

CASE NO. 303519

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

---

PAT McINTYRE, a single man; DAVID THOMPSON, a  
single man; and GARY PETERS, a single man,

Appellants,

v.

SPOKANE VALLEY HERITAGE MUSEUM, d/b/a SPOKANE  
VALLEY LEGACY FOUNDATION, a non-profit corporation,

Respondent.

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**APPELLANTS' OPENING BRIEF**

---

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## INTRODUCTION

Business property owners Pat McIntyre, Gary Peters and David Thompson, contend that prescriptive right to the roadway and parking spaces owned by the Defendant/Respondent, and used by hundreds of customers daily, for over seventy years, should have been ordered by the Spokane County Superior Court. The Court erroneously created a new element of proof of prescriptive road rights: exclusivity, and erred when it decided that the Plaintiffs' customers shared the road and parking with the public, voiding their prescriptive rights. The Court's conclusion that the Museum property, was also not proprietary, at the time it was owned by the County, completely ignored the permanent non-"use" by the County.

Spokane County maintained a "For Sale or Lease" sign in the window of the Defendant's property. The County's sole use of the property was for short term lease to a dance school, a picture framing shop and occasional wedding receptions.

Further, the Court erroneously ignored the four years of Museum ownership under stridently hostile use of the road and parking by the Plaintiffs' patrons because the Court concluded that a servient estate

must be owned for ten years by the same owner, in order to meet the “requisite” ten years of use by an adverse party.

## ISSUES

Pursuant to R.A.P. 9.2(c), Appellants McIntyre, Peters and Thompson present the following issues on review:

- I. Whether exclusivity is a necessary element of prescriptive use such that concurrent public use of the road negates granting of a prescriptive easement?
- II. Whether continuous open and notorious use over a uniform path of the roadway by Plaintiffs’ customers for over forty years was “hostile” as to owner Spokane County?
- III. Whether the roadway and parking spaces on the Museum property were ever “used” for governmental purposes when for over thirty years the only occupants of the building have been two short term tenants?
- IV. Whether unoccupied building, through-road and parking spaces with a “For Lease” sign displayed—for over 25 years—is held in the County’s proprietary capacity?
- V. Whether the “requisite ten-year period” (*Memorandum Opinion, pg. 6, lines 16-17*) means that the servient estate owner must exclusively own the subject roadway for ten years?
- VI. Whether it is an error of law to hold that to meet the ten year period of use in a prescriptive rights claim, a claimant must show that the ten year period was only adverse to one servient owner?

## ASSIGNMENTS OF ERROR

### **Objections to Memorandum Opinion Findings of Fact and Conclusions of Law**

Honorable Spokane County Superior Judge Tari Eitzen ultimately decided that her Memorandum Opinion of June 9, 2011 would constitute the Court's Findings of Fact and Conclusions of Law and Judgment, after three futile attempts to enter customary enumerated Findings and Conclusions.

Plaintiffs' counsel initially presented proposed Findings of Fact and Conclusions of Law which *were agreed upon* by Defendant's counsel. *CP 80*. These were rejected by the Court on the basis that they would play "havoc" with her Memorandum Opinion "on appeal."

Back to the drawing board, the Court instructed Defendant's counsel to prepare a new set of Findings and Conclusions. *CP 91*.

At the time set for presentment, the Plaintiffs/Appellants objected to portions of six Findings and eight of the Conclusions of Law. The Court refused to either enter the Museum's proposed Findings and Conclusions or grant McIntyre's objections.

Plaintiffs' counsel proposed Findings of Fact and Conclusions of Law filed October 14, 2011, which the Court "Rejected." *CP 107*.

The Court announced that she would undertake to draft her own Findings and Conclusions. At the next presentment date, the Court announced that she had abandoned her efforts and instead ruled that "the Court's Memorandum Opinion dated June 9, 2011 sets forth the Court's Findings of Fact, Conclusions of Law: One... two... three ...Order." "And the Court of Appeals, if they want me to put more findings or sort out the memorandum, they will tell me." Presentment RP 142-143.

McIntyre, Peters and Thompson assign error to the Court's rejection of: Plaintiffs' Proposed Findings of Fact and Conclusions of Law of October 14, 2011 (*CP 118-119*) and Plaintiffs' Proposed Findings of Fact and Conclusions of Law of September 30, 2011(*CP 80-90*).

