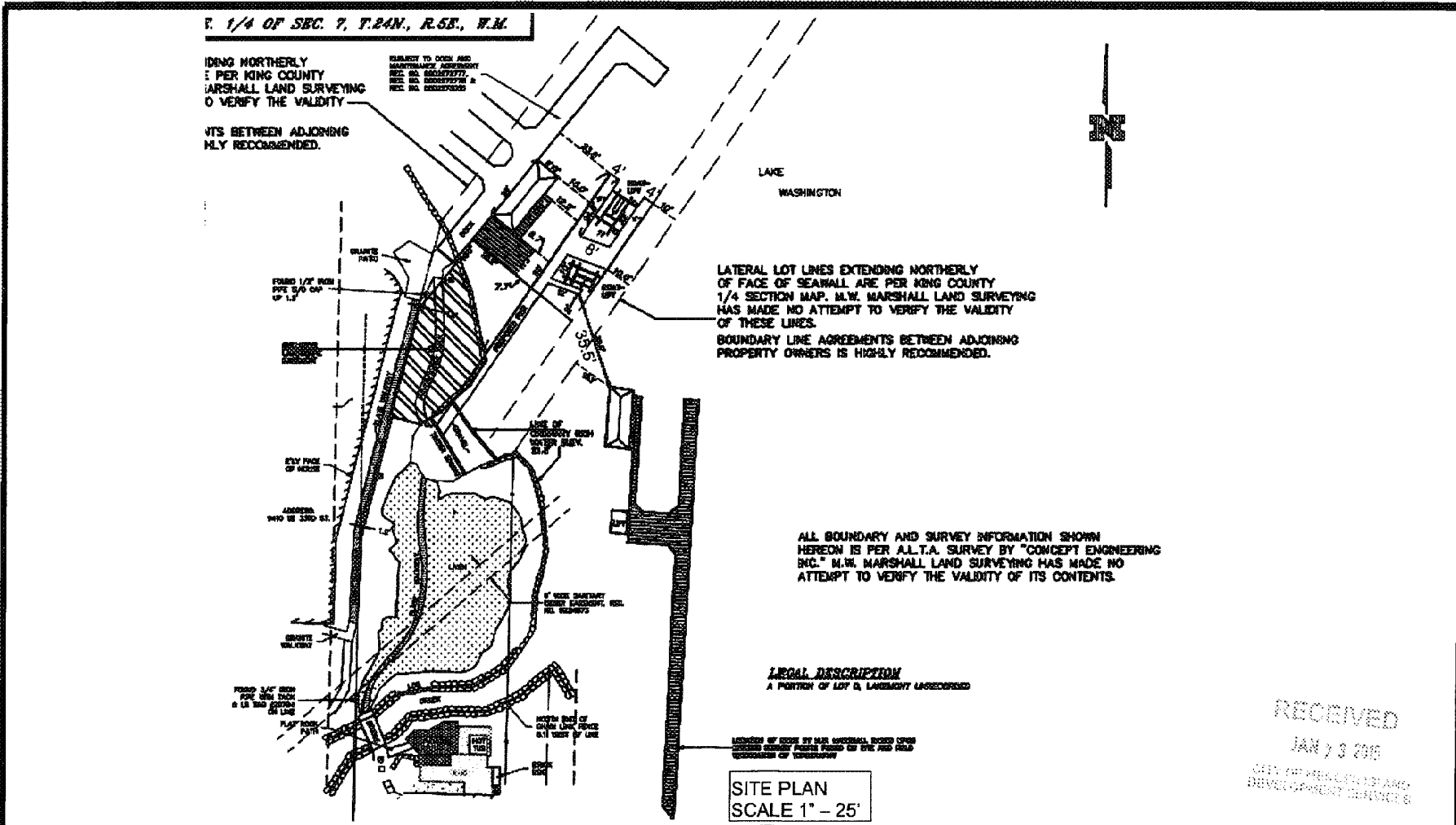
JAN 23 2015

CITY OF MERCER ISLAND
DEVELOPMENT DEPARTMENT

Name James Cherberg

Project Address 9418 SE 33rd Street

Phone # 206-232-0408



RECEIVED
JAN 3 2015
CITY OF MERCER ISLAND
DEVELOPMENT OFFICE

PURPOSE: PROVIDE ACCESS TO LAKE WASHINGTON FOR RECREATIONAL ACTIVITIES AND SMALL BOAT MOORAGE.

