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COURT OF APPEALS

NO. 34496-3-II

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

STATE OF WASHINGTON

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11/13

RICHARD BURKE, a single person,

Appellant,

v.

TYEE YACHT CLUB, INC., a Washington corporation,

Respondent.

REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION.....	1
REPLY RE ASSIGNMENTS OF ERROR.....	3
REPLY RE STATEMENT OF THE CASE.....	3
REPLY ARGUMENT.....	8
A. This Court determines <i>de novo</i> whether the findings support the legal conclusion of adverse possession, <i>vel non</i> , but the trial court failed to enter sufficient findings to support its legal conclusions.....	8
B. Burke adversely possessed the portion of the disputed tidelands onto which he extended his front yard.	9
C. Burke also established adverse possession and mutual acquiescence in the rest of the tidelands.	12
1. Burke established mutual acquiescence.....	13
2. Burke also established adverse possession.	16
(a) Tyee has no response to Burke’s leading point, that the “ultimate test” of adverse possession is whether the claimant uses the property as a true owner would.....	16
(b) Burke’s uses were sufficiently exclusive.	16
(c) Tyee tacitly concedes that Burke’s uses were actual and uninterrupted.....	21
(d) Burke proved “open and notorious” possession.....	21
(e) Burke’s uses were “hostile” as to Tyee.	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

STATE CASES

<i>Anderson v. Hudak</i> , 80 Wn. App. 398, 907 P.2d 305 (1995).....	8
<i>Bowden-Gazzam Co. v. Hogan</i> , 22 Wn.2d 27, 154 P.2d 285 (1944).....	19
<i>Bowden-Gazzam Co. v. Kent</i> , 22 Wn.2d 41, 154 P.2d 292 (1944).....	19
<i>Bryant v. Palmer Coking Coal Co.</i> , 86 Wn. App. 204, 936 P.2d 1163 (1997).....	22
<i>Campbell v. Reed</i> , 134 Wn. App. 349, 139 P.3d 419 (2006)...	13, 14
<i>Chaplin v. Sanders</i> , 100 Wn.2d 853, 863, 676 P.2d 431 (1984).....	8, 16, 22
<i>Frolund v. Frankland</i> , 71 Wn.2d 812, 431 P.2d 188 (1967)	22
<i>Harris v. Urell</i> , 133 Wn. App. 130, 135 P.3d 530 (2006)	20
<i>Johnston v. Monahan</i> , 2 Wn. App. 452, 469 P.2d 930 (1970).....	16
<i>Lamm v. McTighe</i> , 72 Wn.2d 587, 434 P.2d 565 (1967).....	13
<i>Lloyd v. Montecucco</i> , 83 Wn. App. 846, 924 P.2d 927 (1996)	13, 15, 22
<i>Miller v. Anderson</i> , 91 Wn. App. 822, 964 P.2d 365 (1998)	8
<i>Peeples v. Port of Bellingham</i> , 93 Wn.2d 766, 613 P.2d 1128 (1980).....	16, 17, 18, 22
<i>Shelton v. Strickland</i> , 106 Wn. App. 45, 51, 21 P.3d 1179 (2001).....	20
<i>Spath v. Larsen</i> , 20 Wn.2d 500, 148 P.2d 834 (1944)	13

State v. Johnson, 132 Wn. App. 454, 132 P.3d 767 (2006) 8

STATE STATUTES

RCW 79.105.060(3) 3

INTRODUCTION

The Court will no doubt note with some irony that the opening and responsive briefs in this case pass like two ships in the night. Yet Burke displayed full running lights, and sounded several clear warnings. Tyee appears to have been belowdecks. Or perhaps it was just fogged in.

Either way, Tyee tacks to avoid the 800 cubic-foot gorilla sitting on the tidelands – the corner of Richard Burke’s front yard. Burke extended his front yard roughly ten feet onto the tidelands in 1986, including within the disputed area. This portion of the disputed area is no “postage stamp of 60 square feet” (BR 12): It is over 6’ x 10’ x 12’ – nearly 800 *cubic* feet of *terra firma*.

Exhibit 1.38 (BA App. D) shows two of the huge rocks (standing roughly 10 feet north of the old concrete bulkhead) that Burke ran across the front of his property in 1986. He then filled the space from the rocks to (and over) the bulkhead with rocks and earth, extending his front yard ten feet onto the tidelands. The eastern edge of this construction was consistent with the uplands boundary, across the disputed area. Tyee neither permitted nor challenged this encroachment. To ignore these undisputed facts risks running aground on them.

For want of these facts, Tyee makes several inaccurate statements in its argument. For instance, Tyee claims that Burke's "only evidence of his own use" was dredging, as if running a marina and extending his front yard with tons of dirt and rocks were not uses. Similarly, Tyee claims that Burke "never placed any type of physical marker on either the tidelands or the shorelands of Tyee's Tidelands Parcel" – as if importing several tons of earth and rock were not physical enough. BR 16-17. Tyee floats these sorts of statements throughout its brief: They all sink to the bottom.

The trial court adopted the 1997 ADA survey as the uplands boundary. Ex 1.1. This survey clearly shows the line running from the eastern arm of Burke's bulkhead out to Tyee's former dredge piling, on a nearly 26° bearing, parallel to Tyee's pier 60 feet to the east. This Court should reverse and remand with instructions for the trial court to adopt the recorded 1997 ADA survey *in toto* – as reflecting both the uplands and the tidelands boundary.

Richard Burke is no landlubber, but he would like his front yard back, please. And while on the subject, the Court should extend his eastern boundary out across the tidelands, as did the 1997 survey that the trial court partially adopted, and as have the parties, for so many years. The law and common sense favor it.

REPLY RE ASSIGNMENTS OF ERROR

Tyee is confused about Burke's assignments of error. BR 1. While the assignments are shipshape and Bristol fashion, BA 13-14 could leave no doubts as to Burke's heading. Tyee's attempts to throw the facts overboard or take the argument off course are misplaced.

REPLY RE STATEMENT OF THE CASE

Tyee's attempts to jettison the facts are predictable, but unhelpful. The opening brief accurately states the relevant and undisputed facts, with cites. This reply attempts to clear up the flotsam and jetsam.

As Tyee notes (BR 2, 4), Judge Costello visited the site, yet stated that the tidelands¹ start at the base of the concrete bulkhead. CP 515. That is the problem. Burke placed tons of earth and stone north (waterward) of the old bulkhead, within the disputed area. *Compare* Ex 1.38 (before photos; BA App. D) *with* Ex 1.37 (riprap plans, attached as Appendix F to this brief²) *and with* Ex 1.43 (after photos; attached as Appendix G). That is why the judge erred.