It was error to reject the first set where they were supported by substantial evidence and the agreement of the Museum's counsel. *CP 92-98*.

It was error to reject the second set where they were supported by substantial evidence and law elucidated in this Brief.

And, it was error to “enter” certain of the Memorandum Opinion’s Findings and Conclusions for the following enumerated reasons.

**McIntyre, Peters and Thompson  
Object to the Court’s Memorandum “Findings.”**

1. “The Museum property (two lots and the stucco building) were managed and maintained by Spokane County from 1996 to 2004. The property was vacant during that time ....” *CP 53, para. 4*. In the prior paragraph, the Court cites the Deed to Spokane County in 1990. The Court should have found that the property was vacant from the time of the grant, 1990, and that Spokane County did nothing to use the property since that date.

2. The Court erred in its Findings of the sole testimony of Jayne Singleton, *CP 55, para. 2*, because the Court ruled during trial that she was “impeached” as a witness.

3. The Court’s Conclusion of Law that “... the Defendants (the Museum) have not been the true owner of the lots in

question for the requisite ten year period. Any facts or analysis related to what occurred while the Museum was the true owner are superfluous. The issue is whether the prescriptive rights arose while the County of Spokane or the Township of Opportunity was the true owner, *CP 56, para. 4*, is a an obvious error of law.

4. The Court's mixed Findings of Fact and Conclusions of Law that "... Plaintiffs fail to meet the requirements of exclusivity and hostility" is error of fact and law.

5. The Court's Conclusion of Law that "As such, no prescriptive rights has (sic) been acquired over the Defendant's property" is error. *CP 56, para. 6*.

6. The Court's Findings and Conclusions *CP 58, Exclusive, paras. 2 and 3* are assigned error.

7. The Court erred as a matter of law, in concluding that "implied permissive use" was applicable to the subject improved, urban property. *CP 59, para. 1*.

8. Error is assigned to the Court's Findings of Fact and Conclusions of Law from "[g]iven the fact that the County of Spokane owns a considerable amount of real property, allowing

three small businesses to use one of their [Spokane County's] currently unoccupied properties can certainly be viewed as a neighborly acquiescence," through *CP 60, para. 1*, "during that time [since 2004] the Museum has clearly asserted its rights to quiet title and ejectment. The only period of time where a prescriptive easement could have been attained was when the County of Spokane was the true owner."

9. It was error for the Court to make Findings that the land owned by the County was ever devoted to any public use. *CP 61, para. 1*.

10. It was an erroneous Conclusion of Law that "[t]he property in question was being used in a governmental capacity" and the balance of *CP 61, para. 2*.

11. It was an erroneous Finding of Fact that "The County demonstrated that it had a plan to preserve and maintain the historic town hall for one reason or another," as unsupported by any evidence, oral or written.

12. The entire Findings and Conclusions of *CP 61, para. 4* are erroneous.

13. The entire Findings and Conclusions of *CP 62, para. 2* are erroneous.

14. It was erroneous for the Court to make findings that, “In addition, and in the alternative, the Museum property in question has always been used in a governmental capacity. The original two lots were maintained and looked after for many years by the successive governmental entities. Such maintenance was clearly intended to preserve the land for the public, in as it was a historic town hall. As such, prescriptive rights cannot be acquired over government land.” *CP-63, para. 2*.

#### **STATEMENT OF THE CASE**

The subject property now owned by the Spokane Valley Heritage Museum (the “Subject Property” or “Museum Property”) has an interesting history of ownership. In November of 1990, the long defunct Opportunity Township quitclaimed the (now Museum) lots to Spokane County. *CP 43, para. 3*. Please see **Exhibits P1** for the relative locations of the Museum, Ichabod’s, Peters Hardware and Dave’s Bar and Grille.

The relative and contiguous location of the Plaintiffs' respective properties and the County property are depicted on the Court's site map as well on the Court's **Exhibits A, B, C**. *CP 64, 65 & 66*.

In the early sixties, David Thompson's parents drove back and forth over the roadway area while taking him to the bicycle shop and Marty's Toyland. RP 59, l. 10 – RP 68, l. 10.

