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APPEAL NO. 69274-7-I

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

(Whatcom County Court Case No. 05-2-02841-2)

YOUNG S. & YONG S. KIM,

Appellants,

vs.

KYUNG-RAK & JAE SOOK KIM, ET AL,

Respondents.

Appellant Restaurant Kim's Opening Brief

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I – INTRODUCTION

Appellants Young S. Kim and Yong S. Kim (Restaurant Kim), own real property located in Birch Bay, Whatcom County, Washington (Parcel 2). Since October 8, 1996, Restaurant Kim have owned and operated a Restaurant and rental property on Parcel 2, using at all times all portions of Parcel 2, including the northern half which is a paved parking lot. Trial Exhibit 26, 31(B) and 31(D). Appendix "A". Since December 17, 1997, Respondents Kyung-Rak Kim and Jae Sook Kim (Market Kim), have owned and operated a Market on Parcel 1. Trial Exhibit 28. Parcels 1 and 2 are situated directly adjacent to one another. This appeal arises out of Market Kim's use of the portion of the parking lot on Parcel 2, which abuts the paved parking area to the south of the Market on Parcel 1. Market Kim claims both an implied and prescriptive easement across Restaurant Kim's parking lot.

Parcels 1 and 2 were originally owned by William O. Vogt (Vogt). In 1978, Vogt quit claimed Parcel 2 to his daughter, Penny Beebe (Beebe). No easement was ever executed or recorded between Vogt and Beebe for the continued use of Parcel 2 for parking or delivery of goods to Parcel 1. Following the 1978 Quit

Claim Deed to Beebe, and over the next twenty years, there is a series of nine (9) more recorded documents, filed with the Whatcom County Auditor, related to title and/or easements affecting title to Parcels 1 and 2. Trial Exhibits 16, 17, 18, 20, 22, 23, 26, 27, and 28. Although there are recorded easements granted to third parties, none of the recorded documents disclose an easement between Vogt and Beebe for the continued use of or easement on Parcel 2 by the Market for its suppliers or patrons.

On December 8, 2005, Restaurant Kim sued Defendants Kaiser, et al, (Defendants) asking the trial court to determine that said defendants' 10 foot easement was in gross. CP 8-21. The issue of the ten foot easement was resolved by way of summary judgment. CP 71-75. Restaurant Kim's remaining claims against Kaiser were settled. CP 40-41. On August 25, 2006, the trial court ruled that Market Kim were necessary parties to the action. CP 54 at 57. On October 3, 2006, Defendants joined Market Kim as named Joined Defendants. *Id.* On January 19, 2007, Market Kim answered and cross claimed against Restaurant Kim, asking that Market Kim be awarded an implied easement or prescriptive easement on Restaurant Kim's parking lot. CP 59-70.

Trial occurred in December 2009. The trial court's unfiled one page written decision was made on December 15, 2009. The trial court, in writing, determined that Market Kim had both an implied easement and prescriptive easement over a substantial portion of Restaurant Kim's real property. On February 28, 2012, twenty six (26) months after trial, Market Kim moved for entry of Findings of Fact and Conclusions of Law. CP 183; CP 185. Restaurant Kim objected to entry of the proposed Findings of Fact and Conclusions of Law. CP 201. On April 3, 2012, more than twenty seven (27) months after trial, the trial court entered written Findings of Fact and Conclusions of Law. CP 269-84.

The trial court, in Finding of Fact No. 9, relied upon the credibility of five Market Kim witnesses for its Conclusions of Law: Blair Beebe, James Perry, Gil Brackinreed, Bruce Koch, and Sung-Soo Kim. Their relevant testimony was that before 2003, the customers of the Market and Restaurant used the common parking lot and the use was permissive and mutually beneficial to the owners of Parcel 1 and Parcel 2.

II – ASSIGNMENTS OF ERROR

Restaurant Kim assigns error to the following decisions:

No. 1: The trial court erred in making and entering its unfiled and unsigned letter ruling on December 15, 2009. CP 217.

No. 2: The trial court erred in making and entering its Findings of Facts and Conclusions of Law on April 3, 2012. CP 269.

No. 3: The trial court erred in making and entering its Conclusion of Law No. 1. CP 278.

No. 4: The trial court erred in making and entering its Conclusion of Law No. 5. CP 279.

No. 5: The trial court erred in making and entering its Conclusion of Law No. 6. CP 279.

No. 6: The trial court erred in making and entering its Conclusion of Law No. 7. CP 279.

No. 7: The trial court erred in making and entering its Conclusion of Law No. 8. CP 279.

No. 8: The trial court erred in making and entering its Conclusion of Law No. 9. CP 280.

No. 9: The trial court erred in making and entering its Conclusion of Law No. 10. CP 280.

No. 10: The trial court erred in making and entering its Conclusion of Law No. 11. CP 280.

No. 11: The trial court erred in making and entering its Conclusion of Law No. 12. CP 280.

No. 12: The trial court erred in making and entering its Conclusion of Law No. 13. CP 280.

No. 13: The trial court erred in making and entering its Conclusion of Law No. 14. CP 280.

No. 14: The trial court erred in making and entering its Conclusion of Law No. 15. CP 280.

No. 15: The trial court erred in making and entering its Conclusion of Law No. 16. CP 280.

No. 16: The trial court erred in making and entering its Conclusion of Law No. 17. CP 280-81.

No. 17: The trial court erred in making and entering its Conclusion of Law No. 18. CP 281.

No. 18: The trial court erred in making and entering its Conclusion of Law No. 19. CP 281.

No. 19: The trial court erred in making and entering its Conclusion of Law No. 20. CP 281.

No. 20: The trial court erred in making and entering its Finding of Fact No. 7. CP 271.

No. 21: The trial court erred in making and entering its Finding of Fact No. 8. CP 271.

No. 22: The trial court erred in making and entering its Finding of Fact No. 18. CP 273.

No. 23: The trial court erred in making and entering its Finding of Fact No. 23, to wit: "This lease demonstrates that the use of the Restaurant Parcel parking lot to access parking, the loading dock, and storage bays, was essential to the operations of the market on the Market Parcel." CP 274.

No. 24: The trial court erred in making and entering its Finding of Fact No. 25, in that the transfer occurred on October 8, 2006. CP 274; Trial Exhibit 26.

No. 25: The trial court erred in making and entering its Finding of Fact No. 30. CP 275.

No. 26: The trial court erred in making and entering its Finding of Fact No. 31. CP 275.

No. 27: The trial court erred in making and entering its Finding of Fact No. 34. CP 276.

No. 28: The trial court erred in making and entering its Finding of Fact No. 36. CP 276.

No. 29: The trial court erred in making and entering its Finding of Fact No. 38. CP 277.

No. 30: The trial court erred in making and entering its Finding of Fact No. 39. CP 277.

No. 31: The trial court erred in making and entering its Finding of Fact No. 40. CP 278.

No. 32: The trial court erred in making and entering its Finding of Fact No. 5. CP 270-71.

No. 33: The trial court erred in making and entering its Final Judgment on April 3, 2012, granting easements in favor of the Market Parcel (Parcel 1) and burdening the Restaurant Parcel (Parcel 2). CP 285.

No. 34: The trial court erred in making and entering its Final Judgment ordering Restaurant Kim to remove fence(s) or bollards from Parcel 2. CP 289.

No. 35: The trial court erred in making and entering its Final Judgment granting a permanent injunction prohibiting certain activities by Restaurant Kim on Restaurant Kim's property. CP 288.

No. 36: The trial court erred in entering its Order denying Restaurant Kim's Motion to Reconsider and Motion for New Trial on August 7, 2012. CP 394-95.

No. 37: The trial court erred in making and entering its Finding of Fact No. 10. CP 271.

III- ISSUES PERTAINING TO ASSIGMENTS OF ERROR

1. Did Vogt intend to reserve an easement in favor of Vogt, as owner of Parcel 1 over the northern one-third (1/3) of Parcel 2?

2. Did Beebe, in 1996, sell Parcel 2 to Restaurant Kim subject to an undisclosed easement in favor of Vogt as owner of Parcel 1 over the northern one-third (1/3) of Parcel 2?

