

No. 43723-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JEFF BOWLBY AND STEFANIE PLOWMAN,

Respondents

v.

SCOTT WILLIAMS AND DONNA WILLIAMS,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JOHN R. HICKMAN

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BRIEF OF RESPONDENT

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I. INTRODUCTION

In this appeal, Scott and Donna Williams¹ challenge the trial court's resolution of their contentious property dispute with their new neighbors, Jeff Bowlby and Stefanie Plowman. The Bowlby-Plowman parcel is "landlocked" and can only be accessed by using a gravel roadway that traverses the Williams' property.

Owners of the Bowlby-Plowman property have used this gravel roadway for ingress and egress since at least 1969. Most, but not all, of this gravel roadway falls within a 20-foot express easement for ingress and egress that benefits the Bowlby-Plowman parcel. Still, the portions of this gravel roadway that do not fall within the express easement have been in use for over 40-years.

Recently, after learning that Bowlby and Plowman intended to operate an adult family home on their land, Williams intentionally and unilaterally blocked the easement road with a fence, locked gate, and large piles of dirt and debris. In doing so, Williams prevented Bowlby and Plowman from

¹ Although both Scott and Donna Williams appeal, Respondents employ the same usage as the Appellants and use "Williams" rather than "the Williamses" to refer to Appellants.

using a portion of the gravel roadway that is located wholly within the express easement.²

Bowlby and Plowman brought a suit to: (1) quiet title in the express easement and in a prescriptive easement over the portion of the gravel road that lays outside of the express easement, (2) gain injunctive relief requiring Williams to restore the easement road to viability, and (3) recover for the waste to their property interest caused by Williams' statutory trespass. After a bench trial, the court granted Bowlby and Plowman's requested relief, including an award of reasonable attorney fees and costs. This court should affirm.

II. STATEMENT OF FACTS

A. Owners of the Bowlby-Plowman property have used the Old Road for ingress and egress for more than forty years.

Since 1969 a gravel road has crossed two parcels of land on South 52nd Street to reach a third, neighboring parcel of land (hereinafter "Old Road"). *See* RP at 320-25, 329-30. Williams now owns the two parcels that the Old Road crosses and Bowlby and Plowman own the parcel that the Old Road serves.³ CP at 210-11, 275.

² For your convenience, the parcel map (CP at 275), site plan (Plaintiff's Ex. 3), and survey record (Plaintiff's Exs. 8-7) are attached hereto. Each of these documents is included in the record before this court.

³ Williams owns and resides on parcel number 0220242224. CP at 210, 275. Williams also owns parcel number 0220242275. CP at 210, 275. Bowlby and Plowman now own

Williams' home is located on a parcel that runs lengthwise along South 52nd Street. CP at 210, 275. Access to Williams' home is independent of the Old Road, as there is a separate driveway right off of South 52nd Street. RP at 113-15. Williams purchased their home in 1989. CP at 210. Williams' other parcel is a large piece of land behind their home, which they purchased on June 8, 2001. CP at 210, 275.

Bowlby and Plowman purchased their home in 2009 and, after completing renovations, they moved into the home in June, 2010. RP at 92-102. Bowlby and Plowman's parcel cannot be accessed directly from any public road. *See* CP at 275.

Since long before Williams, Bowlby and Plowman purchased these parcels, the Old Road has been a relatively straight, level, gravel road, providing direct access to the Bowlby-Plowman parcel. CP at 216-17; RP at 320-25. Much of this Old Road from South 52nd Street to the Bowlby-Plowman property is on a 20-foot-wide express easement, granted in 1969 from the then-owners of the Williams property to the then-owners of the Bowlby-Plowman property. *See* Plaintiff's Ex. 5⁴; CP at 377. This

and reside on parcel number 0220242130. CP at 211, 275. Please note that CP at 275 is a particularly helpful map of the parcels, which is appended to this brief for your convenience.

⁴ Please note that, although the 1969 Easement Agreement is included among the Clerk's Papers, the most legible copy of it is at Plaintiff's Ex. 5, which was designated in the Designation of Clerk's Papers.

express easement provides ingress and egress for the Bowlby-Plowman property and runs near the western edge of the Williams property, from South 52nd Street towards the Bowlby-Plowman property. CP at 377.

Several years after Williams' and Bowlby and Plowman's predecessors-in-interest entered the express easement agreement in 1969, they entered and recorded a road maintenance agreement for the Old Road. CP at 57-60. This 1976 road maintenance agreement remains in effect and is binding on all successive owners of the Williams and Bowlby-Plowman properties. CP at 60, 378. The road maintenance agreement states:

The parties hereby agree that the roadway described above shall be maintained in perpetuity *within its present boundary* or such boundaries as may be agreed to by all parties hereto. The surface of the roadway shall be maintained so as to allow free and reasonable passage of such vehicular traffic as may be reasonable and necessary in order that all parties may enjoy full and free use of the parcels of real property affected hereby.

Clerk's Papers (CP) at 59 (emphasis added).

There is no dispute that the express easement remains in full effect and binds the Williams' properties for the benefit of the Bowlby-Plowman property and that it is subject to the terms of the road maintenance agreement. CP at 377. At South 52nd Street, the Old Road is within the boundaries of the express easement. Plaintiff's Ex. 3; CP at 275. However, as the Old Road crosses the Williams' back parcel, it meanders

outside of the express easement's western boundary. *See* Plaintiff's Ex. 3; RP at 48-50.

Thus, the Old Road lies partly inside and partly outside of the express easement. CP at 378. Nonetheless, as Williams note, the owners of the Bowlby-Plowman parcel have used the Old Road for ingress and egress since 1969.⁵ RP at 307, 324-25, 331, 364. Also since 1969, owners of the Bowlby-Plowman parcel have maintained and re-graveled the Old Road. RP at 330.

Jake and Celia Keller owned the Bowlby-Plowman parcel beginning in July 1958. Defendant's Ex. 16. The Old Road was constructed and used as the only ingress and egress to the Bowlby-Plowman parcel by August of 1969.⁶ *See* Defendant's Ex. 17. What is now Williams' back parcel was once three separate parcels: "Parcel A," "Parcel B," and "Parcel C." *See* Defendant's Ex. 26. These three parcels have since been consolidated into Williams' single back parcel. *See Id.*

The portions of the Old Road crossing Williams' back parcel that lay outside of the boundaries of the 1969 express easement are situated in the

⁵ Bowlby and Plowman note that Williams' predecessor moved the location of the Old Road slightly, near South 52nd Street, during the 1984 construction of the home on that parcel. The location of the entire Old Road has not changed since 1984. Moreover, the location of the Old Road has remained consistent on Williams' back parcel since 1969.

⁶ While it is likely that the Kellers began using the Old Road in 1958 when they acquired the Bowlby-Plowman parcel, the record establishes that the Old Road was certainly in use by 1969.

areas that were formerly “Parcel B” and “Parcel C.” *See* Defendant’s Ex. 26. Since inception of the Old Road, Janna Schultz owned “Parcel B” until December 1974 and “Parcel C” until November 1979. Defendant’s Ex. 6; Defendant’s Ex. 8. Accordingly, Jake and Celia Keller used the Old Road over Ms. Schultz’s property as if it was their own from 1958 at the earliest and 1969 at the latest until 1974 and 1979, respectively.

However, the Kellers purchased “Parcel B” and “Parcel C” from Ms. Schultz. Thus, for many years the Kellers owned both the Bowlby-Plowman parcel and the portions of the Williams’ back parcel over which the Old Road travels that are outside of the express easement.⁷

Nonetheless, since Williams acquired the back parcel on June 8, 2001, all owners of the Bowlby-Plowman property have used only the Old Road for ingress and egress as if it were their own, without any question until Bowlby and Plowman commenced this lawsuit on June 28, 2011. *See* CP at 1-7, 201. Moreover, since commencing this lawsuit on June 28, 2011, Bowlby and Plowman have continued to use all portions of the Old Road that lay outside of the express easement for ingress and egress and under a claim of right. *See* CP at 372-73.

⁷ Bowlby and Plowman note that any issues related to merger of title were not raised at trial or argued in Williams’ opening brief.

