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COURT OF APPEALS DIV. I
STATE OF WASHINGTON

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No. 68035-8-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK S. PELOQUIN and
JENNIFER W. PELOQUIN, a married couple,

Plaintiff-Appellants,

v.

REGINALD SORDENSTONE and
CAROL SORDENSTONE, a married couple,

Defendants-Respondents

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
THE HONORABLE DEAN LUM, PRESIDING

BRIEF OF APPELLANTS PELOQUINS

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KING COUNTY CODE SUMMARY

DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES, KING
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INDUSTRIES (2008)37

III. INTRODUCTION

After a three day bench trial, King County Superior Court Judge Dean Lum found that Plaintiffs Mark and Jennifer Peloquin (“Peloquins”) had met their burden of proof for a prescriptive easement over Defendants', Reginald and Carol Sordenstone (Sordenstones), property which borders the Peloquins' Property directly to the west – a 30 by 160 foot strip of land containing a driveway, referred to herein as the “Disputed Area.” CP 989-991. The evidence established that the Disputed Area has been in use for access to the Peloquin Property for 40 years by all four sets of owners of the Peloquin Property. RP 35:16-17 & Ex 1.

The original “purpose” of the easement over the Disputed Area has been use for access to the Peloquin Property along its entire 160 foot west boundary. Use of the Disputed Area began with Gary Goodale in 1972 when Gary Goodale purchased the lot from William Fitzpatrick. RP 47:17-25 & 48:9-17. This lot, the house and Shop that Gary Goodale built on it have become the Peloquin Property.

The trial judge correctly found that the Peloquins met their burden of proof for a prescriptive easement showing that the use was adverse to the title owner; open, notorious, continuous and uninterrupted use for 10 years; and that the owner knew of the use when he was able to enforce his rights. CP 989-991. However, the trial court judge erred when establishing

the scope of the easement. The scope of the easement was set too narrowly. It is based on distinctions between types of people, types of vehicles, and the reasons for access to the Peloquin Property. Only Peloquin Property owners driving their personal vehicles (and emergency personnel) are allowed access, everyone else is prohibited. CP 991. This ultra narrow scope prevents maintenance and prohibits lawful uses of the Peloquin Property.

Because key findings and conclusions are not supported by substantial evidence and the order contains an erroneous application of case law to establish the scope of the easement, this Court should modify the scope and establish *general outlines* consistent with the purpose of the easement. The scope should provide use of the Disputed Area for access to the Peloquin Property, maintenance of the Peloquin Property, and for grass cutting on the Disputed Area, all of which are consistent with the original purpose and use of the Disputed Area as established by Gary Goodale.

The trial judge also erred when he burdened the Peloquin Property with a restrictive covenant. The restrictive covenant requires the Pelosquins to keep the Peloquin Gates closed when not in use. CP 991. The Peloquin Gates are on the Peloquin Property. RP 53:19-25 & Ex 27 & Ex 33. The restrictive covenant was not plead, briefed, nor argued at trial, is contrary to the testimony of the Sordenstones' predecessor-in-interest,

Michael Sweeny, and is not supported by substantial evidence. The restrictive covenant deprives the Peloquins of due process, curtails their freedom and use of their property, and should be removed by this Court.

IV. ASSIGNMENTS OF ERROR

1. Finding 29 "This Court finds it persuasive that Michael Sweeny did not observe trucks or other commercial traffic. The Court also finds it persuasive that Michael Sweeny would have known whether trucks or other commercial type traffic were using the Disputed Area" is not supported by substantial evidence and conflicts with Findings 28 and 30.
2. Finding 37, "Third, the Court finds that the credibility of the prior landowners of the Peloquin Property to be slightly troubling because unlike Michael Sweeny, some of the prior landowners of the Peloquin Property do have a stake in the outcome of this proceeding. Particularly the Grosses are potential defendants since they sold the Peloquin Property to the Peloquins," is not supported by substantial evidence and Finding 37 is a conclusion of law.
3. Finding 42, "Gary Goodale testified that his use of the Disputed Area was irregular as well," is not supported by substantial evidence, and does not support conclusions 14 and 15.
4. Finding 56, "Historic use of the Disputed Area was for limited personal use," is not supported by substantial evidence, and does not

support conclusions 14 and 15.

5. Finding 57, "There was no foot traffic over the Disputed Area," is not supported by substantial evidence, and does not support conclusion 15.

6. Finding 58, "There was no commercial use of the Disputed Area" is not supported by substantial evidence to the extent that the term "commercial use" is not defined and seems to be intended by the trial court to refer to a commercially registered vehicle or a third party vehicle, and does not support conclusions 14 and 15.

7. Finding 59, "The nature of the historic use of the Disputed Area was limited, infrequent personal use by personal vehicles" is not supported by substantial evidence and does not support conclusions 14 and 15.

8. Finding 62, "The gate on the Peloquin Property was always closed after it was used" is not supported by substantial evidence and does not support conclusion 15.

9. Finding 67 is not supported by substantial evidence to the extent that "No foot traffic occurred there" and does not support conclusion 15.

10. The trial court erred in conclusion 14 by concluding the evidence proved that historic use of the Disputed Area was for limited personal use.

11. The trial court erred in conclusion 15 by ordering the scope of the prescriptive easement to require:

b. The fenced gate between the Disputed Area and the Peloquin

Property (the Peloquins' Gate) must be closed unless it is actively in use.

- f. There can be no commercial, retail, business or public use of the Disputed Area.
- g. No customers may use the Disputed Area.
- h. No visitors may use the Disputed Area.
- j. The Disputed Area cannot be used for deliveries or pickups of product or materials.
- k. No foot traffic over the Disputed Area.
- l. No deliveries or mail over the Disputed Area.
- m. No third party vehicles accessing the Disputed Area.

12. The trial court erred in conclusion 18 by concluding that on the at least two documented occasions when construction vehicles were allowed back over the Disputed Area, such use was an accommodation and an express permissive use by Michael Sweeny, and it was outside of the prescriptive easement grant.

13. The trial court erred by not including access along the 160 foot length of the Peloquin Property from the Disputed Area, which is necessary for maintenance of the Peloquin Property.

14. The trial court erred in the portion of conclusion 17 that reads “The scope of the prescriptive easement is for occasional and irregular personal access by personal or family vehicle.”

15. The trial court erred by denying the motion for reconsideration.

V. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it was offended by the behavior that is at the essence of a prescriptive easement claim – adverse use? (Pertains to Assignments of Error Nos. 1 through 15).
2. Did the trial court err when applying the law to determine the scope of the easement by focusing on minute details of the interest and set the scope of the easement too narrowly by naming particular people and types of vehicles instead of establishing general outlines for access? (Pertains to Assignments of Error Nos. 3, 4, 5, 7, 9, 10, 11, 12, 13, and 14).
3. Did the trial court err by using a false characterization of use, i.e., “personal” and “commercial” to find that “there was no commercial use of the Disputed Area,” thereby devaluing the Peloquin Property by preventing lawful uses of the shop. (Pertains to Assignments of Error Nos. 1, 3, 4, 6, 7, 10, 11, and 14).
4. Did the trial court err in determining the credibility of the witnesses by finding that the prior owners of the Peloquin Property had a stake in the outcome of the proceeding but Michael Sweeny did not? (Pertains to Assignment of Error No. 2).
5. Did the trial court err by finding that: "Gary Goodale testified that his use of the Disputed Area was irregular as well?" (Pertains to Assignments of Error Nos. 3, 4, 5, 7, 9, 10, 11, 12, 13, and 14.); that "there was no foot

traffic over the Disputed Area" and ordering: "no third party vehicles or people (customers, visitors, members of the public) accessing the Disputed Area." (Pertains to Assignments of Error Nos. 1, 3, 4, 5, 7, 9, 10, 11, 12, 13, and 14); "that on at least two documented occasions when construction vehicles were allowed back over the Disputed Area, such was an accommodation and an express permissive use by Michael Sweeny." (Pertains to Assignments of Error No. 12).

6. Did the trial court err by not including access along the 160 foot west boundary of the Peloquin Property? (Assignment of Error No. 13).

7. Did the trial court err by placing the Peloquin Property under a restrictive covenant – ordering the Peloquins to close the Peloquin gate when it is not in use? (Pertains to Assignments of Error Nos. 8 and 11).

VI. STATEMENT OF THE CASE

A. FACTS

1. Gary Goodale

In 1972 Gary Goodale and his wife Kathleen went shopping for a place to build their home and raise a family on Vashon Island. RP 35:13-17 & 36:7-13. They found a lot at the north end of the island. RP 36:22-37:13. The lot they selected was a corner lot, bordered by 116th ST to the north and by a 30 by 160 foot strip of land containing a road running along the west side of the lot (the Disputed Area). Ex 26 & Ex 47.

Gary Goodale was a marine carpenter. RP 35:20. He had a vision

to build a house with a shop where he could do woodworking and fiberglass work; a shop was a critical consideration for the lot.

Access along the west side of the lot via the Disputed Area was essential to Gary Goodale's decision to purchase the lot. Gary Goodale testified that he would not have purchased the lot in the first place if he didn't have access via the Disputed Area. At trial Gary Goodale testified:

Q. And if you didn't have access, what would you -- would you have designed the house differently?

A. Uhm -- not really. That was how I was going to do it, and I wouldn't have bought the lot if I couldn't.

RP 103:1-4

Right from the time of purchase, it was Gary Goodale's understanding that he was buying the lot along with access from the Disputed Area. Gary Goodale always considered that the purchase price included payment for the lot and access along the Disputed Area. On this point Gary Goodale testified:

Q. Okay.
Did you think it was part of the purchase price for that access?

A. When I bought the property, I considered the purchase price that went towards the use of that driveway, also.

RP 103:5-9

Gary Goodale testified that he relied on the access the Disputed Area provided when designing the layout of his property. RP 102:16-25.

