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No. 68202-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM,
Appellants, Cross Respondents
v.
RONALD J. MORGAN and KAYE L. MORGAN, husband and wife,
Respondents, Cross Appellants.

APPEAL FROM THE SUPERIOR COURT OF WASHINGTON,
WHATCOM COUNTY

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM,
Petitioners
v.
RONALD J. MORGAN and KAYE L. MORGAN, husband and wife,
Respondents.

REVIEW FROM THE SUPERIOR COURT OF WASHINGTON,
WHATCOM COUNTY

HONORABLE JOHN MEYER, SUPERIOR COURT JUDGE,
Visiting Judge, Skagit County

COTTINGHAMS' OPENING BRIEF

David C. Cottingham WSBA No. 9553, *pro se* ands Attorney for Plaintiff Joan Cottingham
Cottingham Law Office PS
103 East Holly Street, Suite 418
Bellingham, Washington 98225
(360) 733-6668

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I. INTRODUCTION.

Morgans dened the strength of Cottingham's title without investigation. Conduct begun with wrongful waste and no notice was followed by reckless pumping from their drain field or worse, high ground water, even pleadings invoking condemnation jurisdiction for their counterclaim. When facts at trial showed Morgan's Lot Eleven was not landlocked, and that their surveyor had not even studied the question whether their lot abutted access *to and* over the essential access provided by a publicly dedicated

railroad lot to the county road, Morgans quietly abandoned the condemnation counterclaim without comment and sought relief through equitable balancing in effort to satisfy building permit requirements without involing LUPA jurisdiction. Their unstaked setback had moved into area Cottinghams long possessed following rejection of their plan to building in the shoreline setback, and their driveway still violates their permit's setback condition to their desired property line in the area wasted.

II. ASSIGNMENTS OF ERROR.

1. Unsupported and Contradicted Findings. The following findings are not supported by substantial evidence for the following reasons:

a. Finding 4's legal descriptions are equivocal and conntradictory, establishing conflict between the plat legal and Morgans'survey.

b. Finding 5 was supported by stakes set where Morgans directed they be placed, not at corners after study of the Lot's extent, even without locating or quantifying the plat's additional extent of Lot Eleven.

c. Finding 7 does not locate the described area.

d. Finding 8 finds nothing and misstates Amended Complaint paragraph 2.17 and 2.5.

e. Finding 10 is not supported by locating Lot Eleven.

f. Findings 11 and 12 are not supported by evidence that Morgans and Steele saw "no evidence" or "little evidence."

g. Finding 13's two findings are neither supported by location of Lot Eleven at trial, nor Morgans' own survey. Its finding regarding the laurel locations is contradicted by Morgans' surveyor Steele's by EX 4 used at summary judgment, and the south half of laurels was removed by Morgans before the EX Ayers' survey (EX 32, and CP 393-397).

h. Finding 14 is substantially contradicted by omission of the pictured locust tree (CP 507, 538 exh.I, 540; exh. K; 542, exh. M; 543, exh. N; 551, exh. V), and rhododendrons (CP 552, exh. W).

i. Finding 15. Summary judgment did not define the disputed area distinguishing the Wilson plat identified in Cottinghams Amended Complaint para. 2.5 and 2.17 and Cottitnghams summary judgment Declaration

j. Finding 17 is not supported by evidence that location of a preexisting septic system controlled Morgans' septic system.

k. Finding 18 is not supported by evidence *locating* a described "disputed property" in this quiet title action which still includes evidence of unresolved conflict between the plat's legal and lot location (EX 13 pg 1), Wilsons survey (EX 13 pg 2) and Morgans' surveys (EX 4 and 5).

l. Finding 19 addresses laurels which summary judgment evidence already showed as crossing Morgans shortened side line survey at summary judgment (EX 4, CP 507; exh. P at CP 545) as crossing Morgan's surveyor's line (also CP 446, 449, 451, 452, along Cottinghams' S 59° 04' 35" W Maintenance line from the "I[ron]R[od]" of surveyor Ayers Exhibit (CP 395) following Cottinghams' earlier uses CP 513, 540, 542,[1] so the Finding is not unsupported by the recited discovery at trial and "Lot 11" has not been distinguished by quiet title from the Wilson Survey or Morgans'/Steeles/ shortened Lot Eleven survey.

m. Finding 20 and 22 and 23 fail to distinguishing the true description and location of Lot Eleven, whether the Plats' location, Wilson's Survey or Morgans'/Steeles shortened Lot Eleven survey.

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[1] (Declaration of David C. Cottingham in Support of Summary Judgment photographic exhibit K and M).

n. Finding 23 A is not supported by any weighing of the value assigned to Cottingham's use for defensive garage, their own setback, vehicular access from the water or privacy, and Finding 23 B is not supported by any evidence of weighing great value of 292.2 square feet to Morgans.

o. Finding 23 C is not supported by any evidence of threat to "substantial permanent improvements being removed" or safety issues related to access.

p. Finding 23 D is not supported by any evidence of further dispute potential at the instance of or participated in by Cottinghams and cannot be found upon Morgan's initiation of conflict.

q. Finding 23 E is not supported by any evidence of "unreasonable restriction upon the use of property by Morgans" or comparison with benefit to Cottinghams.

r. Finding 23 F is not supported by evidence of impairment to rketability or detraction therefrom.

s. Finding 24 is not supported by substantial evidence that Leo Day was a certified septic installer; that Morgan believed what he pumped was odorless; that the land was vacant where pumped, or that the health department required large boulders.

t. Finding 25 is not supported by any evidence that Morgans performed site condition investigation necessary to the prevention of continuing nuisance after months of neglected septic failure by a signor of EX 19 agreeing to comply with WCC 24.05.

u. Finding 26 is contradicted by 23 D (likelihood of further disputes and conflict), and 27, as well as evidence of intentional abuse by Morgan following --and from the location of—Morgans' wrongful removal of Cottinghams' privacy hedge.

v. Finding 30 is unsupportable and is contradicted by Morgans' intentional behavior, health code violation and avoidance of required timely disclosures to the health officer.

w. Amended Finding 23C adds setback for the residence, septic system and driveway. The finding is not supported by necessity or substantial evidence and the court does not have jurisdiction to entertain proof of the finding. 33 (removal of laurels necessary for reasonable vehicle access).

x. Supplemental Finding 23 D adds that Morgans at no time acted in bad faith nor willfully in violation of Cottinghams' claim of title and the finding is not supported by substantial evidence, is contradicted by 23 D (likelihood of further disputes

and conflict) and the evidence admitted by Ron Morgan. The court rejected Morgans' proposed Finding 34 (Morgan reasonably believed the land was Morgan's property), and 35 (Morgans' removal was casual not willful).

2. Assignments of Error, Conclusions.

a. The Forced Sale Judgment is void, entered without subject matter jurisdiction and in violation of Washington Article 1 §16 as an invalid condemnation; Article 1 § 12 as a preference in violation of Washington' privileges and immunities clause; the privileges and immunities clause and due process clause of the fourteenth amendment of the United States Constitution and its Fifth Amendment prohibition against taking private property and conferring it upon another without a public purpose.

b. It was error invalidating a forced sale judgment and any Decree to assume subject matter jurisdiction in relief of land use permit conditions, without review on the conditions, deference to agency jurisdiction and exhaustion of agency remedies . RCW 36.70C.,

c. It is a manifest abuse of discretion to grant relief during agency permit action enforcing setback conditions (EX 1 and EX 23) and to do so during an unresolved complaint before the

agency (EX 34) that property line evidence withheld in Morgans permit application amounting to misrepresentation by concealment of evidence, has capacity to negate agency jurisdiction, even to negate permit validity, while the range of potential agency action may still include refusal to issue final occupancy approval.

d. Conclusions 1, 6 and 8, and judgment. Lack of compliance with condemnation statutes RCW 8.24 and RCW 8.20 deprived the court of subject matter jurisdiction for any condemnation remedy but for quieting superior title to both description and location of the properties and property adversely possessed. It was error to fail to enter a Decree completely quieting the properties' resulting legal descriptions.

e. Conclusion 9. It was error to dismiss claims for injunctive relief protecting against nuisance and interference with Cottinghams' improvements, outrage, trespass and privacy damages.

f. Amended Conclusion 5. It was arbitrariness, oversight or error, contradicted by express findings and the evidence at summary judgment an trial, conclude Cottinghams did not establish adverse possession

g. Amended Conclusion 7. Though stricken in whole or in part, it was error to deny damages for Morgans' continuing trespass to the date of judgment and continuing thereafter.

h. Amended Conclusion 8. The conclusion is without corner location finding supporting its legal description. It was error to fail to resolve superior title distinguishing plat location, Wilson Survey location; and it was error to address interests of others in this long-relocated private road without employing CR 19 procedures

i. Amended Conclusion 11. The conclusion that the Lis Pendens should be removed is void for lack of jurisdiction and error, exceeding constitutional restraint of Washington's Article 1 §16, RCW 8.24.030 and RCW 36.70C.030, .040, a violation of procedural and substantive due process Cottinghams' impairing fundamental property interests and amounts to unconstitutional taking allowing intervening interests of third parties under Spahi v. Hughes-Northwest, Inc., 107 Wn. App. 763 (2001) while leaving the remainder of the parties' property line unresolved and subject to interpretation.

