

FILED
SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No.: 99331-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79754-9-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

RALPH A. HEINE,

Appellant,

v.

TIM S. RUSSELL and ROBERTA A. RUSSELL and their
marital community; JOHN PURDY, a single man; and
NORMAN STOW and SARINA STOW and their marital
community, and WILLIE R. KENDALL, a single man,

Respondents,

and

STEVEN RUSSELL and STEPHANIE COLEMAN,

Defendants.

**RESPONDENT JOHN PURDY'S ANSWER TO RALPH A. HEINE'S
PETITION FOR REVIEW**

Carleton F. Knappe, WSBA No. 5697
Knappe & Knappe, Inc., P.S., Lawyers
90 Avenue A
Snohomish, WA 98290
(360) 568-5597
Attorneys for Respondent John Purdy

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I. INTRODUCTION

Respondent John Purdy acquired his residential property in 1999 by Statutory Warranty Deed and said conveyance was together with a description of an easement across a 30' wide parcel extending to the County road to the south, recorded Snohomish County Auditor's File No. 9904020377. **CP 635-674**

In 2016, Purdy received a Quit Claim Deed which conveyed the owner's interest in said 30' wide strip, recorded Snohomish County Auditor's File No. 201611100685. **CP 843-866**. Prior to 2016, Purdy shared non-exclusive easement rights with his neighbors, including Appellant Ralph Heine, and the other parties to this action: the Russells, the Stows, and Kendall, for use by ingress, egress and utilities.

Within the easement parcel was an access road located to the westerly side of this parcel. To the east side of the access road, water, electric and telephone utilities were located and served the neighborhood. All of the existing access and utility uses were non-exclusive and shared by all of the parties consistent with the easements serving their own residential properties.

Heine sued Purdy as well as the Russells, and the later the Stows and Kendall, seeking to extinguish their easements in the easterly portion of the 30' wide easement way abutting his residential property. Heine also sought to extinguish Purdy's accessing utility rights in use and when he acquired actual title of the property in 2016.

Heine's adverse possession claims were rejected by the Hon. Eric Z. Lucas in the Snohomish County Superior Court action, and awarded Purdy attorneys' fees and costs pursuant to RCW 7.28.083(3).

The unpublished opinion of the Court of Appeals affirmed the Snohomish County Superior Court in all respects applying well-established law on adverse possession and awarded Purdy additional attorneys' fees under RCW 7.28.083(3) or RAP 18.1 and RAP 18.1(j)). The Court of Appeals denied Heine's motion to publish the Court of Appeals opinion.

II. ISSUES PRESENTED FOR REVIEW

The issue presented by Heine as to Purdy is whether the Court should accept review of the decision of the Court of Appeals that applied the facts that pertained, applied the legal precedents of well-established legal theory, and did not overrule any precedent of this Court or any precedent of the Court of Appeals, nor was any noteworthy substantial public interest identified.

III. STATEMENT OF THE CASE

The parties all shared use of an easement area identified by Snohomish County as 242nd Drive SE for ingress, egress and utilities. In 2016, Purdy became the owner of the 30' easement parcel at which time his previous rights as a dominant holder of non-exclusive easement rights merged into his ownership – continuing to be subject to the easement rights of the Russells, the Stows, Kendall, and Heine.

As one proceeds north on 242nd Drive SE, the first parcels of parties to this action are the properties of Russell to the west and Heine to the east across from each other. Continuing north next are the Stows' property to the west and Kendalls to the east across from each other. At the end of the access road, an easement area is the residential property of John Purdy.

Next are the Stows' property to the west, and Kendall to the east – also across from each other.

At the end of the access road is the residential property of John Purdy.

In Heine's statement of the case, it is stated on page 9 as follows:

“66. The court ruled that if the Russells ever decide to use the entire 30-foot-wide strip for ingress and egress, Heine must demolish his front yard by removing all landscaping materials from the area at his expense. CP 350-51.”

This statement may be what Heine feared but is not accurate.

What is stated on the Order Granting Tim and Roberta Russell's Motion for Partial Summary Judgment, at Page 2, Paragraph 4, is as follows:

“4. The Russells are entitled, in their discretion, to develop and improve the full extent of the Easement for normal means and modes of access and egress, including motor vehicles, bicycles, pedestrian use, and other similar uses that would normally be made of a driveway or roadway leading to and from a single family residence.”

