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

Jeffrey HALEY, Plaintiff & Appellant v. John F. PUGH, Defendant & Respondent	No. 70649-7-1

BRIEF OF APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ASSIGNMENTS OF ERROR

(1) The order by the Superior Court granting summary judgment to Pugh that Haley's recorded **easement** on Pugh's property is terminated and denying Haley's cross motion to dismiss Pugh's claim for termination of the easement.

(2) The order by the Superior Court granting summary judgment to Defendant Pugh dismissing Plaintiff Haley's claim that Pugh's **boat lift** is in an illegal location and must be removed.

Except that both issues involve adjoining properties owned by the same parties, the issues are unrelated. Haley presents facts and argument on the easement issue in Part A below and facts and argument on the boat lift issue in Part B below.

PART A - EASEMENT ISSUE - INTRODUCTION

In this case, John Pugh is trying to improve his property for his own benefit by taking easement rights away from his neighbor Haley's property without paying for them so he can use Haley's easement area for a private garden. The easement rights add value to Haley's property by preventing Pugh from building a fence along the property line that would block Haley from walking in the easement area through the garden, would block Haley's view of the garden, and would make Haley's property appear and feel smaller. It also adds value to Haley's property by allowing Haley to use the easement area for occasional overflow parking. The law allows such property rights to be taken by a neighbor only in limited circumstances which do not apply here.

Pugh is trying to retroactively take the easement rights away from the prior owner of Haley's property, Kathleen Hume, by persuading her to sign a

declaration saying that she had intentionally abandoned her easement rights before she sold the property to Haley, even though there was nothing put in writing at the time suggesting that the easement rights were abandoned and the warranty deed by which she sold the property to Haley conveyed the easement rights to Haley.

Pugh is also trying to take the easement rights away from Haley by adverse possession. However, prior to January 2012, Pugh's actions were not sufficiently hostile to provide adequate notice. And, even if they were adequately hostile, Haley commenced this action before the 10 year adverse possession period had run.

PART A - STATEMENT OF FACTS ON EASEMENT ISSUE

The record shows the following facts. These facts do not support a summary judgment terminating easement rights. Instead, these facts provide a basis to dismiss Pugh's claim for termination of easement rights without further proceedings.

1. Haley's residential property, Lot B of a four-lot short plat by the Wood family, is located on Butterworth Road on Mercer Island. The north side of Haley's residential property borders Tract A owned by John Pugh. Tract A was established by creation of more than 21 lots in a subdivision called Dawn Terrace. Tract A is a long and thin extension of the subdivision, 30 feet wide by more than 250 feet long, its length extending from the subdivision to the shore of Lake Washington. Haley Declaration (first) ¶2, CP 28.

2. An aerial photograph with markings showing the Haley residence, an outline of Tract A, and an outline of the easement area in dispute was created

by Pugh and attached to the Hume declaration as Exhibit 2, CP 66. A copy is attached to this brief for handy reference.

3. Haley's property, Lot B, is the dominant estate in a recorded easement 10 feet wide within Tract A all along the northern boundary of Haley's property. As stated in the grant document, the easement was granted "in perpetuity . . . for purposes of utilities . . . pedestrian ingress, egress, and right-of way . . . and parking of vehicles of visitors to the Dominant Estate." Paragraph 1 of Exhibit 2 to Declaration of Frank Siderius, CP 185 (emphasis added).

4. This 10 feet wide easement for the benefit of Haley's Lot B was created by "dedication"; that is, it was created by lines and words marked on the recorded plat drawing by which the property was subdivided into four lots. The plat drawing included a citation to the recording number where the words of the easement were recorded in the county land records. Exhibit 14 to the Deposition of Hume, CP 105-151.

5. The same 10 feet wide easement area also provided an easement for access to the waterfront Lots C and D created by the Wood short plat. When a new access road across the other 20 feet of Tract A was put in by John Pugh, who was then the owner of both Lot D and Tract A, Lots C and D stopped using the 10 feet wide easement. In 2004, Pugh and the owners of Lot C (Oylers) made an agreement to extinguish their prior easement rights to the 10 feet wide easement area and replace the easement rights with a new easement under the new road. Paragraph 6 of Exhibit 12 attached to Haley Third Declaration, CP 100-101. The document was recorded in King County. A copy of this Exhibit 12 is attached to this brief for handy reference.

6. No document was created to terminate the easement rights of Lot B to the 10 feet wide easement area. No release or cancellation of any aspect Lot B's 10 feet wide easement has been recorded in the real estate transfer records of King County. Haley Declaration (first) ¶3, CP 29.

7. Hume did not ever make any changes to the surface of the ground within the 10 feet wide easement area. Hume Deposition 18:23 – 19:5. Hume did not ever tell others that she wanted to make changes to the surface within the easement area. Hume Deposition 31:8-11.

8. After he completed the new road for Lots C and D which provided no benefit for Lot B, John Pugh placed in the 10 feet wide easement area the following obstacle: one mailbox support structure supporting three mailboxes and many low bushes. In addition to placing the mailboxes, he dug a ditch for locating a creek and he lined the banks with rocks to prevent the creek from moving by erosion. Pugh declared under oath that he made these changes in 2003 and 2004, CP 14. The records of the City of Mercer Island relating to the easement area agree with these dates. Haley Second Declaration ¶4, CP 50. This is a minimum of 7 years and 8 months before the present suit was filed in July 2012 and a maximum of 9 years and 6 months before the suit was filed.

