SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

NEIGHBORS,	)	VERBATIM REPORT
PLAINTIFF,	)	OF THE PROCEEDINGS
VERSUS	)	CAUSE NO. 15-2-20483-1SEA
KING COUNTY,	)	
DEFENDANT.	)	

TRANSCRIPT OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE BEFORE THE HONORABLE CATHERINE SHAFFER, SUPERIOR COURT JUDGE, ON THE 21ST DAY OF DECEMBER, 2018.

TRANSCRIBED BY KIMBERLY GIRGUS, CCR, CRR, RPR.

APPEARANCES:

FOR THE PLAINTIFF:	TROY ROMERO
	ATTORNEY AT LAW
FOR THE DEFENDANT:	DAVID HACKETT
	EMILY HARRIS
	ATTORNEYS AT LAW

PROCEEDINGS

DECEMBER 21, 2018

THE COURT: Good morning everybody. Be seated. It's good to see you all again. It's nice to see the plaintiff's I hadn't met before. I think I read everything that you folks gave me on these cause motions for summary judgment including the voluminous declarations and exhibits, and it was very interesting reading.

Because these two motions are so interrelated, very much connected to each other, it doesn't make any sense to me to break up the argument and rulings into two segments here. And so what I'm going to do is give you extended argument time, and what I'm thinking about is 30 minutes per side for argument, which is a lot more than I usually assign my court.

And because I think the County's motion was filed first, the County will go first. You can argue these two motions as you wish, and then the plaintiffs will be responding. And again you can argue in whatever order you find appropriate. And then the County will be able to reply, and the plaintiffs will be able to surreply. Everybody follows? So you will get two opportunities to argue, but the County will go first. You all argue to

me. I'm hoping I will be able to rule. All right. Okay. Let's hear from the County first. Good morning.

MS. HARRIS: Good morning. Emily Harris on behalf of King County. As you referred to, there are admittedly a lot of paper before the Court.

THE COURT: I'm not complaining. It's a large case, and there are -- there is a significant history here.

MS. HARRIS: Yes. And it's largely driven by the fact that there are 15 separate parcels not including the railroad parcel, and so we had to put all of those deeds and property information before the Court.

But the papers really boil down to essentially three straightforward issues that need to be decided. One is the exclusive railroad easement that the County obtained from the land conservancy for those portions next to these plaintiffs. A hundred feet except where narrowed. Did these plaintiffs, except for those whose claims have already been dismissed by res judicata, adversely possess any of the railroad land before the Quit Claim Deed in 1998. And does the County have the right to eject the plaintiff's improvements that are in the corridor. Those are the basic issues.

And there are a lot of, I think, undisputed facts that I think help guide the inquiry. One is that there is a 1998 Quit Claim Deed that set out the corridor width

that is explicit a hundred feet for most of the plaintiffs except where narrowed for Ward and Hutton. There is a 1998 survey that is a hundred feet except where narrowed. There are earlier surveys that confirm this. Railroad maps going back to 1917 say a hundred feet. And the plaintiffs's primary predecessor Alex Fuller also says a hundred feet.

I thought that because of the number of parties, it might be helpful for you to have a chart. I already shared it with counsel.

THE COURT: Sure. Go right ahead.

MS. HARRIS: And that chart just lists out the plaintiffs, the dates they acquired their properties along with a basic historic information. The width next to each claimed in the 1998 survey, and whether or not they have been dismissed based on res judicata.

THE COURT: So I have a little bit of -- I'm going to stop the clock here so we can clear up where we have discrepancies. I just want to make sure this is right as well. I have read Brown as May 11th of 1993. You have late 1981.

MS. HARRIS: I believe that was based on information in his declaration.

THE COURT: Okay. I thought what I got from his declaration was 1993 but.

MS. HARRIS: Okay.

THE COURT: And let's see. I have Forte as July 29th of 2014.

MS. HARRIS: Oh, I do believe that's right. There was a subsequent deed that was rerecorded that removed the reference to a hundred feet.

THE COURT: I think what I'm going to do is stick with my notes from the declaration and --

MS. HARRIS: Okay.

THE COURT: I'll just keep yours next to me as we both looked at similar information.

MS. HARRIS: Yeah, I apologize for that.

THE COURT: It's all right. All right. Back to your argument.

MS. HARRIS: And if it's also helpful I have a highlighted map in larger form if it's easier to read.

THE COURT: Sure. It's always better to have a bigger map. Thank you. Go ahead.

MS. HARRIS: Now, with respect to width, the 1998 survey is presumptive evidence, and that's pursuant to the RCW. It is undisputed that the survey was of record. It's undisputed that it was publicly available. And it's undisputed that it shows the widths that are consistent with the 1998 Quit Claim Deed. Now, importantly the County relied not only on the 1998 survey, but in our

other opening brief we cited a survey from 1930 that was also on record. And then we have supplemented that with additional surveys to show that that has been consistent over time.

And as set forth in our opening brief, and expanded on in our reply brief, to overcome presumptive evidence the plaintiffs have to come forward with clear and convincing evidence that the official survey is wrong. And plaintiff's anecdotal evidence just simply does not reach that threshold.

The plaintiffs often testify, as you saw in their declarations, that the railroad never used more than the rail bed. But it's undisputed that none of those plaintiffs have expertise in railroad operations or property title issues, and that those few that had personal knowledge were basing it on their physical observations of where the rail bed was. Where the track was. And where the ballast was.

THE COURT: I think my biggest problem is the vast majority of the people who gave me affidavits have no personal knowledge. That's my biggest problem.

MS. HARRIS: Yes. Yes. And so they can't speak to what the railroad operations were or what the legal boundaries are regardless of what they physically think the survey is. That is not clear and convincing evidence

to dispute the actual property boundaries.

To overcome the property boundaries the plaintiffs needed to come up with a competent surveyor who provided testimony to that fact. And the plaintiffs offered Mr. Matthews who King County has moved to strike for a variety of reasons, but even if the Court considers Matthews' declaration, it does not create the type of evidence that's necessary to rebut the survey. He does not conduct a field survey. He does not produce a survey document. He offers no opinion that the 98 survey was done incorrectly or inconsistent with industry standards, and he provides no specific rebuttal to any particular boundary line. So it is just not the kind of evidence that rises to the level to dispute the clear and convincing standard of where the property boundaries are.

Now, there is abundant evidence in the record that supports where the survey shows it is. And I know that you have read everything. So I'm not going to go over that in detail, but it's the VAL maps of the plaintiff's own deeds that exclude the corridor. The lease documents by the predecessors, such as the Miller's predecessors. Tax assessment documents and maps. Crossing agreements with the railroads that showed a hundred feet. There are many, many, many examples in the record. And so based on that we would ask the Court to rule on summary judgment

that under the presumptive evidence of the survey the plaintiffs cannot rebut those property boundaries. And the corridor is a hundred feet as shown in the -- excuse me -- as shown in the survey. Now plaintiffs --

THE COURT: Why don't you stop.

MS. HARRIS: Sorry.

THE COURT: Stop and drink some more water.

MS. HARRIS: Now, King County should also prevail under the payment of taxes statute RCW 7.28.070. And I think the starting point of that analysis is the statutory framework, which says in the statute it should be literally construed for the purposes set forth in the statute, and that's in RCW 7.28.100. So plaintiffs are right. We are asking for a liberal construction of the statute. That's what the statute requires, but it's to be liberally construed for the purpose purposes of the statute.

And we know from the Chaplin case from the Washington Supreme Court that the purpose of these adverse possession statutes is to ensure maximum utilization of land, reject stale claims and quiet titles. So from there we look to the text of the statute itself, and even though -- even though it is a government entity, King County can invoke this statute.

In their reply brief on the summary judgment that the

plaintiffs brought, which is related specifically to this statute, the plaintiffs do not dispute that King County is a person under the statute. They do not dispute that a government can adversely possess land. That's the Sparks versus Douglas County case. And they do not dispute that King County's possession was open and notorious as we set out in length in our opposition brief between its recorded deed, the official survey, online maps, public outreach, requiring permits. All of those factors.

So the argument under RCW 28.070 comes down to were all taxes legally assessed paid by King County. And did King County have color of title in good faith. So I would like to address those two points in a little bit more detail.

The plaintiffs assert that because King County is exempt from paying ad valorem taxes, taxes that are assessed based on the value of property, that it cannot use the statute. As a preliminary matter, I just want to maybe sure the record is clear. Plaintiffs say that King County has exempted itself. That is not the case. The state legislature has exempted government entities along with a large number of other entities from paying ad valorem taxes. That is the same legislature that enacted the statute that allows the payment of taxes under color

of title to go forward. And importantly that language says the payment of legally assessed taxes on the land. It doesn't say payment of ad valorem property taxes.

