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INTRODUCTION

This is a boundary dispute involving uplands and tidelands. The trial court quieted title to the uplands in appellant Richard Burke along a boundary running from an old (1930s or '40s) cedar-board fence, down to the eastern corner of Burke's equally-old bulkhead. But the trial court refused to extend that boundary out over the tidelands despite substantial uncontradicted evidence that the parties treated this as the tidelands boundary for many years.

In the early '70s, Respondent Tyee Yacht Club, Inc. drove a dredge pile along that boundary, dredged along that boundary, and built a pier on the other side of its property along a bearing parallel to that boundary. In the late '70s, Burke also dredged along that boundary to establish his marina. In the late '80s, Burke extended his front yard roughly ten feet onto the tidelands across the disputed parcel. Tyee never objected to (or permitted) Burke's activities, which substantially encroach upon Tyee's platted line.

The trial court erred as a matter of law in concluding that the parties' actions were insufficient to establish the tidelands boundary by adverse possession or mutual acquiescence. This Court should reverse and remand with instructions to quiet title in the tidelands in Richard Burke.

ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 7, several portions of which are actually erroneous legal conclusions. CP 556.¹
2. The trial court erred in failing to enter Burke's proposed detailed Findings (CP 535-45), or some other detailed Findings sufficient to support its legal conclusions. App. A.
3. The trial court erred in concluding that Burke had not established ownership of the disputed tidelands via adverse possession, and in apparently failing to rule on Burke's mutual acquiescence claim. CP 557.
4. The trial court erred in entering judgment based on the erroneous finding and conclusions noted above. CP 587-88.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court quieted title to the uplands in Burke due to adverse possession of or mutual acquiescence in a common boundary marked by an old cedar-board fence, which the court extended down to the eastern corner of Burke's equally-old bulkhead. Both Burke and Tyee manifested agreement that this

¹ The Findings & Conclusions, including Exhibits, are attached as Appendix A.

line extended out over the tidelands by dredging and building structures on the tidelands in accordance with this extended line. Did the trial court err in declining to quiet title along this tidelands boundary in Richard Burke?

2. Did the trial court err in declining to enter detailed findings sufficient to support its conclusions denying adverse possession of or mutual acquiescence in the tidelands boundary?

STATEMENT OF THE CASE

Richard Burke has owned property fronting Bainbridge Island's Eagle Harbor since 1976. RP 150; Ex 1.22² (Statutory Warranty Deed). He owns lots 1, 2, 5 and 6 of block 2, on "A Plat of Pleasant View Townsite," dated November 27, 1888. Ex 1.7 (portion attached as Appendix B); Ex 1.22. Burke's lots 1 and 2 include the adjoining second class tidelands of Eagle Harbor, to the north. *Id.* Burke's lots 5 and 6 are upland (south) of lots 1 and 2, and each is 60-feet wide on its southern boundary. *Id.* Ex 1.1.³

² Plaintiff's Exhibits were identified at trial as "Ex 1.____"; defendant's exhibits were identified as "Ex 2.____".

³ A very helpful version of Ex 1.1, used both at a summary judgment hearing and at trial, including color highlighting and a highlighting key, is attached as App. C. This is a blowup of a portion of the map attached to the Findings & Conclusions (App. A) at CP 562.

A. The trial court ruled on summary judgment that Burke adversely possessed a pie-shaped parcel in the uplands, where his property adjoins Tyee's property, reserving ruling on the tidelands.

Burke's property is bounded on the east by Respondent Tyee Yacht Club's property. App. C. Fencing has long separated roughly 200 feet of the upland portions of these properties. See, e.g., CP 247. The trial court ruled on summary judgment that this fencing forms a portion of the upland boundary between the properties by virtue of adverse possession and/or mutual acquiescence. CP 423, 516, 555-56 (App. A, F/F 5 & 6).

After a trial, the trial court ruled that this fence line, extended to the eastern corner of the concrete bulkhead fronting Burke's property, forms the boundary between the Burke and Tyee properties. CP 423, 516, 555-56 (App. A, F/F 5 & 6). This line follows a bearing of roughly N23°34'11"E. App. C (line bordering east side of green and blue highlights). By contrast, the platted line between the properties followed a bearing of S22°57'12"W. App. C (line bordering east side of pink highlighting). The green and blue highlighting on App. C thus show the pie-shaped upland portion of the Tyee property awarded to Burke. App. C. The yellow highlighting shows the still disputed tidelands portion. *Id.*

B. Burke built a very substantial fill/riprap on the tidelands portion of his property in 1986, placing substantial earth and rocks over a portion of the disputed tidelands.

Burke's property was apparently filled and extended waterward a long time ago, and the original bulkhead stood roughly 11 feet north of Tyee's bulkhead, out onto the tidelands. See, e.g., Ex 1.38 (1986 photos taken during riprap construction, showing Burke's bulkhead and 11-foot eastern wall; attached as Appendix D). Burke's bulkhead is thus U-shaped; that is, it begins with a 20-foot north-south wall on the west, turns 90° and runs eastward 120 feet across the front of Burke's property (with a slight bend in the middle, following the shoreline), and then turns 90° and runs southward 11 feet, where it intersects Tyee's bulkhead. RP 98-99. The entire U-shaped structure is made of similar materials, a construction different from Tyee's bulkhead. RP 100-01. Burke's bulkhead has been in existence since at least 1947. See, e.g., CP 247; Ex 1.6.A.3 (early photo of original bulkhead).

Burke's bulkhead began to crumble in 1984, requiring him to reinforce it. RP 102; 145. In constructing a sustaining wall of earth and rock ("riprap") in 1986, Burke extended his property further north onto the tidelands, using roughly eight-to-ten feet of fill and very large stones, to a height of roughly 12 feet. See, e.g., App. D;

Ex 1.37 (proposal for riprap, with second page noting “PROPOSED ROCK BULKHEAD . . . 8 TO 10 FEET SEAWARD OF EXISTING WALL”); Ex 1.43 (photos showing property extended by riprap);⁴ CP 307, ¶ 14. Burke sought and received Tyee’s permission to place some of the large rocks onto its tidelands to support his 11-foot eastern wall (RP 90, 146); this property is not at issue here.

Burke frequently uses the extended portion of his front yard. See, e.g., CP 307. He also built a planter box with ornamental grasses within the disputed parcel, beyond the cement retaining wall and nearer the rocks, in 1991 or 1992. RP 146-47; Ex 1.43 (lower photo). He has maintained this planter ever since. RP 147.

In addition, to maintain visibility of the corner of the bulkhead after installing the riprap, Burke placed a white metal pole on the corner of the bulkhead, within the disputed area. RP 147-48; Ex 1.52. During this litigation, Burke saw two people on his property late at night; he confronted them, but they ran out onto Tyee’s pier. RP 149-50. Burke called the police, and discovered that his pole had been cut down; the pole was found lying on Tyee’s pier. *Id.*

⁴ As the Court can see in the upper photo on page 3 of Ex 1.43, the earthen riprap completely covers even the top of the old concrete bulkhead, leaving it invisible underground.

C. The trial court's failure to extend the longstanding uplands boundary over the tidelands dissevered a substantial portion of Burke's front yard.

In relation to this riprap extension of Burke's front yard, the blue highlighting on App. C reflecting the last 75 feet of the previously disputed uplands extends up to the corner of the old concrete bulkhead, but stops there, omitting the fill/riprap area (depicted as large rocks, but actually including substantial earth). App. C. The yellow highlighting reflecting the disputed tidelands portion then begins after the riprap. *Id.* As noted above, this omitted portion is actually a substantial piece of property that Burke added in 1986. *See also, e.g.*, Ex 43 (various views of filled/riprap area); Ex 53 (top photo, showing white markers and wood strips identifying where the disputed parcel runs through the fill/riprap).