9. When John Pugh took out a pipe that formerly contained the creek and replaced it with an open ditch, this did not render impossible surface use of the 10 feet wide easement. It did not render impossible use of the easement for pedestrian purposes. While it did render portions of the easement unusable by typical motor vehicles for parking or passage, this could be cured by placement of decking or dirt and a culvert. Haley Declaration (first) ¶7, CP 29. It did not render impossible surface use for parking vehicles in a 25 by 7 feet area between the upper end of the ditch and

the paved portion of Butterworth Road, which area is occupied by low bushes. Haley Second Declaration ¶9, CP 51. Neither Haley nor any prior owner of his property has used the 7 feet by 25 feet space just described for parking or has modified this space to be suitable for parking. Haley Second Declaration ¶10, CP 51.

10. Haley bought Lot B from Hume in 2005. The deed by which Hume conveyed the property to Haley is a warranty deed, Exhibit 1 to the Declaration of Kathleen Hume, CP 62-64. It expressly references an attached Exhibit A which, in paragraph 4, incorporates "easements contained in short plat" recorded March 4, 1980 which is Exhibit 14 to the Deposition of Hume, CP 105-151. The short plat drawing, Exhibit 14 to the Hume deposition, shows the 10 feet easement area and specifies the King County recording number of the easement grant document.

11. No release or cancellation of any aspect of the 10 feet wide easement was signed by Haley. Haley Declaration (first) ¶3, CP 29. Haley and his family members make use of the easement area for pedestrian purposes. Haley Declaration (second) ¶5, CP 50.

12. Until 2012, John Pugh never said to Haley, either in writing or orally, that his intentions with respect to Tract A were adverse to Haley's continuing use of the easement area for pedestrian purposes to walk in the creekside garden or Haley's future use of the easement area for any purpose stated in the easement grant document. Haley Declaration (first) ¶8, CP 30.

13. To prevent loss of his easement rights by adverse possession, Haley filed this action in July, 2012, less than 7 months after Pugh first stated his adversity to Haley's future use of the easement area. Haley requested a declaration that the easement rights are intact, CP 4-5, and Pugh filed a

counterclaim for a declaration that the easement rights were terminated, CP 9. Pugh then filed a motion for summary judgment on his counterclaim and Haley filed a cross-motion for partial summary judgment on his claim. CP 299-306.

PART A - ARGUMENTS ON EASEMENT ISSUE

Because this issue was presented to the court below on cross motions for summary judgment, the Court of Appeals may, if the evidence is clear enough, either affirm the Superior Court's ruling that the easement is partially terminated or reverse the Superior Court and rule that the easement is intact. There is no need to remand for trial unless this court finds a genuine issue of material fact.

A1. The granting of an environmental land use permit cannot work a taking of recorded easement rights of neighbors.

Pugh argued below that a land use permit based on satisfaction of environmental concerns issued by the City of Mercer Island to remove a culvert and dig a ditch for water to flow in worked a termination of the easement rights then held by Haley's predecessor, Hume. There is no legal support for this theory and it would be unconstitutional.

A request for environmental clearance is not in any sense a legal notice to an easement holder that they must oppose the permit application and prevail or they will lose easement rights. And, if such an effect were sanctioned by the law, due process would require that the notice of the application to modify the land be served on the easement holder like a subpoena and explicitly state that easement rights will be lost if an easement holder does not oppose the permit application and prevail. Easement rights are property rights and cannot be taken without due process under both the

United States constitution and the state constitution. The notice was not served like a subpoena and it did not state that easement rights could be lost.

In this case, the digging of the ditch for water is not inconsistent with use of the easement area for pedestrian purposes (which is the primary use that Haley makes and wishes to continue to make of the easement area) so the City's environmental permit process could not have given any kind of notice that granting of the permit would terminate pedestrian usage rights or allow Pugh to build a fence that would block Haley's pedestrian access and views of the garden.

A2. Abandonment and adverse possession law to be applied

The law to be applied is articulated in the cases of *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002) and *Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9 (2006). The *Cole* case presents the analysis for a claim that a recorded easement has been lost by adverse possession (intentional acts of the servient estate owner). The *Heg* case presents the analysis for a claim that a recorded easement has been lost by abandonment (intentional acts of the dominant estate owner).

The two analyses are different, not merely inverses of each other. In the abandonment analysis, the focus is on actions of the easement holder that show intent to abandon the easement. For adverse possession, the focus is on uninterrupted actions of the servient estate owner that might have given notice of a hostile intent to adversely take away the easement.

A3. The burden of proof to show hostile intent has not been met.

To prevail, Pugh must show uninterrupted adverse actions that were clearly hostile. For extinguishment of an easement by adverse possession, the *Cole* court stated:

"To establish adverse possession, the claimant must show use that was open, notorious, continuous, uninterrupted, and adverse to the property owner for the prescriptive period of 10 years. RCW 7.28.010." . . ..

"to start the prescriptive period, the adverse use of the easement must be clearly hostile to the dominant estate's interest in order to put the dominant estate owner on notice." p.184 (emphasis added). . . ..

"Hostile use is difficult to prove. The servient estate owner has the right to use his or her land for any purpose that does not interfere with enjoyment of the easement. *Beebe*, 58 Wn. App. at 384. Proper use by the servient estate owner is generally a question of fact that depends largely on the extent and mode of the use. *Thompson v. Smith*, 59 Wn.2d 397, 408, 367 P.2d 798 (1962). If the dominant estate has established use of an easement right of way, obstruction of that use clearly interferes with the proper enjoyment of the easement. However, if an easement has been created but has not yet been used by the dominant estate, adverse use by the servient estate is more difficult to prove. *See, e.g.*, *Beebe*, 58 Wn. App. at 383-84; *City of Edmonds v. Williams*, 54 Wn. App. 632, 636, 774 P.2d 1241 (1989)."

"Mere nonuse, no matter how long, will not extinguish an easement. *Thompson*, 59 Wn.2d at 407. During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement's future use. *Id.; Edmonds*, 54 Wn. App. at 636. For example, if an easement has been created and no occasion has arisen for its use, the owner of the servient estate may fence the land and that use will not be considered adverse until (1) the need for the right of way arises, (2) the owner of

the dominant estate demands that the easement be opened, and (3) the owner of the servient estate refuses to do so. *Id.* at 636-37."

