Supreme Court No. 96973-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 49988-6-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN K. KENNELL, AS MANAGING MEMBER OF POTATO PATCH LLC, a Washington Limited Liability Company,

Plaintiff-Appellant,

v.

DAVID GREER NIELSEN, and RITA NIELSEN, husband and wife; and EDWARD LUCKE and JOAN LUCKE, husband and wife; and JAMES STOVER and BONNIE STOVER, husband and wife; and WILLIAM TINNESAND and DEBORAH TINNESAND, husband and wife; and PENELOPE RADEBAUGH, a married woman as her separate estate; and JENNIE MOWATT, a single woman,

Defendants-Respondents.

APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Plaintiff and Appellant John Kennell, as Managing Member of Potato Patch LLC ("Potato Patch"), seeks review of the decision designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Potato Patch seeks review of the unpublished decision terminating review of Division Two of the Court of Appeals, entered on November 6, 2018. A copy of the decision ("Decision") is attached as Appendix A. A timely motion for reconsideration was denied by a summary order entered on February 20, 2019. A copy of that order is attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

This case involves the continuing efforts by John Kennell and his wife to "unlock" family property, known as the "potato patch" and located on the western shore of the Hood Canal, by providing the property with road access to the outside world. The Court of Appeals rejected the Kennells' efforts to unlock the potato patch. The Court of Appeals' Decision raises three issues, all of which are intertwined by the common thread of this State's long-standing public policy favoring the unlocking of land. *See, e.g.*, *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 8, 282 P.3d 1083 (2012) (recognizing the "overriding public policy goal against making landlocked property useless").

1. The scope of the Court of Appeals' Decision in *Granite Beach Holdings, L.L.C. v. Department of Natural Resources*, 103 Wn. App. 186, 11 P.3d 847 (2000). In *Granite Beach Holdings, L.L.C. v Department*

of Natural Resources, 103 Wn. App. 186, 11 P.3d 847 (2000), the Court of Appeals held that an easement passing partly across State of Washington land could not be extended farther across that land to reach—and thereby unlock—private property, because this would require an impermissible taking of State land. Here, the Court of Appeals applied *Granite Beach Holdings* to bar access to the potato patch over an existing road easement that passes entirely across land now owned by the Department of Fish and Wildlife, merely because the ensuing use could *in some way* burden that land—even though there had been no showing that allowing use of the road to access the potato patch would actually impair the Department's use of its land. The Court of Appeals' application of *Granite Beach Holdings* wrongfully impairs the ability of landlocked property owners to unlock their land, by unduly privileging State land. This is a matter of substantial public interest warranting review by this Court. *See* RAP 13.4(b).

2. The scope of a Washington trial court's power to resolve a dispute over the location of an easement. Several owners of property in a subdivision immediately south of the potato patch refused to allow the Kennells to use a road crossing the subdivision, which connects to the road running across the Department's land. The subdivision property is subject to a dedicated public right-of-way that the dedicator intended would provide access to the potato patch. The dedicator's intent can only be fulfilled if the right-of-way is declared to run along the road, the only practicable route now available for crossing the subdivision. Fulfilling the dedicator's intent also is necessary to unlock the potato patch. Yet the Court of Appeals

upheld the trial court's refusal's to declare that the right-of-way ran along the road, and in doing so questioned whether Washington courts have the inherent equitable power to settle disputes over an easement's location. Whether Washington courts should be able to exercise that power is a matter of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

3. The test for determining the existence of alternative routes for accessing property. The adjacent subdivision property owners claimed that the Kennells had voluntarily landlocked the potato patch by selling a connecting piece of property located immediately to the southeast, which allegedly could have provided the potato patch with road access to the world. This connecting piece of land ran along a bluff above a beach, and the unrebutted evidence in the record showed that the bluff was too unstable geologically to safely support a road. The Court of Appeals nonetheless held that the potato patch could have had access through that piece, using a beach easement immediately below the bluff, and therefore the Kennells voluntarily landlocked the potato patch when they sold the connecting property. The appropriateness of treating the surrender of beach access as constituting the voluntary land-locking of property is a matter of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

A. McGrew dedicates a public right-of-way across his property, in order to provide road access for the "potato patch," property located immediately to the north.

In 1939, G.F. McGrew bought property in Jefferson County located inland from Quilcene Bay, which would later become known as the Point Whitney Tracts. CP 98, 100. In 1943, McGrew conveyed to Jefferson County in fee simple a public right-of-way for "road purposes" (CP 55), providing access to the property immediately to the north of McGrew's property via:

> [a] right of way for road, from point where present county road enters their property, thence in a generally northerly direction to the north boundary of their property. This road to follow the eastern boundary as near as possible except where natural obstacles prevent[.]

CP 48-51 (copy attached as Appendix C). The deed setting forth the right-of-way was recorded in 1944. CP 51. As discussed more fully in Section IV.C., *infra*, the property to the north, benefited by the right-of-way created by McGrew, has long been known as the "potato patch."

A steep ravine exists on the eastern boundary of McGrew's property, which makes it impracticable to build a road there. CP 251. Thus, when McGrew dedicated a right-of-way evidently intended to provide road access to and from the property located along the north boundary of McGrew's property, it was apparent at the time that any future roadway using the right-of-way would have to be located somewhere west of the eastern boundary of McGrew's property.

B. The Lorenzens acquire the McGrew property and create the Point Whitney Tracts subdivision, subject to the right-of-way dedicated by McGrew. A road is built—the Canyon Creek Road—running from the north boundary of the Point Whitney Tracts south to a county road. The southern portion of the road uses an easement granted to the owners of the Point Whitney Tracts. The Department of Fish & Wildlife later acquires the land subject to that easement.

In 1987, Marvin Lorenzen and his wife took title to what would later become the Point Whitney Tracts. CP 54-55. Their deed specifically incorporated and acknowledged the McGrew right-of-way, which had remained as an encumbrance on the property since 1944. CP 55 ("Subject to easement affecting a portion of subject property for road purposes in favor of Jefferson County as recorded Dec. 15, 1944, Auditor's File No. 103323[.]").[1] In 1991, the Lorenzens subdivided the property into the "Point Whitney Tracts" consisting of eight lots: four located on the western half of the property, and four located on the eastern half of the property. CP 43; CP 63-64, 117, 205. (A copy of the Point Whitney Tracts large lot subdivision is attached as Appendix D.) The owners of the four eastern Point Whitney Tract lots later built homes on their lots, located between the eastern boundary of the Point Whitney Tract and Canyon Creek Road. CP 104-05.

As part of the Point Whitney Tracts subdivision, a roadway was created and approved by the County; this roadway, called Canyon Creek

[1] At one point, area resident William Duesing requested that the County itself take steps to open the right-of-way, which the County declined to do. CP 205-06, 214. But the County has never abandoned the right-of-way. CP 205, 214.