Gary Goodale's understanding of his right of access via the

Disputed Area arose from inquiries he made prior to purchasing the property. RP 101:8-13. Although no written easement agreement for access exists, Gary Goodale acted as if he had an easement throughout the 22 years that he owned the property. When asked at trial on cross examination if he (Gary Goodale) ever asked for an easement, Gary Goodale replied "I didn't ask for something I already had," the question and response at trial was:

Q. I am not -- Sir, I am not asking what you were told, I am asking if you ever asked for an easement?

A. I didn't ask for something I already had.

RP 81:25-82:2.

Right after Gary Goodale purchased the property, he began to use the Disputed Area for access to his lot. RP 43:5-44:11. Gary Goodale used the Disputed Area for access to clear his lot before construction started. RP 48:1-17. Gary Goodale used access from the Disputed Area to bring in a trailer as a temporary on-site residence. RP 48:1-6. Once construction began in 1974, Gary Goodale as well as third parties (concrete truck drivers, lumber delivery, Gary Goodale's father, etc.) all used the Disputed Area for access which included both driving personal vehicles, commercial vehicles, and walking. Gary Goodale's father helped Gary Goodale build the house during the two year construction period. RP 45:10-23 & 52:15-23 & 51:9-19.

The septic system location and future location of the Shop were designed with the access afforded by the Disputed Area. The result of this design is seen on the site plan for the house, filed with King County in December 1973, where the Disputed Area is labeled “30 foot wide access road borders west property line” and on the “AS BUILT” drawing for the septic system which was publically filed with King County in February 1974 and shows the location for the Shop. Ex 18-pg 1 & Ex 24-pg 2.

Gary Goodale used the Disputed Area regularly to access his lot while the house was under construction during the period 1974 through 1976. Gary Goodale testified to his daily use of the Disputed Area to access his property; “[u]sed it full-time, every day we parked our car back there and lumber trucks would deliver lumber back there. It was in full-time use.” RP 52:15-23.

The excavation for the construction of the house was performed by William Fitzpatrick’s company. RP 67:25-68:19. William Fitzpatrick subdivided the lots and was the common Grantor to Gary Goodale as well as to Cathleen Carr (formerly Cathleen Shreve) who was the former owner of the Sordenstone property and the Disputed Area. Ex 5. William Fitzpatrick was aware of Gary Goodale’s layout for the lot and how Gary Goodale was using the lot and how Gary Goodale was going to use the lot. RP 50:10-16.

Following construction of the house, the Goodales used the Disputed Area to access their property for purposes of landscaping. RP 52:24-53:15. Landscaping requires access with both vehicles and on foot. The west boundary of the lot has a railroad tie retaining wall, which ranges from 2 to 5 feet in elevation; construction of this wall and fence was staged from the Disputed Area. The Peloquins' demonstrative trial video compact disk (CD) shows the current state of the septic system retaining wall and fence and the need for maintenance and rebuilding, which would be staged from the grass margins of the Disputed Area. Ex 25.

Gary Goodale used propane to heat his home. RP 55:16-56:2. The propane tank was located on the edge of the west boundary of the property and the propane delivery truck would routinely drive down the Disputed Area to fill the propane tank. The propane tank can be seen in Exhibit 47-pg 1. Accessing the propane tank from the Disputed Area required third party personnel to both drive commercially registered vehicles and to walk on the Disputed Area. Propane deliveries continued during the time the Goodale's owned the property and during the winter the propane deliveries were made every two to three weeks. *Id.*

In approximately 1977 Gary Goodale built a fence around his property. The fence had a gate that was used to access the propane tank. This gate can be seen in Exhibit 14 (The photo in Exhibit 14 was taken in

2009, the heating system has since been updated to natural gas which is why the propane tank is not in the photo). Gary Goodale built the fence so that sections could be removed. RP 54:10-13. At least twice a month Gary Goodale would use the Disputed Area to access the back of his property to load garbage and yard waste to take to the dump. RP 54:21-24.

Gary Goodale regularly mowed the grass on the Disputed Area whenever he mowed his lawn, this happened every week. RP 56:3-22 & 57:10-14. Mowing grass and landscaping all require walking, i.e., using the Disputed Area on foot.

In 1982 Gary Goodale began the process to build the Shop in the location where it appeared on the septic system AS BUILT drawing from 1974. The process involved applying for a zoning variance to locate the Shop closer to the south property line than the 10-foot setback. RP 59:8-23. A site plan was publically filed with King County which showed the location of the Shop on the property. On the site plan, the Disputed Area was labeled "EASEMENT AGREEMENT DRIVEWAY TO MICHAEL AND CATHLEEN SWEENEY¹ RESIDENCE." RP 62:15-20 & Ex 19. The site plan was part of the zoning variance document package that Gary Goodale sent to all property owners within a 500 foot radius for their

¹ Gary Goodale purchased his lot in 1972, six years later in 1978 Michael Sweeney first visited the now Sordenstone Property and married Cathleen Carr in 1980. RP 308:24-25 & RP 311:24-312:3.

public comment. Ex 19 & Ex 20 & Ex 21 & Ex 22.

The elevation of the ground where the Shop was to be built was at a slightly higher elevation than the elevation of the driveway on the Disputed Area. RP 66:25-67:13 & Ex 27. To eliminate a change in elevation which would result in a bump between the elevation of the Shop floor and the driveway on the Disputed Area, Gary Goodale asked Cathleen Carr and Michael Sweeny if he could make a small cut through the ground of the Disputed Area. *Id.* Cathleen Carr and Michael Sweeny agreed to Gary Goodale's request to make a cut in the dirt. *Id.* Gary Goodale did not ask for "access" over the Disputed Area; his only request of Cathleen Carr and Michael Sweeny was to make a cut in the dirt. RP 67:22-24. In exchange, Cathleen Carr and Michael Sweeny asked Gary Goodale to help them build a fence like Gary Goodale's around their property. Cathleen Carr and Michael Sweeny admired Gary Goodale's fence with its removable panels. RP 400:23-401:02.

The purpose of the Shop was to give Gary Goodale a place to build parts for his profession of boat building. RP 66:13-18. The Shop that was built is over 1,100 square feet in floor area, has a twelve foot high ceiling and housed Gary Goodale's woodshop including table saw, jointer, planer, bandsaw, and other tools and is in the same location as it was placed in 1974 on the septic AS BUILT drawing. RP 69:1-13 & Ex 24-pg 2.

Gary Goodale built his Shop with the help of third parties such as William Fitzpatrick's company, which made the cut in the Disputed Area and excavated the foundation for the Shop. RP 67:25-68:13. Third party cement truck drivers with their commercially registered vehicles used the Disputed Area for to access to the Shop construction. *Id.* This process went on for approximately one year until the Shop was completed. The Shop is visible in Exhibit 47, which is an aerial photo from 1990. A truck is also visible in Exhibit 47 parked on the concrete pad in between the Shop and the Disputed Area (directly to the left of the pointer). CP 806.

Once the Shop was completed, Gary Goodale used the Shop to facilitate his boat building business, at times working through the night to complete parts for different jobs. RP 69:1-13. At the Shop, Gary Goodale cut trim, built cabinets, and made fiberglass parts for boats that he was working on in Seattle. Gary Goodale would use his truck and the access afforded by the Disputed Area to bring these parts from the Shop to job sites in Seattle. *Id.* Gary Goodale testified that he would drive in and out of the Disputed Area regularly and that "regularly" meant "daily" use of the Disputed Area to access the Shop. *Id.* Construction on the Shop started in 1982, Gary Goodale's daily use of the Disputed Area lasted from the time the Shop was completed until the property was sold to the Pearsons in 1994. Ex 17-pg 1 & Ex 2 & RP 69:20-70:2.

Michael Sweeny and Cathleen Carr would see Gary Goodale coming and going and cutting the grass on the Disputed Area. RP 70:3-9 & RP 56:23-57:15. They would pass by on occasion as they went to the mailbox at the end of the Disputed Area. *Id.*

During the entire time that Gary Goodale and his wife lived on the property they were never asked to reduce or modify their use of the Disputed Area in any way. RP 70:10-71:10. Gary Goodale testified that there was never any discussion about his fence or how it was to be used. RP 70:24-71:1. Gary Goodale testified that neither Michael Sweeny nor Cathleen Carr ever tried to restrict, manage, or interfere with his use of the Disputed Area, his Shop, his fence, or imply that he didn't have a right to use the Disputed Area. RP 70:10-71:10.

2. Marcia And Steven Pearson (Now Marcia Cook)

In 1994 Gary Goodale sold the property to Marcia and Steven Pearson (now Marcia Cook). Marcia Cook testified that the reason² they bought the property was because of the easy access via the Disputed Area to the large Shop in the back that was setup for manufacturing and at the time she and her husband were in the business of casting jewelry for the trade. RP 121:15-17 & RP 110:3-8. They ran a 24-hour casting service creating precious metal castings for retail companies such as Nordstrom,

² "And that is the reason we bought the place in the first place – because there was easy access to the shop, and so we continued to use the driveway." RP 121:15-17.

Turgeon Raine, LT Benning, etc. RP 110:14-25. They moved their equipment into the Shop using the Disputed Area. RP 117:7-11.

Pictures of the interior of the Shop after the casting equipment was moved in are shown in Exhibits 28, 29, and 30. Exhibit 30 shows the large door on the west wall open and Exhibit 29 shows the large door closed. The large piece of equipment on the floor in Exhibit 28 is a kiln which was delivered using the Disputed Area for access to the Shop. Marcia Cook (formerly Marcia Pearson) would use the Disputed Area to bring supplies back from Seattle, such as hydrogen and oxygen bottles and 100 pound packages of investments "casts." RP 118:8-13.