In the Cole case, the fence, locked gates, and bathtub planters blocking the way did not constitute permanent obstructions that would put Mr. Cole's predecessors on notice that the servient estate holder was asserting hostile, exclusive interest over the easement. p.186.

In this case, the dominant estate holder (Haley) did not demand that the easement be opened until January 2012. And Pugh has not offered any evidence that a prior owner of Lot B made such a demand. Before January 2012, neither Haley nor a prior owner of his property made any use of the easement area for parking of vehicles or made any improvements such as removing bushes to facilitate use of the easement area.

Absent a demand to open the easement, Pugh must show that he put such obstacles in the way of the easement that no trier of fact could reach a conclusion other than that the owner of Lot B must have been on notice that Pugh hostilely intended to take away easement rights.

The only actions Pugh took that might be considered hostile to the interests of Lot B were digging a ditch, planting low bushes, and building a mailbox support structure, and none of these were inconsistent with continuing pedestrian uses. Given the high hurdle set by case law in Washington, the bushes, ditch, and mailboxes were not enough to put either Hume or Haley on notice of Pugh's hostile intent.

Thus there is no evidence of hostile adverse possession for any longer time than six months before suit was filed, when Pugh first stated his hostile intent in words.

A4. The time period for extinguishment of an easement by adverse possession has not been met.

There is another more compelling reason to rule that the easement was not terminated by adverse possession. According to his own sworn testimony at paragraph 6 of his declaration, CP 14, Pugh did not place any obstacles within the easement area until 2003 and 2004, which is less than ten years before this action was filed. The law in Washington is clear that the required period of open, notorious, uninterrupted, adverse, and hostile use to extinguish an easement is 10 years. *Cole* at 184.

A5. Under the statute of frauds, there is inadequate evidence from before she sold her property to Haley that Hume intended to abandon the easement.

For abandonment, the analysis was well summarized with full citations by judge Marywave Van Deren of Division Two of the Court of Appeals writing in a 2010 unpublished opinion as follows:

> "An easement owner "may anticipate future needs" and nonuse of the easement does not by itself constitute abandonment. *Neitzel v. Spokane Int'l Ry. Co.*, 80 Wash. 30, 34, 141 P. 186 (1914). In order to constitute abandonment, the nonuse " 'must be accompanied with the express or implied intention of abandonment.' " *Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006)* (emphasis added, internal quotation marks omitted) (quoting *Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.*, 142 Wash. 204, 210, 252 P. 916 (1927)). Acts evidencing abandonment must be "unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg*, 157 Wn.2d at 161. In *Heg*, the court held that "mere nonuse of a recorded

easement coupled with the use of alternate routes of ingress and egress does not, by itself, support a finding of abandonment." 157 Wn.2d at 156.

In this case, Pugh provided no evidence of an act by Hume before she sold the property showing that she intended to abandon the easement. Pugh offered declaration testimony by himself and Hume that Hume voiced no objection when modifications to the easement area were made. The *Heg* case and subsequent cases show that silence when barriers are erected is not enough to infer intent to abandon a recorded easement. In *Heg*, a road cut created a 4-6 feet high barrier to use of the easement. p. 162. The servient owner improved the easement area and incorporated it into their yard. p. 166. The recorded easement was unused for 44 years. These facts were not enough to show intent to abandon.

The easement in question was created by dedication and was specified on the plat drawing for the four lot subdivision. In 1991, the legislature passed an amendment to the statute of frauds for real estate clarifying that easements created by dedication can only be extinguished with a written deed. RCW 64.04.175 provides:

> "Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners, unless the plat or other document creating the dedicated easement provides for an alternative method or methods to extinguish or alter the easement."

RCW 64.04.010 specifies how such easement rights may be extinguished or altered:

> "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed"

RCW 64.04.020 specifies how such deeds may be created:

> "Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds."

In 2004, Pugh created a document to replace the rights of Lot C to use the 10 feet easement area with a new easement using the other 20 feet of the width of Tract A. CP 98-102. This document was signed by both parties as required by RCW 64.04.175 and RCW 64.04.020. If Hume was willing to abandon her rights to the easement area at that time, Pugh could have obtained a signed document from Hume and he could have recorded it. Why did Pugh not ask Hume to sign such a document at that time? After this lawsuit started in 2012, Pugh persuaded Hume to testify that, in 2004, she would have agreed that her easement rights were abandoned. Perhaps Pugh did not ask Hume to sign a document terminating her easement rights in 2004, before she sold the property in 2005, out of fear that she might ask for compensation.

The court should give meaning to the statute of frauds as expressed in RCW 64.04 and rule that, just as Pugh created a document to extinguish the rights of Lot C to use the 10 feet wide easement area, he needed to create a similar document to extinguish the rights of Lot B to use the easement area if that is what he wanted to do, and then he should have recorded the document before Hume sold her property to Haley.

Any evidence created at Pugh's urging after Hume sold her property is not reliable, and any reliance placed on it would undermine Haley's right

to rely on the public land records. The warranty deed from Hume to Haley specified that the easement rights were included and, absent a contrary document recorded prior to his purchase, Haley was entitled to rely on the public land records. Any other rule would create uncertainly for real estate titles.

PART A - CONCLUSIONS ON EASEMENT ISSUE

Because Pugh did not meet his burden of proof for a summary judgment terminating any part of the easement, the court should reverse the summary judgment.

It is important that land owners be able to rely on the public land records to determine the existence of easements. It would create endless litigation if servient estate owners could terminate an easement merely by persuading a prior owner of the dominant estate to sign a declaration saying that they intentionally abandoned the easement before they sold the property to another, especially where the deed by which they sold the property says the easement was conveyed and there is no evidence of intent to abandon the easement that predates the sale of the property.

