

66245-7

NO. 66245-7-I

King County Superior Court Cause No. 08-2-22750-2 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

GREGG SMITH AND KELLY SMITH
Respondents/Plaintiffs

v.

LARRY L. PETERSON AND SUSAN PETERSON

Appellants/Defendants

2011 MAY 18 AM 9:57

FILED
CLERK OF SUPERIOR COURT
KING COUNTY, WASHINGTON

APPELLANTS PETERSON REPLY ON APPEAL ISSUES AND
RESPONSE ON SMITH CROSS-APPEAL ISSUES

Attorneys for Appellants/Defendants
Larry L. Peterson and Susan Peterson
Charles E. Watts
Oseran Hahn Spring Straight & Watts, P.S.
10900 NE 4th St., #1430
Bellevue, WA 98004
425-455-3900

ORIGINAL

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Cross-Appellants Assign Error to Only Three Findings of Fact	7
III.	Statement of Facts.....	9
	1. The Upland Fence	9
	2. The “Veer” and Gate.....	9
	3. The Dock.....	10
	4. The Canopy/Roof Overhand onto Smith Property.....	13
	5. The King County Assessor Representative Testimony.....	14
IV.	Argument/Authority.....	16
	1. The Fence/Veer	16
	2. Reply to Smith Position Re Fence/Veer	17
	3. The Dock.....	18
	4. Reply to Smiths’ Claims as to Dock	23
	5. The Boundary Line of the Shoreland Extending from the Veer.....	24
	6. The Assessor Testimony	25
V.	Reply to Smith Response to Peterson Cross-Appeal	27
VI.	Conclusion/Relief Sought	30

TABLE OF AUTHORITIES

Cases

Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).....24
Cole v. Laverty, 112 Wn. App. 180, 49 P.3d 924 (2002).....22
Goodman v. Darden, Doman and Stafford, 100 Wn.2d 476, 670 P.2d 648
(1983) 16
Gorman v. City of Woodinville, Case No. 63053-9-I 25
ITT Rayonier v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989)24
Lamm v. McTighe, 72 Wn.2d 587, 593, 434 P.2d 565 (1967) 18, 19, 25
Muench v. Oxley, 90 Wn.2d 637, 584 P.2d 939 (1978)24
Ross v. Kiner, 162 Wn.2d 493, 498-9, 172 P.3d 701 (2007).....21
Union Elevator & Warehouse v. State of Washington, 144 Wn. App. 593,
603, 183 P.3d 1097 (2008)29

Rules

RAP 10.3(4) 7, 8
RAP 10.3(g) 8

APPENDICES

- A Photo of Dock and Canopy (Exhibit 6)
- B Photo of “Veer” and Gate (Exhibit 5)

I. INTRODUCTION

Understanding of the issues presented by the appeal and cross-appeal is, hopefully, enhanced by segregating the issues to four physical or geographic components. These components are:

1. The upland issues –
 - a. The original fence erected in 1971 by Peterson and maintained, repaired and replaced in the same location by Peterson ever since.
 - b. The westernmost portion of the fence (a/k/a the “veer”) constructed by Peterson in 1981 and maintained by Peterson ever since. The “veer” filled the gap between the end of the original fence and the shoreline – a distance of approximately 8 feet.
2. The shorelands –
 - a. The wooden dock constructed on pilings and the canopy/roof covering both sides of the moorage area (slips) of the dock also supported by pilings.
 - b. The portion of the canopy/roof of the dock on the north side which extends across onto the Smith property and has done so

There is no appellate issue about item 1(a). Cross-appellants Smith raise an issue about item 1(b) – the “veer.” Cross-appellants Smith also raise an issue about item 2(a), the dock. Appellants Peterson raise an issue only about item 2(b), the portion of the canopy/roof of the dock which extends onto the Smith property and the pilings supporting it which are also located on the Smith property.

Ben Petersen of PLS, Inc. testified in person and his survey was admitted without objection (Ex. 2; App. 2 to Smith Brief).¹ No other surveying testimony was admitted by the court (I-70).² The survey by Cramer offered by Smith, in the absence of the testimony by the surveyor, was admitted by the court for the limited purpose of showing the Smith “state of mind” (III-138). Also incorporated into the Appendix will be several photographs with annotations to assist the court in understanding the issues presented by this appeal and cross-appeal (App. A and B).

A brief description of the parties and property history might also be helpful:

¹ The PLS, Inc. survey admitted as Ex. 2 at trial was modified as of August 4, 2010 to reflect certain post-trial rulings by the court. It is Appendix 2 to Smith brief.

² References to the Record of Proceeding are to the volume and page. Volume I is proceedings of the morning session of January 25, 2010. Volume II the afternoon session of January 25. Volume III morning session of January 26, 2010. Volume IV is the excerpted testimony of Larry Peterson of January 27, 2010.

1. Larry and Susan Peterson have resided on the southerly property of the two in dispute since 1971. They raised their children on the property. They reside on the property today. The year they bought the property in 1971 they caused a fence to be built in the same location as the fence currently is located on the upland of the property. In order to more completely enclose their property, in about 1981, Larry and Susan Peterson completed the fence to the water's edge, a distance of about 8 feet. In doing so, they did not extend the fence in a straight line to the water but rather extended the fence in a northwesterly direction resulting in an angle or "veer." Larry Peterson installed a gate in the "veer" as a neighborly gesture. Larry Peterson placed the veer so that he had good access to his dock.

2. The Heath family owned the property now owned by Smith located adjacent to and immediately north of the Peterson property. The Heath family owned the property before 1971 and continued to own the property until it was sold to Smith in December 2007. Several members of the Heath family testified at trial although the parents who owned the property were both deceased at the time of trial. Tammy Heath, a daughter, testified. Dean Secord, a grandson, also testified.

