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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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ROBERT NICKELL and KAREN NICKELL,
Appellant,

vs.

SOUTHVIEW HOMEOWNERS ASSOCIATION,
Respondent.

SOUTHVIEW HOMEOWNER ASSOCIATION'S RESPONSE BRIEF

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TABLE OF CONTENTS

INTRODUCTION	1
COUNTER-STATEMENT OF APPEAL ISSUES ARGUED IN THIS BRIEF	3
STATEMENT OF THE CASE.....	3
I. Events prior to 2004/2005.....	3
II. Events of late 2004 through July, 2005.	5
III. Events following 2005.....	9
ARGUMENT.....	10
I. Equity Demands Dismissal of the Nickells’ Claim.	11
A. An Admission, Statement or Act Inconsistent with the Claim Afterwards Asserted.....	17
B. Mr. Chopp, Pierce County and Eleven Homeowners Acted in Reliance on the Nickells Admission, Statement, or Act.	20
C. Pierce County, Eleven Homeowners and the Public Will be Injured if the Nickells are Allowed to Contradict or Repudiate Their Prior Act, Statement, or Admission.....	21
D. The Supreme Court Issued A Decision Nineteen Days After This Summary Judgment Dismissal Illustrating The Wisdom of the Trial Court’s Ruling.....	24
II. The Nickells’ Adverse Possession Claim Fails as a Matter of Law.....	28
A. Plaintiffs Cannot Show The Requisite Element Of Hostility To Prove Adverse Possession.....	28
B. The Vacant Lands Doctrine Should Apply Equally To Adverse Possession Cases as to Prescriptive Easement Cases.....	35
CONCLUSION.....	37

TABLE OF AUTHORITIES

<u>Alcorn Trailer City v. Blazer</u> , 18 Wn. App. 782, 572 P.2d 15 (1977).....	19
<u>Anderson v. Hudak</u> , 80 Wn. App. 398, 401, 907 P.2d 305 (1995).....	28
<u>Board Of Regents v. Seattle</u> , 108 Wn.2d 545, 553, 741 P.2d 11 (1987).....	16
<u>Chaplin v. Sanders</u> , 100 Wn.2d 853 (1984).....	36
<u>Diel v. Beekman</u> , 7 Wn. App. 139, 150, 499 P.2d 37 (1972).....	36
<u>Dorward v. ILWU-PMA Pension Plan</u> , 75 Wn.2d 478, 486, 452 P.2d 258 (1969).....	19, 20
<u>Drake v. Smersh</u> , 122 Wn. App. 147, 154, 89 P.3d 726 (2004).....	30
<u>Hunt v. Matthews</u> , 8 Wn. App. 233, 237, 505 P.2d 819 (1973).....	36
<u>Kunkel V. Fisher</u> , 106 Wn. App. 599, 604-605, 23 P. 3d 1128 (2001).....	31
<u>Lilly v. Lynch</u> , 88 Wn. App. 306, 318, 945 P.2d 727 (1997).....	16
<u>Miller v. Anderson</u> , 91 Wn. App. 822, 828, 964 P.2d 365 (1998).....	35
<u>M.K.K.I. v. Krueger</u> , 135 Wn. App 647, 658-659, 135 P.3d 411 (2006).....	22, 23
<u>Nethery v. Olson</u> , 41 Wn.2d 173, 180, 247 P.2d 1011, (1952).....	31
<u>N.W. Cities Gas Co. v. Western Fuel Co.</u> , 13 Wn. 2d. 75, 84, 123 P.2d 75 (1942).....	28, 29, 31, 33, 35, 36
<u>Parmelee v. Clarke</u> , 148 Wn. App. 748, 758, 201 P.3d 1022 (2008);.....	16
<u>Peeples v. Port Of Bellingham</u> , 21 Wn. App. 821, 824, 588 P.2d 757 (1978).....	35
<u>Proctor v. Huntington</u> , 169 Wn.2d 491, 238 P.3d 1117 (2010).....	11, 24-27

Spear v. Basagno, 3 Wn. App. 689, 690, 477 P.2d 197 (1970)36

State Ex Rel. Shorett v. Blue R. Club, 22 Wn.2d 487, 494-495, 156
P.2d 667 (1945).....30, 32

Thomas v. Harlan, 27 Wn.2d 512, 178 P.2d 965 (1947)18, 19

STATUTES

RCW 36.70A.165.....22

INTRODUCTION

The Nickells filed this claim asking the trial court to act in equity, awarding title to Southview's real property to the Nickells, by adverse possession. After hearing the undisputed facts, the trial court determined equity demanded dismissal of the Nickells' claims.

The Nickells allege they used a small area of land now belonging to the homeowners association at a time when the association's property was unenclosed, wooded and overgrown with blackberries. Because of the dense vegetation, neither the Nickells nor the owner of the Southview property had knowledge the Nickells used what is now Southview land.

However, during platting of association property and *prior* to final plat approval, the County Hearing Examiner ordered removal of landscaping in the disputed area with replanting in compliance with County Code requirements for "open space". The developer informed the Nickells he would remove their landscaping, located on his land and re-landscape according to the County's requirements. The Nickells and the developer had a discussion, during which the Nickells asked questions. The Nickells acquiesced, acknowledging the property belonged to the developer. The Nickells' landscaping was removed and replaced with County required landscaping. The disputed strip was identified as "open space," protected from development or vegetation removal.

Still prior to plat approval, the Nickells were put on notice, by the Pierce County Hearing Examiner, that if any person claimed an interest in the platted land, the County could not approve the plat application without accommodation. Appellants said nothing. The plat was approved.

Subsequently, lots were sold to builders and homeowners who obtained septic approval from Pierce County. Two of those approvals placed drain field, reserve drain field, or both, in the disputed strip.

