

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

RAY M. COLLINS and CAROL J.
COLLINS,

Plaintiffs,

vs.

DAVID W. HALL and MARGARET R.
HALL Trustees, and their successors in trust,
of the D & M Hall Community property
trust, dated March 14, 2005, and also all
other persons or parties unknown claiming a
right, title, estate, lien, or interest in the real
estate described in the complaint in this
action,

Defendants.

CASE NO. 1JU-14-00771 CI

PRETRIAL BRIEF

This case essentially presents two questions: 1) Where is the boundary between the Collins's property and the Halls' adjoining property on Colt Island? and 2) Are the Halls' buildings on Colt Island in violation of any enforceable covenants? First, the Halls intend to prove at trial that the boundary is in the location determined by a 2012 survey done on their behalf by R&M Engineering. And second, they intend to prove that their property is not in violation of one of the covenants, as the Collins's claim, and that the covenants that the Collinses wish to enforce are unenforceable, anyway.

I. The Location of the Boundary

A. Introduction

What property a party owns is governed by the deed vesting title. The Alaska Supreme Court has created a three-step process for deed interpretation. The first step “is to look to the four corners of the document to see if it unambiguously represents the parties’ intent...If a deed when ‘taken as a whole’ is open to only one reasonable interpretation, the interpreting court ‘need go no further.’”¹ Only when a deed is ambiguous as a matter of law will a court consider “the facts and circumstances surrounding the conveyance.” The Halls intend to show that their property can be conclusively identified using the description in the deed, and there is no reason this court should rely on any unrecorded evidence.

The Halls’ deed describes their property as “Lot 15, Area 1, Colt Island Recreational Development according to Plat 75-11, US Survey 1755.” The Collins’s deed states that they own the adjoining Lot 14, Area 1, according to the same plat and survey. A central issue of dispute in this case is the correct “point of beginning” for locating any lot according to Plat 75-11. “Point of beginning” means an identifiable monument in the field that connects what is written on a recorded plat to what the surveyor is doing in the field. For a survey to be reproducible, it must have an identifiable, known point of beginning. From the point of beginning, a surveyor measures certain distances and bearings, as stated on the plat, to locate particular lots.

¹ *Fink v. Municipality of Anchorage*, 379 P.3d 183, 191 (Alaska 2016) (quoting *Estate of Smith v. Spinelli*, 216 P.3d 524, 529 (Alaska 2009)).

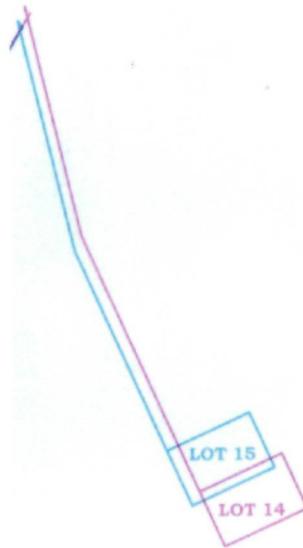
There is no dispute that US Survey 1755 created a single field monument, referred to as “Witness Corner to Meander Corner 1.” There is also no dispute that Plat 75-11 is a “paper plat” which means that it did not create any monuments at all. Plat 75-11 states that it is consistent with US Survey 1755, and both the Hall’s deed and the Collins’s deed refer to both the plat and the survey. Therefore, of those two documents referenced in the deed, only one creates a monument that can be used as a point of beginning, and that is US Survey 1755.

The Hall’s surveyor and two expert witnesses are in agreement about the location of that monument. The monument they have identified corresponds almost perfectly to the description of it in US Survey 1755. However, the Collins’s surveyor used a different “point of beginning” that does not correspond well to the description in US Survey 1755. The Collins’s surveyor is expected to testify that he is not sure whether the “point of beginning” that he used is actually the monument created by US Survey 1755. But he is expected to testify that it is the “point of beginning” that he *believed* was the monument created by US Survey 1755 when he originally created Plat 75-11 in the early 1970s, although he now recognizes he may have been mistaken at the time.

Because the “point of beginning” used by the Collins’s surveyor is about twenty-two feet north-north-east of the “point of beginning” used by the Halls’ surveyor, the two surveys conflict as illustrated below. This figure² was created by one of the Halls’

² Not to scale, for illustrative purposes only.

experts by overlaying two transparencies (the point of beginning is in the upper left, north is the top of the page):



If the surveyors had used the same point of beginning, the purple and blue lines would lie together and identify the same boundary between lots 15 and 14. Instead the boundaries are offset.