Road, runs from south to north through the middle of the subdivision. CP 43, 63-64, 117, 205.[2] (A color copy of a map depicting Canyon Creek Road is attached as Appendix E.) The lot owners have road access to the outside world via that road, which continues south from the Point Whitney Tracts until it connects to a county road. CP 56-57, 104, 117. The southernmost portion of Canyon Creek Road travels along an easement granted to the Whitney Tracts lot owners in 1990. CP 42, 56-64, 104, 117. The Department of Fish and Wildlife later acquired the property subject to this easement. CP 104.

C. The Kennells, longtime area property owners, form the Potato Patch LLC and acquire the potato patch. The only practicable way to effect McGrew's intent and provide road access for the potato patch is via Canyon Creek Road.

John Kennell and his wife are longtime residents of the Kitsap Peninsula, who have for many years owned beachside property along Quilcene Bay. CP 128-30. The Kennells are the sole members of Potato Patch LLC ("Potato Patch"). CP 132. In 2010 the Kennells, via Potato Patch, bought the rural parcel bordering Quilcene Bay adjacent to their property and immediately to the north of the Point Whitney Tracts, known as the potato patch. CP 41-42, 104, 130, 301. The property is called the

[2] At the time of the creation of the subdivision and Canyon Creek Road, the North Mason Public Utility District installed an electrical vault at the northern terminus of Canyon Creek Road to "service [the] future electrical needs" of the property immediately to the north (the potato patch). CP 44, 139.

potato patch because the former owner's father had a vegetable garden on the land, where he raised potatoes during World War II. CP 208.[3]

Potato Patch also owned, but later sold, beachside properties known as the "Duesing properties," abutting the potato patch on the southeast. CP 132, 144-59, 170-72, 307-08. (A color copy of a map depicting the location of the Duesing properties in relation to the potato patch and the Point Whitney Tracts is attached as Appendix F.) The Duesing properties have road access to the outside world, but an engineering evaluation determined that an easement across the Duesing properties to the potato patch could not safely be used to extend road access to the potato patch, because the sloping sloughing bluff along which it would have to run could not safely support a road:

> [A]ccess to the Potato Patch parcel from parcel No. 601072010 [*i.e.*, the Duesing properties] to the southeast is very steep and is unstable. Slope failures should be expected in this area as the slope has been over steepened by shoreline erosion below. *The slope is too steep to safely support a road even if a full bench cut was cut across the slope.* Cutting a road across this slope would also further undermine the slope above and would have a negative impact on the property above[.]

CP 66 (McShane Decl., ¶5) (emphasis added). That evaluation also concluded that the only way to unlock the potato patch and provide it road access to the outside world was via Canyon Creek Road. CP 66 (McShane Decl., ¶¶ 4, 6-7).

[3] The phrase "Potato Patch," when capitalized, refers to the limited liability company formed by the Kennells, which took ownership of the property known as the potato patch. The phrase when not capitalized refers to the property itself. McGrew dedicated his right-of-way in 1943 and recorded it in 1944 during the time when the potato patch literally *was* a potato patch. CP 42, 48.

D. After some of the Point Whitney Tract owners refuse to grant an easement to Potato Patch for use of Canyon Creek Road, Potato Patch sues for relief that would unlock the potato patch property via Canyon Creek Road. The trial court dismisses Potato Patch's action, and the Court of Appeals affirms.

After some of the Point Whitney Tract owners refused to grant Potato Patch an easement to use Canyon Creek Road, Potato Patch sued. Potato Patch sought a declaratory judgment confirming the continuing existence of the McGrew right-of-way, establishing its location along the northern portion of Canyon Creek Road, and granting Potato Patch the right to use Canyon Creek Road including that portion located within the easement over the Department of Fish and Wildlife's land. CP 17-18.

Potato Patch moved for a partial summary judgment confirming the continuing existence of the McGrew right-of-way, and establishing its location on the Point Whitney Tracts' portion of Canyon Creek Road. CP 26-27, 41-64, 65-70. Several Point Whitney Tracts lot owners cross-moved for a summary judgment dismissing Potato Patch's claims. CP 73-96, 97-100, 103-17, 120-217.

The trial court granted summary judgment to the defendants and dismissed Potato Patch's claims with prejudice. CP 350-53. The trial court stated in its order that, although its ruling "d[id] not impact or limit whatever rights [Potato Patch] may have re[garding the] McGrew ROW [*i.e.*, right-of-way]," the "Canyon Creek Easement [*i.e.*, Road] is not [the] McGrew ROW as a matter of law." CP 352; *see also* RP (Jan. 13, 2017) 27 ("McGrew still exists separate and apart from Canyon Creek."); RP (Jan.

13, 2017) 42 ("And as a matter of law, it's pretty clear they are separate and distinct parcels.").[4]

The Court of Appeals affirmed. The Court of Appeals determined that, in order to unlock the potato patch property, Potato Patch would have to be granted use of the portion of Canyon Creek Road located within the existing easement over the land owned by the Department of Fish and Wildlife. *See* Decision at 10-11, 13. Although that easement crossing over the Department's land predated the Department's acquisition of the land, the Court of Appeals held—based on *Granite Beach Holdings*—that Potato Patch could not use it because *any* increased burden would constitute a forbidden taking of State land, even if that burden did not impair the Department's use of the land. Decision at 12. And because full relief therefore could not be granted by the trial court, the Court of Appeals ruled that the trial court had properly dismissed the action.[5]

Potato Patch now petitions for review by this Court.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Our state's public policy against land-locking property is constitutionally grounded. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012) (citing Washington Const. art. I, § 16). The Legislature early on adopted a statutory remedy to effect that policy, now

[4] The trial court denied the defendants' motion for attorneys' fees and costs under the easement-of-necessity statute, and they did not appeal that ruling. CP 418-19.

[5] As will be discussed more fully in Subsections V.B and V.C, the Court of Appeals also ruled that the McGrew right-of-way could not be located over the northern portion of Canyon Creek Road, and that Potato Patch voluntarily relinquished road access to the potato patch when Potato Patch sold off the Duesing properties. *See* Decision at 5, 14-17.

codified as RCW 8.24.010. *Brown v. McAnally*, 97 Wn.2d 360, 367, 644 P.2d 1153 (1982). This Court recently cited and quoted with approval the following explanation for the policy against land-locking property, set forth in 2004 by the Florida Fifth District Court of Appeals:

> Useful land becomes more scarce in proportion to population increase, and the problem in this state becomes greater as tourism, commerce and the need for housing and agricultural goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stockraising, the statute is designed to fill these needs. There is then a clear public purpose in providing means of access to such lands so that they might be utilized in the enumerated ways.

Cirelli v. Ent, 885 So.2d 423, 430 (Fla. Dist. Ct. App. 2004) (discussing Florida's statutory equivalent of RCW 8.24.010) (*quoting Deseret Ranches of Fla., Inc. v. Bowman*, 349 So.2d 155, 156-57 (Fla. 1977)), *cited and quoted with approval in Ruvalcaba*, 175 Wn.2d at 6 n.2.

