

No. 65218-4-1

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON  
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**Gary and Sue Cohn,**

**Appellants,**

**v.**

**Tollefson Family Trust by Its Co-Trustees,  
Marc and Nancy Tollefson**

**Respondent.**

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**Appellants' Brief**

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## I. Assignments of Error<sup>1</sup>

### A. Assignments of Error

1. The trial court erred in entering Judgment and Decree Quieting Title in Favor of Plaintiff the Tollefson Family Trust.
2. The trial court erred in describing and defining the boundaries of the "disputed area." (Finding of Fact 1 and Exhibit A).
3. The trial court erred in finding that the Fields placed a wooden border at the request of the Cohns "at a point which the [sic] believed represented the property line between Lot 16 and Lot 17," if this finding means that the Cohns believed the wooden border represented the property line. (Finding of Fact 5).
4. The trial court erred in "finding"<sup>2</sup> that the Cohns weeding in the area was only "a neighborly accommodation." (Finding of Fact 6).
5. The trial court erred in "finding" that the Danubios would park in the area "exclusively." (Finding of Fact 7)
6. The trial court erred in "finding" that the owners of Lot 17 have always used the disputed area as their own since 1961 to the present and the Cohns have not. (Finding of Fact 8).
7. The trial court erred in finding that a neighbor "not Cohn" parked his boat in the disputed area. (Finding of Fact 11).
8. The trial court erred in "finding" that the Cohns had notice that the owners of Lot 17 were "exclusively" using the disputed area for parking. (Finding of Fact 13).
9. The trial court erred in finding that when the Cohns placed a fence up for their dog that followed the wooden border it

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<sup>1</sup> The trial court's Judgment, Findings of Fact and Conclusions of Law, and Order Denying Defendants' Motion for Reconsideration are included in the appendix. The Clerk's Papers do not include Exhibit D to the Judgment. The Cohns include what they believe to be a true and correct copy of Exhibit D in the Appendix.

<sup>2</sup> Quotation marks signify that the "finding" should be treated as a conclusion of law.

represented what they believed was the property line.  
(Finding of Fact 16).

10. The trial court erred in holding that the Tollefsons' predecessors treated the disputed property as their own. (Conclusion of Law 20).
11. The trial court erred in holding that the Tollefsons' predecessors' use of the disputed area was the same as an owner of the same type of property would make. (Conclusion of Law 21).
12. The trial court erred in holding that parking is more than a use. (Conclusion of Law 22).
13. The trial court erred in holding that the Tollefsons' predecessors' use was consistent, frequent and ongoing and to the exclusion of others sufficient to meet the "exclusivity" element. (Conclusion of Law 24).
14. The trial court erred in holding that a reasonable person would assume that Lot 17 owners were the owners of the entire disputed area. (Conclusion of Law 26).
15. The trial court erred in holding that there is no difference between use of the disputed area as a septic system site and as a parking area. (Conclusion of Law 27).
16. The trial court erred in holding that the Tollefsons' predecessors' possession of the disputed area was actual and uninterrupted for ten years. (Conclusion of Law 29).
17. The trial court erred in holding that the Tollefsons are entitled to quiet title and to ejectment of the Cohns from the disputed area. (Conclusion of Law 30).
18. The trial court erred in entering the order of March 5, 2010, denying the Cohns' motion for reconsideration and in failing to fashion an equitable remedy that would allow the Cohns to continue to use the disputed area for access and maintenance purposes.

**B. Issues Pertaining to Assignments of Error**

1. Does maintaining a gravel driveway and parking partially on a neighbor's lot amount to possession of land or is it merely an adverse use when (i) parking is at a premium in the neighborhood and (ii) the owners of record title used the driveway for access, gardening and maintenance purposes? (Assignments of Error 12-18.)
2. Does a party's use of a grass and gravel driveway between neighboring beach houses, and located partly on each neighbor's property of record, for parking, spreading of gravel, weeding, and hauling a boat out of the water amount to exclusive possession of the driveway when (i) the owners of record title also used the driveway for weeding, gardening, house access and maintenance, moving a boat in and out of the water, parking and storing a boat during the wintertime, and (ii) the boundary line cuts the driveway in half such that neither neighbor had a right of record (fee title or easement) to use the entire driveway for parking? (Assignments of Error 1-17.)
3. If a party adversely possesses a driveway area between two houses, should the adversely possessed area extend to the dispossessed owner's house drip line (or beyond) when (i) the dispossessed owner has (of necessity) used the area beyond the drip line continuously for access and maintenance purposes, and (ii) there has not been any physical obstruction such as a fence? (Assignments of Error 1, 2, 12-18.)
4. If the respondent is entitled to an order quieting title in the driveway area, should the order equitably provide the adversely dispossessed neighbors the right to continue to use a reasonably sized area adjacent to their home for access and maintenance purposes, as they have throughout the prescriptive period, in a manner that does not unreasonably interfere with the adverse possessor's historic use of the adversely possessed driveway? (Assignments of Error 1, 2, 17-18.)

## II. Statement of the Case

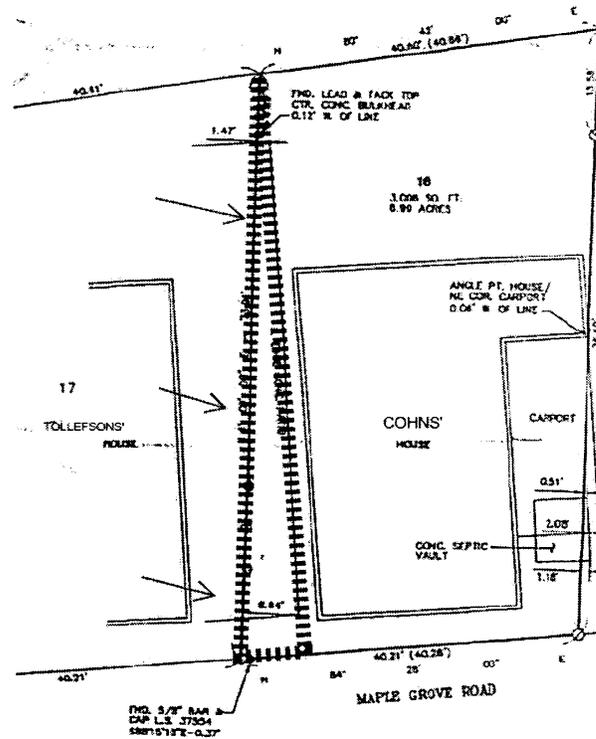
### A. Brief Introduction

The Cohns and the Tollefsons are neighbors who own beachfront homes on Camano Island. This is an adverse possession case involving the area between their homes. Most of the area in dispute has historically been part of a sparsely graveled driveway, used in common by the parties. According to the testimony and other evidence, the Tollefsons' predecessors spread gravel for the driveway and it was their primary parking area. The Cohns and their predecessors also used the disputed area (their half of the driveway) throughout the prescriptive period for gardening, home maintenance, home and beach access, and sometimes used the entire driveway for their winter boat parking, guest parking and other purposes.<sup>3</sup>

The image below (slightly modified from an exhibit introduced at trial) illustrates the Tollefsons' home on the left and the Cohns' home on the right. The arrows point to the record boundary and the dashes outline the triangular disputed area. Maple Grove Road is on the south side of the lots and the beach is located to the north. The north side of the houses is improved with patio area and a bulkhead.

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<sup>3</sup> Prior to renovating their home from 2005-08, the Cohns had a fireplace which extended to the drip line of their home and which made it impossible for the Cohns to access that side of their home without entering the disputed area as defined by the trial court.



The Tollefsons filed a quiet title and ejectment action in 2008 claiming ownership of the hatched area by adverse possession. After a two-day bench trial, the judge ruled in favor of the Tollefsons. The court held that regular parking in the graveled driveway by the Tollefsons and the prior owners of their home amounted to actual and exclusive possession of the entire disputed area, a requisite of finding the Tollefson/Lot 17 owners to have adversely possessed the disputed area from the Cohns/Lot 16. The trial court further held that contemporaneous use of the disputed area by the Cohns and their predecessors was a "neighborly accommodation," thus consensual rather than hostile, and thus

insufficient to disrupt the Tollefsons' "exclusive possession." Because the trial court's order extended the Tollefsons' fee title to the drip line of the Cohns' home, the Cohns moved for reconsideration, requesting that the trial court, at a minimum, provide the Cohns with continuing use rights in the disputed area compatible with the Tollefsons' parking rights to garden and maintain the side of the Cohns' home. The trial court denied the Cohns' reconsideration request. This appeal followed.

**B. The Facts and Procedural Background**

**1. The Properties and Owners**

The parties' beachfront lots share a common boundary line.<sup>4</sup>

CP 24-25. Dr. Gary Cohn and Dr. Sue Cohn (the "Cohns") purchased their property commonly known as 748 Maple Grove Road, Camano Island ("Lot 16") in 1994. CP 25. The Tollefson Family Trust, represented by Marc and Nancy Tollefson as co-trustees (the "Tollefsons") purchased their property commonly known as 750 Maple Grove Road, Camano Island ("Lot 17") in 2005. CP 24-25. Neither couple obtained a survey, CP 25, but Dr. Gary Cohn testified that he knew through an appraisal that the Cohns' lot was 40 feet wide and that he measured 40 feet

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<sup>4</sup> Exhibits 48 and 77 show the driveway, patio, fireplace, and a dog fence (after the fence was moved) in 2005. Exhibits 9 and 10 show the area as it appeared in 2005 during installation of the septic system. RP 75:13-77:25 (the verbatim report of proceedings from trial are designated as RP). Exhibit 13 shows the area as pavers are being installed and Exhibit 98 shows the area as it appears today. These Exhibits are in the Appendix.

from a fence near the eastern boundary line of Lot 16 to estimate the western boundary line. RP 117:21-120:19 and 186:24-187:11.

After the Tollefsons purchased Lot 17 in 2005, they installed a new septic system in the driveway area between the homes. CP 27. From April 2005 to November 2005, the Cohns and the Tollefsons engaged in a series of emails concerning the Tollefsons' improvements, addressing issues such as ground elevation and drainage between the homes, the integrity of the bulkhead, sound absorption if the Tollefsons paved the driveway, and access for the Cohns' contractors when the Cohns started renovations on their house. CP 27.<sup>5</sup> In late 2007 or early 2008, the Tollefsons obtained a survey as part of a mortgage application and learned they were mistaken about the actual boundary. CP 28-29. The Cohns commissioned their own survey which showed the same boundary. Id.

After the surveys, the Tollefsons offered to purchase an easement from the Cohns. RP 82:20-83:10; Exs. 43, 78-79. Negotiations stalled and the Tollefsons brought an action for quiet title and ejectment against the Cohns. CP 24-25; CP 532-38. The Tollefsons alleged ownership of the marked triangular portion of the driveway adjacent to the Cohns' beach home (the "disputed area"), owned of record by the Cohns, by adverse

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<sup>5</sup> In an email during those discussions, Dr. Gary Cohn referred to the driveway as "your driveway," which the Tollefson's later argued was and the trial court treated as a significant admission.

possession. CP 532-38; Ex. 17.<sup>6</sup> The Cohns answered and counterclaimed for a judgment quieting title in them to all property described in their legal description. CP 444-46.

The surveys show that the boundary between the homes cuts the current, rectangular driveway area roughly in half, creating two triangular areas. Ex. 17.<sup>7</sup> The disputed area is used as part of the driveway, and runs from the record westerly boundary of the Cohns' lot east to a line parallel with the Cohns' garden strip under the drip line of the Cohns' roof. The disputed area is approximately seven and one-half feet wide at the road (its widest point) and approximately one foot wide at the bulkhead. CP 532-38; Ex. 17. The disputed area does not include the portion of the driveway that is within the Tollefsons' surveyed, record title area. CP 532-38. The Tollefsons' new septic system is located partially on Lot 16 and partially within the record boundaries of Lot 17. Id. A vehicle parked in the middle of the driveway would be located partially on Lot 16 and partially within the record boundaries of Lot 17 (i.e., partially in the disputed area and partially on property owned of record by the Tollefsons and not claimed by the Cohns). Ex. 17.

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<sup>6</sup> Exhibit 2 of the Complaint also shows the disputed area and is in the Appendix.

<sup>7</sup> Note that the graveling did not extend to the northern end of the triangle, but ended roughly at the northerly edge of the two homes. Ex. 77; Ex. 16 ("Building Sketch" page); RP 190:7-17 (showing and discussing concrete patio area north of the homes).

The Tollefsons have not owned the property long enough to have adversely possessed any rights by themselves, and relied on the doctrine of "tacking." CP 29. The Tollefsons' Lot 17 was previously owned by three families – the Fields, the Danubios, and the Espidals – who purchased Lot 17 together in 1961 and shared use of the cabin. CP 25; RP 22:3-23:10.<sup>8</sup> The Espidals sold their interest to the Palos in 1966. CP 25.

## **2. Use of the Disputed Area**

Ms. Field testified that when she visited she would back her car in and park it near the north end of the driveway so she could unload her groceries into her kitchen, and then leave the car parked there during her stay. RP 24:1-15. The portion of the driveway belonging to Lot 17 is at its widest at the north end. Ex. 17. That means she was traversing, but not occupying much, if any, of Lot 17 for her parking. Her family used the concrete patio area north of the homes for hauling a boat out of the water and storing it. RP 26:16-21; CP 25-26. Ms. Field did not see her Lot 16 neighbor, Mr. Zuivich, store his boat between the homes during winter, but she was only at her cabin once or twice during winters for a weekend; and she shared summer months at the cabin with her co-owners. RP 35:18-36:16.

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<sup>8</sup> The witnesses referred to the Lot 16 and Lot 17 homes as both cabins and houses. The terms are used interchangeably here.

Ms. Field knew that Mr. Palo brought in gravel for the driveway twice over the 40+ year period she was a part owner (after 1966, when Mr. Palo's family purchased). RP 37:5-14. The Fields also poisoned and pulled up the grass that grew through the gravel. RP 37:15-25. Ms. Field testified she never saw the Cohns do anything on the property between the lots, RP 34:18-35:6, and that there was a rosebush next to the Cohns' house and that the Cohns "asked [her] grandson to put some planks down there to protect the rosebush." RP 28:6-10. It was Ms. Field's belief that the planks represented the property line. RP 28:11-15.<sup>9</sup> She believed this based on her use of the driveway for parking and based on what her husband had told her about where the line was, but she never told any of her neighbors that the disputed area was her property. RP 38:23-39:10.

Ms. Field testified that neighbors would "frequently" park without her permission along the road. RP 29:7-19. She also found cars parked in between the houses during the winter and testified that the car owners would usually come out and move the cars if she or her family needed to park there. RP 29:20-22; 38:14-22. Finally, Ms. Field testified that she remembered that the Cohns had put up a dog fence,<sup>10</sup> which went from the beachward corner of the Cohns' home to the bulkhead. RP 40:3-41:8.

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<sup>9</sup> Dr. Sue Cohn simply thought the planks were there to protect the garden. RP 288:6-17.

<sup>10</sup> At trial Mr. Tollefson explained that a diagram attached to his declaration incorrectly shows the fence running the length of the disputed area. RP 303:23-304:10; Ex. 81. The incorrect diagram is also attached to the Tollefsons' Complaint. CP 537.

