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COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

YOUNG S. & YONG S. KIM,

Appellants,

v.

KYUNG-RAK & JAE SOOK KIM, ET AL.

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Young and Yong Kim ("Appellants" or "Restaurant Kims")[1] own property and run a teriyaki restaurant on the waterfront in Birch Bay, Whatcom County. Kyung-Rak and Jae Sook Kim ("Respondents" or "Market Kims") own the property next door and run a small market/grocery store. The two properties share an entrance and parking lot and have for decades. After a 3 day trial, the trial court found in favor of Respondents, granting them, among other things, an implied easement and/or prescriptive easement over Appellants' property to allow for patron parking and the movement of delivery and service trucks. The trial court also awarded injunctive relief requiring the Appellants to remove a fence and concrete bollards which obstruct the easement.

Appellants appeal the trial court's findings of fact and conclusions of law supporting the final judgment. They also argue that due to the delay between the end of trial and entry of findings, this Court should not afford the usual deference to the trial court's findings of fact. The appeal fails because the record demonstrates without question, that: (1) the trial court possessed ample memory of the trial justifying the findings entered;

[1] The Appellants and Respondents are both of Korean descent and despite both having the surname "Kim" they are not related. To avoid confusion at trial and on the record, with no disrespect to either party intended, the attorneys and trial court chose to refer to the Appellants as "Restaurant Kim(s)" and the Respondents as "Market Kim(s)." (*See* RP of Trial at 13). To maintain continuity and avoid confusion, these references will also be used here.

(2) as a result, the Findings of Fact should be afforded the standard level of deference on review; (3) the Findings of Fact are supported by substantial evidence in the record; and (4) the Conclusions of Law and Final Judgment are supported by the Findings of Fact and are in accord with the law. The trial court should be affirmed.

II. RE-STATEMENT OF THE CASE

A. Facts Established Through the Undisputed Findings of Fact.[2]

Respondents own a parcel of land located on the corner of Harborview Road and Birch Bay Drive in Birch Bay, Whatcom County ("Market Parcel"). (Finding of Fact ("FF") 1; CP 270)[3]. A small grocery store is operated on the Market Parcel and has been in operation in one form or another for over 50 years. (FF 2; CP 270). Appellants own the adjacent parcel ("Restaurant Parcel"). (FF 3; CP 270). The Restaurant Parcel contains several buildings, but the primary structure is used for the operation of a teriyaki restaurant. (FF 4; CP 270). The Market Parcel and Restaurant Parcel share a parking lot which has one single access over the

[2] Appellants raise 37 Assignments of Error, 14 of which are related to specific Findings of Fact. *See* Brief of App. at 4 to 8. The Findings of Fact cited in this section were neither assigned as error nor argued in the briefing.

[3] The Findings of Fact and Conclusions of Law are attached to this brief as Appendix A and are in the record at CP 269-284.

Market Parcel. (FF 6; CP 271; *See also* Site Conditions Diagram (Ex 32 Tab 23)[4] and Aerial Photo (Ex 32 Tab 26C).[5]

Both the Market Parcel and Restaurant Parcel were originally owned by the Vogt family. (FF 11; CP 272). In the 1920's, the Market Parcel was known as the "Bay Center Resort," had a gas station pump, a small market, and rented out vacation cottages which were located on what is now the Restaurant Parcel. (FF 12; CP 272). In approximately 1961, the old "Bay Center Resort" structure was torn down and the current market building was built. (FF 13; CP 272). At that time, the structure which now houses the teriyaki restaurant on the Restaurant Parcel did not yet exist. (FF 13; 272).

By way of two deeds, one in 1965 and one in 1966, William Vogt became the common owner of both the Market and Restaurant Parcels. (FF 14, 15; CP 272). This conclusively established "unity of title" for the two parcels at issue in the case. (FF 16; CP 272). In 1972, during unity of title, a rear loading dock was added to the Bay Center Market, as well as some annexes for storage. (FF 19; CP 273). The loading dock and the storage bays were routinely used by market vendors and services to deliver goods and services to the Market Parcel. (FF 20; CP 273). To accomplish this use, vehicles using the loading dock and storage bays on

[4] The Site Conditions Diagram is attached hereto as Appendix B.
[5] The Aerial Photo is attached hereto as Appendix C.

the Market Parcel routinely crossed over what is now the property line into the portion of the parking lot located on what is now the Restaurant Parcel. (FF 20; CP 273). Numerous witnesses testified at trial that automobiles accessing the Market Parcel have for decades used portions of the parking lot located on the neighboring Restaurant Parcel to maneuver and park. (FF 9; CP 271).

Common ownership of the Market Parcel and Restaurant Parcel ended in 1978, when William and Blanche Vogt quit-claimed the Restaurant Parcel to their daughter, Penny Beebe. (FF 17; CP 272). After this transfer, Market Parcel patrons and delivery vehicles continued to use the Restaurant Parcel parking lot as they did during Vogt's common ownership. (FF 22; CP 273 to 274). Penny and her husband Blair Beebe constructed the building which is now used as the teriyaki restaurant. (FF 21; CP 273). They operated a gift shop and managed the vacation cottages out of the ground floor while they lived upstairs. (FF 21; CP 273). Eventually, the Beebes stopped operating the guest cottages and sold off that portion of the land. (FF 24; CP 274). During the Beebes' ownership, the Restaurant and Market Parcels were used in the same manner as before, using the Restaurant Parcel for ingress and egress of patrons, vendors and services of the Market Parcel. (FF 24; CP 274).

On September 24, 1996, the Beebes sold the Restaurant Parcel to the Appellants, Restaurant Kim. (FF 25; CP 274).[6] In conjunction with the sale, an express easement was granted to the Restaurant Parcel for ingress and egress over the Market Parcel by Blanche Vogt, owner of the Market Parcel at the time. (FF 26; CP 274). After this sale, patrons, vendors and service providers continued to use portions of the parking lot of the Restaurant Parcel. (FF 28; CP 275). At the time of the sale to Appellants, the use of the Restaurant Parcel by the Market Parcel would have been clear to anyone who took the time to notice. (FF 29; CP 275).

On December 15, 1997, Blanche Vogt sold the Market Parcel to the Respondents. (FF 27; CP 274).

At trial, Sung-Soo Kim,[7] son of the Respondents, testified about the importance of the Market Parcel's continued use of the parking lot on the Restaurant Parcel. (FF 32; CP 275 to 276). The parking lot is used for virtually all operations of the market – deliveries of goods, garbage service and patron parking. (FF 32; CP 275 to 276). Other witnesses

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[6] Appellants assign partial error to Finding No. 25, but it is treated here as unchallenged because the only error assigned relates to the date of the transfer. Appellants allege in Assignment of Error No. 24 that the transfer took place on "October 8, 2006." (*See* Brief of App. at 6). First, the reference to "2006" is presumed to be a typographical error by Appellants since even their own exhibit shows the transfer taking place in 1996. (*See* Ex 26). Second, while Appellants do not argue this assignment of error at all in their brief, it appears their challenge is based on the date of recordation of the relevant deed (October 8, 1996) rather than the date the deed was signed (September 24, 1996). (*See* Ex 26; Ex 32 Tab 19).

[7] Sung-Soo Kim is sometimes referred to in testimony as "John Kim." (RP Trial at 374).

corroborated Sung-Soo's testimony. (FF 35; CP 276). Sung-Soo Kim also testified about the difficult and costly remodel and development that would be required if the Market Parcel were not allowed to use the parking lot on the Restaurant Parcel. (FF 33; CP 276). The court found Sung-Soo Kim's testimony credible. (FF 32; CP 275-276). Based on this the trial court entered the following express and unchallenged finding:

> "switching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It would also require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially."

(FF 33; CP 276).

The area depicted in Exhibit "A" to the Findings of Fact and legally described in Exhibit "B" thereto is supported by witness testimony. (FF 37; CP 277 and Findings Exhibits A (CP 283) and B (CP 284). These are the same exhibits describing the location of the easement incorporated into the Final Judgment. (CP 285-293).

B. Challenged Facts Supported by Substantial Evidence.[8]

Appellants specifically assign error to 14 of the trial court's findings of fact, (*See* Brief of App. at 4 to 8), but they do not effectively challenge the findings in their brief. Accordingly, they are verities on appeal. *Kever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 741, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009 (2006) (regardless of an assignment of error, if the issue is not argued or briefed by citation to authority or to the record, the argument is deemed waived).

To the extent Appellants sufficiently raised challenges to any of the Findings of Fact, they are supported by substantial evidence. These facts and the supporting citations to the record are outlined below in the Argument.

C. Procedural Background.

This lawsuit has a relatively complicated procedural history involving a third party, however, that portion of the case was resolved prior to trial. The procedural history relevant to this appeal is relatively straightforward.

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[8] For unknown reasons, four separately paginated transcripts have been provided as the Verbatim Report of Proceedings. As a result, the VRP consists of at least four different pages which could referred to as "RP at 1." The following references are therefore used:

- "RP Trial at ___" references the four volumes of consecutively paginated trial transcript;
- "RP [date] at ___" references the hearing held on the date referenced in the citation.

On January 19, 2007, Respondents filed their answer and cross-claims against Appellants, which alleged causes of action for implied and prescriptive easement. (CP 61 to 65). Appellants filed their answer denying these claims on August 3, 2007. (CP 76-80).

In November 2007, Appellants began constructing a fence in the middle of the parking lot on the property line. Upon Respondents' motion, the court entered a preliminary injunction ordering Appellants to stop construction and remove the fence posts. (CP 423 to 429).

The case was tried to the bench over a period of three days in December 2009, with the morning of a fourth day necessary for closing arguments. (CP 430 to 437 (clerks docket notes)). On December 15, 2009, the court issued an e-mail ruling to the parties. (CP 214, 217). The email ruling incorporated Respondents' closing argument as its primary basis. (CP 215 ¶ 3; CP 218 to 264).[9]

In January 2012, Respondents' counsel transmitted proposed findings to Appellants' counsel along with a letter requesting comments and redlines. (CP 215, ¶ 7; CP 266). Counsel for Appellants did not respond or provide redlines, and a reminder letter was sent in February 2012. (CP 216 ¶ 8; CP 267). On February 28, 2012, Respondents noted a hearing for March 14, 2012 for presentation of Findings, Conclusions and

[9] Email Ruling attached herein as Appendix D.

Final Judgment. (CP 183 to 200).[10] On March 1, 2012, Respondents' counsel wrote another letter to Appellants' counsel requesting redline comments to the proposed findings and conclusions. (CP 216 ¶ 9 and CP 268). The hearing was continued to March 21, 2012 at Appellants' request. (CP 216 ¶ 10).

On March 15, 2012, Appellants filed a document entitled "Plaintiffs' Objections to Defendants' Proposed Findings, Conclusions, and Judgment." (CP 201). This pleading fails to call out any errors in the proposed findings of fact; instead, it re-argues the case. (*See* CP 202 to 207). Further, Appellants did not propose their own findings of fact, conclusions of law, or judgment. Rather, they simply stated "it is highly likely the Court has little or no appropriate memory of [the trial]." (CP 202). The written objection contained a motion for a "new trial." (CP 207).

