Supreme Court No. 89842-I

SUPREME COURT
OF THE STATE OF WASHINGTON,

YOUNG S. & YONG S. KIM,

Plaintiffs/Appellants,

v.

KYUNG-RAK & JAE SOOK KIM, ET AL.

Defendants/Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSERING PARTY

Respondents Kyung-Rak Kim and Jae Sook Kim ("Market Kim")[1] are submitting this answer.

II. DECISION UNDER CONSIDERATION

The Court of Appeals filed its decision in this case on October 28, 2013. Petitioner filed a motion to publish on November 15, 2013. That motion was denied on December 10, 2013.

III. ISSUES PRESENTED

1. Should this Court review the Court of Appeals' unpublished decision scrutinizing the trial court's findings of fact for substantial evidence rather than *de novo* when the "record here shows the trial court's vivid memory of the trial and the testimony"?

2. Should this Court review the Court of Appeals' legal analysis of the "necessity" factor of implied easements in its decision affirming the trial court's entry of judgment in favor of Market Kim?

3. Should this Court review the trial court's and Court of Appeals rulings related to the prescriptive easement claim?

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[1] As noted by Petitioner, both Petitioners and Respondents are of Korean descent and have the same surname "Kim" (they are not related). With no disrespect to either party intended, both the trial court and Court of Appeals has referred to the Petitioners as "Restaurant Kim" and the Respondents as "Market Kim." (See Slip Opinion No. 69274-7-I at fn. 1, *see* also, RP of Trial at 13).

IV. COUNTERSTATEMENT OF THE CASE

Petitioners make much of the fact that the trial court's Findings of Fact were reviewed for substantial evidence rather than *de novo*, or that they are somehow internally inconsistent. Petitioners do not, however, allege error in the Court of Appeals' finding that "substantial evidence" supported all contested findings.

A. Findings of Fact Where No Error Was Assigned Below.[2]

Respondents Market Kims own a parcel of land located on the corner of Harborview Road and Birch Bay Drive in Birch Bay, Whatcom County ("Market Parcel"). (Finding of Fact ("FF") 1; CP 270)[3]. A small grocery store is operated on the Market Parcel and has been in operation in one form or another for over 50 years. (FF 2; CP 270). Petitioner Restaurant Kims own the adjacent parcel ("Restaurant Parcel"). (FF 3; CP 270). The Restaurant Parcel contains several buildings, but the primary structure is used for the operation of a teriyaki restaurant. (FF 4; CP 270). The Market Parcel and Restaurant Parcel share a parking lot which has one single access over the Market Parcel. (FF 6; CP 271; *See also* Site Conditions Diagram (Ex 32 Tab 23) and Aerial Photo (Ex 32 Tab 26C).

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[2] Below, Petitioners raised 37 Assignments of Error, 14 of which were related to specific Findings of Fact. *See* Brief of App. at 4 to 8. The Findings of Fact cited in this section were neither assigned as error nor argued in the briefing.

[3] The Findings of Fact and Conclusions of Law are Attached herein as Appendix A, and found in the record at CP 269-284.

Both the Market Parcel and Restaurant Parcel were originally owned by the Vogt family. (FF 11; CP 272). In the 1920's, the Market Parcel was known as the "Bay Center Resort," had a gas station pump, a small market, and rented out vacation cottages which were located on what is now the Restaurant Parcel. (FF 12; CP 272). In approximately 1961, the old "Bay Center Resort" structure was torn down and the current market building was built. (FF 13; CP 272). At that time, the structure which now houses the teriyaki restaurant on the Restaurant Parcel did not yet exist. (FF 13; 272).

By way of two deeds, one in 1965 and one in 1966, William Vogt became the common owner of both the Market and Restaurant Parcels. (FF 14, 15; CP 272). This conclusively established "unity of title" for the two parcels at issue in the case. (FF 16; CP 272). In 1972, during unity of title, a rear loading dock was added to the Bay Center Market, as well as some annexes for storage. (FF 19; CP 273). The loading dock and the storage bays were routinely used by market vendors and services to deliver goods and services to the Market Parcel. (FF 20; CP 273). To accomplish this use, vehicles using the loading dock and storage bays on the Market Parcel routinely crossed over what is now the property line into the portion of the parking lot located on what is now the Restaurant Parcel. (FF 20; CP 273). Numerous witnesses testified at trial that automobiles

accessing the Market Parcel have for decades used portions of the parking lot located on the neighboring Restaurant Parcel to maneuver and park. (FF 9; CP 271).

Common ownership of the Market Parcel and Restaurant Parcel ended in 1978, when William and Blanche Vogt quit-claimed the Restaurant Parcel to their daughter, Penny Beebe. (FF 17; CP 272). After this transfer, Market Parcel patrons and delivery vehicles continued to use the Restaurant Parcel parking lot as they did during Vogt's common ownership. (FF 22; CP 273 to 274). Penny and her husband Blair Beebe constructed the building which is now used as the teriyaki restaurant. (FF 21; CP 273). They operated a gift shop and managed the vacation cottages out of the ground floor while they lived upstairs. (FF 21; CP 273). Eventually, the Beebes stopped operating the guest cottages and sold off that portion of the land. (FF 24; CP 274). During the Beebes' ownership, the Restaurant and Market Parcels were used in the same manner as before, using the Restaurant Parcel for ingress and egress of patrons, vendors and services of the Market Parcel. (FF 24; CP 274).

On September 24, 1996, the Beebes sold the Restaurant Parcel to the Petitioners, Restaurant Kim. (FF 25; CP 274).[4] In conjunction with the sale, an express easement was granted to the Restaurant Parcel for

[4] Petitioners assign partial error to Finding No. 25, but never briefed the challenge; the Court of Appeals agreed and treated the Finding as a verity on appeal.

ingress and egress over the Market Parcel by Blanche Vogt, owner of the Market Parcel at the time. (FF 26; CP 274). After this sale, patrons, vendors and service providers continued to use portions of the parking lot of the Restaurant Parcel. (FF 28; CP 275). At the time of the sale to Petitioners, the use of the Restaurant Parcel by the Market Parcel would have been clear to anyone who took the time to notice. (FF 29; CP 275).

On December 15, 1997, Blanche Vogt sold the Market Parcel to the Respondents. (FF 27; CP 274).

At trial, Sung-Soo Kim,[5] son of the Respondents, testified about the importance of the Market Parcel's continued use of the parking lot on the Restaurant Parcel. (FF 32; CP 275 to 276). The parking lot is used for virtually all operations of the market – deliveries of goods, garbage service and patron parking. (FF 32; CP 275 to 276). Other witnesses corroborated Sung-Soo Kim's testimony. (FF 35; CP 276). Sung-Soo Kim also testified about the difficult and costly remodel and development that would be required if the Market Parcel were not allowed to use the parking lot on the Restaurant Parcel. (FF 33; CP 276). The trial court found Sung-Soo Kim's testimony credible. (FF 32; CP 275-276). Based on this the trial court entered the following express and unchallenged finding:

[5] Sung-Soo Kim is sometimes referred to in testimony as "John Kim." (RP Trial at 374).

> "switching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It would also require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially." (FF 33; CP 276).

B. Allegedly Challenged Findings of Fact.[6]

Below, Petitioner expressly assigned error to 14 of the trial court's Findings of Fact (Slip Opinion at 7; Brief of App. at 4 to 8). Respondent argued and the Court of Appeals held that Petitioner did not adequately brief or argue nine of those 14 challenges and thus they were verities on appeal. (Slip Opinion at 8). Regardless, the Court of Appeals engaged in a substantive analysis of those Findings and held that they were nonetheless supported by substantial evidence. (Slip Opinion at 8, fn. 7).