3. Additional Assignments.

a. The court erred failing to enter Cottinghams' proposed Findings and Conclusions (CP 876-915); and failing to grant Cottinghams' Motion for Vacation of Judgment (CP 855).

b. The court erred failing to enter the proposed injunction (CP 918) to protect against Morgans' septic system for failure to disclose seasonal failure; to conduct qualified and mandatory failure condition investigation after evidence of poor siting; high ground water table necessitating pumping on several occasions, Morgan's violation of WCC 24.05.090, .110, .160, and .170, use of unqualified personnel in their self-help remedy, and unlawful withholding of wet-season notice from the health officer in violation of an owner's duties under the health code . . WCC 25.04, WAC 246.272A

c. It was error to fail to enjoin Morgan interference with restoration of the area granted at summary judgment dated January 11, 2011, in correction of Morgan's ejectment of Cottingham Improvements.

d. The court erred in denying Cottinghams' Motion for Vacation of Judgment, Amendment of Findings and Conclusions, Reconsideration and New Trial. CP 641-643. CP 99-104.

e. The court erred in denying award of damages against Morgans for continuing trespass and continuing use of Cottinghams' property. CP 105-107.

f. It was manifest error to enter an Order Re Supersedeas CP 624-625, appraising Morgans' potential for damage during appeal at $750,000.00, well beyond the inherent value of 292 square feet of property ordered sold, with values during prejudgment and post judgment continued use by Morgans, but add an expectancy in Morgans home sale.

g. It was manifest error to enter paragraph 3 ("Lis Pendens filed herein shall be removed from the public record") of the Order Denying [sic] Finality CP 634-635, and render the Lis Pendens beyond ability to supersede by the $750,000.00 amount.

h. It was error to strike portions of the Declaration of David C. Cottingham (762-806), Declaration of Steven Otten (749-761) CP 392. Declarations of Otten, CP 749, and of Richard Koss, CP 762.

i. The court erred in reconsidering Summary Judgment after trial without a moment of pronouncement and opportunity to Cottinghams to demonstrate the entirety of their pleaded and

supportable entitlement. Amended Complaint para. .2.17 and Wilson survey.

j. It was error to fail to consider the Wilson plat and subdivision survey staking and establishing Nixon Beach Tracts side lot lines.

k. The court erred in denying expert surveyor witness fees in its Judgment. CP 620-623. RCW 8.24.030. ($4,652.00, David C. Cottingham Declaration CP 82-98) and investigation costs, RCW 4.24.

III. STATEMENT OF THE CASE

Before Morgans purchased their waterfront lot their surveyor[2] warned them of Cottinghams' hedge (RP I, 131, ln. 20-25), including their hedge in his survey (EX 4), the health officer fielded questions and registered his concern over the lot's potential drain field and driveway conflict, (RPIV 75, ln. 6-12), and a publicly filed Wilson subdivision survey of railroad property[3] showed their Nixon Beach Tracts Lot Eleven corner at its (and Cottinghams') Lot 16 property corner and stake, extending the parties' common lot line straight therefrom to the lake between Cottinghams' Lot Ten

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[2] Morgans' :survey" was incorporated into their deed as an exception B,which the deed is specifically "subject to" RP I, 132, ln. 6-15.

[3] Burlington Northern Inc. Railroad Right of Way subdivision.

and Morgans' Eleven. Cottinghams' had maintained railroad lot 16 and Nixon Beach Tracts Ten ("NBT Ten") more than twenty years since July 1985 along a line from that stake to the south alder, crossing where Morgans' surveyor put their shoreward stake in Ex 5. (See, ex. F at CP 535, and also CP 534, Ayers Survey crossing "found r/c, on lot line R.O.S. A.F.208010636) Access from the county road over BNRR 16 to NBT Eleven was still staked (RPII112, ln. 6) from the subdivision shown at pg 2, EX 13 (CP 532[4]) Wilson Engineering's ("Wilson's") BNRR plat and Survey. That survey includes a substantial effort at arriving at and representing calculations of bearings of the Nixon Beach Tracts side lot lines.

Morgans were directed to the stake by Cottingham as soon as they asked about covenants. RPIV 53, ln. 4 As contractors planning to sell within two years (RP I pg. 24 ln. 9; CP 630, ln. 10), Morgans' unsuccessfully planned their building placement in the prohibited shore setback. RPIV 182, ln. 1- 184, ln. 2. The Building

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[4] Entitled "Burlington Northern Inc. Railroad Right Of Way Along Lake Whatcom Div. No. One," filed in 1976 under certificate of Lloyd Short, Surveyor for James Wilson Engineer CP 532 (also Exhibit D, Declaration of David C. Cottingham in Support of Partial Summary Judgment, CP 507) and referred to herein as the "Wilson" plat, with its lots as subdivided referred to herein as the "BNRR" lots, eg., BNRR Lot 16's southern stake, being the "Iron Pipe" of the Partial Summary Judgment CP 389.

official's rejecton of that plan in 2006[5] pushed their construction upland and back to Cottingham's hedge. On limited services by surveyor and contractor (RP IV 182, 16-22); Morgans built a house for profit by resale.[6] No one was watching out for necessary septic and driveway area conflicts (RP IV 182, ln. 1-5), despite the health officer's early concern.[7] (RP IV 74, ln. 7 – 75, ln. 12; and 77, ln. 25 – 77, ln.14; and 96, ln. 23 – 97, ln. 4). The Building Official also rejected Morgans' driveway in the side yard setback, yet it remains today. (See, *Note,* EX 1).

Morgans cut into Cottinghams hedge to establish their buildings' north side yard as seen in exhibit "V" and "W"(CP 551-2) and "Z",(CP 555). No evidence revealed that Morgans discussed any effect on title of Cottingham's improvements with their surveyor or with Cottinghams or any contractor before or during construction. Their surveyor even testified that because of Morgan's "scope of work" work (RP II pg.138 ln. 25) he only staked as directed by Ron

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[5] "The County made us go back 15 feet more all during June, July, August, 2006. RP1, 22, ln 7-9, testimony of Ron Morgan.

[6] Ron Morgan testified "*We've built several houses before, one house* [sic] *before. My job is I'm a mediator and an arbitrator.* RPI.pg. 24, ln. 9. *See, also, Fourth Declaration of Ron Morgan. Para. 04., pg 2, ln. 10, CP 629-631(plan was to build, hold for two years).*

[7] For his part, Morgan actually testified he was uninvolved. "I do not get real involved in building a house" RPI pg. 24, ln. 8. Morgan wasn't "concerned about anything at all." RPI, 133, ln 6-9;

Morgan, and never studied further upland. Comparing his survey, EX 4 (corrected at EX 5 in year 2008) with survey and stake information known to him from Wilson's BNRR survey and the Nixon Beach Tracts plat description[8] shows he staked short of essential access to the public road while also omitting reference to Wilsons stake at such access.

Morgans' Answer admitted "discharge of effluent from defendants' septic system onto defendants' property," (para. 10) and counterclaimed for a private way of necessity under RCW 8.24 for a "driveway" located "between the septic field and the said boundary." CP 564. Partial Summary Judgment Quieting Title And Granting Ejectment (CP 496-498) was granted Cottinghams after on factual declarations and photographic evidence of uses from year 1985 (CP 513) even *before* a hedge (CP 514, Exhibit K, CP 540), but also on demonstration of Wilsons stake and survey (CP 532), and approved for staking and filing (CP 389). Improvements before the hedge had included a swing and gym, tree, and composting structure shown in Exhibit K and M (CP 514, ln. 12-15). Cottinghams' mowed on the south side (Morgans') of such

[8] The plat description sets these lots between the railroad property and the lake. Pg. 1, EX 13.

improvements and regularly trimmed the laurels on the same south side." (CP 500-501). Summary judgment had definitely located --by staking-- certain area as adversely possessed by history of uses from July 1985, (CP 507-555), adjudicating Cottinghams' first and second claims by Order authorizing staking and public recording without delay (CP 391).