Respondents provided a substantive reply to the issues raised by Appellants, (CP 208-213), and a hearing was held on March 21, 2012 on the entry of the proposed Findings, Conclusions and Judgment. (*See Generally* RP 3/21/13). After argument, the court entered the Findings of Fact, Conclusions of Law and Final Judgment in the same exact form as

[10] The Findings and Conclusions presented to the trial court in this filing contained several mixed up pages. This was clarified and corrected at the hearing on entry of those Findings and Conclusions. (RP 3/21/13 at 5).

proposed by Respondents. (CP 447 (clerks notes). It also denied Appellants' motion for new trial, raised in their objection to Findings. (RP 3/21/12 at 26, lines 18-23). Because of a scheduling issue raised by Appellants' counsel, the court deferred formal entry of the Findings, Conclusions and Final Judgment until April 3, 2012 to allow Appellants to bring a timely motion to reconsider. (CP 447 (clerks notes); CP 269 (Findings/Conclusions); CP 285 (Final Judgment).

On April 12, 2012, Appellants filed a motion to reconsider/new trial, noting it for hearing on April 27, 2012. (CP 294-308). The motion was ultimately heard on August 7, 2012. (CP 336 to 338; CP 339 to 341; *See Generally* RP 8/7/12). The court issued its order denying the motion for reconsideration/new trial that same day. (CP 394 to 395).

Appellants filed a Notice of Appeal on August 30, 2012. (CP 396). The Notice of Appeal assigns error to the Letter Decision, the Findings of Fact and Conclusions of Law, and the Denial of the Motion to Reconsider. (CP 397). Oddly, it does not assign error to nor attach a copy of the Final Judgment in the case. (*Id.*).

III. STANDARDS OF REVIEW

A. Findings of Fact.

Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002). A finding of

fact erroneously described as a conclusion of law is reviewed as a finding. *Willener v. Sweeting*, 107 Wn.2d 388, 393-4, 730 P.2d 45 (1986). Individual findings of fact must be read in the context of other findings of fact and of the conclusions of law. *In re Hews*, 108 Wn.2d 579, 595, 741 P.2d 983 (1987).

Findings of fact which are properly challenged are reviewed for substantial evidence in the record. *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

B. Conclusions of Law.

An unchallenged conclusion of law becomes the law of the case. *King Aircraft v Lane,* 68 Wn. App. 706, 716, 846 P.2d 550 (1993).

Challenged conclusions of law are reviewed *de novo*. *Robel*, 148 Wn.2d at 43. However when an appellant challenges conclusions of law not based on the law itself, but in alleging insufficient evidence supports those conclusions, *de novo* review is not appropriate. Instead, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether those findings support the conclusions. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990), *citing, Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)

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C. CR 59 Motion for Reconsideration and New Trial.

Motions for reconsideration and a motions for new trial under CR 59 are reviewed for "abuse of discretion." *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 40, 931 P.2d 911 (1997) (new trial); *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App 896, 906, 977 P.2d 639 (1999) (reconsideration). The Appellant must demonstrate the trial court's manifest abuse of discretion, meaning the ruling must be "manifestly unreasonable, or based on untenable grounds or reasons." *Kohfeld*, 85 Wn. App. at 40.

IV. ARGUMENT

A. The Trial Court's Findings Should be Given Deference.

Appellants ask this Court to review all of the trial court's findings of fact *de novo* rather than affording them the normal level of deference on appeal. (*See* Brief of App. at 17 to 18). Appellants argue this is warranted due to the passage of time between the end of the trial and the date the trial court formally entered findings. (*Id.*). Appellants present no Washington authority on this issue, and Respondents could find none.

Appellants cite *Keller v. US*, 38 F.3d 16 (1st Cir. 1994) for the proposition that the delay in entry of findings in this case *requires* this

Court to review the findings *de novo*. Appellants' argument ignores the underlying facts of *Keller,* and the facts of this case.[11]

In *Keller*, the appellants complained of an eight year delay between the end of a trial and entry of findings of fact. *Id.* at 21. The court held that in a case of "prolonged delay" between trial and entry of findings, a court of appeal may choose to review the record *de novo*, rather than afford the typical deference to trial court findings of fact. *Id.* Even though the *Keller* court conducted a *de novo* review of the findings, it actually held that notwithstanding the delay, the court need not presume the trial court was incapable of determining matters of witness demeanor, credibility or to recollect or reconstruct trial testimony through reliable means, such as trial notes. *Id.*

The situation here is markedly different from *Keller.* Most obvious: the delay was two years, not eight. Most compelling: the trial court's oral findings on this issue. In over seven pages of transcript, the trial court explained that it had a vivid memory of the trial and the testimony. (*See* RP 3/21/12 at 21 to 28). The trial court even said it had a better memory of this trial than most others:

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[11] Appellants failed to designate the transcript from the March 21, 2012 hearing on entry of Findings, Conclusions and Judgment and make no reference to that hearing in their brief. Appellate counsel (who was also trial counsel) was present at that hearing. Respondents provided this transcript to the Court at their own expense. A review of that transcript reveals that the court made express oral findings highly relevant to Appellants' argument. (RP 3/21/12 at 21 to 28).

> In this case, I have retained, I think, a fair degree of memory and recollection about the facts, despite the confusion of the names of the parties, except for the identification and designation as Restaurant Kims and Market Kims. Um, and I think my recollection is probably better than it would be in most cases of this type, perhaps, again, because of my familiarity with the property in question. (RP 3/21/13 at 23 to 24).

The trial court went on to state that it had spent the better part of a day going over the documents, the pleadings submitted in support of and in opposition to the entry of findings, conclusions, and judgment as well as portions of the trial transcript. (RP 3/21/13 at 24). The court stated that after that review "many of the details were still vivid in my memory." (*Id.*).

The trial court outlined that it also reviewed the trial exhibit notebooks as well as all the other materials assembled in the court's own file. (*Id.* at 24 to 25). The court stated that in reviewing those documents:

> I was able to track very well from beginning to end [of] the trial, including the history of the properties in question here, um, and as I said, I had a pretty vivid recollection of those properties anyway just from my exposure to them for so many years. (RP 3/21/13 at 25, lines 1 to 6).
>
> . . . .
>
> [I]n my opinion, I have sufficient independent recollection of the facts of this case that was refreshed, also by review of my notes, the materials and all of the records and files, including the transcript. (RP 3/21/13 at 26, lines 19 to 23).

> And probably it is just as true now as it was then and it will be forever more than I will still think of the parties as the Market Kims and the Restaurant Kims. So that – it's not so much a confusion of the parties as it is finding a convenient pneumonic [sic] device to keep them separate in my mind. (RP 3/21/13 at 26 to 27, lines 24 to 5).
>
> . . . .
>
> **I have reviewed carefully the proposals and I am willing at this time to sign the proposed documents as submitted by Mr. Dworkin.** (RP 3/21/13 at 27, lines 8 to 11) (emphasis added).

Unlike this case, the *Keller* court did not have the benefit of an extensive explanation of the trial judge's memory of the case. The crux of the *Keller* decision recognized the importance of affording deference to the trial courts findings. The *Keller* court chose to conduct a *de novo* review of the findings because it did not have what this court has—an explanation of the trial court's memory:

> "We consider it critically important that appellate attention remain focused on ensuring that trial court findings, despite inordinate decision-making delay, not be squandered unless their reliability has been undermined."

Keller, 38 F.3d at 21.

Judge Uhrig's extensive explanation of the state of his memory at the time the Findings of Fact were entered eviscerates any question as to the reliability of the Findings of Fact. Appellants' failure to cite to any fact other than the passage of time coupled with the trial court's

affirmation of a clear memory reveal the frailty of their argument. The record supports this court affording the appropriate deference to the trial court's Findings of Fact.

B. The Errors Assigned to the Findings of Fact Were Not Preserved for Appeal Nor Are They Properly Challenged in This Court, and Thus They are Verities on Appeal.

1. Objections to Findings of Fact Not Preserved Below.

Appellants raise 37 assignments of error, 15 of which are related to Findings of Fact and 14 of which have a reference to a specific finding. (*See* Brief of App. at 4 to 8). RAP 2.5(a) gives this Court discretion to decline to review issues not properly brought to the attention of the trial court. Here, Appellants failed below to properly raise challenges to the proposed findings of fact, other than in a motion for reconsideration *after* the findings were already entered. This Court should elect to not review these alleged under RAP 2.5(a).

The Appellants approached their objections to the Findings of Fact by choosing to lie in wait, raising their substantive objections only after the findings were formally entered by filing a motion to reconsider. Despite having the transcript in their possession since 2010, Appellants did not argue to the trial court the alleged evidentiary deficiencies they now propound, and furthermore, they refused to provide the trial transcript

to the court and counsel *before* the hearing on entry of findings. (RP Trial at 1 and 587 (transcript prepared in 2010); CP 334, ¶ 3 to 5 (Declaration of Counsel re: when transcript was made available). Instead, they waited to provide the transcript with their "Motion to Reconsider." (CP 334, ¶ 5).

Prior to the entry of the Findings of Fact, Appellants below raised no specific objections. Instead, they file a general "objection" which merely re-argued their trial theories and requested a new trial. (CP 201 to 207). Their "objection" only cited a few small excerpts of the trial transcript, (CP 205 to 207), but it did not in any way inform the court or the parties why the proposed findings were somehow erroneous. It did not propose redlines or suggest any alternate language for the court to adopt. In fact, the "objection" below did not even cite to a paragraph or specific numbered proposed finding to which they "objected."

"Legal theories not raised in a timely fashion before the trial court will not be considered for the first time on appeal." *Olson v. Silverling*, 52 Wn. App. 221, 230, 758 P.2d 991 (1988) *(citing Wilson v. Steinbach*, 98 Wn.2d 434, 440, 656 P.2d 1030 (1982) *and* RAP 2.5(a) and 9.12). The key here is the word "timely." Rather than giving the trial court an opportunity to address any issues before the Findings and Conclusions were entered, Appellants chose to withhold the transcript and not raise

specific challenges. Appellants did not raise the objections in a timely manner when they were raised for the first time in a motion to reconsider.

This sequence of events was a calculated litigation strategy. At the March 21, 2012 hearing on entry of Findings, the Appellants' argued that the trial court had insufficient memory to enter the Findings. (RP 3/21/12 at 9 to 16). Apparently, Appellants refrained from raising specific objections to the proposed findings because it wanted to "test" the court's memory, rather than refresh it. (*See* RP 3/21/12 at 13 line 20 to pg. 14 line 5). The Appellants admitted on the record at the hearing that they did not specifically object to any of the proposed findings because they wanted to address it in a motion to reconsider after the fact. (RP 3/21/12 at 10, Lines 4 to 12). True to their strategy, Appellants filed a detailed motion to reconsider containing specific objections to the now entered findings—in fact, more detailed than in their opening brief on appeal. (CP 294 to 308 (motion); CP 312 to 322 (Declaration of Shepherd)[12]).