The present action sought to unlock the potato patch, providing it with road access to the outside world. The Court of Appeals' Decision leaves the potato patch landlocked. That decision impermissibly frustrates our state's public policy against land-locking property in three specific ways, matters of substantial public interest warranting review by this Court under RAP 13.4(b)(4).

A. The Court of Appeals' Decision misapplies *Granite Beach Holdings, L.L.C. v. Department of Natural Resources,* 103 Wn. App. 186, 11 P.3d 847 (2000), by holding that any increased impact from granting the use of an existing easement over State land constitutes an impermissible taking of State land. This is a matter of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

Canyon Creek Road gives the Point Whitney Tracts lot owners access to the outside world. The southern portion of Canyon Creek Road passes over property owned by the Department of Fish and Wildlife, via an easement in favor of the Whitney Tract lot owners granted by the Department's predecessor. Unlocking the potato patch requires that its owners be entitled to use the southern portion of Canyon Creek Road. To that end, Potato Patch sought a declaration that it be entitled to share in the use of that easement, along with the owners of the Whitney Tracts.

The Court of Appeals held, however, that the decision in *Granite Beach Holdings, L.L.C. v Department of Natural Resources*, 103 Wn. App. 186, 11 P.3d 847 (2000), barred granting Potato Patch such a use right, because it would increase the burden on the underlying State land. Decision at 12. According to the Court of Appeals, *any* increase in the burden on State land from granting an additional party the right to use an existing easement over State land constitutes an impermissible taking of State land:

> Potato Patch argues that granting a private way of necessity in the existing easement would not "unduly expand" the number of parties using the easement. Reply Br. of Appellant at 15. However, *the relevant inquiry is whether such action effects an increased burden on the servient owner's interests, **not an undue burden**. Granite Beach Holdings*, 103 Wn. App. at 204. *Increasing the servitude placed upon the State lands, even by just one party, constitutes an increased burden on the servient owner's interests. See id.* Thus,

> Potato Patch may have provided evidence showing that Canyon Creek Road was the most feasible route to access its property, but its private condemnation action still could not achieve the access it sought without impermissibly condemning the State's interests.

Id. (emphasis added).

The Court of Appeals has misapplied *Granite Beach Holdings* in a way that impermissibly privileges State land and interferes with the ability of land-locked land owners to achieve relief from that disfavored status. *Granite Beach Holdings* involved an attempt by a party to extend a partial road easement over State land, which did not reach the party's land-locked parcel. 103 Wn. App. at 203. The court there ruled that this extension would constitute an impermissible taking of State land. *Id.* Potato Patch, however, is not seeking any extension of the easement over State land, but only the right to share in the use of an existing easement that already runs entirely across that land.

The Court of Appeals itself recognized that "a private party may condemn another party's interest in an existing easement over State-owned land because such easement is separate from the State's fee interest." Decision at 11 n.9 (citing *State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn.2d 545, 559-60, 119 P.2d 694 (1941); *Granite Beach Holdings*, 103 Wn. App. at 203). And indeed that is *all* Potato Patch seeks to do—condemn the interest of the Point Whitney Tracts owners in the existing easement over the Department of Fish and Wildlife's land, and only to the extent of being granted the right to *share* in the use of the easement.

Only by reading into *Granite Beach Holdings* a rule that *any* increase in the burden on State land, resulting from granting a right to share

in the use of an existing easement over State land, constitutes an impermissible taking of State land, could the Court of Appeals deny Potato Patch the right, like any other private party, to condemn another party's interest in an existing easement over State-owned land. But *Granite Beach Holdings* establishes no such rule. Moreover, such a rule has no support in the law of takings, which requires proof of an undue burden before a taking will be recognized.[6] The Court of Appeals' Decision thus impermissibly privileges State land and interferes with the ability of land-locked land owners to achieve relief from that disfavored status.[7] This is a matter of substantial public interest warranting review by this Court under RAP 13.4(b)(4).

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[6] As the Court of Appeals recognized, a private party may condemn another party's interest in an easement across State land because that easement is separate from the State's fee interest in the land. Hence, the taking of the easement as such does not *a fortiori* operate to effect a taking of the State's fee interest. Potato Patch would agree that the adverse impact of that condemnation on the State's use and enjoyment of its fee right might prove to be of such a magnitude that it should be deemed a taking, similar to the way the adverse impact of a regulation can be deemed a taking (which courts refer to as an "inverse" condemnation). *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (outlining a multi-factor test for determining whether there has been an inverse condemnation). The gravamen of the Court of Appeals' error here is its determination that *any* impact, even if not in fact an interference with the State's use and enjoyment of its fee right, should be deemed a taking. Moreover, the notion that nine—instead of eight—home owners accessing their property by driving on the portion of Canyon Creek Road that passes over the Department's land would have such a material, adverse impact on the Department's use and enjoyment of its land is far-fetched, at best.

[7] Nor will the principles of collateral estoppel salvage the Court of Appeals' Decision on this point. The Whitney Tracts owners have claimed that the rejection in a prior lawsuit of a claim by Potato Patch to a prescriptive easement over the southern portion of Canyon Creek Road bars Potato Patch's present claim. But that claim of prescriptive easement was rejected because Potato Patch failed to show facts that could have given rise to a prescriptive easement supposedly originating in actions taken by Duesing's predecessor. CP 164-69, 177-78, 180-86, 189-92. The present claim is based on the undisputed fact of the easement expressly granted to the Point Whitney Tracts lot owners by the Department of Fish and Wildlife's predecessor.

B. The Court of Appeals' Decision on the issue of the location of the McGrew right-of-way, questioning whether Washington courts may exercise the inherent equitable power to resolve disputes over the location of an easement, raises an issue of substantial public interest warranting review by this Court under RAP 13.4(b)(4).

The Court of Appeals erred when it upheld the trial court's refusal to recognize that the McGrew right-of-way should be deemed to run along the northern portion of Canyon Creek Road. *See* Decision at 14-18. The document creating the right-of-way by its terms contemplates that the road may have to be located away from the eastern boundary of the Point Whitney Tracts. CP 48-50. McGrew's evident intent to create access for the property lying to his north (the potato patch) should not be frustrated by the fact that the passage of time and subsequent development of the area now means there is no place closer to the eastern boundary upon which to locate the right-of-way than where Canyon Creek Road runs.

