

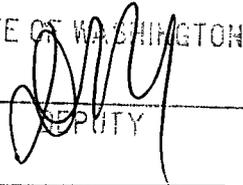
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No. 44689-8-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON


CLERK

MARK L. BUBENIK and MARGARET M. BUBENIK,

Appellants,

v.

THOMAS J. MAUSS and KAROL K. MAUSS,

Respondents.

APPELLANTS BUBENIK'S OPENING BRIEF

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TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR.....	2
ISSUES PRESENTED.....	5
STATEMENT OF THE CASE.....	6
A. The Relevant Properties And Their Relative Locations.	6
B. The Disputed Area.	7
C. The Bubenik Property As Purchased In 1979 And Seller Bill Bell’s Representations Regarding The Property Lines.....	8
D. Neighbor James Niquette Confirmed Bell’s Representations Regarding The Property Lines.	11
E. After Purchasing The Property, Bubenik Maintained The Area Within The Boundaries Bell Identified.....	12
F. Mauss Purchased From Fowler The Property To The Southwest.....	12
G. Bubenik, Mauss and Niquette Replaced The Continuous, Horizontal Log Bulkhead In 1995, Sharing The Cost, Pro Rata, Based On The Length Of Their Respective Bulkheads.	13
H. Bubenik And Mauss Conducted Their Yard Maintenance Activities Consistent With The Observed Property Line And On Their Respective Sides Of The Three-Directional Stairs.....	22
I. Following A Dispute With Henning, Mauss Obtained A Survey In 2009 And, To Bubenik’s Surprise Claimed 17 Feet Of Waterfront Beyond The Line That The Parties Observed For 28 Years.	28

J.	The Trial Court Erroneously Confirmed The Deed Line As Surveyed By AHBL And Denied Bubenik Title To the Disputed Area They Maintained Well In Excess Of 30 Years.	33
ARGUMENT		35
A.	Standards Of Review.	35
B.	The Substantial Evidence Establishes That Bubenik Owns The Disputed Area By Adverse Possession And The Trial Court Thus Erred.....	36
1.	Bubenik’s use of the Disputed Area was open and notorious.	38
2.	Bubenik’s use was exclusive.	39
3.	Bubenik’s use was hostile.	39
4.	Bubenik’s use was actual and uninterrupted.....	41
C.	The Substantial Evidence Establishes That Mauss Acquiesced To And Acknowledged The Observed Line Through Their Actions And The Trial Court Thus Erred.....	45
D.	The Trial Court Erroneously Resolved Survey Discrepancies Without Notice To Bubenik Or Sufficient Evidence And Granted Mauss Affirmative Relief Without A Counterclaim.	47
CONCLUSION.....		50

Appendices

- A. Trial Exhibit 4
- B. Trial Exhibit 16, pg. 1
- C. Trial Exhibit 20, pg. 1
- D. Trial Exhibit 7A (without markings by witnesses)
- E. Findings of Fact and Conclusions of Law (CP 188-203)
- F. Trial Exhibit 3

TABLE OF AUTHORITIES

Cases

<i>Bingham v. Lechner</i> , 111 Wn. App. 118, 45 P.3d 562 (2002).....	35
<i>Chaplin v. Sanders</i> , 100 Wn.2d 853, 676 P.2d 431 (1984)	36, 38, 40, 44
<i>Double L. Properties, Inc. v. Crandall</i> , 51 Wn. App. 149, 751 P.2d 1208 (1988).....	44
<i>El Cerrito v. Ryndak</i> , 60 Wn.2d 847, 376 P.2d 528 (1962).....	40,42
<i>Farrow v. Plancich</i> , 134 Wash. 690, 236 Pac. 288 (1925).....	46
<i>Gray v. McDonald</i> , 46 Wn.2d 574, 283 P.2d 135 (1955).....	40
<i>Howard v. Kunto</i> , 3 Wn. App. 393, 477 P.2d 210 (1970)	44
<i>Irwin Water Dist. No. 6 v. Jackson Partnership</i> , 109 Wn. App. 113, 34 P.3d 840 (2001).....	44
<i>ITT Rayonier, Inc. v. Bell</i> , 112 Wn.2d 754, 774 P.2d 6 (1989)	36
<i>Lee v. Lozier</i> , 88 Wn. App. 176, 945 P.2d 214 (1997)	44
<i>Lloyd v. Montecucco</i> , 83 Wn. App. 846, 924 P.2d 927 (1996).....	43

<i>Malnati v. Ramstead</i> , 50 Wn.2d 105, 309 P.2d 754 (1957).....	40
<i>Merriman v. Cokely</i> , 168 Wn.2d 627, 230 P.3d 162 (2010).....	45
<i>Meshner v. Connolly</i> , 63 Wn.2d 552, 388 P.2d 144 (1964)	42
<i>Mugaas v. Smith</i> , 33 Wn.2d 429, 206 P.2d 332 (1949)	42
<i>Pedersen v. Washington State Dept. of Transp.</i> , 43 Wn. App. 413, 717 P.2d 773 (1986).....	41
<i>Reitz v. Knight</i> , 62 Wn.App. 575, 814 P.2d 1212 (1991)	40
<i>Reymore v. Tharp</i> , 16 Wn. App. 150, 553 P.2d 456 (1976)	44
<i>Riley v. Andres</i> , 107 Wn. App. 391, 27 P.3d 618 (2001).....	40,41
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002)	36
<i>Scott v. Slater</i> , 42 Wn.2d 366, 255 P.2d 377 (1953).....	45
<i>Skoog v. Seymour</i> , 29 Wn.2d 355, 187 P.2d 304 (1947)	42
<i>State v. Solomon</i> , 114 Wn. App. 781, 60 P.3d 1215 (2002)	36
<i>Stewart v. hoffman</i> , 64 Wn.2d 37, 390 P.2d 553 (1964).....	45
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	35
<i>Thornely v. Andrews</i> , 45 Wash. 413, 88 Pac. 757 (1907).....	42

Statutes

RCW 4.16.020	
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INTRODUCTION

This is a property dispute regarding a strip of land between two waterfront properties that is as wide as 17 feet at the waterfront. Appellants Mark and Margaret Bubenik (collectively “Bubenik”) lived on their property and maintained the bulkhead, trees, bushes and plants in this disputed strip for 30 years before they learned that the legal description on their deed, and the deed of their neighbors, respondents Thomas and Karol Mauss (collectively “Mauss”), did not match the area of land they occupied and maintained. Bubenik filed this lawsuit to quiet title to the disputed strip under the legal theories of adverse possession and/or mutual recognition of the common boundary line.

Significantly, the trial court believed and accepted Bubenik’s testimony with regard to representations by the prior owner regarding the location of the common boundary line and their continuous and extended maintenance and use of the disputed area. The trial court, however, held that Bubenik’s extended and diligent care for the disputed area was not sufficiently obvious and hostile to Mauss. The trial court seemed moved by the fact that the parties here, unlike those in many property disputes, always remained civil and friendly.

The trial court, however, misapplied the law on adverse possession and mutual recognition. With regard to adverse possession, exclusive,

open and hostile possession of property does not require constant use, express notice of a hostile claim or display of ill will. With regard to mutual recognition, an express agreement is not required. Rather, the law only requires evidence that manifests good faith recognition of the designated boundary line as the true line.

The Findings of Fact and Conclusions of Law are not internally consistent and they are not supported by the substantial evidence or the law. This Court should reverse the trial court and remand with instruction to enter judgment quieting title to the disputed strip to Bubenik.

ASSIGNMENTS OF ERROR

Bubenik generally assigns error to the trial court's decisions to dismiss their adverse possession and mutual recognition claims, affirmatively resolve discrepancies between two differing professional surveys and deny their motion for reconsideration and new trial.

Appellants specifically assign error to the trial court's Findings of Fact and Conclusions of Law, attached at Appendix E, as follows:

1. Finding of Fact ("FOF") 2 only to the extent that it states Mauss owns all the referenced legally described property, including property adversely possessed.

2. FOF 8 only regarding the finding: "At the time of the purchase, there were no survey markers marking the corners of the

Bubenik Property.”

3. FOF 15 in its entirety.

4. FOF 16 in its entirety.

5. FOF 17 in its entirety.

6. FOF 19 only regarding the findings: Mauss “(3) never discussed the Disputed Line with either Mr. or Mrs. Bubenik; and (4) never recognized the Disputed Line indicated by the steel stake and the orange tag on the camellia bush to be the boundary of the property.”

7. FOF 20 in its entirety.

8. FOF 21 in its entirety.

9. FOF 22 to the extent it may be construed that Mauss had no knowledge of the boundary line prior to the 2009 survey.

10. FOF 25 only to the limited extent that the stated measurements were approximate.

11. FOF 27 only regarding the finding: “the preponderance of the evidence does not support a finding that Mr. Bubenik communicated to Mr. Mauss his belief that the back of the stairs marked the boundary line between the two properties.”

12. FOF 28 regarding the finding that Mauss’ testimony regarding the stair location is credible. It is inconsistent with FOF 51.

13. FOF 29 in its entirety.

14. FOF 30 in its entirety.

15. FOF 31 in its entirety.

16. FOF 32 in its entirety.

17. FOF 36 only to the extent that it should also include a finding that Bubenik consented to the installation of the sprinkler system and the system was installed without regard to ownership but with the primary concern that the entire lower lawn was covered.

18. FOF 37 only regarding the finding: "Mrs. Mauss, Mike Mauss and a professional yard clean up services hired by Mauss also worked in and maintained the garden area on the Bubenik side of the Disputed Line."

19. FOF 38 only regarding the finding: "These gardening activities, however, were not acts of such number, intensity, consistency and obtrusiveness as to give notice to Mr. and Mrs. Mauss that their property interests were at risk."

20. FOF 39 in its entirety.

21. FOF 40 in its entirety.

22. FOF 42 in its entirety.

23. FOF 43 in its entirety.

24. FOF 44 in its entirety.

25. FOF 45 in its entirety.

26. FOF 46 in its entirety.

27. FOF 47 only regarding the finding: the Aspen Survey (Ex. 4) “was not intended to mark the true legally described boundary line. No survey markers were set based on the Aspen survey.”

28. FOF 49 in its entirety.

29. The trial court’s conclusion that Bubenik’s claim for mutual recognition was not established and should be dismissed (Conclusions of Law 4-6, 13).

30. The trial court’s conclusion that Bubenik’s claim for adverse possession was not established and should be dismissed. (Conclusions of Law 9-12, 14).

40. Conclusion of Law 15.

ISSUES PRESENTED

1. Is adverse possession established where the trial court finds and/or the substantial evidence proves that, within the Disputed Area and for the prescriptive period, Bubenik exclusively paid for the construction of and maintained the bulkhead, paid for one-half the construction costs for stairs centered on the Bubenik’s proposed line, exclusively maintained the maple tree located at the Bubenik side of the stairs and exclusively maintained the camellia at the critical upland marker of the proposed line, and Mauss had actual knowledge of this use? (Assignments of Error 30

and 1-11, 17-26).

2. Is a boundary line established by mutual recognition where the trial court finds and/or the substantial evidence proves that Bubenik and Mauss agreed to and did pay for only their pro rata share of a new bulkhead based on measurements taken from and consistent with Bubenik's proposed line; shared equally in construction of stairs without granting any easements, and thereafter maintained their respective properties consistent with a line extending from the center point of the stairs? (Assignments of Error 29 and 6-7, 10-16, 20).

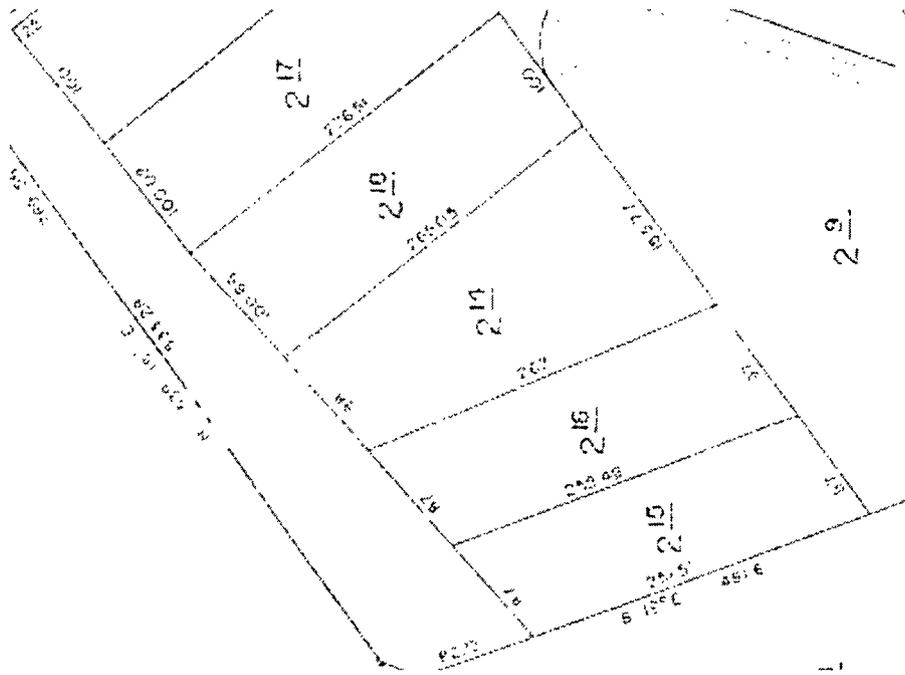
3. Did the trial court error when it resolved a discrepancy between two professionally prepared surveys and quieted title accordingly, though neither party requested such relief and the preparer of the selected survey did not testify at trial? (Assignments of Error 40 and 27-28).

