

FILED

APR 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 303519
IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

**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.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Neighboring businesses do not acquire prescriptive rights in each other's parking lots simply by virtue of their patrons using the parking lots as parking lots. The trial court did not err in its factual findings, nor did it err in concluding that appellants obtained no prescriptive rights in respondent Spokane Valley Heritage Museum's parking lot.

II. STATEMENT OF THE CASE

A. Factual Background.

This case concerns the Spokane Valley Heritage Museum ("the Museum") which, by resolution 04-003 of the City of Spokane Valley, operates in the historic Opportunity Township Hall. (CP 51, 53-54) Constructed in about 1910, the Opportunity Township Hall is the last remaining township hall in the State of Washington. (CP 53) The hall is a relatively small stucco building, and for much of its existence has also served as the Grange Hall. (CP 53) The Opportunity Township Hall is currently a single parcel of land, though it was originally two adjoining parcels: The Hall, owned by the Opportunity Township; and an adjoining lot, which would eventually become a parking lot. (CP 53) The Opportunity Township acquired the adjoining lot in 1956, and held both parcels until November 1990, when the Opportunity Township deeded the property to the County of Spokane. (CP 53) Together, the two adjoining

parcels are comprised of approximately 25% building and 75% parking lot. (CP 53)

From 1990 until 2004, the hall was owned and maintained by the County of Spokane, first by the Facilities Maintenance Department, and then by the Department of Parks and Recreation. (CP 53; VRP 85) In 2004, shortly after the incorporation of the City of Spokane Valley, the County of Spokane deeded the hall and its adjoining parking lot to the City. (CP 54) Around the same time, the Museum came into being, incorporating as a non-profit organization. (CP 54) The Museum's mission is to preserve the history of Spokane Valley. (CP 53) On March 10, 2004, the City of Spokane Valley transferred the hall and its adjoining parking lot to the Museum pursuant to Spokane Valley Resolution 04-003. (CP 54) That resolution provides, *inter alia*, that the property must be maintained and operated as a public museum. (CP 54)

At trial, several witnesses testified that the building was sparsely used in the 1956 to 2004 time period. (CP 53-54) Appellants were generally able to use the Opportunity Township Hall's parking lot without restrictions during that same time period. (CP 52-54) At one point in the mid-1990s the County of Spokane placed concrete barriers along the east property line of the County property, between the County property and

one of appellants' properties. (CP 53) After appellants complained to the County, the County removed the barriers. (CP 53)

At the time the Museum acquired the property and commenced operating in 2004, it was not aware that patrons of appellants' businesses would use the Museum's parking lot. (CP 55) Soon after the Museum commenced operations, it noticed cars speeding across the parking lot using as it as a thoroughfare; it also noted that patrons of the adjoining businesses of appellants destroyed some of the Museum's property. (CP 55) The Museum began placing flyers on the cars parked in its parking lot that were not there for Museum purposes. (CP 55)

Meanwhile, development in the area of the Museum and the three appellants' businesses proceeded. On May 8, 2008, a public hearing was held by the City of Spokane Valley concerning the reestablishment of an alley running behind the Museum and the three appellants' businesses so as to continue to provide public access to all of them. (CP 55) The City of Spokane Valley adopted Ordinance No. 08-010 on May 8, 2008, which includes in its recitations the fact that none of the appellants filed a written objection to the proposed move of the alleyway. (CP 55)

Throughout the middle to late 2000s the Museum put signage in their parking lot stating "Museum Parking Only," and also put notes on cars instructing them to not park on the Museum's property unless it was

for Museum business. (CP 55) The Museum also sought to discourage squatters who had been living in the parking lot in their vehicles. (CP 55) In early 2009, Gonzaga University donated fencing which was installed around the Museum's parking lot. (CP 55) The Museum put the fence up to keep people from using the parking lot as a thoroughfare, which both created dangers to school children on field trips that were in the parking lot as well as interfering generally with the Museum's use of its property. (CP 55)

Around this time (2009) a new Rite Aid had been completed on the corner of Sprague and Pines, as was the modification of the alleyway behind the Museum and appellants' three businesses. (CP 56) Due to the construction of the Rite Aid, the patrons of appellants' three businesses had commenced parking in the Rite Aid parking lot. (CP 56)

On August 3, 2009, the Museum successfully obtained a lot line elimination and condensed the two adjoining Museum parcels into one parcel. (CP 56) The Museum did this in anticipation of moving a number of permanent outdoor exhibits onto portions of the Museum's property. (CP 56)

B. Procedural History.

Appellants commenced suit against the Museum on February 26, 2010. (CP 1-11) Appellants thereafter moved for a preliminary injunction,

which was denied. (CP 35-37) A bench trial was conducted in Spokane County Superior Court before the Honorable Judge Tari S. Eitzen on April 25 and April 26, 2011. (VRP 1, 106) The trial court ruled by Memorandum Opinion on June 9, 2011. (CP 51-66) Findings of Fact and Conclusions of Law incorporating the Memorandum Opinion were entered on October 14, 2011. (CP 118-119) This appeal timely followed. (CP 121-140)

III. ARGUMENT

A. Standards of Review.

A trial court's challenged findings of fact are reviewed for substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 986 P.2d 144 (1999). A court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *Id.* at 714 (citing *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234

(1996)). The court reviews substantial evidence in the light most favorable to the respondent. *Public v. Trade*, 159 Wn.2d 555, 576, 150 P.3d 176 (2007).