On the easement issue, Haley filed a cross-motion for summary judgment to dismiss Pugh's claim for a partial termination of the easement. Pugh did not present enough evidence in support of easement termination to properly survive Haley's cross motion and take the issue to trial. Again, it is important that public land records of easements not be overturnable without more evidence than Pugh presented. Haley needs the easement rights to prevent Pugh from building a fence on the property line that would prevent Haley from walking in the creekside garden and would block Haley's view of the garden and creek and would make Haley's property look and feel smaller.

The court should rule that the easement remains in force as stated in the public land records and Pugh's claim for partial termination is dismissed. No remand is necessary on the easement issue unless this court finds a genuine issue of material fact.

PART B – THE BOAT LIFT ISSUE - INTRODUCTION

Haley's complaint seeks an order that the illegal boat lift be removed. To defend against this claim, defendant Pugh did not present any evidence to refute the allegation that the boat lift is in an illegal location but merely moved for a summary judgment of dismissal on grounds that the limitations period for bringing Haley's claim had run. The trial court granted the dismissal. The Court of Appeals should reverse and remand for further proceedings.

PART B - STATEMENT OF FACTS ON BOAT LIFT ISSUE

For purposes of review of the Superior Court's order granting summary judgment, the Court of Appeals must accept the truth of the following facts present by Haley with declarations and exhibits:

1. Pugh placed the boat lift beside his dock without first obtaining a permit which was required by Mercer Island land use law. Haley Second Declaration ¶18, CP 53.

2. A boat lift cannot be permitted in its present location under Mercer Island land use law. Haley Second Declaration ¶19, CP 53.

3. Pugh then applied for a permit under the Mercer Island shoreline usage code to put a cover on the boat lift, CP 32 ¶18. The permit application presented a drawing with distance numbers showing that the covered

moorage would be "48 feet from the adjoining property", CP 44. A copy of that drawing is attached to this brief for handy reference.

4. If Pugh had placed his covered boat lift at this distance from the adjoining property (48 feet), it would not be in an illegal location, but the actual distance from the boat lift to the adjoining property is less than 34 feet. Haley Declaration (first) ¶21, CP 33.

5. A permit was granted to put a cover on the lift but this granting resulted from false statements by Pugh in his permit application falsely stating that the lift is:

- more than 10 feet from the lateral line,
- more than 35 feet ("48 feet") from the next pier, and
- within the triangle where covers are permitted,

all of which were false. The permit would not have been granted but for the false statements. Haley Declaration (first) ¶19, CP 32.

6. The location of the boat lift has damaged Haley and his property by reducing the value of his property and reducing his ability to enjoy public spaces near his property including views of the public waters. Haley Second Declaration ¶¶26-28, CP 34.

7. Until March 2012, the illegality of the boat lift's location was not evident to neighboring property owners. At the Pugh property, it is difficult for a neighbor to determine where a moorage facility in the water is located with respect to property lines or other piers. There is no fence or similar boundary marker on the north side of the property from which one can project a lateral line into the water. Without trespassing, it is difficult to get close enough to the water's edge to make a judgment of distances relative to a lateral line or

other objects in the water. Pugh has posted No Trespassing signs that warn against trespassing. Haley Second Declaration ¶15, CP 52.

8. Haley was first alerted that the Pugh boat lift might be in an illegal location when Pugh sought a permit to build another dock south of the existing dock at his residence. His permit application required a drawing of the proposed pier and the surrounding shoreline and piers, which drawing was prepared by his hired experts who had access to his property to make measurements and/or had access to Pugh's private documents showing measurements. The draftsman of the drawing included the existing boat lift on the drawing as appropriate. The draftsman showed the boat lift illegally close to the lateral line and illegally close to the next pier to the north. As part of the permit application process, the drawing was mailed to Haley as an adjoining neighbor. Haley Second Declaration ¶17, CP 52-53.

9. Within a few days after receiving the drawing showing the boat lift surprisingly close to the next pier to the north, on April 7, 2012, by using a kayak and measuring with a tape measure the distance from the boat lift to the next mooring structure to the north, Haley verified that the expert's drawing was correct that the boat lift is illegally close to the lateral line and illegally close to the adjoining moorage structure to the north, in violation of MICC 19.07.110 D 2 Table B, which was in force before the lift was built and is still in force today. Haley Second Declaration ¶19, CP 53.

10. Upon discovering that the boat lift is in an illegal location, Haley:

- within one day notified the defendant and requested removal of the lift;

- within four days notified the city and requested enforcement to force removal of the lift;

and, following no action by the defendant or the city,

- within 95 days filed this action to force removal of the lift.

Haley Second Declaration ¶¶21-23, CP 54.

11. Haley obtained from the city copies of Pugh's permit applications and, by studying them and comparing to his measurements, discovered the false statements specified above. He filed this action 90 days after discovering the false statements. Haley Second Declaration ¶20, CP 53-54.

12. In addition to infringing on Haley's view and water usage rights, the illegal boat lift infringes on shoreline usage rights of five owners of an adjoining semi-private shared recreational tract. These five owners own five nearby residential lots and have a shared right to use the shoreline alongside the boat lift. Haley Declaration (first) ¶19c, CP 32-33.

13. It would not be expensive to move the boat lift. The boat lift simply sits on the bottom of the lake and uses adjustable legs to set an appropriate height off the bottom. To move the boat lift, one simply positions a float to support the lift, raises it off the bottom with the float, floats it to a new location, lowers it onto the bottom again, and readjusts the legs. Haley Second Declaration ¶24, CP 33.

14. The boat lift would be in a permissible location if it were simply moved from being alongside the north side of the Pugh dock to being alongside the south side of the Pugh dock. Haley Second Declaration ¶25, CP 33. In this location, the covered boat lift would more adversely impact views from Pugh's property and not at all affect Haley's property or the rights of the five owners of shoreline access rights in the shared recreational tract to the north.

