Case No. 46774-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

D. NORMAN FERGUSON and KAREN FERGUSON,

Appellants,

v.

ALLEN McKENZIE and JANE McKENZIE,

Respondents.

CORRECTED APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is an adverse possession case. The Fergusons, Plaintiffs before the Trial Court and Appellants here, own a residence on Point White Drive on the southern end of Bainbridge Island. The properties owned by the Appellants are labeled Parcels A and B and, are on the left (West) side on Ex. 1 (*CP 711-713)*, attached as Appendix 1. The residence is depicted on the lower half of Parcel B. The residence was constructed in 1987 by Christopher Slye, who also occupied the residence after completion. As described in Ex. 42, dated July 1990, (*CP 617-620*):

> From the kitchen in his home on Bainbridge Island Washington, Christopher Slye enjoys 180 – degree views of Puget Sound's quarter mile wide Rich Passage.

Mr. Ferguson purchased the residence from the Mr. Slye in 1994.

The McKenzies, Defendants before the Trial Court and Respondents here, own an unimproved parcel of real property immediately east of Parcel B.

The property subject to the adverse possession claim is depicted in Ex. 2; Appendix 2 attached hereto, shown as the cross-hatched area and referred to by the Parties as the "Disputed Strip."[1] The east boundary of the Disputed Strip runs from a corner marker at the upper northeast corner of Parcel B ("found 1" iron pipe") to a utility pole in the Point White Drive right of way ("tphone pole") and bisects the McKenzie parcel. The

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[1] Exs. 1 and 2 were also demonstrative exhibits. Both were admitted on Appellant's Motion without objection (TP 5-7) but omitted from the list of admitted exhibits. Ex. 1 was also admitted as a defense exhibit. Both appear at multiple locations in the record, including Respondents' Trial Brief at CP 63, 70, 78 and 79.

east west dimension of the Disputed Strip starting at the point marked 5.5' is about 60 feet based on the map scale of Ex. 1 (*CP 711-713).* A substantial portion of the view corridor to Rich Passage described in Ex. 42 (*CP 617*-620) is across the Disputed Strip.

This litigation was commenced in mid 2011 shortly after the McKenzies built a fence blocking the Fergusons' access from Parcel B to the Disputed Strip. Ex. 5 (*CP 575-576*), Ex. 6 (*CP 577-578*), Ex. 51 (*CP 625-626*), Ex. 53 (*CP 627-628*) and Ex. 54 (*CP 629-630*) taken during construction of the fence show the relationship between the residence, the Disputed Strip as delineated by the fence and the treeline, the pampas grass, the mature fir trees across Point White Drive to the south and, the view corridor across the Strip.[2]

There was no dispute that, prior to the construction of the residence, the Disputed Strip was covered with native vegetation. The Appellants contended that when Mr. Ferguson purchased the property in 1994, the Disputed Strip had been cleared of native vegetation and improved as a side yard including the planting of non-native vegetation, particularly pampas grass.

Initially, Respondents, relying on prior testimony of Mr. Slye by declaration, asserted that Mr. Slye did not alter the Disputed Strip during the construction of the residence:

Declaration of Christopher Slye- Paragraph 5:

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[2] Please note the groups of fir trees in Ex. 51 (*CP 625-626*) and Ex. 54 (*CP 629-630*) are across Point White Drive. The same groups of trees appear regularly in the construction photos.

a. In conjunction with the construction of Plaintiffs' residence, I did not clear, grade, fill and install improvements and landscaping in the Disputed Property.

b. At the time I sold the property to D. Norman Ferguson, the Disputed Property was not cleared, graded or filled.

c. At the time I sold the Ferguson Property to D. Norman Ferguson, no improvements or landscaping were installed in the Disputed Strip.

Defendants' Trial Brief at *CP 69*.[3] In his opening, the Respondents' counsel stated that: "The McKenzies and Mr. Slye will testify -- ... that the entire disputed strip was completely covered with dense, lush, vegetation, all the way up until 2006." TP 13-14. Neither Mr. Slye nor the McKenzies so testified.

Instead, Respondents essentially impeached their own witness. Mr. Slye's testimony changed to: during the construction, he cleared, graded, filled, and constructed improvements, including a large rock retaining wall and underground electrical service on the Disputed Strip – with the permission of the Respondents. While Mr. Slye admitted to some landscaping, he denied it was in the Strip:

> Q. Prior to the sale of the Ferguson property, did you plant anything on the Ferguson property?
>
> A. Well, I planted some flowers and roses and pampas grass, plants.

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[3] The Declaration itself is *CP 18-36*.

TP at 83. Keep pampas grass in mind. The indisputable photographic evidence; Ex. 5 (*CP 575-576*), Ex. 6 (*CP 577-578*), Ex. 51 (*CP 625-626*), Ex. 53 (*CP 627-628*) and Ex. 54 (*CP 629-630*), was that the pampas grass was planted by Mr. Slye in the Disputed Strip as part of Mr. Slye's landscaping of the Strip after clearing grading and filling the Strip.

Mr. Ferguson's testimony was that the Disputed Strip had been cleared and planted with grass and pampas grass when he acquired the property. Mr. Ferguson's description of his activities in the Disputed Strip on and after 1994 is TP 142:16-146:7. Mrs. Ferguson's description of her activities after her relationship with Mr. Ferguson commenced are described at TP 177-182. After 1994 through 2004, the Fergusons used the Disputed Strip as any owner would use a yard.

Notwithstanding the volume of evidence to the contrary, the Respondents' contention was that the Disputed Strip was not cleared or landscaped until 2006 by the Fergusons. Therefore, the Fergusons could not establish the requisite 10 year period of possession.

In Finding 18, the Court states:

> The Court accepts that the encroachment [by Mr. Slye during construction] was for a limited time and purpose and, after the construction, the area affected regrew and returned to its natural state by 1994. The Court is not persuaded that once Slye obtained permission to encroach, that he cleared the property and continued to occupy the disputed strip until the sale in 1994.

To reach this conclusion, the Court ignored the complete flip flop in Mr. Slye's testimony, extensive photographic evidence that the Strip had been cleared, graded and filled, Mr. Slye's testimony to the same

effect, and that Respondents failed to show "that the entire disputed strip was completely covered with dense, lush, vegetation, all the way up until 2006" (TP 13-14) and the complete lack of credible evidence that the Appellants cleared a portion of the Disputed Strip adjacent to the east side of the residence in 2006. That factual conclusion was the ultimate basis for the Court's conclusion that Appellants' failed to establish adverse possession.

With all due respect to the Trial Court, the Findings reached by the Trial Court were made despite the substantial evidence in the record of Appellants' adverse possession of the Disputed Strip and despite the multiple and manifest inconsistencies in testimony of Respondents' witnesses. What appears to have happened is that the Trial Court made a decision as to the credibility of the witnesses without consideration as to whether the testimony being offered was consistent with the photographic and other evidence.

II. ASSIGNMENTS OF ERROR

1. The Trial Court committed error by making Findings which are not supported by substantial evidence.

4. The Trial Court erred by admitting evidence relating to the period after 2004.

III. ISSUES PRESENTED

1. Are the Trial Court's Findings supported by substantial evidence?

2. Did the Trial Court commit error by admitting evidence relating to the period after 2004?

3. Did the Appellants meet their burden of proof?

IV. STATEMENT OF THE CASE

The first factual issue is: what was the "natural state" of the Disputed Strip before Mr. Slye's construction of the residence? This is the base datum against which to compare the various photos discussed below. Mrs. McKenzie testified that the Disputed Strip "was ***completely overgrown, lush vegetation***. ... Shrubbery, trees, you know as I mentioned, hollies. There are fruit trees. It was just as heavily overgrown as one expects in the Pacific Northwest of undeveloped land." TP at 225 (emphasis added). Mr. Slye's testimony is similar. According to Mr. Slye, the entirety of the Disputed Strip was vegetated including alder and some fir trees and, that the vegetation was sufficiently dense that the view from the South end of the Disputed Strip into the Disputed Strip would be "obscured by vegetation." TP 32:15 – 34:8. The view across the Strip from the home site would also be obscured.

The second factual issue is: what was the condition of the Disputed Strip following Mr. Slye's construction activities? Again, it was the Respondents' initial assertion that there had been no construction activities in the Disputed Strip in 1987:

> Declaration of Christopher Slye - Paragraph 5:
>
> a. In conjunction with the construction of Plaintiffs' residence, I did not clear, grade, fill and install improvements and landscaping in the Disputed Property.
>
> b. At the time I sold the property to D. Norman Ferguson, the Disputed Property was not cleared, graded or filled.

> c. At the time I sold the Ferguson Property to D. Norman Ferguson, no improvements or landscaping were installed in the Disputed Property.