3. Did Vogt, in 1997, sell to Market Kim an undisclosed easement in favor of Market Kim, as owner of Parcel 1, over the northern one-third (1/3) of Parcel 2?

4. Did Market Kim acquire by adverse possession, a prescriptive easement in favor of Parcel 1, over the northern one-third (1/3) of Parcel 2?

5. Did the trial court enter appropriate findings of fact and conclusions of law twenty seven (27) months after a bench trial?

IV – STATEMENT OF THE CASE

In 1965, Vogt, by Statutory Warranty Deed, obtained title to Parcel 1, which was approximately ¾ of an acre. At that time, Parcel 1 was legally described as having more than 150 feet of land that abutted Drayton Harbor Road (Harborview Road) to the west. Parcel 1 had more than 150 feet of direct access to Harborview Road. Trial Exhibit 11; CP 106; CP 21; CP 109. Appendix "B". From 1965 to present, Parcel 1 abuts more than 190 feet of a public road on its west side. In 1965, there were buildings on the south half of Parcel 1. The north half of Parcel 1 was, and remains, a gravel parking lot, with more than 100 feet of direct access to Harborview Road. Trial Exhibits 35 and 31(M), (N) and (O); CP 415. From 1961 to the time of trial, Parcel 1 had access and parking on the west and north side of the Market from a public road. CP 106; Trial Exhibit 35; Trial Exhibit 31(L).

In 1966, Vogt, by Statutory Warranty Deed, obtained title to approximately four (4) acres of real property immediately south of Parcel 1. Trial Exhibit 12; CP 147; Trial Exhibit 3; Appendix "C". Neither the 1965 Deed nor the 1966 Deed created or referenced

any easement. Vogt divided a northern parcel of this four acres in 1978 and sold it to Beebe, which is designated Parcel 2 herein.

In 1978, Vogt, by way of a Quit Claim Deed, granted Beebe title, including all after acquired title, to Parcel 2, which was approximately one half of an acre. Trial Exhibit 13; Trial Exhibit 4; Appendix "D". The 1978 Deed neither created nor reserved an easement in favor of Vogt or Beebe. In 1982, Beebe granted a non exclusive easement to Mariner Development Company ("Mariner") for "access, utilities and driveway purposes over, under, across and through" the northern 21 feet and eastern 32 feet of Parcel 2. Trial Exhibit 17. Vogt also provided a similar easement to Mariner over the southerly 11 feet of Parcel 1. Trial Exhibits 5, 16 and 21; Appendix "E".

In 1983, Vogt, by a "Corrected Quit Claim Deed", again granted title to all of Parcel 2, to Beebe, by way of correcting the legal description for Parcel 2. The 1983 Correction Deed, from Vogt to Beebe, again did not create or reserve any easement in favor of Vogt or Parcel 1. In 1985, Vogt and Beebe, by way of a recorded document, granted an easement over the south 5 feet of Parcel 1 and the north 5 feet of Parcel 2, for the benefit of the

developer of property to the east of Parcels 1 and 2, "for pedestrian, golf cart, and emergency vehicle access." Trial Exhibits 19, 22 and 23.

In 1984, Vogt leased Parcel 1 and the Market to Wolten & Montfort, Inc., ("Wolton"). Trial Exhibit 20; CP 356. The Wolten Lease contained the following provisions:

> Property: . . . All located within Whatcom County, Washington. **The parties acknowledge** that the improvements upon the premises **include a building consisting of a grocery store and warehouse space on the ground level, and an apartment on the second floor, plus the parking along the north edge of the building**. . . . (Emphasis added.) CP 356.

> The parties acknowledge that there are two warehouses located upon the leased property at the southeast corner thereof, one warehouse being 20' x 40', and the second warehouse being 20' x 48', is divided into a southern half and a northern half. **The parties agree that the Lessors and their children and grandchildren shall have the right to use the 20' x 40' warehouse, and the southerly half of the 20' x 48' warehouse, during the term of this lease.** (Emphasis added.) CP 359.

> 6. PARKING: The parties acknowledge that other Leasees (sic) of the Lessors use for parking, in connection with their service station that portion of **the following described property northerly of the southeasterly 103 feet thereof**.

> A tract of land in Gov't Lot 1, Section 30, Township 40 North, Range 1 East, W.M., described as follows:
>
> Beginning at a point on the West line of said Gov't Lot 1, 602.24 feet South of the Northwest corner of said Section 30; thence East, 30 feet to the East line of Drayton Harbor Road and the true point of beginning; thence North 66 47' East, 141.43 feet; thence South 28 27' East, 160.37 feet, thence South 61 56' 30" West, 224.9 feet, more or less, to the Easterly line of Drayton Harbor Road; thence Northwesterly along the Easterly line of Drayton Harbor Road, 191.2 feet, more or less, to the true point of beginning.
>
> All situated in Whatcom County Washington, plus one parking stall is to be reserved for the service station operator. **The parties agree** that during the entire term of this lease agreement **customers of the Lessees shall be entitled to use the above in connection with grocery store patronage.** (Emphasis added.) CP 359-60. . . .

> **All commercial vehicles should be encouraged not to block traffic to the condos, the cabins or gift shop. They are to be parked on leased property.** (Emphasis added.) CP 366.

> The term of this Lease shall be for twenty (20) years and commence on October 1, 1984 to September 30, 2004, and shall terminate without notice to quit at midnight on September 30, 2004. CP 356.

See also Trial Exhibits 31(M), 31(N) and 31 (O). Appendix "F".

On October 8, 1996, Beebe, by way of a Statutory Warranty Deed, sold Parcel 2, to Restaurant Kim. Trial Exhibit 26; CP 69.

The 1996 Warranty Deed referenced no easement in favor of Vogt or Parcel 1. The 1996 Warranty Deed did reference several recorded easements in favor of third parties. In October of 1996, Vogt granted an easement over Parcel 1, described as the "servient estate" for the benefit of Parcel 2, described as the "dominant estate." Trial Exhibit 27. The easement was a 30 foot wide strip of land described as a "non-exclusive Easement . . . for ingress and egress." On December 15, 1997, the Estate of Vogt sold Parcel 1 to Market Kim. Trial Exhibit 28. The 1997 Deed to Market Kim referenced no easement on, or rights associated with, Parcel 2.

In 2003, Restaurant Kim, as defendant, in Whatcom County Superior Court cause number 01-2-01416-8, by way of a stipulation and agreed order, had the 1982 Mariner easement on Parcel 2 extinguished. Trial Exhibit 30. In 2003, when the easement in favor of Mariner, over the northern 21 feet of Parcel 2, was extinguished and title to that road easement was quieted in Restaurant Kim, Restaurant Kim notified Market Kim that the permission previously given to Market Kim to use the northern 21 feet or the eastern 32 feet of the Restaurant parking lot for deliveries was terminated and Market Kim was not to use the

Restaurant Kim property, Parcel 2, for Market deliveries or customers. RP 302-04; RP 452.[1]

In 2005, Restaurant Kim started this litigation against Kaiser Investment Inc., et al, to quiet title in the five foot easement. CP 10. On October 3, 2006, Market Kim, was joined as a Third Party Defendant so that title to the easement remaining on the north five feet of Parcel 2 and south five feet of Parcel 1 could be quieted. CP 54. On January 19, 2007, Market Kim answered claiming an implied or prescriptive easement over a portion of Parcel 2. CP 59. The 10 foot easement involving Kaiser was resolved by summary judgment and is not a part of this appeal.

When Vogt and Beebe were neighbors, from 1978 to 1984, the Market and the Restaurant both used the entirety of both

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[1] MR. SHEPHERD: My understanding from the testimony and clearly our position is the use of the parking lot by everybody was permissive and joint to a certain extent with the Market Kims and the other third parties of this lawsuit and once things started to disintegrate there was changes and actions taken by my client to make it clear he no longer gave that permission. I want to give the background.

MR. DWORKIN: We'll stipulate there was definitely no permission from 2003. . . . RP 452.

Parcel's parking lots because it was mutually beneficial to both owners. RP 116-118.

