SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT NO. 1023634

COURT OF APPEALS NO. 84712-1-I

CITY OF EDMONDS,
a Washington Municipal Corporation

Respondent,

v.

THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS,
a Washington Nonprofit Corporation,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent City of Edmonds ("the City") respectfully requests that discretionary review of the Court of Appeals' decision in Case No. 84712-1-I ("Decision" or "Opinion") terminating review be denied. Petitioner Edmonds Ebb Tide Association of Apartment Owners ("Petitioner" or "Ebb Tide") has failed to meet the review standards under RAP 13.4(b), and therefore cannot demonstrate that this matter warrants review. The Petition should be denied.

II. ISSUES PRESENTED

1. Has Petitioner demonstrated that the decision of the Court of Appeals regarding ripeness and justiciability is in conflict with a decision of this Court or a published decision of the Court of Appeals under RAP 13.4(b)(1) or (2)? ***NO.***

2. Has Petitioner demonstrated that the decision of the Court of Appeals regarding easement interpretation is in conflict with decisions of this Court or a published opinion of the Court of Appeals under RAP 13.4(b)(1) or (2)? ***NO.***

3. Has Petitioner demonstrated that the petition involves an issue of substantial public interest under RAP 13.4(b)(4)? ***NO.***

III. STATEMENT OF THE CASE

The following is a summary of the facts relevant to the issues presented for review.

A. <u>The City's Development Of A Continuous Walkway</u>

The City of Edmonds controls property along a span of the Edmonds

waterfront, including a pedestrian walkway extending from Brackett's Landing North to Olympic Beach. A continuous, public waterfront walkway has been contemplated since at least the 1960s. In the 1960s and 1970s, the City began acquiring property along the waterfront, including property that became the underwater park, Brackett's Landing North, Brackett's Landing South. It also reached agreements for the use of Union Oil Beach (now Marina Beach) and interlocal agreements with the Port of Edmonds for the construction and maintenance of a walkway between Olympic Beach and Marina Beach. Ex. 5 at 1.

B. Petitioner's Predecessor-In-Interest Granted The City An Access Easement To Construct A Walkway With A Height Limit Of 17 Feet

Following its plan to complete a continuous waterfront walkway, in 1983, the City acquired an easement from Petitioner's predecessor-in-interest, Olympic Properties, Inc. ("Olympic"), who converted the Nelson Apartments to the Ebb Tide Condominiums that same year. The City was looking to construct "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." Ex. 20 at 15.

In granting the Access Easement, Olympic sought to eliminate public trespass over the Ebb Tide's private patio. Ex. 20 at 11-12, 15. At that time, members of the public would walk over the patio rather than

descending onto the beach. Ex. 20 at 11. The City received trespass complaints, which led to conversations about how to resolve the issue. Id. The parties determined that an access easement to redirect the pedestrian traffic out onto the beach, away from the patio and seawall, would be the most ideal arrangement. Ex. 20 at 12. The landward edge of the easement area is approximately six feet waterward from the seawall at the north end and approximately twelve feet waterward from the seawall at the south end of the Ebb Tide. Ex. 7.

When determining the height restriction for the Access Easement, the parties' representatives stood out on the lawn and decided what would be an appropriate height for a walkway. Ex. 20 at 34. It is likely that the parties to the Access Easement considered a 17-foot height limitation a compromise that would effectuate the purposes of (1) providing for a continuous elevated walkway, (2) protecting against trespass on the Ebb Tide patio, and (3) having a comparatively modest impact on views and privacy, where the drafters of the easement knew the first floor elevation of the Ebb Tide to be located at 15.16 feet above Mean Lower Low Water.

On November 4, 1983, Olympic executed the Access Easement ("Easement"). Ex. 1. The Access Easement conveys to the City in perpetuity "a **right-of-way easement** for public access, use and enjoyment, together with the **right to construct** and maintain **public improvements, facilities,**

utilities and necessary appurtenances, over, through, across and upon" the easement area. Ex. 1 (emphasis added). It also contained the following height limitation:

> The Grantee, its successors, agents, or assigns, shall construct, install, or erect no structures or improvements upon or within the above described easement right of way, whereby any portion thereof extends above a horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water).