3. The Smiths – Mr. and Mrs. Smith purchased the property immediately north of the Peterson property from the Heath children in December 2007. They have never lived on the property. At the time they purchased the property they were made aware by the Heath family of boundary issues regarding the Peterson boundary. The purchase and sale contract between Heath and Smith specifically warned of boundary uncertainties as to the boundary with Petersons. Smiths obtained a survey that confirmed those issues but determined to close in any event. Smiths commenced this lawsuit against Petersons in July 2008, 7 months after purchasing the property from Heath. Smiths have since torn down the Heath residence and are building a new residence structure on the property (not yet occupied).

To summarize the issues presented by the Peterson appeal and the Smith cross-appeal another chart may be helpful:

- a. The upland fence constructed in 1971 – no issue on appeal;
- b. The “veer” constructed in 1981 (App. B) – Smith contends the veer should not be the boundary line between the Peterson and Smith properties. Smiths contend the veer that has been in place for

30 years should not be treated as creating a boundary by acquiescence as the balance of the upland fence was treated by the court.

c. The dock – Smiths contend that they should have an ownership interest in the dock (it is not clear whether the Smith claim is for an undivided one-half interest in the dock or to the north one-half of the surface of the dock). In any case, the Smith claim is that they should own an interest in the Peterson dock by reason of the theory of boundary by acquiescence (App. A).

4. Petersons claim that the court erred in not confirming in them ownership of the shoreland of the Smith lot to the extent which the dock canopy and pilings on the north have encroached onto the Heath/Smith property since before 1971 and continue to do so to this day (App. A).

Counsel for Smith maintained from the beginning of trial that this case was about claims by Smith against Peterson based upon “boundary by acquiescence.” At Volume 1, page 24 of the Record of Proceedings, counsel for Smith identifies all of the legal theories that can result in a boundary other than a legal boundary and then advises the court that:

What we think this case is about is mutual recognition and acquiescence, and that is the claim pled by the plaintiffs

[Smith]. The other theories support and supplement mutual recognition and acquiescence, and there is case law that says if you don't have adverse possession you go to mutual acquiescence and recognition (I-24, ll. 14-20).

II. CROSS-APPELLANTS ASSIGN ERROR TO ONLY THREE FINDINGS OF FACT

RAP 10.3(4) requires a "separate concise statement of each error a party contends was made by the trial court, together with issues." The cross-appellants' (Smith) brief contains a section entitled "Assignment of Error" but does not in that section refer to any finding of fact of law by specific number or allude to what the error was or the issues claimed to result. The first place that a reader of the brief finds any reference to findings of fact is in footnote 4 on page 4. There are sporadic references to findings of fact by number later in the Smith/cross-appellants' brief but no specific error is assigned to them, nor is any specific discrete issue identified.

It is recognized that non-compliance with RAP 10.3(4) is not fatal to an appeal, however, it certainly clouds the issues presented. RAP 10.3(g) specifies that:

The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Nevertheless, it appears that the cross-appeal raises the issue of the denial by the trial court of any claim of ownership interest in the dock which was asserted by Smith on the basis of the doctrine of boundary by acquiescence. It also appears that Smith is appealing from the determination of the trial court that the westerly portion of the fence which “veers” to the northwest and intersects with the shoreline was not a “boundary by acquiescence.” Lastly, it appears that cross-appellants Smith complain about the fact that the trial court extended the shoreland boundary line westerly into the East Channel on a line parallel to all other shoreline boundaries in the area and on a line consistent with the only surveying testimony offered at trial.

None of these claimed errors are supported by the evidence or the law as will be seen below.

III. STATEMENT OF FACTS

1. **The Upland Fence** – Peterson built the upland fence through the services of Reliable Fence in 1971, the year they bought the property (I-94). Petersons have repaired and replaced the fence in the same location over time (I-95). The original upland fence installed by Peterson in 1971 ended approximately 8 feet from the lake shore (I-97). Peterson repaired and replaced the upland fence at his sole expense (IV-9).

Between mid-1990s and 2003, Dean Secord, the grandson of Marion Heath, lived on the property and maintained the property up to the north side of the fence, including the “veer.” Secord did not maintain on the south Peterson side of the fence (II-164, IV-190). The Heath family paid nothing for the fence separating the two properties (IV-62).

Gregg Smith was told that everything was “a mess” on boundaries on Lake Washington and that there were “four different ways to establish property lines” (III-140). The Heath sale documents to Smith disclaimed warranties regarding boundaries (IV-246-7). Tammy Heath never knew where the property lines were (IV-248).

2. **The “veer” and gate** – Peterson built the veer and the gate in the early 1980s (approximately 1982) (I-97). The “veer” is 7-feet 4-

inches long (IV-123). The purpose of the gate was for access “for anybody” including his neighbors. Peterson installed the gate to be “neighborly” (II-269, 275). Petersons built the gate on a veer so that he could “continue the enclosure” of the fence and have access to his dock (IV-10). Peterson installed the gate so that travel between neighbors could be accomplished other than by walking up to the road on the east uphill end of the properties. He installed the gate to separate dogs and kids on the various properties and to give him “better access to my dock” (I-98). There was never any objection from the Heath family to the installation of the veer and gate (II-268). The gate itself did not function between 1992 and 2007. The gate was never locked (II-231). It could not be opened (it swung to the north) due to heavy vegetation and lack of maintenance on the Heath side of the fence (IV-26).

3. **The Dock** – The dock was not used by Heath in any fashion beginning in the early 1980s (II-227-228). Petersons were sole user of both sides of the dock (I-98). From the early 1980s the Heaths did not have a boat that would even fit in the dock slip or moorage areas (II-162, II-183). Dean Secord, the Heath grandson, recalls no use of the dock between 1993 and 2003 (II-196). He recalls in that period using the dock

in dispute only to “retrieve dog toys that floated away” (II-197). Dean Secord does remember that as kids they played on the docks on both properties in the 1970s (II-177-8). Lori Korzai, called by Smith, testified that it was “neighborly” for people with docks to allow others to use them along the lake (II-214).