The Court of Appeals then substantively reviewed the remaining adequately challenged Findings of Fact (Findings 8, 23, 31, 34 and 38) for substantial evidence in the record. (Slip Opinion at 8-10). It found

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[6] For unknown reasons, four separately paginated transcripts have been provided as the Verbatim Report of Proceedings. As a result, the VRP consists of at least four different pages which could referred to as "RP at 1." The following references are therefore used:

- "RP Trial at ___" references the four volumes of consecutively paginated trial transcript;
- "RP [date] at ___" references the hearing held on the date referenced in the citation.

substantial evidence for all Findings[7], including Finding 38 for which the Court of Appeals found "overwhelming evidence":

> "granting an easement as depicted and legally described in Exhibit 'A' and 'B' to these findings is commensurate with the evidence presented at trial . . . [and] represents nothing more than what was well-established at trial as the long-term use of the Market and Restaurant Parcels."

(Slip Opinion at 9)

Petitioners do not now substantively challenge these factual analyses by the Court of Appeals. Rather, Petitioners allege that the Court of Appeals erred in reviewing the Findings of Fact under the typical "substantial evidence" standard, arguing that the delay between trial and entry of Findings should cause the Court of Appeals to review them *de novo*. Thus, Petitioner's claim rests solely on the standard of review.

C. Procedural Background.

On January 19, 2007, Respondents filed their answer and cross-claims against Petitioners, alleging causes of action for implied and prescriptive easement. (CP 61 to 65). In November 2007, Petitioners began constructing a fence in the middle of the parking lot on the property line. Upon Respondents' motion, the court entered a preliminary

[7] The Court of Appeals did not reach the challenge to Finding 31 because it was related solely to the prescriptive easement issue which the court did not reach. *See* Slip Opinion at fn. 8.

injunction ordering Petitioners to stop construction and remove the fence posts. (CP 423 to 429).

In December 2009, the case was tried to the bench over a period of three days. (CP 430 to 437 (clerks docket notes)). On December 15, 2009, the court issued an e-mail ruling to the parties. (CP 214, 217).

In January 2012, Respondents' counsel transmitted proposed findings to Petitioners' counsel along with a letter requesting comments and redlines. (CP 215, ¶ 7; CP 266). Counsel for Petitioners did not respond or provide redlines, and a reminder letter was sent in February 2012. (CP 216 ¶ 8; CP 267). On February 28, 2012, Respondents noted a hearing for March 14, 2012 for presentation of Findings, Conclusions and Final Judgment. (CP 183 to 200).[8] On March 1, 2012, Respondents' counsel wrote another letter to Petitioners' counsel requesting redline comments to the proposed findings and conclusions. (CP 216 ¶ 9 and CP 268). The hearing was continued to March 21, 2012 at Petitioners' request. (CP 216 ¶ 10).

On March 15, 2012, Petitioners filed a document entitled "Plaintiffs' Objections to Defendants' Proposed Findings, Conclusions, and Judgment." (CP 201). Rather than proposing redlines or their own

[8] The Findings and Conclusions presented to the trial court in this filing contained several mixed up pages. This was clarified and corrected at the hearing on entry of those Findings and Conclusions. (RP 3/21/13 at 5).

findings of fact, conclusions of law, or judgment, Petitioners only argued "it is highly likely the Court has little or no appropriate memory of [the trial]." (CP 202). This written objection contained a motion for a "new trial." (CP 207).

Respondents provided a substantive reply to the issues raised by Petitioners, (CP 208-213), and a hearing was held on March 21, 2012 on the entry of the proposed Findings, Conclusions and Judgment. (*See Generally* RP 3/21/13). After argument, the court entered the Findings of Fact, Conclusions of Law and Final Judgment in the same form as proposed by Respondents. (CP 447 (clerks notes). Because of a scheduling issue raised by Petitioners' counsel, the court deferred formal entry of the Findings, Conclusions and Final Judgment until April 3, 2012 to allow Petitioners to bring a timely motion to reconsider. (CP 447 (clerks notes); CP 269 (Findings/Conclusions); CP 285 (Final Judgment).

On April 12, 2012, Petitioners filed a motion to reconsider/new trial, noting it for hearing on April 27, 2012. (CP 294-308). The motion was ultimately heard on August 7, 2012. (CP 336 to 338; CP 339 to 341; *See Generally* RP 8/7/12). The trial court denied the motion for reconsideration/new trial that same day. (CP 394 to 395). Petitioners filed a Notice of Appeal on August 30, 2012. (CP 396).

V. ARGUMENT

A. Issue No. 1: The Court of Appeals Employed the Proper Standard of Review for the Findings of Fact.

Petitioners argue that the Court of Appeals erred when it gave the normal level of deference to the trial court's findings of fact, reviewing them for substantial evidence rather than *de novo*. (*See* Pet. For Rev. at 9-10). Petitioners present no Washington authority on this issue, and Respondents could find none either.

Petitioners cite Keller v. US, 38 F.3d 16 (1st Cir. 1994) for the proposition that the delay in entry of findings in this case required the Court of Appeals to review the findings *de novo*. Petitioners' argument ignores the underlying facts of Keller, and the facts of this case.[9] The Court of Appeals noted the stark contrast between Keller and this case, specifically pointing out that Petitioners failed to allege any type of prejudice from the delay. (Slip Opinion at 5-6).

Petitioners also cite for the first time in this Petition, two Florida cases.[10] These too, are inapposite. Both of these cases are based on a Florida court's interpretation of Florida rules of Judicial Administration.

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[9] Below, Petitioners failed to designate the transcript from the March 21, 2012 hearing on entry of Findings, Conclusions and Judgment and make no reference to that hearing in their Opening Brief. Petitioners' counsel was in fact present at that hearing. Respondents provided this transcript to the Court at their own expense. A review of that transcript reveals that the court made express oral findings highly relevant to Petitioners' argument. (RP 3/21/12 at 21 to 28).

[10] Schang v. Schang, 53 So.3d 1168 (2011), and Baker v. Vidoli, 751 So.2d 608 (1999).

Schang, 53 So.3d at 1170. Moreover, they require relief be granted only when a Petitioner can show the delay caused "a conflict or inconsistency between the judge's statements or findings at trial and the ultimate judgment" or "where there is a 'factual finding . . . unsupported by the evidence.'". Id. at 1170.

Here, there are no such defects. The record supports the Court of Appeals holding that the trial court's memory was "vivid" and the findings therefore reliable. The trial court's email ruling and final judgment are consistent despite the gap in time. In over seven pages of transcript, the trial court explained that it had excellent recall of the trial and the testimony. (*See* RP 3/21/12 at 21 to 28). The trial court even said it had a better memory of this trial than most others:

> In this case, I have retained, I think, a fair degree of memory and recollection about the facts, despite the confusion of the names of the parties, except for the identification and designation as Restaurant Kims and Market Kims. Um, and I think my recollection is probably better than it would be in most cases of this type, perhaps, again, because of my familiarity with the property in question. (RP 3/21/13 at 23 to 24).

The trial court stated that it had spent the better part of a day going over the documents, the pleadings submitted in support of and in opposition to the entry of findings, conclusions, and judgment as well as portions of the trial transcript. (RP 3/21/13 at 24). The court stated that

after that review "many of the details were still vivid in my memory." (*Id.*).

The trial court outlined that it also reviewed the trial exhibit notebooks as well as all the other materials assembled in the court's own file. (*Id.* at 24 to 25). The court stated that in reviewing those documents:

> I was able to track very well from beginning to end [of] the trial, including the history of the properties in question here, um, and as I said, I had a pretty vivid recollection of those properties anyway just from my exposure to them for so many years. (RP 3/21/13 at 25, lines 1 to 6).
>
> . . . .
>
> [I]n my opinion, I have sufficient independent recollection of the facts of this case that was refreshed, also by review of my notes, the materials and all of the records and files, including the transcript. (RP 3/21/13 at 26, lines 19 to 23).
>
> And probably it is just as true now as it was then and it will be forever more than I will still think of the parties as the Market Kims and the Restaurant Kims. So that – it's not so much a confusion of the parties as it is finding a convenient pneumonic [sic] device to keep them separate in my mind. (RP 3/21/13 at 26 to 27, lines 24 to 5).
>
> . . . .
>
> **I have reviewed carefully the proposals and I am willing at this time to sign the proposed documents as submitted by Mr. Dworkin.** (RP 3/21/13 at 27, lines 8 to 11) (emphasis added).

