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No. 68202-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DAVID C. COTTINGHAM and JOAN S. COTTINGHAM,

Appellants/Cross Respondents

v.

RONALD J. MORGAN and KAYE L. MORGAN, husband and wife,

Respondents/Cross Appellants.

REPLY TO RESPONDENT MORGANS' RESPONSE

and

RESPONSE TO CROSS-APPELLANT MORGANS' APPEAL

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TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Rules

Regulations

I. COUNTERSTATEMENT OF FACTS.

Before trial Partial Summary Judgment CP 389, January 11, 2011, granted Cottinghams' Motion CP 496, and their Amended Complaint's Quiet Title cause CP 573-584 on evidence of adverse possession congruent with the line and bearing across Nixon Beach Tracts shown at CP 532 (BNRR Div One subdivision plat) CP 389. In their Answer interposing counterclaims,CP 564-572. Morgans claimed the necessity of an undefined private way of necessity for their driveway only, a claim applicable to landlocked parcels and requiring enhanced notice, bifurcated proceedings, even threshold determination of necessity.[1] It would remain undefined but for value assigned to an unstaked red triangle, quantified for its area, for forced judicial sale to a boundary in Defendants' unusual survey.

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[1] RCW 8.24.010 is strictly construed. Brown v. McAnally, 97 Wn.2d 360, 644 P.2d 1153 (1982). RCW 8.20 establishes the procedures for condemnation of land for a private way of necessity under chapter 8.24 RCW. RCW 8.24.030; Taylor v. Greenler, 54 Wn.2d 682, 684, 344 P.2d 515 (1959). RCW 8.20.010 requires a petition describing the subject property with reasonable certainty, a notice providing the objects of the petition and must be pleaded expressly and with reasonable certainty to invoke the statutory authority. See State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson, 25 Wn.2d 499, 502-03, 171 P.2d 189 (1946) (description of property must be reasonably certain); Leinweber v. Gallaugher, 2 Wn.2d 388, 391, 98 P.2d 311 (1940) (private condemnation claim must be pleaded pursuant to the condemnation statutes); State ex rel. Woodruff v. Superior Court of Chelan County, 145 Wash. 129, 132-33, 259 P. 379 (1927) (description of property in pleadings must be sufficient to place parties on notice of the property affected).

Cottinghams' adverse possession evidence bearing was therefore supported at summary judgment with evidence of its bearing between two known points which Cottinghams had historically aligned their uses with. They offered their surveyor Bruce Ayers and their own Declaration connecting his line with a lakeside south alder. The bearing is shown by Ayers survey EX 12 and was shown at summary judgment by his exhibit, CP393, and Cottinghams photographs, CP 507, as ending at the shore after crossing the survey stake of Morgans' surveyor, and ending lakeside with Morgans' fence at the South Alder. CP 535, 536[2]. The line so shown bears 59°*04*'35" from the same Iron Pipe, a bearing substantially the same as the 59°20'35 bearing call of Wilsons' BNRR Div. One survey and subdivision plat.

For its Partial Summary Judgment CP 389 the court granted Cottinghams' Quiet Title Cause of Action according to the pleaded bearing of 59°04'35" from the Iron Pipe, stating:

> "Decree should enter *quieting title in plaintiffs to Nixon Beach Tracts Lot Ten including within the legal description of such lot all area south* to and including the Maintenance Line from the Iron Pipe to the south shoreland alder according to Exhibit E (Dec. David C. Cottingham)

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[2] Exhibits F and G, Decl David C. Cotitngham in Support of Motions for Partial Summary Judgment.

> designated therein as Maintenance and Occupation Line as per Cottingham (Request dated 7/21/2008) S 59°04'35" W, 251.13" including area of the ten foot road platted within Nixon Beach Tracts where abutting such Lot Ten and south to such maintenance line between such decreed legal description and Burlington Northern Railroad Right of Way Along Lake Whatcom Div. No. One Lot Sixteen described as follows:"

(CP 389-392, Partial Summary Judgment Order dated January 11, 2011, *emphasis added,* Description omitted.)

Morgans sought reconsideration. Cottinghams responded warning that good faith proof was expected if Morgans were pursuing their condemnation claim, CP721 reminding that they were laboring under Morgans Way-of-necessity counterclaim, without good faith amendment of Morgans' pleadings because Morgans' surveys showed no entitlement therefrom to the county road from Morgans' Lot Eleven.CP437-463. Reconsideration was denied. CP 714. Morgans' remaining counterclaim for a private way of necessity remained unamended, forcing Cottinghams' preparation for proof of the absence of access, bifurcated proceedings relating thereto, even identification of necessary parties depending on the area asserted at trial or determined by the court as meeting RCW 8.24, and 8.20, within Washington's constitutional prohibition Art. 1 §16.

Washington's adverse possession period is ten years. RCW 4.16.020. Cottinghams had supported the Partial Summary Judgment's location of their adverse possession even with evidence Morgans surveyor knew was on site (RP2 140, ln. 13-17; 140, 18-25; 141; ln. 10-14; RP2 147, ln 6-8).

Trial commenced November 30, 2012, and Morgans offered testimonial evidence from their surveyor relocating Lot Eleven (RP2 144, ln. 11) in a fashion he had changed lot bearings elsewhere (RP2 159, ln.21 – 160, ln.1), without quantifying how much he changed them (RP2 160, ln. 22-25) commenting on Cottinghams' possession and use *after* 2004 (RP2, ln108, ln 14-23) by lack of mowing in March (RP2 145, ln. 3-6, referring to Morgans' EX 4 and Ex 5. and offering someone's (RP2 147, ln. 1-17) calculated distance to Morgans' house (RP2 150, 10-17;), without locating, either, the court's line or railroad property (RP2 113, ln. 13-12) because Morgans "made the choice" what lines to incorporate" (RP2 109, 13-24; 142, ln. 9-12). Morgans did not show *either*, whether the survey should have included area east, RP2 152, ln. 13-25; 153, ln. 2-9; RP2 137, ln. 24; RP2 138, ln 20-23; 164, ln. 9, 24-25; 170 ln. 11 *or* inquiry into records surrounding earlier staking RP2 171, ln. 20-25, which he had in his own office, RP 171, ln. 19-

25. He admitted he had found the BNRR Div One Iron Pipe in 2005 RP2 151, ln. 10, which he did not investigate because it "was not what we were requested to do." RP 2 140, ln. 13. He had surveyed in the plat before, and admitted that "our office" showed its internal private road as "abandoned." RP2, 156, ln. 2-7.

Morgans urged modification of partial summary judgment CR 54(b) over Cottinghams' procedural due process objection.[3]

At trial, scrutiny necessitated by Morgans' RCW 8.24 condemnation claim resulted in the discovery that Morgans' survey employed *internal* staking, disqualifying the label of his stakes, in Washington, as RCW 58.09.020(3) lot "corners." Morgans silently abandoned their RCW 8.24 condemnation claim[4]. Cottinghams' claims were denied but for wrongful timber trespass damages RCW 64.12.030, trebled, at $13,028.94. Cottinghams' adverse possession was reduced without staking to simply to give area of

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[3] RP 2, pg 124, ln. 5 – 125, ln. 14; 126, ln. 5-9; RP3 37 ln. 20 – 38, (complaining of the scope of the "limited trial...prejudicial to plaintiffs because the plaintiffs then don't get to enter into a great deal of information that supports the courts' decision" due to lack of notice from Morgan before commencement of trial). *See, also* (RP3, 37, ln. 1)

[4] Morgans did not give account of their own avoidance of the counterclaim or prevent Cottinghams efforts under its imprecise definition of area of necessity even at reconsideration following trial, RP3 16, ln. 5-11, until finally at RP3, 32, ln. 5 making representation that Morgans had abandoned condemnation in their Motion for Reconsideration. They had not done so.

setback to Morgans without payment along their house where Cottinghams' hedge improvements stood reduced by half their size and for the area wasted $8,216.55 was awarded as the value of the remaining adverse possession finding with Judgment forcing sale of unstaked "disputed area." CP105. The only pronouncement helpful to understanding is his inquiry during argument, which revealed he was considering relieving the Morgan permit setback condition and was troubled by what his decision regarding it would mean to Building Official efforts. (RP3 34, ln. 14-19; 33, 3-4). Morgans had offered nothing of the Building Official's file or record, other than Cottinghams' complaint identifying property line evidence withheld from the building official at the time they obtained a permit[5] when Morgans' ejectment and waste of Cottinghams' improvements commenced. EX 34

At trial, without quantifying the additional area available beyond Morgans' truncated survey EX4 and EX 5, Morgans argued for a quantity of area, assuring the visiting judge fifteen years' future litigation, saying "we don't even know where the line is." RP3

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[5] Cottinghams introduced EX 23, in which setback was varied from ten crossed off) feet to five feet with the comment "narrow lot" and Testimony of Health Officer Ed Halasz for evidence of Morgans pre-purchase inquiries and his early concern for their drain field protection.

