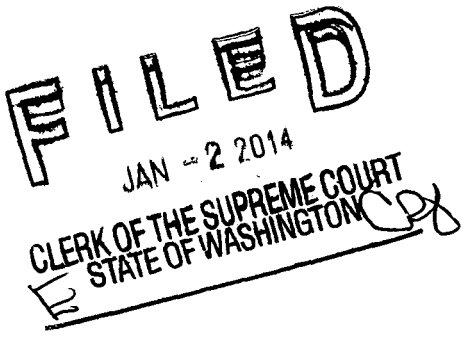
SUPREME COURT NO. 89737-1
Court Of Appeals No. 68202-4-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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

PETITION FOR REVIEW
BY THE
SUPREME COURT OF WASHINGTON



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II. IN`TRODUCTION.

Whether award of RCW 64.12.040 damages, for failure to show belief that the land wrongfully wasted was theirs, allows application of Washington's Liability Rule is presented by this petition. A forced sale was ordered during, and in aid of development permit administration when Cottinghams could not even cause LUPA review, raising exhaustion and due process issues. Regulated development concerns which the Judgment issued to command include setback and safety (Finding 23.B, CP 108, 636), during continuing agency administration of such concerns.

Findings 22, 23, and Conclusion 8 require sale to Morgans for use conflicts within *Morgans'* lot, to avoid moving improvements within Morgans' lot for normal planning needs, safety issues, setback, and marketing. Morgan had not even addressed his resulting setback concern with the planning and development agency.[1] RCW 36.70C.030 prevented Cottinghams' from seeking review of land use decisions regarding regulation, interpretation or application.

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[1] Testimony of Defendant Ron Morgan, pg. 11-14, pg. 164, RP Dec.7, 2013.

The Court of Appeals Opinion recites *Proctor v. Huntington*, as supporting equitable relief, extending it beyond its limits in absence of any finding regarding encroaching structure over any line or any risk of ejectment. . Whether a balancing remedy will be allowed to force sale from a neighbor to address needs purely internal to lot development and within agency jurisdiction, following construction within the notice of occupational indicators and wrongful tortious trespass waste presents a question of first impression in Washington.

The Opinion also proposes remand to address inconsistency[2] of supplemental Conclusion No. 5 negating adverse possession, while subjecting Cottinghams to waiver (*fn. no 4, slip opinion),* as a forfeiture, on a record Cottinghams could not have prepared for. Notice of reconsideration and modification of summary judgment occurred without pronouncement except through entry of Findings. Full trial on adverse possession and the abandoned roadway location did not occur.

Greater inconsistency is raised by the failure to show Morgans' belief that the land was their own and Conclusion no. 7

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[2] Slip opinion, Pg. 10.

(wrongful trespass and waste without such mitigation) conflict with *equity's* use of the extraordinary "liability rule" and forced sale.

III. PETITIONERS' IDENTITY.

Petitioners David C. Cottingham and Joan Cottingham are appellants below under 68202-4-I, plaintiffs in Whatcom Superior Court No. 09-2-01773-1, below.

IV. DECISION FOR REVIEW.

Petitioners Cottingham request the Washington Supreme Court review the October 14, 2013, decision in No. 68202-4-I , Court of Appeals', Division One; and the court's November 18, 2013, denial of reconsideration, attached in the appendix.

If Remand is allowed to address Conclusion No. 5 Adverse Possession trial, the July 25, 2015, decision of the panel of the Court of Appeals denying RAP 7.2(e) leave to proceed under Cottinghams' post trial motion will no longer interfere with appellate jurisdiction and should also be allowed in the interests of justice.

V. ISSUES PRESENTED FOR REVIEW.

A. CONFLICT WITH SUPREME COURT DECISION: Neither Arnold v. Melani nor Proctor v. Huntington Allow A "Liability Rule" Forced Sale Remedy For Satisfaction Of Internal Development Conflicts.

B. CONFLICT WITH SUPREME COURT DECISION: The decision directly conflicts with Bach v. Sarich, 74 Wn.2d 575, 445 P.2d 648 (1968), Rewarding Wrongful Action By

One With Knowledge That His Actions Trespass Upon And Impair Title Of Another.

C. CONFLICT WITH SUPREME COURT DECISION: Cost Management Services v. City of Lakewood, ___ Wn.2d ___ (No. 87964-8, October 10, 2013.

D. CONFLICT WITH SUPREME COURT DECIONS: Broughton Lumber Co. v. BNSF Railway, 174 Wn.2d 619, ___ P.3d ___ (2012)(Cert. U.S. Dist. Ct, E.D.); Jongeward v. BNSF Ry., 174 Wn.2d 586, ___ P.3d ___ (2012) (2012)

E. CONSTITUTIONAL CONFLICT: U.S. Constitution, Am. XIV, Due Process, U. S. Const. Am. V, Due Process and Takings clause; Wash. Const. Art 1 §16;

F. CONSTITUTIONAL CONFLICT: U.S. Const. AM. XIV, Equal Protection Clause and Washington Constitution: Privileges And Immunities Clause.

G. QUESTION OF PUBLIC IMPORTANCE - Equity Should Not Remedy Structural Construction Too Close To One's Own Boundary Regardless Of Planning Enabling Act Regulations, Health Regulations and Surveyor Practices Act Concerns, And Agency Administration By Forced Sale..

VI. STATEMENT OF THE CASE.

Trial began for Morgans' to show their pleaded RCW 8.24 private condemnation with Morgans' survey actually showing their lot landlocked away from access across abutting railroad property. EX 4. A boundary had been determined by summary judgment, and reconsideration stood denied to Morgans. Cottinghams' trespass and waste complaint under RCW 64.12.030 allowed Morgans to simply show "*probable cause to believe that the land on*

which such trespass was committed was his or her own"[3] Treble damages only resulted at Morgans failure to do so.

Reconsideration was not announced for notice allowing full trial on adverse possession, roadway relocation or agency regulations.[4] Without pronouncement of reconsideration allowing notice of broader scope of trial on adverse possession and title according to an earlier filed plat (page 2, EX 13), the court applied the "liability rule" allowing equitable relief without required *Arnold* findings, e.g., that "it is impractical to move [any] structure as built" or any unwitting construction over any line.[5] Morgans had not even denied their surveyor's testimony that they instructed him to stake their Nixon Beach Tracts Lot Eleven other than at railroad property

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[3] " If upon trial of such action it shall appear that the trespass was casual or involuntary, **or** *that the defendant had probable cause to believe that the land on which such trespass was committed was his or her own, or that of the person in whose service or by whose direction the act was done*...., judgment shall only be given for single damages." RCW 64.12.040."

[4] The trial judge informed that he was "really taking this as an offer of proof as much as anything else." ln. 1 - 4, RP II, Page 124 ln. 1 - 4, December 1, 2011; RP II; 125, ln. 6 - 126, ln. 2.

[5] Findings entered without presentment. No emergency was recited, per CR 54(f), and no open court entry occurred which would have produced a transcript at entry.

as called by their plat,[6] but at the internal private road now shifted east.[7] Morgans had not even attempted to determine whether resulting side yard dimension would be approved by the county,[8] yet Finding No 23 entered to support forced sale to satisfy land use development decisions. No final agency decision or certificate thereof revealed Morgans as having fully performed a condition that denied their planned driveway in the side yard setback. EX 23.[9] Findings and Conclusions held Morgans' conduct as intentional and tortious.[10]

Morgans' "offer of proof at trial[11]"over Cottinghams'

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[6] Surveyor Ayers 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; 70, ln. 21; RP II, 69 24 - 71, ln. 4; RPII 71, ln. 10-25

[7] Summary judgments' importance included clearing potential for renewed use of an internal platted road which has shifted within Morgans' lot away from Cottinghams' lot but remains of record. The Opinion incorrectly addresses it as at the eastern edge, but the plat's call and Ex 13, pg 2, show this roadway is internal to Morgans' and Cottinghams' lots and its placement an impediment to use. Establishing it as actually moved was therefore highly advantageous and material to an equitable result for all concerned.

[8] Testimony of Defendant Ron Morgan, pg. 11-14, pg. 164, RP Dec.7, 2013.

[9] WCC 23.60.023.A.(appeal of exemption); WCC 23.50.020.B(Mandatory Enforcement); WCC 23.110.190.S.2("Shall" definition); WCC 23.60.190.A.3 (actual date of an exemption as the last date of required action) *Appendix*.

[10] Finding No. 27 (Intentional "trespass"); Finding no. 29 (knowledge of "a bona fide property line dispute") Conclusion No. 7 (trespass and conversion).

[11] ln. 23-24, RP II, Page 124.

objection,[12] had not resulted in notice of a ruling on Cottinghams' objection, CR 19 analysis, or discussion regarding reconsideration's impact upon the relocated internal roadway, despite Cottinghams' comparison with full trial opportunity[13]to support its findings.

Finding No. 29 established Morgans' knowledge of existence of a bona fide property dispute, but the Opinion upholds use against Cottinghams of setback regulation concerns adopted in the public interest. Finding 23.C, Slip Opinion, page 10. The opinion identifies an inconsistent Supplemental Finding [CP 636-640] denying the findings of adverse possession, for remand with instruction simply to "address" only its inconsistency, although the court rejected Finding No. 22 ("Title in the disputed property, and all of Lot Eleven should be quieted in Morgan").

Cottinghams' moved for RAP 7.2(e) leave to proceed in the trial court with a post trial motion contradicting Finding No 17 (on declaratory evidence that the county health officer had not prohibited relocation of Morgans septic) stands denied by the Court of Appeals. Cottinghams' motion for joinder of this No. 68202-4-I with LUPA review in appeal No. 70218-1-I was denied by the Court

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[12] In. 1 - 4, RP II, Page 124 - In. 14, page 127.

