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BEFORE THE HEARING EXAMINER
FOR THE CITY OF SAMMAMISH

In the Matter of:

Shoreline Substantial Development Permit
issued to King County Parks and Recreation
Division

City of Sammamish File No. SSDP2014- 00171
/ KC File SHOR14-0022

No.: 2014-00171

MOTION FOR SUMMARY JUDGMENT

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1. RELIEF REQUESTED

On July 7, 2015 the Director of Community Development conditionally approved King County's Application for a Shoreline Substantial Development Permit ("SSDP" and "Permit") to widen and pave a 1.3 mile long segment ("Segment A") of the East Lake Sammamish Trail ("ELST") lying within the former Burlington Northern Railroad right of way (the "ROW") along the southeast shore of Lake Sammamish.

Appellants Moores, Bradbury and SHO (collectively called "Appellants") contend that the Director's decision to issue the Permit was erroneous because the County (a) failed to comply with the submittal requirements of SMC 20.05.040; and (b) did not prove a valid legal right to work within two sections ("2 AP Sections")—each about one-third mile long—of Segment A. Appellants respectfully request that the Hearing Examiner enter a summary judgment order reversing the City's decision to issue the Permit and remanding the matter to the City with instructions that it may not issue a new permit until the County has obtained a state or federal court order (a) declaring it has prescriptive easement rights to construct a trail within the 2 AP

MOTION FOR SUMMARY JUDGMENT - 1

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HB
Hanson Baker Ludlow Drumheller P.S.
2229 112th Avenue NE, Suite 200
Bellevue, WA 98004
(425) 454-3374

1 Sections of Segment A; and (b) providing legal descriptions for the County's two easements that
2 are only as wide as the rails, ties and ballast actually used by the railroads.¹

3 2. STATEMENT OF FACTS

4 2.1 Appellants' Homes Abut Segment A.

5 Moores own a residence located at 4299 E. Lake Sammamish Pkwy S.E. and Bradbury
6 owns a residence located at 4011 E. Lake Sammamish Pkwy S.E. The Moore and Bradbury
7 properties are highlighted in the King County maps ("County Maps") appearing in the attached
8 Exhibit 1.² Both homes abut the former ROW within Segment A.³

9 2.2 The County's Alleged Bases for Claiming a Right to Apply for the SSDP.

10 The County Maps⁴ divide Segment A into five different sections and use three colors to
11 distinguish the County's different bases for claiming a right to submit its Application. The County
12 alleges it is the fee owner of three sections of the ROW based upon a Land Grant (colored brown
13 on pages 17 and 18), a deed given by Sadlenken and a deed given by N.P. RWY Co. (colored
14 green on pages 17, 18 and 19). The Hearing Examiner can see in Pages 18 and 19 of the County
15 Maps, however, that the County concedes it does not have a valid deed to the 2 AP Sections of the
16 ROW (colored gray and labeled "AP"). Instead, the County contends it can widen the existing
17 trail in these 2 AP Sections based upon adverse possession or prescriptive easement claims. As
18 noted above, this appeal is being made by owners of properties abutting these 2 AP Sections and
19 focuses largely, but not exclusively, on the complete absence of any proof that the County has
20 adversely possessed a fee interest in, or acquired a prescriptive easement to cross, the 2 AP
21 Sections, and the complete absence of any proof of the location and width of the original rail bed.
22

19 ¹ Appellants reserve the right to present evidence and argument on the remaining issues noted in their Notice of
20 Appeal.

21 ² Exhibit 1 includes pages 17, 18 and 19 of King County's 24 page "East Lake Sammamish Trail Railroad Right of
22 Way Historical Acquisitions" map. Segment A begins at S.E. 33rd Street on page 17, extends south through pages
17 and 18, and ends at the Sammamish/Issaquah City limits on page 19.

³ Moores' home abuts the southern-most AP section and Bradbury's home abuts the northern-most AP section. SHO
is a Washington nonprofit association and joins in this Motion on behalf of all 39 of the families who own lots
abutting the 2 AP sections of the Trail.

⁴ See Exhibit 1.

1 2.3 The County's Proof of Ownership.

