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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 47033-I-II

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

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CASEY W. DOUGHERTY,

Appellant/Plaintiff

v.

HOLIDAY HILLS COMMUNITY CLUB, INC.,

Respondent/ Defendant

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR. The trial court erred as follows:

1. Plaintiff's Motion to Strike. Appellant withdraws this Assignment of Error.
2. Plaintiff's Motion for Summary Judgment. The trial court erred in denying Plaintiff's Motion for Summary Judgment, granting Defendant's Motion by order dated **November 26, 2014**.
3. Defendant's Motion for Summary Judgment. The trial court erred in granting Defendant's Motion for Summary Judgment by order dated **December 5, 2014**.
4. Motion's for Reconsideration. Appellant withdraws this Assignment of Error as the issues raised are covered in the other sections of this brief.

B. Issues Relating to Assignment of Error.

1. The undersigned counsel is new to this matter and has decided to withdraw Plaintiff's assignment of error with respect to Plaintiff's Motion to strike, for the sake of judicial economy, as the issues in that motion are not dispositive of the issues in this matter.

2. The trial court erred in denying Plaintiff's Motion for Partial Summary Judgment and granting Defendant's request for Summary Judgment in the November 26, 2014 Order by:

- a. Denying Plaintiff's claim that Defendants did not have an express easement across his property for existence of either the Old or New water tanks.

- b. Denying Plaintiff's claim that the Old Tank existed on Plaintiff's property only by permissive license, which would defeat a finding of adverse possession, or mutual recognition and acquiescence theories.
- c. Denying Plaintiff's claim that Defendant cannot establish a claim for the location of the Old Tank by Prescriptive Easement.
- d. Denying Plaintiff's claim that the New Tank is not located within any easement, including the "F-3" Easement, and has not been at its current location within the requisite period of time to establish a claim of adverse possession or an easement by prescription.
- e. Denying Plaintiff's claim that there is no prescriptive easement or mutual recognition and acquiescence for the land under the New Tank because it has not been held for the required 10 years pursuant to RCW 4.16.020
- f. Granting Defendant an easement for access to the old tank based on a finding of an express grant in the original plat map ("F-3 Easement).
- g. Granting a prescriptive easement, "to the extent necessary" based on the Pierce County Hearings Examiner's Report and Decision on a variance, supporting expansion of said easement in 2011 to the new location.

3. The trial court erred in granting Defendant's Motion for Summary Judgment entered on December 5, 2014 by:

- a. Not finding that the HHCC did not properly amend the bylaws to increase dues and/or approve a large capital improvement.
- b. Not finding that since the assessment was not lawfully imposed, it is void, and thus was not lawfully assessed against Appellant.

- c. Not finding that there are issues of fact precluding summary judgment on the issue of the HHCC assessments, with respect to notice, or lack thereof for meetings where dues were increased.

## II. STATEMENT OF THE CASE

### A. Underlying Facts.

This appeal results from an action by Appellant (Plaintiff, Casey Dougherty – “Dougherty”), an individual who purchased lots 24 and 25 in the Alder View Estates Plat (“AE”) in January of 2011, for quiet title; injunctive relief; and declaratory relief pertaining to a water tank located on his property which benefits the members of the Respondent (Defendant, Holiday Hills Community Club Inc. - “HHCC”) (CP 3-10).

At the time Dougherty purchased his property, there was a 20,000 gallon water tank serving HHCC in a building between AE 24 and 27 (“Old Tank”) (CP73). It is undisputed that Dougherty holds the deed to AE 24. It is undisputed that Respondent holds no recorded (fee simple absolute) title to lot AE 24. It is undisputed that Respondent holds no recorded easement over AE 24 at the top of Nob Hill. It is disputed that the Old Tank was installed in approximately 1981 with the permission of Appellant’s predecessor in interest. (CP 126, CP 136-137).

Construction of a “new tank” was commenced on Lot AE 24 at a

completely different location on said lot, on or about February of 2011, approximately simultaneously with Dougherty closing on the property (CP 251, CP 266). It is undisputed that HHCC does not hold an easement for the location of the new tank. In fact, Respondent acknowledges in its Variance hearing before the Pierce County Hearings Examiner that HHCC “owns no land” and that “this parcel is the only place they have **permission** to place the tank, as one is present there now” (Emphasis added) (CP 136-137). Furthermore, through multiple documents, other evidence was presented to the trial court demonstrating that the Respondent did not have an easement for the location of the new tank (CP 142, CP 153, CP 201). It is undisputed that HHCC has never engaged with Dougherty to lease the property where either the old tank was located, or where the new tank is installed now. After possession of the property, Dougherty began correspondence with HHCC regarding his concerns about the new tank, trying to negotiate lease terms or some acceptable resolution to the installation of the new tank. HHCC has been unwilling to execute a lease with Dougherty or acknowledge his property rights, which led to the filing of this lawsuit. Dougherty, or his predecessor in interest, has paid all real estate taxes on the land for AE 24 and 25 since 1979.<sup>1</sup>

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<sup>1</sup> (CP 262)

B. Procedural History.

This lawsuit was filed by Appellant on December 26, 2013, to establish rights and responsibilities with respect to an old and new water tank existing on his property, the latter of which currently serves water to approximately 60 properties in the area. Respondent counterclaimed to establish its own property interests. Appellant is a non-practicing attorney who represented himself at the trial court level.