[13] In. 24, RP III, pg. 37, Dec 15, 2011(limited trial objection).

of Appeals. As soon as a land use decision was made by the agency Cottinghams sought review. Summary dismissal entered before a record was certified in 12-2-03029-1. Cottinghams' appeal is under 70218-1-I. Their motion to join these appeals was denied by the Court of Appeals.

VII. ARGUMENT

A. CONFLICT WITH SUPREME COURT DECISION: Neither Arnold v. Melani nor Proctor v. Huntington Allow A "Liability Rule" Forced Sale Remedy For Satisfaction Of Internal Development Conflicts.

Arnold v. Melani and Proctor v.Huntington[14] apply a "liability rule" to injunctive relief against structural encroachment. Finding Nos. 27 (Intentional "trespass"); No. 29 (knowledge of "a bona fide property line dispute") No. 7 (trespass *and* conversion) and failure to demonstrate minimal belief in ownership under RCW 64.12.040 are conclusive. Its use is irreconcilable with Arnold and Proctor factors. No decision has or should apply its "balancing" on proof of extraordinary wrongful trespass waste findings. Not only was no structural encroachment *outside* Morgans' lot identified for protective use of *Arnold's* and *Proctor's* liability rule, structural ejectment was never sought.

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[14] Arnold v. Melani, 75 Wn.2d 143, 146, 449 P.2d 800 (1968); *Proctor v. Huntington*, 169 Wn.2d 491, 192 P.3d 958 (2010).

The Court of Appeals Opinion inappropriately regards Morgans' encroachment into *their own* setback as cause to extend the rare "liability rule" to aid *completion* of development by forcing sale of a neighbor's property, instead of applying the property rule protecting property after wrongful, tortious behaviour. Even if Proctor v. Huntington had addressed adverse possession (which it did not) the Opinion nevertheless conflicts.

Morgans were specifically found possessed of culpable intent which prevents any innocent mistake finding as in Proctor. Cottinghams' evidence exceeded the preponderance burden, showing Morgan's knowledge and their predecessor under adverse possession's "open and notorious" element by "clear, cogent and convincing" evidence. CP 108.[15]

No "unwitting" construction finding entered for *Arnold's* and *Proctor's* justification (protecting structural encroachment against an oppressive use of equity) *Arnold v. Melani* does not stand for imposition of a forced sale remedy to satisfy profitability following tortious behaviour or for agency permit condition satisfaction before

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[15] Conclusion No. 5, preponderance was sufficient.

the agency has ruled.[16]

The particular burden under *Arnold* and *Proctor* was virtually indistinguishable from their burden under RCW 64.12.040, Discussed at "D. (Broughton Lumber, Jongeward v), *infra*. Morgans could not show "probable cause" to believe the land was their own as allowed by RCW 64.12.040, a conclusive failure under Arnold's first test requiring clear and convincing evidence *Proctor* at 500 (emphasis added), therefore the trial court *rejected* Morgans' *Supplemental* Findings and Conclusions, refusing to find good faith, CP 636.[17]

No structure outside Lot Eleven is found at risk of removal. No structure is found located over any line or subject to a requested

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[16] Under *Arnold v. Melani* "the encroacher must prove the following elements by clear and convincing evidence: (1) [H]e did not simply take a calculated risk or act in bad faith, or act negligently, willfully, or indifferently in locating the encroaching structure; (2) the damage to the landowner is slight and the benefit of removal equally small; (3) there is ample remaining room for a structure suitable for the area and there is no real limitation on the property's future use; (4) it is impracticable to move the encroaching structure as built; *and* (5) there is an enormous disparity in the resulting hardships. *Arnold v. Melani,* 75 Wn.2d at 152. (emphasis added).

[17] Rejected were Supplemental Finding No. 33 ("removal of the laurels, when done was necessary for Morgan to continue to have reasonable vehicle access to Lot 11"); 34 (Morgan reasonably believed that the land upon which the bushes was removed was Morgan's property."); and Supplemental No. 35 ("Morgan's removal was casual and not wilfull); and Supplemental Conclusion No. 7 ("...because cutting did not occur on land of Cottinghams"). CP 636.

ejectment. No "enormous disparity in resulting hardships" was included any cost or any review by any permitting authority. The remedy therefore abuses discretion and conflicts with the Supreme Court decision in *Proctor v. Huntington.* The court specifically found that "The Morgans knew of the existence of a bona fide dispute but nonetheless removed the eight laurels in violation of RCW 64.12.030," (Finding No. 29); that in 2005 Morgans' surveyor depicted the laurels (Finding No. 12); "on Lot Eleven." (Finding No. 13); that for the two years before their purchase in 2006 Morgans had seen "the row of laurels which had been in the ground for quite some time" (Finding No. 11); that Morgans were aware of the laurels and their location in close proximity to the survey line" when they purchased (Finding No. 16). Morgans' "completed their construction in 2007," (Finding No. 17) with such knowledge.

The Court of Appeals Opinion found evidence of *resulting* proximity to a line (which Morgans' surveyor disclaimed as actually locating the court's line[18]). But proximity after waste is no measure

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[18] Morgans' surveyor rejected measurements as made to the summary judgment line or to trunks of any of the laurels. In 14, pg. 146, RP II Dec. 1, 2011. He testified "this says *court mandated line*. We did not, that I recall, physically locate that." In. 6-8, pg.147, RP II Dec. 1, 2011. The exhibit was prepared on "numbers that were "provided to us," In. 24; pg.148, RPII; for a line from a "calculated position and probably

of the notice-based knowledge upon which reckless conduct is measured. No measurement while the hedge provided notice during construction entered.

B. CONFLICT WITH SUPREME COURT DECISION: The decision directly conflicts with *Bach v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968), Rewarding Wrongful Action By One With Knowledge That His Actions Trespass Upon And Impair Title Of Another.

The decision in *Bach v. Sarich*[19] has long set a standard for application of equity when relative hardship is any part of the inquiry. "[B]alancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights." The maxim that a court of equity will not intervene on behalf of a party whose conduct has been unconscientious or unjust is basic to justice.[20]

C. CONFLICT WITH SUPREME COURT DECISION: Cost Management Services v. City of Lakewood, ___ Wn.2d ___ (No. 87964-8, October 10, 2013.

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not the Iron Pipe" ln 14-17, pg. 150; RPII; Ln. 11, pg. pg.147; " we were given the line and the measurements" ln. 23, pg. 149, RP II Dec. 1, 2011, testimony of Larry Steele, Surveyor.

[19] *Bach v. Sarich*, 74 Wn.2d 575, at 582, 445 P.2d 648 (1968); and, *see*, *fn. 5, Responsible Urban Growth v. Kent* , 123 Wn.2d 376 (1994).

[20] *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 265 P.2d 1045 (1954); *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 101 P.2d 973 (1940).

Morgans had failed to exhaust administrative remedies and did not qualify for equitable relief. Pursuit of equity without exhaustion administrative process substantially impaired Cottinghams' ability to defend their property. They could not seek review twenty one days after the permit without any final land use decision. RCW 36.70C.030. Therefore they could not effectively scrutinize the administrative decisions and policies by which Morgans might claim detriment. Because of failure to exhaust the administrative process begun under planning enabling act controls and shoreline ordinance conditioning it was error to accord them equitable relief and the decision conflicts with the decision in *Cost Mgmt. Servs., Inc. v. City of Lakewood*[21] *Cost Management Services*[22] *has* returned Washington to clarity regarding the necessity of administrative procedure exhaustion before application of equity

Lack of exhaustion was highly prejudicial to Cottinghams, who cannot be held to have had complete opportunity for trial of development regulations affecting Morgans' good faith. RCW

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[21] ___ Wn.2d ___ (No. 87964-8, October 10, 2013)

[22] Cost Mgmt. Servs., Inc. v. City of Lakewood, ___ Wn.2d ___ (No. 87964-8, October 10, 2013).

19.27.095, *Lauer v. Pierce County*, 173 Wn.2d 242 (2011). Exhaustion serves to prevent needs -including condemnation- from being inconsistently represented to the agency and the court. Shoreline exemption permitting is not even considered "issued" until the last act required. WCC 23. 60.190.3. That act is the final certificate assuring that all laws of the jurisdiction have been complied with. International Building Code (IBC 110.2), including review of RCW 58.09.020(3)[23] WCC 21.05.150; WCC23.50.02.B.[24]

D. CONFLICT WITH SUPREME COURT DECIONS: Broughton Lumber Co. v. BNSF Railway; Jongeward v. BNSF Ry.

The Opinion conflicts with Broughton Lumber Co. v. BNSF Railway, abusing discretion by reward following culpability in the form of wrongful trespass and waste. Trespass waste has long received Washington's strongest condemnation, *Id as* an intentional

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[23] ("Survey" shall mean the locating and monumenting in accordance with sound principles of land surveying by or under the supervision of a licensed land surveyor, of points or lines which define the **exterior** boundary or boundaries common to two or more ownerships or which reestablish or restore general land office corners." RCW 58.09.023(*emphasis added).*

[24] *See, South Hollywood Hills Citizens Ass'n v. King* County, 101 Wn.2d 68, 73, 74, 677 P.2d 114 (1984)(policies underlying the exhaustion doctrine).

tort based upon land ownership.[25] Cottinghams' improvements provided substantial notice to Morgans and any others. Proctor's mistaken construction cannot even be argued when RCW 64.12.040 "belief in ownership" facts cannot be found allowing escape from treble damages. *c.f. Broughton Lumber Co. v. BNSF Railway*, 174 Wn.2d 619, ___ P.3d ___ (2012)(Cert. U.S. Dist. Ct, E.D.); Jongeward v. BNSF Ry., 174 Wn.2d 586, ___ P.3d ___ (2012). Extension of Proctor v. Huntington analysis here -and it did not address adverse possession facts (*fn, No.2* ***at pg 500)***- directly conflicts with *Broughton Lumber Co.*, and cases cited therein, even before recognizing the *rejected* and stricken amendment Supp. No. 34 ("Morgan reasonably believed that the land upon which the bushes were removed was Morgans' Property").