Ms. Field believed the fence was on the Cohns' property but that the fence braces extended onto her property. Id. She did not ask the Cohns to move the fence, but she expected they would have when the dog grew up. Id.

Dave Danubio, a son of the Danubios, testified that his family never lived at the cabin but they would visit "quite often; during the summer, particularly." RP 45:25-46:5. As a child in the early 1960s his family would go out and spend the evening or day on birthdays and holidays. RP 54:6-17. When he would visit as a child, his parents would either park in the driveway or on the street depending on how many guests they had and whether the space was available. RP 46:10-20. He testified that he had only seen one car other than his family's parked in between the homes. RP 48:10-16. As an adult, Mr. Danubio would visit without his parents, but very seldom during the summers. RP 55:23-56:2. He would park either between the homes or on the street depending on which car he drove. RP 46:24-47:4. He remembered Mr. Zuivich was a seiner and would seine out in front and usually park his boat on the boat ramp. RP 56:3-15. The ramp is on the north-east corner of the Cohns' lot, accessed from the area between the Cohn and Tollefson homes. Ex. 16 ("building sketch" page of appraisal showing layout of home and location of boat ramp). Mr. Danubio took notice of the Cohns' dog fence but did not think it was his right to ask them to move it. RP 56:19-24.

Mr. Danubio also helped sell the property to the Tollefsons.

CP 26. When asked if he told the Tollefsons where they should park as owners he explained:

A You know, that was never a question. You know, I knew the property line had to go between the two cabins somewheres, but it was just we had always parked there. The people, when we bought the cabin in - I think it was '61 - previous people had always parked there. And it was just never a question. We parked there. They parked on the other side.

**Q Who do you mean by "they"?**

A The Davidsons. Whoever. The Zuivichs. Or whoever. Cohns. You know, just they parked their cars to the north of the cabin and we parked ours north of our cabin.<sup>11</sup>

RP 51:15-52:2.

Mr. Danubio described the driveway area as "kind of a hole for a big part of the time. . . . Kind of a wallow." RP 53:20-23. He remembered helping spread gravel a couple of times and spraying and cutting down weeds. RP 47:11-25; 53:16-23; CP 26. When asked what else his family used the area between the houses for, Mr. Danubio replied "Hm. I can't think of much else other than parking." RP 47:5-7. He remembered that the Cohns and their predecessors maintained a flowerbed in the driveway area alongside their house. RP 53:25-54:5.

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<sup>11</sup> For clarification, the driveway is to the east of Lot 17 and the Cohns' carport is to the east of Lot 16. Ex. 17. The beach is to the north.

Ms. Palo did not testify at trial because she had had a stroke, RP 30:7-16, but her declaration was admitted at trial. Exhibit 72.

Ms. Palo declared that each family would visit during the summer and "a few times during the rest of each year." Id. Ms. Palo and her husband would "generally" park in the driveway when visiting. Id.<sup>12</sup> She did not know if others used the space when they were gone, but she believed that they did "on occasion" given that parking is "at such a premium." Id. Ms. Palo also declared that she had "no idea where the property line runs . . . I thought that the parking area . . . was on Lot 17, but really do not know whether it was on Lot 17 or partly on Lot 17 and Lot 16." Id.

Lots 16 and 17 are located in the beach community of Maple Grove, where lots are narrow and the parking is limited, particularly on the holidays and certain weekends during summer. CP 26; RP 161:1-9. Due to the scarcity of parking, neighbors often use parking areas owned by other neighbors. CP 27-28. Neighbors of Lot 16 and Lot 17 testified about the community's general sharing of parking and any activities they observed happening in the driveway. Carolyn Cowan testified that she had plenty of parking because she owned two lots and so she allowed a neighbor who needed extra parking to lay down gravel and to park on one

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<sup>12</sup> Dr. Gary Cohn testified that he never met Ms. Palo's husband because he had passed away sometime before the Cohns purchased their home (in 1994). RP 232:13-233:19. Also, Dr. Sue Cohn testified that Ms. Palo's son passed away shortly after the Cohns purchased their home and that she rarely saw Ms. Palo. RP 292:1-16.

of her lots for over 20 years. RP 277:12-278:7. Barry Margolese testified that on busy weekends people park where they can, including on neighbors' property. RP 161:1-19. He witnessed cars parked in the driveway but did not know to whom they belonged. RP 163:15-23. Mr. Margolese never saw any indication of a boundary between Lot 16 and Lot 17 prior to 2005. RP 163:24-164:25.

Marylee Brown owns lots 18 and 89, which are located kitty-corner and to the west of Lot 17. RP 168:16-25; Ex. 16 (plat map attached to appraisal) and Ex. 82 (plat map). She has been visiting these properties around three nights a week during the summer for the past 39 years, but when her children were little she would spend entire summers there. RP 170:11-171:5. She only saw grass and not gravel in the driveway and never saw anyone maintain it. RP 173:6-15. She observed that the Lot 17 families would park "Quite frequently when they were there. . . . Which was mainly summertime." RP 174:2-5. She observed that when Evelyn Danubio came, "she always parked at the very end of the home," meaning along the road and not in the disputed area. RP 174:13-175:2. Because of where Ms. Danubio parked, Ms. Brown's family had to make sure they did not hit Ms. Danubio's car when backing out their boat. Id. Ms. Brown also testified she saw the Cohns' dog fence but that she never saw anything in between the homes that would indicate a boundary line. RP 175:13-23.

Melinda Kelly testified that she would share parking spaces with neighbors. RP 180:21-181:17. Ms. Kelly testified that she witnessed a boat she believed belonged to Mr. Zuivich (the Cohns' predecessor) parked in the disputed area during winter months. RP 182:18-183:24. However, she did not visit often during the winter and so she only saw it a couple times and could not say how long or how often it was stored there. Id. She also parked in between the homes one time. RP 184:12-15. She would have moved if the owners of either Lot 16 or 17 asked her. RP 184:25-185:5, 185:24-186:2. She "assumed it was both parties owned half of it [the property between the homes]." RP 186:3-5.

The Cohns did not park in the driveway when the Danubios were present. The Cohns' primary parking area is on the other (east) side of their home, and the Cohns only needed the disputed driveway for parking occasionally, as a backup parking area for guests. RP 145:11-25 (discussing guest parking); RP 231:16-22 (discussing the Cohns' carport). However, Dr. Gary Cohn testified that the Cohns used the disputed area for other purposes:

**Q Have you ever used that area for anything?**

A Yes.

**Q For what?**

A Well, we use it for access to the west side of our home. We use it to - to tend it. We tend to garden there what we could. We used it for moving a boat up and down in between the two homes in order to get it to the front area.

I maintained it. I think I weed whacked it sometimes. I know I picked up a lot of dog poop there. And we walk around it to - to access the house. From time to time, you know, guests would park there. From time to time other folks in the community would park there.

RP 145:11-25. He also testified that he used the driveway to clean out the fireplace, to clean the gutters and to remove wasp nests:

**Q You've indicated you - you did some maintenance in this area. Could you describe that a little more fully, please?**

A Well, . . . I would go out and cut the grass down. Sometimes the grass would grow pretty tall in that area. . . .

You know, there's a leash law on Camano. And our dogs are always on leashes; other people's are not. And I used to clear that area of, you know, dog poop from time to time. . . .

. . . I would sometimes . . . rake things in there; remove pieces of wood. . . . I would pull weeds in the garden. I would clip the rosebushes. I would go cut pieces of herbs for Sue [Dr. Sue Cohn] when she was cooking.

Sue . . . repainted the cabin and spent extensive time there.

We had some fireplace repair done once upon a time, and . . . there was a . . . large metal device put on top of one of those wind-vane things to prevent downdrafts. And the - the folks . . . who did that work . . . used the spacing between the houses to gain access.

I had to move our-- We owned a couple of different little dinghies. . . .

**Q Let's - let's stick with maintenance, Dr. Cohn.**

A Oh. Oh. Just maintenance. . . . I've had to take care of bees' nests. The wasps, the paper wasps build pretty - pretty nasty nests there. . . .

**Q On the ground or in the house?**

A Well, you have to get to the house via the ground and either with ladders or - or on foot with ladders. Taking care of the gutters. You know, the standard things you do with a piece of property. And, you know, that's why people buy a

house with enough land around it to be able to maintain their homes. . . . Oh, I should add: Cleaning out the fireplace.

RP 233:25-235:18.<sup>13</sup>

Dr. Sue Cohn testified that she used the driveway to place ladders to paint the house and that she would maintain their garden along that side of the house. RP 287:5-288:5. She said that the garden had a rosemary bush until it got snowed under and that it had roses and herbs such as parsley and thyme. Id. She also testified that the boards forming the edge of the garden were a couple inches high and placed vertically, and that they "border between where the gravel would be for the driveway and then where the good dirt, such as good dirt is. . . . So it kind of just does the - forms that edge so I can keep that good dirt in there." RP 288:6-289:7.

Dr. Gary Cohn testified that when they purchased the home he and his wife became acquainted with Ms. Danubio, Ms. Field and Ms. Palo, but not their husbands who had already passed away. RP 232:13-233:19. Dr. Gary Cohn said that they became particularly close with Ms. Field and they also got to know her family, including her daughter, son-in-law who was in the landscape business, and three grandchildren. RP 232:13-233:19. The grandchildren would help the Cohns from time to time. Id.

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<sup>13</sup> Exhibits 48 and 77 show that the fireplace which existed in 2005 (and which has since been removed) extended to the drip line and thus the Cohns and their predecessors had to use the disputed area any time they accessed that side of the house.

He testified that he had to connect the dog fence from the corner of their home to the bulkhead to keep their friendly golden retriever contained. RP 192:20-193:5. The Cohns were concerned their dog might knock over the elderly Ms. Field or any of the other owners or children. Id.

Ms. Tollefson testified that she never saw Dr. Gary Cohn use the driveway for "any purpose" since she has owned Lot 17. RP 113:19-114:10. Mr. Tollefson testified that Dr. Gary Cohn did not use the driveway for access. RP 307:21-308:13. That is not inconsistent with the Cohns' testimony. Dr. Gary Cohn testified that he did not personally maintain or use the disputed area from approximately 2005 to 2008 because they were renting their home for a while and then having it renovated; however, their builders used the disputed area during this time for access. RP 251:5-253:20; 227:3-17.

### **3. Trial Court Decision**

After a two-day bench trial September 9 and 10, 2009, the court issued its Judgment and Findings of Fact and Conclusions of Law on February 11, 2010. CP 17-33. The court held that the Tollefsons used the property as a true owner would by parking in the area, installing the septic system, raising the soil and installing pavers, and held that the Tollefsons' predecessors used the property as a true owner would by parking in and maintaining the driveway. CP 24-32. The court also held that the

Tollefsons' and their predecessors' use of the driveway was "to the exclusion of others." CP 30.

The court recognized that the Cohns weeded the driveway, but found that this was a "neighborly accommodation to the owners of Lot 17." CP 26. The court also found that "another neighbor, not Cohn, park[ed] his boat a couple times in the disputed area during the winter." CP 27. The court also held that parking in the driveway by neighbors of Lot 17 was infrequent and occasional and again "constituted only a neighborly accommodation." CP 30.

The court did not make any findings or conclusions regarding the Cohns' use of the driveway for access to the west and north sides of their home, for moving their dinghy back and forth, for cleaning their gutters and fireplace, for painting their house, and for gardening. CP 24-32. Nor did the court make any express finding that parking by the Tollefsons or their predecessors would or did prevent such activities. Id.

The Cohns filed a motion for reconsideration. CP 12-15. The Cohns argued that (i) awarding fee title to the entire disputed area to the Tollefsons was excessive based on the evidence, and (ii) if the court awarded fee title to the entire area to the Tollefsons, then the judgment should provide rights for the Cohns to continue to use the disputed area for access and maintenance purposes. Id. The trial court's judgment in favor

of the Tollefsons effectively prevents the Cohns from legally accessing the west side of their house and limits access to the north (beach) side because of the configuration of the Cohns' carport and other improvements on the east side of their Lot 16 home. RP 228:23-229:9. The court denied the Cohns' motion for reconsideration. CP 1-2. The Cohns then filed a notice of appeal seeking review of the Judgment, the Findings of Fact and Conclusions of Law, and the Order Denying Defendants' Motion for Reconsideration. CP 611-13.

The Cohns subsequently filed a motion to stay proceedings pursuant to RAP 8.1 and to continue the trial court's preliminary injunction pending appeal. CP 606-10. The Cohns had learned that the septic system installed by the Tollefsons is not designed to be driven on or parked on. Id.; CP 591-605. The court granted the Cohns' motion. CP 540-41.

### **III. Summary of Argument**

Prior to 2005, there was never a dispute between the Cohns and the owners of Lot 17 regarding use of the driveway area, roughly half of which is located on Lot 17 and half of which is located on Lot 16. Like other Maple Grove residents, the Cohns were not particularly concerned with neighbors parking on their property. Also, the Cohns wanted to

accommodate their three elderly neighbors, only one of whom they saw visit regularly.

The Cohns treated the areas between the homes as joint use area, and used the driveway, especially the part located closer to their house, for purposes such as gardening, house maintenance and access, occasional guest parking, and moving their boat to and from the beach. The owners of Lot 17 used the driveway for parking and for moving boats to and from the beach. However, the Lot 17 neighbors' use was not extensive during the time the Cohns owned Lot 16, likely because the owners of Lot 17 used the cabin less frequently as they grew older, husbands passed away, and children grew up and even one passed away. The Cohns and the owners of Lot 17 each weeded the driveway. The Lot 17 owners spread gravel, but only twice over a 40-year period.

The Tollefsons' septic system installation and paving occurred too recently to expand any use rights the Lot 17 owners may have acquired by adverse use over the years. However, the trial court held that the Lot 17 owners' parking, graveling and weeding in the disputed area was, legally, exclusive possession of the area for the prescriptive period, and therefore parking in the driveway by the Tollefsons and their predecessors over a period of more than ten years amounted to adverse possession. This holding was incorrect for at least three reasons.

First, graveling and using an area for a driveway and parking is not, by its nature, an exclusive use, particularly in a neighborhood of second, vacation homes used sporadically where community members routinely share their parking.

Second, the Lot 17 owners' parking (and related graveling and weeding) did not constitute exclusive possession because the Cohns regularly and simultaneously used the driveway for access, maintenance and gardening purposes during the prescriptive period, and their predecessor used the area for boat storage. The trial court did not make any findings regarding most of the Cohns' uses. The trial court either misunderstood that these activities occurred in the disputed area or implicitly held that the Cohns' regular uses were irrelevant and that parking was the only relevant use. However, the Cohns' activities are precisely the types of uses an owner makes of land immediately adjacent to one's home. In fact, prior to the Cohns' removal of their fireplace during their recent remodel, it was impossible for the Cohns or their predecessors to walk around the west side of their home in the area the trial court's order leaves them title to, because the fireplace completely blocked it.