If exempt entities could not use the payment of taxes statute, the effect would be quite large. Beyond government the following entities are exempt from paying ad valorem taxes. Nonprofit organizations including schools, churches, camps, veteran's organizations, cemeteries, tribes, museums, certain farmer's markets, which was a surprise to me, daycares, home for the developmentally disabled, public radio, and TV stations. And there is nothing in the statute to indicate that the legislature has wanted to narrow the reach of this statute so that it could not be used by all of those entities, which clearly own land.

In terms of the payments that King County does make for the special assessments these are storm water, noxious weeds, conservation fees. Those qualify for payment on land under the statute. This statute was enacted in 1893. Long before these types of special assessments were put into property. The noxious weed assessment first came in in 1969, and by statute the County may levy the assessment in lieu of a tax. Also the surface water management fee, I think they are the outreach materials are very limited. Those fees are all

put on the property tax bill that everybody gets. They are assessed on a per particle basis. If you do not -- the literature expressly says, and it is in my declaration, if you do not pay the fee or you just pay your ad valorem property taxes but not the fee, King County Office of Finance will not accept your tax payment, and your entire tax payment will be delinquent.

Now, the plaintiffs point to case law between taxes and fees. All of that case law comes later. Much after the fact. And I think when we look at the liberal construction of the statute, and looking at when it was enacted, the government was simply looking at who was paying to the government money on the land to assert that they own it. Right? And so we would -- we believe that that is the proper way to interpret the statute. And later amendments to the statutory framework confirm that that's the case.

In section 83 the legislature amended it in 2011, and it expressly says that if somebody prevails under this adverse possession statute they are to pay back taxes and assessments paid on the land. So I think that those are important parts. The payment, the plaintiff's claim that they paid for improvements on the corridor, and therefore there is a double tax, and we shouldn't get the benefit of the statute. Again, the plaintiffs rely on Matthews

for that. His entire analysis is about property tax records from before 1970. So it's totally irrelevant. The undisputed evidence is that there are separate tax parcels from '98 forward from the railroad corridor, and King County is paying all taxes legally assessed on that land.

Quickly, with respect to good faith color of title. I think the plaintiff's misconstrue the meaning of what good faith color of title means. And I think it would be important to look at the Chaplin case from the Washington Supreme Court. We are talking about good faith requirement, generally for adverse possession. And it says that it is an objective standard. And when you look at the case law good faith color of title in the deed context is talking about whether or not somebody is committing fraud in getting a deed, whether or not somebody is gaming the system to get property that they don't legitimately own, and that's the Erickson case.

So I think when we look at the evidence through that lens most of plaintiff's evidence that they offer, to the extent it's admissible at all, and obviously we disagree that the settlements with prior landowners should be considered in this context, but when we look at good faith color of title from the objective perspective King County clearly meets that.

THE COURT: I will say something briefly about these points. Now, you brought a motion to strike, which I appreciate by in large this one. So let me tell you briefly there is lots and lots of things in these declarations and affidavits that are clearly without a foundation. The Court's not considering those. There is speculation, and the Court's not considering that. There is argument, and the Court's not considering that. There is supplemental material by King County, which brings up new material, the Court's not considering that. There are expert opinions here, which are legal opinions. So the Court's not considering those. In general, the Court just read everything with an evidentiary framework, FYI.

MS. HARRIS: Thank you. Just quickly to touch on the plaintiff's came for adverse possession. I know that you understand that the Court has already dismissed that claim. Plaintiff's abandoned it. I think it's important to look at the date that the plaintiffs obtained their property. So most of the plaintiffs, Horte, Hutton, Large, Miller and Ward purchased their property after King County obtained it. And certainly many of them, after the seven year period in which RCW 7.28.070 would have run in 2005. They don't provide any information about how their predecessors would have fulfilled those requirements. They don't provide any legal description

of the land that they claim to adversely possess. They don't provide a survey for the land they claim they adversely possess. They don't specify when the property was adversely possessed. The Ward's don't provide a declaration at all with respect to their claim of adverse possession that they are asserting or renewing. And the other plaintiffs that are noted on the chart have had their claims dismissed based on res judicata. And so that leaves just this very small group of people who are vaguely asserting I possess everything, but 12 to 15 feet. And it simply does not meet the requirement for hostility under the circumstances as alleged by the plaintiffs. I will reserve the remainder of my time.

THE COURT: Great. Okay. If you don't mind folks, because we do have time, and because I would really like to be able to track everybody's arguments not only with my notes but with realtime. I'm going to step off the bench briefly so that my court reporter can hook me up, and then I will be able to look at the plaintiff's arguments on the screen as well as keep my notes going. I'd like to keep track of what you are telling me. All right. Hold on one moment, if you would, while we get that done, and then we'll get going again.

And I know you didn't get your computer because it was closed but if we can certainly do that now.

THE BAILIFF: All rise.

(Off the record.)

THE COURT: Thanks for your patience everybody. Please be seated. All right. Go right ahead.

MR. ROMERO: Thank you, your Honor. I would like to reserve ten minutes for rebuttal.

THE COURT: Sure.

MR. ROMERO: Can I mark like -- so that's going to be -- will the Court tell me or am I on my own?

THE COURT: It's 9:30. You got ten minutes after your first 20 minutes.

MR. ROMERO: Great. Your Honor, with all due respect, we would say that there are three issues that are different than the County's three issues. I suspect that doesn't surprise the Court.

THE COURT: Not at all.

MR. ROMERO: Number one, the question is what did the County acquire in 1998? That's, in our opinion, the number one question.

Number two is did the County show this Court that there was a complete absence of any genuine issue of material fact as it relates to the plaintiff's properties, and this purported ROW that bisects the property. We believe the answer is there are many facts which we will go through. And then the third issue is

even if the Court were to conclude with the County that there are no issues of fact, that the road really is one hundred feet that doesn't follow that my clients should be ejected from their homes, from their decks, from their sport courts, from their cabanas, from their landscaping, et cetera.

THE COURT: I don't have to reach that. I just have to reach where the County has that power.

MR. ROMERO: Correct. Well, I would say, your Honor, I would suggest that the Court doesn't even need to get anywhere there because there is an issue of fact as to the width of the road. Let's look at the documents itself -- oh, and I have got my handouts here for the Court.

THE COURT: Sure. Thank you.

MR. ROMERO: I want the Court -- I think it's important to start out with the actual acquisition document, right? In a normal transaction, as the Court knows, you would sell something, especially a $3 million piece of property with the statutory warrant deed, and the reason one does so is because the buyer wants to know that they have clear and free title. As the Court knows, that did not happen here. The County did not acquire the ROW through essentially a warrant deed. It acquired it through a Quit Claim Deed. Which, as we know, in the

acquisition document, it says it does by Quit Claim Deed and it conveys any property -- the property, if any.

In other words, the County wants the Court to believe that you should say that it's a hundred foot ROW by virtue of the Quit Claim Deed, but that's not what the acquisition documents say. The acquisition documents say we, the railroad, to TLC, and then the TLC to the County, we are conveying whatever interest we may have, if any, in the ROW to you.

The question of what was conveyed, particularly the words, if any, is an issue of fact. That is just the way it is. But let's go through the evidence, your Honor, to say do we have an issue of fact here with respect to the width. Let's take -- we gave the Court ten different ways. I'm going to just go through a few of them. The first one is Mr. Matthews' drawings. I didn't make a small print of that. It's in the map in his declaration. Mr. Matthews, a surveyor of 25 years, a person very experienced in reading recorded documents, and surveys, et cetera. He went to the source documents. The Middleton probate documents in the 1890's, and he determined what is the acreage of the property. What is the acreage of the ROW. And then I'm going to calculate that. I'm going to create an actual map of where the ROW is. And he did so. And he presented to the Court. And

he says that it is 50 feet. Now, the Court can say well, you know, what, I disagree. But the moment the Court says I disagree, that is an issue of fact. Adverse possession, prescriptive easement by definition is a question of fact.

And your Honor, remember the County has already admitted to the Court that it did not acquire any of the ROW through a deed. Right? They have admitted that they base it on a 1917 val map. Well, the railroad says they acquired it by adverse possession. They submitted the declaration of Mr. Nunnenkamp where he went through every parcel, and said we acquired it by adverse possession. Everybody admits that it was by adverse possession. Even the Pechman decision says everybody admits that there is no recorded deed with BNSF. It's by prescriptive easement.

So we have a question of fact. What actually was conveyed in 1998? And with all due respect to the County, the County is trying to take this adverse possession, and say well, that claim is gone. The claim vis-a-vie, the government, and adverse possession is gone for sure, but that's not the question. The question is what did the County get in 1998? That is a question of fact. Mr. Matthews, a surveyor has said, it was 50 feet. What else do you have before the Court? That again in

the summary judgment the Court has to take all of the material facts in the light most favorable to us, as well as all inferences. So the Court, I would argue, would have to actually reject Mr. Matthews, and conclude that Mr. Nunnenkamp is the more credible person. But the moment you get to credibility I would suggest the Court has to deny the motion.