B. *Although Williams has known about the easement since before purchasing his parcels, after learning that Bowlby and Plowman intended to open an adult family home on their property, Mr. Williams unilaterally changed the course of the Old Road.*

Williams knew about the express easement and the road maintenance agreement before purchasing their two parcels of land. CP at 218-19.

Williams understood that the express easement and the road maintenance agreement meant that they “could make no use of the [burdened] land” that would interfere with the Bowlby-Plowman parcel’s use of the Old Road for ingress, egress, and utilities. CP at 220.

In 2009, after Bowlby and Plowman had purchased their home and while they were doing renovations before they moved in, they mentioned to Mr. Williams that they intended to open an adult family home on their property. CP at 244. Mr. Williams informed them that he “did not like the idea of an adult family home, and if there was anything [he] could do to prevent it, [he] would.” CP at 245. Williams opposed Bowlby and Plowman’s prospective adult family home because he worried that it would “draw the wrong crowd” and increase traffic. CP at 245.

Shortly after Mr. Williams told Bowlby and Plowman that he would do anything he could to prevent them from opening an adult family home, Williams took action. Williams undertook work that limited access to the Bowlby-Plowman parcel by beginning constructing a C-shaped road that

bypasses part of the Old Road. RP at 126-40. This “Bypass Road” leaves the Old Road with a 90 degree turn to the left, which is followed by an immediate 90 degree turn to the right, to rejoin the Old Road. RP at 139-40; Plaintiff’s Ex. 3 attached hereto. Williams did not seek a construction permit before undertaking work on the Bypass Road, which is unstable, poorly structured, too narrow for emergency vehicle access, and not complaint with applicable building codes. RP at 34-90.

Although the bypassed portion of the Old Road is situated within the 20-foot express easement, the Bypass Road is not within the express easement. RP at 50-52; *see also* Plaintiff’s Ex. 3. Instead, the Bypass Road crosses property over which Bowlby and Plowman could be excluded. CP at 376-85. Williams acknowledges that neither Bowlby nor Plowman ever agreed to use the Bypass Road. CP at 252-61; RP at 274-85.

Before Williams unilaterally decided to construct the Bypass Road, all owners of the Bowlby-Plowman property dating back to 1969 had only ever used the Old Road to access the parcel. *See* RP at 103. But after constructing the Bypass Road, Williams blocked all access to the Old Road with a locked, metal gate.⁸ RP at 142.

⁸ The parties refer to the Bypass Road as such because it bypasses this metal gate. The locked gate that Williams installed is the second gate along the Old Road. Another neighbor, Janna Keller-Porter, who uses the Old Road to access her property had installed

With the second gate locked, Bowlby and Plowman were forced to use the Bypass Road to reach their home. RP at 139-54. The Bypass Road's tight turns and generally unstable condition make it difficult, if not impossible, for large vehicles to reach the Bowlby-Plowman property. See RP at 76-78, 143-54. Accordingly, fire trucks, ambulances, garbage and recycling trucks, and delivery trucks were no longer able to serve the Bowlby-Plowman parcel. RP at 57-62, 121, 163, 230-31; Plaintiff's Ex. 10. Indeed, the Bowlby-Plowman parcel actually *lost* its trash collection service. Plaintiff's Ex. 10. Bowlby and Plowman must now take their trash and recycling bins to South 52nd Street, which is approximately 800 feet from their home. Plaintiff's Exs. 9-10.

C. After unilaterally changing the course of the Old Road, Williams has consistently and intentionally blocked portions of the Old Road that are situated within the express easement.

Bowlby and Plowman coordinated their move to their new home with trash collection day, under the assumption that the second gate would be unlocked and that they would be able to travel down the Old Road with their moving truck. RP at 139-54. Although the second gate was unlocked on the day Bowlby and Plowman moved into their property, Mrs. Williams saw them approaching in their moving truck and blocked the Old Road with a tractor and cart, just beyond the second gate. RP at

an unlocked gate on the Old Road near South 52nd Street. The parties refer to these gates as the first gate and second gate, respectively. CP at 246, 250.

143-54; CP at 64. Mrs. Williams refused to move the tractor to allow Bowlby and Plowman to use the Old Road with their moving truck, so Bowlby and Plowman called the police. RP at 142-54; CP at 279-81.

Even after the police arrived, Williams refused to move the tractor, meaning police had to assist Bowlby in navigating the moving truck through the Bypass Road with “10 minutes of directed turns and direction reversals.” CP at 281. Mr. Williams eventually testified that he would not move the tractor because he was upset that Bowlby and Plowman had opened the second gate and used the Old Road on a prior occasion without first asking his permission. CP at 258-62. Importantly, the portion of the Old Road from which Williams excluded Bowlby and Plowman is situated entirely within the express easement, not the prescriptive easement. *See* CP at 275.

After Bowlby and Plowman moved into their home, Williams placed additional obstacles on the Old Road, forcing them to use the Bypass Road. Near the second gate, Williams placed large piles of yard debris and several large piles of dirt onto the Old Road. RP at 63-70, 90, 126-39. Some of these piles of dirt are approximately five feet high and 15-feet wide. RP at 63-70. Accordingly, even if the second gate was open, the Old Road was not passable with a motor vehicle. RP at 63-90, 127-39.

Thus, Bowlby and Plowman were forced to use the Bypass Road to reach their home.

Because the Bypass Road prevented emergency vehicle access to the Bowlby-Plowman parcel, inspectors denied Bowlby and Plowman's application for a license to run an adult family home. RP at 230-31. Williams did not remove the debris and dirt barriers on the Old Road until one week before trial. RP at 222.

D. The trial court correctly exercised its equitable discretion to fashion a compromise solution with the first gate.

The Bowlby-Plowman parcel adjoins property owned by Janna Keller-Porter. RP at 328. The Old Road provides the only access to Ms. Keller-Porter's home. RP at 328-31. Before Bowlby and Plowman bought their home, Ms. Keller-Porter noticed some illegal activity on the Old Road, usually at nighttime. RP at 112, 332. Accordingly, Ms. Keller-Porter installed an unlocked gate across the Old Road, near South 52nd Street (the "first gate"). RP at 332. Since Ms. Keller-Porter installed the first gate in 2007, she has noticed a decline in criminal activity on the Old Road. RP at 334.

Although the first gate was intended to reduce criminal activity on the Old Road, it was not closed at all times. RP at 338. Ms. Keller-Porter would leave the first gate open if she was expecting a visitor. RP at 338.

Ms. Keller-Porter would also generally leave the first gate open during the daytime when someone was home. RP at 338. Ms. Keller-Porter would generally close the first gate in the evening. RP at 338. Ms. Keller-Porter has specified that she has no objection to the first gate remaining open during the daytime when she is at home. RP at 338-39.

Bowlby and Plowman greatly prefer leaving the first gate open because opening it requires them to stop their car, crouch in the bushes to open the gate, pull through, stop their car, and close the gate. RP at 168-69. Bowlby and Plowman find such maneuvering is always inconvenient, especially so in inclement weather. RP at 168-69.

E. Procedural history

After Williams blocked the Old Road, requiring them to use the narrow, difficult to navigate Bypass Road to reach their home, Bowlby and Plowman brought suit. CP at 1-7, 15-21. On June 28, 2011, Bowlby and Plowman sought recovery for trespass against their easement right, outage, and permanent injunctive relief requiring Williams to restore the Old Road to its previous condition. CP at 15-21. Although the trial court did grant a preliminary injunction requiring Williams to remove the barriers from the Old Road, Williams did not do so until one week before trial, apparently because Bowlby and Plowman did not post bond. CP at 101-02.

With the trial set for May of 2012, Williams finally filed an answer to Bowlby and Plowman's complaint, asserting affirmative defenses and a counter claim, in April of 2012. CP at 148-54. Bowlby and Plowman filed an answer to Williams' affirmative defenses and counter claim in which they requested declaratory relief that they had a prescriptive easement over the portions of the Old Road that were situated outside of the express easement. CP at 155-58. Accordingly, the parties briefed and argued the issue of a prescriptive easement at trial.