Only after the plat was approved, the open space limitations imposed, the septic systems installed and the homes occupied by families who had no knowledge whatsoever of appellants' alleged use of the property, did appellants claim, for the first time, they owned nearly the entire open space bordering their property.

The Nickells assert they "have no intention of requiring any substantive change in the status quo of the disputed strip. They intend to maintain it as a 'greenbelt' per the designation of the plat." If that is true, then the Nickells receive no benefit from acquiring title to the disputed strip. The association is mandated to maintain the entire open space in its existing, vegetated condition.

The trial court's ruling was correct and should be affirmed.

COUNTER-STATEMENT OF APPEAL ISSUES ARGUED IN THIS BRIEF

1. Did the trial court properly dismiss the Nickells' claim since the Nickells participated in land use hearings, submitted to the developer's ownership of the land, failed to object when the plat was preliminarily approved dependent on the disputed strip being part of the open space and remained silent when the disputed strip was occupied by septic systems?

2. Did the trial court properly dismiss the Nickells' claim since granting adverse possession to the Nickells would result in no benefit to the Nickells and enormous hardship to Southview?

3. Did the trial court properly dismiss the Nickells' claim in light of statutory and common law prohibitions on taking platted, open space lands by adverse possession?

4. Did the trial court properly dismiss the Nickells' claim since the doctrine of unenclosed lands should apply equally to adverse possession cases as to prescriptive easement cases?

STATEMENT OF THE CASE

I. Events prior to 2004/2005.

The Nickells seek to quiet title to a strip of land 18.5 feet wide, running the length of their property, roughly 840 feet. CP 4-5. Admittedly, the Nickells used only a portion of this extended strip, near

the center of the 840' length. CP 27-31, 103-104. More than half the strip was unmaintained, blackberries and scrub trees. CP 27-31.

The property to the east of the Nickells' property, which later became the Southview subdivision, was vacant and unimproved. CP 36. In fact, the vegetation on the Southview land was so dense that a person standing at the mid-point of one of the property boundaries could not see the property corner. CP 81 ("a wall of blackberry bushes growing on the adjacent property"); CP 85 (survey stakes located at the property corners could not be observed from the allegedly landscaped area).

When the owner of the neighboring land, the Southview property, sought to obtain preliminary plat approval to develop a subdivision, including the strip the Nickells now claim, Ms. Nickell testified at the plat hearing. CP 40. The Pierce County platting file shows Ms. Nickell as a "party of record" to receive copies of documents. CP 65.

It might be presumed that Ms. Nickell testified the plat could not be approved because it included property she and her husband owned by adverse possession. But she did not. At no point during the 10+ year platting process did she claim ownership of the land she now claims - - even as it was undeniably made part of the platted "open space." When Ms. Nickell testified, she complained only that the proposed lots were too small and trees would be removed. CP 40.

In their opening brief, the Nickells assert they had no knowledge the disputed strip was part of the Southview plat until after final plat approval, when septic systems were installed. (Appellants' Opening Brief at 6, 28, 29.) That assertion is patently and provably false.

The Examiner's preliminary plat approval, issued in 1994, identified conditions that must be met *BEFORE* final plat approval. Condition AI provides:

The 25-foot buffer area along the west property line shall be replanted in accordance with a landscape plan which must be approved by the Planning Division and must comply with Section 18.50.390 DR.

CP 47. For purposes of the summary judgment proceeding, it must be presumed the Nickells had no knowledge the disputed strip was part of the Southview plat at the time the Hearing Examiner issued this preliminary plat approval. Their claim is rooted in their testimony that vegetation on the Southview property was so dense, there was no way to determine where property lines were, based on the surveyor's corner markers. CP 85.

II. Events of late 2004 through July, 2005.

In late 2004 or early 2005, before final plat approval, the developer told the Nickells the disputed strip was his property. CP 85. He informed the Nickells he intended to remove the landscaping they appeared to maintain and replace it with his own landscaping. He informed them the

land was “greenbelt” to his subdivision. The Nickells asked questions but made no objection.

Q Okay. Did you have a discussion with Mr. Chopp about that issue?

A He talked to my husband and I and told us that that was greenbelt to the development he was working on, but not to worry because it was all greenbelt. He had to tear out part of our lawn and plant vegetation per the county requirements.

Q Did you object to that?

A We were flabbergasted, but we trusted what he said.

Q So when he tore out the lawn and replanted vegetation or landscaping, you did not object; is that correct? . . .

A No, we questioned, but we didn't pursue it after that.

Q What exactly did Mr. Chopp do?

A He tore out the lawn that existed here. (Indicating.) . . . He came, and he said that on the east side of the border that ran on this line, from there east was greenbelt that ran north to south, south to north. He had to tear out lawn and plant plants and put some trees along here per the county, which he did because it was greenbelt, and whoever bought this place couldn't do anything with it anyway.

Q Okay. And so he did, in fact, tear out the lawn –

A Yes, he did.

CP 32-33. There is no disputed fact the Nickells knew the developer claimed the disputed strip following these events. There is no disputed fact the Nickells knew Pierce County depended upon the open space “greenbelt” as fundamental to plat approval.

As previously stated, the applicant is providing an appropriate open space buffer around the perimeter of the plat The applicant is also required to replant the 25-foot open space buffer along the west property line in accordance with the requirement of Section 18.50.390 DR.

CP 42 (Hearing Examiner’s Decision on Preliminary Plat, copy mailed to Karen Nickell).

There is no disputed fact, these events occurred prior to final plat approval. “Staff believes that the final plat meets all conditions imposed by preliminary plat approval and therefore the Examiner should approve the final plat.” CP 54, 57 (Hearing Examiner’s Decision on Final Plat).