From 1980 to 1990, David Thompson drove a Joey August Distributor's beer delivery truck over the roadway and parked right on the lots to deliver to Sig's Tavern ("Sig's") and Ichabod's Tavern ("Ichabod's"), twice weekly. RP 52, l. 23 – RP 53, ll. 1-25. In 1990, Thompson bought Sigs property and reopened Dave's Bar and Grille. RP 55, ll. 8-13. Sales grew from 75 plates served per day to 350 to 450; open seven days per week. RP 56, ll. 12-24.

Dave Thompson recalled the "For Rent" sign that hung in the little stucco building through the '90s. And, for this lifetime, the only occupant he recalled was a picture frame shop "right around 2000." RP 60, ll. 13-17.

RP 62, ll. 17-20; RP 65, ll. 1-2. Less customers found a route to the restaurant in May of 2009, and by July 2009, David Thompson laid off six employees. RP 66, ll. 19-23.

Donald Secor, who has worked for the Facilities Division of Spokane County Parks and Recreation Department for thirty-seven years, testified that the Museum Property (two lots and the stucco building) were managed by Spokane County from 1996 to 2004. RP 84, ll. 11-25; RP 85, ll. 1-22. The property was vacant during that time except for one year when the building was leased as a frame shop. RP 85, ll. 1-22.

Otherwise, Mr. Secor testified, neither Spokane County Parks Department nor anyone else used the property. RP 86, ll. 10-11. The maintenance department “went in there and did some work ... when it was first handed over to us ... and after the frame shop left.” “I couldn’t tell you exactly what we did.” RP 86, ll. 1-6. On the outside, the County put down some parking-type bumpers and Jersey Barriers, “because they didn’t want people going through there.” RP 89, ll. 16-25.

Mr. Peters, of Peters Hardware, testified that the Jersey Barriers made the customers mad, and the subsequent parking bumpers kept getting moved around and messed up; several customers got stuck on them. RP 100, ll. 10-15; RP 101, ll. 16-25. *CP 53, para. 4.* “People continued to park as they always have. A number of (bumpers) were broken from being driven on, parked aside. RP 17, ll. 1-3.

Peters Hardware was opened at its present location in “1940 something,” by current operator Gary Peters’ grandfather. RP 92, ll. 13-14. Gary Peters started working in the store at age 8, riding his bicycle over the same roadway where his father and at least one-third of the family’s customers drove. RP 92, ll. 2-5; RP 93, ll. 8-25. In frequency of usage, at the hardware store alone, a slow Sunday would bring 50 customers and a busy day would bring 250 customers. RP 94, ll. 22-25. Approximately ten customers a day were from out of town, and Mr. Peters provided those customers driving directions, which included turning in at the Subject Property’s roadway, and to either park on the Museum lots or behind the hardware store. RP 95, ll. 14-16; RP 96, ll. 1-10.

Mr. Peters saw no signs but the “For Rent” sign at the Museum Property until the Museum put up “museum parking” signs, which were placed on the pavement, parking bumpers and building. RP 96, ll. 10-24.

The patrons of the Museum’s three neighboring businesses continued to drive unfettered through the Museum Property and use the Museum’s parking areas as they wished. RP 97, ll. 1-17. The proprietor of the frame shop which operated at the Museum Property prior to the Museum’s existence, a woman named Shelly, wanted people to stop driving through the Subject Property’s parking area, so she “put up bumpers” approximately 4 feet high and 5 feet long. The neighboring businesses’ customers pushed them aside and used the Subject Property to drive through and park anyway. *CP 4, para. 1.* Also, the past driver of a beer delivery truck, Robert McIntyre (no relation to the owner of Ichabod’s, a Plaintiff herein), testified that he delivered beer to Ichabod’s and Sig’s (now Dave’s) for seventeen years (1980-1997), during which time he drove through the Museum Property, and parked on said property to deliver beer.

the Museum Property, and parked on said property to deliver beer. He testified that since his retirement in 1997, he has gone to those bars once a week and parks in the Museum lot. *CP 4, para. 1.*

Plaintiff Pat McIntyre purchased Ichabod's Tavern in 1981. RP 7, ll. 17-20. Ichabod's has been a tavern since 1970, and its customers testified they used the Subject Property to turn in from Sprague Avenue, and parked on the Subject Property's lot. RP 36, l 22 – RP 27, ll. 1-25. The main doors for all the neighboring businesses are in the rear of the establishments. RP 8, ll. 15-24. At one point, Spokane Parks and Recreation Department, Mr. Birkenthal, offered to rent the Subject Property to McIntyre. RP 14, ll. 1-23. The "For Rent" sign on the Subject Property hung for more than a decade before it became the Museum. RP 14, ll. 2-7. No governmental activity ever occurred on the property. RP 14, ll. 9-12.

