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STATE OF WASHINGTON

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NO. 84828-9  
IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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WILLIAM H. KIELY and SALLY CHAPIN-KIELY, husband and wife,

Respondents,

v.

KENNETH W. GRAVES and KAREN R. GRAVES, Trustees of the  
Graves Family Trust; and all other persons or parties unknown  
claiming any right, title, estate, lien, or interest in the real estate  
described in the complaint herein,

Petitioners.

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**BRIEF OF RESPONDENTS**

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## TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
A.    The Plat dedicates the disputed area to the City as an alley. ....	2
B.    The Kielys and their predecessors-in-interest used the disputed area as their own.....	3
C.    The Graves petitioned the City to vacate the alley, which it did in March 2009. ....	5
D.    The Kielys brought suit in June 2009, alleging ownership of the disputed property by adverse possession.....	6
ARGUMENT.....	6
A.    Standard of Review. ....	6
B.    As a threshold matter, the Kielys could adversely possess the disputed area while the City had an easement over it. ....	7
1.    Cases dating back to territorial days hold that cities have only an easement over the dedicated street or alley. ....	8
2.    The Court of Appeals' holding in <i>Erickson</i> controls. ....	13
3.    Examining the language of plat dedications on a case-by-case basis makes no sense. ....	15
4.    The Graves do not hold a reversionary interest or a possibility of reverter in the City's easement. ....	16
C.    Substantial evidence supports the two challenged findings of fact. ....	18
D.    The Kielys adversely possessed the Graves' interest in the disputed area. ....	20

1.	The Kielys' possession was open and notorious.....	20
2.	The Kielys' possession was actual and uninterrupted.....	23
3.	The Kielys' possession was exclusive. ....	26
a.	The Kielys' use was not convenient or incidental. ....	28
b.	<i>Muench v. Oxley</i> is not analogous to this case. ....	30
c.	It is immaterial who built the hog-wire fence. ....	31
d.	The Kielys exerted dominion and control by allowing the blackberry bushes to grow. ....	31
e.	The public was restricted from accessing the disputed area.....	32
4.	The Kielys' possession was hostile.....	33
	CONCLUSION .....	35

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<b><i>Barnhart v. Gold Run, Inc.</i></b> , 68 Wn. App. 417, 422 n.2, 843 P.2d 545 (1993).....	12
<b><i>Beebe v. Swerda</i></b> , 58 Wn. App. 375, 381, 793 P.2d 442, <i>rev. denied</i> , 115 Wn.2d 1025 (1990) .....	12
<b><i>Bradley v. Am. Smelting &amp; Refining Co.</i></b> , 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985).....	16
<b><i>Bryant v. Palmer Coking Coal Co.</i></b> , 86 Wn. App. 204, 214, 936 P.2d 1163, <i>rev. denied</i> , 133 Wn.2d 1022 (1997) .....	23, 27
<b><i>Burkhard v. Bowen</i></b> , 32 Wn.2d 613, 203 P.2d 361 (1949).....	9
<b><i>Burmeister v. Howard</i></b> , 1 Wash. Terr. 207 (1867).....	8
<b><i>Butler v. Anderson</i></b> , 71 Wn.2d 60, 65, 426 P.2d 467 (1967).....	24
<b><i>Chaplin v. Sanders</i></b> , 100 Wn.2d 853, 861, 676 P.2d 431 (1984).....	<i>passim</i>
<b><i>Cowiche Canyon Conservancy v. Bosley</i></b> , 118 Wn.2d 801, 808, 828 P.2d 549 (1992).....	2, 18
<b><i>Croton Chem. Corp. v. Birkenwald, Inc.</i></b> , 50 Wn.2d 684, 314 P.2d 622 (1957).....	18
<b><i>Davis v. Dep't of Labor &amp; Indus.</i></b> , 94 Wn.2d 119, 123-24, 615 P.2d 1279 (1980).....	2, 18

<b><i>Draszt v. Naccarato,</i></b> 146 Wn. App. 536, 540-41, 192 P.3d 921 (2008).....	7
<b><i>El Cerrito, Inc. v. Ryndak,</i></b> 60 Wn.2d 847, 376 P.2d 528 (1962) .....	20
<b><i>Erickson Bushling, Inc. v. Manke Lumber Co.,</i></b> 77 Wn. App. 495, 891 P.2d 750 (1995).....	7, 13, 14, 15
<b><i>Finch v. Matthews,</i></b> 74 Wn.2d 161, 167-68, 443 P.2d 833 (1968) .....	<i>passim</i>
<b><i>Frolund v. Frankland,</i></b> 71 Wn.2d 812, 818-19, 431 P.2d 188 (1967) .....	27
<b><i>Goedecke v. Viking Inv. Corp.,</i></b> 70 Wn.2d 504, 509, 424 P.2d 307 (1967) .....	8
<b><i>Gustaveson v. Dwyer,</i></b> 83 Wash. 303, 304-06, 145 P. 458 (1915) .....	8
<b><i>Hovila v. Bartek,</i></b> 48 Wn.2d 238, 242, 292 P.2d 877 (1956) .....	21
<b><i>Howard v. Kunto,</i></b> 3 Wn. App. 393, 398, 477 P.2d 210, <i>rev. denied</i> , 78 Wn.2d 996 (1970) .....	20, 24, 25
<b><i>ITT Rayonier, Inc. v. Bell,</i></b> 112 Wn.2d 754, 757, 774 P.2d 6 (1989) .....	20, 26
<b><i>King v. Bassindale,</i></b> 127 Wash. 189, 192, 220 P. 777 (1923) .....	33
<b><i>Krona v. Brett,</i></b> 72 Wn.2d 535, 433 P.2d 858 (1967) .....	21
<b><i>Lilly v. Lynch,</i></b> 88 Wn. App. 306, 313, 945 P.2d 727 (1997).....	27, 29
<b><i>Lingvall v. Bartmess,</i></b> 97 Wn. App. 245, 253, 982 P.2d 690 (1999).....	6

<b><i>M.K.K.I., Inc. v. Krueger,</i></b> 135 Wn. App. 647, 654, 145 P.3d 411 (2006).....	9, 12, 17
<b><i>Michelson Bros., Inc. v. Baderman,</i></b> 4 Wn. App. 625, 630, 483 P.2d 859 (1971).....	17
<b><i>Miller v. Anderson,</i></b> 91 Wn. App. 822, 828, 964 P.2d 365 (1998), rev. <i>denied</i> , 137 Wn.2d 1028.....	33
<b><i>Muench v. Oxley,</i></b> 90 Wn.2d 637, 583 P.2d 939 (1978).....	30, 31
<b><i>Olympia v. Palzer,</i></b> 107 Wn.2d 225, 229, 728 P.2d 135 (1986).....	9
<b><i>Peebles v. Port of Bellingham,</i></b> 93 Wn.2d 766, 771, 613 P.2d 1128 (1980).....	6, 7
<b><i>Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle,</i></b> 70 Wn.2d 222, 226-28, 422 P.2d 799 (1967).....	5, 17
<b><i>Rowe v. James,</i></b> 71 Wash. 267, 128 P. 539 (1912).....	8, 10
<b><i>Sanders v. City of Seattle,</i></b> 160 Wn.2d 198, 214-215, 156 P.3d 874 (2007).....	11
<b><i>Schwede v. Hemrich Bros. Brewing Co.,</i></b> 29 Wash. 21, 69 P. 362 (1902).....	9
<b><i>State v. Wineberg,</i></b> 74 Wn.2d 372, 378, 444 P.2d 787 (1968).....	9
<b><i>Sunnyside Valley Irrigation Distr. v. Dickie,</i></b> 149 Wn.2d 873, 879, 73 P.3d 369 (2003).....	18
<b><i>Thompson v. Smith,</i></b> 59 Wn.2d 397, 407, 367 P.2d 798 (1962).....	12
<b><i>Waldrip v. Olympia Oyster Co.,</i></b> 40 Wn.2d 469, 474, 244 P.2d 273 (1952).....	23

***Wenatchee Sportsmen Ass'n v. Chelan County,***  
141 Wn.2d 169, 176, 4 P.3d 123 (2000) ..... 18

***White v. Branchick,***  
160 Wash. 697, 295 P. 292 (1931) ..... 25, 26

***Wood v. Nelson,***  
57 Wn.2d 539, 540, 358 P.2d 312 (1961) ..... 26

**STATUTES**

RCW 7.28.090 ..... 8, 9

RCW 58.08.015 ..... 11

RCW 58.17.010 ..... 16

RCW 64.04.175 ..... 12

RCW 64.12.010 ..... 15

RCW 64.12.030 ..... 16

**RULES**

ER 408 ..... 35

RAP 2.5(a) ..... 34

**OTHER AUTHORITIES**

17 William B. Stoebuck, *Washington Practice Real Estate:  
Property Law* § 8.19 ..... 27

F. Clark, *Law of Surveying and Boundaries*, § 561 at 565  
(3rd ed. 1959) ..... 24

## INTRODUCTION

For at least 30 years, William Kiely and Sally Chapin-Kiely (the Kielys) and their predecessors-in-interest used a 15-foot-wide strip of land abutting their property held in title by their neighbors, Kenneth and Karen Graves, as trustees for the Graves Family Trust (the Graves). A hog-wire fence separates the disputed area from the Graves' abutting lot. The Kielys and their predecessors parked their cars, planted gardens, stored materials, and maintained the disputed area, while the Graves' abutting lot lay vacant.

The original plat dedicated the disputed area to the City of Port Townsend (the City) as an alley. Well-settled case law holds that although publicly-owned lands cannot be adversely possessed, when property is dedicated to a municipality as a street or alley, the city has only an easement, and the abutting owners retain title to the land. Here, the City never owned the disputed area. The Graves and their predecessors did. The Kielys adversely possessed that ownership interest.

The trial court's unchallenged findings combined with the substantial evidence prove the Kielys' possession of the disputed area was open and notorious, actual and uninterrupted, exclusive, and hostile, for ten years. The trial court did not err.