When the Pearsons were moving in they used the Disputed Area to access the Shop many times every weekend. After the Pearsons moved in their use continued to be several times a week to a couple of times a day. RP 117:7-11. Marcia Cook testified that she used the Disputed Area for pedestrian access as well and customers would use the Disputed Area to come to their Shop. RP 117:12-14 & RP 117:17-22.

Marcia Cook testified that her husband Steven would use the Disputed Area to bring their vehicles, i.e., motorcycle and Jeep back to the Shop and park them there and work on them there. RP 120:19-121:3.

After the Pearsons moved in, mud developed where the Disputed Area meets 116th St due to wet weather during the winter months and the

delivery trucks that were using the Disputed Area to deliver to the Shop. RP 121:10-22 & RP 409:19-410:5. Michael Sweeny presented a license agreement for the Pearsons to sign in order to continue using the Disputed Area. RP 410:2-5. Marcia Cook and her husband refused to sign the license agreement and continued to use the Disputed Area. RP 359:11-13. Attorney Margaret Koch responded to Michael Sweeny's license agreement on behalf of the Pearsons (now Marcia Cook). The letter Margaret Koch sent on behalf of the Pearsons put Michael Sweeny and Cathleen Carr on notice of the Pearsons' claim to a prescriptive easement that already applied the Disputed Area. Ex 35. The Pearsons did not hear from Michael Sweeny again after the letter went out and Michael Sweeny did not block their access over the Disputed Area. RP 124:2-6. Michael Sweeny testified that he did nothing in response to the Pearsons' claim for a prescriptive easement. RP 411:5-7.

Towards the end of the time the Pearsons owned the property, Mr. Pearson damaged the large doors in the west wall of the Shop with his truck. RP 129:4-10. Mr. Amelin, a neighbor, used the Disputed Area to access the Shop with his Volkswagen and helped straighten the doors with the help of other neighbors from the area. RP 129:16-19.

3. Michael Gross And Magdalena Rangel Gross

In February 1999 the Pearson sold their property to Michael Gross

and Magdalena Rangel Gross. Magdalena Rangel Gross testified that she was attracted to the property because the Shop was suited for use as a studio and office. RP 207:9-13. In her testimony, Magdalena Rangel Gross described the Disputed Area as an easement that provided access to the Peloquin Property. RP 208:17-21.

Before the Gross family moved in, they hired contractors to remodel the house; this lasted for approximately 6 months. RP 206:13-207:5 & 210:8-211:7. The contractors used the Disputed Area to access the Shop and staged building materials in the Shop, while using the Shop as a workshop to support remodeling the main house. *Id.* There is no testimony in the record from Michael Sweeny on this construction event.

The west wall of the Shop was in need of replacement since the large sliding doors had become damaged by Steven Pearson, the previous owner. RP 129:4-10. The Gross family hired contractors to replace the west wall of the Shop. RP 144:7-23 & RP 211:8-23. The contractors used the Disputed Area to access the Shop bringing out demolition materials from the old wall and bringing in new materials. *Id.* The rebuilt west wall of the Shop is seen in Exhibit 27. There is no testimony in the record from Michael Sweeny on this construction event either.

Michael Gross and Magdalena Rangel Gross refused to have their access to the Disputed Area limited; they had unfettered use of the

Disputed Area to access their property. RP 153:4-10 & 217:1-9. The Gross family refused to sign any agreement to limit their use with Michael Sweeny. *Id.* The Gross family used the Disputed Area to have third party gardeners drive into the court yard of the Shop with their trucks and lawn mowers in order to stage and perform yard work on the property, such as pruning, lawn mowing, bringing yard waste out, etc. RP 213:5-16.

The Gross family together with other neighborhood mothers prepared a float for the Strawberry Festival on Vashon using the Shop and access via the Disputed Area. RP 213:17-214:8, 145:7-18. This involved having people come to the Shop (on foot) via the Disputed Area to work on the float for the parade. *Id.* Magdalena Rangel Gross described making the float called “*Where The Wild Things Are,*” made with a pickup truck, a bunch of moms, a lot of paint, and a cardboard jungle, which would have children on it dressed up as little wild things when in use. *Id.*

Magdalena Rangel Gross described leaving the gates in their fence open (Peloquin gate) for people to walk through after entering the Disputed Area to the yard sale location at the Shop. RP 213:21-214:1.

Michael Gross used the Disputed Area to access the Shop with his vehicles and he used the Disputed Area on foot. RP 145:7-18. Michael Gross testified to using the Disputed Area as he needed to and he didn’t keep track of how many times he used it. RP 176:3-18. The only

quantification of use Michael Gross was able to make was in the aggregate; he used the Disputed Area hundreds (100s) of times including use on foot. RP 176:3-18. Michael Gross testified that he would leave his property and enter the Disputed Area to walk his dog, or to take his children for walks because it was easier to get out to 116th St from the Disputed Area rather than go through all the elevations of his yard. RP 179:2-17. Michael Gross liked the pleasant atmosphere that the woods provided along the driveway on the Disputed Area. *Id.* Michael Gross would walk on the Disputed Area to inspect the fence which runs along the length of the west boundary of the property. RP 178:23-179:1.

4. Peloquins

In November 2008 the Peloquins purchased the property from the Gross family. RP 181:14-18. Like the Pearsons and Gross family before them, the Peloquins were attracted to the property because of the existence of the large 1,100 square foot Shop and the varied uses that are possible with it. RP 182:15-183:5. The Peloquins bought the property because of the existence of the Shop. RP 182:11-14 The Peloquins were looking for a property on Vashon where they could have a pottery studio and home office for Mark Peloquin. *Id.* Currently, the Peloquins are using the Shop as a woodworking shop and for their kayak pump business Bluewater Kayak Works. RP 242:3-23.

After the Peloquins moved in, the Peloquins began using the Disputed Area to access the Shop and cut the grass on the Disputed Area in 2009 once it started to grow. RP 191:9-11. At this time Michael Sweeny was advertising his property (now the Sordenstone Property) for sale.

5. Sordenstones

Reginald Sordenstone testified that he met with Michael Sweeny on several occasions prior to purchasing Michael Sweeny's property and closing on the now Sordenstone property. Reginald Sordenstone testified that Michael Sweeny did not tell him anything about the history of: (1) the Disputed Area; (2) the Margaret Koch's letter concerning the Pearson's prescriptive rights to the Disputed Area; or (3) the repudiated license agreements. RP 447:24-448:9. Contrary to Reginald Sordenstone's testimony, Michael Sweeny testified to telling Reginald Sordenstone about the history of the Disputed Area prior to the closing on the sale of his property to the Sordenstones. RP 417:12-18.

Reginald and Carol Sordenstone purchased the Sordenstone property from Michael Sweeny in June 2009. Ex 8. As part of the conditions of sale, Michael Sweeny is holding a mortgage for the Sordenstones. RP 380:9-11. During the sale to the Sordenstones, Michael Sweeny did not disclose the prior notice that he received from the Pearsons informing him of a claim for prescriptive rights to the Disputed

Area. RP 418:14-19 & Ex 38-pg 1. This disclosure could have been made on MLS Form 17 paragraph E but was not reported. *Id.*

The Sordenstones commenced building a gate across the Disputed Area and intended to require the Peloquins to ask permission to access the Disputed Area; the law suit was filed to halt construction of the gate. RP 469:15-17 & RP 472:13-20. Reginald Sordenstone expressed to Mr. Peloquin his intention to erect a fence parallel to the Peloquins' fence, which would prohibit the Peloquins from performing maintenance on their septic system retaining wall or fence. RP 249:4-5.

6. Michael Sweeny

Michael Sweeny contradicted himself at trial as to whether vehicles were ever parked on the concrete pad in front the Shop and whether the Peloquin Gates was always closed when not in use. RP 357:6-10. On direct, Michael Sweeny testified that you couldn't park a car in there (on the concrete pad in front of the Shop) and close the gate and that the Peloquin Gates in the fence were open because he could see that there were *never* any cars parked there (in front of the Shop). RP 351:14-19. On cross Michael Sweeny testified that Gary Goodale did park cars on the concrete pad in front of the Shop. RP 402:11-21. Michael Sweeny testified that the Peloquin Gates are seven to eight feet tall and 12 or 14 feet wide. RP 424:22. A truck is shown parked on the concrete pad in front of the

Shop in Exhibit 47-pg 1 (aerial view from July 10, 1990) and the demonstrative trial video shows the Peloquins' truck coming and going from a parked position on the concrete pad in front of the Shop.

On direct Michael Sweeny testified that he never saw tire track evidence on his driveway in the Disputed Area like he did on his property at the bend in his driveway. RP 364:20-365:4. On cross, Michael Sweeny testified that he did observe ruts in the Disputed Area after the Pearsons (now Marcia Cook) moved in and he acknowledged that this was the result of a truck and that he didn't know what type of truck caused the ruts. RP 409:16-410:1.

Michael Sweeny testified that he never tried to limit pedestrian use of the Disputed Area. RP 409:1-12. Michael Sweeny testified that he never even discussed pedestrian use of the Disputed Area with any of the owners of the Peloquin Property. *Id.* The trial court found that the use of the Disputed Area was adverse to Michael Sweeny. CP 989.

7. The Peloquin Property

The Shop is currently in need of maintenance, the roof and skylights are leaking and the west wall is rotting and is in need of repair. RP 189:17-25. The gas heating system in the Shop requires routine service; currently heating contractors cannot access the Shop because of the prohibition on "commercial vehicles." The septic system retaining

wall on the west boundary of the Peloquin Property is rotting and will need to be replaced. The fence surrounding the perimeter of the Peloquin property is in need of immediate replacement, this can be seen in the photos in Exhibit 25 and Exhibit 14. RP 191:12-16. Just as was done when the Shop, the septic system retaining wall, and fence were built, maintaining or replacing these structures are jobs that need to be staged from the grass margin on the Disputed Area. RP 191:1-5 & CP 831-843.