At Page 9, Paragraph 9, states as follows:

“9. Plaintiff Heine is entitled to leave the plants, shrubs, paving, and other landscaping materials he or his predecessors have placed within the Easement until such time as the Russells decide to expand and improve the area within the Easement beyond the boundaries of the existing gravel road. At that time, if the materials Heine or his predecessors have placed within the Easement would impede or interfere with the Russells’ planed use of the Easement, Heine is obligated to promptly remove those items and materials at his own expense.”

A. Express Easement in Favor of Heine, Kendall, Russells, Stows, and Purdy, 2016.

In 1999, John Purdy required residential property from the Howlands and in addition to the property conveyed to him for ownership, the transfer was together with a 30’ wide parcel that was an easement. Appendix A, Parcel D, at page 2 of Statutory Warranty Deed. This easement was not exclusive and was subject to the easements for ingress, egress and utilities existing in other property owners which rights now are held by the Stows, the Russells, Heine and Kendall. Purdy now owns said easement parcel. Appendix B.

The initial easement rights were created in 1966 by the then owners of this 30’ parcel, Donald and Mary Wagner. The strip of land is described as follows:

A strip of land 30 feet in width, extending from the Florence Acres County Road, the easterly boundary of which strip begins at a point on the northly [sic] boundary of said road, which is 120 feet westerly from the east line of the northeast ¼ of the southwest ¼ of Section 33, Township 28 North, Range 7, E.W.M., which said point is also the southwest corner of the May Carlson Tract, thence said 30 foot strip continuing northerly parallel to the east line of said subdivision, a distance of 320 feet.

CP 700 The document goes on to state:

For and in consideration of the mutual benefit to be derived therefrom, do hereby declare, establish, and create a non-exclusive easement for ingress, egress, and utilities over, under, along and across the above described property.

Said easement is appurtenant to and for the benefit of Gaylord A. Allpress and Virta E. Allpress, his wife, together with their successors and assigns, owners of the adjacent property to the above described, conveyed by statutory warranty deed, filed under Auditor's File # 1427591, November 2, 1960, records of Snohomish County, Washington.

Grantors do hereby grant and convey to the present and future owners of said adjacent property, the right to use said easement for the purposes hereinbefore stated.

It is true that even before 2016 that others in the neighborhood treated Purdy as the owner of the property upon which the access road and utilities were located.

B. Road, Utilities and Other Uses of Easement Area.

The access road is located in the west portion of the easement area between the properties of Heine and the Russells. Water, electric and telephone utilities are located easterly of the gravel access road. In the area east of the access road are trees, landscaping, and parking areas in front of the residences: in particular, Kendall and Heine, but there are no permanent or obstructive improvements in the area east of the gravel road.

C. Westerly Portion of Easement Area.

The road serving the neighborhood with access was maintained by all of the property owners as access to their respective properties. Purdy shared with other owners in the neighborhood in maintaining the roadway and providing

supplies and equipment, in addition to some of the manpower to maintain this access.

D. Use of Eastern Portion of the Easement Area.

Located in the area east of the access road are the utilities serving the neighborhood shared by all of those with non-exclusive easement rights. No demand has been made by Purdy or other property owners to “open up” the easement area such as for widening of the road, establishing new utilities, for creating sidewalks, curbs or gutters, or other such use of easement development that could be anticipated. There is also no evidence to establish that Heine, in particular, was recipient of a demand to remove landscaping or any other use to which Heine or his predecessors had put to use of the area east of the gravel road.

IV. STANDARD OF REVIEW

The factors to be considered as to whether the Supreme Court should accept review of the decision by the Court of Appeals is set forth in RAP 13.4(b), which sets forth the factors to be considered in whether the review will be accepted or not:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

V. ARGUMENT

When considering the facts and particulars applied to this case there is not any conflict with the Court of Appeals decision:

1. With any Supreme Court decision;
 2. With any other decision of the Court of Appeals;
 3. There are no State Constitutional issues asserted; and
 4. The Petition does not set forth any issue of substantial public interest.
- A. Heine's adverse possession claim – conflict or with precedent.