None of the cases cited by Petitioner come even close to matching the record in this case of unambiguous statements from the trial court

detailing the extent of the trial court's memory. The crux of the Keller decision as well as the two Florida cases cited by Petitioner is to emphasize the importance of affording deference to a trial court's findings when they are proven reliable:

> "We consider it critically important that appellate attention remain focused on ensuring that trial court findings, despite inordinate decision-making delay, not be squandered unless their reliability has been undermined."

Keller, 38 F.3d at 21.

The Court of Appeals appropriately gave deference to the trial court's findings, reviewing only for substantial evidence, because the record demonstrates the impeccable reliability of the findings. The Court of Appeals correctly relied heavily on the trial court's announcement of the extent of its memory when it denied Petitioner's challenge on this issue. The Court of Appeals correctly held that Petitioners also failed to demonstrate any prejudice. Petitioner's claim fails because "The record here shows the trial court's vivid memory of the trial and the testimony. The trial judge refreshed his memory by reviewing the trial transcripts, his trial notes, admitted exhibits, the parties' trial notebooks, and court files" (Slip Opinion at 6-7).

B. Issue No. 2: The Court of Appeals did not Err in its Analysis of the "Necessity" Factor of Implied Easements.

Reviewing whether an implied easement exists requires analysis of three "factors:" (1) former unity of title and subsequent separation; (2) prior apparent and continuous quasi-easement for the benefit of one part of the estate to the detriment of another, and (3) a certain degree of necessity for the continuation of the easement." (Slip Opinion at 10, citing, Adams v. Cullen, 44 Wn.2d 502, 505, 268 P.2d 451 (1954), MacMeekin v. Low Income Hous. Inst., Inc., 111 Wn. App. 188, 195, 45 P.3d 570 (2002)). The first factor – unity of title—is required; the remaining two factors are "aids to construction in determining the cardinal consideration—the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other." (Slip Opinion at 10-11, citing, Adams v. Cullen, 44 Wn.2d at 505-06).

Petitioners conceded below that they had no substantive challenge to (and the Court of Appeals found overwhelming record evidence of) the first two factors. (Slip Opinion at 11-12). Petitioners agreed that their only true substantive challenge to the trial court's judgment imposing an implied easement on the Restaurant Parcel arose out of the "necessity" factor. (Slip Opinion at 12, fn. 11). Petitioners' argument boils down to

timing: they argue that the time of the "necessity" to be evaluated was in 1978 at the time of subsequent separation of title, not the time of trial. (Pet. For Rev. at 8; see also, Slip Opinion at 17).

Petitioners only superficially argued this issue in their opening brief, citing absolutely no authority to support their proposition. (See Slip Opinion at 17, citing, Appellant's Br. At 23-24). In their reply, Petitioners cited Hellberg v. Coffin Sheep Co[11] which the Court of Appeals quickly distinguished. (Slip Opinion at fn. 14). After oral argument, Petitioners submitted a statement of additional authorities citing the Court of Appeals decision in Veach v. Culp, 21 Wn. App. 454, 458-59, 585 P.2d 818 (1978), which at first glance appears to address the issue in dicta.

The Court of Appeals explained in detail why Petitioners' citation to Veach v. Culp was unpersuasive. (Slip Opinion at 17-19). The Court of Appeals went on to cite several cases where the necessity factor was measured at the time of trial, including the seminal Adams v. Cullen.[12] These cases both pre-date and post-date the Court of Appeals opinion in Veach which Petitioners cite.

The Court of Appeals noted that the Veach opinion cited by Petitioners was overruled by this Court in Veach v. Culp, 92 Wn.2d 570,

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[11] Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 668, 404 P.2d 770 (1965).
[12] The Court of Appeals cited Fossum Orchards v. Pugsley, 77 Wn. App. 447, 892 P.2d 1095 (1995), and, Bays v. Haven, 55 Wn. App. 324, 329, 777 P.2d 562 (1989).

599 P.2d 526 (1979). (Slip Opinion at 17-18, fn. 14). This Court held, without limitation, that "The decision of the Court of Appeals and the judgment of the trial court are reversed." Petitioners' use of the lower court's opinion in Veach v. Culp as authority is at best, questionable.

Limiting the scope of the necessity factor to a snapshot in time on the date of separation of title rather than a review of all the circumstances as a whole up to the current date is illogical when viewed in the context of the doctrine of implied easements. The rationale espoused in Adams v. Cullen and its progeny instruct us that the purpose of the "necessity" element is to balance the interests of the alleged dominant estate against those of the alleged servient estate. The higher the necessity at the time of demanding the easement, the more likely the easement will be implied. The cases analyzing claims of implied easements are in accord with this analysis. Adams, 44 Wn.2d 502; Bays v. Haven, 55 Wn. App. 324; McPhaden v. Scott, 95 Wn. App. 431, 438, 975 P.2d 1033 (1999).

All of the Petitioners' focus on the "necessity" factor must be tempered by the two rules limiting its overall relevance in the implied easement analysis. First, the "necessity" factor is not an absolute requirement; instead, it is only an "aid to construction" of implied easements. Adams v. Cullen, 44 Wn.2d at 505-06. Second, "necessity" and prior use of the land are counterbalancing factors. Thus, the stronger

the evidence of prior use during common ownership, the less evidence of necessity is required, and vice versa.[13] Adams, 44 Wn.2d at 455, *citing Restatement, Property*, § 476, comment g. p. 2983, *et seq.* As a result, contrary to what Petitioner suggests, "no precise definition of necessity can be made." *Id.*

C. Issue No. 3: Should this Court Review The Issues Related to the Prescriptive Easement Claim?

At trial, Respondent Market Kims advanced two theories of easement—implied and/or prescriptive. The trial court ruled in their favor on both theories. The area and scope of the easement requested by Respondents and ultimately granted by the trial court was not dependent upon the legal theory employed. Respondent Market Kims asked for the same area and scope of easement whether it be by implication or through prescription.

The Final Judgment and its attached exhibits reflect this approach to the case by the Respondents as well as the trial court. (See, CP 285-293 (Final Judgment, attached as Appendix B)). The Final Judgment contains no mention of whether the easement being created thereby is based on a theory of prescription or implication. Instead, those details are properly left to the findings and conclusions.

[13] Petitioners did not challenge (at trial or on appeal) any of the evidence of decades of prior use during common ownership. *See* Section IV *infra.*

Petitioners ask this Court to grant review on the issue of the burden of proof of a prescriptive easement, alleging that the trial court erroneously applied the wrong standard. (Pet. For Rev. at 10-11). In asking for review, Petitioners fail to point out that the Court of Appeals did not even reach this issue.[14]

Petitioners unequivocally conceded at oral argument before the Court of Appeals that if the court were to affirm on the implied easement issue, the prescriptive easement issue becomes immaterial:

> Presiding Judge Lau: "You would agree that if this court adopts the view that the trial court did, that there is an implied easement by use, that we need not reach the prescriptive easement?"
>
> Petitioners' Counsel: "I guess the answer is yes, because I don't think you can decide that the light was red and green...."[15]

Thus, even assuming for argument that there was some error in the trial court's analysis of the prescriptive easement issue, so long as the relief granted the Market Kims in the Final Judgment is fully supported by the implied easement theory, the affirmance by the Court of Appeals was proper and must be upheld. See, Port of Seattle v. Lexington Ins. Co., 111

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[14] See, Slip Opinion at 9, fn. 8.

[15] Excerpt taken from Court of Appeals Oral Argument Hearing, held September 13, 2013, and found at http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20130913

Wn. App. 901, 919-920, 48 P.3d 334 (2002) (upholding ultimate decision of trial court despite error when alternative theory supported judgment).

VI. CONCLUSION

For the reasons stated herein, the Petition for Review should be Denied, and all taxable costs should be awarded to the Market Kims.