Morgans never denied notice of the publicly filed Wilson plat and survey at trial.[9] David Cottingham testified that he had given Morgan notice of the location of the regarding the Wilson stake's location. RPIV 53, ln. 4-25. Morgan's own initial permit had issued only after recommendation of a defensive garage in this flood zone critcal area. *Pgs 6 and 7*, PLA EX 7. Judgment awarded Cottinghams trebled damages for Morgans' waste of their hedge, CP 105-107, revised the Summary Judgment and denied Cottinghams' claims for trespass, restoration, maintenance easment, outrage, and injunction from destruction, ejectment.[10]

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[9] Morgans' private condemnation counterclaim was for driveway, but had never described the area requested for purposes of RCW 8.24 and its implementing statute, RCW 8.20. CP at 564-572. Notice of the publicly filed Wilson plat and survey which included their lot was never denied by Morgans, nor did they deny knowledge of the Building official's condition (EX 1 and EX 23) that their driveway conform to a five foot setback.

[10] But see, No. 5, pg. 3, Findings, referring to stakes set by Morgan.

Trial Exhibit 29 alone reveals the extent of unstaked area awarded Morgans by sale

Cottinghams' Motion For Vacation of Judgment, Amendment of Findings and Conclusions, Reconsideration and New Trial (CP 99-104; Order CP 641-643) and Memorandum (CP 20) objected to forced sale, advised on doctrines of primary jurisdiction, exhaustion of remedies, Whatcom County's interest in permitting, and Land Use Petition Act jurisdiction, RPIV 26, ln. 14; RPIV 30, ln. 5-6; f RCW 36.70C's notice and joinder. RPIV9, ln 1 – pg 11, ln. 1. The motion was denied (CP 99-104; 41-49; 50-69). The only pronouncement helpful to understanding the Findings and Conclusions occurred when the trial judge informed that he "didn't use the eminent domain statute, I didn't think it applied." RPV 7, ln. 13 – 14.

IV. ARGUMENT

1. Adverse Posession was Clear as a Matter of Law

Adverse possession recognizes the earlier advent of new title following ten years' possession of a quality that provides notice. El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 1528 (1962)[11]:

[11] See, also 10 Thompson on Real Property, Second Thomas Edition sec. 87.03, at 92 (Daniel A. Thomas ed. 1995) ('The cases are in accord that

.Any other relevance urged is merely argument for a change in law, as by requiring that there be continuous occupation for after ten years, or that Cottinghams' duty is to prevent Morgans' investment. Such is an estoppel argument, long disfavored as cause to divest property rights.

Factual construction and occupation of the Cottnghams' line occurred 1992 (compost structure) 1993 (Laurel Hedge) 1994 (Gym and Swing and more laurels) and since then, all along a line at which mowing and trimming maintenance was witnessed, evident and and participated in by Cottinghams in 1985. CP 513, ln. 22, para. 10 - 517 ln. 20.

As in Mugaas v. Smith, 33 Wn.2d 429, 206 P.2d 332, 9 ALR2d 846 (1949), "[n]o inquiry was made of [Cottinghams] as to the boundary line before the appellants made their purchase. They were notified as to [Cottinghams'] claim before doing any work on the strip in question and before setting in place the house which encroaches on that strip."

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when adverse possession is completed, title passes from the former owner to the adverse possessor.'); id. sec. 87.01, at 76 (Title by adverse possession 'is a new and independent title by operation of law and is not in privity with any former title.'). '{T}itle acquired by adverse possession is not affected by the recording statutes.' Crescent Harbor Water Co. v. Lyseng, 51 Wn. App. 337, 345, 753 P.2d 555 (1988).

Cottinghams' summary judgment declaration revealed that on the south side (Morgan Lot 11) of the hedge Cottingham "continued mowing a width of forty inches lateral mowing became difficult by 2004 and still I continued trimming on both sides... used ladders for several days each year until 2005." (ln. 24 pg. 9 CP 515). Conclusions 5, and finding 11 and 12 are not relevant and ignore a history of uses preceding Morgans' purchase. Findings holding that Morgans or their surveyor "saw no evidence of adverse possession" (but for Cottingham's hedge), simply invite change in the doctrine of adverse possession as though it required constant additional showing *after* ten years. Ell Cerrito, while introducing no new evidence

If reversal of the Partial Summary Judgment Decree conclusion was intended by the court (while curiously maintaining forced sale from Cottinghams to Morgans), then Amended Conclusion 5 appears as capricious and arbitrary challenging as a violation of due process, by sudden selective resort to focus only upon the location of laurel *trunks* as though the Cottingham Declaration (CP 507) did not establish -without contest- other earlier uses with maintenance upon both sides of laurels according to a line defined as between the south alder and the Wilson Iron

Pipe. (CP 513, ln. 8, and 515, ln 19-24). Ignoring history of pre-hedge uses, conclusion 5 would attempt to reverse authority firmly holding that property need not be continuously held in an adverse manner after new title until quieted in a lawsuit.

1. Lack of Jurisdiction Renders Any Forced Sale Void.

The judgment forcing sale to Morgans is void. The purposes to be served in Finding 23, and its Amended or Supplemental Finding 23, require structural improvements over a line and jurisdiction which was never invoked[12]. The court did not have jurisdiction to force sale to ensure compliance with permit conditions in protection of Morgans' profit expectancy or marketability. Wash. Const. Art. 1 §16 (condemnation); Art. I, § 3 (due process clause), Art. I, § 7 (protection of personal interests); Art. I, § 12 (privileges and immunities) clauses of the Washington Constitution. The notice and joinder of parties necessary to the requested relief is statutorily enacted in RCW 36.70C.030, .040, and constitutional in dimension. Only compliance with required notice and joinder of RCW 36.70C.040 (2) would confer such

[12] Authority employed for equitable balancing arises only under constitutional restraint, Arnold v. Melani, 75 Wn.2d 143, 152, 449 P.2d 800 (1968) and Proctor v. Huntington, neither of which involved an adverse possession finding.

jurisdiction. RCW 37.70C.050. The court now has an absolute duty to vacate the void judgment. CR 60(b)(5). A case invoking a condemnation counterclaim which never even mentioned or specified area of a request for relief from setback deserves vacation. RCW 36.70C is not simply a statute holding a judgment addressing permit conditions void if not approached through the notice of its provisions. It is a statute which declares that permit condition relief may not be addressed except through *timely* compliance with procedures giving due process-quality notice to all interested parties.

Requests to vacate void judgments may be brought at any time. In re Marriage of Leslie, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989). Since Morgans could not and did not demonstrate title superior to Cottinghams claim under the Wilson Survey and Adverse Possession at summary judgment or at trial, it was manifest error to refuse entry of Cottinghams' proposed Decree. The court should vacate and remand for entry of a corrected judgment and Decree conforming to the Summary Judgment Order entered January 11, 2011. (CP 389). The judgment forcing sale is an unpermitted condemnationExclusive Original Jurisdiction Is Not Shared With The Building Official. RCW 36.70C.030.

Morgans could not invoke jurisdiction over their setback conditions without notice and joinder of a Land Use Petition. See, Chaney v. Fetterly, 100 Wn. App. 140, 149, 995 P.2d 1284 (2000) (administrative tribunal has exclusive original jurisdiction; superior court has only appellate jurisdiction). When the legislature means exclusive original jurisdiction, it says exclusive original jurisdiction. *fn 1,* Ledgerwood v. Lansdowne, 120 Wn. App. 414, at 420 (2004).

Under RCW 36.70C.030 Morgans request for relief of permit conditions is an impermissible collateral attack on Whatcom County's setback conditions. Relief without invoking the trial court's exclusive original jurisdiction is narrowly allowed under RCW 36.70C.030 and can be highly prejudicial to full review and due process. Piecemeal review is counter productive at this point. Because the trial court proceeded without jurisdiction properly invoked by Morgan, any judgment must be determined to be void, such that it inspires and supports no potential for intervening rights in the property described at summary judgment. RAP 12.8.

. Morgans have not shown the futility administrative proceedings. Chaney v. Fetterly, 100 Wn. App. 140, 149, 995 P.2d 1284 (2000) (administrative tribunal has exclusive original

jurisdiction; superior court has only appellate jurisdiction). Beard v. King County, 76 Wn. App. 863, 870, 889 P.2d 501 (1995)

Finding 23 awards a leap over the agency jurisdiction, relieving Morgan from the burden of demonstrating valid permitting. RCW 36.70C.030 is the only route to such relief. By enforcing the legislature's expectation that relief from building permit conditions such as setback proceed only through that statute agencies have ability to enforce expectations that they will receive cooperation and honest applications on full disclosure with planning equal to the development challenge. Without invoking such jurisdiction as offers notice, joinder of interested parties and opportunity to be heard however, the result of this trial is a procedurally tainted and unjustified private condemnation under color of RCW 8.24 condemnation authority, reviewed and deficient under RCW 8.24, 8.20 and Taylor v. Greenler, 54 Wn.2d 682, 344 P. (2d) 515 (1959). At the least adjournment was necessary when Morgans shortened surveying technique was uncovered.[13]

"[13] The court or judge may, upon application of the petitioner or of any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected." RCW 8.20.060.