On May 5, 2003, the Defendant incorporated as Spokane Valley Legacy Foundation, a non-profit corporation.

The City of Spokane Valley incorporated in 2003. On January 5, 2004, Spokane County quitclaimed the property to the City of Spokane Valley. **Exhibit P2.** On March 10, 2004, the City of

Spokane Valley quitclaimed the Subject Property to the Spokane Valley Legacy Foundation. **Exhibit P2.**

Some time in the late 2000's, the Museum put up a sign that said "MUSEUM PARKING ONLY." The Museum also put notes on people's cars, which stated, "Don't park here." *CP 55, para. 4.* However, Mr. McIntyre testified that nothing the Museum did could discourage as many as 100-225 of his customers from parking on the Museum Property daily. *RP 10, l 25.* Peters' customers also did not relent from using the Museum Property. *RP 97, ll. 3-18.*

Undisputed testimony from a wide cross section of long since retired delivery truck drivers, Ichabod's customers, neighbors who had lived in the area all their lives, and the third generation owner of Peters Hardware, was clear, cogent and convincing that a roadway from Sprague Avenue across the lot to the rear of the three businesses was continuously used for more than seventy years by as many as two hundred vehicles per day.

In approximately April of 2009, the Museum put up a high fence all around the property and tall concrete barriers to keep people from using their parking lot as a thoroughfare.

Within months, Dave's laid off employees; public outcry escalated and petitions were signed by hundreds. RP 98, ll. 4-16. Please read Spokesman Review articles. **Exhibits P5, P6 & P8.**

## ARGUMENT

**I. Whether the business owners “demonstrated only three of the five necessary elements of a prescriptive easement” thereby failing to establish prescriptive rights over the subject property?**  
Conclusion of Law, No. Two, RP (Transcript) p. 143, ll. 5-8.

The Court decided that McIntyre, et al. “failed to meet the requirements of exclusivity and hostility.” *CP 56, para. 6.*

A. Is exclusivity a requisite element of proof of prescriptive use?

To establish a prescriptive right of way over the land of another person, the claimant of such right must prove that his use of the other's land has been open, notorious, continuous, uninterrupted, over a uniform route, adverse to the owner of the land sought to be subjected, and with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. *The Mountaineers v. Wymer*, 56 Wn.2d 721, 722, 355 P.2d 341, 342 (1960) (citing *NW Cities Gas Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942)).

Neither *Wymer* nor *NW Cities Gas Co.* contain the word “exclusive.” *NW Cities Gas Co.*, recites sixteen enumerated “principles” of prescriptive rights and does not include exclusivity. 13 Wn.2d at 83-88, *supra*.

Prescriptive use has been found over roadways which are used by: Members of the public, customers of the claimants, and the owners of the burdened land. In *NW Cities Gas Co.*, the gas company encouraged its customers and the public to use the roadway over the neighbor’s property. *Id.* at 91. The road was used by “various persons” using the property as a dumping ground for rocks and dirt excavated elsewhere. *Id.* at 80. The roadway was used by “respondent’s employees and customers.” *Id.* at 81.

The trial court in the instant case held that the roadway had been used by the public as well as the customers of the Plaintiffs’ businesses, and therefore, “the easement sought is not for the public at large, but rather for the Plaintiffs and their customers. What the Plaintiffs really want is a private easement with the ability to share their rights with certain members of the public. However, the public

at large would not be denied access. The Plaintiffs have failed to establish exclusivity.” *CP 58*.

Contrarily, in *Schulenbarger v. Johnstone*, 64 Wash. 202, 207, 116 P. 843 (1911), the court held that “the right [may] be asserted by the public.” In *NW Cities Gas Co.*, the plaintiff gas company “encouraged the public to use that method of ingress and egress to and from its premises...[making] the same use of [the servient estate]...as it would have made is the land had been its own” *NW Cities Gas Co.*, 13 Wn.2d at 91.