RESPECTFULLY submitted this 10th day of February 2014.

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SCANNED 16

FILED

APR - 3 2012

WHATCOM COUNTY CLERK

By: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

YOUNG S. KIM and YONG S. KIM, a marital community, Plaintiff, vs. KAISER INVESTMENTS, INC., an inactive Washington corporation, JOY INVESTMENTS, LLC, a Washington corporation, RAINBOW PROPERTIES, LLC, a Washington corporation, UNIVERSAL MANAGEMENT, INC., a Washington corporation and SABRINA CHAUDHRY, an individual, Defendants/Third-party Plaintiffs, vs. KYUNG-RAK and JAE SOOK KIM, a marital community; DAVE and BONNIE HARKELROAD, a marital community and PETER TORKILD, an individual. Joined Defendants.	NO. 05-2-02841-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW JUDGE IRA J. UHRIG

ORIGINAL

THIS MATTER came on before the Court for a bench trial commencing on December 1, 2009 and testimony and argument having been taken on December 1, 2, 7, and 8, 2009, with the Court having reviewed all pleadings, memorandum, admitted exhibits and records in this case, the Court enters the following Findings of Fact and Conclusions of Law:

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CP- 269

I. FINDINGS OF FACT

The Court enters the following Findings of Fact regarding all claims asserted by both Plaintiff Young and Yong Kim and Joined Defendants Kyung-Rak and Jae-Sook Kim:

1) Joined Defendants Kyung-Rak and Jae-Sook Kim ("Joined Defendants Kim") own real property commonly referred to as the "Bay Center Market" in Birch Bay, Whatcom County Washington. This property is generally located on the corner of Harborview Road and Birch Bay Drive, and is legally described in trial Exhibit 32, Tab 21 (Referred to herein as "Market Parcel").

2) Located on the Market Parcel is a small market which sells groceries, supplies, and other wares. This store has been operated on the Market Parcel in one form or another for over 50 years.

3) Plaintiff Young S. and Yong S. Kim ("Plaintiffs Kim") own real property in Birch Bay, Whatcom County, Washington, which has a Teriyaki restaurant and other buildings located on it. This property is located directly adjacent to the Market Parcel, and is legally described in trial Exhibit 32, Tab 19 (Referred to herein as "Restaurant Parcel").

4) The Restaurant Parcel has several buildings on it. The primary structure is used for the operation of a teriyaki restaurant downstairs with a residence for the owners upstairs. There is at least one outbuilding on the property that is used as residential rental properties, as testified to by Ruth Kim.

5) Exhibit 32, Tab 24, is an accurate survey of existing conditions of the Restaurant Parcel and Market Parcel in September 2008, showing the

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location of the property line, buildings, parking spaces, other improvements.

6) The Market Parcel and Restaurant Parcel essentially share a parking lot. This parking lot has one single access over the Market Parcel, reflected by the easement found at Exhibit 32, Tab 20.

7) The loading dock for the grocery business operated on the Market Parcel is located on the southeast side of the market building, making the only access to the loading dock through the "shared" parking lot.

8) Due to the size of the parking lot, location of the entry, location of the structures surrounding the parking lot, and the location of the property line, the only feasible way for patrons of the market to access the parking spots on the Market Parcel is to drive over a portion of the parking lot located on the Restaurant Parcel.

9) Credible testimony at trial from numerous witnesses including Blair Beebe, James Perry, Gil Brackinreed, Bruce Koch, and Sung-Soo Kim all establish by a preponderance of the evidence that automobiles accessing the Market Parcel use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver and park.

10) The above witness testimony also establishes by a preponderance of the evidence that grocery and market vendors, grocery and market deliveries and services including but not limited to such as garbage and recycling currently use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver, deliver items, park and/or temporarily park to deliver items or perform services.

11) Both the Market Parcel and Restaurant Parcel were originally owned by the Vogt family, who homesteaded a large area of Birch Bay in the late 19th century.

12) In the 1920's the Market Parcel was known as the "Bay Center Resort" and had a gas station pump, a small market, and rented out vacation cottages which were located on what is now the Restaurant Parcel.

13) In approximately 1961, the "Bay Center Resort" structure depicted in Exhibit 32, Tab 26-GG, was torn down and the current structure serving as the Bay Center Market was constructed. At that time, the structure which now houses the teriyaki restaurant was not in existence, as depicted in Exhibit 32, Tab 26-FF.

14) On March 22, 1965, William O. Vogt obtained fee title to the Market Parcel from Sara Vogt, as evidenced by demonstrative Exhibit 32-5 and the deed at Exhibit 32-13.

15) On February 28, 1966, William O. Vogt obtained fee title to the Restaurant Parcel, as evidenced by demonstrative Exhibit 32-5 and the deed at Exhibit 32-14.

16) Thus as of February 28, 1966, the Market Parcel and Restaurant Parcel were in common ownership and had unity of title.

17) This common ownership remained until 1978 when William O. and Blanche Vogt quitclaimed the Restaurant parcel to their daughter, Penny Beebe, wife of trial witness Blair Beebe, as evidenced by Exhibit 32-6 and 32-15.

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18) Testimony, photographic exhibits, and other evidence admitted at trial show that during the period of common ownership from 1966 to 1978, the Market Parcel and Restaurant Parcel were used in a manner that is similar to how they are used now, to-wit: the parking lot was paved and patrons would park at the market building by nosing their cars to the southerly wall of the market building. In order to do so, these cars would drive over the Restaurant Parcel's portion of the parking lot.

19) In Approximately 1972, during common ownership, William O. Vogt added the rear loading dock and annexes to the Market building located on the Market Parcel, which appear as garages or storage bays.

20) Evidence at trial established that this loading dock and the storage bays were routinely used by market vendors and services to deliver goods and services to the Market Parcel. Evidence further established that to do so, vehicles using the loading dock and storage bays were required to cross over portions of the parking lot located on the Restaurant parcel.

21) Shortly after the 1978 transfer of the Restaurant Parcel from William and Blanche Vogt to Penny Beebe, Penny Beebe and her husband Blair Beebe constructed the building on the Restaurant Parcel which is now used as the teriyaki restaurant. The building was originally used as a gift shop. The Beebes lived upstairs, ran the gift shop, and managed the guest cottages to the south.

22) No formal easement was ever executed between William and Blanche Vogt and Penny Beebe to allow the continued use of the Restaurant

Parcel parking lot by Market Parcel invitees. However, such use, as that which occurred during common ownership of the Market and Restaurant Parcel continued.

23) In 1984, a lease was recorded (Exhibit 32-18) wherein William and Blanche Vogt leased the market business to Wolten & Montfort, Inc. 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.

24) The Beebes continued to operate the Restaurant Parcel as a gift shop, eventually eliminating the guest cottages to the south and selling off that portion of the land. During the Beebe's entire ownership of the Restaurant Parcel, the Market Parcel was used in the same manner as described herein, utilizing the Restaurant parcel for ingress and egress of patrons, vendors and services.

25) On September 24, 1996, Penny and Blair Beebe transferred their interest in the Restaurant Parcel to Plaintiffs Kim (Exhibit 32-19). No easement was recorded reflecting the right of the Market Parcel to use that portion of the parking lot located on the Restaurant Parcel.

26) On October 8, 1996 an express easement allowing access over the Market Parcel was granted by Blanche Vogt as owner of the Market Parcel to Plaintiffs Kim as owners of the Restaurant Parcel (Exhibit 32-20).

27) On December 15, 1997 Vogt transferred all interest in the Market Parcel to Joined Defendants Kim.

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28) Testimony at trial, as specifically found above, establishes that patrons, vendors and service providers of the market and Market Parcel continued to use portions of the parking lot located on the Restaurant Parcel for ingress, egress, access, parking and delivery of services and goods.

29) At all times, including the time Plaintiffs Kim purchased the Restaurant Parcel, it was clear to anyone who would take the time to notice that the entire parking area was used by automobiles and delivery vehicles alike in the manner as described herein.