The burden is upon the party challenging the trial court's findings of fact to demonstrate why specific findings of the trial court are not supported by the evidence, and to cite to the record in support of that argument. *In re Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).

The assignments that the trial court erred in making fourteen findings of fact, without any attempt to show wherein the findings were erroneous or lacked evidentiary support, is an invitation to us to search the record and see if we can find any error. It is not our function or duty to search the record for errors, but only to rule as to errors specifically claimed.

Malnati v. Ramstead, 50 Wn.2d 105, 107, 309 P.2d 754 (1957)(quoting *Knatvold v. Rydman*, 28 Wn.2d 178, 183, 182 P.2d 9 (1947)).

Unchallenged factual findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Similarly, findings of fact that are not clearly challenged by adequate reference to the record are treated as verities. *Lint*, 135 Wn.2d at 533).

The trial court's conclusions of law are reviewed to determine if they are supported by the findings of fact. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

A trial court's findings on the elements of prescriptive easements are mixed questions of law and fact. *810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007)(citing *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987)).

B. The Trial Court Did Not Err in Entering Findings of Fact and Conclusions of Law.

Appellants assign error to the trial court's rejection of their proposed Findings of Fact and Conclusions of Law. (*Appellants' Brief*, pp. 3-5) Appellants argue that they were entitled to have the trial court enter their proposed Findings and Conclusions. (*Id.*) Appellants do not cite any authority in support of this assignment of error. (*Id.*) Appellants do not state the nature of the alleged error. (*Id.*) Further, the sections of the record cited by appellants do not support the factual allegations made in their Brief. (*Compare Appellants' Brief* pp. 3-5 with CP 80, 91)

"If a written opinion or memorandum decision is filed, it will be sufficient if formal findings of fact and conclusions of law are included." Superior Court Civil Rule ("CR") 52(a)(4). There is no inherent right of a

party to have its proposed findings and conclusions entered by the court. *See* CR 52(c).

An appellant waives an assignment of error by not providing a sufficient record to permit appellate review. *Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). An appellant waives an assignment of error by failing to make a legal argument in support of the contention. *Id.*

Here, appellants' assignment of error to the rejection of appellants' proposed findings and conclusions is an expression of wish that the trial court had acted differently, rather than an argument in support of an assignment of error. The trial court's memorandum opinion is accompanied by a formal findings of fact and conclusions of law, consistent with CR 52(a)(4). (CP 51-66, 118-119) Appellants cite no authority for the proposition that the trial court erred by complying with CR 52(a)(4), waiving the assignment of error. *Haugh*, 58 Wn. App. at 6.

Appellants allege the trial court rejected the appellants' proposed findings and conclusions, and that respondent had agreed to these proposed findings and conclusions. (*Appellants' Brief*, p. 3) The section of the record cited to is a red-line version of appellants' proposed pleading; there is no support at that portion of the record for the contention that respondent had stipulated to its entry. (CP 80) Appellants also contend that the trial court ordered the respondents "back to the drawing board" to draft

a new pleading. (*Appellants' Brief*, p. 3) The section of the record cited to is a pleading entitled "Plaintiff's Objections to Defendant's Proposed Findings of Fact and Conclusions of Law." (CP 91) The relationship between this citation and appellants' factual/procedural contention is unclear. As the portions of the record cited are not pertinent to appellants' assignment of error, this assignment of error may be deemed waived. *Haugh*, 58 Wn. App. at 6.

Finally, appellants do not explain what, if any, differences exist between the trial court's findings in its memorandum opinion and the appellants' proposed findings and conclusions, nor do they explain why entering one rather than the other was error. To be a difference it must make a difference. *See, e.g. In re Estate of Nelson*, 85 Wn.2d 602, 614, 537 P.2d 765 (1975)(alleged trial court errors which do not affect the case's outcome are harmless).

Appellants' initial assignment of error lacks adequate foundation in the record and in law, and presents no issue warranting reversal or modification of the trial court's decision.

C. The Trial Court Did Not Err in its Evidentiary Rulings.

Appellants argue that the trial court erred in its findings of fact because a particular witness had been ruled "impeached" at trial. (*Appellants' Brief*, p. 5, assignment of error no. 2) No further mention of

this assignment of error is made in Appellants' Brief. The trial court did not rule that witness "impeached." (CP 62) Indeed, the trial court called the appellants' argument concerning that witness a "red herring." (CP 62)

A court's decision to admit or exclude evidence is reviewed for manifest abuse of discretion. *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 128, 920 P.2d 619 (1996).

"[T]he appellant bears the burden of complying with the Rules of Appellate Procedure and perfecting his record on appeal so the reviewing court has before it all the evidence relevant to deciding the issues before it . . . The court may decline to reach the merits of an issue if this burden is not met." *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 692, 959 P.2d 687 (1998)(*internal citation omitted*).