PART B – STATEMENT OF BOAT LIFT SUB-ISSUES

1. Is the illegal location of the boat lift, too close to the adjacent pier and not where Pugh said in his application he would put it, a continuing violation such that there is no statutory limitations period for bringing an action to force removal?

2. Does the fraudulently obtained permit to add a cover to the boat lift retroactively cure the lack of a permit to originally place the boat lift, thereby creating a short limitations period from the date the permit was granted for any neighbor to object or forever be barred from objecting, even though Pugh did not place the boat lift where the permit on its face would allow him to place it?

3. Does the fact that the City and the public were misled by Pugh's false representations about the location of the boat lift toll the limitations period such that it does not begin to run until the false statements are discovered or should have been discovered with appropriate diligence?

PART B - ARGUMENT ON BOAT LIFT ISSUES

B1. The location of the boat lift is a continuing zoning violation and there is no statutory limitation period to force removal.

The record includes credible evidence, which the court must assume is true on review of the granted summary judgment, that the boat lift is located where boat lifts are not permitted under Mercer Island law and not where Pugh said in his application that he would put it. In a permit application, Pugh represented that the covered boat lift would be located 48 feet from a nearby property, a permissible location. However, the boat lift is located less than 34 feet from the nearby property, an impermissible location.

When a structure is built in a place where such structures cannot be permitted under local zoning law, because it is a continuing violation, there is no statute of limitations or other deadline for action to compel removal. In effect, it is a new violation every day. The court has equity power under the common law to order removal of the structure and no statutory authority is required. *Larsen v. Colton*, 94 Wn. App. 383 (1999 Div. III); *Radach v. Gunderson*, 39 Wn. App. 392 (1985 Div. II); *City of Eupora*, 722 So. 2d 695 (1998 Miss).

In the *Larsen* case, on February 5, 1997, a building permit was improperly issued to Tilton to build a large garage. The period for others to file an objection under the Land Use Petition Act (LUPA), RCW 36.70C, passed without a filing. Three months later, after Tilton had poured a concrete pad 32 feet by 40 feet for the illegal garage, the Larsens filed a complaint for injunctive relief on May 6, 1997. The Larsen court stated:

> An action for injunctive relief is an appropriate way for an aggrieved property owner to contest erection of a structure he believes to be in violation of a zoning ordinance. . . ..
>
> The Tiltons contend nevertheless that the Larsens' complaint for an injunction was untimely. This argument assumes the Larsens' complaint was for some specific act that occurred in the past. However, by its nature an injunction is directed at *continuing* conduct. Indeed, an action for damages--not for an injunction--is the proper remedy for injury resulting from past conduct. . . . **[*392]** Violation of a zoning ordinance thus is a continuing violation, the remedy for which is an injunction. *Radach*, 39 Wash. App. at 399.

Because the Larsens alleged the Tiltons' structure would result in a *continuing* violation of the zoning ordinance, it would make no sense to apply a limitation period that refers to an act in the past. It was the potentially continuing violation, not some past conduct, that formed the heart of the Larsens' complaint.

Pugh argued below that the *Larsen* case discussed above is distinguishable because Larsen brought suit to enjoin an illegal structure only three months after a permit was granted to build the structure. But the principal applied in Larsen does not depend on the illegal structure having been in place for only a short time duration.

The point made by the Larsen court is that a continuing violation can be enjoined at any time. All that is required is that the action be brought within a reasonable time after the plaintiff acquires "actual or constructive knowledge" of the illegality of the structure. In this case, Haley began his suit within 95 days after discovering the illegality of the structure. Before commencing the suit, within one day after the discovery, Haley notified Pugh of the discovery and attempted to achieve a private resolution before involving the courts.

Pugh argues that Haley knew about the location of the boat lift years before taking action. Haley knew that the boatlift existed, but Haley did not know that the boat lift was in an illegal location and had no way to discover this until Pugh provided to Haley a drawing that showed the boat lift in an illegal location.

In *Radach*, a building contractor applied for a permit to build a new house 40 feet from a property line rather than 50 feet as required by the city's zoning code. By oversight, the city nevertheless granted the permit. After construction was completed, about a year after the permit was granted, a

neighbor filed suit. An injunction was granted forcing removal of the house. The court stated:

> The Radachs sued to protect their view and to prevent the City from allowing encroaching buildings to destroy the legally enforceable setback line. Injunctions have often been used to protect such interests. *Department of Ecology v. Pacesetter Constr. Co.,* 89 Wn.2d 203, 571 P.2d 196 (1977); *Hunt v. Anderson,* 30 Wn. App. 437, 635 P.2d 156 (1981). Although the trial court found that the injury did not devalue the Radachs' property, a demonstrable financial loss is not essential to support an injunctive remedy for a zoning violation. *Welton v. 40 E. Oak St.* **[*400]** *Bldg. Corp.,* 70 F.2d 377 (7th Cir. 1934). The improper setback creates a continuing condition which adversely affects the Radachs' enjoyment of their property. A continuing injury is remedied properly by injunction. *See Brown v. Voss,* 38 Wn. App. 777, 689 P.2d 1111 (1984). In our view, the equities must be very compelling indeed to avoid an injunction to correct a clear violation of a zoning ordinance. Therefore, we generally agree that:
>
> > [A]n action for injunctive relief is the appropriate remedy of an aggrieved property owner who seeks to bar the erection of a structure on adjoining or nearby premises in violation of express zoning regulations.
>
> . . .. The public interest is properly considered in determining if a zoning violation should be enjoined. . . .. "The enforcement of a zoning ordinance by injunction is essential if the amenities of the area sought to be protected are to be preserved." *Mercer Island v. Steinmann,* 9 Wn. App. 479, 486, 513 P.2d 80 (1973).