While Washington law recognizes the doctrines of adverse possession and easement in the adverse possession context, the law is well settled over the years. It is clear that easement rights can be extinguished in Washington as against other property owners. However, the element of “hostility” necessary to extinguish an easement is a high standard. (*Thompson v. Smith*, 59 Wn.2d 397, 367; P.2d 798 (1962)). The *Thompson* case involved a fee owner of property and makes it clear that such things as a lawn, a paved driveway, fences in a garden (all as Heine alleges were established by the Styles use when they owned the property adjacent to the easement area and uses made in the easement area) are not hostile or adverse enough to arise to the level of adverse possession to defeat the rights of the dominant property rights holders, i.e., those with easement rights both in use and not as yet developed. At the time of the Styles residency, Purdy was a dominant holder of non-exclusive easement rights for ingress, egress and utilities just as were the other parties that Heine has made claim against in this action. It was only in 2016 when Purdy became the full owner and was therefore a servient property holder as to those with established easement interests.

The hostility element of adverse possession as to extinguishment of easement rights requires that as against the property owner there is a demand for

use that is refused and/or there is such an improvement on the property that amounts to an impediment of the easement rights, such as ingress and egress that has existed for the ten year statutory period. *Cole v. Laverty*, 112 Wn. App. 180, 185; 49 P.3d 924 (2002). In the case of Heine, he is seeking to extinguish easements of all of the holders of easement rights with the other non-exclusive easement holders with rights in the same area. He is seeking to hold these rights exclusively in this 30' wide area: the use and rights of which he now shares with the other non-exclusive easement holders. Heine's claim appears to be that his uses exceed the acceptable easement uses and limitations that apply to the property in question and therefore shall become exclusive. See *Timberlane Homeowners Ass'n. v. Brame*, 79 Wn. App. 303; 901 P.2d 1074 (1995).

Nothing in the factual record indicates any assertion of adverse rights or hostility sufficient to extinguish mutual non-exclusive easement rights as against the other dominant easement holders. It was only then that Heine asserted resistance to expanding use of the easement way consistent with easement rights of record or objected to "opening" of the easement. The ten year constant period of adversity and other elements, including the hostility element, would not have been achieved by Heine as this action was commenced before the ten-year period of his own occupancy and use. He has asserted that his predecessors completed adverse possession and extinguished the easement rights to the area in front of his property not as yet developed.

At no point was Purdy impeded in the use of the easement area nor were permanent improvements set in place to obstruct his access until, again, at the

time when Heine started to assert such adversity and hostility in suing Purdy and the others included in the Snohomish County Superior Court action.

Even in light most favorable to Heine, use of the easement area by Heine and his predecessors in title did not arise to the dignity of hostility against the other easement holders nor against the later ownership post 2016 of Purdy. The dismissal of Heine's adverse possession claim in the Snohomish County Superior Court proceeding to extinguish his neighbors' easement rights was proper as was the ruling and decision of the Court of Appeals.

B. Issues of Substantial Public Interest.

The decision of the Court of Appeals did not set forth a finding of any novel issues or the breaking of precedent from well-established case history in the areas of adverse possession relative to extinguishment of easements. Such was all so stated in the declination of the Court of Appeals to publish their opinion.

C. Purdy should be awarded attorneys' fees as per RCW 7.28.083(3) and RAP 18.1(j).

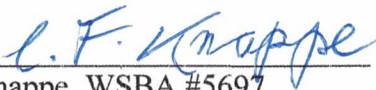
If this Court does not accept Heine's Petition for Review, Purdy is entitled to additional costs and fees for requiring to respond, according to RAP 18.1(j).

VI. CONCLUSION

Perhaps Heine has misunderstood the evidence or the legal effect of same when applied to the established law applied by the Snohomish County Superior Court and the Court of Appeals. Heine fails to establish any basis under RAP 13.4(b) as grounds for the Washington Supreme Court to accept review and there is no demonstrated public interest that has been presented that would be

constructive to the established body of law on easements and adverse possession of same. Review should therefore be denied.

Respectfully submitted on this 15 day of January, 2021.