An appellant waives an assignment of error by not providing a sufficient record to permit appellate review. *Haugh*, 58 Wn. App. at 6. An appellant waives an assignment of error by failing to make a legal argument in support of the contention. *Id.*

Appellants do not cite to the record to support the contention that a witness was ruled "impeached." (*See Appellants' Brief*, p. 5) Appellants have not preserved the portion of the record in which the testimony of that witness, Jayne Singleton, appears. (VRP 138) Appellants devote no section of their brief in support of this assignment of error. (*See*

Appellants' Brief, passim) Consequently, this assignment of error should be deemed waived. *Haugh* at 6. Alternatively, the trial court's conclusion that this argument is a "red herring" should be affirmed. (*See* CP 62)

D. The Trial Court's Findings of Fact Are Supported By Substantial Evidence.

1. *Findings of Fact Concerning the History of the Opportunity Township Hall Are Supported By Substantial Evidence.*

Appellants assign error to the trial court's finding of fact concerning the history and use of the Opportunity Township Hall. (*Appellants' Brief*, p. 5, 7, assignment of error no. 1) Appellant refers to a portion of a sentence from the trial court's memorandum decision. (*Appellants' Brief* at p. 5, selectively quoting CP 53) The citation to the record concerns the trial court's description of the testimony provided by a witness who had been employed by the County of Spokane during the relevant time period. (CP 53) Appellants urge that the trial court "should have found that the property was vacant from the time of the grant, 1990[.]" (*Appellants' Brief*, p. 5) No citation to the record is provided in support of this exhortation. (*Id.*) The trial court describes the evidence presented at trial that the property was not vacant after 1990. (CP 53-54) As appellants provide no citation to record or authority in support of assignment of error no. 1, and as the trial court both had considered and described in its memorandum opinion the evidence contradicting

appellants' "vacant" claim, the trial court did not err in the manner described by appellants in assignment of error no. 1. *Haugh*, 58 Wn. App. at 6; *Lint*, 135 Wn.2d at 531-32.

2. *Findings of Fact Concerning City and County Maintenance And Disposition of the Opportunity Township Hall Are Supported By Substantial Evidence.*

Appellants assert the trial court erred in finding that the County of Spokane demonstrated it intended to preserve the historic Opportunity Township Hall. (*Appellants' Brief*, p. 7, assignment of error no. 11) Appellants further assert that "[t]he entire Findings and Conclusions of CP 61, para. 4 are erroneous." (*Appellants' Brief*, p. 7, assignment of error no. 12)

Appellants devote a section of their brief to the aforementioned assignment of error. (*See Appellants' Brief*, pp. 24-31) However, while that section of the brief alleges the trial court made an error of fact, the argument contained within that section contends that the trial court erred in its legal conclusions. (*See Appellants' Brief*, pp. 25-31) The legal conclusion that the historic Opportunity Township Hall was held in a governmental capacity is discussed *infra*.

Appellants' argument that the trial court erred in its findings of fact is supported by a reference to certain testimony taken at trial. (*See Appellants' Brief*, pp. 24-25) These facts were discussed by the trial court

in its memorandum opinion. (*Compare Appellants' Brief*, pp. 24-25 with CP 51-66) Also discussed were the facts that the property is the last remaining township hall in the State of Washington, that the Opportunity Township Hall also served as the Grange Hall, that it was maintained by the County Parks & Recreation department, and that it was ultimately conveyed to the Museum on the condition that the Museum preserve the property and operate it as a public museum. (CP 53-56, 61)

Appellants' citation to evidence considered by the trial court and incorporated into its memorandum decision does not support the contention that the trial court did not have substantial evidence for its factual conclusions concerning the County's use of its property. Likewise, appellants' omission of other facts considered by the trial court does not erase those facts from the record.¹ That appellants disagree with the factual conclusions reached by the trial court does not mean the trial court's decision was not supported by substantial evidence; the appellate court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *Greene*, 97 Wn. App. at 714.

¹ Appellants failed to preserve for review the record of any of defendant/respondent's case in chief. (*See* VRP 138) The record on review is therefore insufficient to support a challenge to the trial court's findings of fact for substantial evidence, and this Court should decline to reach the merits of appellants' factual challenges. *Haugh*, 58 Wn. App. at 6; *Lint*, 135 Wn.2d at 531-32; *Rhinevault*, 91 Wn. App. at 692.

3. *Findings of Fact Concerning Damages Are Supported by Substantial Evidence.*

Appellants' assignment of error no. 13 states: "The entire Findings and Conclusions of CP 62, para. 2 are erroneous." (*Appellants' Brief*, p. 8) That section of the trial court's memorandum decision concerns appellants' evidence of damages; the trial court concluded that "[t]he [appellants] have not provided sufficient evidence to demonstrate the alleged damages with reasonable certainty." (CP 62). Appellants devote no further section of their brief to this assignment of error. Consequently, the assignment of error should be deemed waived, and the trial court's conclusion that appellants failed to establish that they have been damaged should be affirmed. *Haugh*, 58 Wn. App. at 6; *Malnati*, 50 Wn.2d at 107.