After the bench trial, the court found that the owners of the Bowlby-Plowman parcel had used the Old Road for ingress and egress "along a uniform route, openly, notoriously, continuously and with a claim of right that was hostile to the owners of the servient estate for a period of over 10 years creating a prescriptive easement over those portions of the Old Road that lie outside of the easement area described" in the express easement. CP at 378.

The trial court also found that Williams' conduct in completely obstructing the Old Road with a closed gate, mounds of debris, and large piles of dirt, was unreasonable. CP at 381-82. Because Williams knew that they lacked the authority to block the easement in favor of the Bowlby-Plowman parcel, the trial court found that Williams knowingly

and intentionally caused waste to Bowlby and Plowman's property interest in violation of RCW 4.24.630. CP at 384.

Based on Williams' violation of RCW 4.24.630, and the trial court's determination that Williams' defense was frivolous under RCW 4.84.185, the trial court awarded Bowlby and Plowman their reasonable attorney fees and costs. CP at 386-93.

The trial court further found that the first gate was a reasonable restraint on the easement but fashioned an equitable, compromise solution that the first gate would remain open during hours of daylight and closed, if a party closed it, during the hours of darkness. CP at 392.

Williams appeals. CP at 400-01.

III. ARGUMENT

Williams does not challenge the trial court's findings that the Bowlby-Plowman parcel benefits from the express easement granted in 1969, which is subject to the terms of the road maintenance agreement filed in 1976. In this Appeal, Williams argues that (1) insufficient evidence supports the trial court's finding of a prescriptive easement over the portions of the old road that lay outside of the express easement, (2) the conditions the trial court imposed on the parties' use of the first gate are unreasonably restrictive, and (3) the trial court abused its discretion in

awarding Bowlby and Plowman their reasonable attorney fees and costs under RCW 4.24.630(1) and RCW 4.84.185. This court should affirm.

A. *Sufficient evidence supports the trial court's finding that the Bowlby-Plowman property has a prescriptive easement over the portions of the old road that lay outside of the express easement.*

Unchallenged findings of fact are verities on appeal. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). Appellate courts review challenged findings of fact and conclusions of law to determine whether the findings of fact are supported by substantial evidence and, if so, whether those findings of fact support the trial court's conclusions of law. *Hegwine*, 132 Wn. App. at 555-56. Substantial evidence supports a trial court's finding of fact when there is sufficient evidence to persuade a fair-minded person that the finding is true. *Hegwine*, 132 Wn. App. at 555-56. In conducting this analysis, appellate courts view the evidence in the light most favorable to the prevailing party, deferring to the trial court on witness credibility and inconsistent testimony. *Hegwine*, 132 Wn. App. at 556.

A claimant establishes a prescriptive easement by showing ““use of the servient land that is: (1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the [claimed servient] land . . . , and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.”” *Drake v.*

Smersh, 122 Wn. App. 147, 151, 89 P.3d 726 (2004) (quoting *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128)).

In establishing these elements, a claimant may include a predecessor-in-interest's time of continuous and uninterrupted use in satisfying the 10-year requirement. RCW 7.28.060; *see also Drake*, 122 Wn. App. at 149-51, 155. Additionally, adverse use is an objective standard based on the observable actions of the landowner and the person using the land, between whom no "ill will" is required. *Lingvall v. Bartmess*, 97 Wn. App. 245, 250, 982 P.2d 690 (1999). A claimant's use of the land is adverse when he "uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use." *Kunkel*, 106 Wn. App. at 602.

In general, there is a presumption that use is adverse when a claimant asserts a claim of a prescriptive easement over developed land. *See Drake*, 122 Wn. App. at 154, n. 16. However, in cases involving prescriptive easements on developed land, a court *may imply* that the use was permissive, rather than adverse, *if* the facts of the given case support an inference that the use was an allowed use between neighbors.⁹ *Drake*, 122 Wn. App. at 153-54.

⁹ This court should note that Williams incorrectly states that "courts must always start with the presumption that the use of another's property is permissive." Br. of Appellant at 18. In making that unfounded assertion, Williams overlooks both the general rule in

The underlying facts do not support an inference of permissive use between neighbors when existing access to one neighbor's home requires using a driveway over the other neighbor's land, even if constructing a new driveway that did not traverse over another's land was possible. *See Drake*, 122 Wn. App. at 149-50, 154-55. For example, in *Drake*, the Masseys bought a parcel of land on Lummi Island for a vacation cabin and bulldozed an extended driveway over the Wallens' neighboring parcel. 122 Wn. App. at 149. After the Wallens made no objection, both the Masseys and the Wallens used that expanded driveway for over twenty years before the Wallens sold their land. *Drake*, 122 Wn. App. at 149-50. Although the Masseys eventually sold their parcel as well, every owner of the Massey parcel used the extended driveway as if they owned it for another twenty years, without asking permission of the Wallens' successors. *Drake*, 122 Wn. App. at 150-51.

There was no evidence that the Masseys ever requested or received permission to expand their driveway. *Drake*, 122 Wn. App. at 155. The Masseys and all of their successors used the expanded driveway as if they owned it, without permission from the Wallens or their successors. *Drake*, 122 Wn. App. at 155. Thus, because there was no relationship between

cases involving developed land that there is an assumption that the use is adverse and the *Drake* opinion. In *Drake*, the Court of Appeals clarified that its earlier decision in *Kunkel v. Fisher* did not impose a presumption of permissive use in prescriptive easement cases involving developed land. *Drake*, 122 Wn. App. at 153-54.

the Masseys and the Wallens from which a court could reasonably infer a permissive, neighborly use of the driveway, the use was adverse. *Drake*, 122 Wn. App. at 155.

Here, each owner of the Bowlby-Plowman parcel has used the Old Road to access the land since 1969. RP at 307, 324-25, 331, 364; *See* CP at 377. The portions of the Old Road that are situated outside of the express easement are on Williams' back lot. *See* Plaintiff's Ex. 3. Between 1958 at the earliest or 1969 at the latest, the Kellers used the Old Road to reach the Bowlby-Plowman parcel, even though the Old Road deviated from the express easement and crossed Janna Schultz's land. *See* Defendant's Exs. 6, 7, 16. Even assuming, however, that any prescriptive rights the Kellers had in the Old Road were extinguished by their unity of title, which they had between 1979 and 2001, the owners of the Bowlby-Plowman parcel have still established a prescriptive easement over the portions of the Old Road situated outside of the express easement.

Williams purchased the back lot effective June 8, 2001. Defendant's Ex. 11. Since Williams purchased the back lot to present all owners of the Bowlby-Plowman parcel have used the portions of the Old Road that deviate from the express easement to reach their home, as if the land was their own. Even after Bowlby and Plowman filed this litigation on June 28, 2011, they have continued to use the portions of the Old Road that are

situated outside of the express easement to reach their home, as if the land was their own and without seeking permission.

Thus, the evidence shows that the owners of the Bowlby-Plowman parcel have used the Old Road, along its current route which deviates from the express easement, openly, notoriously, and under a claim of right that is adverse to the owners of the back parcel for over 10-years.

Accordingly, substantial evidence supports the trial court's finding and conclusion that owners of the Bowlby-Plowman parcel had acquired a prescriptive easement over the portions of the Old Road that are situated outside of the express easement. This court should affirm.

B. *The trial court acted well within its discretion when it ordered that the first gate shall remain open during daylight hours.*

Appellate courts review a trial court's decision to grant injunctive relief and the terms of such injunctive relief for an abuse of discretion. *Snyder v. Haynes*, 152 Wn. App. 774, 780-81, 217 P.3d 787 (2009). A trial court has broad discretion to grant injunctive relief and to tailor such relief to "fit the particular circumstances of the case before it." *Snyder*, 152 Wn. App. at 781. A trial court abuses its discretion only if its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Snyder*, 152 Wn. App. at 781.

The owner of servient land may restrict use of the land to the extent that use exceeds the burden originally intended with an express grant of an easement.¹⁰ See *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 241, 23 P.3d 520 (2001). A servient landowner may restrict such use by “maintaining gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner’s use.” *Standing Rock*, 106 Wn. App. at 241 (quoting *Rupert v. Gunter*, 31 Wn. App. 27, 31, 640 P.2d 36 (1982)). Such gates are a reasonable restraint on the dominant owner’s use when they were designed to decrease the incidents of trespass and vandalism on the land, reduce traffic on the roadway, and the gates were left unlocked. *Standing Rock*, 106 Wn. App. at 341-42.