Appellant filed a motion for Summary Judgment on various issues listed above. Appellant's motion was denied. Respondent moved the court for summary relief in its response, which was granted. Respondent then filed a Motion for Summary Judgment, which was granted. Appellant filed timely Motions for Reconsideration of both orders, both of which were denied. Appellant filed a timely appeal of all orders entered by the court.

Because of the number of complex issues in this case as it is, the undersigned has eliminated, as indicated above, some of the Assignments of Error designed by Appellant when he was pro-se, not necessarily because Appellant's assignments of error were incorrect, but that perhaps they were not necessary for the determination of the issues herein by the Appellate Court.

### III. ARGUMENT

#### **A. Standard of Review**

When reviewing a trial court's ruling on a question of law, the appellate court reviews the question de novo. Columbia Cmty. Bank v. Newman Park, LLC, 177 Wash. 2d 566, 573, 304 P.3d 472, 475 (2013).

#### **B. Standard on Summary Judgment**

*In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. \*\*\* If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which that party will bear the burden of proof at trial, then the trial court should grant the motion. \*\*\**

Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 225, 770 P.2d 182 (1989)(internal cites omitted).

When considering such evidence, the Court must apply the same evidentiary burden as will exist at trial. Gossett v. State Farm Ins., 133 Wn.2d 954, 973, 948 P.2d 1264 (1997). Mere speculation, conclusory allegations, argumentative assertions or affidavits taken only at face value do not suffice; nor will self-serving affidavits which merely contradict the defendant's allegations. Vacova Co. v. Farrell, 62 Wn.App. 386, 395, 814 P.2d 255 (1991).

Summary Judgment should be granted when there are no genuine

issues of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56(c). A material fact is one that affects the outcome of the litigation. Ruff v. County of King, 125 Wash.2d 697, 703, 887 P.2d 886 (1995). Although facts and inferences must be viewed in the light most favorable to the nonmoving party Jones v. Allstate Ins. Co., 146 Wash.2d 291, 300, 45 P.3d 1068 (2002), a fact question is not created by pointing out a mere difference in possible factual outcomes. That is because summary judgment is appropriate if reasonable persons could reach only one conclusion. Venwest Yachts, Inc. v. Schweickert, 142 Wn.App. 886, 893, 176 P.3d 577 (2008).

### **C. Substantive Legal Authority**

#### 1. The Court Erred in Denying Plaintiff's Motion for Partial Summary Judgment and Granting Defendant's Motion for Partial Summary Judgment.

##### a. Plaintiff owns Lot 24 under the Old Tank, and Defendant does not have an Express Easement for a water tank.

Any express conveyance of real estate must have been in writing and recorded to be enforceable against the plaintiff. Pardee v. Jolly, 663 Wash 2d. 558, 567; 182 P.3d 967, 972 (2008). Pardee explains the requirements of the Statute of Frauds as follows:

*"The statute of frauds, by its terms, applies to "[e]very conveyance of real estate, or any interest therein, and every contract creating*

or evidencing any encumbrance upon real estate."<sup>2</sup> ... Under the statute of frauds, contracts for the sale or conveyance of real property must include a legal description of the property.<sup>3</sup> ... A contract for the sale or conveyance of platted real property must include a description of the property with the correct lot number, block number, addition, city, county, and state.<sup>4</sup>"

Id.

Easements are also subject to the Statute of Frauds. McPhaden v. Scott, 95 Wn.App 431, 434-435; 975 P.2d 1033 (1999), which explains the applicability as follows:

*"Easements are interests in land.<sup>5</sup> ... As such, express easements must comply with the statute of frauds, which requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed[.]"<sup>6</sup> ... Deeds must "be in writing, signed by the party to be bound thereby, and acknowledged[.]"<sup>7</sup> ... But no particular words are necessary to constitute a grant of easement. "[A]ny words which clearly show the intention to give an easement ... are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms."<sup>8</sup> ... "*

In the instant case, the AE plat map shows no space for any water tank at the top of Nob Hill' (CP 153). The creator of the plat contemplated

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<sup>2</sup> Quoting RCW 64.04.010.

<sup>3</sup> Quoting Key Design, Inc. v. Moser, 138 Wash.2d 875, 881, 983 P.2d 653, 993 P.2d 900 (1999).

<sup>4</sup> Quoting Martin v. Seigel, 35 Wash.2d 223, 229, 212 P.2d 107 (1949).

<sup>5</sup> Quoting Bakke v. Columbia Valley Lumber Co., 49 Wash.2d 165, 170, 298 P.2d 849 (1956) (citation omitted).

<sup>6</sup> Quoting RCW 64.04.010; Berg v. Ting, 125 Wash.2d 544, 551, 886 P.2d 564 (1995).

<sup>7</sup> Quoting RCW 64.04.020.