It is important to note that in order to park in the disputed area, the Cohns, their guests and predecessors had to park partially on their lot and

partially on the Tollefsons' lot. It would be odd to hold as a matter of law that the Cohns did not use the disputed area "as an owner would" simply because they did not park a vehicle there, which would require that they trespass on Lot 17. The doctrine of adverse possession is already peculiar in that it rewards a person who trespasses. The trial court's ruling here implicitly takes it a step further and punishes the Cohns for not regularly "counter-trespassing" themselves. Washington law does not require that the Cohns prove they violated their neighbor's property rights simply to protect their own.

Third, a parked vehicle only occupies part of the driveway (and depending how far north it is parked, perhaps is not even parked within the disputed area); thus parking does not amount to possession of the entire driveway. The uncontradicted evidence at trial demonstrated that even when Lot 17 cars were parked there, the Cohns regularly used and accessed the part of the disputed area adjacent to their home. Based on her testimony, Ms. Fields parked mostly, if not entirely, on Lot 16, although she would have crossed a larger portion of Lot 17 to reach her preferred parking location. The parking use by the owners of Lot 17 simply was not an exclusive use of the area; and the Lot 17 owners were not even the exclusive users of the parking. At most, the evidence could

give rise to a prescriptive parking easement in favor of Lot 17, but not fee title to the entire area.

Finally, the trial court erred in not fashioning an equitable remedy that would allow the Cohns to continue to use the driveway as they and their predecessors have for decades.

#### **IV. Argument**

To establish adverse possession, a claimant must show possession of the claimed property that is: (1) actual and uninterrupted, (2) open and notorious, (3) exclusive, (4) hostile, and (5) for ten years. Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The presumption of possession is in the party holding legal title and thus the party claiming adverse possession bears the burden of proving each element. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); see also Miller v. Anderson, 91 Wn. App. 822, 827, 964 P.2d 365 (1998) (explaining that presumption of possession exists because "courts will not permit 'theft' of property by adverse possession unless the owner had notice and an opportunity to assert his or her right").

Adverse possession is a mixed question of law and fact; whether certain facts exist is for the trier of fact, but whether the facts, as found, amount to adverse possession is a question of law for the court to determine. Peeples v. Port of Bellingham, 93 Wn.2d 766, 771, 613 P.2d

1128 (1980), overruled on other grounds by Chaplin v. Sanders, supra; see also Maier v. Giske, 154 Wn.App. 6, 18, 223 P.3d 1265 (2010) ("this court reviews the adverse possession determination de novo, but defers to the factual findings made below"). A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law and vice versa. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Given that the facts at trial relevant to this appeal were largely uncontested, the question is whether the trial court erred in holding that the owners of Lot 17 exclusively and adversely possessed the disputed area for the prescriptive ten-year period through their parking, graveling and weeding.

**A. The Relevant Time Period Is Prior to the Tollefsons' Purchase of Lot 17 in 2005**

For purposes of this appeal, the Tollefsons' septic system installation and paving activities in the disputed area after 2005 are largely irrelevant as they only occurred for three years. A claimant must establish that the elements of adverse possession existed concurrently for 10 years. Chaplin, 100 Wn.2d at 857. In an earlier ruling on summary judgment, the trial court noted that the Tollefsons' expanded activities in the disputed area have occurred only since 2005 and thus "cannot be the basis of the claim for adverse possession." 11/5/08 RP 3:23-4:7. Thus, the main question here is whether parking, graveling and weeding in the driveway

by the Tollefsons' predecessors extending back to at least 1998 is legally sufficient to establish exclusive and adverse possession.

**B. Use of a Driveway for Access and Parking Is a Use and Not Possession and at Most Establishes a Prescriptive Easement**

Prescription and adverse possession are related doctrines.

However, "prescription involves the *use* of another's land and gives easement rights, whereas adverse possession involves the *possession* of another's land and gives title." 17 Stoebuck & Weaver, Wash. Prac. Real Estate: Property Law § 2.7, at 99 (2d ed. 2004); see also Restatement (Third) of Prop. (Servitudes) § 2.17 cmt. a (2000) (same, but noting that the exclusivity requirement is relaxed for prescription); Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999) (same, but noting that the continuity requirement is relaxed for prescription).

The test for adverse use is whether the use is the kind of use one would make of an easement, such as "walking, driving, utility lines, or otherwise." 17 Stoebuck & Weaver, supra, § 2.7, at 100. Often it is easy to distinguish whether the activity is "only a use, such as passing over land, or possession, marked by occupation, fencing or permanent improvements." Stoebuck & Whitman, The Law of Property § 8.7 at 452 (3d ed. 2000). For example, the construction and maintenance of a

building on another's land is quintessentially adverse possession. Shelton v. Strickland, 106 Wn. App. 45, 51, 21 P.3d 1179 (2001).<sup>14</sup>

A critical difference is that a right to possess includes "the right to exclude all other persons from all parts of the land, for any reason or for no reason," whereas a holder of an easement only has "the right to exclude others from actual interference" with the use of the easement. 17 Stoebuck & Weaver, supra, § 2.7, at 106. An easement holder may not prevent the owner of the servient tenement from using the area so long as such uses are compatible with the easement holder's use rights. Id. It follows that a claimant can establish a prescriptive easement right even if the owner of the servient estate and others also used the property, "so long as the claimant exercises and claims his right independent of others." Drake v. Smersh, 122 Wn. App. 147, 151-152, 89 P.3d 726 (2004). Even in instances where a claimant's use is exclusive, the easement obtained can be an "exclusive easement" rather than fee title. Hoffman v. Skewis, 35 Wn. App. 673, 676, 668 P.2d 1311 (1983) (holding easement established by statutory condemnation was not exclusive but could become exclusive by prescription).

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<sup>14</sup> Other times it can be more difficult to distinguish between use and possession, particularly when a use is substantial or exclusive in nature such as with a railroad right-of-way. 17 Stoebuck & Weaver, supra, § 2.1, at 81.

The essential question here is whether the Lot 17 owners' driving over and parking on a graveled area between vacation homes, and partially on their neighbor's land, over a period of 40 years as a matter of law "excluded" the owners of Lot 16 and all others from the disputed area all the way up to the drip-line, for any reason or for no reason. That conclusion is simply contrary to the evidence and common sense. The parking area was not fenced. The Cohns and their predecessor used it. The Lot 17 owners' driveway use, therefore at most gave rise to a continued right to park without interference. The evidence showed that both parties used the area between the homes without asking each other's permission. Although the Lot 17 owners used the area far more for parking than the Lot 16 owners did (which seems natural as the area was the "back side" of the Cohns' home and the "entry side" of the Tollefsons'), the Cohns and their predecessors also used the disputed area "continuously" for other uses, without asking permission of the Tollefsons. Driveway use, even for 40 years, does not give rise to full ownership rights such that the Tollefsons can install a septic system or exclude the Cohns from the driveway. At most (and for purposes of this appeal, the Cohns do not contest that), the driveway use gives rise to a continued right to use the area as a driveway without interference by the Lot 16 owners.

**1. There Is a Difference Between Use of the Disputed Area As a Septic System and as a Parking Area**

Under Washington law, an access easement acquired by prescription does not include a right to install utilities. See, e.g., Lee v. Lozier, 88 Wn. App. 176, 187, 945 P.2d 214 (1997) ("The easement acquired [by prescription] extends only to the uses necessary to accomplish the purpose for which the easement was claimed"); 17 Stoebuck & Weaver, Wash. Prac. Real Estate: Property Law § 2.9, at 111 (2d. ed. 2004) ("an easement that began as an easement for utility lines could never become a roadway easement"). The trial court erred in holding that "[t]here is no difference between the use of the disputed area as a septic system and as a parking area." CP 31. There is no evidence to support that conclusion. Moreover, the septic system currently installed within the disputed area is, in fact, not designed to be driven over or parked on, so the current system is incompatible with use of the area as a driveway or for parking. CP 591-605 at 592 ¶ 7.

**2. The Trial Court Failed to Recognize the Distinction Between an Easement by Prescription and Title by Adverse Possession**

The trial court held that "[p]arking is not merely a use, especially in a beach area such as Maple Grove where parking is at a premium. Parking is an essential part of owning a residence so that a person can easily access their residence." CP 30. Regardless of how valuable

parking may be, the trial court's holding fails to recognize the difference between use and possession. The fact that parking is "at a premium" does not change what is typically a periodic surface use that was not incompatible with other uses of the same area by the true, record owner into exclusive possession by the parkers.

Typically, use and maintenance of a driveway only gives rise to a prescriptive easement. See Wash. State Bar Ass'n, Real Property Deskbook § 64.3(1) (3d ed. 1997) ("Adverse use of property, such as a driveway, may give the user a prescriptive right, but it is not adverse physical possession sufficient to establish this element [actual possession]"); see also Nw. Cities Gas Co. v. W. Fuel Co., 13 Wn.2d 75, 123 P.2d 771 (1942) (adverse use of roadway established prescriptive easement); Drake, supra (bulldozing extension for driveway along with maintenance and use of driveway established prescriptive easement); 810 Prop. v. Jump, 141 Wn. App. 688, 702, 170 P.3d 1209 (2007) (holding that claimant's use of a road could not be characterized as a "neighborly accommodation" and thus claimant established adverse use element for a prescriptive easement); Miller v. Jarman, 2 Wn. App. 994, 471 P.2d 704 (1970) (use of neighbor's driveway for over 40 years did not give rise to a prescriptive easement because the use was permissive).

Washington's rule is consistent with cases from other states analyzing similar disputes. In Tenala, Ltd. v. Fowler, the Supreme Court of Alaska held that substantial shared driveway use of a strip of land by an adverse claimant and the true owners amounted to prescriptive use and not adverse possession of the property in dispute. 921 P.2d 1114 (Alaska 1996). In Tenala, the estate of Sally Mayo brought an action to quiet title to lands bordering to the west, south and east of her lot. On the west of her lot, Ms. Mayo and her family used a strip of land more than 15 feet wide to park cars, chop wood, store garbage cans, and as a driveway for access to their coal shed and the rear of their house; the true owners occasionally used the area for access to a garage. Id. at 1117. The Tenala court stated that the "level of use" determines whether a claimant acquires title via adverse possession or merely a prescriptive easement, and quoted Professor Cunningham for the following proposition:

maintaining . . . a paved driveway is usually treated as a prescriptive use, but its permanent, continuous, and substantial nature might lead a court to consider it possessory. . . . *It seems the test should flow from the principle that possession implies not only the possessor's use but his exclusion of others, while use involves only limited activities that do not imply or require that others be excluded.*

Id. at 1119 (quoting Roger A. Cunningham, et al., The Law of Property § 8.7, at 451-52 (2d ed. 1993)).<sup>15</sup> The court noted that the record title owner also used the disputed area occasionally for access to a garage and that the Mayos never placed any permanent improvements on the disputed area and never fenced or posted the area as their own. Id. The court concluded that such use by the Mayos was insufficient to give notice to the true owners that the Mayos were claiming a possessory interest in the driveway strip and could only establish a prescriptive easement. Id.

Similarly, the use by the Tollefsons' predecessors was not sufficiently exclusive of the Cohns to give rise to a possessory, fee interest in the land occupied rather than a use right.<sup>16</sup> Ms. Field and Mr. Danubio testified that they never placed any permanent structures in the area, never fenced the area, and never posted signs. RP 36:17-37:1; RP 53:2-12. Ms. Field did not tell the Cohns to move the dog fence even though it was in the disputed area. Neighbors testified that they never witnessed anything in the area delineating a boundary line. RP 163:24-164:25; RP 175:13-23. One long-time neighbor testified that she "assumed it was both parties

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<sup>15</sup> The third edition of The Law of Property goes on to state "in distinguishing adverse use from adverse possession, we are not ultimately concerned with the substantiality of physical objects but with whether the claimant's uses and purposes are inconsistent with other persons' shared uses." Stoebuck & Whitman, The Law of Property § 8.7, at 453 (3d ed. 2000).

<sup>16</sup> The Cohns' shared use of the area is discussed in greater depth in the section regarding exclusivity.

owned half of [the property between the homes]." RP 186:3-5. Also, the Cohns conducted their uses without asking permission from anyone. RP 289:8-13.

Therefore, similar to Tenala, use by the Tollefsons' predecessors was insufficient to give rise to exclusive *possession* of the areas between the homes. The parking was an adverse use to the true owner, but did not exclude the true owner from simultaneous use for a variety of purposes. There is no evidence to support that parking by the Lot 17 owners excluded the Cohns from simultaneously using the disputed area as they needed to for their enjoyment of Lot 16.

Sutherlin School District No. 130 v. Herrera, 851 P.2d 1171 (Or. Ct. App. 1993), is another example of driveway use giving rise to an easement by prescription, but not title by adverse possession. In that case, homeowners used a portion of a road located on an adjacent school district's property as a driveway to the house for nearly 40 years. Id. at 1173-74. The homeowners also constructed an addition to their house and a gravel walkway on a portion of the road, but not for the statutory period. Id. at 1173. The homeowners did not contend at trial or on appeal that their use established a prescriptive easement. Id. at 1174 n.5.

The trial court ruled that the homeowners had acquired title to the portion of the road used as a driveway by adverse possession. Id. at 1173.

The Oregon Court of Appeals reversed, stating that the trial court failed to recognize the distinction between an easement by prescription and title by adverse possession. Id. The court then held that "although defendants' predecessors' *use* of the road as a driveway may have established a prescriptive easement over the road, that is not the type of possession or occupation that is associated with a claim of ownership by adverse possession." Id. at 1174 (footnote omitted).

It is possible for an adverse user's truly exclusive use of a driveway area to give rise to adverse possession. For example, in Harris v. Urell, 133 Wn. App. 130, 135 P.3d 530 (2006), the Harris family paid taxes on the property, cleared the land, laid down a gravel driveway and used it daily, and did not allow anyone except family and invited guests onto the property. Id. at 139-40. The true owners did not engage in *any* activity on the disputed property during the statutory period. Id. at 138-39. Later, the record-title owners used the driveway, but only after repeatedly asking for and receiving the express permission of Ms. Harris. Id. at 142. When the Urells purchased the property, they placed a barricade to prevent Ms. Harris – an 84-year-old woman recovering from cancer – from using the driveway, forcing her to walk 70 feet downhill to reach her home. Id. at 135. Based on these facts, the court held that Harris' activities satisfied the elements of adverse possession.

The facts in this case are distinguishable from Harris, and fall squarely in the line of cases where adverse driveway use creates a prescriptive easement right only.<sup>17</sup> Neither the Tollefsons nor their predecessors (i) paid taxes on the disputed area, (ii) cleared or leveled the land (until after 2005), (iii) exclusively maintained the disputed area, or (iv) exclusively used the disputed area on a daily basis, nor did the Cohns ask permission to use the disputed area for their own purposes. In sum, the Lot 17 owners' use of the driveway over the prescriptive period for access and parking does not amount to exclusive possession of land. The driveway was not paved until recently (within the prescriptive period). According to Mr. Danubio, the driveway was "kind of a hole for a big part of the time. . . . Kind of a wallow." RP 53:20-23. Moreover, use of the driveway by the Tollefsons' predecessors for parking did not interfere with the Cohns' use of the disputed area for home access, house maintenance and gardening. The fact that parking is "at a premium" in Maple Grove does not convert what is a *use* of land into *possession*. The trial court erred in holding that the Tollefsons acquired fee title to the disputed area by beach cabin driveway and parking use for the prescriptive period.