¹ The judge said "shore lands," but shorelands abut lakes or rivers, not tidewaters like Puget Sound. See, e.g., RCW 79.105.060(3).

² Appendices A through E are attached to the opening brief.

Tyee goes on at length citing random evidence allegedly supporting various findings. BR 5-11. But Burke's adverse possession/acquiescence claim is based on three undisputed facts: (1) in the '70s, Tyee placed a dredge piling in line with the eastern arm of Burke's bulkhead, and the parties dredged their respective tidelands up to that line; (2) in the '80s, Burke extended his front yard 10 feet north onto the tidelands, a massive project whose eastern edge falls on the same line; and (3) Tyee also built a pier on the other side of its property on a bearing parallel to this same line. BA 5-11. In other words, everybody agreed that this was the tidelands boundary for many, many years.

Tyee presents no evidence that the parties did not dredge along the line running from the eastern arm of Burke's bulkhead out to Tyee's dredge piling. BR 5-11. Tyee presents no evidence that Burke did not build on the disputed parcel in 1986. *Id.* And Tyee presents no evidence that it did not build its pier on a parallel bearing precisely 60 feet away. *Id.* In short, since both parties treated this line as the tidelands boundary, the trial court's legal conclusion that Burke did not prove adverse possession or mutual acquiescence is unsupported.

Tyee's first factual argument seems to be that because the parties' deeds say they own the abutting tidelands, *ipso facto* the boundary falls on a particular bearing. See BR 5-6 (citing Exs 1.7, 1.22, 1.32 & 2.2). The whole point of adverse possession and mutual acquiescence, however, is that the established lines on the ground conflict with the platted lines. Merely pointing to the platted lines is no answer at all.

Tyee continues in this vein, citing to various surveys and leases. BR 6-9. But again, just because some document says that the boundary falls on a particular bearing does not make it true in the real world. Most of the surveys accurately reflect the lines on the ground diverging from the S 22° W bearing. See, e.g., Exs 1.1, 1.34, 2.16. But most of the aquatic-lands leases show that bearing running straight through the dredge piling. Exs 1.25, 1.29 & 2.21. That is not the reality, but it leaves no doubt that the parties treated the line from the eastern arm of Burke's bulkhead to Tyee's piling as the tidelands boundary, only later to discover that the bearing supposedly at 22° was really at nearly 26°. And again, that is what adverse possession/mutual acquiescence is all about.

The source of the divergence is the angle of the eastern arm of the old concrete bulkhead, which differs from the uplands line by

several degrees because the arm itself is perpendicular to the shoreline. See, e.g., Ex 1.2.³ The overgrown area near this arm made it difficult to see the bend at the corner of the wall. See, e.g., RP 103. But as Ex 1.2 shows, Tyee constructed its pier precisely 60 feet east of this arm, and on the same nearly 26° bearing, just as its dredging contractor placed the dredge piling on that same bearing. Indeed, Tyee's Carl Weiss admitted that in preparing his dredging application, he drew the dredge line "as an extension of the property line." RP 33; see also Ex 1.31(c) (Weiss' drawing extending the dredge line from the eastern arm of Burke's bulkhead straight out over the water); RP 85-86 (Weiss admits that he borrowed Burke's lease exhibit when making his drawing); Ex 1.24(a) (Burke lease exhibit). Again, the parties treated the line from the eastern arm (at nearly 26°) as the tidelands boundary.

Tyee also argues that it "used" the disputed tidelands. BR 9-11. These claims concern (a) surface waters, and (b) a small portion of the tidelands underwater twice a day. *Id.* As noted in the opening brief, however, using the surface waters is not use of the tidelands and cannot affect adverse possession because the

³ The relevant portion of Ex 1.2 is attached as Appendix H.

surface waters are open to all under the public trust doctrine. BA 26. Tyee has no response to this point.

As also noted in the opening brief (and further discussed below), yacht-club members' occasional uses of a small, desolate strip of intermittent shoreline did not include Burke's front yard, and are insufficient to prevent adverse possession. BA 24-26.

Finally, Tyee improperly conflates (1) an undisputed portion of Tyee property east of Burke's bulkhead (on which Burke sought and received permission to place some large rocks to shore-up the eastern arm of the old bulkhead) with (2) the disputed tidelands north of the old bulkhead, onto which Burke extended his front yard. BR 10-11. The small area of Tyee property used in shoring-up the eastern arm of the old bulkhead is not now and never was in dispute. Burke neither sought nor received Tyee's permission to extend his yard northward onto the tidelands, encroaching upon the disputed parcel, because both parties thought for many years that Burke was just extending his front yard over his own tidelands. The Court should not be confused by Tyee's attempt to muddy the waters.

REPLY ARGUMENT

- A. **This Court determines *de novo* whether the findings support the legal conclusion of adverse possession, *vel non*, but the trial court failed to enter sufficient findings to support its legal conclusions.**

Burke first argued that this Court determines *de novo* whether the findings support the legal conclusion of adverse possession, *vel non*, and that the trial court erred in failing to enter sufficient findings to support its legal conclusion that Burke did not adversely possess the tidelands. BA 14. Tyee claims this is “simply wrong”; yet Tyee acknowledges that the issue here is whether the findings support the legal conclusions. BR 12-13.

This Court has repeatedly stated the proper review standard.

See, e.g.:

Adverse possession is a mixed question of law and fact: whether the necessary facts exist is for the trier of fact, but whether those facts constitute adverse possession is an issue of law for the court to decide. ***Chaplin [v. Sanders]***, 100 Wn.2d [853,] 863[, 676 P.2d 431 (1984)]; ***Anderson v. Hudak***, 80 Wn. App. 398, 401-02, 907 P.2d 305 (1995).

Miller v. Anderson, 91 Wn. App. 822, 828, 964 P.2d 365 (1998), *rev. denied*, 137 Wn.2d 1028 (1999). Issues of law are always reviewed *de novo*. *See, e.g., State v. Johnson* 132 Wn. App. 454, 459, 132 P.3d 767 (2006). Burke challenges the trial court’s legal conclusions, so review is *de novo*.

Tyee has no response to the point that the trial judge erred in failing to enter sufficient findings. BR 12-13. Burke proffered more complete findings, CP 535-44, but the trial court rejected them as “not necessary.” 12/02 RP 18-19. This was error because, without the findings, this Court is faced with reviewing the entire record to determine whether the conclusions are supported.

B. Burke adversely possessed the portion of the disputed tidelands onto which he extended his front yard.

Burke next argued that he adversely possessed the portion of the disputed tidelands onto which he extended his front yard. BA 15-16. Tacitly acknowledging the strength of this argument, Tyee consigns its response to the back of its brief, claiming Burke neither raised nor proved this issue. BR 27-29. Neither claim is correct.