Defendants' Trial Brief at *CP 69*.[4] In his opening, the Respondents' counsel stated that: "The McKenzies and Mr. Slye will testify -- ... that the entire disputed strip was completely covered with dense, lush, vegetation, all the way up until 2006." TP 13-14. "All the way up" – in other words, the Disputed Strip was covered in dense lush vegetation continuously from pre-1987 until 2006.

The Fergusons' contention was that Mr. Slye cleared and graded and maintained the Strip to improve his view. As the Trial Court noted in Finding 17, it was undisputed that some construction activities took place in the Disputed Strip. The Court states: "The fact there was construction does not prove that Slye had cleared and cultivated the Disputed Strip as the Fergusons claimed." *Id.* Appellants would agree that photographs taken during construction would not show "cultivation" but, the assertion that the evidence does not show that Mr. Slye cleared, graded and filled the Disputed Strip simply cannot be reconciled with the actual evidence.

When confronted with the actual evidence, these witnesses attempted to characterize the construction activities as limited in scope and extent, essentially attempting to ignore the obvious. This is simply not supported by the evidence.

What appears to be the earliest photo of the construction activity is Ex. 32 *(CP 610-611)*, looking East and South from a position on Parcel B

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[4] The Declaration itself is *CP 18-36*.

in the location of the to be constructed deck across the Disputed Strip at the utility pole ("tphone pole") on Point White Drive: TP 60-63. The field of view is the southern portion of the Disputed Strip. Mr. Slye testified:

> Q. So that's a pile of grubbing debris there; isn't it?
>
> A. It is.
>
> Q. And that's all been cleared and graded in there, right?
>
> A. It's been -- yeah. It's been cleared or graded, yeah.
>
> Q. And do you see any ***dense, lush vegetation***, mature fir trees, mature alder trees, any such stuff obscuring the view of the phone pole?
>
> A. Not that pole, ***no***.

TP 63 (emphasis added). Note the view of Rich Passage over the area of cleared ground. The pile of debris obviously consists of debris from fallen trees. Nevertheless, Slye testifies:

> Q. Okay. Was [Mrs. McKenzie] concerned about any damage to the trees?
>
> A. No. As long as we didn't take out any big fir trees.
>
> Q. Was it clear to you that you were not to take out anybig fir trees?
>
> A. Correct.
>
> Q. Did you damage any trees when you accessed the well?
>
> A. No, I don't think so.

TP 86.

The bottom photo in Ex. 24 (*CP 602-603*) would be next in sequence based on the state of construction of the residence, looking Southeast across the floor plate of the house from above the location of the wellhead on Ex. 2.[5] TP 64. Again, note the view of Rich Passage and the stands of mature fir across Point White Drive to the south. Based on Ex. 1, the boundary line would be 12.5 feet to the left of the Southeast (far left) corner of the floor plate. The field of view includes the south one-third of the Disputed Strip. The same utility pole seen in Ex. 32 (*CP 610-611*) can be seen between the rear of the orange van and the temporary electrical service. In this regard, in Finding 19, the Court found that "a temporary power source may well have been located in the Disputed Strip." This is the temporary electrical service shown in the photo. The orange van is obviously well into the Disputed Strip on the far side of the temporary electrical service which is denuded of, rather than covered with, dense, lush vegetation.

The top photo in Ex. 20 (*CP 596-597*) faces southeast across the Disputed Strip to the left of the residence and the same temporary electrical service can be seen. As in Ex. 24 (*CP 602-603*), the whole of the Disputed Strip that can be observed in this photo is denuded of vegetation. Mr. Slye again agreed that the observable portion of the Disputed Strip is not covered in "dense lush vegetation." TP 57:22 - 58:3.

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[5] The little circle connected to the line marked 100' R. If Ex. 24 (CP 602-603) is compared to Ex. 51 (*CP 625-626*) and Ex. 54 (*CP 629-630*) , the large trees in the field of vision are across Point White Drive. See, also Ex. 25 (*CP 604-605*) and Ex. 46 (*CP 623-624*).

The left side of Ex. 21 (*CP 598-599*) is a photo taken of the west face of the uncompleted home. The field of view is to the southeast across the Disputed Strip and, looking through the windows, the orange van can once again be observed across the disturbed earth. Notice the lumber in front of the van. The upper right photo in Ex. 23 (*CP 600-601*) is a picture of the same thing taken from "immediately to the south of what's been marked as the deck here on Exhibit No. 2. ... looking towards the southeast again" across the Disputed Strip. TP 60. No "dense, lush vegetation."

Ex. 18 (*CP 592-593*) and Ex. 19 (*CP 594-595*) both depict the East face of the residence looking West from inside the Disputed Strip. Note the large fir log in the foreground of Ex. 18 (*592-593*). Mr. Slye testifies: "But I was told not to cut any firs or madronas or any of the nice, beautiful, big trees, the alders. And I didn't take any big trees." TP 85. Ex. 18 (*CP 592-593*) and Ex. 19 (*CP 594-595*) depict the same area from which Mrs. McKenzie would testify Appellants removed a mature fir and other trees in 2006, as discussed in more detail below.

Ex. 19 (*CP 594-595*) postdates Ex. 18 (*CP 592-593*) and, as Mr. Slye admitted, demonstrates that the property in view had been cleared, graded and filled. TP 53-54. Comparing the 2 photos, the amount of fill is significant. For reference, the boundary line in Ex. 1 is "5.5 feet" from the corner of the deck on the left of the photo. The actual dimension of the residence from the right hand corner of the carport to the corner of the deck on the left is 60 feet based on the scale on Ex. 1. On the same basis, the east-west dimension of the Disputed Strip at the

location from which the photo was taken is about 60 feet.[6] As Mr. Ferguson testified, the fill depicted in this photo extends well into the Disputed Strip and remains in place to date. TP 126–127.

Ex. 25 (*CP 604-605*) is a view looking from West to East looking through the carport into the Disputed Strip at a bulldozer and front end loader. Based on the scale on Ex. 1, the boundary between the Ferguson Property and the Disputed Strip is ten feet from the corner of the house in the center of the photo.

Ex. 17 (*CP 590-591*) "is a picture taken from roughly Northwest of the residence looking to the Southeast across the carport into the disputed strip." TP 47-49. The front end loader is also depicted in this photo.

Ex. 33 (*CP 612-614*) is taken from the top of the retaining wall looking directly North to the East of and directly up the property line. TP 39-43. The object in the very left hand corner of these duplicate photos is a monument just above the retaining wall at the South end of the boundary line marking the boundary line. The monument is partially buried in fill. The property line would run from the monument to a point 5.5 feet from the right hand side of the deck. Everything to the right of that line is fill which was in place when Mr. Ferguson acquired the residence. TP 125. So, Mr. Slye knowingly filled over the boundary line both as shown in Ex. 33 (*CP 612-614*) and Ex. 19 (*CP 594-595*).

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[6] This Exhibit has particular relevance to the assertion that the Disputed Strip reverted to its natural state because of Mrs. McKenzie's testimony that what was" most noticeable" in 2006 was the removal by the Fergusons of the "large trees, particularly the large fir tree" which she testifies were in what is the field of view of Ex. 19 (*CP 594-595*). TP 313

The orange van is parked in the vicinity of the septic tank shown on Exs. 1 and 2 (the two oval objects). This is the same view with respect to which Mr. Slye stated that the view would be "obscured by vegetation;" TP 32:15 – 34:8, prior to Mr. Slye's construction activities.

In Finding 17, the Court states:

> Exhibit 19 depicts only a very limited area of the disputed strip where the construction was occurring. It is impossible to conclude that the whole disputed strip was cleared and planted.

However, there are 10 construction photos in evidence. If you take the time to place all the fields of view from these photos onto Ex. 2, the entirety of the Disputed Strip from a point well North of the septic tank all the way to the southern end, well over half of the surface area, is depicted in these photos and has been cleared and graded. The conclusion that the clearing and grading had the effect of clearing the view across the Strip is inescapable particularly given Mr. Slye's testimony that the view would otherwise be "obscured by vegetation;" TP 32:15–34:8, prior to Mr. Slye's construction activities. The western half of the Disputed Strip, from the retaining wall on the South end of the Disputed Strip to the septic tank on the north has been filled.

Prior to Mr. Slye's construction activities, the view from the residence across the Disputed Strip would have been blocked by the "dense, lush vegetations." TP 32:15 – 34:8. Afterwards, as described in Ex. 42, dated July 1990, (*CP 617-620*):

> From the kitchen in his home on Bainbridge Island Washington, Christopher Slye enjoys 180 – degree views of Puget Sound's quarter mile wide Rich Passage.

That is the same view seen some 24 years later in Ex. 51 (*CP 625-626*) and Ex. 54 (*CP 629-630*), taken during or after the construction of the boundary line fence by the McKenzies. Mr. Slye got the view he sold to Mr. Ferguson by clearing the Strip.