The trial court ultimately ruled that the upland boundary line would extend only to the corner of the old bulkhead, cut across roughly six feet along the bulkhead, and then extend from the base of the bulkhead out across the fill/riprap area and out into the tidelands, along the former platted line (bearing S22°57'12"W). App. A, CP 556 (F/F 7). As noted, this cut off a rather substantial portion of Burke's property (roughly six feet wide x eight-to-ten feet long x 12 feet high) that had been in place since 1986. This

included the planter box, and literally tons of earth and rock sitting atop the tidelands. The record is not clear as to why the trial court did this, although Tyee did specifically ask the court to maintain this erroneous ruling. See CP 547.

The trial court thus granted Burke's claims of adverse possession and/or mutual acquiescence regarding the uplands, but denied his claim of adverse possession regarding the tidelands. The trial court apparently failed to rule on Burke's mutual acquiescence claim regarding the tidelands. See RP 225-26 (pleadings amended to conform to the proof regarding the mutual acquiescence claim).

D. In 1972 and 1979, the parties dredged their tidelands and built structures in accordance with a line extending out from the longstanding upland boundaries.

Tyee dredged its tidelands and added a pier and ten float-mooring piles, in 1972. RP 19-24; Ex 1.16. According to Tyee's witness, Carl Weiss, Jr., the dredging contractor who drove the float-mooring piling for Tyee also drove two additional piles to the east and west of the piling, "to keep his dredge bucket in line with what he thought was the envelope of the dredged area" (RP 22). Although Weiss later claimed that the dredge piles were "just arbitrarily [*sic*] dropped" (RP 23), he nonetheless admitted that the

dredging plans Tyee submitted (Ex 1.16) showed a dredge envelope coinciding with the edge of Burke's eastern bulkhead; *i.e.*, with the fence-line and the edge of Burke's bulkhead, which the trial court ultimately ruled constitutes the adversely-possessed or acquiesced upland boundary line. RP 74-75.

On Ex 1.16, page 2, the float-mooring piling is marked in a row of 10 "+" signs, and the two dredge piles are similarly marked, parallel with the tenth (northernmost) mooring pile, to its east and west, on either side of Tyee's property. Ex 1.16.⁵ Weiss nonetheless denied that these two dredge piles were intended to mark the east and west boundaries of Tyee's tidelands. RP 23. Yet Tyee amended its permit to depict these two dredge pilings as permanent fixtures. *Compare* Ex 1.15 (orientation drawing page one) *with* Ex 1.16 (orientation drawing page one); RP 22.

Another version of Tyee's Ex 1.16 orientation drawing page one is contained in "New Ex 6," attached as Appendix E. This is simply a certified copy of the same exhibit, but it shows the dredge pilings a bit more clearly. The other significant thing about this exhibit is located in its bottom left-hand corner: Note that Tyee's

⁵ As noted below, a certified copy of this same exhibit page is attached as Appendix E.

own drawing, submitted in 1972, shows a 60-foot distance between the eastern edge of Tyee's proposed dock and the western edge of Tyee's existing bulkhead, where Tyee's bulkhead intersects the eastern arm of Burke's bulkhead. App. E. Sixty feet is the precise width of Tyee's lot 3, per the plat. See App. B.⁶ Thus, Tyee acknowledged in 1972 that the boundary between the properties runs along the eastern wall of Burke's bulkhead.

Perhaps more significantly, Tyee's proposed (and its actual) dock runs out into the water on a bearing parallel to a line running perpendicular to the shore from the eastern wall of Burke's bulkhead. See App. E. Thus, Tyee acknowledged this bearing as the true boundary between the parties' tidelands in 1972, years before Burke even purchased his property.

Moreover, Burke also testified, and provided substantial evidence, that both parties routinely treated the eastern edge of his bulkhead, falling on a line with the Tyee's westernmost dredge pile, as the recognized boundary line. In 1979, Burke dredged his tidelands to install his own mooring piling and floats. RP 153. His

⁶ The "Description" in the top center notes that the lots are 60 ft. x 100ft. The Court may need to look at the larger version, which is part of Ex 1.7, in order to read this description.

tidelands were not passable prior to the dredging. *See, e.g.*, Ex 1.20 (Burke's pre-dredging tidelands). Burke submitted a dredging plan, and permit and lease applications, depicting the eastern edge of his dredge envelope – and the area that he was leasing – as coinciding with the eastern edge of his concrete bulkhead, running on a straight line out to Tyee's dredge piling, which remained in place until after Burke had dredged his property. *See, e.g.*, Exs 1.21, 1.24 through 1.29; RP 24-25. Tyee's Weiss acknowledged that he saw Burke's dredging plans in 1979, and yet never objected to them as encroaching on Tyee's tidelands. RP 79-85.

E. Procedure.

As noted, the trial court granted summary judgment that Burke adversely possessed most of the uplands and/or that Tyee acquiesced in the boundary marked by the old cedar-board fence. CP 423, 516, 555-56 (App. A, F/F 5 & 6). Notwithstanding the above evidence, however, the trial court also found that Burke had failed to establish adverse possession of the disputed tidelands, a wedge-shaped area beginning approximately six-feet wide at the base of the old concrete bulkhead (underneath tons of riprap), and widening to roughly 40 feet at the outer perimeter of the tidelands. App. A, CP 556 (F/F 7); App. C (yellow highlighting). The court

specifically found that Burke failed to establish that he openly, notoriously, exclusively and under a claim of right possessed the disputed tidelands for any period of time. *Id.* It also concluded that neither Burke's dredging nor Tyee's dredge pile were sufficient to establish adverse possession or acquiescence. *Id.*

As to the tidelands (beginning at the base of the old concrete bulkhead), the court adopted a 1983 Reid, Middleton survey. App. A, CP 556, 564 (attaching the survey, which was Ex 2.16 at trial). Thus, the boundary runs north between the properties for 220 feet along the well established fence lines on the ground (bearing roughly N23°34'11"E), to the corner of the concrete bulkhead, then west roughly six feet (under ground) along the bulkhead, and then north across the earthen riprap roughly ten feet (bearing N22°57'12"E), and on out to the extreme low tide line. *Compare* Ex 2.16 *with* App. C (Ex 1.1).

SUMMARY OF ARGUMENT

Burke plainly adversely possessed the roughly six feet x 10 feet x 12 feet portion of the tidelands that he covered with tons of earth and rock in 1986. This substantial use was open, notorious, exclusive and under a claim of right for more than 10 years. The trial court plainly erred in cutting off this substantial portion of

Burke's front yard. At the very least, the common boundary should extend not to the base of the old bulkhead (which is underground), but to the outer edge of the earthen riprap.

Burke just as plainly is entitled to run this well established boundary line out to the extreme low tide line. Tyee acknowledged this line in the early '70s, when it dredged the tidelands within this boundary and constructed a pier parallel with it. Burke acknowledged this line – and adversely possessed the tidelands up to it – by dredging along the line and by constructing the riprap extension of his front yard within the disputed parcel. The Court should reverse and remand with instructions to quiet title to the tidelands in Richard Burke.