<sup>8</sup> Quoting Beebe v. Swerda, 58 Wash.App. 375, 379, 793 P.2d 442 (1990) (citations omitted).

a water system that did not use such a tank, and reserved no easement for placement of one, instead relying upon the Mid-Level Tank. *Id.*

Andrew and Mildred Munden owned AE 24 and 25 since November 1979<sup>9</sup> until they contracted to sell the lots to Dougherty in January of 2011<sup>10</sup>. Dougherty has owned the lots from 2011 to present<sup>11</sup>. There is no other filed deed purporting to transfer interest in AE 24 or 25, save for the deed from the Estate of Moore to HHCC in 1981. Further, since Munden, the owner of AE 24 and 25 in 1981, did not sign the deed between Moore and HHCC, the rule set forth in *McPhaden* (quoting *Bakke*), shows that Munden did not grant a deed to HHCC over his interest in the property.

None of the recorded easements on AE 24 and 25 permit HHCC to build a water tank, pump house, water lines or riprap pad at the top of AE 24 or 25. The easements impacting AE 24 or 25 include:

- 1) An easement, restricted to the use and benefit of owners of land on the top of Nob Hill, allowing the owners of those lots to access their homes and build utility lines.<sup>12</sup>
- 2) An easement permitting Alder Mutual light to put in a power line to provide power only to those homes at the top of Nob Hill.<sup>13</sup>
- 3) An easement permitting access and utilities to HH via a specified route within AE.<sup>14</sup>

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<sup>9</sup> (CP 262)

<sup>10</sup> (CP 216)

<sup>11</sup> (CP 216)

<sup>12</sup> (CP 152)

<sup>13</sup> (CP 153-155)

<sup>14</sup> (CP 152-156)

- 4) An easement for access and utilities along a specified route for AE lots 1 through 8.<sup>15</sup>
- 5) An easement for a water system, reserved to Daryl Moore, but for purposes of the rights of AE 24 and 25, only at the mid - level of AE 24 and 25 along the road.<sup>16</sup> This included the water system itself as built in 1976 and an easement on AE 24 of approximately 20' x 80' at the mid-level of Nob Hill for the Mid-Level Tank<sup>17</sup>.

The Pierce County hearing examiner found when granting the variance for the New Tank that there was a “leasehold interest” in the property under the Old Tank.<sup>18</sup> However, there is no evidence that such alleged leasehold interest, or its terms, were in writing, or publically recorded, as required by RCW 64.04.010<sup>19</sup>. Further, the existence of such interest is contradicted by the seller disclosure statement Munden provided to Dougherty in conjunction with the 2011.1.17 real estate contract, and Dougherty has been unable to locate any evidence supporting Pierce County’s finding.<sup>20</sup>

Daryl Moore’s Estate’s deed to Holiday Hills of 1981 was of the portion of the water system he owned at the time and the associated “easements of record.”<sup>21</sup> The only easements of record were those recorded in the AE plat map of 1976 and the HH plat map of 1964<sup>22</sup>. Those only encompassed easement 5, noted above (an easement at the

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<sup>15</sup> (CP 153, 155)

<sup>16</sup> (CP 153, 155)

<sup>17</sup> (CP 153, 155)

<sup>18</sup> (CP 133)

<sup>19</sup> (CP 126)

<sup>20</sup> (CP 217)

<sup>21</sup> (CP 124)

<sup>22</sup> (CP 78, Line 12)

mid-level of Nob Hill, the Mid-Level Tank and the easements explicitly reserved to Moore on the AE plat map).<sup>23</sup>

In absence of any evidence of a filed deed to the contrary, the court should find that there was no express conveyance of real estate whatsoever for the benefit of HHCC pertaining to Appellant's property.

b. Any use of Appellant's property for the Old Tank was permissive, and therefore Respondents cannot establish a property interest by Adverse Possession.

The use by the public is presumed to be permissive where land is wild, uncultivated and unenclosed. Turner v. Davisson, 47 Wash. 2d 375, 384-85, 287 P.2d 726, 732 (1955).

Furthermore, with respect to permissive use as it intersects with the theory of adverse possession Washington Courts have held as follows:

*To prove adverse possession, the ... [party claiming adverse possession] must prove that they possessed the ... [area] in a manner that was (1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted for the statutory period of 10 years.<sup>24</sup> ... [and] must establish each element by a preponderance of the evidence.<sup>25</sup> ... Permission, express or implied, from the true owner negates the hostility element because permissive use is inconsistent with making use of property as would a true owner.<sup>26</sup> ... In adverse possession cases, "hostile" does not mean animosity; rather, it is a term of art which means that the claimant possesses property in a*

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<sup>23</sup> Id.

<sup>24</sup> Quoting RCW 4.16.020(1) and Chaplin v. Sanders, 100 Wash.2d 853, 857-62, 676 P.2d 431 (1984).

<sup>25</sup> Quoting Varrelman v. Blount, 56 Wash.2d 211, 211-12, 351 P.2d 1039 (1960).

<sup>26</sup> Quoting Chaplin at 861-62.