## STATEMENT OF THE CASE

**A. The Plat dedicates the disputed area to the City as an alley.**

The Kielys own real property in the City that abuts real property owned by the Graves. CP 163, Unchallenged Finding of Fact (UFF) 1, 2 (attached);<sup>1</sup> RP I 85, 171, 173;<sup>2</sup> Ex 1. When the Graves property was first platted in 1908, it included an alley abutting the Kiely parcel that was dedicated to the City via the following plat language:

And we do hereby dedicate to the Public for its use forever as Public thoroughfare the streets and alleys as shown on this plat.

Ex 27 (attached).

The Plat describes an alley 15 feet wide, running along the length of the boundary between the Graves property to the south (identified as "Lot 10" on the Plat, Ex 27) and the Kiely property to the north (not pictured on the Plat, but identified in Ex 1 as "Winslow's Addition"). Ex 1 (attached), 27. This alley has never

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<sup>1</sup> The Graves assign error only to Findings of Fact 3 and 4. BA 2-3. The remaining findings are verities on appeal. **Cowiche Canyon Conservancy v. Bosley**, 118 Wn.2d 801, 808, 828 P.2d 549 (1992); **Davis v. Dep't of Labor & Indus.**, 94 Wn.2d 119, 123-24, 615 P.2d 1279 (1980).

<sup>2</sup> The court reporter did not consecutively paginate the record for the two days of trial. "RP I" refers to the April 5, 2010 RP. "RP II" refers to the April 6, 2010 RP.

been opened. CP 163, FF 4; CP 164, UFF 9-13; RP I 185-87. This unopened alley is the disputed area.

For as long as anyone can remember, a hog-wire fence has run along the southerly boundary of the disputed area. CP 163, UFF 7; RP I 28, 33, 68, 189-90.<sup>3</sup> A shed and cottage on the Kiely property encroach on the disputed area. CP 163-64, UFF 8, 9; Ex 1. The easterly approximately one-fourth of the disputed area historically has been used as a parking area for the cottage and shed. CP 164, UFF 9; RP I 55, 67, 94-95.

**B. The Kielys and their predecessors-in-interest used the disputed area as their own.**

Daniel Blood owned the Kiely property from 1981 to 1987. CP 164, UFF 10; RP I 64-65. He used the disputed area to store building materials and park his trailer. CP 164, UFF 10; RP I 67. During his ownership, Lot 10 was nothing but an open field and brush, as if the lot were abandoned. CP 164, UFF 10; RP I 68. Blood manicured much of the disputed area, which contrasted with the overgrown conditions of Lot 10. RP I 79. He testified that only he and his guests accessed the disputed area. RP I 70-71.

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<sup>3</sup> Exhibit B to the Kielys' trial brief, CP 119, an aerial photograph with labels, is attached for the Court's convenience.

Between 1993 and 1997, Duncan Watters<sup>4</sup> and his girlfriend, Carol Cahill, lived on the Kiely property as tenants. CP 164, UFF 11, 12; RP I 47-49. After Cahill moved out in 1997, Watters remained as a tenant until 2000. CP 164, UFF 12; RP I 24-25, 47, 161. While Watters lived at the Kiely property, he "made exclusive use of the disputed area for his impressive garden." CP 164, UFF 12; RP I 27-29, 50, 53-54, 127. Year round, he grew different kinds of vegetables and herbs, and he used the hog-wire fence to support fava beans. CP 164, UFF 11, 12; RP I 27-29, 50, 53-54, 127. Watters also used the cottage for a bakery business, and his customers would park in the eastern end of the disputed area next to the cottage and shed. CP 164, UFF 12; RP I 24. During the time he lived at the Kiely property, Watters used the disputed area as his property. CP 164, UFF 12.

The Kielys purchased their property in 2000. CP 164, UFF 12; RP I 85. They renovated the cottage, using the disputed area to park their cars and store materials. RP I 94-95, 159. While the Kielys did not keep up Watters' garden, they regularly mowed and

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<sup>4</sup> The RP spells his name "Waters." "Watters" appears in many other pleadings, declarations, and the Findings and Conclusions. CP 21, 97, 164.

"weed wacked" the disputed area. CP 164, UFF 13; RP I 96. Except for a westerly portion that they allowed to overgrow with blackberries, the Kielys maintained the disputed area up to the hog-wire fence. CP 164, UFF 13; RP I 96, 165.

**C. The Graves petitioned the City to vacate the alley, which it did in March 2009.**

In 2008, the Graves petitioned the City to vacate the alley easement and merge it into Lot 10. RP I 176-77; Ex 28. The City required the Graves to pay for an appraisal of the area, a survey of the requested vacation, and a lot-line adjustment. RP I 179; Ex 28-30. The City also required the Graves to pay the appraised value<sup>5</sup> and to sign an indemnity and hold-harmless agreement releasing the City from any future damages resulting from encroachments and adverse possession claims. RP I 179; Ex 28, 29. In February 2009, the City Council passed an ordinance vacating the alley. Ex 28. On March 2, 2009, the City recorded a lot-line adjustment, which vacated the alley easement. Ex 29.

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<sup>5</sup> This may have been improper. See *Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wn.2d 222, 226-28, 422 P.2d 799 (1967) (when city street easement, it could not "sell" the underlying fee because it did not own the fee).

**D. The Kielys brought suit in June 2009, alleging ownership of the disputed property by adverse possession.**

On June 9, 2009, the Kielys filed a quiet title action in Jefferson County Superior Court, alleging ownership of the disputed area up to the hog-wire fence by adverse possession. CP 1-3. The Kielys moved for summary judgment, and the Graves responded and cross-moved for summary judgment, arguing that the Kielys could not have adversely possessed the disputed area when the City owned it. CP 6-7, 26-49. The trial court denied both motions and held a bench trial. CP 108-11. After a two-day trial and viewing the property, the trial court entered a memorandum opinion quieting title in the Kielys. CP 147-52. The Court entered findings of fact and conclusions of law. CP 162-67 (attached).

**ARGUMENT**

**A. Standard of Review.**

The Graves challenge only the trial court's adverse possession ruling. BA 2-4. This ruling is a mixed question of law and fact. *Peebles v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 861, 676 P.2d 431 (1984); *Lingvall v. Bartmess*, 97 Wn. App. 245, 253, 982 P.2d 690 (1999). "Whether

the essential facts exist is for the trier of fact; but whether the facts, as found, constitute adverse possession is for the court to determine as a matter of law." *Peebles*, 93 Wn.2d at 771.

The Graves confuse the applicable standard of review by referring to the summary judgment decisions. BA 9. The trial court did not grant summary judgment to either party, but denied both parties' motions for summary judgment. BA 9; CP 111. The trial court found that issues of fact precluded summary judgment. CP 108-11. The Graves thus cannot appeal from the denial of summary judgment. *Draszt v. Naccarato*, 146 Wn. App. 536, 540-41, 192 P.3d 921 (2008).

**B. As a threshold matter, the Kielys could adversely possess the disputed area while the City had an easement over it.**

The Graves essentially argue that the Kielys and their predecessors could not have adversely possessed the disputed area because the City owned it in fee simple from 1908 until 2009, when the City vacated the alley easement. BA 12-18. As a threshold matter, because case law dating as far back as territorial days mandates the trial court's decision, the Graves are wrong. In any event, the trial court was right because (1) the City had only an easement, (2) *Erickson Bushling, Inc. v. Manke Lumber Co.*, 77

Wn. App. 495, 891 P.2d 750 (1995) controls, (3) plat dedications should not be examined on a case-by-case basis, and (4) the Graves did not have a reversionary interest in the disputed area.

**1. Cases dating back to territorial days hold that cities have only an easement over the dedicated street or alley.**

Although no one can adversely possess publicly-owned property, since territorial days, Washington courts have adhered to the principle that a street dedication in a plat ordinarily conveys only an easement to the municipality. *Finch v. Matthews*, 74 Wn.2d 161, 167-68, 443 P.2d 833 (1968) (street dedication conveys only an easement); *Goedecke v. Viking Inv. Corp.*, 70 Wn.2d 504, 509, 424 P.2d 307 (1967) (no one can adversely possess publicly-owned property); *Gustaveson v. Dwyer*, 83 Wash. 303, 304-06, 145 P. 458 (1915) (same); *Rowe v. James*, 71 Wash. 267, 128 P. 539 (1912) (street dedication conveys only an easement); *Burmeister v. Howard*, 1 Wash. Terr. 207 (1867) (same); RCW 7.28.090 (no one can adversely possess publicly-owned land).

The abutting property owners retain title to the property, subject to the easement. *Finch*, 74 Wn.2d at 167-68; *Rowe*, 71 Wash. at 270; *Burmeister*, 1 Wash. Terr. 207. This rule applies even when a recorded plat dedicates the street to the public

"forever." *Finch*, 74 Wn.2d at 167-68 (citing *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 P. 362 (1902)).

An easement is a property right separate from ownership, allowing use of another's land without compensation. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654, 145 P.3d 411, (2006) (citing *Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986)) *rev. denied*, 161 Wn.2d 1012 (2007). The dedication of an alley is not materially different than the dedication of a street. *State v. Wineberg*, 74 Wn.2d 372, 378, 444 P.2d 787 (1968) ("We have previously held that for all practical purposes alleys are the same as roads, highways or streets. *Burkhard v. Bowen*, 32 Wn.2d 613, 203 P.2d 361 (1949)"). RCW 7.28.090, which provides that publicly-owned lands cannot be adversely possessed, does not preclude an adverse possession claim because the municipality has only an easement in a street. It does not own, have title to, or hold the property.

Here, the 1908 Plat dedicated space to be used for streets and alleys. The trial court correctly ruled, consistent with this well-settled case law, that the dedication reserved an easement in the City, with the Graves' predecessors retaining title to the underlying

property. The Graves recognize this principle in their brief, but do not ask this Court to overrule the well settled law. BA 13 n.9.