DATUM: CORPS OF ENGINEERS 1919

ADJACENT OWNERS:
 HAL GRIFFITH
 9410 SE 33RD ST.
 MERCER ISLAND, WA. 98040

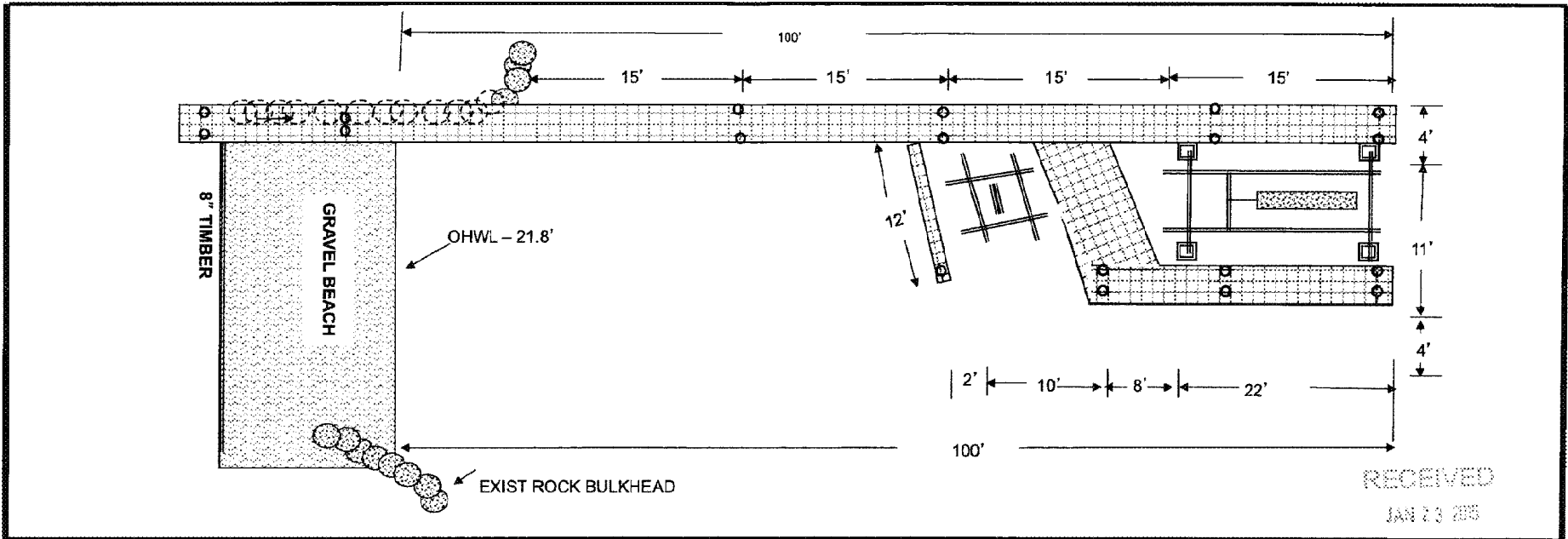
JT GRAUE
 9422 SE 33RD STREET
 MERCER ISLAND, WA. 98040

PROPOSED: Construct a new residential pier with a 100' X 4' walkway, a 8' X 15' connector, a 22' X 4' finger pier, and a 12' X 2' finger pier. The proposed dock will be supported by (15) 8" steel piles and will be fully grated. Install two ground based boatlifts.

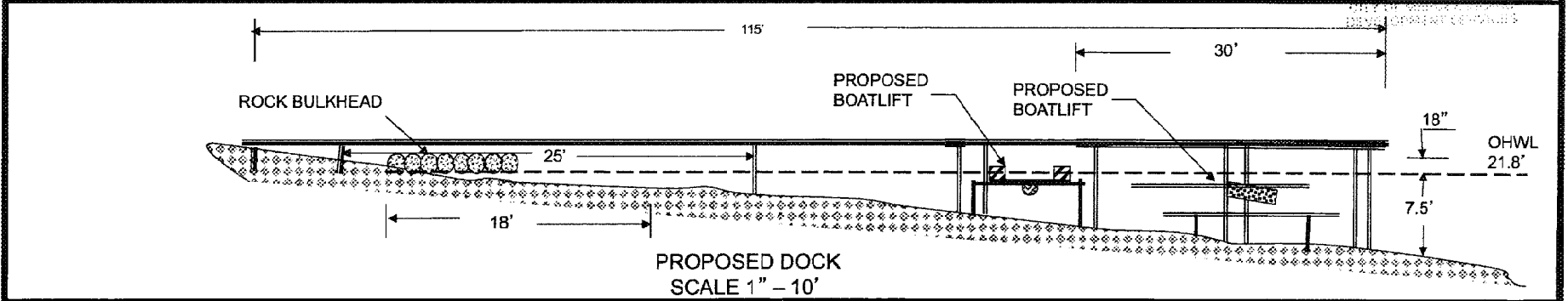
IN: LAKE WASHINGTON
 AT: MERCER ISLAND
 COUNTY: KING

APPLICANT: JAMES CHERBERG
 9418 SE 33RD STREET
 MERCER ISLAND, WA. 98040

DATE: 1/3/15 PAGE 2 OF 7



RECEIVED
JAN 23 2015



PROPOSED DOCK
SCALE 1" = 10'

PURPOSE: PROVIDE ACCESS TO LAKE WASHINGTON FOR RECREATIONAL ACTIVITIES AND SMALL BOAT MOORAGE.