In a footnote, Tyee acknowledges that Burke argued this issue in the trial court. BR 27 n.5 (citing 12/2/05 RP at 11-12). Tyee claims that this was too late, but it was Burke’s first opportunity to argue the point – the judge had not previously severed 800 cubic feet of Burke’s front yard. Frankly, no one could have anticipated such a groundless ruling.

Tyee’s argument that Burke did not prove adverse possession of the covered tidelands is both misleading and

incorrect. Tyee cites Exs 1.43 and 2.38, but ignores Ex 1.38, attached to the opening brief as Appendix D. Those color photos clearly show the roughly eight-to-ten feet between the old concrete bulkhead and the rocks, an area Burke filled with earth and rocks. See *also* RP 90-91 (addressing these photos). The upper photo in Ex 1.43(3) (see App. G) plainly shows both Burke's extended front yard (basically, the yellowed grass area) and the planter box that (contrary to Tyee's claims) Burke placed on top of his encroaching earthen riprap. See *also*, RP 146-47; CP 307, ¶ 14.

Tyee also misleadingly cites to evidence regarding Burke's rock wall on the east side of the eastern arm of the old concrete bulkhead. BR 28 (citing RP 57, 145-46). That testimony has nothing to do with the disputed tidelands parcel, which is to the north of the old bulkhead:

Q. Okay. Now, I notice some rock or ruffraff [*sic*] that is stacked up there [citing Ex. 42-B].

A. [Carl Weiss] I see that.

Q. Is that rock that Mr. Burke placed there **to the east of the concrete wall**?

A. Yes.

Q. And he asked your permission, did he not, to go on to the Tyee property, to place the rock on your property, up against the concrete wall?

A. Yes, we saw that to be to our advantage, to have that there.

RP 57 (emphasis added);

Q. When did you get that permit [to shore-up the old concrete bulkhead]?

A. **[Richard Burke]** I applied for it in . . . October of 1985.

Q. When did you do the construction?

A. 1986.

Q. Did you have a conversation with Mr. Weiss about that project?

A. I did.

Q. What did you say to him?

A. Well, I realized that **the rocks on the eastern arm of my concrete bulkhead would be on his property.** I called him up and I said, "Look, I'm going to put a rock wall in, and the rocks are going to be on your side of my concrete wall. Do you mind if I put them there?" And he said, "No. Go right ahead."

Q. You said, 'My concrete wall'?

A. Yes.

Q. Did he object to your characterization that you said it was your concrete wall?

A. No.

RP 145-46 (emphasis added).

Referring solely to these rocks buttressing the eastern arm, Tyee claims that Burke cannot adversely possess this area

because Tyee gave him permission to place the rocks there. BR 28-29. This is true, if limited strictly to the rocks sitting not on the disputed parcel to the north of the old concrete bulkhead, but rather on what is undisputedly Tyee's property to the east of eastern arm of the old bulkhead. Burke has never claimed that area, so Tyee raises a (rather fishy) red herring.

In sum, it is undisputed that Burke placed nearly 800 cubic feet of earth and rock on a six-by-ten foot portion of the disputed tidelands in 1986. Tyee neither approved nor challenged this encroachment within 10 years. As a matter of law, Burke adversely possessed this portion of the tidelands. The Court should reverse and remand with instructions to quiet title in at least this portion of the disputed tidelands in Richard Burke.

C. Burke also established adverse possession and mutual acquiescence in the rest of the tidelands.

Burke also argued that he established adverse possession or mutual acquiescence in the entire tidelands boundary – considering how a true owner would likely use tidelands. BA 16-29. Both parties recognized and respected their mutual boundary running from the eastern arm of the old concrete bulkhead, across the eastern edge of the riprap, and out to Tyee's dredge piling, on a

bearing of roughly 26°. See, e.g., BA App. C (blow-up of 1997 ADA survey (Ex 1.1), which the trial court adopted solely as to the uplands boundary). Tyee acknowledged this boundary beginning in 1971 (when it placed the piling and dredged its property along the boundary), and reiterated it by placing a pier along the same bearing 60 feet to the east – precisely the width of its property. It would be difficult to find clearer evidence of mutual acquiescence and adverse possession of tidelands.

1. Burke established mutual acquiescence.

Burke next argued that since both parties dredged and built on their properties consistent with the recognized line running from the eastern arm of Burke's bulkhead to Tyee's dredge piling, he proved mutual acquiescence. BA 17-21 (citing and discussing, *inter alia*, **Spath v. Larsen**, 20 Wn.2d 500, 148 P.2d 834 (1944); **Lloyd v. Montecucco**, 83 Wn. App. 846, 924 P.2d 927 (1996), *rev. denied*, 131 Wn.2d 1025 (1997); and **Lamm v. McTighe**, 72 Wn.2d 587, 434 P.2d 565 (1967)). Nothing more is required.

Tyee first quotes a very recent case from this Court, which quotes **Lloyd** and **Lamm** for the elements of mutual acquiescence. BR 20 (citing **Campbell v. Reed**, 134 Wn. App. 349, 139 P.3d 419 (2006)). But Tyee omits this statement from **Campbell**:

A claimant to title by mutual recognition and acquiescence makes out a prima facie case where the adjoining parties in interest have demonstrated by their possessory actions the asserted line of division between them.

134 Wn. App. at 363. This Court concluded that the **Campbell** claimant had created an issue of fact on mutual acquiescence by showing that stakes in the ground marked the alleged property lines; that both parties used and improved their land according to these mutually-accepted lines; and that this acquiescing use continued for at least 10 years. *Id.*

Burke's evidence is much stronger than that presented in **Campbell**. Tyee itself marked and dredged along the alleged line before Burke even owned his property. Before Burke dredged, Tyee's dredge piling plainly distinguished its dredged area from Burke's undredged area for its yacht-club members, much like the stakes at the property corners in **Campbell**. Burke later dredged along the same line, and then extended his front yard onto the tidelands along the same line. Tyee again respected this line when it built its pier precisely 60-feet eastward along the same bearing. This is not just *prima facie* evidence of mutual acquiescence, it is irrefragable proof.

Yet Tyee again claims that Burke “never placed *any* barrier on Tyee’s Tidelands Parcel” [sic], and claims the dredging was not a marker. And again, 800 cubic feet of earth and rocks is a barrier. And even prior to this, Tyee’s dredge piling marked the boundary so that its own members would not run aground on Burke’s undredged tidelands. That too is certainly a barrier.

But Tyee is wrong to claim that Burke had to place a barrier in the water. Such an act would impede navigation and fly in the face of numerous laws and regulations, not the least of which is the public trust doctrine itself. Burke could not obstruct navigation, and no case does (or should) require such an illegal act to prove mutual acquiescence in a tidelands boundary.