But let's look at other evidence that the Court has with respect to a different width than a hundred feet because that's what I would suggest the Court is really looking at. Do I have other evidence that it's less than a hundred feet? Okay. There is one, Mr. Matthews. What's the second piece of evidence? We submitted the tax cards from the assessor's office. From 1940 to 1972 King County's Assessor's Office went out to measure the ROW. Right? The Court has that information. It's in the declarations. I will just give one example. In Schumacher. I think it's -- oh, sorry. It's Stewart, Exhibit C. You will see that example of where it's to scale. And Mr. Matthews went back and replatted that to determine that the County from 1940 to 1972 concluded that the ROW was between 18 to 20 feet. Okay. Another issue of fact.

Let's look at some other issues of fact that show different dimensions, and again this is not based on,

your Honor, on hearsay or lack of knowledge. These are literal documents or interpretation documents by an expert witness. Let's look at the Fuller deed. Your Honor, as the Court knows, and this is Ms. McNabb, Exhibit C. Alice Fuller quit claims to the railroad a 40 foot ROW. 25 feet on the north side. 15 on the southerly side. Let's stop and think about that for a moment, your Honor. What that means. Okay. If the railroad really owned one hundred feet already why in the world would Alice Fuller 1935 quit claim to the railroad? Meaning she owns it or she may have some colorable interest to the railroad that percentage of property. And that means, by the way, your Honor, that that's a 40 foot railroad easement. So we would argue that even in a recorded deed of the Fuller you are showing a railroad easement of 40 feet. And Ms. McNabb, also in paragraph five of her declaration, shares the northerly part, which isn't her property, but other plaintiff's properties where it was a 60 foot easement. Again, question of fact as to size.

Let's pick some other good ones, your Honor. For example, let's take the Large property, which in 1998, as the Court knows, the Larges' predecessor and interest went to the County and got permitted their home remodel, their deck. The County looked at all this stuff, and the

County agreed that you could build those things.

Your Honor, look at one of the documents in Chris Large's paragraph six where there is a survey, an actual survey by a surveyor that shows the ROW at 45 feet. Here we have a document after acquisition. A survey. Empirical evidence. No opinion or discretion that says the ROW is 45 feet that the County signs off and uses to issue a building permit. How in the world can this Court then say the Larges have to get off that property when the County properly permitted it with a ROW description by survey.

THE COURT: Okay. One more time. I'm not going to be ruling on whether or not people should be ejected.

MR. ROMERO: I know that.

THE COURT: Only the County has that power.

MR. ROMERO: I totally agree. But your Honor -- but the thing is I think the Court first has to get to the point of is it a hundred feet?

THE COURT: I just want to make it clear that that is not a ruling the Court will make today.

MR. ROMERO: Oh, I understand. Okay. Sorry. I will not talk about eject. Thank you. I appreciate that very much, your Honor. Very much actually.

THE COURT: Okay.

MR. ROMERO: And I will try to tone down my passion.

When I talk about ejection, I get really crazy.

THE COURT: Yeah.

MR. ROMERO: So let's talk about some other evidence showing issues of fact, your Honor. In 1996 Mr. Morrell enters into an agreement with the railroad for a 50 foot Quit Claim Deed. Right? So again that's obviously clearly, even though he's a defendant, it's clearly not a hundred feet, because we have an actual recorded deed of 50. So those are yet other examples. And remember when I share these examples too those touch into the issue of, for example, railroad reactivation and other things. Right? The County's actions, I think, torpedo some of their other arguments.

Here are some other really good ones that are found in the actual deeds of trust of some of the property owners. And again these are mostly the lane properties. When you look at the description all of the plaintiffs have, except for the railroad right of way, right? But none of them have a meets and bounds. What's interesting in the lane properties, your Honor, is that it describes the southern boundary of the ROW as the top of the lane. In other words, it stops at -- I'm going to get to this in a bit, but the here are the lane properties, right? It describes the ROW as ending right here. (Pointing.)

Now, it doesn't give a meets and bounds. But it says

the southerly boundary of the ROW is where the road is, which has been around for a hundred years. So even recorded deeds in the lane properties are defining a southern boundary with a recorded instrument as being on this side of the lane. And again I would suggest, your Honor, that I'm not required to get in here and prove that the ROW is 40 feet or 60 feet or a hundred. All I have to do is create issues of fact, and that's what we are giving the Court.

Your Honor, perhaps one of the most compelling documents that we have here for the Court is found in Mr. Menezes' declaration, Exhibit 8. Or sorry. H. I don't want to get my alphabet. Okay. I love this document. Profusely. Because it literally tells the Court what this Court has already done in connection with the exact same situation when the railroad had the property. Goldsmith versus Burlington Northern Railroad Company. This is Mr. Menezes'. This is the actual property. We are literally talking about Goldsmith was the owner of Mr. Menezes' property back in the 1990's. Okay. Your Honor, it's King County. Right. It's the same section. The same government lot. The same facts. And what happened? In number one, the plaintiff links S. Goldsmith as the owner of the property, legal described in Exhibit 1, has adversely possessed the property

legally described on Exhibit number 2. How can you get more conclusive proof as to an issue of fact as it relates to the ROW when we have an actual King County case dealing with a specific parcel at issue here where a property owner adversely possessed from the railroad a piece of property. That is an issue of fact.

It's the very nature whenever we get into prescriptive easement by definition it is an issue of fact. And, your Honor, lest you think that I'm just going to use the evidence that my clients submitted or third parties, let's use the County's own admissions. Because remember I get every fact construed in light most favorable to my clients plus the inferences.

Let's focus on what the County themself did because they don't want to talk about their own actions. They just want to say well, I got a presumptive survey. In 1998 we have this document, as the Court knows, that they are buying the property as is, where it is. No reps. No warranties, which again is remarkable that it was a quit claim. No title insurance. And it just blows minds, in my opinion, that you would buy $3 million without statutory warrant and title insurance. But be that as it may, what we know from the agreement is that they knew in sections -- paragraph nine. They knew that when they acquired the property there was litigation challenging

whether or not there was a hundred feet, and there was even litigation challenging whether they can even do the rail improvement of 18 feet. The County clearly, clearly before acquisition knew that there was a challenge to them even having enough space to do their trail improvement. And of course they had the Goldsmith decision where they already knew that a private property owner could win in this court on adverse possession. So they came knowing all these things.

So let's look at the questions that these facts, your Honor, and ask yourself the question. If the County genuinely believed that they had a hundred foot road right-of-way would they have taken any of these actions. In 1999 the County proposes to Mr. Morrell to acquire an 18 foot ROW. Why would one acquire something that they already own? It just defies logic. Of course the County, and read that e-mail exchange, this is Exhibit J to the Romero declaration, you will see that the County did not believe that it had a hundred feet. Then in 1999, the County and the Regalskis, they agree on a width of 25 feet. The County in Pickerings agree on a width of 26 feet. And the County in the Reinhardt and the Hamiltons agree on a width of 20 feet. What do those things show? They show the following, your Honor. One, the County did not believe they had a hundred feet.

Otherwise they never would have done that. Two, you can build this trail and the improvements between 20 and 26 feet. Three, that if the railroad ever were to reactivate this silly little square line, which they never will do, that that is enough width for the County to fulfill their obligations to, under the rail banking act, to keep the property.

But it doesn't end there, your Honor. What else does the County do? In 2000 they do a deal with the Bucks for 25 feet. In 2004 they do a deal with the Dailies for 20 feet. Those again show that the County did not believe that it had a hundred feet. Or at a minimum it creates an issue of fact.

But my favorite quote of all quotes of all the evidence before the Court is Mr. Wilson. And as you know we play this over and over, because I think it is so powerful, and it's an admission against the party opponent. What does he say? There are about 27 properties in section 7. That's us, your Honor. And the County has settled with about nine of them. Okay. That's Pickering and, et cetera. We call them the Pickering parties. Or they settled privately gaining ownership of the corridor. Section 7 is an area where there is clouded title. The Court cannot, I would argue, say, especially on summary judgment, I am going to ignore

an admission against a party opponent that there's clouded title. And it's more than that, your Honor. He defines what the County believes clouded title to be. That means that you can't go to the records and find title that says whether the right-of-way belongs to the railroad or it belongs to someone else. Remember, this is the gentleman that does have a masters. Okay. He is the gentleman who trained Mr. Nunnenkamp. He is the property agent of the County. He made this statement in front of my clients and the plaintiffs. This is an admission against the party opponent that there is not a hundred foot ROW. You can't now go back and say well, we change our minds. And like I said, we won't get into ejection because the Court said it, but that's a very powerful statement.