DATUM: CORPS OF ENGINEERS 1919

ADJACENT OWNERS:
 HAL GRIFFITH
 9410 SE 33RD ST.
 MERCER ISLAND, WA. 98040

JT GRAUE
 9422 SE 33RD STREET
 MERCER ISLAND, WA. 98040

PROPOSED: Construct a new residential pier with a 100' X 4' walkway, a 8' X 15' connector, a 22' X 4' finger pier, and a 12' X 2' finger pier. The proposed dock will be supported by (15) 8" steel piles and will be fully grated. Install two ground based boatlifts.

IN: LAKE WASHINGTON
 AT: MERCER ISLAND
 COUNTY: KING

APPLICANT: JAMES CHERBERG NWS-2013-0565
 9418 SE 33RD STREET
 MERCER ISLAND, WA. 98040

DATE: 1/3/15 PAGE 3 OF 7

From: tedeurns@yahoo.com
Sent: Sunday, January 27, 2013 9:22 PM
To: can-cherberg@q.com
Subject: Re: Jim Cherberg

Hi Jim,

I'm OK, and it's good for both of us to share our thoughts and concerns.....we're in the middle of a journey. I'll add a couple of comments:

1. I've struggled with spanning the bulkhead due to construction issues, first I was concerned that the dock would be too high (you and I resolved that issue when we met on the 18th), and second I've been very concerned about the structural costs associated with a 40" +/- span. I now understand that you're OK with the costs and how I need to construct a dock section that's reinforced with an internal steel framework to eliminate the chance of bounce along the long span.
2. I'm embarrassed that I may have misled you and Nan on the size of the dock, it's walkways and how wide the ELL can be. The original (and contracted) design was based on Griffiths removing the floats and possibly moving the boatlift and canopy. Now that he's unwilling to make those enhancements to the inshore area; we're now trying to mitigate a dock larger than the RGP-3 guidelines of 480 square feet of overwater coverage, a main walkway with a section larger than 4' and an ELL limited to 6' wide (or would you rather try for 8'?).

In summary, tomorrow I'll re-draw the dock with a finger pier and connector to the ELL at a more acute angle away from Graue's. The inshore will be 4' wide to the first finger pier, and then increase to 5' wide to the end of the dock. The finger pier will be 2' wide, the connector will be 4' wide, and the ELL will be 6' wide. Does that sound like what Nan is looking for? Please note, that this dock would have an over water coverage great than 480 square feet and a walkway greater than 5'; which will require additional mitigation and we should have a planting plan to compensate. Make sense?

Thanks,

Ted Burns
Seaborn Pile Driving Company
ESTABLISHED 1947
9311 SE 36th Street - Suite 204
Mercer Island, WA. 98040
www.seabornpiledriving.com
206-236-1700 - office

206-947-4010 - mobile

-----Original Message-----

From: <can-cherberg@q.com>

Date: Sunday, January 27, 2013 5:43 PM

To: Ted Burns <tedeburns@yahoo.com>

Subject: Re: Jim Cherberg

Hey Ted. I'll try to address your e-mail - in detail - so you know where I'm coming from. We almost always go to the Boat Show. Of particular interest to me for the last 6 years have been docks and lifts - since I needed lifts at Enatai and the dock was eventually needing refurbishing. While on Lake Sammamish years ago, Nyman built a dock for me and provided a lift. As you know, they are no longer around.

I've known Alan for upwards of 20 years, and always try and say hello to him at the Show. When I was needing a new lift at Enatai, I approached him and asked with whom I should deal. As diplomatic as Alan is, it took a little "arm twisting" until he told me to go with Sunstream. Been with Jeff and them since.

Last night, Alexander and I were looking at all sorts of stuff: Wiley's; a \$650,000. woody; towers; automated canopy at Sunstream; dry suits; boards; docks, decking and the various products out there available for docks. Not everyone offers the same. Saw some interesting grating at Waterfront. I looked in the catalogue to see if you had a booth, and then decided I'd check out Marine Restoration. Indeed, it was very curious to hear - from him - that he builds his docks off-site and floats them over to install. He did not seem too forth-coming in his answers. I can filter through the incomplete answers and his bad-mouthing of other companies.

As you can tell, I am a hands-on guy and have a lot of questions. This can be a pain in the ass. And you have been patient and receptive to my questions. But I want to point out that my questions regarding vertical piles and the grating patterns available came before the Boat Show. You answered these questions.

That does bring me to the last half of your second paragraph and the different site plans and additional hours. I'm certainly responsible for a lot of our delay, not getting over to the neighbors in timely manner for one; researching different configurations, etc. But I also know that I have asked several times before, over a good number of weeks, why we could not span the bulkhead, as we are planning to do now? So when we met on Jan. 17, you gave me some measurements to take. I did measure on the 18th, you came out and confirmed we could clear the bulkhead and span it. I was frustrated that we had not done this much earlier on. I think it would have cut out a lot of back and forth time coming to this conclusion earlier. Perhaps you

were trying to mitigate construction costs; perhaps you believed the bulkhead to be too high to span. I'm not sure.

That is why I commented recently on how tight the site really is. Especially with the landscape easement with Griffith which, I guess, I did not stress upon you adequately enough to review it. That might have gotten us sooner to where we are now. So yeh, I wanted to seek information to mollify my frustration.