30) Plaintiffs Kim had sufficient information available to them to put them, or any other person, on notice of this use. This use was long-term, apparent, obvious, visible, continuous, open and notorious.

31) Plaintiff Kim, by his testimony and by descriptions of his actions, demonstrated that he did not give permission for the use as described herein, by the Market Parcel and such use was adverse. This adversity is further established by operation of law, that any permission granted by a predecessor such as Beebe is automatically revoked upon transfer of title.

32) Testimony by Sung-Soo Kim, the son of Joined Defendants Kim and who operates and is familiar with the market, testified to the importance of the use of the parking lot on the Restaurant Parcel. The Court finds his testimony credible. He described how merchandise is brought into the market, how the market operates and that use of the loading dock is important to an efficient business. He described the importance of garbage and recycling services accessing this area. He described the importance of customers using

this area to access parking and to park on the Restaurant side.

33) Sung-Soo Kim testified and this Court finds that switching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It also would require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially.

34) If no easement existed in favor of the Market Parcel, the Market Parcel would use all practical use of parking lot on the south side of the building, which would become useful for parking not much more than bicycles. Delivery vehicles and automobiles would be almost completely unable to make any use of the south side of the building.

35) Factual Witnesses at trial testified as to the general area of the Restaurant Parcel parking lot they had historically used to gain access to the Market Parcel. Demonstrative exhibits were used to depict this area.

36) Jeff Vanderyacht, a Professional Engineer with expertise in traffic planning, testified as to the established turning radii of various types of trucks and cars. This testimony demonstrated that historical use of the Restaurant Parcel parking lot was reasonable and necessary to access and use the Market Parcel. Mr. Vanderyacht's testimony is credible and supported by demonstrative and admitted exhibits on the record, including but not limited to Exhibits 35, 36,

37, and 38. The Court finds Mr. Vanderyacht's testimony of what is a reasonable and necessary easement area as reflected in his testimony and markings on Exhibit 35 is a reasonable area for the easement to be located.

37) The areas described at trial by the various fact and expert witnesses as the area of the Restaurant Parcel parking lot that has been historically used is depicted in Exhibit "A" to these Findings of Fact and incorporated herein by Reference. This exhibit was created post trial, but done in light of trial testimony. The area depicted in Exhibit "A" is legally described by metes and bounds in Exhibit "B" as demonstrated by the affidavit of Adam S. Morrow, which is attached thereto. These two exhibits are incorporated herein by reference.

38) The Court finds that granting an easement as depicted and legally described in Exhibits "A" and "B" to these findings is commensurate with the evidence presented at trial. Further, granting such an easement represents nothing more than what was well-established at trial as the long-term use of the Market and Restaurant Parcels.

39) At some point after Plaintiff came into title to the Restaurant Parcel, they constructed a six foot wood privacy fence on the eastern portion of the Restaurant Parcel and metal bollards on eastern portion of the property line abutting the Market Parcel. These improvements are accurately depicted and located in Trial Exhibit 32 Tab 24. They are located within the Easement Area established herein in an area historically used for vehicle and truck turnaround. This Court finds that the fence and bollards will obstruct the use and enjoyment

of the Easement and frustrate the Easement's purpose if allowed to remain, and therefore, they must be removed.

40) The Court reaffirms its findings and rulings made in this case on the record in the issuance of the preliminary injunction and granting of partial summary judgment to the extent they apply to the adjudication of the merits of the case between Plaintiffs Kim and Joined Defendants Kim.

II. CONCLUSIONS OF LAW

Based upon the above express Findings of Fact as well as all evidence admitted at trial, the Court enters the following Conclusions of Law:

IMPLIED EASEMENT

1) The elements for establishing an implied easement by reservation enunciated by the Supreme Court in *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954) and its progeny govern this case, and are satisfied herein by a preponderance of the evidence. The Court concludes Joined Defendants Kim are entitled to an implied easement by reservation, the dominant estate being the Market Parcel and the servient estate being the Restaurant Parcel.

2) The Restaurant Parcel and the Market Parcel were in unity of title when both parcels were owned by William O. Vogt in 1966.

3) The Restaurant Parcel and Market Parcel were subsequently separated when William Vogt quitclaimed the adjoining parcel, the Restaurant parcel to his daughter, Penny Beebe, in 1978.

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4) William and Blanche Vogt retained ownership of the adjacent Market Parcel, until 1997, when the Market Parcel was transferred to Joined Defendants Kim.

5) Prior to the quitclaim deed transfer of the Restaurant Parcel to Penny Beebe, the usage existing between the Restaurant Parcel and the Market Parcel could have been an easement appurtenant to the Market Parcel, had they been separately owned.

6) The use of the Restaurant Parcel by the Market Parcel is reasonably "necessary" to the use of the Market Parcel, as it had been during common ownership by William and Blanche Vogt.

7) The use of the Restaurant Parcel by the Market Parcel was apparent to anyone who would have observed the properties and their use.

8) Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of an implied appurtenant easement running with the land to which the Restaurant Parcel is servient. The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

PRESCRIPTIVE EASMENT

9) Joined Defendants Kim have established all elements necessary to prove a prescriptive easement by a preponderance of the evidence as outlined herein.

10) September 24, 1996, is the date Plaintiffs Kim took ownership to the Restaurant parcel, and as such, is the date the time period to establish a prescriptive easement began to run.

11) Plaintiffs Kim never addressed or denied Joined Defendants Kim's claim for a prescriptive easement in this lawsuit until actual trial, which commenced more than 10 years after September 24, 1996, and as such, the 10 year prescriptive period has been proven by Joined Defendants Kim.

12) Joined Defendants Kim have proven that their predecessors' guests and invitees as well as their guests and invitees' actual and historical use was over a uniform route on the Restaurant Parcel and was used for the uniform purposes of access, ingress, egress, parking and delivery of goods and services.

13) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was open and notorious.

14) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was hostile.

15) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was continuous.

16) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was exclusive as required by the law of prescriptive easements.

17) Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of a prescriptive easement which is appurtenant and runs with the land to which the Restaurant Parcel is servient.

The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

QUIET TITLE

18) The Court concludes that Joined Defendants Kim are entitled to judgment quieting title and granting easements over the Restaurant Parcel as dictated by these Findings and Conclusions.

INJUNCTIVE RELIEF

19) The Previous Preliminary Injunction entered by this Court shall be converted into a Final and Permanent Injunction so that Plaintiffs Kim or their successors are prohibited from constructing or erecting any structure or obstacle which would in any way unreasonably interfere with Joined Defendants Kim's use of the easements established in this case.

20) A Permanent Injunction shall be entered which requires the Plaintiffs to immediately remove the 6' tall privacy fence and metal bollards that are located in the Easement as there is no adequate remedy at law to compensate Joined Defendants Kim for the inability to use this portion of the Easement established herein.

IT IS SO ORDERED this ~~day of this~~ 13 day of March 2012.

