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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 34496-3-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

RICHARD BURKE, a single person,

Appellant,

v.

TYEE YACHT CLUB INC.,

Respondent.

BRIEF OF RESPONDENT TYEE YACHT CLUB INC.

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I. INTRODUCTION

After a two-day trial, Kitsap County Superior Court Judge Leonard W. Costello found that plaintiff Richard Burke (“Burke”) had failed to adversely possess or otherwise dispossess defendant Tyee Yacht Club (“Tyee”) of a wedge-shaped parcel of shorelands and tidelands (“Tyee’s Tidelands Parcel”). *See* Respondent’s Appendix, Exhibit A (map and description of property); Ex. 3-A. Burke now appeals Judge Costello’s findings and judgment in favor of Tyee. Because Judge Costello’s findings and conclusions are supported by substantial evidence in the trial record, this Court should affirm the Superior Court and deny this appeal.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Burke’s assignments of error are confusing at best. Distilled, they challenge Judge Costello’s finding that Burke failed to prove his ownership of Tyee’s Tidelands Parcel by adverse possession or mutual acquiescence. Because Burke has failed to identify any legal error associated with those findings, the only question for this Court is whether substantial evidence supports Judge Costello’s findings.

Burke also assigns as error Judge Costello’s rejection of Burke’s proposed findings, and it appears that Burke also contends that Judge Costello’s findings are insufficient. Brief of Appellant (“App. Br.”) at 2-3. However, Burke never develops either point in his brief. Accordingly, Tyee will not address those claimed errors

except to demonstrate that Judge Costello's findings are fully adequate and supported by substantial evidence.

III. STATEMENT OF CASE

Procedural History. This case was tried before Judge Leonard Costello of the Kitsap County Superior Court on May 17 and 18, 2005. Before trial, Tyee agreed that Burke had adversely possessed a sliver of upland (never wider than one foot) along an existing fence line that ran 135 feet from the garage at the southeastern corner of Burke's property toward the water. What remained for trial was whether Mr. Burke had obtained ownership of the remaining 75 feet of upland at issue – a narrow wedge that widened from about one foot at the end of the fence to approximately six feet at the concrete retaining wall; and whether he had also obtained Tyee's Tidelands Parcel, which commenced at the base of the concrete retaining wall at a width of 6 feet and extended to a width of 41 feet at its furthest waterward perimeter. *See* Respondent's Appendix, Exhibit A.

At the conclusion of trial, which included a site visit by Judge Costello, the Court issued a Memorandum Decision that accurately described Tyee's Tidelands Parcel as follows: "[t]he tidelands parcel is approximately five to six feet wide at the beginning of the shore lands, which is the retaining wall, but widens to over forty feet at the outer perimeter of the tidelands parcel." CP 515

(Memorandum Decision dated June 20, 2005 (“Mem. Decision”) at

1). Judge Costello then found:

As it relates to the tidelands, the Plaintiff [Burke] has not persuaded this Court by a preponderance of the evidence that he has openly, notoriously, exclusively, and under a claim of right, possessed the tidelands per the legal description of the property. While plaintiff had a portion of the disputed property dredged a number of years ago, that does not amount to a sufficient basis to quiet title to the disputed property in the Plaintiff. The Plaintiff claimed a significance of location of a piling that was installed at the behest of the Defendants. This Court places little, if any, significance in that piling as it relates to the boundary line between the subject parcel. The Court’s decision regarding the tidelands appears consistent with the Department of Natural Resources’ conclusion as to the location of the boundary line in the aquatic lease that has been executed between the State and the Defendant [Tyee].

CP 516 (Mem. Decision at 2).

While Burke suggests that Judge Costello “fail[ed] to rule on Burke’s mutual acquiescence claim” concerning Tyee’s Tidelands Parcel, App. Br. at 2, Judge Costello’s Findings of Fact and Conclusions of Law clearly rejected both Burke’s adverse possession and mutual acquiescence claim to Tyee’s Tidelands Parcel:

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

...

7. With respect to the tidelands and shorelands, the Court finds that Burke has not proven that he has adversely possessed *or otherwise obtained* title to any of Tyee’s shorelands and tidelands, and the Court hereby quiets title in

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

CP 555, 556 (emphasis added) (Findings of Fact and Conclusions of Law at 1, 2).¹

¹ Judge Costello found that the evidence supported Burke's ownership of the small upland wedge that terminated at and included the old concrete retaining wall. Tyee has not appealed that ruling, and it is not at issue here.

Substantial Evidence Supporting Judge Costello's

Findings. The evidence supporting Judge Costello's findings was not only substantial, it was overwhelming. Tyee purchased its property on which its Eagle Harbor outstation is located in June 1969. The deed transferring title to Tyee describes the property as follows:

Lots 3, 4, and 7, Block 2, Pleasant View Townsite, according to Plat, recorded in Volume I of Plats, Page 5, in Kitsap County, Washington, TOGETHER WITH tidelands of the second class adjoining said Lot 3.