Here, the trial court found that the “[f]irst [g]ate places reasonable burdens and limitations on the owners of the Bowlby[-Plowman] property and reasonably helps to protect the affected properties from unwanted intruders.” CP at 379. Then, the trial court exercised its equitable discretion and concluded that the first gate shall remain open during daylight hours but any party may close it during the hours of darkness. CP at 384. Williams challenges this relief, arguing that this court should remand for the trial court to enter an order requiring the first gate to be

¹⁰ The first gate lies within the express easement granted in 1969. See CP at 192-96.

closed at all times. Br. of Appellant at 23-26. But such relief is inappropriate.

It is inappropriate to remand for the trial court to enter an order requiring the first gate to be closed at all times because: (1) Bowlby and Plowman's use of the old road to reach their home has not subjected the Williams property to any increased burden; (2) during the daytime, Bowlby and Plowman regularly take brief trips from their home and having to open and close the gate on each of these trips is burdensome; (3) Bowlby and Plowman each testified that they prefer having no gate at all because it is inconvenient and even dangerous; and (4) Janna Keller-Porter, the parties' neighbor who also uses the old road to reach her home, testified that she does not mind having the first gate open during the daytime and that she often leaves it open during the daytime when she is at home.

Accordingly, the trial court balanced Bowlby and Plowman's desire not to have any gate against Williams' and Keller-Porter's desire to have a gate. Since Keller-Porter testified that she was comfortable having the first gate open during daylight hours, the court concluded that it shall be open during the daylight hours. CP at 384. In reaching this decision, the trial court acted well within its discretion and reached a compromise solution that this court should affirm.

C. *The trial court correctly awarded Bowlby and Plowman their reasonable attorney fees and costs.*

Appellate courts apply a two-tiered standard of review to awards or denials of attorney fees. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). First, appellate courts review de novo whether there is a legal basis for an award of attorney fees under statute, contract, or recognized ground in equity. *Gander*, 167 Wn. App. at 647. If so, appellate courts next review the amount of any such award for an abuse of discretion. *Gander*, 167 Wn. App. at 647. When a statute authorizes such an award of attorney fees, any such award is left to the sound discretion of the trial court and will be disturbed on appeal only by a showing of a clear abuse of discretion. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009). A trial court abuses its discretion only if its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Snyder*, 152 Wn. App. at 781.

1. *RCW 4.24.630*

The statutory trespass statute provides:

Every person who goes onto the land of another and . . . wrongfully causes waste or injury to the land . . . is liable to the injured party for treble the amount of damages caused by the . . . waste or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to act. Damages recoverable under this

section include . . . reasonable attorney[] fees and other litigation-related costs.

RCW 4.24.630(1). An award of reasonable attorney fees and costs under this statute is appropriate when the trial court finds that the defendants acted intentionally, unreasonably, and with the knowledge that they lacked the authority to so act, even if the trial court does not award damages attributable to the trespass itself. *See Clipse v. Michels Pipeline Construction, Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492 (2010).

Easement rights are interests in land, protected by law, to which the statutory trespass statute should apply because “[t]he law protects a wide range of property interests from harm.” *Affiliated FM Ins. Co. v. LTK Consulting Svcs., Inc.*, 170 Wn.2d 442, 458, 243 P.3d 541 (2010). As the Washington State Supreme Court recently stated:

An easement is a right to enter and use property for some specified purpose. . . . The holder of a nonpossessory interest does not have to hold title to the servient estate in order to sue for damage to the nonpossessory interest. . . . The owner of an easement whose right has been invaded and injured or destroyed has a right of action therefor. . . . [P]roperty interests falling well short of full fee simple are worthy of legal protection.

Affiliated FM Ins. Co., 170 Wn.2d at 458 (internal citations omitted).

A 2008 Division III case applied RCW 4.24.630 to protect the holder of mineral rights, which is a nonpossessory interest in land similar to an easement. *Saddle Mountain Minerals, LLC v. Santiago Homes, Inc.*, 146 Wn. App. 69, 78-79, 189 P.3d 821 (2008) (*review denied*, 165 Wn.2d

1033, 203 P.3d 382 (2009)). In that case, Saddle Mountain owned mineral rights on property acquired by Santiago Homes. 146 Wn. App. at 78.

Because Saddle Mountain was concerned that Santiago Homes' development of the property could interfere with its mineral rights, representatives from Saddle Mountain contacted and met with Santiago Homes on several occasions regarding its mineral rights. *Saddle Mountain*, 146 Wn. App. at 79. Accordingly, Santiago Homes knew of Saddle Mountain's rights. 146 Wn. App. at 79.

Nonetheless, Santiago Homes employed subcontractors who removed several dump trucks full of minerals from the property. *Saddle Mountain*, 146 Wn. App. at 78-79. Even though Saddle Mountain did not own fee simple in the property, Division III protected Saddle Mountain's nonpossessory interest in the land, holding that it could assert a claim against the landowner under RCW 4.24.630.¹¹ 146 Wn. App. at 79-80.

Conversely, in an earlier Division III opinion, the court reversed an award of attorney fees in favor of an easement holder under RCW 4.24.630. *Colwell v. Etzell*, 119 Wn. App. 432, 438-43, 81 P.3d 895 (2003). Although the *Colwell* court mentioned that RCW 4.24.630 is

¹¹ Because the *Saddle Mountain* court reviewed a trial court decision granting summary judgment in favor of Santiago Homes, Division III remanded for further proceedings on Saddle Mountain's statutory trespass claim, charging the trial court to resolve disputed facts regarding whether Santiago Homes' actions were intentional, unreasonable, and committed with the knowledge that it lacked the authorization to act. 146 Wn. App. at 79-80.

premised on a physical trespass, the court devoted most of its analysis to whether the owner of the servient land *wrongfully* invaded the easement holder's property interest. *See Colwell*, 119 Wn. App. at 439-43. Because the evidence did not establish that the owner of the servient land had acted *wrongfully* under RCW 4.24.630, "the statute d[id] not support the finding of intentional interference by Mr. Etzell in the Colwells' easement to their land." 119 Wn. App. at 441-42. The court's choice of words implies that, had Mr. Etzell's conduct been *wrongful* under the statute, the Colwells may well have had a claim under RCW 4.24.630.¹²

Here, Bowlby and Plowman's easement rights are an interest in land to which the statutory trespass statute should apply. Even though Williams knew the Bowlby-Plowman property benefitted from an express easement for ingress and egress, Williams intentionally blocked that easement by installing a locked metal gate, piling debris and several large piles of dirt on the easement road. CP at 64, 281; RP at 63-90, 127-54, 222. Williams began blocking the easement road upon learning that Bowlby and Plowman intended to apply for a license to operate an adult family home on their property. *Id.* Upset, Williams stated that he would

¹² This reading of *Colwell* appears consistent with an unpublished Division II case filed last year, *Noonan v. Thurston Cnty.*, No. 41433-3-II at ¶25. In interpreting *Colwell*, the *Noonan* court stated: "The court held that because Etzell was attempting to protect his own property from serious drainage problems *rather than intentionally interfering with the Colwells' easement*, the record did not support liability under RCW 4.24.630."

do anything he could to prevent Bowlby and Plowman from operating an adult family home. CP at 244-45. The facts show that Williams intentionally interfered with the easement in favor of the Bowlby-Plowman property even though Williams knew he had no authority to do so. Accordingly, Williams wrongfully caused waste or injury to the land, as contemplated by RCW 4.24.630.

Because Williams acted wrongfully in excluding Bowlby and Plowman from their easement, *Saddle Mountain* is more on point than *Colwell*. Thus, as in *Saddle Mountain*, this court should presume that RCW 4.24.630 operates to protect a party's property interest from wrongful intrusions, even if that property interest is not in fee. Such a construction comports with the principles of protecting nonpossessory interests in land, as championed by our state supreme court in *Affiliated FM*. Protecting the Bowlby-Plowman parcel's easement rights from Williams' wrongful, intentional interference is proper given the underlying facts and the principles of *Saddle Mountain* and *Affiliated FM*.

