

No. 34882-9

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Wm. Dickson Co.,
Appellant,

v.

Thomas and Joanne Urquhart,
Respondents.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
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STATE OF WASHINGTON
BY 

ORIGINAL

ARGUMENT

At issue on this appeal is whether the trial court's determination regarding the allowed use of the private road was properly supported by the evidence. Consistent with the law of easements, the scope of allowed use must be based upon Dickson's intent at the time the easement was created. The trial court's findings of fact regarding intent must be overturned because they were not supported by substantial evidence and were contrary to the undisputed facts.

Findings of fact may be overturned when the evidence is insufficient to persuade a rational, fair-minded person, or when the evidence relied on by the trial court is inconsequential and of little probative value. *Rogers Potato Service, LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97P.3d 745 (2004); *Feak v. Lacamas Valley Ranch*, 34 Wn.2d 798, 808, 210 P.2d 133 (1949). In light of all the evidence presented at trial, the evidence relied on by the court and cited by the Urquharts was inconsequential and insufficient to reasonably support the court's conclusion.

The evidence cited by the Urquharts in their brief is unpersuasive and does not support the court's conclusion. The location of the road was sufficient to allow access the gravel pit via the Carlton parcel and Lot 4. The trial court misconstrued the "dead end" notation, and there was access

across Lot 4 despite the absence of a paved road. Although the land was in part purchased as a buffer, this is not inconsistent with occasional use of the road and Lot 4 to access the pit. Finally, there was no explicit finding that Dickson's evidence or testimony was not credible. Both the court's finding regarding intent and the conclusions of law based upon the finding should be overturned as not supported by substantial evidence.

A. THE DEED AND SHORT PLAT DO NOT RESTRICT USE OF THE ROAD.

The deed dated September 14, 1979 and the short plat do not restrict access. It is clear from the face of the short plat (Exhibit 15 and Appendix C to Respondents' Brief) that the process was begun in March 1979 and the plat was recorded on September 21, 1979. During this process, the deed (Exhibit 14 and Appendix B to Respondents' Brief) was recorded on September 14, 1979.¹ Thus, the deed and short plat were part of the same transaction and should be construed together to determine Dickson's intent. *See Standring v. Mooney*, 14 Wn.2d 220, 227, 127 P.2d 401 (1942).

Neither the deed nor the plat state that use of the road is restricted to access solely the four lots of the short plat. The language on the short plat is standard language that does not restrict use to particular parcels, but

¹ Whether the deed had the legal effect of creating an easement is probably irrelevant, but the language is certainly persuasive evidence of Dickson's intent as to how the road would be used in 1979.

rather limits the number of roads to comply with county requirements. Dickson did not extend the road into Lot 4 because it intended to retain that lot. Thus, a road or easement across Lot 4 was unnecessary. As the Urquharts point out, Dickson could not have had an easement across its own Lot 4. *E.g. Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 853, 351 P.2d 520 (1960). Similarly, Dickson did not pave the entire road because it would have been an unnecessary expense. RP Vol. 2 at 102:1-6. The location of the private road was perfectly consistent with Dickson's intent to use the road to access the gravel pit via Lot 4.

The Urquharts erroneously claim on page 8 of their brief that there was no access to the Dickson gravel pit from Lot 4 when it was acquired in 1979. To the contrary, Lot 4 shares a long common boundary with the Carlton parcel, acquired by Dickson in 1976 (Exhibit 40; RP Vol. 1 at 8:4-8; RP Vol. 2 at 74:19-24, 75:9-25). Thus, Dickson could, and did, access its property via Lot 4 and the private road continuously from 1979 to the present. RP Vol. 2 at 75:21-25.

Quite simply, there is no evidence in any of the recorded instruments or in the statements of the grantor that the easement was restricted to access only to the lots of the short plat. Thus, the holding of *Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986), is inapplicable. The easement at issue in *Brown* was specifically restricted to access a single

parcel only. *Id.* at 368.² Further, *Kemery v. Mylroie*, 8 Wn. App. 344, 506 P.2d 319 (1973), cited in Dickson's opening brief, confirms that an easement can be appurtenant to land not physically adjacent to the easement itself.

B. THE REFERENCE TO A "DEAD END" DOES NOT CONTRADICT DICKSON'S INTENT TO USE THE ROAD TO ACCESS ADDITIONAL PROPERTY.

The Urquharts have overstated the conclusions that can reasonably be drawn from the "dead end" notation on Exhibit 13. The testimony of Bill Dickson confirmed that he had made that note at some point, but this is quite different from the claim on page 10 of the Urquharts' brief that "Dickson, over the years, characterized 46th Street East as a 'dead end'."

