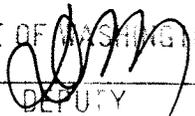


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 37772-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOSEPH A. BACUS AND SANDRA BACUS, husband and wife,
Appellants,

vs.

STANLEY AND CATHERINE ANDERSEN, husband and wife,
Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

When the Bacus' purchased lot 3 of the Patricia Andersen Short Plat they reviewed the public records and determined that the roadways shown on the short plat map were private roads. Cp. 91

The Bacus' treated the roadways as their private roads. The Bacus' had no question regarding the fact that the roadways were private roads until 2002 when Andersen claimed that they were easements that could be used for development purposes.

There are numerous ways to gain ingress and egress for the entire short plat from Sprague Landing Road which is a public road.

II. SUMMARY

1. The Bacus' filed this petition to quiet title when they learned that the Andersen's were claiming that they owned roadway easements on lot 3 that they could use for development purposes.

2. The Andersen's created this short plat. They continue to own all land in the short plat except lot 3 that is owned by the Bacus'.

3. The trial court sustained Andersen's motion for summary judgment finding that the Bacus' petition was time barred by either the retroactive application of the statute of limitations in LUPA or the reasonable time statute of limitations imputed to the writ of review.

4. The Andersen's have known that this short plat was not approved by the county since before it was recorded in 1989.

A short plat requires the approval of the health district, the county engineer, the planning department and the treasurer be certified on the right legend of every short plat map before a short plat can be approved. On the right legend the health district certified that the short plat was not approved. The Andersen's prepared the short plat map and have been on actual notice that the short plat was not approved since the health district's written disapproval was certified on the right legend of the short plat map on June 21, 1989.

The Andersen's repeated statements that it is unfair to vacate this short plat after 13 years is without merit because they have been on actual notice that it was not approved from the very beginning.

There are no third party interests involved in this matter because only the Bacus' and the Andersen's own land in the short plat.

Neither LUPA nor the writ of review applies to this case because they are not triggered until there is a land use decision. There wasn't a land use decision in this case because the short plat was never approved.

Additionally, this is not a land use case. This case involves an ownership interest in land. Neither LUPA nor the writ of review applies to cases involving ownership interests in land. Additionally, LUPA does not apply retroactively.

5. If this short plat had been approved, the roadways on lot 3 could not be easements because they do not comply with the short plat ordinance requirement that easements must be dedicated to a "person or persons, corporation or entity or the public."

The Andersen's have admitted in their recorded private roadway agreement; in their affidavit attached to their motion for summary judgment and on page 16 of their Response Brief that the roads depicted on the short plat map are private roads.

The short plat ordinance makes a clear distinction between “easements” and “private roads.” Although they both can be used for ingress and egress, lot owners can deny usage of private roads.

The Bacus’ denied usage of the private roads on lot 3 to all others in their recorded roadway revocation document. Cp 90.

6. Owners of servient tenements can vacate alleged easements on their land by adverse possession in the same way and for the same reasons as any other adverse possession claimant.

In this instance the Bacus submitted admissible evidence pursuant to RCW 9A.72.085, that was not disputed by the Andersen’s, establishing that, if there were any easements on the roadways on lot 3, they were extinguished through adverse possession pursuant to RCW 7.28.070.

7. A large part of the problem in this case was caused by the local title company. The deed from Stanley Andersen to his former wife Patricia Andersen merely made reference to the short plat map. Subsequent deeds were drawn subject to easements as shown on the short plat map. It is clear that the local title company did not understand that the roadways did not meet the short plat ordinance requirements for creating

easements. They merely reacted to what they saw on the short plat map. The easements are not created when they do not meet the ordinance requirements.

III. ARGUMENT

(An Appeal of a Summary Judgment is heard by the appellate court de novo on the law based upon the record from the trial court. The trial court determined that the Bacus' did not have the right to maintain their cause of action because it was filed out of time. The general rule that "questions not raised in the court below will not be considered on appeal...does not apply when the question raised affects the right to maintain the action." *Maynard Investment Co. Inc. v. Marshall McCann, et.al.*, 77 Wash. 2d 616, 621, 465 P. 2d 657(1970))

1. a. This alleged short plat (Cp. 91) was never approved and consequently neither LUPA nor the writ of review applies.