Tyee also distinguishes **Spath** and **Lloyd**, claiming that Burke argues they *ipso facto* require a finding of mutual acquiescence in this case. BR 23-26. Burke also distinguished **Lloyd**, and cited **Spath** for the general proposition that courts may draw a line perpendicular to the shore to establish a tidelands boundary. BA 17-20. It is the evidence of Burke’s possession – most of which Tyee ignores – that proves mutual acquiescence here, not these cases.

Tyee also relies on *Johnston v. Monahan*, 2 Wn. App. 452, 469 P.2d 930, *rev. denied*, 78 Wn.2d 993 (1970), and *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 613 P.2d 1128 (1980), *overruled on other grounds in Chaplin, supra*. *Johnston* is inapposite because it involved only two temporary concrete blocks on the tidelands, which is plainly insufficient. *Peeples* is also inapposite, for reasons discussed below.

2. Burke also established adverse possession.

(a) Tyee has no response to Burke’s leading point, that the “ultimate test” of adverse possession is whether the claimant uses the property as a true owner would.

Tyee simply does not respond to Burke’s leading point, that the “ultimate test” of adverse possession requires the Court to focus on how a true owner would use tidelands. BA 22-24. Rather, Tyee first argues that substantial evidence supports the trial court’s legal conclusions. BR 13-14. That is not a relevant question. Substantial evidence must support the findings. But Burke is challenging the trial court’s legal conclusion that the evidence provided does not amount to adverse possession. BA 14.

(b) Burke’s uses were sufficiently exclusive.

Tyee next argues that Burke did not prove that his use of the disputed tidelands was exclusive. BR 14-16. As predicted, its

leading argument is that it floated boats above the tidelands. *Compare* BA 26 *with* BR 14-16 & n.3. Tyee notes that Burke attempted to exclude its members from even the surface waters in his marina. BR 14 n.3 (citing RP 192-94). But he could not do so under the public trust doctrine. BA 26. Burke also used the same surface area above the tidelands for access to his marina, and Tyee could not exclude his tenants either. Where a true owner cannot legally exclude others, the adverse possessor's inability to do so should not affect the legal analysis.

In any event, as noted in the opening brief, using surface waters is not using tidelands; but dredging them to establish a marina is. Only Burke dredged these tidelands. And Tyee manifested its agreement with this tidelands boundary by (a) dredging only on its side of the mutually recognized boundary running from the eastern arm of Burke's bulkhead out to Tyee's piling, and (b) placing its pier 60-feet east of this boundary along the same bearing. This is sufficient.

Tyee relies on *Peeples, supra*, which is inapposite here. BR 14 & n.3. In *Peeples*, owners of 2.5 acres of tidelands commenced a quiet title action against the Port, and the Port counterclaimed for

similar relief. 93 Wn.2d at 767. The trial court quieted title in the Port, and the Court of Appeals affirmed.

The Supreme Court reversed, first noting (contrary to Tyee's argument here) that adverse possession is not a pure question of fact, but rather a mixed question of fact and law: "Whether the essential facts exist is for the trier of fact; but whether the facts, as found, constitute adverse possession is for the court to determine as a matter of law." 93 Wn.2d at 771. As here, the facts of possession in *Peeples* were not really in dispute, so the issue was a question of law. 93 Wn.2d at 772.

The *Peeples* Court held that the Port never had exclusive possession. 93 Wn.2d at 773. The Port constructed a bulkhead and breakwater that did not touch on the disputed parcel; it did not restrict access to the tidelands from either the shore or the sea; and it admitted that others used the tidelands. *Id.* By contrast, here Burke exclusively used the tidelands for his own marina, and no evidence exists that Tyee members tried to or were allowed to use Burke's marina (other than the surface waters).

Peeples also rejected the presence of one "dolphin" floating in the disputed area because the Court has "held that the mooring of a floating structure on tidelands is not such an open, notorious,

and hostile possession as would give notice to an owner that someone was claiming title adversely.” 93 Wn.2d at 773-74 (citing ***Bowden-Gazzam Co. v. Kent***, 22 Wn.2d 41, 54, 154 P.2d 292 (1944); ***Bowden-Gazzam Co. v. Hogan***, 22 Wn.2d 27, 40, 154 P.2d 285 (1944)). Burke never relied on such evidence, and testified that he has never objected to Tyee’s members using the water above the tidelands. RP 193. But this also means that Tyee cannot claim that floating boats above the tidelands is using them.

Moreover, while it is true that the ***Peeples*** Court found the Port’s mere dredging of a channel insufficient, that is solely because it was only a one-time use:

The channel dredged in 1957 by the breakwater contractor appears to have been a one-time use for the purpose of floating rock barges during construction. **There is no evidence that the port made any further use of the channel until 1970.** What use there was of any of the dolphins, including the single one inside the seaward line of the subject property, appears to have been sporadic use *by the general public*, not the port. **The port exercised no control over any moorage, made no arrangements, and collected no rent.**

93 Wn.2d at 773 (italics original; bold added). This is quite the opposite of Burke’s use of the dredged area. He has run a professional marina in these tidelands, accommodating up to 36 vessels, since shortly after he dredged the tidelands in 1979. RP

94-95. Until he dredged in 1979, Tyee's 1971 dredge marker signaled to its members where they needed to sail to avoid Burke's undredged tidelands. After he dredged, everyone was free to use the surface waters above both Tyee's and Burke's tidelands under the public trust doctrine. But no evidence exists that Burke otherwise permitted Tyee members to use his marina.

Tyee attempts to distinguish the recent decision in *Harris v. Urell*, 133 Wn. App. 130, 135 P.3d 530 (2006). BR 16. But to do so, Tyee claims Burke's "only . . . use" was dredging – contrary to undisputed facts. *Id.* Burke not only dredged, but ran a marina on the dredged area. He also extended his front yard roughly 10 feet over the disputed tidelands. He regularly used this area, and the entire dredged area, to the exclusion of Tyee and its members (other than floating on the surface waters). Burke saw only sporadic uses of the small, intermittent, desolate shoreline near the riprap extension, and Tyee has no answer to the legal rule that an encroachment includes "a reasonable amount of the surrounding territory" in any event. BA 25-26 (citing *Shelton v. Strickland*, 106 Wn. App. 45, 51, 21 P.3d 1179, *rev. denied*, 145 Wn.2d 1003 (2001)). Burke's uses were sufficiently exclusive.

(c) Tyee tacitly concedes that Burke's uses were actual and uninterrupted.

Burke next argued that his uses were actual and uninterrupted. BA 26-27. Tyee has no response. Burke accepts the concession.

(d) Burke proved "open and notorious" possession.

Burke both extended his front yard onto the disputed area and dredged it. BA 27. These acts were open and notorious. *Id.* This element is met.