*manner not subordinate to the title of the true owner.<sup>27</sup> ...To prove hostility, the claimant must produce evidence showing that he treated the property as would a true owner throughout the statutory period.<sup>28</sup> ...An adverse possessor bears the burden of proving that permission terminated either because (1) the claimant asserted a hostile right or (2) the servient estate changed hands through death or alienation.<sup>29</sup> ... [P]ermissive use cannot ripen into prescriptive use unless distinct change in use provides notice to owner.<sup>30</sup> We determine when the permissive use terminates based on the viewpoint of the party who granted the permission.<sup>31</sup> ... An adverse possessor has the burden of showing that the permission terminated and that the original owner had notice of the adverse use.<sup>32</sup> ... The claimant's subjective beliefs and intent are not relevant, but permission, express or implied, from the true owner negates the hostility element as a matter of law because permissive use is inconsistent with making use of property as would a true owner.<sup>33</sup> Teel v. Stading, 228 P.3d 1293, 1295, 1296 (2010)*

HHCC's use of the land under the Old Tank, Old Lines and Nob Hill Road was permissive and its use did not change to permit that permission to ripen into adverse possession (or an easement by prescription). Furthermore, HHCC's use of the property was solely for construction, access, and maintenance of the water tank and for no other purpose. Respondent does not allege use for any other purposes. Respondent claims a right to use under an "F-3 Easement", arguing it was a "covered utility" under that easement, rather than an adverse

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<sup>27</sup> Quoting El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 854, 376 P.2d 528 (1962).

<sup>28</sup> Quoting Chaplin at 860-61.

<sup>29</sup> Quoting Miller v. Anderson, 91 Wn. App. 822, 829, 964 P.2d 365 (1998) (other cites omitted).

<sup>30</sup> Quoting rule from Ormiston v. Boast, 68 Wn.2d 548, 551, 413 P.2d 969 (1966).

<sup>31</sup> Quoting Miller at 829.

<sup>32</sup> *Id.* At 832.

<sup>33</sup> Quoting Chaplin at 861-62.

claim against the fee simple interest in the property. (CP 287).

Respondent cannot argue this both ways.

In the instant case, in addition to the required presumption of permission<sup>34</sup>:

- (1) Defendant's records also show that Munden granted permission to build the Old Tank and Old Lines, and the nature of use never changed. (CP 126, 199)<sup>35</sup>
- (2) Defendant's pleadings acknowledges that Munden granted permission and that he actually helped to construct the water system (CP 12, line 10)<sup>36</sup>
- (3) Defendant acknowledged before the Pierce County Hearings Examiner that it had "permission" for the location of the old tank (CP137).

To prove Respondent's use became hostile or adverse, HHCC must show that "permission terminated either because (1) the claimant asserted a hostile right or (2) the servient estate changed hands through death or alienation."<sup>37</sup>

From the time the Old Tank and Old Lines were built until 2011, Munden owned AE 24 and 25 and the land did not change hands

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<sup>34</sup> *Petersen* at 486.

<sup>35</sup> The court excluded these documents based on a hearsay objection by Respondent. However, CP 126 were discovered in Respondent's business records produced in discovery, authenticated by Respondent author (CP 410), and are an admission by party opponent. See ER 801(d)(2); 803(a)(5); 803 (a)(6).

<sup>36</sup> When a pleading or affidavit is properly made and is un-contradicted, it may be taken as true for purposes of passing upon the motion for summary judgment. Leland v. Frogge, 71 Wash. 2d 197, 200, 427 P.2d 724, 727 (1967)

<sup>37</sup> *Teel* at 1296.

through death or alienation<sup>38</sup>. Further, HHCC continued to use the Old Tank, Old Lines, and Nob Hill road in the same way Munden had contemplated from the time he granted permission through 2011.<sup>39</sup> The claim of HHCC to adverse possession over the land under the Old Tank, Old Lines and Nob Hill Road must fail because the use was permissive and not hostile.

The court rendered the issue of adverse possession “moot” when it found that Respondent had express easement rights and/or prescriptive rights. The court should have ruled on the issue of adverse possession, and based on the clear and undisputed facts, Respondent’s claim for adverse possession should have been dismissed.

The Appellant is entitled to attorney’s fees and costs pursuant to **RCW 7.28.083(3)**, as Appellant should clearly be the prevailing party on Respondent’s adverse possession claims.

c. The court should find that Respondent cannot demonstrate that it has a prescriptive easement for location of the Old Tank, as is the case with Respondent’s Adverse Possession Claim, the location and use of the tank was and has always been permissive.

The law disfavors prescriptive easements.<sup>40</sup> Although the 2<sup>nd</sup> division has not explained this disfavor, the first division suggests that

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<sup>38</sup> (CP 263)

<sup>39</sup> (CP 71 – Generally)

<sup>40</sup> See Nickell v. Southview, 271 P.3d 973, 979, 167 Wn. App. 42 (2012).

“[p]rescriptive easements are disfavored because they effect a loss or forfeiture of the rights of the owner.”<sup>41</sup>

*A claimant must prove the following elements to establish a prescriptive easement: (1) a use adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for the entire prescriptive period; and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights.*<sup>42</sup>  
*MALELLA v. KEIST*, No. 31681-1-II (Wash. Ct. App. July 7, 2005).

“Proof of such prescriptive right necessarily includes a showing of uninterrupted hostile use for 10 years which has been open and notorious.”<sup>43</sup> *Petersen* at 485.