When I said hello to Alan I told them we had moved to M.I., but did not have a dock. I asked him a generic question of who's this Marine Restoration? I think I spotted a bit of a grimace only. I asked him who to use? He said, Ted Burns at Seaborn. Alan didn't set me wrong with Sunstream, and I don't think he is now.

But I did want to ask an outsider and was pleased with the answer. I know there are other companies out there. I can certainly understand your not wanting to work the permit, if you did not build the dock. But it doesn't seem very practical to me to pay for time spent already, and just to start over again.

The unfortunate aspect here is that I was trying to work through my frustration to avoid any conflict, but had decided before going to the Boat Show that I really needed to speak with you about the above. Had intended to do so tomorrow. So there it is. I'm OK if you are, and would like to get Marshall to work up that drawing.

I am comfortable that you try and satisfy your customers. I'm glad this is out in the open. But maybe we should touch upon another sketch or two I did today to mitigate the tightness, and get your opinion, so Marshall does only one drawing. Look forward to hearing from you....Jim

----- Original Message -----

From: "Ted Burns" <tedeburns@yahoo.com>

To: "Nan Chot-Cherberg" <can-cherberg@q.com>

Sent: Sunday, January 27, 2013 1:23:51 PM

Subject: FW: Jim Cherberg

Hi Jim,

I understand you met with Alan Boling yesterday at the boat show and were asking Alan about Marine Restoration Company. Marine Restoration is a dock builder, however different from most of us, they don't have any cranes or barges and work from a 30' aluminum boat. They hire another construction company to drive their piles before they come in and construct the dock.

Marine Restoration will also help with your permits, however different than us, they work on time and materials plus "out of pocket expenses" with no firm quote or "not to exceed" amount. Our contract with you does define a "not to exceed" amount for the permit services, however as I'm sure you agree, we will have some additional hours associated with the different site plans we've proposed as part of the dock location, plus Marshal's drafting and CAD time. .

Seaborn Pile Driving Company is a dock and bullhead construction company and we compliment our construction projects by acquiring the required permits. I'm very comfortable with you looking at other construction companies and canceling our contract, as I want you to do what makes you most comfortable. However, there are much better construction competitors than Marine Restoration Company (I'd be happy to give you a name). And, if you do change, I'd like to ask that you have another company complete the permit process.

Please let me know how you want us to proceed.

Thanks very much!!

Ted Burns
Seaborn Pile Driving Company
ESTABLISHED 1947
9311 SE 36th Street - Suite 204
Mercer Island, WA. 98040
www.seabornpiledriving.com
206-236-1700 - office
206-947-4010 - mobile

-----Original Message-----

From: Alan Bohling <alan@seattleboat.com>
Date: Saturday, January 26, 2013 9:00 PM
To: Ted Burns <tedeburns@yahoo.com>
Subject: Jim Cherberg

Hi Ted,

I believe you have talked with Jim in the past regarding his dock needs on Mercer Island. He was at the boat show tonight and asked me about some Marine Restoration company. I told him you were the only place to go.

If you have a chance, let him know I contacted you to reach out to him. I have his phone number at the office if you need it.

All the best,
Alan

Sent from my iPhone

Clark, David S NWS

From: Clark, David S NWS
Sent: Thursday, January 30, 2014 10:22 AM
To: 'ted'
Subject: Re: NWS-2013-00565 (Cherberg, James (pier)) (UNCLASSIFIED)

Classification: UNCLASSIFIED
 Caveats: NONE

Hi Ted,

I really your help with my questions! However, it appears that there are still a couple issues with the application.

1. I still don't have a clear sense of the new square footage of the pier. Page 3 of the revised RGP 3 form says 584 sq ft of new overwater coverage, while page 9 of the revised JARPA says 646 sq ft. Additionally, if I calculate square footage based on the dimensions shown on page 4 of the drawings, I get an even higher number for square footage.

Pier (105' X 4')= 420 sq. ft.
 Ell (30' X 8')= 240 sq. ft.
 Finger pier (15' X 2')= 30 sq. ft.
 Ell "connector" (approx 11' X 4')= 44 sq. ft.

$420 + 240 + 30 + 44 = 734$ sq. ft.

Of course it's possible that I didn't calculate these numbers right. Let me know!

However, of the 3 square footages, please let me know which one is correct, and adjust the drawings, JARPA and RGP forms so they coincide.

2. Your drawings show (Page 4) that the piles beyond the first set are 18' and 19' apart. However, Page 4 of the RGP3 form has a conservation measure that says "Beyond the first set of piles, piles for a new pier must be spaced no closer than 20 feet apart..." Please check the "Will not implement" box for this conservation measure. I can simply write it down manually for you, as long as you give the ok in your email response.

Thanks for your help. I look forward to hearing from you. As always, feel free to shoot me some questions of your own if you have them.

Thanks!