In furtherance of those principles, applying RCW 4.24.630 here provides a statutory basis for the trial court's award of Bowlby and Plowman's reasonable attorney fees and costs. There is no dispute over the amount of the trial court's award. Accordingly, this court should affirm.

2. *RCW 4.84.185*

In addition to awarding Bowlby and Plowman their reasonable attorney fees based on RCW 4.24.630(1), the trial court cited RCW 4.84.185 as an additional statutory basis for the award because it allows for an award of reasonable attorney fees and costs incurred in opposing a frivolous claim or defense. RCW 4.84.185 states:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counter-claim, cross-claim, third party claim, or *defense* was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such . . . *defense*.

(emphasis added). Thus, RCW 4.84.185 provides a statutory basis for an award of the prevailing party's reasonable attorney fees and costs in defending against a frivolous defense. A defense is frivolous for purposes of RCW 4.84.185 when the defense as a whole is unsupported by any rational argument in fact or law. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339 (2012).

Here, even though the trial court found that Williams' conduct did not rise to the level of outrage, the trial court found that Williams' defense as a whole was "frivolous and advanced without reasonable cause." CP at 398. Accordingly, the trial court cited RCW 4.84.185 as an additional basis for its award of Bowlby and Plowman's reasonable attorney fees.

CP at 398. In making this determination, the trial court acted within its discretion and this court should affirm.

IV. ATTORNEY FEES ON APPEAL

Williams requests an award of appellate attorney fees, arguing that it is entitled to such an award if this court reverses. Williams is incorrect. RAP 18.1 allows a party to recover its reasonable appellate attorney fees if there is a legal basis for such an award. Williams has no legal basis under statute, contract, or recognized ground in equity to support an award of appellate attorney fees. Thus, this court should deny Williams' request.

Instead, as discussed above, this court should affirm the trial court's award of Bowlby and Plowman's reasonable attorney fees based on RCW 4.24.630 and RCW 4.84.185. Then, this court should award Bowlby and Plowman their reasonable appellate attorney fees and costs under RAP 18.1 because there is a statutory basis for such an award, which is warranted because Bowlby and Plowman have been forced to resort to costly litigation to protect their property rights that Williams intentionally and wrongfully jeopardized.

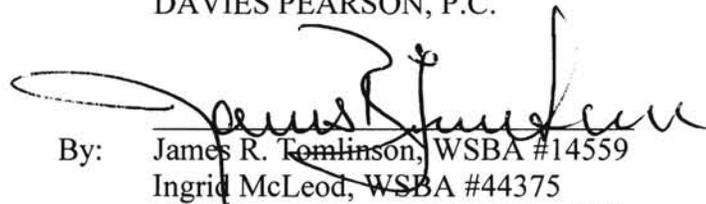
V. CONCLUSION

The owners of the Bowlby-Plowman parcel have used the Old Road, including the portions of it that deviate from the express easement, under a claim of right since at least 1969. Owners of the Bowlby-Plowman parcel

have used the Old Road under a claim of right for over ten years during Williams' ownership of the back parcel. Thus, substantial evidence supports the trial court's finding and conclusion that the Bowlby-Plowman parcel has a prescriptive easement over the portions of the old road that are situated outside of the express easement. Moreover, the trial court correctly applied RCW 4.24.630 to protect Bowlby and Plowman's property interest from wrongful invasion by Williams. The trial court further acted well within its discretion in fashioning equitable relief and awarding Bowlby and Plowman their reasonable attorney fees and costs. Thus, this court should affirm and should also award Bowlby and Plowman their reasonable attorney fees on appeal under RAP 18.1.

RESPECTFULLY SUBMITTED this 13 day of February, 2013.

DAVIES PEARSON, P.C.



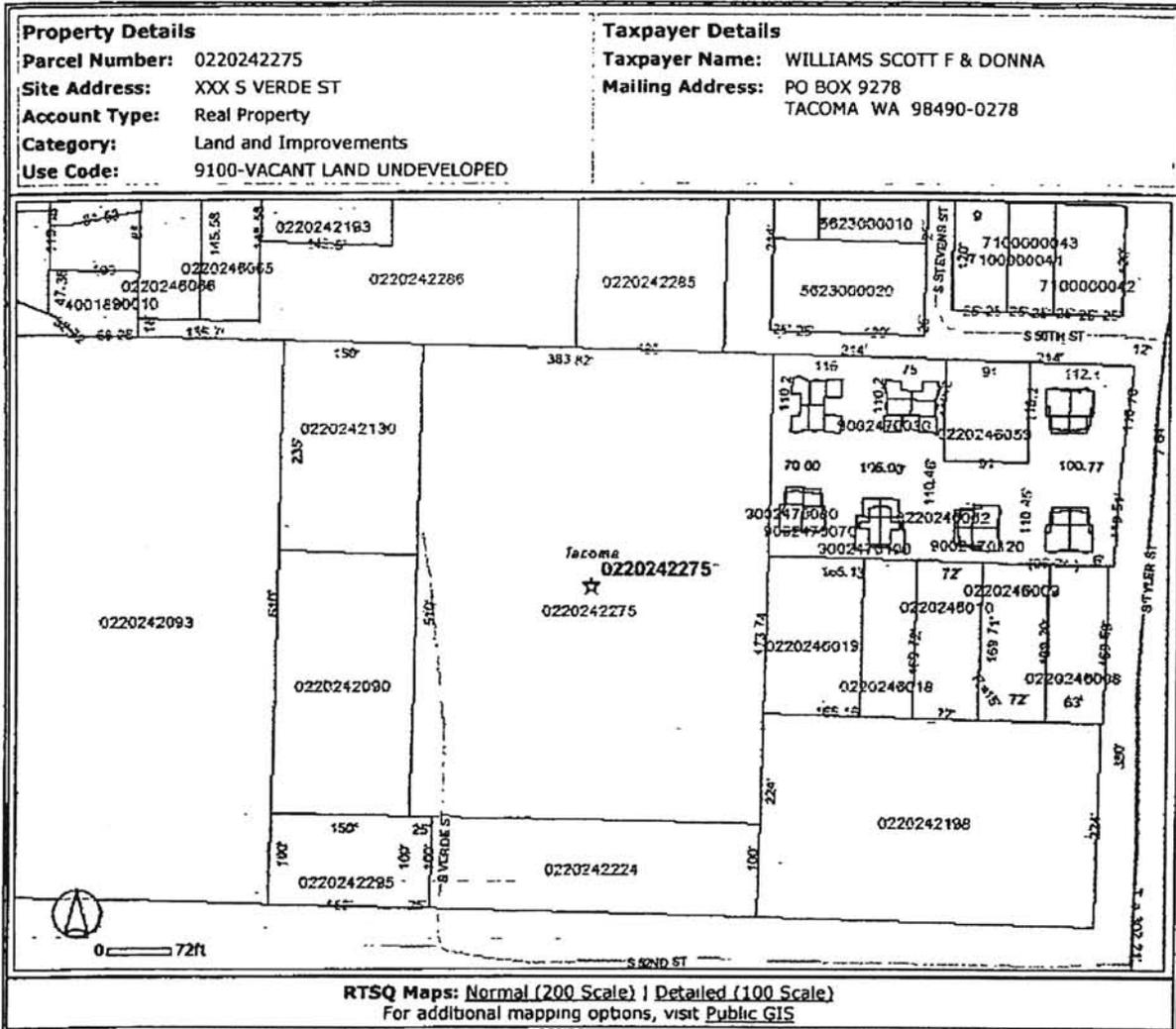
By: James R. Tomlinson, WSBA #14559
Ingrid McLeod, WSBA #44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Respondents

APPENDIX

Pierce County Assessor-Treasurer ePIP

Parcel Map for 0220242275

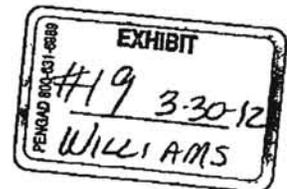
03/28/2012 01:14 PM



I acknowledge and agree to the prohibitions listed in RCW 42.56.070(9) against releasing and/or using lists of individuals for commercial purposes. Neither Pierce County nor the Assessor-Treasurer warrants the accuracy, reliability or timeliness of any information in this system, and shall not be held liable for losses caused by using this information. Portions of this information may not be current or accurate. Any person or entity who relies on any information obtained from this system does so at their own risk. All critical information should be independently verified.