ARGUMENT

A. Standard of review.

Adverse possession is a mixed question of law and fact. ***Miller v. Anderson***, 91 Wn. App. 822, 828, 964 P.2d 365 (1998), *rev. denied*, 137 Wn.2d 1028 (1999). The character of a party's possession is always a question of fact. ***Scott v. Slater***, 42 Wn.2d 366, 255 P.2d 377 (1953), *overruled on other grounds*, ***Chaplin v. Sanders***, 100 Wn.2d 853, 861, 676 P.2d 431 (1984). Whether

those facts constitute adverse possession is an issue of law, reviewed *de novo* by this Court. **Miller**, 91 Wn. App. at 828.

Here, Burke challenges several aspects of the trial court's Finding 7, not as to the character of Burke's possession (which was largely undisputed), but rather as to the trial court's conclusion that Burke's possession was not sufficient to establish adverse possession or acquiescence. Conclusions incorrectly designated as findings receive *de novo* review. See, e.g. **Willener v. Sweeting**, 107 Wn.2d 388, 393-94, 730 P.2d 45 (1986).

Specifically, Burke challenges the trial court's legal conclusions that

- ◆ Burke has not openly, notoriously, exclusively, and under a claim of right, possessed the disputed tidelands at any time.
- ◆ Burke's dredging of a portion of the disputed tidelands is insufficient to establish adverse possession.
- ◆ The placement of a dredge piling by Tyee's contractor within Tyee's tidelands has little or no significance relating to the boundary line between the two properties, and provides no basis for granting title to Burke based on adverse possession, mutual acquiescence or any other equitable ground.

App. A, CP 556 (F/F 7). These legal conclusions are not supported by any substantial findings, and are legally incorrect. Burke proffered more complete findings, CP 535-45, but the trial court erroneously failed to enter sufficient findings.

B. Burke adversely possessed the tidelands underlying tons of earth and rock that he put there in 1986.

To establish title to the tidelands through adverse possession, Burke needed to establish that his possession of the disputed parcel was: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious and (4) hostile. See, e.g., **Chaplin**, 100 Wn.2d at 857. These elements had to exist concurrently and uninterrupted for at least 10 years. RCW 4.16.020. Burke bore the burden of establishing the existence of each of these elements. **ITT Rayonier, Inc. v. Bell**, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

It almost needs no argument to establish that Burke adversely possessed the portion of the disputed tidelands roughly ten feet north of the old concrete bulkhead by placing and maintaining tons of earth and rock on it for over ten years. It is difficult to imagine a use more exclusive, open and notorious, actual and uninterrupted, and hostile, than extending one's front yard onto someone else's property. The trial court plainly erred in failing to grant title to this portion of the tidelands to Burke.

Tyee did not dispute that Burke built his earthen riprap over the disputed tidelands. Nor did Tyee present any evidence that the 12-foot high earthen riprap was anything less than an exclusive,

open, actual and uninterrupted use of the disputed tidelands very well known to Tyee. Tyee never even claimed that someone from its yacht club climbed up Burke's rock wall and walked around on Burke's front yard. In the one known incident, where someone came onto Burke's property to cut down his pole and left it lying on Tyee's pier, Burke chased the nighttime intruders off his property.

This Court should reverse and remand for entry of a judgment quieting title to the riprap-covered tidelands in Burke.

C. Burke also established adverse possession or mutual acquiescence in extending the recognized upland boundary out across the tidelands.

Burke also established Tyee's acquiescence in the mutually recognized tidelands boundary, as witnessed by the parties' dredging activities. Alternatively, Burke established his adverse possession of the tidelands – considering the possible uses of tidelands normally under water. Either way, the trial court erred in failing to grant the disputed tidelands to Burke.

The elements of adverse possession are noted above, and discussed further below. Mutual acquiescence and agreement is a refinement of the doctrine of adverse possession. *Lilly v. Lynch*, 88 Wn. App. 306, 316, 945 P.2d 727 (1997). Where adjoining property owners have defined their boundary line in good faith,

have made improvements based on the boundary line and have considered that line to be the true dividing line of the properties, then that line will be deemed to be the true dividing line between the two properties. See **Mullally v. Parks**, 29 Wn.2d 899, 906, 190 P.2d 107 (1948).

In order to establish a boundary line under the doctrine, a claimant must show: (1) the presence of a certain and well defined boundary line, physically marked on the ground; (2) the parties' good faith manifestation of a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the parties' continuous mutual acquiescence in the line for 10 years. **Lilly**, 88 Wn. App. at 316.

1. Burke established Tyee's mutual acquiescence in extending the upland boundary across the tidelands.

The trial court found that either Tyee's or Burke's predecessor in interest established a common uplands boundary between the properties. App. A, CP 555-56. Under longstanding Washington precedent, this conclusion regarding the uplands required the trial court to also conclude that the tideland boundary consisted of an extension or prolongation of the upland boundary over the tidelands, perpendicular to the shore. See **Spath v.**

Larsen, 20 Wn.2d 500, 148 P.2d. 834 (1944); **Lloyd v. Montecucco**, 83 Wn. App. 846, 856-857, 924 P.2d 927 (1996), *rev. denied*, 131 Wn.2d 1025 (1997). The parties in fact acted in accordance with this precedent, dredging their tidelands in accordance with that boundary.

In **Spath**, our Supreme Court considered apportionment of tidelands among neighbors who own adjacent uplands. The Court observed that no one formula is appropriate for determining an equitable apportionment of tidelands. But when considering, as here, a relatively straight shoreline, the court should simply run a line perpendicular to the upland boundary:

Along a comparatively straight shore line, these boundaries [of the tidelands] may easily be determined by erecting lines perpendicular to the shore or meander line, depending upon which line constitutes the water boundary of the upland, at points where property side lines intersect the shore or meander line.

20 Wn.2d at 512 (citation omitted); **Lloyd**, 83 Wn. App. at 856-857.

In **Lloyd**, as here, the parties disputed both their upland boundary and their tidelands boundary. The trial court found that the neighbors adversely possessed the uplands, and found adverse possession of or mutual acquiescence in the tidelands boundary. This Court affirmed as to the uplands, but found “errant concrete

blocks, intermittent moorage, and seeding of oysters and clams” insufficient to establish a “certain and well-defined” boundary. 83 Wn. App. at 855-56. The Court distinguished **Spath** on the ground that it contemplated a line of stakes. *Id.* The Court remanded for entry of a judgment resetting the tidelands boundary (out to the meander line) according to the platted line, but allowing the trial court to reconsider where to set the oysterland boundary (waterward of the meander line) pursuant to the **Spath** rule, if the original deed did not set those boundaries. 83 Wn. App. at 857.

Under **Spath** and **Lloyd**, the trial court erred in not extending the uplands boundary out over the tidelands. Under a 1962 Statutory Warranty Deed, Tyee received the second class tidelands adjoining its lot 3. Ex 1.10. Similarly, under a 1976 Statutory Warranty Deed, Burke received the “second class tide lands adjoining” his lots 1 and 2. Ex 1.22. As relevant here, to “adjoin” is to “abut upon.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 27 (1993). Thus, the deeds define the lateral tideland boundaries with reference to the upland boundaries.

Moreover, unlike the facts in **Lloyd**, the boundary between the Tyee and Burke tideland parcels was certain and well defined. The line was originally established by the eastern arm of the

concrete bulkhead, and reaffirmed to 1971, when Tyee dredged its tidelands. Tyee's dredge permit included an exhibit showing a dredge envelope of 60 feet, corresponding with the platted width of the upland lot. *Compare* Ex 1.7 with 1.14. Tyee subsequently applied for and received a permit to construct a pier, drive a piling, and install mooring floats on its tidelands. Ex 1.15. An exhibit to the permit (which had been an exhibit submitted with the Tyee application) reflected a dredge envelope of 60 feet, coincident with the common boundary reaffirmed by the trial court. *Id.*

Burke also dredged the tidelands. He applied for a Substantial Development Permit under the Shoreline Management Act. Ex 1.26. An exhibit to Burke's application depicted a dredge envelope whose eastern boundary coincides with the established lines on the ground, from the 11-foot concrete wall, out over the water. Ex 1.26. Tyee was notified of Burke's plans to dredge and to construct a dock and float. Ex 1.27. An amendment to Burke's DNR lease includes Exhibit A, depicting the eastern boundary of the lease area on a line with the concrete wall, extended out over the water. Ex 1.29.