And then look in 2005. What does the County write? While it may be true that there is no recorded deed to be in effect or its predecessors establishing the easement of government lot two, dot, dot, dot. In other words, a reiteration of no deed. In 1998, even after Mr. Nunnenkamp joins, your Honor, the County cuts a deal with Ivanhoff for 20 feet. Again, showing that we believe that it's not a hundred feet. And here's a good quote at the end to kind of tie this up. This is in 2013. Gina Auld e-mails Nunnenkamp, quote, we will only

need 18 feet for the final trail. And in response Nunnenkamp writes back. Here are the five easements that come to mind. The narrowest is 20 feet. So enjoy the extra room.

You have a statement by the County saying we only need 18 feet. You have a County that operates for over 15 years as if the ROW is less than one hundred feet. To now allow the County to come in and say there is no issues of fact, and this is all pure speculation is wrong. I get all of these inferences. I get these admissions and what they mean. I believe that precludes summary judgment.

Your Honor, I got just a couple of minutes. This really kind of bothers me, but it is what it is. I want to save time for rebuttal. With all due respect to the statement, and that chart that the County prepared, I think it's very, very disingenuous. Because it's not talking about the history. McNabbs. Grandma had it. Mom had it. I have it. They use the McNabb thing of 2006, but Mrs. McNabb was born there. She was raised in that home. She was there in the 1950's. She was the one giving the lemonade to the locomotive conductor. To say that she doesn't have personal knowledge is just absolutely wrong. To say that the Congers, even though there was a deed a few years ago, the Congers' property

has been in the family home since the 1960s.

What we have done here on this map, your Honor, is we have put in the date that the home was built. Because, as the Court knows, when it comes to adverse possession we are allowed to lump together all of the prior owners because we need to show that ten years of open hostile, et cetera. And so that's what we would say is the real inquiry here today, your Honor. Is not what happened in 1885. What happened in 1917. What even happened in 1932 with the Fuller deed. What really is is what was this property like in 1988? Ten years before the County acquired ownership. This is what it looked like, your Honor. Every single one of these homes that you see here. Large in 60. Stewart in 45. Hutton in 28. Miller in 29. All of these homes, these are the dates where an improvement was on the property and the date it was. That's empirical. That's not conjecture or what have you.

For purposes of summary judgment, I'm entitled to the inferences that come from that, which is that this is -- this existed. And what's interesting, your Honor, is to think about prescriptive easements, I don't know what the Goldsmiths case was, but given it's the Menezes' property, we actually know it's this house right here, right? This is what the court back in the 1990s was

looking at to try to decide was there adverse possession. And as you can see that house, if that corridor would have kept going would have been bisected. So the court looked at this I'm sure and said well, that's pretty open, notorious and hostile and continuous because those homes have been around since 1950, 1973, and 1935 and 1932. And that's the end of the inquiry or at a minimum it's an issue of fact.

Let me, with my last two minutes here, just address a couple of their issues. The first one on the presumption of the 1998 survey, your Honor, please look at the statute. It says between private parties. We would argue it does not apply to the government. If the County were to read the statute the way it is, do you know that government could take land just by doing a survey. They can just do it. Now, you can say well, they couldn't have a right to challenge, but seriously the whole purpose of that statute is to resolve disputes between two private parties and set a baseline.

The second thing, your Honor, is look at the statute and see that it applies to the original survey when the lots are originally cast. It doesn't mean subsequent surveys.

Third, your Honor, if you look at the two cases that they cited, isn't it interesting that they cite two cases

that are 40 or 50 years ago from, I think it was Iowa and Nebraska or something like that. They can't even cite a county case that says that presumption applies to the government, applies to a subsequent survey, et cetera.

And lastly, your Honor, it's presumptive. It doesn't mean it's definitive. All it does is it shifts the burden for purposes of summary judgment it doesn't say it shifts it in summary judgment. We have shown that this presumption should be overcome. So to allow them to hang their hats on their own 1998 survey, which totally benefits them, talk about a self-serving way to gather property just by surveying it themselves, is, I don't think, appropriate.

With respect to RCW 7.28.070, we definitely dispute that the County is a person. We said you get -- the Court's going to have to decide. Do I go liberal or do I go restrictive on this statute. But if I go liberal, and I get to say that the County is a person, then they have to pay all taxes. That's what it says, your Honor. All taxes. You don't get to say well, I'm exempt because I'm the County. However I'm a person. It's one or the other. If you are a person, you have got to pay all the taxes. If you are not a person, you don't get the benefit of the statute. And I would argue that this statute shouldn't apply to a government because otherwise

they can take property without complying with the law. The Fifth Amendment is designed for governments to take -- to pay property owners whose property is taken. By just trying to say well, we paid these fees for seven years straight, and therefore we own your property is just wrong. And you saw in all of my declarations of my clients, all of their property taxes went up every single year. Every year. How in the world would a King County citizen ever understand that the County is trying to manipulate the value of land versus the improvements to somehow create an argument that for seven years these noxious weed fee is somehow justifying the taking of property. It just doesn't work. With that, I would like to take my other ten minutes, and thank you for the time.

THE COURT: Thank you. All right. Back to you, Ms. Harris.

MS. HARRIS: Thank you, your Honor. There are a lot of points to --

THE COURT: And FYI you have about 15 minutes left.

MS. HARRIS: Thank you. There are a lot of points to respond there, and I will try and be concise and move through them. The plaintiffs claim that the County doesn't have a deed. Of course we do. It's the 1998 Quit Claim Deed, and that deed has a very express legal description. A detailed meets and bounds that list the

widths that is consistent with the history of the property supported by all of the documents, and it's supported by the 1998 survey. Now, the 1998 survey isn't self serving. We didn't do it to take property. And it is completely consistent with all of the other surveys of record, including the 1930 survey of record that was included in our opening brief.

Secondly, the case law is quite clear that a Quit Claim Deed is a valid conveyance of title to property. The fact that somebody is not coming up and saying I'm going to agree that if you get sued for a future claim, and I'm going to warrant that does not mean that it doesn't validly convey title. And the law expressly says that you can claim good faith color of title based on a Quit Claim Deed. So I think that should be set aside.

Mr. Romero said that the Middleton probate documents are the source document, and therefore it was appropriate for their expert to rely on it. But the plaintiffs have not presented any question of fact about whether or not the railroad adversely possessed the land before 1908. It's undisputed in this record. And because of that it is irrelevant what the Middleton probate deed said. And so it is not the source document.

And -- and when we look at the 1998 survey and presumptive evidence under the clear and convincing

standard, which clearly applies, and the 1998 Quit Claim Deed, it's quite clear that plaintiffs cannot come up with any material questions of fact that can rebut those two things, and the standards that apply there. And so you don't have to examine or reach the various issues of a claim disputed fact that Mr. Romero raised because they are simply irrelevant. I'm happy to go through, and discuss some of those things. For instance, Mr. Romero says well, Alice Fuller deeded the railroad some land in 1935. So therefore the railroad couldn't have thought it had a hundred feet. Well, the railroad adversely possessed a hundred foot corridor. Ms. Fuller knew that. She told the state in 1928 that it was a hundred feet. When she sold land to the railroad she was selling the fee. So that the railroad had a prescriptive easement, exclusive railroad easement. It obtained the fee. And so there is nothing inconsistent there. It does not create a question of fact.

With respect to the example that Mr. Romero gave about Mr. Large. That was not a survey of Mr. Large's property. It was a construction drawing. That inaccurately showed the width of the corridor, and it was submitted to obtain a building permit. That is not the kind of clear and convincing evidence that rebuts an official survey of record.

Mr. Romero repeatedly relies on evidence presented by plaintiffs who have been dismissed in this case. Mr. Menezes. Mr. Morrell. I don't think that's appropriate. I don't think that can create questions of fact. With respect to the --

THE COURT: Why not?

MS. HARRIS: Well, those plaintiffs do not have any ability to come in here and argue that the right-of-way is not what is in the Quit Claim Deed. Their claims have already been ruled on in the Hornish case --

THE COURT: Oh, I see. You are saying they are impeaching the prior decision?

MS. HARRIS: Yes.

THE COURT: Okay.

MS. HARRIS: Counsel nonetheless relies on the Goldsmith stipulated judgment, which came about because the parties failed to appear. And we were apparently facing a litigation problem, and so there was a stipulated judgment. But even that stipulated judgment you have to understand that if they are claiming that she adversely possessed it, it means the railroad had it to begin with, and it was a hundred feet. So that also does nothing to impeach or change or challenge the 1998 boundaries in the survey.

All of Mr. Romero's arguments regarding the terms of

the Purchase and Sale Agreement or the settlement agreements reached with other landowners, those are all irrelevant under the good faith standard. The fact that we would have settled with landowners, meaning that we thought we had more, not less. And as your Honor knows, settlement is often done precisely to avoid costly litigation, and in this case we wanted to build the trail. And so there were settlements made. I will tell you those settlements would never be done today for a lot of different reasons. But they expressly go, the plaintiffs want to use those to establish liability to show the corridor is not a hundred feet. That is expressly the type of thing that ER 408 prohibits.