A motion to reconsider or new trial under CR 59 cannot be based on new legal theories previously not raised. *See* CR 59; s*ee also, Wilcox v. Lexington Eye Inst.,* 130 Wn. App. 234 241, 122 P.3d 729 (2005) *citing, JDFJ Corp. v. Int'l Raceway, Inc.,* 97 Wn. App. 1, 7, 970 P.2d 343 (1999) ("CR 59 does not permit a plaintiff to propose new theories of the case

[12] This declaration contained only excerpts of testimony as well as two exhibits which were neither offered nor admitted at trial, but obviously available to Appellants.

that could have been raised before entry of an adverse decision"). RAP 2.5(a) requires appellants to timely bring an issue to the attention of the trial court in order to preserve it for appeal. *Olson*, 52 Wn. App. at 230. The motion to reconsider does not constitute "timely" raising the issue to the trial court in satisfaction of RAP 2.5(a) and Appellants have failed to preserve their challenge to the Findings of Fact.

2. Findings Assigned as Error Not Properly Challenged in Appellants' Brief.

Even if this Court finds Appellants preserved these challenges for appeal, most of them have been waived. A party who assigns error to a specific findings of fact but fails to properly argue or brief it, waives the error. *Kever & Associates, Inc.*, 129 Wn. App. at 741. If not properly challenged, the findings are not reviewed on appeal. *In re Estate of Palmer*, 145 Wn. App. 249, 265, 187 P.3d 758 (2008).

Appellants' brief fails to address the majority of the Findings to which they assign error. The Appellants have the burden of demonstrating why specific findings of fact are not supported substantial evidence through citation to the record. *Palmer*, 145 Wn. App. at 265. Moreover, Appellants have failed to either type out the material portions of the challenged findings verbatim or append them to their brief, another prerequisite to properly raising a challenge to findings. *Id.*

This Court has the discretion to waive technical violations when the briefing makes the nature of the challenge perfectly clear. *Id.* However, strict adherence to the rules is not just a "technical nicety." *Id.* The rules exist to avoid requiring the court to "comb the entire record" and construct arguments for the Appellants. *Id. citing*, *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998).

While not conceding the issue, Respondents believe that at best, Appellants assign error to and provide a sufficient modicum of argument on five of their 14 assignments of error:[13]

- Assignment of Error No. 21: Finding of Fact No. 8
- Assignment of Error No. 23: Finding of Fact No. 23
- Assignment of Error No. 26: Finding of Fact No. 31
- Assignment of Error No. 27: Finding of Fact No. 34
- Assignment of Error No. 29: Finding of Fact No. 38

To the extent these are properly argued, they are addressed below. However, the remaining the Assignments of Error[14] challenging the trial court's Findings should be treated as verities due to Appellants failure to providing any meaningful briefing or argument on them.

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[13] In their briefing, Appellants seem to raise potential challenges to other Findings of Fact which were not assigned as error, but it is difficult to discern. Nonetheless, a substantive response is provided *infra*.

[14] Assignments of Error: 2, 20, 22, 24, 25, 29 to 32, and 37.

C. The Trial Court Properly Found that an Implied Easement Exists.

Adams v. Cullen, 44 Wn.2d 502, 268 P.2d 451 (1954) was the first case in Washington to expressly acknowledge implied easements by reservation and provide a cogent analytical framework for courts on the issue. Respondents agree with the Appellants that an implied easement by reservation requires a greater degree of "necessity" than an implied easement by grant. Nonetheless, a review of *Adams*, its progeny, the findings and conclusions, and the evidence on the record as a whole, demonstrates that the trial court did not err.

1. Elements of Implied Easement by Reservation.

An implied easement by reservation exists:

> 1) When there has been unity of title and subsequent separation;
> 2) When there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title;
> 3) When there is a certain degree of necessity that the quasi easement exist after severance.

Adams v. Cullen, 44 Wn.2d at 505.[15]

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[15] In other words: (1) A landowner conveys part of his land; (2) The landowner retains part of his land, usually an adjoining parcel; (3) Before the conveyance, there was a usage existing between the parcel conveyed and the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part; (4) The usage is reasonably necessary to the use of the part to which it would have been appurtenant; and, (5) The usage is "apparent." *See* 17 Wa. Prac., Real Estate § 2.4 (2d. ed.) (Stoebuck).

The first element, "Unity of title and subsequent separation is an absolute requirement" for creation of an implied easement. *Adams*, 44 Wn.2d at 505 to 506. The remaining elements "are aids to construction" in determining the "cardinal consideration—the presumed intention of the parties **as disclosed by**"

→ the extent and character of the user,

→ the nature of the property, and

→ the relation of the separated parts

Adams, 44 Wn.2d at 505-506 (emphasis added).

The last two elements stated in *Adams* are not "hard and fast rule[s]"—the presence or absence of either or both of them "is not necessarily conclusive" in a court's determination of an implied easement. *Id.* at 506.

2. Unity of Title and Subsequent Separation Is Established.

Appellants do not appear to assign error to the existence of this element or otherwise argue it in their brief. The unchallenged Findings and Conclusions establish:

Findings of Fact:

. . . .

> 16) Thus as of February 28, 1966, the Market Parcel and Restaurant Parcel were in common ownership and had unity of title. (CP 272).

17) This common ownership remained until 1978 when William O. and Blanche Vogt quitclaimed the Restaurant Parcel to their daughter, Penny Beebe, wife of trial witness Blair Beebe, as evidenced by Exhibit 32-6 and 32-15. (CP 272).

. . . .

Conclusions of Law:

. . . .

2) The Restaurant Parcel and the Market Parcel were in unity of title when both parcels were owned by William O. Vogt in 1966. (CP 278).

3) The Restaurant Parcel and Market Parcel were subsequently separated when William Vogt quitclaimed the adjoining parcel, the Restaurant parcel to his daughter, Penny Beebe, in 1978. (CP 278).

4) William and Blanche Vogt retained ownership of the adjacent Market Parcel until 1997, when the Market Parcel was transferred to Joined Defendants Kim. (CP 279).

Appellants also admitted to the trial court that "Prior to 1978, the Market Parcel and the Restaurant Parcel were of common ownership, common use, and common scheme, being owned by William and Blanche Vogt." (*See* CP 62 (¶ 3.1.e of Respondents' Cross Claims) and CP 77 (Appellants' Answer, unconditionally admitting ¶ 3.1.e)).

In any event, the above findings and conclusions are supported by undisputed substantial evidence in the record. The trial exhibits were stipulated to by the parties and admitted in lieu of opening statements.

(RP Trial 31 to 46 (Market Kims' Exhibits) and 16 to 30 (Appellants' Exhibits)). The progression of ownership showing unity of title and subsequent separation was demonstratively mapped in color, with references to the relevant deeds. (Ex. 32 Tabs 5 to 12 (demonstrative maps); Ex 32 Tabs 13 to 17, 19 and 22 (Deeds); RP Trial 34 to 36 (explanation of exhibits); RP Trial 59 to 60 (Adam Morrow); RP Trial 96 to 97 (Blair Beebe).

3. "Quasi Easement" or "prior use" during Unity of Title is Established.

Appellants assign error to Conclusions of Law 1 and 5 as well as the Final Judgment generally, but they do not contest this element in their briefing at all. While Respondents argue any error has been waived, the Conclusions of Law related to this element are supported by Findings of Fact, which are in turn supported by substantial evidence.

"In a bench trial where the court has weighed the evidence, this Court's review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law." *Day v. Santorsola*, 118 Wn. App. 746, 755, 76 P.3d 1190 (2003), *rev. denied*, 151 Wn.2d 1018 (2004).

Professor Stoebuck rephrases this second element as "before the conveyance, there was a usage existing between the parcel conveyed and

the parcel retained that, had the two parts then been separately owned, could have been an easement appurtenant to one part." 17 Wa. Prac., Real Estate § 2.4 (2d. ed.) (Stoebuck). It is also referred to as "prior continuous use." *McPhaden v. Scott*, 95 Wn. App. 431, 438, 975 P.2d 1033 (1999).

The court made the following Findings of Fact relevant to the prior continuous use of the two properties during common ownership:

Findings of Fact:

2) Located on the Market Parcel is a small market which sells groceries, supplies, and other wares. This store has been operated on the Market Parcel in one form or another for over 50 years. (CP 270).[16]

6) The Market Parcel and Restaurant Parcel essentially share a parking lot . . . (CP 271).[17]

7) The loading dock for the grocery business operated on the Market Parcel is located on the southeast side of the market building, making the only access to the loading dock through the "shared" parking lot. (CP 271).

9) Credible testimony at trial from numerous witnesses including Blair Beebe, James Perry, Gil Brackinreed, Bruce Koch and Sung-Soo Kim all establish by a preponderance of the evidence that automobiles accessing the Market Parcel use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver and Park. (CP 271).[18]

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[16] This finding was not assigned as error.
[17] This finding was not assigned as error.
[18] This finding was not assigned as error.

10) The above witness testimony also establishes by a preponderance of the evidence that grocery and market vendors, grocery and market deliveries and services including but not limited to such as [sic] garbage and recycling currently use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver, deliver items, park and/or temporarily park to deliver items or perform services. (CP 271).

18) Testimony, photographic exhibits, and other evidence admitted at trial show that during the period of common ownership from 1966 to 1978, the Market Parcel and Restaurant Parcel were used in a manner that is similar to how they are used now, to-wit: the parking lot was paved and patrons would park at the market building by nosing their cars to the southerly wall of the market building. In order to do so, these cars would drive over the Restaurant Parcel's portion of the parking lot. (CP 273).

19) In approximately 1972, during common ownership, William O. Vogt added the rear loading dock and annexes to the Market building located on the Market Parcel, which appear as garages or storage bays. (CP 273).[19]

20) Evidence at trial established that this loading dock and the storage bays were routinely used by market vendors and services to deliver goods and services to the Market Parcel. Evidence further established that to do so, vehicles using the loading dock and storage bays were required to cross over portions of the parking lot located on the Restaurant Parcel. (CP 273).[20]

22) No formal easement was ever executed between William and Blanche Vogt and Penny Beebe to

[19] This finding was not assigned as error.
[20] This finding was not assigned as error.

> allow the continued use of the Restaurant Parcel parking lot by Market Parcel invitees. However, such use, as that which occurred during common ownership of the Market and Restaurant Parcel continued. (CP 274).[21]

These Findings support the Conclusions of Law and are supported by substantial evidence. "Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. This is because credibility determinations are left to the trier of fact and are not subject to review." *Burrill*, 113 Wn. App. at 868 (2003).

This Court "reviews all reasonable inferences in a light most favorable to the prevailing party. Though the trier of fact is free to believe or disbelieve any evidence presented at trial, appellate courts do not hear or weigh evidence, find fact, or substitute their opinions for those of the trier-of-fact." *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104-05, 267 P.3d 435 (2011) (*citations omitted*).

Blair Beebe is the son-in-law of William and Blanche Vogt. (RP Trial at 86). He is married to their daughter, Penny. (RP Trial at 85). Blair has known Penny Beebe since at least 1965 when he was in 5th grade, and is personally familiar with the Restaurant and Market Parcels

[21] This finding was not assigned as error.

since then, or before. (RP Trial at 87). Mr. Beebe's parents owned the Driftwood Inn, located down the street. (RP Trial at 87 to 88).