Ex. 1. Other than the above height limitation, the Access Easement contains no language restricting impacts on Petitioner's views or access to the water.

C. The City Planned To Fill The Missing Link As Part Of Its Edmonds Waterfront Redevelopment Project

At some point in the early 2000s, the City completed construction of the other portions of Edmonds Marine Walkway along the entirety of the waterfront. Most of the existing walkway is located on top of a bulkhead at around 16 feet above MLLW, keeping the walkway above beach-level and dry most of the time. RP 210.

The City rekindled the effort to complete the Ebb Tide portion of the walkway in 2015 as part of the Edmonds Waterfront Redevelopment Project, which included redevelopment of the Edmonds Senior Center immediately north of the Ebb Tide. Ex. 14.

The City engaged consultants in 2016 to create a design for construction of a walkway in front of the Ebb Tide. CP 2612. The City met

with board members of the Petitioner and again organized public meetings for residents to voice their preferences and concerns about the walkway. CP 2612-2617. Over the course of many months, the City's consultant led a multi-disciplinary design team that conceived and evaluated several design options for walkway structures within the easement area, settling on the design attached to the City's Amended Complaint (the "Planned Improvements"). Ex. 27, 19.

The Planned Improvements document is a 30% engineered design for a pile-supported walkway in the easement area. See Proposed Improvements, attached to the Petition for Review, at pages marked 2233 and 2234. At the 30% design stage, the major material structural components have been selected for both the walking surface and support structure. Ex. 19. The design is sufficiently advanced for the project to have obtained a Substantial Shoreline Development Permit and applied for a Joint Aquatic Resources Permit Application (JARPA) permit. CP 1360-1398. The design will not materially change between the 30% design stage and the fully engineered (100%) design; rather, the engineers and landscape architects will refine the design. RP 302. Design elements such as the shape of the pile caps for the walkway will be refined to perform their engineering tasks and be more aesthetically pleasing. RP 297. Similarly, the design of the steel within the concrete pile supports could change thickness, while

keeping the exterior diameter of the piles the same. RP 371, 375. These are not material changes to the design of the walkway. They are minor changes that address project requirements, cost, and buildability. RP 302.

D. The City Brought This Action To Determine The Scope Of Its Real Property Rights Under The Access Easement

On September 27, 2017, the City filed this lawsuit. Within the Complaint's prayer for relief, amended in 2019, the City asked the Court for a declaratory judgment that the City has sufficient real property rights to construct the Planned Improvements within the easement area. CP 2224.

The parties filed various motions for summary judgment. In these motions, the Court ruled that:

- The Access Easement is valid, and also ambiguous, so the parties could present extrinsic evidence regarding the intent of the parties to the Easement. CP 3049-3051.
- The surveyors who drafted the Access Easement intended the height restriction of the Access Easement to be calculated as 1.84 feet above the finished first floor elevation of the Ebb Tide. CP 2235-2236.
- The phrase "public improvements, facilities, utilities and necessary appurtenances" in the Access Easement, should be read to encompass some kind of improved walkway. CP 1651-1652.

The remaining issue for trial was to determine whether the Planned Improvements were consistent with the type of improved walkway contemplated by the parties. After a four-day bench trial including a site visit by the Court, the Court issued its Findings of Fact, Conclusions of Law,

and Decision on October 14, 2022. CP 72-76. In it, the Court stated: "the Court grants the City's request for a Declaratory Judgment and confirms that the easement rights held by the City are sufficient to allow it to construct an elevated walkway similar to the Conceptual Plan design." CP 72. The Final Judgment and Order stated: "The City has sufficient real property rights to construct a walkway within the easement area, the final design of which will be materially consistent with the Planned Improvements as attached as Exhibit B to the Amended Complaint." CP 70.

Petitioner appealed the trial court's Final Order and Judgment to the Court of Appeals. In that appeal, Petitioner argued that the trial court erred in granting declaratory relief: (1) in absence of a justiciable controversy; (2) in disregarding intrinsic and extrinsic evidence of intent; (3) because the Planned Improvements would create an exclusive use of a non-exclusive easement; and (4) because it effects an unconstitutional taking without just compensation. The Court of Appeals affirmed the trial court's award of declaratory relief in the City's favor in its Opinion.