B. PROCEDURAL HISTORY

The Peloquins filed a complaint for a prescriptive easement in November 2009. The court issued a temporary restraining order in November 2009, ordered a preliminary injunction in April 2010, and trial commenced on August 15, 2011. CP 1-7 & CP 30-43 & CP 445-452.

The trial court issued an oral ruling on August 18, 2011, wherein the trial judge stated that he didn't know what the Peloquins meant by "maintain." RP 630:22.

The Peloquins filed a motion for reconsideration on October 13, 2011 along with declarations from two contractors (Antonio Hernandez and Christopher C. Smith) and a septic designer (Scott Skelton) that followed up on Mark Peloquin's testimony regarding the need for maintenance access from the Disputed Area to the Shop and for maintenance access along the west boundary of the Peloquin Property. CP

819-830 & CP 831-834 & CP 835-838 & CP 839-843.

On October 14, 2011 the day after the Peloquins filed their opening brief for reconsideration, the trial court amended its oral ruling and added access for emergency vehicles (ambulance and fire trucks) to the scope of the easement. CP 885-885. After the hearing on reconsideration, the trial court lifted one of two restrictive covenants it had placed on the Peloquin Property, which required the Peloquins to maintain the Peloquin gates and fence in a particular condition. However, the trial court left the restrictive covenant in place which requires the Peloquins to keep the gates in their fence closed when not in use. *Id.* The Peloquins filed a timely notice of appeal. CP 999-1029.

V. ARGUMENT

A. **THE TRIAL COURT FAILED TO APPLY THE LAW CORRECTLY WHEN IT SET THE SCOPE OF THE EASEMENT - A PARTY'S IDENTITY, VEHICLE, AND PURPOSE FOR ACCESSING THE PELOQUIN PROPERTY IS IRRELEVANT TO THE SCOPE OF THE EASEMENT**

1. Standard Of Review

A prescriptive easement involves mixed questions of law and fact. *Petersen v. Port of Seattle*, 94 Wash.2d 479, 485, 618 P.2d 67 (1980). To establish a prescriptive easement, a claimant must prove: (1) use adverse to the title owner; (2) open, notorious, continuous and uninterrupted use for 10 years; and (3) that the owner knew of the use when he was able to enforce his rights. *Bradley v. American Smelting & Refining Co.*, 104

Wash.2d 677, 693, 709 P.2d 782 (1985) (citing *Dunbar v. Heinrich*, 95 Wash.2d 20, 22, 622 P.2d 812 (1980)). A trial court's findings of fact are reviewed for substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). The trial court's conclusions of law are reviewed to determine if they are supported by the findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

2. The Trial Judge Was Offended By The Very Behavior That Is At The Essence Of A Prescriptive Easement Claim – Adverse Use

Remarkably, the trial court was offended by adverse use. In Finding 38, the trial court states that “the Court finds the credibility of Marcia Cook (formerly Marcia Pearsons), Michael Gross and Magdalena Rangel Gross to be troubling because they seem to have taken an unsettling position that they essentially own the Disputed Area. Although they didn’t use those exact words, their attitude was that they could do whatever they wanted with the Disputed Area. This was unsettling to the Court.” CP 984 (Finding 38).

The essence of a prescriptive easement claim is adverse use of

property. Use is adverse if “a claimant uses property as if it were his own, entirely disregarding the claims of others, asks permission from nobody, and uses the property under a claim of right.” *See Lee v. Lozier*, 88 Wash.App. 176, 182, 945 P.2d 214, 218 (1997) (citing *Crescent Harbor Water Co., Inc. v. Lyseng*, 51 Wash.App. 337, 341, 753 P.2d 555 (1988) (quoting *Malnati v. Ramstead*, 50 Wash.2d 105, 108, 309 P.2d 754 (1957))). Thus, the very behavior that is essential to the Peloquins’ claim troubled the trial court and negatively impacted the trial court’s credibility determinations of the Peloquins’ predecessors-in-interest because they were of the opinion that they had a right to use the Disputed Area.

The Peloquins have been prejudiced by the trial court’s fundamental error in reaction to adverse use and that error is reflected in the trial court’s Findings of Fact 29, 37, 42, 56, 57, 58, 59, 62, and 67 and incorrect application of the law (Conclusions 14, 15, 17, and 18), all of which ultimately produced the ultra narrow scope for the prescriptive right. These findings and conclusions are not supported by substantial evidence, are not binding on this Court, and should be reversed. The ultra narrow scope of the prescriptive right deprives the Peloquins of the reasonable uses acquired by prescription and severely devalues the Peloquin Property.

3. Creating Access Distinctions Based On Types of People, Types

of Vehicles, And The Reasons Underlying Access Is Error And Does Not Establish General Outlines For The Easement

In Washington State, binding authority on the issue of scope of a prescriptive easement is found in the Supreme Court decisions of *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 94, 455 P.2d 372 (1969) and *Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 135 P.2d 867 (1943). These cases hold that the scope of a prescriptive easement extends to the uses necessary to achieve the purpose for which the easement was claimed. *Lee v. Lozier*, 88 Wash.App 176, 187-188, 945 P.2d 214, 220-221; *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 94, 455 P.2d 372 (1969); *Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 135 P.2d 867 (1943). While applying this precedent, this Court in *Lee v. Lozier* pointed to the untenability of focusing on individual activities as highlighted by the *Restatement of Property*:

No use can be justified under a prescriptive easement unless it can fairly be regarded as within the range of the privileges asserted by the adverse user and acquiesced in by the owner of the servient tenement. Yet, no use can ever be exactly duplicated. If any practically useful easement is ever to arise by prescription, the use permitted under it must vary in some degree from the use by which it was created. *Hence, the use under which a prescriptive interest arises determines the general outlines rather than the minute details of the interest* (emphasis added).

Lozier, 88 Wash.App. at 187-188 (citing Restatement of Property §477 at 2992 (1944)).

By prohibiting a list of types of people and vehicles, the trial court set the scope of the easement to the narrow single activity of the: “easement holder driving his or her own passenger vehicle in and/or out of the Disputed Area.” CP 973-978. The trial court failed to ascertain the claimed “purpose” of the easement, it failed to recognize the “uses” that supported the claimed purpose, nor did it establish the “general outlines” based on the claimed “purpose” of the easement. Thus, the trial court erred when it set the scope of the easement by failing to apply the rule of law, as pointed out by this Court in *Lozier*; that “the use under which a prescriptive easement arises determines the general outlines rather than the minute details of the interest.” *Lozier*, 88 Wash.App. at 187-188 (citing Restatement of Property §477 at 2992 (1944)).

The purpose of the easement was established by Gary Goodale’s use of the Disputed Area from the time of his purchase in 1972, and reaffirmed by each subsequent owner. Gary Goodale thought he was purchasing a corner lot with access along the Disputed Area. RP 103:5-9. Gary Goodale based his decision to purchase and then develop the lot in the first instance because of the access he had to the lot from the Disputed Area. RP 103:1-4. In 1973 Gary Goodale filed a site plan with his building permit application and labeled the Disputed Area: “30 foot wide access road borders west property line.” Ex 18-pg 1. In 1974, Garry placed the

house, septic system, and Shop in their present locations on the AS BUILT drawing filed with King County for the septic system. Ex 24-pg 2. These drawings are objectively observable acts adverse to the title owner and evidence that Gary Goodale operated under a claim of right to use the Disputed Area for access along the entire length of his west boundary line. *See Dunbar v. Heinrich*, 95 Wn.2d 20, 27, 622 P.2d 812, 816 (1980).

Garry Goodale and third parties at his request used access from the Disputed Area to: clear his lot; build his house; stage construction of the septic system, landscaping e.g., the retaining wall on the west boundary of the lot; build the perimeter fence; build the Shop; receive deliveries of propane; for daily vehicle access to/from the Shop including parking a vehicle or his boat on the concrete pad between the Shop and the Disputed Area; to cut the grass on the Disputed Area; and to remove yard waste over the 22 years that he owned the property.³ Thus, Gary Goodale established the purpose of the easement as access to the Peloquin Property by objectively observable acts. The *general outlines* of the scope of the easement that are consistent with Gary Goodale's claimed purpose and the uses Gary Goodale engaged in are:

Access to the Peloquin Property from the Disputed Area;

³ RP 48:1-17; RP 52:1-4 & RP 52:15-23; RP 49:5-11 & Ex 24-pg2 & RP 52:24-53:15 & RP 55:6-15; RP 53:17-25; RP 67:25-68:19; RP 55:16-56:2; RP 69:1-13 & Ex 47; RP 56:4-22 & RP 57:10-14; RP 54:18-24.

**grass cutting on the Disputed Area; and
staging maintenance of the Peloquin Property from the
Disputed Area without blocking the driveway on the Disputed
area.**

Subsequent owners of the Peloquin Property have engaged in uses that are consistent with the *general outlines* of the easement shown above. For example, the Pearsons (now Marcia Cook) used the Disputed Area for access to and from their property for vehicles and on foot. RP 117:7-16 & RP 120:19-121:3 They ran their business Gold Spells out of the Shop, and used the Disputed Area for vehicular access and access on foot. RP 110:14-111:2 & RP 112:9-115:3 & RP 118:3-13. Vehicles included their own vehicles as well as third party big box trucks. RP 354:16-17. Some of their customers accessed the Shop via the Disputed Area. RP 117:17-22.

The Gross family used the Disputed Area for third party access to their property: for remodeling the residence; rebuilding the west wall of the Shop; for gardeners to upkeep the grounds; to build a float named *Where The Wild Things Are* for the Vashon Island Strawberry Festival; and for access to the yard sale location in front of the Shop.⁴ People walked in from the street (116th ST) across the Disputed Area and through the Peloquin Gates to work on the float and to access the yard sale location. RP 213:21-214:1.

