IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

JEFFREY LEWIS and NANCY LEWIS, Husband and wife, Plaintiff, vs. HILTON LAKE HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation Defendants.	NO. 14-2-09529-1 **DEFENDANT'S TRIAL BRIEF**

FACTS

This case involves a claim by Plaintiffs (Lewis) that they are entitled to land which, by deed, belongs to the defendant homeowners association (HOA). The HOA property is "common area" or "greenbelt" for the development known as Hilton Lake. It is therefore, a case of adverse possession. Corresponding to that claim, is a counterclaim by the HOA for trespass.

Plaintiffs purchased their home from the Kanias in August, 2008. The Kanias had purchased their home from some people named Messner, that Bernie Kania describes as having owned a landscaping business in August, 1986.

There will be several exhibits for the court to examine to get an idea of the area in dispute. It has not been surveyed and is an irregular piece. Most of the area has grass,

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landscaping or gravel placed on it by Lewis' or their predecessors, although there is some blending of the boundaries in certain areas where the Lewis' claimed area adjoins the common areas around Hilton Lake.

In 1997, the legislature enacted RCW 36.70A.165, which reads:

> The legislature recognizes that the preservation of urban greenbelts is an integral part of comprehensive growth management in Washington. The legislature further recognizes that certain greenbelts are subject to adverse possession action which, if carried out, threaten the comprehensive nature of this chapter. Therefore, a party shall not acquire by adverse possession property that is designated as a plat greenbelt or open space area or that is dedicated as open space to a public agency or to a bona fide homeowner's association.

Since the land in question is within a greenbelt or open space, it may not be subject to an adverse possession claim. However, nothing is as easy as it seems and that statute must be construed in light of case law. It appears there is only one case dealing with the statute, ***Nickell v.Southview Homeowners Association***, 167 Wash.App. 42 (2012).

In ***Nickell,*** the claim of the Nickells was that their claim of adverse possession against HOA property was not barred by the statute because their period of adverse possession was completed prior to the statute being enacted in 1997. The Court of Appeals agreed and the rule now is that the statute does not apply retroactively, and if an adverse period is completed prior to the enactment of the statute, a party may still adversely possess greenbelt or open space. Hence one of the questions in this case is whether the Lewis' adverse claim period, when tacked onto the any adverse claim period of the Kanias, was completed prior to 1997. In this case, the entire adverse claim would be during Kania's ownership. What the court is expected to hear is that when Kanias purchased their property, they really had no idea where the actual boundaries were. All Mr. Kania knew was that his predecessor in ownership had been a landscaper and had landscaped a lot of

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the area around his house. In fact, in his deposition, Mr. Kania regretfully admitted that he only found out after he agree to purchase that the area he considered his side yard was actually a separate piece of property being sold to someone else. He had no idea where his property boundaries were. The property next to the Lewis' belongs to David Flaming. He purchased his property in 1988 and will testify that at that time, a small concrete wall later installed by Kania did not exist. Obviously then at least some changes occurred to the property after 1988 with the result that at least some changes to the property occurred after the necessary beginning of the adverse period.

Mr. Kania also acknowledges that when the original plat was recorded, portions of the property were intended to remain as HOA property and be used for the benefit of all property owners within the HOA. Those include pathways, benches, tennis court, picnic areas, ball field, an area around the lake, etc.

Kania further agrees and others will testify that there were at least annual work parties where neighbors got together and improved, cleaned up and helped with landscaping in the common areas around Hilton lake and that at such times, people were not actively watching to insure whether they remained just on common area or at times wandered onto areas owned by individuals; it was a group effort to beautify the lake area. Kania also agrees that it was at least not unheard of, if not common, that people would blend in their landscaping to that of the common area to create a pleasing overall appearance. None of that was done with the idea that property owners would be usurping parts of the greenbelt or common area. In fact, Kania goes so far as to acknowledge authoring a handwritten document which contains the following:

"First, there was absolutely no contact between the Lewis's & us until after the sale

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of the property, therefore no understood and described boundaries of the property was conveyed by us." He went on to write,"There was never any established boundary inter the lake and the back of the property. The west property line was the only one in contention." That west line was between his house and the Flaming house and had nothing to do with the disputed area. Finally he notes: "Any work or improvements done in that area were not done to establish property lines inter the lake and the property, but strictly for aesthetics."