E. Appellants Acquired No Prescriptive Rights in the Museum's Parking Lot.

Appellants assign error to the trial court's conclusion that appellants acquired no prescriptive rights to the Opportunity Township Hall's parking lot. (*Appellants' Brief*, pp. 5-7, assignments of error no. 3, 4, 5, 6, 7, 8)²

² Assignment of error no. 3 concerns the period in which the alleged prescriptive easement accrued. The appellants argued at trial that their prescriptive easement arose during the time the Opportunity Township Hall was owned by either Opportunity Township or the County of Spokane. (CP 56, quoting appellants' counsel). The trial court agreed that "[i]f a prescriptive right did arise while the County or Township was the true owner, the prescriptive right would have run with the land and would therefore have been transferred through the quitclaim deed to the Defendants." (CP 56) It is unclear as to what appellants are assigning error. If appellants believe that their prescriptive claim did not

Prescriptive rights are not favored under Washington law. *810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007)(citing *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946)). “Easements by prescription are disfavored in the law because they effect a loss or forfeiture of the rights of the owner.” *Kunkel v. Fisher*, 106 Wn. App. 599, 603, 23 P.3d 1128 (2001), *rev. denied*, 145 Wn.2d 1010 (2001)(citing *Granite Beach Holdings, LLC v. Dep’t of Natural Res.*, 103 Wn. App. 186, 11 P.3d 847 (2000), and *City of Spokane v. Catholic Bishop*, 33 Wn.2d 496, 514, 206 P.2d 277 (1949)).

A prescriptive easement presents a mixed question of law and fact. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997). To establish a prescriptive easement, the claimant must show that his or her use of the servient land was “(1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the land sought to be subjected, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.” *Imkie v. Steve Kelley et al.*, 160 Wn. App. 1, 7, 250 P.3d 1045 (2010), *rev. denied*, 171 Wn.2d 1029 (2011)(quoting *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)); *see also 810 Properties*, 141 Wn. App. at 700

arise until 2004 when the Museum took control of the Opportunity Township Hall, then they failed to state a claim in their Complaint because the requisite ten year period had not elapsed at the time suit was commenced.

(citing *Mood v. Banchemo*, 67 Wn.2d 835, 841, 410 P.2d 776 (1966), and *The Mountaineers v. Wymer*, 56 Wn.2d 721, 722, 355 P.2d 341 (1960)).

The burden of proving the existence of a prescriptive right always rests upon the one benefited by the easement. *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 288 P.2d 252 (1955); *see also Imkie*, 160 Wn. App. at 7 (citing *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942)) (“The claimant has the burden of establishing the existence of each element.”); *Granite Beach*, 103 Wn. App. at 200; *Todd v. Sterling*, 45 Wn.2d 40, 42, 273 P.2d 245 (1954).

The presumption is that the use of another’s property is permissive. *810 Properties*, 141 Wn. App. at 700 (citing *Kinkel*, 106 Wn. App. at 602).

1. *Appellants’ Use Was Not Hostile.*

Appellants argue the trial court erred because their use of the Opportunity Township Hall’s parking lot was hostile. (*Appellants’ Brief*, pp. 18-22) Appellants further argue, without citation to authority, that the burden is upon the title owner to prove permission, rather than the burden being upon appellants to prove the hostile nature of their use of the property. (*Appellants’ Brief*, p. 20) Finally, appellants argue that a local government cannot grant accommodations to anyone. (*Appellants’ Brief*, p. 21) These arguments are contrary to Washington law.

“[I]n developed land cases . . . an inference of permissive use applies when a court can reasonably infer that the use was permitted by neighborly sufferance or accommodation.” *Imkie*, 160 Wn. App. at 7 (citing *Drake v. Smersh*, 122 Wn. App. 147, 154, 89 P.3d 726 (2004)).

Use without express permission is insufficient to establish adverse or hostile use. *Imkie* at 8 (citing *Cuillier v. Coffin*, 57 Wn.2d 624, 628, 358 P.2d 958 (1961)). Indeed, when the owner of an established road either shares or permits use of his road by another, there is an inference of neighborly accommodation. *Id.* Even though a claimant uses an established road, no prescriptive easement is established because there is no manifestation of a purpose to impose a separate servitude on the property. *Id.*

“A use that is permissive at its inception cannot ripen into a prescriptive right, no matter how long the use may continue, ‘unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate.’” *Imkie* at 7-8 (quoting *Nw. Cities Gas*, 13 Wn.2d at 84).

[A] property owner’s acquiescence in another’s use can be established in a number of ways, not merely through express permission. Permission can be express or implied. A permissive use may be implied in any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.

McMillian v. King County, 161 Wn. App. 581, 601, 255 P.3d 739

(2011)(*citations and internal quotations omitted*).