This is not a challenge to the Patricia Andersen Short Plat. This case is based upon the fact that the Patricia Andersen Short Plat has never existed because it was never approved by Skamania County. Collateral

attacks on short plats that are covered by land use statutes of limitations relate to allegations that for one reason or another the short plat is unlawful. This case is based upon the fact that there is no short plat.

The trial court's ruling and the Andersen's case rest upon the assertion that this short plat was approved. Neither LUPA nor the writ of review is triggered until a short plat is approved. *Overhulse Neighborhood Assoc. v. Thurston County, No. 20165-8-11 (Wash. App. Div. 2 03/28/1997)* This short plat was not approved for a number of reasons. Among them is the fact that the health district disapproved the short plat.

RCW 58.17.060 states that RCW 58.17.110 applies to short plats. RCW 58.17.110(2)(a) states a short plat "shall not be approved unless the ...county makes written findings that: a) appropriate provisions are made for ...potable water supplies and sanitary wastes." Above his signature on the face of the short plat map the health district sanitarian states "adequacy of water supply is not guaranteed..." Within the lot lines of lot 2 he states "no subsurface sewage disposal site has been located on this lot." (my emphasis)

Since the short plat was not approved there were no easements created on lot 3.

The fact that the short plat was not approved and consequently there were no easements on lot 3 was initially set forth in the Bacus' initial pleading – the Petition to Quiet Title.

The Andersen's prepared the short plat map. The approval of a short plat takes place when the health district, county engineer, planning department and treasurer sign and certify on the right legend of the short plat map that it is approved. SKA 17.64.125 Absent these approvals there is no short plat. This right legend is the location where the health district disapproved the short plat. The disapproval is dated 6/21/89.

The Andersen's have made much ado about the fact that it is unfair to challenge the existence of a short plat after 13 years. The fact is that they have been on actual notice that the short plat was not approved and therefore did not exist since 1989.

Regardless of what may be said regarding other certifications on the short plat map, no county official has the authority to approve a short plat in violation of a state statute.

The health district, county engineer, planning department and treasurer are entirely independent and no one of them can approve a short plat for another.

b. The Andersen's have attempted to negate the health district's disapproval of the short plat by taking several statements on the short plat map out of context.

The Andersen's have taken the statement that "this short plat is approved pursuant to County and State laws" and made it seem to have some significance. This is actually the introductory sentence in a formatted statement that appears on all short plat maps located in the Columbia River Gorge National Scenic. It warns that the short plat may not comply with the legal requirements of the National Scenic Act. It is signed by the Director of the Planning Department.

The form statement is located in the center of the short plat map and states:

"This short plat is approved pursuant to county and state laws. This short plat is within the Columbia River Gorge National Scenic Area Act. Purchasers of lots in this short plat are hereby cautioned that the lots in

this short plat may be inconsistent with this act and the land owner should consult the Columbia River Gorge National Scenic Area manager to determine allowable uses.”

The Andersen’s next made the misleading statement that ““the plat fully complies with RCW 58.17.170 which requires a county to give its “written approval on the face of the short plat.””

RCW 58.17.170 actually states in pertinent part that “...when the ...county finds that the subdivision ...meets the requirements of this chapter, other applicable state laws and any local ordinances adopted under this chapter ...it shall suitably inscribe and execute its written approval on the face of the plat.” Clearly the requirements of RCW 58.17 et. seq. were not met because the health district certified on the short plat map that the short plat did not meet potable water and sanitary sewer requirements in violation of RCW 58.17.110

The Andersen’ misleadly state that the health district signed the plat as if to say the health district approved the plat. The health district did sign the plat when it certified on the plat that the plat was disapproved.

Finally, the Andersen's state that the director of planning "declared and certified that the plat met the minimum requirements of law." This language does not appear on the short plat map. The director of planning states on the short plat above his signature on the right legend that "the layout of this short subdivision complies with Ordinance 1980-07." This merely certifies that the short plat's out boundaries and lot lines are properly drawn.