Tyee falsely claims Burke "never placed any type of physical marker on either the tidelands or the shorelands of Tyee's Tidelands Parcel [*sic*] to provide notice to Tyee that he claimed dominion over that portion of its property." BR 16-17; see *also* BR 18 ("Burke's claim that a single event – his dredging . . . fulfills the open and notorious requirement . . ."). These assertions willfully sail in the face of both the opening brief and the undisputed evidence that Burke placed tons of earth and rock on the disputed tidelands parcel. Had Tyee paid any attention to even its own surveys, it would have instantly detected the encroachment. But in truth, Tyee thought that the agreed boundary running from the eastern arm of Burke's bulkhead out to its own dredge piling was

the true boundary, so it had no reason to investigate or complain. Tyee even built its own pier on precisely this bearing.

Tyee next “answers” (at length) an argument that Burke did not make. Compare BA 27 (citing *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 936 P.2d 1163, rev. denied, 133 Wn.2d 1022 (1997) and *Lloyd, supra*) with BR 17-18 (discussing *Frolund v. Frankland*, 71 Wn.2d 812, 431 P.2d 188 (1967), overruled on other grounds, *Chaplin, supra*). Burke cited *Frolund* for the unremarkable (and irrefutable) proposition that the quality of possession “necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied.” BA 22 (quoting *Frolund*, 71 Wn.2d at 817). Tyee’s “response” bears no relation to Burke’s argument. BR 17-18.

Finally, Tyee asserts that Burke’s dredging was merely a “single trespass.” BR 18-19. But as noted above, unlike the Port in *Peeples*, Burke not only dredged, but he has continued to use the dredged area for his Marina over the past 27 years. Burke also extended his uplands out onto the tidelands over the disputed area. Taken together with Tyee’s own acknowledgment of the location and bearing of the boundary (by placing a pier precisely 60-feet

eastward on the same bearing), this is ample evidence that his possession was open and notorious.

(e) Burke's uses were "hostile" as to Tyee.

Finally, Burke noted that his uses, dredging and building out over the disputed parcel, were plainly hostile as to Tyee. BA 27-29. Burke noted that Tyee said nothing even though its 1984 survey clearly indicated that Burke's 1986 build-out plainly encroached on Tyee's tidelands. BA 28. Even though Tyee admits that (like Burke) a "typical" claimant "relies on his occupancy of the land to give the record owner constructive notice of his hostile claim," Tyee has no response to the fact that Burke did so. BR 19-20.

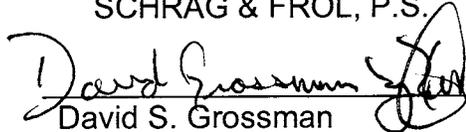
Rather, Tyee argues that because some documents prepared by or for Burke inaccurately showed a 22° bearing, Burke "openly conceded Tyee's superior title." BR 20. Everyone was mistaken about that bearing for a time. But that does not change the undisputed fact that in the real world – where adverse possession occurs – the parties recognized and honored a boundary on a bearing from the eastern arm of Burke's bulkhead to Tyee's dredge piling. Tyee has no relevant response to this reality.

CONCLUSION

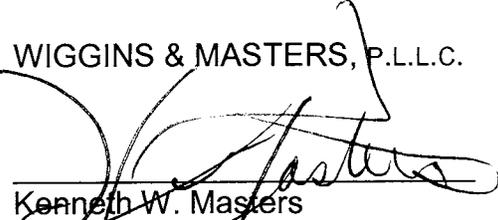
For the reasons stated above and in the opening brief, this Court should reverse and remand with instructions to quiet title in Richard Burke according to the 1997 ADA survey (Ex. 1.1), not just in the uplands, but also in the tidelands.

DATED this 3rd day of November 2006.

REESE, BAFFNEY,
SCHRAG & FROL, P.S.


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Walla Walla, WA 99362
(509) 525-8130

WIGGINS & MASTERS, P.L.L.C.


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WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 3rd day of November 2006, to the following counsel of record at the following addresses:

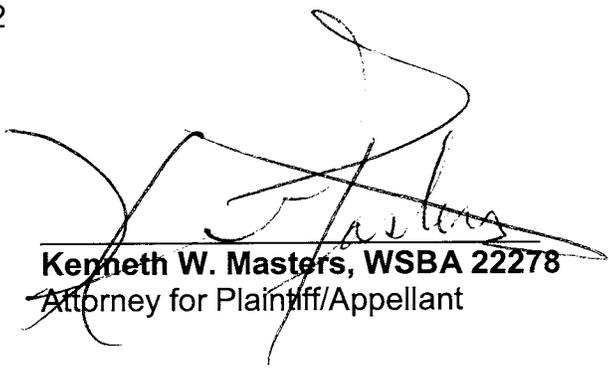
Co-Counsel for Plaintiff/Appellant

David S. Grossman
216 S. Palouse Street
Walla Walla, WA 99362

Counsel for Defendant/Respondent

John W. Phillips
315 Fifth Avenue South
Seattle, WA 98104-2682

FILED
COURT OF APPEALS
NOV 10 2006
AM 10:14
STATE OF WASHINGTON
BY W
CLERK



Kenneth W. Masters, WSBA 22278
Attorney for Plaintiff/Appellant

KITSAP COUNTY

DEPARTMENT OF COMMUNITY DEVELOPMENT

BUILDING PLUMBING MECHANICAL

ASSESSOR'S ACCOUNT NO. 4165-002-001-0008 SHORT PLAT NO. _____
 OWNER'S NAME Richard Burke PHONE 842-7151
 OWNER'S PRESENT ADDRESS 5846 Main St Bainbridge Island Wa98110
 PROPOSED TYPE OF BUILDING AND USE Bulkhead BASIC NO. _____
 PROPOSED SITE ADDRESS AND LOCATION Eagledale Moorings 5842 & 5846 Main ST Bainbridge Is

BUILDER Self Or to be selected DESCRIBE OTHER BUILDINGS ON PROPERTY _____
 BUILDER'S ADDRESS _____ Pump House 2 bd residence, 1br cabin, shop
 PHONE 842-7751
 PLUMBING CONTRACTOR _____ MECHANICAL CONTRACTOR _____

- ANY WATER ON OR ADJACENT TO PROPERTY — SALT WATER CREEK POND LAKE MARSH
- NEW RESIDENCE ACC. BLD. Bulkhead line 1 ft 120
 MODULAR BULKHEAD MAIN FLOOR (sq. ft.) _____ SECOND FLOOR (sq. ft.) _____
 ADDITION GARAGE/CARPORT BASEMENT (sq. ft.) _____ GARAGE (sq. ft.) _____
 REMODEL OTHER CARPORT (sq. ft.) _____ DECK (sq. ft.) _____
 DECK/PORCH _____ No. of BEDROOMS _____ U.B.C.' 82 ED. _____
 BASEMENT _____ No. of BATHROOMS (SEE AND READ NOTICE ON REVERSE SIDE) _____