Tammy Heath, a Heath daughter, cannot remember using the dock in the period from 1985 to 1989 when she lived there (II-228). She does not remember any use of the dock at all in the 1990s and she remembers no use in the 2000s either (II-237-8). According to Tammy Heath use of the dock in dispute was “shared” with the Petersons (II-255). It was a “neighborly sharing (IV-269). Tammy Heath testified that never was the dock physically divided or segregated into ownership or possessory parts (II-255, II-258, II-259). Use of the dock by neighbors was “shared” (II-259). Tammy Heath has found no documents between Peterson’s predecessor in interest and the Heath family regarding dock ownership or use (II-259).

Tammy Heath testified that after the Heath boat, which had been given to them by the Peterson predecessor, was removed from the north side of the dock in 1978, Heath did not use the slip and did not store

anything in it or on it (II-260-1). Petersons were using both sides of the dock so they provided power to the dock (II-267). Use of the dock was “neighborly” and to the extent others used the dock it was “a friendly thing” per Tammy Heath (II-269, II-275).

Smiths thought they were getting a one-half interest in the dock through “historical use” (III-135). Tammy Heath testified that when she sold the property to the Smiths in 2007 she did not promise anything regarding boundary lines (II-262; see also Exhibits 14 and 15). Tammy Heath did not tell the Smiths before closing that they had a right to use the north slip on the dock in dispute (II-263). Tammy Heath testified that she did not consider the dock by the Heath family as “exclusive.” It was always shared with the Petersons and the Heath family never limited their use to only the north half of the dock (IV-255). There was never any physical divider on the dock according to Tammy Heath and any use of the dock was a “shared use” (IV-258-9). The use of the dock was “neighborly” (IV-269). According to Tammy Heath, “everybody” used the dock (IV-275). After 1978, Heaths never had a boat on the north side of the dock (IV-31-2).

The Petersons paid “every penny” for repairs to the dock. Heath never paid a penny to maintain and repair the dock (IV-14). Petersons paid for all roof repairs and other repairs to the dock (IV-18, IV-36). Petersons paid for extension of power and meters for power to the dock (IV-73-4). Petersons paid all power bills to the dock. Heaths paid nothing for electricity (IV-19-20).

Peterson paid for John’s Docks to repair the dock (IV-46, Exhibit 53). Peterson installed new boat hoists on north and south side of the dock in 1989 at his expense. Heath contributed nothing (IV-50). Peterson replaced planks on the dock in April of 1976 and paid for it himself (IV-59). Peterson saw Heaths water ski off the dock only one or two times after 1978 (IV-86).

4. The Canopy/Roof Overhang onto Smith Property –

The canopy roof overhang onto the Heath/Smith property has been in existence since before 1971 (IV-100). The existence of that canopy/roof overhang has never been with permission from Heath or Smith. Peterson maintained the entire roof including the overhang (IV-101). Peterson paid Seaborn for piling replacement and repair and decking replacement or repair on the dock. Heath contributed nothing (IV-93-4). Peterson

testified to all of the work that he did and paid for on the dock without any contribution or permission from Heath (IV-95-6). Peterson never asked Heath to pay for any dock repairs or maintenance or electrical work. Peterson never asked Heath to pay for any piling replacement or repair on the dock (IV-129-131).

The north three pilings holding up the north roof/canopy need to be replaced as they are in danger of failing (I-106). It presents a safety issue (IV-97). Peterson applied to the City of Bellevue for permission to replace the three north pilings but was stopped by Smith complaining to the City about ownership (IV-96). The Peterson survey (Exhibit 2) shows the overhang/encroachment on the canopy and pilings onto the Smith property (I-7). (App. B is slightly modified from Ex. 2).

5. **The King County Assessor Representative Testimony** – Smiths called a representative of the King County Assessor’s office to attempt to establish ownership of one-half of the dock in dispute because of King County records. The witness for the Assessor’s office said that the entry on Assessor’s records for the Peterson and Smith property regarding ownership of one-half of the dock in each property was based on another Assessor employee calling a “son” to confirm ownership (III-22-

3). There is no evidence of who the son was (Petersons have three) and no evidence of the text of the call (III-48). The Assessor does not know who is referenced in the records about the conversation with the “son” regarding dock ownership (III-48-50). The witness had no knowledge as to how the Assessor records came to reflect that the dock was “shared” (III-51). The Assessor witness does not know where the employee who made the note about conversation with the “son” got the “one-half dock” information (III-42-3).

The Assessor representative confirmed that the tax bill received by the taxpayer does not segregate improvements by specific identity of the improvements, rather it lumps all improvements together into a single value (III-59). The representative confirmed that you cannot look at the Assessor’s records on value and isolate the value of the dock or any dock modification (III-63). The Assessor representative testified that if she had been aware that the property line was actually located north of the dock, she would have done more to verify the information apparently obtained from a “son” (III-71).

The Assessor representative testified that the Assessor works off legal lines only and does not create new boundary lines (III-72). The

witness testified that the Assessor would not move or alter a property line just because someone asks that it be done. It requires “proof” (III-74-5). The Assessor does not do lot line changes (III-82.3).

IV. ARGUMENT/AUTHORITIES

Counsel for cross-appellants Smith in her opening statement to the court stated unequivocally that the Smith claims were based only on the doctrine of “boundary by acquiescence” (I-24). Case law does not support an award in favor of Smith on either adverse possession or boundary by acquiescence claims with respect to the “veer,” the dock, or the shoreland boundary line. Finding of Fact 7, 8 and 9 are each amply supported by substantial evidence and are, therefore, verities on appeal. *Goodman v. Darden, Doman and Stafford*, 100 Wn.2d 476, 670 P.2d 648 (1983).