Ex. 2.1 (emphasis added). According to that plat, Tyee's western boundary line, running the length of Tyee's uplands, shorelands, and tidelands, stands at a bearing of 22°. Exs. 1.7 and 2.2. There was no dispute at trial that all of Tyee's Tidelands Parcel lies within Tyee's deeded property, which includes the second class tidelands adjoining Lot 3. CP 482-485 (Defendant Tyee Yacht Club's Trial Brief at 2-5); CP 495-496 (Trial Brief of Plaintiff Richard Burke at 2-3).

Burke owns the property to the west of and adjacent to Tyee's property on Eagle Harbor. Burke purchased his property in June 1976. Burke's deed describes his property as follows:

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 plant recorded in Volume 1 of Plats, page 5, records of Kitsap County

Ex. 1.22 (emphasis added). The plat places Burke's eastern boundary, the boundary he shares with Tyee, on a bearing of 22°. Exs. 1.7 and 2.2.

At trial, Burke sought to prove his ownership of Tyee's Tidelands Parcel by drawing a new boundary line on a bearing of 26°24'07". Burke's Testimony, RP 128:1-129:9; Ex. 1.32. Burke's proposed new bearing for the Tidelands boundary was inconsistent with the following evidence presented at trial:

1. Tyee's Surveys

Tyee had several surveys performed and each one of these recorded surveys identified Tyee's and Burke's common boundary line as having a bearing of 22°.

- 1983 survey completed by Reid Middleton & Associates *and recorded with Kitsap County on March 29, 1984*, Ex. 2.16;
- 1993 survey completed by Reid Middleton & Associates, Ex. 2.25;
- 1995 survey completed by Reid Middleton & Associates *and recorded with Kitsap County on December 29 1995*, Ex. 2.28.

2. Tyee's Aquatic Lands Leases

In 1981, Tyee leased from the Washington Department of Natural Resources ("DNR") the state-owned aquatic lands adjacent to Tyee's Tidelands Parcel. Eastvold Testimony, RP 238:8-239:14;

Weiss Testimony, RP 37:12-38:17. Tyee's Aquatic Lands lease specifically referred to the common boundary line between the Tyee and Burke properties as being situated along a bearing of 22° and described the leasehold as along a bearing of 22°. Ex. 2.35. DNR renewed Tyee's lease of the aquatic lands adjoining Tyee's Tidelands Parcel in 2001, over the objection of Burke. Ex. 2.36.

3. Burke's Aquatic Lands Leases

Like Tyee, Burke has in the past leased state-owned aquatic lands that are adjacent to his privately owned tidelands. Each of Burke's Aquatic Lands leases with the DNR, signed by Burke, acknowledge that Tyee and Burke share a common property line located at a bearing of 22°:

- Burke's 1976 Aquatic Lands Lease lists the border of the leasehold and his eastern property line as running along a bearing of 22°, Ex. 1.25;
- 1979 Amendment of Description and Adjustment Of Annual Rental For Burke's Aquatic Lands Lease amends the description of his eastern property line from 22° to 22°57'12", Ex. 1.29;
- 1986 Amendment To Burke's Aquatic Lands Lease again lists his eastern property boundary as running along a bearing of 22°57'12", Ex. 2.20;

- Burke's 1986 Aquatic Lands Lease again lists his eastern property boundary as running along a bearing of 22°57'12", Ex. 2.21.

In 1994, Burke argued to the Division of Aquatic Lands:

[M]y lease boundary not depicted and within 100'. Comparing the Tyee exhibit with mine I find a difference in the common boundary. Mine starts at a 'known' property corner on a bearing of 22-57'-12" whereas the Tyee boundary starts somewhat to the West of the property corner and on a bearing of 22-57'-48". The exhibit should reflect these boundaries.

Ex. 2.27. That argument is obviously inconsistent with the position Burke took at trial – that the tidelands boundary actually had a bearing of over 26 degrees.

Burke also tried to convince DNR that he – and not Tyee – had preferential lease rights in the aquatic lands fronting Tyee's Tidelands Parcel, and DNR consistently rejected his arguments, noting that Tyee, and not Burke, has historically leased, paid rent on and had preferential lease rights for the aquatic lands fronting Tyee's Tidelands Parcel. DNR explained in 1997 that the acreage leased by Burke did not include the state aquatic lands extending beyond Tyee's Tidelands Parcel. It also explained that Tyee had leased and paid rent on the aquatic lands fronting Tyee's Tidelands Parcel. Ex. 2.29. In his Memorandum Decision, Judge Costello specifically noted that his findings were "consistent with the Department of Natural Resources' conclusion as to the location of the boundary line

in the aquatic lease that has been executed between the State and the Defendant [Tyee].” CP 516 (Mem. Decision at 2).