"Our office works for you, the taxpayer"

Pierce County Assessor-Treasurer
Dale Washam
2401 South 35th St Room 142
Tacoma, Washington 98409
(253)798-6111 or Fax (253)798-3142
www.piercecountywa.org/atr



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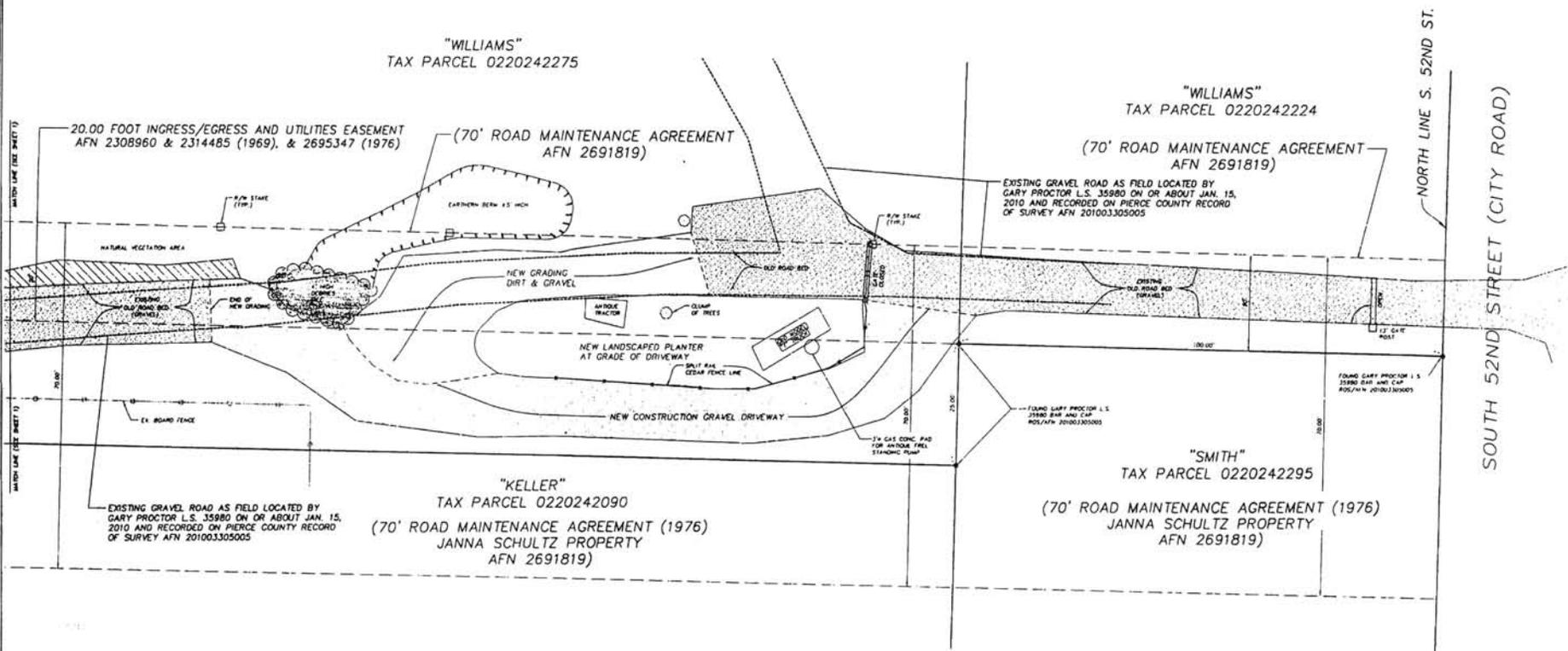
ROADWAY EXHIBIT MAP

NE 1/4, NW 1/4, SEC.24, TWN.20 N., RNG. 2 E., W.M.
CITY OF TACOMA, COUNTY OF PIERCE
STATE OF WASHINGTON



LEGEND

- FOUND BAR & CAP L.S. 25980
- (D) DEED
- (M) MEASURED
- EXISTING TREE
- R/W STATE



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DESIGNED	2007
DRAWN	2007
CHECKED	2008
DATE	04/16/12
DRAWING NO.	79900512
SHEET	2 OF 2

PROJECT BY
LAPSON AND ASSOCIATES
P.C. BOX 1637
TACOMA, WA 98401

PROJECT BY
LAPSON AND ASSOCIATES
Land Surveyors & Engineers, Inc.
1400 So. Elm St., Tacoma, WA 98402 (253) 474-2100

SITE PLAN

DATE	04/16/12
DRAWING NO.	79900512
SHEET	2 OF 2



PLAINTIFF'S EX. 2

ROADWAY EXHIBIT MAP

NE 1/4, NW 1/4, SEC.24, TWN.20 N., RING. 2 E., W.M.
CITY OF TACOMA, COUNTY OF PIERCE
STATE OF WASHINGTON

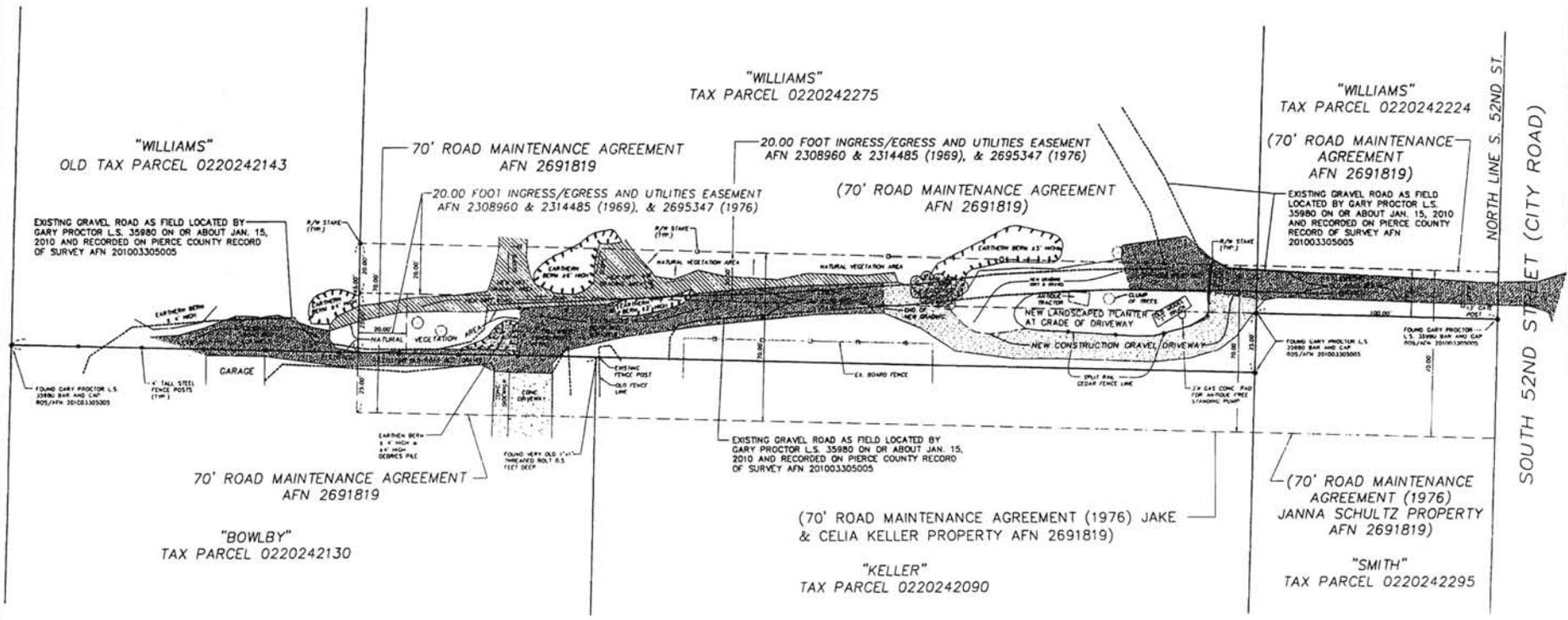
(BOWLBY)
LEGAL DESCRIPTION

AS PER CD FILE NUMBER INC. UNDER # 090510727
DATED DEC. 21, 2009 AND AMENDED JAN. 11, 2012.
COMMENCING AT THE NORTHWEST CORNER OF THE NORTHEAST
QUARTER OF THE NORTHWEST QUARTER OF SECTION 24,
TOWNSHIP 20 NORTH, RANGE 2 EAST OF THE W.M. IN PIERCE
COUNTY, WASHINGTON; THENCE EAST ALONG THE NORTH LINE
OF SAID SECTION 225.87 FEET; THENCE SOUTH 84.0 FEET;
THENCE EAST 318.41 FEET TO THE TRUCK POINT OF BEGINNING;
THENCE SOUTH 275 FEET; THENCE WEST 100 FEET; THENCE
NORTH 225 FEET; THENCE EAST 100 FEET TO THE POINT OF
BEGINNING.