M. Burke
 OWNER/AGENT

10/24/85
 DATE

SUBDIVISION Pleasant View Townsite SCHOOL DIST. 303 LOT 1 LOT SIZE _____
 SEC. 35 TWN. 25 RANGE 2E

	PLUMBING/FIXTURES	FEE	MECHANICAL/EQUIP.	FEE
VALUATION \$ <u>600.00</u>				
BUILDING PERMIT FEE \$ <u>11.50 pd</u>				
PENALTY FEE \$ _____				
PLUMBING FEE \$ _____				
MECHANICAL FEE \$ _____				
TOTAL FEES \$ <u>11.50 pd</u>				

001-29001
PH. # 876-7181

BLDG CHCK 32735*# 11.50 10/24/85

KITSAP COUNTY COMM. DEVELOPM.

COMMENTS ZONING Repair & Maintenance of existing bulkhead which is sliding waterward due to land movement. Placement is to be non further waterward than 10 feet front the existing concrete wall.

COMMENTS BUILDING _____

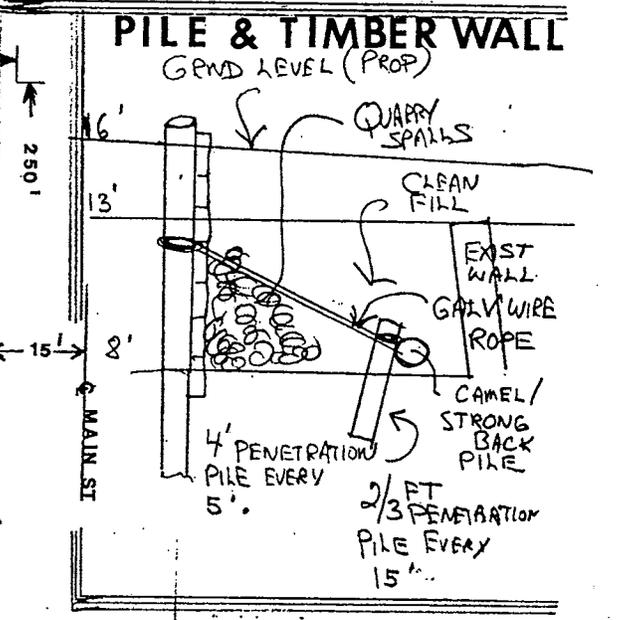
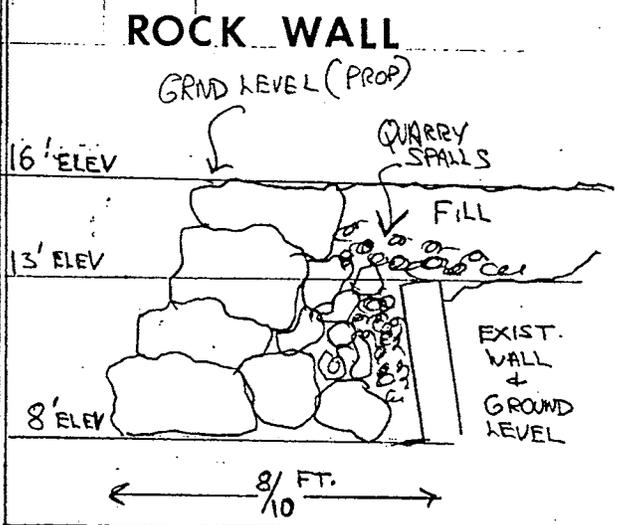
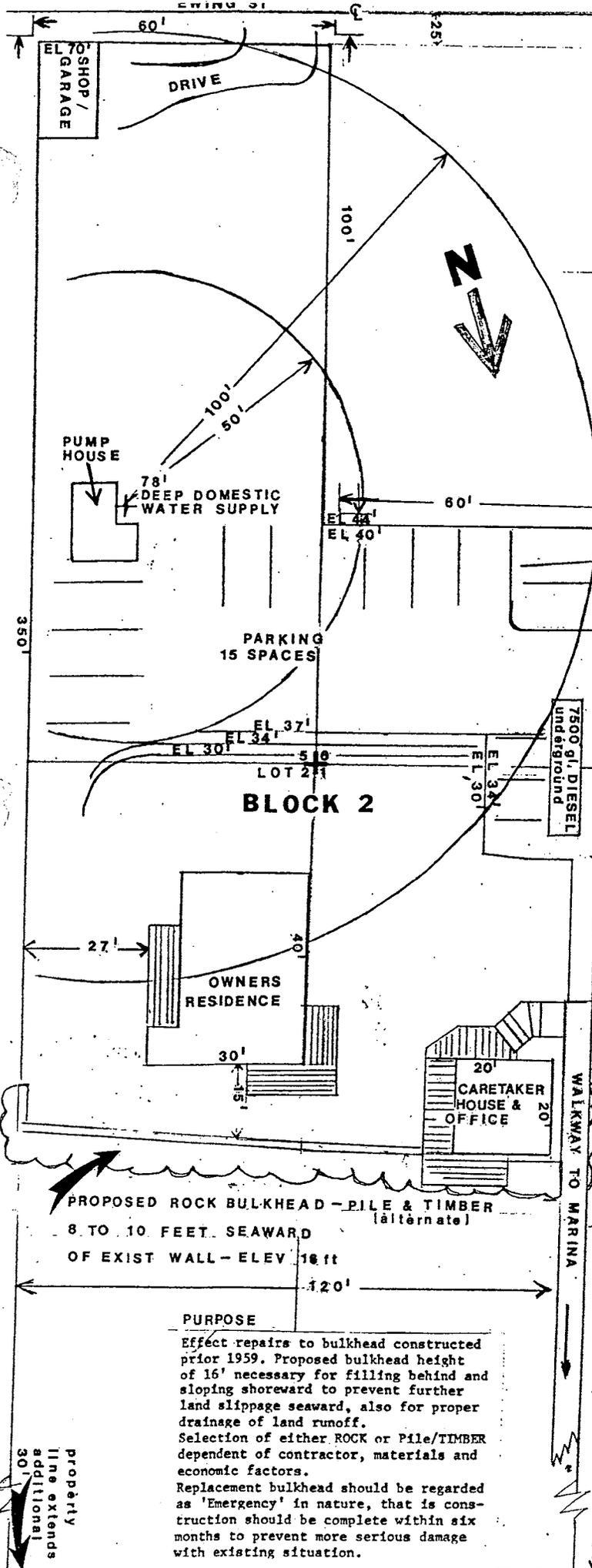
start to
10-24-86
VAL
on 4-8-86

APPROVAL SUBJECT TO ON SITE INSPECTION APPROVAL

BY Ron Perkerewicz kg

DATE 10/24/85

Appendix F



STREET END
EL 29'

ADJOINING PROPERTY OWNERS

EAST- Tye Yacht Club,
3229 Fairview Ave,
Seattle, WA.