C.F. Knappe, WSBA #5697
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Snohomish, WA 98290
knappeandknappe@yahoo.com
Attorney for John Purdy

APPENDIX A

PORTIONS OF THIS
DOCUMENT ARE POOR
QUALITY FOR SCANNING.

EXHIBIT "A"

Parcel A:

Beginning at the intersection of the East line of the Northeast quarter of the Southeast quarter of Section 33, Township 28 North, Range 7 East, W.M., in Snohomish County, Washington, with the North line of Florence Acres County Road;
THENCE North along the East line of said Subdivision to the South Bank of Woods Creek and the Point of Beginning;
THENCE South along the said East line of said Subdivision to a point which is 495 feet North of the North line of the Florence Acres County Road;
THENCE West parallel to the North line of the said County Road 150 feet;
THENCE North parallel to the East line of said Subdivision to the South Bank of Woods Creek;
THENCE Easterly along the South bank of Woods Creek to the Point of Beginning;

EXCEPT all that portion thereof, if any, lying within the certain 30 foot strip described in Deed recorded in records of Snohomish County, Washington, said Deed being recorded in Volume 730 of Deeds, Page 30, under Recording No. 1427591.

Parcel B:

That part of the East one-third of the Northeast quarter of the Southeast quarter of Section 33, Township 28 North, Range 7 East, W.M., in Snohomish County, Washington, lying South of Woods Creek and North of the Florence Acres County Road (Survey 1159), described as follows:

Beginning at a point on the East line of said Subdivision 320 feet North of the point of intersection of said East line with the North boundary line of said Florence Acres Road, the True Point of Beginning;
THENCE continuing North on the East line of said Subdivision (Section line) 175 feet;
THENCE West at right angles 120 feet;
THENCE South parallel with said East line 175 feet;
THENCE East 120 feet to the True Point of Beginning.



Parcel C:

That part of the Northeast quarter of the Southeast quarter of Section 33, Township 28 North, Range 7 East, W.M., in Snohomish County, Washington, lying South of Woods Creek and North of the Florence Acres County Road (Survey 1159) described as follows:

Beginning at a point on the East line of said Section 33, Township 28 North, Range 7 East, W.M., 320 feet North of the point of intersection of said East line with the North line of said Florence Acres Road, at an Iron Survey stake painted red;
THENCE West at right angles 120 feet to an iron survey stake painted red;
THENCE South parallel with the said East Line 13 feet;
THENCE Easterly 120 feet, more or less, to the East line of said Section at a point 20 feet South of the Point of Beginning;
THENCE North along the said East Line 20 feet to the Point of Beginning.

Parcel D:

An easement for roadway over and across the Northeast quarter of the Southeast quarter of that portion of Section 33, Township 28 North, Range 7 East, W.M., described as follows:

A strip 30 feet in width extending Northerly from the Florence Acres Road, the Easterly boundary of which strip begins at a point on the Northerly boundary of said Road which is 120 feet Westerly from the intersection of the East line of the subdivision and the North boundary of the Florence Acres Road, the Easterly boundary of said 30 foot strip continuing;
THENCE Northerly parallel with the East line of said Subdivision a distance of 495 feet to the Northwest corner of the parcel conveyed.

ALL SITUATE in the County of Snohomish, State of Washington.

TAX ACCOUNT NUMBER: 332807-4-017-0005.

PA
W.M.

9904020377

SPECIAL EXCEPTIONS:

6. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

Grantee: Snohomish County Fire Protection District No. 3, a municipal corporation
Purpose: Water storage tank or reservoir
Area Affected: The description contained therein is not sufficient to determine its exact location within the property herein described
Recorded: June 22, 1954
Recording No.: 1102152

Refer to the record for full particulars.

7. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

Purpose: Taking and using water in common with other persons from fresh water spring
Disclosed by: Instrument recorded under Recording No. 1427591
Area Affected: The description contained therein is not sufficient to determine its exact location within the property herein described

Refer to the record for full particulars.

Said Easement contains a covenant to bear equal share of construction, repair or maintenance of said Facility.

8. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

Purpose: Taking and using water from fresh water spring
Disclosed by: Instrument recorded under Recording No. 1331093
Area Affected: The description contained therein is not sufficient to determine its exact location within the property herein described

Refer to the record for full particulars.