The Appellants, the Museum’s neighboring property owners, did just the same as the Plaintiff in *NW Cities Gas Co.*: the Appellants encouraged their patrons to use the road and parking. Employees of Peter’s Hardware used the road “just about everyday since 1946 on.” RP 94, ll. 11-14. For example, hardware store customers seeking directions were instructed that, “If they were coming [from] downtown, we would instruct them to come in this way ....” RP 96, ll. 1-5. The hardware store customers were also directed to park on the property. RP 101, ll. 16-20.

If right of way easements acquired by prescription were necessarily exclusively used by the claimant, there could never be a claim of prescriptive easement over a pre-existing road. In the *810 Properties v. Jump* case, the adjoining landowner acquired a prescriptive easement to use a roadway, even though the roadway had been used for a variety of purposes, “including repairing fences, trucking cattle, Kittitas Reclamation District (KRD) maintenance work, and hunting...” *810 Properties v. Jump*, 141 Wn. App. 688, 701, 170 P.3d 1209 (2007). “... [T]he roadway was used by property owners to the south, the KRD, and sportsmen ....” *Id.*, at 701. This concurrent use by the public did not obviate against exclusivity; the prescriptive easement was awarded to the claimant property owners. *Id.* at 703.

- B. Whether the use was not hostile, where “given the fact that the County of Spokane owns a considerable amount of real property, allowing three small businesses to use one of their currently unoccupied properties can certainly be viewed as neighborly acquiescence?” Memorandum Opinion, *CP 59*, para. 3.

The presumption of permissive use has been twice clarified and narrowed by the Supreme Court. In *NW Cities Gas Co.*, that Court’s

principle No. 4 made the reined statement that when one enters into possession or use of property of another, there was a “presumption” that he does so with permission, if the land is vacant and undeveloped – i.e. the “vacant lands doctrine.” *NW Cities Gas Co.*, 13 Wn.2d at 84 (*supra*).

In that 1942 Decision, *NW Cities Gas Co.* cited *Long v. Leonard*, 191 Wash 284, a 1937 case, and *Peoples Savings Bank v. Bufford*, 90 Wash 204, 155 P.1068, a 1916 case.

More currently, in *Drake v. Smersh*, 122 Wn.App. 147, 89 P.3d 726 (2004), that court “recognized on reflection that our analysis in *Kunkel* extended the *implication* of permissive use by neighborly accommodation too far when we applied a *presumption* of permissive use,” *Drake*, 122 Wn.App. at 153-154 (emphasis original)(referring to *Kunkel v. Fisher*, 106 Wn.App. 599, 23 P.3d 1128 (2001)). Because *Kunkel* had been interpreted to apply a presumption of permissive use in prescriptive easement cases to developed land, the court clarified the rule to now be:

In developed land cases, when the facts in the case support an inference that use was permitted by neighborly sufferance or accommodation, a court may

*imply* that use was permissive ... the courts should only apply the *presumption* of permissive use in cases involving undeveloped land...

*Drake*, 122 Wn.App. at 154 (emphasis original).

In the instant case, involving the Subject Property's two platted city lots, the court must consider evidence in the record to find a reasonable inference of neighborly accommodation. However, there was no evidence showing that the employees and customers of the Plaintiffs' businesses ever asked for permission from the Museum or received any express consent, either to use the roadway or to park cars. RP 47, ll. 15-18; RP 54, ll. 23-25; RP 60, ll. 22 – RP 61, l. 1; RP 99, ll. 16-18.

In the instant case, when developed City lots are at issue, there must be affirmative evidence to support a reasonable inference of permissive use. "Neighborly acquiescence" by Spokane County or the City of Spokane Valley was not contained in the Trial Management Report as a contention by the Defendant nor listed as an issue of fact or law. The County installed parking barriers at one point but they were driven over and broken up by the Plaintiffs'

customers. RP 91, l. 6; RP 16, l. 23 – RP 17, ll. 1-4; RP 100, ll. 21-25 – RP 101, ll. 1-3.

“Neighborly” accommodation often involves a relationship such as two brothers (*Granston v. Callahan*, 52 Wn.App. 288, 294, 759 P.2d 462 (1988)); a close, friendly relationship (*Miller v. Jarman*, 2 Wn.App. 994, 997, 471 P.2d 704 (1970)); common use by neighboring farmers (*Crites v. Koch*, 49 Wn.App. 171, 177, 741 P.2d 1005 (1987)).