David

-----Original Message-----

From: ted [mailto:tedeburns@yahoo.com]
Sent: Wednesday, January 29, 2014 7:07 PM
To: Clark, David S NWS
Subject: [EXTERNAL] Re: NWS-2013-00565 (Cherberg, James (pier)) (UNCLASSIFIED)

Hi David,
 Please see my comments in capitalization below.

Thanks very much!!

Ted Burns
Seaborn Pile Driving Company
ESTABLISHED 1947
9311 SE 36th Street - Suite 204
Mercer Island, WA. 98040
www.seabornpiledriving.com
206-236-1700 - office
206-947-4010 - mobile

On Jan 6, 2014, at 2:06 PM, "Clark, David S NWS" <David.S.Clark@usace.army.mil> wrote:

Classification: UNCLASSIFIED
Caveats: NONE

Hi Ted,

I appreciate your prompt response to my previous questions, and your application is complete. However, I need more information to process your application and permit.

It appears that the Griffith's pier north of the project area is on the Cherberg property, as you stated. It seems that 18.5 feet would be insufficient room for the Griffith family to use their pier, especially since a large pier like that could accommodate a large vessel. This also appears to be an issue to the south side of the proposed pier, where the clearance would only be 28.5 feet from a pier and pair of boatlifts located at 9418 SE 33rd St. Please describe how installation of the Cherberg pier would affect and/or limit the use of those adjacent piers, and how it would impact navigation in the area.

THE PROPOSED PIER LOCATION WAS DISCUSSED WITH THE GRIFFITHS AS PART OF PURCHASING THE PROPERTY AND THEY AGREED WITH THE LOCATION. FOR REFERENCE, THE GRIFFITHS CURRENTLY DON'T USE THE SOUTH SIDE OF THEIR DOCK EXCEPT TO STORE FLOATS AND A BOATLIFT. THE APPLICANT HAS REVIEWED THE PROPOSED DOCK DESIGN AND LOCATION WITH THE GRAUES ON THE SOUTH SIDE OF THE PROPOSED PIER. THEY ARE ALSO IN AGREEMENT WITH THE LOCATION. THE PROPOSED DOCK WILL PROJECT INTO LAKE WASHINGTON LESS THAN THE EXISTING PERMITTED GRIFFITHS DOCK AND THUS WON'T BE A NAVIGATION HAZARD TO THE WATERWAY.

I'VE ATTACHED THE DOCK USE AGREEMENT THAT HAS BEEN RECORDED AT KING COUNTY RECORDS.

As you have stated, the project does not meet the conditions of the expired RGP 3. However, if the RGP 3 application form (SPIF) is to be used as a reference BE, then the information contained in it must be accurate. In the RGP 3 RBE, you state the surface coverage of the pier would be 584 feet, while the revised JARPA you submitted says 646 feet. Please clarify the size of the proposed pier. There are other instances in the RBE where you state that the applicant will not implement the measure or specification. Please submit a description of why they will not meet the measure or specification, in particular, the impact reduction measures on page 5, which specify that the planting area must be at least ten feet wide extending along the entire length of the property shoreline, except for 6-foot wide entrance(s) to the pier(s).

PLEASE SEE THE REVISED JARPA AND RGP 3.

The RGP 1 SPIF indicates that the applicant meets RGP 1 for watercraft lifts - on your Mitigation point worksheet, you show that installing two trees and two shrubs would fulfill the mitigation requirements for this RGP. However, your planting plan does not include any trees at all. Additionally, installing two trees and two shrubs provides mitigation only for impacts related to the watercraft lifts (RGP 1), not for the approximately 600 feet of new overwater coverage by the proposed pier. Please clarify these issues. PLEASE SEE THE REVISED PLANTING PLAN WHICH NOTES THE TREES SPECIFIC TO THE BOATLIFT MITIGATION ON PAGE 8 "PLANT SCHEDULE".

I have attached a copy of your planting plan with the southern property line emphasized in orange. It appears that much of the planting plan actually occurs on the adjacent property (9422 SE 33rd St.), south of the project area. If this is true, then nothing below the orange line can be considered mitigation for this project, and the planting plan you submitted is insufficient. If this is actually the property line, please revise your mitigation plan to keep any proposed plantings on the applicant's property, and provide square footages of the proposed planting areas. Please note that only native trees and shrubs are considered appropriate for mitigation plantings, not ground cover or herbaceous species. PLEASE SEE THE ATTACHED LANDSCAPE EASEMENT FOR THE PLANTING AREA ON THE ADJACENT PROPERTY TO THE EAST.

Finally, please help me understand the condition of the existing vegetation on the shoreline by providing additional labeled pictures of where the proposed plantings would be installed. Pictures of the existing pier on the Cherberg property would be helpful as well. Keep in mind, only areas that are within the subject property are relevant. PLEASE SEE THE ATTACHED PICTURES OF THE PROPERTY AND PLANTING AREAS ON PAGE 7 OF THE ATTACHED DRAWINGS.