4. Tyee’s Use of Tyee’s Tidelands Parcel

The evidence also demonstrated that Tyee’s members continuously made full use of Tyee’s Tidelands Parcel. Tyee’s members moored their boats at the club’s Eagle Harbor dock and used Tyee’s Tidelands Parcel for both ingress to and egress from Tyee’s dock. At various times during the year, and for decades, Tyee’s members rafted several boats together out from the dock into Tyee’s Tidelands Parcel. And Tyee’s members use the shorelands within Tyee’s Tidelands parcel for recreational uses. *See, e.g.*, Weiss Testimony, RP 25:13-28:21 (floating, rafting and walking within Tyee’s Tidelands Parcel); Larkin Testimony, RP 221:6-21; 221:24-223:16; 224:6-22 (floating, rafting and recreating within Tyee’s Tidelands Parcel); Eastvold Testimony, RP 239:15-240:11 (same); High Testimony, RP 248:21-249:21; 250:23-251:13; 256:7-20 (same); Ex. 2.38 (a, b) (photos of rafting within Tyee’s Tidelands Parcel). Throughout the period of Burke’s claimed adverse possession, Burke complained incessantly to the City and State about Tyee members floating their boats through his alleged waters, rafting boats over his alleged tidelands and generally using Tyee’s Tidelands Parcel. RP 192:7-194:16. Yet Tyee continued to use Tyee’s Tidelands Parcel as its own, because, of course, they did own it.

By contrast, Burke presented no evidence of his use of Tyee's Tidelands Parcel, except as a temporary staging area for construction and for which he received the permission of Tyee (Weiss Testimony, RP 57:5-15; 90:5-9) and for a one time dredging in 1979, to which Tyee had no objection because the dredging mutually benefited the two properties (Weiss Testimony, RP 24:11-19) – just as Tyee's two dredgings in the last 35 years have benefited Burke. Weiss Testimony, RP 19:3-6, 78:11-23; Exs. 2.4, 2.5, and 2.40. Burke also never placed any barrier or boundary marker denoting his supposed claim to ownership of Tyee's Tidelands Parcel. And the dredge pole, placed by Tyee's dredging contractor in 1972 and removed by Burke's dredging contractor in 1979 – done without the direction or permission of either Tyee or Burke, had – as Judge Costello logically observed – no significance to setting a boundary between the two properties. *See e.g.*, Weiss Testimony, RP 21:21-22:22; 23:2-23, 65:25-69:21 and CP 516 (Mem. Decision at 2).

With respect to the “rip-rap” installation in 1986, Burke performed it out of necessity because he was losing the concrete retaining wall and specifically sought and obtained permission from Tyee to place the rip-rap reinforcement. Burke Testimony, RP 145:12-146:7. Tyee had no reason to object to the rip-rap installation as it benefited both property owners and gave its permission for the installation. Weiss Testimony, RP 57:5-15; 90:5-9. Burke's counsel conceded this precise point in closing argument

(RP 271:12-16), and Judge Costello specifically found that the rip-rap was placed on a small portion of Tyee's Tidelands Parcel with Tyee's permission. CP 516 (Mem. Decision at 2) ("The concrete retaining wall is visible behind the large rocks that the plaintiff placed on the Defendant's property with the Defendant's agreement some years ago.")²

IV. SUMMARY OF ARGUMENT

The trial court's finding that Burke did not prove adverse possession or mutual acquiescence in Tyee's Tidelands Parcel is supported by overwhelming, let alone substantial, evidence in the record, including evidence of Burke's own conduct. On this fundamental ground, this Court should affirm the trial court.

Burke's attempt to circumvent this substantial evidence by claiming that the trial court should have extended the uplands boundary line across the tidelands even though he failed to prove adverse possession of Tyee's Tidelands Parcel has no traction under Washington law. Burke's failure of evidence rightfully doomed his

² The planter that Burke references (App. Br. at 6) has no bearing on the question of adverse possession of any portion of Tyee's Tidelands Parcel. First, in his Trial Brief at 7-8 (CP 500-501), Burke described the planter as placed on the *uplands* – not the tidelands. Second, the photograph marked Ex. 1.43(2) does not show the planter on the rip-rap at all but on the concrete wall. And to the extent it is not on the concrete wall it is on rip-rap to the east of the concrete wall that Burke never claimed was his at any time. Similarly, Burke's reference to a white metal pole (App. Br. at 6) is irrelevant here as Burke placed it on the concrete retaining wall that is part of the uplands that are no longer at issue.

claim to Tyee's Tidelands Parcel, and it cannot be revived through an artificial extension of property lines.

Finally, Burke's attempt to salvage a postage stamp of 60 square feet underlying the rip-rap supporting the concrete wall separating the uplands and tidelands is an argument he failed to raise at trial and is inconsistent with the evidence presented to the trial court.

This Court should affirm Judge Costello in all respects.