C. It is also an error of law to conclude that the County allowed use as a “neighborly accommodation.”  
*Memorandum Opinion, CP 59, para. 3.*

As a matter of law, a county municipality cannot grant accommodations to anyone in a “neighborly, informal” acquiescence. In *Nelson v. Pacific Country*, 36 Wn.App 17, 671 P.2d 785 (1983), an adverse possession case, it was argued that the County had abandoned some property, and later made a “settlement agreement” relinquishing its interest. The Court held that (a) “The County did not manifest a clear intent to relinquish its interest in the property,” and (b) “[m]oreover, we conclude that the County may not abandon dedicated property in this manner.” *Id.* at 22. “Under

RCW 36.34, County property cannot be sold or disposed of without notice and a public hearing.” *Nelson*, 36 Wn.App. at 23-24. The *Nelson* court describes in detail the necessity of giving the public the “significant opportunity” to participate. *Id.* at 24.

In its only other Finding regarding neighborly acquiescence or accommodation, the instant Court cites the testimony of Andrea Owens, an Ichabod’s customer, to find that when *one customer* might consider accommodating the Museum for one night during a special event, and upon request of the Museum, neighborly acquiescence exists. *Memorandum Opinion, CP 54, footnote 3.* However, “neighborly acquiescence” runs the opposite direction; the title owner acquiesces in the Claimant’s use, not vice-versa. Moreover, this was temporally inside the period of Museum ownership, the time period ignored by the Court.

**II. Whether the “requisite ten year period” applies to continuous ownership by a single owner of the servient estate?**

Judge Eitzen’s opening sentence on prescription easement reads:

Prior to a complete analysis of prescriptive rights it should be noted that the Defendant (the Museum) have not been the true owner of the lots in question for the requisite ten year period. Any facts or analysis related to what occurred while the Museum was the true owner is superfluous.

*Memorandum Opinion, CP 56, pg. 6.*

The only period of time where a prescriptive easement could have been attained was when the County of Spokane was the true owner. *CP 59-60.*

The Court's Conclusion of Law that a prescriptive easement cannot be claimed (as to the requisite ten year period) against the Museum Property for the period 2004 to date of filing of the Complaint because "The Defendant was not the owner for the requisite ten year period," is an obvious error of law. *Memorandum Opinion, CP 56, para. 4, line 1.* Washington cases universally hold that the ten year period applies only to the period of *use by the Claimant*, and not the ownership or successive ownerships of the servient estate owner. "The claimant must show use ... for the prescriptive period of ten years." *Cole v. Laverly*, 112 Wn.App. 180, 184, 49 P.3d 234 (2002);(See also, *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962)( ...[P]roperty which has been held adversely for ten years ....")).

The period required in this state to establish a prescriptive right of way is ten years, which is analogous to the provisions of RCW 4.16.020, which is the statute of limitations relative to actions for the recovery of real property. *NW Cities Gas Co.*, 13 Wn.2d at 83.

**III.** It is an error of fact to find that “the property in question was being used in a governmental capacity.” *Memorandum Decision, CP 61, para. 2. Emphasis added.*

The testimony at trial showed that, aside from its use as parking and a through way for a multitude of Plaintiffs’ customers’ cars and vendor delivery trucks for seventy years, the Subject Property since 1980 was only *used* as follows:

- to display a “For Rent” sign, RP 14, ll. 5-22;
- for a dance studio in about 1986, RP 136, ll. 16-24; RP 61, ll. 5-8;
- for a picture frame shop in about 1990, RP 14, ll. 23-25;
- for various anniversaries and wedding receptions and a Thanksgiving Dinner gathering., RP 13, ll. 21 – RP 15, lls.1-8, RP 98, ll. 17-25.

Mr. Secor, a 37-year veteran of the Spokane Park Department, and the current maintenance manager, testified that the Subject Property has never been occupied by any government

offices. RP 86, ll. 1-9. Mr. Thompson testified that he recalled no one else using the property in fifty years. RP 2, ll. 2-4. However, the property was remodeled twice, once remodeled in preparation for lease to the frame shop, and once after that tenant left. RP 86, ll. 1-6.