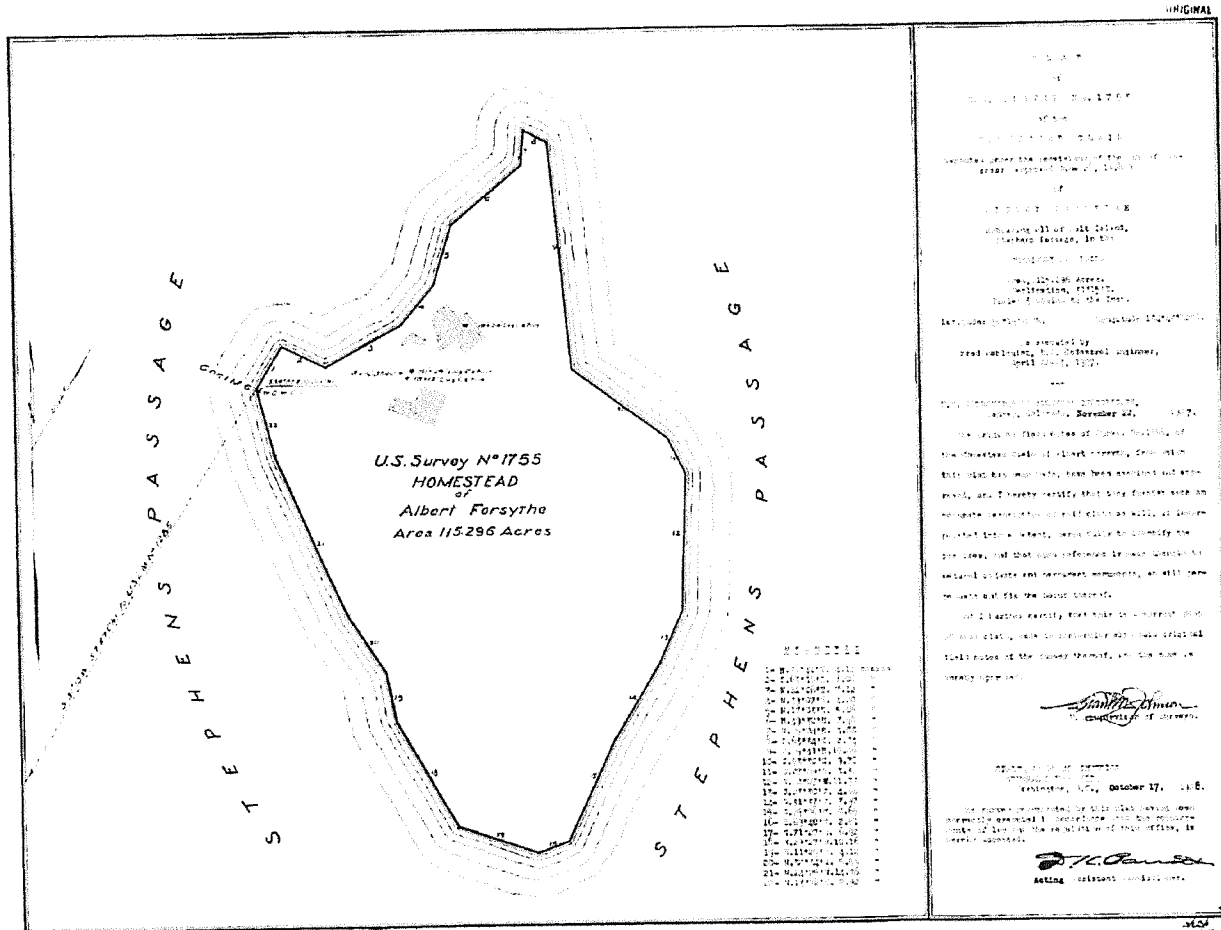
Because the recorded documents referenced in the Halls’ and Collins’s deeds are unambiguous, and the Halls’ and Collins’s property boundary can be identified solely by reference to them, evidence of unrecorded contrary intent is irrelevant and should carry no weight with this court. The Hall’s survey most closely conforms to the recorded documents, and uses the most accurate surveying techniques, and therefore this court should find in the Hall’s favor.

A. The Hall’s Survey

As noted above, Halls’ deed describes their property as “Lot 15, Area 1, Colt Island Recreational Development according to Plat 75-11, US Survey 1755” and the

Faulkner Banfield, P.C.
 8420 Airport Boulevard, Suite 101
 Juneau, Alaska 99801-6924

Collins's deed describes their property as Lot 14, Area 1, according to the same plat and survey. US Survey 1755 was done in about 1927. As can be seen in the figure below, it surveys Colt Island as one large tract, according to meander lines around the edges.



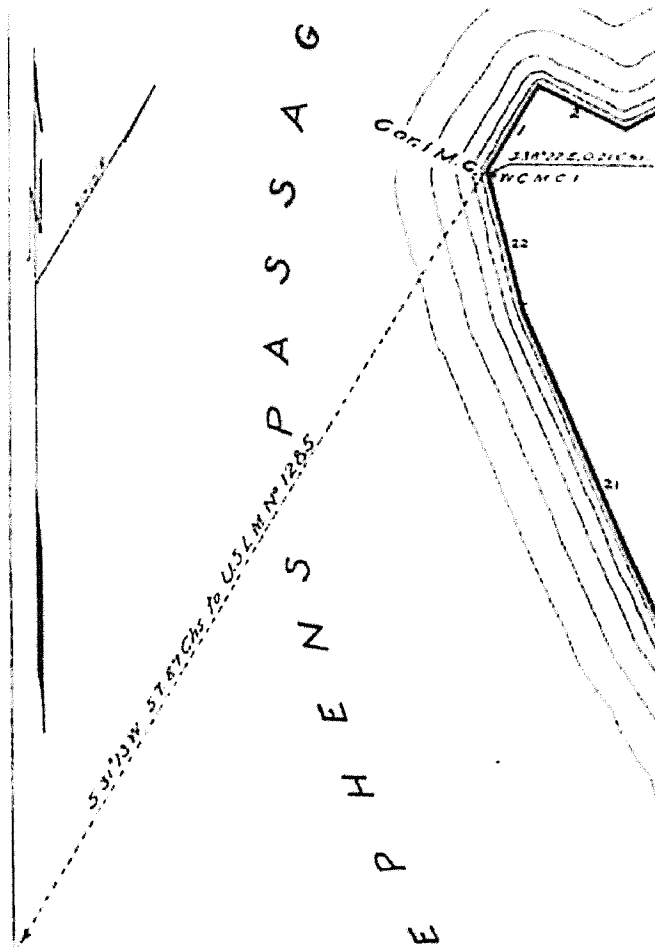
Vol. 43 p 207

715
 841

US Survey 1755 established only one monument³ on the island: Witness Corner to Meander Corner 1 (“WCMC1”). The field notes to Survey 1755 describe the location of that monument as follows: the surveyors began by locating an existing