V. ARGUMENT

A. Standard of Review

Adverse possession involves mixed questions of fact and law. Proof of the elements necessary to establish adverse possession is a question of fact, which, if supported by substantial evidence, should not be overturned. *Diel v. Beekman*, 7 Wn. App. 139, 149 (1972), *overruled on other grounds, Chaplin v. Sanders*, 100 Wn.2d 853, 852 (1984). “Whether use is adverse or permissive is a question of fact.” *Miller v. Anderson*, 91 Wn. App. 822, 828 (1998) (quoting *Miller v. Jarman*, 2 Wn. App. 994, 997 (1970) (citing *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 84 (1942)), *review denied*, 78 Wn.2d 995 (1970)). The Court of Appeals thus “review[s] whether substantial evidence supports the trial court’s challenged findings and, if so, whether the findings in turn support the trial court’s conclusions of law and judgment.” *Harris v. Urell*, 133 Wn. App. 130, 137 (2006) (citations omitted). Accordingly, if

the Superior Court applied the correct legal elements of adverse possession, its findings regarding whether Burke met his burden of proof as to each element must be sustained if supported by substantial evidence in the trial record. Because there is simply no question that Judge Costello employed the correct legal framework for proof of adverse possession, this Court should affirm his findings if they are supported by substantial evidence.

Burke's claim that this Court should conduct *de novo* review is simply wrong. Such a standard of review would be applicable only if an undisputed record was submitted to the trial judge. That is not the case here. Both the nature and character of each party's use and possession were disputed. Judge Costello resolved those disputes, and his decision should be affirmed if supported by substantial evidence in the record.

B. Judge Costello's Conclusion that Burke Had Not Adversely Possessed Tyee's Tidelands Parcel is Supported by Substantial Evidence

Tyee, as the holder of legal title, was presumed to have possession and "need not maintain a constant patrol to protect [its] ownership." *Hunt v. Matthews*, 8 Wn. App. 233, 238 (1973), *overruled on other grounds, Chaplin v. Sanders*, 100 Wn.2d 853 (1984). To prove adverse possession, Burke was required to prove ten continuous years of his (1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted use of Tyee's Tidelands Parcel. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757 (1989)

(citations omitted). Burke had the burden of establishing the existence of each of the above elements. *Id.* Burke's failure to prove any one of these elements was fatal to his claim. *Id.*

Substantial evidence supported Judge Costello's conclusion that Burke did not prove one or more of these elements.

1. Burke Did Not Establish Exclusive Use of Tyee's Tidelands Parcel

An essential element of adverse possession is exclusive use of the claimed property. *Bell*, 112 Wn.2d at 757. Exclusivity applies equally to a case involving submerged tidelands property. *See Peeples v. Port of Bellingham*, 93 Wn.2d 766, 773 (1980) (claim of adverse possession of tidelands property rejected, in part, because claimant failed to prove exclusive use of the tidelands where no evidence was presented that "the port limited access by boat to the [tidelands] property, which was physically accessible at all times"), *overruled on other grounds, Chaplin v. Sanders*, 100 Wn.2d 853 (1984).³ Burke did not and could not prove exclusivity because Tyee, the titleholder, had consistently treated and used Tyee's

³ *Peeples* refutes Burke's claim (App. Br. at 24-25) that he does not need to satisfy the elements of adverse possession for the submerged tidelands because he was required to let Tyee members use the Tidelands Parcel under the "Public Trust" doctrine. *See Peeples*, 93 Wn.2d at 773. Moreover, Burke's position that he had to permit Tyee members' use of the tidelands is at odds with his behavior prior to suit in which he repeatedly complained to public officials – unsuccessfully – about Tyee members' use of their own submerged tidelands. Burke Testimony, RP 192:7-194:16 and *supra* at 9.

Tidelands Parcel in a way that indicated its ownership. *Thompson v. Schlittenhart*, 47 Wn. App. 209, 212 (1987); *Scott v. Slater*, 42 Wn.2d 366, 369 (1953), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853 (1984). While these uses did not occur every day, it was not necessary for Tyee to use Tyee's Tidelands Parcel every day in order to maintain its ownership. As Burke asserted in his trial brief:

[P]hysical occupation of the shore area of the tidelands is only possible during low tide. The "beach" area, if it can be called that, is shaded and rocky and accessible only by traversing private property. . . . The tidelands serve little purpose other than to provide access to navigable waters for abutting upland owners, and potential access to the uplands from the waterway.

CP 502-503 (Trial Brief at 9-10). Tyee's uses of Tyee's Tidelands Parcel were thus consistent with the nature of its property and how an owner would use it.

Burke was required to show not only that he used Tyee's Tidelands Parcel, but also that Tyee did not. This he could not do. At best, Burke's evidence demonstrated no more than a shared or common use (or non-use) of Tyee's Tidelands Parcel, which proved fatal to his adverse possession claim. *ITT Rayonier, Inc. v. Bell*, 51 Wn. App. 124, 129 (1998), *aff'd*, 112 Wn.2d 754 (1999) (exclusivity requirement not met as a matter of law where plaintiff shared occupancy of the property with another family); *Scott v. Slater*, 42

Wn.2d at 369 (exclusivity requirement not met where plaintiff shared use of property with the property's legal owner).