Finally, the series of circles at the south end on Ex. 2 are a retaining wall extending into the Disputed Strip installed by Mr. Slye. TP 29-30. The wall can be seen in the lower left on Ex. 53 (*CP 627-628*). Mr. Slye also installed underground electrical service on the Strip; *id*, which is not protected by an easement. TP 112.

The gravamen of this is that Mr. Slye's testimony by declaration, offered into the record by Respondents, was unquestionably untruthful and his subsequent testimony attempting to minimize his intrusions into the Disputed Strip in conjunction with his testimony about the construction photos equally untruthful.

The issue then becomes, what happened in the Disputed Strip between 1988 when construction was finished and 1994 when Mr. Ferguson took possession. The Trial Court accurately states that: "the photos of construction do not illustrate what the land looked like as it existed in 1994." Finding No. 17: *CP 544*. "Even if this Court accepts that the area was cleared during construction, that was six to seven years before D. Norman Ferguson bought the property." Finding 17: *CP 545*.

The Trial Court stated, in Finding 20:

> There is little photographic evidence that can be relied upon to definitively persuade this Court that the area cleared in the construction phase remained cleared and possessed thereafter in an open notorious and hostile fashion from 1994 to 2004.

CP 545. ***This is true if you only look at half the photos.***

Here is what Mr. Slye had to say; TP 89-90-:

> Q. From the time you completed your construction on the Ferguson residence until the time you sold the Ferguson residence, did you make any changes to the disputed strip?
>
> A. No.

At TP 83:

> Q. Okay. How can you be sure that you didn't plant anything in the disputed strip?
>
> A. Because I made a point not to. ...
>
> Q. Prior to the sale of the Ferguson property, did you plant anything on the Ferguson property?
>
> A. Well, I planted some flowers and roses and pampas grass, plants.

Remember the pampas grass.

Mr. Ferguson's testimony as to the condition of the Disputed Strip when he acquired it is as follows:

> What vegetation was present on the disputed strip when you acquired the property on June 23, 2004? Was it pampas grass? Was it grass? Was there lawn?
>
> A. There was grass up near the septic tank. There was grass in the front going down the slope, maybe five, six, seven feet. There was some pampas grass. There was blackberries. There was some Scotch broom. There was typical scrabble that would be around in that neighborhood. But it -- it was clearly low kinds of brush, I would call.
>
> Q. But there was no large trees, no mature trees?
>
> A. I don't recall any large mature trees.

TP at 136. Ex. 27 (*CP 606-607*) depicts how the property looked in 1994. TP 67:24–68:2. Pampas grass in the lower right. Ex. 28 (*CP 608-609*) was taken in 1997 from the Disputed Strip looking Southeast towards Rich Passage and the utility pole ("Tphone pole" on Ex. 2). TP 183-185. More pampas grass. Ex. 45 (*CP 621-622*) is a photo taken by Mr. Ferguson in Christmas 2003. Mr. Ferguson testified as to this photo:

> Q. Okay. Now, see all those white things kind of poking up there?
>
> A. Yes.
>
> Q. What are those?
>
> A. Pampas grass, ferns.
>
> Q. Where are those located?
>
> A. In the disputed strip.

TP at 139. Ex. 46 (*CP 623-624*) was taken by Mr. Ferguson in November 2006. More pampas grass.

In these photos, it is hard to tell exactly where the pampas grass is, presumably the basis for the statement by the Trial Court in Finding 20 cited above. However, Ex. 5 (*CP 575-576*), Ex. 6 (*CP 577-578*), Ex. 51 (*CP 625-626*), Ex. 53 (*CP 627-628*) and Ex. 54 (*CP 629-630*), taken during or after the construction of the boundary line fence by the McKenzies, tells us exactly where the pampas grass were. Most of the pampas grass depicted in these photos are in the Disputed Strip. As Mr. Ferguson testified:

> Q. Okay. How did the pampas grass come to be, in your understanding?

A. They were there when I bought the house.

TP 130.

Again, Mr. Slye's testimony:

Q. Prior to the sale of the Ferguson property, did you plant anything in the disputed strip?

A. No.

Although the Court characterizes Mr. Slye as credible, the simple fact of the matter is that Mr. Slye is once again demonstrably untruthful as to the condition of the Disputed Strip at the time it passed in to Mr. Ferguson's possession.

Ex. 42 (*CP 617-620*) is a magazine article about the Slye residence published in July 1990. The first sentence of the Article reads:

> From the kitchen in his home on Bainbridge Island Washington, Christopher Slye enjoys 180 – degree views of Puget Sound's quarter mile wide Rich Passage.

Ex. 42 (*CP 617-620*) goes on to state, Mr. Slye's "first dictate" to his architect "was to maximize the view" from the kitchen. Since a substantial portion of the view corridor from the kitchen towards Rich Passage would be across the Disputed Strip, the view obviously was not obscured by "dense, lush vegetation" in July 1990.

In Exhibit 42 (*CP 617-620*), the object visible through the window on the right is the utility pole ("tphone pole") on Ex. 2:

> Q. Now, standing in your kitchen there by the island --and I've actually stood there with you -- is that the phone pole on Point White Drive shown out the window to the right there?
>
> A. Yes, it is.

> Q. Would you agree with me that there's no dense, lush, overgrown vegetation depicted in the area between that window and the phone pole on Point White Drive?
>
> A. I would agree.

TP 133. You can compare the diagram of the residence in Ex. 42 (*CP 617-620*) to the map of Ex.2 to see that view is southeast so, the kitchen window on the right faces south. The other 2 windows on the right face east, into the Disputed Strip. In order to see Rich Passage from these windows, the Strip would have to be denuded of vegetation.

Mr. Ferguson goes on to testify (TP 131-136), testimony which was undisputed,[7] that various of the objects viewed through the 2 windows to the left in Ex. 42 (*CP 617-620*) were on the far side of the boundary between the Disputed Strip and the remainder of the McKenzie property. Again, these windows face almost directly east across the Disputed Strip to the vantage point from which Ex. 19 (*CP 594-595*) was taken. Both Ex. 19 (*CP 594-595*) and Ex. 42 (*CP 617-620*), in conjunction with Mr. Ferguson's testimony, establish that as of 1990, there was no vegetation, and particularly, no mature trees in the area to the east of the residence.

However, this is precisely the area from which Mrs. McKenzie testified she observed clearing in 2006. TP at 307. Very reluctantly; TP 311-312, Mrs. McKenzie acknowledged that Ex. 19 (*CP 594-595*) shows that this area had been cleared in 1987:

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[7] See Finding 22. The only testimony offered with respect to the magazine article and what was viewed in the windows was that of Mr. Ferguson. The photo, in conjunction with Mr. Ferguson's testimony leaves no mystery about what is depicted.

> Q. Do you see any of that vegetation in Exhibit No. 19 (*CP 594-595*)?
>
> A. No.
>
> Q. Okay. So does it not follow, Ms. McKenzie, that the vegetation you testified was there before Mr. Slye began construction was removed by Mr. Slye during construction and not in 2006 as you've testified by the Fergusons?
>
> A. I believe Mr. Slye actually testified that after he occupied the house, the vegetation returned, went back to its natural state.

This answer is undoubtedly an admission by Mrs. McKenzie that the area the Respondents contend was cleared in 2006 had, in fact, previously been cleared by Mr. Slye. A reference to re-vegetation would have been unnecessary unless the area had already been cleared. Second, Mrs. McKenzie does not testify of her own personal knowledge that she observed the re-growth of vegetation. To avoid admitting that the area she testified was cleared in 2006 had already been cleared in 1987, she relies on the prior testimony of Mr. Slye.[8] So, if Mr. Slye's testimony about his post 1997 activities in the Disputed Strip are untruthful, as is demonstrably the case, there is literally no evidence supporting Finding 18: *CP 545*, that the area cleared by Mr. Slye in 1987 was re-populated by "volunteer vegetation" by 2006.

Mrs. McKenzie went on to describe what was allegedly cleared by the Fergusons in 2006 as follows:

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[8] Mr. Slye's testimony on "re-vegetation" appears at TP 86 and TP 92. If, as Mrs. McKenzie testified, she regularly viewed the Disputed Strip, why would she need to rely on Mr. Slye's observations?

> Q. So tell me, Ms. Ferguson -- Ms. McKenzie -- I'm sorry again -- what kind of vegetation was removed from the area you previously described to the east of the Ferguson residence.
>
> A. Well, as I said, the most noticeable were the large trees, particularly the large fir tree which Mr. Slye had trimmed after having asked permission to do so. That was obvious. The other vegetation would have been just rough vegetation that grows in the Pacific Northwest.

TP 313. To believe Mrs. McKenzie, various trees, including a large fir tree which she had given Mr. Slye permission to trim but not remove, ceased to exist in 1987, but miraculously re-appeared so the Fergusons could cut them down again in 2006. The photographic evidence, particularly with Mrs. MacKenzie's admission, is really unequivocal and puts the whole of Mrs. MacKenzie's testimony about what transpired in 1987 in doubt.