Perry, who worked for Darigold driving delivery trucks, delivered to the Market once a week until 1990. RP 139; RP 140. Perry testified that he believed he was driving on the parking lot with the permission of the owners. RP 145.

Brackinreed, who rove truck for Darigold from 1985 to 1996, testified that it appeared to him to be easier to drive and maneuver his truck on the north side of the Market because the north side looked pretty wide open. RP 163. Brackinreed did not know who owned the parking lot, did not think it was necessary to ask who owned the parking lot, and he assumed permission from the owners. RP 168.[2]

Koch, a driver for Sanitary Service Company, drove a garbage truck weekly onto the parking lot and picked up the garbage from the Market Property and the Restaurant Property at the same time. RP 175-185. When he was picking up the Market garbage he did not try to stay on Parcel 1 and when he was picking

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[2] Restaurant Kim objected to the testimony of Perry and Brackinreed on relevancy grounds. Both testified as to events before Parcel 2 was purchased by Restaurant Kim or Parcel 1 was sold to Market Kim. RP 141; RP 163; RP 165-66.

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up the Restaurant garbage he did not try to stay on Parcel 2. RP 186-87. Koch never asked for permission from Market Kim to use the parking lot or from Restaurant Kim to use the parking lot. RP 188. It was not the only shared parking lot on which he picked up garbage in Whatcom County. *Id.* Koch admitted that the north parking lot would be an easier location for garbage collection, with less concerns for obstacles. RP 189. At all times he was on the south parking lot, Koch believed he was using the property with the permission of Market Kim and Restaurant Kim. RP 192.

At trial, the son of Market Kim, testified as follows:

> Q. **Until 2003** it was clear to you it was a mutual benefit to both of you to agree on how to use that parking lot, isn't that correct? **Mutual benefit to both of you?**
>
> **A. Yes, it's a mutual benefit to both parties.**
>
> Q. Okay. And there was little or no problem because it was perceived by both of you that it was a mutual benefit to both parties to get along on that parking lot?
>
> **A. Yes,** it is.

RP 303. (Emphasis added.)

> Q. (BY MR. SHEPHERD) I don't want to put words in your mouth but up until 2003 as neighbors you had cooperated on the use of this parking lot, correct?
>
> A. Yes.

RP 304.

Blair Beebe, on cross, admitted that the parking lot between the Market building and the Restaurant building was used by customers of each with permission from Vogt and Beebe because it was beneficial to both business and there was always cooperation, prior to the sale to Restaurant Kim. RP 116-118.

V – LEGAL ARGUMENT

A. Standard of Review

The trial court's application of law to the facts in this case is reviewed de novo. *Wash. Imaging v. Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011). Review of mixed questions of law and fact is de novo. *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278 (2010). "We review conclusions of law under the same de novo standard." *Id.*

Findings of fact are usually reviewed for substantial evidence which support the finding. "Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Trial occurred in December of 2009. The Findings and Conclusions were entered by the trial court in April of 2012, more

than twenty seven (27) months after the trial. The substantial delay is an irregularity in the proceedings of the court which prevented the entry of fair findings and proper conclusions. Civil Rule 59(1). Substantial justice was not done by the trial court. Civil Rule 59(9). Because of the delay, this Court should not give the usual deference to the trial court's findings on appeal. Appeal of the findings should be de novo.

Excessive delay in the entry of findings of fact and conclusions of law require, on appeal, "*de novo* scrutiny of the entire record with a view to whether the prolonged delay in reaching a decision rendered the trial court's findings of fact unreliable . . ." *Keller v. U.S.*, 38 F.3d 16, 21 (N.H., 1994). Market Kim waited two years and simply tailored the findings to meet their burden on appeal. *State v. Portomene*, 79 Wn.App. 863, 864-65, 905 P.2d 1234 (Div. I, 1995). The findings were not consistent with the evidence. The exhibits and testimony did not support the conclusions.

B. No Implied Easement Was Established

Market Kim claimed, and the trial court found, that Vogt intended, in 1978, to reserve an easement over Parcel 2 when it was conveyed to Restaurant Kim even though the Deed was silent.

> To succeed in their implied easement claim, the appellants must prove three elements: (1) unity of title in the common grantor, (2) a severance of the estate, and (3) necessity. *Hellberg,* 66 Wash.2d at 668, 404 P.2d 770. Unity of title and severance are absolute requirements. *Id.* Necessity must exist at the date the common parcel is severed. *Id.* At 667, 404 P.2d 770.

Granite Beach v. Natural Resources, 103 Wn.App. 186, 196, 11 P.3d 847 (Div 1. 2000).

Washington law allows a court to create an implied easement only when the facts allow but one reasonable conclusion; that Vogt, in 1978, intended to reserve an easement over Lot 2 but forgot to do so in the Warranty Deed. Reserved implied easements are not favored. An implied easement cannot arise unless the facts require a fair minded, rational person to conclude that Vogt intended to reserve an easement over Lot 2.

> There is a well-recognized distinction between an implied grant and an implied reservation . . . In the case of severance of the servient estate, an easement will, ordinarily, not be reserved since the grantor cannot derogate from his own grant.

Wreggitt v. Porterfield, 36 Wn.2d 638, 640, 219 P.2d 589 (1950). (Citations omitted.)

Intention cannot be implied without necessity. In determining the facts and making its conclusions as to the issue of an implied easement, the trial court erroneously applied the rule of "reasonable" necessity. Finding No. 36. In Conclusion No. 6, the trial court erroneously determined that the applicable standard to be applied was reasonable necessity and erroneously concluded that an easement was reasonably necessary.

"It is not difficult to state that there must be 'reasonable' necessity for the existence of an easement by implied grant and 'strict' necessity for the existence of an easement by implied reservation." *Adams v. Cullen*, 44 Wn.2d 502, 508, 268 P.2d 451 (1954). In *Adams*, the Court provided further guidance as to the type of necessity required for an easement by reservation.

> The authors of the Restatement have avoided using the term 'strict necessity,' but the following quotation indicates that, *in the absence of other considerations*, a higher degree of necessity is needed for an easement by implied reservation than is needed for an easement by implied grant.

Id.

"In order to give rise to the presumption of a reservation of an existing easement or quasi easement, where the deed is silent upon the subject, the necessity must be of such a nature as to leave no room for doubt of the intention of the parties." *Wreggitt*, 36 Wn.2d at 640. The relevant intention is the intention, in 1978, to create an easement. It this matter, the trial court was not left just to ponder the original document and circumstances.

The trial court erroneously accepted the offer to indulge in a presumption to reserve an easement, and in doing so chose to completely ignore contradictory evidence of Vogt's actual intent not to reserve an easement provided by nine subsequent title or easement documents. Trial Exhibits 16, 17, 18, 20, 22, 23, 26, 27, and 28. Clearly, Vogt knew and understood how to grant or reserve an easement. Neither Vogt nor Beebe, in any of the subsequent documents, attempted to correct or disclose any imagined intention, silent in the original 1978 conveyance. Vogt's failure to insert or reference a reserved easement, in multiple subsequent documents, demonstrates that none existed.

The 1983 "Correction Deed," reveals that Vogt did not fail to include his full intentions in the 1978 grant by Warranty. Trial

Exhibit 18. In 1996, when Beebe sold Parcel 2 to Restaurant Kim, there was a duty to disclose the easement if Beebe believed one existed. In 1997, when Vogt sold Parcel 1 to Market Kim, there was a duty to transfer the easement if Vogt believed one existed. *Ross v. Kirner,* 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

Another series of filed easements, disclose that neither Vogt nor Beebe were under the belief that the northern portion of Parcel 2 was necessary for access to or the operation of the Market. In 1982, they granted a 32 foot easement over the 32 feet immediately south of the Market building to Mariner. Trial Exhibits 16 and 17. In 1985, they granted a 10 foot easement, five feet on each side of the common boundary line, to Birch Bay Trailer Park. Trial Exhibits 19 and 22. That easement was the original basis of this litigation.