In an adverse possession case applying the same elements the court considers in prescriptive easement cases, the court explained:

*Permission, express or implied, from the true owner negates the hostility element because permissive use is inconsistent with making use of property as would a true owner.*<sup>44</sup> ... “[H]ostile” does not mean animosity; rather, it is a term of art which means that the claimant possesses property in a manner not subordinate to the title of the true owner.<sup>45</sup> ... To prove hostility, the claimant must produce evidence showing that he treated the property as would a true owner throughout the statutory period.<sup>46</sup> ... [He] bears the burden of proving that permission terminated either because (1) the claimant asserted a hostile right or (2) the servient estate changed hands through death or alienation.<sup>47</sup> ... [P]ermissive use cannot ripen into prescriptive use

<sup>41</sup> *Kunkel v. Fisher*, 106 Wn.App. 599, 603, 23 P.3d 1128 (2001).

<sup>42</sup> Quoting *Dunbar v. Heinrich*, 95 Wn.2d 20, 22, 622 P.2d 812 (1980).

<sup>43</sup> Quoting *Krona v. Brett*, 72 Wn.2d 535, 433 P.2d 858 (1967).

<sup>44</sup> Quoting *Chaplin* at 861-62.

<sup>45</sup> Quoting *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 854, 376 P.2d 528 (1962).

<sup>46</sup> Quoting *Chaplin* at 860-61.

<sup>47</sup> Quoting *Miller v. Anderson*, 91 Wn. App. 822, 829, 964 P.2d 365 (1998) (other cites omitted).

*unless distinct change in use provides notice to owner.<sup>48</sup> We determine when the permissive use terminates based on the viewpoint of the party who granted the permission.<sup>49</sup> ... [The claimant] has the burden of showing that the permission terminated and that the original owner had notice of the adverse use.<sup>50</sup> ... The claimant's subjective beliefs and intent are not relevant, but permission, express or implied, from the true owner negates the hostility element as a matter of law because permissive use is inconsistent with making use of property as would a true owner.<sup>51</sup> Teel v. Stading, 228 P.3d 1293, 1295, 1296 (2010)*

Again, for the same reasons which support dismissal of Respondent's Adverse Possession claim (including the Peterson Presumption and the evidence submitted supporting permissive location and use of the Old Tank), Respondent's claim for a Prescriptive Easement Fails because the location of the Old Tank and lines, are and always have been permissive by Appellant's predecessor, and there has been ample evidence to support Appellant's contention. Respondent has done absolutely nothing to rebut the permissive presumption.

d. The New Tank is not located within any easement, including the "F-3" Easement, and has not been at its current location within the requisite period of time to establish a claim of adverse possession or an easement by prescription.

The New Tank has been in place only since mid to late 2011 and is *not* located on the same land the Old Tank and Old Lines were

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<sup>48</sup> Quoting rule from Ormiston v. Boast, 68 Wn.2d 548, 551, 413 P.2d 969 (1966).

<sup>49</sup> Quoting Miller at 829.

<sup>50</sup> *Id.* At 832.

<sup>51</sup> Quoting Chaplin at 861-62.

located on<sup>52</sup>. The Old Tank, Old Lines and New Tank were all on AE 24 simultaneously from early to mid-2011 through May 2012.<sup>53</sup> Since the New Tank has not been on AE 24 for the requisite 10 years required by RCW 4.16.020 for adverse possession, HHCC's claims to adverse possession of portions of AE 24 and 25 must fail.

The Appellant is entitled to attorney's fees and costs as the prevailing party pursuant to RCW 7.28.083(3).

e. There is no prescriptive easement or mutual recognition and acquiescence for the land under the New Tank because it has not been held for the required 10 years pursuant to RCW 4.16.020

The New Tank has been in place only since mid to late 2011 and is not located on the same land the Old Tank and Old Lines were located on<sup>54</sup>.

Even if HHCC should argue that it had an easement under the Old Tank and Old Lines, and intended to exchange that easement for an easement under the New Tank, division 2 "adhere[s] to the traditional rule that easements may not be relocated absent mutual consent of the owners of the dominant and servient estates, regardless of how the easement was created."<sup>55</sup>

Such mutual consent, as an interest in land, would also be subject to the statute of frauds and would need to be in writing and properly

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<sup>52</sup> See (CP 142, CP 204, CP 239, CP 251)

<sup>53</sup> (CP 71 Generally)

<sup>54</sup> See (CP 142, CP 204, CP 239, CP 251)

<sup>55</sup> Crisp v. Vanlaecken, 122 P.3d 926, 928, 929 (2005) (other cites omitted).

recorded as a deed<sup>56</sup>. There is no such evidence in existence here.<sup>57</sup> Similarly, to prove mutual recognition and acquiescence, a party must show recognition of the boundary line for at least 10 years.<sup>58</sup> Further, the Old Tank, Old Lines and New Tank were all on AE 24 simultaneously from early to mid-2011 through May 2012, with no additional consideration, negating any argument there was a simple exchange intended by the parties.<sup>59</sup>

Since the New Tank has not been on AE 24 for the requisite 10 years required by RCW 4.16.020 or *Merriman*, HHCC's claims to prescriptive easement or mutual recognition and acquiescence of portions of AE 24 and 25 must fail.

f. The trial court should not have found an express easement for access to the old and water tank.

For the reasons explained above, it could hardly be argued that Respondent ever had an "express" easement for the purposes of locating a water tank on Plaintiff's property to serve 60 properties. Respondent even acknowledges in its materials that the only express easement for any utilities on the property was for an easement which would serve Lots 24-27 of Alder View Estates. (CP 279, line 1-3). Respondent's tank existed on the property clearly only as a matter of license, or against the will of the then owner of the property. For the reasons set forth above,

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<sup>56</sup> RCW 64.04.010.