Similarly, when the City vacated the alley, it required an indemnity and hold-harmless agreement. Ex 28. Through this agreement, the Graves and the City recognized that the disputed area could have been adversely possessed, even though publicly-owned property cannot be adversely possessed. Ex 28 at 2. The Graves and their predecessors retained the fee in the disputed area before the City vacated the alley easement, so the Kielys could adversely possess the Graves' interest. *Rowe*, 71 Wash. 267. The trial court properly determined that the Kielys could adversely possess the disputed area.<sup>6</sup>

*Finch*, *supra*, answers any remaining issues regarding the plat language used here. In that case, property was dedicated by a plat to the City of Seattle "to the use of the public forever" as a part of a street. *Finch*, 74 Wn.2d at 163. Rejecting a claim that the City owned the disputed area, the Court held that the dedication

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<sup>6</sup> The Graves contend that the plat map and 2009 survey indicate that the alley was a distinct property. BA 15. These documents do not, however, indicate that the unopened alley is a separate property. Ex. 1, Ex. 27. They merely show where the alley would be located if it were opened. *Id.*

language created only an easement and that the original owner retained title to the property. *Id.* at 167-68.

The plat language used here is almost identical to that in *Finch*, dedicating "to the Public for its use forever" the streets and alleys shown on the plat. Ex. 27. As there is no material difference between the plat language used here and the language in *Finch*, this Plat too created only an easement, not a fee interest.<sup>7</sup>

Additionally, the easement was dedicated "to the Public." Ex 27. It does not state that it may be held by a private party. See *Sanders v. City of Seattle*, 160 Wn.2d 198, 214-215, 156 P.3d 874 (2007) ("An easement must be construed strictly in accordance with its terms in an effort to give effect to the intentions of the parties"). The Graves could not own the easement because, by its terms, only the public could.

Because the City had only an Inchoate easement, the vacation did not transfer a property interest to the Graves. Rather, vacating the easement merely eliminated any potential

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<sup>7</sup> The Graves cite RCW 58.08.015, but it does not address how streets and alleys are platted. It identifies what warranties, if any, attach to a conveyance when property is donated or granted via a plat, providing that a donation or grant marked or noted on the plat of the town is to be treated as if a quitclaim deed were used, rather than a bargain and sale deed or a statutory warranty deed.

encumbrance over the disputed area. Because the vacation eliminated any possible encumbrance, the Graves cannot possess an "alley easement." *Contra* BA 17.

In a fallback argument, the Graves claim that even if the City possessed only an easement, the ten-year period did not begin to run until the easement was vacated. BA 16-17. Again, this claim mistakenly presumes that an easement is an ownership interest in the property. An easement is a property right separate from ownership, a mere encumbrance permitting entry onto another's property without compensation. *M.K.K.I., Inc.*, 135 Wn. App. at 654; *see also Beebe v. Swerda*, 58 Wn. App. 375, 381, 793 P.2d 442, *rev. denied*, 115 Wn.2d 1025 (1990). Even if the dominant estate does not use an easement, "for no matter how long," the easement does not extinguish. *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962); *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 422 n.2, 843 P.2d 545 (1993); *see also* RCW 64.04.175 ("Easements established by a dedication are property rights that cannot be extinguished or altered without the approval of the easement owner or owners").

In sum, the Graves and their predecessors owned the disputed area until the Kielys and their predecessors adversely

possessed it. The Graves do not ask this Court to overturn this long line of dispositive cases. The Court should affirm.

**2. The Court of Appeals' holding in *Erickson* controls.**

In addition to the cases spanning back to Washington's territorial days, the Court of Appeals recently decided a case analogous to the facts presented here. *Erickson*, 77 Wn. App. 495. There, the parties owned abutting properties, with a section-line dividing the properties. The original plat dedicated an easement for a county road that straddled the section-line and extended onto each property. *Id.* at 496. The road was never opened, and Erickson's predecessor built a fence encroaching on Manke's property. *Id.*

Nearly 40 years later, Manke discovered the discrepancy and logged the property up to the section-line. *Id.* Erickson filed an action to quiet title and for timber trespass. *Id.* Ruling that Erickson could adversely possess the property over which the county had an easement, the trial court quieted title to the disputed area in Erickson and awarded damages for Manke's timber trespass. *Id.* at 497. On appeal, Manke argued that Erickson and its predecessors could not have adversely possessed the disputed

area because most of it was a "dedicated, unopened public road or right of way, and thus was subject to a governmental interest." *Id.*

Rejecting Manke's arguments, the Court of Appeals held that Erickson and its predecessors could adversely possess the property because Manke held title to the property and the county held only an equitable interest in the property for a public right of passage. *Id.* at 497-98. Thus, Erickson could adversely possess Manke's interest in the property without affecting the county's easement. *Id.* at 499.

*Erickson* controls here. Just like in *Erickson*, the Kielys and their predecessors used property over which a governmental body had an easement. Just like in *Erickson*, the easement here was unopened. And just like in *Erickson*, the Kielys adversely possessed the disputed area.

The Graves attempt to distinguish *Erickson*, arguing that the *Erickson* plat dedicated only an easement, but here, the plat conveyed a fee interest. BA 13-15. The Graves add that the trial court assumed the plat dedicated only an easement and that it should have analyzed the grantor's intent. BA 13-14. *Erickson* and the above-cited cases hold that a plat dedicating a right-of-way does not convey a fee interest, but merely an easement over the

land. *Erickson*, 77 Wn. App. 497-98. The Graves' attempt to distinguish *Erickson* fails.

**3. Examining the language of plat dedications on a case-by-case basis makes no sense.**

The Graves also suggest that courts should examine plat-dedication language on a case-by-case basis. BA 14-15. Our courts have already held that this plat language creates only an easement, and several other problems exist with the Graves' proposal. First, as the Graves put it, there are "uncounted alleys and streets dedicated in plats within the boundaries of cities and towns throughout Washington that are not yet opened." BA 15 n.12. Requiring courts to reexamine similar plat language countless times would waste significant judicial time and resources.

Second, the Graves' rule would create confusion about property rights. Under their proposal, it would no longer be clear whether a municipality has an easement, title to the property, or some other interest. It would also be unclear what an abutting owner can do with unopened, dedicated property. If the municipality had title to that property or even a significant enough interest, then the owner could be subject to claims for waste, trespass, or timber trespass, to name a few. See RCW 64.12.010

(waste); RCW 64.12.030 (timber trespass); *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985) (explaining elements of intentional trespass). Since existing case law provides a clear rule, there is no reason to depart from it.

The Graves multiply the complexity of their proposed rule by suggesting that "[t]he duration and extent of the interest conveyed is important." BA 15. Besides the telling lack of authority for this idea, it could lead to plats with identical language being interpreted differently. *But see* RCW 58.17.010 (divisions of land "should be administered in a uniform manner by cities, towns and counties throughout the state"). Their suggestion flies in the face of all known rules of interpretation. This Court should reject the Graves' unsound and impractical proposals.

**4. The Graves do not hold a reversionary interest or a possibility of reverter in the City's easement.**

The Graves posit that because they held a reversionary interest or possibility of reverter, their future interest could not be adversely possessed. BA 17-18. But if anyone could have a reversionary interest or possibility of reverter, it would be the Kielys and their predecessors. The Kielys' predecessors had already adversely possessed by 1981. They thus owned the disputed area

subject to the City's easement. If a reversionary interest could exist, it belonged to the Kielys.

But no such reversionary interest or future interest could exist. The City held an easement, but when it vacated that interest, it terminated. See *Puget Sound Alumni*, 70 Wn.2d at 226-28; *Michelson Bros., Inc. v. Baderman*, 4 Wn. App. 625, 630, 483 P.2d 859 (1971) ("When a street is vacated, the abutting owners continue to hold their fee to the center of the vacated street, but the fee is unencumbered by this public easement"). There was no future interest in the easement to revert.

Quixotically, the Graves argue that, assuming the City held only an easement, "[h]ad the City not vacated the alley, the Graves would have no interest to dispossess by adverse possession." BA 17. This argument just ignores the law. An easement is different from ownership and when property is dedicated for a street or road, the servient estate retains ownership of the property. *M.K.K.I., Inc.*, 135 Wn. App. at 654; *Finch*, 74 Wn.2d at 167-68.

In sum, the City possessed only an easement over the property and, until adversely possessed by the Kielys and their predecessors, the Graves held title to the disputed area. Because

the City did not own or hold title to the disputed area, the Kielys could adversely possess it. The Graves' arguments fail.

**C. Substantial evidence supports the two challenged findings of fact.**

The Graves assign error to only two of the trial court's 13 findings of facts. BA 2-3. The remaining 11 findings are verities on appeal. *Cowiche Canyon Conservancy*, 118 Wn.2d at 808; *Davis*, 94 Wn.2d at 123-24. "Findings of fact are reviewed under the substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true." *Sunnyside Valley Irrigation Distr. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). A reviewing court will not substitute its judgment for that of the trial court even though it would have resolved the factual dispute differently. *Id.* at 879-880 (citing *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957)). Substantial evidence supports the two challenged findings.

Finding 3 is purely descriptive and essentially undisputed (CP 163):

Said alley was platted wholly within the Power Addition, lies between the parties' two parcels (Exhibit 27) and is depicted

as "vacated alley" on Exhibit 1, the Anderson survey. The vacated alley is the disputed area between the parties and is legally described in Exhibit "A" attached hereto.

It is unclear what the Graves believe is wrong with this finding. Exhibit 27 is a copy of the Plat, which shows the location of the parcel. Exhibit 1 is the Anderson survey depicting the disputed area as "Vacated Alley." Exhibit B to the Kielys' trial brief is a color aerial photograph showing the disputed area that confirms the descriptions in Exhibits 1 and 27. CP 119. The vacated alley is also the disputed area between the parties, and Exhibit A to the Findings and Conclusions describes the disputed area. *See also* BA 4 (describing the disputed property as the alley). Substantial undisputed evidence supports Finding 3.