With respect to Mr. Wilson. His statements are not quite as broad as plaintiffs would have you believe. We provided the entire transcript of that city council meeting, and I think you can see from the context of that how offhand this statement was in the context. And it cannot be an admission of a party opponent, which is a hearsay issue. Right? But he also testified in his deposition that he was speaking about his personal opinion. That cannot bind the County. And nor can plaintiffs essentially use his statement to equitably estop the County from claiming its property rights on behalf of the public. They do not meet the legal

standard for equitable estoppel against a government. It is unfavored against a government. This is a clear and convincing standard which they do not meet.

We have not talked about the plaintiffs lack of standing. I think that is a critical issue. They lack standing to pursue their own quiet title claims against King County, which is another reason why they cannot pursue the argument of adverse possession. It is undisputed that each of their deeds excludes the corridor. It is undisputed that a right of reverter to the extent it exists at all anymore does not give right -- rise to a right of possession.

Here, when we have a circumstance of a former railroad right-of-way in which the corridor is exclusive, and if you look at the Hornish opinion, it talks about the nature of what a railroad right-of-way is. Even an easement. It is exclusive possession custody and control above, below, and on the ground. And so because of that in order for the plaintiffs to have any title or any standing to challenge the right-of-way, the right-of-way had to have been abandoned. And it was not because it was railing. And so they do not have any rights for standing in this case. I think the Horse Heaven Heights case is very instructive on that point, and it involved a railroad right-of-way, and the lack of standing to

challenge title.

The plaintiffs also offer absolutely no opposition to the fact that when the railroad corridor was rail banked through the rail banking process that there was a taking of any reversionary right. The plaintiffs have a single footnote in their brief that says that's a red herring. No explanation. No argument. But the reversionary right was taken, and the plaintiffs also lacks standing on that basis.

With respect to adverse possession, on the issue of hostility, the plaintiffs offer no evidence that their use or their predecessors use of the corridor land was not permissive. That it wasn't done with the railroad's knowledge and acquiescence. They repeatedly state in their declarations that they coexisted with the railroad in a neighborly fashion. They never had any problems until King County owned the land. And so the hostility element only comes up after King County owns the land, and is enforcing its rights to the property, and they cannot claim adverse possession against the County for reasons that your Honor articulated previously.

THE COURT: Well, I already ruled on it.

MS. HARRIS: Yes. Exactly. Now, I understand that you are not going to address anything but King County's right to ejectment.

THE COURT: Well, of course I'm not going to eject anybody. That's not before me.

MS. HARRIS: And so I just wanted to though talk briefly though about the right to ejectment. I think --

THE COURT: That's different. That is -- that is part of your motion is the right to eject. Whether you exercise it, who knows.

MS. HARRIS: That's right. That's right. And so I think we start with the proposition, the general proposition, that the right of rejectment is the most precious of the bundle of six. And then you have to add an overlay on that that not only is it the most precious right, but here we are talking about public land, and we are talking about public land that was purchased for the public benefit and use, and which was being developed and continues to be developed at great cost to the public for the public's use. And we have found no case that allows equity to enjoying the government in a right of ejectment asserted on behalf of the public. The plaintiffs have not cited a case. And so that lack of authority is consistent with what we have cited in our briefing that there are duties and obligations of the County to preserve property. There are statutes that talk about how the County can dispose of property. There are -- the County's obligations, legal obligations as the trail

sponsor to preserve the corridor for reenactment for reactivation. Now, the plaintiffs say, you know, that's kind of a nullity because everybody knows this corridor isn't going to be reactivated. So that's just not something that they should be able to rely on. The very purpose of this statute allowing the rail banking is to anticipate in the future at some point in time those corridors are very valuable, and may need to be reactivated and --

THE COURT: Okay. I know you are private counsel representing the County, but it would be nice if you could say something reassuring about what you're actually planning to do with the land here. Do you follow me? There's a lot of angst that's being expressed. So this discussion of rejectment is not whether or not if you have the right to possession you carry one of the classic rights of possession. What are you going to do? If I grant your motion, that's what they are worried about.

MS. HARRIS: Yeah. So the County is undertaking a process to develop a consistent policy countywide for how it deals with encroachments on County property, park property. And we have said in our brief, and I can represent to the Court, that if there is an existing home that was put -- that was built in the right-of-way. So if you look at Mrs. McNabb's home, if there was an

existing home put into the right-of-way, in good faith, not like some of the property owners who tried to gain the system, that King County would consider a special use permit where fees are paid to compensate the public for the use of that land. And eventually at some point when that house is not able to be maintained or it burns down, then those things would be rebuilt on the plaintiff's property. So that the public regains the benefit of that land.

Now, we already have some policies in place for how we deal with things like landscaping in the corridor that doesn't conflict with the trail. We would certainly -- we'd provide special use permits for crossing the trail where it's safe for the public. And so we would look at -- and the problem is that policy is not fully developed yet. And so I can't --

THE COURT: Understood.

MS. HARRIS: -- give the details. But we are very cognizant.

THE COURT: Yeah. That's where a lot of heat's coming from.

MS. HARRIS: Yes.

THE COURT: All right.

MS. HARRIS: And just because I hate somebody saying that I didn't accurately represent something. In our

chart of the plaintiffs we very specifically set out for say Mr. Conger that his parents purchased the property in 1960. It says for McNabb the property goes in the family back to 1935. We acknowledge those points. I'm not trying to hide behind any dates or anything like that.

Oh, one last point. Mr. Romero said that the statute on the presumptive nature of the survey that the statute itself said that it could only be between private parties, and for an original government survey of land. I think if you look at the statute that language is nowhere in the statute. He may have misremembered some of the case law that we had cited along with it. And the statutory definition of person in the payment of taxes statute very expressly includes government entities, and so this argument that somehow King County cannot be a person is directly contrary to the statutory language. Unless you have any other questions.

THE COURT: Nope. You are good.

MS. HARRIS: Thank you.

THE COURT: You stayed within your time. All right. You have another ten minutes, Mr. Romero.

MR. ROMERO: Thank you, your Honor. I'm hiding over here. Thanks for your time. What I would like to do is first say an overarching comment here. Whenever I hear counsel arguing about what the evidence says, to me, it's

an issue of fact.

THE COURT: I hear you.

MR. ROMERO: And what I heard the County arguing in rebuttal there is basically our evidence is better than your evidence, and if the Court is going to get into a debate about which evidence is better, who is more credible, Sullivan or Matthews, Nunnenkamp or Wilson, I'd just say it's rife with an issue of fact that precludes summary judgment.

But let's look at a few other things that counsel said. She said that on Middleton we don't care about the source documents. Well, I really appreciate that because to me that was Nunnenkamp's entire testimony is Middleton. So if we are going to say hey, look, adverse possession is the issue, and that's what we are talking about, we have so many citations out that it's an issue of fact, your Honor. And just because the railroad said in 1917 they had it, it doesn't mean that in the 1940's my client did have it. In the 1960's the railroad had it. You know, what I mean. In other words, adverse possession can ebb and flow by definition. And so the real question is what were the last ten years? 1988, what did it look like? It looked like this, your Honor. That's what it looked like. (Indicating.) And the question is, and for a summary judgment purposes can the

Court say I'm going to ignore all of these uses, and say that I don't think they are open, notorious or hostile or continuous. I just don't think the Court can regardless of whether it's anecdotal, regardless of whether my clients did or didn't. The County has never rebutted all of these things. This map is exactly what happened and when it happened. So it's an issue of fact that precludes summary judgment.

It's interesting that in the context of the Larges that when the County wants to use a document that's called a survey. You know, like an SUP or something it has high value. But when the property owner, like the Larges, submit a documentation from a surveyor that shows the ROW at 45 feet, and you pay the County official to review your documentation to look at it, and they see something that says 45 feet, that the County goes well, you know, what, hey, you know, ignore that. It's not really that important. Of course it's an issue of fact. The County saw a document that said it was 45 feet. They allowed my clients, the Larges, actually their predecessor, to put in part of their house, and their deck, and property permitted it. There is just no way that you can say on summary judgment well, the ROW is a hundred feet in light of the County's own actions, seeing it, and approving it.

With respect to Pechman and the five people, the five property owners and the question why. Obviously one of the main reasons they get to submit declarations, and have their evidence considered is ejectment. I know the Court isn't going to rule on that today. But Pechman does not say that they are ejected from their property. She doesn't even say there is a right to eject because it's not decided for her. What she said, your Honor, is it says, except where narrowed by prior transactions the County owns a hundred foot easement. That's her ruling.