The Subject Property was never held for a governmental purpose, but instead was held exclusively for “sale” or “rent.” Mr. McIntyre testified that he was approached to purchase or rent the Subject Property. The “For Rent” sign was displayed for about 20 years. RP 14, ll. 1-20. A number of witnesses testified that there was a “For Rent” sign in the window of the Subject Property as long as it was held by the Spokane Park Department. The Subject Property was held by Spokane County and subsequently the City of Spokane valley for one sole use: lease by nongovernmental persons. There is no sufficient evidence supporting the Court’s Finding of any governmental use for “historic preservation.”

The second *Duwamish Slough* case, discussed below, specifically held that when property is held for resale and is not in a special purpose trust or restricted by any special ordinance, then it is

held in a proprietary capacity and subject to adverse possession or a prescriptive easement. *King County v. Commercial Waterway Dist. No. 1 of King County*, 42 Wn.2d 391, 393, 255 P.2d 539 (1953)(where the Supreme Court held that in “selling” such riverbed property, the municipality was holding the property “in a proprietary capacity.”) The historical basis of this issue begins with statehood:

It is clear, upon the face of the statute, that the Legislature did not intend to provide for the acquisition of the title to school lands by adverse possession. We accordingly hold that title to lands granted to the state of Minnesota for the use of its schools by the United States cannot be acquired by adverse possession, as against the state. To the same effect, see *Scofield v. Schaeffer (Minn.)* 116 N.W. 210; *State v. Tanner*, 73 Neb. 104, 102 N.W. 235. See, also, *N. P. Ry. Co. v. Ely*, 197 U.S. 1, 25 S.Ct. 302, 49 L.Ed. 639. In opposition to this case, the appellants cite *Schneider v. Hutchinson*, 57 P. 334, from the Supreme Court of Oregon, where it was held that title to school lands of that state might be acquired by adverse possession. There was no limitation on the power of alienation in Act Feb. 24, 1859, c. 33, 11 Stat. 383, admitting Oregon into the Union, or in the Oregon Constitution, such as are found in our enabling act and in the Constitution of this state. For this reason the decision is not in point. The same is true of the cases cited from *Missouri and Indiana. School Directors v. Georges*, 50 Mo. 194; *Hargis v. Township*, 29 Ind. 70. In the language of the Supreme Court of the United States:

This being the nature of the title to the land granted for the special purposes named, it is evidence that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any proportion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly .... and to permit title to school lands in this state to be acquired indirectly by adverse possession would be repugnant to the laws of the United States and the Constitution of the state.

- *O'Brien v Wilson*, 51 Wash. 52, 58, 97 P. 1115 (1908)

The *O'Brien* court's 1908 conclusion is the genesis of Washington law regarding adverse possession of municipally owned proprietary land.

The state court cases cited by our Supreme Court in the 1908 *O'Brien* decision supported the rule of law that such lands as school lands, granted for that special purpose to the State, could not be acquired by adverse possession as they could not be alienated directly for another purpose; thus not indirectly.

The modern application of the above rule arose in 1963. In 1911-1912 King County's waterway district acquired the Duwamish Slough. *Commercial Waterway Dist. No. 1 of King County v*

*Permanente Cement Co.*, 61 Wn. 2d 509, 510-11, 379 P.2d 178 (1963). Waterway District No 1 of King County acquired a strip of land 500 feet wide and five miles long across the Seattle tide flats. *Id.* at 511. It was dredged by the Corps of Engineers and the Duwamish River was diverted into it to create a commercial waterway on Puget Sound. *Id.* The waterway was free and open to public shipping and navigation. *Id.*

In 1946, Permanente Cement Company acquired an adjoining parcel; constructed facilities and a permanent dock into the waterway, and carried on a gypsum unloading, processing and loading business. *Id.* In 1959, the Waterway District asserted a claim for rent for the upland area between the company's land and the strip along the shore and into the water. *Id.* The gypsum company countered by claim of adverse possession. *Id.* at 512.

The trust capacity or special governmental capacity was applied:

Nor can title by adverse possession be acquired to property held by a municipality for public purposes in its governmental capacity.

- *Permanente Cement Co.*, 61 Wn. 2d at 512  
(citing, *Town of West Seattle v. West Seattle*)

*Land & Improvement Co.*, 38 Wash. 359, 80 P. 549 (1905)).

The *Permanente Cement Co.* court also cited to *Rapp v. Stratton*, 41 Wash. 263, 83 P. 182 (1905) which held:

The property upon which the appellant is seeking to obtain title by adverse possession is confessedly held by the city as a trustee for the public, and not as property of the municipality.

