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STATE OF WASHINGTON

No. 44689-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK L. BUBENIK and MARGARET M. BUBENIK,

Appellants,

v.

THOMAS J. MAUSS and KAROL K. MAUSS,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE GAROLD E. JOHNSON

BRIEF OF RESPONDENTS

DAVIES PEARSON, P.C.

By: James R. Tomlinson, WSBA #14559
Ingrid McLeod, WSBA #44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Respondents

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I. INTRODUCTION

In this appeal, waterfront property owners Mark and Margaret Bubenik attempt to re-litigate their contentious dispute over a triangular strip of land along their boundary line with their longtime neighbors Thomas and Karol Mauss. This disputed strip of land along the Bubenik-Mauss boundary is 17-feet wide along the waterfront and narrows to a point on the upland edge of the Bubenik and Mauss properties. Within this disputed strip of land, lie a maple tree with a planting bed around its base, a lawn area shared by both the Bubeniks and the Mausses, a walled garden area that both the Bubeniks and the Mausses access and maintain, and the Bubenik's parking area.

Although the Bubeniks and the Mausses had been friendly neighbors for thirty years, ownership of the disputed strip of land became contentious only after the Mausses obtained a survey of their property and the surveyed boundary line did not comport with Mr. and Mrs. Bubenik's understanding of the boundary line. Accordingly, the Bubeniks filed suit seeking to quiet title in the disputed strip of land in their name based on theories of adverse possession and mutual recognition or acquiescence to a common boundary line.

After a four-day bench trial, the trial court concluded that the Bubeniks had not established *any* of the elements of either adverse possession or

mutual recognition or acquiescence to a common boundary line.

Additionally, in an exercise of its equitable discretion in resolving quiet title actions, the court fixed the location of the Bubenik-Mauss boundary line according to the legal description established by the survey that the Mausses obtained to determine the boundaries of their property.

The Bubeniks appeal, arguing that: (1) substantial evidence does not support the trial court's conclusions of law on their adverse possession claim, (2) substantial evidence does not support the trial court's conclusions of law on their mutual recognition or acquiescence to a common boundary line claim, and (3) the trial court abused its discretion in establishing the boundary line according to the Mausses' survey because neither party had requested that relief. This appeal is without basis in fact or law. The Bubeniks seek only to reargue the facts contrary to the court's findings but the court's findings are supported by substantial evidence. This court should affirm and should award the Bubeniks their reasonable attorney fees on appeal.

II. STATEMENT OF FACTS

The Bubeniks and the Mausses have owned adjoining waterfront properties on Henderson Bay for more than 30-years. CP at 210-12. The Bubeniks' parcel is wedge-shaped or trapezoidal, with the waterfront edge measuring approximately 88-feet and the upland edge measuring

approximately 153-feet. CP at 210; RP at 29; Ex. 4. The Bubenik's wedge-shaped parcel is situated to the northeast of the Mauss parcel. CP at 210; Ex. 4. In addition to their shared boundary line, the Bubenik parcel adjoins the a parcel owned by James Niquette to the northeast and the Mauss parcel adjoins a parcel owned by brothers Butch and Rich Hennings to its southwest. RP at 98-100; CP at 236; Ex. 12.¹ A single bulkhead runs along the waterfront edge of the Niquette, Bubenik, and Mauss properties. CP at 213.

A. *When Mr. and Mrs. Bubenik purchased their property, the boundary line that the seller had pointed out to them was not accurate.*

Mr. and Mrs. Bubenik purchased their property in 1979 from William and Florence Bell. CP at 2, 210. When the Bubeniks purchased the property from Mr. and Mrs. Bell, they did not have it surveyed and there were no survey markers identifying the corners of the property. CP at 211.

Despite the absence of survey markers, in 1979, Mr. Bell showed Mr. Bubenik a steel stake in the ground on the upland side of the bulkhead and near the base of a large maple tree. CP at 97, 211. While Mr. Bell stated

¹ Please note that, in Exhibit 12, which is appended to this brief for the court's convenience, the Niquette property is identified as parcel 218, the Bubenik property is identified as parcel 214, the Mauss property is identified as parcel 216, and the Hennings property is identified as parcel 215. RP at 98-100.

that he believed this steel stake marked the boundary with the neighboring parcel, which was then owned by Ralph and Clarissa Fowler, Mr. Bell did not tell Mr. Bubenik that this steel stake was on a surveyed line. CP at 3, 94, 211.

Mr. Bell also showed Mr. Bubenik an orange plastic ribbon tied in a camellia bush on the upland portion of the property. CP at 211. Mr. Bell told Mr. Bubenik that the orange plastic ribbon in the camellia bush also marked the property's boundary line. CP at 98. But, other than the steel stake and the orange plastic ribbon in the camellia bush, nothing else marked the purported boundary line.² CP at 98; RP at 192-94; *see also* Exs. 4, 7, 16, 20.³ Indeed, there is nothing that objectively indicates a physically-designated boundary line on the ground. RP at 192-94.

Mr. Bell told Mr. Bubenik that the boundary line between what would become the Bubenik and Mauss properties projected from the steel stake on the upland side of the bulkhead through the camellia bush and onward past the garage; Mr. Bubenik refers to the line projected from the steel stake upland of the bulkhead through the camellia bush as the "Observed Line." CP at 211; *see also* RP at 168-69, 189-192-96. But Mr. Bell's

² Nothing else "marked" the purported boundary line because the orange plastic ribbon in the camellia bush no longer "marks" the purported boundary line, as it disappeared approximately 5-years ago. RP at 40.

³ For the court's convenience, copies of these Exhibits are appended to this brief.

description of the boundary line was incorrect.⁴ CP at 211. Instead, the steel stake that Mr. Bell showed Mr. Bubenik is situated approximately 14-feet southwest of the actual, legally described boundary between the Bubenik and Mauss parcels as extended to the bulkhead.⁵ CP at 211.

B. *The Bubeniks claim that they acquired title to a triangular shaped strip of land along their boundary with the Mausses that lies between the boundary line as legally described and the boundary line as the Bubeniks believed it existed.*

The Bubenik property's waterfront edge as legally described is 88-feet-long as measured at "points along the sidelines representing the historical meander or high water line."⁶ Clerk's Papers (CP) at 210; RP at 29; Ex. 4. Importantly, the 88-foot waterfront edge of the Bubenik's wedge-shaped property was not measured at the bulkhead; instead, as shown in a survey commissioned by Mr. and Mrs. Bubenik in preparation for litigation, it was measured "approximately 27 feet [upland] from the bulkhead near the Bubenik home[,] where the property is wider."⁷ CP at 210; Ex. 4.

Nonetheless, Mr. Bubenik believed that he "was very aware of the boundary location." CP at 116. Based on Mr. Bubenik's awareness of the

⁴ The Bubeniks do not assign error to this finding of fact.

⁵ The Bubeniks do not assign error to this finding of fact.

⁶ The Bubeniks do not assign error to this finding. *See* Br. of Appellants at 2; CP at 210.

⁷ The Bubeniks do not assign error to this finding. *See* Br. of Appellants at 2; CP at 210.

boundary location, he and his wife performed intermittent maintenance and gardening work in the disputed area, which consists of portions of a planting area around the maple tree, the Bubeniks and the Mausses' shared lawn area, walled garden, and driveway. CP at 215; *see also* Exs. 4, 7. Both the Bubeniks and the Mausses frequently entered all parts of the shared lawn and disputed area. RP at 298.

On several occasions over the years, the Bubeniks deadheaded the rhododendrons and pruned other shrubs in the disputed area. CP at 215. The Bubeniks have also performed intermittent gardening activities in the disputed area, including raking, weeding, planting a few flowers like daffodils and wild geranium, watering plants, and trimming the large maple tree. CP at 215. On one occasion, the Bubeniks even hired a tree trimming service to trim the maple tree. *See* RP at 394.

While the Bubeniks performed most of the gardening and yard maintenance on their side of the disputed line, Mr. and Mrs. Mauss, their son, their tenant, and a professional yard service that they hired also gardened and maintained the planted areas in the disputed strip of land and even onto the Bubeniks' land. CP at 215; RP at 123.

Moreover, the Bubeniks and the Mausses shared responsibility for mowing and maintaining their shared lawn. CP at 215. Both the Bubeniks and the Mausses would routinely mow the lawn beyond the

disputed line and the legally described boundary line. RP at 44-46, 185-86, 229-34, 355-56. At present, the Bubeniks and the Mausses use a mowing service to mow the entire shared lawn area and they share the expense. RP at 136, 326, 358.