There is also no dispute the Nickells were made aware, through pure coincidence, that if they had a claim to any of the Southview Property, they needed to assert it prior to final plat approval. As coincidence would have it, the Examiner’s final decision was conditional.

CP 53. The decision explained that a different neighbor claimed rights to the Southview Property. CP 54-60. The Hearing Examiner analyzed and explained statutory and common law that prohibit him from granting the subdivision request if adverse possession claims exist and the claimant objects. CP 59-60. The Examiner explained that if a neighbor claims ownership of some portion of the platted property by adverse possession, the potential claims must at least be included as a notation on the face of the plat. Id. The Nickells were aware of the process for claiming an interest in the platted property if they had one. They said nothing.

The Examiner's decision was sent to the Nickells as parties of record. CP 52. The decision identified the steps necessary for any person seeking reconsideration of the Examiner's decision. CP 63. The Nickells asserted no ownership interest in the Southview land.

There is no dispute the Nickells knew the disputed strip was claimed by the developer, re-landscaped by the developer, relied upon by the County as protected "open space" and that the County could not issue final plat approval without accommodation if a neighbor claimed an interest in the platted property - - all *before* final plat approval issued. Conditional plat approval issued July 15, 2005. CP 52. The condition was satisfied on July 28, 2005, by letter sent to the Nickells as parties of record. CP 71.

III. Events following 2005.

In November 2006, the Tacoma/Pierce County Health Department received and accepted the “as-built” drawing showing a septic system for one of the Southview lots bordering the disputed strip. CP 73-74. The reserve drain field is clearly identified as wholly contained in the “25’ open space.” CP 73. In February 2007, a second septic as-built, for a different Southview lot bordering the disputed strip, was accepted. CP 75. This time, both the drain field and the reserve drain field clearly extend into the “25’ open space tract”. When these septic systems were approved and installed, the Nickells made no objection.

With final plat approval and completion of construction on all Southview lots, the Association now owns the 25’ open space perimeter. The Association’s use of the open space is limited by the Examiner’s condition required on the face of the plat.

The open space areas, appearing on the plat shall be developed in accordance with the Development Regulations for the Gig Harbor Peninsula. No clearing, grading, fill or construction of any kind will be allowed within these tracts area except for the removal of diseased or dangerous trees and the placement of underground utility lines and supplemental landscaping. . . .

CP 47. So long as the disputed strip is part of the Southview plat, it is protected from any and all clearing, grading and development. It cannot be used for anything except its current purpose, landscaping.

Significantly, this use comports with the Nickells stated intentions for use of the land. “The Nickells have no intention of requiring any substantive change in the status quo of the disputed strip. They intend to maintain it as a ‘greenbelt’ per the designation of the plat.” Appellants’ Opening Brief at 33. In other words, dismissal of the Nickells’ claim insures the disputed strip will be maintained in its status quo in perpetuity, a representation the Nickells cannot make on behalf of any of their successors, should the relief they seek be granted.

The Nickells come to this Court seeking an equitable remedy. Equity demands the trial court decision be affirmed.

ARGUMENT

The Nickells’ claim should be dismissed as a matter of law on either of two theories. The Nickells never took the disputed strip by adverse possession because the Nickells cannot prove the requisite element of hostility. Hostility is lacking because the Southview land was wild, uncultivated and unenclosed. The claim should alternatively be dismissed based on equitable estoppel or estoppels in pais. The Nickells’ act of surrendering the land to the developer and the County, knowing the land would be dedicated as open space to the Southview plat, bars their claim.

The trial court dismissed based on equity. Nineteen days later, the Supreme Court issued a decision in accord with the trial court's dismissal. Proctor v. Huntington, 169 Wn.2d 491, 238 P.3d 1117 (2010). Accordingly, this brief will begin with an analysis of equitable defenses and conclude with argument regarding the element of hostility.

I. Equity Demands Dismissal of the Nickells' Claim.

The Nickells ask the court to act in equity by quieting title in the Nickells, to Southview's land, by adverse possession. Their claim seeks blind adherence to the beneficial results of adverse possession without consideration of the consequences of the Nickells' deceptive action. To grant relief in equity, the court must act equitably. It would be wrong for the court to turn a blind eye to the Nickells' deceptive conduct, even if the Nickells did not intend to deceive, when the County and eleven homeowners relied on the truth of the Nickells' actions.

Equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable. . . .

It is a contradiction of terms to adhere to a rule which requires a court of equity to act oppressively or inequitably and by rote rather than through reason.

Proctor v. Huntington, 169 Wn.2d 491, 500, 238 P.3d 1117 (2010).

Before the court can grant the equitable relief requested by the Nickells,

the court must evaluate the equities of the claim. Following that evaluation, the trial court properly dismissed the Nickells' action.

The Nickells claim they owned the disputed strip not later than 1995 and ask the court to quiet title in them based on events that allegedly occurred prior to 1995. If the Nickells filed a claim for adverse possession in 1995 and proved facts sufficient to support their claim, title could have been quieted in them then. They would then have appeared on title as owners of the land. But they did not.

Accordingly, when Randall Chopp approached the Nickells in 2004 or 2005, the discussion involved land in title to Mr. Chopp. The record does not reveal when Randall Chopp purchased the property from the Greethams, but it was sometime after May 1994. CP 38. Moreover, recall the vegetation on the Southview land was so dense that from the disputed strip, the Nickells could not see the perimeter of the property on any other side. It must be presumed that Mr. Chopp, whenever he bought the property, could not see the use being made of the disputed strip from the perimeter of the property.¹ The Nickells assert that neither Mr. Chopp nor the Greethams ever entered the disputed strip. (Appellants Brief at 5.)