STATEMENT OF THE CASE

A. The Relevant Properties And Their Relative Locations.

While this property dispute is between Bubenik and Mauss, there are four adjacent waterfront properties discussed in this appeal. To provide orientation of these properties prior to a discussion of the facts, the properties are depicted below on an Assessor's Map excerpt (Ex. 12.). Moving from a northeasterly point in a southwesterly direction (top to bottom) the properties are owned by Niquette (parcel 218) Bubenik

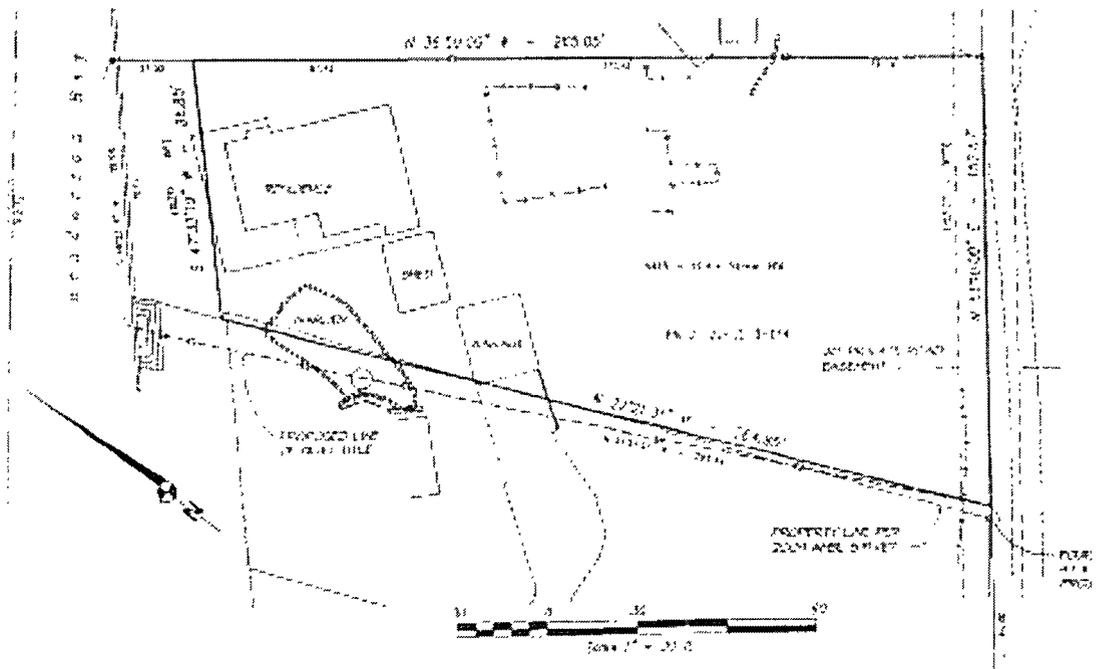
(parcel 214), Mauss (parcel 216) and Henning (parcel 215). (RP 98-100.). Each property fronts Henderson Bay and the left (northerly) side of each parcel is the waterfront side. (*Id.*)



B. The Disputed Area.

The “Disputed Area” is a strip of land located between the Bubenik and Mauss properties. The two properties are shown on a professionally prepared survey map prepared by licensed surveyor Dan Johnson on the next page. (Ex. 4.) The Bubenik property is depicted at the top or northeasterly portion of the survey map. The Mauss property is the lower, southwesterly parcel. The dark line between the properties is the

“Surveyed Line” based upon the legal descriptions in the parties’ respective deeds. The dotted “Proposed “Line” or “Observed Line”, (starting at the center of the bulkhead stairs on the left) is the line Bubenik claims was observed by the parties and reflects the true boundary. The area between the two lines is the “Disputed Area.”



C. The Bubenik Property As Purchased In 1979 And Seller Bill Bell’s Representations Regarding The Property Lines.

Mark and Margaret (“Peggy”) Bubenik (collectively “Bubenik”) live on waterfront property located on Henderson Bay at 8415 104th Street NW in Gig Harbor, Washington. They purchased the property 34 years ago, in 1979, from William and Florence Bell. (RP 27-28.)

The size and boundaries of the property were described to

Bubenik prior to their purchase. It was described as a wedged or trapezoidal shaped 1.07 acre parcel that is narrower on the waterfront end (with the bulkhead measuring 88 feet) and wider at the upland end (143 feet). (RP 28-32, Ex. 14.). Bubenik also walked the property with Bell to identify the boundary lines. (RP 33-34, 307-08.)

A horizontal log bulkhead extended continuously across three properties, with the Bubenik property in the middle. From the Bubenik property this bulkhead extended to and across the adjacent property immediately northeast (owned by Niquette) and, on the opposite end, to and across the adjacent property immediately southwest (now owned by Mauss). (RP 46.) Bell advised Bubenik that each end of the waterfront line on the Bubenik property was physically marked at this log bulkhead. On the northerly (and easterly) end of the Bubenik property (adjoining Niquette's property) there was nail or spike driven into the bulkhead. (RP 34, 308.) On the opposite southerly (and westerly) end, there was a steel stake located back from the face of the bulkhead, close to the low bank. (*Id.*) Slightly upland and to the east from the location of this steel stake there is large maple tree that was also identified as on the Bubenik property. (RP 210. *See also*, Exs. 7A, 16 at p. 1, 20 at pp. 1, 4.) After the two steel waterfront markers were identified, Bubenik and Bell measured the distance along the bulkhead between the markers. (*Id.*) Consistent

with Bell's representation (*see* Earnest Money Agreement, Ex. 14), the bulkhead measured 88 feet between the two markers. (RP 34-35, 308-09.)

Upland on the property there were other indicators of the westerly property line that Bell identified. About midway upland, south on the westerly side, the property is improved with a garage. (RP 35, Ex. 4.) A retaining wall extends out from the garage in a southwesterly direction along the access to the Bubenik garage. (RP 35, Ex. 4. *See also*, RP 39-40, Ex. 16 at p. 5, Ex. 7A.) A camellia was planted near the end of the wall on the uphill side. (*See* Ex. 16 at p. 5, Ex. 7A.) Tied to the camellia was an orange plastic marking ribbon that Bell represented was about the midpoint of the westerly boundary line. (RP 34-35, 309-10.) Notably, that ribbon remained on the camellia from 1979 until approximately five years ago. (RP 40.)

The "proposed line of quiet title" depicted on the survey (Ex. 4, also attached as Appendix A and depicted in part at page 8 of this brief), connects the two westerly markers that Bell identified for Bubenik before they purchased the property, specifically the location of the steel stake at the southwesterly end of the bulkhead and the ribbon on the upland camellia. (RP 92-94, 106-08.) Again, this line is referred to in this Brief as the "Observed Line" or "Proposed Line." Use and activities on the

Bubenik and Mauss properties will be described below in their relation to this Observed Line.

D. Neighbor James Niquette Confirmed Bell's Representations Regarding The Property Lines.

As noted earlier, the adjacent property north and east of the Bubenik property (located at 8411 104th Street Northwest) is owned by James Niquette. (RP 206-07.) Also, as noted earlier, Niquette, Bubenik and Mauss properties were all improved with a single, continuous horizontal log bulkhead. (RP 46, 209.)

Niquette has lived on his beach property since 1974, even longer than Bubenik and Mauss. (RP 206, 208.) He was friends with Bill Bell, the prior owner of Bubenik's property (RP 208), and discussed with Bell the property lines along the beach. Bell specifically showed Niquette the steel nail or spike driven into the bulkhead to mark the boundary between the Bell (Bubenik) and Niquette properties. (RP 209.) Bell also told Niquette that the boundary between the Bell (Bubenik) property and the adjacent southwesterly property (then owned by Fowler, now owned by Mauss) was located between the maple tree and Fowler's home; thus the maple tree was identified as on the Bell (Bubenik) property. (RP 210, 224-25.)

Niquette's portion of the continuous log bulkhead was 100.66 feet

(measuring from the location where the concrete bulkhead of his neighbor to the east joined with his log bulkhead to the steel nail identified by Bell). (RP 210. *See also*, Ex. 14, RP 46.)

E. After Purchasing The Property, Bubenik Maintained The Area Within The Boundaries Bell Identified.

After purchasing the property in 1979, Bubenik took over the responsibility of maintaining the property. At that time, the property to the southwest (now owned by Mauss) was owned by Ralph and Clarissa Fowler (collectively "Fowler"). (RP 41.) Consistent with Bell's representations, Fowler maintained the property on their side of the Observed Line. (RP 44.) For example, there is lawn in an area between the bulkhead and the retaining wall that extends continuously on both sides of the Observed Line. (*See* Exs. 7A, 16 at p. 1 and 20 at p.2.) Fowler would mow only the portion of the lawn that was southwesterly of the steel stake by the bulkhead and the Observed Line. (RP 44-46.) Bubenik mowed the other side of the lawn and maintained the trees, bushes, plants and flowers east of Observed Line as identified by Bell. (RP 44-46.)

F. Mauss Purchased From Fowler The Property To The Southwest.

In 1981, Tom and Karol Mauss (collectively "Mauss") purchased from Fowler the property southwest of the Bubenik property. (RP 337.)

The Mauss property is located at 8419 104th Street Northwest. (RP 334.)

Tom Mauss testified that Fowler only generally discussed the property borders and did not show them any specific boundary lines when they purchased the property. (RP 337.) Based on Fowler's general description, Mauss thought the common line with the Bubenik property was "very close" to the maple tree, yet Fowler did not specifically state that the tree was on Mauss' property. (RP 338-39, 408.) Karol Mauss testified that she had no belief regarding the location of the common boundary line and that she "felt it was not an important issue." (RP 417.) She also testified that she did not know who owned the maple tree, but assumed it belonged to Bubenik. (RP 427.) Their son Michael Mauss, who lived on the property from the time he was 3 years old until he was 18 (RP 229, 232), also testified that, while he did not know the location of the common boundary line, he would have thought that the maple tree was slightly on Bubenik's property. (RP 234-35.)

Tom Mauss testified that he did not see either the steel stake / pipe near the bulkhead that Bell identified for Bubenik, nor did he see the ribbon on the camellia. (RP 340, 346.) The legal description of the Mauss property provides that the beach frontage is 87 feet. (Ex. 2.)

G. Bubenik, Mauss and Niquette Replaced The Continuous, Horizontal Log Bulkhead In 1995, Sharing The Cost, Pro Rata, Based On The Length Of Their Respective Bulkheads.

Because the aging log bulkhead was deteriorating, Niquette, Bubenik and Mauss collectively decided in 1995 to replace it with a more durable concrete bulkhead.¹ (RP 63-64, 212, 348.) They hired a contractor, Pacific Northwest Bulkhead, to perform the work. (RP 63, 213.) Though the contractor was hired to construct a single, continuous concrete bulkhead across all three properties, Niquette, Bubenik and Mauss each signed a separate contract through which they took individual responsibility for payment based upon the actual footage of bulkhead to be constructed in front of their respective properties. (RP 67, 71-72, 213-14, 349, 383, Ex. 5.)

Niquette, Bubenik and Mauss all met with the contractor at the same time to measure their portions of the bulkhead. (RP 348-49, 395, 399, 408-09.) The new concrete bulkhead was to be and actually was constructed in the same location of the log bulkhead. (RP 409.) For purposes of measuring, the far end points of the log bulkhead were easy to locate, since the neighbors' bulkheads were made of different material. (RP 46-47, 183-84.) The bulkhead fronting the property adjoining Niquette's property on the east was concrete. (RP 47.) The bulkhead

¹ Until this time, Bubenik annually backfilled his portion of the log bulkhead with sand and gravel because the winter high tide waves would wash out and erode the bottom of his bulkhead. (RP 47-49.) This same level of maintenance was not required beyond the steel stake along the Mauss bulkhead because Mauss put concrete between the logs, thereby limiting the erosion. (RP 50.) There was no cement filling on the Bubenik side of the steel stake. (*Id.*)

fronting property adjoining Mauss' property on the west (owned by Henning) was also concrete. (RP 47, 184.) Niquette and Bubenik testified that the parties determined the interior boundary lines by using the same markers that Bell identified to Niquette, and then later to Bubenik when he purchased the property from Bell. (RP 69, 215-16, 220, 225.)

Niquette, Bubenik and Mauss proceeded to measure each of their respective bulkheads with the contractor. (RP46, 64-65, 214-15.) They started at the northern most end of the Niquette property. (RP 65.) Niquette's portion was measured from the point where the log bulkhead abutted Niquette's northeasterly neighbor's concrete bulkhead to the steel nail that marked the boundary between the Niquette and Bubenik properties. This Niquette portion of the bulkhead measured 100.6 feet. (RP 46, 65-66, 214, 399.)

Thereafter, the three neighbors measured Bubenik's portion of the bulkhead. This section was measured from the steel nail that marked the boundary between the Niquette and Bubenik properties then southwesterly to the steel stake that Bell had identified as the marker delineating the Bubenik and Mauss properties (which is the starting point of the Observed Line). This Bubenik section measured 88 feet. (RP 47, 66, 215, 399.) Bubenik still has the contract he signed with the contractor and the contract was admitted at trial. (Ex. 5, RP 67.68.) It verifies that Bubenik

contracted for the construction of 88 lineal feet of concrete bulkhead and was charged \$160 per each foot for 88 feet. (*Id.*)

Finally, Mauss' portion of the log bulkhead was measured. This measurement was taken from the steel stake that Bell had identified as the marker delineating the Bubenik and Mauss properties (west of the maple tree) and then southwesterly to the point where the log bulkhead abutted Mauss' southwesterly neighbor's (Henning) concrete bulkhead. Again, it was easy to locate this southwesterly end of the log bulkhead, since the Henning bulkhead was made of concrete. This Mauss section of the bulkhead measured 87 feet. (RP 47, 216, 300.)

Both Bubenik and Niquette testified that Tom Mauss was present when the bulkhead measurements were taken and the stairs were located using the southwesterly steel stake as the delineating marker between the Bubenik and Mauss bulkheads. (RP 69-70, 215-16.) While he indicated that he did not believe the boundary lines were being determined at the time (RP 351-52), Tom Mauss once again did not directly contradict Bubenik and Niquette's testimony. Instead, he testified that he did not have a good memory of the meeting. He nonetheless confirmed the respective measurements. Specifically, Mauss testified:

Q. Mr. Mauss, the testimony has been that in 1995 you and Mr. Bubenik and Mr. Niquette agreed to replace you bulkheads on the property; is that correct?

A. That's correct.

Q. And the testimony has been that there was a meeting of the three of you near the bulkheads about the happening with the contractor. Do you recall such a meeting?

A. I kind of remember that, yeah.

Q. Okay. Can you tell me what happened?

A. I can't. Other than splitting the costs three different ways. We more or less told them where we wanted the thing to be, but other than that, nothing.

(RP 348-49.) He further testified on this matter at RP 399:

Q. Were you at the meeting at the time the contractor measured the length of what you bulkhead was going to be?

A. I assume I was, But I quite frank -- I can't remember that.

Q. Do you remember that -- Jim Niquette being present at the time the contractor was doing some measurement?

A. Yes. I think he was there.

Q. Okay. You do understand that the contractor would have to do some measurements, do you not?

A. Yes.

Q. And is it your understanding that the measurements that were done were [sic] the Niquettes' was 100 feet?

A. Yes.

Q. And that Bubeniks' was 88 feet?

A. Yes.

Q. And yours was 87 feet?

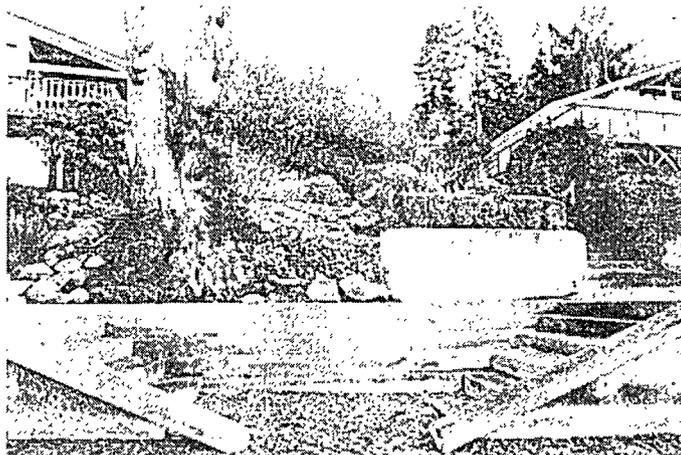
A. Yes.