Pugh attempts to distinguish *Radach* by arguing that Radach brought his suit within only one year after the permit was granted. Again, Haley's point is that "a reasonable time" does not begin to run until the illegality is discovered or should have been discovered. Haley brought his suit within 95 days after the illegality could be discovered and only after attempting a private resolution without involving the courts.

In *City of Eupora*, 722 So. 2d 695 (1998 Miss), the structure placed in an illegal location in violation of zoning laws had been in place for more than three years. In granting the requested injunction, the *Eupora* court stated:

> With substantial uniformity, the courts have held that the municipality itself, having adopted a zoning ordinance, may pursue the remedy of obtaining an injunction against a violator of it, and is not limited to a proceeding to enforce a penalty. This is the general rule even though an injunction is not specifically authorized by statute. . . . ..
>
> The Court had full authority to grant injunctive relief wholly absent any showing of irreparable harm. Implicit in land use regulations enacted for the benefit of the public is that substantial violations per se cause irreparable harm.

Courts have inherent common law power to grant injunctions for violations of all kinds of zoning laws, whether land only zoning laws, as in cases above, or zoning laws based on authority of the Shoreline Management Act, as in this case. *Hunt v. Anderson*, 30 Wn. App. 437 (1981 Div. III) (Private party granted injunction for zoning rules violation of SMA by trial court and affirmed by appellate court.)

When a permit allows a structure to be placed in a permissible location and the structure is instead placed in an impermissible location, there

is no limitations period to force removal of the structure. The limitations period for objecting to the granted permit is irrelevant.

B2. The fact that Pugh subsequently obtained a permit to put a cover on the boat lift does not render the lift or the cover permitted because that permit was obtained through false statements and the boat lift is not in the location allowed in the permit.

If the facts were different such that:

(1) in his application for a permit to place a cover on the boat lift, Pugh had made no false statements, and

(2) the permit application had shown the true distance from the boat lift to the lot line, the true distance from the boat lift to the adjoining property, and the true location of the lift with respect to the triangle where covers are permitted, and

(3) the permit had been granted due to error by the city, and

(4) Pugh had placed the covered boat lift at the distance he said he would from the adjoining property (48 feet);

then Pugh would have a good argument that the statutory limitations period for appealing the city's grant of the permit bars the plaintiff's claim now. But none of 1 or 2 or 3 or 4 is true.

In *Lauer v. Pierce County*, 173 Wn.2d 242 (2011), a building permit application was filed in 2004 and granted based on false representations. Six months later, when the building department inspected the ongoing construction, the true facts were discovered. The County suspended the permit and issued a cease and desist order. The Supreme Court stated (emphasis added): "A permit application that is not allowed under the regulations in place at the time it is submitted and is issued under a knowing

misrepresentation or omission of material fact confers no rights upon the applicant." (Emphasis added)

In *Ecology v. Pacesetter*, 89 Wn.2d 203 (1977), the applicant made false representations to obtain two building permits. By the time of a hearing for an injunction, the foundations had been poured for two houses and two of three stories had been framed for one of the houses. The trial court issued an injunction that forced removal of all construction. The Supreme Court affirmed, stating: "[The defendants] committed fraud to avoid complying with the permit requirement. Such fundamental violation is a threat to future effectiveness of [the permit process]."

B3. The fact that the City and the public and Haley were misled tolls the limitations period until the false statements are discovered.

Pugh cannot use the passage of time since his false statements as a defense to get away with his false statements. RCW 4.16.080(4) provides that, in an "action for relief upon the ground of fraud, the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud". As the false statements were discovered on April 11, 2012 and suit was filed three months later, this is well within the statutory period.

Pugh argued below that, by the exercise of due diligence, Haley could have and should have discovered the false statements years earlier, but Pugh does not explain how this could have been done. If Pugh could show that any of his at least five other adversely affected neighbors who own the right to use the shoreline alongside the boat lift discovered the false statements before Haley did, this would be evidence that Haley too could have discovered it earlier. But none of them discovered it before Haley. If six people with a

motivation to do so did not discover the false statements, then the false statements must not have been discoverable with due diligence.

The Superior Court below stated that it intended to let the boatlift issue go to trial because of the unrefuted allegations of false statements of material fact in the permit application. Verbatim Report of Excerpt of CD Recorded Proceedings, February 15, 2013. The court then accepted further briefing and inexplicably changed its position and granted the summary judgment without more oral argument.

PART B - CONCLUSIONS ON BOAT LIFT ISSUE

The court should reverse the order dismissing Haley's claim for an order that the boat lift be relocated and rule that Haley's claim may go forward with further proceedings.

Dated this 10th day of December, 2013

Jeffrey T. Haley

The following Appendix contains three exhibits referenced above.

HALEY PROPERTY

EASEMENT
10' X 140'

PUGH TRACT A
(OUTLINED IN RED)

Bird's Eye View Facing West

PUGH PROPERTY

Hume declaration EXHIBIT 2
Page 66 of CP

When Recorded Return to
John F Pugh
5194 Butterworth Road
Mercer Island, WA 98040

****

Name of Document: Easement Agreement

Reference Numbers of related documents: none

Grantor: John Pugh

Grantee: Duane L Oyler and Nancy W Oyler, husband and wife

Legal Description: Grantor (Pugh) Property
Tract "A", Dawn Terrace, Vol 94 Pgs 16 & 17, King County

Grantee (Oyler) Property
Lot C, Mercer Island SP No 78-4-018, rec no 8003041151

Tax Parcel Number: Grantor (Pugh) Property 192200-0220
Grantee (Oyler) Property 192405-9135

****

EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT is made this 5th day of March, 2004, by and between John F Pugh, a single person ("Grantor") whose address is 5194 Butterworth