¹ The thickness of vegetation is supported by the record. The Pierce County Hearing Examiner viewed the Southview property in 1994 and never mentioned evidence of any potential adverse possession claim or adverse user. CP 40.

Accordingly, when Mr. Chopp asserted ownership over the disputed strip in 2004 or 2005, the Nickells' surrender of the land was monumentally significant. By their surrender of the land, the Nickells lead Mr. Chopp to believe the Nickells held no claim to title. Regardless of what Mr. Chopp knew or did not know, should or should not have known, the Nickells surrender of the land at that moment lead Mr. Chopp to believe, as record title indicated, that he owned the land.

Ironically, it was not Mr. Chopp in a position of superior knowledge, as the Nickells argue in their opening brief. Rather, it was the Nickells who had the superior knowledge. The Nickells were the only party with knowledge of the alleged use they historically made of the disputed strip. When the opportunity arose for the Nickells to share their knowledge and claim the land they now assert they owned, they did not. Instead, they surrendered the land to Mr. Chopp.

This is a very different situation from a case where a neighbor builds on the titled property of another and then claims the failure of the true owner to speak up estops the true owner from claiming title. In that situation, the builder is on constructive notice based on record title. In this case, Mr. Chopp held title to the land and when he challenged the Nickells' use, they surrendered control to him and concealed their private knowledge of their claimed use. Although Mr. Chopp seemed to know the

landscaping belonged to the Nickells, there is no evidence indicating knowledge on his part as to how long the Nickells maintained that landscaping or that the Nickells may possess an adverse possession claim.

When the Nickells surrendered the land to Mr. Chopp, they also surrendered the land to the jurisdiction of the Pierce County Planning and Land Services Department. The Nickells had received the preliminary plat approval (CP 49) and knew the perimeter of the subdivision would be dedicated to open space. The Nickells knew the developer was obligated to re-landscape the open space perimeter adjacent to their property. The developer candidly informed the Nickells he was doing exactly that in late 2004 or early 2005. CP 32-33. Accordingly, when the Nickells surrendered the disputed strip to Mr. Chopp, they also surrendered it to Pierce County's jurisdiction and Pierce County's mandate that the land be held as open space in perpetuity. If the land actually belonged to the Nickells, contrary to record title, then the Nickells deceived Mr. Chopp and Pierce County by surrendering control of the land to Mr. Chopp and the County, knowing the County would change the use and character of the land forever.

Finally, the Nickells also deceived future owners of the homes in Southview. When prospective purchasers viewed homes or lots "for sale" in Southview, they did not see landscaping in the disputed strip that was

identifiable with the Nickells' property. To the contrary, prospective purchasers saw landscaping uniform with all the Southview landscaping because the developer had installed the landscaping in the disputed strip in 2004 or 2005.

When septic systems were installed in the open space, the Nickells deceived lot owners into believing the Nickells had no claim to the disputed strip because the Nickells surrendered control of the disputed strip to the lot owners.

The Nickells had abundant opportunity to express their private knowledge of their use of the disputed strip. They attended hearings and received public information about the plat. They were informed that if they had a claim to the land, they needed to assert it. Yet, at every opportunity, they concealed the information, knowing the developer, the County and eleven families relied on record title ownership of the land in the absence of any asserted claim.

Now, the Nickells claim ownership of nearly the entire open space area on the western perimeter of Southview. Their claimed ownership would include the right to change the character of the green belt, render void the County's open space requirement and eject the existing septic drain fields and reserve drain fields from the strip. The law will not tolerate the Nickells' deceit, even if unintended.

The elements of equitable estoppel are (1) an admission, statement, or act inconsistent with a claim afterwards asserted; (2) action by another in reliance upon that act, statement, or admission; and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.

Parmelee v. Clarke, 148 Wn. App. 748, 758, 201 P.3d 1022 (2008); see also, Board Of Regents v. Seattle, 108 Wn.2d 545, 553, 741 P.2d 11 (1987) (“The State will be estopped by its silence, coupled with knowledge of another's detrimental acts in reliance on that silence.”)

“Estoppel in pais” is yet another method by which boundaries between adjoining parties may be established. [Citations omitted.] Alteration of record titles to land by estoppel requires three elements: “(1) [a]n admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.”

Lilly v. Lynch, 88 Wn. App. 306, 318, 945 P.2d 727 (1997). Again, in this case, Southview is not asserting estoppel to take land titled to the Nickells. (Though, as evidenced by the cited quote, if the land were titled to the Nickells, appropriate circumstances would allow for that taking.)

Rather, Southview is defending its record title and attempting to prevent the Nickells from taking its land.

The facts support Southview's defense based on estoppel and estoppels in pais.

A. An Admission, Statement or Act Inconsistent with the Claim Afterwards Asserted.

The Nickells had a discussion with Randall Chopp and asked questions (CP 32) about his intention to remove their landscaping from the disputed strip. Thereafter, they *surrendered* control of the land to Mr. Chopp. (CP 32-33.) Their action of allowing Mr. Chopp to re-landscape the disputed strip, coupled with their knowledge that the County would dedicate the land to a perpetual greenbelt, owned by a future homeowner association and their additional act of submission and surrender when septic systems were installed in the open space, are actions entirely inconsistent with their present claim of ownership and control over the disputed strip. Their actions of submission and surrender satisfy the first element of the 3-pronged estoppel test.

The evidence of surrender is clear, cogent and convincing. Ms. Nickell testified that following her and her husband's discussion with Mr. Chopp, they allowed him to "tear out" their landscaping. Ms. Nickell's participation in hearings and receipt of Examiner reports is beyond dispute

and acknowledged by Ms. Nickell. (CP 85.) Ms. Nickell affirms her knowledge that septic systems were installed in the open space. (Id.) The evidence supporting the Nickells' surrender of the land to Mr. Chopp, to the County's jurisdiction and to the homeowner association is undeniable.