50, ln. 14-15. Evidence in the form of James Wilson & Associates Engineers' subdivision plat and survey shows the shared corner of BNRR Div. One Lot 16 and Morgans' Nixon Beach Tracts lot Eleven. EX 13, pg. 2. It also shows the bearing of Nixon Beach Tracts lots, and the bearing between the parties' lots as 59°20'35" from the Iron Pipe.

At trial Morgans' surveyor admitted that the Wilsons' BNRR Div. One survey and subdivision (EX 13 pg. 2 Burlington Northern Inc. Railroad Right of Way Along Lake Whatcom Div. No. One) represents Morgans' Lot 11 corner and its own Lot 16 corner as at one point. RCW 58.09.020(3) defines corners in a survey as "points or lines which define the exterior boundary," Cottinghams' surveyor did not support Morgans' stakes as exterior corners for the strongest of reasons --because the Nixon Beach Plat does not do so. It defines Nixon Beach Tracts lots as extending to the railroad or the creek from Lake Whatcom. Wilsons' BNRR Div. One survey and shows that Morgans' Lot Eleven reaches the railroad property from Lake Whatcom, and that only railroad property exists between Nixon Beach Tracts and the county road. Even Morgans' surveyor's 1984 survey shows the same. EX 14.

Plaintiff's Trial Memorandum had informed that plaintiffs

would work to show that Lot Eleven abutted the railroad subdivision plat (ln 12, pg. 2, CP863, and see fn. 7 (extension of Nixon Beach Tracts sidelines by BNRR Div. One subdivision plat)) because of Morgans' condemnation claim (ln. 3-4, pg. 3, Plaintiffs' Trial Memorandum, CP 861-875 at 863), and Cottinghams' continued to assert the BNRR Div. One Subdivision survey as reliable in their Plaintiff's Supplemental Trial memorandum, CP 922-955 (fn. 12, pg. 5), which argued against "movement of the property line" as creating limitations on Cottinghams' future uses and building shape (ln. 7, pg 10, Plaintiff's Supplemental Trial Memorandum, 922-955, ,and CP 872). One such use was a serious need to locate a garage as a defensive measure against debris torrents. Morgans had been required during permitting to produce an expert opinion for this critical alluvial fan hazard area, EX 7, requiring a defensive garage placement. Therefore, as photographs reveal, CP 552, Morgans installed two such garages between them and debris torrents. Cottinghams had removed theirs for relocation the threatened direction. RP1, 153, ln. 13-25; 155, ln. 4,5; 173, ln. 8-9.

By raising their survey evidence *at trial* Morgans allowed scrutiny which revealed their survey evidence as incomplete, inexplicably at variance with the plat dimension, resulting from a

theory of apportionment based upon lost stakes without investigation of any record of available stakes present when the BNRR Div. one survey was conducted. It was also discovered at trial that Morgans' surveyor "did not use the court mandated line (Summary Judgment line) in his trial testimony regarding proximity to Morgan's house, RP2 147, ln. 6-18, RP2 149, 21-23, or to Cottinghams' improvements RP2, 146, ln. 10-14, for EX 9. He admitted that he did not study the railroad survey (RP2 137, ln. 24), never found end points of the primary and secondary base lines RP 166 ln. 7-24, although they are important to any proportionate measurement of lot lines RP2 167, ln. 4, and 22, there was not a lot of evidence across 11, 12, 13, 14, RP 168, ln.2, so he had "extrapolated" to arrive at Lot 11. RP 2 160, ln. 16-17, resulting in an unquantified bearing change --compared with the plat-- for Nixon Beach Tracts side Lot lines that he could not offer, RP2 160, ln. 18-25, based upon some concrete retaining walls on other lots. Yet on whether the railroad survey held support for its determinations, Steele had "not studied" that because "nobody asked me to look at that question" RP2 164, ln. 1-25. See RP2 165 ln. 9-13.

Remarkably, on whether the area east of the private platted

road is Morgans' as part of Lot Eleven, Steele only testified that was an "interesting question." RP2 164, ln. 5-9.

At trial introduced testimony of Bruce Ayers, and he informed that Morgans' surveyor, Steele, had not employed the Iron Pipe in his description, RP2 62, ln. 2 – 18. Because Morgans never accounted for additional area while claiming necessity for Cottinghams' and because Morgans were seeking condemnation under RCW 8.24, Ayers was then offered for testimonial evidence on the question whether Morgans' Nixon Beach Tracts Eleven abuts the railroad plat at RP2 65 ln. 2- 5, (and RP4 *December 7, 2011, proceedings, 22 17-24).*, Ayers gave his opinion that additional area was unsurveyed in Morgans' survey of Lot Eleven. RP2 75, ln. 1-3, and as to blocked condition of the private road location from which access had shifted RP2 76, 5-17, as it was when Morgans' surveyor had noted it as abandoned in a 1984 survey. RP2 76, ln. 2-17, and see, EX 14. He testified that both Tracts 10 and eleven extend across the private platted roadway to the railroad right of way "so if there was a survey done that didn't extend those lines, they didn't survey the entire tract Eleven. Tract Eleven goes to the right-of-way." RP2 64, ln. 24 – 75, ln 2.

Morgans offered Ron Morgans' Declaration that he saw no

evidence of any portion of Lot Eleven having been maintained, but that declaration said that "I employed Larry Steele in early 2005 to survey the entire lot" ln. para. 3, pg. 3 CP 465. (emphasis added). At trial Ron Morgan did not contradict Steele's representation that he had directed Steele's placement of stakes at the private platted road.

Cottinghams moved for Vacation of Judgment, Amendment of Findings and Conclusions, Reconsideration, and New Trial, CP 99-194 supported by their Memorandum of Authorities CP50-69 and Supplemental Memorandum of Authorities CP41-49, which motion was denied CP 641-643. The Court did not enter Cottinghams' proposed Injunction Prohibiting Septic Effluent Disposal in Violation of WCC 25.04 and Ejectment CP 918-921. Cottinghams' raised the doctrine of exhaustion of remedies and RCW 36.70C LUPA jurisdiction, asserting that the building permit was interlocutory, RP3 20, 14-25, the official's jurisdiction continuing RP4 26, ln. 14, RP4 30, ln. 5-6; RP49, ln 1 – pg 11, ln. 1.

II. ISSUES RESPONSIVE TO MORGANS' ASSIGNMENTS OF ERROR

A. Did Morgans Demonstrate Superior Title?

"An action to quiet title allows a person in peaceable

possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination." Kobza v. Tripp, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). Although any finding that Morgans are the owners of the property within that described by Cottinghams is a mere unsupported conclusion given Cottinghams' proof of adverse possession, Buchanan v. Cassell, 53 Wn.2d 611 (1959),[6] there can be no misunderstanding regarding what Cottinghams have urged and pleaded as "the correct line."

Morgans' survey evidence would not support a Decree Quieting title. Only Cottinghams' pleaded 59°04'35" Bearing Line can be "the correct line between Nixon Beach Tracts Lot Eleven and Nixon Beach Tracts Lot Ten..." (CP577 , para. 2.17, ln. 20-22)[7] from that "Iron Pipe" at the BNRR Div. One subdivision plats'

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[6] Although the BNRR Div. One subdivision plat and survey is the only record to have located and staked their east corner of Lot Eleven and No Finding or Conclusion locates Lot Eleven in relation to staking or by any full survey otherwise, any finding that the respondents are the legal owners of Lot Eleven where located would be nothing more than a conclusion of law. Since the Cottinghams established a prima facie case of ownership by adverse possession such a conclusion of law would be unsupportable in the face of adverse possession. Buchanan v. Cassell , 53 Wn.2d 611 (1959).