1. **The Fence/Veer** – As seen from the fact summary, the evidence was undisputed that the existing fence to a point about 8 feet from the water line had been in place since 1971 and remains in place to this date. Mr. and Mrs. Peterson built the fence in 1971 and have repaired, maintained and replaced it ever since. The Heath family (the Smith predecessors) paid nothing with respect to the installation, maintenance, repair or replacement of the fence. At trial there was virtually no dispute

between the parties that the upland fence to a point about eight feet from the shoreline constituted a boundary by acquiescence and Petersons and Smiths do not appeal that determination here.

With respect to the “veer,” Smiths seem to claim that because the “veer” had a gate in it that could be opened from either side, the veer could not be considered to have established a boundary line by acquiescence between the Smith and Peterson properties. Mr. and Mrs. Peterson built the “veer” in the early 1980s (this lawsuit was filed in 2009) and have maintained the installation ever since without any contribution or assistance from the Heath family (recall that Smiths acquired the property in December 2007 and have never lived on the property).

Dean Secord and other members of the Heath family testified that they used and maintained up to the north side of the fence between their property and the Peterson property, including the veer, but did not go beyond it as far as use or maintenance.

2. **Reply to Smith Position regarding Fence/Veer** – Smiths argue that the 1971 section of fence should be determined to be the boundary line under principles of boundary by acquiescence. Then through sleight-of-hand Smiths maintain that the remainder of the fence

(the “veer”) extending to the shoreline which has been in place since the early 1980s should not be treated as a boundary by acquiescence. This notwithstanding all of the elements of the legal theory are equally present. Smiths claim that because the “veer” had a gate in it, this somehow distinguishes the present case from the factors required by *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

However, the veer, with or without a gate, meets the first test of *Lamm* in that it provides for a “well defined, and in some fashion physically designated upon the ground, divider between the two properties which was respected by both neighbors.” The example in *Lamm* of such a divider is said to include “fence lines.” All of the testimony is consistent with the fact that the Heaths and the Petersons respected the entire fence separating their properties, including the veer, and that the veer should be treated exactly the same as the balance of the fence although it was constructed approximately nine years later. Recall that Dean Secord among others testified that the Heath family maintained and used their property up to the fence, not beyond.

3. **The Dock** – With respect to the dock, the Smith argument completely ignores all of the requirements of *Lamm v. McTighe*. Smiths

ask the court to extend the upper fence line to the shoreline, and then down the middle of the dock. There is no physical barrier required by *Lamm v. McTighe* supporting such a physical division of the dock. The use of the dock over all of the years was testified to be both “neighborly,” and without regard to physical location on the dock. The Heath family testified that they used the entire dock on a friendly basis. Tammy Heath testified that the dock was always used on a “shared” basis. Never was there any “divider” down the middle of the dock recognized by anyone in their use of the dock. This claim by Smith violates the first, second, and third requirements of *Lamm* for establishment of a boundary by acquiescence.

Smiths then claim that the court had the power to extend the 1971 fence line out into the waters of the East Channel and to physically divide the dock in dispute into a north half and a south half and presumably allow either party to extend a fence down the middle of a dock. Not only is this an absurd result, it is not supported by the evidence and the fact that the veer in the fence has been in place for over 25 years without any effort on the part of the Heath family to assert the claim that they owned down the

middle of the dock and that the veer did not represent the boundary line between the properties.

While the court may have the power to extend a line to “create a penumbra of ground,” this is certainly not a case where either reasonable necessity or logic justifies that outcome. Smiths then try to bootstrap the Cramer survey which they attempted to offer into evidence without the surveyor testifying in support of it. The court allowed the Cramer survey in for a very limited purpose, only to show “state of mind” of the Smiths. The Cramer survey cannot be used as evidence of anything other than what the Smiths may have thought before they acquired the property. Smiths’ reliance on the Cramer survey is impermissible given the evidentiary ruling of the court at trial.

Smiths then contend that there was an express and an implied agreement that the Heaths and Petersons were to “share the dock.” However, their argument in support of this position at page 18-19 of the brief cites no record authority demonstrating any evidence to support the contention. Argument without authority in the record should not be sufficient to establish a claim that has such scanty logical and evidentiary support in any event. If the Heaths thought they owned the dock, where is

any evidence about objection to the Peterson completion of the fence all the way to the waterline in the early 1980s, placing the dock entirely within the Peterson exclusive area?

Smiths contend that the earnest money agreement between Petersons and their seller in 1971 controls over the ownership of the dock by reference to a “1/2 interest” being conveyed. However, the deed which conveyed the property to Petersons makes absolutely no reference to such a limitation on conveyance of ownership, and therefore, the doctrine of “merger” prevents reference to the purchase contract (Ex. 51). *Ross v. Kiner*, 162 Wn.2d 493, 498-9, 172 P.3d 701 (2007).

Smiths rely on out-of-state cases for the proposition that having a gate in a fence prevents the fence from acting as a definitive boundary for purposes of establishing a boundary by acquiescence. However, the cases cited by Smiths at pages 20-22 of their brief are either adverse possession cases or easement ouster cases, and none of them are boundary by acquiescence cases. There is no conceivable basis in the law to deny the physical nature of a fence to establish a boundary by acquiescence just because the fence has a gate in it. It is the use of the ground on either side of the fence and the respect of the parties for the fence (including the gate)

as the boundary line that is crucial to the determination of a boundary by acquiescence.

The only Washington case cited on this issue by Smiths is *Cole v. Laverty*, 112 Wn. App. 180, 49 P.3d 924 (2002). This is an easement case, dealing with the issue of “ouster.” It has no bearing whatsoever on the issues presented to the court in this case which involved only the question of boundary by acquiescence. The fact that Smiths had to stretch the point to the extent they did citing inapposite cases to support their claim with regard to the gate defeating the boundary by acquiescence determination of the trial court demonstrates the fatal weakness of their contention.