So the question is have we presented facts even as it relates to these parties about prior transactions? I'm confident that the County isn't saying that the Morrell agreement with the railroad wasn't a prior transaction. Although I don't know that for sure. But that's why the Court has to go look, I can see -- what does that word prior transactions mean. I would argue that, and if you look at the Pechman decision, she is saying look, you property owners, you didn't submit any evidence of payment of taxes. You didn't submit any evidence of challenging whether the railroad needed a hundred feet. So I'm going to say generally the ROW is a hundred feet. But if you can come in and show me that on a particular parcel, even with these five there's a prior transaction I may change my mind about this or I may agree to it. So

I would suggest that even with those people, with res judicata, the Court shouldn't go further than Judge Pechman who said except where narrowed by prior transactions, and we believe we have submitted evidence of prior transactions that would cause the Court to not find a hundred feet.

With respect to the lack of standing. I do not understand this argument in the least. Mr. Darrell, the County number one appraiser, the big honcho, over my client's property, testified in deposition on every single lot that my clients paid for every improvement, your Honor. If you look at this map, your Honor, every single improvement that you see here, houses, decks, cabanas, my clients paid all the property taxes on those. The idea that we are going to read this statute, RCW 7.28.070, and just read out the word tenements. Is that what we do? It says either or. My clients paid all of the property taxes for decades on all the tenements that are located within that ROW. And remember to get the benefit of RCW 7.28 you have to pay all taxes. So even if you give them this idea that a fee, a noxious weed fee equals property taxes, I would -- you still don't go there because my clients paid it.

And, your Honor, I would ask that the Court look at the rules of construction of statutes. The legislature

clearly could have put in anybody who pays the taxes and fees. It's done throughout the statutes. We cited it. What's the difference between a tax and a fee? Is it something that's allotted for a specific thing, i.e., noxious weeds? It's not a tax. You can look at the case law. None of those three fees are taxes. They were designed for specific purposes. Let's control the surface water that's coming here. Let's control the noxious weeds that are there. They are not taxes. So even if you give them the proper -- the idea that they are a person, which I'd argue they shouldn't be because this conflicts with the Fifth Amendment in terms of taking, it's still my clients did pay taxes within the corridor at least on all of the improvements.

And remember there is an issue of fact too here with Mr. Matthews who told you he looked at the same documentation Mr. Nunnenkamp did, and he concluded that the assessor's office was going between 42 to 75 feet using those tax cards. So we even have an issue here. So even if you say that the County was paying some fees on some portions of the property, it doesn't follow that they were paying a hundred feet worth. It just says the ROW. And therefore that's an issue of fact.

With respect to the issue -- let's see. I'm going to have to skip some stuff here. On the right to eject. So

I know the Court is not talking about eject, and I appreciate that. But since counsel brought the issue of the right to eject. I think the Arnold factors and the equitable estoppel do come into play. In other words, I don't think they are just based on can you toss them. I think it affects the actual right to do it. And I won't go into those factors because I don't have the time. But I want the Court to focus on this idea of what the County is telling you. The County is saying because I have a Quit Claim Deed, which means that there is no guarantee of any title whatsoever, and I know there is all kinds of challenges to the title because I say that I get a hundred feet, therefore I have to protect that land. I own that land. That is not what their obligation is, your Honor. Their obligation is to maintain what the railroad had in 1998.

What did the railroad have in 1998, your Honor? They had twelve feet. That's all they used. Isn't it telling that the County can attack my clients for anecdotal evidence, but what does the County do? Do they have testimony of anybody from the railroad? Do they have testimony from anybody on the land? The only evidence that you have before the Court is that for over a hundred years the railroad used just twelve feet. For purposes of summary judgment you have to give me that, your Honor,

I would argue. You have to give me that it was only twelve feet. It's an issue of fact. And so when you get to the right of ejectment to get that far to get to ejectment, you are going to have to say I find that it's a hundred feet because that's what they're asking. They are not asking you to eject from twelve feet. They are asking you to eject from a hundred feet. Right? That's what they are really saying. And as the Court knows my clients are not raising an issue that they are not entitled -- the County isn't entitled to those twelve feet or to the trail. You have heard this.

If I can leave you with one thing, it is this, and that is this Court should be looking for preserving the status quo. The partis can coexist. Mr. Overton has said, we can build the trail without taking anybody's property. Ms. Auld said in 2013 that we only need 18 feet for the trail. Why in the world would we even have a potential right for ejectment when that is the situation. Because remember even though we call it a bundle of rights, to get that full bundle of ejectment, requires you to determine that a one hundred foot railroad right-of-way easement entitles you to eject people. That doesn't follow. The County doesn't say it. They just say well, it's always in the bundle of rights. Isn't it a question of fact of what the railroad had in

1998? Could the railroad have ejected the people in 1995 from their houses? I would argue the Goldsmith case shows very clearly that not only could the railroad do it, but they didn't do it. Goldsmith won on adverse possession.

So in the end, your Honor, we would ask you to find that there is definitely an issue of fact as to the width of the ROW. And if you do that that's the end of the inquiry.

As it relates to our claim, if I still -- do I still have a minute or so? On the RCW 7.28 claim, the reason that I think that -- I think there is tons of issues of fact, but the reason I think the Court can dispose of this now is because as a matter of law there is no way to say that they had good faith belief and clear title.

Your Honor, just look, please, at that 1998 document that they acquired. Where they acknowledge that there is litigation against it. Where there is claims against it. Where there is no guarantee of any rights in the title. To be able to say that they had a good faith basis they had no idea that my clients were asserting any claim is just wrong. And remember that RCW 7.28 statute doesn't just say you pay taxes for seven years. That statute is just designed to take one piece of adverse possession, and get rid of the ten years. Right? You still have to

have good faith belief and clear title. You still have to be open, notorious and hostile. As we've shown, my clients were paying taxes on all improvements. We believe we were paying taxes on a portion of the real estate, and we definitely believe that the County was not. Thank you so much for your time.

THE COURT: Thank you. All right. So as everybody before me knows today, this case is about the width of the east Lake Sammamish trail corridor and claimed right-of-way that King County, the County, claims across numerous properties along the eastern shore of Lake Sammamish on what was once a railway. The County is before me requesting summary judgment to resolve all the remaining claims it has except for claimed damages resulting from plaintiffs' use of the corridor. The County asserts it owns a fee simple interest in the hundred foot corridor with some exceptions that are acknowledged, and that the plaintiffs lack standing to challenge the County's ownership.

The County argues not that it will eject, or if the Court should eject, but it has the right to eject encroachments by plaintiffs in the corridor. Plaintiffs bring a cross-motion for summary judgment asserting that the County does not own the hundred foot corridor in its entirety.

So the first question before me is whether King County owns a fee simple ownership interest in the hundred foot wide corridor, and I'm going to answer that question, yes. The second question is whether the plaintiffs have standing to challenge King County's rights in the corridor, and I'm going to answer that question, no. And the last question is not whether King County will or whether the Court will order this, but whether the County has the right to eject encroachments by the plaintiffs in the corridor. And the answer to that is yes.

I'm going to back up here to the history, which goes back a ways. As I think we all are aware now, in the 1880's the Seattle, Lakeshore & Eastern Railing Company, the SLS & E, which later became part of the BNSF Railroad Company, the BNSF together with the SLS & E became the Railroad. Those entities together began to construct the corridor along the eastern shoreline of Lake Sammamish. The SLS & E obtained the land it needed for the corridor through various means, which gave the SLS & E a collection of both railroad easements and fee simple properties.

In 1997 BNSF conveyed all its ownership interests in the corridor to The Land Conservancy of Seattle and King County (TLC) through a recorded Quit Claim Deed. On June 11th, 1997 The Land Conservancy, the combined entity

basically, initiated the railbanking process by petitioning the Surface Transportation Board, the STB, for an exemption to allow The Land Conservancy's abandonment of the corridor for active rail service. As part of its petition The Land Conservancy provided King County's Statement of Willingness to Assume Financial Responsibility as the interim trail sponsor under the Trails Act. The STB granted the exemption on May 13th of 1998. On September 16th, 1998, the STB issued an order "railbanking" the corridor described in the 1997 BNSF Quit Claim Deed under the Trails Act and authorized interim use as a recreation trail.

TLC and King County entered into an agreement that formally designated King County as the trail sponsor. And the agreement conveyed to King County all of TLC's ownership interest in the corridor through a recorded Quit Claim Deed describing the corridor's boundaries, and the County conducted a survey of the corridor in 1998.

The plaintiffs own property adjacent to the corridor in Government Lot 2 of Section 7, which I'm going to refer to as Lot 2 and Government Lot 3 of Section 17, which I'm going to refer to as Lot 3. Both of which fall within Township 24 North, Range 6 East of the Willamette Meridian.

The record before the Court contains maps and surveys

that date since the early 1900s that reflect a hundred foot corridor in the area in issue. Early maps of the railroad corridor along east Lake Sammamish show the railroad reported obtaining a corridor that was 50 to 200 hundred feet wide to accommodate not just the rails, but the various uses and needs of the railways, such as to serve local businesses, and for access to construct, maintain, and repair track, ties, and ballasts.