EXCISE TAX NOT REQUIRED
King Co Records Division
By P. Oyler Deputy

EXHIBIT 12
Page 1 of 5

Road, Mercer Island, Washington 98040, and Duane L and Nancy W Oyler, husband and wife ("Grantee"), whose address is 5210 Butterworth Road, Mercer Island, Washington 98040

RECITALS

A Grantor is the owner of that certain property ("Grantor Property") legally described as

Tract "A" of Dawn Terrace, according to the plat thereof recorded in Volume 94 of Plats, pages 16 and 17, records of King County, Washington,

Together with Second Class Shore Lands as conveyed by the state of Washington situate in front of, adjacent to or abutting thereon,

Situate in the City of Mercer Island, County of King, State of Washington

B Grantee is owner of that certain property ("Grantee Property") legally described as

Lot C of City of Mercer Island Short Plat No 78-4-018 as recorded under recording number 8003041151, Records of King County, Washington,

Together with Second Class Shore Lands adjoining, the southern boundary of which was established as the South line of the North 150 feet of said Government Lot 2 extended easterly from the easterly line of Government Lot 2 to the easterly limit of the Second Class Shore Lands adjoining, by that certain Boundary Agreement dated November 30, 1955 and recorded December 8, 1955 under King County Recording No 4644177

C Grantor's Property is adjacent to the Grantee Property and Grantor wants to provide Grantee with access to Grantee's Property over, under and across a portion of the Grantor's Property and to provide for use and maintenance of the access provided,

AGREEMENT

NOW THEREFORE, In consideration for the mutual promises and covenants contained herein, and other good and valuable consideration it is agreed between the parties as follows

1 **Grant of Easement.** Grantor hereby grants to Grantee, Grantee's agents, invitees and assigns, a non-exclusive easement over, under and across that portion of the Grantor Property as described in Exhibit A attached hereto and incorporated herein by this

EXHIBIT 12
Page 2 of 5

reference The easement for ingress and egress is referred to herein as the "Driveway Easement" and the easement for utilities is referred to herein as the "Utilities Easement" (the Driveway Easement and the Utilities Easement are collectively referred to herein as the "Easement")

2 **Purpose of Easement.** Grantee shall be entitled to use the Driveway Easement for the purposes of vehicular and pedestrian ingress and egress to and from the Grantee Property Grantee shall be entitled to use the Utilities Easement for the purposed os installing maintaining, replacing, removing and use of sewer lines, electric lines, gas lines, telephone lines, fiber optic lines and television cable conduit for residential purposes benefitting Grantee Property The Easement is granted solely for the benefit of one single family house on the Grantee Property and may not be used to serve more than one single family house on the Grantee Property regardless of the future subdivision, aggregation or development of the Grantee Property

3 **Maintenance of the Utilities Easement.** The cost of maintenance and repair of the Utilities Easement shall be born solely by the Grantee Property except where damage to the utilities Easement is damaged by the owner of the Grantor Property or their invitees, licensees or agents In the event maintenance of the Utilities Easement is necessary, the owner of the Grantee Property shall have the right of reasonable entry for that purpose

4 **Maintenance of the Driveway Easement.** The cost of maintenance and repair of the Driveway Easement shall be born equally by the owners of the Grantor Property and the Grantee Property ("Maintenance") For purposes of this agreement, Maintenance shall be defined as keeping the Driveway Easement in reasonably good condition and in compliance with all government requirements Owners of the Grantor Property and Grantee Property shall cooperate in obtaining the services and materials necessary for the Maintenance and agree to promptly pay for such services and materials However, neither owner shall contract for or incur costs for the Maintenance without the mutual written consent of the other owner, which consent will not be unreasonably withheld For purposes of this agreement, mutual consent shall be achieved if one of the spouses of any marital community who is a owner consents to the Maintenance If any owner contracts or incurs costs for Maintenance without such mutual consent, that owner shall bear the full liability and costs incurred thereto and the non consenting owner shall have no obligation to share in such liability or costs unless the non-consenting lot owner's consent was unreasonably withheld In the event maintenance of the Driveway Easement is necessary, the owner of the Grantee Property shall have the right of reasonable entry for that purpose

5 **Touch, Concern the Land.** The Easement shall be appurtenant, shall touch and concern the real property described herein and shall run with the land

6 **Replacement of Existing Grant.** This Easement is to replace a ten (10) foot

EXHIBIT 12
Page 3 of 5

easement for ingress, egress and utilities recorded un King County Recording Number 7903010712

7 **General Provisions.**

7 1 Binding Effect This agreement shall be binding upon and inure to the benefit of the parties and their successors, heirs, assigns, and personal representatives and all persons claiming by through or under the parties hereto

7 2 Notices Any notice provided for or concerning this agreement shall be in writing and be deemed sufficiently given when sent by certified sent to the respective address of each party as set forth at the beginning of this agreement

7 3 Governing Law It is agreed that this agreement shall be governed by, construed, and enforced in accordance with the laws of the Sate of Washington Jurisdiction and venue of any suit arising out of or related to this agreement shall be exclusively in the state and federal courts of King County, Washington

7 4 Entire Agreement This agreement shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this agreement shall not be binding upon either party except to the extent incorporated in this agreement

7 5 Waiver The waiver by any party of a breach of any provisions of this agreement by the other party shall not operate or be construed as a waiver of any subsequent breach by that party No waiver shall be valid unless in writing and signed by the party against whom enforcement of the waiver is sought

7 6 Costs and Attorneys Fees In the event that any suit or other proceeding is instituted by any party to this agreement arising out of or pertaining to this agreement or the relationship of the parties, including but not limited to filing suit or requesting an arbitration, mediation, or other alternative dispute resolution process (collectively "Proceedings"), and appeals and collateral actions relative to such a suit or Proceedings, the substantially prevailing party as determined by the court or in the Proceeding shall be entitled to recover its reasonable attorney's fees and all costs and expenses incurred relative to such suit or Proceeding from the substantially non prevailing party, in addition to such other relief as may be awarded