As part of their lawn maintenance duties, without consulting the Bubeniks, the Mausses installed a sprinkler system in the shared lawn at their sole expense. CP at 215; RP at 267-70. The Mausses alone have the ability to control the sprinkler system, whose spray reaches beyond the shared lawn area and onto the Bubeniks' property. CP at 55, 133; RP at 267.

C. In 1995, the Bubeniks, Mausses, and Niquettes agreed to replace their shared wooden bulkhead with a shared concrete bulkhead traversing the lengths of their properties and with each of them sharing in the construction costs.

While the single bulkhead along the waterfront edge of the Niquette, Bubenik, and Mauss parcels was originally made of wood, in 1995, Mr. Niquette, Mr. Bubenik, and Mr. Mauss agreed to replace the original bulkhead with a new concrete bulkhead at the same time and using the same contractor, Pacific Northwest Bulkhead. CP at 16, 213. Mr. Bubenik and Mr. Mauss also agreed that they would share the cost to

install new, three-directional stairs in the bulkhead that both of their families and guests would use to reach the beach.⁸ CP at 16, 213.

In agreeing to replace the bulkhead, Mr. Niquette, Mr. Bubenik, and Mr. Mauss all met together on the beach with the bulkhead contractor. CP at 213. During this meeting, they agreed where to build the concrete bulkhead and the three-directional stairs. CP at 213. But they did not discuss or make any agreements regarding the location of their respective boundary lines. RP at 69, 189.

In agreeing where to build the concrete bulkhead and the three-directional stairs, Mr. Bubenik measured the original wooden bulkhead from a nail, which he believed marked the boundary between his parcel and the Niquette parcel, to the steel stake that he believed marked his boundary with the Mauss parcel. RP at 65. Mr. Bubenik determined that the length of the bulkhead between the nail and the steel stake was 88-feet. RP at 65.

Even though Mr. Bubenik measured the length of the bulkhead between the nail and the steel stake as 88-feet, neither Mr. Niquette nor the Bubeniks had ever done a survey of their property to establish the boundary lines and, thus, they could not be certain if the nail from which

⁸ The three-directional stairway is a u-shaped stairway from which a person may access the beach from the Bubenik parcel, the planting area around the maple tree, or the Mauss parcel. *See* Ex. 4, 7, 16.

Mr. Bubenik measured what he believed was his property accurately marked the Niquette-Bubenik boundary. RP at 208-09, 295. Moreover, Mr. Niquette recalled that Mr. Bubenik measured his portion of the bulkhead from the nail at or near the Niquette-Bubenik property line to a hollow, metal pipe in the beach, on the water side of the bulkhead. RP at 215-21.

The metal pipe in the beach that Mr. Niquette believed marked the Bubenik-Mauss boundary line was not the steel stake that Mr. Bubenik believed marked the Bubenik-Mauss boundary line. *See* RP at 219. Mr. Niquette never saw the steel stake on the upland side of the bulkhead that Mr. Bubenik believed marked the Bubenik-Mauss boundary line. RP at 219-21. Mr. Bubenik never saw that hollow, metal pipe in the beach on the waterfront side of the bulkhead that Mr. Niquette believed marked the Bubenik-Mauss boundary line. RP at 298.

In apportioning the cost of the concrete bulkhead and the three-directional stairs, Mr. Niquette agreed to pay for approximately 100.6-feet of bulkhead, Mr. Bubenik agreed to pay for approximately 88-feet of bulkhead and half of the three-directional stairs, and Mr. Mauss agreed to pay for 87-feet of bulkhead and half of the three-directional stairs. CP at 213. Notwithstanding their apportionment of the cost of the concrete bulkhead, Mr. Niquette, Mr. Bubenik, and Mr. Mauss did not have any

discussion regarding their respective boundary lines. RP at 69. Indeed, Mr. Mauss' only purpose on that day was to agree where to locate the three-directional stairs, not to set a boundary line and there was no survey of the boundary line, no discussion of the boundary line, no mention of the steel stake marking a boundary line, and no agreement regarding the location of the boundary line. RP at 348-56.

The location of the boundary lines and Mr. Bubenik's belief that their apportionment of the new bulkhead determined their boundary lines was not obvious to Mr. Mauss; he did not believe that agreeing to apportioning the cost of the new bulkhead meant that they were agreeing as to the locations of their respective boundary lines. RP at 351-52.

Moreover, while Mr. Bubenik believed that the three-directional stairs were centered on the steel stake that he believed marked the boundary between the Bubenik and Mauss parcels, Mr. Mauss believed that the three-directional stairs were built in the same location as the original stairs because that location was best suited for the staircase based on the land's topography. CP at 213-14; RP at 50-51, 69.

After building the concrete bulkhead and the three-directional stairs in 1995, no one saw the steel stake that the Bubeniks believed marked the boundary with the Mausses until it was discovered in December 2012 between two large rocks near the base of the maple tree. CP at 215.

D. The Mausses commissioned a survey to establish their property's boundaries in 2009.

In 2009, the Mausses obtained a survey from AHBL for the purpose of establishing the true, legally described boundary lines of their property and the survey was recorded with the county shortly after its completion.⁹ CP at 217. Before commissioning this survey, the Mausses had been unaware of the precise location of their property's boundaries and was unaware of Mr. Bubenik's Observed Line. RP at 337-44. Survey markers were placed in accordance with this 2009 survey. CP at 217. The results of the AHBL survey showed that the entire three-directional staircase was on the Mausses' property. Exs. 3-4.

Mr. Bubenik was alarmed by the AHBL survey stakes because he "knew" that the stakes did not represent the boundary line. Report of Proceedings (RP) at 85. Moreover, Mr. Bubenik was upset that the Mausses claimed that the boundary line was as AHBL had surveyed it because Mr. Bubenik believed that the boundary line as surveyed by AHBL encroached onto his land by approximately 17-feet. RP at 88. Although Mr. Bubenik did not tell Mr. Mauss that he believed that the AHBL survey did not accurately mark the boundary line, his "message

⁹ The Bubeniks do not assign error to this finding of fact. Br. of Appellant at 2-3; CP at 217.

[was] . . . that we were not recognizing that as the boundary line.” RP at 87.

Accordingly, Mr. Bubenik retained Aspen Land Surveying to survey the boundary line that he believed was accurate, his Observed Line. RP at 91-93. Interestingly, when Aspen first prepared a survey according to Mr. Bubenik’s instructions, Mr. Bubenik was not satisfied with the results because he believed that the survey markers were approximately two feet further onto the Bubenik property than the Observed Line. RP at 287-89. Accordingly, Mr. Bubenik elected not to rely on Aspen’s first survey and instead commissioned a second survey, upon which he does rely in defining the Observed Line. RP at 288.

Aspen conducted its second survey to define the Observed Line according to Mr. Bubenik’s instructions by identifying a point on the bulkhead—the center of the three-directional stairs, which was not a physically-marked boundary point—that *Mr. Bubenik identified* as the boundary point and projecting a straight line back to the southwest corner of the Bubenik property.¹⁰ RP at 93. Despite surveying Mr. Bubenik’s Observed Line according to Mr. Bubenik’s instructions, Aspen had been unable to identify the Observed Line without Mr. Bubenik’s instruction because there is no objective boundary marker at the center of the three-

¹⁰ The Mausses note that, in instructing Aspen on surveying his Observed Line, Mr. Bubenik did not reference the camellia bush or the orange plastic ribbon. RP at 292.

directional stairs or anywhere else along Mr. Bubenik's Observed Line.

RP at 289-90.

Although Mr. Bubenik relies on the second Aspen survey in defining his Observed Line, Aspen's second survey determined that the nail in the bulkhead that Mr. Niquette and Mr. Bubenik had believed marked their boundary was not accurate. RP at 296-97. Still, Mr. Bubenik thought it was a boundary marker based on what his predecessor-in-interest, Mr. Bell had told him. RP at 295-97.

In preparing its survey according to Mr. Bubenik's instructions, the Aspen surveyor reviewed the AHBL survey that the Mausses had commissioned in 2009 to mark the boundaries of their property. RP at 96. Although the Aspen survey differed from the AHBL survey on the Bubenik-Mauss boundary, Aspen's surveyor would not say that the AHBL survey was inaccurate because the properties' legal descriptions were based on a historical meander corner that no longer exists. RP at 96. Because the legal descriptions of the Bubenik and Mauss properties are based on a historical meander corner that no longer exists, surveyors attempt to calculate the position of that historical meander corner based on other measurements but there are several methods that those calculations can be made, which can lead to varied results. RP at 96-97.