Both Tyee and Burke occupied and improved their tideland parcels with reference to this line. Although there was no express

agreement between the parties, they “[in] good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line.” *Lamb v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967); *Houplin v. Stoen*, 72 Wn.2d 131, 133, 431 P.2d 998 (1967) (“Both parties must agree or acquiesce, either expressly or by implication”).

Without question, the parties maintained their agreement regarding the common boundary of their tideland parcels for the required ten year period. Tyee’s dredge permit issued March 1971. Ex 1.14. Burke’s DNR lease issued in February 1977. Ex 1.25. The parties’ agreement upon the common tideland boundary continued well beyond the required ten-year period.

The trial court erred in failing to adjust the tideland boundary to correspond with the recognized upland boundary. The Court should reverse and quiet title in the disputed tidelands in Burke.

2. Burke also established adverse possession of the tidelands in accordance with the upland boundary.

The *Spath/Lloyd* line of cases also supports extending the recognized boundary across the tidelands due to adverse possession. Burke’s obvious adverse possession of the portion of

the tidelands under his earthen riprap plainly shows that the parties believed the recognized uplands boundary extended out to the tidelands, running along the eastern edge of the 11-foot north-south wing of the old concrete bulkhead. Both Burke's and Tyee's dredging in accordance with this line confirms Burke's possession.

- (1) **Burke's possession of the disputed tidelands parcel must be judged by the nature and character of the property at issue; i.e., tidelands normally underwater.**

The "ultimate test" of possession is whether the person claiming to have adversely possessed the property exercised dominion and control over the land in the same manner as would a true owner. *ITT Rayonier*, 112 Wn.2d at 759. The quality of these actions ". . . necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied." *Frolund v. Frankland*, 71 Wn.2d 812, 817, 431 P.2d 188 (1967), *overruled on other grounds*, *Chaplin*, 100 Wn.2d at 861. Thus, "the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location." *Heriot v. Lewis*, 35 Wn. App. 496, 504, 668 P.2d 589 (1983).

Here, the tidelands consist of rocks and mud, and are covered with saltwater twice each day. Given this nature and character of the property at issue, Burke's dredging of the tidelands to clear them for his marina, and his subsequent placement of an earthen riprap on the tidelands according to the same boundary, are uses of the disputed tidelands a true owner would make.

Burke dredged his tidelands for a marina – perhaps the highest and best use to which a true owner could put these tidelands – and Tyee dredged its tidelands for a yachting outstation; both parties defined their respective dredge envelopes with respect to an extension of the recognized upland boundary. Exs 1.14, 1.15, 1.25, 1.26. Moreover, Tyee's dredging contractor placed the dredge pile in relation to Tyee's dredge envelope, aligning it along the eastern edge of Burke's bulkhead. *Id.*; RP 22.

Burke and Tyee each referenced this recognized boundary in their tidelands lease applications. Burke did so repeatedly over many years. See Exs 1.24-A, 1.24-B, 1.24-C (Burke lease application exhibits); Ex 1.39 (Burke 1986 DNR lease); Ex 1.25 (lease area designated in Exhibit A); Ex 1.33 (Public Notice of Application for Burke permit); Ex 1.37 (Burke permit to repair bulkhead). Tyee's initial plans to improve its property indicated a

lot-width of 60 feet, and it made actual improvements with reference to the recognized boundary. Ex 1.13 (sheets 1 & 2); Exs 1.17, 1.31 (pier and floats), 1.40 (proposed mooring floats); App. E. Tyee's lease application also depicted its improvements in relation to this recognized uplands boundary. Exs 1.31, 1.32; see *also* Ex 1.44 (Tyee letter including exhibit depicting improvements with reference to recognized boundary).

In sum, Burke used the disputed tidelands as a true owner would, and Tyee did not, as a matter of law.

(2) Burke's uses were exclusive.

Burke placed tons of earth and rock over a six-by-ten-by-12-foot portion of the disputed tidelands, exclusively occupying that portion for over ten years. He alone dredged along a line between the eastern edge of his bulkhead and Tyee's own dredge marker. And for purposes of adverse possession, courts may project a line between objects when reasonable and logical if, as here, the adverse use was open and notorious. See, e.g., *Lloyd*, 83 Wn. App. at 854. Burke's uses of the tidelands were exclusive.

Tyee's witnesses testified that the children or dogs of some members of the yacht club occasionally played in the mud in the small area of the disputed tidelands visible when the tide was out.

RP 28, 251. As one Tye witness admitted, however, this was an unattractive, muddy and desolate shore. RP 88-89; see Ex 1.20. This witness could not specify any time or place any particular person used the area. RP 87-88. The witness with the dog said it ran there between 1989 and 1994, perhaps once a month, and that a “126 pound dog is hard to stop.” RP 257. Burke also testified that beachcomers were “rare” due to the unpleasant nature of the shoreline, inaccessibility, and tides. RP 151-53, 195; see *also* Ex 1.20 (photo showing pre-dredging shoreline). On the rare occasions when he saw kids playing, he’d warn them against various dangers, but was neighborly. *Id.*

This sort of neighborly accommodation of a rare beachcomber is not sufficient to defeat Burke’s claim, as a true owner normally would act in the same manner under the circumstances. ***Harris v. Urell***, __ Wn. App. __, 135 P.3d 530, 534 (2006) (“an occasional, transitory use by the true owner usually will not prevent ownership transfer by adverse possession if the adverse possessor permits the use as a ‘neighborly accommodation’”) (citing ***Lilly***, 88 Wn. App. at 313). Moreover, on “urban property, the placement of structures on another’s land, or encroaching partially on another’s land, amounts to possession not

only of the land covered by the structure but of a reasonable amount of the surrounding territory.” ***Shelton v. Strickland***, 106 Wn. App. 45, 51, 21 P.3d 1179, *rev. denied*, 145 Wn.2d 1003 (2001). Burke’s clear assertion of exclusive dominion over the tidelands to the eastern edge of his bulkhead is sufficient possession of the remaining small area of shoreland near the earthen riprap that is inundated twice a day.

The only other possible argument that Burke’s use was not exclusive is yacht-club members’ use of the surface waters above the tidelands for traversing in and out of their moorage area, or for occasionally “rafting” boats out from their dock. But under the public trust doctrine, no one may exclude public use of the surface waters. *See generally, e.g., Caminiti v. Boyle*, 107 Wn.2d 662, 668, 732 P.2d 989 (1987), *cert. denied*, 484 U.S. 1008 (1988). Since even the true owner could not exclude such uses, Burke’s inability to do so does not affect the exclusivity of his possession of the tidelands.

(3) Burke’s possession of the disputed tidelands was actual and uninterrupted.

Burke’s possession of the disputed tidelands was also actual and uninterrupted, an element that also considers how a true owner

would act. *Heriot*, 35 Wn. App. at 505. Burke dredged the disputed tidelands in 1979, and then drove pilings for his moorage. He placed a permanent reinforcing wall of earth and rock on the disputed tidelands in 1986. As a matter of law, in light of how a true owner would use the same property, Burke's possession was actual and uninterrupted for more than 10 years.