LEGEND

- FOUND BAR & CAP L.S. 35980
- 100' POST
- 100' MEASUREMENT
- EARTHLINE POINT
- R/W STAKE



FOR NUMBER	7290
SCALE	1"=20'
RECORDED 000	11-20
DRAWN	W.A.
CHECKED 000	W.A.

PROFESSIONAL
LAND SURVEYOR
TACOMA, WA

LARSON and ASSOCIATES
Land Surveyors & Engineers, Inc.
1401 So. 68th St. Tacoma, WA 98409 (253) 721-3124

SITE PLAN



DATE	04/18/12
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SHEET	1 OF 1

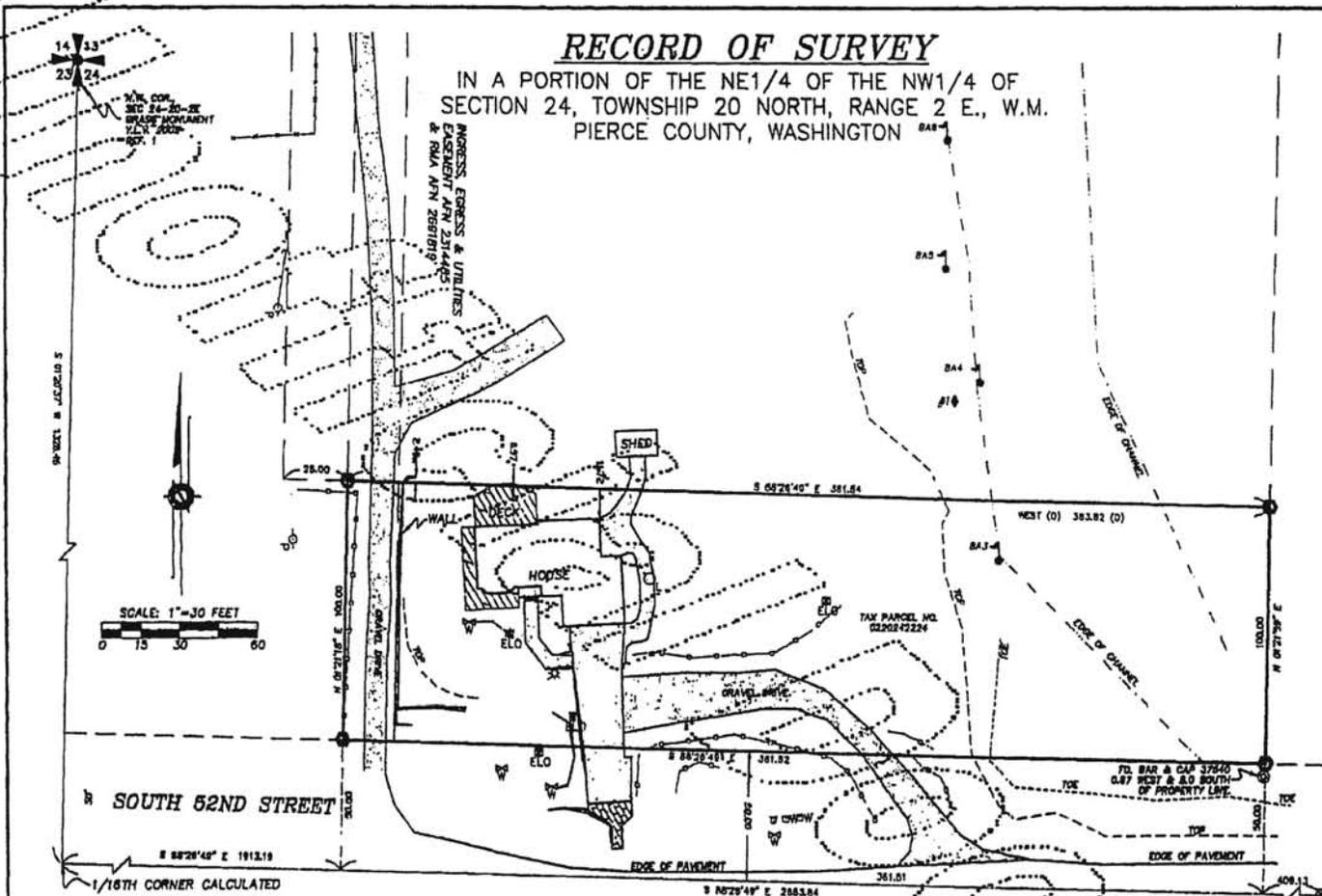
SITE

PLAINTIFF'S Ex. 7

For reference only, not for re-sale.

RECORD OF SURVEY

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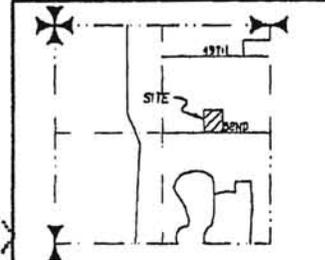


- LEGEND**
- ⊙ CONCRETE MONUMENT
 - ⊠ SET NUB & TAG ON LINE
 - ⊙ FOUND AS NOTED
 - ⊙ TEST HOLE
 - ⊙ POWER POLE
 - FENCE
 - ⊙ SET THORNTON LAND SURVEYING REBAR & CAP, L.S. 35200
 - ▨ GRAVEL ROAD
 - CONCRETE
 - ▨ DECK
 - ▨ BRICK
 - ⊙ WETLAND FLAG

BASIS OF BEARINGS
BOUNDARY LINE RESOLUTION APN. 200805035004

SURVEY STANDARDS
THIS SURVEY CONFORMS TO THE MERRILL SURVEY STANDARDS AS PER RCW, §§.68 AND WAC, §§.131-135.

EQUIPMENT / PROCEDURE
BORDA SET 330R TOTAL STATION AND/OR NIKON DTM320 TOTAL STATION WITH A CALIBRATED STEEL TAPE, FIELD TRAVERSE AND LOT STAKES



DESCRIPTION

THE SOUTH 100 FEET OF THE FOLLOWING DESCRIPTION: COMMENCING AT A POINT 195.13 FEET WEST AND 18 FEET SOUTH OF THE SOUTHEAST CORNER OF DR. MCCORMICK'S MYRTLE PARK ADDITION; THENCE SOUTH 225 FEET TO POINT OF BEGINNING; THENCE WEST 383.82 FEET; THENCE SOUTH TO A POINT 100 FEET NORTH OF THE NORTH LINE OF 52ND STREET; THENCE EAST 25 FEET; THENCE SOUTH 100 FEET TO NORTH LINE OF 52ND STREET; THENCE EAST ALONG SAID NORTH LINE OF 52ND STREET TO A POINT SOUTH OF POINT OF BEGINNING; THENCE NORTH TO POINT OF BEGINNING. SECTION 24 TOWNSHIP 20 RANGE 2E PIERCE COUNTY, WASHINGTON.