Notwithstanding these potentially varied results, the meander line is not necessarily fairly represented by a bulkhead. RP at 99-101. Meander lines remain constant over time, they reflect the shoreline as surveyed by the government when the property was first legally described, which generally was early in the Twentieth Century. RP at 99-101. However, bulkheads are man-made structures that, while along the shore, are not necessarily linked to the historical meander line. *See* RP at 99-101.

E. *The Bubeniks filed suit, asking the court to quiet title in the disputed strip of land in them.*

The Bubeniks filed this litigation, alleging ownership of the disputed strip of land under theories of adverse possession and mutual recognition or acquiescence to a common boundary line. *See* CP at 1-16. The Bubeniks asked the court to change the properties' legal descriptions in accordance with the legal descriptions provided by Aspen in the survey of his Observed Line. RP at 471. In a bench trial, the court heard four days of testimony consistent with the facts described above.

After the close of the parties' cases, the court clarified that the Mausses position was that both: (1) the AHBL survey correctly establishes the Bubenik-Mauss boundary line and (2) the Bubeniks and the Mausses intended for both families and their guests to be able to use the three-directional stairs to reach the beach, meaning that the Mausses would not

object to the court granting the Bubeniks prescriptive use of the three-directional stairs in resolving the case. RP at 455-56, 464.

In issuing its ruling, the trial court considered each element of the Bubeniks' adverse possession and mutual recognition or acquiescence to a common boundary line claims in light of the Bubeniks' burdens of proof. *See* RP (January 18, 2013) at 2-11. After setting out its analysis, the court noted:

I personally went out and took a look at this property. Certainly, in my view of it, even today there is really not a clear line on the property.

. . . .

[I]t just does [not] come to the certain, well defined, and in some fashion physical boundary . . . designated on the ground. It certainly is no express agreement as to a boundary line.

RP (January 18, 2013) at 10. Additionally, while the trial court found Mr. Bubenik's testimony credible as to what he personally believed, the trial court ruled against the Bubeniks on both of their claims. *See* CP at 218-20.

Instead of merely denying the Bubeniks' claims, the court exercised its equitable discretion to settle the boundary line between the Bubenik and Mauss properties. The court stated:

The findings should definitely include . . . the legal description of the parcel in dispute.

In terms of the line itself, the line I would rely upon is the line that was drawn by [AHBL] in 2009, which was the [Mausses'] engineer. The reason that that line . . . was done to establish that property, that was the purpose of it. It's recorded, unrefuted in that court document. The

other line was done at the behest of the plaintiffs to define the line where they believe the line by [acquiescence] was. That was its major purpose. Indeed in order to give the legal description[, as the Bubeniks requested], you [would] have to find the other side as well. That was provided to this court. I do think that being done by agreement. AHBL is the more reliable document, marginally so, but I do think it was more reliable.

Now, *this is a matter of equity*. It is patently unfair in this Court's mind to bar either the current owners, the plaintiffs or their successor in interest access to the beach down the stairway. Those stairs were built for both parties [*sic*] enjoyment and use, they both paid for [them]. I think the Court has the power . . . to fashion a remedy in equity that suits the facts presented in this case. I [am] doing this for two reasons; one it [is] not fair, period. It is inequitable to bar the plaintiffs from using that stairwell . . . the other reason is . . . the defense's acknowledgment that that would be fine in any event. . . . With the parties involved here, I do [not] think it will become an issue . . . *But the concern is that these may not always be the same property owners and use has to be [resolved] with some clarity for both parties so as not to engage in battles in the future.*

RP (January 18, 2013) at 11-12 (emphasis added). Consequently, the trial court found that, had the parties known in 1995 when they constructed the concrete bulkhead and three-directional stairs that the entire stairway was on the Mausses' property, they would have granted a pedestrian easement to the Bubeniks. CP at 217.

Thus, although the trial court settled the legal description of the Bubenik-Mauss boundary line according to the AHBL survey, the trial court granted the Bubenik parcel a perpetual nonexclusive pedestrian easement over the three-directional stairs for ingress and egress. CP at 220.

The Bubeniks appeal.

III. ARGUMENT

Mr. and Mrs. Bubenik argue that (1) substantial evidence establishes that they adversely possessed a strip of land along their boundary line with Mr. and Mrs. Mauss, (2) substantial evidence establishes that Mr. and Mrs. Mauss mutually recognized and acquiesced to the Bubeniks' proposed boundary line, and (3) the trial court erred in relying on a professionally prepared survey to define Mr. and Mrs. Mauss' boundary line once and for all. Because Mr. and Mrs. Bubeniks' arguments are not supported by the record or the law, this court should affirm.

A. *Substantial evidence supports the trial court's finding that the Bubeniks did not adversely possess a strip of land along their boundary with the Mausses.*

Unchallenged findings of fact are verities on appeal. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). Appellate courts review challenged findings of fact and conclusions of law to determine whether the findings of fact are supported by substantial evidence and, if so, whether those findings of fact support the trial court's conclusions of law. *Hegwine*, 132 Wn. App. at 555-56. Substantial evidence supports a trial court's finding of fact when there is sufficient evidence to persuade a fair-minded person that the finding is true. *Hegwine*, 132 Wn. App. at 555-56. In conducting this analysis, appellate

courts view the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party, deferring to the trial court on witness credibility and inconsistent testimony. *Hegwine*, 132 Wn. App. at 556; *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). If the substantial evidence standard is satisfied, an appellate court will not substitute its judgment for that of the trial court. *Proctor v. Huntington*, 146 Wn. App. 836, 845, 192 P.3d 958 (2008). Thus, appellate courts neither weigh evidence nor find facts nor substitute their opinions for the opinions of the fact finders. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Appellate courts review de novo a trial court's conclusions of law. *Proctor*, 146 Wn. App. at 845.

Accordingly, this court's review of the trial court's findings on the Bubeniks' claims of (1) adverse possession and (2) mutual recognition and acquiescence are subject to the substantial evidence standard and this court's review of the trial court's legal conclusions based on those findings is de novo. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997); *Merriman*, 168 Wn.2d 627 (2010).

1. *The Bubeniks failed to meet their burden on their adverse possession claim.*

A party may only obtain title to another's real property by showing that he or she possesses the disputed property and that his or her

possession is: (1) open and notorious, (2) exclusive, (3) hostile, and (4) actual and uninterrupted for the 10-year statutory period. RCW 4.16.020(1); *Teel v. Stadling*, 155 Wn. App. 390, 393-94, 228 P.3d 1293 (2010). The party claiming to have adversely possessed another's land must establish each of these elements by a preponderance of the evidence. *Teel*, 155 Wn. App. at 393-94.

In a boundary line dispute invoking adverse possession, it is immaterial whether or not the parties are aware of the actual boundary because it is the parties' actual treatment of the land that controls, not "their subjective beliefs regarding their true interests in the land." *Reitz v. Knight*, 62 Wn. App. 575, 581, 814 P.2d 1212 (1991). Indeed, a claimant's subjective belief regarding his or her interest in land is irrelevant to the adverse possession analysis. *Chaplin v. Sanders*, 100 Wn.2d 853, 861, 676 P.2d 431 (1984).

This court should affirm the trial court's conclusion that the Bubeniks failed to establish that their use of the disputed property was not open and notorious, exclusive, or hostile; thus, this court should affirm the trial court's decision dismissing the Bubeniks' adverse possession claim.

i. The Bubeniks' use was not open and notorious.

In order to establish an adverse possession claim, a person must establish that his or her use of the land was open and notorious, which

requires proof that: (1) the true owner had *actual notice* of the adverse use throughout the statutory period *or* (2) the claimant used the land in a manner that would cause a reasonable person to assume that the claimant owned the land. *Shelton v. Strickland*, 106 Wn. App. 45, 51-52, 21 P.3d 1179 (2001).

Here, the Bubeniks claim without argument and without citation to the record that “testimony from the Mauss family establishes that Mauss had actual notice.” Br. of Appellant at 39. But the record shows that both the Bubeniks and the Mausses used the disputed land and that the Mausses did not know where the boundary line was before commissioning the AHBL survey in 2009. RP at 299, 337-44. Thus, the Bubeniks’ bald assertion that the Mausses had actual notice is not supported by the record and must fail.