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<sup>17</sup> Interestingly, the Urells appeared pro se and apparently did not argue that Ms. Harris's possession only amounted to an easement by prescription only rather than adverse possession; thus the court did not analyze that question. Id. at 136, 138.

**C. The Trial Court Erred in Holding That Use of the Disputed Area by the Tollefsons' Predecessors Was Exclusive When the Cohns Regularly Used the Area**

A claimant's shared use of property with third persons generally does not rise to the level of exclusive possession. ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 759, 774 P.2d 6 (1989). Moreover, any sharing of possession by the claimant with the true owner is "particularly sensitive," such that any significant or regular use by the true owner will prevent a finding of exclusive adverse possession. 17 Stoebuck & Weaver, Wash. Prac. Real Estate: Property Law § 8.19, at 541 (2d. ed. 2004); see also Scott v. Slater, 42 Wn.2d 366, 369, 255 P.2d 377 (1953), overruled on other grounds by Chaplin v. Sanders, supra (holding that possession was not exclusive when true owners entered disputed area to maintain and harvest pear tree branches hanging over the area).

A claimant's possession need not be "absolutely" exclusive. Lilly v. Lynch, 88 Wn. App. 306, 313, 945 P.2d 727 (1997). "[O]ccasional, transitory use by the true owner usually 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.'" Id. (quoting 17 Stoebuck, Wash. Prac. Real Estate: Property Law § 8.19, at 516 (1995)). But, courts usually find a lack of exclusivity when uses by the title owner are indicative of ownership. Id.

**1. Use of the Disputed Area by Ms. Field, Ms. Palo and Ms. Danubio Was Limited, Vacation Home Use; There Were Many Opportunities for Use by the Cohns and Others over the Seasons and Years**

Use of the disputed area by the owners of Lot 17 was limited both in time and by type of use, as they themselves testified. Ms. Field testified that she would typically park at the north end of the driveway where the disputed area is narrower, (RP 24:1-15), and thus only minimally (if at all) in the disputed area (Ex. 17). Witness testimony also showed that since the Cohns purchased Lot 16 in 1994, (i) Ms. Danubio would visit infrequently and when she did she visit she would always park along the street and not in the disputed area,<sup>18</sup> and (ii) Ms. Palo visited infrequently (RP 292:1-16). In essence, the evidence from the 1994 to 2005 period (a 10 year period sufficient for the Cohns themselves to establish prescriptive rights) demonstrated parking by Ms. Field on a small northerly portion of the disputed area for a month during the summer, infrequent parking by

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<sup>18</sup> Dr. Sue Cohn said she observed Ms. Danubio visit the cabin only around half a dozen times before Ms. Danubio passed on. RP 292:21-293:22. Dr. Sue Cohn observed that Ms. Danubio would always park along the street near the door to Lot 17 and not in the disputed area. RP 292:1-7. Ms. Brown, a long-time neighbor, also testified Ms. Danubio would always park on the street. RP 174:11-175:2. The testimony of Dave Danubio that his parents parked in between the lots when he was a child is not contradictory, as such activity occurred during the 1960s. RP 46:10-20; RP 54:6-15. Similarly, the trial court's finding that "the Danubios would park in the disputed area exclusively" when they visited, CP 26, does not contradict the fact that when Ms. Danubio (singular) would visit by herself she would always park along the street. The testimony showed that Ms. Danubio's husband passed away sometime before 1994, and thus the Danubios (plural) have not parked in the disputed area since at least that time. In essence, as is often the case with vacation properties, the frequency and intensity of use may vary over the years as the owners' family and other circumstances change. Application of that principle harmonizes the testimony of the parties the trial court mistakenly took as conflicting.

other owners or their family members and no other significant uses. The Lot 17 owners' limited use during that period did not interfere with the Cohns' use of the disputed area for the uses they chose to make of the area.

**2. The Cohns' Uncontested Testimony Shows That They Regularly Used the Disputed Area in Ways a Typical Homeowner Would**

The trial court found that the Cohns have not used the disputed area as their own. CP 26 (Finding of Fact 8). This purported finding is, in fact, a legal conclusion as it requires determining what a reasonable owner would do. It is not supported by substantial evidence<sup>19</sup> and is error as a legal conclusion. Similarly, the trial court's finding of fact (which mirrors its conclusion of law) that the Tollefsons' predecessors "parked" in the driveway "exclusively"<sup>20</sup> should not be interpreted as "finding" that the Cohns did not engage in any of the activities discussed below, but rather as a conclusion of law based on the trial court's view that the Cohns' uses were permitted by the Lot 17 owners as a "neighborly accommodation." To the extent the trial court's holdings are findings of fact, they are not supported by substantial evidence and should be overturned.

The fact that the Cohns only occasionally used the disputed area "for parking" does not mean the Cohns did not use the disputed area as an

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<sup>19</sup> A trial court's findings of fact must be supported by "substantial evidence," which is "sufficient to persuade a fair-minded, rational person of the declared premise." Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

<sup>20</sup> See, e.g., Finding of Fact 13 (CP 27) and Conclusion of Law 24 (CP 30).

owner of their Lot 16 home would, configured as it is - with a relatively generous parking area on the opposite side of their home by their entry doors. The Cohns testified that they used the disputed area for:

- access to the west side of their home;
- tending to their herb and flower garden;
- moving a dinghy up and down in between the two homes in order to get it to the beach;
- guest parking;
- cleaning out the fireplace on the west side of their home;
- fireplace repair;
- installing a dog fence;
- painting that side of the house;
- cleaning the gutters; and
- removing bees and wasps nests.

RP 145:11-25; RP 233:25-235:18. The Cohns also (i) cut the grass, (ii) raked wood and other debris, and (iii) picked up manure from other neighbors' dogs. Id. The Cohns' predecessor, Mr. Zuivich, used the area for boat parking during the winter.

The Cohns' testimony regarding their use of the driveway area for access, maintenance and gardening is logical considering the layout of the properties and was essentially uncontested.<sup>21</sup> Given the layout of their home (and particularly before they removed their fireplace), it is obvious

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<sup>21</sup> Ms. Tollefson testified that since she purchased the property she never saw Dr. Gary Cohn use the driveway for "any purpose." RP 113:19-114:10. Mr. Tollefson testified that Dr. Gary Cohn did not use the driveway for access. RP 307:21-308:13. However, Dr. Gary Cohn acknowledged that they did not personally maintain or use the disputed area from approximately 2005 to 2008 because they had renters and then were having their home renovated; however, the Cohns' builders used the disputed area during this time for remodeling access. RP 251:5-253:20 and 227:3-17.

that the Cohns and their predecessors must have used the disputed area periodically over the years, first to build and thereafter to maintain the west side of their home, where their garden and fireplace clean out were located, and which led to their boat ramp. It would not have been possible to build or maintain the house otherwise (e.g., from within 18 inches of the foundation, with the fireplace extending out about that far from the foundation) given the trial court's ruling that the area adversely possessed extends to the home's drip line. See Ex. 17. The Cohns' survey and testimony show that there is only a very narrow walkway on the other (east) side of the Cohns' house and they cannot use that path to move their dinghy back and forth to the beach, or similar activities. RP 228:23-230:21; Ex. 17. Mr. Danubio acknowledged that the Cohns and their predecessors maintained the garden strip and flowerbed immediately next to the Cohns' house. RP 53:25-54:5. The only area to the west of the Cohn home not in the disputed area is the area under the Cohns' drip line, approximately 18 inches wide, and occupied in part by the fireplace throughout the relevant prescriptive period. RP 71:25-72:4. The Cohns explained that to clean the gutters or paint the house they put ladders in the disputed area. RP 235:8-14 and 287:9-13. Photographs of the area as it existed in 2005, Exs. 6, 9, 10, show that to garden under the drip line, to clean the fireplace, to paint the house, to clean the gutters, and to access or

move a boat, a person would be physically located in or using the disputed area and would not be under the drip line.

The testimony did not show exactly when or how often most of these activities occurred, but it is reasonable to infer that some of the activities, such as access and gardening, were relatively frequent whereas others, such as painting and cleaning gutters, were periodic (like the Lot 17 owners' spreading of gravel). The important question is whether the quantum of the Cohns' use was regular or significant when taking into consideration that the property was used as a vacation house and located in a summer vacation home neighborhood. Courts consider the collective activities rather than each independent act in assessing adverse possession claims and defenses. 16 Richard R. Powell, Powell on Real Property § 91.01(2), at 91-8 (Michael Allan Wolf ed., 2000).

In Howard v. Kunto, the court held that summertime occupancy of a summer beach home was sufficient to satisfy the continuity element of adverse possession because a claimant only needs to act as a typical owner caring for property of like nature and condition. 3 Wn. App. 393, 397, 477 P.2d 210 (1970), overruled on other grounds by Chaplin v. Sanders, supra. Here, because the properties are used primarily during summertime as beach homes, neither the Lot 17 nor Lot 16 uses need be year-round to be deemed "continuous." In order to show shared use of the disputed area

by the Cohns as record owners sufficient to defeat the exclusivity claim of the Tollefsons, the Cohns only need to show regular or significant use of the area taking into consideration that it is a beach house, the same test as is applied to the Tollefsons' adverse use claims.

The activities listed above collectively show that the Cohns and their Lot 16 predecessors made use of the disputed area as a typical owner makes use of a small back or side yard adjacent to one's vacation house.<sup>22</sup> As Dr. Gary Cohn testified, "people buy a house with enough land around it to be able to maintain their homes," RP 235:13-14, and that is precisely how they used the disputed area, RP 233:25-235:18.

**3. The Disputed Area Is Only a Portion of the Driveway; the Cohns Need Not Trespass on Their Neighbors' Land to Use the Disputed Area as an Owner**

The only activities of the Cohns that the trial court addressed were parking and weeding. The Cohns admit that they did not use the disputed area *for parking* as much as the owners of Lot 17, because the Cohns have parking on the other side of their home nearer its entrances.

The trial court's analysis failed to recognize the difference between the use of disputed area (which is only the triangular portion of the driveway immediately adjacent to the Cohns' house) and the entire

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<sup>22</sup> The Cohns testified that they might like to use the area for slightly different purposes such as wood storage, propane tank storage, placement of a hot tub, or a dog run once their house is renovated and they retire. RP 156:4-13; 208:4-12; 290:5-21.

driveway (which includes a portion of the Tollefsons' lot, the ownership of which is not at issue in this lawsuit). When the Cohns (or their guests) did use the driveway for parking, they parked partially on Lot 16 (in the disputed area) and partially on Lot 17 (which is not part of the disputed area, and owned by the Tollefsons of record). In other words, in order to park in the disputed area the Cohns also would have been trespassing on Lot 17 unless they had permission to park there.

As stated in Howard, supra, the Cohns' use should be assessed based on the specific characteristics of their property, Lot 16. How would a typical owner use an area between two vacation homes partially graveled so as to be usable for a driveway and parking, *only about half of which is located on their lot*, when they have additional, more convenient parking on the other side of their house. A typical owner does not regularly park in a less convenient location. A typical owner does not trespass for no reason on his or her neighbor's property. Thus, the fact that the Cohns did not regularly use the graveled driveway area between Lots 16 and 17 for their own parking does not mean they did not use the area like a true owner of their home, as it is configured.

**4. The Cohns' Maintenance of the Disputed Area Was Not a "Neighborly Courtesy"**

The trial court held that both the Cohns' weeding of the driveway and any use of the area by other neighbors of Lot 17 for parking was

nothing more than a "neighborly accommodation" by the owners of Lot 17. CP 26, 30.<sup>23</sup> The term "neighborly accommodation" means the "type of use permitted by the community as a neighborly courtesy" rather than shared occupancy. Lilly v. Lynch, 88 Wn. App. 306, 314, 945 P.2d 727 (1997) (quoting Crites v. Koch, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987)).

The Cohns agree that parking is the type of use typically permitted in the neighborhood as a neighborly courtesy (which is another reason why parking by Ms. Field, Ms. Palo and Ms. Danubio did not cause the Cohns concern). However, there was no testimony that residents weed-whack their neighbors' driveways or pick up dog manure as a "neighborly courtesy," and the trial court's conclusions on that point are in error.

In sum, sharing of possession with the true owner is not "exclusive possession." In assessing exclusivity, the trial court erred in failing to distinguish between use of the entire driveway for parking and the myriad uses the Cohns and their predecessors made of the disputed area owned by the Cohns, consistent with the layout of the Cohns' own home. The

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<sup>23</sup> The "finding" that the Cohns' use was a "neighborly accommodation" in paragraph 6 is the same as the trial court's conclusion of law in paragraph 23 and should be treated as a conclusion of law because the phrase "neighborly accommodation" is essentially the opposite of "hostile." See, e.g., 810 Prop. v. Jump, 141 Wn. App. 688, 702, 170 P.3d 1209 (2007) (holding that claimant's use of road could not be characterized as a "neighborly accommodation" and thus claimant established adverse use element for prescriptive easement).

evidence is uncontroverted that the Cohns made regular, significant use of the *disputed area* – their half of the driveway area – even if their use of the *entire driveway* was infrequent, and even if their uses typically were not parking related.

The Cohns used the disputed area before 2005 (before the Tollefsons' installed the septic system and pavers) for (i) access around their house, (ii) various house maintenance purposes, (iii) boat launching, and (iv) gardening. It was also uncontested that they weed-whacked and cleaned-up the disputed area before 2005, including cleaning up the messes of neighborhood dogs. From approximately 2005 to 2008, the area was used by the Cohns' contractors for extensive renovation of their home. RP 252:8-253:20. These are precisely the types of uses an owner of a vacation house would make of a small back or side yard. Collectively, these activities show regular and/or significant use by the Cohns, which defeats exclusivity.

**D. The Trial Court Erred in Holding That the Entire Area Was Adversely Possessed by the Tollefsons**

Even if the trial court was correct in holding that the Tollefsons acquired title by adverse possession, the court erred in the amount of land awarded. Trial Exhibit 98 shows that a single car parked in the area still leaves significant room in front, in back, and around the sides of the vehicle for the Cohns' concurrent regular uses described above.

Therefore, the Tollefsons' predecessors did not use, much less "exclusively possess," the driveway *all the way up to the drip-line*.

Paragraph 2.4 of the Tollefsons' Complaint describes the "point of origin" for the disputed area as alleged as the point where the Cohns' fence meets the bulkhead, and Exhibit 2 of the Complaint outlines the alleged disputed area and shows that it is significantly to the west (perhaps by two feet) of the Cohns' drip line. CP 532-538. Exhibit D of the Judgment is not included in the Clerk's Papers, but a copy of Exhibit D is included in the Appendix. Exhibits A-D of the Judgment show that the "EDGE CONC" line, which is the edge of the new pavers and roughly parallel with the Cohns' drip line, is the edge of the disputed area as awarded. Exhibits A-D also show the disputed area as awarded extends past the bulkhead even though the Complaint alleges only that the bulkhead is the "point of origin."

The trial court erred in defining the disputed area as up to the drip line and past the bulkhead when the evidence showed that the Tollefsons' predecessors used only a portion of the disputed area, the Cohns regularly used the area adjacent to their house for access, to tend their garden, and to maintain their house, and the Tollefsons' own Complaint depicts the disputed area as west of the drip line and starting at the bulkhead.