IV. ARGUMENT: THE PETITION SHOULD BE DENIED

Petitioner has failed to demonstrate that the Court of Appeals' Opinion warrants review by the Supreme Court in accordance with RAP 13.4(b). While Petitioner disagrees with the Court of Appeals' analysis, it

cannot show that the Court of Appeals' decision conflicts with case law. This Petition should be denied.

A. Standard Of Review

A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review demonstrating review is warranted under one of the four review considerations of RAP 13.4(b):

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Petitioner has failed to satisfy any of the review considerations of RAP 13.4(b), where it cannot demonstrate that the Court of Appeals' Opinion conflicts with a decision of the Washington Supreme Court or published decision of the Court of Appeals, or that it implicates an issue of substantial public interest.

B. Petitioner Has Failed To Show That The Decision Regarding Ripeness And Justiciability Is Inconsistent With A Supreme

Court Decision Under RAP 13.4(b)(1) Or A Published Decision Of The Court Of Appeals Under RAP 13.4(b)(2)

The Court of Appeals' decision does not conflict with Bloome v. Haverly, 154 Wn. App. 129, 225 P.3d 330 (2010), the only case where Petitioner alleges a conflict on the issue of justiciability under RAP 13.4(b). Rather, the Court of Appeals properly distinguished Bloome and rejected Petitioner's claim that the City's declaratory judgment action was nonjusticiable where the Planned Improvements design is not a final building plan. Bloome does not support Petitioner's argument that a 100% engineered design is necessary for a case to be justiciable.

In that case, Bloome brought a declaratory judgment action to construe a view covenant that burdened Bloome's downhill parcel in favor of Haverly's uphill parcel. Bloome v. Haverly, 154 Wn. App. 129, 133, 225 P.3d 330, 332 (2010). Bloome sought a judgment that the view covenant did not prohibit the construction of a house on the downhill parcel. Id. The court held that the record did not contain facts necessary to resolve the dispute, because "Bloome has not put forth any construction plan over which the parties have had the opportunity to litigate as to its conformance with the covenant." Id. at 141-142. In fact, "nothing in the record indicates that Bloome either planned or plans to construct a building on the downhill parcel." Id. at 137. Petitioner argues that Bloome stands for the proposition

that the building plan must be final in order to be justiciable—the case did not make that holding. The court merely held that "[i]n the absence of a dispute over whether *actual* building plans satisfy the covenant …, a declaratory judgment … would not conclusively settle the controversy between them." Id. at 142 (emphasis added). The Planned Improvements in the present case are those "actual building plans" that were missing in Bloome.

The Court of Appeals properly held that Bloome is distinguishable from the present case, where the Planned Improvements design is an engineered design that shows the material structural components of the walkway, where the City has already sought and obtained certain regulatory permits for the Planned Improvements based upon that design, and where the City plans to construct the walkway in accordance with the Planned Improvements. As the Court of Appeals held, these facts distinguish Bloome from the present matter.

Instead of demonstrating that the Court of Appeals' holding contravened other case law on justiciability, Petitioner makes a strained analogy to the issue of specific performance in Kruse v. Hemp, 121 Wn.2d 715, 853 P.2d 1373 (1993). An analogy, by its nature, cannot create a conflict of law and therefore cannot support a petition for review. The Kruse case does not relate to either justiciability or declaratory judgment actions,

and therefore is inapposite.

In sum, the Court of Appeals correctly distinguished Bloome and held that the City's declaratory judgment was justiciable. Petitioner has cited to no other case that allegedly contradicts the Court of Appeals' decision as required by RAP 13.4(b)(1) or (2). As such, this Petition should be denied.

C. Petitioner Has Failed To Show That The Decision Regarding Easement Interpretation Is Inconsistent With A Supreme Court Decision Under RAP 13.4(b)(1) Or A Published Decision Of The Court Of Appeals Under RAP 13.4(b)(2)

While Petitioner claims several errors regarding easement interpretation, it fails to support those claims with contrary case law as required by RAP 13.4(b).