[7] The Amended Complaint informs that "Exhibit D is a true and correct copy of the 1976 Plat entitled Burlington Northern Railroad Along Lake Whatcom Division No. One [sic], showing its sideline aligned with NBT Lots but also

representation of the south corner of Lot 16 so staked. It should be so quieted.

Rarely is an adversely possessed line also supported, as here, by a public record revealing a survey and stake on the same line before the dispute commences. Cottinghams' actually studied a 59°20'35" bearing in the Burlington Northern, Inc., subdivision plat,[8] and Morgans offer no evidence that they studied its staked' location. [9] Their notice of that 1972 stake (RP2, 140, ln. 15-16; 141, ln 19-21) and subdivision survey plat was provided in Cottinghams' Amended Complaint many times. The facts supporting summary judgment reveal that Cottinghams' relied since 1985 upon the "James Wilson & Associates Engineers" "Plat of Burlington Northern Inc. Railroad Right Of Way Along Lake Whatcom Division No. One." EX 13, pg 2.[10] ("BNRR Div. One", and

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providing bearings of NBT lots. No evidence existed to plaintiffs' knowledge of any disagreement as to misalignment of NBT Lots with BNRR Lots when they purchased the NBT lot Nine residence or when they began use, improvement and development up to the maintenance line of NBT Lot Ten." Ln. 24, pg 2 – ln. 6, pg. 3, CP 508-509

[8] Cottinghams offered CP 532 being exhibit "D," the same as EX 13 pg 2 at trial.

[9] Even Morgans' surveyor recognized the Wilson stake as material and required, by his EX 5 addition to the EX 4 survey, which Morgans had obtained their permit without any disclosure of. He testified that he knew of its location before Morgan's construction.

[10] The Nixon Beach Tracts plat was attached to the BNRR Div One plat and they will be pages one and two, respectively, of EX 13. (RP2, 156, ln. 18-25).

"railroad property," hereinafter) and its Iron Pipe. The bearing of Cottinghams' maintenance and Occupation was defined and shown at CP 534 and (Ayers Consulting LLC map) with the Declaration of David C. Cottingham in Support of Partial Summary Judgment (CP 507), and is substantially consistent with the bearing represented on the BNRR Div. One plat bearing as separating the parties' Nixon Beach lots Ten and Eleven, CP 532, from a point at which three lots have their corners, BNRR Div. Sixteen (Cottinghams) and Nixon Beach Tracts Ten (Cottinghams) and Nixon Beach Tracts Lot Eleven (Morgans) EX 13, pg 2. Support is included in the Declaration of Steve Otten CP 499and Richard Koss CP 502.Both surveyors commented on Wilson Engineerings' south corner of BNRR Div. One Lot Sixteen. RP2 58, ln. 5-25; RP2 141, ln. 12-13.

By a specific legal description and the bearing of their possession between two points -the BNRR Div. One "Iron Pipe" and a shoreline South Alder (59°04'35")- Cottinghams provided certainty regarding description *and location* of area claimed as title by their Amended Complaint in relation to Morgans' incomplete survey for ease of reference. But Cottinghams showed that they and their predecessors actually possessed adversely from the Iron Pipe with minimal difference between the BNRR Div. One bearing,

their Amended Complaint's pleading (507-555), supporting a bearing of 59°04'35" from the Iron Pipe which was pleaded as the true and correct line. Evidence of a different bearing from a different point internal to the Nixon Beach Tracts plat was offered by Morgans at summary judgment and at trial (EX 4 and EX 5), and Morgans referred to this different point as a "corner,"but was not found to be a corner, external or otherwise.

Only The James Wilson & Associates Engineer's Subdivision Survey of "BURLINGTON NORTHERN INC. RAILROAD RIGHTOF WAY ALONG LAKE WHATCOM DIVISION No..ONE" Subdivision Plat and Survey Has Represented The True External Corner and Has Staked, Located And Provided Bearing of The East End Of The Lines Common To NIXON BEACH PLAT LOTS TEN and ELEVEN And The Parties Common Lot Line.

"The gravamen of the action is a determination of all of the interests in the property claimed by the defendants. The action was not aimed at a particular piece of evidence but was directed to all of the pretensions of [Morgans] to the title. It put [Morgans] to a disclaimer or to allegations and proof of all of the interests which he claimed to the property, the nature of which were known to him, or by the use of diligence, could have been known. Symington v.

Hudson, 40 Wn.2d 331, 243 P.2d 484 (1952)

"[W]hat are the boundaries is a question of law, and where the boundaries are is a question of fact." DD&L, Inc. v. Burgess, 51 Wn. App. 329, 335, 753 P.2d 561 (1988). Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) . The court reviews de novo the legal conclusions flowing from the trial court's decision about the location of the boundary. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d Wn.2d 873, 880 (2003); DD&L v. Burgess, 51 Wn. App. 329, 753 P.2d 561(1988). Material to the resulting description are determinations regarding proper monuments.

Although once adverse possession is established the "boundary" has accordingly changed, a "boundary" is the dividing line between two parcels of land. DD&L, 51 Wn. App. at331 n.3. If monuments "are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, . . . they will be rejected as false." White v. Luning, 93 U.S. (3 Otto) 514, 525, 23 L. Ed. 938 (1876). "

Morgans' Survey Evidence Was Shown Untrue At Trial. Morgans entered into trial of adverse possession and quiet title retreating from their own survey evidence. The Declaration of Ron

Morgan declaring that "I employed Larry Steele in early 2005 to survey the entire lot" in. para. 3, pg. 3 CP 465, was contradicted by his own surveyor's testimony that Morgans' "made the choices" where to set "corners," RP2 pg.109, ln. 13 – 17; RP2 pg.142/11-12.; RPII 165, ln. 11-13; RP2 pg.165, ln. 11-12. Even though Steele counseled Morgans that he believed the property extended beyond those corners, RP2, 142, ln. 24-25 - 143, ln. 1, he set them where he was told to, adopting their "scope of work." He had not studied, *either*, whether the survey should have included area east, RP2 152, ln. 13-25; 153, ln. 2-9; RP2 137, ln. 24; RP2 138, ln 20-23; 164, ln. 9, 24-25; 170 ln. 11 *or* records of earlier staking RP2 171, ln. 20-25. His EX 4, used for Morgans permitting omitted the stake found in 2005 before Morgans RP2 151, ln. 10, because it "was not what we were requested to do." RP 2 140, ln. 13, despite standards applicable to land surveys. RCW 58.09.040, .060, WAC 332-130-030, and WAC 332-130-050.

Morgans' proof of their property line stood substantially impeached, and little weight is due broad, conclusory, language communicating that they Morgan and his surveyor saw "no evidence" of possession. They saw the stake found in 2005 and Cottinghams' hedge. The lack of evidence they offer does little to

commend their resolution as reliable.

At the conclusion of this, because Morgans stakes were internal to the Nixon Beach Tracts plat and Morgan did not ask Steele to study the additional area, the BNRR Div. One plat and stake stood at trial as the superior definition and location of title so far as Cottinghams' South and Morgans' North line, and quieting the 5°.

B. Did Morgans Offer Evidence From Which Any Inference Contradicts Cottinghams' Proof Of Adverse Possession and Raise Any Genuine Question Of Material Fact For Trial?