During testimony, Mr. Beebe reviewed two historical photos of the properties. (RP Trial at 88 to 89, reviewing Ex 32 Tab 26FF and Tab 26HH). He had personal knowledge of the images in both photos, and was familiar with the "old" market building shown in Ex 32 Tab 26HH[22] and the "newer" building shown in Ex 32 Tab 26FF. (RP Trial at 89 to 90). Beebe identified Ex 32 Tab 26FF[23] as showing the building constructed in approximately 1962, depicting the market and the 46 red-roof vacation cottages to the south. (RP Trial at 90). William and Blanche Vogt owned both properties when the "new" market was built in approximately 1962. (RP Trial at 92).

Blair and Penny were responsible for the project of building the structure that is now the teriyaki restaurant on the Restaurant Parcel. (RP Trial at 93). The Restaurant Parcel was ultimately given to Penny by her parents. (RP Trial at 93). At the time of that transfer, the Bay Center Market was being operated on the Market Parcel. (RP Trial at 96). Further, at the time of that transfer (and thereafter), Blair Beebe personally witnessed patrons of the grocery store using the Restaurant Parcel parking

[22] Attached as Appendix E
[23] Attached as Appendix F

lot. (RP Trial at 97). He also saw delivery trucks for the market using the loading dock area. (RP Trial at 97 to 98).

Trial Exhibit 8A was used by many witnesses to mark the historical pathway of travel of cars and trucks to the Market Parcel, over the Restaurant Parcel. Blair Beebe marked Exhibit 8A, showing the above, and describing what route cars and trucks would use in great detail. (RP Trial at 98). This included testimony regarding how trucks would historically back up to the loading dock, which is now blocked due to the fence constructed by Appellants and which the court ordered removed. (RP Trial at 99 to 100(testimony); RP Trial at 435 (fence was put up by Appellants to stop trucks); (CP 289 ¶ 7 (Final Judgment ordering removal of fence)).

Jim Perry worked for Dairygold and had delivered milk and ice cream to the Market Parcel since 1953, retiring in 1990. (RP Trial at 139). He testified, using Exhibit 8A, that during this 30 plus years, at least twice a month he would drive south of the property line between the Market and Restaurant Parcels to make his deliveries to the Market Parcel. (RP Trial at 142 to 143).

Gil Brackinreed (dairy delivery) and Bruce Koch (garbage service) corroborated this historical use. They continued practices similar to those described by Beebe and Perry. (RP Trial at 154 to 158 (Brackinreed); and

at 179 to 184 (Koch). Brackinreed also confirmed Beebe's testimony that Appellants' placement of the 6' privacy fence (depicted on Exhibit 8A) blocked the historical turnaround for Market delivery vehicles. (RP Trial at 158 to 160).

The above testimony and evidence is uncontroverted and constitutes substantial evidence to support Findings of Fact related to the element of "quasi-easement" or "prior continuous use."

4. Necessity for Implied Easement by Reservation was Established.

a. The Level of "Necessity" Required is Not as High as Appellants Argue.

Appellants' challenge of the trial court's ultimate rulings regarding the implied easement appears to focus on the element of "necessity." Appellants argue, among other things, that Conclusion of Law No. 6 and Finding of Fact No. 36 are erroneous. Appellants argue that the trial court's use of the phrase "reasonable necessity" rather than "strict" necessity establishes reversible error. Appellants are incorrect.

The legal standard of "necessity" is established in *Adams v. Cullen* and progeny. "A fair statement of Washington's definition of 'necessary' is that it does not mean strict necessity but only that other possible routes of use would be substantially less convenient which might mean more expensive to develop and use." 17 WA Prac., Real Estate, § 2.4 (2d Ed.)

(Stoebuck) (emphasis added). "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989), *citing Adams v. Cullen*, 44 Wn.2d at 507.

Necessity and prior use of the land are counterbalancing factors. Thus, the requirement of true "strict necessity" in private condemnation cases, where prior use is irrelevant. *See* RCW 8.24.010. With implied easements, the stronger the evidence of implication by showing prior use during common ownership, the less necessity is required, and vice versa. *Adams*, 44 Wn.2d at 455, *citing Restatement, Property*, § 476, comment g. p. 2983, *et seq*. As a result, "no precise definition of necessity can be made." *Id.*

The facts of *Adams v. Cullen* are actually similar to the case at bar, and establish that a common driveway or access, with other possibly available, can support an easement implied by reservation. In *Adams,* Cullen asserted he had an implied easement over Adams' property. *Adams*, 44 Wn.2d at 503. The Adams and Cullen properties were originally one parcel, with the "Strahorn" residence located on what later became the Adams property and the carriage house to the Strahorn residence located on what later became the Cullen property. *Id.* At the

time of the lawsuit, the two respective buildings had become the "Strahorn Apartments" and the "Cullen Apartments." *Id.* The access to the Cullen Apartments/Cullen Property was a driveway located on the Adams Property. *Id.* at 504.

The evidence established that the driveway over the Adams property had constantly been used for access to the Cullen property since the driveway was built. *Id.* There was no evidence that another driveway to the Cullen property had ever existed. *Id.* at 504. Finally, even though it was possible for the Cullen property to gain its own access via an abutting public street, the cost to do so was significant, and the access was not a satisfactory substitute the one over the Adams' property. *Id.* at 510.

The trial court found an implied easement by reservation and the Supreme Court affirmed. The Court held that while implied easements by reservation require a higher degree of necessity than do those by grant, they still do not require "strict necessity." *Id.* at 508 to 509. The Court found that in light of the history of use and the cost and inconvenience of the alternative, Cullen had established sufficiently "necessity" justifying an implied easement by reservation. *Id.* at 510.[24]

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[24] The *Adams* Court also relied on the fact that the Adamses' had knowledge of the Cullens' use of the driveway. Here, the trial court made a similar finding. (*See* FF 29, CP 275).

Appellants cite several cases in an attempt to convince this Court the rule of "strict necessity" applies, rather than the actual rule enunciated in *Adams*. Appellants cite *Wreggitt v. Porterfield*, 36 Wn.2d 638, 639, 219 P.2d 589 (1950) for the proposition that "necessity must be of such a nature as to leave no room for doubt of the intention of the parties." (Brief of App. at 21). Appellants fail to point out that *Wreggitt* (1950) preceded *Adams* (1954), and its precedential value on the issue of implied easements by reservation was expressly called into question by the *Adams* court: "[*Wreggitt*] is not authority for the rule that an easement cannot be created by implied reservation." *Adams*, 44 Wn.2d at 454.

Appellants also argue that the timeframe in which necessity must be measured is in 1978, not at the time of trial. (Brief of App. at 23 to 24). Appellants cite to no authority supporting this proposition, because none exists. Further, considering necessity at the time of separation would be illogical. Reading into the rationale espoused in *Adams* and progeny, the purpose of the "necessity" element is to balance the interests of the alleged dominant estate against those of the alleged servient estate. The higher the necessity at the time of demanding the easement, the more likely the easement will be implied. The cases analyzing claims of implied easements are in accord with this analysis. *Adams*, 44 Wn.2d 502; *Bays v. Haven*, 55 Wn. App. 324; *McPhaden*, 95 Wn. App. 431.

The level of necessity required in this case is a level of reasonable necessity heightened over that required in the case of an implied easement by grant, but less than true "strict" necessity. The greater the evidence of consistent prior use during common ownership, which then continues after separation, the less degree of necessity required.

b. The Conclusions of Law on "Necessity" are Supported by the Findings of Fact, which are Supported by Substantial Evidence.

The trial court entered the following Findings of Fact in support of its Conclusions of Law relative to the issue of "necessity."[25]

Findings of Fact:

29) At all times, including the time Plaintiffs Kim purchased the Restaurant Parcel, it was clear to anyone who would take the time to notice that the entire parking area was used by automobiles and delivery vehicles alike in the manner as described herein. (CP 275).[26]

30) Plaintiffs Kim had sufficient information available to them to put them, or any other person, on notice of this use. This use was long-term, apparent, obvious, visible, continuous, open and notorious. (CP 275).

32) Testimony by Sung-Soo Kim, the son of Joined Defendants Kim and who operates and is familiar with the market, testified to the importance of the use of the parking lot on the Restaurant Parcel. The Court finds his testimony credible. He described

[25] The findings discussed in earlier argument sections are also relevant to necessity.
[26] This finding was not assigned as error.

how merchandise is brought into the market, how the market operates and that use of the loading dock is important to an efficient business. He described the importance of garbage and recycling services accessing this area. He described the importance of customers using this area to access parking and to park on the Restaurant side.[27]

33) Sung-Soo Kim testified and this Court finds that switching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It also would require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially.[28]

34) If no easement existed in favor of the Market Parcel, the Market Parcel would use [sic] all practical use of parking lot on the south side of the building, which would become useful for parking not much more than bicycles. Delivery vehicles and automobiles would be almost completely unable to make any use of the south side of the building.

35) Factual Witnesses at trial testified as to the general area of the Restaurant Parcel parking lot they had historically used to gain access to the Market Parcel. Demonstrative exhibits were used to depict this area.[29]

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[27] This finding was not assigned as error.
[28] This finding was not assigned as error.
[29] This finding was not assigned as error.

> 38) The Court finds that granting an easement as depicted and legally described in Exhibits "A" and "B" to these findings is commensurate with the evidence presented at trial. Further, granting such an easement represents nothing more than what was well-established at trial as the long-term use of the Market and Restaurant Parcels.

Substantial evidence supports these findings. Vehicles use of the parking lot was visible to anyone who would watch for an hour or so. (RP Trial at 104). Appellants' family members were aware of this in 1996. (RP Trial at 378 to 379). They knew it would be a contentious issue if they tried to stop it. (RP Trial at 381). James Kim, son of Appellants, testified they were aware of the use of the Restaurant Parcel by trucks and cars as described by the various witnesses. (RP Trial at 426 to 427). While Mr. Young Kim testified that he did not see delivery trucks making the movements described by other witnesses, he did state he visited the Restaurant Parcel for two days before purchasing it. (RP Trial at 501 to 502).

Sung-Soo Kim testified he worked at his parents' market. (RP Trial at 265 to 67). He witnessed cars and trucks making the same movements described by the other fact witnesses. (RP Trial at 269 to 274). He also testified about the differences between using the man door on the north side of the Market for deliveries versus using the loading dock on the south side, and how the loading dock is a much more efficient

for running their business. (RP Trial at 284 to 286; Ex 42 (floorplan of relevant area of market showing difference between delivering on south side versus north side) and *generally* all photos under Ex 32 Tab 26). Delivery and service truck drivers and the former business owner confirmed that using the loading dock is more efficient than the north side man door, because you don't have to hand truck inventory through man doors, but instead, can place it right in the loading bay. (RP Trial at 275; 287). Photographic exhibits admitted corroborate this testimony. (*See* Ex 32 Tab 26Y, 26Z, 26AA).

Appellants argue the court's findings on necessity are in error because the testimony of Bruce Koch and Gil Brackinreed indicates that using the north side man door would be easier than the south. (*See* Brief of App. at 15 to 16). These arguments fail for two reasons. First, whether it is easier for a truck to turn around in a large open parking lot is not the relevant inquiry on necessity. Second, the witness testimony is not what Appellants make it out to be. Brackinreed testified that while it may be easier to maneuver a truck on the north side, there is no receiving area and he had never delivered there. (RP Trial at 163 to 164). Koch testified it would be to maneuver a garbage truck in an open vacant lot as opposed to parking lot on the south side. (RP Trial at 189). However, neither witness

testified or had any personal knowledge as to the logistics *inside* the market, of running the business, or of the cost.