2 2.3.1 **The County Failed to Submit a Title Report.**

3 The City's Land Use Application for a Shoreline Substantial Development Permit
4 mandates submittal of eleven different items.⁵ The third required submittal is a title report (issued
5 within the prior 30 days) for the property being improved. Here, the County did not submit any
6 title report assuring that it had a fee interest or easement interest in any of the ROW located
7 within Segment A.

8 2.3.2 **The County's Evidence of Ownership Was Largely Irrelevant.**

9 In lieu of a title report, the County submitted copies of eleven Deeds, seven Easement
10 Agreements and 106 Special Use Permits.⁶ Seven of the eleven Deeds involve portions of the
11 ROW outside of Segment A and have nothing to do with the County's Application. Only four of
12 the Deeds actually describe portions of the ROW within Segment A. They are Sadlenken's 1887
13 Right of Way Deed, N.P. RWY Co.'s 1898 Deed, a 1997 Quit Claim Deed from Burlington
14 Northern Railroad ("BNRR") to the Land Conservancy of Seattle ("TLC") and TLC's 1998 Quit
15 Claim Deed to King County.⁷ TLC's Quit Claim Deed to the County purports to convey 12.45
16 miles of the former ROW to the County, including the 2 AP Sections.⁸ None of the seven
17 Easement Agreements involve former ROW within Segment A and, like most of the Deeds, have
18 nothing to do with Segment A. Similarly, only 20 of the 100+ Special Use Permits submitted by
19 the County actually involve properties adjacent to the 2 AP Sections, and none of the 20 permits
20 grant any rights of use to the County.⁹

21 2.3.3 **BNRR Did Not Have A Record Interest In The 2 AP Sections.**

22 Appellants concede that the legal descriptions in BNRR's Quit Claim Deed to TLC and
TLC's Quit Claim Deed to the County include descriptions of the 2 AP Sections in Segment A.
An analysis of the chain of title for these two Sections reveals, however, that BNRR did not, in
fact, have any record interest in the 2 AP Sections at the time it gave its Quit Claim Deed to

⁵ See Exhibit 2 to this Motion.

⁶ See Exhibit 12 of the Decision.

⁷ See Exhibits 3 and 12 of the Decision.

⁸ See Declaration of Rick Cline.

⁹ The legend for the County Maps indicate the 20 Lots given Special Use Permits are highlighted with purple dots.

1 TLC.¹⁰ If BNRR did not have a recorded fee or easement interest in the 2 AP Sections when it
2 gave its Quit Claim Deed to TLC, King County did not acquire a record interest in these Sections
3 when the County recorded its Quit Claim Deed from TLC.¹¹

4 The 2 AP Sections lie within former Government Lots 1 and 3 of Section 17 in Township
5 24 North, Range 6 East W.M.¹² In 1887 Seattle Lake Shore and Eastern Railway Company
6 acquired these two Government Lots from C.E. Perkins and Sarah Perkins and two years later its
7 successor, Northern Pacific Railroad Company ("NPRR"), conveyed all of both Government Lots
8 to Samuel T. Middleton ("Middleton"), without reserving for itself a railroad right of way.¹³
9 Following Middleton's death a Judgment was entered in 1910 awarding Government Lot 3 (less
10 3.19 acres of right of way) to Samuel T. Middleton¹⁴ and awarding Government Lot 1 (less 2.39
11 acres of right of way) to Allen Middleton. In his search of documents recorded with the King
12 County Recorder, Title Officer Rick Cline has not found any conveyances of Middleton's interests
13 in the rights of way within Government Lots 1 and 3 to Middleton's heirs or third parties.¹⁵
14 According to the King County Recorder's records, therefore, title to the 2 AP Sections appears to
15 be vested in the heirs and devisees of Middleton.¹⁶ Consequently, BNRR never obtained a
16 recorded interest in the 2 AP sections and the County never acquired an interest in either of these
17 Sections when it accepted TLC's Quit Claim Deed in 1998.

18 The County surely knew of this title deficiency—which makes it particularly disturbing to
19 read the November 20, 2014 letter from the Manager of the County's Capital Planning and Land
20 Management Section,¹⁷ responding to the City's request for an explanation of "disputed property
21 ownership issues." Ms. Leers' letter completely ignores the 125 year period that the railroad has
22 been "out of title" to the 2AP Sections, offers no court orders or evidence in support of its adverse
possession claims to these Sections, and ends up relying exclusively on the Quit Claim Deed

¹⁰ See Declaration of Rick Cline.