In Richards v. City of Pullman, 134 Wn. App. 876 (2006) the failure to challenge setback condition was dismissed as untimely for failure to employ LUPA procedure. The court specifically determined that the LUPA remedy precluded declaratory relief from the owners' setback challenge.

Morgans impermissibly and collaterally attack their land use permit conditions without disclosing a record survey establishing their access as though they should not be bound by the notice it provides. They do the same with the notice provided by Cottinghams' hedge. They do so without slight effort at showing any competing history of Cottingham's use, even without attempting the investigation before construction, while enjoying a measure of latitu. The findings, conclusions and the judgment awarding forced sale in relief of setback cannot stand given RCW 36.70C.030 and its pronouncement of the exclusive means of judicial review of land use decisions. A judgment is void when the court lacks jurisdiction of the subject matter, or lacks the inherent power to enter the particular order involved. Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975), *supplem.*, 88 Wn.2d 167, 558 P.2d 1350 (1977). When a judgment is void, a court has a nondiscretionary duty to vacate the judgment.

Building permits and building code inspections only authorize construction to proceed; they do not guarantee that all provisions of all applicable codes have been complied with. Taylor v. Stevens County 111 Wn.2d 159, 167, 759 P.2d 447 (1988). "[I]ndividual permit applicants, builders and developers, and not local governments, are responsible for ensuring compliance with building codes." Mull v. Bellevue, 64 Wn. App. 245, 255, 823 P.2d 1152 (1992). Misrepresentation at permitting is serious and the report cannot be ignored. Lauer v. Pierce County, 157 Wn. App. 693, 238 P.3d 539 (2011)(Dec. 15, 2011) (reported misrepresentation invalidates permit and its vesting).

Equity favoring Morgans' counterclaim is as absent as jurisdiction. Morgans simply sought "return" of Lot Eleven without distinguishing the Wilson survey or addressing superior title's location, apparently to accommodate building permit and zoning conditions unsupported by structural improvement over any line to justify equitable balancing. Cottinghams' summary judgment facts had not changed, and additional facts recited as becoming clear "at trial" demonstrate cause for sanction of Morgans, not relief. Trial showed that Morgans neither considered language of their plat or the recorded Wilson survey; investigated history of Cottinghams'

possession and title; offered their obedience setting definite setback for permit conditions; or offered support for the counterclaimed condemnation.

2. Due Process Is Offended By Opening Summary Judgment at Trial Under CR 54(b).

Opening the Partial Summary Judgment Order after Morgans had opportunity to be heard denied Cottinghams full and fair opportunity to try title as fully as was alleged in their complaint. "Although the exact procedures required by the constitution depend on the circumstances of a given case, the - fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." PJ v. Wagner, 603 F.3d 1182, 1200 (10th cir. 2010); Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

3. Cottinghams' Superior Demonstration of Title Prevails.

Cottingham stood on the Wilson Survey and adverse possession. A quiet title action challenges the defendants to establish the quality of their title. Morgans failed to do so. EX 13, pg. 1, the Plat Dedication Certificate, July 2nd, 1945, W.J. Nixon and Margaret Nixon, reads in pertinent part:

"This plat covers and includes that part of,'
Govt. lot 1, Section 5, Township.37N, Range 4 East

> of W. M., *lying between the right-of-way of the Northern Pacific Railway, and the shor line* [sic] *of Lake; Whatcom and North and West of Smith Creek...*"

Lot Eleven abuts the railroad dedication where the Wison's stake revealed its surveyors' opinion of Morgans' north side lot line. A surveyor is required to locate and preserve notation regarding other evidence of survey pins at the site and to "follow the footsteps" of the original surveyor. §14.01 Clark, *Surveying and Boundaries*, *Seventh Ed.*, Robillard and Bouman, 1987, 1992.

Morgans surveyor ignored the plat's description. Cottinghams' expert surveying witness Bruce Ayers easily gave his unreserved opinion that Mortgans had not surveyed their entire lot. Morgan's surveyor could not offer any opinion that Morgans' Lot Eleven did not extend further *or* that Morgan was entitled to rely upon staking completed as "corners." Morgan and Steele therefore ignored the lot's true dimension, carelessly mislocated the "gravel drive" and failed in EX 4, to add the Wilson stake. RP 2,112, LN. 6 *et seq.* ("...time we knew that one was there. I didn't show them in the 2005 survey."Testimony of Larry Steele, Surveyor). He had referenced it (Wilson's) in his work in the same Nixon Beach plat in 1984 as his "Basis of Bearings" and distances, though he left it out

of Morgan's EX 4 "survey.". (EX 14, and compare, *pg. 2,* EX 13, being the James Wilson & Associates plat).

Surveyor practices in Washington are regulated in the interest of the client, but also for the public welfare and benefit. WAC 18.43; WAC 196-27A-020(2); RCW 18.235.130(11). *See,* RCW 58.09.090(1)(iii)(physical evidence of occupation, encroachment or improvement).); RCW 58.09.040(2)("... he shall file with the county auditor in the county in which said corner is located a record of the monuments and accessories *found or* placed at the corner location, in such form as to meet the requirements of this chapter.)

Morgans' surveyor had to agree at trial "there is no explicit exception " for the upland area east of the 10-foot private platted road in Nixon Beach Tracts RPII 136, ln. 19 - 137, ln. 10 but, regarding Morgans entitlement, and he admitted at trial time that he was not prepared, saying "I've not studied that," RPII 137, ln. 24, and "I did not pursue that" RPII 138, ln 23.

Location of corners is certainly a required duty of a surveyor. A "corner" is a legal point determined by a survey." "§17.01 §17.07, pg. 521 Clark, Surveying and Boundaries, Seventh Ed., Robillard and Bouman, 1987, 1992. What Morgans showed at trial was only

that Morgans' surveyor set stakes as Morgan wanted them, " two corners *at the road* and two at the lake" RPII, 138, ln 21-22; RPII, 137 ln. 23 - 138, ln. 1.

Clearly, Morgan's did not engaged surveying to accomplish *full* retracing of the original platter's intent or that of its staking surveyor. "[T]hirty years ago morgans surveyor "filed a survey showing the internal private road as "abandoned" RPII, 156, ln. 7-13. When Morgan limited his surveyor's services and "made the choices" RP II pg.109/13 – 17; RPII pg.142/11-12.; RPII 165, ln. 11-13; RPII pg.165/12, even though Steele counseled Morgans that there may be more Lot Eleven upland, RP II, 142, ln. 24-25 - 143, ln. 1. RPII 152, ln. 13-25, Morgans were not even preparing to show superior title.

Exhibit 29 is not located in relation to the use and occupation line. Though Morgans' surveyor had located the BNRR lot 16 corner stake in 2005, RPII pg.141/19 and 151/10, but RPII, 142, ln. 9-12 he never showed it until 2008 after construction and also never even located the court mandated line for his testimony, RPII, 147 ln. 6-9. His exhibit 29 was prepared on "numbers that were "provided to us," RPII pg.148/24; and did not shoot the line therein, RP149, ln. 17-20, but proceeded from a line and measurements he

was "given," 149, ln. 23, for a "calculated position," not the Iron Pipe RP150, ln 14-17, and he assumed the measurements were provided by the court - if not through counsel. Shepherd, RPII pg.147/11.

Surveyor Ayers clearly testified that the "boundary of the Nixon Beach Plat extends or abuts the right-of-way RPII 68, ln. 3-5, and 69, ln. 5, and the answer is found "right off the plat," 70, ln. 21; RP II, 69 24 - 71, ln. 4; RPII 71, ln. 10-25. Morgans had more area than they were admitting at trial!

> "Tract 10 and Tract 11 extend across the roadway to the right of way. So if there were a survey done, that didn't extend those lines, they didn't survey the entire Tract 11. Tract 11 goes to the right of way."
> RP II, ln 24 - 75, ln. 2.

When descriptions merely designate the land as part of a larger tract, without greater certainty as to the identity of the particular part, they are fatally defective. Asotin Cy. Port Dist. v. Clarkston, 2 Wn. App. 1007, 1011 (1970).