No. Morgans only offer facts that Cottinghams did not mow and argue that Cottinghams' laurels should be regarded as a tree line. Morgans' surveyor says he saw no structures. They offer nothing from any of their predecessors in interest. They also offer no measurement to or from the line granted by the court' summary judgment order, whether to Cottinghams' laurel trunks, Morgans house, the area they planned as setback or otherwise. For what it offers on the location of Cottinghams Maintenance and Occupation Line adopted at summary judgment, Morgans' surveyor admits he did not locate it but, as he gave dimensions in testimony and for Morgans showing of their house's proximity to a line, they were figures provided him. RP2 147, ln. 6-18, RP2 149, 21-23, or to

Cottingham's improvements RP2, 146, ln. 10-14; 150, ln. 7-21, for EX 9. He did not locate even the hedge except generally, as the disclaimer in EX 4 reveals when it provides that "shrubs and trees shown are approximate locations." It would be difficult to infer much from this testimony, except that the Childrens swing and gym were removed as the Declaration of David C. Cottingham says as well. CP 516, ln. 24 (removed in 2004).

C. Did Morgans Cut Cottinghams' Laurels And Remove Cottinghams' Laurels Beyond The Maintenance And Occupation Line Cottinghams Had Maintained Since 1985?

Yes. In addition to the wasted laurels those standing are shown cut in half in the photograph at CP 555 and CP 534, EX and are mentioned at RP 2 104, ln 8 – 25.

D. Did Morgans Offer Evidence From Which Any Inference Contradicts Cottinghams' Proof Of Wrongful Conversion and Waste, Raising Any Genuine Question Of Material Fact For Trial?

No. Morgans assert that once removed Laurels were delivered for replanting without information to determine whether they would live and whether they could be planted fast enough.

E. Did The Court Usurp Agency Jurisdiction Over Land Use Permit Conditions Without Apropriate Invocation of Finality By Morgans Resulting In Invalid Findings, Conclusions, Orders And Judgments?

Morgans offered no certificate of finality, the customary

method of revealing the end of agency jurisdiction and full permit-condition performance. As the judge prepared to "give them a setback" RP3 34, ln. 14-19, RP3, according to such "corners" he worried that any order would impair the building official's jurisdiction (RP 33, 3-4) and inquired when Cottinghams' title ripened. (RP 3 36, ln. 16-18). The court's jurisdiction is not concurrent with the building official as it does not extend to setback relief, and it even interferes with the agencies ability to mandate planning functions if relieved in the courts before performance of permit and zoning conditions, free from misrepresentation, are relieved. *fn.*10, Chaney v. Fetterly, 100 Wn. App. 140, 995 P.2d 1284, *rev. den.*, 142 Wn.2d 1001 (2000). Findings refer to setback as the interest served as well. RCW 36.70C.030, .040 offers the only route to relief from land use permit decisions. Satisfying the setback condition with forced sale of Cottinghams title is taking private property for private purposes. Wash. Const Art. 1, §16 prohibits such taking. Courts have a nondiscretionary duty to vacate void judgments. ShareBuilder Sec. Corp. v. Hoang, 137 Wn. App. 330 (2007)

F. Did Morgans Direct a Surveyor's Efforts And, By Their Own Scope Of Work Subject to RCW 58.09.040, .060, WAC 332-130-030, and WAC 332-130-050, Either Fail To Identify And Reveal Found Monuments and Different Corner Positions, Fail To Reference Recorded Survey Documents That Identify

Different Corner Positions, Fail To Give The Physical Description Of Any Monuments Found, or Fail To Identify Any Ambiguities, hiatuses, or Overlapping Boundaries?

G. Did Morgans set stakes and represent them as "corners" rather than survey their entire lot?

H. Did Morgans or Their Surveyor Know Of And Fail To Include Evidence That Reasonable Analysis Might Result In Alternate Positions Of Lines Or Points As A Result Of An Ambiguity In The Description?

Answering all three of the issues- yes.

Morgans actually directed their surveyor to produce, as a survey employing Washington State terminology, staking which was not external corner staking for a survey omitting known evidence of "recorded survey documents identifying different corner positions," omitting a description of found monuments, omitting a description of the hiatus upland to the railroad property, and omitting "evidence that reasonable analysis might result in alternate positions of lines or points as a result of an ambiguity in the description." Morgans caused their EX 4 "survey" be recorded to secure a building permit. EX 5, filed only after Cottinghams complaint to the building official following Morgans wrongful waste, adds the iron pipe *and still* it omits a description of the hiatus, and even *afterward* Steele testified that he had not studied that hiatus because it wasn't what we were requested to do." RP 2 140, ln. 13;

RP2 152, 13-18. Washington's licensed surveyors "must inform their clients or employers of the harm that may come to the ... property and welfare of the public at such time as their professional judgment is overruled or disregarded, "and "shall not knowingly falsify, misrepresent or conceal a material fact in offering or providing services." WAC 196-27A-020. Morgans problem is of their own making and Washingtons Art. 1, §16 must be employed to determine their conduct a "flagrant abuse of the reasonable necessity doctrine." Ruvalcaba v. Kwang Ho Baek, No. 85732-6, ___ Wn.2d ___ (2012) (*en banc*)

> "Few people are aware of the pain staking research of old records required before fieldwork is started. Diligent time consuming effort may be needed to locate corners on nearby tracts for checking purposes as well as to find corners for the property in question." *Elementary Surveying An Introduction To Geomatics*, Ghilani &Wolf, Thirteenth Ed.

> "A search for the corner monument must include a search for all witness trees and monuments. A failure to do so is not prudent. The recovery of a bearing tree is direct evidence of the corner itself. If the surveyor can find one or more of the trees called for, he can relocate the corner with accuracy, When trees have been removed or have died, the surveyor must make a diligent search for the remains of the tree stumps or holes. ...The acceptance of this type of evidence can be sufficient to elevate a lost corner to the dignity of an obliterated corner."" p. 376 - 377 *Clark on Surveying and Boundaries*, 7th Ed, Robillard, Bouman, Lexis Law Publishing. *See, also* §14.14 *line trees; §14.15*

Although any finding that Morgans are the owners of the property within that described by Cottnghams is a mere unsupported conclusion given Cottinghams' proof of adverse possession, Buchanan v. Cassell, 53 Wn.2d 611 (1959),[11] Cottinghams have urged and pleaded "the correct line." That survey's stake was also identified in Cottinghams' Complaint to the Whatcom County Building Official (EX 34), and EX 13 pg 2, for the additional support its *bearing from that corner* provided as notice to Morgans of their north Lot Eleven boundary. Cottinghams's Amended Complaint called for a 59°04'35 boundary as well, not the 57°48'12" bearing which Morgans offered at trial in an incomplete survey (EX 4 and 5). Cottinghams also elicited uncontroverted testimony from Morgans' own surveyor at trial that the point from which his EX 4 and EX 5 bearing runs was placed where Morgans wanted him to place it, based on his lost or obliterated corner conclusion without study of BNRR Div. One records, even without

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[11] Although the BNRR Div. One subdivision plat and survey is the only record to have located and staked their east corner of Lot Eleven and No Finding or Conclusion locates Lot Eleven in relation to staking or by any full survey otherwise, any finding that the respondents are the legal owners of Lot Eleven where located would be nothing more than a conclusion of law. Since the Cottinghams established a prima facie case of ownership by adverse possession such a conclusion of law would be unsupportable in the face of adverse possession. Buchanan v. Cassell , 53 Wn.2d 611 (1959).

his opinion of the full extent of their lot east to the access. He did admit that the BNRR Div. One plat appears to show BNRR Div One's Lot 16 corner as "on the projection of the line between Cottinghams' Lot Ten and Morgans Lot Eleven line. RP2 141, ln. 12-14. Morgans therefore have *always* had constructive and actual notice of the BNRR Div. One bearing and staked location of the upland, north east corner of their lot and the Nixon Beach Tracts legal definition of the northeast extent and location of their lot, but they have ignored such evidence.

Because Morgans survey evidence would not support a Decree Quieting title or conclusion regarding "corners" None entered. Only Cottinghams' pleaded 59°04'35" Bearing Line can be "the correct line between Nixon Beach Tracts Lot Eleven and Nixon Beach Tracts Lot Ten..." (CP577 , para. 2.17, ln. 20-22)[12] from that "Iron Pipe" at the BNRR Div. One subdivision plats' representation of the south corner of Lot 16 so staked. It should be so quieted.