In 1984, Vogt leased the Market and the parking lot to the north of the Market to Wolten. Trial Exhibit 20. Wolten, for a period of 20 years, leased the Market and the "parking along the north edge of the building." Vogt retained for himself and his children and grandchildren the east warehouse and the south half of the middle warehouse, leaving access for Wolten and Market

patrons, vendors and suppliers only by way of the dock and door on the north parking lot or the west front door. Trial Exhibit 20, ¶ 5. Wolten agreed that all commercial vehicles not block the access to or operation of the Restaurant property, then owned by Beebe. *Id.*, ¶ 25. From 1984 until 1998, all commercial vehicles were to be parked on leased property, which leased property was described as a market, a second floor apartment, warehouse space and "the parking along the north edge of the [Market] building." *Id.*, ¶ 1.

> As regards implied reservations of easements, the matter stands on principle in a position very different from implied grants. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant or render that which he has granted less beneficial to his grantee. Accordingly, where there is a grant of land with full covenants of warranty without express reservation of easements, the best considered cases hold that there can be no reservation by implication, unless the easement is strictly one of necessity.

Cogswell v. Cogswell, 81 Wash. 315, 319, 142 P. 655 (1914).

The necessity must have existed in 1978. The findings are devoid of any 1978 analysis. The trial court erroneously examined

and found necessity in 2009. Particularly in Findings 32, 33 and 34. The trial court was concerned, that in 2009, requiring the Market to use Parcel 1, would be "substantially less convenient, both logistically and financially." The trial concluded that if an undisclosed easement was not granted, delivery vehicles would have to deliver to the north side of the Market. Market Kim's evidence at trial was that north deliveries would be inconvenient and inefficient. RP 300. Exhibit 32 is not an accurate survey of existing conditions on Parcels 1and 2 in September 2008. It does not demonstrate the parking or access to the north of the Market.

The trial court erroneously found that the 1984 Lease demonstrated ongoing Market use of Parcel 2. Finding 23. The Lease language is to the contrary; parking on Parcel 2 is prohibited, blocking Parcel 2 is prohibited. There is no substantial evidence that the Market was operated, from 1984 until December of 1997, inconsistent with the terms of the 1984 Lease. Testimony does not support the findings that from 1978 Parcel 2 was used in a same or similar manner as was complained about by Restaurant Kim in 2003.

C. No Prescriptive Easement Was Established

After finding and concluding that the parking practices and delivery practices that began in 1978 continued until the time of trial, the trial court found an implied easement. Those findings and conclusion prohibit the creation of a prescriptive easement.

> Use that is permissive at its inception is presumed to remain permissive unless proof exists of (1) a change in use beyond that permitted, providing notice of hostility to the true owner, or (2) the sale of the servient estate. (Emphasis added.)

Miller v. Anderson, 91 Wn.App 822, 825, 964 P.2d 365 (1998).

In granting a prescriptive easement, the trial court again accepted an invitation to enter into a flight of fancy, concluding that beginning October 8, 1996 Parcel 2's entire parking lot was used by Molten, Vogt's Lessee, in a hostile, exclusive and notorious manner, demonstrating a claim of right. This argument found life in the trial court, ignoring testimony that prior to 2003 the use was joint and mutual, with the Restaurant using Parcel 1 for parking, of mutual benefit to the Restaurant and Market, and with permission. RP 302-303. Permissive use cannot be hostile until permission is withdrawn. Restaurant Kim told Market Kim that they no longer

had permission, in 2003, to use Parcel 2 for parking or for deliveris. RP 404.

The "exclusive" finding, found in Conclusion 16, ignored the testimony of Market Kim's son, who admitted Restaurant Kim's trucks turned around on Parcel 1 and Parcel 2. RP 300. And, Market Kim admitted that Market Kim allowed Restaurant Kim's customers to park on Parcel 1. RP 300-01.

This Court has determined that the burden required establishing a prescriptive easement is "clear proof," higher than a preponderance of the evidence. A party seeking to appropriate the property of another by prescription bears "the burden of establishing (all elements) . . . by **clear proof** . . . ." (Emphasis added.) *Lee v. Lozier*, 88 Wn.App. 176, 185, 945 P.2d 214 (Div. I, 1997). The incorrect standard used by the trial court was by a preponderance of the evidence. Conclusion 9. CP 279.

Other state courts are in accord with Division I.

> An examination of the cases in many other jurisdictions discloses the rule to be that the burden is on the one claiming a right of use by prescription to prove it by clear and convincing evidence. Some of the cases use the phrase 'by clearest and most satisfactory proof.' Others use the phrase 'clear and positive proof.' (Citations omitted.)

McInnish v. Sibit, 114 Ohio App. 490, 493-94, 183 N.E.2d 237 (1953).

Utah requires "clear and convincing" evidence to establish a prescriptive easement. *Essential Botanical Farms, LC v. Kay*, 270 P.3d 430, 437 (2011). Oregon requires clear and convincing evidence to support the establishment of a prescriptive easement. *Drayton v. City of Lincoln City*, 244 Or.App. 144, 150, 260 P.3d 642 (2011). Idaho requires 'clear and convincing proof' to establish a prescriptive easement. *Weitz v. Green*, 148 Idaho 851, 230 P.3d 743 (2010). In California "[a] party seeking to establish a prescriptive easement has the burden of proof by clear and convincing evidence." *Brewer v. Murphy*, 161 Cal.App.4th 928, 938, 74 Cal.Rptr.3d 436 (2008). "The higher standard of proof demonstrates there is no policy favoring the establishment of prescriptive easements." *Grant v. Ratliff*, 164 Cal.App.4th 1304, 1310, 79 Cal.Rptr.3d 902 (2008). Montana is similar. *Steiger v. Brown*, 336 Mont. 29, 33, 152 P.3d 705 (2007).

> We conclude that there is little persuasive precedent for applying a subjective standard of adverse use in prescriptive easement cases. The gravamen of adversity in such cases is whether the user has occupied the

> property in a manner which is adverse to the true owner. Malnati v. Ramstead, 50 Wash.2d 105, 309 P.2d 754 (1957). Although subjective intent may have some relevance in an adverse possession case where the user claims title, the claim in a prescriptive easement case is merely to use which could have been prevented by the rightful owner. Malnati, at 108, 309 P.2d 754. We therefore hold that adversity is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner.

Dunbar v. Heinrich, 95 Wn.2d 20, 27, 622 P.2d 812 (1980).

Even if the burden were by preponderance, under Washington law there is no prescriptive easement. In Washington, the grantor's continued use of a Deeded Parcel is presumed permissive. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 486, 618 P.2d 67 (1980). All the witnesses said use was permissive, until 2003. If the essential facts are not in dispute, "whether use is adverse or permissive is purely a question of law." *Lingvall v. Bartmess*, 97 Wn.App. 245, 250, 982 P.2d 690 (1999).

> The requirements to establish a prescriptive easement are the same as those to establish adverse possession. The claimant must prove use of the servient land that is: (1) open and notorious; (2) over a uniform route; (3) continuous and uninterrupted for 10 years; (4) adverse to the owner of the land sought to be subjected; and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. Washington employs an objective test for adversity.

> When the claimant uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use, the use is adverse. Adversity may be inferred from the actions of the claimant and the owner. . . .
> Under the doctrines of both prescriptive easement and adverse possession, a use is not adverse if it is permissive. Permission can be express or implied. A permissive use may be implied in 'any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence[.]'

Kunkel v. Fisher, 106 Wn.App. 599, 602, 23 P.3d 1128 (Div I, 2001).

When Market Kim rested, Restaurant Kim moved to dismiss the claim of prescriptive easement. RP 350. The basis of Restaurant Kim's motion was that Market Kim had made no attempt, in its case in chief, to identify when the prescriptive period began and when it ended. The trial court's written letter does not disclose when the period began and when it ended. At trial, Perry and Brackinreed talked about driving and use that was before Restaurant Kim purchased Parcel 2. No one testified for Market Kim regarding practices that existed during possession of the Market by Wolton, (1984 to December of 1997) except Koch, who weekly drove a garbage truck onto the parking lots and, with permission, used both Parcel 1 and 2 to

pick up garbage for Parcel 1 and both Parcel 1 and 2 to pick up garbage for Parcel 2.