On this issue, in Finding 18, the Trial Court states:

> The Court accepts as credible Jane McKenzie's testimony that she visited her own property, which became the Disputed Strip, and observed and witnessed Slye's construction site many times. It defies reason to accept that the Ferguson's claim that Slye cleared an area that encroached on the McKenzie property while Jane McKenzie passively looked on ....

But, that is exactly what the Respondents asked the Court to believe when Mrs. McKenzie testified about the Fergusons allegedly clearing their property without permission in 2006; that the McKenzies simply waited, from 2006 until mid-2011 when a fence was constructed, five and one half years, before doing anything. If you believe Mrs. McKenzie, in 1987 she refused to give Mr. Slye permission to remove any trees only trim one

large fir tree. But, she didn't do anything in 2006 when according to her, the Fergusons cut that same tree down with many others. Mrs. McKenzie's testimony is simply irreconcilable with the photographic evidence.

Findings 12, 13 and 14 address testimony by Mr. Ferguson that when he purchased the home, the utility pole in Point White Drive was identified by Mr. Slye as marking the southeast corner of the property being acquired by Mr. Ferguson. Mr. Ferguson's testimony on this subject appears at TP 119 to 124. Mr. Slye denied representing the telephone pole was the corner marker and his testimony appears at TP 88-89 and 109-111. The Court adopted Mr. Slye's testimony finding that Mr. Slye was the more credible witness. Finding No. 14.

This finding is based principally on the following: "Slye further stated that ***he gave D. Norman Ferguson Exhibit D-1 (CP 631-653), a septic system application for permit***, during the sales negotiations." Exhibit D-1 (*CP 631-653; emphasis added*) includes a number of maps. The first page includes a hand drawn map of the system without any reference to property boundaries. At the back of the Exhibit; *CP 642*, is a map showing the ***proposed*** system and home in relation to the property lines. The Court goes on to state: "Identifying the power line as the property marker would be nonsensical in light of ***the septic system permit application Slye gave D. Norman Ferguson*** when they discussed the property line prior to purchase." Finding 14 at *CP 543 (emphasis added)*.

For this Finding to be supported, there would need to be evidence that Mr. Ferguson was provided with the entirety of the application, was

aware of its contents and, informed that the septic system was constructed in conformance with application. The problem is that ***Mr. Slye never testified that he gave Mr. Ferguson the septic system permit application, discussed its contents with Mr. Ferguson or, even discussed the actual as built location of the septic system with Mr. Ferguson.*** After authenticating the Exhibit: TP 79-82, Mr. Slye was asked no further questions about the Exhibit.

Mr. Ferguson acknowledged seeing the first page of Exhibit D-1 (*CP 632*) at the time of the purchase. That map does not show the location of the septic system in relation to the boundary. But there is no evidence that he received the entirety of the Exhibit, was aware of is contents outside the map on the first page or discussed the document or the location of the septic system, either proposed or as built with Mr. Slye. The Findings based on Exhibit D-1 (*CP 631-653*) are without any evidentiary support whatsoever.

These two witnesses agree that only the northeast corner of Parcel B was located as evidenced by Ex. 13 (*CP 588-589*). However, Mr. Ferguson's un-rebutted testimony was that when Mr. Slye and Mr. Ferguson went looking for the Southeast corner, they looked along Point White Drive.

Ex. 53 (*CP 627-628*) depicts the Disputed Strip from the south end. Note the retaining wall which is also depicted in Ex. 2. Ex. 33 (*CP 612-614*) is taken from the top of the retaining wall looking directly North to the East of and directly up the property line. TP 38-43. The object in the very left hand corner of these duplicate photos is a monument

above – to the north of, the retaining wall at the South end of the boundary line, away from Point White Drive. The monument is almost buried in fill in 1987. Mr. Slye and Mr. Ferguson were looking in the wrong place for the monument. But, Mr. Slye knew where the monument was. Why would Mr. Slye be knowingly looking in the wrong place?

Mr. Slye knew his underground utility service crossing the Disputed Strip was not protected by an easement. Although Mr. Slye was a licensed realtor, Mr. Slye did not disclose that the underground utility service to the residence across the Disputed Strip was not in an easement either orally: TP 112 and124, or in his Form 17 Disclosure Statement: Ex.12 (*CP 585-587*). Mr. Slye also did not want a survey: TP 119. What would a survey disclose that Mr. Slye did not want disclosed?

As the Court notes, by representing the utility pole as the property line, Mr. Slye would have knowingly misrepresented the boundary to Mr. Ferguson. The only reasonable inference to be drawn is that Mr. Slye did not want the actual location of that corner to be discovered. He knew the lack of an easement for the utility service across the Disputed Strip and/or the inability to protect the view across the Disputed Strip would devalue his property and/or kill the sale to Mr. Ferguson. All you have to do is look at Ex. 54 (*CP 629-630*), see the utility pole, to understand what is going to happen to that "180 degree view" of Rich Passage if the Disputed Strip re-grows. Parcel B is going have a 90 degree view. To borrow a phrase, it defies reason that Mr. Ferguson would buy a view property where the view was not protected.

The Complaint in this matter (*CP 1-12*) was filed on June 3, 2011. The Affidavit of Mr. Slye cited by the Respondents in their Trial Brief was filed on September 9, 2011 (*CP 18-36*). The Affidavit was signed on May 26, 2011 but was filed in response to Appellants' Summary Judgment Motion which Motion was not filed until August of 2011. My Slye was named a defendant in an Amended Complaint (*CP 37-42*) filed on April 6, 2012 alleging misrepresentation claims against Mr. Slye. Mr. Slye moved for summary judgment on statute of limitations grounds and was dismissed on July 2, 2012.[9] This Order was, of course, an interlocutory order so, at the time of trial, Mr. Slye was still at risk.

The Respondents obtained Mr. Slye's Affidavit at a very early stage in the case in which Mr. Slye denies doing anything in the Disputed Strip and the Respondents later file that Affidavit asking the Court to rely on that testimony. But, at trial, both Mr. Slye and the Respondents testify that Mr. Slye entered the Disputed Strip, cleared, graded, filled and installed improvements with permission. You can't have it both ways.

So, here is what the Appellants believe actually happened. Mr. Slye's testimony simply cannot be reconciled with the photographic evidence. During construction, Mr. Slye knowingly cleared and graded the lower two-thirds of the Disputed Strip to ensure his view. The only reasonable conclusion supported by any evidence is that the McKenzies did not object to Mr. Slye's activities because they were not aware of the true location of the boundary. It is clear that Mr. Slye planted a significant

---

[9] Part of Appellants' Supplemental Designation of Clerk's Papers.

portion of the Disputed Strip with non-native pampas grass present on the property when Mr. Ferguson purchased. If the McKenzies repeatedly viewed the Strip between 1987 and 2004 as they contended, they could not possibly have missed the non-native plantings in the Strip. Accordingly, their testimony regarding the condition of the Strip in the period 1987 to 2004 cannot be reconciled with the photographic evidence.

When Mr. Ferguson purchased the property, Mr. Ferguson was informed that the treeline on the far side of the Disputed Strip was the property line and, thereafter, the Ferguson's used the Strip as a yard continuously between 1994 and 2004 when the statute on the adverse possession claim ran.

Mrs. McKenzie's testimony about clearing in 2006 cannot be reconciled with the photographic evidence. It is physically impossible for the portion of the Strip she claimed was cleared in 2006 to have re-grown large trees in the 1987–2006 time period. Nor, can it be reconciled with the McKenzie's complete inaction after the supposed timber trespass in 2006. Appellants agree with the Court. It defies belief that the Respondents would have just sat by while the Appellants removed trees Mrs. McKenzie testified she refused to allow Slye to cut in 1987. As a result, Mrs. McKenzie's testimony regarding the 2006 clearing and her testimony as to her communications with Mr. Slye during construction and the post construction condition of the Strip is simply not credible. Without that testimony, there is no basis discounting the Appellants' testimony about their use of the Strip or, for concluding that the Appellants' possession was not adverse between 1994 and 2004.

The fact that the Respondents would first file an Affidavit for Mr. Slye in which he testifies under oath that he engaged in no activities in the Disputed Strip and then for both the Respondents and Mr. Slye to testify that the extensive activities shown in the photos was permissive leads only to the conclusion that the testimony about permission was after the fact collusive fabrication.

Finally, Findings 23 through 29 relate to the period after 2004. The Trial Court itself ruled that events after 2004 (TP 165-166) were not relevant or admissible for the purpose of establishing the elements of an adverse possession claim. In light of the Court's own ruling, these findings are legally irrelevant to the fundamental issues in the case, as discussed further below.