I. If Morgans Violate The Terms of a Septic Permit Requiring

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[12] The Amended Complaint informs that "Exhibit D is a true and correct copy of the 1976 Plat entitled Burlington Northern Railroad Along Lake Whatcom Division No. One [sic], showing its sideline aligned with NBT Lots but also providing bearings of NBT lots. No evidence existed to plaintiffs' knowledge of any disagreement as to misalignment of NBT Lots with BNRR Lots when they purchased the NBT lot Nine residence or when they began use, improvement and development up to the maintenance line of NBT Lot Ten." Ln. 24, pg 2 – ln. 6, pg. 3, CP 508-509

That They Report Drain Field Failure by Failing To Make The Report, Pumping Septage Onto Neighbors Properties, and By Failing To Disclose High Ground Water and Provide Competent, State Certified Evaluation Of Site Conditions May Injunctive Relief Compel Obedience to The County Health Code?

Yes. Whatcom County Code (WCC) 24.05.160A.1. Requires that they "The OSS owner is responsible for properly operating, monitoring and maintaining the OSS to minimize the risk of failure, and to accomplish this purpose shall: 1. Obtain approval from the health officer before repairing, altering or expanding an OSS (On Site Septic System)" and WCC 24.05.160.11 requires the owner to "Request assistance from the health officer upon occurrence of a system failure or suspected system failure."

WCC 24.05.170B requires that When an OSS failure occurs, the OSS owner shall develop and submit information required under WCC 24.05.090(A) prior to replacing or repairing the soil dispersal component, and WCC 24.05.090A requires Prior to beginning the construction process, a designer proposing the installation, repair, modification, connection to, or expansion of an OSS shall develop and submit the following to the health officer and obtain approval… " The soil and site evaluation as specified under WCC 24.05.110" which states that "Only professional engineers,

designers, or the health officer may perform soil and site evaluations. Soil scientists may only perform soil evaluations," and the report "shall...report... The ground water conditions, the date of the observation, and the probable maximum height.... [using] the soil and site evaluation procedures and terminology in accordance with Chapter 5 of the On-Site Wastewater Treatment Systems Manual, EPA 625/R-00/008," and "D. The health officer... (1)Shall render a decision on the height of the water table within 12 months of receiving the application under precipitation conditions typical for the region; (2) May require water table measurements to be recorded during the wet season, if insufficient information is available to determine the highest seasonal water table; [and] (3) May require any other soil and site information affecting location, design, or installation."

Cottinghams proposed a Decree Quieting Title,CP 916, and an Injunction prohibiting unlicensed septic discharge with ejectment which sought little more than removal of gravel improvements and Morgans' fence corresponding to the area from which they were wasted(CP 918), consistent with argument. RP3, 38, ln. 21-22..

Nuisance is defined as unlawfully doing an act which either annoys, injures or endangers the comfort, repose, health or safety

of others . . . or in any way renders other persons insecure in life, or in the use of property. RCW 7.48.120. It is a public nuisance For an owner or occupier of land, knowing of the existence of a ... septic tank, cesspool, or other hole or excavation ten inches or more in width at the top and four feet or more in depth, to fail to provide other proper and adequate safeguards RCW 7.48.140(9)

J. Do Morgans satisfy the Elements Of Estoppel?

Estoppel is quite disfavored. Given Morgans' "abandonment" of the condemnation RP[Jan. 26, 2012] 32, ln.5), estoppel is, *de facto* what was requested at trial, and was specifically argued as such at hearing on Cottinghams Motion to Vacate. RP[Jan. 26, 2012] 21, ln.24).

> "Mere silence, without positive acts, to effect an estoppel, must have operated as a fraud, must have been intended to mislead, and itself must have actually misled.The party keeping silent must have known or had reasonable grounds for believing that the other party would rely and act upon his silence. The burden of showing these things rests upon the party invoking the estoppel."

Nickell v. Southview Homeowners Association, ___ Wn. App. ____ (2010)(published No. 41128-8-II, 2012)As in Nickell, Morgans apparently urge estoppel based upon the permit they obtained under RCW 36 and, as in Nickell, Morgans asserted a need for their septic drain field. As in Nickell If Cottinghams were

trespassers during their adverse possession, certainly their trespass was not the casual variety and was easily observed. As in Nickell, the disputed strip had been maintained more than two decades before Morgans purchased Lot Eleven or obtained any Land Use Permit for its use.

"Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie." Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). As in Nickell. Neither before or after wrongfully wasting Cottinghams hedge improvements did Morgans either quantify or locate area they hope to claim as covered by Cottinghams improvements. Instead they put the cart in front of the horse and developed, committing their waste afterward. In Nickell part of a subdivision septic tank was located on the adversely possessed strip without demand for its removal. Here there is not even such clarity. Therefore, as in Nickell, the observation is deserved: "Proctor addresses only actual ejectment; "adverse possession and estoppel claims [were] not before [the Supreme Court] on review. Proctor, 169 Wn.2d at 495 n.2."

K. Does Equitable Balancing Apply on Adverse Possession's proof?

No. See, Proctor's footnote 2, at 495. Equitable balancing does not apply to adverse possession's factsIt has always been error even in the context of adverse possessions' proof to entertain the equitable balancing remedies. Apportionment is not the proper means to resolve the dispute where the defendant had acquired title to a portion of the disputed land through adverse possession. Reitz v. Knight, 62 Wn. App. 575, 580, 814 P.2d 1212 (1991) See, also, Booten v. Peterson, 47 Wn.2d 565, 569-70, 288 P.2d 1084 (1955). See Page 34, Respondent/Cross Appellant's Opening Brief.

"Proctor addresses only actual ejectment; "adverse possession and estoppel claims [were] not before [the Supreme Court] on review. Proctor, 169 Wn.2d at 495 n.2." Nickell v. Southview Homeowners Association, ___ Wn. App. ____ (2010)(published No. 41128-8-II, 2012).[13]

The trial court rejected Morgans counterclaim and Morgans' proposed Amended or Supplemental Findings No. 33, 34, and 35, refusing , refusing to find that Morgans' wrongful waste of Cottinghams' hedge improvement was necessary to reasonable

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[13] Nickell was not citeable when Cottingham began briefing and was not immediately discovered at the date published..

vehicle access, occurred on property Morgans reasonably believed was theirs, and was casual and not willful. These should be regarded as finding the waste unnecessary *and* occurring on Cottinghams' property since the court also rejected Morgans proposed Finding 29 that "...Cottingham has not proved title to any portion of Lot 11 by adverse possession." CP 535, 636-640.

Morgans "forfeited the benefit of balancing relative hardship by proceeding with construction after receiving notice he was invading the property rights of his neighbors." "The court will not engage in a balancing of the parties' relative hardships if the offending homeowner acted with knowledge or warning that the act sought to be enjoined constitutes an encroachment on a right held by another homeowner. Wimberly v. Caravello, 136 Wn. App. 327, 149 P.3d 402 (2006) See, also Hollis v. Garwall, Inc., 137 Wn.2d 683 , 691, 974 P.2d 836 (1999)(citing Bach v. Sarich , 74 Wn.2d 575 , 445 P.2d 648 (1968)). The ejectment sought by Cottinghams is limited to gravel and some cyclone fence. Morgans simply urge a change in law based upon estoppel with aggressive view of the facts, offering only one of Cottinghams' uses to distract from their

inability to show ever planning setback location.[14] Washington promotes restraint in developing to ensure against claims of unwritten title. Halverson v. Bellevue , 41 Wn. App. 457 (1985)

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III. ARGUMENT

A. Morgans' "Survey" Was Contested At Trial.

Cross examination was all that was necessary. Morgans surveyor admitted that Cottinghams' BNRR Div. One Lot 16 was surveyed. RP2 157, ln 4, that flooding thereafter'93 and likely destroyed survey evidence on lots 11-14. RP2 ln. 165, 5-8; 167, ln. 5-7; 170, ln. 21, (RP2 140 ln. 15), yet Morgans' surveyor did not study those records even though he had them at hand. RP2 ln. 171, ln. 19-25. Morgans' "scope of work" had not even allowed his preparation for a "private way of necessity" condemnation counterclaim. No wondr no conclusion adopts Morgans' stakes,[15] they offered neither upland corners of their lot nor competent investigation and demonstration of a survey competing with Wilsons' BNRR Div. One location of their *internal* Lot Eleven corner