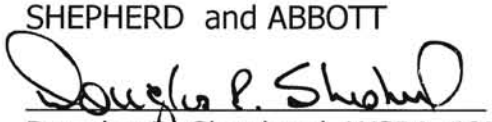
The prescriptive period would likely have ended on December 8, 2005, when this litigation was started. CP 26. If not on December 8, 2005, it would have ended no later than October 3, 2006, when Market Kim, by pleadings, was made a joined Defendant in this matter. CP 54. Restaurant Kim took title to Parcel 2 on October 8, 2006. Market Kim took title to Parcel 1 on December 17, 1997.

VI - CONCLUSION

This Court should review the testimony, exhibits and trial court's decisions de novo. After review, this Court should determine that as a matter of law, Market Kim has no easement, implied or prescriptive, on or over Parcel 2, and return the matter to the trial court with instructions to enter a judgment consistent with this Court's determination.

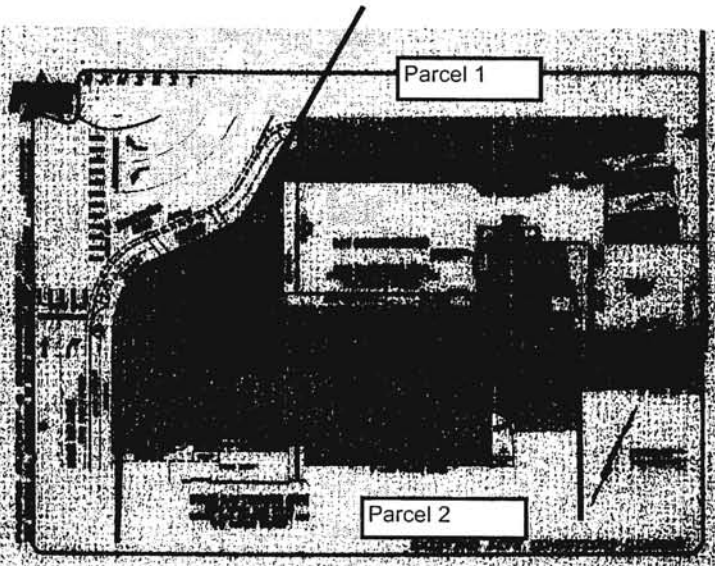
RESPECTFULLY SUBMITTED THIS 11th day of January 2013.

SHEPHERD and ABBOTT



Douglas R. Shepherd, WSBA #9514
Of Attorneys for Appellants Kim

APPENDIX "A"



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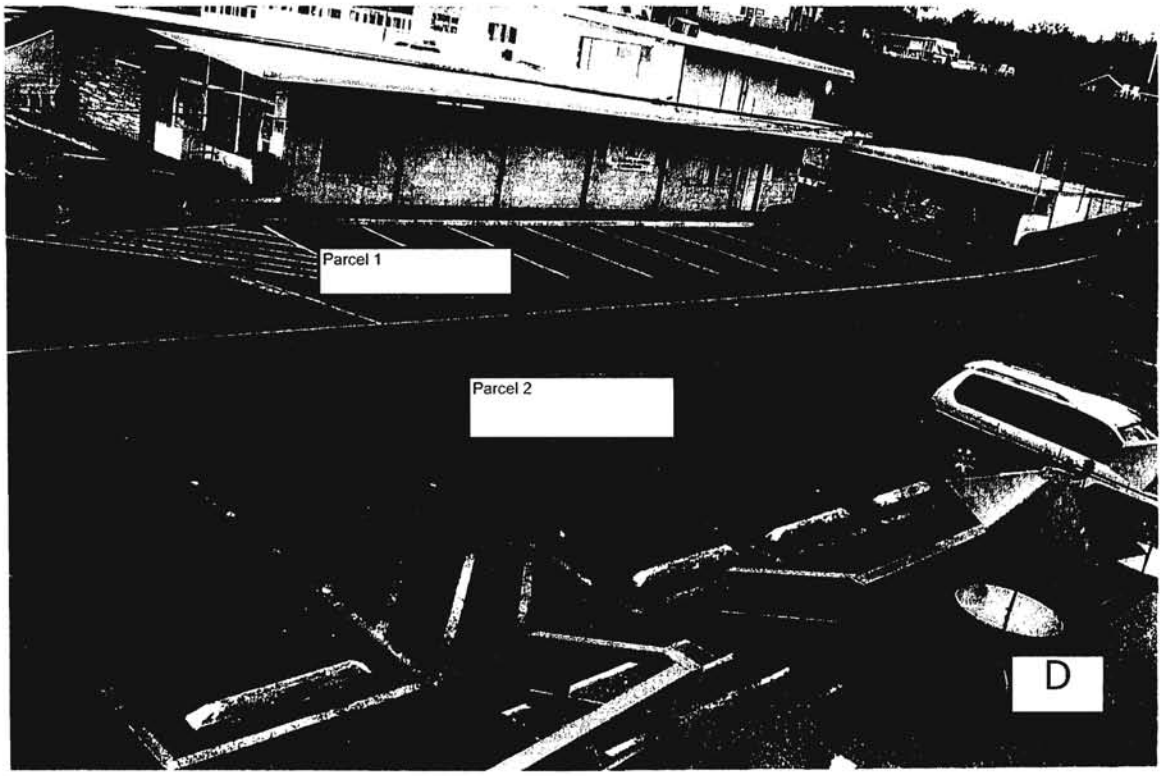
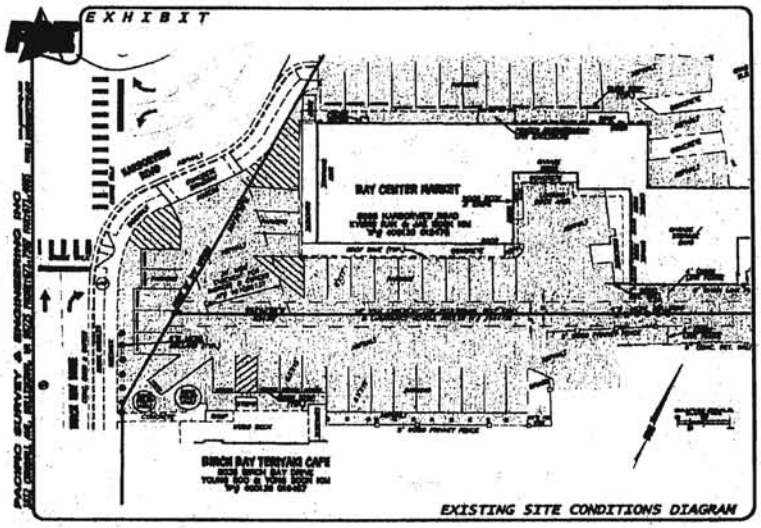
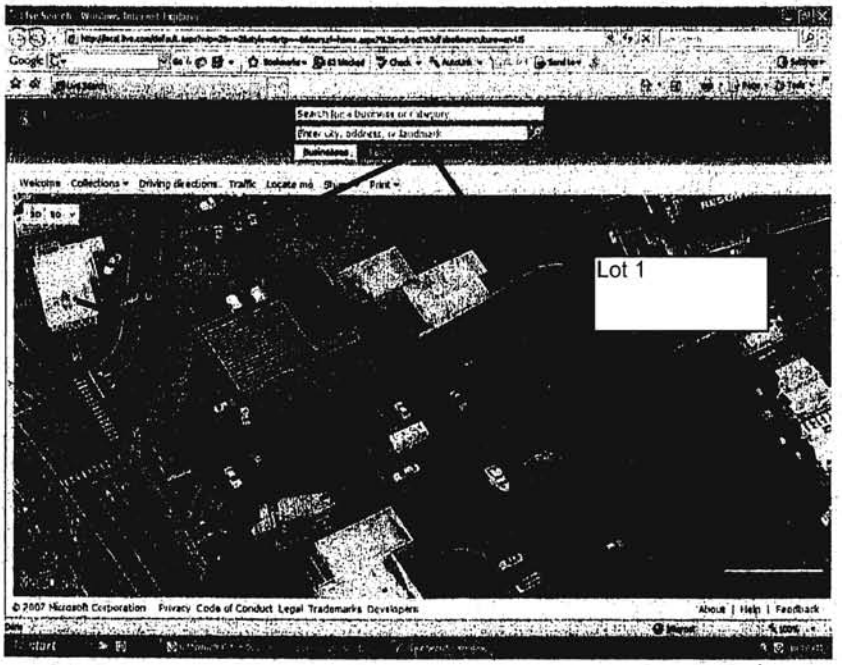