In upholding the trial court's ruling that the McGrew right-of-way cannot be deemed to run along the northern portion of Canyon Creek Road, the Court of Appeals refused to follow the approach of the Wisconsin intermediate court of appeals in *Spencer v. Kosir*, 733 N.W.2d 921 (Wis. Ct. App. 2007), as urged by Potato Patch. In *Kosir*, Spencer, the party in the position of Potato Patch, sued for a judicial declaration "confirming the existence and validity of [his] easement rights and a determination of an appropriate width and location of the easement." 733 N.W.2d at 923. The Wisconsin Court of Appeals affirmed the trial court's determination on summary judgment that an easement—described as "a right of way for road

purposes"—covered the eastern twenty feet of Kosir's property. *Id.* at 925-26. The trial court in *Kosir* used the same types of factors to determine the location and scope of the easement as the trial court here *should have used*: locating the easement where it would least affect the servient estate's property and where the least number of trees needed to be cut. *Id.* at 926.[8]

The Court of Appeals here refused to follow *Kosir* because Potato Patch supposedly failed to explain why the court should adopt the reasoning of another jurisdiction and "impose [the] requirement on the superior court" set forth by the Wisconsin Court of Appeals in *Kosir*. Decision at 17 n.12.[9] Somewhat contradictorily, the Court of Appeals also stated that Potato Patch had "fail[ed] to present any authority showing that Washington courts

[8] Shortly before McGrew conveyed the right-of-way to the County in 1943, he sold a portion of the lower southeastern part of what is now Point Whitney Tracts (CP 117) to one Frank Stewart. CP 98 (declaration of a title officer with Jefferson County Title Company noting a "gap of approximately 165 feet (the Stewart Property) between the McGrew [right-of-way] and the nearest road (Canyon Creek Road)" running immediately due south of the eastern boundary of the McGrew property). A portion of Canyon Creek Road runs due east along this strip, connecting the portion traversing the Point Whitney Tracts to the portion passing across the land belonging to Fish & Wildlife. *See* Appendices E & F (maps). The strip is now owned by the Nielsens, who are Defendants and Respondents in this action, and is impressed with an easement in favor of the Point Whitney Tract owners allowing use of the portion of Canyon Creek Road connecting their lots to the final portion connecting to the county road. *See* CP 107-115. Thus, complete relief can be afforded to Potato Patch if this Court reinstates this action.

[9] The Point Whitney Tracts owners attempted to distinguish *Kosir* on the basis that the easement in that case "did not specify the location of the easement." Resp. Br. at 28 n.18. But the conveyance document here also does not specify precisely the McGrew right-of-way's location: "the eastern boundary *as near as possible except where natural obstacles prevent*[.]" CP 48 (emphasis added). Moreover, Potato Patch is prepared to show that, in light of the development of the Whitney Tracts lots and the building of homes on the lots lying between the eastern boundary of the Tract and Canyon Creek Road, locating the McGrew right-of-way along the northern portion of Canyon Creek Road now is the only way to effect McGrew's evident intent to provide access for the potato patch across what is now the Point Whitney Tracts. Under *Kosir*, this should be a powerful factor weighing in favor of locating the right-of-way along the northern portion of Canyon Creek Road.

share the Wisconsin courts' 'inherent power to affirmatively and specifically determine [an easement's] location, after considering the rights and interests of both parties.' *Spencer*, 301 Wis.2d at 529." *Id.*

Potato Patch submits that this Court should be disturbed that the Court of Appeals evidently does not believe that Washington courts have the inherent power to affirmatively and specifically determine an easement's location—why else would the Court of Appeals chide Potato Patch for not producing authority showing Washington courts *do* have such power? Moreover, an examination of Wisconsin law reveals that the inherent power recognized and upheld by the Wisconsin Court of Appeals in *Kosir* is a long-established and widely-recognized equitable power, of obvious utility to the resolution of disputes regarding the location of easements. *See Werkowski v. Waterford Homes, Inc.*, 141 N.W.2d 306, 310 n.3 (Wis. 1966) (citing 17A Am. Jur., "Easements," pp. 711-712, § 101, and pp. 727-736, §§ 119-125, supporting the right of trial courts to exercise the inherent power questioned by the Court of Appeals here). Confirming that Washington courts may also exercise this power[10] is a matter of substantial public interest warranting review by this Court under RAP 13.4(b)(4).

[10] Potato Patch has not located a decision of this Court squarely stating that Washington courts may exercise the inherent power questioned by the Court of Appeals here. But the comprehensive review of Washington easement law, in the context of determining whether a Washington court may relocate an easement for the benefit of the servient estate without the consent of the dominant estate, set forth by the late Judge Faye Kennedy of Division One in *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (2002), strongly suggests that confirmation of such a power would be consistent with Washington easement law.

C. The Court of Appeals' Decision that Potato Patch voluntarily landlocked its property applies an unreasonable test for determining the availability of access from adjacent property. This is a matter of substantial public interest warranting review by this Court under RAP 13.4(b)(4).

The Court of Appeals erred when it ruled that Kennell voluntarily landlocked the Potato Patch property by selling the Duesing properties. *See* Decision at 5 n.3. The only evidence in the record addressing whether the potato patch could be "unlocked" through the Duesing properties directly contradicts the Court of Appeals' conclusion. Expert Dan McShane testified by declaration that the unstable slope of the bluff next to the beach rendered a road unbuildable that could otherwise have connected the potato patch through the Duesing properties to the County road system. CP 66 ¶5; CP 249-50. Nor does the fact that the potato patch could be reached by crossing the beach portion of the Duesing properties constitute access for the potato patch to the outside world, for the obvious reason that, under modern shoreline regulations, no *road* can be built *along a beach.*

Selling off whatever right of "access" the potato patch enjoyed via the Duesing property beach easement cannot reasonably support a finding of voluntary land-locking. The inappropriateness of the Court of Appeals' test for finding voluntary land-locking is a matter of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

VI. CONCLUSION

This Court should grant review, and hold that granting an additional party the use of an existing easement across State land does not, standing alone, constitute an impermissible taking of State land. This Court should

also hold that Washington courts have the inherent power to resolve a dispute over the location of an easement, and that a landowner's surrender of beach access to their property does not constitute the voluntary land-locking of that property. This Court should reinstate Potato Patch's action and remand for further proceedings.

Respectfully submitted this 21st day of March, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Michael B. King, WSBA No. 14405
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED: March 21, 2019.

Patti Saiden

Patti Saiden, Legal Assistant

Appendix A

Filed
Washington State
Court of Appeals
Division Two

November 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POTATO PATCH LLC, JOHN K. KENNEL MANAGING MEMBER, a Washington Limited Liability Company, Appellant, v. DAVID GREER NIELSEN and RITA NIELSON, husband and wife; and EDWARD LUCKE and JOAN LUCKE, husband and wife; and JAMES STOVER and BONNIE STOVER, husband and wife; and WILLIAM TINNESAND and DEBORAH TINNESAND, husband and wife; and PENELOPE RADEBAUGH, a married woman as her separate estate; and JENNIE MOWATT, a single woman, Respondents.	No. 49988-6-II UNPUBLISHED OPINION

LEE, A.C.J. — Potato Patch LLC (Potato Patch) owns a landlocked parcel of land in rural Jefferson County. The only feasible way for Potato Patch to access its property with a vehicle is through an abutting private road that travels through the property of Potato Patch's neighbors to the south. After its neighbors denied Potato Patch access to this road, Potato Patch filed a complaint seeking declaratory judgment that this private road was actually a public right of way conveyed to the County in 1943, or in the alternative, declaratory judgment granting Potato Patch a private way of necessity over the road.

Potato Patch appeals the superior court's dismissal of its claims on summary judgment and argues that: (1) there remained a genuine issue of material fact as to Potato Patch's private way of necessity claim, (2) there remained a genuine issue of material fact as to whether the abutting road is the 1943 public right of way, and (3) the superior court erred in failing to determine the precise location of the 1943 public right of way. We disagree and affirm.