<sup>57</sup> (CP 123).

<sup>58</sup> *Merriman v. Cokeley*, 230 P. 3d 162, 164, 168 Wash. 2d 627

<sup>59</sup> (CP 71 Generally)

Respondent cannot overcome the presumption of permissive use, and in fact Appellant has shown that there is evidence of permissive use.

The Court clearly erred by finding that the original express “easement” benefited Respondent in its location of the original tank.

g. The Court should not have granted a prescriptive easement, “to the extent necessary” based on the Pierce County Hearing’s Examiner’s Decision.

The Court’s ruling on November 26, 2014 specifically found that because Plaintiff had “at least constructive knowledge” of a Pierce County Hearing’s Examiner’s determination regarding a variance for the installation of the new water tank, and failed to appeal, “to the extent necessary” to find expansion of the original easement, Respondent had satisfied the requirements of a “prescriptive expansion” of the original easement.

The court’s ruling with regard to the prescriptive easement found for the location of the new tank is problematic for two reasons. First of all, in order to establish any prescriptive right to a property, a party must show that the prescriptive use was for a duration of at least (10) years. **RCW 4.16.020.** With the hearings examiner decision being in 2011, this clearly cannot be the case.

Second, the Pierce County Hearing’s Examiner does not have the lawful authority to take a property right from an individual in a variance

proceeding, nor was that issue before him.

**Article 1, section 3 of the Washington State Constitution** provides:

*'No person shall be deprived of life, liberty, or property, without due process of law.'* The pertinent portion of the fourteenth amendment of the United States Constitution is:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The trial court determined that Plaintiff's predecessor, Munden should have filed a LUPA appeal if they were aggrieved by the approval of the new tank on their property. This would only have been true if Respondent had a vested property right with respect to where the new tank was being located<sup>60</sup>. The hearings examiner only had the issue of a variance before him.

In fact, the Hearing's Examiner specifically made its variance approval conditioned on certain conclusions:

*"5. The decision set forth herein is based upon representations made and exhibits..."*

*..6. The authorization graneted herein is subject to all applicable federal, state and local laws, regulations and ordinances.*

*(Emphasis Added)*

(CP 140)

Furthermore, page 4 of the Hearings Examiners decision says:

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<sup>60</sup> No County government can unilaterally grant easement rights to one private party over another party's property.

*“Holiday Hills Corporation owns no land, and this parcel is the only place that they **have permission to place the tank**, as one is present there now”*

(CP 137)

Nowhere in the Hearings Examiner’s Report and Decision is there a request for a finding of an easement or any other property right on behalf of the Respondent. In fact, the report is clear that this is only a variance request, based upon representations made by the Respondent. At the time this matter was presented, the instant case had not been filed, as Dougherty did not own the property. It can be easily determined by a review of that decision (when Respondent was not fighting for its property rights in litigation), that Respondent’s own characterization of its use of Dougherty’s property was permissive. Ironically, the court will see that there is no reference to adverse or prescriptive use that was now being requested by Respondent to the trial court.

The Court clearly erred in finding that the Pierce County Hearings Examiner’s decision somehow established a property interest in favor of Respondent’ over the Appellant’s property.

2. The Court Erred in Granting Defendant’s Motion for Partial Summary Judgment on December 8, 2014.

- a. Holiday Hills did not legally increase its dues and assessments, and certainly did not legally impose punitive measures against the Appellant for non-payment of the same.

In Support of its Motion for Summary Judgment on the issue of

Appellant's non-payment of association dues, Respondent contended that the association board was authorized by a majority vote of the "members who attended the September 2007 meeting" to enter into a contract in the amount of \$343,316 to construct a completely new water system. (CP 507). HHCC argues that this significant capital acquisition was somehow authorized under the Bylaws provision for 'annual water maintenance fund dues', which is charged to members for the "maintenance and operation of the HHCCC Water System". (CP 506- 507).

HHCC's governing documents provide certain authority to the board of directors with respect to the charging for and the collection of assessments as follows:

The Articles of Incorporation provide as follows:

*"The purposes for which this corporation is formed are:  
...14. To fix, establish, levy, and collect annually such charges and/or assessments as may be necessary, in the judgment of the board of trustees to carry out any or all of the purposes for which this corporation is formed, **but not in excess of the maximum from time to time fixed in the bylaws**" (Emphasis Added).*

Clearly the Articles of Incorporation allow assessments to be charged and collected, but in a restricted amount which is to be fixed by the Bylaws.

The Bylaws do not establish or authorize expenditure for a capital

expenditure such as the purchase of an entirely new water system, nor do they even “fix” a maximum amount for an assessment for a capital improvement. See generally the Bylaws, (CP 179). The original (and only effective) Bylaws merely allow for dues associated with “maintenance and operation” of the water system, but again, do not fix a set amount, other than what is specifically listed (\$5 and \$24 respectively for office supplies and road maintenance).