JUDGE IRA J. UHRIG

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PRESENTED BY:

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PETER R. DWORKIN, WSBA# 30394
Attorney for Joined Defendants Kim

Copy Received, ~~Approved for Entry~~: QNS

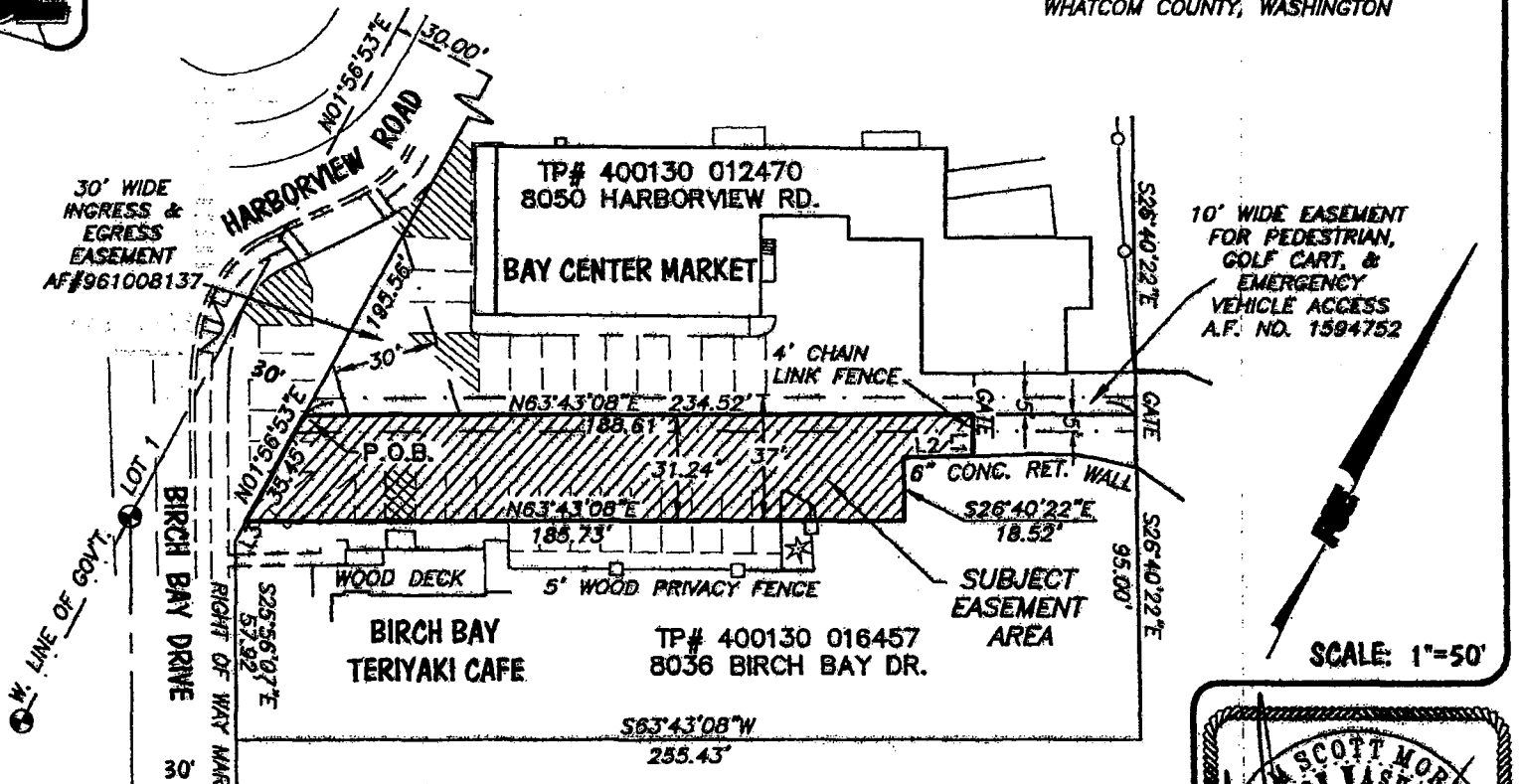
SHEPHERD ABBOTT ALEXANDER

DOUGLAS SHEPHERD, WSBA #9514
Attorney for Plaintiffs Kim

Findings Conclusions 012712 to shepherd

EASEMENT EXHIBIT

SITUATE IN GOVERNMENT LOT 1, SECTION 30, TOWNSHIP 40 NORTH, RANGE 1 EAST, W.M., WHATCOM COUNTY, WASHINGTON



SURVEY NOTES

1) DATA FOR THIS SURVEY WAS GATHERED BY FIELD TRAVERSE UTILIZING ELECTRONIC DATA COLLECTION IN AUGUST 2008.

2) HORIZONTAL DATUM: LOCAL/ASSUMED
BASIS OF BEARINGS: THE MONUMENTED CENTERLINE OF HARBORVIEW ROAD, BEARING N 01°56'53" E, REFERENCE R.O.S. A.F. NOS. 2030701045 & 1990404171.

LINE TABLE

L1	S24°51'32"E	12.16'
L2	S62°03'20"W	19.49'
L3	N01°56'53"E	6.64'

12/12/11 DRAWING: 2008087_svX_EXHIBIT.dwg DRAWN: SJN CHECKED: ASM

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JOHN SCOTT MORROW — STATE OF WASHINGTON — 40525 — REGISTERED PROFESSIONAL LAND SURVEYOR

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EASEMENT DESCRIPTION

THAT PORTION OF GOVERNMENT LOT 1, SECTION 30, TOWNSHIP 40 NORTH, RANGE 1 EAST OF W.M., WHATCOM COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

COMMENCING AT A POINT ON THE WEST LINE OF SAID GOVERNMENT LOT 1, WHICH BEARS SOUTH 01°56'53" WEST 602.24 FEET FROM THE NORTHWEST CORNER OF SAID SECTION 30; THENCE AT RIGHT ANGLES, SOUTH 88°03'07" EAST 30.00 FEET TO A POINT ON THE EAST MARGIN OF DRAYTON HARBOR ROAD (HARBOR VIEW ROAD, COUNTY ROAD NO. 8); THENCE ALONG SAID MARGIN, SOUTH 01°56'53" WEST 195.56 FEET TO THE NORTHWEST CORNER OF THE SERVIENT PARCEL BEING DESCRIBED UNDER STATUTORY WARRANTY DEED A.F. NO. 961008135, RECORDS OF WHATCOM COUNTY AND THE POINT OF BEGINNING; THENCE ALONG THE NORTHWESTERLY LINE OF SAID PARCEL, NORTH 63°43'08" EAST 188.61 FEET; THENCE DEPARTING SAID LINE AND ALONG A CHAIN LINK FENCE, SOUTH 24°51'32" EAST 12.16 FEET TO A CONCRETE RETAINING WALL; THENCE ALONG THE NORTH FACE OF SAID WALL, SOUTH 62°03'20" WEST 19.49 FEET; THENCE PARALLEL WITH THE NORTHEASTERLY LINE OF SAID SERVIENT PARCEL, SOUTH 26°40'22" EAST 18.52 FEET; THENCE PARALLEL WITH SAID NORTHWESTERLY LINE, SOUTH 63°43'08" WEST 185.73 FEET TO SAID EAST MARGIN; THENCE ALONG SAID MARGIN, NORTH 01°56'53" EAST 35.45 FEET TO THE POINT OF BEGINNING.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT
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FILED

APR - 3 2012

WHATCOM COUNTY CLERK

By: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

YOUNG S. KIM and YONG S. KIM, a marital community, Plaintiff, vs. KAISER INVESTMENTS, INC., et al Defendants/Third-party Plaintiffs, vs. KYUNG-RAK and JAE SOOK KIM, a marital community, et al. Joined Defendants.	NO. 05-2-02841-2 FINAL JUDGMENT JUDGE IRA J. UHRIG

ORIGINAL

I. JUDGMENT SUMMARY

Judgment Creditors:	Kyung-Rak and Jae Sook Kim
Judgment Debtor:	Young S. and Yong S. Kim
Abbreviated Legal Desc:	PTN. IN GOV. LOT 1, S30, T40N, R1E
Date of Judgment	_____
Principal Amount:	$ N/A
Pre-Judgment Interest:	$ N/A
Attorneys Fees:	$ N/A
Costs:	$ N/A
Attorney for Plaintiff:	Douglas Shepherd
Attorney for Joined Defendants:	Peter R. Dworkin

ANY AND ALL ATTORNEY'S FEES AND COSTS INCURRED IN THE ENFORCEMENT OF THIS JUDGMENT SHALL BE AWARDED AS PART OF THE JUDGMENT.