The facts of this case are entirely dissimilar from those of Thomas v. Harlan, 27 Wn.2d 512, 178 P.2d 965 (1947). Moreover, the Thomas court did not rule as described in the Nickells' opening brief. In Thomas, one neighbor built his garage on property held in title by his neighbor. The titled property owner did not object. In the present case, Mr. Chopp and the Association only took action on land in which they held title.

In Thomas, the garage builder claimed he took title to the neighbor's land based on alternate theories of estoppel and acquiescence. The court found the facts did not support estoppel because the garage builder did not rely on the titled property owner. To the contrary, rather than displaying reliance, the garage builder obtained his own, albeit incorrect, survey. Accordingly, the case was not decided on estoppel and the Nickells' argument that the Thomas case is dispositive is erroneous.

The Thomas court did, however, provide dicta helpful to the understanding of an estoppel argument in this context.

Estoppel is a preclusion in law, which prevents one alleging or denying a fact in consequence of his own previous act, allegation, or denial, of a contrary tenor. Equitable

estoppel, or estoppel *in pais*, is that condition in which justice forbids that one speak the truth in his own behalf. It stands simply as the rule of law which forecloses one from denying his own expressed or implied admission, which has in good faith, and in pursuance of its purpose, been accepted and acted upon by another. To constitute estoppel *in pais*, three things must occur: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Thomas v. Harlan, 27 Wn.2d at 518 (emphasis added). The quoted language illustrates the “admission, statement or act inconsistent with the claim afterwards asserted” may be “implied”. Implication is not necessary based on the present facts, as the Nickells willfully and intentionally surrendered the land to the control of the developer, the County and the homeowners. If the Court did not, however, find the action of surrender to be affirmative, it could be implied.

Similarly, the cases of Alcorn Trailer City v. Blazer, 18 Wn. App. 782, 572 P.2d 15 (1977) and Dorward v. ILWU-PMA Pension Plan, 75 Wn.2d 478, 486, 452 P.2d 258 (1969), support the application of estoppel in this case. In both cases, no words were ever spoken between the parties. Rather, the courts relied on the actions and the implications behind the actions, of the parties. In Alcorn, the lessor never told tenant the lease terms were unacceptable but did cash the tenant’s rent check.

The silent action of cashing the rent check worked an estoppel. Alcorn Trailer City v. Blazer, 18 Wn. App. at 789. In Dorward, the court reasoned that estoppel could be granted based on the pension plan trustee's "failure" to notify the employee that his years of work did not qualify him. Dorward v. ILWU-PMA Pension Plan, 75 Wn.2d at 486.

While the record does not reveal the statements made or questions asked when Randall Chopp and the Nickells discussed the disputed strip, the fact of the discussion is undisputed. Thereafter, the Nickells silently surrendered control of the land or, said differently, failed to notify Mr. Chopp, the County or any potential homeowners of their undisclosed claim. Their surrender and failure to disclose their claim are admissions, statements or acts inconsistent with their claim.

B. Mr. Chopp, Pierce County and Eleven Homeowners Acted in Reliance on the Nickells Admission, Statement, or Act.

Recall the Nickells were uniquely and singularly in possession of the knowledge they allegedly used the disputed strip as their own for more than 10 years. While Mr. Chopp came into ownership at some unknown time after 1994, he could not see the alleged adverse use from the perimeter of the property and there is no evidence in the record that he entered the Nickells' property to view the Southview property or see the claimed encroachment. The Hearings Examiner viewed the site (CP 40),

yet he never indicated any knowledge of the alleged encroachment. By the time homeowners viewed the property, any indicia of the Nickells' use had been eliminated by Mr. Chopp's "tearing out" of the Nickells landscape and replacement with his own.

Accordingly, when the Nickells concealed knowledge of their claim and surrendered control of the land to Mr. Chopp, to Pierce County and to the homeowners, each relied on the Nickells' surrender as confirmation that record title to the property was correct. Evidence of reliance by each is clear, cogent and convincing. Mr. Chopp invested in re-landscaping and completed the platting process, knowing he would sell lots to homeowners warranting title to each. Pierce County relied and allowed the disputed strip to fulfill the open space requirement for the plat. Homeowners relied by investing their family fortunes in homes located in Southview believing the subdivision to be compliant with its platting requirements and by their dependence on septic systems located, in part, in the open space.

C. Pierce County, Eleven Homeowners and the Public Will be Injured if the Nickells are Allowed to Contradict or Repudiate Their Prior Act, Statement, or Admission.

Pierce County approved the Southview Plat because it included "appropriate open space buffer." CP 42. The open space buffer is intended to provide greenbelts for the benefit of not only the Southview

homeowners but the public in general. It is for this reason the Legislature barred, by the Growth Management Act, this claim and others like it.

The legislature recognizes that the preservation of urban greenbelts is an integral part of comprehensive growth management in Washington. The legislature further recognizes that certain green-belts are subject to adverse possession action which, if carried out, threaten the comprehensive nature of this chapter. Therefore, a party shall not acquire by adverse possession property that is designated as a plat greenbelt or open space area or that is dedicated as open space to a public agency or to a bona fide homeowner's association.

RCW 36.70A.165. This statute bars the Nickells' claim. Had the Nickells quieted title to the disputed strip in 1995 or any time prior to plat approval, the statute would have no bearing. But the Nickells' delay in seeking to quiet title until after the disputed strip was dedicated to open space is fatal. If the statute does not bar the Nickells' claim, it stands as clear, cogent and convincing evidence of the injury to the County and the public if the open space designation is cast aside.