Parcel 1
Parcel 2
D

APPENDIX "B"





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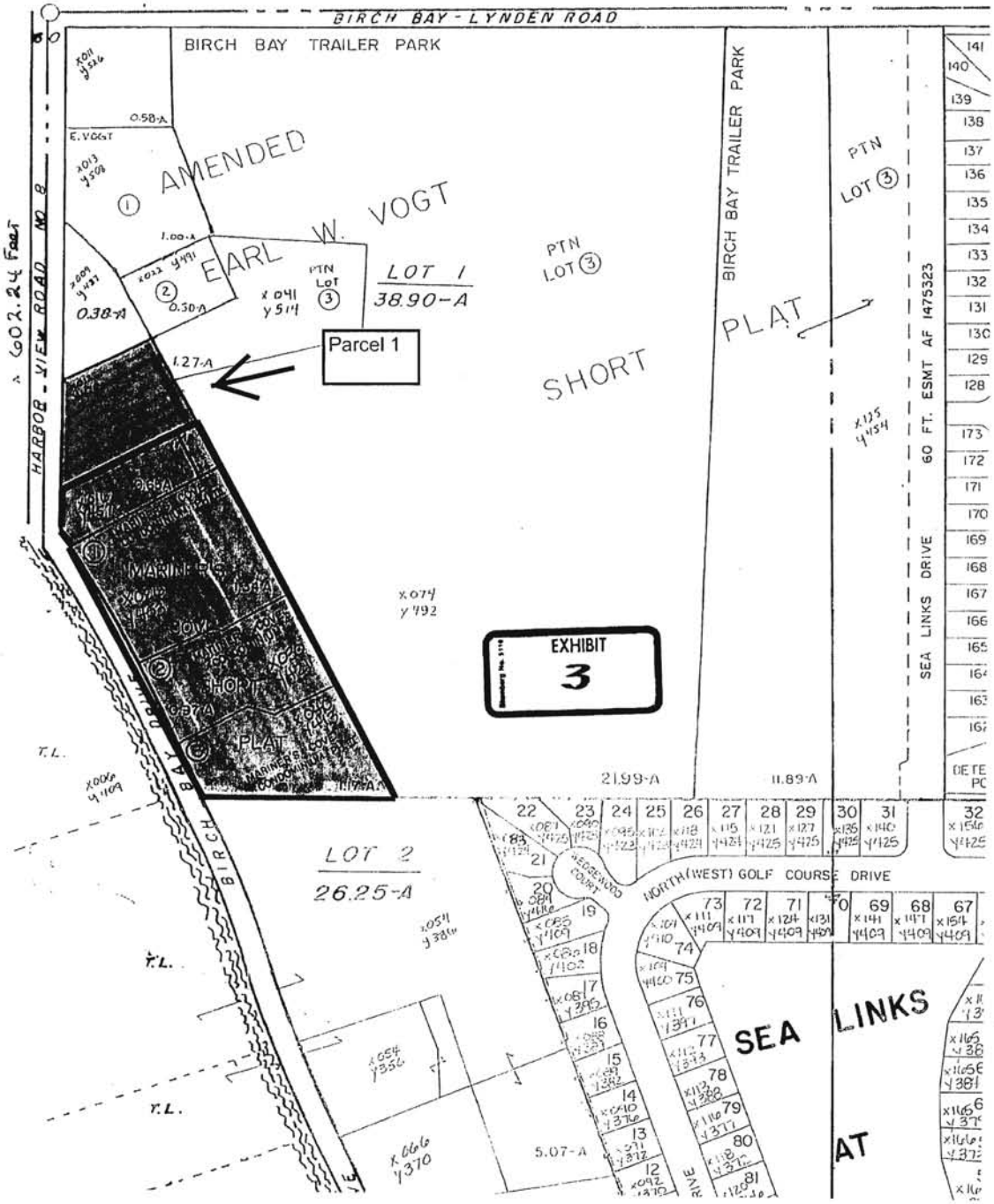
APPENDIX "C"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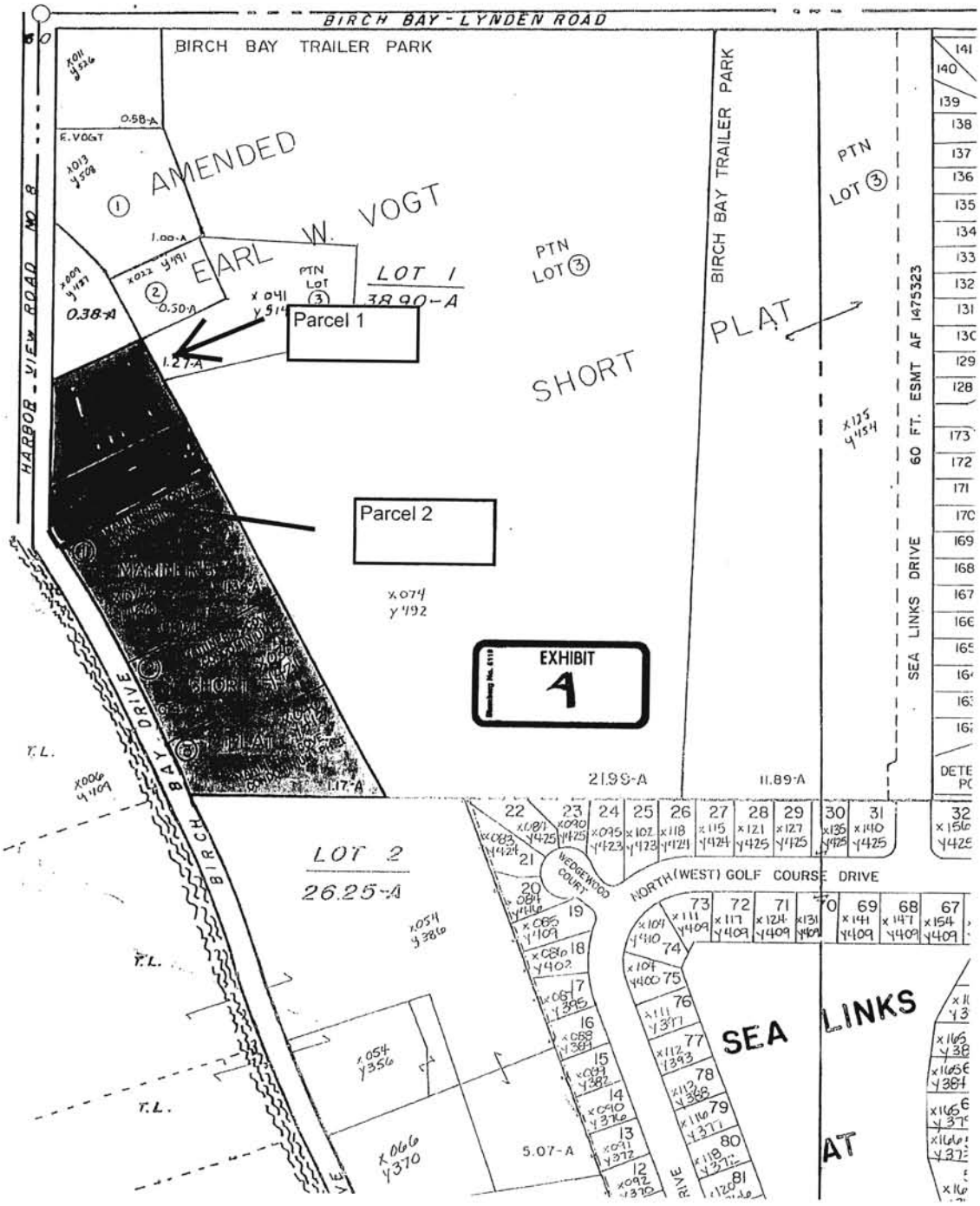
BIRCH BAY TRAILER PARK
HARBOR - VIEW ROAD NO 8
602.24 Feet
AMENDED
EARL W. VOGT
LOT 1
38.90-A
PTN LOT 3
Parcel 1
1.27-A
0.38-A
0.58-A
1.00-A
0.50-A
SHORT PLAT
BIRCH BAY TRAILER PARK
PTN LOT 3
60 FT. ESMT AF 1475323
SEA LINKS DRIVE
MARINE DR
HOLT
PLAT
BIRCH BAY DRIVE
EXHIBIT
3
21.99-A
11.89-A
LOT 2
26.25-A
5.07-A
NORTH(WEST) GOLF COURSE DRIVE
SEA LINKS