Another circumstance to be considered is who made the road and who used it. If one, for his exclusive use, makes a road across the land of another and uses it for the prescriptive period, it is much more persuasive of adverse use than if the claimant had merely used a road for the prescriptive period, which had been used first by the owner of the property and who continued, at all times, to use the road for his own purposes. Indeed, the latter circumstance, we have consistently held, justifies the inference that such use by the non-owner is with the permission of the owner. It signifies only that the owner is permitting his neighbor to use the road in a neighborly way.

Cuillier v. Coffin, 57 Wn.2d at 627 (*citing Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 206 P.2d 277 (1949)).

In *Imkie v. Steve Kelley et al.*, the court reversed the trial court's factual finding that the plaintiff/respondent's use of a road was hostile, finding, *inter alia*, that there is no evidence of adverse use where a claimant uses his neighbor's established private road in a manner that does not interfere with the owner's use of that same road. *Imkie*, 160 Wn. App. at 10-11. Instead, under those circumstances, an inference of permissive use or neighborly acquiescence is warranted. *Id.*

Although there do not appear to be cases of record in Washington where a business owner claimed prescriptive rights to an adjoining parking

lot, courts in other jurisdictions have considered factually similar cases and have generally found that the use of a parking lot by adjoining businesses, their patrons, and members of the general public does not establish adverse use or prescriptive rights. *See Greenco, Inc. v. May*, 506 N.E.2d 42, 46 (Ind.App. 1987)(no prescriptive easement for use of parking lot, because use of parking lot as a parking lot consistent with the owner's title); *Shapiro Bros. v. Jones-Festus Prop.*, 205 S.W.3d 270, 275-77 (Mo.App.E.D. 2006)("[M]ere use of the [parking lot] as a convenient 'cutoff' because it was available for use or seemed to be intended for public use, does not alone show that the use is adverse or is exercised as a matter of right."); *Zabaneh v. Dan Beard Associates, LLC*, 105 Conn. App. 134, 937 A.2d 706 (Conn.App. 2008); *Aubuchon Realty Co. Inc. v. Cohen*, 294 A.D.2d 738, 742 N.Y.S.2d 421 (N.Y.App.3d. 2002); *Thompson v. E.I.G. Palace Mall*, 657 N.W.2d 300, 304 (S.D. 2003)("members of the general public cannot, by routine and regular use, create a prescriptive easement on behalf of a landholder.").

In the present case, the trial court held:

Here, the Court must look at the totality of the circumstances when assessing whether or not the use was adverse for the requisite ten year period. The extent to which an action by the Plaintiffs was permitted by the Defendants should take into account the circumstances surrounding those actions. The lot in question was basically vacant for many years. It

had ample room to permit parking and create and alleyway. For most of the time the Plaintiffs claim they were using the property adversely the property was owned by the County of Spokane. 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. If this were a single-family home that, for ten years, allowed three businesses to use 75% of their land the circumstances would be substantially different. Certainly the use of a single-family home's property would be viewed as hostile rather than impliedly permissive. However, since this is property owned (at the time in question) by an entity as large as the County of Spokane, it is more than reasonable to expect such neighborly acquiescence since such acquiescence would not work any hardship on the true owner. One specific example of such acquiescence was when the County of Spokane erected Jersey barriers on the eastern property line of the two lots. After the Plaintiffs had demonstrated their objections to the barriers, the County of Spokane acquiesced and removed them.

(CP 59)

Appellants used their neighbor's parking lot as an alleyway and parking lot. This use was not hostile to the title owner's interest in the property, because the property being used by appellants as a parking lot was, in fact, a parking lot. *See Imkie*, 160 Wn. App. at 10-11; *McMillian*, 161 Wn. App. at 601. *See also Shapiro Bros.*, 205 S.W.3d at 275-77 (“[M]ere use of the [parking lot] as a convenient ‘cutoff’ because it was available for use or seemed to be intended for public use, does not alone show that the use is adverse or is exercised as a matter of right.”). The trial

court properly applied the inference of permissive use, and appellants failed to rebut it.

Finally, appellants contend that a local government cannot grant a neighborly acquiescence, citing *Nelson v. Pacific County*, 36 Wn. App. 17, 671 P.2d 785 (1983). *Nelson* does not so hold. In *Nelson*, certain real property had been acquired and dedicated for public use (as a public highway and a public park). *Nelson*, 36 Wn. App. at 19. The *Nelson* court explained that, *inter alia*, once property has been acquired, held in a governmental capacity, and dedicated for public use, it may not be abandoned or alienated by the government without legislative authorization. *Id.* at 23-24. The relevance of this citation is unclear. *Nelson* does not concern prescriptive easements, nor does it discuss the elements of a prescriptive easement claim, nor does it discuss neighborly acquiescence. Further, a neighborly acquiescence is not an alienation of property – it is a license for permissive use without affecting title of the property or the granting of an easement. *See Imkie*, 160 Wn. App. at 10-11. Finally, in *Nelson* the property was being held in a governmental capacity; for *Nelson* to be apt, appellants must first concede that the Opportunity Township Hall was being held in a governmental capacity. *See Nelson* at 23.