There was never a land use decision issued in regard to this short plat because this short plat was never approved.

c. It should also be recognized that this case involves the Andersen's claimed ownership of interests in real property – easements. Neither LUPA nor the writ of review apply to cases involving the ownership of real property. Additionally, LUPA does not apply because it is not retroactive.

2. The Andersen's assert that the statutes of limitation in RCW 36.32.330 and RCW 58.17.180 apply. The Supreme Court has held that RCW 36.32.330 does not apply to short plats. It applies to other decisions made by county boards of commissioners. *Cathcart-Maltby-Clearview*

Cnty. Council v. Snohomish County, 96 Wn. 2d 201, 205, 634 P. 2d 853 (1981)

The statute at RCW 58.17.180 merely states that “any decision approving or disapproving a short plat shall be reviewable under chapter 36.70C.” This is the LUPA statute. Prior to this time RCW 58.17.180 referred to the writ of review. Neither LUPA nor the writ of review applies to this case for a number of reasons including the fact that this short plat was never approved.

The Patricia Andersen Short Plat does not exist because it was never approved and the Andersen’s have had actual knowledge of this since 1989.

3. The Bacus’ interest in the land comprising lot 3 is protected even though the short plat was never approved.

Contrary to assertions made by the Andersen’s, the Bacus’ interest in the land comprising lot 3 is protected because RCW 58.17.210 provides for a cause of action against the Andersen’s for selling lot 3 in violation of RCW 58.17 et. seq.

Skamania County is estopped from denying that the sale of the land comprising lot 3 took place because it is culpable for making it possible for the Andersen's to sell lot 3 by unlawfully permitting the recording of a short plat that was not approved.

4. The Andersen's cite some very old cases to support their assertion that the statute of limitations at RCW 4.16.020 does not apply to petitions to quiet title. This was not the holding in these cases.¹ Every reported case on this subject in this state has held that RCW 4.16.020 does apply to quiet title actions. *Magelssen v. Cox*, 68 Wash. 2d 785, 788, 415 P. 2d 645 (1966) and *Butler v. Andersen*, 71 Wash. 2d 60, 64, 426 P. 2d 467 (1967)

5. The Andersen's incorrectly assert that the 10 year statute of limitations in RCW 4.16.020 begins to run when a short plat is approved. This is incorrect. Aside for the fact that this short plat was never approved, RCW 4.16.020 makes it very clear that an action can be brought if the Bacus' were "seized or possessed of the premises in question within

¹ *Wagner v. Law*, 3 Wn. 500, 28 P. 1109 (1901) – The holding in this case was that in quiet title action an action for recovery can be brought within 10 years.

Andersen v. Hall, 91 Wn. 376, 157 P. 996 (1916)-The holding in this case was that a party has a right to file a petition to quiet title as long as he remains in possession.

Inland Empire Land Co. v. Grant County, 138 Wn. 439, 245 P. 14 (1926)-the holding in this case was that a petition to quiet title to remove a cloud on a title is not subject to the general statute of limitations.

ten years before the commencement of the action.” The Bacus’ purchased lot 3 in 1995 and have continuously owned it to the present date.

6. Aside from the fact that the short plat was never approved, this short plat map is incapable of creating easements.

The Andersen’s incorrectly claim that “the law does not require any special language to create an easement.” This would be correct if we were dealing with the common law. This issue does not involve the common law it involves statutory law as contained in the Skamania County Short Plat Ordinance. RCW 4.04.010 provides that statutory law prevails over the common law. *Senear v. The Daily Journal-American*, 97 Wash. 2d 148, 152, 641 P. 2d 1180 (1982)

The short plat ordinance states that an easement cannot be created unless it is “granted by a property owner to specific person or persons, corporation or entity or to the public ...” (my emphasis) SKA 17.64.020-E

The statement on the short plat map defining Patricia Road states “Patricia Road (private) to provide access to lots 2 & 3.” The statement on the eastern border of lot 3 states “roadway easement for the remainder of the property.

Regardless of any arguments to the contrary these roadways cannot be easements because they do not meet the requirements of law as mandated in the short plat ordinance.

These roadways are defined by the short plat ordinance as “private roads.”