WEST- Eagle Harbor Marina
Ward Ave.
Bainbridge Island, WA. 98110

EL 13' top of bulkhead EXISTING
EL + 8' beachline BULKHEAD

PURPOSE

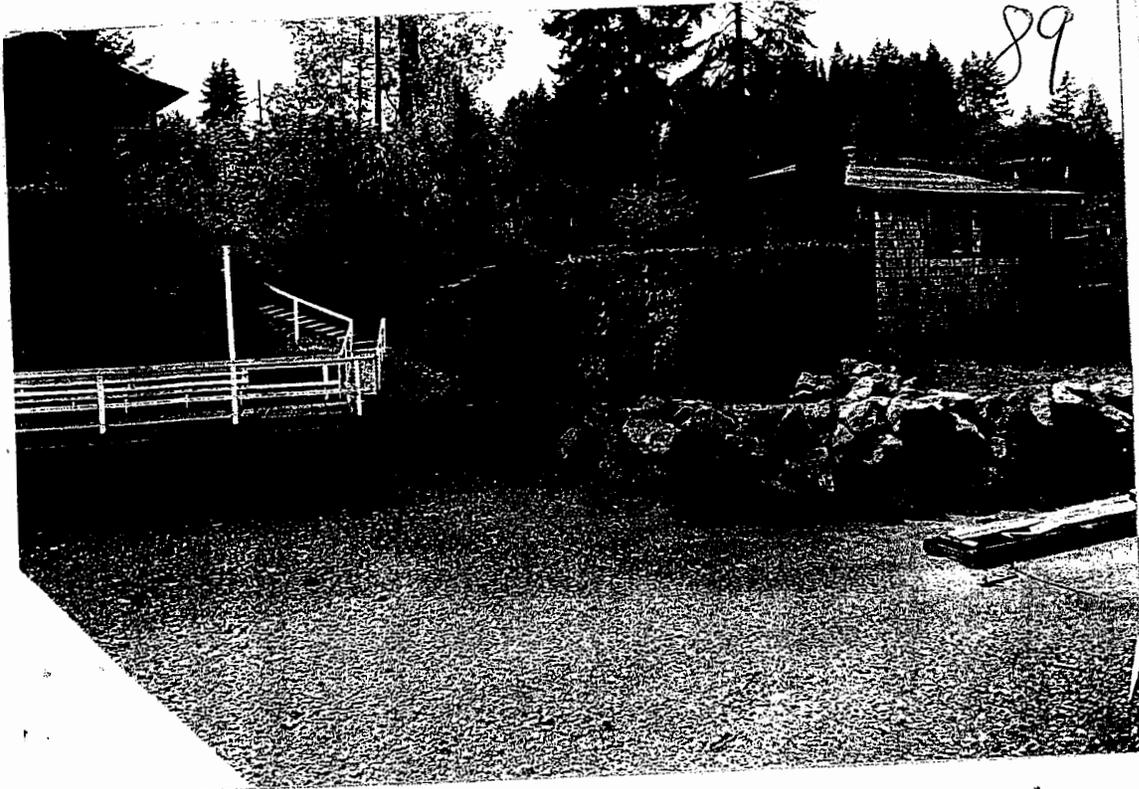
Effect repairs to bulkhead constructed prior 1959. Proposed bulkhead height of 16' necessary for filling behind and sloping shoreward to prevent further land slippage seaward, also for proper drainage of land runoff. Selection of either ROCK or Pile/TIMBER dependent of contractor, materials and economic factors. Replacement bulkhead should be regarded as 'Emergency' in nature, that is construction should be complete within six months to prevent more serious damage with existing situation.