APPENDIX "D"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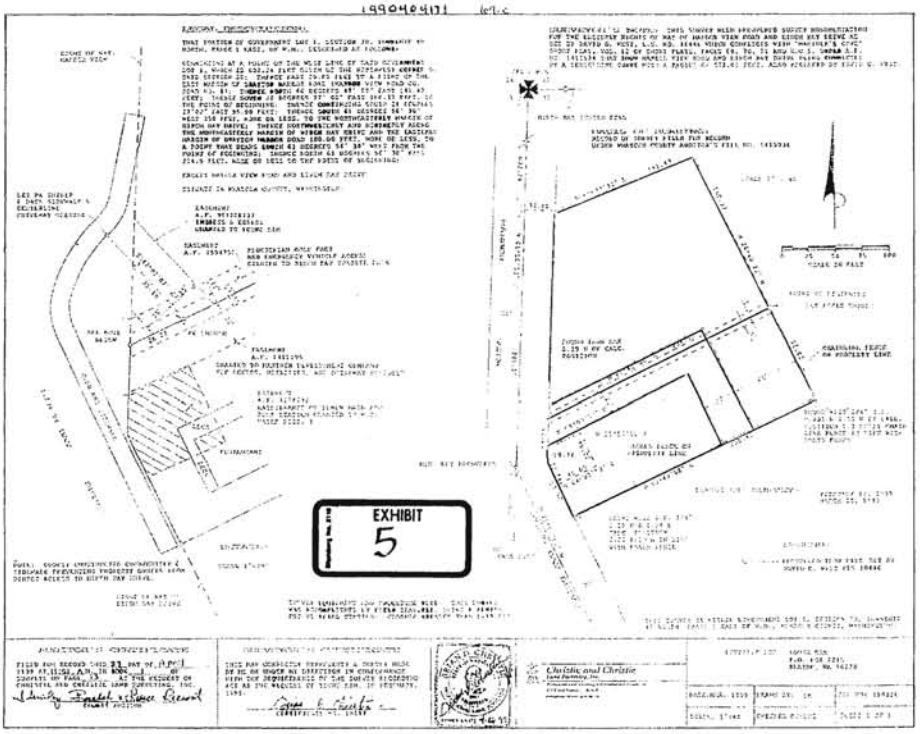
BIRCH BAY TRAILER PARK
HARBOR VIEW ROAD NO 8
AMENDED
EARL W. VOGT
LOT 1
3.90-A
PTN LOT 3
Parcel 1
Parcel 2
SHORT PLAT
BIRCH BAY TRAILER PARK
PTN LOT 3
60 FT. ESMT AF 1475323
SEA LINKS DRIVE
EXHIBIT 4
BIRCH BAY DRIVE
LOT 2
26.25-A
21.98-A
11.89-A
5.07-A
1.27-A
0.38-A
0.58-A
1.00-A
0.50-A
WEDGEWOOD COURT
NORTH (WEST) GOLF COURSE DRIVE
SEA LINKS

APPENDIX "E"

1990404171



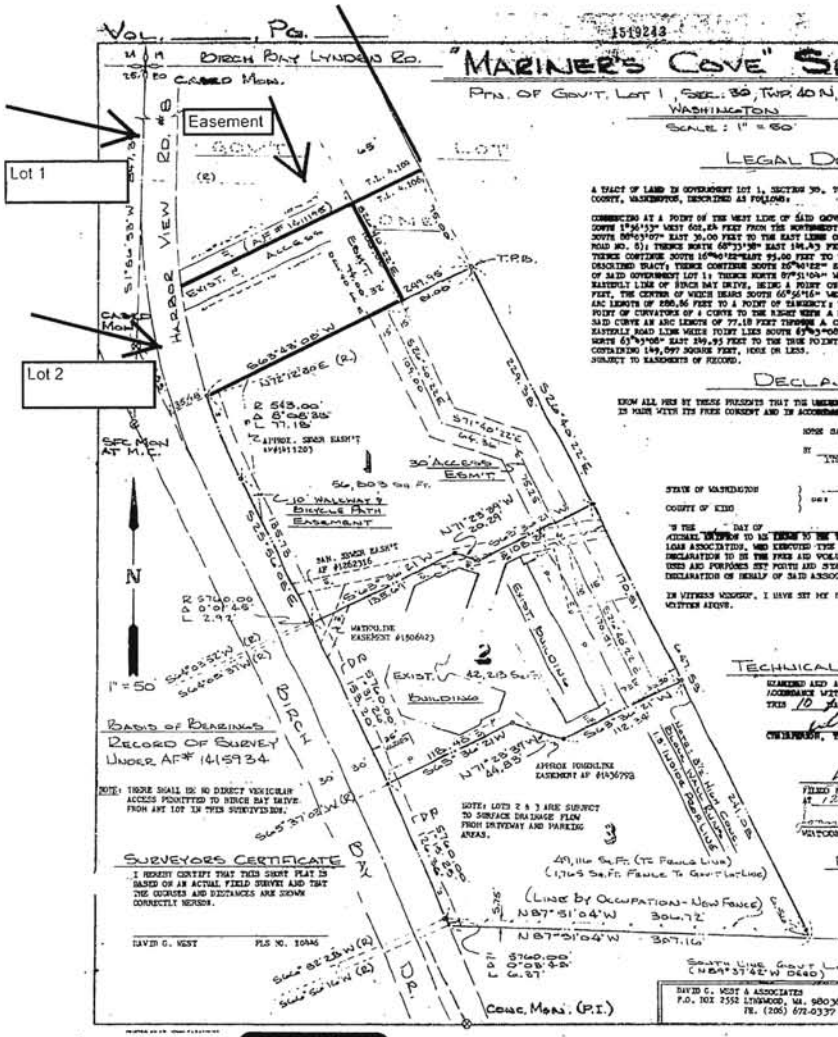
Vol. ____, Pg. ____

1519243

"MARINER'S COVE" SHORT PLAT

PTN. OF GOV'T. LOT 1, SEC.: 30, TWP. 40 N, R1E, W.M., WHATCOM COUNTY, WASHINGTON

SCALE: 1" = 50'



LEGAL DESCRIPTION

A TRACT OF LAND IN GOVERNMENT LOT 1, SECTION 30, TOWNSHIP 40 NORTH, RANGE 1 EAST, W.M. WHATCOM COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