Both Bill and Richard Dickson testified that the road was used to access the pit. RP Vol. 1 at 14:10-19, RP Vol. 2 at 86:8-9, 15, 107:2-4. Dickson did not distinguish Lot 4 from the rest of the pit. Exhibit 13 (Appendix A to Respondents' Brief) (showing no discernible difference between Lot 4 and the rest of the pit). The road beyond the boundary of Lot 4 was informal and primitive, and access was restricted. RP Vol. 1 at 32:18-19, 33:13-17; Exhibit 33 (Appendix A hereto) (photo of gate). For

² Although *Brown* stated the rule that an easement specifically limited to benefit one parcel cannot be used to benefit other land, it is interesting that the Court did not enjoin use of the easement to access the additional parcel. *Id.* at 373.

these reasons, the road could be considered in one sense a “dead end,” and yet still be used by Dickson to access the pit.

As mentioned in the opening brief, the Urquharts’ Exhibit 33 concedes that the gate at the boundary of Lot 4 was an “access gate to [the] pit.” In light of these and other facts, a conclusion that Dickson did not intend to access the pit via the private road is unreasonable based solely on the “dead end” notation.

C. IT WAS POSSIBLE TO ACCESS THE PIT WITHOUT A FORMAL PAVED ROAD ACROSS LOT 4.

Finding of Fact No. 8 has been similarly misconstrued by the Urquharts. Significantly, this finding does not state that the road was created *solely* for use by the four lots of the short plat, which is the entire issue of this appeal. Further, the formal road did end at the boundary of Lot 4. However, there was ample testimony at trial that an informal road continued across Lot 4 and into the rest of the gravel pit.³ RP Vol. 1 at 32:18-19, 33:13-17. Exhibit 13 does not show a road across Lot 4, but it also does not show *any* roads within the gravel pit due to the nature of

³ To the extent Finding of Fact 8 is interpreted to mean that no road at all, including an informal road, existed on Lot 4, Appellants assign error to this finding as well. Because RAP 1.2(a) requires a liberal interpretation of the rules “to promote justice and facilitate the decision of cases on the merits,” RAP 10.3 does not prevent an appellate court from considering a party’s argument despite a failure to properly assign error if the claimed error is discussed in the brief. *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582, 915 P.2d 581 (1996); *see also Harris v. Urell*, 133 Wn. App. 130, 135 P.3d 530 (2006); *State v. Clark*, 53 Wn. App. 120, 765 P.2d 916 (1988) (superseded on other grounds as recognized in *State v. C.M.B.*, 130 Wn. App. 841, 125 P.3d 211 (2005)).

these roads. RP Vol. 1 at 15:14-18, 34:17-23. Quite simply, Dickson did not need a paved road in order to use the road as intended.

D. LOT 4 WAS USED BOTH FOR ACCESS AND AS A BUFFER.

The Urquharts make unsupportable conclusions about the use of Lot 4 as a buffer. Mr. Urquhart did not testify that Lot 4 was to be used *solely* as a buffer, and reliance upon his testimony to determine Dickson's intent is unreasonable. RP Vol. 2 at 147:17-22. Dickson intended to use the area both as a buffer and as an alternate access. RP Vol. 1 at 11:22-12:4; RP Vol. 2 at 82:21-23. The claim that land used as a buffer cannot be used for occasional truck traffic is not supported by fact or law. In fact, it is more likely that use as a buffer was a secondary intent at the time of Dickson's purchase of the Woempner parcel. As the Urquharts point out, Dickson did not at that time own the land immediately to the west of Lot 4 (although it owned the parcel to the south), so it is unlikely that it would have purchased the land solely to use as a buffer.

E. THE TRIAL COURT DID NOT MAKE A FINDING REGARDING CREDIBILITY.

Finally, the Urquharts correctly state that credibility determinations made by the trial court are rarely reconsidered on appeal. However, the trial court did not make an explicit finding regarding credibility in this matter. After stating that the trial court is generally better able to judge

credibility, *Feak v. Lacamas Valley Ranch*, 34 Wn.2d 798, 808, 210 P.2d 133 (1949), confirms that reversal of a trial court's findings of fact is appropriate when "the evidence tending to support the trial court's decision [is] inconsequential and of slight probative effect." The Urquharts cite *Fisher Prop. v. Arden-Mayfair*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990), but the trial court in that matter had made an express determination regarding the credibility of each parties' witnesses.