Similarly, out of protection for the public, Washington courts bar the modification of plat requirements absent a formal plat amendment. If the subdivision loses the green belt, the subdivision will be non-compliant with the Hearing Examiner's conditions. The plat will not accomplish the public policy goal of preserving greenbelts. Accordingly, the only way the platted green belt can be eliminated as a protected environment is

through a formal plat amendment. M.K.K.I. v. Krueger, 135 Wn. App 647, 658-659, 135 P.3d 411 (2006). There has been no formal plat amendment. The strip must remain under the protections of the Hearing Examiner's approval.

M.K.K.I illustrates the reliance a county justifiably places on the silence of surrounding property owners. It is specifically to draw comment from neighbors that a county requires developers to post property with a distinct, large, yellow sign and why a county hosts hearings inviting interested members of the public to comment. It is because the county is going to make weighty land use decisions based on information gathered at those hearings. When a land use decision is final, it cannot be disturbed absent another land use process. Id. As M.K.K.I. explained, civil litigation between landowners cannot undo the County imposed requirements of land use development. Granting the Nickells' relief will subvert the County process, rendering void, one of the requirements for approval of the plat.

While the Nickells concluded their opening brief by describing their alleged intent to maintain the disputed strip in its present condition, there is nothing obligating them to do so. Moreover, there is nothing to prevent future owners of the Nickells' property from disturbing the open space if the Nickells were successful in this claim. If the Nickells or their

successors own the open space buffer, the open space designation will be eliminated. The owners of the open space area could remove all vegetation, could pave the open space for a driveway, a patio or a sport court, could erect outbuildings or other structures in the open space and otherwise treat the land as their own, without restriction. Septic systems installed pursuant to Pierce County Health Department approval would become a trespass.

Injury to the County, the public, the eleven Southview homeowners and the two with septic system features in the open space is undeniable. Equity bars the Nickells' claim.

D. The Supreme Court Issued A Decision Nineteen Days After This Summary Judgment Dismissal Illustrating The Wisdom of the Trial Court's Ruling.

In Proctor v. Huntington, 169 Wn.2d 491, 238 P.3d 1117 (2010), the Huntington's unwittingly built their house, well and garage on the Proctor's property. The improvements stood for less than 10 years when Proctor sued for ejectment. Though the Court could not find adverse possession, the court did not issue an injunction ordering removal of the structures. The Court crafted an equitable remedy allowing the Huntingtons to maintain their improvements and purchase the land from the Proctors.

While the case includes facts very different from those at issue: improvements built on land titled to another; improvements constructed rather than landscaping installed; no elements of estoppel in pais, the case stands for a proposition illuminating to this case. Rote enforcement of real estate doctrine, without accommodation for harsh effects, is contrary to equity.

Ordinarily, . . . a mandatory injunction will issue to compel the removal of an encroaching structure. However, *it is not to be issued as a matter of course*. . . . [T]he court must grant equity in a meaningful manner, *not blindly*?

Proctor v. Huntington, 169 Wn.2d at 502 (emphasis in original). The Nickells seek blind application of the adverse possession doctrine. They claim they earned title to the disputed strip in 1995 and title should be awarded to them, with a corresponding ejectment of Southview, regardless of the Nickells' concealment of facts and surrender of the land. The Nickells' deception cannot be rewarded in light of Proctor.

In Proctor, the Court introduced, or rather, reintroduced, an old doctrine called the liability rule:

[A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that: (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's

future use; (4) it is impractical to move the structure as built; and
(5) there is an enormous disparity in resulting hardships.

Proctor v. Huntington, 169 Wn.2d 500. Since the Nickells seek to eject Southview, claiming the Nickells have been the true, albeit undisclosed, owner since 1995, the Association would be the “encroacher” in this analysis. Applying the elements of the test, it is clear that Southview should not be ejected, even if the Nickells have owned the land since 1995.

1) Southview occupies the disputed strip based on record title, ruling by the Pierce County Hearing Examiner, reliance on the platting process and the Nickells’ surrender of control to Southview’s developer. There is no reasonable allegation the association or its predecessor took a calculated risk, acted in bad faith or negligently, willfully or indifferently occupied the open space.² 2) Damage to the Nickells is not only slight, it is nonexistent since they claim to want to maintain the land in its current state and the Association is compelled to do so. Removal of the landscaping and open space designation is contrary to the Nickells’ expressed desire. 3) As evidenced by the photographs and surveys in the record, the Nickells have an enormous quantity of land and this

² The Nickells argue that Southview’s predecessor has “unclean hands.” As the record shows, the Nickells were uniquely possessed of knowledge of their claim and they concealed the information. Nothing in the record evidences “unclean hands” by Randall

landscaped area is a small portion. There is abundant additional space for landscaping. 4) It is impractical to remove the septic systems installed in the open space. Removal would be dependent on those homeowners relocating the drain fields and reserve drain fields, assuming adequate soil for that purpose is available elsewhere, at great expense. It is impractical, if not legally impossible, to eliminate the open space designation on which plat approval was based. 5) There is no hardship to the Nickells if their claim is rejected as the land will continue to be maintained in its status quo, which they purport to want. There will be enormous hardship to the association that will be out of compliance with its plat requirements, to Pierce County, which approved the plat dependent on satisfying open space requirements and to the two homeowners whose septic systems, and thus homes, are dependent on the open space.