Appellants failed to overcome the inference of permissive use and neighborly acquiescence; and appellants have failed to show that the trial court's findings are either unsupported by substantial evidence or a misapplication of law. The trial court's finding that appellants failed to establish the hostility element of their prescriptive easement claim should be affirmed.

2. *Appellants' Use Was Not Exclusive.*

A claim of prescriptive rights in another's land generally requires that the claimant have exclusive possession for the entire prescriptive period. *In re Ahtanum Creek*, 139 Wn. 84, 100-01, 245 P. 758 (1926). "To establish an exclusive easement by prescription, the possession must be . . . exclusive[.]" *Hoffman v. Skewis*, 35 Wn. App. 673, 676, 668 P.2d 1311 (1983); *Lund v. Johnson*, 162 Wn. 525, 529-30, 298 P. 702 (1931)(exclusivity required to establish prescriptive easement); *Malnati v. Ramstead*, 50 Wn.2d 105, 108-09, 309 P.2d 754 (1957)(same); *cf. The Mountaineers v. Wymer*, 56 Wn.2d at 723-24 (prescriptive easement established where plaintiff established road on defendant's land, posted "no trespassing" signs, and maintained a padlocked gate at the entrance of the road).³

³ Also relied upon by appellants.

Although, where a prescriptive easement is sought for what appears to be an already-established public road, exclusivity is not an element. *Curtis v. Zuck*, 65 Wn. App. 377, 384, 829 P.2d 187 (1992). In *Curtis*, a road was platted in the 1880s under both a public easement and a private easement. *Id.* at 378. By operation of the statutes of the time, since the road was not constructed as platted within five years, the public easement was deemed abandoned. *Id.* at 378. The private easement, however, was not abandoned, and a gravel road was constructed. *Id.* at 379. The road as constructed deviated from the road as originally platted. *Id.* Starting in the 1960s, the road was maintained by Whatcom County. *Id.* at 380. The road had a posted street sign titled “Bennett Avenue.” *Id.* at 383. The *Curtis* court held that under such circumstances, a demonstration of exclusivity was not a requirement, and a non-exclusive prescriptive easement existed on the portions of the road which deviated from the original plat. *Id.* at 384. As the present case does not concern a road which appears to be a public street for use by the public, but rather a claim for a private prescriptive easement in a neighboring parking lot, *Curtis* is inapt. (See CP 6, 58)

Appellants cite *Schulenbarger v. Johnstone*, 60 Wn. 202, 116 Pac. 843 (1911). In *Schulenbarger*, the plaintiff alleged he had obtained a prescriptive easement to a road across some open land by virtue of

continuous use over the course of 25 years. *Id.* at 204. The *Schulenbarger* court affirmed the trial court's dismissal of the claim, holding that there was a presumption that use of a neighbor's land is with permission, and that the plaintiff had not shown hostile or adverse use. *Id.* at 205-08. The court explained:

[I]n order to give a prescriptive right, the use must at least be such as to convey to the absent owner reasonable notice that a claim is made in hostility to his title. It seems to us that any other rule amounts to a practical confiscation of private property for public purposes.

Id. at 207 (quoting *Watson v. County Com'rs*, 38 Wn. 662, 80 Pac. 201 (1905)). The court continued:

If there are any acts which indicate the intention of the owner of the soil to preserve the control to himself, like the erection of a fence and gate, it cannot be said that [a prescriptive easement] is established, and the road does not become a highway, however long it may have been used, even beyond the period of twenty years. Such permissive use, in the absence of any intention to dedicate, is but a mere license, which may be revoked at the pleasure of the owner.

Id. at 207 (quoting *Whitesides v. Green*, 13 Utah 341, 44 Pac. 1032 (1896)).

Appellants rely upon *N.W. Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942). *N.W. Cities* concerned the extension of a public road, South First Avenue in Yakima. *Id.* at 79. Certain companies

had constructed, in the 1920s, an extension of South First Avenue on what was actually private property. That private property was conveyed, in the late 1930s, to another owner, who attempted to fence off the road. *Id.* at 81-82. The court found that the owner of the land at the time the road extension was constructed had acknowledged that a road easement had been established across her property, which precluded the subsequent property owners from attempting to revoke the easement. *Id.* at 90-91.

Appellants also rely upon *810 Properties v. Jump*, 141 Wn. App. 688, 170 P.3d 1209 (2007). In *810 Properties*, a road was constructed across a parcel of property in 1942. *Id.* at 701. Fifty years later, a new owner acquired the parcel, and attempted to block off the road. *Id.* That new owner had herself used the road as if it were a public road or easement before she acquired the property. *Id.* Testimony established that the nearby property owners thought they were using the road as a matter of right. *Id.* The court affirmed that hostile use had been established for the requisite period before the new owner took possession and attempted to block the road. *Id.* By implication, construction, maintenance, and use of a road excludes all other uses of the land on which the road sits for any purpose other than a road.