⁴ RP 206:13-207:5 & RP 210:8-211:7; RP 144:7-145:2 & RP 211:8-23; RP 213:5-16; RP 145:7-18 & RP 211:24-212:9 & RP 213:17-214:8.

Similarly, the Peloquins have used the Disputed Area for third party delivery of fire wood to the concrete pad in front of the Shop. The Peloquins cut the grass on the Disputed Area during 2009; and now run Bluewater Kayak Works out of the Shop. RP 191:9-11 & RP 242:3-23.

There should be no prohibition of access based on the relationship between a person and the easement holder. There should be no prohibition of access based on the type of vehicle, e.g., personal vehicle verses “commercial” vehicle. There should be no prohibition on whether the access is accomplished with a vehicle or on foot. There is no basis in the law for prohibitions of access based on these distinctions.

The single activity ultra narrow scope of, “easement holder driving his or her own passenger vehicle in and/or out of the Disputed Area” is analogous to what Appellant Lozier urged in *Lozier*. See *Lee v. Lozier*, 88 Wash.App. 176, 186-187, 945 P.2d 214. Appellant Lozier argued that each of the easement holders had to prove that they engaged in each activity for which they claimed a prescriptive right. *Id.* This Court in *Lozier* did not agree and stated:

“Lozier cites no authority for the proposition that an easement must be specifically limited to the individual activities that each of the claimants proved they engaged in in the past, and we know of none. Instead as stated in the *Yakima Valley* case, the easement extends to the uses necessary to achieve the *purposes of the easement*. The untenability of Lozier’s position is recognized by the

Restatement (emphasis added).”

Lozier, 88 Wash.App. at 187-188 (citing Restatement of Property §477, at 2992 (1944)).

The scope of the easement in *Lozier* was “recreational uses of the dock.” Thus, each plaintiff did not have to prove that they each took part in all the different recreational uses encompassed by the general outline of “recreational uses of the dock;” i.e., water-skiing, swimming, fishing, strolling, sunbathing, picnicking, and the temporary moorage of boats. *See Lozier*, 88 Wash.App. at 187-188. Similarly, the Peloquins do not have to prove that either they or their predecessors-in-interest participated in every activity encompassed within the *general outlines* of the prescriptive interest listed above on pages 30-31.

It is an error of law to parse “types of people,” “types of vehicles,” and “modes of access” (vehicles or on foot) as the trial court did. Nor is the “reason” for the access germane to use of the easement; a third party is a third party as long as they are using the Disputed Area lawfully at the request of the easement holder. The scope of the easement in *Lozier* did not prohibit the relatives or friends of the easement holders from using the dock. In sharp contrast to *Lozier*, if Mark Peloquin is returning from a kayak trip with his nephew, his nephew cannot stay in the car while Mark Peloquin traverses the Disputed Area to the Shop in order to put the

kayaks away. His nephew must get out of the car and walk a different way to reach the Shop in order to help put the kayaks away.

This Court in *Lozier* explained that “in ascertaining whether a particular use is permissible under a prescriptive easement the court should compare that use with the uses leading to the prescriptive easement in regard to: (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement.” *Lozier*, 88 Wash.App. at 188 (citing Restatement of Property §478, at 2994).

In the instant case, the “physical character” of the uses of the Disputed Area leading to the prescriptive easement is “a temporary traverse of the Disputed Area by vehicle or on foot, or for staging work on the Peloquin Property, and cutting grass on the Disputed Area.” The “purpose” of the use is “access via the Disputed Area to the Peloquin Property and maintenance of the grass on the Disputed Area.”

The “reason” underlying why a person wants to access the Peloquin Property is not relevant to the analysis. Focusing on the “reason” for the access, i.e., construction access, etc. the type of vehicle, e.g., “commercial,” or the identity of the person led the trial court down the path to exclude, amongst other things, emergency vehicle access to the Peloquin Property via the Disputed Area in the trial court’s oral ruling. CP 973-978. On motion for reconsideration, the Peloquins pointed out the

hazardous and dangerous condition that results from this approach as well as the deprivation of uses of the Peloquin Property. CP 819-830. The day after the motion was filed, the trial court *sua sponte* added access for emergency vehicles. CP 885. However, this small step in the right direction did not cure the trial court's error.

The trial court failed to follow the law when it established the scope of the easement. There is no authority recognizing easements for emergency vehicle access. There was no historical precedent for emergency vehicle access to the Peloquin Property via the Disputed Area among the previous owners of the Peloquin Property; the trial court violated its own erroneous method of focusing on historical "activities" when it added access for emergency vehicles. *See Stevens v. Parker*, 2009 WL 2915274 (Wash.App. Div 1). The current scope of access deprives the Pelosquins of many uses for their Shop and devalues their property because the scope did not establish *general guidelines* for the prescriptive right. Prohibiting the ambulance, the contractor, the delivery man, the repairman, the nephew, or the person coming to do pottery from accessing the Peloquin Property via the Disputed Area is what the holding in *Lozier* prohibits because there is no authority to support it.

A person could not conclude that use of the Disputed Area was irregular, limited personal use, infrequent, without foot traffic and limited

only to personal vehicles, thus Findings 42, 56, 57, 59, and 67 are not supported by substantial evidence and do not support Conclusions 14, 15, and 18.

4. The Trial Court Erred By Using A False Characterization Of Use, i.e., “Personal” And “Commercial” To Find That “There Was No Commercial Use Of The Disputed Area,” This Finding Devalues The Peloquin Property By Preventing Lawful Uses Of The Shop, Which Are Only Possible With Access Via The Disputed Area

The current single activity scope of easement would not even permit the Peloquins to use their Shop as Marcia Cook (formerly Marcia Pearson) did because a big box truck (commercial vehicle) was needed to bring equipment to the Shop for Gold Spells. RP 354:5-19. Now, “commercial” vehicles and third parties are prohibited and the easement holder driving his or her own personal vehicle is inadequate to bring the necessary equipment into the Shop. This false characterization of so-called “commercial use” deprives the Peloquins from uses of their Shop, devaluing the Peloquin Property and a taking results.

The trial court erred by using the term “commercial use” in its order without providing a definition for the term in a geographical area where there can be no “commercial uses” in the first place. This is error. Both the Peloquin Property and the Sordenstone Property are zoned Rural Area (RA). Ex 100-101. There can be no “commercial use” in RA zoned areas. “Commercial use” mischaracterizes uses that are lawful and that

fall within the scope of uses that originally established the easement.

King County has promulgated code sections that allow residents of a home to operate small scale businesses from their residences or from outbuildings on their property in RA zoned areas. This is not “commercial use.” These code sections are summarized in Department of Development and Environmental Services (DDES) Customer Information Bulletin # 43A.⁵ DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES, KING COUNTY WA, BULLETIN #43A, HOME OCCUPATIONS AND HOME INDUSTRIES (2008). All of the previous and current owners of the Peloquin Property have and are using the Shop for various lawfully permitted home industries or home occupations. The photographs in Exhibits 28 and 29 are from the Pearson’s ownership when they ran the business Gold Spells out of the Shop. All of the equipment in these photos was brought in through the Disputed Area, some of it using commercial big box trucks which are not personal vehicles. RP 354:16-17.

Exhibits 28, 29, 30, and Michael Sweeny’s testimony to seeing ruts in the Disputed Area made by trucks is contrary to Finding 29. RP 409:19-410:5. Michael Sweeny’s testimony of seeing a big box truck on the Disputed Area where the Pearsons were unloading equipment for Gold Spells into the Shop is contrary to Finding 29. RP 354:5-19. Finding 29 is

⁵ The trial court was presented with a copy of Bulletin #43A

also contrary to Marcia Cook's (formerly Marcia Pearson) testimony that some of their customers came to the Shop via the Disputed Area. RP 117:17-22. In light of this evidence to the contrary, Finding 29 is not supported by substantial evidence.

Vashon Island is known for its cottage industries, art, art studios, and semi-annual art walk. RP 342:13-23. Indeed all of the previous owners of the Peloquin Property testified that their decision to purchase the property was heavily influenced by the existence of the 1,100 square foot Shop. RP 110:3-8 & 121:15-17 & RP 207:9-13 & RP 182:15-183:5. Gary Goodale wouldn't have bought the lot and developed the now Peloquin Property in the first place if he didn't have access along the Disputed Area in order to build and access a shop. RP 103:1-4.

To the extent that the trial court used the terms "commercial use" and "personal use" to proscribe vehicles, people or "reasons" for accessing the Peloquin Property via the Disputed Area in support of lawful home occupation or home industry use or business use of the Peloquin Property, a person could not conclude that there is no evidence to support such use within the scope of the prescriptive right. Therefore, Findings 29, 42, 56, 58, and 59 are not supported by substantial evidence, and these findings do not support Conclusions 14 and 15, all of which is not binding on this Court and should be reversed.

B. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DETERMINED THE CREDIBILITY OF THE WITNESSES

1. Michael Sweeny Had A Stake In The Outcome; The Peloquins' Predecessors-In-Interest Did Not.

Finding of Fact 37 is mislabeled; it is a conclusion of law. The trial court erred as a matter of law with Finding 37. Michael Sweeny is an interested witness; he holds a mortgage for the Sordenstones. RP 380:9-11. The Sordenstones make monthly payments to him; he has a current active pecuniary interest in the Sordenstone Property. He failed to disclose to the Sordenstones, before they purchased his property Gary Goodale's site plan labeled: "EASEMENT AGREEMENT....." and the prescriptive easement claim to the Disputed Area that was made by the Pearsons (now Marcia Cook). Ex 35. Nor did Michael Sweeny disclose that the previous owners of the Peloquin Property refused to sign his license agreements. RP 359:11-13 & RP 153:4-10 & RP 217:1-9.