COMMENCING AT A POINT OF THE WEST LINE OF SAID GOVERNMENT LOT 1, SAID POINT LYING SOUTH 1°36'33" WEST 668.28 FEET FROM THE NORTHWEST CORNER OF SAID SECTION 30; THENCE SOUTH 88°03'07" EAST 30.00 FEET TO THE EAST LINE OF DRAYTON HARBOR ROAD (HARBOR VIEW ROAD/COUNTY ROAD NO. 8); THENCE NORTH 68°23'38" EAST 194.43 FEET; THENCE SOUTH 26°40'22" EAST 160.37 FEET; THENCE CONTINUE SOUTH 16°40'22"EAST 95.00 FEET TO THE TRUE POINT OF BEGINNING OF THE HEREIN DESCRIBED TRACT; THENCE CONTINUE SOUTH 26°40'22" EAST 649.53 FEET MORE OR LESS TO THE SOUTH LINE OF SAID GOVERNMENT LOT 1; THENCE NORTH 87°51'04" WEST ALONG SAID SOUTH LINE 307.16 FEET TO THE EASTERLY LINE OF BIRCH BAY DRIVE, BEING A POINT ON A CURVE TO THE LEFT WITH A RADIUS OF 5,760.00 FEET, THE CENTER OF WHICH BEARS SOUTH 66°56'16" WEST; THENCE NORTHWESTERLY ALONG SAID CURVE AN ARC LENGTH OF 280.86 FEET TO A POINT OF TANGENCY; THENCE NORTH 23°36'48" WEST 135.73 FEET TO A POINT OF CURVATURE OF A CURVE TO THE RIGHT WITH A RADIUS OF 543.00 FEET; THENCE NORTHERLY ALONG SAID CURVE AN ARC LENGTH OF 77.18 FEET THROUGH A CENTRAL ANGLE OF 8°08'35" TO A POINT ON SAID EASTERLY ROAD LINE WHICH POINT LIES SOUTH 63°33'08" WEST FROM THE TRUE POINT OF BEGINNING; THENCE NORTH 63°33'08" EAST 199.93 FEET TO THE TRUE POINT OF BEGINNING.
CONTAINING 149,097 SQUARE FEET, MORE OR LESS.
SUBJECT TO EASEMENTS OF RECORD.

DECLARATION

KNOW ALL MEN BY THESE PRESENTS THAT THE UNDERSIGNED OWNER HEREBY DECLARES THIS SHORT PLAT IS MADE WITH ITS FREE CONSENT AND IN ACCORDANCE WITH ITS WISHES.

HOME SAVINGS AND LOAN ASSOCIATION

BY _____

ITS EXECUTIVE VICE PRESIDENT

ACKNOWLEDGEMENT

STATE OF WASHINGTON }
COUNTY OF KING } SS

ON THE _____ DAY OF _____, 19__, BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, DULY COMMISSIONED AND SWORN TO ME BE THE EXECUTIVE VICE PRESIDENT OF HOME SAVINGS AND LOAN ASSOCIATION, WHO EXECUTED THE FOREGOING DECLARATION AND ACKNOWLEDGED SAID DECLARATION TO BE THE FREE AND VOLUNTARY ACT AND DEED OF SAID ASSOCIATION FOR THE USES AND PURPOSES SET FORTH AND STATED THAT HE IS AUTHORIZED TO EXECUTE SAID DECLARATION ON BEHALF OF SAID ASSOCIATION.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND AFFIXED MY SEAL THE DATE AND YEAR FIRST WRITTEN ABOVE.

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, RESIDING AT _____

TECHNICAL COMMITTEE APPROVAL

EXAMINED AND APPROVED BY THE TECHNICAL COMMITTEE IN ACCORDANCE WITH WHATCOM COUNTY SUBDIVISION REGULATIONS THIS 10 DAY OF October, 19 93.

CHAIRMAN, TECHNICAL COMMITTEE

SURVEYORS CERTIFICATE

I HEREBY CERTIFY THAT THIS SHORT PLAT IS BASED ON AN ACTUAL FIELD SURVEY AND THAT THE COURSES AND DISTANCES ARE SHOWN CORRECTLY HEREON.

DAVID G. WEST PLS NO. 10446

AUDITORS CERTIFICATE

FILED FOR RECORD THIS 12 DAY OF October, 1993 AT 12:43 P.M. IN VOLUME OF SHORT PLATS ON PAGE 69 AT THE REQUEST OF Tom Ogle

WHATCOM COUNTY AUDITOR'S OFFICE

EASEMENT MAINTENANCE NOTE

ALL COSTS OF MAINTAINING, REPAIRING, IMPROVING OR OTHERWISE CONNECTED WITH THE ACCESS EASEMENTS NOTED HEREON SHALL BE BORNE EQUALLY BY THE LOT OWNERS. SAID COSTS SHALL BECOME AN ENFORCEABLE LIENS AGAINST ANY LOT WHICH OWNER REFUSES OR FAIL TO PARTICIPATE IN SAID MAINTENANCE, REPAIRS OR IMPROVEMENTS MADE BY AGREEMENT OF THE OTHER OWNERS. THIS PROVISION SHALL BE CONSTRUED AS A COVENANT RUNNING WITH THE LAND.

SHEET 1/2

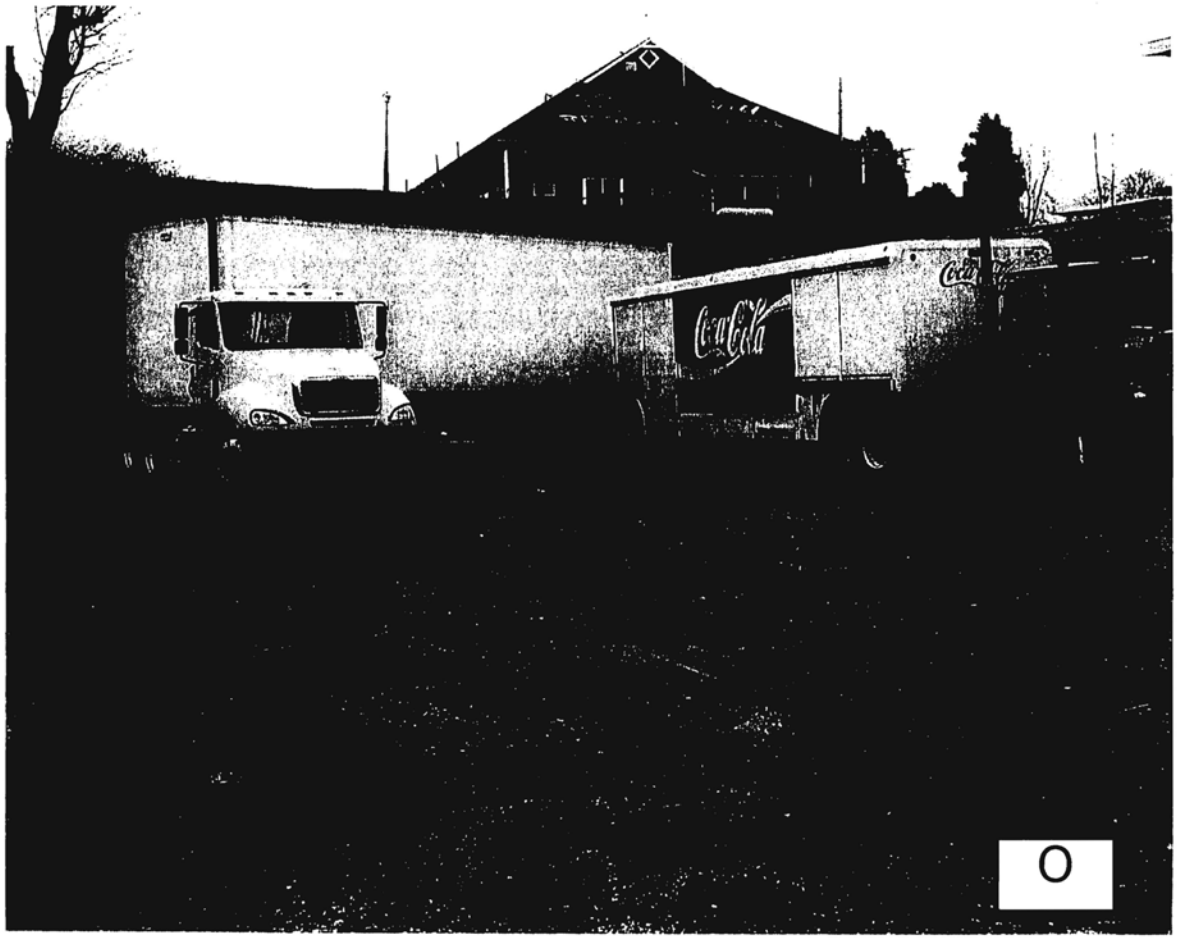
DAVID C. WEST & ASSOCIATES
P.O. BOX 2552 LYNNWOOD, WA. 98036
PH. (206) 672-0337

Vol. 12 Pg. 69

EXHIBIT 2L

APPENDIX "F"


M


Coca-Cola
O