There is no indication in the court's decision as to a determination of credibility. Finding of Fact 11 does not state that the Dicksons' testimony was not believed, but rather identifies the minimal facts upon which the court based its finding. As discussed, these facts are insufficient to persuade a reasonable person of the court's conclusion, and the finding should be overturned.

F. CONCLUSION

Dickson does not argue simply that there alternative explanations for the evidence offered at trial. Rather, the trial court's decision should be overturned because the meager evidence relied upon by the trial court was insufficient to support its conclusion regarding intent. The trial court was asked to determine whether Dickson intended to restrict use of the private road at the time it was created. Abundant evidence was offered to show that there was never such intent.

1. There was no restrictive language on either the deed (Exhibit 14) or the short plat (Exhibit 15), and the grantor did not believe the language to be restrictive. RP Vol. 2 at 93:7-10.

2. The only individuals involved in creating the road testified that it was intended to be used to access the gravel pit. RP Vol. 1 at 11:22-12:4; RP Vol. 2 at 82:21-23.

3. Prior to recording the short plat, the road was widened from 40 to 60 feet to accommodate truck traffic. Exhibits 22 (Exhibit B hereto), 23 (Exhibit C hereto); RP at 85:12-14.

4. The gate in place at the boundary of Lot 4 was referred to by the Urquharts as the “access gate to pit.” Exhibit 33 (Exhibit A hereto).

5. Over the years, Dickson cleared along the road, maintained it, and attempted to widen it. RP Vol. 2 at 100:12-18, 154:19-20, 155:10-11.

6. It was undisputed that the road was used for Bill Dickson’s personal access to the pit. RP Vol. 2 at 175:18-19, 200:4.

The inconsequential and minimal evidence relied on by the trial court or cited by the Urquharts cannot be reasonably construed to support the court’s conclusion. The frequency of subsequent use of the road has little bearing on the critical issue of Dickson’s intent at the time of creation. The extent of paving on the road and the road’s location are entirely consistent with Dickson’s intent to use the road to access the pit

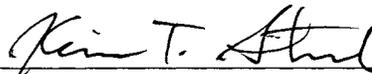
via Lot 4 and the parcel immediately south. Finally, because the formal road did not need to extend beyond the boundary of Lot 4, and a gate was in place to allow access to authorized vehicles, it is unreasonable to conclude that the "dead end" notation meant that Dickson had never intended to use the road for access.

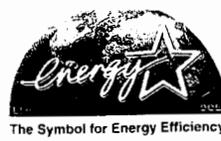
In light of the foregoing, the trial court's finding that Dickson did not intend the road to be used to access additional land was based on insufficient evidence and must be overturned. Substantial evidence available at trial confirmed Dickson's intent to use the private road to access its other property. The easements must be construed consistent with this intent, and the judgment reversed.

DATED this 21st day of December, 2006.

Respectfully submitted,

DICKSON STEINACKER LLP


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KEVIN T. STEINACKER, WSBA #35475
Attorneys for Appellant



Look for the Energy Star label on appliances, consumer electronics, office equipment, home heating & cooling systems, lighting, windows & other building products.