The Bubeniks further claim that they used the disputed land in a manner that would cause a reasonable person to assume that they owned it because they: (1) paid for half of the three-directional stairs and 88-feet of the shared bulkhead; (2) maintained the maple tree, including by hiring a tree trimmer at one time; and (3) maintained the camellia bush and other plants. Br. of Appellant at 38-39. But these sporadic acts on portions of the disputed land were not sufficient to give notice to Mr. and Mrs. Mauss that their property interest was being challenged. Instead, the Bubeniks’

gardening activities are the sort of informal, neighborly activities that longtime acquaintances and next door neighbors with a shared yard could reasonably anticipate. Thus, any use the Bubeniks made of the disputed strip of land was not sufficiently open and notorious to establish adverse possession.

ii. *The Bubeniks' use was not exclusive.*

Merely establishing use of disputed land is not sufficient to prevail on an adverse possession claim; instead, a claimant must show his or her dominion over the disputed land through specific acts of use rising to the level of exclusive possession. *ITT Rayonier v. Bell*, 112 Wn.2d 754, 758-59, 774 P.2d 4 (1989). Shared use of the disputed land is insufficient to establish exclusive possession. *ITT Rayonier*, 112 Wn.2d at 758-60.

Here, the trial court concluded that “Mr. and Mrs. Bubenik did not at any time have ‘exclusive’ possession of the Moss Property up to the disputed line. Maintenance and use of the disputed area was shared.” CP at 219. Without argument or citation to the record, the Bubeniks claim that the Bubeniks’ and Mausses’ agreement to share maintenance duties on their shared lawn “does not change that the substantial evidence established that maintenance of the remaining larger portion of the [d]ispute[d] area was exclusively [possessed] by Bubenik.” Br. of Appellant at 39. This assertion is not supported by the record.

Instead, the record shows that, within the disputed area, the Bubeniks and the Mausses shared lawn maintenance duties, the Mausses installed a sprinkler system at their sole expense that they alone controlled and that watered the shared lawn area and some of the Bubeniks' plants, and that the Mausses hired a cleanup crew at their expense to maintain the disputed area at least once a year. Thus, the Bubeniks' use was not exclusive.

iii. The Bubeniks' use was neighborly and permissive rather than hostile.

A claimant cannot establish an adverse possession claim without proving that his or her possession of the disputed land was hostile, meaning that he or she treated the land as his or her own as against the world. *Chaplin*, 100 Wn.2d at 861. A claimant's use of land cannot be hostile if it is with the permission of the land's true owner because permissive use is inconsistent with the use a true owner would make. *Chaplin*, 100 Wn.2d at 861-62; *Teel*, 155 Wn. App. at 396.

Permission may be either express or implied, meaning that use may still be permissive even when permission was not expressly requested or granted. *Teel*, 155 Wn. App. at 396; *Cullier v. Coffin*, 57 Wn.2d 624, 626, 358 P.2d 958 (1961). Washington courts infer that use is permissive in "any situation in which it is reasonable to infer that the use was

permitted by neighborly sufferance and acquiescence.” *Timberland Homeowners Ass’n v. Brame*, 79 Wn. App. 303, 311, 901 P.2d 1074 (1995). Once permissive, use of another’s land cannot become hostile for purposes of adverse possession unless the claimant makes a “distinct and positive assertion of a right” to the disputed property as a true owner would make. *Timberland*, 79 Wn. App. at 311.

Here, the Bubeniks argue that their use of the disputed land was hostile because they acted as the land’s true owner by “pay[ing] for and maintain[ing a portion of] the bulkhead, the maple tree and the camellia.” Br. of Appellant at 40. They argue that these activities, along with their regular planting and caring for flowers, are consistent with the actions of a true owner. Br. of Appellant at 40. Thus, the Bubeniks claim that their use of the disputed strip of land was hostile under the law. Br. of Appellant at 41.

The Bubeniks are incorrect. Use can still be permissive even if permission is neither expressly requested nor granted. *Teel*, 155 Wn. App. at 396. Further, in accordance with *Timberland*, Washington courts infer that use is permissive in any circumstance where it is reasonable to infer that use is permitted based on neighborly sufferance and acquiescence.

Here, the Bubeniks and the Mausses have been neighbors for more than 30-years. They share a lawn area and both families enjoy, access,

and maintain the disputed strip of land. The record does not show any act by the Bubeniks sufficient to overcome the presumption of permissive use. Thus, any use that the Bubeniks made of the disputed strip of land is presumed permissive and not hostile.

iv. The Bubeniks did not actually possess the disputed land.

While a claimant must actually possess land in order to prevail on an adverse possession claim, a claimant need not actually possess all of the disputed land and need not establish a clearly demarcated line marking a disputed boundary. *Riley v. Andres*, 107 Wn. App. 391, 396, 27 P.3d 618 (2001). Where actual possession is not uniform throughout a disputed piece of land, Washington courts may project a line between objects, where it is reasonable to do so, and thereby establish a boundary line that reflects the claimant's general use and occupation of the disputed area. *El Cerrito v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962). But, where the claimant does not place permanent improvements on the disputed land, isolated and infrequent acts on the land are insufficient to establish actual, uninterrupted possession. *See id.* For example, planting trees, shrubs, and a small garden is not sufficient to establish actual possession. *Spinning v. Pugh*, 65 Wash. 490, 118 P. 618 (1911).

Here, the Bubeniks did not install permanent improvements on the disputed strip of land. Instead, the Bubeniks engaged in only occasional

gardening and yard maintenance acts on the disputed land. Thus, the Bubeniks cannot establish that their use of the disputed land was actual. Because the Bubeniks could not meet their burden on their adverse possession claim, this court should affirm the trial court's ruling denying the Bubeniks' adverse possession claim.

2. *The Bubeniks did not meet their burden on their mutual recognition or acquiescence to a common boundary line claim.*

The doctrine of mutual recognition and acquiescence to a common boundary line supplements the doctrine of adverse possession. *Lloyd v. Montecucco*, 83 Wn. App. 846, 855, 924 P.2d 927 (1996). It allows adjoining landowners to mutually recognize and acknowledge a common boundary line, which then becomes the true boundary line. *Lilly v. Lynch*, 88 Wn. App. 306, 316 P.2d 717 (1997).

In order to establish a true boundary line through mutual recognition and acquiescence, a party must prove three elements by clear, cogent, and convincing evidence: (1) the boundary line between the adjoining properties was 'certain, well[-]defined, and in some fashion physically designated upon the ground'; (2) the adjoining landowners manifested a good faith, mutual recognition of the physically designated boundary line as the true boundary line; and (3) the mutual recognition of the boundary line continued for at least ten years, which is the period required to

establish adverse possession. *Merriman v. Cokeley*, 168 Wn.2d 627, 630, 230 P.3d 162 (2010). A claimant's unilateral acts alone cannot support a claim for a boundary line by mutual recognition and acquiescence. *Heriot v. Smith*, 35 Wn. App. 496, 501, 668 P.2d 589 (1983).

In order to meet the first element and establish a well-defined and physically designated boundary line, a party must establish the presence of a clear dividing line. *Merriman*, 168 Wn.2d at 632. While a fence, wall, or other barrier may establish a clear dividing line, a clear dividing line is not established by three widely spaced markers placed across a weeded area. *Merriman*, 168 Wn.2d at 632. Similarly, a clear dividing line is not even established by a row of trees along a purported boundary line or by a short retaining wall built along part of the purported boundary when there are no other physical markers, *e.g.*, monuments, roadways, fence lines, along the purported boundary line. *Scott v. Slater*, 42 Wn.2d 366, 368-69, 676 P.2d 377 (1953), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984); *Green v. Hooper*, 149 Wn. App. 627, 642, 205 P.3d 134 (2009).

Where a trial court finds that a party fails to meet its burden of establishing these three elements by clear, cogent, and convincing evidence, an appellate court reviewing that finding for substantial evidence will not reverse the trial court unless the evidence shows that the

facts establishing recognition and acquiescence are “highly probable.” *See Merriman*, 168 Wn.2d at 630-31; *see also In re Dependency of C.B.*, 61 Wn. App. 280, 283-86, 810 P.2d 518 (1991).

Here, the record shows that there is insufficient physical designation of the Bubeniks’ claimed Observed Line on the ground to create a common boundary by mutual recognition. There simply is no physical boundary to recognize. Mr. Bubenik conceded that, other than the: (1) center of the three-directional stairs, (2) steel stake that was not seen from 1995 until 2012, and (3) orange plastic ribbon that was on the camellia bush until about five years ago, *there are no other objective markers of his Observed Line*. RP at 192-94. These items provide even less physical designation of the Observed Line than the three widely spaced boundary markers set in a weeded area that were insufficient to support a claim for mutual recognition of a common boundary line in *Merriman*.

Moreover, even assuming the Bubeniks could show a physically-designated Observed Line, they cannot show any agreement regarding its recognition. Instead, the record shows that Mr. Bubenik saw a steel stake and believed it marked the boundary. While Mr. Niquette did not see Mr. Bubenik’s steel stake, Mr. Niquette saw a different marker—a hollow, metal pipe—that he thought marked the Bubenik-Mauss boundary. The Mausses did not see either the steel stake or the metal pipe.