Although there does not appear to be a Washington case directly on point concerning a claim of prescriptive rights in a parking lot, courts

in other jurisdictions have held that “exclusivity” is an element of a prescriptive claim to a parking lot. *See Slauson v. Bertelsen Family Trust*, 335 Mont. 43, 46, 151 P.3d 866 (2006); *Shapiro Brothers v. Jones-Festus Prop.*, 205 S.W.3d 270, 279 (Mo.App.E.D. 2006); *Swan v. Hill*, 855 So.2d 459, 464 (Miss.App. 2003); *Thompson v. E.I.G. Palace Mall*, 657 N.W.2d 300, 304 (S.D. 2003); *Aubuchon Realty Co. Inc. v. Cohen*, 294 A.D.2d 738, 739-40, 742 N.Y.S.2d 421 (N.Y.App.3d 2002); *Greenco, Inc. v. May*, 506 N.E.2d 42, 46 (Ind.App. 1987); *Bauer v. Harris*, 617 N.E.2d 923, 927-28 (Ind.App. 1993).

Here, as noted by the trial court, and as confirmed by appellants’ Complaint, the appellants are claiming an exclusive prescriptive easement. (CP 6, 58) This lawsuit was precipitated by the Museum’s installation of fencing that had been donated by Gonzaga University. (CP 55-56) The fencing was installed because the Museum was converting portions of the parking lot into space for outdoor Museum exhibits. (*Id.*)

Appellants seek an exclusive easement for their own benefit; not for the benefit of the general public. (CP 6, 58) Appellants also seek to exclude the Museum’s use of the property as museum exhibit space, and seek to supplant the Museum’s use of the space with appellants’ own use for different purposes. (*See* CP 58)

Consequently, appellants were required to establish that their claimed prescriptive easement was exclusive. *Hoffman*, 35 Wn. App. at 676. The trial court did not err in finding that they failed to do so. (See CP 58)

3. *The County of Spokane and the City of Spokane Valley Acted in a Governmental Capacity in Holding and Transferring the Historic Opportunity Township Hall.*

The trial court found certain facts pertaining to the characteristics of the Opportunity Township, and later the County of Spokane's ownership of the Opportunity Township Hall. (CP 54-55, 61) The trial court then concluded as a matter of law that the Opportunity Township Hall had been held in a governmental, rather than a proprietary capacity. (CP 61)

Appellants contend the trial court erred because the Opportunity Township Hall was not "*being used* in a governmental capacity." (*Appellants' Brief*, pp. 7-8, 24; appellants' assignments of error no. 11, 12, and 14)(*emph. in original*).

The legal question, however, is not whether a piece of property is being used for government offices, nor, necessarily, the particular use to which the property is put at a given time. Rather, the question is in which capacity the property is being held by the government.

Actions of a local government (*i.e.* city or county) may be either in a governmental or a proprietary capacity. *Washington Public Power Supply System (“WPPSS”) v. General Electric Company*, 113 Wn.2d 288, 293, 778 P.2d 1047 (1989). In determining whether an action is sovereign or proprietary, the court “may look to constitutional or statutory provisions indicating the sovereign nature of the power, and . . . may consider . . . traditional notions of powers which are inherent in the sovereign.” *Id.* at 296. “Relevant to this analysis are the general powers and duties under which the municipality acted, the purpose of those powers, and whether the activity or its purpose is normally associated with private or sovereign concerns.” *Id.*

“While the duality of municipal function is well understood, the classification of particular activities as governmental or proprietary has proved to be more difficult.” *Id.* at 296. “Each case is determined in light of the particular facts involved.” *Id.*

The principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the corporate entity. *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003); *Hagerman v. City of Seattle*, 189 Wn. 694, 701, 66 P.2d 1152 (1937).

Also relevant is the manner in which the local government acquired title to the property. If the property is purchased by the local government and used to generate profit for private business or the municipal community, it is more likely that the court will find the property is being held in a proprietary capacity. *WPPSS*, 113 Wn.2d at 301. Likewise, a property is held in a proprietary capacity where the local government acquires the property in a transaction with a private business, then later abandons title or ownership of the land. *See Sisson v. Kollé*, 10 Wn. App. 746, 751, 520 P.2d 1380 (1974).

If, on the other hand, a property is acquired via a tax foreclosure, it is presumed to be held in a governmental capacity. *Gustaveson v. Dwyer*, 83 Wn. 303, 145 P. 458 (1915); *see also Edmonds v. Williams*, 54 Wn. App. 632, 774 P.2d 1241 (1989). Similarly, even where property is obtained by the local government via private transaction, the property is held in a governmental capacity if the property was acquired for some special (public) purpose. *Com'l Waterway Dist. No. 1 v. King County*, 200 Wn. 538, 558, 94 P.2d 491 (1939).

If a property is being held by a local government in a governmental capacity, the fact that the local government makes long-term leases of the property to private industry while the government delays in making a public use of the property does not affect the characterization of the

property as governmental rather than proprietary. *Com'l Waterway Dist. No. 1*, 200 Wn. at 558-560.

Where land is held by a local government in a governmental capacity, when that land is transferred to a private owner, the period for establishing adverse possession may commence no earlier than the time of the transfer to the private owner. *Finley v. Jordan*, 8 Wn. App. 607, 609, 508 P.2d 636 (1973).