ACCESS SITE 7

PIT FROM EASEMENT

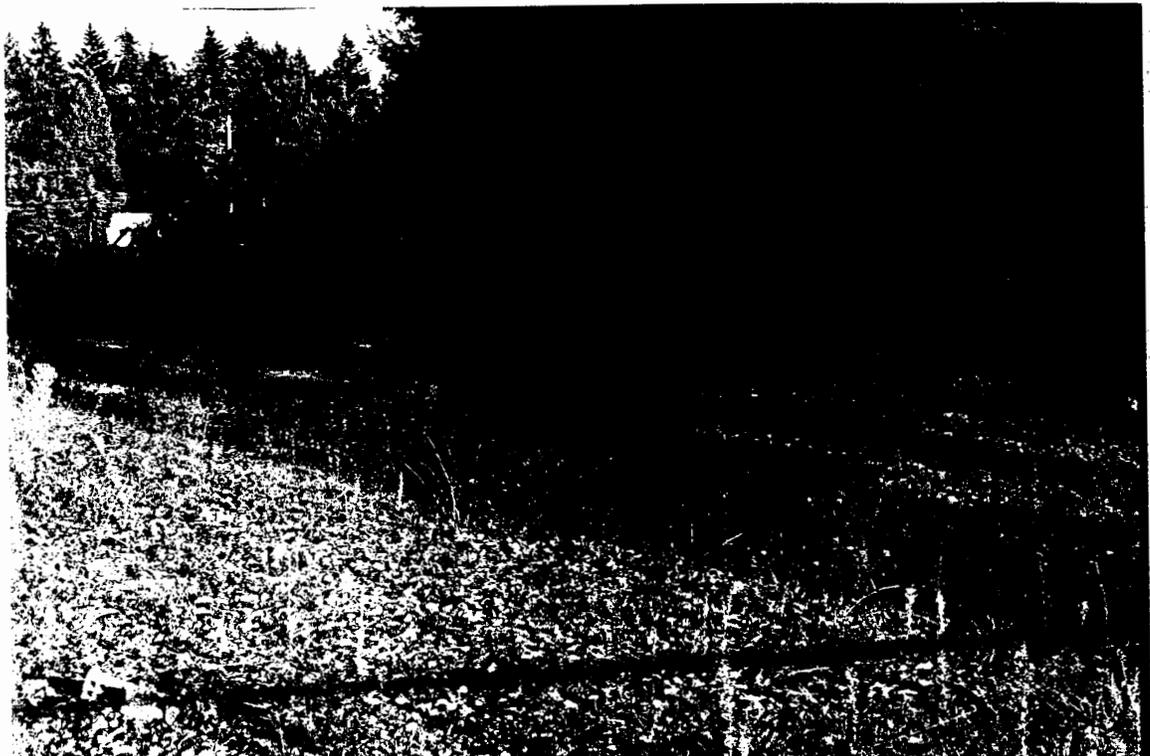