**E. The Trial Court Erred in Not Fashioning an Equitable Remedy That Would Provide the Cohns Access to Maintain Their House**

Quiet title actions lie in equity and thus courts are free to fashion appropriate remedies. Haueter v. Rancich, 39 Wn. App. 328, 331, 693 P.2d 168 (1984). An equitable remedy is one which "strives to do perfect justice." Crafts v. Pitts, 161 Wn.2d 16, 23, 162 P.3d 382 (2007). Courts "must grant equity in a meaningful manner, not blindly." Arnold v. Melani, 75 Wn.2d 143, 152, 449 P.2d 800 (1968). Equity cannot be used as "a weapon of oppression rather than in defense of a right." Id. at 153.

In Brown v. Voss, 105 Wn.2d 366, 715 P.2d 514 (1986), the court upheld a trial court decision that holders of a private road easement could traverse the servient estate to reach not only the original dominant estate, but also a subsequently acquired parcel. Even though this use was a misuse of the easement, the servient estate owners were not entitled to an injunction to stop it. Id. at 372-73. The trial court considered that extension of the easement created no additional burden on the servient estate and that an injunction would impose a severe hardship on the holders of the easement. The trial court also considered that the holders of the easement acted reasonably in the development of their property. Id.

Prior to renovation of their home, the Cohns had a fireplace which extended to the drip line and thus the Cohns had to use the graveled

driveway area to access that side of the house. Exs. 48 and 77. The trial court's order ignores the Cohns' historic use and renders the Cohns' continuation of such use to be trespasses. If the trial court's finding of adverse possession is otherwise upheld, the decree should, at a minimum, be modified to authorize the Cohns to continue to use the disputed area in the same manner as they and their predecessors always have.

The Tollefsons filed suit to prevent removal of the pavers and septic system, RP 109:5-14; CP 506 ¶ 9, and not out of concern of any of the Cohns' historic uses. Neither the Tollefsons nor their predecessors ever complained about the Cohns' use of the disputed area for access, maintenance, gardening, etc. Continued use by the Cohns in similar fashion, and in a manner that does not interfere with the Tollefsons' parking, poses no additional hardship on the Tollefsons. In contrast, the judgment imposes a severe hardship on the Cohns as it prevents them from legally accessing the west side of their home and severely limits access to the north side. RP 228:23-229:9. The Cohns will no longer be able to maintain the west side of their house, use their garden or move their dinghy to and from the beach without the Tollefsons' permission unless they trespass. Also, the Cohns and their predecessors acted reasonably in developing and using their property. Equity favors providing the Cohns continued access to and use of the disputed area.

The owners of Lot 16 and Lot 17 have made shared uses of the disputed area for over 40 years without contention or any clear boundary line. Regardless of the Court's determination of the ultimate fee owner of the disputed area, the legal titles should conform to the facts that the Cohns and their predecessors have always used the area for access, maintenance and gardening purposes. At a minimum, the judgment should be revised to include an easement in the disputed area in favor of Lot 16 that would authorize the Cohns to continue to use the disputed area for these purposes, in a manner that does not unreasonably interfere with the Tollefsons' use of the driveway. Such an equitable modification of the judgment would relieve the Cohns of the hardship created by the Judgment and impose no new burden on the Tollefsons.

#### **V. Conclusion**

The Tollefsons did not meet their burden of proof and the trial court erred in holding that the Tollefsons acquired fee title to any part of the disputed area, much less the entire disputed area up to the Cohns' drip line, via adverse possession. The Cohns respectfully request that this Court reverse the trial court's holding that the Tollefsons exclusively and adversely possessed the disputed area, vacate the trial court's judgment and remand this matter to the trial court for further proceedings.

In the alternative, at a minimum, if this Court upholds the trial

court's adverse possession ruling, the Cohns respectfully request that this Court use its equitable authority to modify the trial court's judgment and quiet title in the Cohns to an easement in favor of the Cohns to use the disputed area for home maintenance and access around the home and to the beach, in a manner that does not unreasonably interfere with the Tollefsons' use of the disputed area for parking. The Cohns and their predecessors have used the disputed area for access and maintenance purposes ever since the Cohn home was built, and such uses have never interfered with the Tollefsons' or their predecessors' uses of the driveway for parking. Conforming the judgment to authorize and recognize the neighbors' rights to both continue these uses long maintained in the disputed area is an appropriate use of this Court's equitable powers.

DATED: August 16, 2010

**PERKINS COIE LLP**

By: 

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Facsimile: 425.635.2400

Attorneys for Appellants  
Gary and Sue Cohn

# APPENDIX

1

**FILED**

**FEB 11 2010**

**PATRICIA TERRY  
ISLAND COUNTY CLERK**

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND**

TOLLEFSON FAMILY TRUST, by ITS  
CO-TRUSTEES, MARC AND NANCY  
TOLLEFSON,  
  
Plaintiff,  
v.  
  
GARY AND SUE COHN, husband and  
wife, and the marital community  
composed thereof,  
  
Defendants.

**NO. 08-2-00335-8**

**JUDGMENT AND DECREE  
QUIETING TITLE IN FAVOR OF  
PLAINTIFF THE TOLLEFSON  
FAMILY TRUST**

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THIS MATTER having come before the Court for trial and based upon the  
evidence established at trial, the Court having rendered the Findings and Facts and  
Conclusions of Law filed herewith, now, based upon those Findings of Fact and  
Conclusions of Law it is hereby

ORDERED, ADJUDGED and DECREED that title shall be quieted in favor of  
the Plaintiff, the TOLLEFSON FAMILY TRUST to the triangular piece of property  
immediately to the east of Lot 17 of Maple Grove Beach, Number 3, according to the pat  
thereof recorded in Volume 3 of Plats, page 37, records of Island County, State of  
Washington, as described in Exhibit A attached hereto and incorporated as if fully set  
forth herein, and specifically identified in the survey attached hereto as Exhibit D and

1 incorporated as if fully set forth herein. Said survey will be recorded  
2 contemporaneously with entry of this judgment; and further

3 ORDERED, ADJUDGED and DECREED that said Plaintiff is now the owner in  
4 fee simple of said property and has a perfect title against Defendants GARY and SUE  
5 COHN, their heirs, legatees and assigns and to all others; and further

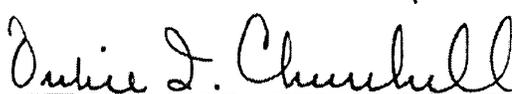
7 ORDERED, ADJUDGED and DECREED that the legal description of Lot 17 of  
8 Maple Grove Beach, Number 3, according to the plat thereof recorded in Volume 3 of  
9 Plats, page 37, records of Island County, State of Washington shall hereafter be revised  
10 to describe Lot 17 as set forth in Exhibit B attached hereto and incorporated as if fully  
11 set forth herein; and further

13 ORDERED, ADJUDGED and DECREED that the legal description of Lot 17 of  
14 Maple Grove Beach, Number 3, according to the plat thereof recorded in Volume 3 of  
15 Plats, page 37, records of Island County, State of Washington shall hereafter be revised  
16 to describe Lot 16 as set forth in Exhibit C attached hereto and incorporated as if fully  
17 set forth herein; and further

19 ORDERED, ADJUDGED and DECREED that neither party is awarded any of  
20 the fees nor costs incurred in this action; and further

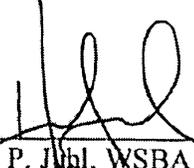
22 ORDERED, ADJUDGED and DECREED that both parties' sureties are hereby  
23 exonerated and released from any further obligation herein.

25 DATED this 10 day of February, 2010.

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28 HON. VICKIE I. CHURCHILL

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Presented by:  
BAROKAS MARTIN & TOMLINSON

By   
Hans P. Juhl, WSBA #33116  
Attorneys for Plaintiff, the Tollefson Family Trust

Approved; Copy Received;  
Notice of Presentation Waived  
CRAIG L. MILLER, P.S.

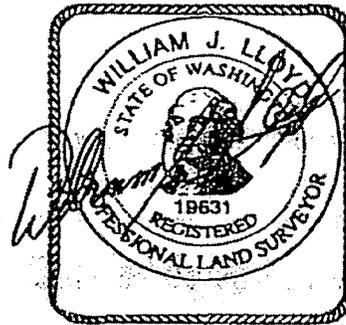
By: \_\_\_\_\_  
Craig L. Miller, WSBA #  
Attorneys for Defendants Gary & Sue Cohn

**EXHIBIT A**  
**CONVEYANCE, LOT 16 TO 17**

All that portion of Lot 16, Maple Grove Beach Number 3, according to the plat thereof recorded in Volume 3 of Plats, page 37, Records of Island County, State of Washington, described as follows:

**BEGINNING** at the Southwest corner of said Lot 16 of said plat as depicted on that particular survey recorded under Auditor's File Number 4232795, Records of Island County; thence N 84° 28' 00" E along the South line of said Lot 16 a distance of 7.23 feet; thence N 4° 04' 34" W a distance of 32.78 feet; thence N 2° 12' 26" W a distance of 7.43 feet; thence N 4° 21' 42" W a distance of 33.10 feet; thence S 80° 42' 00" W a distance of 0.76 feet to the Northwest corner of said Lot 16; thence S 1° 00' 00" W along said West line a distance of 73.91 feet to the **TRUE POINT OF BEGINNING**.

Situate in the County of Island, State of Washington.



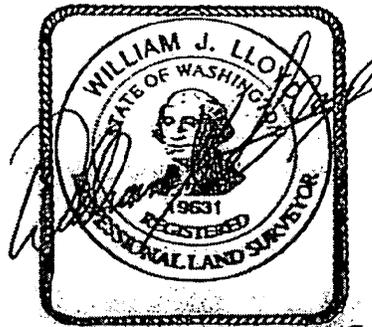
11-20-09

**EXHIBIT B**  
**REVISED LOT 17 DESCRIPTION**

Lot 17, Maple Grove Beach Number 3, according to the plat thereof recorded in Volume 3 of Plats, page 37, Records of Island County, State of Washington. Together with that portion of Lot 16 of said plat lying West of the following described line:

**COMMENCING** at the Southwest corner of said Lot 16; thence N 84° 28' 00" E along the South line lot as depicted on that particular survey recorded under Auditor's File Number 4232795, Records of Island County, a distance of 7.23 feet to the **TRUE POINT OF BEGINNING**; thence N 4° 03' 34" W a distance of 32.78 feet; thence N 2° 12' 26" W a distance of 7.43 feet; thence N 4° 21' 42" W a distance of 33.30 feet to a point on the North line of said Lot 16 and the terminus of herein described line.

Situate in the County of Island, State of Washington.



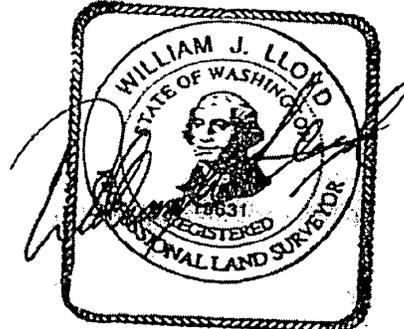
11-20-09

**EXHIBIT C**  
**REVISED LOT 16 DESCRIPTION**

All that portion of Lot 16, Maple Grove Beach Number 3, according to the plat thereof recorded in Volume 3 of Plats, page 37, Records of Island County, lying East of the following described line:

**COMMENCING** at the Southwest corner of said Lot 16; thence N 84° 28' 00" E along the South line lot as depicted on that particular survey recorded under Auditor's File Number 4232795, Records of Island County, a distance of 7.23 feet to the **TRUE POINT OF BEGINNING**; thence N 4° 03' 34" W a distance of 32.78 feet; thence N 2° 12' 26" W a distance of 7.43 feet; thence N 4° 21' 42" W a distance of 33.30 feet to a point on the North line of said Lot 16 and the terminus of herein described line.

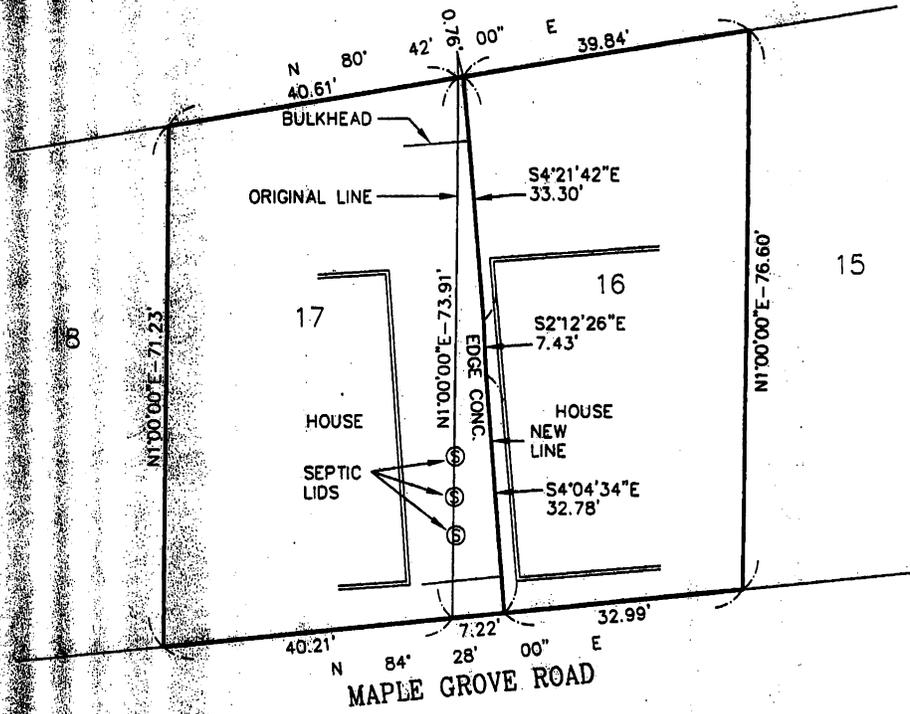
Situate in the County of Island, State of Washington.



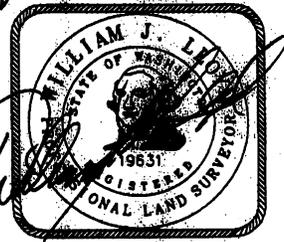
11-20-09

1. copy to Patricia  
2/26/10  
copy given to Patricia Terry 3/10/10

# EXHIBIT D



11-20-09



1/8 inch = 20 ft.

JOB NO.: 18786      DATE: 11/18/2009      DWN. BY: LAF  
 FOR: IN GOVT LOT      SEC. 23, TWP. 32N, RGE. 2E, W.M.