While the log bulkhead was being replaced in the same location,

one modification was made to the bulkhead crossing the Bubenik and Mauss' properties. The old bulkhead was bisected with two separate sets of stairs accessing Bubenik and Mauss' respective properties. Bubenik had steel stairs that provided their access to the beach. (RP 50, 172-73.) Mauss had separate concrete steps. (RP 173. *See also*, Ex. 20 at p. 1.)

Rather than preserving the two separate sets of stairs, Bubenik and Mauss agreed to a single stair way that they would both use and for which they would equally share the cost. (RP 71-72, 398, 223.) Bubenik and Mauss agreed on three-directional stairs. (*Id.*)

The stairs as constructed are depicted in trial exhibit 20, page 12 shown below. The home on the left is the Bubenik home and to the right is the Mauss home. The tree trunk left of the center point of the stairs is the maple tree. (A photo depicting the steps with survey laths marking the Observed Line (Ex. 16, p. 1) is attached as Appendix B.)



It is now known that, if the property line is based exclusively on their respective deeds, the three directional stairs were constructed wholly on Mauss' property. (Ex. 4, Ex. 3.) However, the testimony overwhelming establishes that this was not the parties' intent.

Bubenik testified that the center of the stairs corresponded with the location of the steel stake, which, again, marked Bubenik's understanding of the dividing line (Observed Line) between their respective properties. (RP 50-51, 69.) Niquette confirmed that Bubenik and Mauss agreed that the shared stairs were being centered at the property line. (RP 222-23.)

Though Mauss testified that he did not think the new shared stairs were being specially placed at the property line, he likewise did not affirmatively testify that he believed the stairs would be located wholly on his own property. (RP 349-50.) Rather, Mauss testified he thought the new stairs would be located in the same place as his old stairs. (*Id.*) With regard to the stairs, Mauss testified at RP 350-51:

Q. Do you recall any discussion regarding where to locate the three-directional steps?

A. I – it was my feeling that it should be where the old – my place where I came in with my boat; that it goes right in there. I knew it was going to be wider and that's where I thought we were going to put it.

Q. Showing you what's been marked as Defendant's Exhibit No. 20, Page 1, which is it's been testified as an aerial photograph of the property prior to placement of the bulkhead. So you're looking at the old bulkhead and

the old stairs, okay.

A. Yes.

Q. There are some old stairs from your – coming down from your home to the water, which have been circled with a number one put around it; is that correct?

A. That's correct.

Q. Did the location of those old stairs have anything to do in your mind to the location of the new stairs?

A. More or less what I expected, only wider. And the back side you could walk three different ways, I guess. Right put you on my property and left on – on the other property.

Q. Were you going to put the new stairs in the same location as the old stairs?

A. Exactly, exactly.

Q. Do you recall discussing that with Mr. Bubenik?

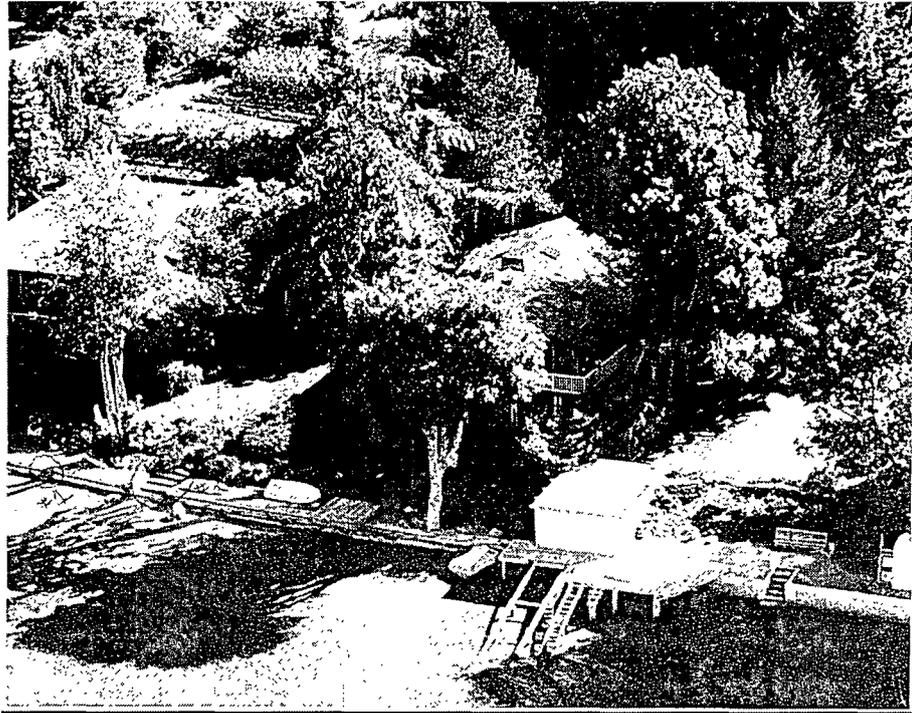
A. I don't know that. I forget that far back.

Q. You don't recall specifically?

A. No.

The photograph Mauss discussed, Ex. 20-1 (Appendix C and below), depicts the bulkhead prior to replacement. The circles and numbers were drawn during Mike Mauss' (Tom Mauss' son) testimony. (RP 250-53.) Mike testified that the stairs depicted on the far left of Ex. 20-1 and marked #1 were Bubenik's old steel stairs. (RP 252.) The stairs immediately to the right and marked #2 were Mauss' old stairs. (RP 252-53.) For orientation, the maple tree is between the two marked stairs. (RP 252.) The Bubenik home is on the far left and the Mauss home is in the center of the photo. (RP 250-53.) The white shed to the right of the

Mauss home is the boathouse on the Henning property. (RP 251.)



Again, the replacement stairs were located as depicted below. (Ex. 20, p.1.). The Bubenik home is on the left, the Mauss home is on the right and the maple tree is located just above and to the left side of the stairs.



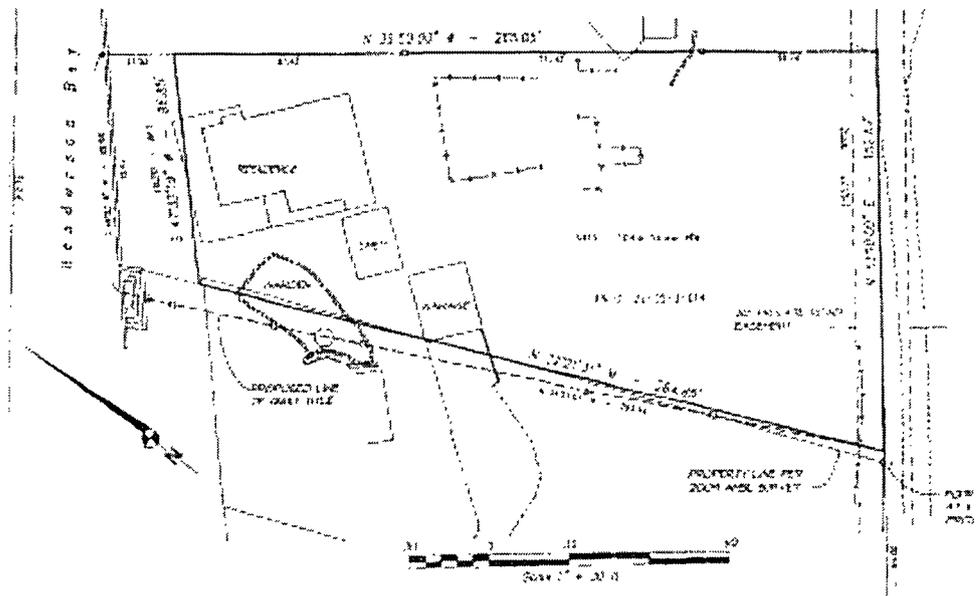
H. Bubenik And Mauss Conducted Their Yard Maintenance Activities Consistent With The Observed Property Line And On Their Respective Sides Of The Three-Directional Stairs.

With a single exception, Bubenik and Mauss separately maintained their respective properties consistent with the Observed Line. Before discussing their respective maintenance efforts, a detailed description of the Disputed Area is helpful.²

Looking from the water, immediately upland of and on the northeasterly side of the three-directional stairs is the maple tree; a retaining wall is on the right (southwesterly) side of the stairs; and there are plantings around the tree and retaining wall. (Ex. 16, p. 1 (Appendix B), Ex. 20, pp. 2, 11-12, Ex. 7A.) Just upland (southerly) of the stairs, maple tree and retaining wall, there is a lawn that occupies both the Bubenik and Mauss properties. At trial, the parties referred to this lawn as the “shared lawn” or “shared lower lawn.” (RP 77, EX. 7A.) Portions of this “shared lawn” can be seen from different angles in the photographs admitted as trial exhibit 16, pages 1-2 and trial exhibit 20, pages 1-2, 4-7, 11-13. (*See also*, Ex. 7A, Appendix D.)

² Detail of this area is also depicted on a drawing (Ex. 7A) that was admitted for illustrative purposes (RP 76-77), and then further marked and used by witness as they testified about the area (*see* RP 78-79, 123-26). Unfortunately, because Ex. 7A was an oversized exhibit that was specially marked by the witnesses during testimony, Bubenik was unable to copy and attach the exhibit as marked during the trial. However, for reference, the drawing without the testifying witnesses’ is at Appendix D.

Continuing southerly and upland there is a garden area that is encircled with a rock wall. (Ex. 4, Ex. 7A, Ex. 16, pp. 2-3, Ex. 20, pp. 5-7, RP 61-62.) The Observed Line crosses through this garden area as depicted by the dotted line in the survey (Ex. 4) below.



There are rhododendrons and dahlias planted on the Bubenik (northeasterly) side of the Observed Line and there is a Dogwood tree on the Mauss side of the observed line. (Ex. 7A, RP 55.)

Finally, further upland from the garden is Bubenik's garage and a retaining wall that extends southwesterly from the garage along the garage access to the Observed Line. (Ex. 4, 7A, RP 35, 39-40.) On the upland (southern) side and near the western end of this retaining wall is a camellia, which is the same camellia that was once marked by Bell with an

orange plastic ribbon and is point along the Observed Line. (Ex. 16, p. 5, Ex. 7A, RP 34-35, 309-10.)

Both Bubenik and Mauss have consistently mowed the entire shared lower lawn area. (RP 44-46, 185-86, 229-34, 355-56.) This common or shared lawn maintenance merely a reflection of its small size, the neighborly relationship of Bubenik and Mauss and the fact that the parties considered it odd to mow only a part of this small continuous grass area. (*Id.*) Thus, whoever mowed the lower lawn area would typically mow the whole thing. (RP 233-34.) Currently this shared lower lawn area is mowed by a service and Bubenik and Mauss share the cost. (RP 136, 326, 358.) The lawn, however, is an exception to the long-time maintenance of the disputed area. The remainder of the disputed area has been separately maintained by Bubenik and Mauss consistent with the location of the Observed Line.³

Starting with the maple tree at the northeasterly side of the three-directional stairs , Mark and Peggy Bubenik both testified that they alone planted and maintained wild geranium and a stargazer lily at the base of the tree; and annually they also annually plant and maintain zinnias at the base of the maple. (RP 315-17, 51-53, 197-201.) Bubenik has also

³ Mauss' son installed a sprinkler system in the shared lower lawn. This sprinkler system was installed without concern for the common boundary line, but with the primary concern that the sprinkler system water and cover the entire lower lawn area. (RP 247-48, 270, 366-67, 237-28.)

exclusively maintained the maple tree itself. Bubenik cuts the suckers that shoot out from the tree trunk and limbs (RP 317-18, 51-52) and has hired and paid a tree service to prune the tree and remove the dead branches (RP 317-18, 171-72).

Significantly, Tom and Karol Mauss both knew that Bubenik hired the tree service to trim the maple tree. (RP 394-95, 425.) In fact, Mauss hired the same tree service to trim a tree on the Mauss side of the Observed Line. (RP 394-95.) While Mauss exclusively paid for trimming the tree on the Mauss side of the Observed Line, Mauss did not contribute to the cost of trimming the maple tree. (RP 395.) Tom Mauss testified that Bubenik provided for the maintenance of the maple tree for the entirety of Mauss' 30+ year residency. (*Id.*) Karol and Mike Mauss confirmed and both testified that they did not maintain the maple tree or the plants beneath it. (RP 234-35, 425.) Mike and Karol's inaction with regard to the maple tree was consistent with their testimony that, while unaware of the location of the boundary line, they both assumed that the maple tree was on Bubenik's property.⁴ (RP 234-35, 417.)

At the significant upland point of the Observed Line, at the southwestern end of the garage retaining wall and camellia, the testimony

⁴ Recall, Tom Mauss testified that he thought the common line with the Bubenik property was "very close" to the maple tree, but he was uncertain of the exact location of the line. (RP 338-39, 408.)

of all the parties was again in accord with regard to maintenance of this area. Mark and Peggy Bubenik testified that they alone maintained the camellia. They cleaned up the blossoms after they would fall and also pruned this significant bush. (RP 62-63, 311.) Tom, Karol and Mike Mauss all acknowledged that they never maintained this camellia. (RP 237-38, 265, 425.) In fact, Mike Mauss acknowledged at trial the Bubenik took care of everything on the other side of the garage retaining wall, including the camellia. (RP 237-38.)

Finally, the parties maintained the garden area (encircled by the rock wall) located between the maple tree and garage retaining wall and camellia consistent with the Observed Line. Mark and Peggy Bubenik testified that they planted some of the rhododendrons on the Bubenik side of the Observed Line they alone performed the sticky and tedious job of deadheading all the substantial rhododendrons on that side of the line. (RP 319-20, 54-57.) Tom, Karol and Mike Mauss, on the other hand, all testified that they never deadheaded these rhododendrons. (RP 245-46, 386-87, 426.)

Mark and Peggy Mauss also testified that they alone maintained the azaleas and planted and maintained the dahlias and daffodils on the Bubenik side of the Observed Line through this garden area. (RP 54-57, 61.) Tom, Karol and Mike Mauss, correspondingly testified that they did

not plant or maintain those flowers. (RP 175-75, 426.) Tom Mauss, knew Bubenik planted and maintained flowers in this area and complimented their efforts, testifying “it’s a pretty garden.” (RP 362.) When Mauss’ fall clean-up crew cut and damaged the flowers on the Bubenik side, Bubenik complained to Mauss (RP 59-60, 323-24), and Mauss apologized and attempted to address the issue (RP 364, 430-31). Thereafter, Mauss notified that the clean-up service was coming and Bubenik put “do not cut” signs at the flowers on their side of the Observed Line. (RP 60-61.)