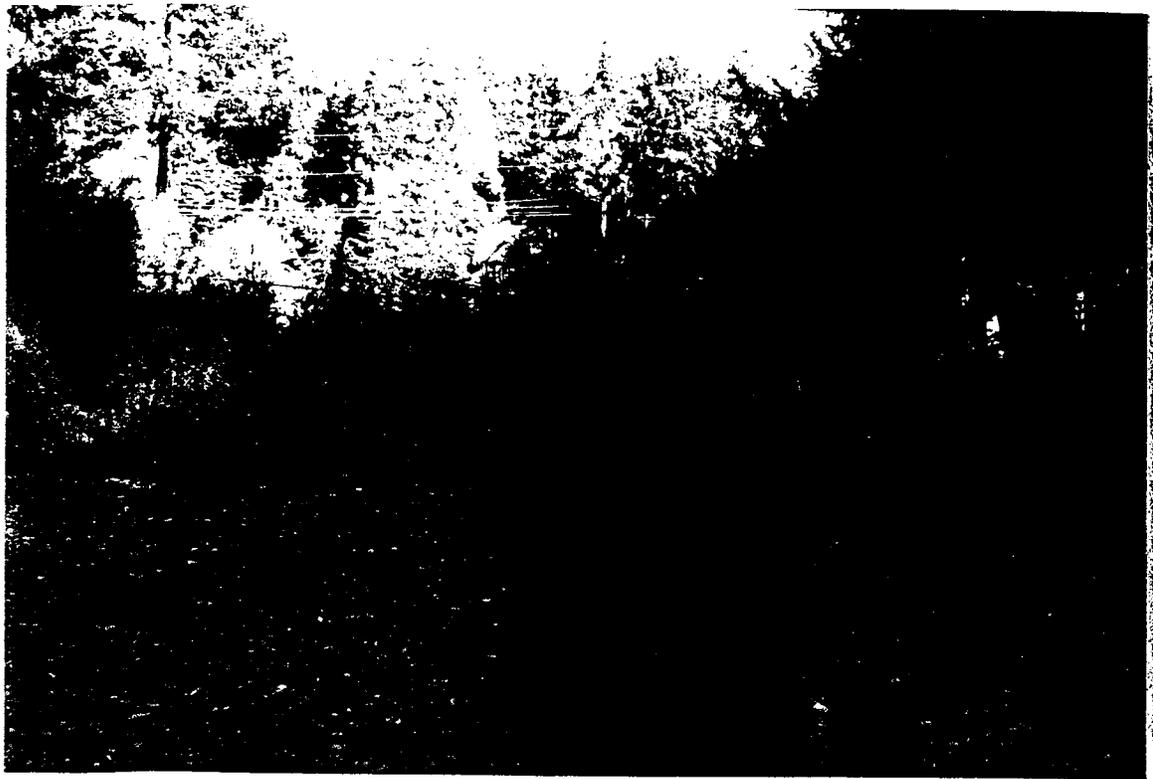
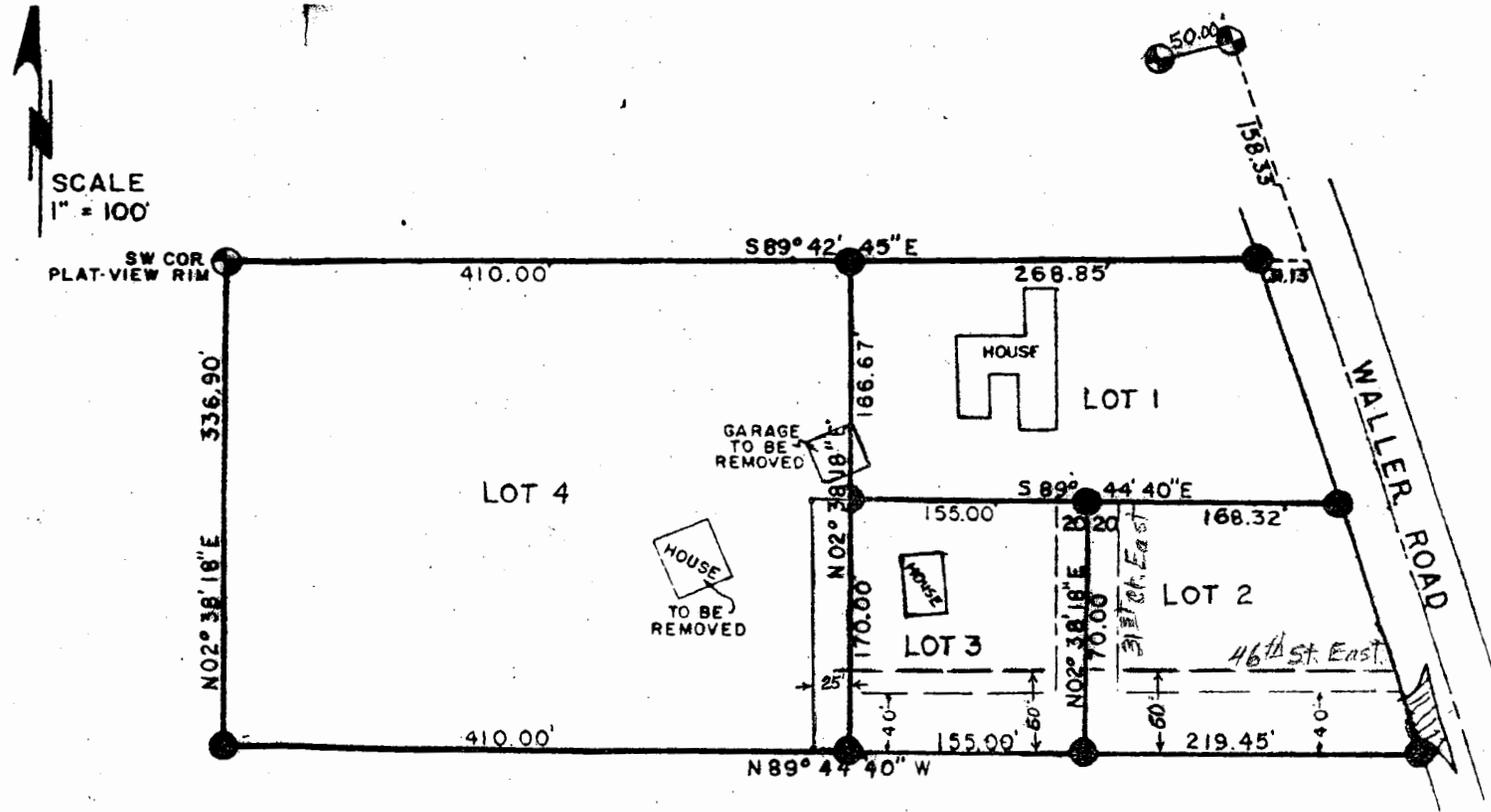