Finding 4 is again an essentially undisputed fact (CP 163):

No person remembers the alley ever being opened or used as a public right-of-way nor is there any record of it having been opened in court, and thus, the court finds that the alley was never opened or used by the public as an alley.

Again, the Graves do not explain any alleged error. There is no evidence that the City opened the alley or that the public used it as an alley. The testimony is that the easterly quarter of the disputed area was used for parking, and the rest was used by the Kielys and their predecessors as they wished. CP 164, UFF 9; RP I 27-29, 50,

55, 67, 94-95. No one presented City records that the alley had been opened. Although Mr. Graves testified that, while growing up, he rode his dirt bike on a path through the disputed area, that does not mean the City opened the alley or that the public used the disputed area as an alley. RP I 192, 205. Substantial evidence supports the trial court's findings.

**D. The Kielys adversely possessed the Graves' interest in the disputed area.**

Adverse possession requires "possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile" for ten years. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989) (citing *Chaplin*, 100 Wn.2d at 857). Predecessors' uses tack to satisfy the time requirement. *Howard v. Kunto*, 3 Wn. App. 393, 398, 477 P.2d 210, rev. denied, 78 Wn.2d 996 (1970), overruled on other grounds by *Chaplin*, supra; *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962). Between the verities and the substantial evidence, the trial court easily found the elements of adverse possession.

**1. The Kielys' possession was open and notorious.**

The requirement of open and notorious possession is satisfied "if the title holder has actual notice of the adverse use

throughout the statutory period." *Chaplin*, 100 Wn.2d at 862 (citing *Hovila v. Bartek*, 48 Wn.2d 238, 242, 292 P.2d 877 (1956)). The requirement is that the claimant make such use of the land that any reasonable person would assume she is the owner. 100 Wn.2d at 862. Thus, the title holder is held to constructive notice of the possession. *Id.* "In determining what acts are sufficiently open and notorious to manifest to others a claim to land, the character of the land must be considered." *Id.* at 863 (citing *Krona v. Brett*, 72 Wn.2d 535, 433 P.2d 858 (1967)). The claimant's use and occupancy need only be the same as a true owner would assert in view of its nature and location. *Id.*

Here, the Kielys and their predecessors openly and notoriously used the disputed area. As far back as anyone can remember, a hog-wire fence has been on the disputed area, serving as a boundary line between the Kiely and Graves properties. CP 163, UFF 7; RP I 28, 33, 68, 189-90. The strip extends up a slope to an area where blackberry bushes grow. RP I 33, 96, 165. The Kielys, their predecessors, and their tenants openly and notoriously used the land by parking their cars in the disputed area, planting intricate gardens up to and including the fence, and maintaining and mowing the area. CP 163-64, UFF 7-

13; RP I 27-29, 50, 55, 67, 96, 106, 122-23, 161-63. In contrast to the Graves' vacant lot abutting the disputed area, the Kielys and their predecessors openly used this land as would an owner.

The Graves argue that the Kielys failed to prove this element because they did not (1) construct a fence to define the disputed area, (2) exclude the public from the disputed area, (3) use the back-third of the disputed area, or (4) maintain Watters' gardens. BA 22. First, while it is unclear who constructed the hog-wire fence, it marked the boundary between the two properties, and the Graves, the Kielys, their respective predecessors, and the public all treated it as such. RP I 68, 88; RP II 18.

Second, in contrast to the Graves' vacant lot, the Kielys and their predecessors openly used the disputed area by storing materials on it, parking on it, putting a garden in it, and regularly maintaining the area, CP 163-64, UFF 7-13; RP I 27-29, 50, 55, 67, 96, 106, 122-23, 161-63. As for the claim that the public was not excluded from the disputed area, the truth is that the public was allowed on the property as invitees of the Kielys, their predecessors, and their tenants. See *Chaplin*, 100 Wn.2d 863-64 (holding that because the adverse possessors maintained the disputed area and used it for a garden and guest parking, in

contrast to the overgrown, undeveloped land owned by the adversely possessed owner, the plaintiff had proven open and notorious use of the disputed area).

While there were blackberry bushes at the back of the disputed area, that is consistent with the character of that property. *Contra* BA 22. As Cahill and Mr. Kiely testified, that land is not suitable for a garden or other purposes. RP I: 51, 165. Only the Kielys and their predecessors used that property for any purpose. In any event, the Kielys decided whether the blackberries should remain there. RP I 96, 165. The Graves did not make that decision. The Kielys openly and notoriously used the property.

**2. The Kielys' possession was actual and uninterrupted.**

The actual possession requirement ensures that the adverse possessor has more than a tangential relationship with the disputed area. See *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 474, 244 P.2d 273 (1952). The claimant must demonstrate some sort of physical possession of the property. *Id.* (holding that paying property taxes on a parcel, by itself, is not actual possession); accord *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 214, 936 P.2d 1163, *rev. denied*, 133 Wn.2d 1022 (1997). To be

uninterrupted, the use of the property must be continuous for the ten-year period. *Butler v. Anderson*, 71 Wn.2d 60, 65, 426 P.2d 467 (1967), *overruled on other grounds by Chaplin, supra; Howard*, 3 Wn. App. at 397-98. "Continuity of possession may be established although the land is used regularly for only a certain period each year." 3 Wn. App. at 398 (quoting F. Clark, *Law of Surveying and Boundaries*, § 561 at 565 (3<sup>rd</sup> ed. 1959)).

Here, the Kielys and their predecessors actually possessed the property for more than ten uninterrupted years. The Kielys and their predecessors did not simply pay taxes on the disputed area, but used the land for parking, gardens, storage, and other plants. CP 163-64, UFF 7-13; RP I 27-29, 50, 55, 67, 96, 106, 122-23, 161-63. They physically maintained the property. *Id.* As a result, they actually possessed the property.

Although the uses varied, they were uninterrupted for nearly 30 years. From Daniel Blood, to Duncan Watters, to the Kielys, the disputed area was continuously used by owners or tenants of the Kiely property from 1981 to 2009. CP 164, UFF 10-13. The Kielys proved actual and uninterrupted use.

The Graves imply that because the Kielys took possession of the property in 2000, and brought the claim for quiet title less

than ten years later, they could not have continuous possession. BA 21-22. But the Graves did not assign error to Findings 10 through 13, so it is a verity that from 1981 until the initiation of the lawsuit in 2009, the Kielys and their predecessors adversely used the disputed area. CP 163-64. The Graves must concede that this possession was uninterrupted. The Graves also ignore that tacking can be used to meet the timing requirement. *Howard*, 3 Wn. App. at 398. The Graves' argument lacks merit.

The Graves contend that the hog-wire fence is not evidence of "actual use," citing *White v. Branchick*, 160 Wash. 697, 295 P. 292 (1931), *overruled on other grounds by Chaplin, supra*. BA 23. Of course, the use is more than simply "having" a hog-wire fence. The evidence shows that the parties and their predecessors treated that fence as a boundary. And the Kielys used the disputed area up to the fence.

Moreover, the facts here are distinguishable from those in *White*. There, the appellants failed to demonstrate adverse possession because they cultivated the land only once, twelve years before filing suit, and because they did not recognize that the temporary, crooked fence was the boundary between the two properties. 160 Wash. 699-700.

Here, unlike in *White*, the hog-wire fence was not merely a crooked or temporary fence. It has been in existence as long as anyone can remember. The Kielys and their predecessors also regularly cultivated and maintained the disputed area up to the fence. The Graves' analogy to *White* fails. The Kielys and their predecessors actually and continually possessed the disputed area for more than 10 years.

**3. The Kielys' possession was exclusive.**

While a party claiming property through adverse possession does not need to have absolutely exclusive possession of the land, "the possession [of the land] must be of a type that would be expected of an owner." *ITT Rayonier, Inc.*, 112 Wn.2d at 758-59 (internal quotations omitted). "The ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take." *Id.* at 759. A fence is the usual means used to exclude strangers and establish the dominion-and-control characteristic of ownership. *Wood v. Nelson*, 57 Wn.2d 539, 540, 358 P.2d 312 (1961).

"An 'occasional, transitory use by the true owner will not prevent adverse possession if the uses the adverse possessor permits are such as a true owner would permit a third person to do

as a "neighborly accommodation."'" *Lilly v. Lynch*, 88 Wn. App. 306, 313, 945 P.2d 727 (1997) (quoting 17 William B. Stoebuck, *Washington Practice Real Estate: Property Law* § 8.19 at 516 (1995)); see *Frolund v. Frankland*, 71 Wn.2d 812, 818-19, 431 P.2d 188 (1967) (holding that social and casual use of a beach among neighbors does not defeat a claim for adverse possession), *overruled on other grounds by Chaplin, supra*. "Cases where the courts have found a lack of exclusivity involve use by the title owner that indicate ownership." *Lilly*, 88 Wn. App. at 313 (quoting *Bryant*, 86 Wn. App. 204).

Here, the Kielys and their predecessors exerted exclusive dominion and control over the disputed area. They parked their cars on the disputed area. CP 164, UFF 10, 12; RP I 67, 94-95, 123, 159. They also invited their guests to park on the area. CP 164, UFF 12; RP I 94-95, 159. They grew and harvested plants and vegetables in a garden in the disputed area. CP 164, UFF 11-12; RP I 27-29. The garden extended up to and included the hog-wire fence. CP 164, UFF 11-12; RP I 27-29, 50, 53, 127. They maintained a compost pile. RP I 26-27. Although the Kielys did not keep up the extensive garden, they continued to mow and weed the disputed area. CP 164, UFF 13; RP I 96. The trial court viewed

the property. CP 147, 162. It was able to assess both the character of the land and the manner in which the Kielys and their predecessors exerted their dominion and control over the disputed area. The trial court did not err in concluding that the Kielys proved exclusive possession.