John F. Pugh, a single person

"Grantor"

EXHIBIT 12
Page 4 of 5

EXHIBIT A
TO EASEMENT AGREEMENT BETWEEN
PUGH AND OYLER

Easement over, under and across that portion of Tract "A" of Dawn Terrace per plat recorded in Volume 94 of Plats, Pages 16 and 17, records of King County, Washington, described as follows

That portion of said Tract "A" lying North and West of the following described line

Beginning at the Southwest corner of Said Tract "A" thence S 88°24' 56" E along the South line of said Tract "A" a distance of 137 82 feet more or less to the Northeasterly corner of Lot "C", Amos Wood Short Plat, Thence N 1°35' 04" E a distance of 30 00 feet more or less to the North line of said Tract "A" and the terminus of said line

Proposed: Pugh EcoCanopy
Reference: _____
Purpose: Canopy Installation
App: John Pugh
At: ~~5220~~ Butterworth Road, Mercer Island, WA 98040
Sheet 2 of 3 Date: 2-18-05

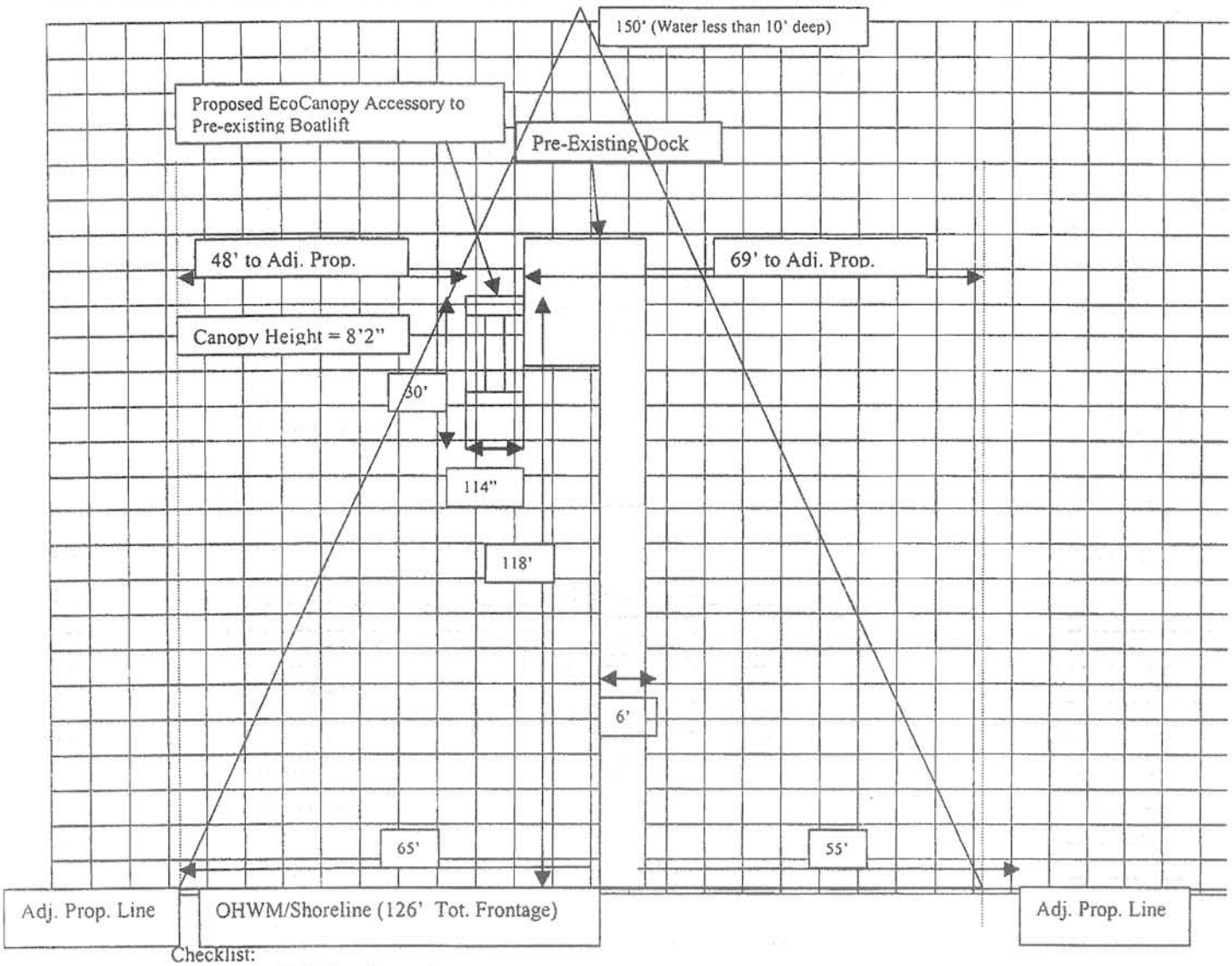
5194

North Arrow

E
N S
W

Plan View

Body of Water: Lk Washington Scale: 1 Square = 6'



Checklist:

1. North designation ✓
2. Name of Waterbody ✓
3. Draw the location of exiting shoreline ✓
4. Draw and note the structure dimensions and the distance the structure extends beyond OHWM ✓
5. Draw and indicate the distance from shoreline to waterward end of structure ✓
6. Indicate the water depth when water is at OHWM at each of structure corners see cross section view
7. Draw and indicate the location of any vegetation or woody debris none
8. Draw and indicate distance to existing structures on subject and adjoining properties see adj. prop. measurements
9. For canopies, indicate height of cover above waterline at corners and at center. 6' and 8'2"

Page 44 of CP.
Permit Application