(4) Burke's uses were open and notorious.

A use is "open and notorious" if a reasonable person would conclude that the claimant was the true owner. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 211-212, 936 P.2d 1163, *rev. denied*, 133 Wn.2d 1022 (1997). The possession must be visible and known to, or discoverable by, the true owner. *Lloyd*, 83 Wn. App. at 853.

The placement of 30-or-more square yards of earth and rock on the disputed tidelands, visible even during high tide, is open and notorious. The same is true of dredging. Only a true owner would undertake such efforts. Burke met this element as a matter of law.

(5) Burke's uses were "hostile" as to Tyee.

Burke's possession of the tidelands was "hostile" and "under a claim of right." Burke treated as his own as against the world the tidelands beneath and around the riprap, and those he dredged,

throughout the statutory 10-year period. **Chaplin**, 100 Wn.2d at 860-861. Burke dredged the disputed area in 1979, without objection from Tyee. He also informed Tyee of his plans to build the earthen riprap. RP 145-46. He sought Tyee's permission to place large rocks on what were undisputedly Tyee's tidelands east of the concrete wall. RP 146. There is no evidence, however, that Burke ever requested Tyee's permission to place huge amounts of earthen riprap to the north of his Bulkhead, over the disputed area, or that Tyee ever objected to Burke's use of the disputed area in this fashion. Burke's actions in 1979, 1986, and continuing thereafter, were clearly hostile as to Tyee.

Indeed, Burke built his riprap in 1986, two years after Tyee obtained a survey from Reid, Middleton Associates, depicting the platted line as having a bearing of N22°57'12"E, which intersected the Burke bulkhead approximately 6-to-8 feet west of the north-south concrete wall. Ex 2.16. At the time Burke placed the rocks, therefore, Tyee was on notice that the platted boundary did not coincide with the 11-foot concrete wall and that Burke was building a riprap on what should have been Tyee's tidelands north of the Burke bulkhead. Nevertheless, Tyee did nothing. Burke's possession was hostile as to Tyee.

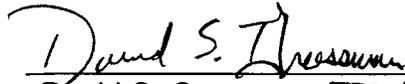
The trial court erred in not quieting title to the disputed tideland parcel in Burke, both in the area beneath the riprap and immediately adjacent tidelands, and in the extended area along the line between the eastern edge of Burke's bulkhead and the dredge piling, along which both parties dredged the tidelands.

CONCLUSION

For the reasons stated above, the Court should reverse and remand with instructions to quiet title in the tidelands in Burke.

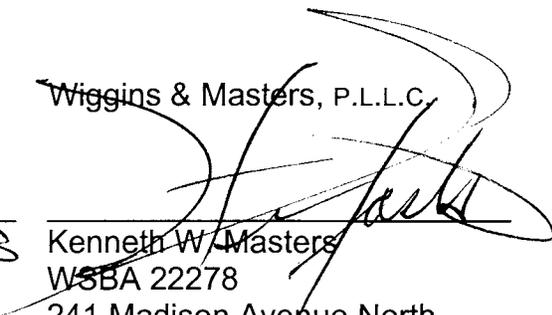
DATED this 18th day of August 2006.

REESE, BAFFNEY,
SCHRAG & FROL, P.S.



David S. Grossman
WSBA 18428
216 So. Palouse St.
Walla Walla, WA 99362
(509) 525-8130

Wiggins & Masters, P.L.L.C.



Kenneth W. Masters
WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 18th day of August 2006, to the following counsel of record at the following addresses:

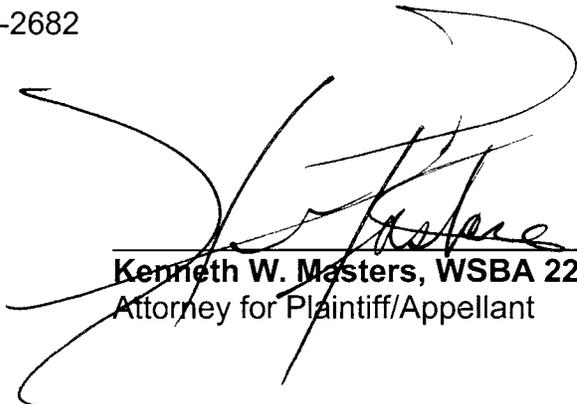
Co-Counsel for Plaintiff/Appellant

David S. Grossman
216 S. Palouse Street
Walla Walla, WA 99362

Counsel for Defendant/Respondent

John W. Phillips
315 Fifth Avenue South
Seattle, WA 98104-2682

FILED
COURT OF APPEALS
06 AUG 21 AM 9:12
STATE OF WASHINGTON
BY WJ
DEPUTY



Kenneth W. Masters, WSBA 22278
Attorney for Plaintiff/Appellant

FILED
KITSAP COUNTY CLERK Honorable Leonard W. Costello

2006 FEB -8 -AM 11:37

DAVID W. PETERSON

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

RICHARD BURKE, a single person,

Plaintiff,

v.

TYEE YACHT CLUB, INC., a Washington
corporation,

Defendant.

Case No. 01-2-03679 5

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
FINAL JUDGMENT

The Court conducted a bench trial in this matter on May 18-19, 2005, and enters the following findings of fact and conclusions of law and final judgment, consistent with its Memorandum Decision dated June 20, 2005, and its clarifying remarks at a hearing held on December 2, 2005.

FINDINGS OF FACT

1. Plaintiff Richard Burke ("Burke") is the owner of property located on the south shore of Eagle Harbor, Bainbridge Island, Washington, with a street address of 5842 Main Street NE, Bainbridge Island, Washington, 98110. The property includes Lots 1 and 2 of A Plat of Pleasant View Townsite, which Plat was recorded December 9, 1888. The full legal description of Burke's property as of the date of commencement of this lawsuit is contained in the Statutory Warranty Deed [Plaintiff's Trial Exhibit 22] attached hereto as Exhibit A.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
FINAL JUDGMENT
(01-2-03679 5) - 1

PHILLIPS LAW GROUP, PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
telephone (206) 382-6163
fax (206) 382-6168

Appendix A

1 2. Defendant Tyee Yacht Club ("Tyee") is the owner of property immediately to the
2 east of Burke's property on the south shore of Eagle Harbor, Bainbridge Island, Washington,
3 98110. The property includes Lot 3 of A Plat of Pleasant View Townsite, which Plat was
4 recorded December 8, 1888. The full legal description of Tyee's property as of the date of
5 commencement of this lawsuit is contained in the Statutory Warranty Deed [Plaintiff's Trial
6 Exhibit 12] attached hereto as Exhibit B.

7 3. Burke seeks to obtain by adverse possession or other equitable grounds title to a
8 disputed parcel that is within the legal description of Tyee's real property on Eagle Harbor,
9 Bainbridge Island.

10 4. The case can be divided into Burke's claim to Tyee's shorelands and tidelands
11 and his claim to Tyee's uplands.

12 5. With respect to the uplands, the Court finds that Burke, through his actions and
13 the actions of his predecessors in interest, has adversely possessed or acquired title by mutual
14 acquiescence and agreement to a portion of Tyee's uplands.