¹¹ Authority

¹² See Exhibit 3 to this Motion, an old N.P. Ry. Right of Way Plat Map showing Former Government Lots 1 and 3.
Appellants invite the Hearing Examiner to compare this Plat Map to Exhibit 1 to this Motion in order to confirm that
the 2 AP Sections lie within former Government Lots 1 and 3.

¹³ See Declaration of Rick Cline.

¹⁴ Believed to be the decedent's son.

¹⁵ See Declaration of Rick Cline.

¹⁶ See Declaration of Rick Cline.

¹⁷ Decision Exhibit 8.

1 given by TLC (and warranting nothing) as having resolved the ownership dispute. Ms. Leers'
2 conclusion may be correct as to the deeded portions of Segment A, but it is incorrect as to the 2
AP Sections.

3 2.4 Summary of City's Submittal Requirements and the Status of Title to the 2 AP
4 Sections.

5 The City has mandated that SSDP applicants submit up-to-date title reports for the
6 properties being developed. Here, the County failed to submit the requisite title report for any of
7 the ROW within Segment A and failed to submit any proof that BNRH had openly, notoriously,
continuously occupied or used the ROW, under claim of right, for more than ten years.

8 3. EVIDENCE RELIED UPON

Appellants' Motion is based upon:

9 3.1 The evidence of ROW ownership that the County submitted to the City in
10 support of its Application for the SSDP;

11 3.2 The County Maps attached as Exhibit 1;

12 3.3 The Declaration of Rick Cline Appellants will file on October 27, 2015,
13 along with true and correct copies of documents recorded with the King County Recorder
attached to Mr. Cline's Declaration; and

14 3.4 The City's Land Use Application Form attached as Exhibit 2; and

15 3.5 A Northern Pacific Railway Right of Way attached as Exhibit 3.

16 4. ARGUMENTS

17 4.1 Comparing the County's and Appellants' Claims.

18 To give context to the arguments below, Appellants offer the following explanation of
19 their position regarding the County's right to work in the 2 AP Sections.

20 The County alleges it has acquired fee title to the 2 AP Sections by adverse possession and
that it can place a recreational trail anywhere within the 100' width of these two Sections.
21 Appellants contend that the County has, at most, a prescriptive easement for a recreational trail
that is no wider than the width of the tracks, ties and ballast actually used by the railroad.
22 Washington law is clear. One cannot adversely possess property, or acquire a prescriptive
easement to cross, any greater area than the area possessed or used. Appellants contend that the
County's prescriptive easement is more nearly 10' – 12' wide (or whatever width the proof

1 establishes), not 100' wide. Consequently, the County cannot perform any of the construction
2 described in the County's 95% Plans that is outside this 10' – 12' corridor.

3 Appellants also contend the County cannot acquire fee or easement interests in the 2 AP
4 Sections by simply alleging it has done so. It must convince a Court that all of the requisite
5 elements of an adverse possession or a prescriptive easement claim have been proven for a ten
6 year period. The County must also prove precise locations of the affected areas, after which the
7 Court must enter an order approving legal descriptions—most probably measured from the
8 centerline of the tracks—for the areas within the 2AP Sections adversely possessed or burdened
9 by prescriptive easements. Without legal descriptions and a Court order, the margins of the Trail,
10 and the limits beyond which the County cannot build, remain undefined.

11 4.2 The City Should Not Have Issued the SSDP Because the County Did Not Submit a
12 Complete Application.

13 SMC 20.05.040 (1) states that:

14 The department shall not commence review of any application set forth
15 in this chapter until the applicant has submitted the materials and fees specified
16 for complete applications.

17 Here, the County failed to file the most fundamental submittal requirement listed in the City's
18 Shoreline Substantial Development Land Use Application; a current title report showing that the
19 County owned the ROW. The County's Application was, therefore, incomplete and should not
20 have been processed.

21 Normally a title report for the property will reveal (a) a legal description for property; (b)
22 the record owner of the property; and (c) the identity of lenders or other parties who might be
affected by the development and/or required to join in the Application. Given the generally
unsettled status of the law regarding railroad rights of way it is not surprising that the County
failed to submit a title report. In this appeal, however, the issue is not whether BNRR had been
granted a fee interest, a limited fee interest, or an easement interest in the 100' ROW; or whether
the Appellants have reversionary interests in the 2 AP Sections The ultimate substantive issues
are whether the County has a valid legal right to cross the 2 AP Sections and, if so, its widths and
legal descriptions within each Sections. The procedural issue is whether the County has
submitted a complete Application.