SKETCH FOR:

**MARC TOLLEFSON**

**CASCADE SURVEYING AND ENGINEERING, Inc.**  
 P.O. BOX 326  
 ARLINGTON, WA  
 (360) 435-5551

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**FILED**

**FEB 11 2010**

**PATRICIA TERRY  
ISLAND COUNTY CLERK**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND COUNTY**

**TOLLEFSON FAMILY TRUST, BY  
ITS CO-TRUSTEES, MARC AND  
NANCY TOLLEFSON,**

**Plaintiff,**

**v.**

**GARY AND SUE COHN, husband and  
wife, and the marital community  
composed thereof,**

**Defendants.**

**NO. 08-200335-8**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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DV

THIS MATTER having come on for trial on the 21<sup>st</sup> day of September, 2009, the Plaintiff, Tollefson Family Trust, by its Co-Trustees Marc and Nancy Tollefson, appearing with counsel, Hans P. Juhl of Barokas Martin & Tomlinson, and the Defendants Gary and Sue Cohn, appearing with counsel Craig L. Miller and Vickie Brewer of Craig L. Miller, P.S. and the Court having reviewed the record, heard the argument of the parties, and being fully advised in the premises makes the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. The Tollefson Family Trust, represented by Marc and Nancy Tollefson, co-trustees (the "Tollefsons") brought this action for quiet title and ejectment against Dr.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

BAROKAS MARTIN & TOMLINSON  
ATTORNEYS AT LAW  
1422 BELLEVUE AVENUE  
SEATTLE, WASHINGTON 98122  
TELEPHONE (206) 621-1871  
FAX (206) 621-9907

24

1 Gary Cohn and Dr. Mary Sue Cohn (the "Cohns") for a triangular portion of the Cohns'  
2 property consisting of approximately 272 square feet in a beach area on Camano Island  
3 known as Maple Grove (the "disputed area"). The disputed area is more fully described  
4 in Exhibit A to these Findings of Fact and Conclusions of Law.  
5

6 2. The parties share a common boundary line between their properties, the  
7 property commonly known as 750 Maple Grove Road, Camano Island ("Lot 17") owned  
8 by the Tollefsons, and the property commonly known as 748 Maple Grove Road,  
9 Camano Island ("Lot 16") owned by the Cohns. The Cohns purchased Lot 16 in 1994.  
10 The Tollefsons purchased Lot 17 in 2005. Neither party had a survey done when they  
11 purchased Lot 16 and Lot 17.  
12

13 3. Lot 17 was purchased in 1961 by three (3) families: the Fields, the  
14 Danubios and the Espidals. The Espidals sold their interest to the Palos in 1966. The  
15 three (3) families used the property as a beach cabin and shared time with each other  
16 during the summers. On February 14, 2005, the three (3) families sold their interests in  
17 Lot 17 to the Tollefsons. The three (3) families used the disputed area for parking when  
18 they visited their beach cabin.  
19

20 4. Ann Fields, one of the original owners of Lot 17 since 1961, and her  
21 family parked on the disputed area from 1961 until the property was sold in 2005 to the  
22 Tollefsons. Fields testified that if a neighbor parked in the disputed area, the neighbor  
23 would come out immediately upon the Fields' arrival and move his or her car so the area  
24 was available for the use of the owners of Lot 17. The neighbors, in effect,  
25 acknowledged that the Fields possessed the parking area next to the Fields' cabin and that  
26 the Fields had the right to deny or permit use by the neighbors.  
27  
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FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2

BAROKAS MARTIN & TOMLINSON  
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1           5.       The Fields also used the property as a true owner would. The Fields used  
2 the property to haul their boat out of the water. They maintained the area by weeding,  
3 spaying and putting gravel down to make it more suitable for parking and a driveway  
4 area. Additionally, they placed a wooden border at the request of the Cohns at a point  
5 which the believed represented the property line between Lot 16 and Lot 17.  
6

7           6.       Dave Danubio, a son of one of the original owners of Lot 17, was on the  
8 property frequently as a child and later as a young adult. He parked in the disputed area,  
9 spread gravel over the area, sprayed and cut down weeds. The Cohns occasionally  
10 weeded the area as a neighborly accommodation to the owners of Lot 17.  
11

12          7.       When the Danubios visited the beach cabin and the Cohns or their  
13 predecessors in interest were present, the Danubios would park in the disputed area  
14 exclusively. The Cohns or their predecessors in interest would park in their own  
15 driveway to the east of the cabin on Lot 16 or on the street parking pad in front of the  
16 cabin on Lot 16.  
17

18          8.       The lots in Maple Grove are narrow and the streets are crowded, even  
19 more so on holidays when people are more likely to want to be at the beach. Due to the  
20 crowded nature of the neighborhood and scarcity of parking. The owners of Lot 17 have  
21 always used the disputed area as their own since 1961 to the present. The Cohns have  
22 not.  
23

24          9.       When the Tollefsons purchased Lot 17, the structure consisted of a small  
25 beach cabin with a cesspool under the front porch for a septic system. The Tollefsons  
26 were advised by the sellers, represented by Mr. Danubio, that their property included the  
27 disputed area to the east of the cabin on Lot 17 to the Cohns' residence on Lot 16.  
28

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

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1           10. Neighbors would often use parking areas owned by other neighbors.  
2 Neighbors would ask permission to park on another neighbor's spot and were prepared to  
3 move if the true owner needed the parking space.  
4

5           11. Neighbors of Melinda Kelly would ask to borrow the parking spot that she  
6 owned. On one occasion, she parked in the disputed area between the Tollefsons' house  
7 and the Cohns' house. She was willing to move at a moment's notice if the Tollefsons  
8 came. She saw another neighbor, not Cohn, park his boat a couple of times in the  
9 disputed area during the winter.  
10

11           12. After the Tollefsons purchased the property, they obtained a permit on  
12 April 1, 2005 for installation of a septic system on the area they considered to be their  
13 driveway. The septic system installation was completed on or about November 11, 2005.  
14 From April 2005 to November 2005, the Tollefsons engaged in a series of emails  
15 concerning the elevation and drainage between the two houses, the integrity of the  
16 bulkhead if the Tollefsons removed their concrete patio abutting the bulkhead, the sound  
17 absorption if the Tollefsons paved the driveway area with concrete, and access to the  
18 driveway when the Cohns started renovations on their residence. The Cohns never  
19 questioned whether the system would encroach on their property.  
20  
21

22           13. The Cohns had notice throughout their ownership of Lot 16, from 1994 to  
23 the present, that the owners of Lot 17 were exclusively using the disputed area for  
24 parking. The Cohns also had notice that the Tollefsons were using the disputed area to  
25 put in a septic system, the location of the septic system, the elevation and drainage  
26 between the two houses, and the installation of pavers on the disputed area. The Cohns  
27 made no objections as to where the septic system was placed. The Cohns' concerns  
28

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4

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1 centered on mitigating any adverse effect the septic system would have on the integrity of  
2 the bulkhead and the stability of the soil and drainage between the two (2) houses.

3 14. In an email that Dr. Gary Cohn sent to Marc Tollefson on November 6,  
4 2005, Cohn refers to the disputed area as "your [Tollefsons'] driveway." On November  
5 11, 2005, the Cohns' architect emailed the Cohns that the Tollefsons' septic system  
6 appeared to be completely installed with the exception of some wiring. The email  
7 advised the Cohns that the closest septic tank was 3'8" from the Cohns' house. The  
8 architect also included some photographs of the Tollefsons' septic system.  
9

10 15. The Cohns' architect pointed out to the Cohns how close the septic system  
11 was to the Cohns' residence. The Cohns were aware that the Tollefsons installed a  
12 retaining wall up to the point that both parties believed to be the Cohns' property and that  
13 the Tollefsons installed pavers over the septic system and up to the retaining wall. Cohns  
14 had notice of the adverse use that the Tollefsons made of the disputed area during the  
15 time from 2005 to 2008.  
16

17 16. From the time the Cohns purchased their property in 1994, the Cohns were  
18 aware that the owners of Lot 17 used the designated area for parking. The owners of Lot  
19 17 never asked the Cohns' permission to use the disputed area. The Cohns used the area  
20 by their front door on the east side of Lot 16 and on the street side of their residence for  
21 their own parking. When the Cohns placed a fence up for their dog, they followed the  
22 line established by the wooden border put up by the Fields that represented what they  
23 believed was each other's property line.  
24

25 17. Sometime in late 2007 or early 2008, the Tollefsons applied for a  
26 mortgage. As a condition of the loan application, the Tollefsons had a survey (which was  
27

1 recorded on December 29, 2008) done in April 2008 for Lot 17, which revealed that the  
2 triangular piece of property between Lot 16 and Lot 17 was part of Lot 16. The Cohns  
3 had a survey (which was recorded on May 23, 2008) with the same result as the  
4 Tollefsons' survey. The Tollefsons attempted to unsuccessfully to settle the matters with  
5 the Cohns, and then filed this complaint for adverse possession.  
6

7 14.

## 8 II. CONCLUSIONS OF LAW

9  
10 18. In order to establish a claim of adverse possession, there must be evidence  
11 that the claimant's possession was (1) hostile, (2) exclusive, (3) open and notorious, (4)  
12 actual and uninterrupted, and (5 ) for a period of 10 years. Possession is established if it  
13 is of such a character as a true owner would exhibit considering the nature and location of  
14 the land in question.  
15

16 19. From the time the Tollefsons purchased the property in 2005 until 2008, a  
17 period of three years, the Tollefsons treated the disputed area to the east of the residence  
18 to the west side of the Cohns' residence between Lot 16 and Lot 17 as their own against  
19 the true owner and the world. The Tollefsons continuously and exclusively parked in the  
20 area, installed a septic system in the area, elevated the property 10 inches, and installed  
21 pavers and a concrete retaining curb within the area.  
22

23 20. Prior to the Tollefson's acquisition of Lot 17, the Tollefsons' predecessors  
24 in interest from whom the Tollefsons acquired Lot 17 also treated the disputed property  
25 as their own against the true owner and the world. A predecessor's adverse use may be  
26 tacked on to the claimant's use, if privity exists between them, and if together they have  
27 held the land continuously and adversely to the title holder for the requisite ten year  
28

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6

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1 period. Privity is established when the disputed property is transferred by deed or  
2 physically turned over, as was the case here.

3 21. The Tollefsons' use and their predecessors' use of the disputed area was  
4 the same as an owner of the same type of property would make and constitutes actual  
5 possession sufficient to meet the "hostility" element necessary to establish the  
6 Tollefsons' adverse possession of the disputed area.  
7

8 22. Parking is not merely a use, especially in a beach area such as Maple  
9 Grove where parking is at a premium. Parking is an essential part of owning a residence  
10 so that a person can easily access their residence.  
11

12 23. Infrequent and occasional use by the Tollefsons' and their predecessors'  
13 neighbors of the disputed area for parking, with the permission of the owners of Lot 17,  
14 was neither frequent nor ongoing such that it could defeat the Tollefsons' claim of  
15 exclusive use of the disputed area. Any such use by the neighbors of Lot 17 constituted  
16 only a neighborly accommodation.  
17

18 24. The Tollefsons' and their predecessors' consistent, frequent and ongoing  
19 use of the disputed area to the exclusion of others is sufficient to meet the "exclusivity"  
20 element necessary to establish the Tollefsons' adverse possession of the disputed area.  
21

22 25. The open and notorious element of adverse possession requires proof that  
23 (1) the true owner has actual notice of the adverse use throughout the statutory period, *or*  
24 (2) the claimant (and/or predecessors) used the land in a way that any reasonable person  
25 would assume that person to be the owner.  
26

27 26. All of these uses of the disputed area by the Tollefsons and their  
28 predecessors in interest provided actual notice to the Cohns that the Tollefsons and their

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7

1 predecessors had been and were continuing to use the property in a way that any  
2 reasonable person would assume that person to be the owner.

3 27. There is no difference between the use of the disputed area as a septic  
4 system and as a parking area. The Tollefsons maximized their use of the disputed area in  
5 a way that any reasonable property owner would do.

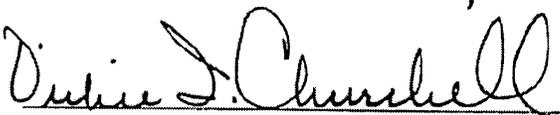
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7 28. The Tollefsons have met their burden of proof for the open and notorious  
8 element. The Cohns had actual notice of the adverse possession throughout the statutory  
9 period, and the Tollefsons and their predecessors used the land in a way that any  
10 reasonable person would assume that the disputed area belong to the owners of Lot 17,  
11 *i.e.*, the Tollefsons. There is sufficient evidence to support the determination that the  
12 possession was sufficiently "open and notorious" to establish the Tollefsons' adverse  
13 possession of the disputed area.

14  
15  
16 29. There is sufficient evidence to support the determination that the  
17 Tollefsons and their predecessors' possession of the disputed area was actual and  
18 uninterrupted for ten (10) years. Even though the Tollefsons can only claim  
19 approximately three (3) years of adverse use, their predecessors in interest also used the  
20 disputed area as their own since 1961. As such, the successive periods of occupation  
21 may be tacked to each other to compute the required 10 year period of adverse holding.

22  
23 30. The Tollefsons are entitled to quiet title and to ejection of the Cohns  
24 from the disputed area.

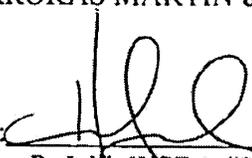
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DATED this 11 day of <sup>Feb. 2010</sup> ~~December 2009~~.

  
HON. VICKIE I. CHURCHILL

Presented By:  
BAROKAS MARTIN & TOMLINSON

Approved as to form:  
CRAIG L. MILLER, P.S.

By:   
Hans P. Juhl, WSBA #33116  
Attorneys for Plaintiff  
Tollefson Family Trust

By: \_\_\_\_\_  
Craig L. Miller, WSBA # \_\_\_\_\_  
Attorneys for Defendants Gary & Sue Cohn

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 9

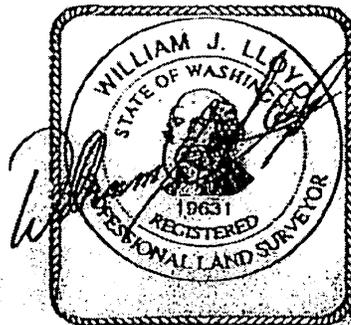
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**EXHIBIT A  
CONVEYANCE, LOT 16 TO 17**

All that portion of Lot 16, Maple Grove Beach Number 3, according to the plat thereof recorded in Volume 3 of Plats, page 37, Records of Island County, State of Washington, described as follows:

**BEGINNING** at the Southwest corner of said Lot 16 of said plat as depicted on that particular survey recorded under Auditor's File Number 4232795, Records of Island County; thence N 84° 28' 00" E along the South line of said Lot 16 a distance of 7.23 feet; thence N 4° 04' 34" W a distance of 32.78 feet; thence N 2° 12' 26" W a distance of 7.43 feet; thence N 4° 21' 42" W a distance of 33.10 feet; thence S 80° 42' 00" W a distance of 0.76 feet to the Northwest corner of said Lot 16; thence S 1° 00' 00" W along said West line a distance of 73.91 feet to the **TRUE POINT OF BEGINNING**.

Situate in the County of Island, State of Washington.



11-20-09

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**FILED**

**MAR 05 2010**

**PATRICIA TERRY  
ISLAND COUNTY CLERK**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND COUNTY**

TOLLEFSON FAMILY TRUST, BY  
ITS CO-TRUSTEES, MARC AND  
NANCY TOLLEFSON,

Plaintiff,

v.

GARY AND SUE COHN, husband and  
wife, and the marital community  
composed thereof,

Defendants.