**a. The Kielys' use was not convenient or incidental.**

The Graves litter their brief with various arguments as to why the Kielys did not exert dominion and control or their use was not exclusive. BA 18-21, 23. They first argue that the Kielys' use was only convenient and incidental to the proximity of the alley. BA 18-19. In support, they contend (1) the Kielys did not erect the hog-wire fence, (2) the garden merely "crept" across the disputed area, and (3) the public regularly accessed the disputed area to drive and park cars, walk their dogs, visit the local library, and ride dirt bikes. BA 18-19. They also argue that the Kielys shared occupancy of the disputed area with the public. BA 19.

Assuming *arguendo* these facts were true, none of them demonstrate that the Kielys' use was not exclusive. The Kielys still exerted dominion and control over the land, even if people occasionally entered their property. As the factfinder, the trial court could reasonably find that the occasional entry by the public or

even the Graves was merely a "neighborly accommodation." *Lilly*, 88 Wn. App at 313.

Moreover, many of the Graves' factual premises are inaccurate or misleading. The testimony was not that the garden "crept" onto the disputed area. Cahill and Watters intentionally planted intricate gardens on the disputed area, using the fence to support Watters' fava beans. RP I 27-29, 50. Aside from Mr. Graves' and his brother's testimony that they drove dirt bikes on the disputed area while growing up, there is no other testimony that members of the public or the Graves regularly accessed the disputed area. RP I 192, 205, 209. The evidence shows the Kielys, their predecessors, and their guests as the only people using the alley to walk to the library, walk the dog, or park their car. CP 164, UFF 10, 12; RP I 67, 94-95, 123, 149-50, 159; RP II 25. No shared occupancy occurred.

Further, when Ms. Chapin-Kiely and her mother testified to using an alley to walk a dog or walk to the library, it is unclear whether they referred to the disputed area or to one of the two opened alleys abutting the Kiely property. RP I 149-50; RP II 25. What is clear from the record is that to the extent the public used the disputed area, it was either at the Kielys' or their predecessors'

invitation, or it was so minimal as to leave the Kielys' dominion and control unaffected.

The Graves argue that using the disputed area for a garden or to park lacks the continuity or consistency necessary to show exclusive use. BA 23. The gardens and parking were more than occasional, intermittent uses. CP 164, UFF 10-13; RP I 27-29, 67, 94-95, 122-23, 159. The Kielys and their predecessors consistently used and maintained the property. *Id.*

**b. *Muench v. Oxley* is not analogous to this case.**

The Graves argue that the old hog-wire fence does not show the Kielys' exertion of dominion, attempting to draw an analogy between this case and *Muench v. Oxley*, 90 Wn.2d 637, 583 P.2d 939 (1978), *overruled on other grounds by Chaplin, supra*. BA 19-20. In *Muench*, the Court held that exclusivity had not been shown by an old, dilapidated fence, where neither party maintained the disputed area. 90 Wn.2d at 642.

*Muench* is inapposite. Here, both parties and their predecessors used the fence as a boundary. On the Graves side, Lot 10 remained vacant land, as it always had been. Even when they cleared Lot 10, the Graves cleared only up to the hog-wire fence. RP II 18. On the Kiely side, they and their predecessors

used the property up to the fence for purposes consistent with the type of land. Unlike in *Muench*, the ground on the Kiely side was not heavily covered by trees and underbrush. CP 164, UFF 10-13; RP I 27-29, 67, 94-95, 122-23, 159.

**c. It is immaterial who built the hog-wire fence.**

The Graves argue that an "unbiased observer" would conclude that the fence was constructed by the owner of Lot 10, not by the Kielys' predecessors. BA 20-21. Setting aside their slap at the trial judge, there is no testimony or evidence on who first built the hog-wire fence. But it does not matter who built the fence. What matters is what purpose the fence and the other uses of the disputed area served. Substantial evidence shows that the hog-wire fence served to separate Lot 10 from the Kiely property. RP I 28, 33, 68-69, 97, 189; RP II 18.

**d. The Kielys exerted dominion and control by allowing the blackberry bushes to grow.**

The Graves argue that the Kielys did not assert dominion and control over the area that has brambles and blackberries. BA 21. But since the Kielys' predecessors used the disputed area for more than ten years, it does not matter whether the Kielys continued to assert dominion or control over that area. In any

event, the Kielys decided whether to allow blackberries. They had exclusive control over the property.

Finally, growing blackberry bushes in that area is an appropriate use of the land, given the topography. The blackberries are up a slope, in a place difficult to reach. RP I 33, 96, 165. Thus, the Kielys' use is consistent with ownership of land of this character.

**e. The public was restricted from accessing the disputed area.**

The Graves assert that the public used half of the alley for nearly 100 years for purposes of walking their dogs and accessing the City Library. BA 23-24. But it was Kiely-property owners and their tenants who used the alleys to walk their dogs and access the library. RP I 51, 149-50; RP II 25. Even if "the public" used the disputed area, that use was *de minimis* compared to the Kielys' and their predecessors' uses.

The Graves also argue that the "alley was never fenced, access was never restricted, there were no 'No Trespassing' signs placed in the alley . . . and the Graves used the alley publicly to access Lot 10." BA 24. But the disputed area was fenced, as the Graves admit. BA 18, 20, 23. The fence and the character of the

property thus restricted public access to the disputed area. A "No Trespassing" sign is not legally required. At times, the Kielys and their predecessors wanted the public to park on their property. Watters wanted customers for his bakery, and the Kielys invited members of the public to use the space. CP 164, UFF 12; RP I 67-68, 94-95, 159. Thus, any public access was consistent with the Kielys' and their predecessors' dominion and control over the land. Finally, some Graves minimally used the disputed area when they rode dirt bikes on it as children, but this was years before Blood owned the Kiely property. RP I 192, 205, 209. The Graves' arguments fail, and substantial evidence supports the exclusive possession element.

**4. The Kielys' possession was hostile.**

The Kielys also proved that their use of the property was hostile. Hostility "does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner." *Chaplin*, 100 Wn.2d at 857-58 (quoting *King v. Bassindale*, 127 Wash. 189, 192, 220 P. 777 (1923)). Permissive use negates the hostility element. *Miller v. Anderson*, 91 Wn.

App. 822, 828, 964 P.2d 365 (1998), *rev. denied*, 137 Wn.2d 1028;  
**Chaplin**, 100 Wn.2d at 861-62.

Here, the Graves do not argue that they ever gave the Kielys or their predecessors permission to use the land. The Kielys and their predecessors used the property as would owners of the property. Their possession was hostile as to the Graves.

The Graves argue that the Kielys acknowledged the City's superior title by seeking a parking permit from the City. BA 24-25. This argument is a red herring. As discussed above, the Kielys did not and could not adversely possess the City's easement over the property; they adversely possessed the Graves' ownership interest in the property. The Kielys properly recognized the City's easement when they sought a parking permit. The Kielys did not seek permission from the Graves to use the disputed area. The Kielys' possession was thus hostile.

The Graves briefly posit that the Kielys acknowledged the Graves' superior title to the disputed area by offering to purchase it prior to initiating this lawsuit. BA 25. This is an improper argument for several reasons. First, no such evidence is before this Court. Issues not raised below are not properly at issue here. *See, e.g.*, RAP 2.5(a).

Second, ER 408 specifically precludes the use of offers to compromise as evidence. It is grossly inappropriate to bring up such "evidence" now.

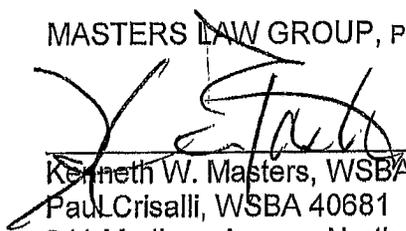
Finally, assuming this unsupported allegation could be considered, it merely shows that the Kielys attempted to purchase the disputed area from the title holder of record. This could not prove that the Kielys believed they had not adversely possessed the property. The Kielys' possession of the property was hostile.

#### CONCLUSION

The Graves held title while the City had an alley easement, but the Kielys and their predecessors adversely possessed the Graves' ownership interest in the disputed area. This Court should deny direct review, and remand to the appellate court for an affirmance.

RESPECTFULLY SUBMITTED this 27th day of January, 2011.

MASTERS LAW GROUP, P.L.L.C.



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Bainbridge Is, WA 98110  
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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS** postage prepaid, via U.S. mail on the 27th day of January 2011, to the following counsel of record at the following addresses:

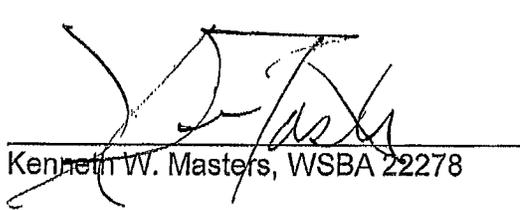
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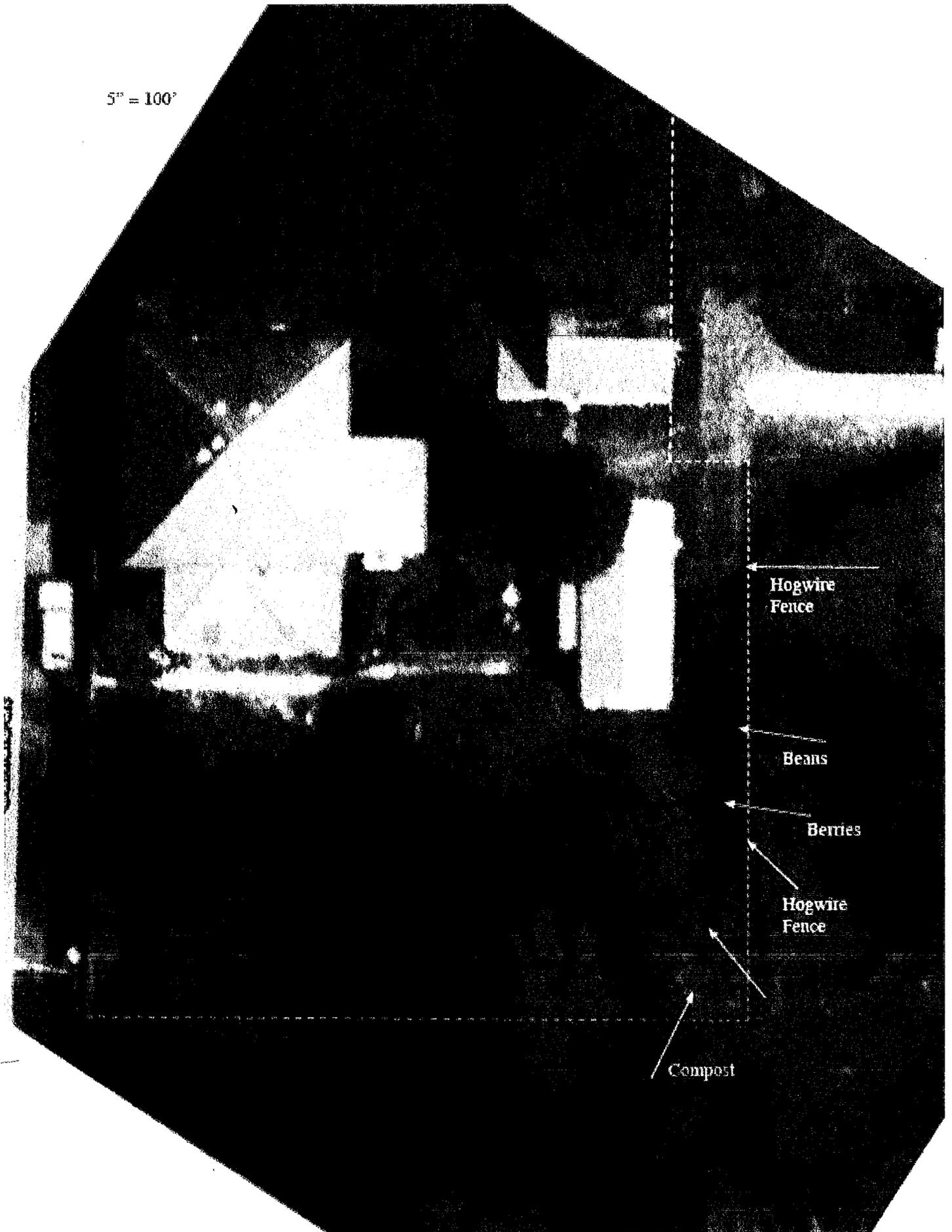
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Kenneth W. Masters, WSBA 22278

5" = 100'



Hogwire  
Fence

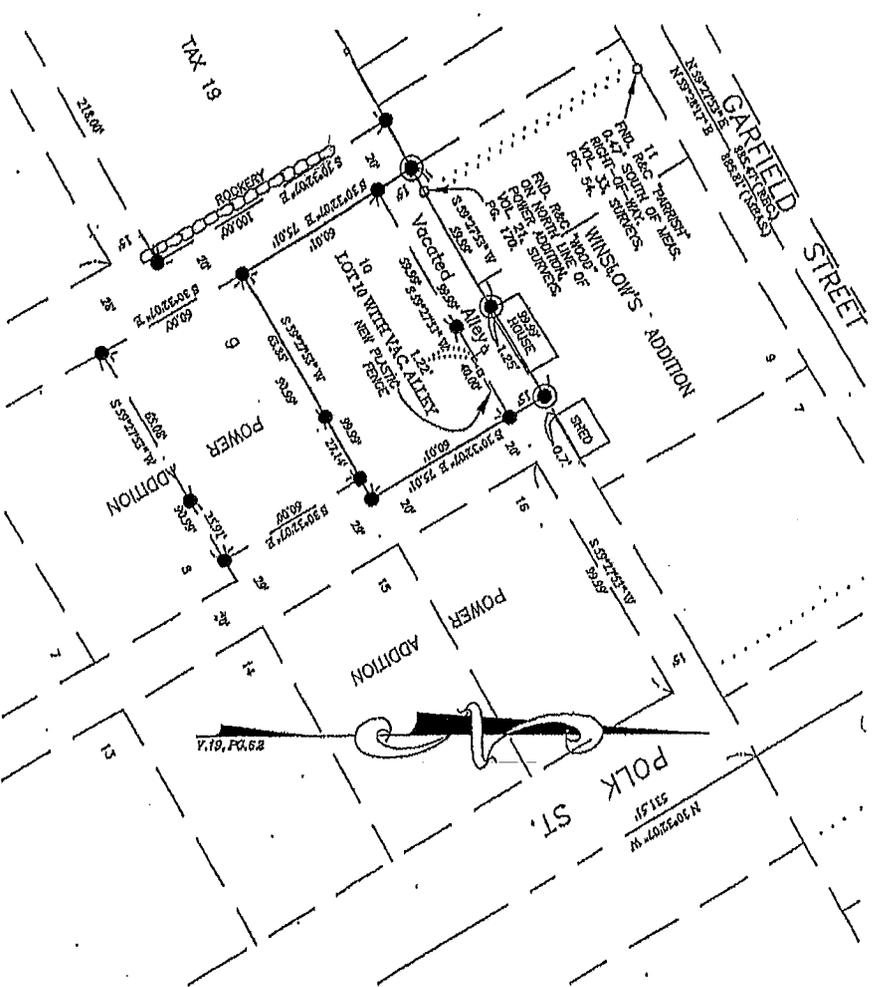
Beans

Berries

Hogwire  
Fence

Compost

**SURVEY OF LOT LINE ADJUSTMENT  
 LOT 10 & CONTIGUOUS ALLEY, BLOCK 2, POWER ADDITION,  
 SEC. 2, TWP. 30 N., RANGE 1 WEST, W. M., JEFFERSON COUNTY, WASHINGTON**



**REFERENCE SURVEYS:**  
 VOL. 2 OF PLANS, PG. 129 (POWER ADD.)  
 VOL. 1 OF PLANS, PG. 17 (GARFIELD ST. ADD.)  
 VOL. 33, SURVEYS, PG. 54 (POWER ADD.)  
 VOL. 21, SURVEYS, PG. 176 (POWER ADD.)

**GRAPHIC SCALE**  
 1 inch = 30 ft.

**LEGAL DESCRIPTIONS**

REFER TO STATEMENT OF RIGHT RECORDED 6441-2, 2009  
 FILED UNDER ADJUTANT GENERAL'S FILE NO. 54-02-57  
 AND ORDINANCE NO. 2008 FOR ALLEY VACATION FILED  
 UNDER ADJUTANT GENERAL'S FILE NO. 57-09179

**APPROVALS**

DEVELOPMENT SERVICES DEPARTMENT APPROVAL:  
 DEVELOPMENT SERVICES DEPARTMENT  
 CITY OF FORT TOWNSEND

JEFFERSON COUNTY ASSessor APPROVAL:  
 JACK WESTERMAN III  
 COUNTY ASSESSOR  
 BY: *John Powell*  
 DEPUTY

**SURVEYOR'S NOTES**

**BASES OF BEZANCE**  
 CONSISTANT WITH THE GEODETIC CONTROL AND MONUMENTATION PLAN FOR THE CITY OF FORT TOWNSEND. (VOL. 19, SURVEYS, PS-61-70)

**EQUIPMENT USED:**  
 THIS SURVEY WAS PERFORMED USING A TOPCON GTS 301-D ELECTRONIC TOTAL STATION THEODOLITE/EDM, DURING CLOSED RANDOM TRAVERSERS FROM AND BETWEEN EXISTING PLAT MONUMENTS.

**CONTROL ACCURACY:**  
 THIS SURVEY MEETS OR EXCEEDS STATE MINIMUM ACCURACY REQUIREMENTS OF 1/5,000 FOR (a) CITY-RESIDENTIAL AND SUBDIVISION LOTS PER W.A.C. 312-130-090.

**LEGEND:**

- SET 1/2" REBAR & CIP.
- STAMPED ANDERSON 2785T.
- 1/2" REBAR & CIP STAMPED ANDERSON 2785T PER VOL. 34 OF SURVEYS, PAGES 128, 129 & 130.
- FOUND CONCRETE MARKMENT WITH BRASS DISC & PUNCH IN IRON CASE (11-0-9)



**SURVEYOR'S CERTIFICATE**  
 THIS MAP OR PORTION THEREOF WAS PREPARED BY ME OR UNDER MY CLOSE PERSONAL SUPERVISION AND I AM A LICENSED SURVEYOR IN THE STATE OF WASHINGTON.  
 GRAMES RANDY TRIST  
 REGISTERED SURVEYOR  
 JEFFERSON COUNTY, WASHINGTON  
 LICENSE NO. 2785



**ANDERSON CIVIL ENGINEERS & SURVEYORS**  
 FORT TOWNSEND, WA, 98366  
 (360) 385-0398

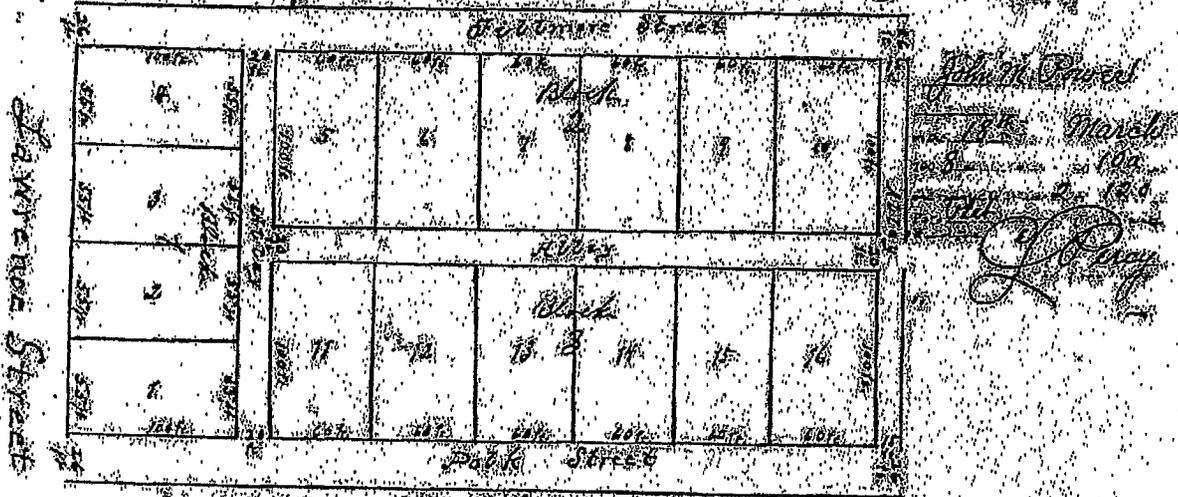
**RECORD OF SURVEY**  
 RECORDED IN JEFFERSON CO. WA. FOR  
 GRAYES VALLEY TRUST  
 FOR TOWNSEND, WA.