³ A “monument” is a fixed physical object marking a point on the surface of the earth used to commence or control a survey or to establish a lot corner.

monument on Admiralty Island, U.S. Land Monument 1285. They then measured a certain distance and bearing from that monument to the meander line on the northwest corner of Colt Island. They called this point Meander Corner 1, and it is the “point of beginning”⁴ for the entire survey of the island. However, because this Meander Corner 1 was in an unsafe location, they established a “Witness Corner to Meander Corner 1” (WCMC1) a certain distance and bearing up the beach. This can be seen in the following figure, which enlarges the relevant portion of Survey 1755.



⁴ “Point of beginning” means an identifiable location, typically a monument but sometimes a natural feature, on the boundary of a parcel. For a survey to be reproducible, it must have an identifiable, known point of beginning.

This is also explained in the field notes to Survey 1755 which state:

I begin [the survey] at the true point for Cor[ner] No. 1, M[eander] C[orner], on line of mean high tide of Stephens Passage, which point is situated on the prominent point forming the northwest corner of Colt Island...from which U[nited] S[tates] L[and] M[onument] 1285 ... bears S.31°13'W, 57.87 ch[ain]s dist[ant]....As the above true point for meander corner falls at an unsafe place for corner, I establish a witness corner at a point which bears S.38°22'E, 0.21 ch[ain]s dist[ant] from this true corner point, as follows: On the sharply sloping face of a bedrock ledge, showing 2 ft. x 3 ½ ft. above ground and facing northwest, I mark with cross (+) and with letters: WC MC1 S1755, for witness corner to Cor[ner] No. 1 and M[eander] C[orner] of this survey.⁵

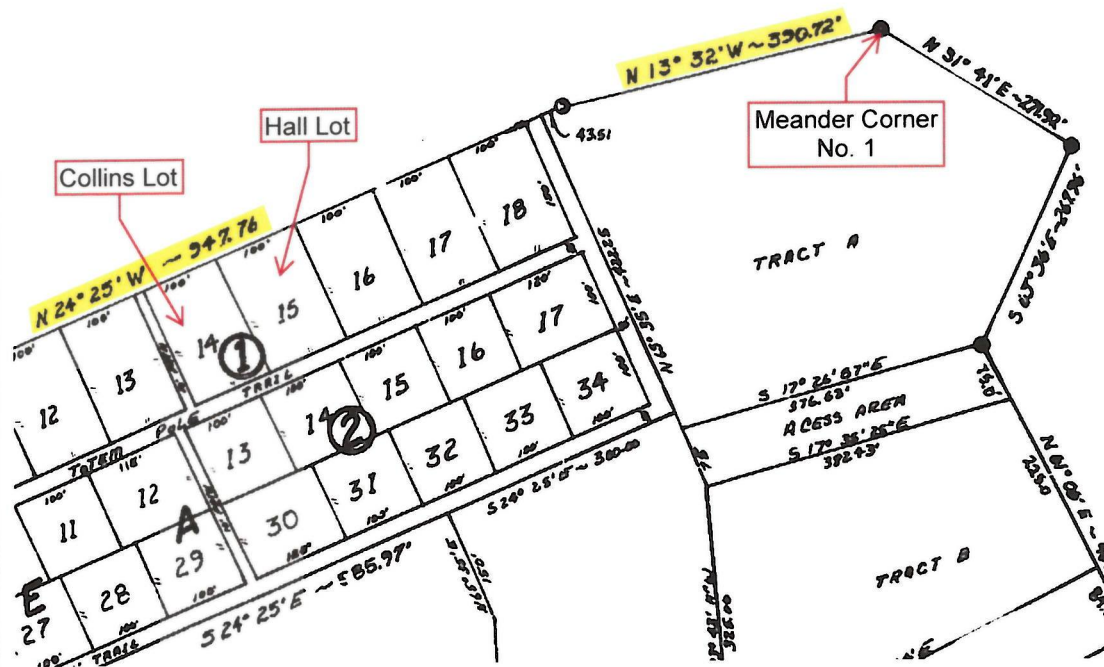
Colt Island remained unsubdivided until the 1970s when J.W. Bean prepared a subdivision plat, recorded as number 75-11. Plat 75-11 is a “paper plat,” which means that it does not record any field work or establish any monuments.⁶ The “Certificate of Survey” on Plat 75-11 states: “This plat correctly represents...US Survey 1755.” And the meander lines that form the outside boundaries of the plat are identical to the meander lines in Survey 1755. Therefore, any reasonable surveyor would conclude that Plat 75-11 has the same point of beginning as Survey 1755. This is Meander Corner 1, which is determined by locating WCMC1, described above.