Members of the Heath family testified that in the 1980s and before they may have used the dock in dispute to water ski off of and, until about 1978, to store a boat on the north side under the canopy. However, since at least 1980, the Heaths had at the most sporadic and limited usage of the dock, to the point that in the late 1980s and thereafter they could not testify at trial as to any use of the dock except to “rescue dog toys from the water.”

The Smiths’ witnesses, almost all members of the Heath family, testified that their use of the dock over the decades that they lived next to

the Petersons was on a “neighborly” basis. They testified to the fact that the children of all the families used docks up and down the waterfront indiscriminately. They testified that there was no effort to physically segregate the north half of the surface of the dock from the south half. There was no line down the middle of the dock. They testified that they used, whenever they used the dock, all portions of the dock. They testified that they never sought nor gave permission to use any portion of the dock to anyone else.³

4. **Reply to Smiths’ Claims as to Dock** – Adverse possession requires use of the property of another in such a manner as to place the true owner on notice that someone else is using the property as if they were the true owner. *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984). The testimony at trial is without dispute that the use of the dock by all parties was permissive, neighborly, and undifferentiated. It was certainly not exclusive. See e.g., *ITT Rayonier v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Adverse possession cannot apply to give rise

³ Proof of boundary by acquiescence must be “clear and convincing,” a standard not met here as to the dock. *Muench v. Oxley*, 90 Wn.2d 637, 584 P.2d 939 (1978).

to a claim of title in the dock by Smith. This fact alone explains why counsel for Smith at the opening of trial indicated reliance only on the doctrine of boundary by acquiescence to attempt to support the Smith claims.⁴

Boundary by acquiescence does not help the Smith claims as to the dock either. Boundary by acquiescence requires a definitive line demarking two properties, which are used in relation to that line. *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967). The testimony is undisputed that there is not now and never has been a definitive line or physical demarcation on the dock identifying any portion of the dock as owned by one party or another. Photographs of the dock in the appendix show the same thing. Fundamental attributes necessary to establish boundary by acquiescence are completely missing in this case.

5. The boundary line of the shoreland extending from the veer – Complaint is made about the acceptance by the court of the survey and surveying testimony of the only surveyor to testify at trial. Ben

⁴ Division I has recently revisited the fundamental principles of adverse possession in its decision in *Gorman v. City of Woodinville*, Case No. 63053-9-I, in a published opinion filed March 21, 2011. Plainly, any claim of adverse possession by Smiths would be defeated by all of the five enumerated elements to establish adverse possession. Smiths can meet none of them in respect to an adverse possession claim and this explains why

Petersen (no relation to the Peterson party here) was the only surveyor who testified at trial. His survey was the only survey that was admitted for the purpose of showing the facts of the survey outcome at trial. Mr. Petersen testified, and his survey demonstrates, that the extension of the shoreland lines into the water parallel with the adjoining shoreland lines of the properties in dispute and others is accepted surveying practice. There is no testimony to the contrary. Logic strongly supports, extending the shoreland boundary line parallel to all other shoreland boundary lines in the water from the veer. Substantial evidence supports the trial court extension of the shoreland boundary from the veer parallel to all other boundary lines.

6. **The Assessor testimony** – The Assessor’s representative testimony should have been completely excluded by the trial court. The evidentiary value of the testimony is destroyed by the fact that the Assessor’s representative testified that it was not within the purview of the Assessor’s office to “establish boundary lines.” The Assessor representative who testified was not the person who claimed to have talked to a “son” upon which the Assessor’s records were modified to show a

Smiths’ counsel wisely abandoned the adverse possession claims in favor of pursuing

“shared” dock. The testimony did not identify the son even through hearsay. The records offered by the Assessor representative do not identify the son. The tax bills sent out by the Assessor do not discretely identify every improvement on the assessed property such as a “shared” dock.

Since the Assessor does not determine boundary lines, the evidence presented could not be deemed “relevant” under ER 401. The evidence should have been rejected based upon ER 402 as the evidence was plainly irrelevant given the fact that the Assessor does not determine boundary lines as a part of its responsibilities. ER 602 prevents a witness from testifying in most cases due to lack of personal knowledge. In the present case, the Assessor witness could not identify the “son” who has claimed to have been one who advised another non-witness in the Assessor’s office as to the “shared” dock condition. Absent this foundation testimony by the participant in the conversation, the entire testimony of the Assessor representative should have been rejected under ER 602. Nor does ER 701 allow the Assessor representative to testify as to an “opinion” because the opinion about the conversation with the son (somebody’s son) and the

only boundary by acquiescence claim at trial.

“shared” dock is not “rationally based.” The records produced by the Assessor’s representative only show a telephone conversation with a “son” to support the valuation change by the Assessor showing the dock as being “shared.” The Assessor did not know where the property line was located in making this change. All of the testimony of the Assessor’s representative should have been excluded and Smiths’ reliance on it is egregiously misplaced.

V. REPLY TO SMITH RESPONSE TO PETERSON CROSS-APPEAL

The problem with the outcome adjudged by the trial court with respect to the northerly three pilings supporting the canopy on the north side of the dock in dispute is that the court failed to identify the legal relationship it established. That legal relationship can, at best, be described as a “license.” Instead of finding either a prescriptive easement or a fee simple interest established by Petersons in the portion of the canopy and the three pilings extending over onto the Smith property (by just a few feet), the court declined the Peterson invitation to do so and concluded instead that the “canopy is attached to the pilings but is not a fixture.” (Finding of Fact 13.) The court went on in the same finding to determine that the canopy made of wood structure and metal covering “can

be removed, moved or modified.” The court concluded that “. . . to remove it, [the canopy and the pilings] . . . it does not affect the ownership of the shorelands below or the Smith pilings.”