REFERENCE

- 1) BLR APN. 200805035004
- 2) MOLTRE ADDITION APN. 200809118001

NOTES:

- (1) THIS MAP DOES NOT ATTEMPT TO SHOW ALL THE PHYSICAL FEATURES, ENCUMBRANCES AND/OR ENCROACHMENTS PERTINENT TO THIS PROPERTY.
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AUDITOR'S CERTIFICATE
FILED FOR RECORD THIS 27th DAY of July, 2008.
AT 11:49 O'CLOCK A.M. UNDER AUDITOR'S FILE NUMBER:
200807305003
By: M. McCarty for Scott & Donna Williams
COUNTY AUDITOR

SURVEYOR'S CERTIFICATE
THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY SUPERVISION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDS ACT AT THE REQUEST OF:
SCOTT & DONNA WILLIAMS
DATE: 7/28/2008
SERIAL: CERTIFICATE NUMBER: 728
GARY E. PROCTOR, REGISTERED PROFESSIONAL LAND SURVEYOR



Thornton Land Surveying.
P.O. BOX 249
GIG HARBOR, WASHINGTON 98335
TELEPHONE (253) 858-8106 / FAX 858-7468

RECORD OF SURVEY FOR & REQUESTED BY
SCOTT & DONNA WILLIAMS
IN A PORTION OF THE NE1/4, & THE NW1/4 OF SECTION 24, TOWNSHIP 20 NORTH, RANGE 2 E., W.M. PIERCE COUNTY, WASHINGTON

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CHECKED	SCALE	JOB NUMBER
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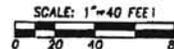
200807305003

Original

RECORD OF SURVEY

IN A PORTION OF THE NE1/4 OF THE NW1/4 OF SECTION 24, TOWNSHIP 20 NORTH, RANGE 2 E., W.M. PIERCE COUNTY, WASHINGTON

SURFACE BRASS MONUMENT
82ND & MARSH AVE
T.L.V. 2008



REFERENCE

- BLR APN. 20080505504
- NOLTE ADDITION APN. 200008118001

DESCRIPTION

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LEGEND

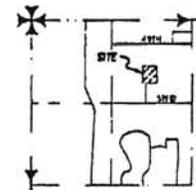
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- FENCE
- ⊙ SET THORNTON LAND SURVEYING REBAR & CAP. I.S. 35880
- ▭ GRAVEL ROAD
- ▭ CONCRETE
- (D) DICK
- ⚡ NETLAND FLAG

BASIS OF BEARINGS

BOUNDARY LINE RESOLUTION APRIL 200605083004

SURVEY STANDARDS

THIS SURVEY CONFORMS TO THE MANUAL SURVEY STANDARDS AS PER R.C.W. 56.08 AND W.A.C. 333-130. EQUIPMENT / PROCEDURE
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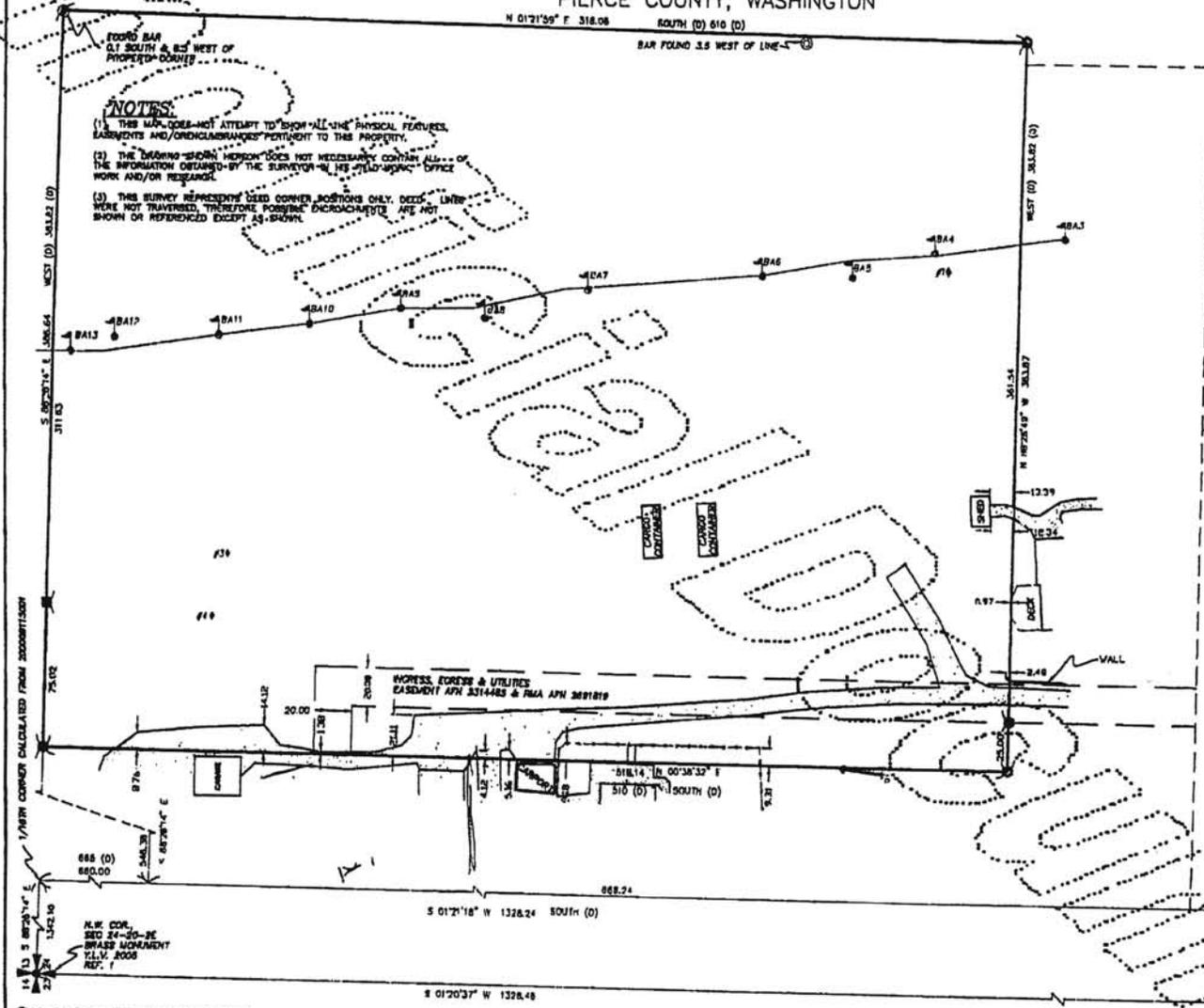
INDEX BLOCK & VICINITY MAP

RECORD OF SURVEY FOR & REQUESTED BY SCOTT & DONNA WILLIAMS IN A PORTION OF THE NE1/4 OF THE NW1/4 OF SECTION 24, TOWNSHIP 20 NORTH, RANGE 2 E., W.M. PIERCE COUNTY, WASHINGTON

DRAWN	DATE	FIELD BOOK
DRM	25 MAR 2008	18-24.6
CHECKED	SCALE	JOB NUMBER
DAP	1" = 40'	020247

NOTES

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AUDITOR'S CERTIFICATE
FILED FOR RECORD THIS 30 DAY OF MARCH, 2008 AT 1:15 P.M. UNDER AUDITOR'S FEE NUMBER: 201003305005
Janice Veems
Deputy

SURVEYOR'S CERTIFICATE
THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY ACCORDING ACT AT THE REQUEST OF: SCOTT & DONNA WILLIAMS
1118 2008 35880 CERTIFICATE NUMBER
SARY A. PROCTOR, REGISTERED PROFESSIONAL LAND SURVEYOR



Thornton Land Surveying.
P.O. BOX 249
GIG HARBOR, WASHINGTON 98335
TELEPHONE (253) 858-8106 / FAX 858-7466

201003305005

PLAINTIFF'S EX. 8
For reference only, not for re-sale.

CERTIFICATE OF SERVICE

The undersigned hereby declares under the penalty of perjury under the laws of the State of Washington in the County of Pierce that on February 13, 2013, I personally served via ABC Legal Messengers a true and correct copy of the Brief of Respondent addressed to the following:

Kelly DeLaat-Maher
Smith Alling, P.S.
1102 Broadway Plaza, #403
Tacoma, WA 98402

DATED at Tacoma, Washington, this 13th day of February 2013.



Sondra Lee
Legal Assistant