Thus, to locate any lot according to Plat 75-11, a surveyor must first locate WCMC1, then measure the correct distance and bearing down the beach to Meander

⁵ The original survey 1755 and the field notes to it use “chains,” which is 66 feet. So when comparing distances between US Survey 1755 and the later plats and surveys, it is necessary to multiply by 66.

⁶ See 11 AAC 53.900(24) (“‘paper plat’ mean essentially the same as an actual survey plat, except that the pertinent data and courses are derived from a compilation of official survey data and no actual field survey was accomplished.”)

Corner 1, which is the point of beginning. The location of Meander Corner 1 can be confirmed by reference to USLM 1285 on Admiralty. The surveyor then measures the distances and bearings set out in Plat 75-11 in order to locate a particular lot. This process is shown in the figure below, superimposed onto the relevant section of Plat 75-11, which has been enlarged:



This shows that, from Meander Corner 1, the surveyor measures 390.72 feet at a bearing of thirteen degrees south, thirty-two minutes east.⁷ From there, the survey measures three hundred and sixty-three feet at a bearing of twenty-four degrees south, twenty-five minutes east to locate the edge of the Halls' lot (15). This distance is forty-

⁷ Plat 75-11 says thirteen degrees *north* and thirty-two minutes *west*, but that is only true when going around the island clockwise. A surveyor locating Lots 14 or 15 in Area 1 would go counter-clockwise since the distance to these lots is closer in that direction. Therefore, the directions are intentionally reversed in this description from what is written on the plat.

three 51/100 feet, then twenty feet for an easement, then three hundred feet for three 100-foot-wide lots. To reach the edge of the Collins's lot 14, the surveyor measures an additional 100 feet along the edge of the Halls' lot.

In 2012, the Halls commissioned a survey of their property by R&M Engineering. R&M Engineering used this methodology to locate the corners. First, they located the engraved rock shown in the photograph below (the engravings have been filled with chalk to make them more visible).



As described in the field notes to Survey 1755, it is a cross (“+”) and the letters “WC MC1 S1755” engraved on a sharply sloping bedrock ledge. They then mathematically computed what the bearing and distance between WCMC1 and USLM

1285 (the monument on Admiralty) should be according to Survey 1755.⁸ They determined that, according to Survey 1755, that distance should be 3,814.61 feet. They measured and found the distance to be 3,813.49. That minor variance of 1.12 feet was unsurprising given that modern measuring tools have better accuracy than the ones used in 1927. Furthermore, they found the bearing to USLM 1285 to be what Survey 1755 said it should be. Thus, they concluded they had correctly located WCMC1 to Survey 1755. They then measured down the beach as indicated by Survey 1755 to locate Meander Corner 1. They then measured the distances and bearings indicated by Plat 75-11 to locate the corners of Lot 15, Area 1, belonging to the Halls.

Thus, R&M's survey locates Lot 15, Area 1, Plat 75-11, US Survey 1755 according to the recorded documents.

B. The Collins's Survey

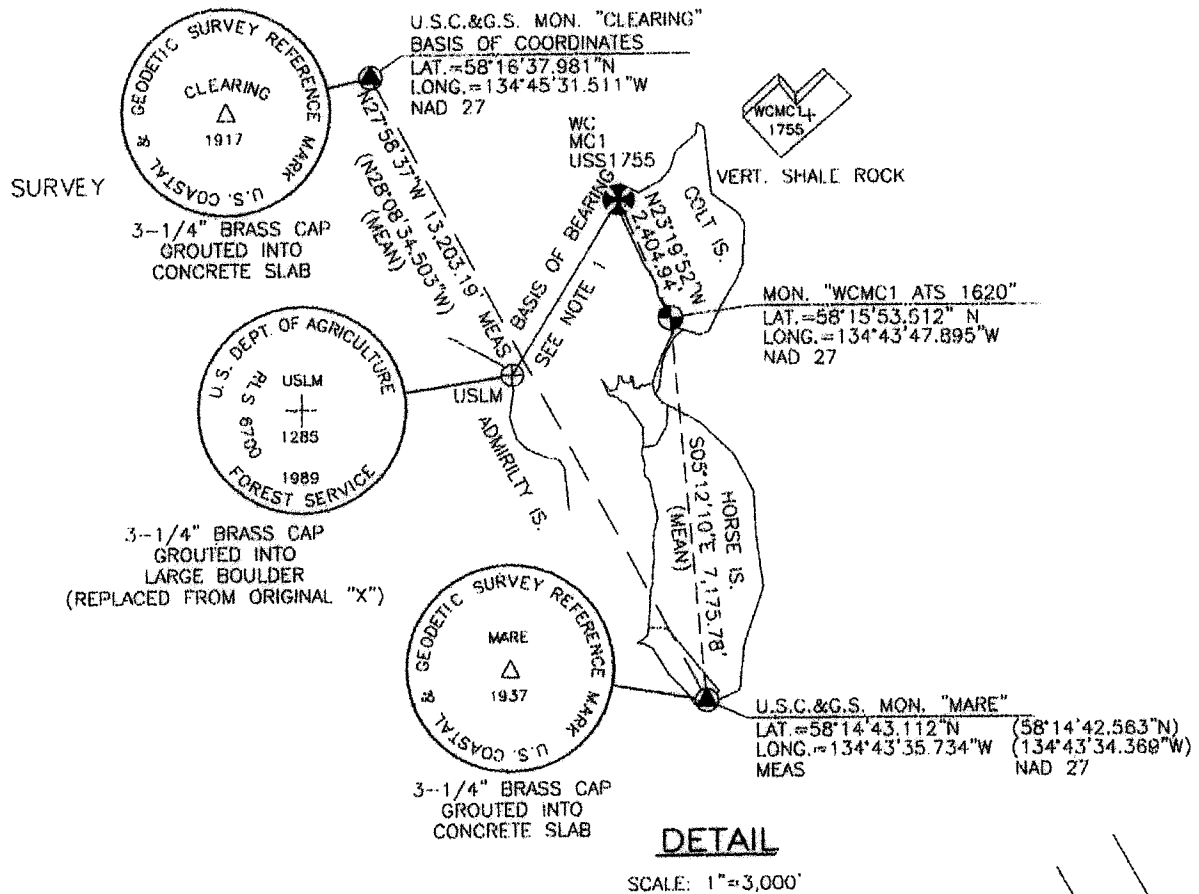
The Collinses argue that the boundary between Lots 14 and 15 is where surveyor J.W. Bean placed corners in 2009. According to the testimony given at his depositions, he is expected to testify to how he placed those corners as follows.