15 6. The upland boundary between the Burke and Tyee properties as determined by
16 the Court is as reflected and depicted in the survey of ADA Engineering, LLC [Page 2 of
17 Plaintiff's Exhibit 1], attached hereto as Exhibit C, recorded September 23, 1998, which the
18 Court references here solely for the purpose of establishing the upland boundary line, which is
19 more particularly described as being:

20 The beginning point of that fence is a 4 x 4 post located near the
21 southeasterly corner of Lot 5, Pleasant View Townsite, and is located
22 South 67°02'48" East 1.98 feet from an "X" marked in concrete thence
23 along an existing fence line North 23° 11' 15" East 117.14; thence
24 continuing along said fence 24° 53' East 12.60 feet; thence North 24°32'
25 East 9.60 feet; thence North 22° 44' East 12.00 feet; thence North 23° 41'
26 East 28.90 feet; thence North 25° 13' East 9.50 feet; thence leaving said
27 fence line North 26° 54' 50" East 22.80 feet to the angle point on the outer
face of a concrete bulkhead; thence along said face, North 29° 03' East
11.20 feet to the outside corner of the outer face of said concrete
bulkhead" [which is visible behind the large rocks that Plaintiff placed on
the Defendant's property with the Defendant's agreement some years ago],
thence turning in a westerly direction and running along the north face of

1 the concrete bulkhead approximately six (6) feet to a point that joins
2 Burke's pre-existing property.

3 Under the new upland property line established by this Judgment, the Tyee pumphouse
4 remains entirely within the Tyee property, and no portion of it has been adversely possessed by
5 Burke. The above upland boundary description reflects existing barriers and fencing between
6 the two properties, none of which will be moved or changed as a result of this Judgment.

7 7. With respect to the tidelands and shorelands, the Court finds that Burke has not
8 proven that he has adversely possessed or otherwise obtained title to any of Tyee's shorelands
9 and tidelands, and the Court hereby quiets title in Tyee as the legal owner of the shorelands and
10 tidelands. The disputed tidelands and shorelands is approximately six feet wide at the base of
11 Burke's concrete bulkhead, but widens to over forty feet at the outer perimeter of the tidelands
12 parcel. The defendant Tyee owns all of the disputed shorelands and tidelands, commencing from
13 the base of Burke's concrete bulkhead that runs east/west and separates the uplands from the
14 shorelands and tidelands and extends to the end of its property as defined by the legal description
15 of Tyee's property (Exhibit B hereto). The Court specifically finds that Burke has not openly,
16 notoriously, exclusively, and under a claim of right, possessed the disputed tidelands and
17 shorelands for any period of time. The Court further specifically finds that Burke's dredging of a
18 portion of the disputed tidelands many years ago is insufficient to establish adverse possession in
19 Tyee's tidelands and shorelands. And the Court further specifically finds that the placement
20 many years ago of a dredge piling by Tyee's contractor within Tyee's tidelands and shorelands
21 has little or no significance as it relates to the boundary line between the two properties and does
22 not provide a basis for granting title to Burke based on adverse possession, mutual acquiescence
23 or any other equitable ground. The western boundary of Tyee's shorelands and tidelands to
24 Burke's concrete bulkhead is defined by the western boundary depicted in the 1983 Reid
25 Middleton Survey attached hereto as Exhibit D, which the Court references here solely for the
26 purpose of establishing the boundary line for the tidelands and shorelands.
27

CONCLUSIONS OF LAW

1
2 1. This Court has jurisdiction over the subject matter of this action, as well as
3 personal jurisdiction over the parties.

4 2. Consistent with the Court's Findings of Fact, the Court quiets title in Plaintiff to
5 all of the disputed uplands as set forth in the Court's findings.

6 3. Consistent with the Court's Findings of Fact, the Court quiets title in Defendant in
7 all the disputed tidelands and shorelands, and rejects plaintiff's adverse possession and other
8 claims to that disputed property.

9 4. The parties shall bear their respective costs and attorney's fees incurred in this
10 action.

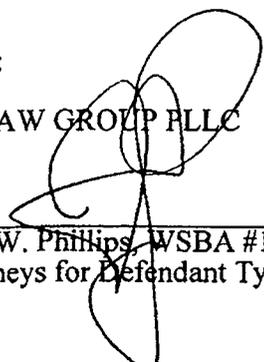
11 DONE IN OPEN COURT this 7 day of February, 2006.

12
13 
14 HONORABLE LEONARD W. COSTELLO

15 Presented by:

16 PHILLIPS LAW GROUP PLLC

17 By:

18 
19 John W. Phillips, WSBA #12185
20 Attorneys for Defendant Tyee Yacht Club
21
22
23
24
25
26
27

119739



**PIONEER NATIONAL
TITLE INSURANCE**

A TICOR COMPANY

Filed for Record at Request of

AFTER RECORDING MAIL TO:

Puget Sound Mutual Savings Bank

922 Second Avenue

Seattle, Washington 98104

Carol Hanson 36171-3

THIS SPACE RESERVED FOR RECORDER'S USE

3/22
KEY COUNTY
TRANSACTION EXCISE TAX

PAID JUN 28 1976

AMOUNT 549.00
COUNTY TREASURER
BY *K. Walwood*

FORM L56

Statutory Warranty Deed

THE GRANTOR Charles V. Leaf and Bernice A. Leaf, husband and wife,

for and in consideration of Ten and No/100 (\$10.00) Dollars and other valuable
Consideration

in hand paid, conveys and warrants to Richard T. Burke, an unmarried man,

the following described real estate, situated in the County of Kitsap, State of Washington,

Lot 1, Block 2;
TOGETHER WITH second class tide lands adjoining;

Lot 6, Block 2;
EXCEPT the Southerly 100 feet thereof;

Lots 2 and 5, Block 2,
TOGETHER WITH second class tide lands adjoining Lot 2;

Pleasant View Townsite, as per plat recorded in Volume 1 of
Plats, page 5, records of Kitsap County;

Situate in Kitsap County, Washington.

Subject to all easements, restrictions, reservations and agreements
of record, if any.



9th

day of June, 1976

PLAINTIFF'S

EXHIBIT A

22 300

for and in consideration of Ten and No/100 (\$10.00) Dollars and of valuable Consideration in hand paid, conveys and warrants to Richard J. Burke, an unmarried man,

the following described real estate, situated in the County of Kitsap, State of Washington:

Lot 1, Block 2; TOGETHER WITH second class tide lands adjoining;

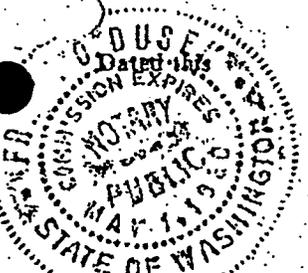
Lot 6, Block 2; EXCEPT the Southerly 100 feet thereof;

Lots 2 and 5, Block 2, TOGETHER WITH second class tide lands adjoining Lot 2;

Pleasant View Townsite, as per plat recorded in Volume 1 of Plats, page 5, records of Kitsap County;

Situate in Kitsap County, Washington.

Subject to all easements, restrictions, reservations and agreements of record, if any.



9th day of June, 1976

Charles V. Leaf (SEAL)
Charles V. Leaf

Bernice A. Leaf (SEAL)
Bernice A. Leaf

STATE OF WASHINGTON, }
County of Kitsap } ss.

On this day personally appeared before me Charles V. Leaf and Bernice A. Leaf, husband and wife, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 21st day of JUNE, 1976

Filed for Record June 28 1976 at 3:30 PM
Request of TRANSAMERICA TITLE Ins. Co. of WASH.,
TED WRIGHT, Kitsap County Auditor

Frank O. Dusek
Notary Public in and for the State of Washington,
residing at *Bainbridge Island*
REF 92PR1350

SCHEDULE A

No. 119959-A

Amount \$ 54,900.00

Date June 30, 1976 at 8:00 A. M.