Please submit all of the information described above within 30 days of the date of this email. After receiving this information, I may contact you to discuss specific aspects of your proposal. If you do not submit the required information or contact me within 30 days, the application will be canceled. However, cancellation of the application would not preclude you from submitting another application in the future. Since a Department of the Army permit is necessary for this work, do not commence construction before obtaining a valid permit.

I appreciate your help in this matter. Let me know if you have any questions.

Have a good week!

David

David Clark
U.S. Army Corps of Engineers, Seattle District
Regulatory Branch
4735 E. Marginal Way South
Seattle, Washington 98134
(206) 316-3998

From: ted [mailto:tedeburns@yahoo.com]
Sent: Wednesday, December 18, 2013 6:15 PM
To: Clark, David S NWS
Subject: [EXTERNAL] Fwd: NWS-2013-00565 (Cherberg, James (pier)) (UNCLASSIFIED)

Hi David.

I've inserted answers to your comments below. In addition, I've attached an updated set of drawings with the date of 12/10/13 with the total project description, an additional page with the vicinity plan showing the proposed dock in relation to the existing piers at the adjacent property, and a clearer drawing of the planting plan.

I've also attached a revised applicant information and the most current JARPA (2012.2).

I'm also mailing this information tonight.

Thanks,

Ted Burns
Seaborn Pile Driving Company
ESTABLISHED 1947
9311 SE 36th Street - Suite 204
Mercer Island, WA. 98040
www.seabornpiledriving.com
206-236-1700 - office
206-947-4010 - mobile

-----Original Message-----

From: "Clark, David S NWS" <David.S.Clark@usace.army.mil>
Date: Friday, December 6, 2013 2:19 PM
To: Ted Burns <tedeburns@yahoo.com>
Subject: NWS-2013-00565 (Cherberg, James (pier)) (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Hi Mr. Burns,

My name is David, and I'll be evaluating the application you submitted on behalf of James Cherberg for the construction of a new residential pier on Mercer Island. I've taken a look at the application, and it's incomplete.

1. Is there any way you could show the proposed pier on page 2 of the drawings, so I can see how it will be located in relation to the adjacent piers? Please see the updated drawings.

2. Please put the 2'x 15' finger pier (landward of the smaller watercraft lift) in the project description. Please see the updated drawings, JARPA and Applicant Information sheet.

3. Please reprint or resend the planting plan (page 5 of the drawings). It's unreadable. Please see the updated drawings.

4. Will either of the watercrafts include wood in their construction?

No. The watercraft lifts are constructed of aluminum.

5. According to page 2 of the drawings, Mr. Griffith's pier at 9410 SE 33rd Street looks partially on Mr. Cherberg's property. Do you have any information on that pier?

The Griffiths dock to the west was originally shared with the Griffiths. The Griffiths purchased the subject site on 2/9/2012, had the easement changed so the dock is exclusively on the adjacent parcel. When that was completed, the Griffiths sold the property to the applicant, excluding any sharing of the pier.

I really appreciate your help in resolving these questions. Let me know if you have any question.

Thanks!

David Clark
U.S. Army Corps of Engineers, Seattle District
Regulatory Branch
4735 E. Marginal Way South
Seattle, Washington 98134
(206) 316-3998