1 While a title report for Segment A may have indicated that the County had fee interests in
2 three of the five sections of Segment A, the title report most assuredly could not have concluded
3 the County had insurable record interests in the 2 AP Sections. Middleton's purchase of these two
4 Sections in 1889, without excepting the ROW from the conveyance, precluded TLC from
5 conveying clear title to the Sections to the County. As the County seems to have conceded in its
6 Maps and application, its only claims of a right to work in the 2 AP sections are based upon off-
7 record and unproven adverse possession or prescriptive easement theories.

8 4.3 The County Has Not Proven Its Adverse Possession or Prescriptive Easement
9 Claims.

10 Under Washington law the requirements of a prescriptive easement are essentially the
11 same as those for adverse possession, except that a party claiming adverse possession must prove
12 that its use has been exclusive.¹⁸ To establish a prescriptive easement the claimant must prove
13 use of the servient land that is: (1) open and notorious; (2) over a uniform route; (3) continuous
14 and uninterrupted for 10 years; (4) adverse to the owner of the land sought to be subjected; and
15 (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his
16 rights. Washington employs an objective test for adversity.¹⁹ Prescriptive rights, however, are
17 not favored in the law, since they necessarily work corresponding losses or forfeitures of the
18 rights of other persons.²⁰

19 Here, the County has not proven any of these elements. The County should not be
20 allowed to widen and pave the trail, remove trees, build walls and construct vaults—outside the
21 footprint of the railroad bed—on the basis of unproven allegations that BNRR adversely
22 possessed, or acquired a prescriptive easement to cross, 100' of ROW. Occasional drives along
East Lake Sammamish Parkway over the last thirty years would have revealed that BNRR made
no use of any part of the ROW for any purpose other than operating trains and maintaining the
tracks. It made no continuous and open use of any part of the ROW that was more than 5' – 6'
outside the centerline of its tracks.

¹⁸ *Chaplin v. Sanders*, 100 Wn. 2d 853, 857 (1984).

¹⁹ *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128, 1130, *review denied*, 145 Wn.2d 1010, 37 P.3d 290 (2001)

²⁰ *Id.* at 603.

1 The City erred when it forgave the requirement that the County submit a title report for the
2 ROW and relied, instead, on the County's unproven allegation that it had acquired by adverse
possession two corridors of ROW, 100' wide, within the 2 AP Sections.

3 4.4 If The County Has Prescriptive Easements, Their Widths Cannot Exceed the
4 Width of the Tracks, Ties and Ballast.

5 As noted in Section 4.1 above, Appellants admit that BNRR's trains crossed the 2 AP
6 Sections virtually every day for more than ten years. Appellants also concede that the County
7 will probably be able to prove that BNRR acquired prescriptive easements to cross these two
8 Sections, but Appellants also contend that BNRR's (and the County's) easement is limited to the
width of the ballast in the rail bed and not by the widths of ROW's deeded to the railroad that
extend beyond the ends of the 2 AP Sections..

9 In *Northwest Cities Gas Co. v. Western Fuel Co.*,²¹ the Washington Supreme Court
10 adopted the majority rule that the width of a prescriptive easement is limited by its actual use.
There the Court declared:

11 Where an easement is acquired by prescription, the extent of the right is
12 fixed and determined by the user in which it originated, or, as it is sometimes
13 expressed, by the claim of the party using the easement and the acquiescence of
the owner of the servient tenement.²²

14 In the *Northwest Cities* case the owner of the servient estate erected fences on his property that
15 were 48' apart, then acquiesced in a neighbor's use of a 10' - 20' wide road, between the two
16 fences from 1920 - 1936. When a successor owner barricaded the road in 1940 the neighbor's
17 successor commenced a lawsuit to establish and protect its prescriptive easement. The trial court
18 enjoined the interference and specifically described the roadway as being 48' wide. On appeal the
Supreme Court reversed the trial court ruling on the width of the easement, and limited the width
of the prescriptive easement to 20'. In so doing the Court held that the neighbor:

19 could not have acquired an enlarged right of way except by express grant or by
20 prescription based on an *extended* use for an additional ten years, and hence [the
dominant estate] cannot claim such an augmented right merely on the basis of [the
servient estate's] action in fencing off a lane wider than the roadway.²³

21 *Id.*

22 *Id.* at 92.