In the present case, the Opportunity Township Hall was constructed by the Opportunity Township at the turn of the previous century. (CP 53) It served as the Grange Hall, and was used for other occasional events. (CP 54) In 1990, the Opportunity Township Hall was quitclaimed to the County of Spokane. (CP 53) The Opportunity Township Hall was maintained by the County Parks & Recreation department during most of the County's period of ownership. (CP 53-54) On several occasions, the building was leased for relatively short periods of time. (CP 53-54) In January, 2004, the Opportunity Township Hall was quitclaimed to the newly-incorporated City of Spokane Valley. (CP 54) The City of Spokane Valley conveyed the Opportunity Township Hall to the Museum, on the condition that it was devoted to non-profit use as a public museum. (CP 54-55)

The trial court held:

[T]he land was actively maintained by the Parks Department between the years 1996 and 2004. Prior to 1996. . .the building was maintained by the County of Spokane's facilities maintenance department... [T]he maintenance department had done remodeling work on the property in addition to erecting Jersey barriers on the east property line of the lots. The County demonstrated that it had a plan to preserve and maintain the historic town hall for one reason or another. The City of Spokane Valley only gave the property to the Museum/Foundation under the conditions that the conveyance would be revoked [if] it were not operated as a Museum (for the benefit of the public).

Generally, courts should not question the government's discretionary decisions or the intentions behind those decisions. It seems evident that the County preserved the town hall as [an] historical landmark and at times the land was leased in order to generate cash flow. Ultimately the County's successor, the City of Spokane Valley, realized that the property would be well-suited to museum ownership and quitclaimed both lots to a non-profit organization (the Defendant's Museum). Indeed the fact that the [City] retained a reversionary interest in the property demonstrates that it sees value in the land and intends to retain a future interest in it. The property is governmental in nature and therefore not subject to an easement by prescription.

(CP 61)

The trial court's conclusion of law that the Opportunity Township Hall was held in a governmental capacity is supported by the findings of fact. *Hegwine*, 132 Wn. App. at 555. Moreover, the trial court's legal conclusion is consistent with Washington law. The Opportunity Township

Hall was conveyed to the Museum with a reversionary interest to ensure that it would be used as a non-profit, public museum – an action for the common good, rather than for the profit of the municipal corporation. *See Okeson*, 150 Wn.2d at 550; *Hagerman*, 189 Wash. at 701. The fact that the Opportunity Township Hall was leased to private businesses for some periods of time does not affect the capacity in which the local government(s) held the property. *Com'l Waterway Dist. No. 1*, 200 Wn. at 558-560.

IV. CONCLUSION

The patrons of appellants' businesses now park in the newly-constructed Rite Aid parking lot. (CP 56) Under appellants' theory, by 2019 appellants will have acquired Rite Aid's parking lot by prescription. This theory is untenable. The owner of a parking lot does not lose its rights to its parking lot because it permits non-patrons to park there. That appellants used their neighbor's parking lot as a parking lot does not invest in them prescriptive rights; rather, permitting one's neighbors to use one's parking lot is the sort of permissive use or "neighborly acquiescence" that the court is supposed to infer in prescriptive easement cases. The trial court did not err in holding that appellants' use of their neighbor's parking lot as a parking lot was neither exclusive nor hostile to the interests of the

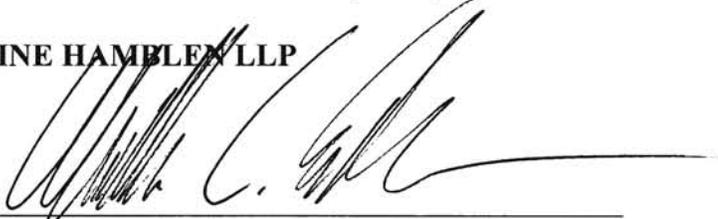
owner of the parking lot, and that therefore that no prescriptive rights were obtained.

Further, the trial court did not err in holding that the Opportunity Township Hall was held in a governmental capacity, precluding the assertion of prescriptive rights.

For these reasons, the Museum respectfully requests that the Court affirm the trial court's judgment.

RESPECTFULLY SUBMITTED this 26th day of April, 2012.

PAINE HAMBLEN LLP

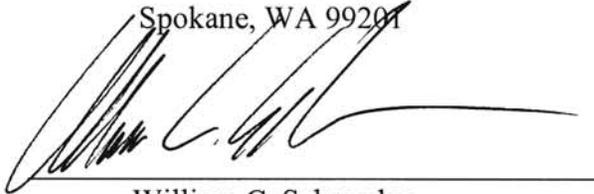
By: 

William C. Schroeder, WSBA # 41986
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2012, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF**, by the method indicated below and addressed to the following:

<u> </u>	U.S. MAIL	Timothy R. Fischer
<u> X </u>	DELIVERED	John F. Bury
<u> </u>	OVERNIGHT MAIL	Murphy, Bantz & Bury, P.L.L.C.
<u> </u>	FACSIMILE	818 W. Riverside, Suite 631
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William C. Schroeder

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