In Proctor, the Court awarded compensation to Proctor because Proctor lost valuable property. Compensation is not appropriate in this case for several reasons. First, the Nickells' claim should fail based on estoppel and failure to prove adverse possession. If the court found the Nickells' adverse possession claim meritorious but refused to eject Southview based on Proctor's liability rule, the Nickells would not be

Chopp or the homeowners. The homeowners have just arrived on stage. The stage was set by the Nickells.

damaged. In fact, the Nickells would be benefitted. The Nickells expressed desire is that the disputed strip remains in its vegetated state. That result would be a certainty, but ongoing maintenance would be at the expense of the Association, not the Nickells. The trial court properly dismissed this claim based on equity.

II. The Nickells' Adverse Possession Claim Fails as a Matter of Law.

A. Plaintiffs Cannot Show The Requisite Element Of Hostility To Prove Adverse Possession.

In order to establish a claim of adverse possession, there must be possession for 10 years that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.

Anderson v. Hudak, 80 Wn. App. 398, 401, 907 P.2d 305 (1995). All elements of an adverse possession claim must be proven or the adverse possession claim fails.

A user which is permissive in its inception cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.

N.W. Cities Gas Co. v. Western Fuel Co., 13 Wn. 2d. 75, 84, 123 P.2d 75 (1942). If a claimant's use of property arose out of permission, it cannot

become a hostile use unless and until the claimant makes some overt act to change the character of the relationship.

In most cases, the mere use of property owned by another for the requisite time gives rise to a presumption of hostility. However, that rule is not true if the claimed land is unimproved.

This last mentioned rule does not apply, however, to vacant, open, uninclosed, unimproved lands. In such cases, *mere use* of a way over the land of another, in the manner and for the time referred to in the last preceding rule, will not of itself give rise to a presumption that the use has been adverse, or, as sometimes expressed, to a presumption of a grant. Courts do not, in such cases, infer adverse user, but require evidence of facts or circumstances indicating that the user was indeed adverse and not permissive.

N.W. Cities Gas Co. v. Western Fuel Co., 13 Wn. 2d. 75, 85-86, 123 P.2d 75 (1942).

The tracts of land in question are wild, uncultivated, and uninclosed; hence, the use to which the public subjected those tracts is presumed to have originated by permission and to have continued as a license until some act — the evidence discloses none — of the public or public official asserted the use to be exercised as a matter of right rather than privilege. The mere continuance, no matter how long, of this use by the public cannot, of itself, change such a privilege into a right in derogation of the title.

...

[W]here the use (as in the case at bar) is permissive in its inception, then such permissive character, being stamped on the use at the outset, will continue of the same nature and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character.

State Ex Rel. Shorett v. Blue R. Club, 22 Wn.2d 487, 494-495, 156 P.2d 667 (1945).

[C]ourts should apply the "vacant lands doctrine" and its *presumption* of permissive use only in cases involving undeveloped land because, in those cases, owners are not in the same position to protect their title from adverse use as are owners of developed property.

Drake v. Smersh, 122 Wn. App. 147, 154, 89 P.3d 726 (2004). It is undisputed the Southview property was vacant, unimproved, forested land, densely overgrown with blackberries, until the plat improvements were constructed. Accordingly, the Nickells' use of the Southview property, for any amount of time, would not ripen into adverse possession until ten years after plaintiffs made an overt assertion of a claim of right. No such claim was made in this case until plaintiffs filed this lawsuit.

To the contrary, every action taken and every word uttered by the Nickells prior to filing this lawsuit was in submission to the true property owner's use and ownership. Ms. Nickell did not like the proposed plat but instead of asserting dominion over the process based on her superior title and claimed ownership interest, she testified as any other interested neighbor regarding her unhappiness with the proposal. Even when she admittedly knew her alleged yard was consumed by the open space, she submitted her control of the land to the true owner. When septic systems were installed in the disputed strip, the Nickells surrendered.

The Nickells' acquiescence throughout this process evidences their permissive use of the property. The Nickells knew they had no ownership of the disputed strip and thus, never asserted ownership.

[T]he intentions and attitudes of the parties may be shown by evidence as to their conduct relative to the use of the right of way in question.

N.W. Cities Gas Co. v. Western Fuel Co., 13 Wn. 2d. 75, 88, 123 P.2d 75 (1942). When a claimant's conduct and words evidence a subordinate ownership interest, a subsequent assertion that the use was actually hostile will not suffice. Nethery v. Olson, 41 Wn.2d 173, 180, 247 P.2d 1011, (1952); Kunkel V. Fisher, 106 Wn. App. 599, 604-605, 23 P. 3d 1128 (2001).

Because the Southview property was vacant, unimproved, unenclosed land, the presumption is that any use made of the land by its neighbors was made with permission. The Nickells cannot overcome that presumption. To the contrary, all of their conduct and words support the presumption.

The reason for the vacant land rule is protection of absentee land owners from loss of their land when they have no reasonable way of knowing that another person is using their land. In addition, the law fosters a policy of neighborly courtesy and refuses to stimulate results requiring undeveloped land owners to establish a perimeter shield, blocking friends, neighbors and even casual trespassers from entering. The vacant lands doctrine stimulates neighborly accommodation by creating public policy that allows risk-free, neighborly courtesies between property owners when one owner's informal use of a neighbor's property causes no harm or inconvenience to the property owner.

An owner is not required to adopt a dog-in-the-manger attitude in order to protect his title to his property.

State Ex Rel. Shorett v. Blue R. Club, 22 Wn.2d 487, 496, 156 P.2d 667 (1945). In Shorett, defendant's property was unimproved and unenclosed and the public crossed it routinely to access the beach. Years later, the public sought a right of way permanently encumbering defendant's land.

The Court ruled that neighborly courtesy by defendant, in allowing its neighbors to cross its land, would not be punished by the loss of defendant's land. The defendant was not required to safeguard his perimeter from use by neighbors in order to safeguard title to his property.