E. CONSTITUTIONAL CONFLICT: U.S. Constitution, Fourteenth Amendment's Due Process, Fifth Amendment's Due Process and Takings clause; Washington's Const. Art 1 §16;

Procedure at trial was constitutionally inadequate for lack of opportunity for trial on adverse possession, the internal roadway's previous location, and administrative interpretations of development

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[25] Broughton Lumber Co. v. BNSF Railway, 174 Wn.2d 619, ___ P.3d ___ (2012)(Cert. U.S. Dist. Ct, E.D., et., Jongeward v. BNSF Ry., 174 Wn.2d 586, ___ P.3d ___ (2012)

regulations. Essential notice was denied by use of CR 54(b)[26] after trial, and materially denied a fair trial denying preparation for trial on adverse possession with entry of EX 29 and Conclusion 8 (road relocation dismissal). Prejudice entered trial by Cottinghams as a consequence of lack of pronouncement of the moment and scope of reconsideration.(Finding 19, 20).

Conclusion No. 8 summarily dismissed the remedy won at summary judgment (merely stating "abandonment of the private road was not before the court in this proceeding") without trial by elevating CR 54(b) authority over CR 19. Joinder of others was unnecessary unless judgment sought was against others who claimed an interest after a CR 19 motion.[27]. Not surprisingly on this limited record, the opinion misstates the roadway's prior location as at the eastern end of the two lots,[28] rather than internal (regarding which internal location Morgans' offered no opinion at trial even

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[26] A judicially created rule may be challenged on constitutional grounds. Gossett v. Farmers Ins. Co., 133 Wn.2d 954(1997).

[27] No finding asserts that any person was interested in the road's return and Morgans' surveyor had filed a survey revealing that same road as abandoned EX 14. *See,* "Wimberly v. Caravello, 136 Wn.App. 327 (2006).

[28] Surveyor "Ayers" gave uncontradicted testimony that the Nixon Lots abut the railroad property. 67, ln. 14-68, ln.4, RP 2; 70, ln. 21 - (Dec, 1, 2013); and Morgans did not survey their entire lot. 74, ln 14-75, ln.6

through their surveyor).[29] The shifted private roadway and prior surveying support (EX 13 pg. 2) deserved a record better offered under Cottinghams' complaint.[30] Potential for deprivation of a private property interest by government requires greater scrutiny [31]Substantive State Law entitlement was prejudiced without due process. State Shoreline Management law and EX 23 (RCW 90.58.230, WCC 23.50.020.B, appendix), carried fundamental expectancies in mandatory enforcement at great risk of erroneous deprivation without full trial after exhaustion of agency purposes.

No substantial relation to the public health, safety, or general welfare exists in a forced sale for administrative regulation satisfaction. Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir.

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[29] As to who owned property upland and east of Morgans :corner" stakes which the plat calls out as abutting railroad, their surveyor answered "It's an interesting question." ln.9, pg. 164 RP2, Dec 1, 2011; and he was "sure" he had a conversation informing that Morgans' property extended further than those corners. In 22-24, pg. 142 RP 2.

[30] *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).

[31] Mathews v. Eldridge , 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)); Wedges/Ledges of Cal. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994)

2007) *Shanks v. Dressel*, 540 F.3d 1082 (9th Cir., 2008) Use of development regulations also effects unconstitutional "per se" taking regardless of compensation[32] A duty to enforce a shoreline setback is recognized in Washington State. See *Radach v. Gunderson,* 39 Wn. App. 392, 695 P.2d 128 (1985) .

No legitimate interest is furthered by disregard of such definite benefits. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005); Hawaii Housing Authority v. Midkiff, 702 F.2d 788, (No. 83-141); *Stop The Beach Renourishment v. Florida Dep Env. Prot.*, 130 S. Ct. 2592 (2010). The judicial forced sale remedy for development condition satisfaction lacked a rational relationship to a legitimate governmental end, prejudicing regulatory expectancies benefiting Cottinghams.

Use of development regulations to remedy internal conflicts stretches the police power "too far." Washington provides enhanced protections against taking private property for private use. *Manufactured Housing Communities v. State*, 142 Wn.2d 347 (2000). Unconstitutional taking occurred with physical invasion of private property by government. *Loretto v. Teleprompter Manhattan*

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[32] *See, fn.* No. 9, Manufactured Housing Communities v. State, 142 Wn.2d 347 (2000)

CATV Corp., 458 U.S. 419, 426, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)

F. CONSTITUTIONAL CONFLICT: U.S. Constitution Fourteenth Amendment, Equal Protection Clause and Washington Constitution: Privileges And Immunities Clause.

While Morgans continued with advantages of permitting and development and forced sale litigation, Cottinghams were prevented from the court's jurisdiction for review of their permitting decisions under RCW 36.70C.030 Administration of Washington's "liability rule" on such a record violated the Equal Protection Clause And Privileges and Immunities by unjustly discriminating against Cottinghams and their property. Under the equal protection clause, persons similarly situated with respect to the law must receive similar treatment. *Tunstall v. Bergeson*, 141 Wn.2d 201, 225, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001). Strict scrutiny is deserved when a fundamental property right is involved.

The decision elevates and a class of citizens building new construction which do not apply equally to all neighbors to development, contrary Wash. Const. Article I, §12 .[33].

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[33] Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 476, 611 P.2d 396 (1980)(construed similarly).

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The decision elevates and a class of citizens building new construction which do not apply equally to all neighbors to development, contrary Wash. Const. Article I, §12 .[33].

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[33] Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 476, 611 P.2d 396 (1980)(construed similarly).

Respectfully submitted this 18 day of December, 2013.

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November 18, 2013

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CASE #: 68202-4-I
David & Joan Cottingham, Apps/Cross-Resps. vs. Ronald & Kaye Morgan, Resps/Cross-Apps

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

c: The Hon. John Meyers

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM, Appellants/Cross Respondents, v. RONALD J. MORGAN and KAYE L. MORGAN, Husband and Wife, Respondents/Cross Appellants.	No. 68202-4-I (Consolidated with No. 68402-7-I) ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, David C. Cottingham and Joan S. Cottingham, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 18th day of November, 2013.

FOR THE COURT:

Judge

RICHARD D. JOHNSON,
Court Administrator/Clerk

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October 14, 2013

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CASE #: 68202-4-I
David & Joan Cottingham, Apps/Cross-Resps. vs. Ronald & Kaye Morgan, Resps/Cross-Apps
Whatcom County, Cause No. 09-2-01773-1

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm in all respects but remand to address the inconsistent conclusion of law in the Supplemental Findings of Fact and Conclusions of Law."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

c: The Honorable John Meyer

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM, Appellants/Cross Respondents, v. RONALD J. MORGAN and KAYE L. MORGAN, Husband and Wife, Respondents/Cross Appellants.	No. 68202-4-I (Consolidated with No. 68402-7-I) UNPUBLISHED OPINION FILED: October 14, 2013

SCHINDLER, J. — David and Joan Cottingham (Cottingham) own waterfront property on Lake Whatcom. Ronald and Kaye Morgan (Morgan) own an adjacent waterfront lot. Cottingham filed a lawsuit against Morgan claiming ownership of a portion of Morgan's property by adverse possession. Cottingham also asserted claims for nuisance, outrage, conversion, and trespass. Morgan filed a counterclaim to quiet title to the disputed area. The court granted Cottingham's motion for partial summary judgment, concluding Cottingham established adverse possession of approximately 800 square feet of Morgan's property. But at the conclusion of the trial, the court found that Cottingham established adverse possession as to only 292.3 square feet of Morgan's property. The court quieted title to the property in Cottingham but allowed Morgan to purchase the property at fair market value. The court also ordered Morgan pay treble

damages under the timber trespass statute, and dismissed Cottingham's claims for nuisance and outrage.

On appeal, Cottingham contends the court erred in revising the decision on partial summary judgment, allowing Morgan to purchase the property, and dismissing the nuisance and outrage claims. Morgan cross appeals the order granting partial summary judgment, the determination that he committed conversion, and the award of treble damages. We affirm the trial court in all respects but remand to address an inconsistent conclusion of law in the "Supplemental Findings of Fact and Conclusions of Law."

FACTS

David and Joan Cottingham (Cottingham) own two waterfront lots on Lake Whatcom, Lot 9 and Lot 10 of the "Nixon Beach" tracts. Lot 9 is directly north of Lot 10. The lots are narrow and rectangular. The western edge of the lots borders Lake Whatcom. Cottingham's house is located on Lot 9. Lot 11 shares a boundary with Lot 10. Lot 11 is also a narrow rectangular tract of land with the western edge bordering Lake Whatcom. A 10-foot-wide private road runs across the eastern edge of the Nixon Beach tracts. The road is held in undivided ownership interests for all of the owners of 14 Nixon Beach lots.[1]

In 2004, Ronald and Kaye Morgan (Morgan) considered purchasing Lot 11. In 2005, Morgan retained Larry Steele to conduct a survey. In January 2006, Morgan purchased Lot 11. A row of laurels was located along the boundary between Lot 10 and Lot 11.

[1] The deed to Lot 11 states that title includes an "undivided 14th interest in the road shown on the plat."

In August 2006, Morgan began construction of the house, a fence, and a driveway. Morgan installed the fence along the property line indentified in the Steele survey. In September 2007, Morgan removed eight of the laurels to construct the driveway. In fall 2008, ground water from the septic tank was inadvertently pumped onto the lot south of Lot 11. Morgan installed a new drain field in the spring.

In June 2009, Cottingham filed an action to quiet title to a portion of Lot 11 asserting ownership by adverse possession. Cottingham also alleged claims for trespass, conversion, nuisance, and outrage. Morgan filed a counterclaim to quiet title to the disputed portion of his property.