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II. JUDGMENT

THIS MATTER having come on for trial in December 2009 before the Honorable Ira J. Uhrig, without a jury, and the Court, after hearing all the evidence and having made Findings of Fact and Conclusions of Law, and the Court having heard oral argument on the same, the Court now enters the following Final Judgment, and it is NOW, THEREFORE, HEREBY:

1. ORDERED, ADJUDGED, AND DECREED that this Judgment quiets title to and declares easement rights related to the two parcels of real property described below; all rights are intended to run with the land and be binding on each party and their respective successors, heirs, devisees, and/or assigns. This Judgment Declares and Decrees rights related to the following described Real Property:

PARCEL A – "Restaurant Parcel"

THAT PORTION OF GOVERNMENT LOT 1, SECTION 30, TOWNSHIP 40 NORTH, RANGE 1 EAST OF W.M., DESCRIBED AS FOLLOWS

COMMENCING AT A POINT ON THE WEST LINE OF SAID GOVERNEMENT LOT 1, WHICH IS 602.24 FEET SOUTH OF THE NORTHWEST CORNER OF SAID SECTION 30; THENCE EAST 30.00 FEET TO A POINT ON THE EAST MARGIN OF DRAYTON HARBOR ROAD (HARBOR VIEW ROAD CO. ROAD NO. 8); THENCE NORTH 66 DEGREES 47' 00" EAST 141.43 FEET; THENCE SOUTH 28 DEGREES 27' 00" EAST 160.37 FEET, TO THE POINT OF BEGINNING; THENCE CONTINUING SOUTH 28 DEGREES 27' 00" EAST 95.00 FEET; THENCE SOUTH 61 DEGREES 56' 30" WEST 250 FEET, MORE OR LESS, TO THE NORTHEASTERLY MARGIN OF BIRCH BAY DRIVE; THENCE NORTHWESTERLY AND NORTHERLY ALONG THE NORTHEASTERLY MARGIN OF BIRCH BAY DRIVE AND THE EASTERLY MARGIN OF DRAYTON HARBOR ROAD 100.00 FEET, MORE OR LESS, TO A POINT THAT BEARS SOUTH 61 DEGREES 56' 30" WEST FROM THE POINT OF BEGINNING;

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THENCE NORTH 61 DEGREES 56' 30" EAST 224.9 FEET, MORE OR LESS TO THE POINT OF BEGINNING;

EXCEPT HARBOR VIEW ROAD AND BIRCH BAY DRIVE

SITUATE IN WHATCOM COUNTY WASHINGTON

(Hereinafter Referred to as the "**Restaurant Parcel**");

PARCEL B – "Market Parcel"

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

BEGINNING AT A POINT ON THE WEST LINE OF SAID GOVERNEMENT 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 DEGREES 47' EAST 141.43 FEET; THENCE SOUTH 28 DEGREES 27' EAST, 160.37 FEET; THENCE SOUTH 61 DEGREES 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 POINT OF BEGINNING.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

(Hereinafter Referred to as the "**Market Parcel**").

2. ORDERED, ADJUDGED, AND DECREED that Joined Defendants Kyung-Rak and Jae Sook Kim have prevailed on all of their Cross-Claims against Plaintiffs Young S. and Yong S. Kim.

3. ORDERED, ADJUDGED, AND DECREED that title is hereby quieted pursuant to the terms of this Judgment which decrees certain rights and obligations related to the real property described herein and declares that the

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Restaurant Parcel is the servient estate and the Market Parcel is the dominant estate of an Easement established by this Judgment and Decree.

4. ORDERED, ADJUDGED, AND DECREED that the Market Parcel is the dominant estate of a non-exclusive Easement burdening the Restaurant Parcel, the area of which is depicted in Exhibit A to this Judgment and legally described by metes and bounds in Exhibit B to this Judgment and such Exhibits are incorporated by reference herein (hereinafter referred to as the "Easement"). The Easement shall run with the land and inure to the benefit of the owners of the Market Parcel and their successors, heirs and assigns and to the burden of the owners of the Restaurant Parcel and their successors, heirs and assigns.

5. ORDERED, ADJUDGED, AND DECREED that the purpose and scope of the Easement is for ingress, egress, parking, and delivery of goods and services, by and for the owners, guests, invitees and/or assigns of the Market Parcel. The Easement scope and purpose specifically includes access and turnaround of larger vehicles, including but not limited to delivery trucks and service trucks such as garbage and recycling, to use the Easement for the purpose of accessing the rear (easterly) loading dock and storage bays of the market located on the Market Parcel. This includes using the easement for the turnaround of these vehicles.

6. ORDERED, ADJUDGED, AND DECREED that a permanent injunction is hereby GRANTED prohibiting the Restaurant Parcel and its owners from unreasonably interfering with the Easement, and specifically, from placing any structures, including fences or fence posts within the Easement Area. Such

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posts were the subject of a preliminary injunction in this case and it is hereby ordered that such posts, if not removed already, shall be removed by Plaintiff immediately, at their own expense.

7. ORDERED, ADJUDGED, AND DECREED that the Plaintiff is to remove the 6' privacy fence and metal bollards located within the eastern portion of the Easement area depicted and described herein, because they interfere with and frustrate the purpose of the Easement. The fence and metal bollards to be removed are specifically identified in Exhibit "C" to this Final Judgment. This Court orders that the fence and bollards shall be immediately removed by the Plaintiff, at their own expense.

8. ORDERED, ADJUDGED, AND DECREED that the Court's order on Partial Summary Judgment entered on April 20, 2007 is affirmed and adopted herein having not been further challenged at the trial in this matter.

9. ORDERED, ADJUDGED, AND DECREED that all of Plaintiffs Young and Yong Kim's claims asserted against Joined Defendants Kim, if any, are hereby DISMISSED with PREJUDICE.

DONE in open court this ~~2 day of this~~ 3 day of April ~~March~~ 2012.

JUDGE IRA J. UHRIG

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PRESENTED BY:

BELCHER SWANSON LAW FIRM, PLLC

PETER R. DWORKIN, WSBA# 30394
Attorney for Joined Defendants Kim

Copy Received, ~~Approved for Entry:~~

SHEPHERD ABBOTT ALEXANDER

DOUGLAS SHEPHERD, WSBA #9514
Attorney for Plaintiffs Kim

Final Judgment 012712 to shepherd

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EASEMENT EXHIBIT

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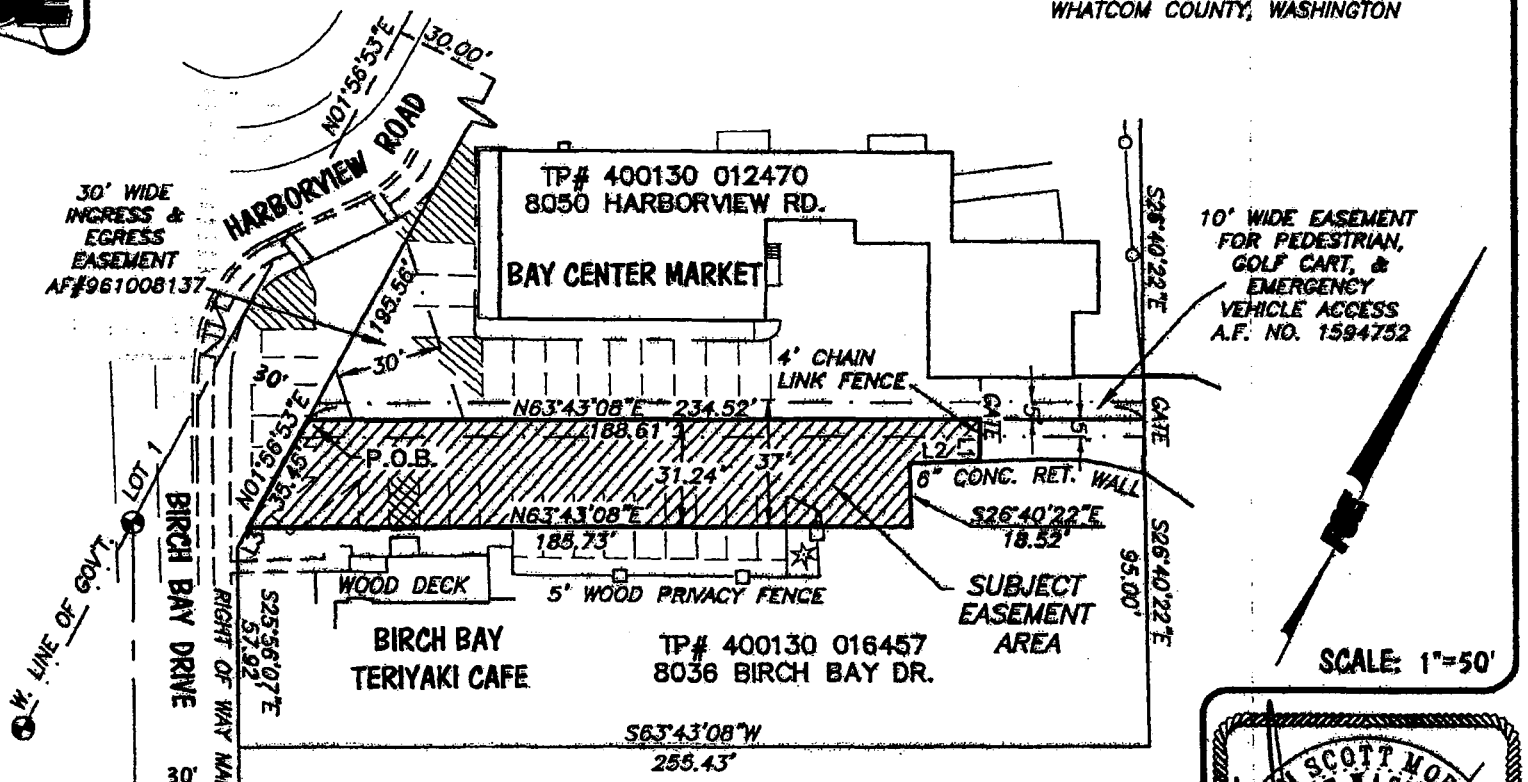