Notwithstanding the evidence that the pilings are driven into the shoreland and that the canopy is affixed to the top of the pilings as any other wood structure would be, and that the canopy and pilings have been in place since before 1971, the court apparently concluded that the canopy and pilings were not real property, and therefore, could not create an ownership by adverse possession. Under Washington law, real property includes fixtures, such as machinery that is permanently used in a particular location. *Union Elevator & Warehouse v. State of Washington*, 144 Wn. App. 593, 603, 183 P.3d 1097 (2008). The determination of whether an item is annexed to the land as a “fixture” is made through objective evidence rather than through a party’s subjective belief. *Union Elevator, supra*, at 603. An item is a fixture if it meets a three-prong test based on whether (1) it is actually annexed to the realty, (2) it is adapted to the use of the realty, and (3) the annexing party intended a permanent attachment. *Union Elevator, supra*, at 603.

The canopy installation has been in existence since before 1971, is founded on pilings driven into the shoreland, and is permanently affixed to the dock. The canopy meets all tests of a “fixture,” and therefore, is as much a part of the realty as the dock itself. A canopy is no different than a carport roof or a garage roof or, indeed, the roof on a home. The finding of the trial court that the canopy was “transitory” and not a part of the realty is not supported by law or the evidence in this case.

In making this determination, the court ignored the testimony that the Petersons have maintained the canopy supported by the pilings, have replaced the roof material on top of the canopy structure at their own expense, and that since 1980 had had the exclusive possession of the shorelands and waters above them under the north canopy which extends over onto the Smith property.

In Conclusion of Law 6, the court held that the “Smiths owned the Smith pilings.” The court also held that the “. . . northerly slip of the dock may be used by the Petersons even though it may put a boat close to the boundary line near the easternmost Smith piling.” Conclusion of Law 7 rejects the Peterson claim of adverse possession and instead substitutes this vaguely defined “use” by Petersons of the north slip without any

definition of duration, what happens on title transfer, what happens if the “Smith pilings” are so decayed as to cause the collapse of the canopy on a boat the Petersons might have under the structure?

There is simply no authority in the law to award Petersons the limited and ill-defined interest that the court concocted here. The evidence is clear that the Petersons since 1980 at least have had the exclusive use of the north slip and have made use of that north slip. Whatever the interest that may have existed prior to 1980 (the court says it was a “shared” interest), since Larry Peterson moved the Heath boat (SEAWOLFE) off the north side of the dock without permission in 1978, Heaths have made no use of that slip and Petersons have had exclusive use of it ever since. The Petersons have adversely possessed the entire shoreland under the canopy on the north side of the dock, including the three pilings which are almost exactly upon the boundary line for the shorelands established by the court.

Having established adverse possession ownership to the area of the Smith property under the canopy, including the pilings, the court should have confirmed fee title in Petersons and their successors and assigns to

that area. The “use” interest awarded by the court is without definition and without precedent in the law of adverse possession.

VI. CONCLUSION/RELIEF SOUGHT

Appellants Larry and Susan Peterson ask the court to reverse the trial court on their adverse possession claim with respect to the portion of the canopy and the three pilings that extend onto the Smith property. Petersons ask the court to award them fee ownership of the shoreland under the canopy and the three pilings so that they own the slip, and can maintain the canopy and repair or replace the pilings to allow them the ability to continue to use the slip safely. The fee simple ownership of Petersons is the proper outcome under the law with respect to adverse possession. To this extent, and only to this extent, the decision of the trial court should be reversed. The decision should be remanded to the trial court for purposes of allowing the trial court to amend its judgment to award fee ownership to Petersons of the shoreland, canopy and pilings on the north side of the dock, based upon the testimony of Ben Petersen of PLS, Inc., the shoreland under the canopy.

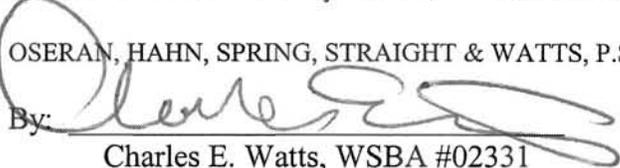
The remainder of the decision of the trial court confirming the fence constructed by Peterson in 1971 as a boundary by acquiescence,

confirming the “veer” in the fence constructed by Peterson in 1980 as the boundary by acquiescence, and rejecting any claims by Smith as to an ownership interest in the dock in issue should be affirmed. In addition, the trial court should be affirmed on extending the shoreland boundary between the properties on a line parallel with the other shoreland boundaries adjacent to it.

Therefore, the relief sought is a “reversed in part” as to the canopy and three pilings extending onto the Smith record ownership, and affirmed as to the fence, “veer,” dock, and shoreland boundary.

RESPECTFULLY SUBMITTED this 17 day of May, 2011.

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

By: 

Charles E. Watts, WSBA #02331
Attorney for Appellants/Cross-Appeal
Respondents Larry and Susan Peterson

CERTIFICATE OF SERVICE

The undersigned, Joy Griffin, certifies that on the 17th day of May, 2011, she caused to be served a copy of the attached Appellants Peterson Reply on Appeal Issues and Response on Smith Cross-Appeal Issues to the following via certified, return receipt requested US Mail:

Brian Krikorian
Law Offices of Brian Krikorian
2110 N. Pacific St., Suite 100
Seattle, WA 98103

The Court of Appeals/State of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