23 *Id.* at 93.

1 Applying the *Northwest Cities'* holding to this case, the right to use the 2 AP Sections was
2 "fixed and determined by the users in which it originated"—the railroads—and that use has never
3 been expanded. The railroads' uses were limited to the width of their rails, ties and ballast. The
4 County has proven neither the location of the railroad bed nor its width. In short, the County has
5 not proven a prescriptive right to enter onto the land within the 2 AP sections on which it plans to
6 build the ELST.

6 5. CONCLUSION

7 SMC 20.05.040(1) prohibits the City from reviewing the County's application for a SSDP
8 before it had submitted a complete application. The City's SSDP Land Use Application form
9 required submittal of a current title report for all of the properties within Segment A. The County
10 did not submit the requisite title report for any of the properties within this Segment and the
11 County failed to prove it has a valid, legal right to perform work within the 2 AP Sections.

12 The City erred by issuing the SSDP and its decision to do so should be reversed and
13 remanded to the City with instructions that it may not reissue a Permit until the County has
14 obtained a state or federal court order (a) declaring the County has prescriptive easement rights to
15 construct a trail within the 2 AP Sections of Segment A; and (b) providing legal descriptions for
16 the County's two prescriptive easements that are only as wide as the rails, ties and ballast actually
17 used by the railroads.

18 DATED this 23rd day of October, 2015.

19 HANSON BAKER LUDLOW
20 DRUMHELLER P.S.


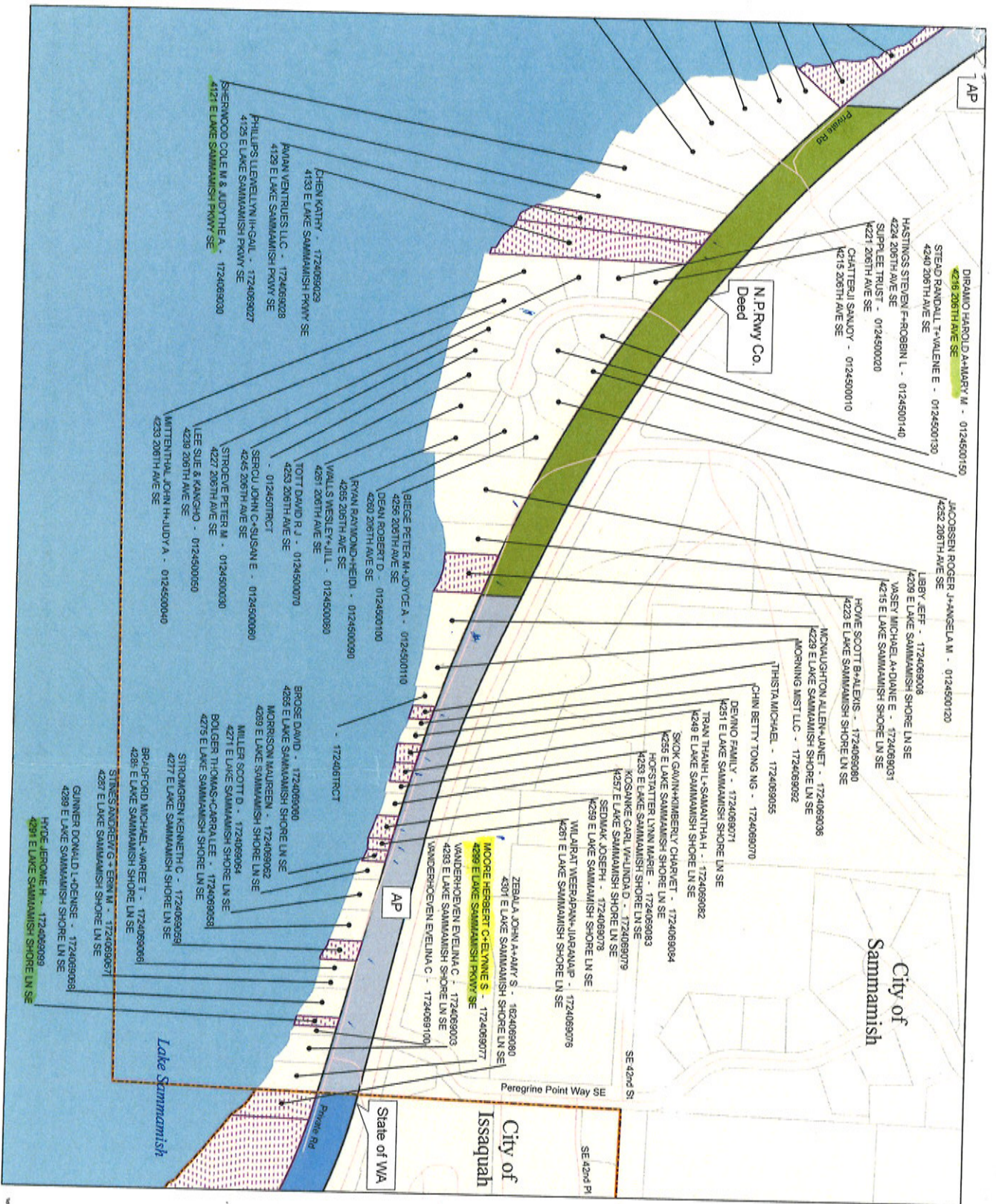
21 By: 
22 JOHN T. LUDLOW
WSBA No. 7377
Attorney for Appellants Sammamish Homeowners,
Moore and Bradbury (collectively "Owners")