SURVEY NOTES

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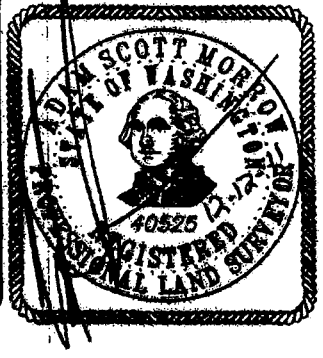

tabbies EXHIBIT A

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SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT
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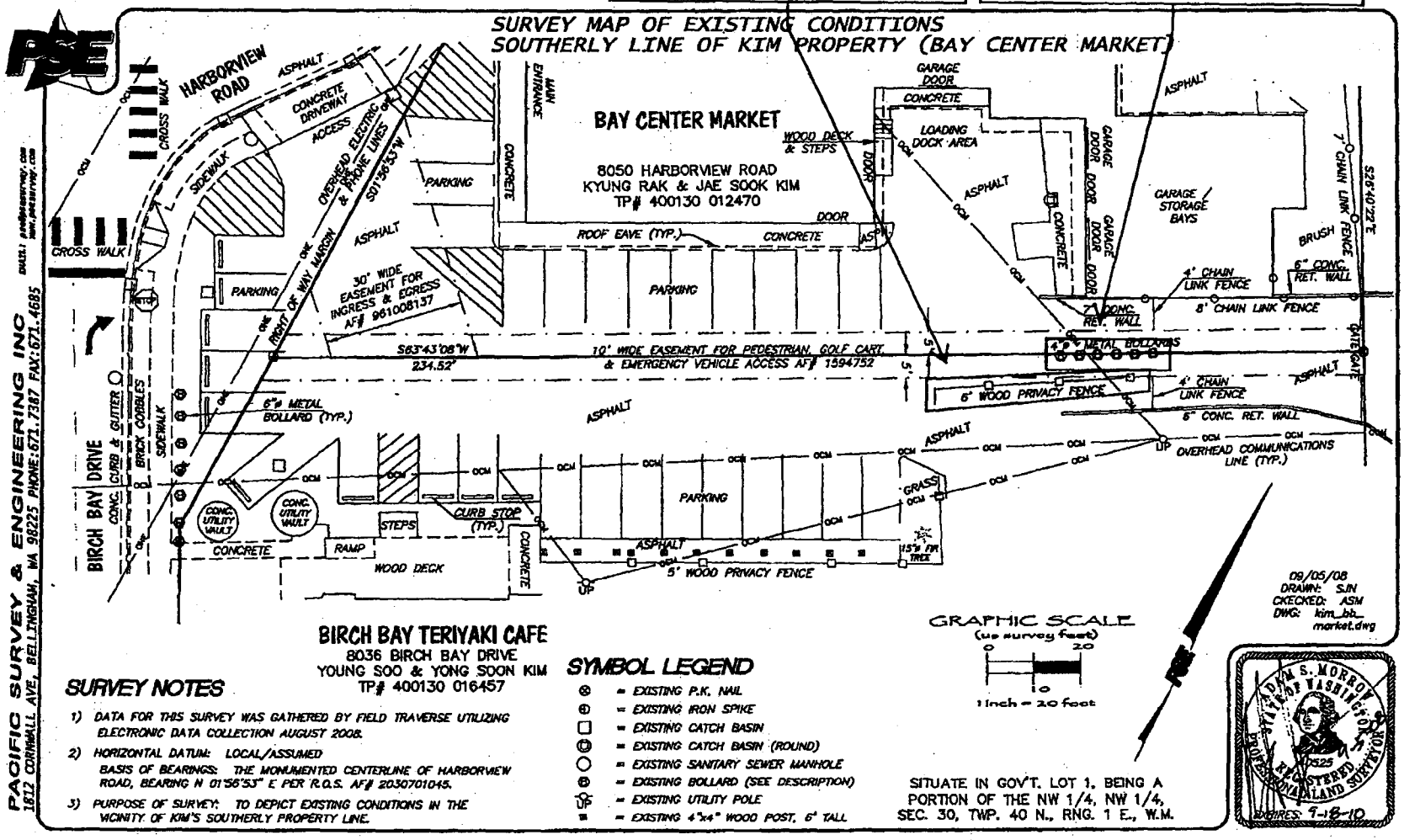
EXHIBIT 2

6' Wood Privacy Fence to be Removed

Metal Bollards to be Removed



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1) DATA FOR THIS SURVEY WAS GATHERED BY FIELD TRAVERSE UTILIZING ELECTRONIC DATA COLLECTION AUGUST 2008.
2) HORIZONTAL DATUM: LOCAL/ASSUMED
BASIS OF BEARINGS: THE MONUMENTED CENTERLINE OF HARBORVIEW ROAD, BEARING N 01°56'53" E PER R.O.S. AF# 2030701045.
3) PURPOSE OF SURVEY: TO DEPICT EXISTING CONDITIONS IN THE VICINITY OF KIM'S SOUTHERLY PROPERTY LINE.

SYMBOL LEGEND

- ⊗ = EXISTING P.K. NAIL
- ⊕ = EXISTING IRON SPIKE
- □ = EXISTING CATCH BASIN
- ◎ = EXISTING CATCH BASIN (ROUND)
- ○ = EXISTING SANITARY SEWER MANHOLE
- ⊕ = EXISTING BOLLARD (SEE DESCRIPTION)
- UP = EXISTING UTILITY POLE
- ■ = EXISTING 4"x4" WOOD POST, 6' TALL

ADAM S. MORROW
STATE OF WASHINGTON
21525
REGISTERED PROFESSIONAL LAND SURVEYOR

OFFICE RECEPTIONIST, CLERK

From: Mylissa Bode <mylissa@belcherswanson.com>
Sent: Monday, February 10, 2014 4:22 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Pete Dworkin
Subject: No. 89842-I, Answer to Petition for Review
Attachments: Answer to Petition for Review 021014.pdf; Dec of Service 021014.pdf

Attached please find Respondents' Answer to Petition for Review and my Declaration of Service. If you have any questions or concerns, please let me know. Thank you.

Sincerely,

Mylissa Bode
Paralegal to Peter R. Dworkin
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Bellingham, WA 98225
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