NO. 08-200335-8

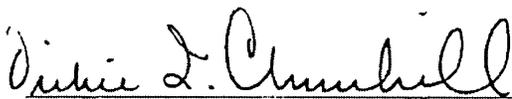
**ORDER DENYING  
DEFENDANTS' MOTION FOR  
RECONSIDERATION**

100  
VE

THIS MATTER having come before the Court, on the Defendants' Motion FOR  
Reconsideration, and the court having reviewed the files and records herein, the  
Defendants' moving papers, the Plaintiff's responsive papers, having heard argument and  
being fully advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that Defendant's Motion for  
Reconsideration is DENIED.

DATED this 5 day of March 2010.

  
HON. VICKIE CHURHILL

ORDER DENYING DEFENDANTS' MOTION FOR  
RECONSIDERATION - 1

ORIGINAL  
1

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Presented By:  
BAROKAS MARTIN & TOMLINSON

  
By: \_\_\_\_\_  
Hans P. Juhl, WSBA #33116  
Attorneys for Plaintiff  
Tollefson Family Trust

Approved as to form;  
Copy received; Notice of presentation waived:

CRAIG L. MILLER, P.S.

By: \_\_\_\_\_  
Craig L. Miller, WSBA #5281  
Attorney for Defendants  
Gary and Sue Cohn

ORDER DENYING DEFENDANTS' MOTION FOR  
RECONSIDERATION - 2

2

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**FILED**

**MAY 06 2008**

**SHARON FRANZEN  
ISLAND COUNTY CLERK**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF ISLAND COUNTY**

Tollefson Family Trust  
by its co-trustees, Marc and Nancy  
Tollefson

Plaintiff,

v.

Gary and Sue Cohn, husband and wife,  
and the marital community composed  
thereof,

Defendants.

NO. **08 2 00335 8**

**COMPLAINT FOR QUIET TITLE  
AND EJECTMENT**

**I. PARTIES, JURISDICTION & VENUE**

1.1 Plaintiffs are a family trust, administered by its co-trustees Marc and Nancy Tollefson, a marital community.

1.2 Defendants are a marital community.

1.3 The real property, which is the subject of this lawsuit, is located in the City of Camano Island, Island County, State of Washington.

1.4 This is an action by Plaintiff to:

1.4.1 Determine that Plaintiff has a acquired a portion of Defendant's real property by adverse possession and to quiet title to that portion of Defendant's real

1 property in Plaintiff and to eject Defendant from any use or occupancy of that portion of  
2 Defendant's real property.

3 1.5 All real estate, which is the subject of this action, exists in Island County,  
4 State of Washington.

5 1.6 Plaintiff's claims arise under Washington state statutes and common law.

6 1.7 This Court has jurisdiction over this matter because the real estate exists in  
7 Island County, Washington.

8 1.8 Venue in the Island County Superior Court is proper because the subject  
9 matter of the action, real estate, exists in Island County.

10 **II. FACTS**

11 2.1 Plaintiff owns property in the City of Camano Island whose street address  
12 is 750 Maple Grove Road, Camano Island, WA 98282 and whose legal description is as  
13 follows:

14 Lot 17, Plat of Maple Grove Beach #3, according to the  
15 plat thereof, recorded in Volume 3 of Plats, page 37,  
16 records of Island County, Washington. Situated in Island  
17 County, Washington. Parcel #S7470-30-00017-0.

18 2.2 Defendant occupies property located in the City of Camano Island whose  
19 street address is 748 Maple Grove Road, Camano Island, WA 98282 and whose legal  
20 description is as follows:

21 Lot 16, Plat of Maple Grove Beach #3, according to the  
22 plat thereof, recorded in Volume 3 of Plats, page 37,  
23 records of Island County, Washington. Situated in Island  
24 County, Washington. Parcel #S7470-30-00016-0.

25 2.3 Plaintiff, and Plaintiff's predecessors in interest, have owned and occupied  
26 the property for over forty years to date of this Complaint.

27 2.4 Prior to 1998 to, and including, May 2008, Plaintiffs and their  
28 predecessors in interest have used a portion of Defendant's land described above. The

1 Plaintiffs have used a portion of the Defendant land, which is a piece of land extending  
2 from where the Defendant's fence meets the bulkhead ("Point of Origin") out at an angle  
3 that bisects the Maple Grove Road at a point approximately eight feet south and west of  
4 the Point of Origin. The land described in this Paragraph 2.4 is also represented by  
5 "Exhibit 1" and "Exhibit 2" attached to this Complaint.

6 **III. ACTION FOR ADVERSE POSSESSION**

7 3.1 Paragraphs 1.1 through 2.4 of this Complaint, inclusive, are hereby  
8 realleged and reincorporated as if set forth fully herein.

9 3.2 Possession of the area in questions described above in Paragraph 2.4 has  
10 been by acquiescence of Defendant and Defendant's predecessor in interest with Plaintiff  
11 that the portion of land described in Paragraph 2.4 marks the true legal boundary between  
12 the properties and such acquiescence has therefore established the common property line  
13 as being the portion of land described in Paragraph 2.4 when inconsistent with the  
14 property line.

15 8.1 Plaintiff has openly, notoriously, and hostilely and exclusively (as defined  
16 under Washington law) possessed, used and occupied the area described in Paragraph 2.4  
17 in such a manner as to place the true owner of the property upon notice that Plaintiff  
18 claimed ownership of same. That use and occupancy has included parking and storing  
19 vehicles and equipment, installing a septic tank, installing paving stones, and using a  
20 patio on said land and all other legal activities on an exclusive and open and obvious  
21 basis without interruption by Defendants or Defendants' predecessors in interest.

22 **IX. PRAYER FOR RELIEF**

23 WHEREFORE, based upon the foregoing allegations, Plaintiffs pray for the  
24 following relief:

25 1. For Judgment and Decree quieting title in Plaintiff, their heirs, successors,  
26 and assigns to that portion of the Defendant's real property described above in Paragraph  
27 2.4 of this complaint.  
28

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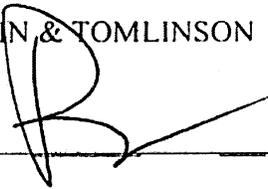
2. For Judgment and Decree ejecting Defendant and any persons claiming by, through, or under them from any use or occupancy of the real property whose title is quieted in Plaintiff pursuant to the preceding paragraph.

3. For recovery of Plaintiffs' statutory costs herein; and

4. For such other and further relief as the Court may deem proper under the circumstances.

DATED this 5 day of May 2008.

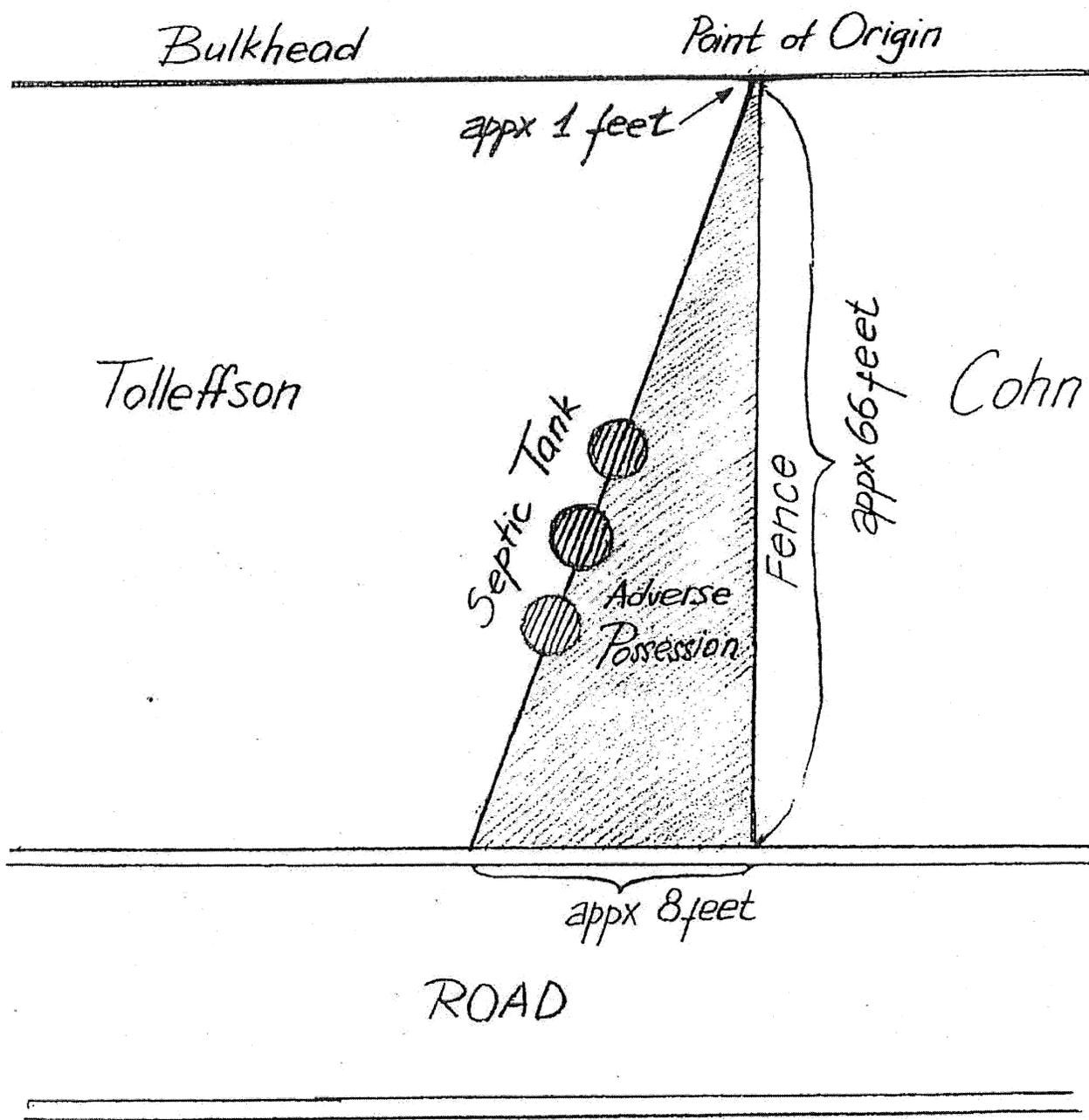
BAROKAS MARTIN & TOMLINSON

By:  

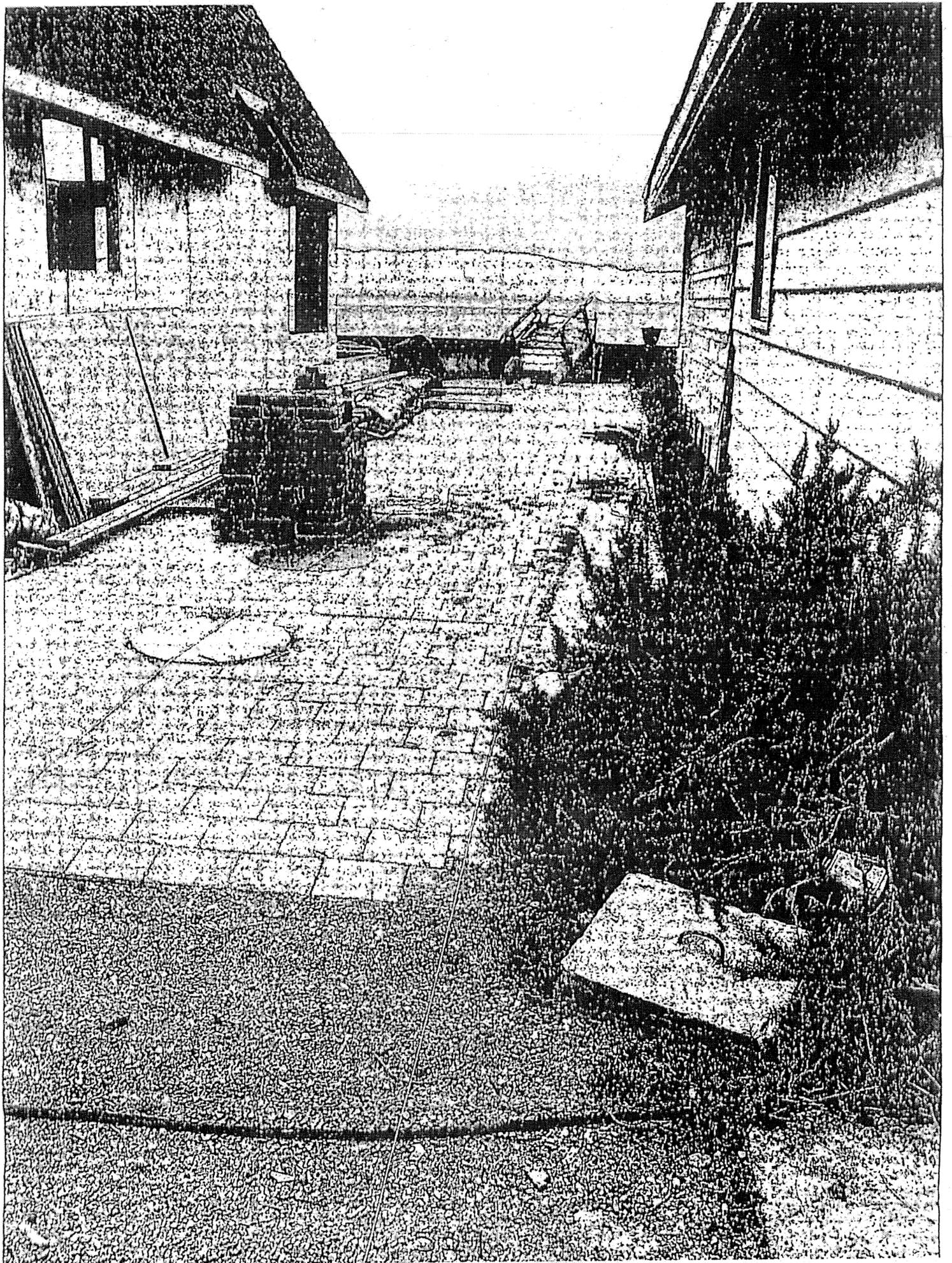
Aric Bomszyk WSBA No. 38040  
Attorney for Plaintiff

# EXHIBIT 1

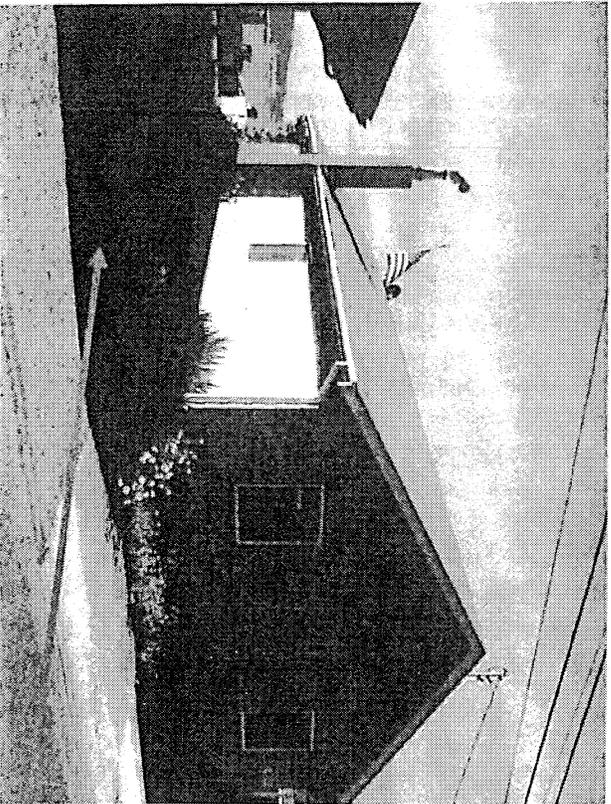
This diagram is not drawn to scale and is for illustrative + representative purposes only



# EXHIBIT 2



# Maple Grove House Photos



- View from the road in front of Wild garage (facing northeast) three years ago
- Cohn house on the right
- Tollefson house on the left (prior to demolition)
- Note raw character of mutually used space between houses (dirt, weeds, gravel) and flower beds tended by Cohns on west side of house (requiring access on west portion of Cohn property)

Photo Date: July 14, 2005

CAUSE NO: 08-2-00335-8  
PLF / DEF'S EXHIBIT # 43  
Admitted  
MARKED FOR IDENTIFICATION  
MK WELLER, DEPU., CI RPY  
Reflected

# Maple Grove House Photos

- View from the bulkhead (facing southeast)
- Cohn house on the left
- Tollefson house on the right (prior to demolition)
- Jake's containment fence shows marks (red arrow) from unauthorized removal of bracing and cement color difference from sand bag removal (arrows).