In the 1970s when he prepared Plat 75-11, he intended to survey and monument all lot corners after recording the paper plat. But, due to a dispute between the developers, he was not paid as agreed, and so he stopped work on the project shortly

⁸ Survey 1755 gives two sides of a triangle: the bearing and distance from USLM 1285 to Meander Corner 1, and the bearing and distance from Meander Corner 1 to WCMC1. Therefore, the third leg of that triangle, the bearing and distance between WCMC1 and USLM 1285, can be mathematically determined.

after recording the paper plat. However, he did do some unrecorded surveying before he stopped work. He knew that WCMC1 was the starting point for surveying the subdivision. He looked for, and failed to locate, a cross with numbers and letters as described in the field notes. However, he located a “X” lightly engraved in rock, without numbers or letters. That “X” was the correct bearing from USLM 1285. He did not check the distance between it and USLM 1285, however. He believed it was WCMC1 from US Survey 1755 and set what he calls “control points” based on it. These were not recorded monuments. Over the years, he used these unrecorded “control points” to locate the boundaries of a few lots on the Island (but not Lots 14 or 15). He did not produce any surveys or record documentation of this work or these corners. Nor did he go back and start at WCMC1 when doing this work.

In 2004, Mr. Bean was commissioned to survey tidelands adjacent to Tract D of Plat 75-11, a large tract at the far end of Area 1 (the Collins and Hall lots are 13 and 14 of Area 1, Tract D abuts Lot 1 of Area 1). For that survey, Mr. Bean did not rely on his “control points,” but went back and located WCMC1. At that time, he located the monument used by R&M Engineering in its survey for the Halls, engraved with a cross and the numbers and letters “WC MC1 S1755.” This can be seen in the upper right-hand corner of the figure below, which is an inset from that survey:



The survey notes state that he measured between that WCMC1 and USLM 1285 (the monument on Admiralty) and found the distance to be exactly what Survey 1755 says it should be. Tract D is now owned by Allen Marine Tours, and the site of the very valuable Orca Point Lodge commercial property. A representative of Allen Marine Tours is expected to testify on the Halls' behalf that Allen Marine relied on Mr. Bean's 2004 survey when developing the property, and if this court affirms the Collins's survey which uses the different "point of beginning," it may cloud Allen Marine's title.

In 2009, Mr. Collins asked Mr. Bean to set the corners of his property. Mr. Bean did so without referring to WCMC1. Instead, he located corners he had previously set in Area 1 for other owners using his unrecorded “control points,” and measured from them to locate the corners of Mr. Collins’s lot. According to the corners that Mr. Bean set in 2009, the Halls’ workshop and outhouse encroached on the Collins’s property. Mr. Bean did not record anything documenting this surveying.

After the Halls recorded R&M’s survey, Mr. Collins asked Mr. Bean to record a survey of the corners he set in 2009. Mr. Bean then prepared a survey thus: he took GPS coordinates of the corners of the Collins’s lot that he set in 2009. And he had GPS coordinates for USLM 1285 on Admiralty. He worked backward, on a computer and without returning to area of Colt Island where WCMC1 would be, from the GPS locations for the corners he set in 2009 along the distances and bearings indicated by Plat 75-11 to determine a GPS location for WCMC1. He could then compute the distance and bearing between that point and the GPS location he had for USLM 1285. According to his computations, the bearing was correct but the distance was 22.19 feet farther away USLM 1285 than Survey 1755 said it should be. He recorded this survey in 2014.

Another relevant point about Mr. Bean’s recorded survey is that it is a topographical survey, showing elevations across the property. According to these topographical lines, the seaward property line of the Collins’s lot runs between twenty-two and thirty-six feet above sea level half-way up a steep bluff. According to Plat 75-

11 and US Survey 1755, this property boundary should be the meander line (as identified by the original surveyor in 1927). Although isostatic rebound would be expected to have some effect in moving the high tide line since 1927, isostatic rebound would not be expected to move the property boundary significantly up a steep bluff.