FACTS

A. BACKGROUND

1. The Potato Patch Property

John and Melinda Kennell are the sole members of a limited liability company called Potato Patch LLC. Potato Patch's only asset is an undeveloped parcel of property in Jefferson County. The Potato Patch property is bordered to the East by the Hood Canal and to the North and West by areas of steep and unstable terrain. South of the Potato Patch property lies a residential community known as the Point Whitney Tracts. The Washington State Department of Fish and Wildlife owns the land to the south of the Point Whitney Tracts.

The Potato Patch property is inaccessible by public road. However, a road named Canyon Creek Road abuts the southern edge of the Potato Patch property, travels down through the Port Whitney Tracts, and across the State-owned land to the south. Canyon Creek Road connects to a southeast county road named Bee Mill Road. The owners of the tracts of land comprising the Port Whitney Tracts consider Canyon Creek Road to be private and have denied Potato Patch's request to access its property through Canyon Creek Road.

2. The McGrew Right of Way

G. F. McGrew once owned the land that would eventually become the Point Whitney Tracts. In 1943, McGrew conveyed by quit claim deed a public right of way over his land to Jefferson County. The deed described the public right of way as:

> A right of way for road, from point where present county road enters their property, thence in a generally northerly direction to the north boundary of their property. This road to follow the eastern boundary as near as possible except where natural obstacles prevent, all in SW ¼ NW ¼ Sec 7, Twp 26N, R 1 W., W.M.[1] situated in the County of Jefferson, State of Washington.

Clerk's Papers (CP) at 48.

In 1987, Marvin and Adelaide Lorenzen purchased the land that would eventually become the Point Whitney Tracts. The deed to the property stated that the land was "[s]ubject to easement affecting a portion of subject property for road purposes in favor of Jefferson County as recorded Dec. 15, 1944, Auditor's File No. 103323, records of Jefferson County, Washington" (the McGrew right of way). CP at 55.

However, according to Jefferson County, the McGrew right of way was never opened and is landlocked. The McGrew right of way does not connect to any roads because McGrew sold the southern 165 feet of his property three years before granting Jefferson County the McGrew right of way. The man who purchased the southern 165 feet of McGrew's property never granted Jefferson County a right of way. Thus, according to the County, there is presently a 165 foot gap between the McGrew right of way and the nearest road (Canyon Creek Road). The County does not intend to build a public road on the McGrew right of way because in order to do so, it would

[1] This is the current location of the Point Whitney Tracts.

need to obtain a deed or easement from the present owner of the property south of the Point Whitney Tracts that make up the 165 foot gap.

3. Canyon Creek Road

In 1990, the Lorenzens settled a lawsuit that they had initiated against other landowners in the area. The settlement provided that the defendants would grant the Lorenzens and their successors in interest "a non-restrictive easement for ingress, egress and utilities, thirty (30) feet in width, extending from the county road known as the Bee Mill Road to the real property of the [Lorenzens]." CP at 56-57.

In 1991, the Lorenzens subdivided their property into the Point Whitney Tracts.. The survey plat creating the Point Whitney Tracts showed a "30 ft. easement for ingress, egress and utilities" beginning at Bee Mill road, traveling west, and then turning north through the Point Whitney Tracts. CP at 115. The survey plat also identified this easement by reference to the 1990 settlement agreement between the Lorenzens and their then neighboring landowners. This easement is Canyon Creek Road.

4. The Duesing Properties

Two separate properties, referred to as the Duesing properties,[2] abut the southeast corner of the Potato Patch property and are accessible by a public county road. Potato Patch acquired the

[2] The parties refer to these two properties as "the Duesing properties" because the Kennells purchased the properties from Carol Duesing in 2009. Br. of Appellant at 6; Br. of Resp't at 6. However, the Kennells also purchased the Potato Patch property from Duesing in 2009. Even though Duesing no longer owns any of the property at issue in this case, for clarity, we refer to the two southeastern properties as the Duesing properties because both parties refer to the parcels under this name. It is unclear from the record who purchased the Duesing properties from the Kennells.

Duesing properties at the same time it acquired the Potato Patch property. Potato Patch sold the Duesing properties in January 2014. As a term of sale, Potato Patch expressly relinquished any rights to an easement for ingress and egress it had over the Duesing properties.[3]

5. 2010 Complaint against the State of Washington

In 2010, even though Potato Patch owned the Potato Patch property, the Kennells personally brought an action to quiet title to the portion of Canyon Creek Road crossing the State-owned land based on the theories of easement by prescription and easement by implication in an attempt to secure access to the Potato Patch property.[4] The superior court dismissed the Kennells' claims to a prescriptive and implied easement over the portion of Canyon Creek Road crossing the State-owned lands on summary judgment.

C. THE COMPLAINT AGAINST NIELSEN

In November 2015, Potato Patch filed an amended complaint against David and Rita Nielsen, as well as the other present owners of the land comprising the Point Whitney Tracts[5]

[3] Had Potato Patch not affirmatively relinquished its rights to an easement over the Duesing properties as a term of the sale, it likely would have been able to reach the Potato Patch property through an implied easement by necessity over the Duesing properties. *See Visser v. Craig*, 139 Wn. App. 152, 158, 159 P.3d 453 (2007) ("An easement implied from necessity arises where a grantor conveys part of her land, and retains part and, after the conveyance, it is necessary to cross the grantor's parcel to reach a street or road from the conveyed parcel.")

[4] Three months before the Kennells filed this complaint, their lawyer sent the State a letter explaining that the Kennells had a "prescriptive easement claim with a private way of necessity alternate claim over Point Whitney Tracts." CP at 175. The Kennells never named the Point Whitney Tract owners as defendants in their 2010 lawsuit against the State.

[5] Potato Patch named as defendants David Greer Nielsen, Rita Nielsen, Edward Lucke, Joan Lucke, James Stover, Bonnie Stover, William Tinnesand, Deborah Tinnesand, Penelope Radebaugh, and Jennie Mowatt, all of which own tracts within the Point Whitney Tracts. We refer to the defendants collectively as Nielsen.

(Nielsen). Potato Patch requested a declaratory judgment establishing the existence, location, and scope of the McGrew right of way, or in the alternative, a declaratory judgment granting Potato Patch a private way of necessity over Canyon Creek Road, including the portion of Canyon Creek Road across the State-owned land. Potato Patch did not name the State of Washington as a defendant in its complaint.

Potato Patch alleged that its property was inaccessible from public road, and therefore, it was reasonably necessary for Potato Patch to obtain a private way of necessity to Canyon Creek Road over the Point Whitney Tracts. Potato Patch claimed that alternative routes to its property were impractical because the surrounding topography made it impractical and prohibitively expensive to build a road. Potato Patch also claimed a right to access and use the McGrew right of way, which it asserted still existed over the Point Whitney Tracts. Potato Patch later asserted that it was "logical to conclude" that the McGrew right of way became Canyon Creek Road because the McGrew right of way was never extinguished and the 1991 plat dividing the Port Whitney Tracts did not specify that Canyon Creek Road was private.[6] CP at 36.