Premium \$ 247.75

1. Insured

RICHARD J. BURKE

2. Title to the estate, lien or interest insured by this policy is vested in

The Named Insured, as his separate estate

3. Estate, lien or interest insured

Fee Simple Estate

4. Description of the real estate with respect to which this policy is issued

Lot 1, Block 2;
TOGETHER WITH second class tide lands adjoining;

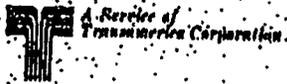
Lot 6, Block 2;
EXCEPT the Southerly 100 feet thereof;

Lots 2 and 5, Block 2;
TOGETHER WITH second class tide lands adjoining Lot 2;

Pleasant View Townsite, as per plat recorded in Volume 1 of
Plats, page 5, records of Kitsap County;

Situate in Kitsap County, Washington.

Transamerica Title Insurance Co



THIS SPACE RESERVED FOR RECORDER'S USE.

NO. 73-723
 KITSAP COUNTY
 TRANSACTION EXCISE TAX
 PAID JUL 17 1969
 AMOUNT 750.00
 COUNTY TREASURER
 BY *[Signature]*

8707210121

Filed for Record at Request of
 Name Donald Cartwright
 Address 16402 36th NW
 City and State Seattle, WA 98107

Statutory Warranty Deed

Form 487-W-REV

THE GRANTOR **Raymond R. Meyer and Blanche E. Meyer, his wife**

for and in consideration of **Fulfillment of Real Estate Contract**

in hand paid, conveys and warrants to **Tyee Yacht Club, Inc., A Washington corporation**

the following described real estate, situated in the County of **Kitsap**, State of **Washington**

PARCEL I: Lots 3, 4, and 7, Block 2, Pleasant View Townsite, according to Plat recorded in Volume 1 of Plats, Page 5, in Kitsap County; TOGETHER WITH tidelands of the second class adjoining said Lot 3; **PARCEL II:** Portion of Government Lot 2, Section 35, Township 25 North, Range 2 East W.M., Kitsap County, described as follows: Beginning at the Southeast corner of Lot 7, Block 2, Pleasant View Townsite, according to plat recorded in Volume 1 of Plats, Page 5, Kitsap County; thence Northeasterly 100 feet along the Easterly line thereof; thence Westerly along the Northerly line of said Lot, 60 feet; thence Northeasterly along the Easterly lines of lots 4 and 3, in said Block, to the government meander line; thence Southeasterly and Southerly along the government meander line to its intersection with the Westerly side of the bed of Taylor Creek; thence Southerly along the Westerly side of the bed of said Creek to the North line of Bwing Street in said plat extended; thence Northwesterly along said extended line to the point of beginning.

This deed is given in fulfillment of that certain real estate contract between the parties hereto, dated June 11, 1969, and conditioned for the conveyance of the above described property, and the covenants of warranty herein contained shall not apply to any title, interest or encumbrance arising by, through or under the purchase in said contract, and shall not apply to any taxes, assessments or other charges levied, assessed or becoming due subsequent to the date of said contract.

Real Estate Sales Tax was paid on this sale on June 13, 1969, Rec. No. 75723

Dated this 11 day of June, 1969

[Signatures of Raymond R. Meyer and Blanche E. Meyer]
 (SAL)
 (SAL)

STATE OF WASHINGTON,

County of King

On this day personally appeared before me **Raymond R. & Blanche E. Meyer** to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and purpose therein mentioned.

GIVEN under my hand and official seal this 17th day of July, 1969

[Signature of Notary Public]
 Notary Public in and for the State of Washington,
 residing at **Mercer Island**

8707210121

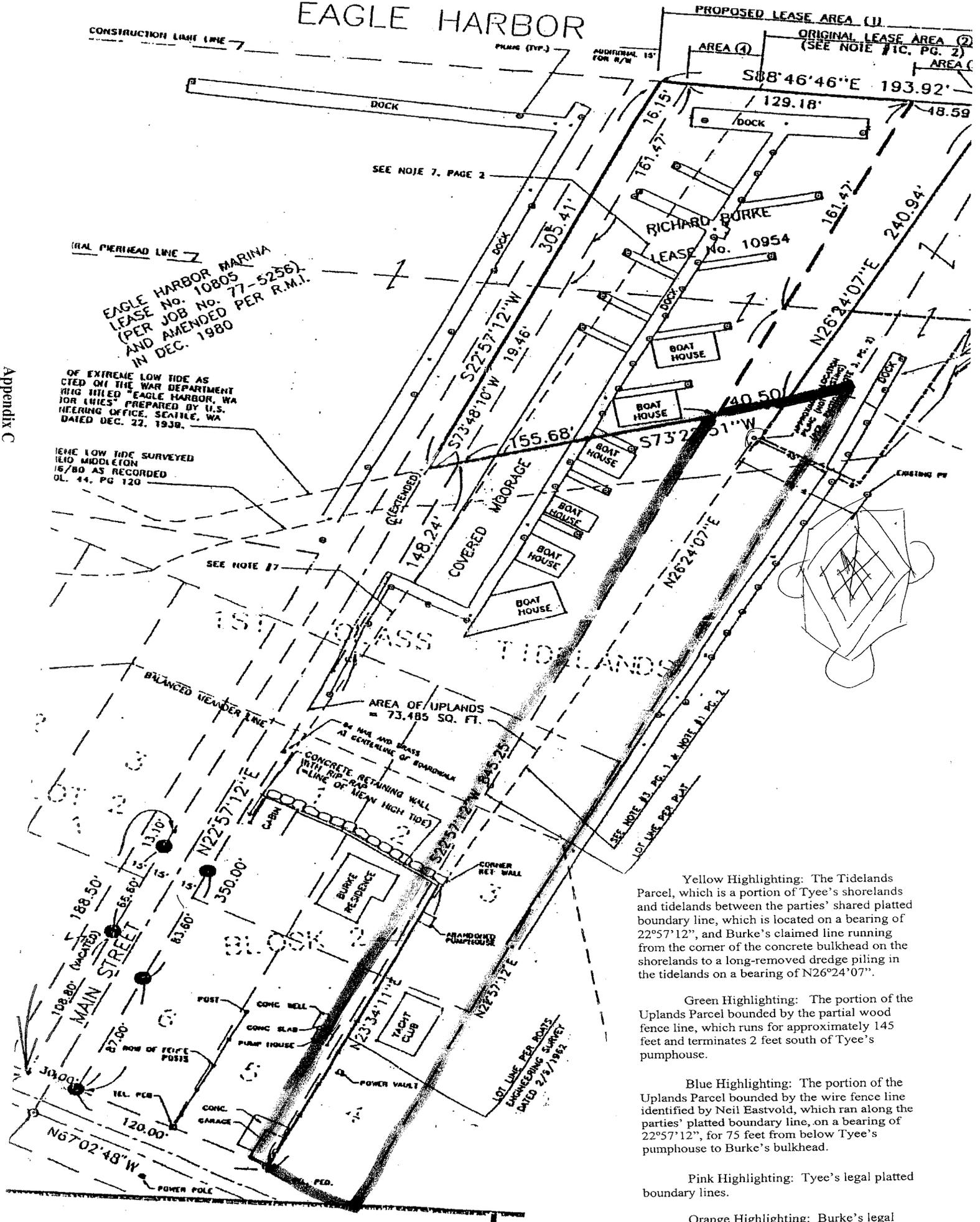
REEL 429R1243

EXHIBIT **B**

PLAINTIFF'S

Appendix A

EAGLE HARBOR



Appendix C

EAGLE HARBOR MARINA
 LEASE No. 10805
 (PER AMENDED PER R.M.I.
 AND AMENDED PER R.M.I.
 IN DEC. 1980)

OF EXTREME LOW TIDE AS
 CTED ON THE WAR DEPARTMENT
 HIG TILED "EAGLE HARBOR, WA
 FOR LINES" PREPARED BY U.S.
 HEERING OFFICE, SEATTLE, WA
 DATED DEC. 22, 1938.