The Bylaws provide as follows with respect to amendment:

*“Article VII.*

*Amendments to the bylaw may be submitted by any member with voting rights in the HHCCC. These amendments must be submitted in writing to the recording Secretary not less than six weeks prior to the general meeting or at a special election meeting. The by-laws amendment will be mailed to the membership with the general meeting notices and will be voted on at the next general meeting. A 2/3 majority will be needed to amend the by-laws.”*

(CP 182).

Even if a significant capital expenditure (such as an entire new water system) could be classified somehow as included in the “maintenance and operation” of the water system, no maximum amount for water system maintenance has been fixed by the bylaws, as is required by the Articles of Incorporation. Clearly, it was the intention of the incorporators to require that the Bylaws set pre-determined limits on expenditures, so that homeowners would not face unexpected major

increases such as this, without a representative and proportionate vote of the *entire membership*. To the extent that the Association wished to pass such a large capital expenditure, the Bylaws needed to be amended to “fix” such an amount, which would require **a 2/3 vote of the membership, not a “simply majority of the members present”**. In addition, should a change to the Bylaws be desired, advance notice of the proposed change would have to be given to the members, six weeks prior to the meeting on which the amendment is sought. The association has provided no proof that any of these requirements have been satisfied.

Rather than require a 2/3 vote of the membership for such an incredibly large expenditure, Respondent argues that the board may so approve an entire new water system based on a “simple majority” *of the persons who happen to appear at a meeting*. (CP 506-507). Respondent, by this statement, clearly acknowledges that the Bylaws were never amended to allow for such an enormous expenditure. Under this theory, the board may spend a million dollars (in this case almost a half a million), if three people show up at a meeting and two vote to do so. Clearly this is not the intent of the Articles of Incorporation, when it required that the bylaws “fix” maximums, which would then only be modified by a 2/3 vote of the membership<sup>61</sup>.

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<sup>61</sup> At best, the governing documents are ambiguous with respect to approving capital expenditures, which should be construed against the declarant.

Obviously an expenditure of several hundred thousand dollars is not expenditure in the normal course of business that could be characterized as simply an annual water dues increase. Either way, the Articles of Incorporation contemplate that a fixed sum be inserted into the Bylaws prior to charging a member. Since a maximum sum was not previously fixed by the Bylaws, the Bylaws should have been amended to do so, prior to a vote on authorizing the increase to sum amount acceptable to at least 2/3 of the membership. The Association's authorization of this expenditure violates Article I, Paragraph 15 of the Articles of Incorporation, and it is also not authorized whatsoever by the Bylaws.

Furthermore, the association has even ignored its own rules with respect to the Road Maintenance dues which are clearly denoted at \$24 per year in the bylaws. As the court can see, the association is now charging \$45 per year, in further blatant disregard for the amount clearly fixed for that item in the Bylaws. (CP 179-180).

Finally, and as a point of clarification, HHCC has characterized the new water system charges as simply a "determination of a yearly fee". (CP 506-507). However, this action by the board was clearly an authorization to cause the association to incur debt, allegedly with no limits with respect to the supermajority of the membership required for

even a basic dues increase. This action and the resulting debt amount not authorized by the Bylaws.

- b. The Appellant not properly and legally assessed for the water system.

An action taken in violation of a Homeowner's Association's established governing documents is invalid and this is voidable. Hartstene Pointe Maint. Ass'n v. Diehl, 95 Wash. App. 339, 345, 979 P.2d 854, 857 (1999). Respondent argues that Appellant has no standing to argue against an "Ultra Vires" act of the Association because he was not a member of the Association when the current dues were established and the statute of limitations have run on any Ultra Vires cause of action. This theory is misplaced in that Appellant is not arguing that the Association was without power to increase its dues. Appellant is arguing that the Association did not follow its rules under its governing documents in implementing any increase.

As has been explained in the previous section, in order for Association dues to be assessed against a member, they must be lawfully approved in accordance with the Articles of Incorporation and ensuing Bylaws. Therefore in order for the court to determine if the Appellant was "properly assessed" for the water system, the court must look at the validity of the assessment at its creation.

A separate fixed amount was not set in the Bylaws for the water system as required by the Articles of Incorporation. All dues are billed together. The Bylaws were never amended to fix a separate sum for water maintenance and the Administrative and Road Maintenance dues were set at \$5 and \$24 respectively.

The Bylaws were never amended to raise the amount of the Road Maintenance Assessment from \$24 to \$45 per year. The current Bylaws cited by the Association as authority for the assessment provide for a \$24 per road maintenance assessment. The sum charged of \$45 exceeds the amount fixed by the bylaws, in further violation of Article 14 of the Articles of Incorporation.

The Appellant was not properly assessed for any of the current charges claimed by the Association.

- c. Respondent did not give the requisite notice of its meetings, nor did it publish notice of increased dues.

Respondent has multiple problems with how it has proceeded in “amending” its financial obligations, given the limited scope of its only true existing restrictive covenants.