Said Easement contains a covenant to bear equal share of construction, repair or maintenance of said Facility.

9. ANY PROHIBITION OR LIMITATION on the use, occupancy or improvement of the land resulting from the rights of the public or riparian owners to use any waters which may cover the land or any part thereof.

10. ANY QUESTION that may arise due to the shifting and changing in the course of Woods Creek.

11. RIGHT TO ENTER SAID PREMISES to make and the right to cut brush and trees which constitute a menace or danger to the electric transmission line located in the street or road adjoining said Premises as granted by instrument:

Recorded: December 19, 1962
Recording No.: 1580149

12. AGREEMENT AND THE TERMS AND CONDITIONS THEREOF:

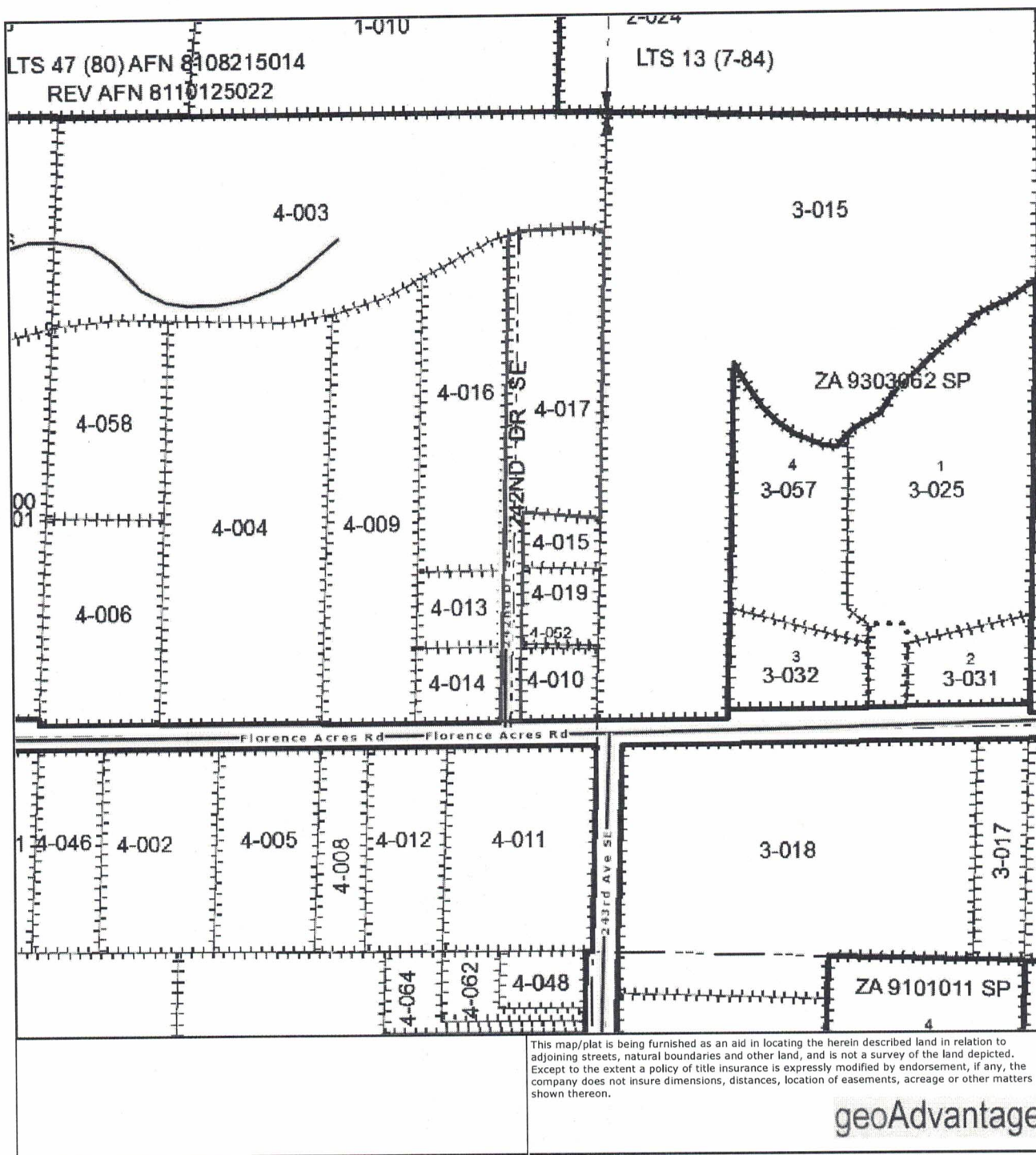
Between: D. R. Wagner
And: Marvin O. Gibson, et al
Dated: December 7, 1976
Recorded: December 14, 1976
Recording No.: 7612140020
Regarding: Maintenance, repair and replacement of the existing private road