Only Sung-Soo Kim testified to these issues, and his testimony was found by the trial to be credible. (FF 32; CP 275). He said that in order to formally use the north side for deliveries, his parents would have to pave the gravel parking lot at a cost of approximately $100,000, due to its location in the shoreline jurisdiction. (RP Trial at 288; 290; and 52 (Adam Morrow confirming shoreline jurisdiction); Ex 34). The market itself would require engineering and a structural remodel at a cost of $200,000 to $250,000. (RP Trial at 291). These estimated costs presented a significant financial burden on Respondents. (RP Trial at 296).

Sung-Soo Kim acknowledged that some trucks were now using the north side for deliveries, but that was only because of Appellants' complaints and actions. (RP Trial at 299). He noted it was extremely inconvenient and inefficient for the market business to receive deliveries on that side. (RP Trial at 300). Sung-Soo Kim analogized using the north side man door for market truck deliveries "like trying to get an elephant through the front door." (RP Trial at 312).

Jeff VanderYacht, a professional traffic engineer, testified regarding national traffic standards for the minimum area required for cars to park. (RP Trial at 199 to 201; 202 to 213). He demonstrated to the

court minimum room needed for a passenger vehicle to park nose-in on the south side of the market, where they had been parking for over 50 years. (RP Trial at 213 to 214, using Ex 35, 36, 37 and 38). His testimony was found by the trial court to be credible, (FF 36, CP 276), and it corroborated what the factual witnesses testified too—that patrons parking at the market would loop to the south over portions of the Restaurant Parcel parking lot to then pull in nose-first to the south side of the market.

Finally, Appellants essentially argue that the 1985 grocery store lease overcomes all of the above testimony. (*See* Brief of App. at 22 to 23; Ex 32 Tab 18 (lease)). In so doing, they focus on only limited provisions of the lease, ignoring all provisions as a whole. A complete review of the lease reveals it supports the Findings and result in this case.

For example, paragraph 25 of the lease states: "all commercial vehicles should be encouraged not to block traffic to the condos, the cabins or the gift shop. They are to be parked on leased property." (Ex 32 Tab 18). This provision actually supports Respondents' case. It demonstrates that the parties to the lease anticipated that commercial traffic for the Market Parcel would in fact use the Restaurant Parcel (e.g. the gift shop) to access the area, but it "encourages" them not to block traffic. The lease in no way prohibits the lessees of the Market Parcel from using the Restaurant Parcel parking lot nor does it prohibit them

from *temporarily* blocking traffic. The lease also shows that it was the Vogts' intent at that time that the market continue to operate in this manner, using the Restaurant Parcel parking lot, for at least the next 20 years.

Lease paragraph 30 specifically states that patrons of the market may park on the "Landlubber Gift Shop property" which, we know from testimony, is the Restaurant Parcel. (RP Trial at 96-97). This lease was executed in 1985, after separation of common ownership. Thus, in context, this too supports the trial court's Findings as it demonstrates that parking on the Restaurant Parcel by Market patrons was integral to the operation of the Market Parcel and serving the market's customers despite no express easement existing over the Restaurant Parcel.

All of the trial court's Conclusions of Law regarding the implied easement claim are supported by Findings of Fact. All of the Findings of Fact are supported by substantial evidence in the record. The implied easement claim should be affirmed.

D. This Court Need Not Reach the Issues Related to the Prescriptive Easement Claim if it Affirms the Implied Easement.

The legal theories of implied easement and prescriptive easement are not necessarily inconsistent, as Appellants suggest. Regardless, they are in some respect alternative theories as they both support the same

exact relief based on different facts and theories. Alternate theories may be pleaded together. CR 8(e)(2). If this Court affirms the trial court's findings, conclusion and judgment as it relates to the implied easement cause of action, it need not reach the prescriptive easement analysis at all, because even if the court's conclusion were in error, the implied easement theory supports all relief granted in the Final Judgment. *See Port of Seattle v. Lexington Ins. Co.,* 111 Wn. App. 901, 919-920, 48 P.3d 334 (2002) (upholding ultimate decision of trial court despite error when alternative theory supported judgment).

E. The Trial Court Properly Held that a Prescriptive Easement Exists.

Appellants challenge the trial court's Findings, Conclusions and Judgment regarding the prescriptive easement on three bases, alleging the trial court "accepted an invitation to enter into a flight of fancy." (Brief of App. at 25). First, Appellants argue the burden of proof for this claim is greater than a preponderance of the evidence. (Brief of App. at 26). Second, Appellants argue that the use was permissive until 2003. Third, and in conjunction with second issue, they argue the requisite period of 10 years of hostility had not passed. All of these assaults on the trial court's sound judgment fail.

1. Burden of Proof is a Preponderance, Not Higher.

Appellants admitted below that our Supreme Court has not expressly declared the burden of proof on a prescriptive easement claim to be anything greater than a preponderance. (CP 303, lines 20 to 21). On appeal, the only Washington authority cited by Appellants supporting a higher burden of proof is the Division I prescriptive easement case of *Lee v. Lozier*, 88 Wn. App. 176, 185, 945 P.2d 214 (1997).

A review of *Lee v. Lozier* reveals that the burden of proof was not at issue in the case. Instead, after the *Lee* court used the phrase "clear proof" it engaged in a discussion about the substantive element being addressed, not the burden of proof. *Lee*, 88 Wn. App. at 185. Arguably, this sole use of the phrase "clear proof" is dictum. *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 fn. 16, 964 P.2d 380 (1998) ("statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed. Dicta is not controlling precedent" (*citations omitted*)). Opinions of this Court issued after *Lee v. Lozier* do not adopt or reference the phrase "clear proof." Instead, they remain silent on the issue. *See Drake v. Smersh*, 122 Wn. App. 147, 89 P.3d 726 (2004) and *Granite Beach Holdings, LLC v.*

State ex rel. Dept. of Natural Res., 103 Wn. App. 186, 11 P.3d 847 (2000).[30]

Whether the burden of proof be "clear proof" or "preponderance of the evidence, the trial court did not err based on the Findings of Fact and the evidence on the record.

2. 10 Year Prescriptive Period.

The adverse possession "clock" began to "tick" when permission was revoked. The use of the parking lot between the Beebes and the Vogts, was obviously permissive. However, that permission ended by operation of law upon transfer of title to the Restaurant Parcel from the Beebes to Appellants. "We reaffirm the rule set forth in previous Washington cases: absent revocation, only the sale of the servient estate . . . terminates permission. *Miller v. Anderson*, 91 Wn. App. 822, 832, 964 P.2d 365, 370 (1998).

Appellants took ownership of the Restaurant Parcel on September 24, 1996. (Ex 32 Tab 19). The Vogts' period of ownership from this date

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[30] Respondents discovered the following Washington cases (in addition to *Lee* case) using the phrase "clear proof" in an adverse possession or prescriptive easement situation. In *People's Sav. Bank v. Bufford*, 90 Wn. 204, 208, P55 P. 1068 (1916), an adverse possession case, the Supreme Court used the phrase "clear proof" in relation to the adverse possession of platted "town lots" when there was no adverse subjective intent of adverse possessor. In *Hunt v. Matthews*, 8 Wn. App. 233, 237-38, 505 P.2d 819 (1973, *overruled by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), another adverse possession case, the Court of Appeals cited *People's* under similar circumstances, which are distinguishable from the situation here. Finally, in *Adams v. Skagit County*, 18 Wn. App. 146, 566 P.2d 982 (1977), the Court of Appeals used the phrase "clear proof" without explanation and apparently as dicta.

until Respondents took title can be tacked on to this calculation. *See Miller v. Anderson*, 91 Wn. App 822, 827, 964 P.2d 365 (1998). Respondents asserted their claim of adverse possession on August 8, 2007, when they filed their cross-claims. At that time, more than 10 years had passed. This Court need not go further on this issue, except of course to confirm the trial court's factual finding of "hostility" during this almost 11 year period.

3. Hostility vs. Permissive Use.

"Hostile" means: (S)uch use of property as the owner himself would exercise, entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right. Hostile use of real property by an occupant or user does not import ill will, but imports that the claimant is possessing or using it as owner, in contradistinction to possessing or using the real property in recognition of or subordinate to the title of the true owner." *Dunbar v. Heinrich*, 95 Wn.2d 20, 23, 622 P.2d 812 (1980) (citations omitted).

Hostility—adversity—is a question of fact. *Miller*, 91 Wn. App at 828. It is to be determined under an objective standard. *Id.*, *Dunbar,* 95 Wn.2d at 23. Only if the essential factual findings are unquestioned, is hostility determined as a matter of law. *Lingvall v. Bartmess,* 97 Wn. App. 245, 250, 982 P.2d 690 (1999). The court entered appropriate

Findings of Fact and Conclusions of Law using these standards.

Appellants make much of the testimony of Sung-Soo Kim and James Kim which they assert proved the use was permissive.[31] (Brief of App. at 25-26). This testimony focused more on "mutual benefit" and assumptions rather than actual permission. (RP Trial at 309-310; 404). Regardless, this testimony is irrelevant under the objective test used by the court, which is in accord with the law. *Dunbar*, 95 Wn.2d at 24 (in determining hostility, courts do not discuss or consider the subjective intent of the parties but instead only look to objective factors). Here, after the benefit of listening to and watching the live testimony, the court found:

> 31) Plaintiff Kim, by his testimony and by descriptions of his actions, demonstrated that he [sic] did not give permission for the use as described here, by the Market Parcel and such use was adverse. This adversity is further established by operation of law, that any permission granted by a predecessor such as Beebe is automatically revoked upon transfer of title. (CP 275).

This finding is supported by substantial evidence.

Because of their close familial relationship, the Vogts' use of the property once it was given to the Beebes was permissive. *Granston v.*

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[31] James Kim only lived in the area for two years of the entire time at issue, spending the other years in Boston or Mukilteo. (RP Trial at 401). Sung-Soo Kim had lived in the area and worked at the market since 2002, and before that, worked at the market for all of his school breaks throughout the year. (RP Trial at 265-268).

Callahan, 52 Wn. App. 288, 294, 759 P.2d 462 (1988). But this permission terminated when the servient estate was transferred to the new owners, Appellants. *Granston*, 52 Wn. App. at 295; *See also, Miller*, 91 Wn. App. at 832. Whether permission was re-granted after that, is a question of fact.

Both Respondents and Appellants agree that Respondents never asked for "permission" to use the property, (RP Trial at 315; 358; 404). Asking for permission could have possibly indicated an intent other than hostility. *Granston*, 52 Wn. App at 293. Appellants cannot legitimately argue that on the record here, the Appellant Kims and Respondent Kims were close or friendly enough that "permission" can be inferred.

Contrary to Appellants' arguments, no presumption of permission for neighborly sufferance exists in Washington law. In developed land cases (as opposed to vacant land cases) the courts may imply that use was permissive when the facts support an inference that the use was permitted by neighborly sufferance or accommodation. *Drake v. Smersh*, 122 Wn. App. 147, 154, 89 P.3d 726 (2004). However, that implication is not required. In *Drake*, this Court found no inference of permissive use and upheld a finding of a prescriptive easement when the evidence showed the claimant and his predecessors had used a driveway since 1950. *Id.* at 155.