In N.W. Cities Gas Co. v. Western Fuel Co., 13 Wn. 2d. 75, 84, 123 P.2d 75 (1942), the seminal case on the vacant land doctrine, the court said:

An adverse user will not ripen into a prescriptive right unless the owner of the servient estate knows of, and acquiesces in, such user, or unless the user is so open, notorious, visible, and uninterrupted that knowledge and acquiescence on his part will be presumed.

Id. at 87(emphasis added). The presumption turns on the knowledge of the absentee landowner. In N.W. Cities, the presumption was overcome by the claimants' obvious use of the defendants' land and the defendants' predecessor's expressed knowledge of that use. The defendants laid a cinder road through the middle of the property. The defendants' use of the land was so obvious, the original land owner excepted "rights of way for roads" from title when she conveyed to her successor. *Id.* at 91. It was the following owner who attempted to block defendants' access and the Court held the claimant's use was so open, notorious, visible and uninterrupted

that it must be presumed the original owner became aware of it. Those facts are nothing like the undisputed facts in this case.

In this case, Ms. Nickell's testimony establishes that the Nickells' use of the neighboring land was so obscure, so unobvious, so unapparent that even the Nickells did not know they were using their neighbor's land. Though the Nickells were on site every day, they did not know they were using Southview property. Similarly, there is no way the owner of the Southview property could reasonably have known of the use. The vacant lands doctrine fosters a policy that would allow the Nickells to tend lawn on a small portion of Southview's land, since that use created no hardship to Southview's predecessor, without punishing Southview for the loss of that land.³

The Nickells cannot overcome the presumption their use of defendant's land originated with permission. Any use of Southview land by the Nickells was permissive because of the vacant lands doctrine.

³ The Nickells' briefing claims the Southview predecessor was on actual notice of the encroachment because a survey of the property corners was completed at some point. At the same time, plaintiffs argue that because there were no mid-line survey stakes placed, plaintiffs had no way of knowing of the encroachment. Plaintiffs fail to even try to explain how Southview's predecessor was in a better position to know of the encroachment based on a survey that did not reveal the encroachment, than plaintiffs, who were at the property every day.

B. The Vacant Lands Doctrine Should Apply Equally To Adverse Possession Cases as to Prescriptive Easement Cases.

The doctrine of unenclosed lands originated in cases addressing prescriptive easements. It does not appear Washington has yet extended the doctrine to adverse possession claims, but there is no reason why the doctrine is less applicable to adverse possession cases than to prescriptive easement cases. Because prescriptive rights arise from the theory of adverse possession, the elements of the two claims are nearly identical and analysis of those elements that are the same is equally applicable to both doctrines. The only element that is different between the two theories is the element of exclusive possession. The element of “hostile use” also described as “adverse use” is required in both doctrines. Thus, interpretation of the requirement in one context is applicable in the other.

. . . we have a number of cases which do apply it in reference to adverse possession, and the rule would seem equally applicable to the issue of adverse user in easement cases.

N.W. Cities Gas Co. v. Western Fuel Co., 13 Wn. 2d. 75, 84, 123 P.2d 75 (1942)(A question of fact in an adverse possession case would also be a question of fact in a prescriptive easement case.)

In fact, Washington law is replete with examples of N.W. Cities being cited as authority in adverse possession cases. Miller v. Anderson,

91 Wn. App. 822, 828, 964 P.2d 365 (1998); Peeples v. Port Of Bellingham, 21 Wn. App. 821, 824, 588 P.2d 757 (1978) reversed on other grounds by Peeples v. Port Of Bellingham, 93 Wn.2d 766 (1980) overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853 (1984); Hunt v. Matthews, 8 Wn. App. 233, 237, 505 P.2d 819 (1973) overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853 (1984); Diel v. Beekman, 7 Wn. App. 139, 150, 499 P.2d 37 (1972) overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853 (1984); Spear v. Basagno, 3 Wn. App. 689, 690, 477 P.2d 197 (1970) overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853 (1984). While the vacant lands doctrine has not been applied in an adverse possession claim, NW Cities is frequently cited as authority in adverse possession cases.⁴

Again, the basis for the vacant lands doctrine is that the defendant in an adverse possession claim must have a reasonable ability to know their land is being used by another. That principle is equally applicable in adverse possession and prescriptive easement cases. When a landowner has no reasonable way of knowing another is using their property, the landowner is not charged with a duty to prevent the use. Rather, the user

⁴ Significantly, Chaplin v. Sanders, 100 Wn.2d 853 (1984), is a case where the Supreme Court specifically overruled 50 supreme and appellate court cases analyzing the element of hostility, yet the Court did not overrule NW Cities and its progeny. The vacant lands doctrine is good law and remains the law of the land.

is presumed to access the property with permission, allowed by neighborly courtesy.

Plaintiffs' use of the Southview property arose from permission, based on the vacant lands doctrine. Their permissive use was never converted to hostile use. Thus, plaintiffs cannot prove the elements for adverse possession and their claim fails as a matter of law.

CONCLUSION

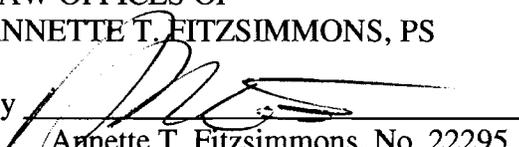
The Southview Homeowners Association respectfully requests this Court uphold the trial court decision to dismiss this action.

Dated this 9th day of February, 2011.

Respectfully submitted,

LAW OFFICES OF
ANNETTE T. FITZSIMMONS, PS

By


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Attorney for Southview
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Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on February 9, 2011, I caused service of the foregoing pleading via U.S. Mail on:

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By 
Annette T. Fitzsimmons

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