Cottingham filed a motion for partial summary judgment on adverse possession. Cottingham submitted a declaration stating that beginning in 1989, he mowed and cleared blackberry in the disputed area. Cottingham also stated that between 1989 and 1994, he planted rhododendrons, the laurel hedge, a garden, a locust tree, and a hydrangea on or near the disputed area, and installed a compost structure and a swing set in the disputed area. Cottingham said that he planted another row of laurels on the eastern end of the boundary in 1995.

Cottingham also submitted the declaration of Steven Otten. Otten maintained Lot 11 for the previous owner, Gladys Cook, until she sold the property in 1998. Otten stated that the disputed area "was being regularly mowed and maintained and used by Cottinghams."

In opposition, Morgan argued that when he visited the property in 2004 and 2005, he never saw "any evidence of any occupation of Lot 11 by plaintiffs or anyone else." Morgan submitted the declaration of his surveyor Steele. Steele stated that

when he visited the property between January 2005 and January 2007, he did not "see evidence of any established boundary line, or witness or see evidence of any adverse occupation." Steele also stated that there was "an uneven row of bushes some of which were north of Lot 11, some of which were on the surveyed property line, and some of which were on Lot 11."

The court granted the motion for partial summary judgment. The court concluded the unrebutted evidence established that Cottingham adversely possessed approximately 800 square feet of the property located near the boundary line near Lot 10 and Lot 11 beginning in 1989. The order states, in pertinent part: "Defense has raised disputed legal conclusions, but no relevant issues of material fact. The adverse possession lasted well in excess of the statutory requirement."

Several witnesses testified during the four-day trial on the remaining claims, including Cottingham, Morgan, septic installer Thomas Pulver, real estate appraiser Don Gustafson, and surveyors Bruce Ayers and Steele.[2] The court also conducted a site visit.

At the conclusion of the trial, the court revised its ruling on partial summary judgment "because at trial it became clear" that many of the laurels were "clearly on Lot 10 and not Lot 11." The court ruled that Cottingham had established adverse possession as to only 292.3 square feet and not 800 square feet of the disputed area. The court also ruled that Morgan was entitled to purchase the 292.3 square feet from Cottingham and that title "in the disputed property, and all of Lot 11 should be quieted in Morgan upon payment of $8,216.55 to Cottingham." Finding of fact 23 states, in

[2] The other witnesses were Whatcom County Environmental Health Specialist Edward Halasz and septic designer Sharon Kettells.

pertinent part:

> Although Cottingham acquired a portion of Lot 11 by adverse possession, that portion acquired:
>
> A. provides little value to the Cottinghams;
>
> B. is of great value to the Morgans, providing for minimum set back requirements;
>
> C. any remedy requested by Cottingham would result in substantial permanent improvements being removed on Lot 11 and/or would likely create safety issues related to access to all of the Morgan residence and property; and
>
> D. any remedy requested by Cottingham would likely result in further disputes and conflict as opposed to ending this matter.
>
> E. not to allow the Morgans to purchase the property from the Cottinghams would place an unreasonable restriction on the use of the Morgan's property, without giving much benefit to the Cottinghams.
>
> F. not to allow the purchase would significantly affect marketability and usability of the Morgans' property.
>
> The Court should exercise its equitable powers and require that the Morgans purchase that portion of the disputed area adversely possessed at fair market value.

The court also ruled that Morgan committed the tort of conversion by removing several laurels that were clearly not on his property and ordered him to pay treble damages under the timber trespass statute, RCW 64.12.030. The findings of fact state, in pertinent part:

> 27. The laurel bushes removed by Morgans were clearly not theirs, regardless of location or condition. Morgan committed the tort of conversion in taking them.
>
> 28. The fair market value to replace the laurels is $4342.98.
>
> 29. The Morgans knew of the existence of a bona fide property line dispute but nonetheless intentionally removed the eight laurels in violation of R.C.W. 64.12.030. Therefore, damages should be trebled.

The court rejected Cottingham's nuisance and outrage claims. The court found that "[t]he Morgans have not been involved in a public nuisance as claimed by Cottinghams. Any spill from the old septic system or delay in designing a new system was de minimus and occurred in good faith."

The court entered a judgment against Morgan in the amount of $21,245.49:

1. For timber trespass waste under RCW 64.12.030, damages for which, at $4,342.98, are trebled for $13,028.94.
2. For purchase of the "disputed area" $8216.55.

Cottingham filed a motion to reconsider, vacate the judgment, amend the findings of fact and conclusions of law, or grant a new trial. The court denied Cottingham's motion and entered Supplemental Findings of Fact and Conclusions of Law proposed by Morgan.[3]

ANALYSIS

Cottingham contends the court erred in revising the decision on partial summary judgment, ordering him to sell the property he owned by adverse possession, and dismissing the nuisance and outrage claims. Morgan cross appeals the finding that Cottingham established adverse possession of a portion of Lot 11, the finding that he committed conversion, and the decision to award Cottingham treble damages under the timber trespass statute.

Adverse Possession

Cottingham claims the court erred in revising the decision on partial summary judgment by finding that he established adverse possession as to only 292.3 square feet of Lot 11. We disagree. Because the order on partial summary judgment was not

---

[3] Supplemental finding of fact 23 states:

The portion of Lot 11 claimed by Cottingham by adverse possession:

A. provides little value to the Cottinghams;

B. is of great value to the Morgans providing for minimum set back requirements for the residence, septic system and driveway;

C. Morgan at no time acted in bad faith nor willfully in violation of any claim [o]f title to Lot 11 of Cottingham;

D. any remedy requested by Cottingham would result in substantial permanent improvements being removed on Lot 11 and/or would likely create safety issues related to access to all of the Morgan residence and property; and

. . . .

final, the court had the authority to modify the order at any time prior to entry of the final judgment. CR 54(b); Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 300, 840 P.2d 860 (1992).

Cottingham also argues substantial evidence does not support the finding that the disputed area was only 292.3 square feet and not 800 square feet.[4]

To establish ownership by adverse possession, Cottingham had the burden of establishing that possession of the disputed area was (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile for the 10-year statutory period. RCW 4.16.020(1); Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). The party claiming adverse possession has the burden of establishing each element. Miller v. Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998). Whether a person has gained title by adverse possession is a mixed question of law and fact. Miller, 91 Wn. App. at 828. Whether the facts establish adverse possession is a question of law that we review de novo. Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 210, 936 P.2d 1163 (1997).

We review a trial court's findings of fact to determine whether substantial evidence supports the findings of fact and, in turn, whether the findings support the conclusions of law. Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The court views the evidence and all

[4] Cottingham waived his right to challenge findings of fact 4, 5, 7, 8, 10, 14, 15, 18; conclusion of law 9; and amended conclusions of law 7 and 11; and assignments of error regarding the lis pendens, the supersedeas bond, and the motion to strike portions of declarations submitted in support of summary judgment. None of these assignments of error are addressed in the argument section of the brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

reasonable inferences in the light most favorable to the prevailing party. Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). We defer to the trial court's determination regarding conflicting evidence and credibility of the witnesses. Weyerhaeuser v. Tacoma-Pierce County Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). "The party challenging a finding of fact bears the burden of showing that it is not supported by the record." Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). Unchallenged findings of fact are verities on appeal. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

Substantial evidence supports the finding that Cottingham adversely possessed only 292.3 square feet of Lot 11 because "many laurels were planted on a portion of the joint property line and a substantial portion of them were clearly on Lot 10 and not Lot 11." The record also supports the finding that only the laurels "on the east part of the common line were planted . . . on Lot 11, in the disputed area." The Steele survey depicts the placement of the laurels in 2005. Steele testified that the laurel hedge was located on Lot 11 along the eastern edge of the boundary with Lot 10. The survey also shows the laurel hedge continuing west along the boundary toward the lake and then crossing the boundary line onto Lot 10.

Equitable Sale

Cottingham claims the court abused its discretion by allowing Morgan to purchase the 292.3 square feet. Quiet title actions are equitable in nature. Durrah v. Wright, 115 Wn. App. 634, 639, 63 P.3d 184 (2003). A trial court sitting in equity has broad discretion to fashion a remedy "to do substantial justice." Esmieu v. Hsieh, 92

Wn.2d 530, 535, 598 P.2d 1369 (1979); Haueter v. Rancich, 39 Wn. App. 328, 331, 693 P.2d 168 (1984).

We review the authority of a court to fashion an equitable remedy for abuse of discretion. Sac Downtown Ltd. P'ship v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The trial court's equity power is "flexible and fact-specific." Proctor v. Huntington, 169 Wn.2d 491, 503, 238 P.3d 1117 (2010).

The factors set forth in Proctor support the trial court's decision. In Proctor, the Huntingtons mistakenly built their home, well, and garage on a portion of Proctor's land. Proctor, 169 Wn.2d at 494. Proctor sued the Huntingtons for ejectment. Proctor, 169 Wn.2d at 495. The trial court ordered Proctor to sell the land to the Huntingtons. Proctor, 169 Wn.2d at 495. On appeal, the Washington Supreme Court identified a number of factors the trial court should consider in fashioning the equitable relief, and affirmed. Proctor, 169 Wn.2d at 504. The Court identified the following factors:

> (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Proctor, 169 Wn.2d at 500[5] (quoting Arnold v. Melani, 75 Wn.2d 143, 152, 437 P.2d 908 (1968)). The Court held that the trial court did not abuse is discretion by refusing "to require the Huntingtons to remove their entire house, garage, and well—at an estimated cost of over $300,000—because of both parties' good-faith surveying mistake." Proctor, 169 Wn.2d at 503.

[5] (Internal quotation marks omitted.)

Here, the court expressly found that Morgan "at no time acted in bad faith nor willfully in violation of any claim [of] title to Lot 11 of Cottingham," and the damage to Cottingham was slight and the benefit of removal small. The court found that the portion of Lot 11 that Cottingham acquired by adverse possession was of little value to Cottingham. The court also found that the sale of the disputed area did not limit Cottingham's use of the property, and Cottingham could still build a garage and access Lake Whatcom.