Mr. Collins then filed this lawsuit based on that survey. The Halls counterclaimed for quiet title according to their own 2012 survey. As the lawsuit progressed, it became clear that the source of the discrepancy between the surveys was the “point of beginning” (i.e. the location of WCMC1). So, in 2015, Mr. Collins asked Mr. Bean to return to Colt Island and survey in the field. Mr. Bean did so, and located the “X” in the rock that he believed was WCMC1 in the 1970s. A photograph of that “X” is printed below. As can be seen, it is very faint, and there is no sign of numbers and letters around it (it is between inches 7-8 on the measuring tape).



PL 000241

Using this “X,” he measured to locate Meander Corner 1, and placed a new monument at that location that he called Meander Corner 1 to Plat 75-11 (“MC1 75-11”). This MC1 75-11 is about twenty-seven feet further from USLM 1285 on Admiralty Island than Survey 1755 says it should be, and also the bearing is off by a few degrees. Mr. Bean then recorded a new survey of the Collins’s lot based on this new MC1 75-11. He styled this as an “amendment” of his prior survey of the Collins’s

lot. He did not move the corners that he set in 2009 in this amended survey. However, he did significantly change the bearings and distances used to connect the Collins's lot with his MC1 75-11 from those stated in Plat 75-11. They are as follows:

Starting at Meander Corner 1, Plat 75-11 says to go 390.72 feet at a bearing of N13°32'W. Mr. Bean's Amended Survey goes 378.19 feet at a bearing of N12°30'05"W. Thus, Mr. Bean's first measurement is about twelve and a half feet short, running a full degree further north. According to Plat 75-11, the second measurement should be 463.51 feet at a bearing of S24°25'E. Mr. Bean's Amended Survey goes 466.78 feet at a bearing of S24°30'41"E. Thus, this measurement is about three feet too long, and a few minutes off.

Mr. Bean is expected to testify that these changes were to correct a "closure error" in Survey 1755.⁹ But one of the Halls' experts will testify that he calculated the "closure error" in Survey 1755 and it is only 5.63 feet over a total perimeter area that is more than 10,000 feet. The Halls' experts will testify that it is not accepted surveying practice to correct a "closure error" when surveying only one lot in a large subdivision like Colt Island (which creates more than 100 lots). Furthermore, in his first survey for the Collinses, and in his 2004 survey of the Orca Point Lodge Property, Mr. Bean did not account for this "closure error" and used the exact bearings and distances indicated

⁹ A "closure error" occurs when a survey purports to close (i.e. end at the same point from which it started) but actually does not. In this case, if you compute all the meander lines in US Survey 1755 (and therefore also Plat 75-11 since they're the same) the ending point is 5.63 feet away from the point of beginning.

by Plat 75-11. This makes his statement that changing the bearings and distances from Plat 75-11 is necessary to correctly locate Lot 14 even less credible.

C. The Parties Arguments

The Halls will argue, very simply, that the survey done by R&M Engineering on their behalf uses more accurate methodology and practices than the Collins's survey, and conforms most closely to the recorded documents, Survey 1755 and Plat 75-11. They will argue that the WCMC1 used by their surveyor is more likely to be the accurate one, since it has the engraved letters and numbers described in the field notes, as well as a cross, and the engravings are more visible. Also, the distance between it and USLM 1285 is quite close to what Survey 1755 says it will be, whereas the WCMC1 used by Mr. Bean is about twenty-two feet off. Also, the distances and bearings that R&M used to locate the corners of the Hall's lot conform to Plat 75-11, whereas the distances and bearings Mr. Bean used to locate the corners of the Collins's lot do not. Finally, the Halls will argue that their survey is more likely to be accurate because it places the seaward boundary along the beach, where a meander line should be, rather than half-way up a steep bluff as Mr. Bean's survey does.

Mr. Collins is expected to rely on historical intent and other evidence contrary to the recorded documents in support of his survey. But, since the property descriptions in the deeds are unambiguous, and the boundary between the properties can be clearly identified using the legal description in the deed, this contrary evidence is irrelevant and does not control the boundary location. Specifically, the Collinses are expected to

assert some or all of the following arguments in support of Mr. Bean's survey at trial, and the Halls' surveyor expert witnesses are expected opine that none of them are valid. First, Mr. Collins may argue that, before surveying any lot created by Plat 75-11, surveyors must contact Mr. Bean to ask about the history of the subdivision. However, both of the Halls' expert witnesses are expected to testify that this is not a principle of surveying, and that Mr. Bean's unrecorded recollections do not control the location of lots in the subdivision. Both experts will opine that R&M Engineering's failure to call Mr. Bean does not affect the quality or accuracy of their survey for the Halls.

Mr. Collins may also argue that, because Mr. Bean believed that the fainter "X" without numbers or letters was WCMC1 in the 1970s when he prepared Plat 75-11, that "X" is the point of beginning for Plat 75-11, regardless of whether it is the WCMC1 established in Survey 1755. In other words, if Mr. Bean made a mistake about the location of WCMC1 in the 1970s, that mistake controls the results of future surveys. Both of the Halls' expert witnesses are expected to testify that that is not a principle of surveying. They are expected to testify that Plat 75-11 is a "paper plat" and none of the unrecorded surveying work that Mr. Bean did at that time has any precedential value. Mr. Bean's subjective belief, if not recorded, does not affect future surveys. Similarly, Mr. Bean's unrecorded "control points" are not binding on future surveyors. The Halls' experts are expected to testify that surveyors must survey according to the recorded documents.