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[14] This is specifically what Cottinghams argued in closing. RP3, RP3 6, ln. 17-20; 7, ln. 13-19; 8, ln. 5-10 and 22-25

[15] Cottinghams therefore do not endorse Morgans survey evidence as material to the correct location of Lot Eleven, and contest its relevance to adverse possession doctrine and determinations.

and side lot bearing, following requirements of WAC 332-130-030, WAC 332-130-050[16], and RCW 58.09.040, .060 (1).[17]

Having already introduced the BNRR Div. One plat reference in their Amended Complaint no less than *nine times* times (574, ln. 8, 21; 575, ln. 8, 16; 576, ln. 5; 577, ln. 22; 578, ln. 7, 12; 580, ln. 16), and admitting the certified plat from the Auditor's Office in support of summary judgment (CP 507, at 532) and at trial (EX 13, pg 2), Cottinghams even offered further support at trial for the BNRR Div. One subdivision plat's location of Nixon Beach Tracts Lot Eleven, and original Nixon Beach Tracts Location of Lot Ten side lot lines. with offered evidence remaining on site corresponding to a Maple Tree noted on a record from the Whatcom County Engineer's Office EX17. (RP4 *December 7, 2011,*

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[16] WAC 332-130-050 Controls the mandatory "Survey map Requirements. The following requirements apply to land boundary survey maps and plans, records of surveys, plats, short plats, boundary line adjustments, and binding site plans required by law to be filed or recorded with the county.(1) All such documents filed or recorded shall conform to the following: ... (f) For the intelligent interpretation of the various items shown, including the location of points, lines and areas, they shall:(i) Reference record survey documents that identify different corner positions'...(iv) Give the physical description of any monuments shown, found, established or reestablished, including type, size, and date visited;...(vi) Identify any ambiguities, hiatuses, and/or overlapping boundaries."

[17] The record of survey as required by RCW 58.09.040(1)(a), and 58.09.060 must show "all monuments found, location and giving other data relating thereto... (c) Name and legal description of tract in which the survey is located and ties to adjoining surveys of record ...d) ... (e) Any other data necessary for the intelligent interpretation of the various items and locations of the points, lines and areas shown."

proceedings, 22 ln. 25 – 26, ln. 20), which record was better quality reproduction of the 1945 Nixon Beach Tracts plat[18] showing a maple tree on their east, upland, Nixon Beach Tracts Lot line, and attempted further support for the location of that tree by substantial maple stump which is still on the site.

A Finding that Morgans are the owners of the property within that described by Cottinghams is merely unsupported conclusion given Cottinghams' proof of adverse possession, Buchanan v. Cassell, 53 Wn.2d 611 (1959),[19] but there can be no misunderstanding regarding what Cottinghams have urged and pleaded as "the correct line." Cottinghams' Amended Complaint called for a 59°04'35 boundary as well, not the 57°48'12" bearing which Morgans offered at trial in an incomplete survey (EX 4 and 5). Cottinghams also elicited uncontroverted testimony from Morgans' own surveyor at trial that the point from which his EX 4

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[18] It is better quality from the first glance. On this plat , filed in July, 1945, the Auditor's office copy must have been so faint that a need had been found to draw in the elements of all certifying seals certifying it. EX 13, pg. 1. Compare EX 17.

[19] Although the BNRR Div. One subdivision plat and survey is the only record to have located and staked their east corner of Lot Eleven and No Finding or Conclusion locates Lot Eleven in relation to staking or by any full survey otherwise, any finding that the respondents are the legal owners of Lot Eleven where located would be nothing more than a conclusion of law. Since the Cottinghams established a prima facie case of ownership by adverse possession such a conclusion of law would be unsupportable in the face of adverse possession. Buchanan v. Cassell , 53 Wn.2d 611 (1959).

and EX 5 bearing runs was placed where Morgans wanted him to place it, based on his lost or obliterated corner conclusion without study of BNRR Div. One records, even without his opinion of the full extent of their lot east to the access, and his impression that the BNRR Div. One plat shows BNRR Div One's Lot 16 corner as "on the projection of the line between Cottinghams' Lot Ten and Morgans Lot Eleven line. RP2 141, ln. 12-14. Although the record at trial cannot be regarded even as full and fair opportunity to Cottinghams to support such evidence, given a lack of pronouncement on whether the court would consider modifying the summary judgment line or regard the line as less than correct, Cottinghams evidence was superior to Morgans. Surveyor Bruce Ayers used monuments Steele used so that they would be working on the same relative relationship, RP2 54, ln. 9-11; RP2 57, 6-11, and provide the greatest degree of certainty RP2 60, ln. 6-25. This is service to the court, not Cottinghams' endorsement of Morgans' survey.

B. Adverse Possession Was Also Well Supported by Substantial Uncontroverted Evidence of Cottinghams Installed Fixtures.

Fixtures are unnecessary[20], but by these Cottinghams' title

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[20] See, Mesher v. Connolly, 63 Wn.2d 552, 388 P.2d 144 (1964) (lawn,

ripened no later than June 4, 2004, ten years after fixtures at the east end . At trials' closing argument the trial judge asked whether adverse possession whether Cottinghams' title becomes adversely possessed. (RP3 36, ln. 16-18). Cottinghams identified dated photograph. (RP3, 37 ln.2-7) Cottinghams' had fixtures in place at that time in addition to the laurels shown, (CP 516, Exhibit L, ln.1-2, para. 13, pg 10), being a Childrens piling-based gym, slide, climbing structure, and swing. Decl. David C. Cottingham in Support of Motion for Partial Summary Judgment), including their composting structure fixed into the ground. The earliest dated photograph is June 4, 1994. CP 541. Morgans offered photographs depicting the condition of the property early one spring in 2005, after the 10 year period required by RCW 4.16.020 and urge reasoning long rejected by El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962), that Cottinghams' title is affected after the period shown by adverse possession's facts and notice. Morgans actually urged estoppel at RP Jan. 21, 2012, [].

Cottinghams' laurel placement was just "enough north of the maintenance line to ensure enough room to conduct mowing and

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shrubbery, rockery, eaves, edge of garage); El Cerrito, Inc. v. Ryndak, 60 Wn.2d 847, 376 P.2d 528 (1962)(fence, eaves, shrubs, lawn, sidewalk, trash cans).

trimming on the far (south) side closer to NBT Lot Eleven. I also continued mowing on the south side of these laurels a width of forty inches" [until] "mowing under them became difficult by 2004 *and still I continued trimming on both sides at least once annually on the south sideof the laurels[.] I used ladders for several days each year until 2005*." (para. 13, pg. 9, Declaration of David C. Cottingham, Motion For Partial Summary Judgment Quieting Title (CP 389-392) emphasis added). Thirteen years before Morgans' trespass, Cottingham also planted a nine foot tall black locust tree within twenty three feet of the Iron Pipe and just "three feet north of the maintenance line" (ln. 6, para. 14, pg. 10), "closer to the maintenance line than the earlier laurels were planted" (ln. 23 pg. 10) and "mowing twenty inches south of the maintenance line until 2004" (ln. 6, pg 11, para. 15,) and "Over Twelve Years Before Defendant's Trespass...[Cottingham] planted more laurels ...bearing directly toward the Iron Pipe instead of a point north of it."(ln. 8-11, para. 16, pg 11) "past the compost structure inches south of the maintenance line..."(ln. 13-14, para. 16, pg 11).

Evidence had already shown cutting of blackberry roots (line 16, para. 4, pg. 4, CP 510); 1989 planting of rhododendrons slightly west of the iron pipe close enough that "branches [were] reaching

over the Maintenance line" (ln. 15, para. 9 pg 7, CP 513); the 1992 installation of a compost structure supported by piling into the ground "on the same maintenance line;" (ln. 24, para, 10, pg 7, CP 513); and "...I continued trimming on both sides at least once annually on the south side I used ladders for several days each year until 2005" (ln. 22-23, para. 13, pg. 9, CP 515).