V. APPLICABLE AUTHORITY AND DISCUSSION

A. Standard for Review:

Review in this context is a two step process. First, findings of fact are reviewed under a substantial evidence standard. *Brewer v. Fibreboard Corp.*, 127 Wash.2d 512, 525, 901 P.2d 297 (1995). Evidence is substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding. *Pardee v. Jolly*, 163 Wash.2d 558, 566, 182 P.3d 967 (2008) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003)). Questions of law are reviewed de novo. *Gormley v. Robertson*, 120 Wash.App. 31, 36, 83 P.3d 1042 (2004). T he second question is whether the court's findings of fact support its conclusions of law, *Landmark Development, Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999).

B. The Findings are not supported by Substantial Evidence and do not support the Ultimate decision.

i. The Septic Permit Application

The Trial Court's ultimate decision was that the Ferguson's had failed to meet the burden of proof with respect to a claim of adverse possession. The Court's decision appears to turn on certain specific findings. The first involves the Septic System Application with respect to which Mr. Ferguson testified that he only received the first page:

> Slye further stated that ***he gave D. Norman Ferguson Exhibit D-1 (CP 631-653), a septic system application for permit***, during the sales negotiations. (*CP 542:23-25; emphasis added*).
>
> Identifying the power line as the property marker would be nonsensical in light of ***the septic system permit application Slye gave D. Norman Ferguson*** when they discussed the property line prior to purchase. Finding 14 at *CP 543 (emphasis added)*.
>
> It is reasonable, if not likely, that Slye gave D. Norman Ferguson the entire septic system permit application ... *CP 543:6-7.*
>
> The Fergusons have not proven by a preponderance of the evidence that D. Norman Ferguson did not receive the entire septic system application, including the plat map. On this point, Slye's testimony is more credible than D. Norman Ferguson's. *CP 543: 2-4.*

The trial Court's credibility determinations were based on the finding that Slye ***gave D. Norman Ferguson Exhibit D-1 (CP 631-653), a septic system application for permit***, during the sales negotiations. (*CP 542:23-25; emphasis added*). See, for example, Finding 15.

However, there was no conflict in the testimony. ***Mr. Slye never testified that he gave Mr. Ferguson the septic system permit application, discussed its contents with Mr. Ferguson or, even discussed the actual as built location of the septic system with Mr. Ferguson.*** The basis for the Trail Court's conclusion that Mr. Ferguson's testimony lacked credibility because of the maps in the back of the permit application had no factual support whatsoever.

The Finding is also legally irrelevant. A claim of adverse possession is dependent on the passage of the statute of limitations under RCW 4.16.020: *Gorman v. City of Woodinville*, 160 Wn. App. 759, 249 P.3d 1040 (2011). RCW 4.16.020 provides, in pertinent part:

> The period prescribed for the commencement of actions shall be as follows:
>
> Within ten years:
>
> (1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

"Adverse possession in this state focuses on the nature of the possession not the thought process of the possessor or the record owner." *Doyle v. Hicks*, 78 Wn. App. 538, 897 P.2d 420 (1995), *review denied*, 128 Wn.2d 1011 (1996). The statute begins to run from the date the elements of adverse possession are satisfied irrespective of the good faith of the adverse possessor or the knowledge of the adverse possession by the original owner. *Id.* Even a bad faith deliberate invasion of someone else's

property, like Mr. Slye's clearing, grading and filling the Disputed Strip, will ripen into title if the true owner waits more than 10 years to assert their rights. It literally does not matter if Mr. Ferguson knew where the boundary was in 1994.

So, the Court relied on a wholly erroneous understanding of the testimony to reach a legally irrelevant conclusion, in the process making a wholly unjustified decision about the Ferguson's credibility.

ii. The Condition of the Strip in 1987 After Construction.

In Finding 18, the Court states:

> The Court accepts that the encroachment [by Mr. Slye during construction] was for a limited time and purpose and, after the construction, the area affected regrew and returned to its natural state by 1994. The Court is not persuaded that once Slye obtained permission to encroach, that he cleared the property and continued to occupy the disputed strip until the sale in 1994.

In light of the photographic evidence, including the construction photos as well as the photos disclosing the location of the pampas grass, no rational fair minded person would reach the same conclusion as the Trial Court.

There is no dispute that prior to the construction, the Strip was densely vegetated. As described by Mr. Slye, any view into the Strip would have been obscured. TP 32:15 – 34:8. If you cannot see in, you cannot see out.

But, compare the views in Ex. 51 (*CP 625-626*) and Ex. 54 (*CP 629-630*) with respect to such features as the large mature fir trees on the south side of Point White Drive and the utility pole to the views in Ex. 32 (*CP 610-11*), Ex. 24 (*CP 602-3*), Ex. 23 (*CP 600-601*), and Ex. 20

(CP *596-597*). As described in Ex. 42 , showing the utility pole through the window on the right, dated July 1990, (*CP 617-620*):

> From the kitchen in his home on Bainbridge Island Washington, Christopher Slye enjoys 180 – degree views of Puget Sound's quarter mile wide Rich Passage.

Mr. Slye got that view by denuding the Strip of vegetation.

iii. The Condition of the Strip in 1994.

The question here is did Slye maintain any landscaping in the Disputed Strip or, did he allow native vegetation to re-grow. The Court found that native vegetation re-grew between 1987 and 1994: "This Court accepts that the encroachment was for a limited tine and purpose and, the area affected regrew and returned to its natural state by 1994." Finding 18.

In Findings 20 and 22 the Court discusses the photographic evidence. The Finding states that the Ferguson's burden was to prove that the area cleared in the construction phase remained cleared and thereafter possessed in an open, notorious, and hostile fashion from 1994 to 2004. The Court's ultimate conclusion was that: "The Fergusons have failed to carry their burden of proof with the photographic evidence."

So, what would a rational, fair minded person conclude from the testimony and photographic evidence? First, Slye planted pampas grass. Second, there is no evidence that the Fergusons planted any pampas grass. Photos taken in 1994 Ex. 27 (*CP 606-607*), 1997 Ex. 28 (*CP 608-609*), 2003 Ex. 45 (*CP 621-622*) and 2006 Ex. 46 (*CP 623-624*) all show pampas grass. Ex. 5 (*CP 575-576*), Ex. 6 (*CP 577-578*), Ex. 51 (*CP 625-626*), Ex. 53 (*CP 627-628*) and Ex. 54 (*CP 629-630*), taken during or after the construction of the boundary line fence by the McKenzies, depict the

pampas grass primarily in the Disputed Strip. Pampas grass is neither natural nor native.

Second, you have Exhibit 42 (*CP 617-620)*, the magazine article. If Exhibit 42 is compared to Exhibit 33 (*CP 612*-614) dated in 1987, you are looking at the same utility pole in the right hand window in 1990 as seen as a result of the removal of native vegetation in 1987. The same utility pole is shown in Ex. 28 (*CP 608-609*) which was taken in 1997 from the Disputed Strip looking Southeast towards Rich Passage and the utility pole ("Tphone pole" on Ex. 2). TP 183-185. Based on these photos, no reasonable person would conclude that there was re-grown vegetation obscuring the view across the Disputed Strip. Either nothing grew, or nothing was allowed to grow, which would obscure the view.

No effort was made to rebut any of this evidence. Based on the construction photos, Mr. Slye was a picture taker. However, the Respondents did not submit any pictures from Mr. Slye depicting what the Disputed Strip looked like during his occupancy of the residence. Mr. Slye did not offer rebuttal testimony to Mr. Ferguson's testimony regarding Ex. 42 (*CP 617*-620) concerning the condition of the property in 1990.

Again, the Trial Court's Finding No. 18 states: "after the construction, the area affected regrew and returned to its natural state by 1994." Mrs. McKenzie when she testified about re-vegetation, did not testify on the basis of personal testimonial knowledge. Mrs. McKenzie referenced Mr. Slye's testimony. Mr. Slye testified:

> Q. You testified that you did not plant vegetation on theMcKenzie property; is that right?

A. That's right.

Q. Did you maintain or trim the vegetation on the disputed strip after you finished construction of the property?

A. No.

Q. Was that allowed to grow?

A. Yes.

Q. And over the seven years between the time you completed construction and the time you sold the Ferguson property, did that vegetation, in fact, grow?

A. It did.

TP at 92. Well, pampas grass is not native and not natural state. In almost the same breath in which he testifies about re-vegetation, Mr. Slye makes a blatant misstatement of fact. Mr. Slye was the only witness who actually offered testimony based on personal knowledge on this subject matter and his testimony cannot be reconciled with the photographic evidence. Simply put, no rational fair minded person would accept this testimony.