Mauss, on the other hand, exclusively maintained the trees, bushes and plants on their side of the Observed Line. Mauss pruned the dogwood tree in the rock garden area. (RP 58.) In recent years, Mauss’ tenant has maintained the Mauss side of the observed line. (RP 120-22.) Mauss pointed out the approximate location of the line to which she should perform garden maintenance. (RP 123-24, 128-29, 144.) This line was not identical to the Observed Line, but, as pointed out by Mauss, placed the maple tree on the Bubenik’s property. (RP 123-25, 128.) Mauss’ tenant testified that Bubenik plants and maintains flowers at the base of the maple (RP 137-38), the dahlias, daffodils and japonica in the upland garden area (131-32) and exclusively maintains the camellia further upland at the garage retaining wall (RP 133-34, 144-45). She has also seen Bubenik deadhead the rhododendrons, while she does no such

deadheading. (RP 139, 126.) Consistent with the instruction and line pointed out by Mauss, their tenant weeds, prunes, plants and deadheads on the Mauss side of the Observed Line. (RP 126-31.)

I. Following A Dispute With Henning, Mauss Obtained A Survey In 2009 And, To Bubenik's Surprise Claimed 17 Feet Of Waterfront Beyond The Line That The Parties Observed For 28 Years.

In 2009, Mauss was rebuilding their deck. During that construction, a dispute arose with Henning, Mauss' neighbor to the southwest, regarding the location of their common boundary line. Henning was concerned that Mauss was constructing the deck on Henning's property. (RP 84-85,243, 341-42, 402.) As a result, Mauss retained a surveyor in 2009, AHBL, to survey all the boundary lines of the Mauss property. (Ex. 3, RP 341-42.)

Bubenik learned of the survey when stakes were placed in an area that Bubenik believed was their property. (RP 85.) The location of the survey stakes and survey results were shocking to Bubenik. The AHBL survey line places 17 feet of bulkhead that Bubenik paid for and believed to be their own, as well as all of the three-directional stairs on Mauss' property. (Ex. 3, RP 85-89.) The AHBL line then extends upland to touch the corner of the Bubenik's garage, placing the entire retaining wall for

Bubenik' garage access and the camellia that Bubenik maintained for 30 years on Mauss' property.⁵ (Ex. 3, RP 168-69. *See also*, Ex. 7A, Ex. 4.)

The AHBL survey also places no less than 15 feet of the Mauss bulkhead on the Henning property. (Ex. 3, RP 244-45.) Remarkably, though the survey was the result of the recent 2009 dispute with Henning (RP 341-42, 402, 243-44) and he did not volunteer this information in his extensive deposition testimony (*see* CP 184-85, 180-81), Mauss testified for the first time at trial that he was not surprised by his bulkhead encroachment on the Henning property. Contrary to his deposition testimony that his property line was within no more than four feet of the Henning boat house (RP 377-79), at trial Tom Mauss testified that he was aware of the encroachment in 1995 when the bulkhead was replaced.

At trial, Mauss testified that, during the 1995 construction, he was approached by Henning when approximately 12 feet of his bulkhead remained to be constructed. (RP 354-55.) According to Mauss, Henning stated that the bulkhead remaining to be constructed would be on Henning property. (*Id.*) Mauss testified that he resolved the issue by advising that Mauss would pay for that portion of the bulkhead on the Henning

⁵ The AHBL survey line of the parties respective deed lines (Ex. 3) is slightly different than the Aspen survey line prepared by Dan Johnson (Ex. 4). The AHBL line places more of the Bubenik bulkhead on Mauss property. (*Compare* Ex. 3 to Ex. 4.) Dan Johnson testified at trial to authenticate and explain the basis of his survey. (RP 91-120.) No representative of AHBL, however, testified at trial. Johnson explained the difference between the two lines and why he located the deed line as he did. (RP 95-97, 113-17.)

property. (*Id.*) According to Mauss, this resulted in Mauss paying more for the extra lineal feet on Henning property, supposedly even beyond the cost of his 87 feet that was measured with the contractor, Bubenik and Niquette. (RP 354-55, 382, 396, 399-401.) Unlike in 2009, the purported 1995 dispute with Henning did not lead to a survey by the parties. (RP 355.) Henning was content to allow the encroachment if Mauss paid the “extra” cost of the bulkhead. (RP 354-55, 382, 396, 399-401.)

Though Tom Mauss never affirmatively testified that he knew and understood in 1995 that the three-directional stairs were being constructed wholly on Mauss property or that Bubenik’s bulkhead started several feet northeast of the stairs,⁶ presumably his late testimony regarding the Henning encroachment was to infer he was also aware of the Bubenik / Mauss common deed line. However, Mauss repeatedly testified that he was not aware of the precise location of the boundary line. (RP 363.) Tom Mauss’ also acknowledged that Henning encroachment as surveyed was more severe than he had believed. (RP 403-04.) He was directly contradicted by his son. Mike Mauss testified that, prior to the 2009 survey, his parents were not aware their bulkhead extended 15 feet onto

⁶ Mauss testified that he believed the new three-directional stairs were being constructed in the location of his old concrete stairs. (RP 350-51.) With regard to the boundary line, Mauss only testified that he did not have any belief that the stairs were being specially located in relation to the boundary line, not that the new stairs would fall on one side or the other of the line. (RP 349-50.)

the Henning property. (RP 245.) Mike Mauss testified: “I can speak with pretty good confidence that they weren’t aware.” (*Id.*)

Most importantly, the multiple measurements taken by different individuals all disprove Tom Mauss’ belated testimony that he paid for his 87 feet measured purportedly measured from the deed line between the Bubenik and Mauss properties, plus additional footage for the portion of bulkhead encroaching on Henning property. Tom Mauss did not contradict, but confirmed Bubenik and Niquette’s testimony regarding the bulkhead measurements:

Q. Now, you’ve heard Mr. Niquette and Mr. Bubenik both testify that it was measured in front of your – your log bulkhead was measured from the middle of where the steps are now to the Hennings’ bulkhead, did you not?

A. Okay, yes.

Q. And was there any measurement that you recall that was done that was more than 87 feet?

A. Not that I remember.

(RP 409.)

Of course, the replacement bulkhead was placed in the exact same location as the log bulkhead. (RP 409.) Notably, after this dispute arose, Mauss’ son measured both the Bubenik and Mauss bulkheads from the center point of the stairs (the starting point of the Observed Line). Mike Mauss measured the distance from the center of the stairs to the Bubenik /

Niquette property line. That portion of the bulkhead measured 88 feet. (RP 239-41.) He also measured from the center of the stairs to the beginning of the Henning bulkhead. That measurement was 87 or 88 feet.

Mike Mauss' measurements confirm Bubenik and Niquette's testimony regarding the 1995 measurements and that the new three directional stairs were intended to be centered at the property line. Moreover, the measurements objectively disprove Tom Mauss' claim that he constructed and paid for additional footage of bulkhead beyond the 87 feet measured by the contractor, Bubenik and Niquette back in 1995.

Further confirming that the Observed Line was the basis of the 1995 measurements and construction contracts, Mauss acknowledged at trial that he paid for one-half the cost to construct the shared three directional stairs and only that portion of the bulkhead extending southwesterly (toward Henning) from the stairs. (RP 397-98.) He also acknowledged that Bubenik paid for the other half of the stairs and for the portion of the bulkhead extending northeast (toward Niquette) from the stairs. (*Id.*) Mauss' own testimony confirms that he did not believe he was charged or paid for any of the bulkhead northeast of the stairs (left of the stairs facing upland).

Finally, no easement was granted to either party to ensure continued access to and use of the stairs. (*See* CP 196, Findings 50-51.)

Presumably, if Bubenik and Mauss knew the stairs would be exclusively placed on the Mauss property, an easement would have been prepared and recorded to ensure that Bubenik had access rights through the these stairs that would be there only access to the beach and for which they contributed half the cost. (*See Id.*) No such easement was created.

Mauss' surprise testimony regarding his knowledge of the Henning encroachment and the purported "extra footage" of bulkhead constructed on the Henning property was absolutely and completely disproven by Bubenik, Niquette, Mike Mauss and even Tom Mauss' own testimony, by the 1995 bulkhead payments, by the objective measurements and, finally, the failure of the parties to provide an access easement to ensure Bubenik access via the stairs for which they paid half the cost,

J. The Trial Court Erroneously Confirmed The Deed Line As Surveyed By AHBL And Denied Bubenik Title To the Disputed Area They Maintained Well In Excess Of 30 Years.

Following the 2009 survey, Mauss initially indicated they would not claim the land between the Observed Line and the AHBL survey line. (RP 86-87.) Unfortunately, Mauss did not maintain that position and Bubenik filed a Complaint for Declaratory Judgment and Quiet Title on January 13, 2012. (CP 1-16.) Specifically, they sought to quiet title to the Disputed Area by adverse possession and/or mutual recognition and acquiescence. (CP 5.) Mauss answered the Complaint, but asserted no

counterclaims and made no request for affirmative relief with regard to title. (CP 19-21.) No request was made by either party for the court to resolve the differences between the Aspen survey (Ex. 4) and the AHBL survey (Ex. 3.)

The case was called for a bench trial to the Honorable Garold Johnson on January 10, 2013. (RP 3.) The trial court orally announced its decision on January 18, 2013. (RP (1/18/23) 2-18.) Findings of Fact and Conclusions of Law were entered on February 15, 2013 (CP188-202).

The trial court accepted and made findings consistent with Bubenik's testimony regarding representations by the prior owner on the location of the common boundary line (Findings 9-12), the 1995 measurements (Findings 23-25), Bubenik's understanding regarding location of the stairs (Findings 26-27), and Bubenik's continuous and extended maintenance and use of the Disputed Area (Findings 37-38). (CP 190-94.) However, the trial court embraced Mauss' claimed ignorance and ambivalence regarding the boundary line and related activities, along with the parties' civil and friendly relationship, and concluded this was sufficient to defeat Bubenik's claims. (CP 193-99.)

Though neither party requested it and testimony was not elicited to resolve the discrepancies between the AHBL and Aspen surveys, the trial court affirmatively determined that the AHBL reflects the true common

boundary line and rejected the Aspen survey. (CP 196.) Though Mauss did not assert a counterclaim, the court thereafter, affirmatively quieted title to Mauss consistent with the AHBL survey. (CP 199, 205-07.)

Bubenik moved for reconsideration or a new trial, emphasizing that Mauss' newly asserted testimony regarding the purported 1995 dispute with Henning was so inconsistent with his deposition testimony that it constituted a surprise. (CP 171-79, 180-81, 183-85.) Bubenik also pointed out that Tom Mauss' testimony was contradicted by his son's testimony that his parents were not aware of the significant bulkhead encroachment until the 2009 survey. (*Id.*) The trial court denied Bubenik's motion and Bubenik appealed. (CP 234-35.)

ARGUMENT

A. Standards Of Review.

This Court reviews the findings of fact to determine if they are supported by the substantial evidence in the record. *Irvin Water Dist. No. 6 v. Jackson Partnership*, 109 Wn. App. 113, 119, 34 P.3d 840 (2001). Substantial evidence is a "quantum of evidence sufficient to persuade a fair minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Conclusions of law are reviewed *de novo* to determine if they are supported by the findings of fact. *Bingham v. Lechner*, 111 Wn. App.

118, 127, 45 P.3d 562 (2002); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Put another way, the appellate court reviews conclusions of law to determine whether the trial court "derived proper conclusions of law" from its findings of fact. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

B. The Substantial Evidence Establishes That Bubenik Owns The Disputed Area By Adverse Possession And The Trial Court Thus Erred.

To establish a claim for adverse possession, Bubenik must establish by a preponderance of the evidence that, for a period of ten years, they possessed the Mauss property in question. The possession must be: (1) exclusive, (2) actual and uninterrupted, (3) open and notorious and (4) hostile and under a claim of right made in good faith. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984); *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757-758, 774 P.2d 6 (1989); RCW 4.16.020. Bubenik met their burden.

In this case, the trial court accepted Bubenik's claimed use and maintenance of the Disputed Area for the prescriptive period. The court specifically accepted Bubenik's testimony regarding Bell's representations of the boundary lines and the existence and location of both the steel markers in the log bulkhead and the orange marker in the camellia. (CP 190, Findings 9-12.) The trial court also accepted and found that Bubenik

did the majority of the gardening work in the Disputed Area, including “deadheading rhododendrons, pruning of shrubs, raking, weeding, planting some plants and flowers, watering plants and flowers, trimming branches and sucker sprouts from the maple tree and removing vines from the maple tree.” (CP 194, Findings 37-39.) Finally, the trial court accepted Bubenik’s testimony and found that Bubenik understood the replacement bulkhead was measured and paid for, and the replacement stairs were located, based upon the common boundary line as marked by the steel stake fronting the old log bulkhead. (CP 192-93, Finding 27.) Consistent with this, the court also found that Bubenik paid for installation of 88 feet of bulkhead and Mauss paid for installation of 87 feet of bulkhead. (CP 192, Finding 25.)

Nonetheless, the trial court did not find adverse possession. The trial court concluded that Bubenik’s use and maintenance of the area did not include “acts of such number, intensity, consistency and obtrusiveness to give notice to Mr. and Mrs. Mauss that their property interests were at risk.” (CP 194, Finding 38.) The court held that the parties’ neighborly relationship necessarily rendered Bubenik’s use permissive and not hostile. (CP 195, Findings 41-44.) Finally, the trial court found that Mauss’ claimed lack of awareness regarding the placement of the stairs and measurement of the bulkhead precluded any legal consequence from

those events. (CP 193, Finding 27.) The trial court's findings in this regard and the corresponding legal conclusions are not supported by the substantial evidence or the law.

1. Bubenik's use of the Disputed Area was open and notorious.

In order to establish the open and notorious element of adverse possession, Bubenik must establish that Mauss had actual notice of the adverse use throughout the statutory period or that the land was used in a way that a reasonable person would assume that person to be the owner. *Shelton v. Stickland*, 106 Wn. App. 45, 51, 21 P.3d 1179 (2001); *Chaplin*, 100 Wn.2d at 862.

In this, there can be no dispute that the substantial evidence established an open and notorious claim to the area of the bulkhead from the center of the stairs northeasterly. Mauss does not deny that Bubenik acted as owner and exclusively paid for that section of the stairs and bulkhead without Mauss' contribution. (RP 397-98, 315.) Mauss also testified that he knew Bubenik provided maintenance for the maple for the entirety of Mauss' 30+ year tenancy (RP 395), to include hiring professional tree trimmers without financial contribution from Mauss (RP 394-95, 425.) Upland, the concrete retaining wall to Bubenik's garage physically marked the line of maintenance and Mauss acknowledged they

never maintained the camellia or any other plants on the other side of that retaining wall, but Bubenik did. (237-38, 265, 425.) Finally, with regard to Bubenik's work in the middle, Mauss testified that he was aware of the activity, indicating he was thankful for their efforts and that it was a "pretty garden." (RP 361-62.)