EXHIBIT 1



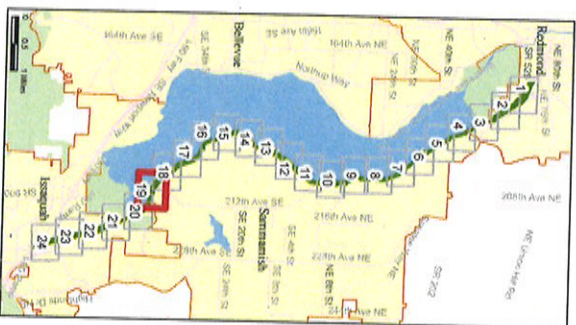
Legend

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East Lake Sammamish Trail Railroad Right of Way Historical Acquisitions

- Legend**
- Deed to Railroad from Private Party
 - Land Grant
 - Easement
 - Adverse Possession
 - Court of Claims Plaintiff
 - Special Use Permit
 - King County Parks Property outside RR ROW
 - Other Parks
 - Tax Parcels



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Department of
Natural Resources and Parks
Parks Division
July 28, 2014



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EXHIBIT 2

Community Development Department
801 228th Avenue SE
Sammamish, WA 98075-9509
Phone: 425-295-0500
Fax: 425-295-0600

City Hall Hours: 8:30am-5:00pm
Permit Center: 8:30am-4:00pm



Web: www.ci.sammamish.wa.us

Land Use Application

SMC Chapter 25.35 & WAC 173-27-180

Shoreline Substantial Development

Submittal Items

	Pre-application Conference ¹
	Base Land Use Application
	Title Report (< 30 days old & demonstrating legal lot status)
	List of Prior/Pending Applicable Permits or Decisions ²
	Variances Obtained or Required
	Legal Description of Site
	Critical Area Affidavit
	SEPA Environmental Checklist ³
	Letter of Description
	ESFR Supplement Review Sheet: Site access for fire/emergency
	Mailing List, Map & Labels ⁴ <ul style="list-style-type: none"> • One list & map of property owners within 500 feet of subject property line • Three sets of mailing labels
	Counter Service Intake Fee Type 2: \$235.00
	Preliminary Review Deposit \$4,121.00
	Legal Notice Posting: \$190.40
	Publication/Mailing: \$254.00
	Critical Area Review: ⁵ \$589.00

A Substantial Shoreline Development permit is required for any development which does not meet the specific shoreline exemptions established by WAC 173-27-040. Activities requiring this permit include, but are not limited to new docks/piers valued at more than \$10,000; single family homes built for subsequent sales, any development worth more than \$6,416.00.