In another variant on this argument, Mr. Collins may argue that the intent of the original developers of the subdivision was to use the faint "X" as the point of beginning for the subdivision, and that this intent controls future surveys. The Halls' experts are expected to testify against this argument in the same way: only recorded monuments control the survey results. The subjective intent of the developers, if not recorded or monumented, has no effect on future surveys.

Furthermore, these arguments are belied by Mr. Bean's own use of the WCMC1 with engraved numbers and letters in his survey of Tract D in 2004. In his only other recorded survey of a lot created by Plat 75-11, he did not use the faint "X" that the Collins's now claim he intended control Plat 75-11. This further weakens the Collins's historical-intent arguments.

The Collinses may also argue that the Halls, one of the Hall's expert witnesses, or some other saboteur carved the engraved WCMC1 used by R&M Engineering (and Mr. Bean in 2004) sometime after Plat 75-11 was recorded. Of course, the Halls and their expert witness will testify that they did not carve it. Another Colt Island property owner, Mr. Webb, will testify that he located it many years ago, and showed it to his daughter Ms. Pearsall. Ms. Pearsall will testify that she showed it to Mr. and Ms. Hall, and also to the expert witness. The expert witness will also testify that he has often seen similar engraved monuments created by surveyors in the 1920s around southeast Alaska, and when he viewed it he saw no reason to suspect it was a modern forgery. Also, the Halls will argue that the idea that it is a modern forgery is implausible in the

extreme. A forger would have had to do sophisticated surveying to locate a point the correct distance and bearing from USLM 1285 on Admiralty. And it is totally unclear why anyone would go to all that trouble, especially before 2004 (when Mr. Bean saw it).

Mr. Collins is not expected to argue that adverse possession plays a role in this case since the corners on which he relies were set less than ten years ago, and no fence or other boundary-by-consent existed before those corners. Mr. Fisher, who owned Lot 15 before the Halls, is expected to testify that at the time he sold the property to the Halls, he was not aware of anything marking the boundary between the two lots and he himself was unsure of the location of the boundary. However, he will testify that the outhouse was in the same place then as it is now, and so, even if this court finds Mr. Bean's survey to be more reliable, it should also find that the Halls have acquired the property up to the edge of the outhouse by adverse possession.

The Collins are also expected to argue that this court should find in their favor because other Colt Island property owners have had their corners set according to Mr. Bean's unrecorded "control points." But this argument has no legal basis, nor is it based on a principle of surveying. It is unfortunate that Mr. Bean may have propagated an error for many years, but it does not control the location of the Collins-Hall boundary line. And, of course, the survey of the most valuable property on Colt Island, the Orca Point Lodge property, is consistent with the Hall's survey. So, no matter how this court

rules, some neighbors will be unhappy. This type of “peer-pressure” should not affect the court’s decision-making one way or another.

II. The Covenants

The Collinses also seek declaratory judgment that the Halls’ outhouse does not comply with Island covenants requiring sewage disposal to comply with DEC regulations. But actually DEC regulations do allow outhouses. Also, the prior owner of the Hall’s property, Mr. Fisher, will testify that he built the outhouse in the mid 1980s, so any objection to it is surely barred by laches.

The Collinses also seek declaratory judgment that the outhouse, and a shop, are out of compliance with a twenty-foot setback rule in the covenants. It is undisputed that, using the correct boundary identified in R&M Engineering’s survey, the outhouse and shop are about fifteen feet from the property line. But, the Collins’s cabin is also about ten feet away from that line on the other side. So the Collinses are also in violation of the twenty-foot setback and are barred by the doctrine of unclean hands from enforcing it against the Halls. Also, the outhouse has been in the same location since the 1980s, and the shop is the same distance from the property line, so laches also bar the Collinses objection to these setback violations. Furthermore the setback covenant—along with a number of similar covenants—has never been enforced on the island and so it would be inequitable to enforce it selectively against the Halls.

A. Background Information

The lots created by Plat 75-11 are subject to protective covenants recorded in 1977. They contemplate the creation of a homeowners' association after the sale of a certain number of lots. The Association would enforce the covenants according to internal procedures. Even though it has been almost forty years since subdivision of the Island, not enough lots on the island have been sold to warrant the creation of a homeowners' association. The covenants start with the most significant rules, important to common life on the Island, including use of common trails and facilities, and restrictions on commercial uses. But later, in the "General Provisions" section, they list a number of rather less important rules that have never been enforced on the Island. These primarily involve the aesthetic of the Island. In addition to the twenty-foot setback rule, they prohibit cutting trees without pre-approval, prohibit building paper on occupied cabins, require fences around stored tools and equipment, and require cats and dogs to be on leash when on common land or beaches. These "general provisions" have never been enforced, and a number of buildings violate the setbacks, are sided with building paper, and do not enclose loose tools and equipment.

In addition to the setback provisions, the "general provisions" section requires each lot owner to comply "with the State of Alaska and federal regulations as they apply to sewer and waste disposal." Alaska regulations do allow the installation and use of pit privies for domestic waste disposal. 18 AAC 72.030. Furthermore over the years many outhouses have been installed and used on Colt Island without objection.

The Collins's own sewer system does not comply with DEC or federal regulations. It is a holding tank that empties directly into the water below the low tide line.