Considered as a whole, it is clear that Mr. Kania never voiced an opinion on what property lines he was conveying to Lewis, had no real idea himself what his boundaries were, and acknowledges that much of what is done around the lake and homes is done for aesthetics, in other words, as a neighborly accommodation. In short, Mr. Kania never asserted ownership of the property in question. Mr. Lewis then comes along and now asserts ownership of property, based on the prior ownership of people who make no such claim.

It is expected that the court will hear additional testimony from other witnesses who will confirm that the HOA does not actively monitor the boundaries of its common areas, that residents of the community often blend in their property lines with those of the HOA to beautify the whole area and that despite such blending of the lines, the folks at Hilton Lake treat the area with what can only be described as neighborly acquiescence or accommodation. The testimony will be that despite such blurring of property lines over the years, no one in the past has attempted to assert ownership over HOA greenbelt. The testimony will be that if the landscaping, mowing, irrigation and maintenance look presentable and enhance the overall appearance of the community, so much the better.

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PROCEDURAL HISTORY

This complaint was prepared in July of 2013. The answer, affirmative defenses and counterclaim were filed on August 28, 2013. Plaintiffs reply, or answer to the counterclaims was filed in September, 2013. Thereafter, Plaintiff filed a a motion for summary judgement in December, 2014. Pleadings were exchanged and oral hearing was held on February 26, 2015 which resulted in the matter being referred for mediation. That mediation occurred on May 1, 2015 and failed to achieve settlement. The court then entered its order denying summary judgment, without further argument or briefing, on June 18, 2015. The issue remaining was whether "neighborly accommodation" existed such that adverse possession was precluded.

LEGAL ANALYSIS

Adverse possession requires ten years of actual and uninterrupted, open and notorious, exclusive and hostile use of property. ***Timberlane v. Homeowners Assn. v. Brame***, 79 Wash.App. 303, 309, 901 P.2d 1074, 1078 (1995). "As the presumption of possession is in the holder of legal title, the party claiming to have adversely possessed the property has the burden of establishing the existence of each element." ***ITT Rayonier, Inc. v. Bell***, 112 Wash.2d 754, 757, 774 P.2d 6, 8 (1989) (citations and quotations omitted). As indicated above, Washington's statute to protect greenbelts, RCW 36.70A.165 was enacted in 1997. That, when coupled with the decision ***NICKELL*** supra requires that the adverse period predate the enactment of the statute in 1997.

While Mr. Kania's landscaping might create the appearance of exclusive possession, the reality at Hilton Lake is somewhat different. The testimony will be that not only did many of the owners blend their property lines with the land belonging to the

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HOA, but also that Mr. Kania himself did not intend to establish property lines with his landscaping. This is precisely the type of activity which prompted the enactment of RCW 36.70A.165. As the court indicated in ***Bell***, supra "Possession itself is established only if it is of such a character as a true owner would make considering the nature and location of the land in question." *Bell*, 112 Wash.2d at 759, 774 P.2d at 9. If the evidence confirms that Mr. Kania never intended to establish property lines with his landscaping, it is hard to suggest that he is acting as a true owner. Kania landscaped the disputed area, but so do many other owners at Hilton Lake. Those actions made for a more appealing area around the lake and many of the neighbors joined in that effort, by serving in work parties to keep the area looking presentable. Both the Kanias and their neighbors frequently joined in those work parties. Nothing in his use was any different then the use of many of his neighbors. From the perspective of the HOA, what he was doing did not in any way foster a belief by the HOA that Kania was "possessing" its property.

As a result of the common efforts to maintain the greenbelt and the general acquiescence by homeowners to the blending of property lines without objection from owners or the HOA, it is hard to establish that the Kanias use of the disputed property was hostile. *Chaplin v. Sanders*, 100 Wash.2d 853, 857-58, 676 P.2d 431, 434 (1984). "The 'hostility/claim of right' element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property." *Id.* at 860-61. While maintaining landscaping might, in other circumstances satisfy the hostility requirement, when everyone around you is doing the same thing, it doesn't suggest hostility. To the contrary it suggests neighborliness.

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For the same reasons that Mr. Kania's use of the disputed property was not hostile, it was also not open and notorious. The "open and notorious" requirement is satisfied "if the title holder has actual notice of the adverse use throughout the statutory period." *Chaplin*, 100 Wash.2d 853, 862, 676 P.2d 431, 437 (1984) (citing *Hovila v. Bartek*, 48 Wash.2d 238, 242, 292 P.2d 877 (1956)). As the testimony will indicate, the HOA has dealt with the blending of property lines and landscaping for decades with no prior efforts to take property by adverse possession. The Kanias use of the property was consistent with others and Mr. Kania is expected to testify that he never gave any notice to the HOA that he was making a claim on their property.