This is equally true of the testimony that the Disputed Strip was cleared in 2006. Once again, to believe Mrs. Mrs. McKenzie, various trees, including a large fir tree which she had given Slye permission to trim but not remove, ceased to exist in 1987, but miraculously re-appeared so the Fergusons could cut them down again in 2006. The photographic evidence, particularly with Mrs. MacKenzie's admission, is really unequivocal and puts the whole of Mrs. MacKenzie's testimony about what transpired in 1987 in doubt.

On this issue, in Finding 18, the Trial Court states:

> The Court accepts as credible Jane McKenzie's testimony that she visited her own property, which became the Disputed Strip, and observed and witnessed Slye's construction site many times. It defies reason to accept that the Ferguson's claim that Slye cleared an area that encroached on the McKenzie property while Jane McKenzie passively looked on ....

But, that is exactly what the Respondents asked the Court to believe when Mrs. McKenzie testified about the Fergusons allegedly clearing their property without permission in 2006; that the McKenzies simply waited, from 2006 until mid-2011 when a fence was constructed, five and one half years, before doing anything. If you believe Mrs. McKenzie, in 1987 she refused to give Slye permission to remove any trees only trim one large fir tree. But, she didn't do anything in 2006 when according to her, the Fergusons cut that same tree down with many others. Mrs. McKenzie's testimony is simply not credible. No rational fair minded person would accept this testimony.

Finally, Findings 23 through 29 relate to events after 2004. On this issue, the Trial Court ruled that this information would not be considered for the purposes of determining whether or not the elements of adverse possession had been satisfied:

> I won't consider it for any substantive evidence as to whether or not this was adverse or hostile, those factual elements, as opposed to whether or not the witness is being truthful.

TP 165-166. Title vests automatically in the adverse possessor if all the elements are fulfilled throughout the statutory period. *El Cerrito, Inc. v. Ryndak,* 60 Wash.2d 847, 855, 376 P.2d 528 (1962) ("When real property

has been held by adverse possession for 10 years, such possession ripens into an original title."). Title acquired through adverse possession cannot be divested by acts other than those required to transfer a title acquired by deed. This rule was articulated in *Mugaas v. Smith*, 33 Wn. 2d 429, 206 P. 2d 332 (1949). It is unclear why these findings were made and. they certainly have no bearing on the issue of whether adverse possession occurred.

VI. CONCLUSION

So, what is the consequence if the Trial Court's Findings cannot be sustained. This is an adverse possession claim. The claim is based on a 10 year statute of limitations which requires the true owner to act within the 10 year period to enforce that owner's rights against an adverse possessor or automatically lose title to that adverse possessor. It is important to recall that the Plaintiff does not bear the burden of proving that the "true owner" had actual notice of the adverse use.

"A claimant can satisfy the open and notorious element by showing that the claimant used the land such that any reasonable person would have thought he owned it." *Riley v. Andres*, 107 Wash.App. 391, 396, 27 P.3d 618 (2001). Hostility requires "that the claimant treat the land as his own as against the world throughout the statutory period." *Chaplin v. Sanders*, 100 Wash.2d 853, 860–61, 676 P.2d 431 (1984). "[I]f the use of another's land is open, notorious and adverse, the law presumes knowledge or notice in so far as the owner is concerned." *Hovila v. Bartek*, 48 Wash.2d 238, 241–42, 292 P.2d 877 (1956). However, it is clear that if the Mckenzies

regularly saw the Disputed Strip as they testified, they could not possibly have failed to note the pampas grass.

Mr. Ferguson's description of his activities in the Disputed Strip on and after 1994 is TP 142:16 – 146:1. Mrs. Ferguson's description of her activities after her relationship with Mr. Ferguson commenced are described at TP 177-182. After 1994 through 2004, the Fergusons used the Disputed Strip as any owner would use a yard.

This can be compared to the nature and scope of possession deemed by Washington Courts to satisfy the elements of an adverse possession claim:

> To establish adverse possession, the claimant must show possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile for the 10-year statutory period. *ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989)* (citing *Chaplin v. Sanders,* 100 Wn.2d 853, 857, 676 P.2d 431 (1984)); RCW 4.16.020. The party claiming adverse possession bears the burden of proving each element. *ITT Rayonier,* 112 Wn.2d at 757, 774 P.2d 6. Adverse possession is a mixed question of law and fact: whether the essential facts exist is for the trier of fact, but whether the facts constitute adverse possession is for the court to determine as a matter of law. *Peeples,* 93 Wn.2d at 771, 613 P.2d 1128.
>
> Citing *Anderson v. Hudak* and *Hunt v. Matthews,* the Bartmesses first argue that Lingvall did not prove hostility because she did not "do everything a true owner could have done" with the land. *Anderson v. Hudak,* 80 Wn. App. 398, 907 P.2d 305 (1995); *Hunt v. Matthews,* 8 Wn. App. 233, 505 P.2d 819 (1973), *overruled on other grounds by Chaplin,* 100 Wn.2d 853, 676 P.2d 431. They contend that all Lingvall did was plant a few small trees and keep the grass and weeds down. They suggest that she could have built a fence.

> The Bartmesses misconstrue the statements in *Anderson* and *Hunt*. The element of hostility does not *require* that a person do everything an owner could do with the land. Instead, when a claimant does everything a person could do with a particular property, it is simply *evidence* of the open hostility of that claim. *Anderson*, 80 Wn. App. at 403, 907 P.2d 305; *Hunt*, 8 Wn. App. at 237, 505 P.2d 819. Hostility "requires only that the claimant treat the land as his own as against the world throughout the statutory period." *Chaplin*, 100 Wn.2d at 860-61, 676 P.2d 431. The nature of possession is determined objectively by the manner in which the claimant treats the land. *Chaplin*, 100 Wn.2d at 861, 676 P.2d 431.
>
> Here, Lingvall planted two flowering plums and pine trees in the triangle. She and her husband cleared away brush and wild shrubbery. They landscaped, mowed, and maintained the area continuously and exclusively from at least 1986 to December 1997.
>
> But relying on our decision in *Anderson*, the Bartmesses argue that planting trees without maintaining them is not enough to establish adverse possession. *See Anderson*, 80 Wn. App. at 404, 907 P.2d 305. *Anderson* is distinguishable because the claimants presented no evidence, other than planting the trees, to establish hostility. *Anderson*, 80 Wn. App. at 404, 907 P.2d 305. And we recognized in *Anderson* that claiming, maintaining, and occupying the land around trees is evidence of hostility. *Anderson*, 80 Wn. App. at 404, 907 P.2d 305 (*citing Otto v. Cornell*, 119 Wis.2d 4, 349 N.W.2d 703, 706 (1984)). Lingvall planted the trees, landscaped, mowed, and maintained the area around those trees. Thus, the trial court did not err in concluding that her possession of the triangle was hostile.

Lingvall v. Bartness, 97 Wn. App. 245 at 253, 254 (*Emphasis in original*).

> The Andres first argue that the Rileys did not possess the disputed strip in an open and notorious manner. They

argue that the Rileys did nothing to establish possession up to a clearly defined boundary line, such as planting a row of trees, mowing grass up to a line, or building a fence. But adverse possession does not require establishing a clearly demarcated line. *Lloyd v. Montecucco*, 83 Wn. App. 846, 853-54, 924 P.2d 927 (1996). The court need not find a "blazed or manicured trail" establishing the disputed boundary; rather, the court may project a line between objects where it is reasonable and logical and the claimant's use of the land was open and notorious. *Lloyd*, 83 Wn. App. at 854, 924 P.2d 927. Neither neighbor built a fence because covenants prohibited fences near the fairway. But the Rileys landscaped and maintained the property up to the point where the Gaults' landscaping began. And the line between the out-of-bounds marker and the point-of-curve marker is a logical boundary, as these stakes marked the line the Rileys and the Gaults seemed to recognize based on their use of the land. Thus, the claimed boundary line is not unreasonably indefinite.

The Andres also contend that the Rileys' landscaping was not open and notorious use. A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it. *Anderson v. Hudak*, 80 Wn. App. 398, 404-05, 907 P.2d 305 (1995). Planting trees without maintaining or cultivating them is not open and notorious use. *Anderson*, 80 Wn. App. at 405, 907 P.2d 305. But, according to the Rileys, they did more than plant trees and shrubs. After planting several rhododendrons and other bushes in 1968, the Rileys maintained the landscaping on the strip, at least until 1993. They watered and pruned the plants, spread beauty bark, and pulled weeds. And a party who claims by adverse possession must show that its use is that of a true owner, given the lands' nature and location. *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). Here, landscaping was the typical use for land of this character.

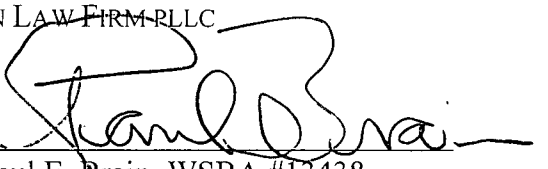
Riley v. Andres, 107 Wn. App. 391 at 396, 397.