4. Quiet Title and Right To a Decree

In an action for ejectment, the party with superior title prevails. RCW 7.28.120.Although findings of fact are reviewed under a substantial evidence standard requiring a quantum of evidence in the record to persuade a reasonable person that a

finding is true, the court did not find any Lot Eleven corner stake as true and correct. Only the Wilson survey shows such an effort. EX 13. Page 3 holds its worthy certificate by Lloyd Short with Cottinghams' summary judgment materials, "based on an actual survey," that "all distances, courses and angles, are correctly shown" and with monuments "accurately placed on the ground." It is an ancient document entitled to high regard and no stake in its vicinity yet contradicts it. It shows the BNRR Lot 16 corner at the corner of Morgan's Nixon Beach Tracts Lot 11. Title should have been determined according to that corner location. False corners are defeated by the certificate.

"[W]hat are the boundaries is a question of law, and where the boundaries are is a question of fact. DD&L, Inc. v. Burgess, 51 Wn. App. 329, 335, 753 P.2d 561 (1988). The trial court did not locate Lot 11 corners. The Court of Appeals reviews de novo issues of law and a trial courts conclusions of law, and review de novo the legal conclusions flowing from the trial court's decision about the location of the boundary. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). An action to quiet title is governed by RCW 7.28.010. The parties are still entitled to a decree. McGuinness v. Hargiss, 56 Wash. 162, 164, 105 P. 233

(1909), overruled on other grounds by Rorvig v. Douglas, 123 Wn.2d 854, (1994) RCW 4.16.020.

5. Innocence Was Contradicted By Lack Of Investigation and Their Unfounded RCW 8.24 Condemnation Claim..

Morgans saw Wilsons' combined "BNRR"[14] plat or failed to deny it. They are charged with knowledge of it. A substantial engineering service to the public by a railroad, it depicts, Wilson's survey reconciles and divides uplands for subdivision *according to* calculated or staked Nixon Beach waterfront lots. Morgans' surveyor could not inform from study on regarding the quality of Wilson's efforts at Lots Ten and Eleven.

Morgans' EX 4 survey, used for their permit application, omits disclosure of the Wilson's survey and stake without so much as a comment. No wonder Morgans do not have their final occupancy permit. Morgans' self-directed surveying set false lot "corners" which are contradicted by the Nixon Beach Tracts plat description of the lots' true extent (railroad to lake). No wonder Morgans could not win a Decree.

Good faith never supported this dispute or a condemnation claim. Ron Morgan did not even understand the question when he

[14] The Plat of Burlington Northern, Inc. Railroad Right Of Way Along Lake Whatcom Div. 1 is combined in EX 13, with NBT as pg 1,

was asked about his condemnation counterclaim. RPI, 125, ln.24. Yet Morgans proceeded to trial without amendment of pleadings, which the court would surely have allowed if timely under CR 12, CR 19, or investigation of their lot's size. Necessity for any of Cottinghams property arose long after warning by the health officer.[15] At trial Morgans simply urged CR 54(b) as their own right, without offer of *factual* cause to revisit summary judgment. It was an abuse of discretion to allow revision of summary judgment and manifest abuse of due process to add no notice that the court would regard the two day trial setting for proof of all of Cottinghams' entitlement.

Nothing in Morgans' pleadings counterclaims relieved Cottinghams of preparation for abandonment of their a private way of necessity RCW 8.24 counterclaim. Morgans simply asserted that "its not over if we stay with that [original summary judgment]," RPIII p. 50, ln. 11-14, assured the court of fighting for the next fifteen years," 50, ln. 15, *also p. 61, ln. 23,* and argued for return of the extent of the area on which they had ejected Cottinghams'

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[15] Morgans also had notice of the health officer's concern for sufficiency of their room alongside an existing driveway before purchase. RPIV 66, 67 (appendix).

improvements. Setback variance relief was never pleaded before trial time but was was granted by Finding 23 and Conclusion 5.

Morgans also arrived at trial without final inspections necessary to final approval; safety or fire regulation regulations which they argue the impacts of; even planning documents or documentary support for statements as bold as that in Finding No. 17 regarding a "septic system "*location of* which was controlled by a preexisting septic system" (emphasis added). Morgans still do not know how large their lot is! Leave to return to the trial court on CR 60(b)(4)(11) grounds regarding misrepresentation of the health department mandate regarding drain field location remains necessary.

No reasonable fact finder would enter Finding 23C's good faith on facts revealing that after Morgans' plan attempted to violate the shore setback they moved their footprint into their neighbor's improvements and wrongfully wasted such improvements with neither notice nor investigation of entitlement while also violating their permits driveway setback. Morgans' withheld conflicting Wilson survey information at permitting, and even claimed without

support that their own septic permit provided cause,[16] installing driveway within and over *their own* notion of their property line (Ayers Exhibit CP 395). All are acts in bad faith, revealing calculated risk-taking. Failure to disclose such issues of unwritten title to the building official as were knowable at the time of Morgan's permitting was Morgans' early misrepresentation of material fact.

Morgans' notice of their RCW 8.24 condemnation claim required and received substantial good faith response at trial. Cottinghams offered expert surveying services --since Morgans' survey appeared designed to show Morgan's Lot Eleven as landlocked—together with septic engineering testimony since Morgans claimed a drain field location created a necessity. For their part, Morgans proceeded to trial on a survey without study whether their Lot Eleven abutted the railroad lot. When they were not held to RCW 8.24's petition-quality notice,[17] even RCW 8.20's

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[16] Morgans had minimized the disclosure of their full lot area to the health officer at permitting which required the health officer correct the information provided him, RPIV 77, ln 25 – 78 ln. 12, and they continued such behavior even at trial. They similarly avoided disclosure of drain field failure to the health officer contrary to WCC 24.05.160 A.1.-10, until wet season evidence had passed for re-permitting without investigation of high groundwater conditions.

[17] A private condemnation action under chapter 8.24 RCW must be pleaded expressly and with reasonable certainty in order to invoke the statutory authority. See State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson, 25 Wn.2d 499, 502-03, 171 P.2d 189 (1946); Leinweber v. Gallaugher, 2 Wn.2d 388, 391, 98 P.2d 311 (1940);State ex rel. Woodruff v. Superior Court of Chelan County,

Morgans abandoned its bifurcated procedure as well to address values before specifying the location of area of any necessity[18] Morgans merely quantified area for their demand that the court return the same and force its sale.

At trial it became perfectly clear that the reason Morgans had no facts inspiring condemnation was because of failure to investigate extent of their own and Cottinghams' entitlement, the plat's legal description and to heed notice given by the health officer and Cottinghams' improvements. Morgans survey EX 4 showed their lot as landlocked contrary to the plat and the Wilson survey. EX 13, pg 1 and 2. The court had an absolute duty to dismiss their counterclaims when evidence showed Morgans had more area, their survey was self-directed and so unsupportable with stakes as corners that even the Nixon Beach Plat's legal description contradicts it because Morgans did not depict their lot as extending to the railroad.

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145 Wash. 129, 132-33, 259 P. 379 (1927) (description of property in pleadings must be sufficient to place parties on notice of the property affected); Oregon-Washington R.R. & Navigation Co. v. Wilkinson, 188 F. 363 (1911) (Notice defects in petition for condemnation are curable by motion to make the petition definite and certain).

[18] Hallauer v. Spectrum Props., 143 Wn.2d 126, (2001) (RCW 8.20 supplies procedure for condemnation).

For good reason balancing has not been applied to trial of title in adverse possession claims. Notice (the very thing denied by Morgans' collateral attack on permit conditions) is the reason. Adverse possession provides notice to the developer, eliminating claims originating in the value of their improvements by denial of the essential predicate innocence. Arnold v. Melani, 75 Wn.2d 143, 152, 449 P.2d 800 (1968), set out numerous reasons that extraordinary relief requiring a structure's movement may be viewed as oppressive, but no structure is threatened with ejectment here.

As in Foster v. Nehls, 15 Wn. App 749; 551 P.2d 768 (1976), Morgans "assumed the risk" of the outcome, building where neighbors' concerns were known. Mugaas v. Smith, 33 Wn.2d 429, 434, 206 P.2d 332, 9 A.L.R.2d 846 (1949); Bach v. Sarich, 74 Wn.2d 575, 582, 445 P.2d 648 (1968). Levien v. Fiala, 79 Wn. App. 294, 298-99, 902 P.2d 170 (1995) (emphasis added) (quoting Miebach v. Colasurdo, 102 Wn.2d 170, 175-76, 685 P.2d 1074 (1984)). Hollis v. Garwall Inc. 137 Wn.2d 683 (1999); Mahon v. Haas, 2 Wn. App. 560; 468 p.2" 713 (1970); See, Holder v. City of Vancouver, 136 Wn. App. 104, 108 (2006).