The facts surrounding the use of the Restaurant Parcel by the owners of the Market Parcel from the time the Restaurant Parcel was transferred to Appellants supports a finding of hostility. Inviting the public onto one's land is probative of a hostile possession, because it shows the adverse possessor treating the property as his own. *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wn.2d 75, 91, 123 P.2d 75 (1942). Both parties agree that Respondents routinely invited the public to use the property to park and deliver goods. Respondents and their vendors and patrons used the Restaurant side of the parking lot with impugnity.

Shinae Kim (daughter of the Appellants) testified her family knew trying to terminate access would be a contentious issue. (RP Trial 381). This supports an inference that Respondents believed they had a right to use the Restaurant Property—an element of hostility. This is confirmed in Sung-Soo Kim's testimony when he states that while there were perhaps some "friendly" relations, he and his family believed their right to use the Restaurant Parcel was permanent. (RP Trial at 309-310). Even Young Kim himself testified the relationship between the parties was not good, as he was annoyed when patrons of the market would "slam the door" in his "cozy" restaurant and when they would use his restroom. (RP Trial at 492; 497 to 498).

The overall relationship between these two families and adjacent property owners does not give rise to a inference or implication of permission. It is undisputed that after the Restaurant Kims took title, the Market Kims and their predecessors used the Restaurant Property as if it were their own and no-one ever asked for permission. Hostility "does not import enmity or ill-will, but rather imports that the claimant is in possession as owner." *Chaplin v. Sanders*, 100 Wash. 2d 853, 857-58, 676 P.2d 431 (1984). The fact that some testimony indicates the parties were at some points facially "friendly" does not prevent the use from being hostile for purposes of a prescriptive easement. The trial court's Findings, Conclusions and Judgment on prescriptive easement should be affirmed.

F. The Motion for Reconsideration and New Trial Were Properly Denied.

Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will reverse a trial court's ruling only upon a showing of manifest abuse of that discretion. *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *Id.*

The grant or denial of a motion for a new trial is also a matter within the trial court's discretion and will not be disturbed on appeal absent a showing of a manifest abuse of that discretion. *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 40-41, 931 P.2d 911 (1997).

Superior Court Civil Rule 59(a)(1) authorizes a court to order a new trial if there was an "irregularity in the proceedings . . . by which such party was prevented from having a fair trial." In order for the trial court to have granted a new trial on this basis, it would have had to find that the alleged irregularity "prevented the moving party from receiving a fair trial and materially affected the party's substantial rights. *Ramey v. Knorr*, 130 Wn. App. 672, 687, 124 P.3d 314, 323 (2005). Appellants failed to meet this burden below as outlined here, because the delay in entry of findings in no way prejudiced them.

Finally, "The grant of a motion for a new trial is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party." *Kohfeld*, 85 Wn. App. at 40-41.

Based on the arguments submitted herein, Appellants cannot demonstrate that the trial court abused its discretion by denying the motion to reconsider and motion for new trial.

V. CONCLUSION

For the reasons stated herein, the trial court should be affirmed.

RESPECTFULLY submitted this 13th day of March 2013.

BELCHER SWANSON LAW FIRM, PLLC

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Attorney for Respondents Kyung-Rak & Jae Sook Kim

APPENDIX A

SCANNED 16

FILED

APR - 3 2012

WHATCOM COUNTY CLERK

By: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

YOUNG S. KIM and YONG S. KIM, a marital community, Plaintiff, vs. KAISER INVESTMENTS, INC., an inactive Washington corporation, JOY INVESTMENTS, LLC, a Washington corporation, RAINBOW PROPERTIES, LLC, a Washington corporation, UNIVERSAL MANAGEMENT, INC., a Washington corporation and SABRINA CHAUDHRY, an individual, Defendants/Third-party Plaintiffs, vs. KYUNG-RAK and JAE SOOK KIM, a marital community; DAVE and BONNIE HARKELROAD, a marital community and PETER TORKILD, an individual. Joined Defendants.	NO. 05-2-02841-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW JUDGE IRA J. UHRIG

THIS MATTER came on before the Court for a bench trial commencing on December 1, 2009 and testimony and argument having been taken on December 1, 2, 7, and 8, 2009, with the Court having reviewed all pleadings, memorandum, admitted exhibits and records in this case, the Court enters the following Findings of Fact and Conclusions of Law:

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ORIGINAL

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I. FINDINGS OF FACT

The Court enters the following Findings of Fact regarding all claims asserted by both Plaintiff Young and Yong Kim and Joined Defendants Kyung-Rak and Jae-Sook Kim:

1) Joined Defendants Kyung-Rak and Jae-Sook Kim ("Joined Defendants Kim") own real property commonly referred to as the "Bay Center Market" in Birch Bay, Whatcom County Washington. This property is generally located on the corner of Harborview Road and Birch Bay Drive, and is legally described in trial Exhibit 32, Tab 21 (Referred to herein as "Market Parcel").

2) Located on the Market Parcel is a small market which sells groceries, supplies, and other wares. This store has been operated on the Market Parcel in one form or another for over 50 years.

3) Plaintiff Young S. and Yong S. Kim ("Plaintiffs Kim") own real property in Birch Bay, Whatcom County, Washington, which has a Teriyaki restaurant and other buildings located on it. This property is located directly adjacent to the Market Parcel, and is legally described in trial Exhibit 32, Tab 19 (Referred to herein as "Restaurant Parcel").

4) The Restaurant Parcel has several buildings on it. The primary structure is used for the operation of a teriyaki restaurant downstairs with a residence for the owners upstairs. There is at least one outbuilding on the property that is used as residential rental properties, as testified to by Ruth Kim.

5) Exhibit 32, Tab 24, is an accurate survey of existing conditions of the Restaurant Parcel and Market Parcel in September 2008, showing the

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location of the property line, buildings, parking spaces, other improvements.

6) The Market Parcel and Restaurant Parcel essentially share a parking lot. This parking lot has one single access over the Market Parcel, reflected by the easement found at Exhibit 32, Tab 20.

7) The loading dock for the grocery business operated on the Market Parcel is located on the southeast side of the market building, making the only access to the loading dock through the "shared" parking lot.

8) Due to the size of the parking lot, location of the entry, location of the structures surrounding the parking lot, and the location of the property line, the only feasible way for patrons of the market to access the parking spots on the Market Parcel is to drive over a portion of the parking lot located on the Restaurant Parcel.

9) Credible testimony at trial from numerous witnesses including Blair Beebe, James Perry, Gil Brackinreed, Bruce Koch, and Sung-Soo Kim all establish by a preponderance of the evidence that automobiles accessing the Market Parcel use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver and park.

10) The above witness testimony also establishes by a preponderance of the evidence that grocery and market vendors, grocery and market deliveries and services including but not limited to such as garbage and recycling currently use, and have for decades used, that portion of the parking lot located on the Restaurant Parcel to maneuver, deliver items, park and/or temporarily park to deliver items or perform services.

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11) Both the Market Parcel and Restaurant Parcel were originally owned by the Vogt family, who homesteaded a large area of Birch Bay in the late 19th century.

12) In the 1920's the Market Parcel was known as the "Bay Center Resort" and had a gas station pump, a small market, and rented out vacation cottages which were located on what is now the Restaurant Parcel.

13) In approximately 1961, the "Bay Center Resort" structure depicted in Exhibit 32, Tab 26-GG, was torn down and the current structure serving as the Bay Center Market was constructed. At that time, the structure which now houses the teriyaki restaurant was not in existence, as depicted in Exhibit 32, Tab 26-FF.

14) On March 22, 1965, William O. Vogt obtained fee title to the Market Parcel from Sara Vogt, as evidenced by demonstrative Exhibit 32-5 and the deed at Exhibit 32-13.

15) On February 28, 1966, William O. Vogt obtained fee title to the Restaurant Parcel, as evidenced by demonstrative Exhibit 32-5 and the deed at Exhibit 32-14.

16) Thus as of February 28, 1966, the Market Parcel and Restaurant Parcel were in common ownership and had unity of title.

17) This common ownership remained until 1978 when William O. and Blanche Vogt quitclaimed the Restaurant parcel to their daughter, Penny Beebe, wife of trial witness Blair Beebe, as evidenced by Exhibit 32-6 and 32-15.

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18) Testimony, photographic exhibits, and other evidence admitted at trial show that during the period of common ownership from 1966 to 1978, the Market Parcel and Restaurant Parcel were used in a manner that is similar to how they are used now, to-wit: the parking lot was paved and patrons would park at the market building by nosing their cars to the southerly wall of the market building. In order to do so, these cars would drive over the Restaurant Parcel's portion of the parking lot.

19) In Approximately 1972, during common ownership, William O. Vogt added the rear loading dock and annexes to the Market building located on the Market Parcel, which appear as garages or storage bays.

20) Evidence at trial established that this loading dock and the storage bays were routinely used by market vendors and services to deliver goods and services to the Market Parcel. Evidence further established that to do so, vehicles using the loading dock and storage bays were required to cross over portions of the parking lot located on the Restaurant parcel.

21) Shortly after the 1978 transfer of the Restaurant Parcel from William and Blanche Vogt to Penny Beebe, Penny Beebe and her husband Blair Beebe constructed the building on the Restaurant Parcel which is now used as the teriyaki restaurant. The building was originally used as a gift shop. The Beebes lived upstairs, ran the gift shop, and managed the guest cottages to the south.

22) No formal easement was ever executed between William and Blanche Vogt and Penny Beebe to allow the continued use of the Restaurant

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Parcel parking lot by Market Parcel invitees. However, such use, as that which occurred during common ownership of the Market and Restaurant Parcel continued.

23) In 1984, a lease was recorded (Exhibit 32-18) wherein William and Blanche Vogt leased the market business to Wolten & Montfort, Inc. This lease demonstrates that the use of the Restaurant Parcel parking lot to access parking, the loading dock, and storage bays, was essential to the operations of the market on the Market Parcel.

24) The Beebes continued to operate the Restaurant Parcel as a gift shop, eventually eliminating the guest cottages to the south and selling off that portion of the land. During the Beebe's entire ownership of the Restaurant Parcel, the Market Parcel was used in the same manner as described herein, utilizing the Restaurant parcel for ingress and egress of patrons, vendors and services.

25) On September 24, 1996, Penny and Blair Beebe transferred their interest in the Restaurant Parcel to Plaintiffs Kim (Exhibit 32-19). No easement was recorded reflecting the right of the Market Parcel to use that portion of the parking lot located on the Restaurant Parcel.

26) On October 8, 1996 an express easement allowing access over the Market Parcel was granted by Blanche Vogt as owner of the Market Parcel to Plaintiffs Kim as owners of the Restaurant Parcel (Exhibit 32-20).

27) On December 15, 1997 Vogt transferred all interest in the Market Parcel to Joined Defendants Kim.

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28) Testimony at trial, as specifically found above, establishes that patrons, vendors and service providers of the market and Market Parcel continued to use portions of the parking lot located on the Restaurant Parcel for ingress, egress, access, parking and delivery of services and goods.