In contrast, the court found that the disputed area was very valuable to Morgan because the land was necessary to meet the "minimum set back requirements for the residence, septic system and driveway." The record shows there was less than 1.5 feet between Morgan's garage and the boundary. Real estate appraiser Don Gustafson testified that a setback of less than five feet affects marketability. The court also found that if Cottingham had title to the disputed area, it "would likely create safety issues related to access to all of the Morgan residence and property." We hold the court did not abuse its discretion by ordering the equitable sale.

Nuisance

Cottingham claims the court erred in dismissing his public nuisance claim. A "public nuisance" is a nuisance "which affects equally the rights of an entire community or neighborhood." RCW 7.48.130. A nuisance action may be brought by "any person whose property is . . . injuriously affected or whose personal enjoyment is lessened by the nuisance." RCW 7.48.020. Nuisance is a substantial and unreasonable interference with the use and enjoyment of land. Grundy v. Thurston County, 155 Wn.2d 1, 6-7, 117 P.3d 1089 (2005).

Cottingham challenges the finding that Morgan "believ[ed] that he was merely pumping odorless ground water" from a hole on his property, that "[a]ny spill from the old septic system or delay in designing a new system was de minimus and occurred in good faith," and that Morgan believed he was pumping "[g]roundwater [and] rainwater" and "couldn't smell anything."

Substantial evidence supports the findings. Septic installer Thomas Pulver testified that when he excavated the old drain field, there was no pooling of effluent or any evidence that anything spilled onto the Cottingham's property. Further, the unchallenged finding states that "[t]here was no substantial evidence that effluent was pumped from the tank or, if it were, that it caused any damage." Unchallenged finding of fact 24 also states that the delay in fixing the septic system was due to wet winter weather: "During the wet winter months it can be problematic with the water table in the area to rebuild a septic field . . . . The delay was in the hands of professionals and not unreasonable under the circumstances."[6]

Outrage

Cottingham also asserts the trial court erred in dismissing his outrage claim. To establish outrage, a plaintiff must show "behavior 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " Kloepfel v. Bokor, 149

[6] (Emphasis added.) Cottingham also argues Leo Day is not a certified septic installer and there is no evidence Whatcom County required the rocks installed as barriers around the drain field. The record does not support Cottingham's argument. The record shows that Leo Day worked for Ultra Tank Services. Thomas Pulver, the owner of Ultra Tank, is a licensed Whatcom County septic installer. A Whatcom County Health Department on-site sewage construction permit indicates, "Traffic control barriers [are] required along perimeter of driveway adjacent to main and reserve drainfield."

Wn.2d 192, 196, 66 P.3d 630 (2003)[7] (quoting Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). The unchallenged finding that "[n]o conduct of Morgans could be regarded as atrocious or utterly intolerable in a civilized community" supports dismissal of the outrage claim.

Cross Appeal

Morgan contends the court erred in concluding Cottingham established adverse possession.

When reviewing a grant of summary judgment, we undertake the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Under CR 56, the moving party bears the initial burden of showing the absence of genuine material issues of fact and that the moving party is entitled to judgment as a matter of law. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets its initial burden, the nonmoving party must set forth specific facts to rebut showing that a genuine issue as to a material fact exists. Allard v. Bd. of Regents of Univ. of Wash., 25 Wn. App. 243, 247, 606 P.2d 280 (1980).

Here, the unrebutted evidence established Cottingham adversely possessed the disputed area from 1995 to 2005. The court did not err in concluding Cottingham adversely possessed the disputed area and granting the motion for partial summary judgment.

Morgan also challenges the finding that he committed the tort of conversion by removing eight laurel bushes. "Conversion" is " 'the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.' " Brown v. Brown, 157 Wn. App. 803, 817-18, 239 P.3d 602

[7] (Emphasis omitted.)

(2010) (quoting Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001)).

Because substantial evidence supports the finding that Morgan "knew of the existence of a bona fide property line dispute but nonetheless intentionally removed the eight laurels in violation of R.C.W. 64.12.030," the trial court did not err in awarding treble damages.

In October 2007, Morgan wrote Cottingham a letter with a subject line, "Morgan/Cottingham Lot Line," informing Cottingham that he had removed several laurels.

> [W]e have removed the marked portions of the hedge needed to provide adequate access to our house. Under any possible compromise the marked laurels could not stay.
>
> I am still willing to discuss a transfer of some property at the back of our lot in return for some property at the front of your lot if you need this to develop your separate lot. At a minimum, however, we would need a permanent easement for ingress and egress over the back part of the property to get reasonable access to our home.

The unchallenged findings of fact also state that "[w]hen the Morgans purchased their property they were aware of the laurels and their location in close proximity to the survey line." There is also no dispute that Cottingham planted the laurels as a hedge between Lots 10 and 11.[8]

Morgan claims the trial court erred by trebling the damages for the cost of the laurels because the timber trespass statute did not apply. We disagree. The timber trespass statute states, in pertinent part:

> Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, . . . timber, or shrub on the land of another person, . . . without

[8] The cases Morgan relies on, Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 364 (Tenn. 2002), and Gostina v. Ryland, 116 Wash. 228, 234-35, 199 P. 298 (1921), are inapposite because they address nuisance, not conversion.

> lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

RCW 64.12.030.[9] If a trespasser has knowledge of a bona fide boundary dispute, treble damages are appropriate. RCW 64.12.030; Maier v. Giske, 154 Wn. App. 6, 21, 223 P.3d 1265 (2010).

Supplemental Findings of Fact and Conclusions of Law

We affirm the trial court in all respects but remand to address what appears to be an inadvertent error in the Supplemental Findings of Fact and Conclusions of Law. In the Supplemental Findings of Fact and Conclusions of Law, the court clearly crossed out the proposed finding that "Cottinghams have not established that they adversely possessed any portion of Lot 11."[10] However, the court did not cross out the corresponding conclusion of law that states, "The Cottinghams have not established all elements of adverse possession by clear, cogent and convincing evidence as to any portion of Lot 11."[11] Accordingly, we remand to address the discrepancy.

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[9] (Emphasis added.)

[10] (Emphasis added.)

[11] (Emphasis added.) This amended conclusion of law is also contrary to the finding that Cottingham established adverse possession to 292.3 square feet of Lot 11, the order allowing Morgan to pay Cottingham $8,216.55 to purchase a portion of Lot 11, and entry of the judgment. On appeal, Morgan admits there is "some confusion in the record" about the court's ruling on adverse possession.

We affirm in all respects but remand to address the inconsistent conclusion of law in the Supplemental Findings of Fact and Conclusions of Law.[12]

WE CONCUR:

[12] Cottingham is not entitled to attorney fees on appeal based on the statutes he cites.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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May 9, 2013

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CASE #: 68202-4-I
David & Joan Cottingham, Apps/Cross-Resps. vs. Ronald & Kaye Morgan, Resps/Cross-Apps

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on May 7, 2013, regarding appellant's motion to continue June 4, 2013 argument date and also motion to join with no. 70218-1-1:

At the direction of the panel the motion to continue and consolidate is denied.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM, Appellants/Cross-Respondents, v. RONALD J. MORGAN and KAYE L. MORGAN, husband and wife, Respondents/Cross- Appellants.	)	No. 68202-4-I (consolidated with No. 68402-7-I) ORDER

Appellants/cross-respondents David and Joan Cottingham have filed a motion under RAP 7.2(e) seeking permission to pursue post-judgment motions in the trial court that may modify the trial court decision currently on review. We have considered the motion under RAP 7.2(e) and have determined that it should be denied. Appellants' motions to stay the trial court's April 26, 2012 order and to file an overlength reply are also denied.

Respondents' motion to strike appellants' overlength reply is granted; the request for attorney fees is denied.

Now, therefore, it is hereby

ORDERED that appellants' motion for permission to pursue post-judgment motions under RAP 7.2(e) is denied; it is further

ORDERED that appellants' motions to stay the trial court's April 26, 2012 order and to file an overlength reply are denied; it is further

No. 68202-4-I / 2

ORDERED that respondents' motion to strike appellants' overlength reply is granted; it is further

ORDERED that respondents' request for attorney fees is denied.

Done this 25th day of July, 2012.

Leach, C.J.

Schindler, J.

APPENDIX.

RCW 58.09.010	Purpose of Survey Recording Act
RCW 58.09.020(3)	Surveys defined as "...of points or lines which *define the external* boundary or boundaries common to two or more ownerships."
RCW 58.09.030	Surveyor Compliance with chapter required
RCW 58.09.040(1)	Required Survey Disclosure - The establishment of a corner which materially varies from the description of record
RCW 58.09.040(1)(a)	Corner Not Previously Existing , Duty To Record Survey IB
RCW 58.09.060	Surveyor Duty To Record Found Monument
RCW 58.17.210	Septic tank, other development permits not to be issued for land divided in violation of chapter or regulations
RCW 90.58.230	Damage Liability – Violation of chapter or permit issued thereunder
WAC 332-130-030(2)	
WAC 332-130-050(1)	Survey map requirements including corners, monuments found, "hiatuses"
County Ordinances	
WCC 21.01.150	Development Regulation Including Notice to Neighbor, Technical Review of survey discrepancy

WCC 23.50.010.B – D	Land Division, Corner Restoration- All maps, plats, or plans showing a land boundary survey shall show all the corners found
WCC 23.50.020.B	Relationship To Other Local Regulations – Mandatory Enforcement Of Exemption Conditions
WCC 23.50.080	Property Rights
WCC 23.60.021	Exemption Application
WCC 23.60.021 A – F	Exemption Application, Interpretation
WCC 23. 60.023.A	Exemption, Appeal
WCC 23. 60.023.B	Statements of Exemption – Substantial Question

RCW 58.09.010
Purpose — Short title.