Adverse possession is established as a matter of law if the essential facts are undisputed. Chaplin, 100 Wn.2d at 863. A trial court's findings of fact must justify its conclusions of law.' Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

Cottinghams' earlier uses included visible fixtures with "seven-inch diameter treated pilings," "installed into and under the ground eighteen inches" with "inch and a quarter lead pipe pounded through the legs at right angles for added stability and permanence" (CP516, ln. 14, 15, 19, 21), or driven "lumber into the ground" (CP 513, para. 10, ln. 23 – 514, ln. 1), and soil removal (CP 515, para. 12, ln. 9), located in line with the Iron Pipe and Composting Structure (CP 538, 540, 542). Morgans do not engage such facts. (CP 540, 543)(Photographs of Childrens' Gym, Slide, and Swing, Black Locust Tree and Composting Structure).

Although taken from very different prescriptive easement

case law, this was never vacant, unimproved land. Morgans' Lot Eleven has been improved with a septic system since 1972. See, Exhibit J, Decl. DDavid C. Cottingham In Support Of Partial Summary Judgment CP 539.

The adverse possession doctrine encourages the rejection of stale claims to land and, most importantly, quiets title in land. . citing Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984)).

Morgans misrepresent Cottinghams' burden of proving adverse possession as "clear, cogent and convincing evidence." They refer to authority stating the burden of proof of a prescriptive easement The burden of proof of adverse possession is a preponderance. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 759, 774 P.2d 6 (1989). "[A]lthough the law disfavors prescriptive easements, no such disfavor applies to adverse possession of actual land." Nickell, v. Southview Homeowners Association, ___ Wn. App. ____ (2010)(and 2012, Order Publishing No. 41128-8-II) citing N. W. Cities Gas, 13 Wn.2d at 83; Kunkel v. Fisher, 106 Wn. App. 599, 603 n.12, 23 P.3d 1128, review denied, 145 Wn.2d 1010 (2001).

Exclusion of OthersBegan in 1992.Cottinghams excluded

Morgans predecessors in interest long before any hedge. "In 1992 the agent for NBT Lot Eleven owner Steven Otten mowed NBT Lot Eleven blackberries twice with a tractor and PTO blade. However he respected the Maintenance Line at my request, without mowing northward of it." Decl. David C. Cottingham, pg. 8, para. 11 ln. 20-23.CP 514. Although one question is how much Cottinghams could have shown with notice and opportunity reopening summary judgment, no evidence of any additional need or opportunity to exclude others was shown by Morgans *either* at trial or summary judgment.

Anderson v. Hudak, 80 Wn. App. 398, 907 P. 2d 305 (1995), involved no evidence of maintenance or cultivation: "[N]o evidence was presented showing that Anderson and her family ever conducted any activities on the trees themselves beyond planting them." *Id.* By contrast, beginning in 1985 Cottinghams removed blackberry roots by use of a heavy brush hook to cut into roots, and mowing continued without lapse in frequency or regularity, mowing every week or two during the growing season, CP510, para. 4, ln. 15-19; 513, para. 8, ln. 7-9; CP 514 para. 11, ln. 16), and Cottinghams mowed and maintained a straight line between two fixed points, the James Wilson & Associates Engineer's Stake

and the shoreline's South Alder CP 510 para. 4, ln. 25. The line was "never without maintenance from the iron pipe to the South Alder (CP 515, para. 11, ln. 3-4). Earlier at the eastern end of these properties. where waste by Morgans was shown at summary judgment by CP 548, 540, 542, in 1989 Cottinghams first planted Rhododendrons (CP 513); in 1992 they drove into the ground a compost structure (para. 10, CP 513); in 1993 and 1994 installed a children's gym and swing, a railroad tie garden, a locust tree, hydrangea and rhododendron all in addition to laurel hedge plants and before 1995. See, CP 507-555 at 516, and photographs at CP 540, 542, 2, as illustrated at CP 538, a sketch labeled Exhibit I.(Decl. of David C. Cottingham in Support of Motion For Partial Summary Judgment).

In 1993 Cottinghams installed a railroad tie delineated garden eighteen feet wide crowding trunks of the laurels (CP 515, para. 12, ln. 6-11; para. 13, ln. 12-20; exhibit Z at CP 555.), continued mowing (CP 515, para. 13, ln 20-21).. . Laurels were planted in 1993, a one hundred thirty foot hedge, west of and 1994 east of the swing and gym even closer to that line. (CP515, pg. 9, para. 13, ln. 13-20; and CP 516 pg 10, para. 15, ln. 22-23) Trimming occurred on both sides annually, in 1994 even using

ladders (CP 515, para. 13, ln. 20) Para. 13, CP 515, and another play structure was installed in 1994 CP515 and photo *at CP 541(Exhibit L).* In 1994 a large childrens' swing was also installed CP 540 (exhibit K), its legs "on and under the same Maintenance Line and it extended Northward across the maintenance line" where it stood until 2004, being piling-based on seven inch pilings with slide, climbing structure and chin-up bar (CP 516, para.15), accompanied by laurels east thereof and closer to the maintenance line than the western laurels which allowed less (CP 516, ln. 23) than the western forty inches (CP 515, ln. 21) for the mowing and trimming north of the maintenance line, which was still conducted at twenty inches south of the laurel trunks (517, para. 15, ln. 1-7). In 1995 Cottinghams installed some more laurels east from the laurel or two already east (CP515, para. 16, ln. 22) of the Childrens Gym and swing (CP 517, para. 16, ln. 9-20) past the still standing composting structure "inches south of the maintenance line" toward the Iron Pipe ((CP 517, para.16, ln. 14-16). There was installation of a nine-foot black locust tree and hydrangea just 23 feet west of the Iron Pipe (CP 516, para. 14, ln. 5-6).

This is area was therefore possessed not only by

maintenance but by fixtures.[21] installed and maintenance even without such hedge. Spring, 2004, was ten years after installation of their Childrens gym, slide, platform and swing as well. (CP515, pg. 9, para. 13, ln. 13-20; and CP 516 pg 10, para. 15, ln. 22-23)

Morgans' predecessor in interest in Lot Eleven had actual notice and objected in 1995 CP 507, "A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it.".Riley v. Andres, 107 Wn. App. 391, 396, 27 P.3d 618 (2001).

Hostility requires "that the claimant treat the land as his own against the world throughout the statutory period." Chaplin v. Sanders, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

"It is enough to establish adverse possession in this type of case that the party claiming ownership held, managed, and cared

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[21] The determination of whether an item is annexed to the land as a "fixture" is based upon an objective test. Union Elevator & Warehouse Co. v. State of Washington, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008). construction and maintenance of a structure partially on the land of another almost necessarily is exclusive, actual and uninterrupted, open and notorious, hostile and made under a claim of right. Draszt v. Naccarato, 146 Wn. App. 536, 542 (2008)(citing Reitz v. Knight, 62 Wn. App. 575, 582, 814 P.2d 1212 (1991)

for the property." Butler v. Anderson, 71 Wn.2d 60, 64, 426 P.2d 467 (1967), overruled on other grounds in Chaplin, 100 Wn.2d at 861 n.2.

C. The Previous Location of the Internal Platted Road Was Properly Quieted IN The Court's Partial Summary Judgment Order.

"[T]itle to an abandoned street may be acquired by adverse possession. Lewis v. Seattle, 174 Wash. 219, 24 P. 2d 427, 27 P. 2d 1119. " Summary Judgment support (CP 546, 548) and Trial (EX 14) included proof of abandonment of a *previous* location of an internal roadway long before 1984, as Morgans EX 4 and EX 5 show[22]outside *their representation of* their boundary Cottinghams showed ouster by blocking it as have others, acts inconsistent with tenancy in common. Abandonment of common roadway interests is not uncommon implied intention to abandon is sufficient. Barnhart v. Gold Run, Inc ., 68 Wn. App. 417, 420 -21, 843 P.2d 545 (1993). In Heg v. Alldredge, 157 Wn.2d 154, 161, 137 P.3d 9 (2006) Trial disclosed no denial regarding shifting location within their own Lot

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[22] Morgans' surveyor, while not offering evidence of their entitlement to area over which the new location passes, explained his two locations for his representation of the gravel road shown by him as directly allowing access otthe county road. RP 2, 112, ln. 17-18), had to redraw (RP 2, 112, ln. 20-21), which drive passed right by "an old existing rebar" that he "didn't show in the 2005 survey," but knew was there and even identified in a letter.