The substantial evidence established that the substantial time and money that Bubenik's dedicated to care for the Dispute Area, especially combined with Mauss' lack of care of this same area, was sufficient to cause a reasonable person to conclude that Bubenik was acting as the owner. However, this was not required, because the testimony from the Mauss family establishes that Mauss had actual notice.

2. Bubenik's use was exclusive.

The trial court next concluded that Bubenik's use was not exclusive. In this regard, the trial court based its conclusion on the parties' shared law maintenance. However, the parties' agreement to share maintenance of this tiny area does not change that the substantial evidence established that maintenance of the remaining and larger portion of the Dispute Area was exclusively by Bubenik.

3. Bubenik's use was hostile.

With regard to the "hostility" element, Washington law does not require that the parties occupying the property subjectively intend to or

even know that they occupy the land of another. *Chaplin, supra*, 100 Wn.2d at 860-61. The fact that the parties previously may not have known the true boundary line is irrelevant. *Reitz v. Knight*, 62 Wn. App. 575, 581, 814 P.2d 1212 (1991). Hostile also does not mean animosity or import ill will, but is a term of art which means that the claimant is in possession as the owner and not in a manner that is subordinate to the title of the true owner. *El Cerrito v. Ryndak*, 60 Wn.2d 847, 854, 376 P.2d 528 (1962); *Malnati v. Ramstead*, 50 Wn.2d 105, 108, 309 P.2d 754 (1957). There is no requirement that the adverse user give the owner express notice of a hostile claim. *Gray v. McDonald*, 46 Wn.2d 574, 579-80, 283 P.2d 135 (1955).

Here the substantial evidence establishes that Bubenik acted as the true owner, as if they had a claim of right to the Disputed Area. They paid for and maintained the bulkhead, the maple tree and the camellia. The regularly planted and cared for flowers in this area. Such activity is consistent with that of a true owner. *Riley v. Andres*, 107 Wn. App 391, 27 P.3d 618 (2001).

Again, Mauss testified that he was aware of Bubenik's gardening. He testified that he did not feel compelled to object or insist on permission because he is a "trustworthy person, and didn't think they were out to get me or anything." (RP 361.) Thus, he testified, it did not "offend" him that

Bubenik did not ask permission. (*Id.*, see also RP 363.) Mauss' subjective interpretation of Bubenik's known activities does not change the fact that Mauss was fully aware of the activity. Acquiescence to a use of land is not the equivalent to permission for the use. *Pedersen v. Washington State Dept. of Transp.*, 43 Wn. App. 413, 418-19, 717 P.2d 773 (1986). Failure of a landowner to interrupt the user is "strong evidence" that the parties thought that the use was done "as a matter of right." *Id.* at 419.

Bubenik's use of the Dispute Area was hostile under the law. That Mauss knew about the use and silently elected not to protest does not make the use permissive. Likewise, that Bubenik conducted their use without sacrificing a neighborly and friendly demeanor does not diminish their use as adverse to Mauss' interests.

4. Bubenik's use was actual and uninterrupted.

Finally, the trial court concluded that because Bubenik did not continuously occupy the every inch of the Disputed Area, the use could not qualify as actual and uninterrupted. Again, the trial court misapplied the law.

Adverse possession does not require establishing a clearly demarcated line. *Riley, supra*, 107 Wn. App. at 396. "The court need not find a 'blazed or manicured trail' establishing a disputed boundary; rather

the court may project a line between objects where it is reasonable and logical and the claimant's use of the land was open and notorious." *Id.* Thus, cases involving adverse possession of strips, such as here, "extending the full length of the residential lots is not unusual." *Mesher v. Connolly*, 63 Wn.2d 552, 388 P.2d 144 (1964).⁷

It is not necessary in such a situation that the adverse possession of an owner of residential property claiming an adjoining tract be limited to the actual ground area of structures or improvements which have been built by him beyond his true line. Nor is erection or the existence of a fence a condition precedent to a claim in adverse possession.

El Cerrito, 60 Wn.2d at 854 (affirming trial court's decision findings adverse possession of a 2 ½ strip for entire length of property). Rather, the court is authorized to extend a reasonable and logical boundary line based upon the general occupation of the area. *Id.*

Such was the case in *Lloyd v. Montecucco*, 83 Wn. App. 846, 854, 924 P.2d 927 (1996). In that case, the Court found that adverse possession had been established. Rather than establish an irregular property line that followed isolated areas of occupation, the court extended a straight line consistent with the general occupation. The court explained its reasoning:

The Lloyds contend the new common boundary

⁷ See *El Cerrito, supra*, (2 1/2 feet by 109 feet); *Mugaas v. Smith*, 33 Wn.2d 429, 206 P. 2d 332, (1949) (3 1/2 feet by 135 feet); *Skoog v. Seymour*, 29 Wn.2d 355, 187 P. 2d 304 (1947) (3 1/2 feet by 172 feet); *Thornely v. Andrews*, 45 Wash. 413, 88 Pac. 757 (1907) (2 feet to 2 feet 7 inches by length of lot).

drawn in the upland tract by the court was in error because the boundary is straight while the Montecucco's actual possession would be more fairly represented by a jagged line. Noting that there is no direct evidence the Montecuccos actually possessed every square yard of the disputed tract, we conclude nonetheless that the trial court's demarcation was proper. Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes. Regarding the straight line between the fence and the bulkhead, courts will project boundary lines between objects when it is reasonable and logical to do so. Courts are not required to find a blazed or manicured trail along the path of the disputed boundary; it is reasonable and logical to project a line between objects when the extent of the adverse possessor's claim is open and notorious as the character of the land and its use require and permit. A steep bank and wooded area do not easily permit a clear demarcation.

Id. at 854 (citations omitted).

Here, the substantial evidence established without contradiction that Bubenik had exclusive responsibility for the bulkhead area and exclusively maintained the maple tree in the Disputed Area. Likewise, the substantial evidence establishes without contradiction that the significant upland point of demarcation of the Observed Line, the Bubenik garage retaining wall and exclusive maintenance of the camellia, established exclusive control of that section of the Disputed Area. This, combined with Bubenik's known gardening activities in the middle garden area

established this element of their adverse possession claim. The trial court erroneously required more than this un-contradicted proof.

Likewise, continuous and uninterrupted use does not require a claimant to prove constant use. “Instead, the claimant need only demonstrate use of the same character that a true owner might make of the property considering its nature and location.” *Double L. Properties, Inc. v. Crandall*, 51 Wn. App. 149, 158, 751 P.2d 1208 (1988). “[I]t has become firmly established that the requisite possession requires such possession and dominion ‘as ordinarily marks the conduct of owners in general in holding, managing and caring for property of like nature and condition.’” *Howard v. Kunto*, 3 Wn. App. 393, 396, 477 P.2d 210 (1970), *overruled on other grds. by Chaplin, supra*, (holding occupancy only during summer months of a beach home did not destroy the continuity of the claimants use, where the surrounding homes were also used as summer recreational retreats). *See also, Reymore v. Tharp*, 16 Wn. App. 150, 153, 553 P.2d 456 (1976) (occupancy during the summer only does not destroy the continuity of possession in adverse possession case); *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997) (holding use of a dock in the summer time only was “continuous and uninterrupted” for purposes of a prescriptive easement analysis because the seasonal use was of the “same

character that a true owner might make of the property considering its nature and location.”).

In this case, Bubenik seasonally maintained the garden area and trees during the times the true owner would be expected to conduct such maintenance. Their maintenance was consistent with that performed by Mauss on the Mauss side of the observed line. The substantial evidence satisfied this final element of adverse possession. The trial court erred when it denied Bubenik’s claim.

C. The Substantial Evidence Establishes That Mauss Acquiesced To And Acknowledged The Observed Line Through Their Actions And The Trial Court Thus Erred.

A boundary line may be established by mutual recognition or acquiescence upon proof by clear, cogent and convincing evidence that

- (1) the boundary line between two properties was certain, well defined, and in some fashion physically designated upon the grounds;
- (2) the adjoining landowners, in the absence of an express boundary line agreement, manifested good faith in a mutual recognition of the designated boundary line as the true line; and
- (3) mutual recognition of the boundary line continued for the period of time necessary (10 years) to establish adverse possession.

Merriman v. Cokely, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). *See also*, *Stewart v. Hoffman*, 64 Wn.2d 37, 390 P.2d 553 (1964); *Scott v. Slater*, 42

Wn.2d 366, 368, 255 P.2d 377 (1953); *Farrow v. Plancich*, 134 Wash. 690, 236 Pac. 288 (1925).

In this case, the trial court rejected the mutual recognition claim because it rejected Bubenik, Niquette and Mauss' actions and agreement regarding the bulkhead replacement as an agreement regarding the common boundary lines. Again, the court accepted Niquette and Bubenik's testimony in this regard as true, but merely found that Mauss was, purportedly, unaware. The substantial evidence does not support the trial court's finding and conclusion.

Importantly, Mauss never contradicted Bubenik and Niquette's testimony regarding the bulkhead measurements, placement of the stairs and the distribution of construction costs. He simply testified that he did not have a good and complete memory of the events. (RP 348-51, 399.) Mauss acknowledged that his bulkhead was 87 feet and he only paid for that portion of the bulkhead southwest of the replacement stairs. (RP 397-98.) The objective measurements by Mauss' own son, confirmed Bubenik and Niquette's testimony. Mauss' bulkhead measured 87 feet from the center of the stairs to the southwest end of Mauss' bulkhead. (RP 239-41.) Finally, the trial court's Finding 51 (CP 196) that, if Mauss and Bubenik knew the stairs were not being centered on the property line, they would have granted pedestrian easements to ensure both parties could use the

stairs they paid for, proves an express agreement. Mauss and Bubenik must have agreed that the stairs were located at the boundary line. Otherwise, the pedestrian easements would have been created. Mauss and Bubenik's exclusive maintenance of their respective sides of this boundary line for the decades following installation of the bulkhead installed, further confirmed this agreement.

Three property owners agreed to pay the significant costs for reconstruction of only their respective bulkheads. The trial court's Finding 51 confirms that this agreement necessarily required a good faith understanding regarding the location of the common boundary lines. The substantial evidence established Bubenik's mutual recognition claim.

D. The Trial Court Erroneously Resolved Survey Discrepancies Without Notice To Bubenik Or Sufficient Evidence And Granted Mauss Affirmative Relief Without A Counterclaim.

As noted earlier, both parties obtained professionally prepared surveys. Mauss obtained a survey prepared by David Follansbee of AHBL in 2009 to address his dispute with Henning. (RP 402-3, Ex. 3.) The AHBL survey was introduced into evidence through testimony from Tom Mauss. (RP 343-44.) Follansbee did not testify at the trial. Thus, the trial court did not receive testimony explaining the basis of his conclusions or confirming his conclusions could be relied upon.

Bubenik obtained a professionally prepared survey from Dan

Johnson of Aspen Land Surveying LLC. (Ex. 4.) The Aspen survey presented two lines for the common boundary line. One was the proposed quiet title line based on instruction with Bubenik consistent with the facts supporting adverse possession and mutual recognition. (RP 93-94, Ex. 4.) The other line, however, was based upon a survey of the deed line. (RP 96-97, Ex. 4.) Dan Johnson, a licensed surveyor (RP 91), testified at trial to authenticate and explain his survey. (RP 91-120.)

The AHBL survey line of the parties respective deed lines (Ex. 3) is slightly different than the Aspen survey line (Ex. 4). The AHBL line places more of the Bubenik bulkhead on Mauss property, and is thus even more detrimental to Bubenik than the Aspen survey line. (*Compare* Ex. 3 to Ex. 4.) Johnson explained the difference between the two lines and why he located the deed line as he did and why his conclusion may be relied upon. (RP 95-97, 113-17.) Again, no representative of AHBL testified to support a conclusion that the AHBL survey line was more reliable.

Though Bubenik did provide limited testimony to support Aspen's surveyed deed line, neither party spent meaningful time addressing the survey discrepancies. This was with good reason. Bubenik's Complaint did not request reconciliation of the two conflicting surveys, but only requested quiet title based upon adverse possession or mutual recognition. (CP 5-6.) Mauss did not assert a counterclaim in their Answer, nor did

they request affirmative relief other than dismissal of Bubenik's claims and attorneys' fees. (CP 19-21.) In his closing argument, Mauss' counsel did not even mention the AHBL survey. (RP 450-64.) With regard to Mauss' requested relief, he concluded his closing argument: "I think this claim fails on all elements of both causes of action. We would ask that it be dismissed." (RP 464.) No affirmative relief was requested.

Only her concluded his closing, the trial court asked Mauss' attorney if he would ask for a ruling that the AHBL survey correctly establishes the boundary line. (RP 464.) Mauss' counsel responded that the AHBL survey was the only recorded survey and "we believe it accurately establishes the boundary line." (*Id.*) Bubenik's attorney appropriately responded in rebuttal, that no evidence was presented that the AHBL line is the accurate line or should be deemed more accurate or reliable than the Aspen survey line. (RP 470.)

CR 8(a) requires that a pleading seeking relief, whether a complaint or counterclaim, "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for relief to which he deems himself entitled." Mauss made not demand for relief at any time in this trial, either in its counterclaim or through a proper motion to amend. Bubenik did not have fair notice that the issue would be resolved. As important, the trial court was not

presented any evidence, much less substantial evidence, that the AHBL survey correctly establishes the true deed line. The trial court's Findings of Facts 47 and 49 are not supported by the substantial evidence and the trial court erred when it quieted title consistent with the AHBL survey.

CONCLUSION

This Court should reverse the trial court and remand with instruction to enter judgment quieting title to the disputed strip to Bubenik.