The purpose of this chapter is to provide a method for preserving evidence of land surveys by establishing standards and procedures for monumenting and for recording a public record of the surveys. Its provisions shall be deemed supplementary to existing laws relating to surveys, subdivisions, platting, and boundaries.

This chapter shall be known and may be cited as the "Survey Recording Act".

[1973 c 50 § 1.]

RCW 58.09.020
Definitions.

As used in this chapter:

(1) "Land surveyor" shall mean every person authorized to practice the profession of land surveying under the provisions of chapter 18.43 RCW, as now or hereafter amended.

(2) "Washington coordinate system" shall mean that system of plane coordinates as established and designated by chapter 58.20 RCW.

(3) "Survey" shall mean the locating and monumenting in accordance with sound principles of land surveying by or under the supervision of a licensed land surveyor, of points or lines which define the exterior boundary or boundaries common to two or more ownerships or which reestablish or restore general land office corners.

[1973 c 50 § 2.]

RCW 58.09.030
Compliance with chapter required.

Any land surveyor engaged in the practice of land surveying may prepare maps, plats, reports, descriptions, or other documentary evidence in connection therewith.

Every map, plat, report, description, or other document issued by a licensed land surveyor shall comply with the provisions of this chapter whenever such map, plat, report, description, or other document is filed as a public record.

It shall be unlawful for any person to sign, stamp, or seal any map, report, plat, description, or other document for filing under this chapter unless he or she be a land surveyor.

[2010 c 8 § 18002; 1973 c 50 § 3.]

RCW 58.09.040
Records of survey — Contents — Filing — Replacing corner, filing record.

After making a survey in conformity with sound principles of land surveying, a land surveyor may file a record of survey with the county auditor in the county or counties wherein the lands surveyed are situated.

(1) It shall be mandatory, within ninety days after the establishment, reestablishment, or restoration of a corner on the boundary of two or more ownerships or general land office corner by survey that a land surveyor shall file with the county auditor in the county or counties wherein the lands surveyed are situated a record of such survey, in such form as to meet the requirements of this chapter, which through accepted survey procedures, shall disclose:

(a) The establishment of a corner which materially varies from the description of record;

(b) The establishment of one or more property corners not previously existing;

(c) Evidence that reasonable analysis might result in alternate positions of lines or points as a result of an ambiguity in the description;

(d) The reestablishment of lost government land office corners.

(2) When a licensed land surveyor, while conducting work of a preliminary nature or other activity that does not constitute a survey required by law to be recorded, replaces, or restores an existing or obliterated general land office corner, it is mandatory that, within ninety days thereafter, he or she 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.

[2010 c 8 § 18003; 1973 c 50 § 4.]

RCW 58.09.060
Records of survey, contents — Record of corner, information.

(1) The record of survey as required by RCW 58.09.040(1) shall show:

(a) All monuments found, set, reset, replaced, or removed, describing their kind, size, and location and giving other data relating thereto;

(b) Bearing trees, corner accessories or witness monuments, basis of bearings, bearing and length of lines, scale of map, and north arrow;

(c) Name and legal description of tract in which the survey is located and ties to adjoining surveys of record;

(d) Certificates required by RCW 58.09.080;

(e) Any other data necessary for the intelligent interpretation of the various items and locations of the points, lines and areas shown.

(2) The record of corner information as required by RCW 58.09.040(2) shall be on a standard form showing:

(a) An accurate description and location, in reference to the corner position, of all monuments and accessories found at the corner;

(b) An accurate description and location, in reference to the corner position, of all monuments and accessories placed or replaced at the corner;

(c) Basis of bearings used to describe or locate such monuments or accessories;

(d) Corollary information that may be helpful to relocate or identify the corner position;

(e) Certificate required by RCW 58.09.080.

[1973 c 50 § 6.]

RCW 58.17.210
Building, septic tank or other development permits not to be issued for land divided in violation of chapter or regulations — Exceptions — Damages — Rescission by purchaser.

No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice. All purchasers' or transferees' property shall comply with provisions of this chapter and each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his or her property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

[2010 c 8 § 18005; 1974 ex.s. c 134 § 10; 1969 ex.s. c 271 § 21.]

RCW 90.58.230
Violators liable for damages resulting from violation — Attorney's fees and costs.

Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.

[1971 ex.s. c 286 § 23.]

WAC 332-130-030
Land subdivision and corner restoration standards—Recording.

The following requirements apply when a land boundary survey is performed. If, in the professional judgment of the surveyor, the procedures of subsections (1) and (2) of this section are not necessary to perform the survey, departures from these requirements shall be explained and/or shown on the survey map produced.

(1) The reestablishment of lost GLO or BLM corners and the subdividing of sections shall be done according to applicable GLO or BLM plats and field notes and in compliance with the rules as set forth in the appropriate GLO or BLM *Manual of Surveying Instructions,* manual supplements and circulars. Federal or state court decisions that influence the interpretation of the rules should be considered. Methods used for such corner reestablishment or section subdivision shall be described on the survey map produced.

(2) All maps, plats, or plans showing a land boundary survey shall show all the corners found, established, reestablished and calculated, including corresponding directions and distances, which were used to survey and which will be necessary to resurvey the parcel shown. Additionally, all such maps, plats, or plans shall show sufficient section subdivision data, or other such controlling parcel data, necessary to support the position of any section subdivisional corner or controlling parcel corner used to reference the parcel surveyed. Where a portion or all of this information is already shown on a record filed or recorded in the county recording office of the county in which the parcel is located, reference may be made to that record in lieu of providing the required data.

(3) Documentation shall be provided for all GLO or BLM corner(s) or point(s) used to control the location of the parcel surveyed. This requirement shall be met by providing on the document produced:

(a) The information required by both the Survey Recording Act and the history and evidence found sections of the Land Corner Record Form; or

(b) The recording data of a document(s) that provides the required information and is filed or recorded in the county recording office of the county in which the parcel is located.

(4) Every corner originally monumented by the GLO or BLM that is physically reestablished shall be monumented in accordance with the Survey Recording Act. If the reestablished corner is not filed or recorded

as part of a record of survey, plat or short plat, at least three references shall be established and filed or recorded on a Land Corner Record Form. If the reestablished corner is filed or recorded as part of a record of survey, plat or short plat, then ties to at least two other monuments shown on the record document may serve in lieu of the required references. A valid set of coordinates on the Washington coordinate system may serve as one of the references. However, to best ensure an accurate relocation, references in close proximity to the corner are recommended. Monuments placed shall be magnetically locatable and include a cap stamped with the appropriate corner designation as defined in the current BLM *Manual of Surveying Instructions.*

[Statutory Authority: RCW 58.24.040(1). WSR 90-06-028 (Order 568), § 332-130-030, filed 3/1/90, effective 4/1/90; WSR 89-11-028 (Order 561), § 332-130-030, filed 5/11/89; Order 275, § 332-130-030, filed 5/2/77.]

WAC 332-130-050

Survey map requirements.

The following requirements apply to land boundary survey maps and plans, records of surveys, plats, short plats, boundary line adjustments, and binding site plans required by law to be filed or recorded with the county.

(1) All such documents filed or recorded shall conform to the following:

(a) They shall display a county recording official's information block which shall be located along the bottom or right edge of the document unless there is a local requirement specifying this information in a different format. The county recording official's information block shall contain:

(i) The title block, which shall be on all sheets of maps, plats or plans, and shall identify the business name of the firm and/or land surveyor that performed the survey. For documents not requiring a surveyor's certificate and seal, the title block shall show the name and business address of the preparer and the date prepared. Every sheet of multiple sheets shall have a sheet identification number, such as "sheet 1 of 5";

(ii) The auditor's certificate, where applicable, which shall be on the first sheet of multiple sheets; however, the county recording official shall enter the appropriate volume and page and/or the auditor's file number on each sheet of multiple sheets;

(iii) The surveyor's certificate, where applicable, which shall be on the first sheet of multiple sheets and shall show the name, license number, original signature and seal of the land surveyor who had responsible charge of the survey portrayed, and the date the land surveyor approved the map or plat. Every sheet of multiple sheets shall have the seal and signature of the land surveyor and the date signed;

(iv) The following indexing information on the first sheet of multiple sheets:

(A) The section-township-range and quarter-quarter(s) of the section in which the surveyed parcel lies, except that if the parcel lies in a portion of the section officially identified by terminology other than aliquot parts, such as government lot, donation land claim, homestead entry survey, townsite, tract, and Indian or military reservation, then also identify that official subdivisional tract and call out the corresponding approximate quarter-quarter(s) based on projections of the aliquot parts. Where the section is incapable of being described by projected aliquot parts, such as the Port Angeles townsite, or elongated sections with excess tiers of government lots, then it is acceptable to provide only the official GLO designation. A graphic representation of the section divided into quarter-quarters may be used with the quarter-quarter (s) in which the surveyed parcel lies clearly marked;

(B) Additionally, if appropriate, the lot(s) and block(s) and the name and/or number of the filed or recorded subdivision plat or short plat with the related recording data;

(b) They shall contain:

(i) A north arrow;

(ii) The vertical datum when topography or elevations are shown;

(iii) The basis for bearings, angle relationships or azimuths shown. The description of the directional reference system, along with the method and location of obtaining it, shall be clearly given (such as "North by Polaris observation at the SE corner of section 6"; "Grid north from azimuth mark at station Kellogg"; "North by compass using twenty-one degrees variation"; "None"; or "Assumed bearing based on ..."). If the basis of direction differs from record title, that difference should be noted;

(iv) Bearings, angles, or azimuths in degrees, minutes and seconds;

(v) Distances in feet and decimals of feet;

(vi) Curve data showing the controlling elements.