1. The Court Of Appeals Properly Held That The Easement Allowed For Underground Construction

On the issue of underground easement rights, the Petition for Review never expressly alleges a conflict with any decision of the Supreme Court or published decision of the Court of Appeals under RAP 13.4(b). The closest it gets to the RAP 13.4 conflict standard is to critique the Court of Appeals' analysis and distinguishing of Coleman v. Everett, incorrectly claiming that Coleman stands for the proposition that, in the absence of explicit language granting the right to construct in a certain area, such construction is foreclosed. That is not the holding of Coleman, which was

correctly distinguished by the Court of Appeals.

In that case, the defendant City of Everett was granted an easement for "the right to construct and maintain a pipe line or lines along and under a strip of land over and across the following described tract of land." Coleman v. City of Everett, 194 Wash. 47, 48, 76 P.2d 1007 (1938). The City of Everett thereafter laid a water line underground in the easement area, and then, years later, laid another water main above ground along the same strip of land. The Court determined that the operative language of the easement was "along and under," and spent the majority of the decision determining whether the term "along" encompassed "above." It held that it did not, in part, because of Everett's previous underground construction: "*in its context*, along must have been *intended by the parties* to carry merely its ordinary meaning of 'lengthwise,' or 'in a line with the length.' … Our interpretation of the phrase is borne out by the fact that the original pipe line was laid under the surface of the land." Coleman, 194 Wash. at 49-50 (emphasis added). Coleman relied on Everett's past action of constructing underground as evidence of the parties' intent that underground pipelines alone were sufficient to fulfill the purpose of the easement.

In the present case, the City of Edmonds has not constructed any improvements on the Ebb Tide property thus far. If, *assuming arguendo*, the City had initially constructed a beach level boardwalk on the Ebb Tide

property and then subsequently sought to build the Planned Improvements, Coleman would have greater applicability. But in the absence of previous construction in the easement area, one cannot determine intent using the analysis in Coleman.

With respect to the portion of the decision that addresses underground support structures, Petitioner has failed to demonstrate that the Court of Appeals' Opinion conflicts with Coleman or any other case law under RAP 13.4(b)(1) or (2).

2. The Court Of Appeals Made No Ruling As To The Exclusivity Of The Easement

Next, Petitioner repeated its unsupported claim that the Court of Appeals (and the trial court before it) made a ruling as to the exclusivity of the Access Easement. Neither court has done so. And Petitioner's mischaracterization that the Court of Appeals' ruling "gave the City what amounted to exclusive use" of the easement area is similarly misleading. Because the Court of Appeals' decision does not treat the easement as exclusive, there can be no conflict with Johnson v. Lake Cushman Maint. Co., 5 Wn. App. 2d 765, 784-85, 425 P.3d 560, 570 (2018). Petitioner has again failed to satisfy the standard for review under RAP 13.4.

3. The Court Of Appeals Did Not *Sua Sponte* Overturn The Ruling Of The Trial Court As To Ambiguity

Petitioner further mischaracterizes the Decision in arguing that the

Court of Appeals *sua sponte* overturned the ruling of the trial court as to the ambiguity of the Access Easement. It didn't. The Court of Appeals specifically held: "While we disagree with the trial court's ruling that the Easement is ambiguous, we affirm the trial court's final judgment and order granting declaratory relief in the City's favor on additional grounds." Opinion, at 10. The Court of Appeals later stated: "… even if we were to agree with the trial court that the Easement is ambiguous with regard to depth, the result would be the same." Opinion, at 11.

The Court of Appeals' decision does not conflict with Dalton M, LLC v. N. Cascade Tr. Servs., Inc., 534 P.3d 339 (2023), for various reasons. First, Dalton M can be distinguished in terms of the development of the relevant issue at the trial court level. In the Dalton M case, after U.S. Bank foreclosed on Dalton M's property, Dalton M sued U.S. Bank to quiet title and for damages to slander of title, and prevailed on both claims. Dalton M., LLC, 534 P.3d at 342. The Court of Appeals reversed the slander of title claim (and the attorney fee award that went along with it), but *sua sponte* requested briefing on how else it could award attorney fees to Dalton M, including based on its own proposed legal theory of prelitigation bad faith conduct (a theory that neither party had briefed or argued to either the trial or appellate court). Id. at 342, 346. Then it *sua sponte* awarded attorney fees on that theory based on inferred facts not actually found by the trial

court. Id. at 342, 346, 349.