**EAGLEDALE
MOORINGS
PLOT PLAN 1" - 20'**



**PROPOSED BULKHEAD
ROCK or TIMBER & PILE
PLAINTIFF'S 37**

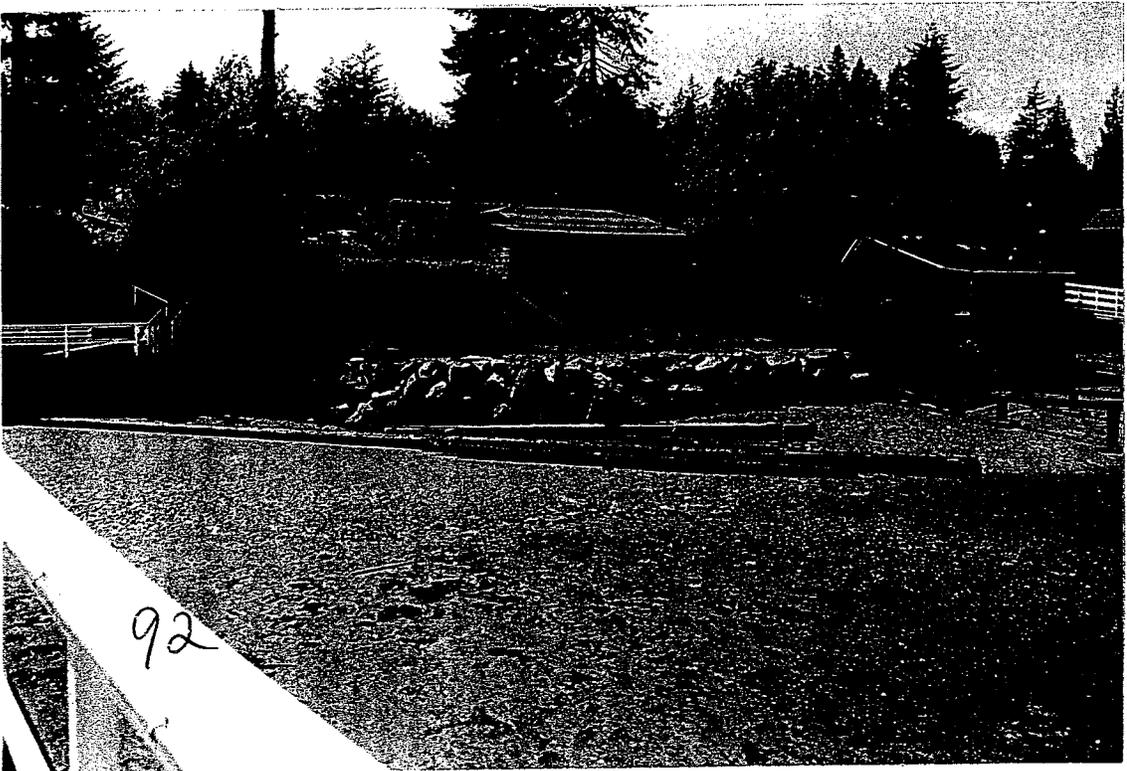
Appendix F



Appendix G

PLAINTIFF'S
EXHIBIT

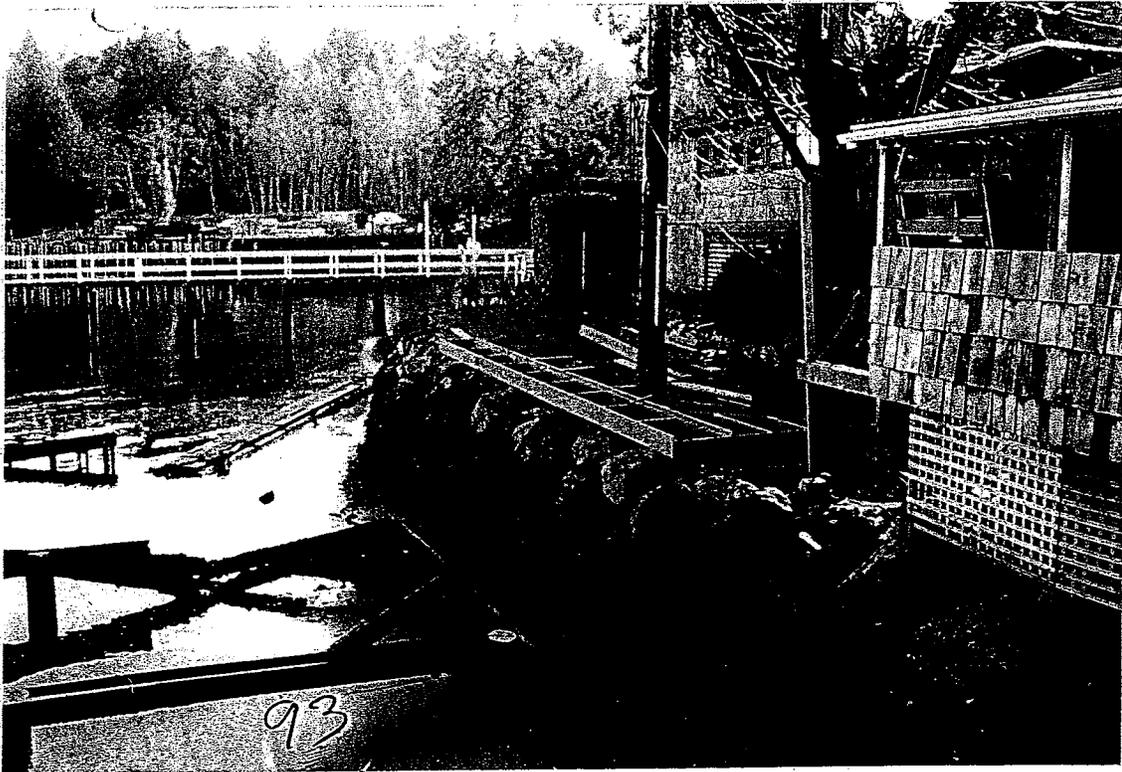
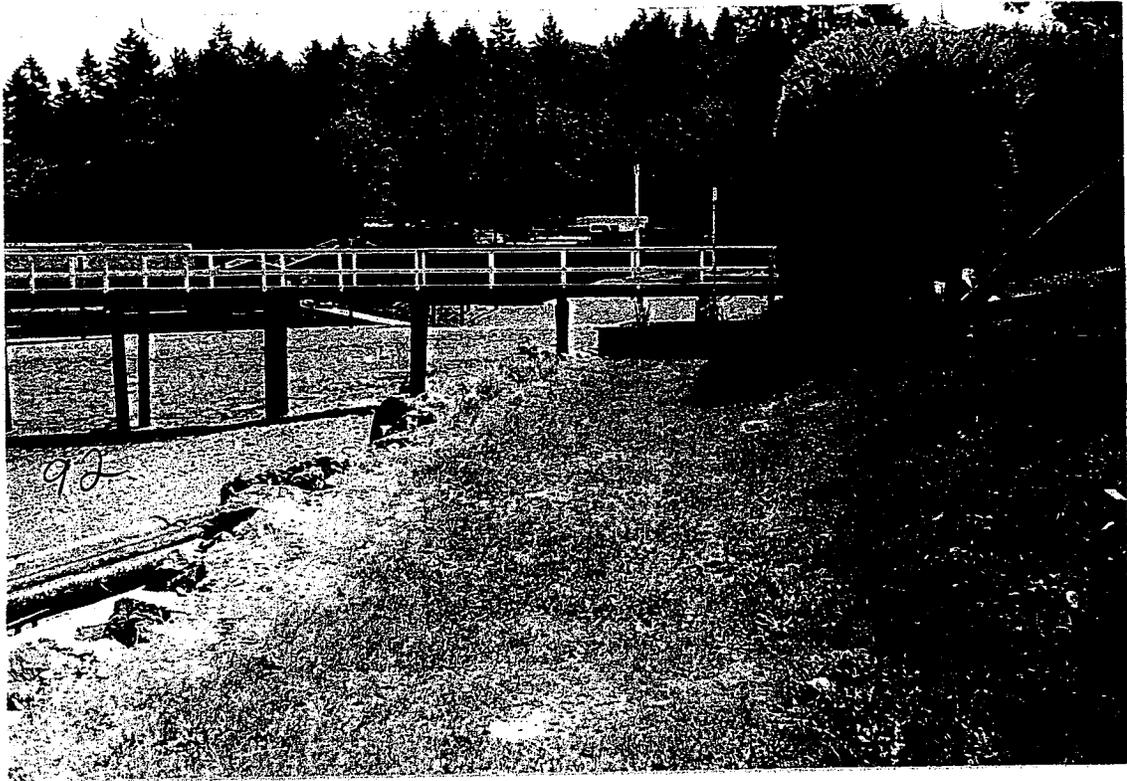
43 1



Appendix G

PLAINTIFF'S
EXHIBIT

43 2



Appendix G

PLAINTIFF'S
EXHIBIT

43

3

E:

Property as
ed on physical
o ADA Engineering
97. This line is
of the needed
nd the accompanying

POST 1997 (6)
POST 1962
T ON FENCE LINE 1997(4)
FENCE LINE (1997 SURVEY)
FENCE LINE AS DEPICTED
1962 SURVEY
SURVEY POST SET 2-8-62
256 PG. 3) NOT RECOVERED