Michael Sweeny testified that he told Reginald Sordenstone about the history of the Disputed Area before the closing on the Sordenstone Property. RP 417:12-18. Reginald Sordenstone testified that Michael Sweeny did not tell him about the history of the Disputed Area. RP 447:24-448:9. The Sordenstones have causes of action against Michael Sweeny for breach of warranty and misrepresentation. Michael Sweeny can hardly be called someone without a stake in the outcome.

The trial Court erred by finding that the “Grosses are potential defendants since they sold the Property to the Peloquins.” This statement is incorrect. The Grosses made no representations to the Peloquins regarding the Disputed Area before the closing on the Peloquin Property. Therefore, the Peloquins do not have a cause of action against the Grosses or any other predecessor-in-interest.

A person could not conclude that Michael Sweeny did not have a stake in the outcome in light of the mortgage he holds for the Sordenstones and the causes of action that the Sordenstones have against him for breach of warranty and misrepresentation. Neither could a person conclude that the Peloquins have a cause of action against their predecessors-in-interest, thus Finding 37 is not supported by substantial evidence, is not binding on this Court and should be reversed.

2. The Trial Court Erred In Finding That; Gary Goodale’s Use Was Irregular; There Was No Third Party Use Or Foot Traffic Over The Disputed Area; And Construction Access Was Permissive

The evidence of Gary Goodale’s use is voluminous and continuous not irregular. The Peloquin Property would still be an undeveloped lot if it were not for Gary Goodale’s continuous use, and that of third parties, as well as foot traffic on the Disputed Area. Indeed, third party use and foot traffic has been continuous for 40 years.

Gary Goodale used access from the Disputed Area under a claim

of right from the beginning to: clear his lot; build his house; stage construction of the septic system, landscaping e.g., the retaining wall on the west boundary of the lot; build the perimeter fence; build the Shop; receive deliveries of propane; for daily vehicle access to/from the Shop including parking a vehicle or his boat on the concrete pad between the Shop and the Disputed Area; to cut the grass on the Disputed Area; and to remove yard waste over the 22 years that he owned the property.⁶ All of these uses required both 3rd parties and walking on the Disputed Area. Garry Goodale, his father, and third party construction workers all walked on the Disputed Area. RP 51:15-16 & RP 45:18-22.

Following completion of the Shop, from 1984 until 1994, Gary Goodale used the Disputed Area for daily access to/from the Shop to support his work as a marine carpenter using his wood tools. RP 69:1-13. Gary Goodale also cut the grass regularly on the Disputed Area for the 22 years that he lived on the property – cutting grass requires walking.

Marcia Cook walked on the Disputed Area. RP 117:12-14. Bill Amelin helped straighten the large doors on the west wall of the Shop after he drove his car to the Shop via the Disputed Area. RP 129:16-19. Delivery trucks made tracks in the mud in the driveway of the Disputed

⁶ RP 48:1-17; RP 52:1-4 & RP 52:15-23; RP 49:5-11 & Ex 24-pg2 & RP 52:24-53:15 & RP 55:6-15; RP 53:17-25; RP 67:25-68:19; RP 55:16-56:2; RP 69:1-13 & Ex 47; RP 56:4-22 & RP 57:10-14; RP 54:18-24.

Area. RP 121:10-22 & RP 409:19-410:5. Customers came to Gold Spells all accessing the Peloquin Property via the Disputed Area. RP 117:17-22.

The house was remodeled; the Shop was maintained all with third parties when the Gross family owned the property. RP 206:13-207:5 & 210:8-211:7 & RP 129:4-10. The neighborhood mothers came through the Disputed Area to work on the *Where The Wild Things Are* float. RP 213:17-214:8 & RP 145:7-18. Gardeners traversed the Disputed Area to access the Shop area, and people traversed the Disputed Area to access the yard sale location. RP 213:5-16 & RP 213:21-214:1.

Foot traffic over the Disputed Area continues to this day when the Peloquins walk on the Disputed Area in order to open the Peloquin Gates to get one of their vehicles in or out of the Shop area. Since the Gross family owned the Peloquin Property, the latch for the Peloquin Gates is on the Disputed Area side of the gate, a person must walk on the Disputed Area in order to open the Peloquin Gates before a vehicle can exit or enter. CP 807-808. Thus, Finding 57 is at odds with the ultra narrow scope of easement set by the trial court and the easement holder violates paragraph 10 of the Order when using a vehicle on the Disputed Area. CP 973-978.

Michael Sweeny testified that he never tried to limit pedestrian use of the Disputed Area. Michael Sweeny testified that he never even discussed pedestrian use of the Disputed Area with any of the owners of

the Peloquin Property. RP 409:1-4 & RP 409:8-12.

Thus, a person could not conclude that use of the Disputed Area was irregular, limited personal use, infrequent, without third parties or foot traffic. Findings 29, 42, 56, 57, 59, and 67 are not supported by substantial evidence and do not support Conclusions 14, 15, and 18, none of which is binding on this Court and should be reversed.

Construction Access

In Conclusions of Law 10 and 11 the trial court found the use to be adverse. However, in Conclusion of Law 18 the trial court found construction access to be a permissive accommodation by Michael Sweeny. In Finding 38, the trial court was troubled by the essence of adverse use and noted that the attitude of Marcia Cook, Michael Gross, and Magdalena Rangel Gross was that they were of the mind that they could do what they wanted with the Disputed Area. Use cannot be adverse and permissive at the same time.

A finding of permissive accommodation by Michael Sweeny for construction access is inconsistent with the finding of adverse use. “A prescriptive right, once acquired, cannot be terminated or abridged at the will of the owner of the servient estate, nor even by the oral admission of the easement claimant that his use was not, and is not, adverse.” *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 88, 123 P.2d 771 (1942)

(citing 28 C. J. S. 716, Easements, § 52; *McInnis v Day Lbr. Co.*, 102 Wash. 38, 172 Pac. 844 (1918); *Downie v. Renton*, 162 Wash. 181, 298 Pac. 454 (1931), reversed, on hearing, on other grounds, 167 Wash. 374, 9 P.2d 372 (1932)). Adverse use, once found, cannot be punctuated by unilateral permissive accommodations for construction access by Michael Sweeny.

When the Gross family purchased the Peloquin Property from the Pearsons in 1994 they immediately initiated a remodel of the house and had their contractors use the Disputed Area for access to the Shop in support of the construction. RP 206:13-207:5 & RP 210:8-211:7. Later on, the Gross family hired third party contractors to rebuild the west wall of the Shop. The contractors used the Disputed Area to remove construction debris and to bring in new materials. RP 144:7-23 & RP 211:8-23. The rebuilt west wall is seen in Exhibit 27. The record is void of any testimony from Michael Sweeny on these instances of construction access.

Just like the Pearsons before them, the Gross family refused to sign any agreement to limit their use of the Disputed Area. RP 153:4-10 & RP 217:1-9. Any presumption of permission was dispelled by Gary Goodale's distinct positive assertions of a right adverse⁷ to the property owner and

⁷ Garry Goodale's site plan for his house and septic AS BUILT drawing were notice to the world in 1973-1974 of his claim to use the Disputed Area for access. The 1973 site plan labels the Disputed Area: "30 foot wide access road borders west property line."

the actions of the Pearsons and the Gross family were consistent with adverse use. Gary Goodale used the Disputed Area under a claim of right from the time of his purchase. RP 103:5-9. When Gary Goodale was asked at trial if he ever asked for an easement he answered: "I didn't ask for something I already had." RP 81:25-82:2.

The Sordenstones argue that the oral grant from William Fitzpatrick to Gary Goodale was permissive. Hypothetically speaking, even if the oral grant from William Fitzpatrick to Gary Goodale was permissive, the site plan for the house and the AS BUILT drawing for the septic system are distinct positive assertions of a right adverse to the property owner William Fitzpatrick which extinguishes any presumption of permission. *See Kunkel v. Fisher*, 106 Wn.App. 599, 604; 23 P.3d 1128, 1131 (2001). William Fitzpatrick acquiesced in Gary Goodale's claim of right to use the Disputed Area for access to his property (now Peloquin Property) when he dug the foundation hole for the house.

In 1974 William Fitzpatrick sold the now Sordenstone Property to Cathleen Carr (formerly Cathleen Shreve). Ex 5. Six years after Gary Goodale purchased his lot from William Fitzpatrick, Michael Sweeny first visited the now Sordenstone Property in 1978 and then married Cathleen Carr in 1980. RP 308:24-25 & RP 311:24-312:3. All the while Gary Goodale continued to access his property via the Disputed Area and he

kept the grass cut on the Disputed Area. He did not ask permission of Cathleen Carr or Michael Sweeny to use the Disputed Area or to stage the construction of; the retaining wall; the fence; or the Shop. RP 70:3-71:10. To eliminate a bump between the Disputed Area and the elevation of the Shop floor Gary Goodale asked to make a cut in the dirt on the Disputed Area. RP 66:25-67:13. In exchange for the cut in the dirt, he agreed to help Michael Sweeny and Cathleen Carr build a fence like his. *Id.*

In 1982 the site plan filed with King County was sent to all neighbors within 500 feet of the Peloquin Property including Michael Sweeny and Cathleen Carr as part of the application for a zoning variance before the construction of the Shop. Ex 19 & Ex 20 & Ex 21 & Ex 22. On the site plan, the Disputed Area is labeled "EASEMENT AGREEMENT DRIVEWAY TO MICHAEL AND CATHLEEN SWEENY RESIDENCE." RP 59:1-23 & RP 62:15-20 & Ex 19. This site plan was another distinct positive assertion of a right adverse to the property owner Cathleen Carr.⁸ Gary Goodale hired William Fitzpatrick's company to dig the foundation hole for the Shop and make the cut in the dirt on the Disputed Area as Michael Sweeny and Cathleen Carr looked on daily while traveling to and from their house. It is now against all principles of equity and reason for the trial court to find that the construction access

⁸ Michael Sweeny did not obtain an ownership interest until 2002; Ex 6.

was permissive while the mutual grantor and title owner of the Disputed Area acquiesced in Gary Goodale's adverse use of the Disputed Area.