The record before Judge Costello does not begin to resemble the “neighborly accommodation” that existed in *Harris v. Urell*, 133 Wn. App. at 138-39, upon which Burke relies. In *Harris*, the Court found that plaintiff had maintained a driveway for her exclusive use for at least ten years and that allowing a neighbor access on one occasion to fell a tree would not defeat a finding of exclusivity. *Id.* at 138. *Harris* stands for the simple proposition that allowing occasional transitory use by others is not inconsistent with exclusivity. Where, as here, Burke's only evidence of his own use was transitory – a mutually beneficial dredging 27 years ago – and where Tyee's evidence demonstrated substantial use of Tyee's Tidelands Parcel *over the objections* of Burke, the trial court properly found that Burke's use was not exclusive and adverse. CP 516 (Mem. Decision at 2).

2. Burke Did Not Prove “Open and Notorious” Possession of Tyee's Tidelands Parcel

In order to be “open and notorious” Burke's possession must have been visible and known to or discoverable to the world. 17 William B. Stoebuck, Wash. Prac. Real Estate: Property Law § 8.11, at 499 (1995). Burke never physically denoted his alleged dominion of Tyee's Tidelands Parcel to the rest of the world. *Id.* He never placed any type of physical marker on either the tidelands or

the shorelands of Tyee's Tidelands Parcel to provide notice to Tyee that he claimed dominion over that portion of its property. And Tyee's contractor's unauthorized placement of a dredge pile in 1972 followed by Burke's contractor's unauthorized removal of it in 1979 obviously proves nothing about boundary lines, as Mr. Weiss testified and Judge Costello found. RP 22:9-23:10; CP 516 (Mem. Decision at 2).

Nor was Burke "open and notorious" in his publicly filed documents. To the contrary, each of Burke's Aquatic Lands leases acknowledged that his common boundary with Tyee ran along a boundary with a bearing of 22° and that he was leasing the beds solely in front of Lot 2. *See supra* at 7-8. Tyee's Aquatic Land leases all reflected Tyee's lease of the beds in front of Lot 3, including all of Tyee's Tidelands Parcel, upon which it paid rent. *See supra* at 6.

Relying on *Frolund v. Frankland*, 71 Wn.2d 812 (1967), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853 (1984), Burke claims that the partial wooden fence line separating the parties uplands should have been extended by Judge Costello across Tyee's Tidelands Parcel to establish Burke's alleged ownership. Burke's reliance on *Frolund* is completely misplaced. First, Burke's partial fence line is not even on the same bearing as Tyee's Tidelands Parcel. It is on a bearing of 23°, not the 26° he claimed at trial. RP 128:1-129:9; Ex. 3-A; Respondent's Appendix

Ex. A. Second, *Frolund* is also easily distinguishable for several reasons. The prevailing defendants in *Frolund* were the title owners of the disputed land. 71 Wn.2d at 814. Burke is not the title owner of Tyee's Tidelands Parcel and never has been. The defendant in *Frolund* placed boundary markers along the entire disputed boundary – including the tidelands. *Id.* at 819-820. Burke placed no such boundary markers. The *Frolund* court was willing to extend the line established by the waterfront improvements to the uplands because no party had used the disputed uplands. *Id.* at 816-817. Here, Judge Costello was presented with substantial evidence that Tyee's members constantly used Tyee's Tidelands Parcel. *See supra* at 8-9. And finally, the court in *Frolund* also held that use of the waterfront portion of the property was consistent with ownership of the uplands parcel because the waterfront constituted the real value of the property. 71 Wn.2d at 818. Here, the circumstance is just the opposite. The value of the parties' Eagle Harbor properties is tied to access to the open waters of Eagle Harbor via the tidelands. Burke's fencing of a narrow portion of the relatively valueless uplands was not a basis to seize Tyee's more valuable – and much wider and larger Tidelands Parcel.

Finally, Burke's claim that a single event – his dredging of a portion of Tyee's Tidelands Parcel 27 years ago – fulfills the open and notorious requirement is completely inconsistent with what is required to meet this element of adverse possession. Such a single

temporary trespass that lasted one or two days instead of the statutory period, that affected only submerged property, and to which Tyee had no reason to object because the dredging benefited both parties' boating activities, does not satisfy the open and notorious possession requirement for the 30 years during which the parties' have been neighbors. *Peeples*, 93 Wn.2d at 773 (court held that dredging was one-time use and insufficient basis to establish adverse possession); *Anderson v. Hudak*, 80 Wn. App. 398, 404-05 (1995) (single act of planting trees on neighbor's property without any further maintenance or cultivation was not open and notorious use); *Turner v. Rowland*, 2 Wn. App. 566, 569 (1970) (installation of underground pipeline was deemed open and notorious use only during the "brief period of its installation"). Coupled with Tyee's own uses of Tyee's Tidelands Parcel, there is simply no question that Judge Costello's rejection of Burke's claim was supported by substantial evidence.

3. Burke Did Not Meet the "Hostility" Requirement

The element of "hostility" requires proof that Burke "treat[ed] the land as his own as against the world throughout the entire statutory period." *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61 (1984); *see also Anderson v. Hudak*, 80 Wn. App. 398, 402 (1995). In the typical adverse possession case, the claimant relies on his occupancy of the land to give the record owner constructive notice of his hostile claim. In this case, constructive notice did not exist –

not only because any alleged occupancy was at best shared, but also because Burke openly conceded Tyee's superior title. Indeed, Burke acknowledged Tyee's superior title to Tyee's Tidelands Parcel in each of the Aquatic Land leases he entered into with DNR over the last 27 years. *See pp. 7-8 supra; Jackson v. Pennington*, 11 Wn. App. 638, 648-49 (1974) (claimant's application to Seattle for a street use permit and payment of permit fees acknowledged the City's superior title and was not a hostile possession), *overruled on other grounds, Chaplin v. Sanders*, 100 Wn.2d 853 (1984).