After SLS & E began operating the corridor on August 26th, 1889, the Northern Pacific conveyed its property on Lots 2 and 3 where the corridor is located to Samuel Middleton. The deed from Northern Pacific to Mr. Middleton doesn't mention the corridor. After Mr. Middleton's death, the land alongside the corridor passed to his heirs through a 1909 probate action in Pierce County Superior Court that expressly excluded the railroad corridor.

In 1913 Daniel Middleton, who was the son that inherited Lot 3, recorded an acknowledgment that he hadn't gotten any property within the corridor. He admitted he was not the owner of that portion in said Lot 3 contained in said railroad right-of-way. Earlier in 1911 Allen Middleton, the son who inherited Lot 2, conveyed Lot 2 to Charles Bennett with a deed excepting the railroad right-of-way from the deed, estimating the

right-of-way as 4.74 acres, which is approximately a hundred feet right-of-way. Lot 2 was again conveyed in 1913 excluding the same amount, 4.74 acres, for the railroad right-of-way.

In October 1920, Alice M. Fuller acquired the land in Lot 2 as a successor to Allen Middleton. Her deed expressly excludes the railroad right-of-way through Lot 2. It doesn't list the acreage excluded though State archived documents reflect that she asserted that a hundred foot right-of-way does run through the property. She conveyed a number of parcels from 1928 to 1935, which formed many of the current plaintiffs' parcels. Every single one of the deeds exclude the right-of-way. Every plaintiff here took aware of that, because it's in your deeds.

On summary judgment courts must consider all facts submitted, and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Absent a genuine issue as to any material fact, however, the moving party is entitled to summary judgment as a matter of law.

A defendant can seek summary judgment in one of 2 ways. The defendant can set out its own version of facts, and allege there is no genuine issue as to the facts set forth that are material, or a party moving for

summary judgment can meet its burden by pointing out to the trial court that the nonmoving party doesn't have sufficient evidence to support its case. In this latter situation, where the moving party points out the absence of evidence to support the nonmoving party's case, the moving party doesn't have to support its summary motion with affidavits, but it does have to identify what's in the record that demonstrates the absence of a genuine issue of material fact.

In this case the undisputed material evidence before me confirms that King County owns a hundred foot corridor. There isn't any competent evidence before me to refute the County's ownership of a hundred foot corridor except where that's conceded. At the time TLC quit claimed its ownership interests in the corridor to the County, the King County Roads Division completed a survey to document the acquired corridor. RCW 36.80.015 requires that the County road engineer keep an office at the County seat, and that records under the authority of the County road engineer be made a public, open to all for inspection and examination. RCW 36.80.040 provides that the County road engineer shall, "record and has authority over all matters concerning the public roads...or other surveys of the County with the original papers, documents, petitions, surveys, repairs, and other

papers in order to have the complete history of any such road...or other survey."

By statute, these surveys conducted by the County provide presumptive evidence of the boundaries of the land at issue here. RCW 36.32.370 provides that, "the certificate of the surveyor so employed [by the County] of any survey made of lands within the County shall be presumptive evidence of the facts therein contained."

The County points out that under Rohrbach v. Sanstrom at 172 Wn. 405, decided in 1933, the government surveys aren't vulnerable to collateral attack by private parties. Rohrbach involved a quiet title action to certain tidelands fronting a government lot on Puget Sound. Plaintiffs claimed title thereto by virtue of a deed to them from the State. Defendants claimed title to a three-fifths interest in the lands under a US patent and a chain of "mesne conveyances". The State of Washington by provisions in the constitution disclaimed title to all tidelands that had been patented by the United States. The controversy was about the three-fifths interest the defendants claimed. The government survey affecting the land was about 75 years old. Compared to the curves of the shoreline at the time of decision of the meander line, according to the government field notes, showed a striking variance. At

some places the line was in deep water, and in other places was some distance from the beach. It was because of that variance that the controversy arose.

The appellants claimed that the government survey, the 75 year old survey, was so clearly erroneous, and such a big departure from the condition of the land that it clearly indicated that the meander line couldn't have run as shown in the official survey, but the Rohrbach court said, "[a] government survey is authoritative and is not open to collateral attack between private parties."

Plaintiffs contend that RCW 36.32.370 doesn't stand for the proposition that the County can use its own survey as presumptive evidence to prove title to land, and the cases only pertain to surveys between private parties, but those positions are not well founded in the law. RCW 36.32.370 expressly provides, "The certificate of the surveyor so employed [by the County] of any survey made of lands within the County shall be presumptive evidence of the facts therein contained." This language does not limit its application to disputes between private parties. It does not prevent the County from utilizing the survey prepared by the surveyor it employed.

Plaintiffs also contend that the Rohrbach case doesn't apply to cases outside of disputes between private

parties citing to this language in the decision: "[a] government survey...is not open to a collateral attack between private parties." And plaintiffs have underlined for me the words "between private parties". But plaintiffs excluded the language that "A government survey is authoritative", which immediately precedes this language about collateral attack between private parties.

This ruling imports 2 ideas. First, that the government survey carries authority, meaning the legal ability to control the boundary dispute. And second, the private parties cannot debase the survey's controlling effect in an unrelated proceeding, as is attempted here.

Plaintiffs next contend that a presumption can be overcome by presenting competent rebutting evidence from either interested or disinterested witnesses. They therefore argue that even if the statute were to apply, and frankly it clearly does, the County's 1998 survey would just put the burden of production on plaintiffs to contradict the evidence. But the 1998 survey is a survey of record by the County. The quantum of evidence to overcome an official survey of record is, "Clear and convincing".

The record before the Court, which is loaded with testimony from witnesses who don't have personal knowledge of the suppositions they set forth in their

affidavits and declarations, reflects a complete dearth of evidence to contradict the County survey. Plaintiffs on page 19 of their oppositional brief provide a one sentence comment to me that they've met their burden of proof, "In the offered Declarations". Which is why the Court read those declarations with meticulous care, and why the Court concluded they were very much without foundation on critical issues. At best, I can say that the plaintiffs declarations provide evidence that their deeds excluded the corridor, and that their improvements encroached on the corridor, and that's the most I can make of them.

Plaintiffs also offer me the declaration of David Matthews, a project surveyor with Encompass Engineering & Surveying. He does have a lot of experience, 25 plus years of experience working in the field of land surveying and civil engineering, and I don't question his abilities in those areas. He declares he was retained to determine the area of the railroad right-of-way between Government Lots 1 and 2 of Section 7. That's where all but 2 of the plaintiffs' properties are. He concluded that ROW width was 50 feet. But his opinions don't review nor do they reconcile the prior quiet title judgment holding that the adverse possession areas in Section 7 and 17 were a hundred feet wide except where

narrowed, the 1998 survey, and many surveys of record over the past hundred years, all of which show the corridor is presumptively a hundred feet wide.

I will also cite here to the decision in Hornish v. King County, 182 F.Supp.3d 1124 at page 1131, decided by the Western District of Washington in 2016.

Of course I consider all facts submitted, and all reasonable inferences from the facts in the light most favorable to the nonmoving party, but the Court cannot reconcile the fact that Mr. Matthews is unable to provide clear and convincing evidence against surveys he has not reviewed. Nor can I draw reasonable inferences from opinions which contradict prior quiet title judgment holdings as in the Hornish case.

Once the initial burden is met by the moving party, the nonmoving party cannot rest on more allegations or denials but must give me material facts that respond to the high burden of proof required here, clear and convincing evidence. Because I have not been given clear and convincing evidence rebutting the 1998 surface boundaries, I must grant summary judgment to King County.

Let me point out, historic records are consistent with a hundred foot corridor described in the 1998 survey. On August 26th, 1889, after the corridor began operation, Samuel Middleton purchased property adjacent to the

corridor in Lot 2 and Lot 3, which became the source of plaintiff's lots. The width of the corridor has been reflected in the State and King County Assessor's records for well over a hundred years. In 1891, the Assessor stated that Mr. Middleton owned 34.35 acres of property in Lot 2. In 1895, the Assessor recorded that Mr. Middleton owned just 29.5 acres in Lot 2, which was now described as Lot 2, less RR, meaning railroad. The area of Lot 2, along with its length, indicates this segment of the corridor is about a hundred feet wide.

The records also reflect a hundred foot corridor on Lot 3. In 1891, the Assessor said that Mr. Middleton owned 16 acres of property in Lot 3. In 1895, the Assessor recorded that Mr. Middleton owned only 12.79 acres in Lot 3 now described as, "Lot 3 less RR". Again, Lot 3, less railroad. The area and length of Lot 3 reflects the length of the corridor being about a hundred feet wide.

When Mr. Middleton died, the probate proceedings in Pierce County Superior Court divided his property between his heirs, as I have already noted, and expressly excluded any interest in the corridor from the property conveyed to the heirs, which the final order confirmed to belong to BNSF.