(c) They shall show the scale for all portions of the map, plat, or plan provided that detail not drawn to scale shall be so identified. A graphic scale for the main body of the drawing, shown in feet, shall be included. The scale of the main body of the drawing and any enlargement detail shall be large enough to clearly portray all of the drafting detail, both on the original and reproductions;

(d) The document filed or recorded and all copies required to be submitted with the filed or recorded document shall, for legibility purposes:

(i) Have a uniform contrast suitable for scanning or microfilming.

(ii) Be without any form of cross-hatching, shading, or any other highlighting technique that to any degree diminishes the legibility of the drafting detail or text;

(iii) Contain dimensioning and lettering no smaller than 0.08 inches, vertically, and line widths not less than 0.008 inches (equivalent to pen tip 000). This provision does not apply to vicinity maps, land surveyors' seals and certificates.

(e) They shall not have any adhesive material affixed to the surface;

(f) For the intelligent interpretation of the various items shown, including the location of points, lines and areas, they shall:

(i) Reference record survey documents that identify different corner positions;

(ii) Show deed calls that are at variance with the measured distances and directions of the surveyed parcel;

(iii) Identify all corners used to control the survey whether they were calculated from a previous survey of record or found, established, or reestablished;

(iv) Give the physical description of any monuments shown, found, established or reestablished, including type, size, and date visited;

(v) Show the record land description of the parcel or boundary surveyed or a reference to an instrument of record;

(vi) Identify any ambiguities, hiatuses, and/or overlapping boundaries;

(vii) Give the location and identification of any visible physical appurtenances such as fences or structures which may indicate encroachment, lines of possession, or conflict of title.

(2) All signatures and writing shall be made with permanent black ink.

(3) The following criteria shall be adhered to when altering, amending, changing, or correcting survey information on previously filed or recorded maps, plats, or plans:

(a) Such documents filed or recorded shall comply with the applicable local requirements and/or the recording statute under which the original map, plat, or plan was filed or recorded;

(b) Alterations, amendments, changes, or corrections to a previously filed or recorded map, plat, or plan shall only be made by filing or recording a new document;

(c) All such documents filed or recorded shall contain the following information:

(i) A title or heading identifying the document as an alteration, amendment, change, or correction to a previously filed or recorded map, plat, or plan along with, when applicable, a cross -reference to the volume and page and auditor's file number of the altered document;

(ii) Indexing data as required by subsection (1)(a)(iv) of this section;

(iii) A prominent note itemizing the change(s) to the original document. Each item shall explicitly state what the change is and where the change is located on the original;

(d) The county recording official shall file, index, and cross-reference all such documents received in a manner sufficient to provide adequate notice of the existence of the new document to anyone researching the county records for survey information;

(e) The county recording official shall send to the department of natural resources, as per RCW 58.09.050(3), a legible copy of any document filed or recorded which alters, amends, changes, or corrects survey information on any document that has been previously filed or recorded pursuant to the Survey Recording Act.

(4) Survey maps, plats and plans filed with the county shall be an original that is legibly drawn in black ink on mylar and is suitable for producing legible prints through scanning, microfilming or other standard copying procedures. The following are allowable formats for the original that may be used in lieu of the format stipulated above:

(a) photo mylar with original signatures,

(b) any standard material as long as the format is compatible with the auditor's recording process and records storage system. Provided, that records of survey filed pursuant to chapter 58.09 RCW are subject to the restrictions stipulated in RCW 58.09.110(5),

(c) an electronic version of the original if the county has the capability to accept a digital signature issued by a licensed certification authority under chapter 19.34 RCW or a certification authority under the rules adopted by the Washington state board of registration for professional engineers and land surveyors, and can import electronic files into an imaging system. The electronic version shall be a standard raster file format acceptable to the county.

(5) The following checklist is the only checklist that may be used to determine the recordability of records of survey filed pursuant to chapter 58.09 RCW. There are other requirements to meet legal standards. This checklist also applies to maps filed pursuant to the

other survey map recording statutes, but for these maps there may be additional sources for determining recordability.

CHECKLIST FOR SURVEY MAPS BEING RECORDED
(Adopted in WAC 332-130)

The following checklist applies to land boundary survey maps and plans, records of surveys, plats, short plats, boundary line adjustments, and binding site plans required by law to be filed or recorded with the county. There are other requirements to meet legal standards. Records of survey filed pursuant to chapter 58.09 RCW, that comply with this checklist, shall be recorded; no other checklist is authorized for determining their recordability.

ACCEPTABLE MEDIA:

- For counties required to permanently store the document filed, the only acceptable media are:
  [ ] Black ink on mylar or photo mylar
- For counties exempted from permanently storing the document filed, acceptable media are:
  [ ] Any standards material compatible with county processes; or, an electronic version of the original.
- [ ] All signatures must be original and, on hardcopy, made with permanent black ink.
- [ ] The media submitted for filing must not have any material on it that is affixed by adhesive.

LEGIBILITY:

- [ ] The documents submitted, including paper copies, must have a uniform contrast throughout the document.
- [ ] No information, on either the original or the copies, should be obscured or illegible due to cross-hatching, shading, or as a result of poor drafting technique such as lines drawn through text or improper pen size selection (letters or number filled in such that 3's, 6's or 8's are indistinguishable).
- [ ] Signatures and seals must be legible on the prints or the party placing the seal must be otherwise identified.
- [ ] Text must be 0.08 inches or larger; line widths shall not be less than 0.008 inches (vicinity maps, land surveyor's seals and certificates are excluded).

INDEXING:

- [ ] The recording officer's information block must be on the bottom or right edge of the map.
  [ ] A title block (shows the name of the preparer and is on each sheet of multiple sheets).
  [ ] An auditor's certificate (on the first sheet of multiple sheets, although Vol./Pg. and/or AF# must be entered by the recording officer on each sheet).
  [ ] A surveyor's certificate (on the first sheet of multiple sheets; seal and signature on multiple sheets).
- The map filed must provide the following indexing data:

[ ] S-T-R and the quarter-quarter(s) or approximate quarter-quarter(s) of the section in which the surveyed parcel lies,
[ ] Optional: A graphic representation of the section divided into quarter-quarters may be used with the quarter-quarter(s) in which the surveyed parcel lies clearly marked;

MISCELLANEOUS

- If the function of the document submitted is to change a previously filed record, it must also have:
  [ ] A title identifying it as a correction, amendment, alteration or change to a previously filed record,
  [ ] A note itemizing the changes.
- For records of survey:
  [ ] The sheet size must be 18" x 24"
  [ ] The margins must be 2" on the left and 1/2" for the others, when viewed in landscape orientation.
  [ ] In addition to the map being filed there must be two prints included in the submittal; except that, in counties using imaging systems fewer prints, as determined by the Auditor, may be allowed.

[Statutory Authority: RCW 58.24.040(1) and 58.09.110. WSR 00-17-063 (Order 704), § 332-130-050, filed 8/9/00, effective 9/9/00. Statutory Authority: RCW 58.24.040(1). WSR 89-11-028 (Order 561), § 332-130-050, filed 5/11/89; Order 275, § 332-130-050, filed 5/2/77.]

21.01.150 Boundary Discrepancies

(1) If, in accordance with State law, the Land Surveyor of record identifies a boundary discrepancy in a proposed short subdivision, preliminary long subdivision, or preliminary binding site plan, then the following shall occur:

(a) The applicant shall mail notice that describes the nature and extent of the boundary discrepancy to all affected property owners within 10 days of submitting the application. A copy of the notice shall be submitted to the Whatcom County Division of Engineering.

(b) The Whatcom County Technical Review Committee shall, within 10 days of the determination of completeness, determine whether the discrepancy affects any of the following factors:

(i) Gross density; or
(ii) Minimum lot size; or
(iii) Access, drainage or other easements; or
(iv) Reasonable use of the property.

(2) If the Whatcom County Technical Review Committee determines that a boundary discrepancy affects any of the factors listed in (1)(b) above, then prior to approval of the land division application the applicant shall:

(a) Acquire a boundary line agreement in accordance with WCC 21.03.060(1) with the owner of the property that is disputed; or
(b) Obtain a judicial decree, order or judgement rendered by a court of competent jurisdiction resolving the boundary discrepancy.

(3) As an alternative to acquiring a boundary line agreement or judicial decree as set forth in (2) above, the applicant may choose to redesign the proposed land division in a manner which does not utilize nor depend upon the area subject to the boundary discrepancy. The boundary discrepancy shall be noted on the face of the final long plat or short plat in accordance with RCW 58.17.255 or on the face of the binding site plan.

(4) The administrative determination that a boundary discrepancy does or does not affect any of the factors listed in (1)(b) above may be appealed to the Hearing Examiner by any party to the determination. The appeal will run concurrently with processing the land division application unless the applicant puts the application on hold.

21.01.160 City Urban Growth Areas

City development standards shall be addressed, in accordance with adopted interlocal agreements, for land divisions located within a city's urban growth area.

21.01.170 Hearing Examiner Consultation with Technical Advisory Committee

The Hearing Examiner may choose to consult with the Technical Advisory Committee concerning technical matters relating to land division applications.

Chapter 23.50
APPLICABILITY AND NONCONFORMING USES

Sections:

23.50.010 Application to persons and development.

A. This program shall apply to any person as defined in Chapter 23.110 WCC.

B. This program shall apply to any use or development as defined in Chapter

23.110 WCC. All development and use of shorelines of the state shall be carried out in a manner that is consistent with this program and the policy of the Act as required by RCW 90.58.140(1), whether or not a shoreline permit or statement of exemption is required for such development pursuant to Chapter 23.60 WCC.

C. No substantial development as defined in Chapter 23.110 WCC shall be undertaken within shorelines by any person on shorelines without first obtaining a substantial development permit from Whatcom County; provided, that such a permit shall not be required for the exempt activities listed in WCC 23.60.022. (Ord. 2009-13 § 1 (Exh. 1)).