D. MOTION FOR SUMMARY JUDGMENT

In 2016, Nielsen moved to dismiss Potato Patch's claims on summary judgment. Nielsen argued that the McGrew right of way was inaccessible from any county road, and thus unusable. In support, he submitted a declaration from Susan Brandt, a title officer in Jefferson County. Brandt explained that McGrew had sold the southern 165 foot wide section of his property before

[6] Potato Patch moved for, and was denied, summary judgment on this issue, arguing that based on the undisputed facts, the court could conclude as a matter of law that Canyon Creek Road was the public McGrew right of way. Potato Patch does not appeal the superior court's order denying Potato Patch's motion for summary judgment on this basis.

granting the McGrew right of way to the County and that the purchaser never granted the County a right of way. Thus, there was a gap between the McGrew right of way and the nearest road, Canyon Creek Road. Brandt also stated:

> Jefferson County has no intention of building a road on the McGrew ROW now or in the future because the County would need a deed from the owners of Tract 1 of the Point Whitney Tracts for the south 165 feet . . . that was not conveyed to the County by McGrew.

CP at 99.

Brandt explained that the nearest road to the McGrew right of way was Canyon Creek Road. Brandt submitted a map depicting this 165 foot gap between the McGrew right of way and the portion of Canyon Creek Road traveling through the southern portion of the Point Whitney Tracts.

Nielsen also submitted a 2016 deposition in which Kennell was asked what road the 1943 deed granting the McGrew right of way referred to when it stated " 'from point where present county road enters their property.' " CP at 141. Kennell responded that he did not know what road the granting deed referred to through this description.

Nielsen further argued that Potato Patch's claims to an easement by necessity failed as a matter of law because Potato Patch sought to expand the scope of the easement over Canyon Creek Road, which could not be done without condemning the interests of the State as the servient estate. The Point Whitney Tract landowners argued that Potato Patch cannot increase the burden on State land by condemning a private easement across State land.

Finally, Nielsen argued that Potato Patch's private way of necessity claim should be dismissed because Potato Patch voluntarily landlocked its property and impermissibly sought to

develop the Potato Patch property. In support, Nielsen submitted a deed showing that Potato Patch had initially purchased the Duesing properties when it purchased the Potato Patch property. Potato Patch sold the Duesing properties in 2014. In connection with the sale, Potato Patch abandoned an easement it had granted to itself over the abutting property because the new "owners didn't want [Kennell's] pickup truck going through their property." CP at 246.

In Potato Patch's response to Nielsen's arguments, Kennell acknowledged that he had recorded an easement over the property he formerly owned to the southeast, but claimed that the easement was for beach access, not legal road access. Kennell also claimed that a creek flows through the eastern portion of the Point Whitney Tracts, and therefore, a road could not be built without bridging a very steep ravine. Kennell cited this as evidence that the McGrew right of way was not on the eastern portion of the Point Whitney Tracts, and thus, there was a logical inference that Canyon Creek Road is the McGrew right of way.[7]

Potato Patch argued that there remained a factual dispute as to the exact location of the McGrew right of way and whether the McGrew right of way was relocated to Canyon Creek Road. As to the private way of necessity claim, Potato Patch submitted the affidavit and report of Dan McShane, a geologist who had surveyed the Potato Patch property and assessed possible access routes. McShane concluded that the slopes surrounding the Potato Patch property were unstable

[7] Nielsen also argued that Potato Patch's private way of necessity claim over Canyon Creek Road should be dismissed because the State of Washington was a necessary party, but any claim against the State would be barred because Potato Patch had already brought an action against the State for an easement by prescription and implication over Canyon Creek Road in 2010, which was dismissed on summary judgment. Kennell responded by admitting that he recognized in 2010 that he had a claim for private way of necessity over the Point Whitney Tracts, but he wanted to first obtain access over the McGrew right of way before filing an action against the State and opined that the State might be willing to sell him an easement in the future.

and road construction was "ill advised due to the geologic conditions and slope gradients." CP at 66. As a result, Canyon Creek Road was " the best and most logical access to the Potato Patch parcel." CP at 66.

The superior court granted Nielsen's motion for summary judgment. Potato Patch appeals.

ANALYSIS

A. LEGAL PRINCIPLES

We review the grant of summary judgment de novo and engage in the same inquiry as the superior court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Like the trial court, we consider all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We will uphold a grant of summary judgment only if, from all the evidence, reasonable minds could reach but one conclusion. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 410, 295 P.3d 201 (2013). We may affirm summary judgment on any basis supported by the record. *Steinbock v. Ferry County Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 485, 269 P.3d 275 (2011).

The moving party in a summary judgment motion bears the initial burden of showing the absence of a genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets this initial burden, then the inquiry shifts to the opposing party to show the existence of a genuine issue of material fact. *Id.* "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of

the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If the opposing party fails to make a showing sufficient to establish a genuine issue of material fact, then summary judgment is appropriate. *Young*, 112 Wn.2d at 225.

B. SUMMARY JUDGMENT AS TO PRIVATE WAY OF NECESSITY

Potato Patch argues that summary judgment should not have been granted on its private way of necessity claim over Canyon Creek Road because it presented evidence that Canyon Creek Road was the most feasible route to access the Potato Patch property. We disagree.

RCW 8.24.010 allows a landowner to condemn a private way of necessity over the land of another if it is necessary for the proper use and enjoyment of his or her land.[8] This statute is based on a "public policy against rendering landlocked property useless." *Brown v. McAnally*, 97 Wn.2d 360, 367, 644 P.2d 1153 (1982). While the necessity to condemn another's land need not be absolute, it must be " 'reasonably necessary under the facts of the case, as distinguished from merely convenient or advantageous.' " *Ruvalcaba*, 175 Wn.2d at 7 (quoting *Brown*, 97 Wn.2d at 367). The party seeking to condemn another's land bears the burden of proving reasonable necessity and demonstrating that the route selected is the most reasonable alternative. *Kennedy v. Martin*, 115 Wn. App. 866, 869-70, 65 P.3d 866 (2003). Once this showing is made, the burden shifts to the potential condemnee to show that a feasible alternative is more equitable. *Id.* at 870.

[8] "An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be." RCW 8.24.010.

A landowner cannot acquire a private way of necessity across State-owned lands pursuant to RCW 8.24. *Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 725, 684 P.2d 719, *review denied* 102 Wn.2d 1005 (1984). However, an existing easement held by a private party over State land is separate from the State's fee interest and is therefore subject to condemnation under RCW 8.24.[9] *Granite Beach Holdings, L.L.C. v. Dep't. of Nat. Res.*, 103 Wn. App. 186, 203, 11 P.3d 847 (2000).