Further, the agreement between the neighbors to replace the original wooden bulkhead with a concrete bulkhead and to share its cost shows only that they divided the costs of constructing a bulkhead. It does not show that their agreement to share the costs of construction the new concrete bulkhead was in any way also an agreement on their respective property interests or the locations of their respective boundary lines.

Accordingly, the Bubeniks did not meet their burden of showing a physically designated boundary on the ground and mutual recognition of that physically designated boundary as the common boundary for 10-years. Thus, the Bubeniks' claim for mutual recognition of a common boundary line must fail and this court should affirm.

B. *The trial court acted within its discretion in crafting an equitable remedy setting the legal descriptions according to the AHBL survey.*

Actions to quiet title are claims for equitable relief that are designed to allow judicial determination of competing claims of property ownership. *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). Trial courts have broad discretion to craft equitable remedies. *SAC Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). When a court is acting in equity, its equitable jurisdiction "extends to the whole controversy and whatever relief the facts warrant will be granted." *Haueter v. Rancich*, 39 Wn. App. 328, 331, 693 P.2d 168 (1984). In

granting equitable relief, a court may craft broad remedies in order to achieve “substantial justice and put an end to litigation” and, in doing so, a trial court’s equitable power “transcends the mechanical application of property rules.” *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003) (internal citations omitted); *Proctor*, 169 Wn.2d at 501. Appellate courts review a trial court’s equitable relief in establishing boundary lines between adjacent properties for an abuse of discretion. *SAC Downtown Ltd. P’ship*, 123 Wn.2d at 204. A trial court abuses its discretion only when it bases its decision on untenable grounds or untenable reasons. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Here, the Bubeniks invoked the court’s equitable powers by filing a quiet title action and, as part of that action, they asked the court to redefine the legally described boundaries of the Bubenik and Mauss parcels. The court took its equitable powers seriously and presented a carefully considered explanation of its rationale for settling the legally described boundary according to the AHBL survey. Even though the AHBL engineer who performed the survey did not testify at trial, the surveyor from Aspen reviewed the AHBL survey and testified at trial as to the methodology employed by AHBL. Notably, the Aspen surveyor refused to say that the AHBL survey was inaccurate. Instead, the Aspen surveyor

testified that the AHBL surveyor employed different—but professionally appropriate—means of calculating the historical meander corner that no longer exists and that forms a base in the Bubeniks’ and Mausses’ legally described boundaries. RP at 96-97.

Additionally, the court exercised its equitable discretion fairly. While it did set the boundary lines according to the AHBL survey, the court also granted the Bubenik parcel a perpetual pedestrian easement over the three-dimensional staircase. CP at 218.

Although the Mausses did not specifically request the trial court fix the boundary line according to the AHBL survey, they did ask the court “for such other and further relief as the court deems just and equitable.” CP at 22. The trial court acted within its broad equitable discretion when it resolved the Bubeniks’ quiet title action as it saw fit by fixing the Bubenik-Mauss boundary line according to the AHBL survey. Thus, this court should affirm.

IV. ATTORNEY FEES ON APPEAL

RAP 18.1 allows a party to recover his or her reasonable attorney fees on appeal if there is a legal basis for such an award. RCW 7.28.083(3) allows the prevailing party in an action asserting title to real property under adverse possession to recover its reasonable attorney fees and costs if such an award is equitable and just. Here, the Bubeniks continue to

assert that they gained title to a strip of land along their boundary with the Mausses by adverse possession. Because the Bubeniks' adverse possession claim is without merit, this court should affirm the trial court. Moreover, because the Bubeniks persist in litigating their meritless claim to the strip of land along their boundary with the Mausses, awarding the Mausses their reasonable attorney fees under RAP 18.1 and RCW 7.28.030(3) would be just and equitable, as they have been forced into costly, protracted litigation to protect their property interests.¹¹

V. CONCLUSION

Despite assigning error to a multitude of the trial court's findings of fact and presenting a lengthy recitation of facts in their brief, Mr. and Mrs. Bubenik cannot show that the record does not support the trial court's findings. Instead of raising any meaningful deficiencies in the record, Mr. and Mrs. Bubenik make only conclusory allegations that the evidence is insufficient to support the trial court's findings and conclusions. Not only are such conclusory allegations insufficient to warrant reversal of the trial court's rulings on the Bubeniks' adverse possession and mutual

¹¹ Considering the record as a whole, because the Bubeniks' appeal presents no debatable issue on which reasonable minds could differ, it is so devoid of merit that no reasonable possibility of reversal exists. Accordingly, the Bubeniks' appeal is frivolous under RAP 18.9. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914 (2013). Accordingly, RAP 18.9 provides an alternate basis upon which this court could award Mr. and Mrs. Mauss their reasonable attorney fees and costs on appeal.

recognition claims, the record unquestionably supports the trial court's findings. Moreover, the trial court acted well within its broad, equitable discretion in settling the boundary line between the Bubenik and Mauss properties according to the AHBL survey. Thus, this court should affirm and should award Mr. and Mrs. Mauss their reasonable attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 25th day of October 2013.

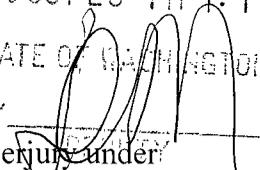
DAVIES PEARSON, P.C.


By: James R. Tomlinson, WSBA #14559
Ingrid McLeod, WSBA #44375
920 Fawcett Avenue/P.O. Box 1657
Tacoma, WA 98401
(253) 620-1500
Attorneys for Respondents

FILED
COURT OF APPEALS
DIVISION II

2013 OCT 28 PM 1:19

STATE OF WASHINGTON

BY 

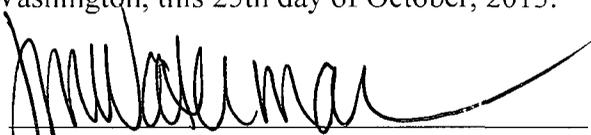
CERTIFICATE OF SERVICE

The undersigned hereby declares under the penalty of perjury under the laws of the State of Washington in the County of Pierce that pursuant to Court Rule and on October 25, 2013, I personally served via e-mail and/or postage pre-paid First Class Mail a true and correct copy of the Brief of Respondent addressed to Counsel for Appellants:

Clerk of the Court
COURT OF APPEALS, DIV. II
950 Broadway
Tacoma, WA 98402
Via postage pre-paid First Class Mail

Margaret Y. Archer
GORDON THOMAS HONEYWELL
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98401
e-mail: marcher@gth-law.com
cc: e-mail to: fostruske@gth-law.com
Via Email and postage pre-paid First Class Mail

DATED at Tacoma, Washington, this 25th day of October, 2013.



Jody M. Waterman
Legal Assistant to Ingrid L.D. McLeod

Appendix A:
Trial Exhibit No. 3

RECORD OF SURVEY
A PORTION OF THE S.W. 1/4 OF THE N.W. 1/4 OF
SECTION 35, TOWNSHIP 22 NORTH, RANGE 01 EAST, W.M.,
PIERCE COUNTY, WASHINGTON.

BASIS OF BEARING
 PER RECORD OF SURVEY 9712230150
 NED SOUTH LINE OF GOVERNMENT LOT 3
 N 89°49'40" W

LEGAL DESCRIPTION

A TRACT OF LAND IN GOVERNMENT LOT 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS

COMMENCING AT MEASURER CORNER TO SECTIONS 34 AND 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, THENCE RUNNING NORTH 25°18'48" EAST 283.73 FEET, THENCE SOUTH 19°00'00" EAST 82.13 FEET, THENCE NORTH 19°00'00" WEST 82.13 FEET, THENCE NORTH 47°53'19" EAST 87.00 FEET TO TRUE POINT OF BEGINNING, THENCE SOUTH 19°39'43" EAST 259.48 FEET, THENCE NORTH 53°10'00" EAST 87.00 FEET, THENCE SOUTH NORTH 20°17'04" WEST 267.51 FEET, THENCE SOUTH 19°00'00" WEST 87.00 FEET TO THE TRUE POINT OF BEGINNING

TOGETHER WITH THAT PORTION LYING BETWEEN THE WESTERLY CORNER OF THE ABOVE DESCRIBED TRACT AND THE TIBELANDS

EXCEPT FROM SAID PREMISES

A TRACT OF LAND IN GOVERNMENT LOT 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS

COMMENCING AT MEASURER CORNER TO SECTIONS 34 AND 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, THENCE NORTH 25°18'48" EAST 283.73 FEET, THENCE SOUTH 19°00'00" EAST 82.13 FEET, THENCE NORTH 19°00'00" WEST 82.13 FEET, THENCE NORTH 47°53'19" EAST 87.00 FEET TO TRUE POINT OF BEGINNING, THENCE SOUTH 19°39'43" EAST 259.48 FEET, THENCE NORTH 53°10'00" EAST 87.00 FEET, THENCE SOUTH NORTH 20°17'04" WEST 267.51 FEET, THENCE SOUTH 19°00'00" WEST 87.00 FEET TO THE TRUE POINT OF BEGINNING

TOGETHER WITH THE FOLLOWING DESCRIBED PREMISES

A TRACT OF LAND IN GOVERNMENT LOT 3, SECTION 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS

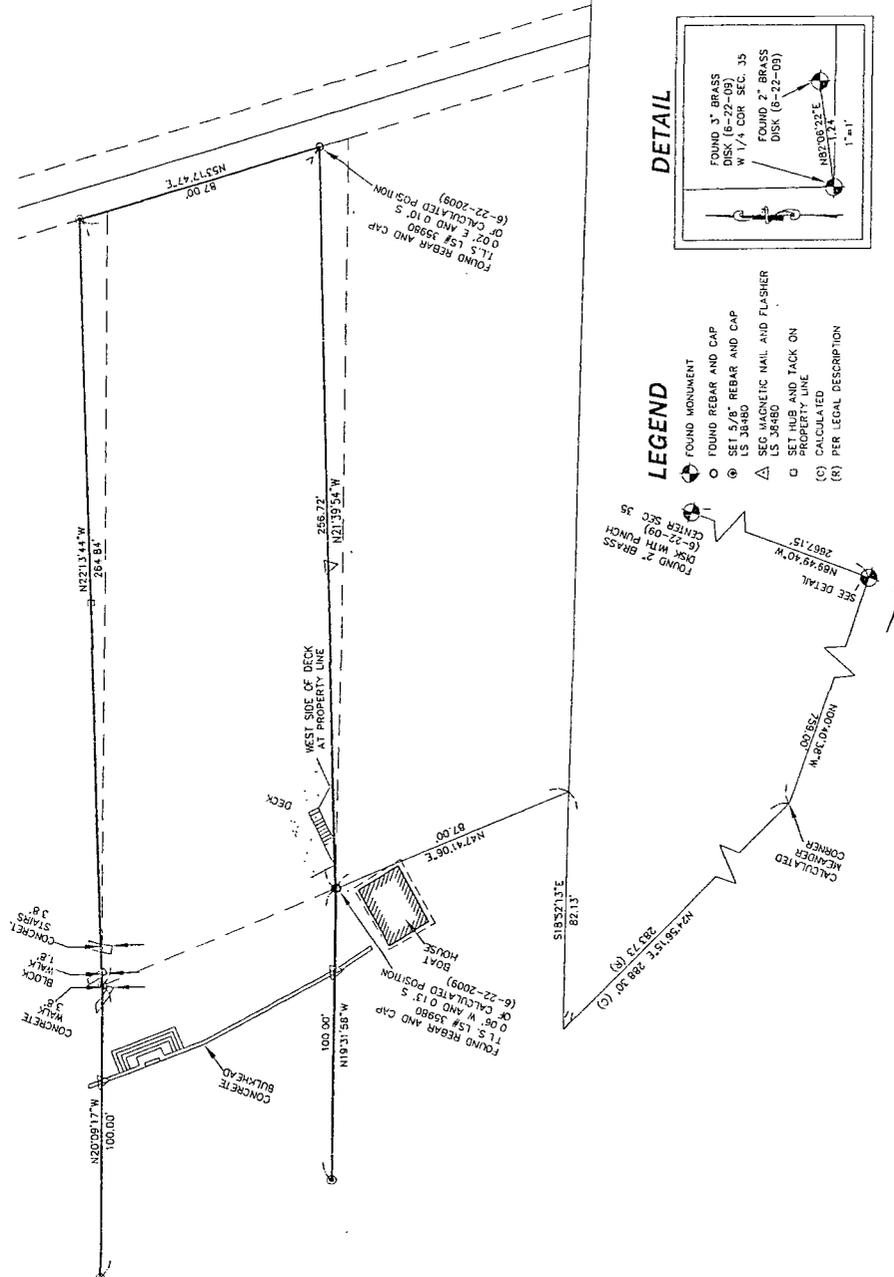
COMMENCING AT MEASURER CORNER TO SECTIONS 34 AND 35, TOWNSHIP 22 NORTH, RANGE 1 EAST OF THE WILLAMETTE MERIDIAN, THENCE NORTH 25°18'48" EAST 283.73 FEET, THENCE SOUTH 19°00'00" EAST 82.13 FEET, THENCE NORTH 19°00'00" WEST 82.13 FEET, THENCE NORTH 47°53'19" EAST 87.00 FEET TO TRUE POINT OF BEGINNING, THENCE SOUTH 19°39'43" EAST 259.48 FEET, THENCE NORTH 53°10'00" EAST 87.00 FEET, THENCE SOUTH NORTH 20°17'04" WEST 267.51 FEET, THENCE SOUTH 19°00'00" WEST 87.00 FEET TO THE TRUE POINT OF BEGINNING

ALSO TOGETHER WITH SECOND CLASS TIBELANDS

TOGETHER WITH AN EASEMENT OVER A ROAD 20 FEET IN WIDTH, THE CENTER LINE OF WHICH IS DESCRIBED AS FOLLOWS

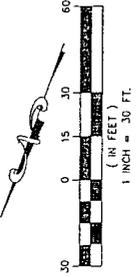
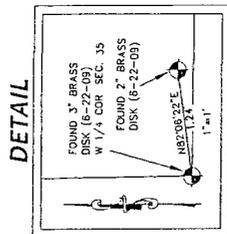
COMMENCING AT THE QUARTER CORNER OF SECTIONS THIRTY-FOUR (34) AND THIRTY-FIVE (35) AND RUNNING THENCE NORTH 19°00'00" WEST 174 FEET TO THE TRUE POINT OF BEGINNING, THENCE NORTH 7°41'30" WEST 198.70 FEET, THENCE NORTH 37°59'00" WEST 201.17 FEET, THENCE NORTH 19°00'00" WEST 137.65 FEET, THENCE NORTH 19°00'00" EAST 132.32 FEET, THENCE NORTH 17°45'00" EAST 195.74 FEET, THENCE ON A CURVE TO THE LEFT HAVING A RADIUS OF 100.94 FEET AND AN ARC DISTANCE OF 100.94 FEET, THENCE SOUTH 53°10'00" WEST 307.89 FEET

ALL IN PIERCE COUNTY, WASHINGTON



LEGEND

- FOUND MONUMENT
- FOUND REBAR AND CAP
- SET 5/8" REBAR AND CAP
- LS 38480
- △ SET MAGNETIC NAIL AND FLASHER
- SET NUB AND TACK ON PROPERTY LINE
- (C) CALCULATED
- (R) PER LEGAL DESCRIPTION



DWN. BY	DATE
TJAD/BD	6/21/09
CHKD. BY	JOB NO.
JB	20228150

AUDITOR'S CERTIFICATE

FILED FOR RECORD THIS DAY OF _____ A.D. 20____
 AT _____
 RECORDS OF THE PIERCE COUNTY AUDITOR, TACOMA, WASHINGTON.
 RECORDING NUMBER _____
 PIERCE COUNTY AUDITOR _____
 FEE _____
 BY _____

SURVEY FOR

THOMAS J. WAUSS
 8-19 104TH ST. NW
 OIG, HANDBO, WA 98032-6848

EQUIPMENT USED

3" TOTAL STATION, LEICA STANED, FIELD TRAVERSE METHODS FOR CONTROL AND STAKING

SURVEYOR'S CERTIFICATE

I, DAVID C. FOLLANSBEE, A PROFESSIONAL LAND SURVEYOR IN THE STATE OF WASHINGTON, HEREBY CERTIFY THAT THIS MAP OR SURVEY WAS MADE BY ME OR UNDER MY DIRECT SUPERVISION AND TO THE BEST OF MY KNOWLEDGE AND BELIEF IT COMPLIES WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT, CHAPTER 59.09 R.C.W. AND 332-130 W.A.C. AT THE REQUEST OF THOMAS J. WAUSS



Draft Engineer
 Structural Engineer
 Landscape Architect
 Community Planner
 Land Surveyor
 Hydrologist

DAVID C. FOLLANSBEE
 TACOMA, SEATTLE
 2115 North 30th Street, Suite 300, Tacoma, WA 98403
 1200 Sixth Avenue, Suite 1620, Seattle, WA 98101