EXTREME LOW TIDE SURVEYED
 IED MIDDLETON
 16/80 AS RECORDED
 OL. 44, PG 120

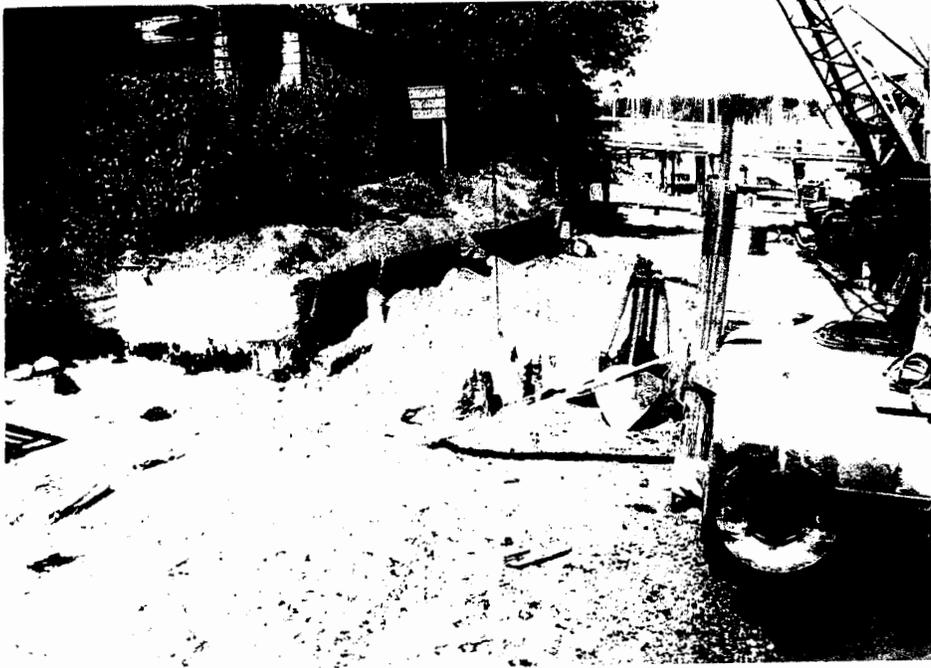
Yellow Highlighting: The Tidlands Parcel, which is a portion of Tye's shorelands and tidelands between the parties' shared platted boundary line, which is located on a bearing of 22°57'12", and Burke's claimed line running from the corner of the concrete bulkhead on the shorelands to a long-removed dredge piling in the tidelands on a bearing of N26°24'07".

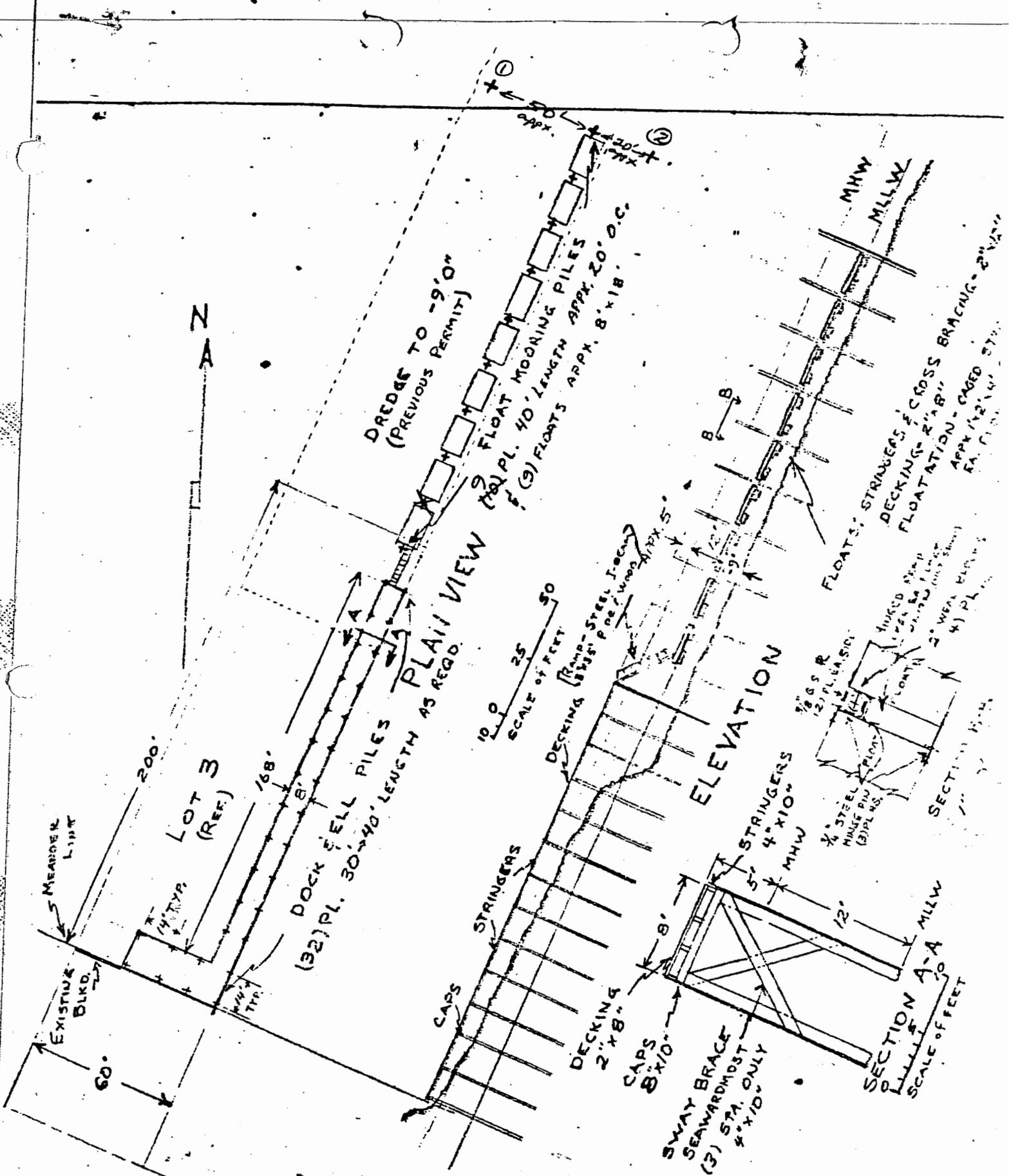
Green Highlighting: The portion of the Uplands Parcel bounded by the partial wood fence line, which runs for approximately 145 feet and terminates 2 feet south of Tye's pumphouse.

Blue Highlighting: The portion of the Uplands Parcel bounded by the wire fence line identified by Neil Eastvold, which ran along the parties' platted boundary line, on a bearing of 22°57'12", for 75 feet from below Tye's pumphouse to Burke's bulkhead.

Pink Highlighting: Tye's legal platted boundary lines.

Orange Highlighting: Burke's legal platted boundary lines.





DETAIL DWG.

PROPOSED DOCK, FLOATS & PILING
REF. TO PAGE 1

CERTIFIED TRUE COPY
Marne Packer