There is no finding of fact to support Conclusion 18, and Finding 38 is to the contrary. Conclusion 18 is an error of law which is not binding on this Court and should be reversed.

3. The Trial Court Erred By Not Including Access To The Peloquin Property Along The 160 Foot West Boundary With The Disputed Area And The Ability To Stage Maintenance From The Disputed Area

From the initial purchase in 1972, Gary Goodale always had access to his property (now Peloquin property) from the Disputed Area along the entire length of the west boundary. RP 81:25-82:2 & RP 70:15-18.

Therefore, the general outlines of the scope of easement must effectuate the "purpose" of the prescriptive right and encompass use of the Disputed Area to access the Peloquin Property along the entire west boundary.

Reginald Sordenstone intends to build a fence parallel to the Peloquin's fence on the west boundary of the Peloquin Property; such a fence would materially interfere with the Peloquins' use and enjoyment of their prescriptive right to access. RP 249:2-5. In particular, such interference would prevent maintenance of the Peloquin Property. Access necessary to maintain the Peloquin Property must fall within the general outlines of the prescriptive right.

Maintenance and rebuilding of the septic system retaining wall and

fence must be staged from the Disputed Area, it is not possible to do this work from the Peloquin Property because of the fact that the Peloquin Property is from 2 to 5 feet higher than the elevation of the Disputed Area. Ex 10 & Ex 26 & RP 190:18-191:5. The only way the Shop can be maintained is by the access afforded through the Disputed Area.⁹ The trial court did not understand these facts nor did it understand what the Pelosquins meant by “maintain.” RP 630:18-631:2. Photos of the west boundary of the Peloquin Property can be seen in Exhibits 10, 25, and 26. There is substantial evidence to support a finding that the scope of easement should include access to the Peloquin Property along the 160 foot west boundary with the Disputed Area. Conclusion 15 is in error because it lacks access along the 160 foot west boundary of the Peloquin Property and the right to stage maintenance of the Peloquin Property from the Disputed Area without blocking the driveway on the Disputed Area.

C. THE TRIAL COURT ERRED WHEN IT PLACED THE PELOQUIN PROPERTY UNDER A RESTRICTIVE COVENANT ORDERING THE PELOQUINS TO CLOSE THE PELOQUIN GATES WHEN NOT IN USE

The notion of the Peloquin Gates being closed when not in use, just like the rest of the terms in the unsigned license agreements, was never agreed to by the owners of the Peloquin Property. Finding of Fact

⁹ Contractors cannot work on the Shop, the retaining wall or fence without use of the Disputed Area. The septic system drain field cannot be moved. CP 831-843.

48 correctly states that “Marcia Cook (formerly Marcia Pearson) and Michael Gross and Magdalena Rangel Gross refused to sign the proposed agreements that were placed in front of them.” Neither was this covenant briefed or argued at trial.

Michael Sweeny tried too hard to convince the trial court of his version of how the Peloquin Property was used in order to support his story of permission. He contradicted himself and the aerial photograph has contradicted and impeached his testimony as well. CP 805-806.

Michael Sweeny testified that the Peloquin Gates were always closed when not in use. RP 357:6-10. However he testified to the contrary that the gates were open when he would drive by because he could see into the Shop. On direct Michael Sweeny testified that you couldn’t park a car in there (on the concrete pad in front of the Shop) and close the gate and that the Peloquin Gates in the fence were open because he could see that “there were *never* any cars parked there (in front of the Shop).” RP 351:14-19. On cross he contradicts his own statement when he admits that Gary Goodale *did* park on the concrete pad in front of the Shop:

Q. The shop. I'm sorry if I wasn't clear, the shop? Did he park in front of the shop on that concrete pad?

A. Not often.

RP 402:11-21

Michael Sweeny testified that the Peloquin Gates are seven to eight

feet tall and 12 or 14 feet wide, therefore he could not have seen through the Peloquin Gates unless they were open. RP 424:22 & Ex 33.

Exhibit 47-pg 1 (aerial view from July 10, 1990) and the demonstrative trial video – both of which show a truck parked on the concrete pad in front of the Shop with the gates closed impeach Michael Sweeny’s testimony. RP 186:9-11 & RP 188:3-15 & RP 351:14-19.

A person could not reach the conclusion that the Peloquin Gates were always closed when not in use. Finding 62 is not supported by substantial evidence, is not binding on this Court, and should be reversed. Finding 48 is evidence to the contrary and these findings do not support Conclusion 15. Neither is there a legal basis to subject the Peloquin Property to this restrictive covenant. In this the trial court committed error.

VIII. CONCLUSION

The trial court was offended by adverse use, erred as a matter of law in key credibility determinations, rendered a scope for the prescriptive right that is ultra narrow, and placed a restrictive covenant on the Peloquin Property. This Court should: (1) remove the restrictive covenant; and (2) modify the findings of fact and conclusions of law and order the scope of the prescriptive easement to follow the general outlines described on pages 30-31 above.

RESPECTFULLY SUBMITTED this 15th day of June 2012.

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IX. APPENDICES

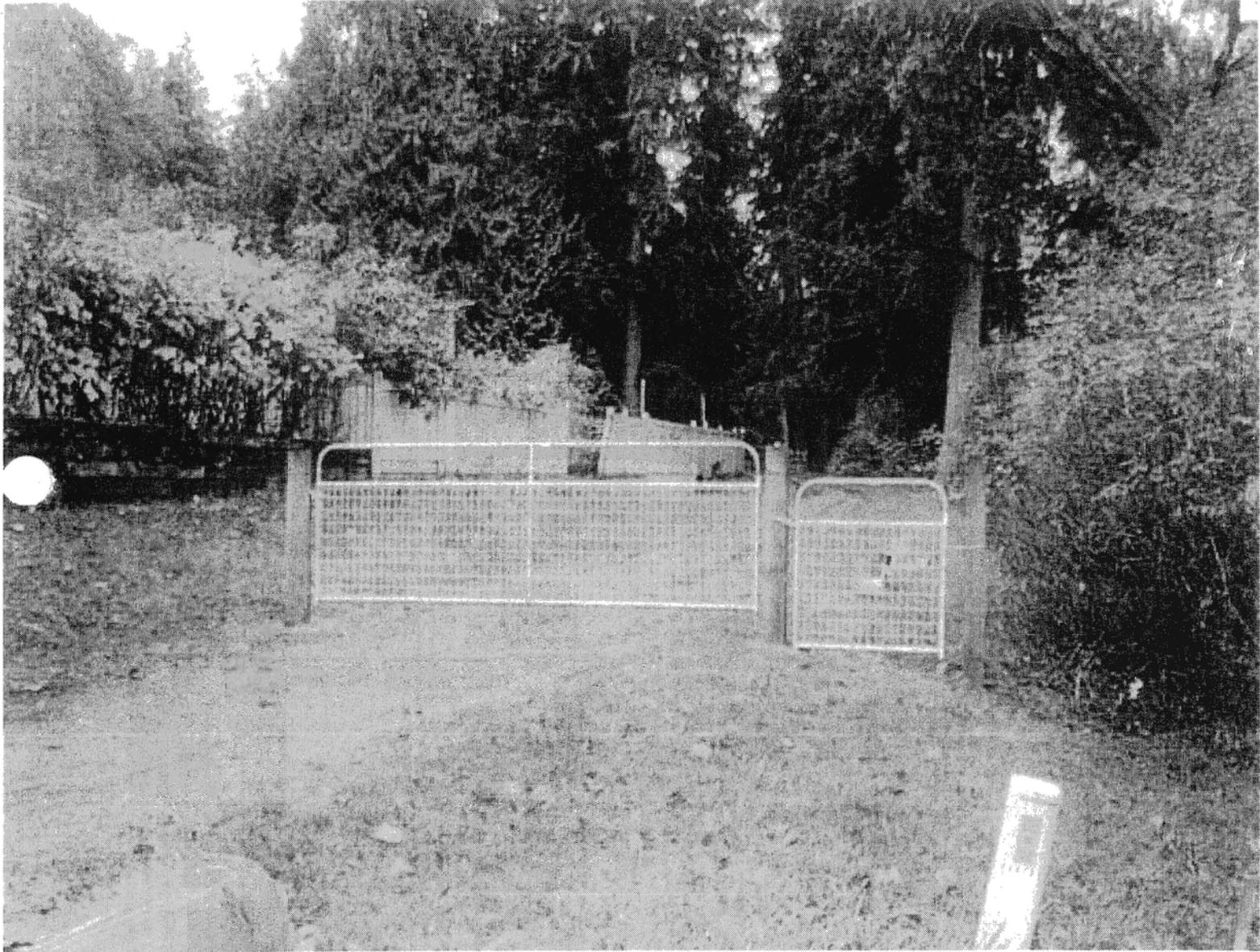
1. CP 807-808 (Exhibit C To Motion For Reconsideration) & Trial Exhibit 25.
2. CP 805-806 (Exhibit B To Motion For Reconsideration (Trial Exhibit 47 Annotated Aerial Photo From 1990)).
3. Trial Exhibit 19 (Site Plan).