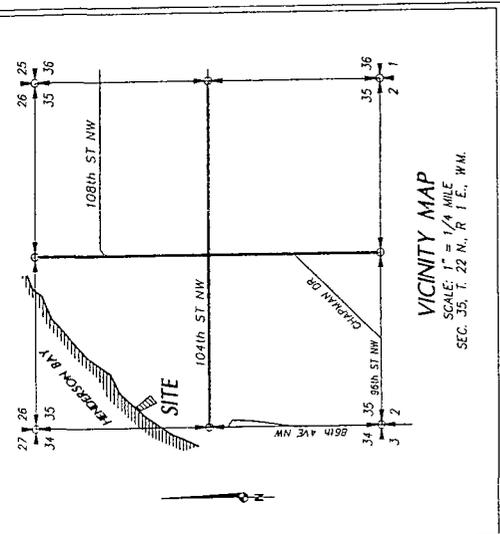
DAVID C. FOLLANSBEE, PLS 45161
 DATE _____

Appendix B:

Trial Exhibit No. 4

RECORD OF SURVEY

PIERCE COUNTY, WASHINGTON



LEGAL DESCRIPTION (Existing)

A parcel of land in Government Lot 3, in the Southwest Quarter of the Northwest Quarter of Section 35, Township 22 North, Range 1 East, W.M., in Pierce County, Washington, described as follows:

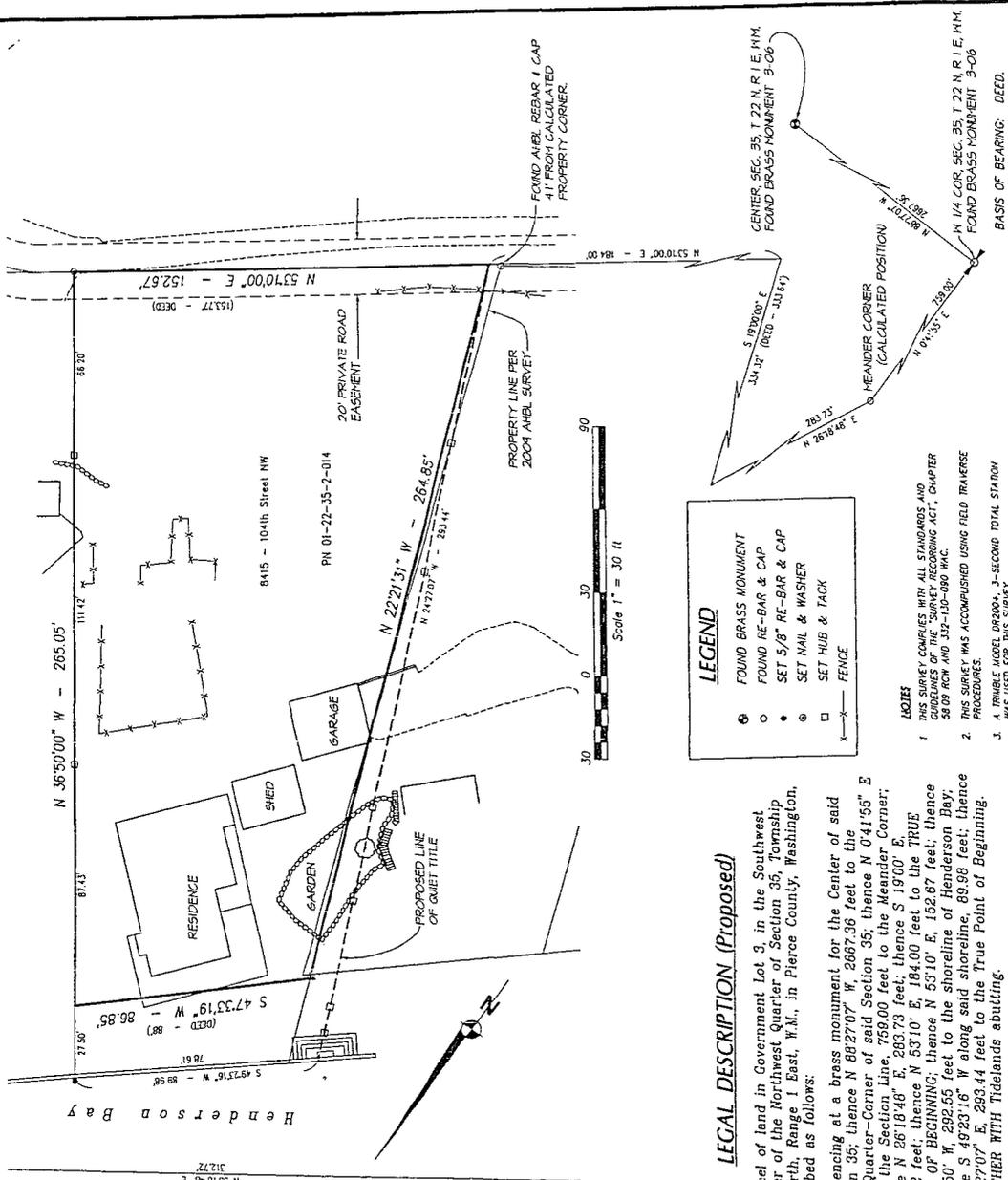
Commencing at the Meander Corner to Fractional Sections 34 and 35, and running thence N 26°18'48" E, 283.73 feet; thence S 19°00' E, 82.13 feet to a point on the shoreline; thence continue S 19°00' E, 251.51 feet; thence N 53°10' E, 174 feet to the most easterly corner of a tract of land conveyed to Ralph W. Fowler and Clarissa L. Fowler, husband and wife, by deed recorded August 31, 1954 under Auditor's Fee No. 1692120, and the TRUE POINT OF BEGINNING; thence continue N 53°10' E, 163.77 feet to the most easterly corner of a tract of land conveyed to W. H. Bell and Florence Bell, husband and wife, by deed recorded under Auditor's Fee No. 1692119; thence N 36°50' W, 265.05 feet; thence S 47°03'19" W, 88 feet to a point bearing N 20°17'04" W of the True Point of Beginning; thence S 20°17'04" E, 267.51 feet to the True Point of Beginning.

TOGETHER WITH that portion lying between the extended sidelines of the above described tract and the tidelands; and TOGETHER WITH tidelands abutting thereon EXCEPT THEREFROM that portion conveyed to Ralph W. Fowler and Clarissa L. Fowler, husband and wife, by deed recorded August 29, 1957, under Auditor's Fee No. 1795719, described as follows: Commencing at the Meander Corner to Sections 34 and 35, Township 22 North, Range 1 East, of the W.M., thence running N 26°18'48" E, 283.73 feet; thence S 19°00' E, 82.13 feet; thence N 53°10' E, 174 feet to the TRUE POINT OF BEGINNING; thence S 20°17'04" E, 267.51 feet; thence N 53°10' E, 10 feet; thence northwesterly to the True Point of Beginning.

LEGAL DESCRIPTION (Proposed)

A parcel of land in Government Lot 3, in the Southwest Quarter of the Northwest Quarter of Section 35, Township 22 North, Range 1 East, W.M., in Pierce County, Washington, described as follows:

Commencing at a brass monument for the center of said Section 35; thence N 66°27'07" W, 2867.36 feet to the West Quarter-Corner of Section 35; thence N 0°41'55" E along the Section Line, 788.00 feet to the Meander Corner; thence N 26°18'48" E, 283.73 feet; thence S 19°00' E, 334.32 feet; thence N 53°10' E, 184.00 feet to the TRUE POINT OF BEGINNING; thence N 53°10' E, 162.87 feet; thence N 36°50' W, 292.55 feet to the shoreline of Henderson Bay; thence S 49°23'16" W along said shoreline, 89.88 feet; thence S 24°27'07" E, 293.44 feet to the True Point of Beginning, TOGETHER WITH Tidelands abutting.



LEGEND

- FOUND BRASS MONUMENT
- FOUND RE-BAR & CAP
- SET 5/8" RE-BAR & CAP
- SET NAIL & WASHER
- SET HUB & TACK
- FENCE

- NOTES**
- THIS SURVEY COMPLIES WITH ALL STANDARDS AND GUIDELINES OF THE "SURVEY RECORDING ACT", CHAPTER 56 OF RCW AND 332-136-090 IAC.
 - THIS SURVEY WAS ACCOMPLISHED USING FIELD TRAVERSE PROCEDURES.
 - A TRIANGLE MODEL DR2004, 3-SECOND TOTAL STATION WAS USED FOR THIS SURVEY.