23.50.020 Relationship to other local regulations.

A. In the case of development subject to the shoreline permit requirement of this program, the county building official shall not issue a building permit for such development until a shoreline permit has been granted; provided, that any permit issued by the building official for such development shall be subject to the

same terms and conditions that apply to the shoreline permit.

B. In the case of development subject to regulations of this program but exempt from the shoreline substantial development permit requirement, any required statement of exemption shall be obtained prior to issuance of the building permit; provided, that for single-family residences, a building permit reviewed and signed off by the administrator may substitute for a written statement of exemption. A record of review documenting compliance with bulk and dimensional standards as well as policies and regulations of this program shall be included in the permit review. The building official shall attach and enforce conditions to the building permit as required by applicable regulations of this program pursuant to RCW 90.58.140(1).

C. In the case of zoning conditional use permits and/or variances required by WCC Title 20 for development that is also within shorelines, the county decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this program in

consideration of recommendations from the administrator. The decision maker shall attach conditions to such permits and variances as required to make such development consistent with this program.

D. In the case of land divisions, such as short subdivisions, long plats and planned unit developments that require county approval, the decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this program and attach appropriate conditions and/or mitigating measures to such approvals to ensure the design, development activities and future use associated with such land division(s) are consistent with this program.

E. Other local ordinances that may be applicable to shoreline development or use include, but are not limited to:

1. Building, plumbing, mechanical, and fire codes.

2. Boating and swimming, WCC Title 11.

3. On-site sewage system regulations, Chapter 24.05 WCC.

4. Solid waste rules and regulations, Chapter 24.06 WCC.

5. Zoning, WCC Title 20.

6. Land division regulations, WCC Title 21.

7. Development standards. (Ord. 2009-13 § 1 (Exh. 1)).

23.50.030 Relationship to other state and federal laws.

A. Obtaining a shoreline permit or statement of exemption for a development or use does not excuse the applicant/proponent from complying with any other local, tribal, state, regional or federal statutes or regulations applicable to such development or use.

B. At the time of application or initial inquiry, the administrator shall inform the applicant/proponent of other such statutes and regulations relating to shoreline issues that may be applicable to the project to the extent that the administrator is aware of such statutes.

23.50.020 Relationship to other local regulations.

A. In the case of development subject to the shoreline permit requirement of this program, the county building official shall not issue a building permit for such development until a shoreline permit has been granted; provided, that any permit issued by the building official for such development shall be subject to the same terms and conditions that apply to the shoreline permit.

B. In the case of development subject to regulations of this program but exempt from the shoreline substantial development permit requirement, any required statement of exemption shall be obtained prior to issuance of the building permit; provided, that for single-family residences, a building permit reviewed and signed off by the administrator may substitute for a written statement of exemption. A record of review documenting compliance with bulk and dimensional standards as well as policies and regulations of this program shall be included in the permit review. The

building official shall attach and enforce conditions to the building permit as required by applicable regulations of this program pursuant to RCW 90.58.140(1).

C. In the case of zoning conditional use permits and/or variances required by WCC Title 20 for development that is also within shorelines, the county decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this program in consideration of recommendations from the administrator. The decision maker shall attach conditions to such permits and variances as required to make such development consistent with this program.

D. In the case of land divisions, such as short subdivisions, long plats and planned unit developments that require county approval, the decision maker shall document compliance with bulk and dimensional standards as well as policies and regulations of this program and attach appropriate conditions and/or mitigating measures to such approvals to ensure the design, development activities and future use associated with

such land division(s) are consistent with this program.

E. Other local ordinances that may be applicable to shoreline development or use include, but are not limited to:

1. Building, plumbing, mechanical, and fire codes.

2. Boating and swimming, WCC Title 11.

3. On-site sewage system regulations, Chapter 24.05 WCC.

4. Solid waste rules and regulations, Chapter 24.06 WCC.

5. Zoning, WCC Title 20.

6. Land division regulations, WCC Title 21.

7. Development standards. (Ord. 2009-13 § 1 (Exh. 1)).

23.50.080 Property rights.

A. Decisions on shoreline permits and/or approvals shall recognize all relevant constitutional and other legal limitations on the regulation of private property. Findings shall assure that conditions imposed relate to the governmental authority and responsibility to protect the public health, safety, and welfare, are consistent with the purposes of the Act, and are roughly proportional to the expected impact.

B. This program does not alter existing law on access to or trespass on private property and does not give the general public any right to enter private property without the owner's permission.

C. Consistent with Whatcom County's high standard of staff conduct, county staff observe all applicable federal and state laws regarding entry onto privately owned property. (Ord. 2009-13 § 1 (Exh. 1)).

23.60.021 Application and interpretation.

A. An exemption from the substantial development permit process is not an exemption from compliance with the Act or this program, or from any other regulatory requirements. To be authorized, all uses and developments must be consistent with the policies and regulatory provisions of this program and the Act. A statement of exemption shall be obtained for exempt activities consistent with the provisions of WCC 23.60.020.

23.60.021 Application and interpretation.

A. An exemption from the substantial development permit process is not an exemption from compliance with the Act or this program, or from any other regulatory requirements. To be authorized, all uses and developments must be consistent with the policies and regulatory provisions of this program and the Act. A statement of exemption shall be obtained for exempt activities consistent with the provisions of WCC 23.60.020.

B. Exemptions shall be construed narrowly. Only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemptions from the substantial development permit process.

C. The burden of proof that a development or use is exempt is on the applicant/proponent of the exempt development action.

D. If any part of a proposed development is not eligible for exemption, then a substantial development permit is required for the entire project.

E. A development or use that is listed as a conditional use pursuant to this program or is an unlisted use, must obtain a conditional use permit even if the development or use does not require a substantial development permit.

F. When a development or use is proposed that does not comply with the bulk, dimensional and/or performance standards of the program, such development or use shall only be authorized by approval of a shoreline variance even if the development or use does not require a substantial development permit.

23.60.023 Statements of exemption.

A. The administrator is hereby authorized to grant or deny requests for statements of exemption from the shoreline substantial development permit requirement for uses and developments within shorelines that are specifically listed in WCC 23.60.022. Such statements shall be applied for on forms provided by the administrator. The statement shall be in writing and shall indicate the specific exemption of this program that is being applied to the development, and shall provide a summary of the administrator's analysis of the consistency of the project with this program and the Act. As appropriate, such statements of exemption shall contain conditions and/or mitigating measures of approval to achieve consistency and compliance with the provisions of the program and Act. A denial of an exemption shall be in writing and shall identify the reason(s) for the denial. The administrator's actions on the issuance of a statement of exemption or

a denial are subject to appeal pursuant to WCC 23.60.150.

B. Exempt activities related to any of the following shall not be conducted until a statement of exemption has been obtained from the administrator: dredging, flood control works and instream structures, development within an archaeological or historic site, clearing and ground disturbing activities such as landfill or excavation, dock, shore stabilization, freestanding signs, or any development within an aquatic or natural shoreline designation; provided, that no separate written statement of exemption is required for the construction of a single-family residence when a county building permit application has been reviewed and approved by the administrator; provided further, that no statement of exemption is required for emergency development pursuant to WAC 173-27-040(2)(d).

C. No statement of exemption shall be required for other uses or developments exempt pursuant to WCC 23.60.022 unless the administrator has cause to believe a substantial question exists as to qualifications of the specific use or

development for the exemption or the administrator determines there is a likelihood of adverse impacts to shoreline ecological functions.

D. Whether or not a written statement of exemption is issued, all permits issued within the area of shorelines shall include a record of review actions prepared by the administrator, including compliance with bulk and dimensional standards and policies and regulations of this program. The administrator may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the Act and this program.

23.60.023 Statements of exemption.

A. The administrator is hereby authorized to grant or deny requests for statements of exemption from the shoreline substantial development permit requirement for uses and developments within shorelines that are specifically listed in WCC 23.60.022. Such statements shall be applied for on forms provided by the administrator. The statement shall be in writing and shall indicate the specific exemption of this program that is being applied to the development, and shall provide a summary of the administrator's analysis of the consistency of the project with this program and the Act. As appropriate, such statements of exemption shall contain conditions and/or mitigating measures of approval to achieve consistency and compliance with the provisions of the program and Act. A denial of an exemption shall be in writing and shall identify the reason(s) for the denial. The administrator's actions on the issuance of a statement of exemption or

a denial are subject to appeal pursuant to WCC 23.60.150.

B. Exempt activities related to any of the following shall not be conducted until a statement of exemption has been obtained from the administrator: dredging, flood control works and instream structures, development within an archaeological or historic site, clearing and ground disturbing activities such as landfill or excavation, dock, shore stabilization, freestanding signs, or any development within an aquatic or natural shoreline designation; provided, that no separate written statement of exemption is required for the construction of a single-family residence when a county building permit application has been reviewed and approved by the administrator; provided further, that no statement of exemption is required for emergency development pursuant to WAC 173-27-040(2)(d).

C. No statement of exemption shall be required for other uses or developments exempt pursuant to WCC 23.60.022 unless the administrator has cause to believe a substantial question exists as to qualifications of the specific use or

development for the exemption or the administrator determines there is a likelihood of adverse impacts to shoreline ecological functions.

D. Whether or not a written statement of exemption is issued, all permits issued within the area of shorelines shall include a record of review actions prepared by the administrator, including compliance with bulk and dimensional standards and policies and regulations of this program. The administrator may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the Act and this program.

DECLARATION OF MAILING

David C. Cottingham under penalty of perjury under the laws of the State of Washington, at Bellingham, Washington, declare that on the date below I mailed the accompanying copy of Cottinghams' Petition for Discretionary Review By The Supreme Court OF Washington, to

Douglas Shepherd, Attorney
Shepherd and Abbott
2011 Young Street, Suite 202
Bellingham, Washington 98225

Dated this 18 day of December, 2013, at Bellingham, Washington.

DAVID C. COTTINGHAM WSB 9553