- *Permanente Cement Co.*, 61 Wn. 2d at 512.

The *Permanente Cement Co.* then cited to *Gustaveson v. Dwyer*, 83 Wash. 303, 145 P. 458 (1915), stating:

This court has recognized that if land were held by a municipality in its proprietary capacity the land would be subject to being acquired by adverse possession the same as if owned by a private individual.

- *Permanente Cement Co.*, 61 Wn. 2d at 512.

The *Permanente Cement Co.* finally held that:

In the instant case we conclude that there is no basis to consider a water highway as being held in a different capacity than a land highway and that appellant owns the property within the waterway in its governmental capacity. The land acquired by purchase and condemnation within the 500-foot right of way for the construction of the waterway is held in trust for the public. Land held by a municipal corporation in trust for the public is not subject to being alienated unless expressly so provided by the legislature.

- *Permanente Cement Co.*, 61 Wn. 2d at 512-513 (citing, *Buckhout v. Newport*, 68 R.I. 280, 27 A.2d 317, 141 A.L.R. 1440 (1942); *Aldrich v. City of New York*, 208 Misc. 930, 145 N.Y.S.2d 732 (1955)).

The key and core of the rule was repeated and reaffirmed that, in regard to property acquired for construction of the Duwamish waterway, the Court determined that no right to alienate was granted. *Id.* at 513-14 (citing, *Commercial Waterway District No. 1 v. King County*, 200 Wash. 538-46, 94 P.2d 491 (1939)(where, after the voters of King County had approved a bond issue to aid in a harbor development project, and when the intent of the board of county commissioners was to use part of the proceeds of the bond issue to acquire, for public use, sites for wharves and docks along the Duwamish Waterway, the Court determined that the property was acquired in the county's governmental capacity).

Relying on such, the *Permanente Cement Co.* court determined that the waterway was held in the governmental capacity. *Permanente Cement Co.*, 61 Wn. 2d at 513.

However, as part of the Duwamish waterway project, when the County diverted the river into the new waterway, it acquired the

then dry former riverbed of the Duwamish. *Permanente Cement Co.*, 61 Wn. 2d at 513. After diversion, it: "... became vested in the appellant district with the right of sale." *Id* at 513. The *Permanente Cement Co.* court cited to *King County v. Commercial Waterway District*, 43 Wn.2d 391, 255 P.2d 539 (1953), where it had held that the district, in selling such dry riverbed property, "acted in a proprietary capacity." *Permanente Cement Co.*, 61 Wn. 2d at 513.

The instant case's Subject Property, on Sprague Avenue in Spokane, came to the County when the Opportunity Township was dissolved. IT WAS HELD SOLELY FOR ONLY TWO PURPOSES AND USES: RENT OR SALE. It was only held, literally, to be alienated. That is how it was acquired. It was advertised for rent for two decades. It was leased for a short time. It was advertised for sale. The property was held in a proprietary capacity. Spokane County did not hold title as school land, street, waterway, railroad or any type of public trust land.

## CONCLUSIONS

It was an obvious error of law by the Superior Court to ignore the period of ownership by Defendant Spokane Valley Heritage Museum, when considering the adherence of prescriptive rights. There is no ten year “single servient estate owner” rule. But this error becomes reversible, being less than ten years, unless during the period of County ownership the use was proprietary. Property held solely for resale or occasional rental is *per se* proprietary, nongovernmental use.

Many decisions grant prescriptive roadway rights over pre-existing roads with co-existing users. The hundreds of customers, employees, owners and vendors used the Subject Property’s road and parking spaces without asking permission and with no fact based inference that it was permissive.

The frame shop failed, and the building was empty for a very long time.

The Museum’s umbrage reached a high pitch in the media. The County, as a matter of Municipal Code, cannot gift use of governmental land to business owners by default, because its

properties might be numerous. The fact is, Spokane Parks Department put up some barriers in a failed attempt “to keep the traffic from driving through.” RP 90, l. 6.

The hundreds of daily users, for seven decades, to the Plaintiffs’ businesses ripened into prescriptive use by year 2000.

RESPECTFULLY SUBMITTED this 12th day of March, 2012.

MURPHY, BANTZ & BURY, PLLC

Handwritten signature of Timothy R. Fischer in black ink, with the initials 'JTB' at the end.

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