Exhibit 33
Appendix A



MASTER



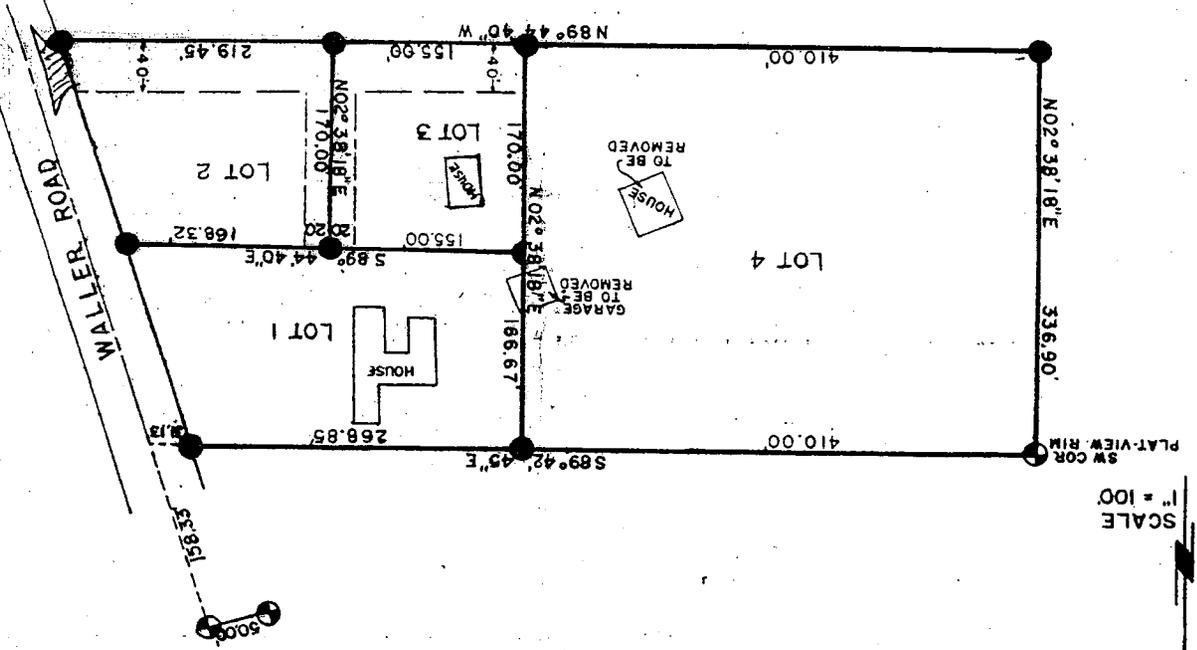
- 1- ROAD EASEMENT SOUTHSIDE OF LOTS 2 AND 3 TO BE WIDENED TO 60'
 - 2- WESTERN LOT LINE OF LOT 3 TO BE MOVED 25' TO THE WEST.
- PLEASE NOTE THESE CHANGES ARE IN RED WITH LINES AND FOOTAGE MARKINGS MADE,

DESCRIPTION:

THE SOUTH HALF OF THE NORTHWEST QUARTER OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 14, TOWNSHIP 20 NORTH, RANGE 3, TOGETHER WITH: THAT PART OF THE SOUTH HALF OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 14, TOWNSHIP 20 NORTH, RANGE 3, LYING WEST OF THE WALLER COUN ROAD.

LEGEND:

DESCRIPTION:
 THE SOUTH HALF OF THE NORTHWEST QUARTER OF
 THE SOUTHWEST QUARTER OF THE SOUTHEAST
 QUARTER OF SECTION 14, TOWNSHIP 20 NORTH, RANGE
 3, TOGETHER WITH THAT PART OF THE SOUTH HALF
 OF THE NORTHEAST QUARTER OF THE SOUTHWEST
 QUARTER OF THE SOUTHEAST QUARTER OF SECTION 14,
 TOWNSHIP 20 NORTH, RANGE 3, LYING WEST OF THE
 WALLER COW ROAD.



SCALE
 1" = 100'

NOTARY PUBLIC, IN AND FOR THE STATE OF WASHINGTON
 Residing at

THE APPROVAL OF THIS SHORT PLAT IS NOT A GUARANTEE
 THAT FUTURE PERMITS WILL BE GRANTED.

This plan was
 changed and the
 change was
 recorded by
 the County,
 46th St was
 widened to
 60' from 40'
 and Lot 3 was
 widened 25'
 to the West
 and a square
 40 x 40 was
 added to the
 NW cor. of
 Lot 3 around
 the garage
 located there

Exhibit 23
 Appendix C

CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the Appellant's Reply Brief to counsel of record as follows:

Steven L. Larson
Attorney for Respondents
1201 Pacific Ave., Ste. 1725
Tacoma, WA 98402

Service was made by:

- First class mail
- Facsimile
- Hand delivery

DATED this 27th day of December, 2006.

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY _____
REPLY

Amy M. DeSantis
Amy M. DeSantis