C. Burke's Own Evidence Refuted His Attempt to Establish Ownership Based on Mutual Acquiescence or Agreement

This Court recently reiterated what is required to establish a boundary line by recognition and acquiescence:

(1) The line must be certain, well defined and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have 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; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession.

Campbell v. Reed, ___ Wn. App. ___, 139 P.3d 419, 426 (2006) (quoting *Lamm v. McTighe*, 72 Wn. App. 587, 592-93 (1967)). With

respect to Tyee's Tidelands Parcel, Burke proved none of these factors at trial.

First, there was absolutely no evidence of a well-defined, physically designated line defining Burke's proposed boundary delineating his alleged right to Tyee's Tidelands Parcel. Burke argues that such a line was established by the uplands bulkhead, dredging permits and the act of dredging. App. Br. at 19-20. None of these satisfies the requirement of a line that is "certain, well defined, and in some fashion *physically designated* upon the ground." *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996) (emphasis added). The concrete bulkhead is not at issue on appeal, so presumably Burke is simply arguing that the line of the bulkhead should have been extended through the tidelands. That is not a physical designation. Nor is a permit a physical designation, and the dredging – which was temporary, mutually beneficial and only associated with submerged lands – also fails to constitute physical designation of a boundary.

Second, Burke did not demonstrate that both parties recognized or acquiesced in his claimed tidelands boundary line, *Houplin v. Stoen*, 72 Wn.2d 131, 137 (1967), which he was required to prove through clear, cogent and convincing evidence. *Muench v. Oxley*, 90 Wn.2d 637, 641 (1978) (citations omitted), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853 (1984). It is not enough that the parties acquiesce in the existence of the purported

boundary – for example a fence – they must agree that it actually serves as a boundary, and not merely as a barrier, between their properties. *See Muench*, 90 Wn.2d at 641 (acquiescence not found in absence of evidence that fence was recognized as true property line); *Lamm v. McTighe*, 72 Wn.2d 587, 592 (1967) (same).

Because Burke never placed *any* barrier on Tyee's Tidelands Parcel, there was nothing as to which Tyee could express its acquiescence and agreement. To the contrary, the record is replete with evidence that Tyee never treated Burke's dredging as denoting a boundary line.

Burke and Tyee not only *did not* mutually agree that the line proposed by Burke at trial was the boundary, but they also openly disputed ownership of Tyee's Tidelands Parcel. Burke made several complaints to various government officials about Tyee members floating and rafting in the waters of Tyee's Tidelands Parcel and the state aquatic lands adjacent to its property, but they continued to do so. *See supra* at 8-9. And Burke unsuccessfully objected to every Aquatic Lands Lease granted to Tyee to the beds beyond Tyee's Tidelands Parcel. Exs. 2.22, 2.27, and 3.36. It is not surprising that Judge Costello found this claim fell far short on the record before him.

D. Burke Could Not Establish Adverse Possession or Mutual Acquiescence Through Extension of the Upland Boundary Across the Tidelands

Burke also claims that he established adverse possession or mutual acquiescence by virtue of his ownership of the thin strip of disputed uplands, whose boundary line he claims that Judge Costello should have extended across the much wider and larger tidelands. App. Br. at 2-3, 16. Burke's argument is a complete misconstruction of Washington law.

First, the case upon which Burke primarily relies, *Spath v. Larsen*, 20 Wn.2d 500, 148 P.2d 834 (1944), addressed the question of what a court should do when the state sells second class tidelands but the boundaries of those tidelands have not been determined. At the turn of the 20th Century, when the State of Washington began to sell its second class tidelands, great uncertainty arose regarding the actual boundaries of those purchased tidelands. *Spath* was thus an important case providing judicial guidance with respect to determining boundaries for tidelands that had been sold when no pre-existing boundary line actually existed. Here, in contrast, when Tye and Burke purchased their property, each purchased second class tidelands adjacent to their respective lots with a defined boundary. The *Spath* decision has *nothing* to do with the question whether a new upland boundary established by adverse possession should be extended across tidelands where adverse possession has not been established as to the tidelands.

As discussed above, adverse possession is an extraordinary remedy that must be proven as to each of its elements as to all of the land the putative adverse possessor seeks to dispossess from the titled owner. Thus, adverse possession of uplands does not *a fortiori* result in adverse possession of tidelands. Three important cases demonstrate this important point clearly. The first is *Lloyd v. Montecucco*, 83 Wn. App. 846 (1996) (affirming adverse possession to uplands but reversing as to tidelands). The second is *Johnston v. Monahan*, 2 Wn. App. 452, *rev. denied*, 78 Wn.2d 993 (1970), and the third is *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 773 (1980) (claim of adverse possession of tidelands property rejected, in part, because claimant failed to prove exclusive use of the tidelands where no evidence was presented that “the port limited access by boat to the [tidelands] property, which was physically accessible at all times”), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853 (1984).