Dated this 18th day of September, 2013.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 

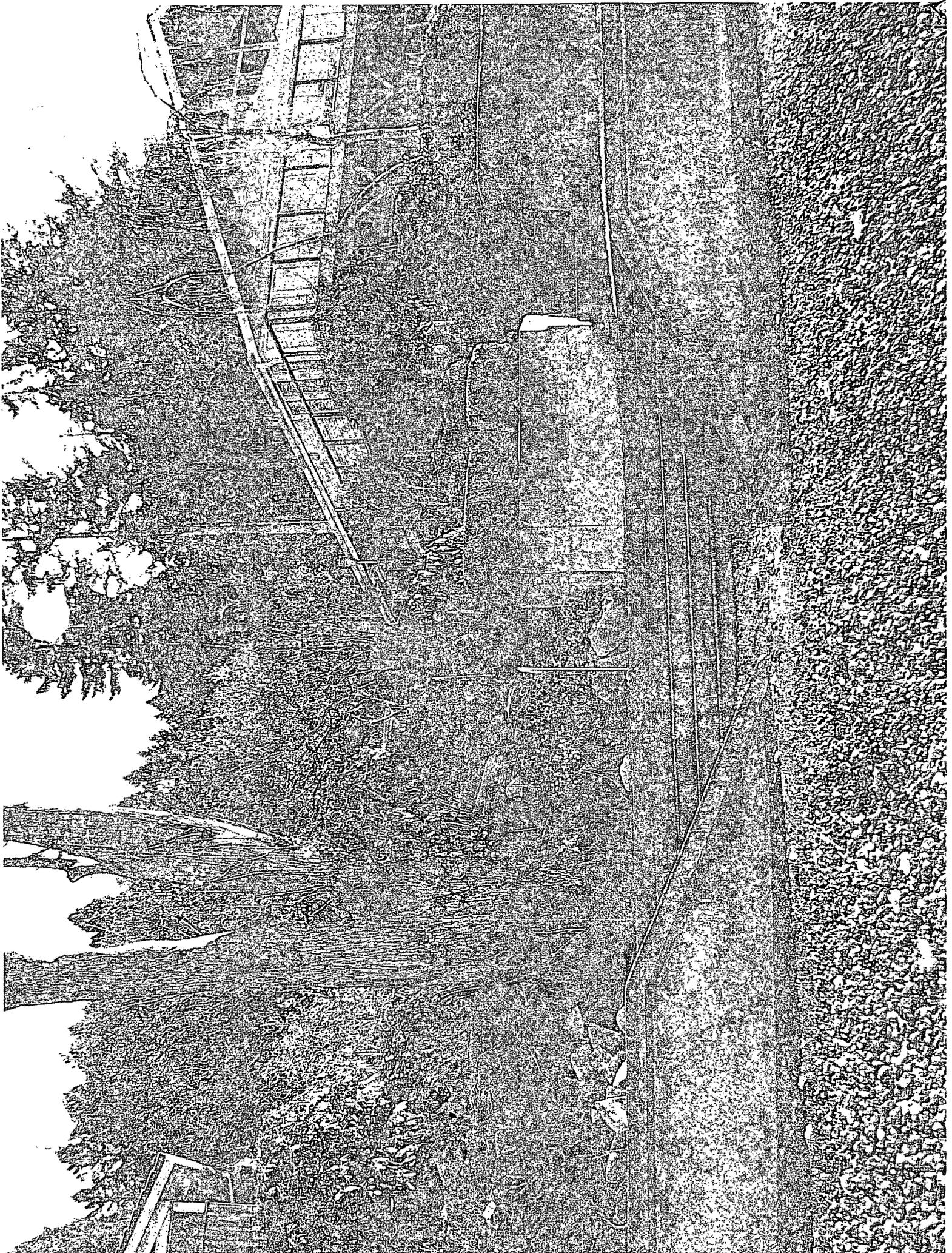
Margaret Y. Archer
Attorneys for Appellants Bubenik
WSBA No. 21224

APPENDIX A

Trial Exhibit 4

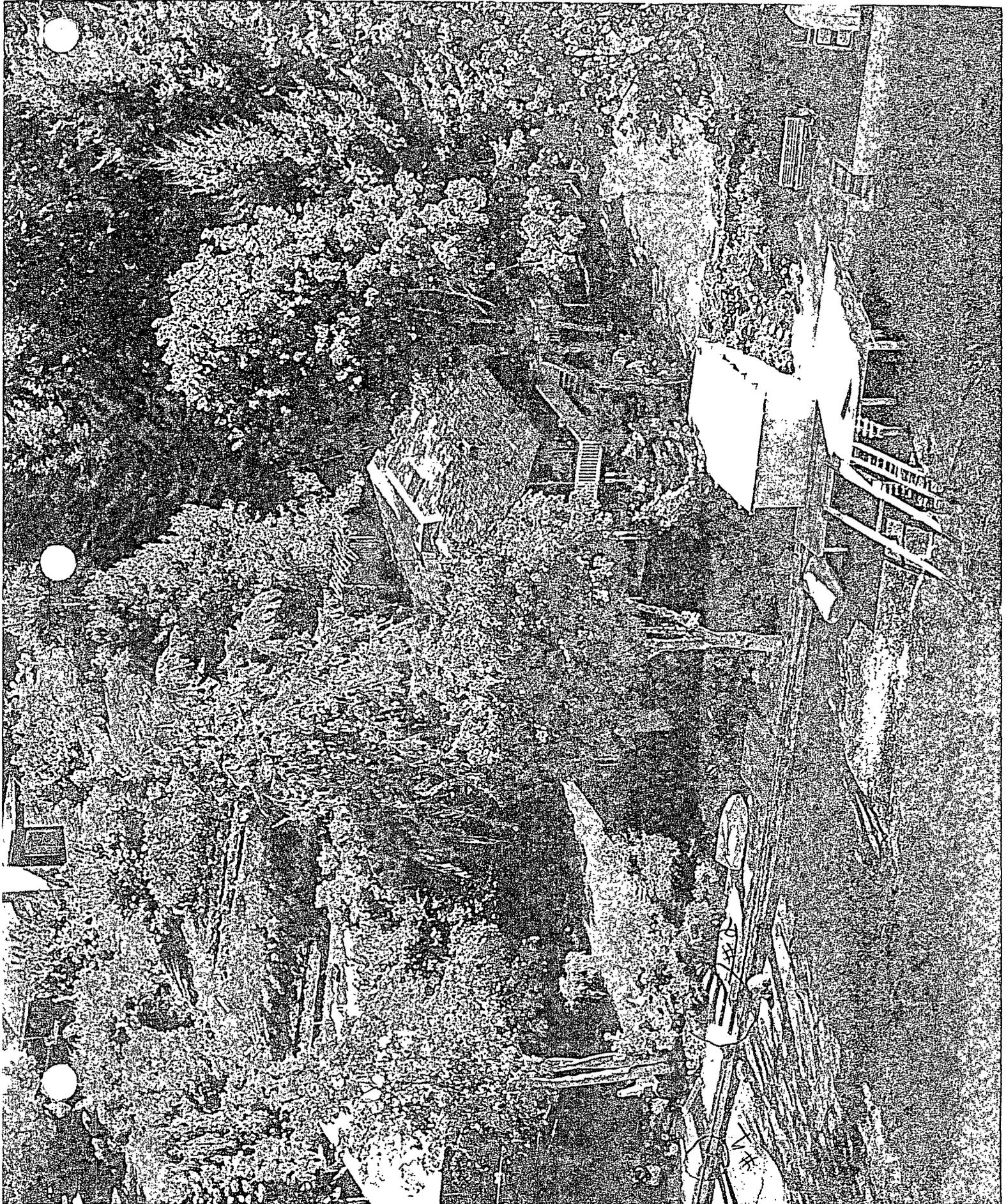
APPENDIX B

Trial Exhibit 16, p. 1



APPENDIX C

Trial Exhibit 20, p. 1



APPENDIX D

Trial Exhibit 7A
(without markings by witnesses)

LEGEND

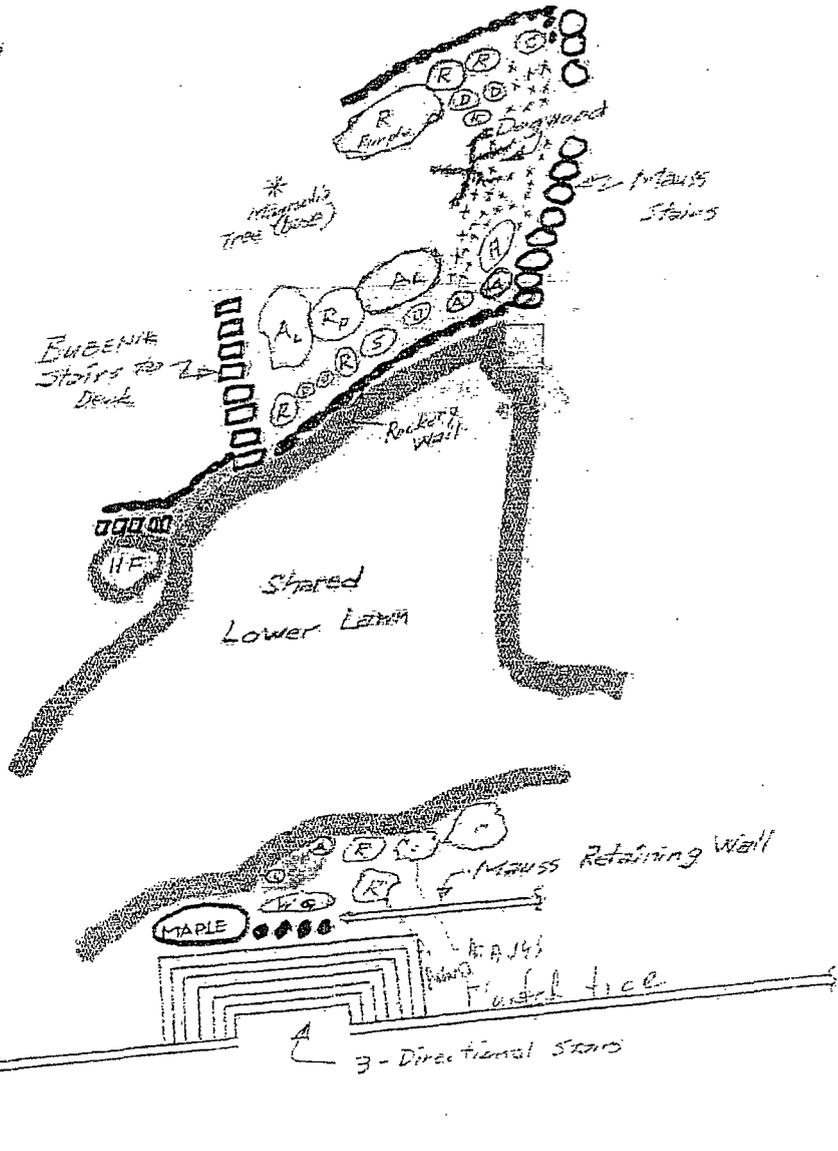
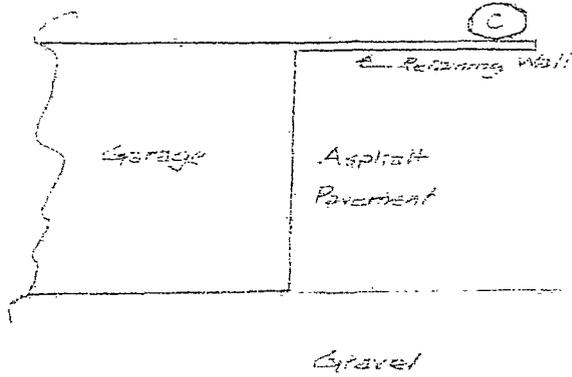
- (R) = Rhododendron*
- (C) = Camellia
- (D) = Dahlia
- (A) = Azalea*
- (R) = Rose
- (L) = Lily (Star gazer)

(WG) = Wild Geranium

*** = Ivy (recently removed)

(HF) = Hardy Fuchsia

NOTE: Sub-letter designates color of plant

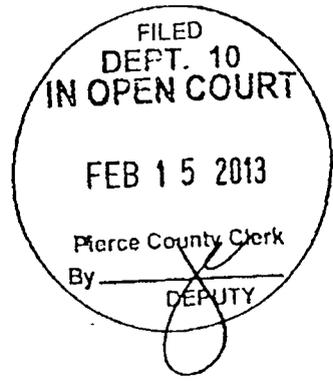


SCALE: 1 inch = 10 feet

APPENDIX E

Findings of Fact and
Conclusions of Law
(CP 188-203)

12-2-05345-1 40027172 FNFL 02-19-13



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

MARK L. BUBENIK and MARGARET
M. BUBENIK, husband and wife and the
marital community comprised thereof,

Plaintiffs,

vs.

THOMAS J. MAUSS and KAROL K.
MAUSS, husband and wife and the marital
community comprised thereof,

Defendants.

NO. 12-2-05345-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come before the court for trial on January 10, 14, 15 and 16,
2013; the plaintiffs appearing through their attorney, Everett Holum; the defendants
appearing through their attorney, James R. Tomlinson of Davies Pearson, P.C.; the court
having heard the testimony of the witnesses and the argument of the counsel; the court
having considered the pleadings and the legal memorandums submitted by the parties;
and the court deeming itself fully advised in the premises makes the following:

Page 1 of 13
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
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ORIGINAL

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FINDINGS OF FACT

1. Plaintiffs Mark Bubenik and Margaret Bubenik, husband and wife, (Bubenik) are the owners of the residential real property located at 8415 104th Street NW in Gig Harbor, WA 98332 and legally described in Plaintiffs' Exhibit 1, a copy of which is attached as **Exhibit A** (the "Bebenik Property").

2. Defendants Thomas J. Mauss and Karol Mauss, husband and wife, (Mauss) are the owners of the residential real property located at 8419 104th Street NW in Gig Harbor, WA, and legally described in Plaintiffs' Exhibit 2, a copy of which is attached as **Exhibit B** (the "Mauss Property").

3. The Bubenik Property and the Mauss Property are adjoining parcels of waterfront property on Henderson Bay. The Bubenik Property lies east of the Mauss Property.

4. The Bubenik Property, as legally described, has a waterfront measurement of 88 feet. The waterfront measurement of the Bubenik Property as legally described is taken at points on the sidelines representing the historical meander or high water line.

5. The legally described waterfront measurement of the Bubenik Property was not at the bulkhead, but rather approximately 27 feet back from the bulkhead near the Bubenik home substantially as shown in the Aspen Survey, Plaintiffs' Exhibit 4.

6. The Mauss Property as legally described has a waterfront measurement of 87 feet.

7. Mr. and Mrs. Bubenik purchased the Bubenik Property from Mr. and Mrs. Bell in 1979. They have lived in the home since that time.

Page 2 of 13
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
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1 8. The Bubeniks did not have the Bubenik Property surveyed when they
2 purchased the Bubenik Property from Bell in 1979. At the time of the purchase, there
3 were no survey markers marking the corners of the Bubenik Property.

4 9. At the time the Bubeniks purchased the Bubenik Property from Bell in
5 1979, Mr. Bell showed Mr. Bubenik a steel stake (Plaintiffs' Exhibit 21) in the ground at
6 the base of the embankment on the upland side of the bulkhead.

7 10. Mr. Bell represented to Mr. Bubenik that he believed the Steel Stake
8 marked a point on the line between the Bubenik Property and the Mauss Property (the
9 Mauss Property was then owned by Fowler).