**RECORDING CERTIFICATE**  
 FILED FOR RECORD THIS 2<sup>nd</sup> DAY OF MARCH, 2009  
 AT THE OFFICE OF THE CLERK OF SUPERIOR COURT IN FORT TOWNSEND, WA.  
 ANDERSON CIVIL ENGINEERS AND SURVEYORS

**RECORDING CERTIFICATE**  
 SHEET 1 OF 1  
 SCALE: 1" = 30'  
 DRAWN: RTR  
 CHECKED: HJA  
 DATE: 02/24/09

# Plot of POWER Addition

City of Fort Johnson, Washington, D.C.



The following is a description of the land shown in the above plat, to-wit: A certain lot of land situated in the City of Fort Johnson, District of Columbia, bounded on the north by the street known as Lawrence Street, on the east by the street known as Park Street, on the south by the street known as [unclear], and on the west by the street known as [unclear].

State of Washington  
 County of Jefferson

I, the undersigned, Clerk of the Court, do hereby certify that the above is a true and correct copy of the original record of the same as the same appears in the records of the Court.

Witness my hand and seal of office this 12th day of [unclear] 1915.

Signature of Clerk  
 in the presence of  
 Jurors

James J. [unclear]

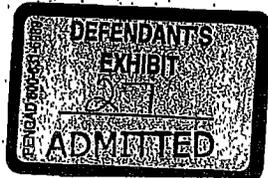
State of Washington  
 County of Jefferson

I, the undersigned, Clerk of the Court, do hereby certify that the above is a true and correct copy of the original record of the same as the same appears in the records of the Court.

Witness my hand and seal of office this 12th day of [unclear] 1915.

Signature of Clerk  
 in the presence of  
 Jurors

James J. [unclear]



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JEFFERSON COUNTY  
RUTH JORSON

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

WILLIAM H. KIELY and SALLY CHAPIN-  
KIELY, Husband and Wife,

Plaintiffs,

-vs-

KENNETH W. GRAVES and KAREN R.  
GRAVES, Trustees of the Graves Family Trust  
and any persons or parties unknown claiming any  
right, title, estate, lien, or interest in the real estate  
described in the complaint herein;

Defendants.

NO. 09-2-00230-3

FINDINGS OF FACT &  
CONCLUSIONS OF LAW

This matter coming on for trial on April 5 and 6, 2010, plaintiffs William H. Kiely and Sally Chapin-  
Kiely appeared through their attorney, Richard L. Shaneyfelt, and defendants Kenneth W. Graves and Karen  
Graves, as trustees of the Graves Family Trust appeared through their attorneys, Frederick Mendoza and Maya  
Mendoza-Exstrom, of the Mendoza Law Center, PLLC, and the court, having considered the file in this matter  
and the testimony of Susan Ambrosius, Carol Cahill, Daniel Blood, Sally Chapin-Kiely, Toby Sheffel, William  
Kiely, Kenneth Graves, Robert Graves, Karen Graves, Suzanne Wassmer, Dominic Smith, and Vivian Chapin,  
as well as the arguments of counsel; the court having also considered the admitted exhibits and, with the  
permission of the parties and not in their presence, having viewed the property on April 6, 2010, and now being  
fully advised by argument of legal counsel; and having rendered a Memorandum Opinion after trial dated May

ORIGINAL

RICHARD L. SHANEYFELT  
ATTORNEY AT LAW  
1101 CHERRY STREET  
PORT TOWNSEND, WA 98368  
(360) 385-0120

1 18, 2010, filed herein, makes the following:

2 **FINDINGS OF FACT**

3 1. Plaintiffs, William H. Kiely and Sally Chapin-Kiely, are husband and wife, form a marital  
4 community under the laws of State of Washington, and reside in Jefferson County, Washington.  
5 Plaintiffs are the owners of the West 84 feet of Block 7, all of Block 9, and the East 37 feet of Block 11, F.H.  
6 Winslows Addition to the City of Port Townsend, as per Plat recorded in Volume 1 of Plats, Page 12, records of  
7 Jefferson County, Washington.

8 2. Defendants, Kenneth W. Graves and Karen R. Graves, are Trustees of the Graves Family Trust,  
9 reside in King County, Washington, but own Lot 10, Block 2 of the Power Addition to the City of Port  
10 Townsend as per Plat recorded in Volume 2 of Plats, Page 120, Jefferson County, Washington, together with the  
11 vacated alley contiguous thereto.

12 3. Said alley was platted wholly within the Power Addition, lies between the parties' two parcels  
13 (Exhibit 27) and is depicted as "vacated alley" on Exhibit 1, the Anderson survey. ~~The area of Lot 10 and the~~  
14 ~~vacated alley northerly of the hog wire fence~~ is the disputed area between the parties and is legally described in  
15 Exhibit "A" attached hereto.

16 4. No person remembers the alley ever being opened or used as a public right-of-way nor is there  
17 any record of it having been opened presented in court, and thus, the court finds that the alley was never opened  
18 or used by the public as an alley.

19 5. The alley was formally vacated by the City of Port Townsend by ordinance on February 17,  
20 2009. (Exhibit 28).

21 6. Plaintiffs claim title to the disputed area by adverse possession. Defendants claim title to the  
22 disputed area through their deed and as a result of the vacation proceeding and payment to the City of Port  
23 Townsend as shown by Exhibit 28.

24 7. There is a hog wire fence, which runs along the southerly boundary of the disputed area. That  
25 fence has been in existence as long as the parties or witnesses can remember. Kenneth Graves testified that it  
26 has been there since he was a kid. Exhibits 12 through 18 are current pictures of the fence.

27 8. There is a shed and cottage on Plaintiffs' property as shown in Exhibit 1 and pictured in Exhibit  
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2.

9. The cottage actually encroaches into the alley as depicted in Exhibit I. The easterly approximately one-fourth of the disputed area is used and historically has been used as a parking area for the cottage and shed.

10. Danfel Blood testified that he owned Plaintiff's property (1123 Garfield) from 1981 until 1987. He used the disputed area to store building materials. He had a trailer parked in the disputed area to support his masonry and tile contracting business and used the disputed area as he wanted to use it, for his business. During his ownership, Lot 10 remained unused. Mr. Sheffel also recalls Mr. Blood's use of the disputed area for his business and remembers the hog wire fence as the boundary between 1123 Garfield and Lot 10.

11. In 1993 Carol Cahill moved onto the property. At that time, Duncan Watters lived there as well and had developed an extensive artistic garden in the disputed area. Mr. Watters used the hog wire fence to support his fava beans and other plants while he resided there.

12. It is clear from the testimony of Ms. Cahill and Ms. Ambrosius that during the time Mr. Watters lived on the property he made exclusive use of the disputed area for his impressive garden. He also used the cottage for his bakery business (Exhibit 31) and customers of that business would park in the eastern end of the disputed area next to the cottage and shed. Exhibit 2 provides detail regarding Mr. Watters' garden, which is supported by the testimony. It is clear that from at least 1993 through 2000, Mr. Watters cultivated and used the disputed area in connection with his occupancy of 1123 Garfield and treated the disputed area as his property. Mr. Watters left the property when Plaintiffs purchased the property in 2000.

13. From 2000, until this litigation commenced Mr. Kiely mowed and "weed wacked" the disputed area. (Testimony of Vivian Chapin). Plaintiffs are not gardeners and did not continue to use the area as a garden; however, Plaintiffs did maintain most of the disputed area up to the hog wire fence except the portion of the west, which he allowed to become overgrown with blackberries.

From the foregoing Findings of Fact, the court makes the following:

**CONCLUSIONS OF LAW**

1. The court has jurisdiction over the parties and subject matter of this action.
2. In proceedings prior to trial Defendants moved for summary judgment asserting that

1 Plaintiffs could not prevail in an adverse possession action as the property involved was a dedicated alley which  
2 had not been vacated.

3 3. Judge Wood issued his Memorandum Opinion and Order, filed March 29, 2010 [CP 38],  
4 in which he found Erickson Bushling v. Makne Lumber Co., 77 Wn. App. 495, 891 P.2d 750 (Div. II, 1995) to be  
5 dispositive. Judge Wood held that the alley, while dedicated, was unopened. Thus, following the holding in  
6 Erickson, while the City had an easement for a "public right of passage", an adverse possession claim could lie  
7 against the fee ownership which is vested in adjoining landowners.

8 4. Defendants argued that Judge Wood was wrong, asserting that Erickson relied on the  
9 statute which automatically vacated a dedicated road if it is unopened for five years after its dedication.  
10 Defendants are correct asserting that the statute does not apply to streets dedicated for public rights of way  
11 within an incorporated city. However, the Erickson Court did not rely on the statute in its analysis that adjoining  
12 landowners each own the fee interest in the right of way which is subject to adverse possession. The remaining  
13 cases cited by defendants in closing argument, Brokaw v. Town of Stanwood, 79 Wash. 322, 140 Pac. 358  
14 (1914), Miller v. King County, 59 Wn. 2d 601, 36 P.2d 304 (1962), Martin v. Walters, 5 Wn. App. 602, 490  
15 P.2d 138 (Div. II, 1971) and Hunt v. Matthews, 8 Wn. App. 233, 505 P.2d 819 (Div. I, 1973) are distinguishable.