APPENDIX I

**CP 807-808 (Exhibit C To Motion For Reconsideration) &
Trial Exhibit 25**

EXHIBIT C

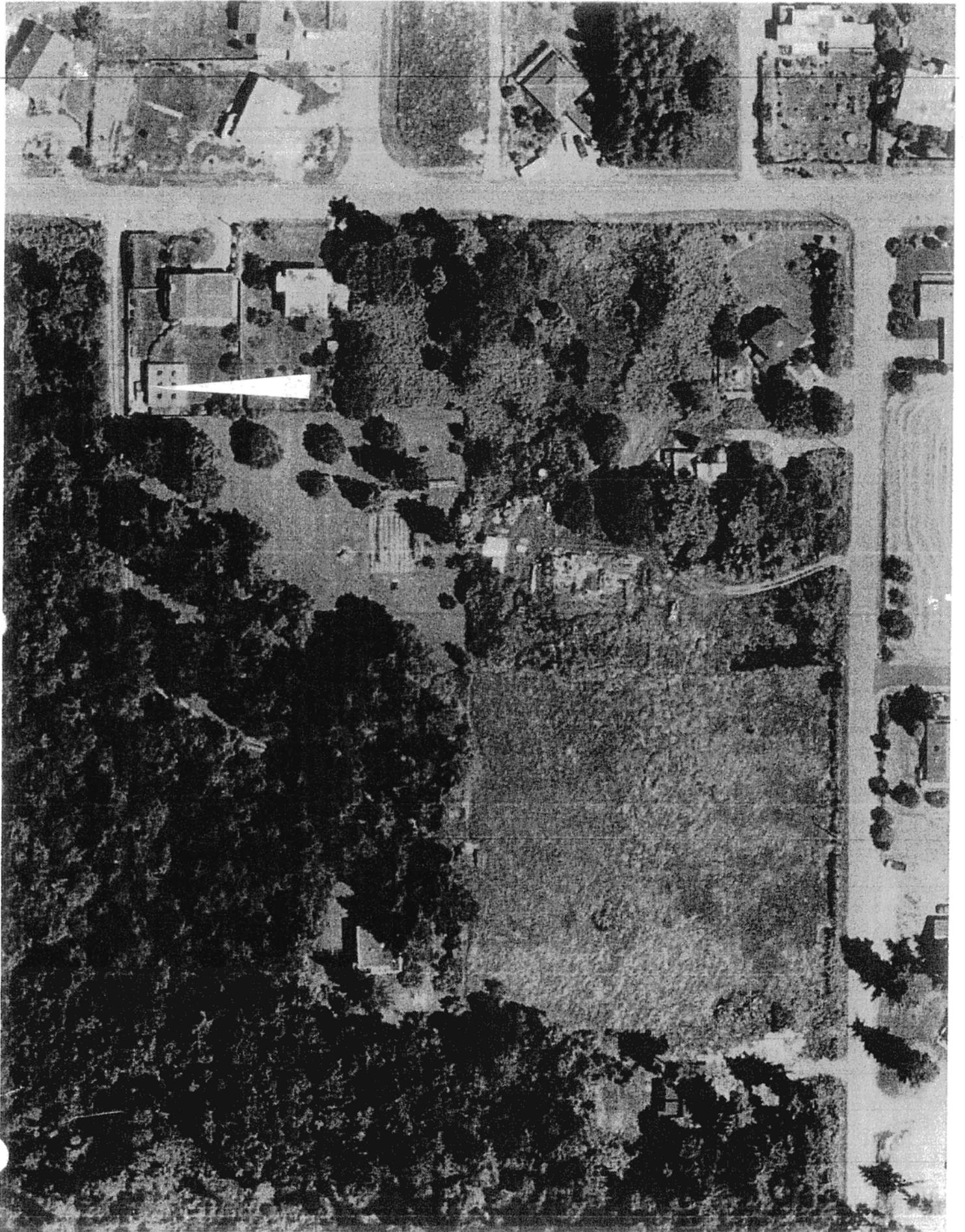




APPENDIX II

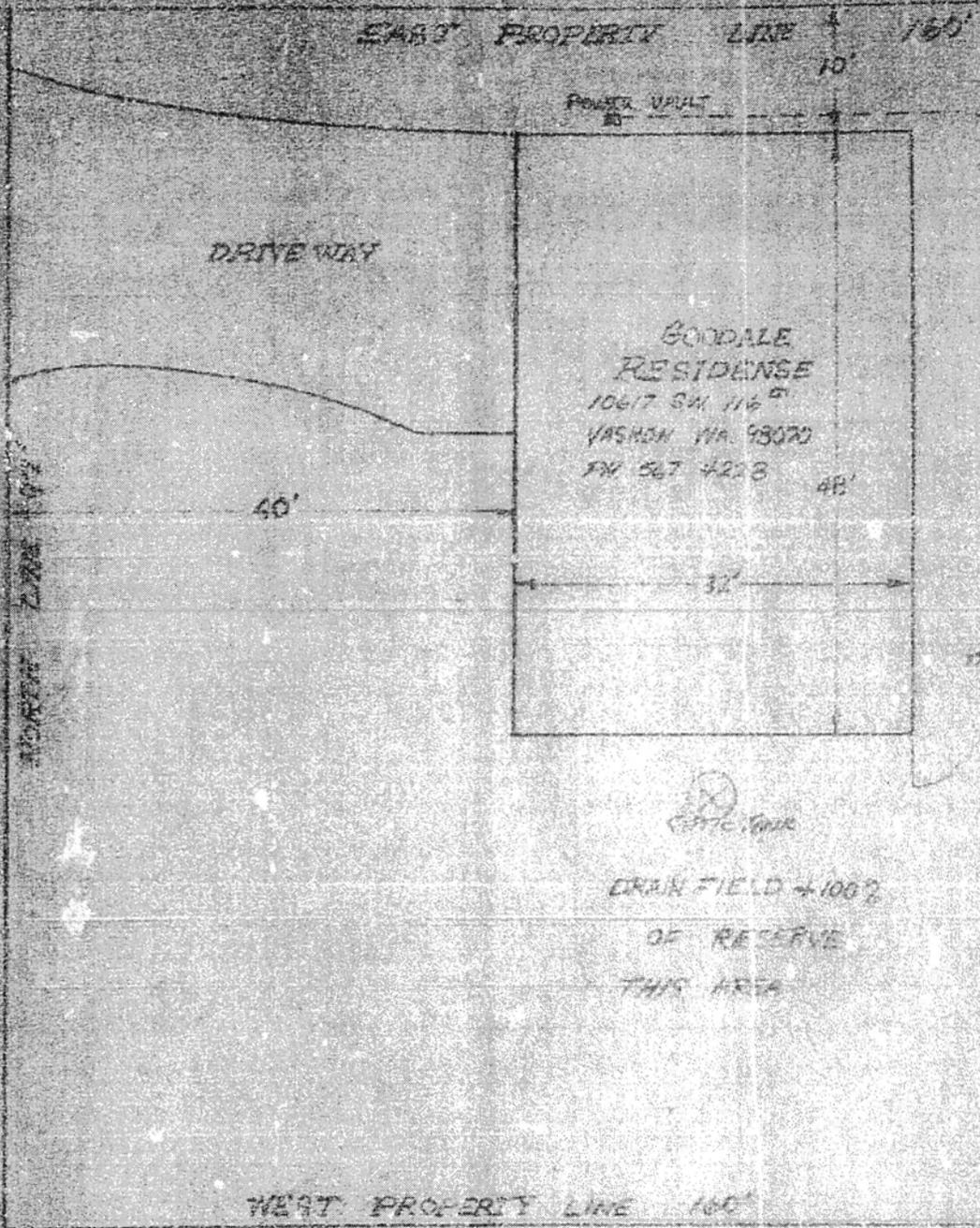
**CP 805-806 (Exhibit B To Motion For Reconsideration (Trial Exhibit
47 Annotated Aerial Photo From 1990))**

EXHIBIT B



APPENDIX III

Trial Exhibit 19 (Site Plan)



S.W. 116 St

NORTH LINE

3/22 Scale

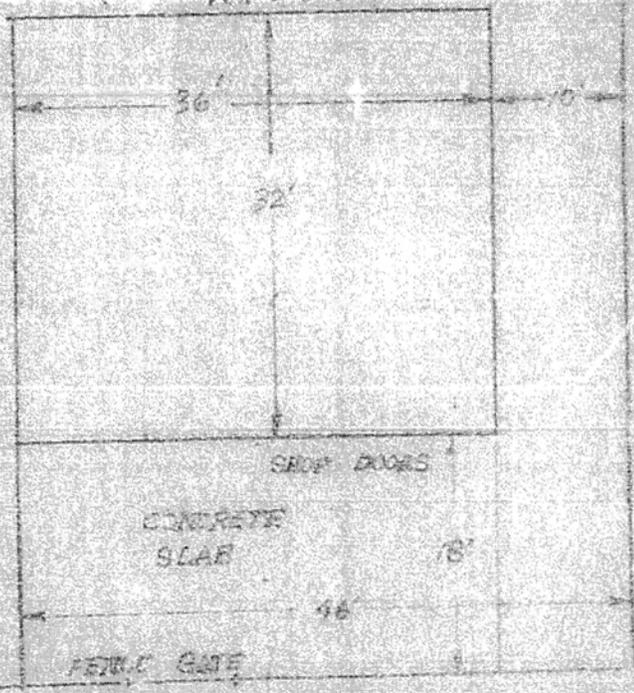
EASEMENT AGREEMENT
 DRIVEWAY TO MICHAEL + ANNE
 RESIDENCE

SOUTH LINE 97'

Back Under Garage

THIS AREA TO RECEIVE MOST EXCAVATION OF SOIL

PROPOSED CONSTRUCTION FOR RV STORAGE - M. WOOD HOUSE



SLOPE PLANTED IN TVV

SLOPE DOWNS

CONCRETE SLAB 18'

FENCE GATE 46'

REVISED PLOT PLAN

10' SET BACK FROM REAR PROPERTY LINE JCS 1-13-9

CEEN SWEENEY →

X. CERTIFICATE OF MAILING

The undersigned does hereby declare that on June 15, 2012 the undersigned deposited a copy of BRIEF OF APPELLANTS PELOQUINS filed in the above-entitled case into the United States mail, first class postage addressed to the following persons:

Bradley Thoreson

Kelly A Lenox

Foster Pepper, PLLC

1111 Third Ave, STE 3400

Seattle, WA 98101

Date: June 15, 2012

Mark S. Peloguin