6. Nuisance-Related Injunctive Relief Remains Requierd.

Though Cottinghams' expert *and* the health officer explained the health code's mandatory requirement of EPA styled drain field failure site investigations and the health code, WCC 24.05, was introduced, the court denied injunctive relief depite Morgans duty and failure to provide wet-season high ground water evidence to the officer. Health code violation continues. As the health officer had no knowledge of wet season failure and high groundwater when re-permitting. Ron Morgan had submitted and signed licensing documents for his septic system (EX 19) which promised his obedience to the county health code. RPI pg.17, ln. 25 - pg.18, ln. 2. Yet when failure of the septic occurred in the year 2007 "rainy season," RPI pg. 18, ln. 17, and "wet season," RPI pg.25, ln. 10, he simply pumped from a canvas hose three inches wide RP I pg.31, ln. 9; 30- 40 feet RP I pg.31, ln. 18, "into the lot next to us...as far as it could be." RPI pg.31, ln. 21. Morgan had no discussion with the septic installer regarding what the problem was. RP I pg.34, ln. 25 – pg 36, ln. 6; and did not care to report it until the threat of real investigation into high groundwater had passed the next summer. He wasn't even surprised by the failure, since the drain field quality was "kind of iffy all along," RP I pg.39, ln. 23-24.

Failure to conduct required failure diagnosis alone substantially justifies injunctive. Morgans called an "installer" to respond, not even an O & M (operation and maintenance) expert. RPI pg.25, ln. 16 – 21. No mandatory prompt report was shown to the health office either. RPI 26, ln. 17-23 regarding high groundwater, RP28, ln. 11. Morgan himself conducted the pumping and left the pump running RP30, ln. 24 – 34, ln. 10, and he never even succeeded in lowering the ground water down to the level of his submerged drain field pipes.

Even the health code could not organize Morgan's conduct. His belief that such pumping could not "possibly affect" neighbors (contradicting his own testimony, RPI pg.31, ln. 21) while he risked pumping septage onto *public* property was dangerous arrogance, utterly impermissible in civilized society, shocking and outrageous. RPI 39, ln. 1-11. Morgan did not care enough to ask about the certification of his "installer" (RPI 85, ln. 7-16; RPI 40, ln. 25), who was unlicensed. (RPI 88, ln.4; *see also* RPI 90, 22-23) or ask what to do next. RPI, 42, ln. 11-20, until 2009, RPI pg 42, ln. 20. Even now no diagnosis yet protects against the site's *wet season* ground water condition to prevent risk of recurrence either. RPI 44, ln. 5 – 25. Any failure diagnosis claimed was contrary to law because it

was by an unqualified installer without mandatory EPA manual Chapter 5 findings (Compare 24.05.220 installer licensing and WCC 24.05.110).

Cottinghams introduced Sharon Kettels, certified septic engineerKettels for testimony as to why high ground water matters:it reduces necessary vertical separation (RPI 61, ln. 3-10; RPI, 57, ln.18-25), The means Morgans have had to eliminate driveway conflict was addressed, including a traffic-bearing tank cover (RPI, ln. 64, ln. 8); Morgans' (EX 1) abandoned configuration (RPI 65, ln. 2-10), smaller rock monuments (RPI 61, ln. 16 – 62, ln. 1) or a non-rectangular drip system drain field (RPI 62). Morgans pursued none of these.

Before repair of an OSS failure WCC 24.05.170 (B) requires an owner to develop and submit the information required under WCC 24.05.090(A), including *size of the parcel*, with "consideration of the contributing factors of the failure to enable the repair to address identified causes."[19]

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[19] Additionally, "[a] designer proposing the installation, repair, modification, connection to, or expansion of an OSS shall develop and submit the following to the health officer and obtain approval....2. soil and site evaluation .. under WCC 24.05.110 (report ...ground water conditions, the date of the observation, and the probable maximum height, [and] 2. Use the soil and site evaluation procedures and terminology in accordance with Chapter 5 of the On-Site Wastewater Treatment Systems Manual, EPA 625/R-00/008, February

Nuisance is unreasonable interference with the use and enjoyment of land. Grundy v. Thurston County, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005) .Discomfort and annoyance suffered by a person is an area of recovery separate from any harm done to the person's property. It is nuisance "[f]or an owner or occupier of land, knowing of the existence of a ...septic tank ... to fail to cover, fence or fill the same, or provide other proper and adequate safeguards. RCW 7.48.140 (9) Nuisance is also defined as unlawfully doing an act which either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property. RCW 7.48.120

7. Injunctive Relief - Ejectment Of Driveway Gravel in Setback Per Permit, And fence Within Wasted Hedge Dimension.

EX 23, Morgans' Shoreline Exemption Review Form, reveals express denial of Morgans' violation of the the side yard setback with driveway dimension reduced as practiced presently, so the official clearly enforced the zoning setback once already. See EX 1: "*Remove from 5' sideyard setback per SMP WY.*" Ayers Survey

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2002). WCC 24.05.110 directs that persons conducting site and soil evaluation "shall employ soil and site evaluation procedures and terminology in accordance with Chapter 5 of the On-Site Wastewater Treatment Systems Manual, EPA 625/R-00/008, February 2002"

Exhibit shows driveway north over *any Lot Eleven line.* Their setback reduction even recites "narrow lot" as a cause, meaning Cottinghams would not likely receive the same side yard setback variance or reduction. The requirements of zoning ordinances cannot be avoided for the benefit of an individual applicant. Chelan County v. Nykreim, 105 Wn. App. 339 (2001) . Injunctive relief is available against zoning violation notwithstanding a building permit's issuance. See, City of Mercer Island, 9 Wn. App. 479, 513 P.2d 80 (1973); Radach v. Gunderson, 39 Wn. App. 392, 398-99, 695 P.2d 128, *review denied,* 103 Wn.2d 1027 (1985).

8. It Was Error To Fail To Award Privacy Value Of Improvements And Distress Damages

Loss of privacy resulting from Morgan's waste is seen in EX 22 and described at RPIV, 103, ln. 17; 105 ln. 3; 111, ln. 14 – 112, ln. 25; RPIV 125, ln. 19; RP1, 156, ln. 11; 160 ln. 21-161- ln. 13. Mrs. Cottingham called it "worrisome" , 161, ln. 13, after learning "what could happen" 160, ln. 23, which had included explosive behavior from Ron Morgan in her presence 159, ln. 14 – 24, which left her feeling "like I got punched in the gut." 160, ln. 18 – 12 and it was shocking physically. Proof of damages often occurs without precision in their calculation, but absence of an award and added

Birchler value is an abuse of discretion. Birchler v. Castello Land Co., 133 Wn.2d 106, 915 P.2d 564 (1997). Allyn v. Boe, 87 Wn. App. 722, 943 P.2d 364 (1997); Phillips, v. Cordes Towing Svce, Inc., 50 Wn.2d 545, 313 P2d 377 (1957). Washington recognizes that damage for inconvenience, discomfort and mental anguish result from intentional interference with property interests. Schwarzman v. Association of Apartment Owners, 33 Wn. App. 397, 404, 655 P.2d 1177 (1982). Morgan admits evidence of one-sided abuse of Cottinghams at the site, resulting from "general frustration...every three months" RPIV, 189 – 191, ln. 7, without Cottinghams' conduct as any cause. RPIV 191, ln. 12; RPII 45, ln. 16 – 50, ln.11; IV 111, ln. 15 – 113 ln. 22; RPIV ln. 125, ln. 20 – 128, ln.10.

9. Outrage

Ron Morgan's conduct has been retalliatory, intentional, wrongful, and viewed in its totalitym, extreme in degree. Private and public abuse are shown. RPIV 125 , ln. 18 – 128, ln. 12,; RPII, 123, ln. 2- 24. RPIV 189. Cottingham was also in the zone of impact at Morgans surprise commencement of waste to Cottinghams' hedge and when he witnessed pumping from the drain field area different than Morgan admits (not from a hole as Morgan described) from a

partially buried pump. RPII, 43. (followed by illness 43, ln. 23; obsessive worrying 44 ln. 21, recurring thoughts, 44, ln. 21, particularly for reputations, 44, ln. 7, potential for Morgan's future beligerance to laws and norms 44, ln. 22, attended by loss of sleep 46,ln. 4). Ron Morgan's very first response to Cottinghams' objection was his threat to Cottingham that informed Morgan would regard opposition as "personal," 48, ln. 11. Ron Morgan has made good on such threat thereafter even in the presence of Cottinghams' child, 49, ln 11-25. Trial included Morgans desperate statement that he had to remove Cottinghams Hedge "because of the health department," and Finding 17 includes the remark. Nothing has been shown to support that remark out of the entire file and with the health officer available at trial for Morgans' use, if he wished. Morgans made no appeal or effort to contest such a mandate, if it did exist. Not surprisingly Morganseven abused the condemnation process. Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630 (2003)

10. CR 19 Necessary Parties Motion Waived By Morgans.

If neighbors are necessary parties to adverse possession of the previous road location, Morgans owed identification, not

obstruction by failure to abide by CR 12(b)(7) in pleadings (failure to join a party under rule 19).