A Portion of
the SW 1/4 of the NW 1/4,
Sec. 35, T 22 N, R 1 E, W.M.
Pierce County, Washington

Aspen
Land Surveying
LLC

At The Landing in Key Center
15510 - 92nd Street KPN
P.O. Box 124
Yauhaun, WA 98394-0124
(253) 303-0270 FAX (253) 303-0273



SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF

MARK BUBENIK

Daniel B. Johnson 2/1/12
DATE

DANIEL B. JOHNSON, PLS #28409

AUDITOR'S CERTIFICATE

FILED FOR RECORD THIS _____ DAY OF _____ AT _____, WA.

UNDER AUDITOR'S FILE No. _____ RECORDING FEE \$1200.00

AT THE REQUEST OF **Aspen Land Surveying LLC**

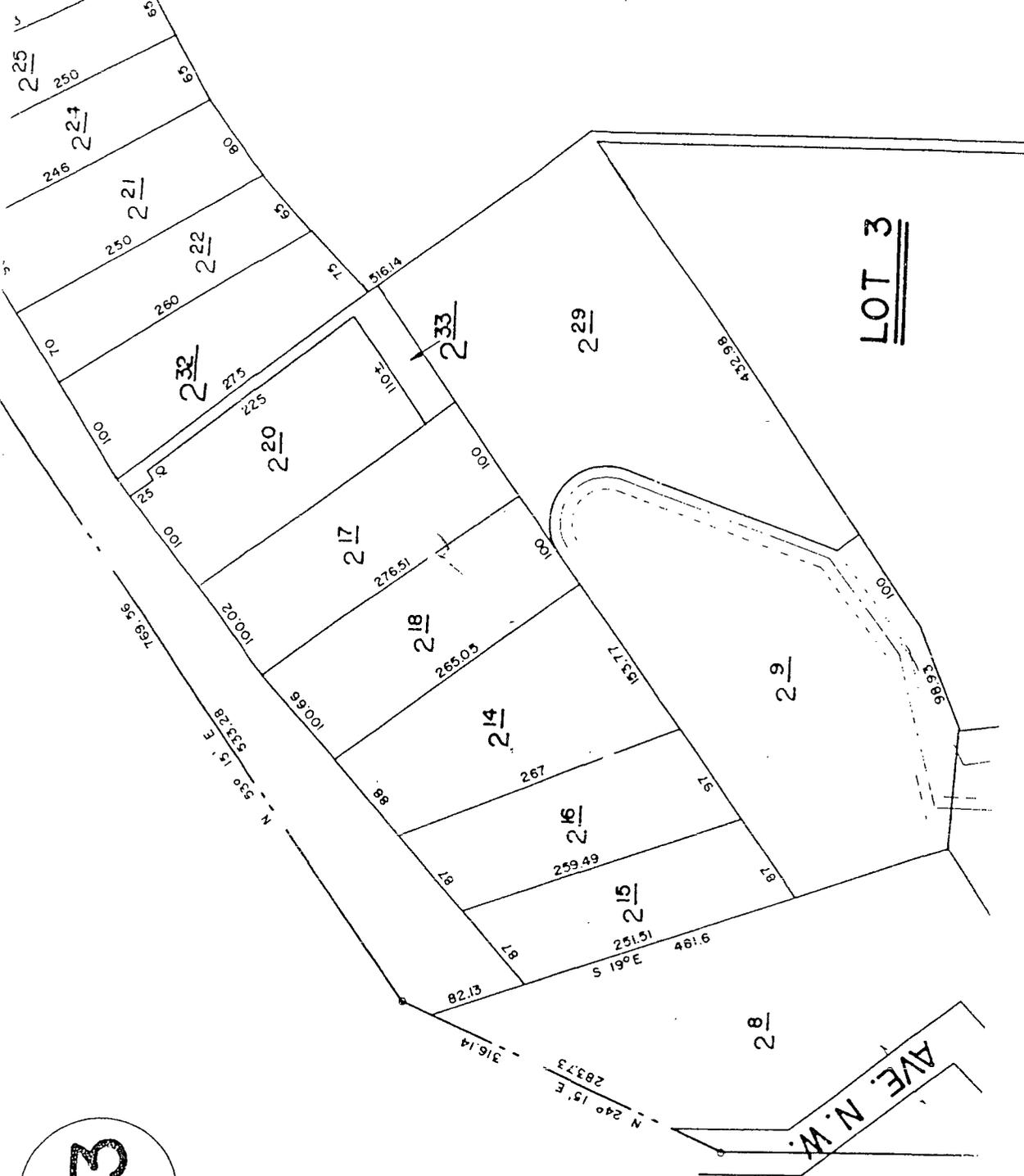
Jillie Anderson
COUNTY AUDITOR

Appendix C:

Trial Exhibit No. 12

17
21
31
39
49
6
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Appendix D:

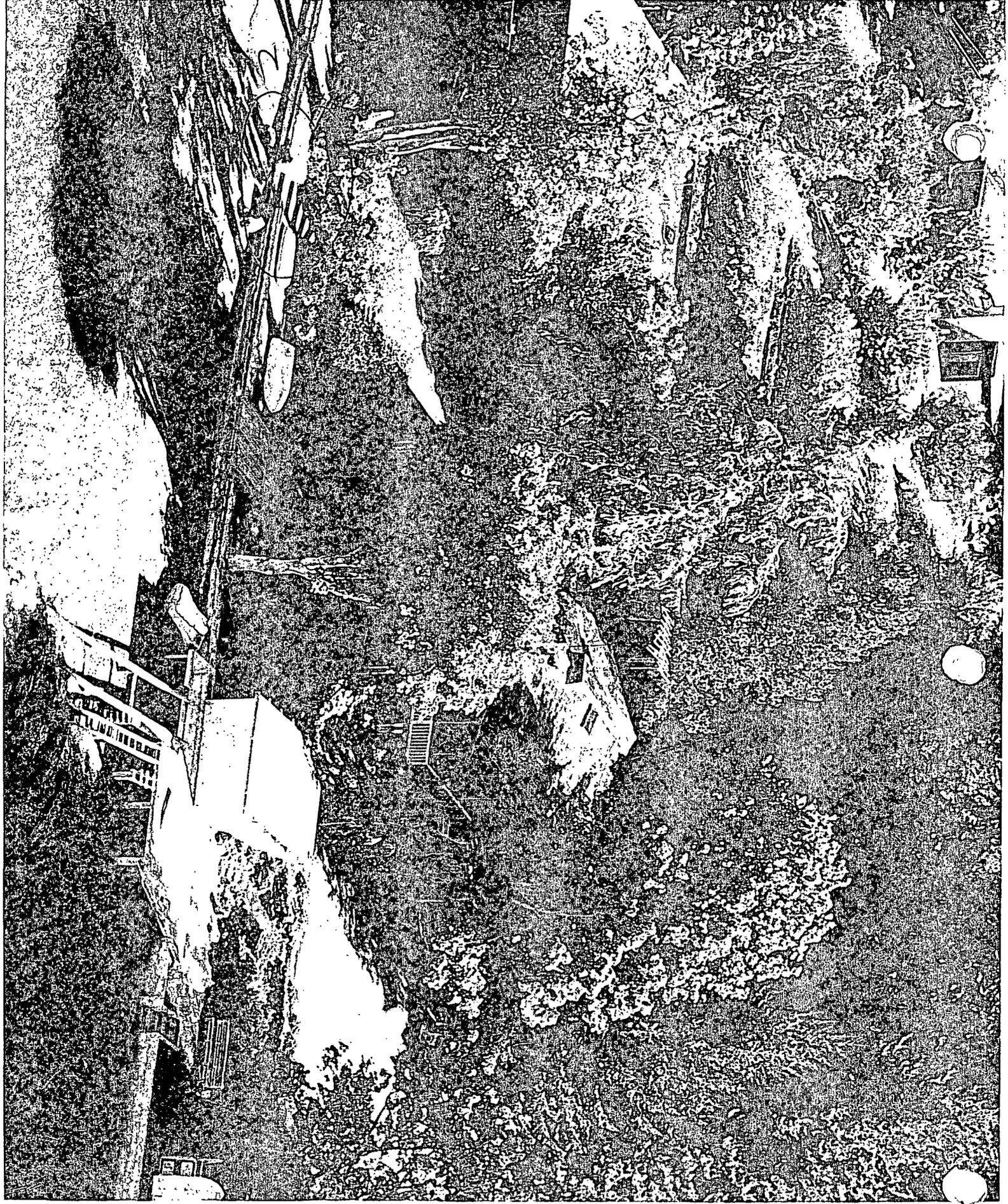
Trial Exhibit No. 16

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Appendix E:

Trial Exhibit No. 20



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