On appeal, the Supreme Court held that an appellate court may not raise a new issue *sua sponte* if the issue "is more like a whole new unpleaded claim depending on factual allegations that were never presented in or proved to the trial court." Dalton M., LLC, 534 P.3d at 343. This Court explained its reasoning: "Injection of a brand-new issue that is akin to an unpleaded claim at the appellate level creates problems for a reviewing court because the record will likely lack factual development related to that new issue." Id. at 349. This Court found the appellate court's decision problematic where "[i]n determining that U.S. Bank engaged in pretrial bad faith conduct beyond the trial court's findings, the Court of Appeals improperly engaged in its own fact-finding. It thereby deprived U.S. Bank of notice or the opportunity to present a defense to any allegation that it engaged in pretrial bad faith conduct." Id. at 350. By contrast, the question of ambiguity is a matter of law. Paradise Orchards Gen. P'ship v. Fearing, 122 Wn. App. 507, 517, 94 P.3d 372, 377 (2004). Furthermore, the parties had litigated the ambiguity of the Access Easement language at the trial court level, including cross-motions for summary judgment and oral argument on those motions. The record on the issue had been fully developed. The issue is not an unpleaded claim depending on factual allegations that were never presented to the trial court. The holding of

Dalton M does not extend to these facts. So, there is no conflict between the Court of Appeals' decision and Dalton M.

Further, the ambiguity portion of the Court of Appeals' Opinion is dicta stated by the court in passing. Under RAP 12.1(b), the issue did not need to be considered to properly decide the case, where the Court of Appeals expressly acknowledged that "the result would be the same." The Court of Appeals did not err where it did not request additional briefing from the parties on an issue that had been previously briefed and which was not dispositive to the Court's Opinion. This dicta should not provide a basis to grant review under RAP 13.4.

Rather than ignoring extrinsic evidence, as Petitioner claims, the Court found substantial evidence in the record to support the trial court's findings. On appeal of a bench trial, the Court of Appeals' "review is limited to determining whether the trial court's factual findings are supported by substantial evidence and whether those findings support the trial court's conclusions of law." Yorkston v. Whatcom Cnty., 11 Wn. App. 2d 815, 831, 461 P.3d 392, 400 (2020). "If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently." Sunnyside Valley Irrig. Dist., 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). The Court of Appeals found that there was substantial evidence in the record that the parties in 1983

intended an elevated walkway in the easement area, which requires the construction of underground pilings. RAP 13.4 does not contemplate review being granted to challenge the sufficiency of evidence; that dispute was resolved conclusively by the Court of Appeals. In order to seek review by this Court, Petitioner must demonstrate that the Court of Appeals' decision contravenes case law—it has not done so. Review by this Court is not warranted.

D. Petitioner Has Failed To Show That The Petition Involves An Issue Of Substantial Public Interest Under RAP 13.4(b)(4)

Last, Petitioner attempts to seek review of the Court of Appeals' decision because "it is a published opinion involving public easements" and "this Court has not addressed the interpretation of an easement for many years." Petition for Review, at 26. These claims alone do not justify review under RAP 13.4(b)(4).

Review is warranted in accordance with RAP 13.4(b)(4) if there is an issue of substantial public interest. "A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." In re Flippo, 185 Wn.2d 1032, 380 P.3d 413, 414 (2016), citing State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Petitioner has failed to meet that standard here: the fact

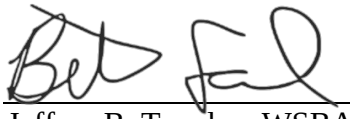
that the Court has not reviewed the issue of easement interpretation supports the argument that there is not confusion on a common issue that requires clarity from the Court. Petitioner has also failed to demonstrate that there is a risk of "additional litigation with attendant takings claims" where Petitioner's takings claim was denied by both the trial court and Court of Appeals. The Petition should be denied under RAP 13.4(b)(4).

V. CONCLUSION

There is no basis for review under RAP 13.4(b). The Court of Appeals properly affirmed the trial court's Final Judgment and Order, and its Decision did not conflict with any decision of the Washington Supreme Court or Court of Appeals or implicate an issue of substantial public interest. This Court should deny the Petition for Review.

This document contains 4,104 words, excluding the parts exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of October 2023.



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