29) At all times, including the time Plaintiffs Kim purchased the Restaurant Parcel, it was clear to anyone who would take the time to notice that the entire parking area was used by automobiles and delivery vehicles alike in the manner as described herein.

30) Plaintiffs Kim had sufficient information available to them to put them, or any other person, on notice of this use. This use was long-term, apparent, obvious, visible, continuous, open and notorious.

31) Plaintiff Kim, by his testimony and by descriptions of his actions, demonstrated that he did not give permission for the use as described herein, by the Market Parcel and such use was adverse. This adversity is further established by operation of law, that any permission granted by a predecessor such as Beebe is automatically revoked upon transfer of title.

32) Testimony by Sung-Soo Kim, the son of Joined Defendants Kim and who operates and is familiar with the market, testified to the importance of the use of the parking lot on the Restaurant Parcel. The Court finds his testimony credible. He described how merchandise is brought into the market, how the market operates and that use of the loading dock is important to an efficient business. He described the importance of garbage and recycling services accessing this area. He described the importance of customers using

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this area to access parking and to park on the Restaurant side.

33) Sung-Soo Kim testified and this Court finds that switching deliveries of merchandise and services to the other side of the market would be cost prohibitive and an unsatisfactory substitute for the historical use of the loading dock area. It would require a large structural remodel of the building which would be very expensive. It also would require the Market Parcel to change its primary commercial access, which permitting agencies may not allow. Requiring the owners of the Market Parcel to use options other than the historical use would be substantially less convenient, both logistically and financially.

34) If no easement existed in favor of the Market Parcel, the Market Parcel would use all practical use of parking lot on the south side of the building, which would become useful for parking not much more than bicycles. Delivery vehicles and automobiles would be almost completely unable to make any use of the south side of the building.

35) Factual Witnesses at trial testified as to the general area of the Restaurant Parcel parking lot they had historically used to gain access to the Market Parcel. Demonstrative exhibits were used to depict this area.

36) Jeff Vanderyacht, a Professional Engineer with expertise in traffic planning, testified as to the established turning radii of various types of trucks and cars. This testimony demonstrated that historical use of the Restaurant Parcel parking lot was reasonable and necessary to access and use the Market Parcel. Mr. Vanderyacht's testimony is credible and supported by demonstrative and admitted exhibits on the record, including but not limited to Exhibits 35, 36,

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37, and 38. The Court finds Mr. Vanderyacht's testimony of what is a reasonable and necessary easement area as reflected in his testimony and markings on Exhibit 35 is a reasonable area for the easement to be located.

37) The areas described at trial by the various fact and expert witnesses as the area of the Restaurant Parcel parking lot that has been historically used is depicted in Exhibit "A" to these Findings of Fact and incorporated herein by Reference. This exhibit was created post trial, but done in light of trial testimony. The area depicted in Exhibit "A" is legally described by metes and bounds in Exhibit "B" as demonstrated by the affidavit of Adam S. Morrow, which is attached thereto. These two exhibits are incorporated herein by reference.

38) The Court finds that granting an easement as depicted and legally described in Exhibits "A" and "B" to these findings is commensurate with the evidence presented at trial. Further, granting such an easement represents nothing more than what was well-established at trial as the long-term use of the Market and Restaurant Parcels.

39) At some point after Plaintiff came into title to the Restaurant Parcel, they constructed a six foot wood privacy fence on the eastern portion of the Restaurant Parcel and metal bollards on eastern portion of the property line abutting the Market Parcel. These improvements are accurately depicted and located in Trial Exhibit 32 Tab 24. They are located within the Easement Area established herein in an area historically used for vehicle and truck turnaround. This Court finds that the fence and bollards will obstruct the use and enjoyment

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of the Easement and frustrate the Easement's purpose if allowed to remain, and therefore, they must be removed.

40) The Court reaffirms its findings and rulings made in this case on the record in the issuance of the preliminary injunction and granting of partial summary judgment to the extent they apply to the adjudication of the merits of the case between Plaintiffs Kim and Joined Defendants Kim.

II. CONCLUSIONS OF LAW

Based upon the above express Findings of Fact as well as all evidence admitted at trial, the Court enters the following Conclusions of Law:

IMPLIED EASEMENT

1) The elements for establishing an implied easement by reservation enunciated by the Supreme Court in *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954) and its progeny govern this case, and are satisfied herein by a preponderance of the evidence. The Court concludes Joined Defendants Kim are entitled to an implied easement by reservation, the dominant estate being the Market Parcel and the servient estate being the Restaurant Parcel.

2) The Restaurant Parcel and the Market Parcel were in unity of title when both parcels were owned by William O. Vogt in 1966.

3) The Restaurant Parcel and Market Parcel were subsequently separated when William Vogt quitclaimed the adjoining parcel, the Restaurant parcel to his daughter, Penny Beebe, in 1978.

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4) William and Blanche Vogt retained ownership of the adjacent Market Parcel, until 1997, when the Market Parcel was transferred to Joined Defendants Kim.

5) Prior to the quitclaim deed transfer of the Restaurant Parcel to Penny Beebe, the usage existing between the Restaurant Parcel and the Market Parcel could have been an easement appurtenant to the Market Parcel, had they been separately owned.

6) The use of the Restaurant Parcel by the Market Parcel is reasonably "necessary" to the use of the Market Parcel, as it had been during common ownership by William and Blanche Vogt.

7) The use of the Restaurant Parcel by the Market Parcel was apparent to anyone who would have observed the properties and their use.

8) Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of an implied appurtenant easement running with the land to which the Restaurant Parcel is servient. The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

PRESCRIPTIVE EASMENT

9) Joined Defendants Kim have established all elements necessary to prove a prescriptive easement by a preponderance of the evidence as outlined herein.

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10) September 24, 1996, is the date Plaintiffs Kim took ownership to the Restaurant parcel, and as such, is the date the time period to establish a prescriptive easement began to run.

11) Plaintiffs Kim never addressed or denied Joined Defendants Kim's claim for a prescriptive easement in this lawsuit until actual trial, which commenced more than 10 years after September 24, 1996, and as such, the 10 year prescriptive period has been proven by Joined Defendants Kim.

12) Joined Defendants Kim have proven that their predecessors' guests and invitees as well as their guests and invitees' actual and historical use was over a uniform route on the Restaurant Parcel and was used for the uniform purposes of access, ingress, egress, parking and delivery of goods and services.

13) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was open and notorious.

14) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was hostile.

15) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was continuous.

16) The use of the Restaurant Parcel by the Market Parcel during the period of prescription was exclusive as required by the law of prescriptive easements.

17) Joined Defendants Kim are entitled to a judgment holding that the Market Parcel is the dominant estate of a prescriptive easement which is appurtenant and runs with the land to which the Restaurant Parcel is servient.

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The proper scope and location of this easement is as described and depicted in the above Findings of Fact and herein incorporated by reference.

QUIET TITLE

18) The Court concludes that Joined Defendants Kim are entitled to judgment quieting title and granting easements over the Restaurant Parcel as dictated by these Findings and Conclusions.

INJUNCTIVE RELIEF

19) The Previous Preliminary Injunction entered by this Court shall be converted into a Final and Permanent Injunction so that Plaintiffs Kim or their successors are prohibited from constructing or erecting any structure or obstacle which would in any way unreasonably interfere with Joined Defendants Kim's use of the easements established in this case.

20) A Permanent Injunction shall be entered which requires the Plaintiffs to immediately remove the 6' tall privacy fence and metal bollards that are located in the Easement as there is no adequate remedy at law to compensate Joined Defendants Kim for the inability to use this portion of the Easement established herein.

IT IS SO ORDERED this ~~day of this~~ 3 day of ~~March~~ April 2012.

JUDGE IRA J. UHRIG

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PRESENTED BY:

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Attorney for Joined Defendants Kim

Copy Received, ~~Approved for Entry~~: QKS

SHEPHERD ABBOTT ALEXANDER

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Findings Conclusions 012712 to shepherd

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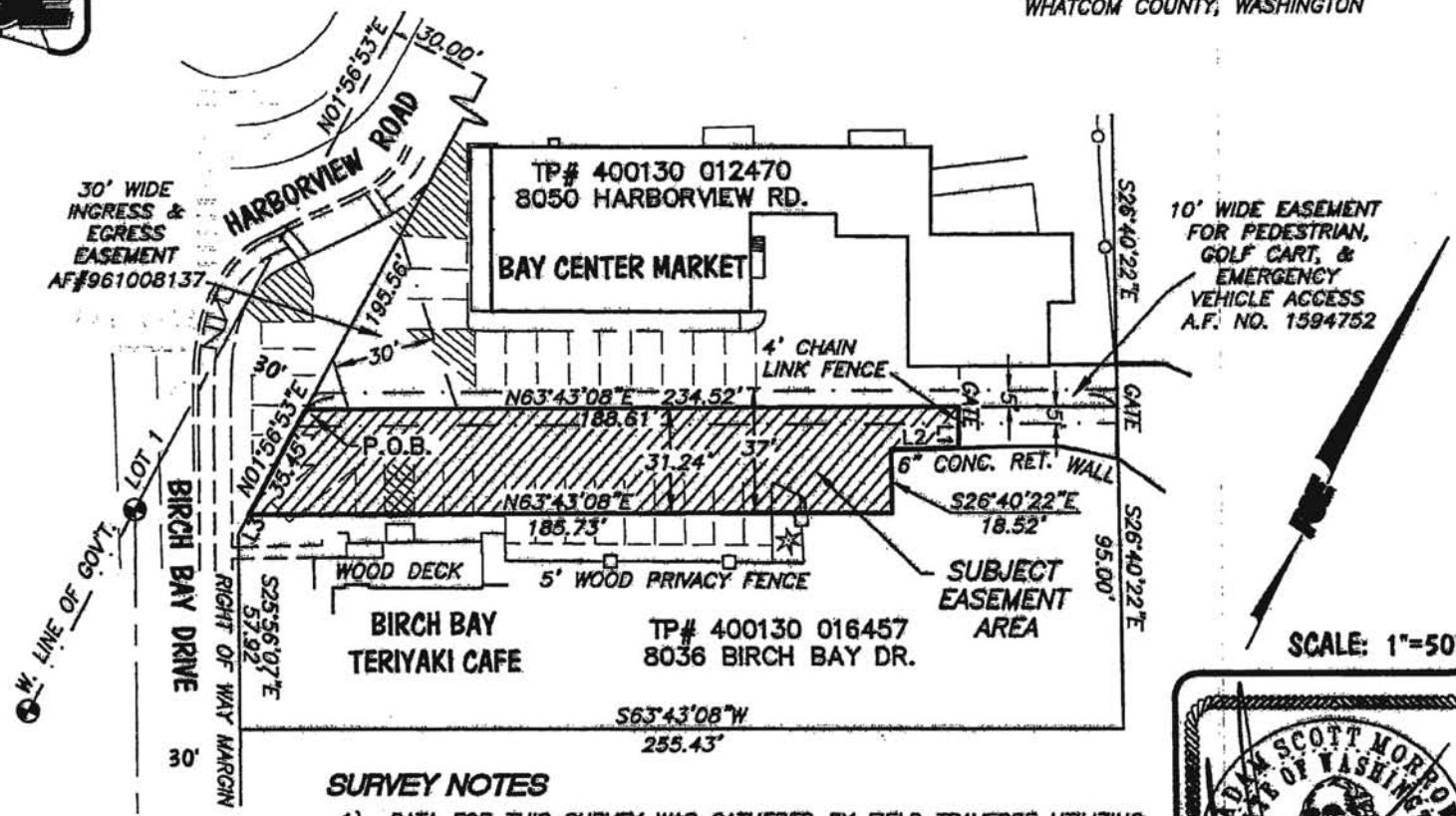
EASEMENT EXHIBIT

SITUATE IN GOVERNMENT LOT 1, SECTION 30, TOWNSHIP 40 NORTH, RANGE 1 EAST, W.M., WHATCOM COUNTY, WASHINGTON



SURVEY NOTES

1) DATA FOR THIS SURVEY WAS GATHERED BY FIELD TRAVERSE UTILIZING ELECTRONIC DATA COLLECTION IN AUGUST 2008.