However, the real key to this issue lies in the meaning of "neighborly accomodation". Not only was it used by the court in the order on summary judgment, but it is also a common theme in cases involving adverse possession and prescriptive easements. As the court knows, the elements of prescriptive easements are nearly identical to those of adverse possession.

> To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an "open" and "notorious" manner, (2) the use was "continuous" or "uninterrupted," (3) the use occurred over "a uniform route," (4) the use was "adverse" to the landowner, and (5) the use occurred "with the knowledge of such owner at a time when he was able in law to assert and enforce his rights." ***Northwest Cities,*** 13 Wash.2d 75, 123 P.2d 771.

As in the case with adverse possession, the claimant bears the burden of proving the elements. Adverse use implies lack of permission. While there is no requirement that the claimant believes he owns the property to establish adverse use, there is nevertheless a presumption that when someone enters onto another's land, the person entering does so with the true owner's permission. ***Northwest Cities*** p. 84

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An excellent discussion of "neighborly acquiescence" and how it applies is found in ***Gamboa v. Clark***, 183 Wash 2d 38, an April, 2015 case. Although dealing with a prescriptive easement, the analysis is nearly identical to cases involving adverse possession. The key issue was whether, when two parties both used a road way, one for a drive entrance and the other to farm grapes, and neither party objected and both were aware of the others' use, such uses were merely neighborly sufferance or acquiescence that did not ripen into an adverse use. The adverse claimant failed in that case because they could not demonstrate a use that was adverse and hostile to the rights of the original owners. In the current case, when the original owners (the HOA) use is such that it fosters overall beautification of the area, has group work parties that do not adhere to strict property lines, allows landscaping, watering and general maintenance by home owners of property that includes HOA property, the use made by the Kanias is certainly not hostile and adverse to that of the HOA. If anything, it confirms how the HOA has treated residents since it was formed. Put another way, the issue of hostile use is contextual and in the context of life at Hilton Lake, the use of property by Kania is similar to, not hostile to the use of many of their neighbors.

"Regarding the "adverse use" element in prescriptive easement cases, our precedent supports applying an initial presumption of permissive use to enclosed or developed land cases in which there is a reasonable inference of *53 neighborly sufferance or acquiescence." Gamboa v. Clark, 183 Wash. 2d 38, 52-53, 348 P.3d 1214, 1221 (2015)

"Thus in Washington, the presumption is that use by adjoining neighbors is permissive and it falls on the claimant to overcome that permission use. [p]ermissive use is not hostile and does not commence the running of the prescriptive period. Use that is

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permissible in its inception cannot ripen into a prescriptive right *unless the claimant has made a distinct and positive assertion of a right hostile to the owner.* ***Timberlane Homeowners Ass'n, Inc. v. Brame****,* 79 Wash. App. 303, 310-11, 901 P.2d 1074, 1078 (1995). While Plaintiff asserts the Timberlane case as supporting of their claims, the contrast with the current case is significant. First, in Timberlane, the court indicated that the HOA lacked standing because the CC&R's did not specifically grant the HOA the authority to enforce the members' covenant of enjoyment in common areas. In this case, there is such authority found to maintain open spaces for the members in Article 4. Moreover, in Timberlane, the encroachment was not just landscaping, it included fencing and a poured patio. "Although the use was originally permissive because the owners of lot 210, as members of the Association, had a nonexclusive easement right to the common area, the construction of a fence and a concrete patio on the property far exceeded a reasonable exercise of that easement right. "***Timberlane Homeowners Ass'n, Inc. v. Brame***, 79 Wash. App. 303, 311, 901 P.2d 1074, 1078 (1995).

CONCLUSION

While under other circumstances at a different location, the way the Kania's and later Lewis' treated the property adjacent to theirs in the common areas of Hilton Lake might give rise to an adverse possession claim, when the case is put into context; where all members have an easement to the common areas for their own use and enjoyment i.e. permissive use; where many members do precisely the same type of landscaping as Kanias albeit perhaps not to the same extent; and were the pervasive attitude among the residents is a desire to have a pleasing overall look to the entire community by reason of the concept

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of neighborly accommodation, the claim for adverse possession must fail.

RESPECFULLY SUBMITTED this ____ day of November, 2015

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