11. Weighing Of Values Did Not Occur.

12. Trespass Damages Remain Appropriate.

13. Impermissible Taking Violates Washington's Constitution

Impermissible taking, without service to any public interest occurred in violation of RCW 8.24, Wash. Const. Art. 1 § 3 and Wash. Const. Art. 1 §16 (amend. 9), Wash. Const. Art. I, § 3 (due process clause), Wash. Const. Art. I, § 7 (protection of personal interests); Wash. Const. Art. I, § 12 (privileges and immunities) clauses. Expert Fees.

Cottinghams were not awarded expert fees under RCW 8.24.030 despite the necessity created by Morgans' pleaded counterclaim and their unmet duty thereunder to describe the area for which they ask a Decree of Appropriation. Cottinghams requested expert fees. Their expert was of substantial assistance.

14. Attorney Fees.

As in Spice v. Pierce County, 149 Wn. App. 461, 467, 204 P.3d 254 (2009) there is no meaningful relief the court can grant in relation to permit conditions except under LUPA.. Attorney fees are deserved under RAP 18.1 and 18.9(a). See, also, Nickum v. City of

Bainbridge Island, 153 Wn. App. 366, 223 P.3d 1172 (2009); West v. Stahley, (2009)(equity will not cure a failure to exhaust his administrative remedies, frivolous appeal presented no debateable issues). Attorney fees under RCW 6.27.230 is also proper basis upon which to award attorney's fees on appeal. Morgans caused Cottingham to prepare for their Decree of Appropriation, abandoned the claim without allowing Cottinghams to stand down from heightened preparedness under procedure in which decisions under which are *only* reviewable.[20] RCW 8.24.030 allows award of expert fees, attorney fees and sanctions, and this frivolous counterclaim action qualifies

V. Conclusion.

Balancing finds little justification for this desperate approach. Morgans claim protection exclusively for their own improvements. Morgans had plenty pf time to prepare to reveal the size of their lot's true dimension[21], and to disclose any interest of neighbors in the path of the private platted road for consideration. They did neither.

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[20] Taylor v. Greenler et al., 54 Wn.2d 682, (1959).

[21] An obviously inadequate survey is not evidence of good faith, it is simply an "arbitrary standard." Heybrook v. Index Lbr. Co., 49 Wash. 378, 95 Pac. 324 (1908). See, Blake v. Grant, 65 Wn.2d 410, 397 P.2d 843 (1964)

Respectfully submitted this 6 day of August, 2012.

David C. Cottingham WSB 9553, *pro se,* and Attorney for Joan Cottingham.

Declaration of ServiceDavid C. Cottingham, under penalty of perjury under the laws of the State of Washington, at Bellingham, Washington, declare that on this day I served a copy of the attached as follows:

By deposit in the United States Mail, first class postage prepaid as Priority Mail, addressed to Attorney for Defendants Ron Morgan and Kaye Morgan: Douglas Shepherd, Attorney, Shepherd, Abbott, 2011 Young Street, Suite 202 Bellingham, Washington 98225.

Dated this 6 day of August, 2012.

David C. Cottingham WSB No. 9553

VI. Appendix

Transcript Table:

RPI Nov. 30	2011	Trial
RPII Dec. 1	2011	Trial
RPIII Dec 15	2011	Closing
RP IV Dec 7	2011	Trial
RP V Dec 15	2011	Reconsideration

Excerpt of Trial Testimony, Whatcom County Environmental Health Officer Edward Halasz

RP IV, Trial Testimony Excerpt,:

Page: 66

23 Q. The location of the drain field was a cause
24 of concern for you?
25 A. Yes. It was a cause of concern because,

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1 obviously, when properties are developed they
2 -- they start doing construction and install
3 access as in driveways and so I wanted to
4 make certain that when they commenced that
5 activity that the drain field is properly
6 located.

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19 . So an earlier issued permit and you used that
20 for additional notes, correct?
21 A. Yes. The original permit was finalized in
22 September of 2000, or excuse me, September of
23 1997.
24 Q. What size house was that permit for?
25 A. There was a proposed three bedroom house.

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1 Q. What -- how many square feet?
2 A. According to this permit record 1,800 square

feet.
Q. Thank you, so back to your October 2005, note, what did you write?
A. On this -- OSS permit, OSS being onsite sewage system, "On the OSS permit proposed drive is north of drain field. I would require as-built's to accurately locate drain field for a building buddy plan." I put a, in parenthesis, possibly upgrade septic system.

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Q. Thank you.
I want to ask you about the preliminary site plan, is your handwritten -- are there any handwritten notes that look like yours that are on that preliminary site plan?
A. Yes. There's a couple of notes that run at

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the top that says "strike (inaudible) OSS status to location."
Q. Any others?
A. Another note that says "property extends to BNR right-of-way."
Q. I'm sorry, property extends to BNR right-of-way?
A. Yes.
Q. Whose handwriting is that?
A. That's my handwriting.
Q. Do you remember making that note?
A. Yes.
Q. What information had been given to you that caused you to make the note that the property extends to the BNR?
A. Well, the information I had available at the time was county tax parcel map which we also referred to -- to get accurate dimensions or property sizes of -- of property.
Q. Thank you.
And the purpose of making that type of a remark for a person in your role with your

duties with Environmental Health, what's the purpose?
A. Well, whenever I review and approve a closed

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septic system application we require the property lines to be located accurately on the -- the site plan. And this preliminary site plan being surveyed was -- well, it shows some -- some property lines going along side the ten-foot wide kind of a road that's referred to, does not show the property continuing further or out to the railroad right-of-way.
Q. So did you -- do I understand that you determined that the property was larger then what's being shown at that visit?
A. I made my notes based on the tax and county map, the county parcel map.
Q. Okay. Do you have a role and duties that you discharge for Whatcom County Environmental Health when a report of a septic system failure arise?
A. Yes. When we're notified or receive information about a possible septic system failure we visit the site as soon as we can to investigate the failure and try to take action to -- to kind of repair that.
Q. Why do you do that as soon as possible?
A. Well, sewage contains bacteria that could be

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possible -- possibly harmful to the human health. If it gets into the water, I mean human exposure.

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Q. Was such a report made regarding the property at 3251 North Shore, a report regarding the failure of any part of the septic system?
A. I only became aware of a possible problem with the septic system here when a -- an application was made to me for a new septic system being installed on that site.

Q. When was that?
A. That date is here in the file, the application was made in June of 2000, excuse me, the application was made in June of 2009.
Q. Whatcom County has adopted it's own health code; is that correct?
A. Yes. That's correct.
Q. And you're required to refer to it?
A. Yes. When we review an new septic system or to respond to (inaudible).
Q. And are there other regulatory authorities you referred to when you are enforcing the health code regarding onsite septic systems?
A. Yes. We ultimately take our -- our county code and base it on the state septic system

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regulations and just, regarding the documents of the US EPA related to the design and installation septic system.
Q. Chapter 5, correct?
A. Yes. That's correct.
Q. So that's Chapter 5 of the EPA regulations and then it's Washington Administrative Code regulations and they tell you things about failure?
A. That's correct.
Q. What do they tell you the health officer's responsibility is with regard to a report of failure?
A. When a failed septic system is found the requirement is that owner of the property either connect to a sewer system that is available or to design and have installed a -- a new septic system.
Q. Do the regulations prescribe any behavior with regard to diagnosing the cause of the failure?
A. Yes. At the time the new system is proposed and designed, there is a requirement to look into the reason why the old original system failed.

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THE COURT: Did you say at the time the new system is proposed?
MR. HALASZ: Yes.
THE COURT: Okay.
MR. HALASZ: That's correct.
THE COURT: Thank you.
MR. HALASZ: The reason being is that you don't want -- if there's an issue or problem you don't want the new system to also fail or have the same problem.
Q. (BY MR. COTTINGHAM) And that reasoning is in Chapter 5 of the EPA manual as well; isn't it?
A. Yes. That's correct.
Q. Do you have an understanding of what the wet season and what the dry season is as regards the review of septic system applications?
A. Yeah. In -- in Whatcom County Code, we define the wet season as starting on December 1st, and going to May 1st. We -- we conduct reviews of septic systems during that time it is a question of what the water table or water conditions might be on the site. The reason being, of course, there's a lot of systems designed to, you know, worst case

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scenario emissions to make sure they function year round.
Q. What problem does the water table create?
A. Well, for septic system, the property's re-sewage, there needs to be unsaturated soil beneath the drain rock and the piping to properly treat the sewage, remove the sewage before it contacts the groundwork tables further below. So if you have water -- water tables and water conditions close to that -- that piping and that drain rock then the sewage would not be properly treated.
Q. You weren't given any report -- strike that. Is there any indication in any of that

file or in your memory of a report during the wet season regarding a failure of a septic drain field at this address 3251 North Shore Road?