Eleven of the Nixon Beach Tracts road. Morgans even installed a drain field upland and east from (CP 547, described at ln. 13, para. 18, CP 518[23]) their own survey stakes, action inconsistent with the continued existence of the location of the road. Curtis v. Zuck , 65 Wn. App. 377 , 829 P.2d 187 (1992)

D. Jurisdiction For Any Forced Sale To Relieve Or Settle Morgans' Setback Is Absent And The Judgment Is Void As A Flagrant Abuse Of The Reasonable Necessity Doctrine And Must Be Vacated.

Wash. Const. Article 1 §16 and the Land Use Petition Act RCW 37.70C do not allow resort to the courts during permitting for forced sale reward in relief from setback conditions. Morgans removed Cottinghams' improvements and also removed half of Cottinghams' laurels still standing RP 2, 103-105, arriving at trial without any measurement showing the extent of Cottinghams' improvements claimed to be over and south of the court's summary

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[23] At this location in the Declaration of David C. Cottingham In Support of Motion For Partial Summary Judgment: "...Exhibit Q receals [the private platted road] as abandoned. Defendants have installed and blocked transportation on it with their 2009 septic installation, as shown in exhibit R, which is a view across defendants' eastern NBT Lot Eleven stake, wire fence, and posts, toward defendants' eastern NBT Lot Eleven stake , wire fence and posts. At no time during the last twenty five years has there been evidence or sign of use of this road. All ability to use such access has been blocked to all use for far more than ten years northward by trees, sheds, and a concrete wall. S is a photograph of the concrete wall blocking the Nixon Beach Tracts access road which was installed by NBT Lot 8 owner Walter Larson at NBT Lot 9. To ensure that access was always available to NBT Lots Eleven through fourteen, without need of purchase of subdivided railroad lots, Whatcom County's plat approval required that BNRR publicly dedicate several lots in Division One as an access."

judgment line, or into any planned setback area urged for resolution by forced sale of a still-floating dimension which clouds Cottinghams' title with their threat of years of litigation. Rewarding Morgans for ignoring the notice given by Cottinghams improvements, Wilsons Engineerings' survey and their setback conditions runs into the teeth of constitutional notions under Equal Protection, Condemnation and LUPA. Furthermore, in Ruvalcaba v. Kwang Ho Baek, No. 85732-6, ___ Wn.2d ___ (2012) (*en banc*)[24]. In Ruvalcuba[25] a condemnation -- urged necessary because of the grantor's own actions required little discussion before the court declared the artful approach to condemnation presented a "flagrant abuse of the reasonable necessity doctrine." Awarding reasonable attorney fees the court declared the attempt to condemn a private way of necessity on facts revealing the owner's former alienation of a portion "erodes the protections for private property found in Article I, §16 of the Washington Constitution.

Here Morgans' predecessors, accepted or endured Cottinghams' hedge, whether or not as encroachment, as did

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[24] Morgans received Cottinghams' citation to Ruvalcaba as additional authority after Cottinghams' opening memorandum was filed.

[25] Morgans received Cottinghams' citation to it as additional authority. The "reasonable necessity" doctrine was employed and held as a flagrant abuse of private property rights after the owner of the property had allowed.

Morgans themselves at purchase as shown in EX 4 referred to in EX 3 at pg. 4, (item 5, by Auditor's File No.), a deed subject to such encroachment. RP I, pg. 131, ln. 17 – pg 133, ln. 16; 140, ln. 9 – pg 142, ln. 23. Reasonable investigation of its attachment RP I, pg 133, ln. 4-9, is rightly presumed. RP1, 141, ln. 9-11. By waiting until trial for modification and leaving Cottingham preparing for condemnation, Morgans unconscionably skirted the trial judge's ability to make inquiry and to ensure against abuse of the process under CR 56(g). Certainly the courts' authority under CR 54(b) is not employed in a fashion to be sprung upon litigants in a trial after summary judgment without further cause or notice, particularly not to block twenty years of their evidence of use, their support for the Wilson survey's location and bearing. Certainly a condemnation counterclaim, with its procedural expectations so related to notice and opportunity to be heard, does not present an occasion to burden Cottinghams with defense of a necessity Morgans chose not to prove and could not prove with their truncated survey.

Morgans' approach to equity through an unsupportable condemnation claim deserves the response delivered in Ruvalcaba v. Kwang Ho Baek, No. 85732-6, ___ Wn.2d ___ (2012) (*en banc,* reversing Wn.2d 360, 367, 644 P.2d 1153 (1982) for its flagrant

abuse of equitable balancing masking condemnation prohibited under Washington's Constitution Art. 1 §16.

Morgans assert that, once invoked, equitable jurisdiction invoked by Cottinghams remains sufficient to reach the relief of permit conditions, however subject matter jurisdiction cannot be conferred and its absence renders the court powerless to pass on the merits of permit conditions given RCW 36.70C. Deaconess Hosp. v. Washington State Highway Comm'n, 66 Wn.2d 378, 409, 403 P.2d 54 (1965) Further, the court's denial of the enforcement of while effectively overruling permit conditions employed by zoning, without legitimate distinction effects a preference without reason for distinction, affecting a substantial and fundamental property right offensive to equal protection and subject to strict scrutiny. The court must assume that Morgans' actual, onsite setting of the boundaries of their setback is irrelevant to the building official to gather authority to intervene.

The court must find Morgans to have interposed their condemnation counterclaim unsupportably to avoid dismissal, established no structure over any line, that their balancing argument was in bad faith, particularly given their resort to setback conditions for support without demonstration of their attempts

during permitting to avoid building in a manner exceeding knowable limitations presented by what they regard as Cottinghams' encroachment.

IV. CONCLUSION.

Remand should direct entry of the Decree and Injunction awarding the maintenance and occupation line which the summary judgment already directed, with ejectment, and the limited, but important, injunctive relief from septic system pumping and to prevent interference with the improvements. Remand should also direct hearing for the purpose of award of expert fees, loss of use of property, and restoration damages. Damages for value of wasted property beyond its intrinsic replacement value should result under Birchler for emotional distress and loss of privacy. See Birchler v. Castello Land Co., 133 Wn.2d 106, 113, 116, 942 P.2d 968 (1997) (emotional distress damages not a cumulative remedy, but "merely another item of damages for a wrong committed as a result of timber trespass").

Overturning the error accomplished through use of condemnation and avoidance of agency jurisdiction is insufficient, as Morgans already deprived this court of its valuable focus at trial without offer of evidence on their condemnation counterclaim or

study locating the extent of their own lot. As in Lauer v. Pierce County, 157 Wn. App. 693; ___Wn. 2d ___(2010)[26] and Ruvalcaba. If it is incumbent upon a permittee to determine the location of their setback before construction and reliance upon their permit, then Washington can not allow balancing to follow a failure to locate the area of that setback. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988) has long stood to require the discharge of that responsibility by Morgans, and Lauer v. Pierce County __ Wn.2d __ (2011) No. 85177-8 raises Morgans responsibility to avoid misrepresentation.

Respectfully submitted this 27 day of October, 2012.

David C. Cottingham WSB 9553,
pro se, and Attorney for Joan Cottingham.

Declaration of Service David C. Cottingham, under penalty of perjury under the laws of the State of Washington, at Bellingham, Washington, declare that on this day I served a copy of the attached as follows: by delivery

~~By deposit in the United States Mail, first class postage prepaid as Priority Mail, addressed to~~ Attorney for Defendants Ron Morgan and Kaye Morgan: Douglas

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[26] Lauer v. Pierce County, ___ Wn. 2d ___ (Dec 15, 2011; No. 85177-8, 2011)(fully complete application required, misrepresentation of setbacks on application is material to permit validity).

Shepherd, Attorney, Shepherd, Abbott, 2011 Young Street, Suite 202 Bellingham, Washington 98225.

Dated this 24 day of October 2012.

David C. Cottingham WSB No. 9553