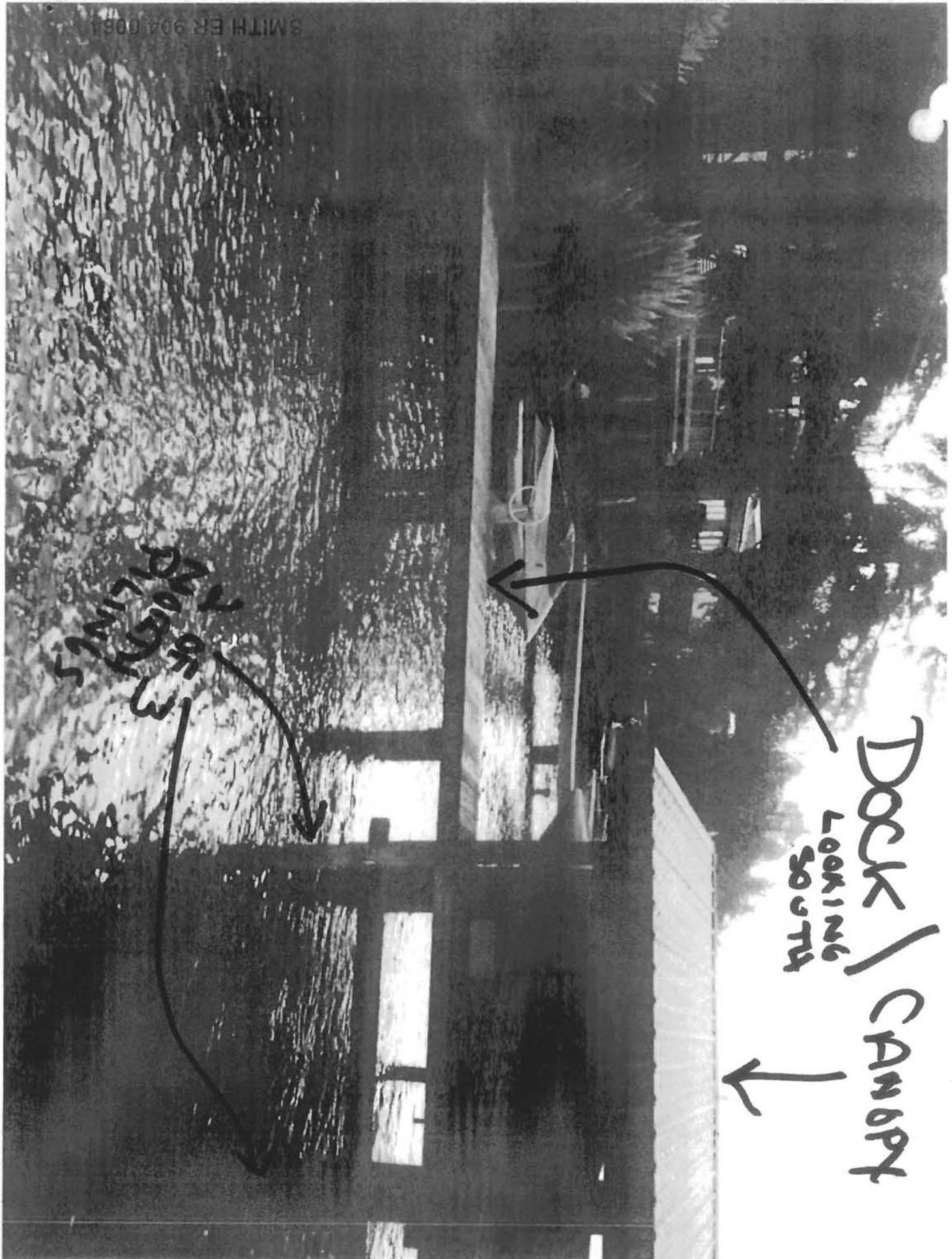
I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 17th day of May, 2011 in Bellevue, Washington.