The simple fact of the matter is that first Mr. Ferguson and then both Mr. and Mrs. Ferguson continuously used the disputed strip in a fashion which "was the typical use for land of this character" for ***15 years before*** becoming aware of the McKenzies' claim of ownership.

Accordingly, the Appellants respectfully submit that this Court should reverse the decision of the Trial Court and remand with direction to enter judgment in favor of Appellants.

DATED this 30th day of March, 2015.

BRAIN LAW FIRM PLLC



By: _____
Paul E. Brain, WSBA #13438
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of March, 2015, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

Counsel for Respondents:

Gary T. Chrey	X	Hand Delivery
Michael D. Uhlig		U.S. Mail
Shiers Law Firm LLP		Facsimile
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Port Orchard, WA 98366		

Counsel forRespondents:

Kenneth W. Masters	X	Hand Delivery
Shelby Lemmel		U.S. Mail
Masters Law Group, P.L.L.C.		Facsimile
241 Madison Avenue North	X	Email
Bainbridge Island, WA 98110		

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of March, 2015, at Tacoma, Washington.

Kim Middleton

Appendix 1

☐ STATE Exhibit No. D 12

☐ PLAINTIFF ☒ DEFENDANT

☐ PETITIONER ☐ RESPONDENT

☐ OTHER _____

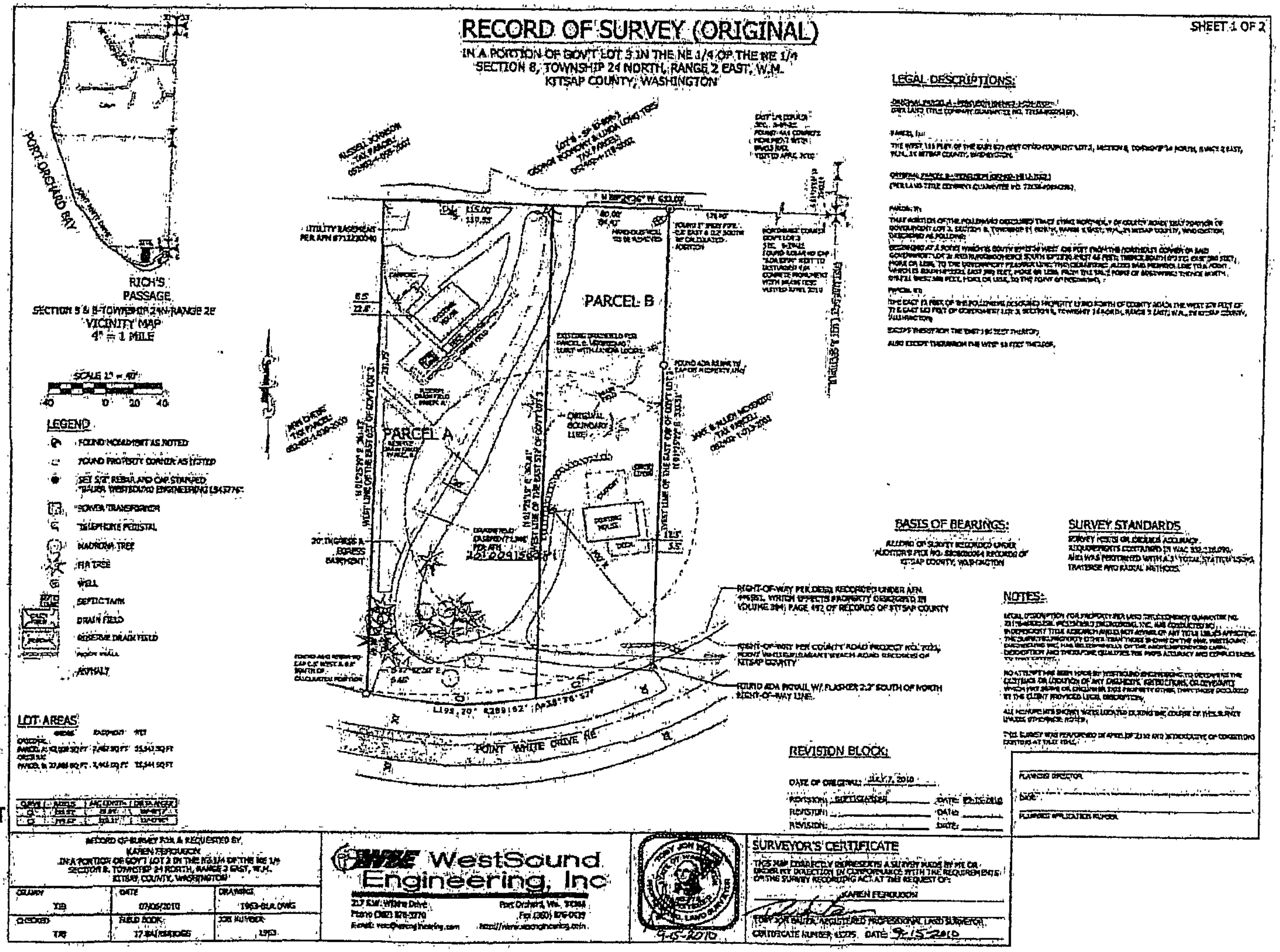
Case No. 11-2-01252-4

FERGUSON VS McKENZIE

[X] Admitted [ ] Refused
[ ] Withdrawn [ ] Not Offered

Date of Court's Ruling: 06/04/14

000712

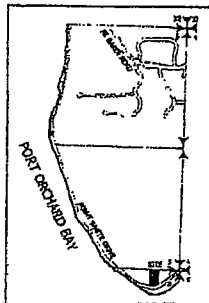


CITY OF
BAINBRIDGE ISLAND
SEP 15 2010
DEPT OF PLANNING &
COMMUNITY DEVELOPMENT

EXHIBIT
012

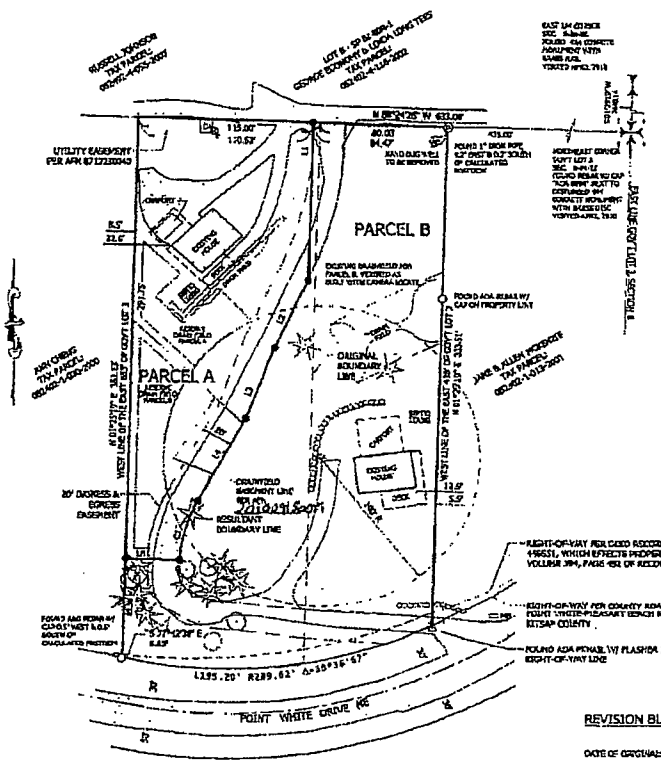
RECORD OF SURVEY (RESULTANT)

IN A PORTION OF GOV'T LOT 3 IN THE NE 1/4 OF THE NE 1/4
SECTION 8, TOWNSHIP 24 NORTH, RANGE 2 EAST, W.M.
KITSAP COUNTY, WASHINGTON



RICH'S PASSAGE
SECTION 5 & 8-TOWNSHIP 24N-RANGE 2E
VICINITY MAP
4" = 1 MILE

SCALE 1" = 40'
40 0 20 40



LEGEND

- FOUND MONUMENT AS NOTED
- FOUND PROPERTY CORNER AS NOTED
- SET 5/8" REBAR AND CAP STAMPED "BAUER WESTSOUND ENGINEERING 154576"
- POWER TRANSFORMER
- TELEPHONE PEDESTAL
- MADRONA TREE
- FIR TREE
- WELL
- SEPTIC TANK
- DRAIN FIELD
- RESERVE DRAIN FIELD
- ROCK WALL
- ASPHALT

LOT AREAS

	GROSS	EASEMENT	NET
RESULTANT PARCEL A	71,272 SQ FT	4,333 SQ FT	66,939 SQ FT
RESULTANT PARCEL B	43,811 SQ FT	8,499 SQ FT	35,312 SQ FT

LINE	BEARING	DISTANCE
L1	S 01°17'34" W	333.51'
L2	S 87°42'26" E	79.41'
L3	S 01°17'34" W	45.00'
L4	S 87°42'26" E	49.32'
L5	N 88°24'26" W	23.09'

CURVE	RADIUS	ARC LENGTH	DELTA ANGLE
C1	289.62'	1295.20'	256°36'47"

LEGAL DESCRIPTIONS:

[illegible]

[illegible]

BASIS OF BEARINGS:

RECORD OF SURVEY RECORDED UNDER AUDITOR'S FILE NO. 8606130004 RECORDS OF KITSAP COUNTY, WASHINGTON

SURVEY STANDARDS

SURVEY MEETS OR EXCEEDS ACCURACY REQUIREMENTS CONTAINED IN WAC 332-130-090, AND WAS PERFORMED WITH A 3" TOTAL STATION USING TRAVERSE AND RADIAL METHODS.