16 5. This court will not reconsider Judge Wood's ruling on summary judgment, which  
17 allowed the case to proceed to trial.

18 6. Plaintiffs William H. Kiely and Sally Chapin-Kiely should have title quieted in their names to  
19 the disputed area as shown on Exhibit 1, bordered by the hog wire fence to the south. *ffm WKS*

20 7. Plaintiffs and their predecessors in interest have made exclusive, actual and  
21 uninterrupted, open and notorious and hostile use of the disputed area under a claim of right made in good faith  
22 for a period exceeding ten years from the filing of their complaint herein. Plaintiffs and their predecessors made  
23 use of the property as set forth in the findings of fact above that would have put Defendants on notice for more  
24 than ten years that a claim was being made to ownership of the disputed area up to the hog wire fence and its  
25 extension to the east.

26 8. The evidence supports Plaintiffs' claim that during at least the ten years prior to the  
27 filing of Plaintiffs' complaint, the Defendants made no use of the disputed area.

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9. Defendants had actual notice of the Plaintiffs' and their predecessors' use of the disputed area.

10. Plaintiffs' and their predecessors use of the disputed area was continuous for more than ten years prior to the filing of the complaint herein.

11. Defendants' vacation of the City's easement interest in the alley did not affect Plaintiffs' underlying adverse possession claim to the servient estate.

DONE IN OPEN COURT this 2 day of July, 2010.

CRADDOCK D. VERSER  
JUDGE  
CRADDOCK D. VERSER, JUDGE

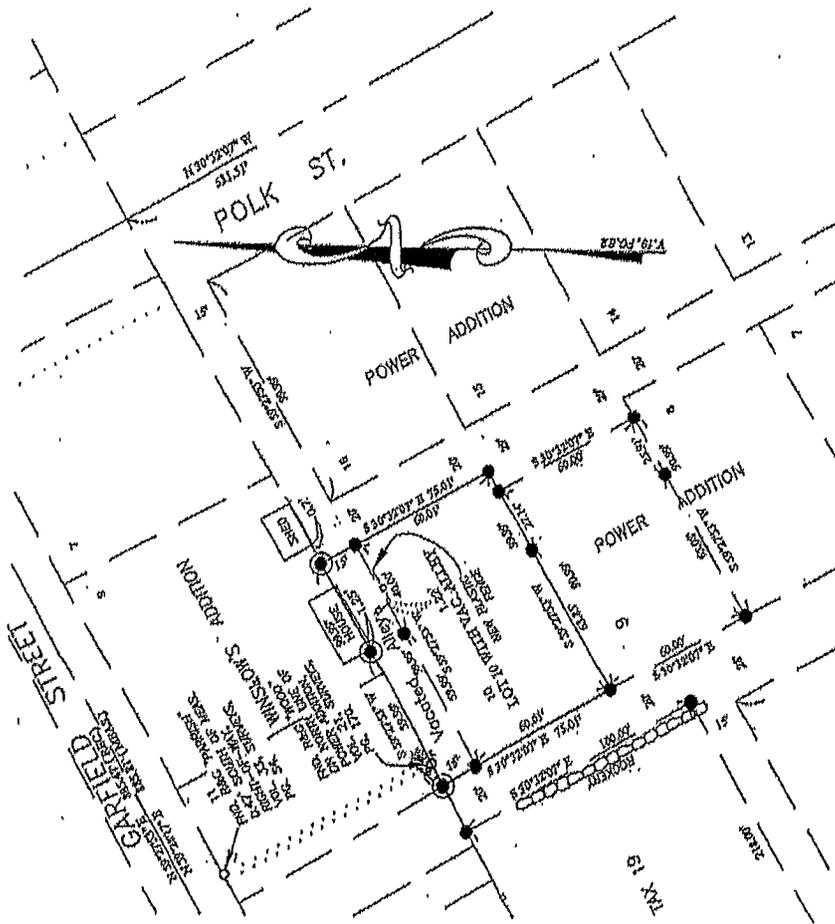
Presented by:

Approved for Entry, Notice  
Of Presentation Waived, Copy Received:  
MENDOZA LAW CENTER, PLLC

Richard L. Shaneyfelt, WSBA #2969  
Attorney for Plaintiff

By: Frederick Mendoza, WSBA #6021  
Attorney for Defendants

SURVEY OF LOT LINE ADJUSTMENT  
 LOT 10 & CONTIGUOUS ALLEY, BLOCK 2, POWER ADDITION,  
 SEC. 2, TWP. 30 N., RANGE 1 WEST, W. M., JEFFERSON COUNTY, WASHINGTON



LEGAL DESCRIPTIONS

KEEP TO STATEMENT OF INTERESTS PER M.A.C. 2-309  
 FILED UNDER ADDRESS INDEX, PAR. 21, M.A.C. 2-309  
 AND CHAINING PER M.A.C. 2-309 FOR ALLEN VACATED LOTS  
 UNDER ADDRESS INDEX, PAR. 21, M.A.C. 2-309

APPROVALS

DEPARTMENT OF TRANSPORTATION APPROVAL  
 [Signature] DATE 2/14/08  
 JEFFERSON COUNTY DEPARTMENT OF TRANSPORTATION  
 CITY REPORT TRANSMISSION

JEFFERSON COUNTY ADDRESS APPROVAL  
 JACK WESTERMARK  
 COUNTY ASSESSOR  
 [Signature] DATE 2/14/08

SURVEYOR'S NOTES:

CONSISTENT WITH THE GEODEMIC CONTROL AND  
 ADMINISTRATION PLAN FOR THE CITY OF PORT  
 TOWNSEND, (VOL. 18, SURVEYS, PG. 61-70)  
 ENCUMBRANCE LINES:  
 THIS SURVEY WAS PERFORMED USING  
 A TOPCON GTS 304-3 ELECTRONIC TOTAL  
 STATION THEODOLITE/LEVEL, CHECKING  
 CLOSED RANDOM TRAVERSE FROM AND  
 BETWEEN EXISTING PLAT MONUMENTS.  
 CONTROL ACCURACY:  
 THIS SURVEY MEETS OR EXCEEDS STATE MINIMUM  
 ACCURACY REQUIREMENTS OF 1/4000 FOR  
 T89 CITY-NEIGHBORIAL AND SUBDIVISION LOTS  
 PER M.A.C. 2-302-030-030.

LEGEND:

- SET 1/2" REBAR & CAP,  
STAMPED "ANDERSON SURVEY"
- 1/2" REBAR & CAP, STAMPED  
"ANDERSON SURVEY" PER VOL. 34  
OF SURVEYS, PAGES 728, 729 & 130.
- FOUND CONCRETE MONUMENT  
WITH BRASS DISC & FRANCH  
IN BORN CASE (11-14)



REFERENCE SURVEYS:

- VOL. 12 OF PLANS, PG. 129 (POWER ADD.)
- VOL. 1 OF PLANS, PG. 17 (POWER ADD.)
- VOL. 33, SURVEYS, PL. 24 (PARISH)
- VOL. 21, SURVEYS, PG. 173 (WOOD)

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY SHOWS THE LOCATION AND EXTENT OF THE SURVEYED LOT AND ALLEY AS SHOWN ON THE PLAT AND IS A TRUE AND ACCURATE REPRESENTATION OF THE SURVEYED LOT AND ALLEY.

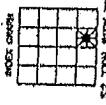
DEPARTMENT OF TRANSPORTATION  
 MICHAEL J. ANDERSON, P.E. & P.L.S.  
 CERTIFICATE NO. 2755



ANDERSON  
 CIVIL ENGINEERS  
 & SURVEYORS  
 PORT TOWNSEND, WA 98368  
 (360) 326-0336

RECORD OF SURVEY  
 PERFORMED IN JEFFERSON CO., WA FOR  
 GRAVES FAMILY TRUST  
 PORT TOWNSEND, WA

RECORDING CERTIFICATE  
 FILED PER RECORD THE 2nd OF FEBRUARY 2008  
 AT THE OFFICE OF THE COUNTY CLERK  
 OF JEFFERSON COUNTY, WASHINGTON  
 COUNTY CLERK  
 JEFFERSON COUNTY, WASHINGTON



PLS  
 CP 167  
 Exhibit A

**RCW 7.28.090**

**Adverse possession — Public lands — Adverse title in infants, etc.**

RCW 7.28.070 and 7.28.080 shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is a person under eighteen years of age, or incompetent within the meaning of RCW 11.88.010; PROVIDED, Such persons as aforesaid shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land shall, within the time last aforesaid, pay to the person or persons who have paid the same for his or her betterments, and the taxes, with interest on said taxes at the legal rate per annum that have been paid on said vacant and unimproved land.

[1977 ex.s. c 80 § 7; 1971 ex.s. c 292 § 7; 1893 c 11 § 5; RRS § 790.]

**OFFICE RECEPTIONIST, CLERK**

---

**To:** Shelly Winsby  
**Subject:** RE: No. 84828-9 - Kiely v. Graves - Brief of Respondents

Rec. 1-27-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Shelly Winsby [<mailto:shelly@appeal-law.com>]  
**Sent:** Thursday, January 27, 2011 3:21 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** No. 84828-9 - Kiely v. Graves - Brief of Respondents

Please accept the attached document for filing:

**BRIEF OF RESPONDENTS**

Case: KIELY v. GRAVES  
Case Number: 84828-9  
Attorney: Kenneth W. Masters  
Telephone #: (206) 780-5033  
Bar No. 22278  
Attorney Email: [Ken@appeal-law.com](mailto:Ken@appeal-law.com)

Thank you.

Shelly Winsby  
Secretary to MASTERS LAW GROUP P.L.L.C.  
241 Madison Avenue North  
Bainbridge Island WA 98110  
(206) 780-5033