10 11. At the time the Bubeniks purchased the Bubenik Property from Bell in
11 1979, Mr. Bell also showed Mr. Bubenik an orange ribbon tied in a camellia bush behind
12 a retaining wall adjacent to the southeast corner of the Bubenik garage as shown on the
13 Aspen Survey that is Plaintiffs' Exhibit 4.

14 12. Mr. Bell represented to Mr. Bubenik that the boundary line between the
15 Bubenik Property and the Mauss Property could be observed by standing over the steel
16 stake near the bulkhead and sighting from that point through the camellia bush near the
17 garage to the southeast corner of the property (hereinafter the "Disputed Line").

18 13. The representation by Mr. Bell to Mr. Bubenik that the steel stake and the
19 orange tag on the camellia bush marked the boundary line between the Bubenik Property
20 and the Mauss Property was not correct.

21 14. The steel stake is in fact located approximately 14 feet southwest of the
22 actual legally described Mauss/Bubenik boundary line as extended to the bulkhead.

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24 Page 3 of 13
25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
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1 15. The steel stake and the orange tag on the camellia bush were not sufficient
2 monuments to physically mark, define or otherwise designate an observable boundary
3 between the Bubenik Property and the Mauss Property.

4 16. From the time of the Bubeniks' purchase of the Bubenik Property through
5 the time of trial, the Disputed Line, originally indicated by the steel stake and the orange
6 tag on the camellia bush, has not been otherwise marked, defined or physically
7 designated on the ground by any kind of observable monument, structure, improvement
8 or marker.

9 17. An objective third party could not reasonably identify the location of the
10 Disputed Line based on observable physical monuments on the ground, unless they were
11 told about the location of the steel stake and the camellia bush.

12 18. Mr. and Mrs. Mauss purchased the Mauss Property from Mr. and Mrs.
13 Fowler in 1981. Mr. and Mrs. Mauss have lived in the home since that time.

14 19. Both Mr. and Mrs. Mauss testified that from the time they purchased the
15 Mauss Property through the time of the AHBL survey of the Mauss Property in 2009 they
16 (1) never saw or otherwise knew about either the steel stake or the orange tag on the
17 camellia bush; (2) never discussed either the steel stake or the orange tag on the camellia
18 bush with either Mr. or Mrs. Bubenik; (3) never discussed the Disputed Line with either
19 Mr. or Mrs. Bubenik; and (4) never recognized the Disputed Line indicated by the steel
20 stake and the orange tag on the camellia bush to be the boundary of the property.

21 20. The testimony of Mr. and Mrs. Mauss as described in Finding No. 19 is
22 credible and accepted as truthful.

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24 Page 4 of 13
25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
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1 21. Prior to the AHBL survey of the Mauss Property in 2009, Mr. and Mrs.
2 Mauss did not know that Mr. and Mrs. Bubenik believed the Disputed Line was the
3 boundary line between the two properties.

4 22. Prior to the AHBL survey of the Mauss Property in 2009, Mr. and Mrs.
5 Mauss did not know the location of the boundary line between the Mauss Property and
6 the Bubenik Property. The location of that boundary line was not of concern to either
7 Mr. or Mrs. Mauss.

8 23. In 1995 Mr. Mauss, Mr. Bubenik and Mr. Niquette, a neighbor to the east
9 of the Bubenik Property, agreed to replace the existing bulkhead in front of their three
10 respective properties at the same time using one bulkhead contractor.

11 24. In addition, Mr. Mauss and Mr. Bubenik agreed to share the cost to install
12 new three directional stairs through the bulkhead to the beach to be used by the Bubenik
13 family and the Mauss family, their guest and invitees.

14 25. Niquette paid for the installation of approximately 100.6 feet of bulkhead.
15 Bubenik paid for the installation of approximately 88 feet of bulkhead and ½ the cost of
16 the three directional stairs. Mauss paid for approximately 87 feet of bulkhead and ½ the
17 cost of the three directional stairs.

18 26. At the time of the 1995 meeting on the beach with Niquette, Bubenik,
19 Mauss and the contractor, the contractor determined and/or the parties agreed where to
20 put the three directional stairs.

21 27. Mr. Bubenik testified that the center of the back of the three directional
22 stairs were placed in the location of the steel stake which he believe marked the boundary

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24 Page 5 of 13
25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
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1 line between the Mauss and Bubenik Properties. This testimony is credible as to what Mr.
2 Bubenik personally believed; however, the preponderance of the evidence does not
3 support a finding that Mr. Bubenik communicated to Mr. Mauss his belief that the back
4 of the stairs marked the boundary line between the two properties.

about

5 28. Mr. Mauss testified that the three directional stairs were placed in the
6 same location as his prior stairs, which he believed to be the best location for the stairs
7 based on the topography of the land. This testimony is credible as to what Mr. Mauss
8 personally believed.

9 29. Bubenik and Mauss never expressly agreed that the Disputed Line was the
10 true boundary line between the Bubenik and Mauss properties.

11 30. The location of the three directional stairs did not create, represent or
12 acknowledge any agreement between Bubenik and Mauss regarding the location of the
13 boundary line between the two properties. There was no meeting of the minds between
14 Bubenik and Mauss in that regard.

15 31. The number of feet of bulkhead paid for by Bubenik and Mauss in 1995
16 did not create, represent or acknowledge an agreement between Bubenik and Mauss
17 regarding either the number of waterfront feet each party had at the bulkhead or the
18 location of a boundary line between the two properties. There was no meeting of the
19 minds between Bubenik and Mauss in that regard.

20 32. The center of the back of the three directional stairs is not an observable
21 monument that physically marks, defines or otherwise designates a boundary between the
22 Bubenik Property and the Mauss Property.

23 Page 6 of 13
24 FINDINGS OF FACT AND
25 CONCLUSIONS OF LAW
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1 33. The steel stake was not seen by anyone after the installation of the new
2 bulkhead in 1995 until Mr. Bubenik again located the steel stake in December 2012.

3 34. The "shared lower lawn", as defined in Plaintiffs' Exhibit 7, is an area of
4 grass between the Bubenik home and the Mauss home that lies on both sides of both the
5 legally described boundary line and the Disputed Line.

6 35. Both Mauss and Bubenik cooperatively shared the lawn mowing and lawn
7 maintenance of the shared lower lawn.

8 36. Mauss installed, at their sole expense, a sprinkler system in the shared
9 lower lawn area that extended across both the legally described boundary line and the
10 Disputed Line.

11 37. Mr. and Mrs. Bubenik performed the majority of the gardening work done
12 on the Bubenik side of the Disputed Line in the garden area adjacent to the shared lower
13 lawn; however, Mrs. Mauss, Mike Mauss, and a professional yard clean up services hired
14 by Mauss also worked in and maintained the garden areas on the Bubenik side of the
15 Disputed Line.

16 38. Mr. and Mrs. Bubenik's gardening activities between the legally described
17 boundary line and the Disputed Line included deadheading rhododendrons, pruning of
18 shrubs, raking, weeding, planting some plants and flowers, watering plants and flowers,
19 trimming branches and sucker sprouts from the maple tree, and removing vines from the
20 maple tree. These gardening activities, however, were not acts of such number, intensity,
21 consistency and obtrusiveness as to give notice to Mr. and Mrs. Mauss that their property
22 interests were at risk.

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24 Page 7 of 13
25 FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW
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1 39. Mr. and Mrs. Bubenik's gardening activities did not designate follow or
2 establish a definable line between the Mauss and Bubenik properties.

3 40. Neither the acts of Mr. and Mrs. Bubenik nor the acts of Mr. and Mrs.
4 Mauss manifest a recognition of or acquiescence in the Disputed Line being the true
5 boundary line between the two parcels.

6 41. At all relevant times the Bubenik family and the Mauss family had a
7 warm, friendly, cordial, cooperative and congenial relationship.

8 42. The landscape and topography of the two properties is such that the lawn
9 and garden areas between the homes flow together without any designation of where one
10 property ends and the other begins.

11 43. Neither property owner sought to designate or mind the boundaries to their
12 property. Neither property owner sought to guard their property from intrusion by the
13 other. Neither party cared if the other entered their property for recreational activities,
14 gardening or property maintenance purposes.

15 44. Based on the totality of the circumstances and the 30 year history of the
16 relationship of the parties, both Mauss and Bubenik gave implied permission to the other
17 to enter their property for recreational, gardening, or other domestic purposes.

18 45. None of the acts performed by Bubenik on the Mauss Property exceeded
19 the scope of the Mauss' implied permission to enter their property.

20 46. Mr. and Mrs. Bubenik's gardening activities were performed in a small
21 portion of the total disputed area. Mr. and Mrs. Bubenik did not physically occupy or
22 possess the majority of the area between the actual line and the Disputed Line.

23 Page 8 of 13
24 FINDINGS OF FACT AND
25 CONCLUSIONS OF LAW
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1 47. The Aspen Survey (Plaintiff's Exhibit 4) was prepared for purposes of this
2 litigation to locate and legally describe the Disputed Line. It was not intended to mark
3 the true legally described boundary line. No survey markers were set based on the Aspen
4 Survey. The Aspen Survey was never recorded.

5 48. The AHBL survey (Plaintiffs' Exhibit 3) was prepared for purposes of
6 establishing the true legally describe boundary lines for the Mauss Property. Survey
7 markers were set based on the AHBL Survey. The AHBL survey was recorded on July
8 28, 2009 under Pierce County recording no. 200907285001.

9 49. The AHBL survey recorded on July 28, 2009 under Pierce County
10 recording no. 200907285001 establishes and marks the true legally described boundary
11 between the Mauss Property and the Bubenik Property.

12 50. At the time Mauss and Bubenik agreed to share the cost to construct the
13 three directional stairs in the bulkhead, it was the intent of both Mauss and Bubenik that
14 both the Mauss family, the Bubenik Family, their guests and invitees, and their
15 successors and assigns, would have reasonable pedestrian access to all portions of the
16 three directional stairs and the immediately surrounding beach area.

17 51. The circumstances regarding the construction of the stairs imply that if
18 they had considered or known that the stairs were constructed entirely on the Mauss
19 property, Mauss would have granted a pedestrian access easement across that portion of
20 the Mauss Property between the bulkhead and the adjacent embankment to all portions of
21 the three directional stairs and the immediately surrounding beach area.

22 Based on the foregoing Findings of Fact, the court makes the following:

23 Page 9 of 13
24 FINDINGS OF FACT AND
25 CONCLUSIONS OF LAW
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CONCLUSIONS OF LAW

1. Plaintiff has plead and tried this case based on two causes of action: (1) mutual recognition or acquiescence to a common boundary line; and (2) adverse possession.

2. Mutual recognition or acquiescence to a common boundary line requires 3 essential elements:

- (1) the boundary line between two properties must be clear, certain, well defined, and in some fashion physically designated on the ground, e.g., by monuments, roadways, fence lines, etc.;
- (2) the adjoining landowners, in the absence of an express boundary line agreement, must manifest in good faith a mutual recognition of the designated boundary line as the true line; and
- (3) the mutual recognition of the boundary line must continue for the period of time necessary to establish adverse possession (10 years).

3. All of the essential elements of mutual recognition or acquiescence to a common boundary must be proven by clear, cogent and convincing evidence.

4. Here, the Disputed Line between the two properties was not at any time clear, certain, well defined, or sufficiently physically designated on the ground.

5. There was never an express agreement between Mauss and Bubenik that the Disputed Line was the true boundary line between the two properties.

6. Neither Mauss nor Bubenik sufficiently manifest to the other by their acts a mutual recognition that the Disputed Line was the true boundary line between the two properties.

Page 10 of 13
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
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1 7. To obtain a decree quieting title to the real property of another by adverse
2 possession, the claimant's possession of the disputed property must be:

- 3 (1) open and notorious;
- 4 (2) exclusive;
- 5 (3) hostile; and
- 6 (4) actual and uninterrupted for the statutory period of 10 years.

7 8. All of the essential elements of adverse possession must be proven by the
8 preponderance of the evidence.

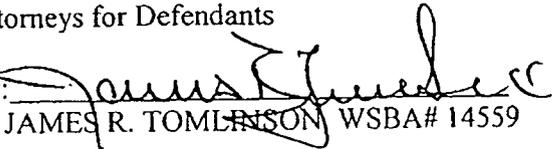
9 9. The acts of Mr. and Mrs. Bubenik on the Mauss Property were not "open
10 and notorious" in that they were not of such a frequency, nature, consistency and/or
11 obtrusiveness as to give notice to Mr. and Mrs. Mauss that their real property interests
12 were at risk.

13 10. Mr. and Mrs. Bubenik did not at any time have "exclusive" possession of
14 the Mauss Property up to the disputed line. Maintenance and use of the disputed area
15 was shared.

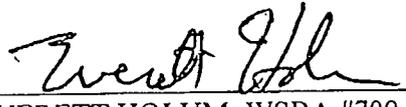
16 11. Mr. and Mrs. Bubenik's occasional use and maintenance of the Mauss
17 Property up to the disputed line was not "hostile". Mr. and Mrs. Mauss allowed Mr. and
18 Mrs. Bubenik to occasionally use and maintain the Mauss Property by neighborly
19 sufferance and acquiescence. Based upon the totality of the circumstances and the
20 relationship between the parties, Mr. and Mrs. Mauss gave Mr. and Mrs. Bubenik implied
21 permission to occasionally use and maintain the Mauss Property.
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Attorneys for Defendants

By: 
JAMES R. TOMLINSON WSBA# 14559

Copy Received, Approved as to Form:

By: 
EVERETT HOLUM, WSBA #700
Attorney for Plaintiffs

Page 13 of 13
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
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EXHIBIT "A"

THE BUBENIK PARCEL

A tract of land in Government Lot 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST of the W.M., in Pierce County, Washington, described as follows:

Commencing at the meander corner to fractional Sections 34 and 35, and running thence North $28^{\circ}18'48''$ East 283.73 feet; thence South $19^{\circ}00'$ East 82.13 feet to a point on the shoreline; thence continue South $19^{\circ}00'$ East 251.51 feet; thence North $53^{\circ}10'$ East 174 feet to the most Easterly corner of a tract of land conveyed to Ralph W. Fowler and Clerissa L. Fowler, husband and wife, by deed recorded August 31, 1954 under Auditor's No. 1692120, and the true point of beginning; thence continue North $53^{\circ}10'$ East 163.77 feet to the most Easterly corner of a tract of land conveyed to W. H. Bell and Florence Bell, husband and wife, by deed recorded under Auditor's No. 1692119; thence north $36^{\circ}50'$ West 255.05 feet; thence South $47^{\circ}33'18''$ West 88 feet to a point bearing North $20^{\circ}17'04''$ West of the true point of beginning; thence South $20^{\circ}17'04''$ East 267.51 feet to the true point of beginning.

TOGETHER WITH land lying between the extended sidelines of the above described tract and the tidelands; AND

TOGETHER WITH tidelands abutting thereon.