A “private road” is “every way or place in private ownership and used for travel by the owner or those having express or implied permission from the owner but not by others.” (my emphasis) SKA 17.64.020-K

The Bacus’ revoked any express or implied permission to use of these private roads in their recorded Revocation of Roadway document.

On page 16 of their Response Brief the Andersen’s have twisted SKA 17.64.020 to state “the plain language of SKA 17.64.020 states that the definitions only apply to usage within the code section.”

SKA17.64.020 actually states that “whenever the following words or phrases appear in this chapter (the chapter is 17.64 which is the short plat ordinance) they shall be given the meaning attributed to them by this section.” Easement and private road are defined at 17.64.020-E and K and their definitions must control when dealing with short plats.

The Andersen's cite to irrelevant cases asserting that the no particular words are necessary to create an easement and that the intent of the plat applicant must control. In *M.K.K.I., Inc. v. Kruger*, 135 Wn. App. 647, 654, 145 P.3d411 (2006) the court was dealing with the common law not statutory law.

The Andersen's cite to *Selby v. Kundson*, 77 Wn. App. 187, 1949, 890 P. 2d 514 (1995) saying that it states that "the intent of the plat applicant determines whether a plat grants an easement." This is taken completely out of context. *Selby* involves allegations of an ambiguity on a plat map. The court held that the best evidence was the plat itself and parol evidence would not be admitted unless the court found an ambiguity. The court found no ambiguity. *Selby* at 150-152

The Andersen's misleadingly refer to the deeds of conveyance for lot 3. The deed from Stanley Andersen to his former wife Patricia Andersen makes no reference to easements. The deed from Patricia Andersen to David Prosser and from David Prosser to the Bacus' reference "easements as shown on the short plat map." These deeds were prepared by a local title company. Seeing roadways on lot 3, they called them easements. The law does not permit them to be easements because

they were not created in compliance with the short plat ordinance. The deeds do not create easements because they merely reference the short plat which has no easements. Cp. 53, 60, 61, 62

The fact that these roadways are “private roads” should be a nonissue because the Andersen’s admit that they are private roads on page 16 of their Response Brief and in their private roadway agreement and the affidavit supporting their motion for summary judgment.

7. The Bacus’ continued ownership of the entirety of lot 3 in fee simple absolute with no easement interest owned by the Andersen’s is assured by their adverse possession pursuant to RCW 7.28.070.

The Bacus’ raised this issue in their Motion for Reconsideration. The facts establishing adverse possession were sworn to under oath of perjury and are admissible pursuant to RCW 9A.72.085.

Since the Bacus’ have held lot 3 and the roadways under good faith color of title and paid all taxes on the roadways for more than seven years, they need only prove “actual, open and notorious possession for those seven years to prove adverse possession.” *Harris v. Urell*, 133 Wash. App.130, 134, 135 P. 3d 530 (2006)

“Actual, open and notorious possession” is proven pursuant to RCW 7.28.070 if the “claimant used the land so that any reasonable person would assume that the claimant was the owner.” *Andersen v. Hudak*, 80 Wn. App.398, 404-405, 907 P. 2d 305 (1995)

In *Harris v. Urell* the *Washington Appellate Court, Division 2* rendered a decision in favor of the claimant in an adverse possession case concerning a driveway. The court found that the claimant had used and maintained a driveway exclusively at her own expense and for her own use. The court also stated that her “actual, open and notorious possession” was not disturbed if others used the driveway on an occasional transitory basis. The court found that her actions had “satisfied every element of her adverse possession claim.” *Harris at 535.*

The Bacus’ sworn testimony states that they had “paid all taxes related to the roadways, done all repair and improvements on the roadways, fenced in the roadways for pasture and took all action with the direct knowledge of the Andersen’s and the general public to indicate that they were the owners of the roadways.”

The Andersen’s have never disputed these facts.

The Andersen's incorrectly cite two cases in an effort to challenge the Bacus' adverse possession.