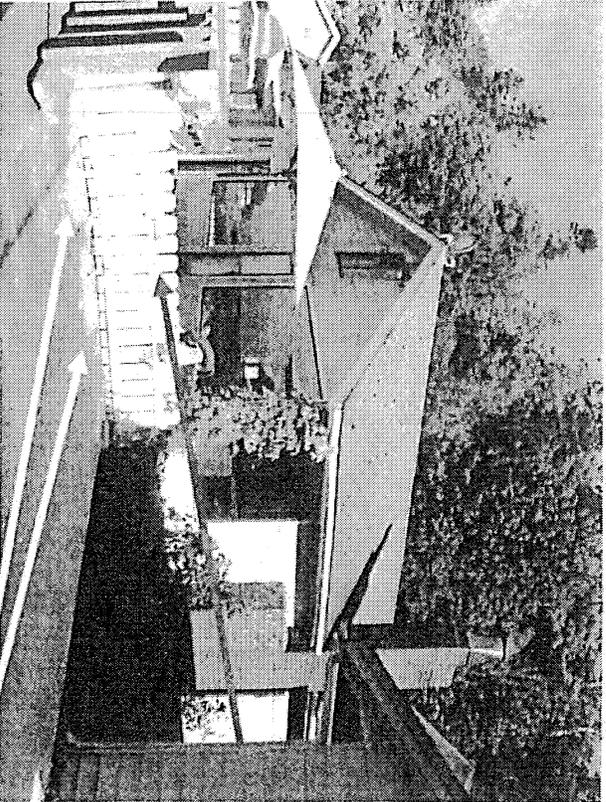
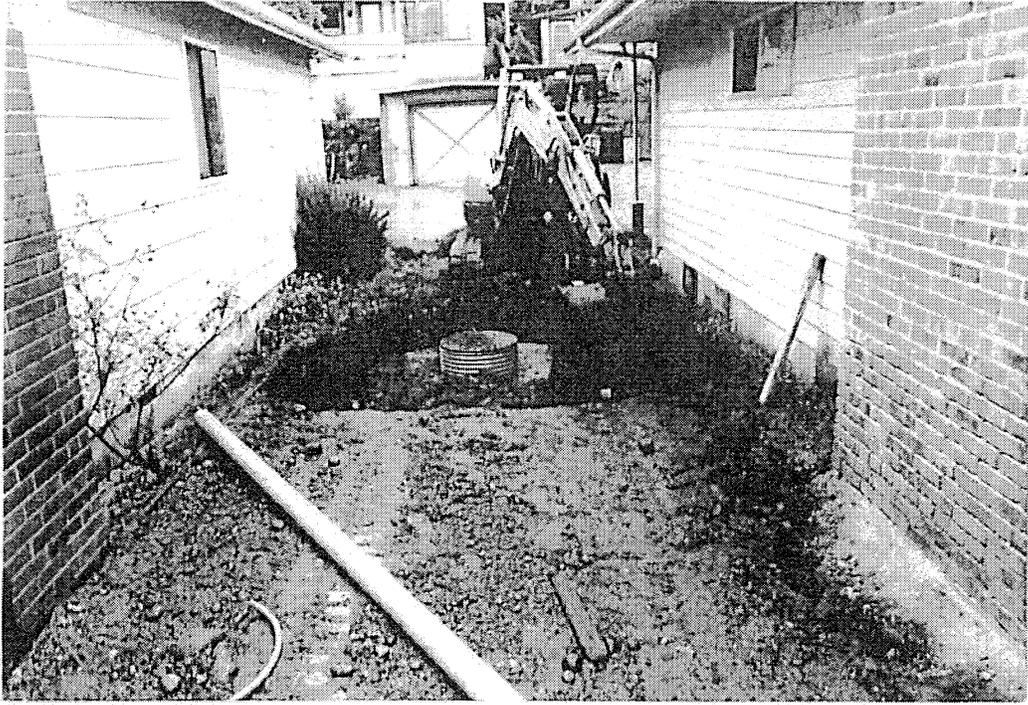


Photo Date: July 14, 2005

CAUSE NO. 08-2-00335-8  
PLF / DEF'S EXHIBIT # 77  
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Admitted Rejected  
MR. WELLS, DEPUTY CLERK

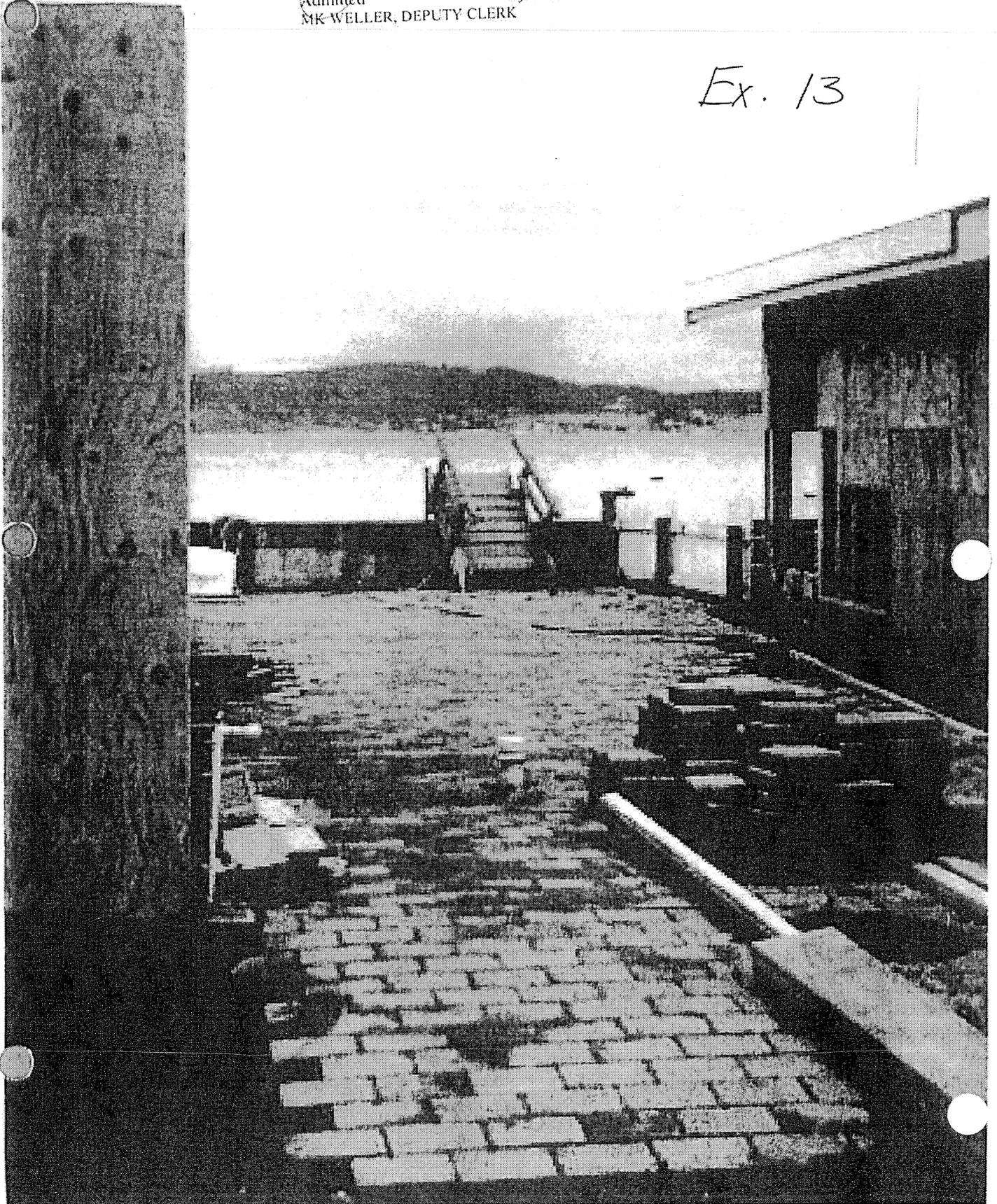
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MK WELLER, DEPUTY CLERK

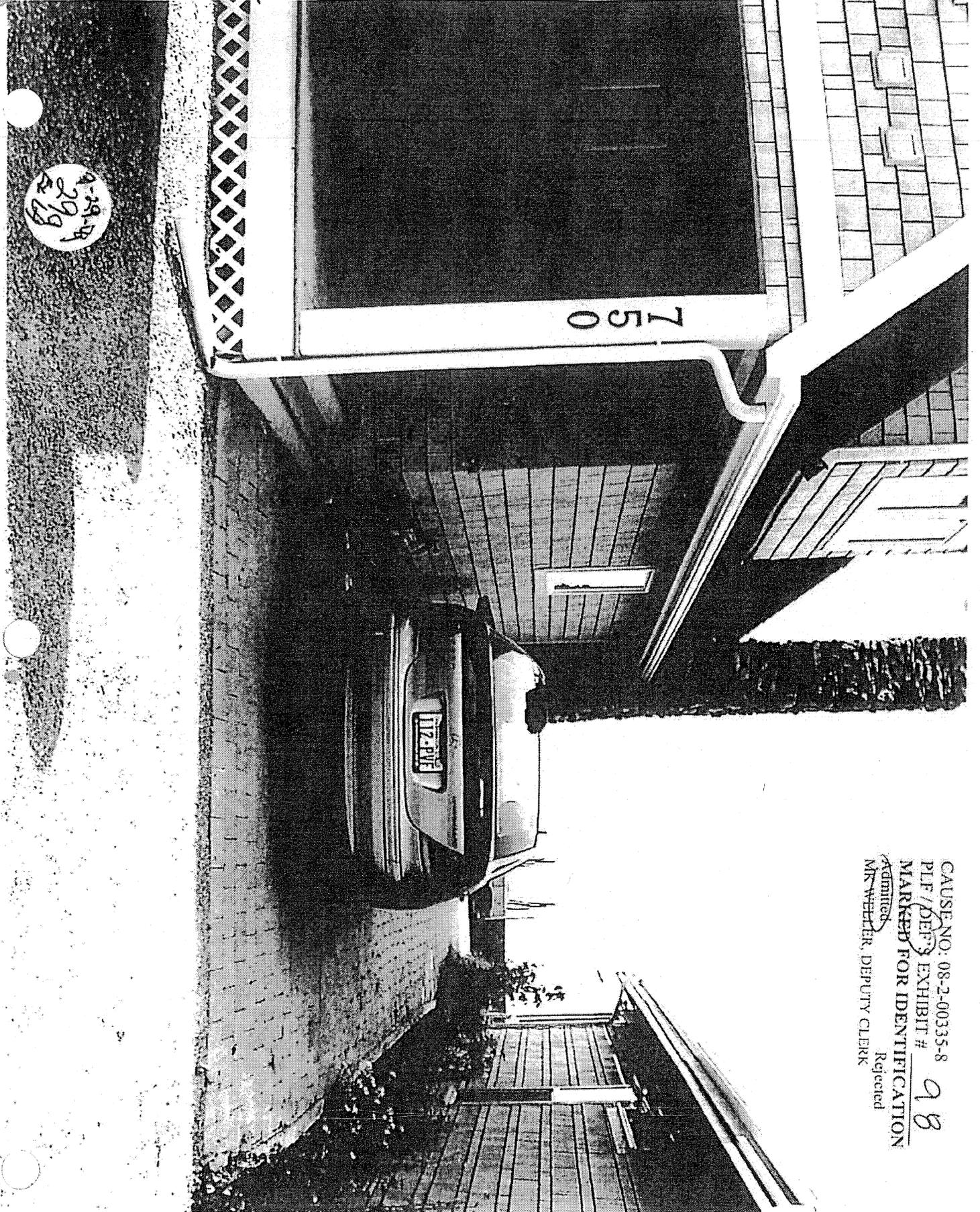
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MK WELLER, DEPUTY CLERK



CAUSE NO: 08-2-00335-8  
PLF / DEF'S EXHIBIT # 13  
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Admitted Rejected  
MK WELER, DEPUTY CLERK

Ex. 13





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172-PVE

CAUSE NO: 08-2-00335-8  
PLF / DEF'S EXHIBIT # 98  
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MR WHEELER, DEPUTY CLERK

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

GARY AND SUE COHN, HUSBAND  
AND WIFE, AND THE MARITAL  
COMMUNITY,

NO. 65218-4-I

Appellants,

CERTIFICATE OF SERVICE OF  
APPELLANTS' BRIEF

vs.

TOLLEFSON FAMILY TRUST BY ITS  
CO-TRUSTEES, MARC AND NANCY  
TOLLEFSON,

Respondent.

I, EDWARD C. LIN, hereby state that on this 16th day of August, 2010, I caused to  
be served true and correct copies of **APPELLANTS' BRIEF** and this Certificate of Service  
on the individual(s) named below, in the manners specifically indicated:

CERTIFICATE OF SERVICE OF  
APPELLANTS' BRIEF – 1

72434-0001/LEGAL18917631.1

**Perkins Coie LLP**  
The PSE Building  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579  
Phone: 425.635.1400  
Fax: 425.635.2400

1  
2 Hans P. Juhl, WSBA No. 33116  
3 Barokas Martin & Tomlinson  
4 1422 Bellevue Avenue  
5 Seattle, Washington 98122  
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**Via Hand Delivery**

Via Federal Express

Via U.S. Mail

Via Fax

Via Email

10 I certify under penalty of perjury, under the laws of the State of Washington, that the  
11 foregoing is true and correct.  
12  
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17

  
Edward C. Lin, WSBA# 41857  
ELin@perkinscoie.com  
R. Gerard Lutz, WSBA No. 17692  
JLutz@perkinscoie.com  
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Attorneys for Appellants  
Gary and Sue Cohn

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CERTIFICATE OF SERVICE OF  
APPELLANTS' BRIEF – 2

72434-0001/LEGAL18917631.1

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