HOWLAND/PURDY
EXHIBIT A



Ad
WWW

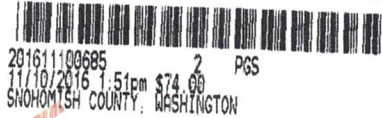
9904020377



APPENDIX B

RETURN ADDRESS:
KNAPPE & KNAPPE, INC., P. S., LAWYERS
90 Avenue A
Snohomish, WA 98290
(360) 568-5597/7511

1119237



No. 9159301 11/10/2016 1:48 PM 10.00
Thank you for your payment.
SIMONE

QUIT CLAIM DEED

THE GRANTOR(S), RALPH BISHOP HOWLAND and MOY M. HOWLAND, husband and wife, for and in consideration of clearing title, conveys and quit claims to JOHN T. PURDY, a single man, the following described real estate, situate in the County of Snohomish, State of Washington, together with all after acquired title of the grantor(s) therein:

That property in the Southeast quarter of Section 33, Township 28 North, Range 7 East, W.M., described as follows:

A strip 30 feet in width extending Northerly from the Florence Acres Road, the Easterly boundary of which strip begins at a point on the Northerly boundary of said Road which is 120 feet Westerly from the intersection of the East line of the subdivision and the North boundary of the Florence Acres Road, the Easterly boundary of said 30 foot strip continuing;

THENCE Northerly parallel with the East line of said Subdivision a distance of 495 feet to the Northwest corner of the parcel conveyed.

Said 30 foot strip further described in Deed recorded in Volume 730 of Deeds, on Page 30, under recording No. 1427591, records of Snohomish County, Washington, more particularly described as follows:

A strip 30 feet in width extending Northerly from the Florence Acres County Road, the Easterly boundary of which strip begins at a point on the Northerly boundary of said road which is 120 feet Westerly from the intersection of the East line of the subdivision, which point is also the Southwest corner of the May Carlson tract (conveyed by recording no. 1331092); thence said 30 foot strip continuing Northerly parallel with the East line of said subdivision, a distance of 320 feet; (the Easterly boundary of which said 30 foot strip parallels the Westerly boundary of those certain tracts conveyed to May Carlson under Recording No. 1331092 and to Leon C. Brown under Recording No. 1511439); said 30 foot strip thence continuing to the Northerly boundary of the tract (Woods Creek), in a meandering course adapting to the surface contour to allow for a switchback descent of the steep south bank of Woods Creek.

Situate in the County of Snohomish, State of Washington.

Assessor's Property Tax Parcel Account Number: 28073300401700 (a portion thereof)

DATED: November 2, 2016

By 
RALPH BISHOP HOWLAND

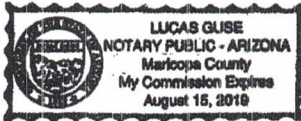
By 
MOY M. HOWLAND

QUIT CLAIM DEED

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this day personally appeared before me Ralph Bishop Howland and Moy M. Howland, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 2nd day of November ~~October~~, 2016.



[Signature]
NOTARY PUBLIC in and for the State of Arizona, residing at 9002 E Riggs Rd Sun Lakes AZ 85248
My commission expires: 08-15-19

Unofficial Document

QUIT CLAIM DEED

KNAPPE & KNAPPE, INC., P.S. LAWYERS

January 15, 2021 - 9:56 AM

Transmittal Information

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Appellate Court Case Title: Ralph A. Heine v. Tim S. Russell, et al.
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