EXCEPT therefrom that portion conveyed to Ralph W. Fowler and Clerissa L. Fowler, husband and wife, by deed recorded August 29, 1957 under Auditor's No. 1795719, described as follows:

Commencing at the meander corner to Sections 34 and 35, Township 22 North, Range 1 East of the W.M.; thence running North $28^{\circ}18'48''$ East 283.73 feet; thence South $19^{\circ}00'$ East 82.13 feet; thence North $47^{\circ}33'18''$ East 174 feet to the true point of beginning; thence South $20^{\circ}17'04''$ East 267.51 feet; thence North $53^{\circ}10'$ East 10 feet; thence Northwesterly to true point of beginning.

TOGETHER WITH an easement over a road 20 feet in width, the center line of which is described as follows:

Commencing at the quarter corner of Sections 34 and 35 and running thence on the East and West center line of said Section 35, South $69^{\circ}05'20''$ East a distance of 439.55 feet to the true point of beginning; thence North $7^{\circ}41'30''$ West 198.70 feet; thence North $32^{\circ}58'$ West 201.17 feet; thence North $0^{\circ}50'$ East 213.13 feet; thence North $73^{\circ}37'$ East 137.69 feet; thence North $51^{\circ}28'$ East 112.32 feet; thence North $17^{\circ}45'$ East 195.74 feet; thence on a curve to the left having a radius of 40.00 feet a distance of 100.94 feet; thence South $53^{\circ}10'$ West 367.66 feet to terminus of said center line.

EXCEPT David Day County Road.

EXHIBIT "B"

THE MAUSS PARCEL

A tract of land in Government Lot 3, Section 35, Township 22 North, Range 1 East of the Willamette Meridian, described as follows:
Commencing at meander corner to Sections 34 and 35, Township 22 North, Range 1 East of the Willamette Meridian;

Thence running North 26 degrees, 18 minutes, 48 seconds East 283.73 feet;
Thence South 19 degrees, 00 minutes East 82.13 feet to a point on the shoreline;
Thence North 47 degrees, 33 minutes, 19 seconds East 87.00 feet to true point of beginning;
Thence South 19 degrees, 39 minutes, 43 seconds East 259.49 feet;
Thence North 53 degrees, 10 minutes, East 87.00 feet;
Thence North 20 degrees, 17 minutes, 04 seconds West 267.51 feet;
Thence South 47 degrees, 33 minutes, 19 seconds West 87.00 feet to true point of beginning.

Together with that portion lying between the extended sidelines of the above described tract and the tidelands;

Except from said premises.

A tract of land in Government Lot 3, Section 35, Township 22 North, Range 1 East of the Willamette Meridian, described as follows:

Commencing at meander corner to Sections 34 and 35, Township 22 North, Range 1 East of the Willamette Meridian;
Thence running North 26 degrees, 18 minutes, 48 seconds East 283.73 feet;
Thence South 19 degrees, 00 minutes East 82.13 feet;
Thence North 47 degrees, 33 minutes, 19 seconds East 87.00 feet to true point of beginning;
Thence South 19 degrees, 39 minutes, 43 seconds East 259.49 feet;
Thence North 53 degrees, 10 minutes East 87.00 feet;
Thence northwesterly to the point of beginning.

Together with the following described premises:

A tract of land in Government Lot 3, Section 35, Township 22 North, Range 1 East of the Willamette Meridian, described as follows:

Commencing at meander corner to Sections 34 and 35, Township 22 North, Range 1 East of the Willamette Meridian;
Thence running North 26 degrees, 18 minutes, 48 seconds East 283.73 feet;

LEGAL DESCRIPTION:

(cont)

Thence South 19 degrees, 00 minutes East 82.13 feet;
 Thence North 47 degrees, 33 minutes, 19 seconds East 174 feet to true
 point of beginning;
 Thence South 20 degrees, 17 minutes, 04 seconds East 267.51 feet;
 Thence North 53 degrees, 10 minutes East 10 feet;
 Thence northwesterly to point of beginning.

Also together with second class tidelands abutting thereon.

Together with second class tidelands abutting thereon.

Together with an easement over a road 20 feet in width, the center line
 of which is described as follows:

Commencing at the quarter corner of Sections 34 and 35 and running
 Thence on the East and West center line of said Section 35, South 59
 degrees, 05 minutes, 20 seconds East a distance of 439.55 feet to the
 true point of beginning;
 Thence North 7 degrees, 41 minutes, 35 seconds West 198.70 feet;
 Thence North 32 degrees, 59 minutes West 201.17 feet;
 Thence North 0 degrees, 50 minutes East 213.13 feet;
 Thence North 73 degrees, 37 minutes East 137.69 feet;
 Thence North 51 degrees, 18 minutes East 112.32 feet;
 Thence North 17 degrees, 45 minutes East 195.74 feet;
 Thence on a curve to the left having a radius of 40.00 feet a distance
 of 100.94 feet;
 Thence South 53 degrees, 10 minutes West 167.66 feet.

Situates in the County of Pierce; State of Washington.

PAGE TWO

APPENDIX F

Trial Exhibit 3

REC OF SURVEY
A PORTION OF THE S.W. 1/4 OF THE N.W. 1/4 OF
SECTION 35, TOWNSHIP 22 NORTH, RANGE 01 EAST, W.M.,
PIERCE COUNTY, WASHINGTON.

BASIS OF BEARING
 PER RECORD OF SURVEY 214521-1-05
 FIELD SOUTH LINE OF GOVERNMENT LOT 3
 N 89°49'40" W

LEGAL DESCRIPTION

A TRACT OF LAND IN GOVERNMENT LOT 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS:
 COMMENCING AT MEANDER CORNER TO SECTIONS 34 AND 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN; THENCE RUNNING NORTH 28°18'48" EAST 283.73 FEET; THENCE SOUTH 19°00'00" EAST 82.13 FEET TO POINT OF BEGINNING; THENCE NORTH 47°33'19" EAST 87.00 FEET TO TRUE POINT OF BEGINNING; THENCE SOUTH 19°29'43" EAST 229.49 FEET; THENCE NORTH 53°10'00" EAST 87.00 FEET; THENCE NORTH 20°17'04" WEST 287.51 FEET; THENCE SOUTH 87°25'19" WEST 87.00 FEET TO THE TRUE POINT OF BEGINNING.

TOGETHER WITH THAT PORTION LYING BETWEEN THE ABOVE DESCRIBED TRACT AND THE ISLANDER.

EXCEPT FROM SAID PREMISES

A TRACT OF LAND IN GOVERNMENT LOT 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS:
 COMMENCING AT MEANDER CORNER TO SECTIONS 34 AND 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN; THENCE RUNNING NORTH 28°18'48" EAST 283.73 FEET; THENCE SOUTH 19°00'00" EAST 82.13 FEET TO POINT OF BEGINNING; THENCE NORTH 47°33'19" EAST 87.00 FEET TO TRUE POINT OF BEGINNING; THENCE SOUTH 19°29'43" EAST 229.49 FEET; THENCE NORTH 53°10'00" EAST 10.00 FEET; THENCE NORTHWESTERLY TO THE POINT OF BEGINNING.

TOGETHER WITH THE FOLLOWING DESCRIBED PREMISES

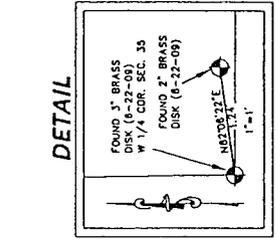
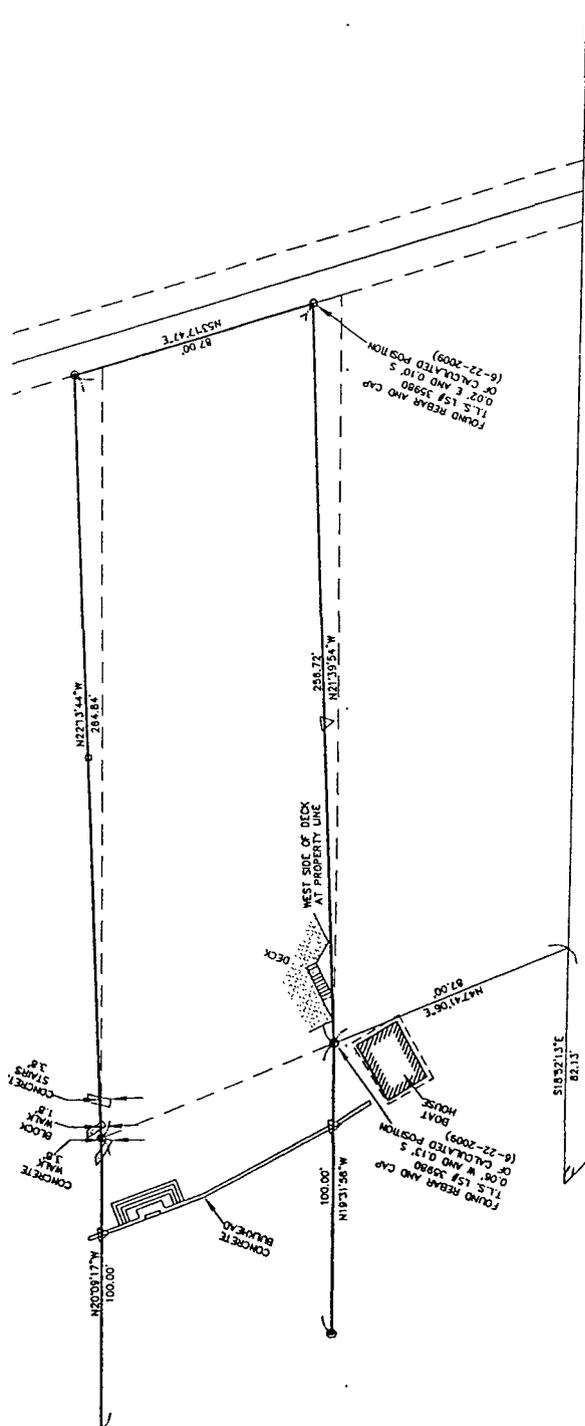
A TRACT OF LAND IN GOVERNMENT LOT 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS:
 COMMENCING AT MEANDER CORNER TO SECTIONS 34 AND 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN; THENCE RUNNING NORTH 28°18'48" EAST 283.73 FEET; THENCE SOUTH 19°00'00" EAST 82.13 FEET TO POINT OF BEGINNING; THENCE NORTH 47°33'19" EAST 87.00 FEET; THENCE SOUTH 19°29'43" EAST 229.49 FEET; THENCE NORTH 53°10'00" EAST 10 FEET; THENCE NORTHWESTERLY TO POINT OF BEGINNING.

ALSO TOGETHER WITH SECOND CLASS ISLANDS ABUTTING THEREON.

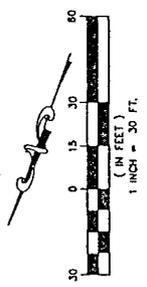
TOGETHER WITH AN EASEMENT OVER A ROAD 20 FEET IN WIDTH, THE CENTER LINE OF WHICH IS DESCRIBED AS FOLLOWS:

COMMENCING AT THE QUARTER CORNER OF SECTIONS THIRTY-FOUR (34) AND THIRTY-FIVE (35) AND RUNNING THENCE ON THE EAST AND WEST CENTER LINE OF SAID SECTION THIRTY-FIVE (35), SOUTH 89°05'00" EAST A DISTANCE OF 100.00 FEET TO POINT OF BEGINNING; THENCE NORTH 74°11'30" WEST 108.70 FEET; THENCE NORTH 32°25'00" WEST 201.17 FEET; THENCE NORTH 0°30'00" EAST 213.13 FEET; THENCE NORTH 73°37'00" EAST 137.89 FEET; THENCE NORTH 51°18'00" EAST 157.22 FEET; THENCE ON A CURVE TO THE LEFT HAVING A RADIUS OF 40.00 FEET A DISTANCE OF 106.94 FEET; THENCE SOUTH 53°10'00" WEST 387.86 FEET.

ALL IN PIERCE COUNTY, WASHINGTON.



- LEGEND**
- FOUND MONUMENT
 - FOUND REBAR AND CAP
 - SET 5/8" REBAR AND CAP
 - △ SET MAGNETIC NAIL AND FLASHER
 - SET IRON AND TACK ON
 - (C) CALCULATED
 - (R) PER LEGAL DESCRIPTION



SURVEYOR'S CERTIFICATE
 I, DAVID C. FOLLANSBEE, A PROFESSIONAL LAND SURVEYOR IN THE STATE OF WASHINGTON, HEREBY CERTIFY THAT THIS MAP REPRESENTS A TRUE AND CORRECT COPY OF THE ORIGINAL RECORDS OF THE SURVEY RECORDING ACT, CHAPTER 58.09 R.C.W. AND 332-130 W.A.C., AT THE REQUEST OF THOMAS J. MAUSS.

SURVEY FOR
 THOMAS J. MAUSS
 8419 104TH ST. NW
 GIG HARBOR, WA 98332-0448

EQUIPMENT USED
 3" TOTAL STATION USING STANDARD FIELD TRAVERSE METHODS FOR CONTROL AND STAKING.

AUDITOR'S CERTIFICATE
 FILED FOR RECORD THIS DAY OF _____, 20__ AT _____ MINUTES PAST _____ OF THE PIERCE COUNTY AUDITOR, TACOMA, WASHINGTON.
 RECORDING NUMBER _____

PIERCE COUNTY AUDITOR

SEE

BY

DATE	6/23/09
TAD/RID	
CHECKED BY	JB
JOB NO.	209281.50

DAVID C. FOLLANSBEE
 PROFESSIONAL LAND SURVEYOR
 2215 North 300th Street, Suite 300, Tacoma, WA 98403
 206.257.2415 TEL
 1200 Sixth Avenue, Suite 1670, Seattle, WA 98101

DAVID C. FOLLANSBEE, PLS 45181

DATE _____

FILED
COURT OF APPEALS
DIVISION II

2013 SEP 19 PM 1:12

STATE OF WASHINGTON
BY 
DEPUTY

COURT OF APPEALS, DIVISION II
OF STATE OF WASHINGTON

MARK L. BUBENIK and MARGARET
M. BUBENIK, husband and wife
and the marital community
comprised thereof,

NO. 44689-8

CERTIFICATE OF SERVICE

Appellants,

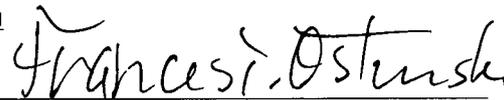
vs.

THOMAS J. MAUSS and KAROL K.
MAUSS, husband and wife and the
marital community comprised
thereof,

Respondents.

THIS IS TO CERTIFY that on this 18th day of September, 2013, I
did serve via email and U.S. Postal Service, true and correct copies of
Appellants Bubeniks' Opening Brief by addressing for delivery to the
following:

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Ingrid McLeod
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jtomlinson@dpearson.com



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