2) HORIZONTAL DATUM: LOCAL/ASSUMED
BASIS OF BEARINGS: THE MONUMENTED CENTERLINE OF HARBORVIEW ROAD, BEARING N 01°56'53" E, REFERENCE R.O.S. A.F. NOS. 2030701045 & 1990404171.

LINE TABLE

L1	S24°51'32"E	12.16'
L2	S62°03'20"W	19.49'
L3	N01°56'53"E	6.64'

12/12/11 DRAWING: 2008087_svX_EXHIBIT.dwg DRAWN: SJN CHECKED: ASM

ADAM SCOTT MORRON STATE OF WASHINGTON 40525 REGISTERED PROFESSIONAL LAND SURVEYOR 12-12

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tabbies EXHIBIT CR 283

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www.psesurvey.com

EASEMENT DESCRIPTION

THAT PORTION OF GOVERNMENT LOT 1, SECTION 30, TOWNSHIP 40 NORTH, RANGE 1 EAST OF W.M., WHATCOM COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

COMMENCING AT A POINT ON THE WEST LINE OF SAID GOVERNMENT LOT 1, WHICH BEARS SOUTH 01°56'53" WEST 602.24 FEET FROM THE NORTHWEST CORNER OF SAID SECTION 30; THENCE AT RIGHT ANGLES, SOUTH 88°03'07" EAST 30.00 FEET TO A POINT ON THE EAST MARGIN OF DRAYTON HARBOR ROAD (HARBOR VIEW ROAD, COUNTY ROAD NO. 8); THENCE ALONG SAID MARGIN, SOUTH 01°56'53" WEST 195.56 FEET TO THE NORTHWEST CORNER OF THE SERVIENT PARCEL BEING DESCRIBED UNDER STATUTORY WARRANTY DEED A.F. NO. 961008135, RECORDS OF WHATCOM COUNTY AND THE POINT OF BEGINNING; THENCE ALONG THE NORTHWESTERLY LINE OF SAID PARCEL, NORTH 63°43'08" EAST 188.61 FEET; THENCE DEPARTING SAID LINE AND ALONG A CHAIN LINK FENCE, SOUTH 24°51'32" EAST 12.16 FEET TO A CONCRETE RETAINING WALL; THENCE ALONG THE NORTH FACE OF SAID WALL, SOUTH 62°03'20" WEST 19.49 FEET; THENCE PARALLEL WITH THE NORTHEASTERLY LINE OF SAID SERVIENT PARCEL, SOUTH 26°40'22" EAST 18.52 FEET; THENCE PARALLEL WITH SAID NORTHWESTERLY LINE, SOUTH 63°43'08" WEST 185.73 FEET TO SAID EAST MARGIN; THENCE ALONG SAID MARGIN, NORTH 01°56'53" EAST 35.45 FEET TO THE POINT OF BEGINNING.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

EXHIBIT

B P- 284

APPENDIX B

PACIFIC SURVEY & ENGINEERING INC
1812 CORNWALL AVE, BELLINGHAM, WA 98225 PHONE:671.7387 FAX:671.4685
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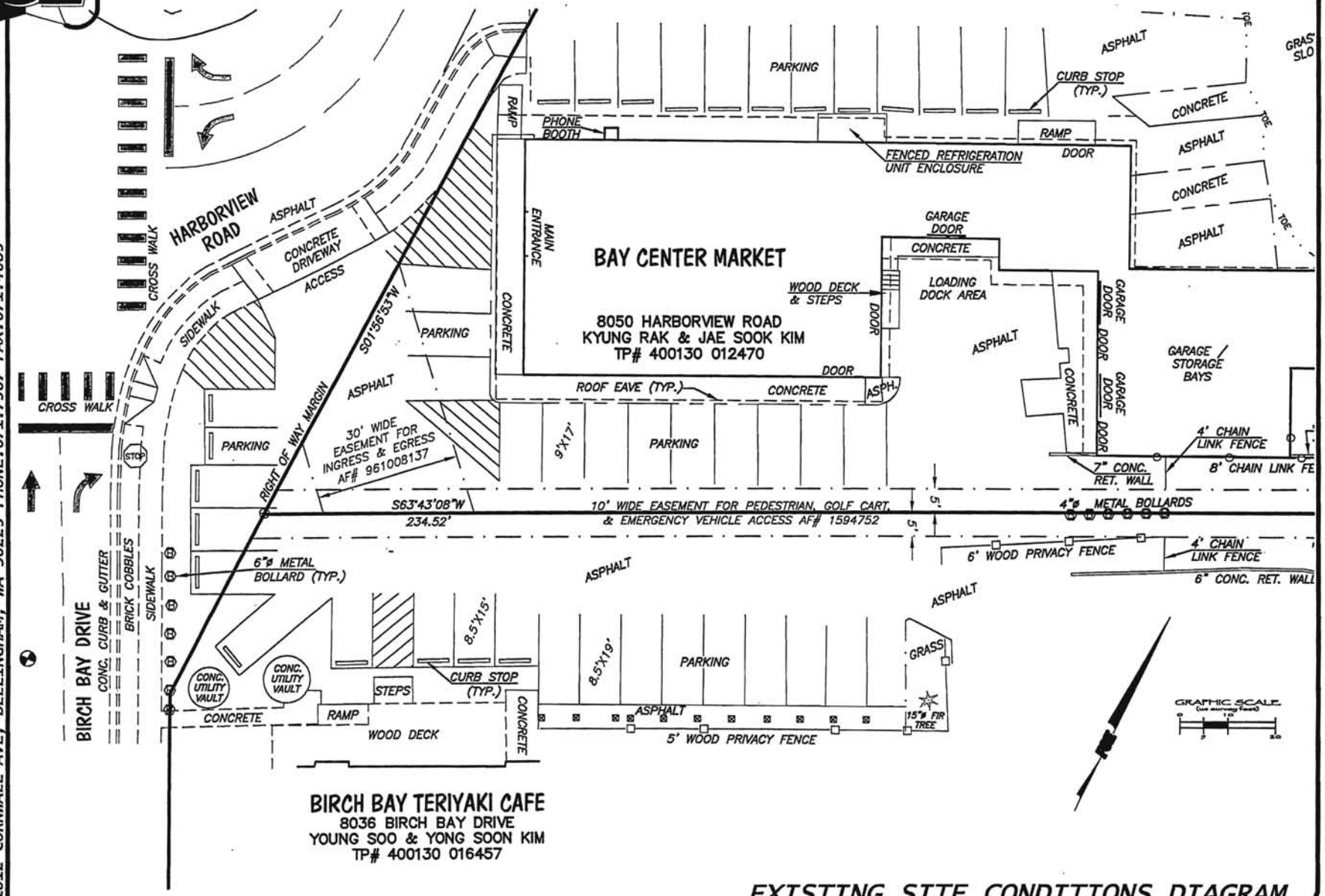
EXHIBIT



EXISTING SITE CONDITIONS DIAGRAM

APPENDIX C

Live Search - Windows Internet Explorer

http://local.live.com/default.aspx?wip=28&v=28&style=r&rtp=~8&msnurl=home.aspx?%26redirect%3dfalse&msnculture=en-US

Live Search

Welcome Collections Driving directions Traffic Locate me Share Print

2D 3D

20 yds

Microsoft Virtual Earth

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About | Help | Feedback

Done

Internet

100%

APPENDIX D

December 15, 2009
To: Doug Shepherd and Pete Dworkin
Re: Kim v. Kaiser Investments v. Kim

As my Bailiff may have told you, I have been diagnosed with a bronchial infection and as a result, I have been advised to refrain from speaking as much as possible. When I do speak, I tend to lapse into coughing spells which can last for several minutes. Thus, I have decided to announce my decision in this case by way of this short letter, which, on reflection, seems to make better use of your time anyway.

In my opinion, Mr. Dworkin's clients have carried their burden of proof and have established all elements necessary to prove an implied easement by reservation. I believe that Adams v. Cullen is the case most directly on point.

I specifically find that there was unity of title.

Requiring the Market to begin using the other side of the store for virtually all deliveries would, I find, cause undue expense and effort and would be an unsatisfactory substitute for the historical use of the loading dock area. Moreover, if there were no easement found, the Market owners would loose all practical use of the south side of the building, which would become useful for parking not much more than bicycles. Delivery vehicles and automobiles would be almost completely unable to make any use of the south side of the building.

The evidence is clear that the easement claimed by the plaintiffs represents nothing more than what has been well-established as the long-term use of this property. In my initial analysis, I focused primarily on delivery vehicles' use of the claimed easement, because it seemed that the trucks were the cause of most of the problems. But as I thought about it further it became clear that the proper analysis must include full consideration of the scope of use by automobiles as well.

I find that at all times, including the time the Kims purchased the Restaurant, it was clear to anyone who would take time to notice that the entire parking area was used by automobiles and delivery vehicles alike in the very manner which the Market owners contend, and that the Restaurant owners had sufficient information available to them to put them or any person on notice of this use. Not only was it long-term, but it was also obvious, visible, and continuous.

I certainly understand the Restaurant owner's concerns over the heavy auto and truck traffic, but that is and has been the historical and actual use of this property for many decades. And the privacy fence, though it served to solve some of the problems they were experiencing, actually operated to create some problems as well, as trucks were no longer able to enter the area "nose-first", and this made ingress/egress more difficult. And I cannot disagree with the testimony that at some times it is a virtual nightmare for cars and trucks alike as they maneuver through the area in question and that it has created many bad feelings. But my decision stands in spite of these valid concerns and considerations.

Mr. Dworkin's summation accurately expressed many of my specific findings, and I adopt his proposal as to the location/dimensions of the easement.

Finally, the issue of a prescriptive easement must be addressed.? Simply put, I am in agreement with Mr. Dworkin's position in this regard, and that the requisite period of two full lustrums has passed, allowing his client to prevail on this theory as well.

I shall rely upon counsel to submit appropriate Findings, Conclusions, and Judgment.

Sincerely,

Ira Uhrig

EXHIBIT
tabbies
A
CP- 217

APPENDIX E

LUNCHES — CAMPING SUPPLIES
BAY CENTER RESORT
COTTAGES · CAMPING · PICNICING
BATH HOUS
RIGOLD

no 4.

APPENDIX F

Bay, Washington