NOTES:

1. LEGAL DESCRIPTION FOR PROPERTY PER LAND TITLE COMPANY GUARANTEE NO. 7216-8904838, WESTSOUND ENGINEERING, INC. HAS CONDUCTED NO INDEPENDENT TITLE RESEARCH AND IS NOT AWARE OF ANY TITLE ISSUES AFFECTING THE DEPICTED PROPERTY OTHER THAN THOSE SHOWN ON THE PLAT. MONUMENTS ESTABLISHING THIS SURVEY WERE SOLELY BASED ON THE ABOVE REFERENCED LEGAL DESCRIPTION AND THEREFORE ONLY PERTAIN TO ANY ADJACENT AND CONFLICTING TO THAT EXTENT.

2. NO ATTEMPT HAS BEEN MADE BY WESTSOUND ENGINEERING TO DETERMINE THE EXISTENCE OR LOCATION OF ANY EASEMENTS, RESTRICTIONS, OR COVENANTS WHICH MAY BE EXISTING. THIS PROPERTY OTHER THAN THOSE DISCLOSED BY THE ABOVE MENTIONED LEGAL DESCRIPTION.

3. ALL MONUMENTS SHOWN HERE WERE SET DURING THE COURSE OF THIS SURVEY UNLESS OTHERWISE NOTED.

4. THIS SURVEY WAS PERFORMED IN APRIL OF 2010 AND IS INDICATIVE OF CONDITIONS EXISTING AT THAT TIME.

REVISION BLOCK:

DATE OF ORIGINAL: JULY 7, 2010

REVISION: SETBACKS DATE: 07-19-2010

REVISION: _____ DATE: _____

REVISION: _____ DATE: _____

PLANNING DIRECTOR _____

DATE _____

PLANNING APPLICATION NUMBER _____

RECORD OF SURVEY FOR & REQUESTED BY
KAREN FERGUSON
IN A PORTION OF GOV'T LOT 3 IN THE NE 1/4 OF THE NE 1/4
SECTION 8, TOWNSHIP 24 NORTH, RANGE 2 EAST, W.M.
KITSAP COUNTY, WASHINGTON

DRAWN	DATE	DRAWING
TJB	07/05/2010	1963-BLA.DWG
CHECKED	FIELD BOOK	JOB NUMBER
TJB	17 BAINBRIDGE	1963

WestSound Engineering, Inc
237 S.W. Wilkes Drive
Port Orchard, WA. 98366
Phone (360) 876-3770
Fax (360) 876-0429
e-mail: mail@westsoundeng.com
http://www.westsoundeng.com

9-15-2010

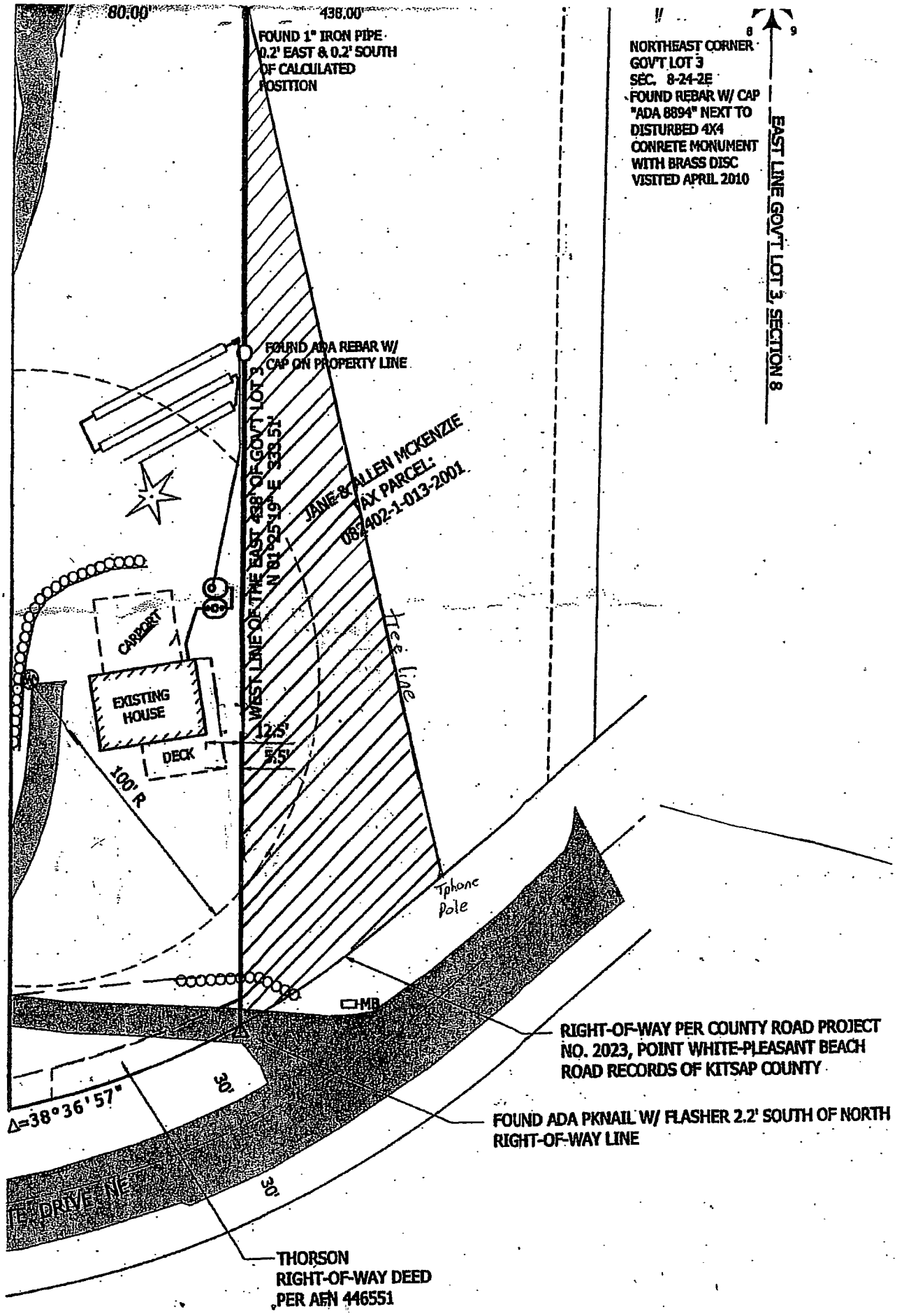
SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF KAREN FERGUSON IN SEPTEMBER, 2010.

TODD J. BAUER, REGISTERED PROFESSIONAL LAND SURVEYOR

CERTIFICATE NUMBER 45776 DATE: 9-15-2010

Appendix 2


80.00'
438.00'
FOUND 1" IRON PIPE 0.2' EAST & 0.2' SOUTH OF CALCULATED POSITION
NORTHEAST CORNER GOV'T LOT 3 SEC. 8-24-2E FOUND REBAR W/ CAP "ADA 8894" NEXT TO DISTURBED 4X4 CONRETE MONUMENT WITH BRASS DISC VISITED APRIL 2010
EAST LINE GOV'T LOT 3, SECTION 8
FOUND ADA REBAR W/ CAP ON PROPERTY LINE
WEST LINE OF THE EAST 438' OF GOV'T LOT 3 N 01°25'19" E 338.51'
JANE & ALLEN MCKENZIE TAX PARCEL: 082402-1-013-2001
CARPORT
EXISTING HOUSE
DECK
12.5'
5.5'
100' R
tree line
Tphone Pole
MB
RIGHT-OF-WAY PER COUNTY ROAD PROJECT NO. 2023, POINT WHITE-PLEASANT BEACH ROAD RECORDS OF KITSAP COUNTY
FOUND ADA PKNAIL W/ FLASHER 2.2' SOUTH OF NORTH RIGHT-OF-WAY LINE
Δ=38°36'57"
30'
30'
TE DRIVE NE
THORSON RIGHT-OF-WAY DEED PER AFN 446551