In *Lloyd*, the Montecuccos demonstrated adverse possession of the uplands tract through testimony that the Montecuccos had possessed, fenced and built a bulkhead on the uplands tract, treating it as their own for 16 years before the Lloyds purchased the property. 83 Wn. App. at 853. The appellate court found that there was insufficient evidence of the Montecuccos’ adverse possession of the adjoining tidelands, however. *Id.* at 856. The Montecuccos had presented evidence that they had seeded the tidelands with oysters,

had laid clam nets, had moored their boat to a buoy connected to hasps anchored on or near the disputed tidelands and had set 40-pound concrete blocks eight feet out from the bulkhead *Id.* at 850-851. The Court found that evidence insufficient as a matter of law to establish adverse possession of the tidelands. *Id.* at 856. If Burke's reading of *Spath* were correct, none of that evidence would have been needed as the court should simply have drawn an extended line from the uplands boundary and inferred adverse possession of the tidelands. This, the court did not do. It required concrete evidence of adverse possession of the tidelands. The evidence in *Lloyd*, which was insufficient as a matter of law to establish adverse possession, was nonetheless far more than what Burke was able to present at trial, even without considering Tyee's own uses of its Tidelands Parcel.⁴

Similarly, in *Johnston v. Monahan*, the court concluded that two concrete blocks placed by the alleged adverse possessor two hundred feet apart in the tidelands were insufficient markings to give notice of adverse possession even though those blocks had been placed there as a temporary boundary marker and had remained in place. 2 Wn. App. at 461. Burke never put any boundary marker along Tyee's Tidelands Parcel. At trial, Burke attempted

⁴ Remarkably, Burke cites *Lloyd* as supporting his position (App. Br. at 18-19) despite the fact that *Lloyd* unambiguously precludes the extension of a boundary line without proof of the elements of adverse possession.

unsuccessfully to fashion a boundary line from the temporary dredge piling that was placed in the tidelands unbeknownst to Tyee by its contractor and removed 7 years later unbeknownst to Burke by his contractor. Weiss Testimony, RP 19:7-25:4. Judge Costello understandably concluded that piling had no relationship to setting a boundary line. CP 516 (Mem. Decision at 2).

Finally, in *Peeples*, the court rejected the Port of Bellingham's adverse possession claim over tidelands even though the Port had once dredged the tidelands and had moored a dolphin in the tidelands. 93 Wn.2d at 773-774. The Court concluded that the "mooring of a floating structure on tidelands is not such an open, notorious and hostile possession as would give notice to an owner that someone was claiming adversely" and the court held that the dredging was only a one-time trespass. *Id.*

These cases demonstrate that Judge Costello was correct in rejecting Burke's attempt to extrapolate adverse possession of Tyee's Tidelands Parcel based on bent lines drawn from the uplands in the absence of substantial evidence proving adverse possession of Tyee's Tidelands Parcel itself.

E. Burke's Claim to Adverse Possession of the Small Patch of Shorelands Under the Rip-Rap Stacked Against the Concrete Retaining Wall Was Not Presented at Trial and Is Not Supported By the Record

On appeal, Burke argues that Judge Costello erred in “cutting off” a six foot by ten foot portion of Tyee’s Tidelands Parcel that Burke covered with rip-rap in 1986 in order to buttress the failing concrete wall. App. Br. at 12-13. However, at trial, Burke did not segregate this little rectangle of tidelands from the rest of the tidelands he claimed, nor did he argue that it merited special treatment. *See* RP 6:22-9:1 (Burke’s Opening Statement) and RP 263:15-273:18 (Burke’s Closing Statement).⁵ What Burke now describes as a “substantial portion of Burke’s front yard,” was never so described at trial. Nor do the photographic exhibits suggest it is

⁵ *After* trial and six months after the Court issued its Memorandum Decision, in argument concerning the form of the order of final judgment, Burke’s counsel stated “with respect to the tidelands, really the only issue is approximately 80 [now 60] square feet that lies beneath the rip-rap, and it’s really not a lot to be fighting over The rocks were placed in 1986, some 19 years ago. One of the claims in this case was adverse possession and they are placed in an area where Tyee, we don’t believe ever acknowledged any sort of ownership, so the 10 year period for adverse possession [a]s to that small portion, certainly applies.” Verbatim Report of Proceedings dated Dec. 2, 2005 at 11:18-12:8.

anything more than a rock bulwark holding up the concrete wall, separating the uplands from the tidelands. Ex. 1.43, 2.38.⁶

Because Burke did not claim at trial that the small portion of tidelands he covered with rip-rap should be analyzed differently than Tyee's Tidelands Parcel as a whole, he should not be permitted to do so now. It is well established that "claims not presented at trial will not be considered upon appeal." *Martin v. Municipality of Metropolitan Seattle*, 90 Wn.2d 39, 42, (1978) (citing *Boeing Co. v. State*, 89 Wn.2d 443 (1978)); *International Tracers v. Hard*, 89 Wn.2d 140, 570 P.2d 131 (1977); RAP 2.5(a) (appellate court may refuse to review any claim of error not raised in trial court except (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted or (3) manifest error affecting constitutional right).