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: NONE

<planting plan extract.jpg>

Classification: UNCLASSIFIED
Caveats: NONE

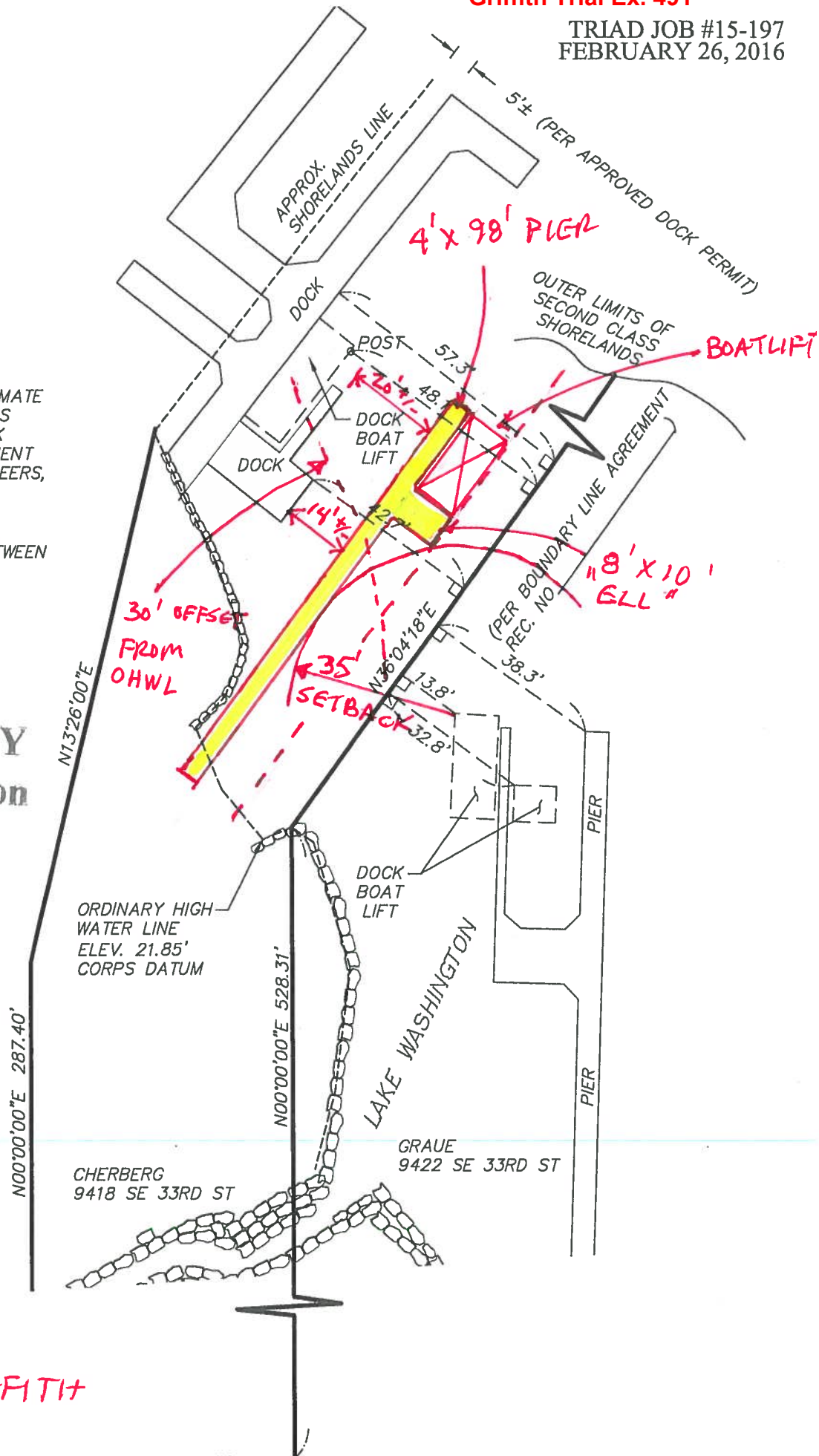


SCALE: 1" = 30'



GRIFFITH - CHERBERG APPROXIMATE SHORELANDS LINE IS SCALED AS SHOWN IN THE APPROVED DOCK PERMIT FOR GRIFFITH, DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, (REFERENCE NO. 96-2-02281, DATED MARCH 25, 1998. NO CURRENT AGREEMENT FOR THE COMMON SHORELANDS LINE BETWEEN GRIFFITH AND CHERBERG WAS PROVIDED TO TRIAD.

ADVANCE COPY
Subject to Revision



FOR HAL GRIFFITH
4/11/2016

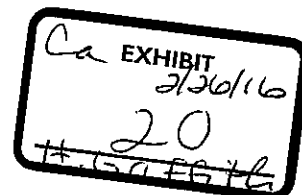
RECEIVED

APR 24 2015

CITY OF MERCER ISLAND
DEVELOPMENT SERVICES

April 23, 2015

City of Mercer Island
9611 SE 36th Street
Mercer island, WA 98040



Dear City:

This is a comment on the application of James Cherberg to construct a dock at 9418 SE 33rd Street, Mercer Island, WA. The Project Numbers are SHL 14-031 and SEP 14-025.

We live immediately next door to the project site, at 9410 SE 33rd Street, and currently have a dock on our property.

We have supported the Cherbergs' goal of obtaining a dock, so long as it is in scale and does not unreasonably limit the use of our dock. The proposal that has been filed, unfortunately, is out of scale for the small amount of waterway in that area. In addition, due to its size and configuration, the proposed dock would come very close (approximately 6 feet) to our existing dock and boat lift. The proposed Cherberg dock would be so close that it would make a significant part of our dock unusable. In addition, the dock would be so long that it would block use of the mooring area on the southeast side of our dock.

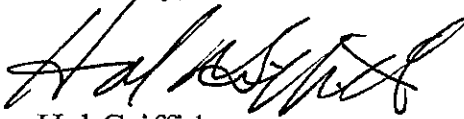
We previously proposed an alternative dock configuration for the Cherbergs' consideration. A copy is attached to this letter. The alternative proposal would provide a dock large enough to moor a large powerboat with a boatlift, to moor a wave runner with a lift, and to have adequate space for a diving board. It would not severely impact the use of our dock. Although it is not ideal from our family's perspective, in the spirit of neighborly cooperation, we would agree that it would serve as a basis for entering into an Adjacent Dock Use

Agreement for this alternative dock layout.

In short, the dock as proposed by the Cherbergs severely impacts the use of our own dock, is out of proportion to the available space and is far beyond any installation that we have ever contemplated. We believe, however, that a dock of suitable size and configuration can meet all reasonable requirements of the Cherbergs. We have expended effort, time and money to generate what we believe is a fair solution.

Thank you for your consideration of this comment and alternative proposal.