The outhouse on the Halls' property was constructed in the mid 1980s by George Fisher, the Halls' predecessor in title. Although the Halls have replaced the doors, resurfaced the roof, sided and repainted it, they have never moved the outhouse. Mr. Fisher openly, notoriously and continuously used it until he sold the property, and the Halls have ever since. The Collinses, nor their predecessors-in-title, ever complained or objected to the existence of the outhouse or its location.

The Halls built the shop in about 2006, in the same place as it is now. It is about the same distance from the Collins's neighboring property as the outhouse is. R&M Engineering's survey shows the outhouse as being fifteen feet from the boundary with the Collins's property, and the shop as being about fifteen and one half feet away from the boundary. J.W. Bean's survey for the Collins's, however, shows the shop and outhouse encroaching slightly on the Collins's property.¹⁰ J.W. Bean's survey shows the Collins's cabin being about twenty-five feet away from the outhouse. The R&M survey does not show the location of the Collins's cabin, but we can infer from Mr. Bean's survey that it is about ten feet from the boundary found by R&M Engineering.

¹⁰ Even if this court finds that Mr. Bean's boundaries are controlling, because the Halls and their predecessor in title have openly, notoriously and continuously used property between their cabin and the outhouse for more than thirty years, they have gained title to it through adverse possession and there is no encroachment.

A. Argument

The outhouse's use as a pit privy does not violate the covenants because it is permitted by Alaska regulation. Furthermore, the Collins's objections to it are barred by laches. The Collins's, and their predecessors-in-interest's, failure to object in the last thirty years has certainly waived any objection. Furthermore, the Collins's own sewage system does not comply with DEC, or federal Clean Water Act, regulations¹¹ so the Collins's claim against the Halls in this regard is barred by the doctrine of unclean hands.

The Collins's claims that the outhouse violates the setback covenant are also barred by laches since no objection to its location was made for thirty years. Because the shop was built a similar distance from the Collins's property, the Collins's objection to its location is similarly waived. Finally, because the Collins's cabin is only ten feet from the property line (as correctly established by R&M Engineering) their claims are barred by the doctrine of unclean hands.¹²

Finally, there are a number of other buildings in violation of the twenty-foot setback, and a number of other outhouses on the Island. And the section of the covenants in which these restrictions are found are not enforced on the island, generally. There are a number of occupied cabins with building paper instead of siding, unfenced

¹¹ See e.g. 18 AAC 83.0159.

¹² See e.g. *Knaebel v. Heiner*, 663 P.2d 551, 554 (Alaska 1983) (defense of unclean hands, from maxim "he who comes into equity must come with clean hands," applies when the plaintiff has perpetrated a wrongful act that relates to the action being litigated).

equipment yards etc. These types of violations concern only the aesthetics of the Island—and when many people violate them, one additional violation does not affect the overall property values on the Island or diminish anyone’s enjoyment of their property. Under these circumstances it would be inequitable to selectively enforce the covenants against the Halls.¹³

Therefore, the Halls will argue at trial that this court should not grant the Collins’s the declaratory judgment they seek. Note that the Collins’s complaint only requests declaratory and injunctive relief. Even if this court does find that the Halls’ property is in violation of the covenants, injunctive relief would not be appropriate. The violations have little or no effect on the Collins’s property values and enjoyment of their property, and it would be expensive to re-locate the structures. Therefore, weighing the costs and benefits, injunctive relief would not be appropriate.¹⁴

III. Conclusion

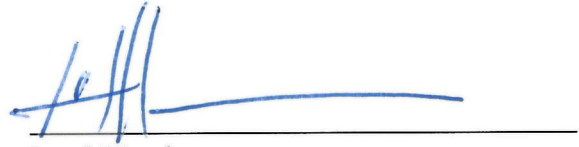
At the conclusion of trial, this court should deny the Collinses any relief, and grant the Halls quiet title to Lot 15, Area 1, Plat 75-11, US Survey 1755 as surveyed by R&M Engineering in Plat No. 2012-32.

¹³ See Restatement (Third) of Property (Servitudes) §83 *cmt. h, illus. 22* (where several properties violate covenant requiring two-car garage, and new owner constructs home without two-car garage but otherwise in character of subdivision, inequitable to require owner to add two-car garage.)

¹⁴ See *id. cmt. h* (““The severity of the breach or violation may be an important factor. If it is minor, injunctive relief may not be warranted unless necessary to protect a property interest””)

DATED this 18th day of November, 2016

FAULKNER BANFIELD, P.C.

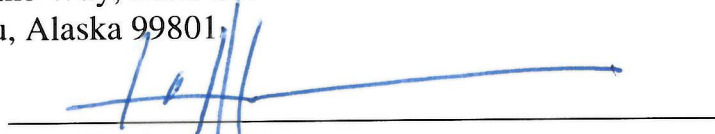


Lael Harrison
AK Bar No. 0811093
Attorney for Defendants
David W. Hall and Margaret R. Hall,
Trustees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of November, 2016, the undersigned caused a copy of the foregoing to be sent by mail to:

Joe Geldhof
Law Office of Joseph W. Geldhof
2 Marine Way, Suite 207
Juneau, Alaska 99801



Lael Harrison 24667

Faulkner Banfield, P.C.
8420 Airport Boulevard, Suite 101
Juneau, Alaska 99801-6924