Please provide a letter describing your proposal and the general vicinity, total project cost, (i.e., a receipt or bid indicating fair market value of labor, equipment and materials) and demonstrate on a development plan the following information as outlined in WAC 173-27-180:

1. Boundary of parcel and land upon which the development is proposed.
2. Name of water body.
3. Ordinary High Water Mark location⁵.
4. Environmentally critical area delineations.
5. Vegetation characteristics.
6. Structures, improvements and uses both existing and proposed for subject site and adjacent properties (Including: identification, locations & dimensions).
7. Landscape plan⁶.
8. View impacts⁶.
9. Fill and grading (Including: quantity, source, composition & destination).
10. Elevations (Including: 100-year flood at 33 feet per FIRM datum).
11. Land contours (existing & proposed).

¹ If you would like to schedule a conference regarding a land use application please contact the Community Development Department.

² Other local, state and federal permits, including but not limited to JARPA may be required.

³ When applicable.

⁴ As identified by KC Tax Assessor records. The 500 foot area shall be expanded as necessary to include at least 20 different property owners.

⁵ As established by a qualified professional pursuant to RCW 90.58 and WAC 173-22-030(11).

⁶ If required.

The listed fees are initial deposit amounts based on hourly rate of \$118.00. If the initial deposits have been exhausted before the project is completed an additional deposit will be required in the amount estimate by the Community Development Department round to the nearest 1.0 hour increment.

EXHIBIT 3

N.P. Ry.

Snogahatne Branch
Right of Way Plat

State of Washington
County of King
Section II Township 24 North Range 5 East of Willamette Meridian

Sheet 4

21

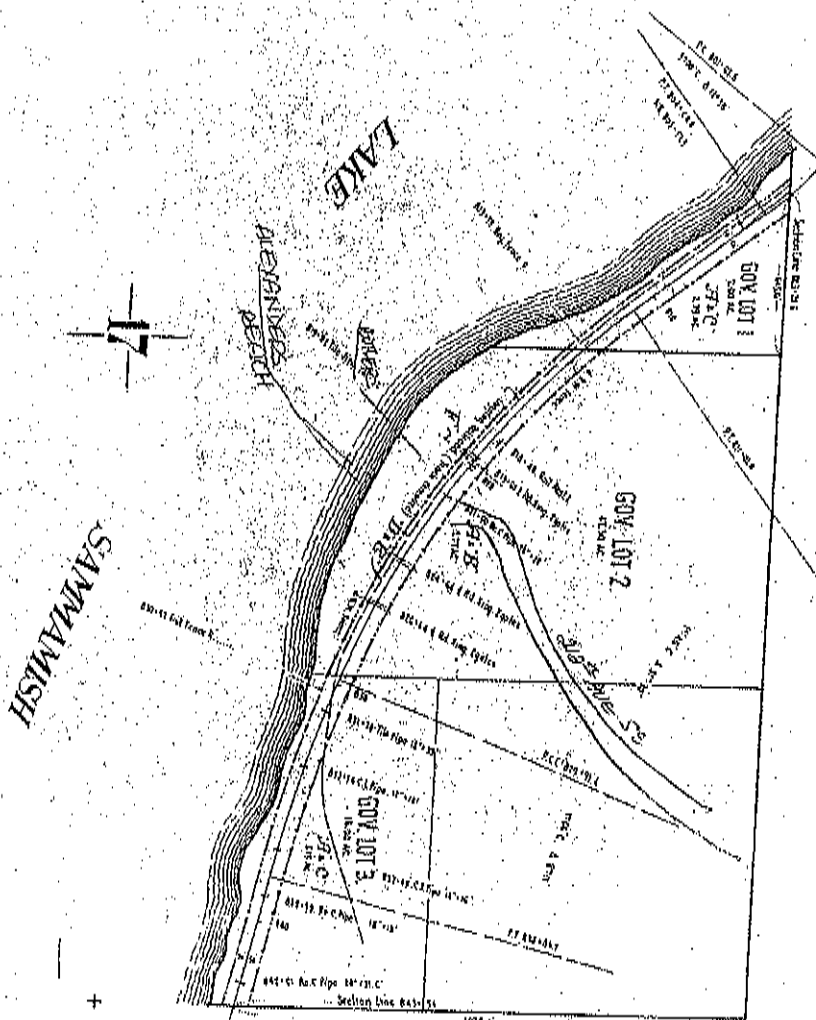


EXHIBIT 4