Sincerely,

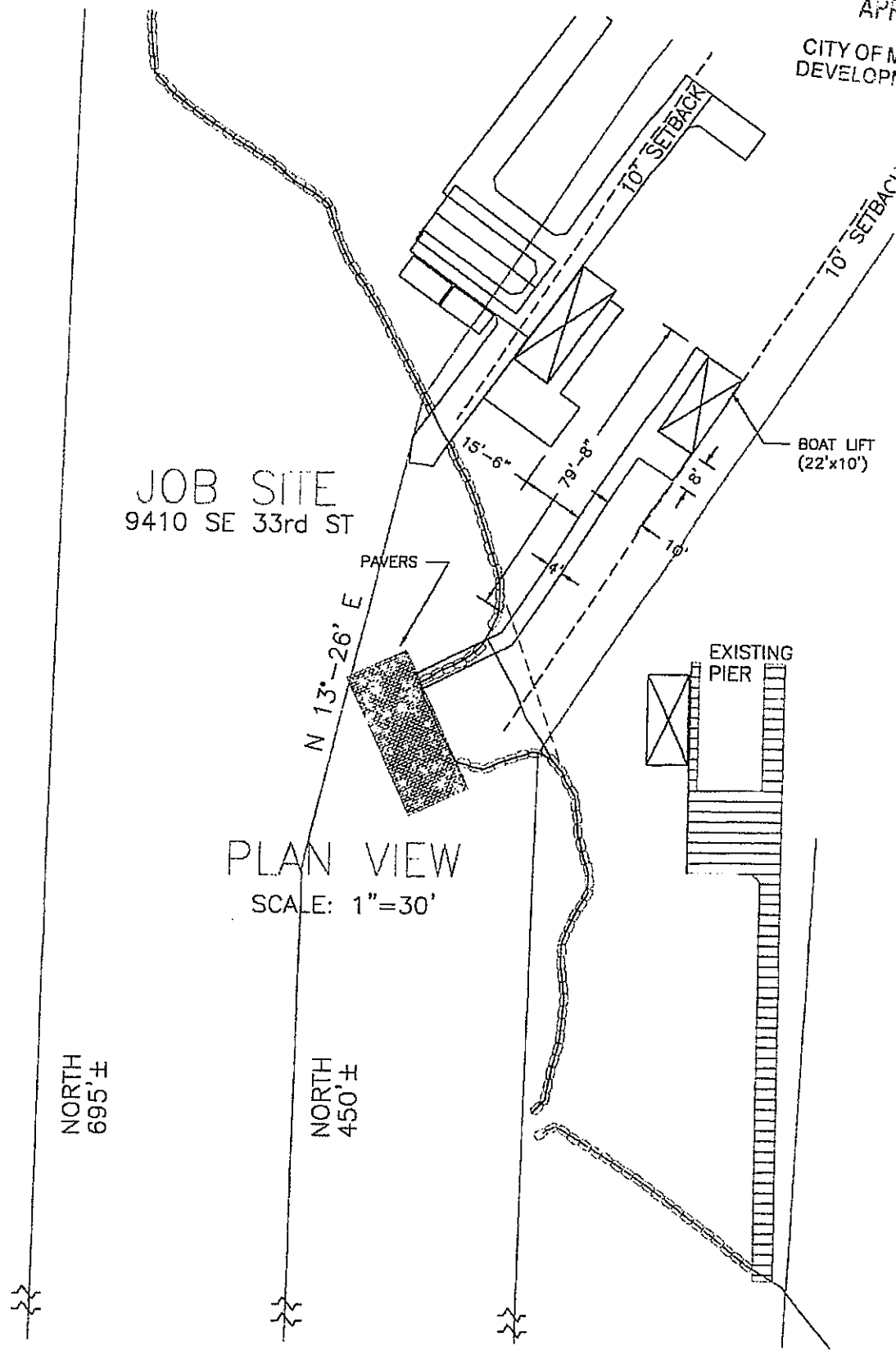
 4/23/15
Hal Griffith

RECEIVED

APR 24 2015

CITY OF MERCER ISLAND
DEVELOPMENT SERVICES

JOB SITE
9410 SE 33rd ST



PLAN VIEW
SCALE: 1"=30'

NORTH
695' ±

NORTH
450' ±

Handwritten signature and date: 4/23/15

HARRIGAN LEYH FARMER & THOMSEN LLP

October 19, 2021 - 4:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 81482-6
Appellate Court Case Title: James Cherberg et ano, Respondents v. Hal Griffith et ano, Appellants

The following documents have been uploaded:

- 814826_Petition_for_Review_20211019160434D1893008_4858.pdf
This File Contains:
Petition for Review
The Original File Name was 20211019 Griffith Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dfalkowski@freybuck.com
- erinf@harriganleyh.com
- kcobb@freybuck.com
- kristinb@harriganleyh.com
- tbuck@freybuck.com
- tylerf@harriganleyh.com

Comments:

Sender Name: Florine Fujita - Email: florinef@harriganleyh.com

Filing on Behalf of: Arthur Washington HarriganJr. - Email: arthurh@harriganleyh.com (Alternate Email: florinef@harriganleyh.com)

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