A. No. There is no such report.

Q. Is there any report of any investigation into the cause of failure with factual findings demonstrating what the cause of the failure of that drain field was?

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MR. SHEPHERD: Objection relevancy, whether it's in the report or not we've had the testimony

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of the people that installed it as to what the cause of the failure was and what the fix was. I don't know whether there's a report of what the cause was in a public document is relevant to any issue in this case, Your Honor.

THE COURT: Well, there wasn't one, was there?

MR. HALASZ: No. There was no such report.

MR. SHEPHERD: And my response would have been that -- that we could get into the -- there's a very specific certification that authorizes people to diagnose those conditions and they are not installed or certifications.

THE COURT: Okay. Next questions.

MR. COTTINGHAM: Thank you.

Q. (BY MR. COTTINGHAM) And when you got the report of this septic system failure, was it your job then to review the permit conditions and the design that was proposed so that you could get this system running again?

A. Yes. That's correct. When the proposal when the application was made for the new septic system, soil test kits were -- were done in an area of the new proposed drain field so to -- we could examine the soil conditions to

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make sure the proposed system would work properly.

Q. You have the ability to exercise discretion for a repair that is different then your discretion for a new permit, my understanding is; are you able to waive setback requirements and such?
A. Yes. We are.
Q. Why is that?
A. On a repair situation we're working with existing structures perhaps, property lines, sometimes small lot sizes and so, yes, we have exercised the ability in approving something to -- to allow for a repair, yes.
Q. And you did so with regard to this new system that was being proposed in 2009, didn't you?
A. Yes. I did.
Q. So in other words, what is there a five foot or a two foot setback?
A. Typically the -- he general requirement for a setback on the property line is five feet from the drain field to the property line. Code says that in certain situations we can reduce that setback to two feet.
Q. And actually it was reduced even more. The

health department gave these owners every benefit; wouldn't you say?
A. Yeah.
Q. Is there an as-built that shows that even less then two feet setback was allowed for the installation of a new -- new drain field?
A. Yes. There's an as-built that shows the reduction as the record drawing done by Bergman Feld (sp) shows that it's less then a foot.
Q. Did that cause you to want to make any other demands, orders or impose certain conditions to protect that drain field?
A. Yes. To reduce the setback was in relation to a road easement required some additional protection barriers be put around the drain field so there's not -- without being

compacted by the road traffic.
Q. And did you specify that they had to be large barriers?
A. I didn't specify any dimensions, I just required that when those road barriers were put up that they were a sufficient size to prevent vehicles from going over there.
Q. A four inch concrete curb would be

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sufficient?
A. Yes.
Q. In this new plan that was installed, this new drain field, was it the same kind of drain field as had originally been permitted in the 90's?
A. The original drain field was a gravity flow system which utilizes four inch diameter appropriate pipe. The new system is pressurized more then the pipe and a pump pressurizes his dose of sewage through the drain field throughout the day and so -- and so it's spread out completely across the drain field so a little difference.
Q. And did you have occasion to examine deposition transcripts of depositions by Leo Day and Thomas Pulver describing the conditions at the time of the failure the previous year?
A. No. I have not.
Q. All right. Has anyone told you anything about the conditions that were examined during the failure the previous year?
A. I recall being told by the septic system installer that he thought the system failed

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because the pipes were crushed in the drain field itself but that's all he told me.
Q. That's the only information you have then about the cause of failure, correct?
A. Yes.
Q. And does that discharge the obligations of an

owner that you understand are imposed by the county code, the state health code and the EPA manual Chapter 5?

MR. SHEPHERD: Object to the form.

MR. COTTINGHAM: When it required -- when it requires investigation of the cause of failure to prevent further failures?

THE COURT: You are getting --

MR. SHEPHERD: Object to the form of the question, that calls for a legal conclusion. I don't know how it's relevant in this case.

THE COURT: What are you asking him?

Q. (BY MR. COTTINGHAM) Did you get an investigation the likes of which you understand is required by law?

A. I did not get a written investigation. I was told that the crushing of the pipes was what caused the drain field to fail.

THE COURT: I'll let that answer stand.

MR. SHEPHERD: Yeah. I --

Q. (BY MR. COTTINGHAM) And did anyone tell you why the pipe that was crushed wasn't just being replaced?

A. No.

Q. Did any -- I don't mean to interrupt you.

A. No. No one told me why the pipe was not replaced.

Q. And no one told you then why it had to be a whole new drain field that was installed?

A. No. This is an older drain field and what they were proposing was a more efficient system so the property so close to the lake I was encouraged that they were actually putting in a better system then what was there but, no, they never did tell me why they didn't just replace the pipe.

Q. Is there anything that requires a drain field to be rectangular or have right angles set at its corners at all?

A. Guidelines for septic systems, I mean this

type of septic system is you -- you're required to have a, typically a rectangular state shape to them just so that there's more efficient distribution to the sewage.

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Q. But I have seen, have I not, let me restart that.

What type of system doesn't have to be right angles at the corners?

A. There's some -- some newer technologies out there, they're -- they're gaging (inaudible) where they can -- just like if your irrigation line is -- in some cases have triangular shapes and just work around trees and other stations, those are other options out there.

Q. And that allows the maximization of space in a tight or narrow or small lot, doesn't it?

A. Yeah. They -- they can be flexible due to the fact that the drain lines can be bent and configured.

Q. And what -- the Whatcom County Health Department also does allow drive over septic tanks as well, correct?

A. Yes. With the proper tank construction and certification, some -- if you've got a -- a traffic bearing lid for septic tanks, yes.

Q. And that maximizes the ability to use space in a tight or small or narrow lot as well, doesn't it?

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A. Yes.

Q. What is an owner's obligation according to permit conditions -- strike that.

In this case I submit to you that there's evidence of groundwater over the drain field pipes viewed from an inspection hole dug near the drain field pipes. If that's the case, does that trigger an owner's obligation as you understand the county health code to make a report to the health department?

A. Yes. If an owner knows their septic system is not working, they should notify us because it could be a public health risk. Yeah.
Q. If you are given a report of a -- a failed septic system in the dry season and you are told that high groundwater was higher, not just into the vertical separation between drain pipes and water table, but higher then the drain pipes; does that cause you to need to gather more information?
MR. SHEPHERD: Object to the form of the question, assumes facts that are not in evidence.
MR. COTTINGHAM: I'm asking about the use of his discretion. There has been evidence that --

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THE COURT: Go ahead.
MR. COTTINGHAM: There has been evidence there was water above the drain field pipes, and even if there hadn't we will be introducing the deposition of Leo Day, which I believe demonstrates that as well.

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THE COURT: Go ahead, he may answer. Subject --
MR. COTTINGHAM: I believe -- I believe Mr. Morgan himself testified to that.
THE COURT: Well, in any event go ahead.
MR. COTTINGHAM: In any case.
THE COURT: Do you want -- do you want to re-ask the question?
MR. COTTINGHAM: If -- if groundwater --
MR. HALASZ: Yeah. Could you please repeat the question.
MR. COTTINGHAM: Well, I'd have to have that one read back, actually.
THE COURT: Nobody to read it back.
MR. COTTINGHAM: No. No way to read it back so I'll ask the next one.
THE COURT: Sorry about that.

MR. COTTINGHAM: No problem.
Q. (BY MR. COTTINGHAM) If -- if -- if in the dry season you're asked to approve a repair of a septic drain field and you're given information that it failed months earlier in the wet season and that the water table,

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excuse me, the water level viewed in a pit dug to inspect that groundwater level was higher then the drain field pipes themselves; would you be inclined to require investigation?
MR. SHEPHERD: Same objection.
THE COURT: Okay. You may answer.
MR. HALASZ: I would have like to have seen that -- that because the groundwater position would be recorded information to the use in prepare that.
Q. (BY MR. COTTINGHAM) What would that information do in terms, how would it influence you to condition the repair?
A. If I find a high groundwater table, I would be concerned as to whether or not a drain field would work in that type of situation so I'd want to monitor that, the -- what the conditions are and use that in approval of a possible repair.
Q. It would possibly be information that a drain field could not be used in that location?
A. If the groundwater conditions were impacted throughout the -- the wet season and it could impact the operation potential in that

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location.