Also, for Lot 3, BNSF recorded color of title

recognizing the corridor being a hundred feet wide. On May 27th, 1887, CE and Sarah Perkins attempted to convey a hundred foot corridor in fee to the SLS & E through a recorded deed granting a hundred foot right-of-way through lands in Section 17. The Perkins deed turned out to be invalid, but it's well settled in Washington that someone who enters upon land under color of title, such as a deed, and possesses just a part of the land will be deemed to have possession of the entire tract of the limits of the boundary described in the color of title for purposes of adverse possession. And that's Yakima Valley Canal Company v. Walker, 76 Wn.2d 90, decided in 1969. For the same reason, the Perkins deed establishes that the corridor is a hundred feet wide today. This is consistent with the survey, and with the exclusion of a hundred foot corridor from the Middleton property in the final order in the Pierce County Superior Court action.

The survey is also consistent with official agency records from the Interstate Commerce Commission, known as the 1917 VAL maps, confirming that BNSF acquired a hundred foot corridor adjacent to the plaintiffs' property. The Valuation Act of 1913, which served the purpose of measuring railroad property subject to regulation, ratemaking and taxation, required the ICC Bureau of Valuation to ascertain the value of all

property owned or used by every common carrier, and railroads of course are common carriers, and the 1917 VAL maps verified and recorded the corridor boundaries. As a result, Valuation Maps are routinely used to decide the boundaries of railroad corridors. And no, I'm not going to cite to all the cases that say that. But I will point out one of them is Alameda Corridor Transportation Authority v. Stewart Title Guarantee Company at 119 F.App. 111, decided by the 9th Circuit in 2004. The 1917 VAL maps for this portion of the corridor shows BNSF originally acquired 4.71 acres of property in Lot 2, by way of adverse possession, and 3.29 acres in Lot 3. These areas and lengths confirm the corridor is a hundred feet wide.

Also, even if the prior rulings by this Court were wrong, I will point out as the Hornish court did, that the County not only acquired title through valid quit claim deeds from BNSF corridor, but through the operation of RCW 7.28.070. That's what the Hornish court said, "it acquired the same through the operation of RCW 7.28.070."

I follow Hornish and recognize that this statute provides the County with a hundred foot corridor except where previously narrowed by prior property transactions with BNSF. RCW 7.28.070 provides, "Every person in actual, open and notorious possession of lands or

tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and judged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title". The County meets the requisite showing to prove this alternative basis to claim title to the hundred foot wide corridor, as the Hornish court said. The County holds the corridor under a good faith color of title through the recorded Quit Claim Deed from TLC. Also, the County paid fees and the taxes that were legally assessed on the hundred foot wide corridor. So did TLC and BNSF before it. And the County has been in "open and notorious" possession of the corridor "by recording the deed, appearing as trail sponsor in public proceedings before the STB, removing the tracks, installing a soft surface trail, and requiring adjacent land owners to apply for permits for crossings and other encroachments on the corridor." And again I'm directly quoting again from Hornish, 182 F.Supp.3rd at 1132 because I follow this ruling for the reasons stated.

Because the County has satisfied all these requirements, as the Hornish court ruled before me it is the legal owner of said lands.

In addition, plaintiffs lack standing. King County requests that I find plaintiffs lack standing to bring suit. Plaintiffs say RCW 7.28.010 gives plaintiffs the right to bring a quiet title action in this matter. But 7.28.010 provides that, "[a]ny person having a valid subsisting interest in real property, and a right of possession thereof," may maintain action to quiet title. Plaintiffs arguably therefore don't have standing to maintain their quiet title action against the County. In fact, they do not have standing. Because the statute, RCW 7.28.010, requires that a person seeking a quiet title to establish a valid subsisting interest in property and a right to possession thereof. I will also point out the enforcement of this provision in Magart v. Fierce at 35 Wn.App. 264, decided in 1983. The requirement to prove some claim of ownership is often necessary under CR 17(a) to establish standing as a real property in interest. The party with superior title, legal or equitable, must prevail.

A party seeking a quiet title must succeed on the strength of its own title, not the weakness of the other party's title. That's pursuant to Ray v. King County, 120 Wn.App. at 571. On this case on cross motions for summary judgment quieting title, both plaintiffs and the County had the burden of proving ownership of the land in

question, and standing as a real party in interest. Again, that's per the Magart decision, 35 Wn.App. at 266. Because both parties sought summary judgment to quiet title I have to address the validity of their respective claims of title separately.

I have already addressed the County's claim to title. Contrariwise, plaintiffs possess no interest in the corridor. Not one plaintiff has a deed purporting to grant the property within the corridor at issue here. Nor is adverse possession a basis for plaintiffs claim of title in any portion of the corridor. First of all, I don't know if you all remember this but I do, I dismissed the claims for adverse possession here. After this the plaintiffs modified their complaint to withdraw claims for adverse possession. So procedurally I don't have a basis to find adverse possession by the plaintiffs here to establish their standing.

Secondly, and very importantly, plaintiffs declarations are replete with evidence that shows that their use at best was permissive in the corridor. There isn't any presumption in favor of an adverse holder "because possession is presumed to be subordinate to the true owner's title" under Herrin v. O'Hern, 168 Wn.App. 305, decided in 2012, which held, "use of the land with the true title owner's permission cannot be hostile".

At best, plaintiffs evidence shows over and over again, to the extent they have personal knowledge, which most of them lack, their use was permissive within the corridor. Schumacher says, "my family coexisted on neighborly terms with the railroad". Stewart says, "The Railroad never interfered or raised any issues during improvements to this area". "The Railroad company knew of my uses and never objected." This is permissive use. Plaintiffs own evidence runs contrary to the prerequisites for a claim of adverse possession, even if I were to consider this claim. But I will point out it is necessarily dismissed given my other rulings thus far.

I will also point out any interest plaintiffs have to counter King County's claim of ownership was taken by the Federal government when they issued the Notice of Interim Trail Use (NITU) in 1997, when the STB issued the order "railbanking" the corridor under the Trails Act and authorized interim use as a recreational trail. "[a] Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use". And that's under Caldwell v. United States at 391 F.3rd, 1226, decided in 2004. The taking occurs, "When the railroad and trail operator communicates to the STB their intention to

negotiate a trail use agreement and the agency issues a Notice of Interim Trail Use that operates to preclude abandonment under Section 8(d)."

The congressional purposes of the Trails Act are evident. Congress intended to "encourage the development of additional trails", and to "assist recreation users by providing opportunities for trail use on an interim basis." I can cite here and quote from Preseault v. ICC, 494 US 1, and 16 USC 1241(a), which says that the Trails Act "promotes the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoors areas and historic resources of the nation." Second, Congress' intent was "To preserve establish railroad rights of way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." That is per the HR report at eight, Senate report at nine, the US Code Congressional and Administrative News in 1983, and 16 USC section 1247 (d).

The County also points out that some plaintiffs or their predecessors in interest filed takings claims for their reversionary interest in the corridor, and conveyance of the trail easement to King County, in the Federal Court of Claims, seeking to recover payment equivalent to the fee value of the land. But the reality

is that a taking occurred to all plaintiffs at the time of issuance of the Notice of Interim Trail Use. Plaintiffs have no claim of ownership, and they have no standing to assert their claims against King County because their interest was taken when the STB issued the Notice of Interim Trail Use.

With regard to ejectment on public lands, which I know is a huge concern for these plaintiffs, I will point out this corridor was public land for almost 2 decades before the 1998 quit claim. A party cannot claim adverse possession of property held or controlled by a municipality for public use. If I disallowed the right of ejectment, stripping King County of a key attribute of any property owner's ownership rights, I would prevent King County from performing its legal duty under federal law as the Trail Sponsor to preserve the railbanked property for reactivation. That duty arises under 16 USC 1247(d).

Additionally, the disposal of public land in this fashion is illegal. Under RCW 36.34.005, counties are permitted to establish comprehensive procedures for the management of county property consistent with the public interest." King County has established procedures to dispose of surplus properties in KCC 4.56.070. This code section requires "approval by the council" to remove

property from public use. Alienation of public property for private use is also subject to notice, and a public bidding process where the highest bidder prevails under KCC 4.65.090, and KCC 4.56.100. King County is required by law to have a right of ejectment as to these public lands.

I grant summary judgment to the County in all respects. I deny plaintiffs summary judgment motion in all respects. Give me orders to reflect my ruling. Thank you for really fascinating briefing and excellent presentations today. We are in recess.

THE BAILIFF: All rise.

C E R T I F I C A T E

STATE OF WASHINGTON)

) SS.

COUNTY OF KING)

I, Kimberly H. Girgus, Certified Court Reporter; in and for the State of Washington, do hereby certify:

That to the best of my ability, the foregoing is a true and correct transcription of my shorthand notes as taken in the cause of NEIGHBORS versus KING COUNTY, on the date and at the time and place as shown on page one hereto;

That I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney of counsel, and that I am not financially interested in said action or the outcome thereof;

Dated this 15th day of January, 2019.

Kimberly H. Girgus

Certified Court Reporter