The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing

covenants. Meresse v. Stelma 100 Wash.App. 857, 866, 999 P.2d 1267, 1273 (Wash.App. Div. 2,2000). However, Washington courts have recognized a third party and newly formed corporation's power, *where there is an express reservation in a plat to that entity*, to adopt new restrictions respecting the use of privately-owned property to be valid, even with a vote of less than 100 percent of property owners subject to restrictive covenants, provided that such power is exercised in a reasonable manner consistent with the general plan of the development. Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc. 76 Wash.App. 267, 273-274, 883 P.2d 1387, 1392 (Wash.App. Div. 1,1994)

Where an association does not follow its governing documents, or where appropriate, statutes as to notice or quorums for a meeting and membership approval of measures taken, it is without power to enforce the same. East Lake Water Ass'n v. Rogers 52 Wash.App. 425, 426, 761 P.2d 627, 628 (Wash.App.,1988) 24.03.010<sup>62</sup>. Where a meeting of a nonprofit corporation is not in accordance with its bylaws (or other appropriate statutory requirements), its proceedings are void. State Bank v. Wilbur Mission Church, 44 Wash.2d 80, 91-93, 265 P.2d 821 (1954).

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<sup>62</sup> Interestingly enough in Eastlake, while the court found that notice was not properly given for the meetings, it ruled against the person challenging notice based on equitable estoppel, because he was the former board officer responsible for notice.

No Notice of Meetings regarding massive assessments

**RCW 64.38.010** defines a Homeowner's Association as follows:

*(11) "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member. "Homeowners' association" does not mean an association created under chapter 64.32 or 64.34 RCW.*

(1) A meeting of the association must be held at least once each year.

Respondent is clearly a "Homeowners Association" governed by **RCW 64.38**.

**RCW 64.38.035** provides, in pertinent part, as follows with respect to meeting notices:

*"Special meetings of the association may be called by the president, a majority of the board of directors, or by owners having ten percent of the votes in the association. **The association must make available to each owner of record for examination and copying minutes from the previous association meeting not more than sixty days after the meeting.** Minutes of the previous association meeting must be approved at the next association meeting in accordance with the association's governing documents.*

**(2) Not less than fourteen nor more than sixty days in advance of any meeting of the association, the secretary or other officers specified in the bylaws shall provide written notice to each owner of record by:**

*(a) Hand-delivery to the mailing address of the owner or other address designated in writing by the owner;*

*(b) Prepaid first-class United States mail to the mailing address of the owner or to any other mailing address designated in writing by the*

owner; or

*(c) Electronic transmission to an address, location, or system designated in writing by the owner. Notice to owners by an electronic transmission complies with this section only with respect to those owners who have delivered to the secretary or other officers specified in the bylaws a written record consenting to receive electronically transmitted notices. An owner who has consented to receipt of electronically transmitted notices may revoke the consent at any time by delivering a written record of the revocation to the secretary or other officer specified in the bylaws. Consent is deemed revoked if the secretary or other officer specified in the bylaws is unable to electronically transmit two consecutive notices given in accordance with the consent.*

***(3) The notice of any meeting shall state the time and place of the meeting and the business to be placed on the agenda by the board of directors for a vote by the owners, including the general nature of any proposed amendment to the articles of incorporation, bylaws, any budget or changes in the previously approved budget that result in a change in assessment obligation, and any proposal to remove a director.”***

**(Emphasis Added)**

Appellant testified in his declaration that there were issues with him not receiving notice of meetings by the association. The association did not come forth with any documentary evidence that it has ever complied with **any** of its notice requirements for meetings (pre or post meeting), yet the court granted summary judgment, finding that previous assessments had lawfully been enacted. With the burden of proof on Respondent, and with the presumptions in favor of the non-moving party on Summary Judgment, there were at least

issues of fact precluding Summary Judgment on the issue of finding that assessments were lawfully charged to the membership (after a lawful notice of a meeting with an agenda for the same).

The court clearly erred in declaring that Respondent had lawfully imposed the massive assessment increase associated on the new water system.

#### IV. CONCLUSION

For the above reasons:

A. This court should reverse the trial court's

order of November 26, 2014, and find as a matter of law that:

1. Respondent does not have an express easement across Lot 24 or Lot 25 of Appellant's property.
2. Respondent has not acquired fee simple absolute title to any portion of Appellant's property based on theories of Adverse Possession, Mutual Recognition or Acquiescence.
3. Respondent's right to locate its water tank(s) on Appellant's property exists solely under a permissive license, which remains in the discretion of the Appellant.
4. Respondent is not a prevailing party on Respondent's Adverse Possession claim, Appellant is entitled to an award of attorney fees and costs.

5. All other issues dismissed, or rendered moot, to the extent not disposed of in items 1-4 above should be remanded to the trial court.

**B.** The court should further reverse the trial court's Order Granting Summary Judgment to Respondent on **December 5, 2014**, and all issues should be remanded back to the trial court, as there are issues of fact which should be determined at trial.

Respectfully submitted this 20<sup>th</sup> day of April, 2015.



MARK E. BARDWIL, WSBA #24776  
Attorney for Appellant CASEY  
DOUGHERTY

Certificate of Service

On April 20, 2015, the undersigned caused to be sent by first class mail, postage prepaid in the mails of the United States at Tacoma, Washington, a copy of the Brief of Appellants to the following:

Attorney for Respondent Holiday Hills Community Club  
SHANNON R. JONES  
Campbell Dille Barnett & Smith PLLC  
PO BOX 488  
PUYALLUP, WA 98371-0164

I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 20<sup>th</sup> day of April, 2015



MARK E. BARDWIL,  
WSBA#24776