Joy Griffin

APPENDIX A

SMITH ER 902 0084



DOCK / CAMPPT
LOOKING SOUTH

1 BR 3 PLINTS

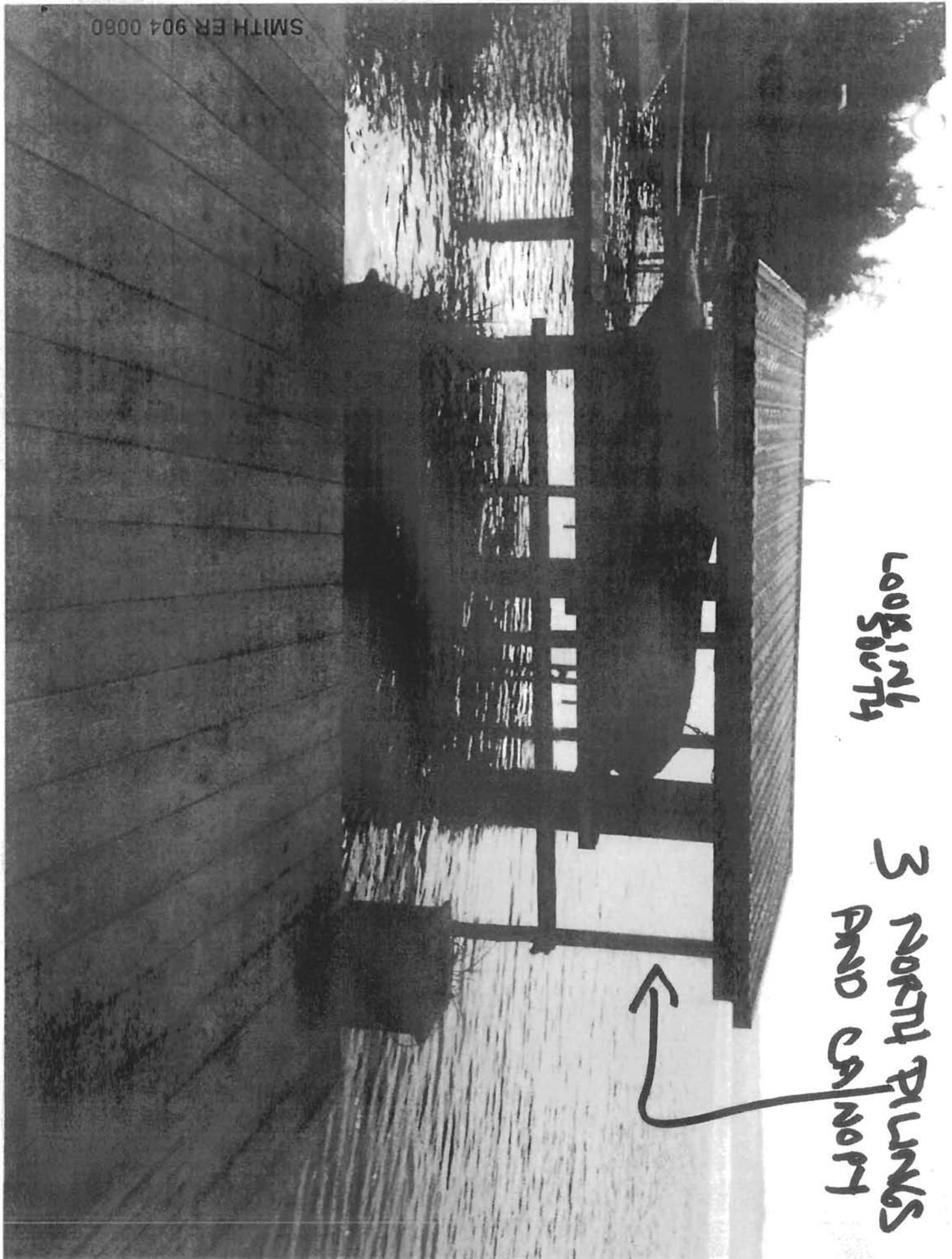
SMITH ER 902 0055

3 NORTH
PILINGS



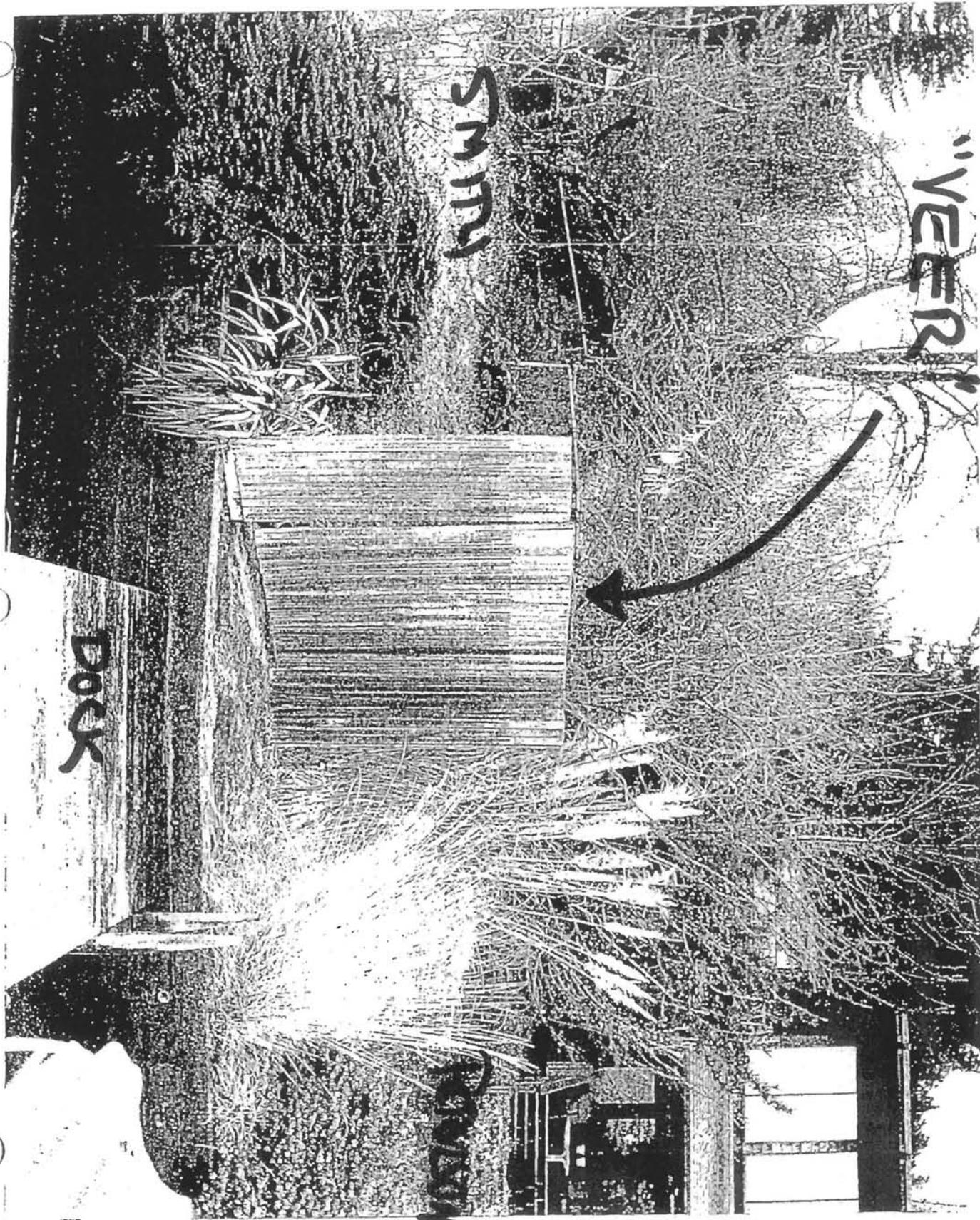
LOOKING SOUTH

3 NORTH PILINGS AND GANTRY



SMITH ER 904 0080

APPENDIX B



"VEER"

SMITH

DOCK