Even if Burke were permitted to raise his new argument on appeal, the evidence that was presented concerning the placement of rip-rap to buttress the concrete bulkhead was that Mr. Burke consulted with Tyee and obtained permission to place the rock and, moreover, that Tyee believed that such rock reinforcement was mutually beneficial to Tyee and Burke. Weiss Testimony, RP 57:5-15; Burke Testimony, RP 145:6-146:7. Under the circumstances, such an action could not constitute adverse possession or mutual

⁶ Respondent's Appendix Ex. A notes that the yellow highlighting denotes Tyee's Tidelands Parcel which starts at the "corner of the concrete bulkhead," not at the end of the rip-rap installed to support the concrete bulkhead.

acquiescence in the 60 square feet underlying the rip-rap.

Permission negates the necessary hostility and open and notorious elements of adverse possession. *Chaplin*, 100 Wn.2d at 861-862 (“permission to occupy the land, given by the true title owner . . . operate[s] to negate the element of hostility”); *Harris*, 133 Wn. App. at 143 (“permissive use of the disputed property defeated the “open and notorious” element of adverse possession”).

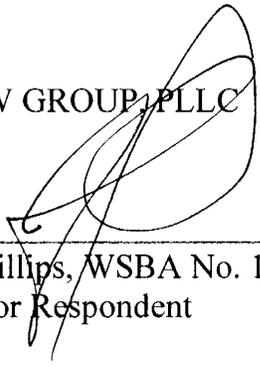
In addition, where, as here, “both the user and the owner are benefited by the arrangement,” Burke’s rip-rap installation is not adverse. *Antrobus v. Slawski*, 23 Pa. D. & C. 3d 568,574, 1982 WL 693, *4 (Pa. Com. Pl. 1982); *see also Finley v. Yuba County Water District*, 160 Cal. Rptr. 423, 429 (Cal. App. 1979) (agreed boundary doctrine is not intended to apply where “a neighbor allows another to use part of his land for the neighbor’s (or their mutual) benefit”); *Bellamy v. Shryock*, 199 S.W.2d 580, 583 (Ark. 1947) (holding that maintenance of fence at base of embankment, planting of flowers, and placing of concrete blocks on bank to prevent washing could “be considered as having been committed for the benefit of both the parties and are insufficient to convert a possession that is otherwise permissive and amicable into a clear assertion of hostile title”).

VI. CONCLUSION

For the foregoing reasons, this Court should affirm Judge Costello's Findings of Fact and Conclusions of Law.

DATED this 3rd day of October, 2006.

PHILLIPS LAW GROUP, PLLC

By:  _____
John W. Phillips, WSBA No. 12185
Attorneys for Respondent

CERTIFICATE OF SERVICE

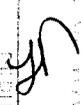
I certify that on October 3, 2006, I caused to be served via Federal Express, a copy of the foregoing **Brief of Respondent**, postage prepaid, to the following counsel of record at the following addresses:

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Carrie J. Krogh

FILED
COURT OF APPEALS
06 OCT -4 AM 9:14
STATE OF WASHINGTON
BY  DEPUTY

EAGLE HARBOR

PROPOSED LEASE AREA (1)

ORIGINAL LEASE AREA (2)
(SEE NOTE 7(C), PG. 2)

AREA (3)

S88°46'46"E 193.92'
129.18'
48.59'

CONSTRUCTION LIGHT LINE

PIPING (TYP.)
ADDITIONAL 15' FOR R/W

SEE NOTE 7, PAGE 2

TRAIL PIERHEAD LINE
EAGLE HARBOR MARINA
LEASE No. 10805
(PER JOB No. 77-5256)
AND AMENDED PER R.M.I.
IN DEC. 1980

OF EXTREME LOW TIDE AS
CTED ON THE WAR DEPARTMENT
BIG TITLED "EAGLE HARBOR, WA
FOR LINES" PREPARED BY U.S.
HYDROGRAPHIC OFFICE, SEATTLE, WA
DATED DEC. 27, 1930.

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

SEE NOTE 17

BALANCED MEASURE LINE

AREA OF UPLANDS
= 73,485 SQ. FT.

CONCRETE RETAINING WALL
WITH RIP-RAP
LINE OF MEAN HIGH TIDE

BURKE RESIDENCE

YACHT CLUB

Yellow Highlighting: The Tidelands Parcel, which is a portion of Tyee'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".

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 Tyee's pumphouse to Burke's bulkhead.

Pink Highlighting: Tyee's legal platted boundary lines.

Orange Highlighting: Burke's legal platted boundary lines.

LOI LINE PER BOYS
DACHENBERG SURVEY
DATED 2/8/1922