They cite the *City of Edmonds v. Williams*, – the Andersen's state that the holding was that “the termination of easements by adverse possession, or any other reason is highly disfavored by the law.” (I was unable to find neither this language nor anything even remotely similar in this case.) The actual case holding is that adverse possession does not run against a municipality when it owns land in its governmental capacity. *The City of Edmonds v. Williams*, 54 Wash. App. 632, 634, 774 P. 2d 1241 (1989)

The Andersen's cite *Cole v. Laverty*, 112 Wash. App. 180, 49 P.3d 924(2002) – they state that “the law requires a much higher threshold when the claim is being used to terminate an easement by adverse possession.” I was unable to find this quotation in the Cole case.

There are two statutes covering adverse possession RCW 7.28.010 which, applies to situations in which the claimant has paid the real estate taxes for at least 7 years and RCW 4.16.020 applies when the claimant has not paid the taxes and the claimant is required to adversely possess the

land for 10 years. Cole mistakenly cites to RCW 7.28.010. However, the discussion clearly indicates that Cole concerns RCW 4.16.020 because the case indicates that the 10 year statute of limitations applies and the requirement of hostile possession applies. These are both requirements in RCW 4.16.020, but are not found in RCW 7.28.010. The Bacus' claim of adverse possession is subject to RCW 7.28.010 because they have paid the real estate taxes on the roadways since 1995 and are not required to prove hostile use or possession. When the court made reference to the requirements of RCW 4.16.020 it was referring to the hostile use requirement and stated that "hostile use was difficult to prove." *Cole at 18.*

The Andersen's assertions regarding the Bacus' extinguishing the purported easements on lot 3 are mistaken. "...Whether an easement is extinguished by adverse use is determined by applying the principles that govern acquisition of title by adverse possession...Annot. Loss of Private Easement by Nonuser or Adverse Possessor, 25 A.L.R. 2d 1265,? 15.48 (2d ed. At 1274-75; Washington State Bar Ass'n. Real Property Desk Book? 1538 (2d ed. 1986)" *The City of Edmonds v. Kenneth E. Williams, Sr. et.al., 54 Wash. App. 632, 633, 774 P.2d 1241 (1989)*

The Bacus' have satisfied every requirement specified in RCW 7.28.070 for acquiring title to the alleged easements on lot 3.

8. The Andersen's are not entitled to attorney fees and costs.

a. The Andersen's state that they are entitled to fees and costs pursuant to RAP 18.1 and RAP 18.9 because the Bacus' appeal is frivolous.

The single fact that the trial court based its decision on the retroactive application of LUPA and the Bacus' in their Opening Brief demonstrated the neither the Legislature nor the Courts intended for LUPA to be retroactive should defeat any claim that their appeal is frivolous.

b. The Andersen's claim that they are entitled to fees and costs pursuant to RCW 4.84.370. The statute makes it very clear that it only applies if there was an administrative adjudication before the county. There was no such adjudication. The short plat was simply recorded without any challenge.

The first adjudication regarding this short plat was the Bacus' petition to Quiet Title before the Superior Court in 2002.

IV. CONCLUSION

This is a case in which a land speculator/developer was able to get a short plat map recorded knowing that it was not approved.

The developer prepared the short plat map. The health district's statement on the face of the short plat map provides that the short plat was disapproved.

The statute of limitations related to land use, LUPA and the writ of review; do not apply until a short plat is approved.

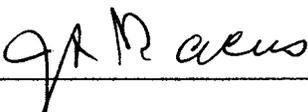
The roadways, drawn on lot 3 cannot be easements because they are not granted to a "person or persons, corporation or entity or to the public."

The Bacus' have met all the requirements for extinguishing easements by adverse possession as outlined by the State Appellate Court, Division 2.

The Bacus' request that either the Patricia Andersen Short Plat be vacated; the roadways on Lot 3 be determined to be private roads as

defined by the Skamania County Short Plat Ordinance or this case be
remanded to the trial court for further proceedings.

Dated this 4th day of December 2008.



Joseph A. Bacus, Pro Se

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I hereby certify that on the 4th day of November, 2008, I caused to
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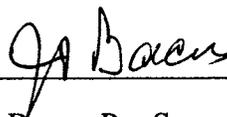
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December 2008, I served one correct copy of the foregoing APPELLANTS REPLY BRIEF by First Class Mail to:

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