A landowner cannot condemn a private way of necessity in an existing easement over State-owned land if doing so would expand the servitude placed upon the State lands. *Id.* at 203-04. In *Granite Beach Holdings*, the owner of a landlocked parcel sought to condemn joint use of an existing private easement across State-owned land. *Id.* at 194. Because the landowners sought to be added to the private easement, rather than be substituted for the easement holders, the court held that such action would increase the burden on the servient owner's interests. *Id.* at 204. The court held that increasing such burden "[could not] be done without condemning that owner's interest in whole or in part." *Id.*

Here, Potato Patch sought an order declaring a private way of necessity "over the Canyon Creek Road easement" across the Point Whitney Tracts and State-owned land. CP at 11. The Canyon Creek Road easement was appurtenant to the real property comprising the Point Whitney Tracts and limited to "ingress, egress and utilities." CP at 56. Potato Patch does not dispute that

[9] Potato Patch frames this as a "limited exception" to the general rule that a landowner cannot condemn State-owned lands. Reply Br. of Appellant at 14. We note that this is not an exception allowing a private party to condemn State-owned lands for private use. *See Weyerhaeuser*, 37 Wn. App. at 725; *Granite Beach Holdings*, 103 Wn. App. at 204. Rather, we have held that a private party may condemn another party's interest in an existing easement over State-owned land because such easement is separate from the State's fee interest. *See State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn.2d 545, 559-60, 119 P.2d 694 (1941); *Granite Beach Holdings*, 103 Wn. App. at 203.

it sought to condemn a private way of necessity in an existing easement the Point Whitney Tract owners held over the State lands. Because Potato Patch sought to be added to the Canyon Creek Road easement over State lands, rather than substituted for the easement holders, such action would increase the burden on the State's interests. This cannot be done without condemning the State's interest in whole or in part. *See Granite Beach Holdings*, 103 Wn. App. at 204.

Potato Patch argues that granting a private way of necessity in the existing easement would not "unduly expand" the number of parties using the easement. Reply Br. of Appellant at 15. However, the relevant inquiry is whether such action effects an increased burden on the servient owner's interests, not an undue burden. *Granite Beach Holdings*, 103 Wn. App. at 204. Increasing the servitude placed upon the State lands, even by just one party, constitutes an increased burden on the servient owner's interests. *See id.* Thus, Potato Patch may have provided evidence showing that Canyon Creek Road was the most feasible route to access its property, but its private condemnation action still could not achieve the access it sought without impermissibly condemning the State's interests.

Nonetheless, Potato Patch appears to argue that it should still be able to condemn only the portion of Canyon Creek Road that crosses the Point Whitney Tracts, even if it cannot access the portion of Canyon Creek Road that crosses State land. Acknowledging that such action would still render the Potato Patch property inaccessible, Potato Patch asserts that it intends to obtain access over the remainder of Canyon Creek Road if it prevails in this case. Potato Patch contends that it should be able to seek access to its landlocked property in a piecemeal fashion by securing access to different portions of Canyon Creek Road through separate negotiations or separate lawsuits.

"[T]he statute which gives a landlocked owner a way of necessity over lands of a stranger is not favored in law and thus must be construed strictly." *Brown*, 97 Wn.2d at 370. The necessity to condemn another's land must be " 'reasonably necessary under the facts of the case.' " *Ruvalcaba*, 175 Wn.2d at 7 (quoting *Brown*, 97 Wn.2d at 367). Potato Patch cannot show reasonable necessity to condemn only the portion of Canyon Creek Road in the Point Whitney Tracts when doing so would still leave its property landlocked.[10] RCW 8.24 does not allow Potato Patch to seize a property interest in another's land on the conditional hope of encumbering another stranger's land in the future.

Because Potato Patch cannot demonstrate reasonable necessity in condemning only a portion of Canyon Creek Road, and also cannot condemn the portion of Canyon Creek Road crossing State lands and possibly the 165 foot gap owned by some unknown person, summary judgment was appropriate.[11]

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[10] Potato Patch's property would remain landlocked even if Canyon Creek Road across Point Whitney Tracts is condemned because Kennells' 2010 suit against the State seeking an easement by prescription or implication over Canyon Creek Road on the State's property was dismissed on summary judgment.

[11] Potato Patch also directs argument at the specific reasoning of the superior court in granting summary judgment. Because our review is de novo, the superior court's "[f]indings of fact and conclusions of law are not necessary on summary judgment, and, if made, are superfluous." *Concerned Coupeville Citizens v. Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243, *review denied*, 118 Wn.2d 1004 (1991). Thus, we do not consider any assignment of error on this basis.

Nielsen also argues that we may affirm summary judgment based on other legal theories called to the attention of the trial court, including collateral estoppel. Potato Patch made several factual representations in response to Nielsen's collateral estoppel argument in its reply brief. Potato Patch later informed this court that one of its factual representations on this issue was incorrect and asked us to allow Potato Patch to file a corrected reply brief. We granted this motion and accepted the corrected reply brief. However, because we affirm summary judgment on other grounds, we need not address this issue further.

C. SUMMARY JUDGMENT AS TO THE LOCATION OF THE MCGREW RIGHT OF WAY

Potato Patch argues that the superior court erred in dismissing its request for a judicial determination of the location of the McGrew right of way because (1) Potato Patch produced sufficient evidence to support a reasonable inference that the McGrew right of way became Canyon Creek Road, and (2) the superior court should have made a judicial determination as to the precise location of the McGrew right of way. We disagree.

1. Evidence the McGrew Right of Way Became Canyon Creek Road

In determining the original parties' intent in an easement, we consider the instrument as a whole. *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 720, 238 P.3d 1217 (2010), *review denied*, 170 Wn.2d 1030 (2011). We will not consider extrinsic evidence of intent if the plain language of the instrument is unambiguous. *Id.* If an ambiguity exists in the instrument, then we may consider extrinsic evidence of the parties' intent, including the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' past conduct. *Id.*

Here, the only instrument Potato Patch provided to support the alleged creation of the Canyon Creek Road easement was the 1990 settlement agreement between the Lorenzens and the previous landowners in the area. Given that the County was not a party to this agreement, it does not show the County's intent to open the McGrew right of way and locate it on Canyon Creek Road.

In fact, the only evidence of the County's intent regarding the McGrew right of way was through Brandt's declaration, which Nielsen submitted in moving for summary judgment. Brandt explained that the McGrew right of way was presently landlocked and that the County had "no

intention of building a road on the McGrew [right of way] now or in the future." CP at 99. Therefore, Nielsen met his initial burden of showing an absence of a genuine issue of material fact as to whether Canyon Creek Road was the McGrew right of way.

Nonetheless, Potato Patch contends that it presented sufficient evidence for a reasonable fact finder to conclude that the County intended the McGrew right of way to become Canyon Creek Road. Potato Patch relies on the undisputed evidence that (1) the deed conveying the McGrew right of way failed to specify its precise location, (2) the County approved the Point Whitney Tracts plat subdivision, which did not identify the McGrew right of way, and (3) an access road could not be practicably built on the eastern boundary of the Point Whitney Tracts due to a steep ravine.

"Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Dep't. of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). The 1943 deed conveying the McGrew right of way to the County stated that the McGrew right of way would begin at the "point where present county road enters their property" and "follow the eastern boundary as near as possible except where natural obstacles prevent." CP at 48. Potato Patch did not provide any evidence as to where the "present county road" entered the property in 1943, nor did Potato Patch provide any evidence as to what constituted "as near as possible" to the eastern boundary of the Point Whitney Tracts in 1943. When deposed in 2016, Kennell stated that he did not know what point the 1943 deed referred to when it stated " 'from point where present county road enters their property.' " CP at 141.

A reasonable fact finder could not conclude that the County intended Canyon Creek Road to serve as the McGrew right of way when Potato Patch did not provide any evidence of such intent and did not provide any evidence showing what points the 1943 deed referred to when describing the McGrew right of way. And evidence that a road could not be built on the most eastern border of the Point Whitney Tracts could not allow a fact finder to speculate that Canyon Creek Road must be the 1943 McGrew right of way. There is no basis to infer that the County intended to open the McGrew right of way by approving a survey plat, prepared at the request of a third party, which did not identify the McGrew right of way.

Viewing the facts in the light most favorable to Potato Patch, they do not support a reasonable inference that the County intended for Canyon Creek Road to be the McGrew right of way. Therefore, Potato Patch fails to show the existence of a genuine issue of material fact, and summary judgment was appropriate on this basis.

2. Judicial Determination as to the Location of the McGrew Right of Way

Potato Patch contends that the superior court had a duty under the Uniform Declaratory Judgment Act to determine the precise location of the McGrew right of way on the Point Whitney Tracts. According to Potato Patch, a justiciable controversy existed between itself and Nielsen as to the location of the McGrew right of way. We disagree.

The Uniform Declaratory Judgments Act allows courts "to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. A party invoking the jurisdiction of the court under the Uniform Declaratory Judgment Act must present a justiciable controversy. *Kitsap County v. Kitsap County Corr. Officers Guild, Inc.*, 179 Wn. App. 987, 994, 320 P.3d 70 (2014). A justiciable controversy is:

> "(1) . . . an actual, present[,] and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract[,] or academic, and (4) a judicial determination of which will be final and conclusive."

Id. (alteration in original) (quoting *City of Longview v. Wallin*, 174 Wn. App. 763, 777-78, 301 P.3d 45, *review denied*, 178 Wn.2d 1020 (2013)).

Potato Patch argues that a justiciable controversy existed between itself and Nielsen because the parties disputed the location of the McGrew right of way. However, the record shows that the only dispute between Nielsen and Potato Patch as to the location of the McGrew right of way was whether the McGrew right of way was located on Canyon Creek Road. Nielsen never disputed that the McGrew right of way still existed somewhere on the Point Whitney Tracts. As explained above, the superior court did not err in dismissing Potato Patch's claim that Canyon Creek Road was the McGrew right of way. Potato Patch failed to present any evidence of the precise location of the McGrew right of way. The only evidence before the superior court was that the right of way was located somewhere on the Point Whitney Tracts with a 165 foot gap owned by some unknown person.[12] CP at 48, 89-99. Therefore, we hold that Potato Patch's claim on this basis fails.

[12] To this point, Potato Patch argues that the trial court should have determined the location of the easement by applying the factors outlined by the Wisconsin Court of Appeals in *Spencer v. Kosir*, 2007 WI App 135, ¶ 13, 301 Wis.2d 521, 529, 733 N.W.2d 921. However, Potato Patch fails to explain why we should adopt the reasoning of another jurisdiction and impose such requirement on the superior court. And Potato Patch fails to present any authority showing that Washington courts share the Wisconsin courts' "inherent power to affirmatively and specifically determine [an easement's] location, after considering the rights and interests of both parties." *Spencer*, 301 Wis.2d at 529.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, A.C.J.

We concur:

Bjorgen, J.

Melnick, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

February 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

POTATO PATCH LLC, JOHN K. KENNEL MANAGING MEMBER, a Washington Limited Liability Company, Appellant, v. DAVID GREER NIELSEN and RITA NIELSON, husband and wife; and EDWARD LUCKE and JOAN LUCKE, husband and wife; and JAMES STOVER and BONNIE STOVER, husband and wife; and WILLIAM TINNESAND and DEBORAH TINNESAND, husband and wife; and PENELOPE RADEBAUGH, a married woman as her separate estate; and JENNIE MOWATT, a single woman, Respondents.	No. 49988-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, John Kennell, filed a motion for reconsideration of this court's unpublished opinion filed on November 6, 2018. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Lee, Melnick, Bjorgen

LEE, A.C.J.

B 1

Appendix C

B

G.F. McGrew to County of Jefferson - Quit claim Deed.

No. 103323

The grantor herein G F. McGrew for the consideration of One Dollars and also of benefits to accrue to him by reason of laying out and establishing a public road through his property, and which is hereafter described, conveys, releases and quit claims to the County of Jefferson, State of Washington, for use of the public forever, as a public road and highway, all interest in the following described real estate, viz:

A right of way for road, from point where present county road enters their property, thence in a generally northerly direction to the north boundary of their property. This road to follow the eastern boundary as near as possible except where natural obstacles prevent, all in SW¼ NW¼ Sec 7, Twp 26N, R 1 W., W.M. situated in the County of Jefferson, State of Washington.

Dated this 10th day of April, A.D. 1943.

G.F. McGrew

Witnesses
G.A. Whitehead)
Archie L. Brown)

State of Washington)
ss
County of Jefferson)

On the 10th day of April, 1943, before me, the undersigned, personally came G.F. McGrew to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year first above written.

Auditor's SEAL

P.M. Richardson, Jefferson County Auditor, residing at Port Townsend.

Filed for record at request of County Engineer Dec 15, 1944, at 9:30 A.M. and recorded in Volume 1 of Road Waivers, Page 642, records of Jefferson County.

P.M. Richardson, County Auditor
By Marion N. Bruzs, Deputy

EXHIBIT A

C 1

[illegible] establishing a public road through his property, and which is hereafter described, conveys, releases and quit claims to the County of Jefferson, State of Washington, for use of the public forever, as a public road and highway, all interest in the following described real estate, viz:

A right of way for road, from point where present county road enters their property, thence in a generally northerly direction to the north boundary of their property. This road to follow the eastern boundary as near as possible except where natural obstacles prevent, all in SW¼ NW¼ Sec 7, Twp 26N, R 1 W., W.M. situated in he County of Jefferson, State of Washington.

Dated this 10th day of April, A.D. 1943.

G.F. McGrew

Witnesses
G.A. Whitehead)
Archie L. Brown)

State of Washington)ss
County of Jefferson)

On the 10th day of April, 1943, before me, the undersigned, personally came G.F. McGrew to me known to be the individual described in and who executed the within instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year first above written.

P.M. Richardson, Jefferson County
Auditor, residing at Port Townsend.

Auditor's SEAL

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Filed for record at request of County Engineer Dec 15, 1944, at 9:30 A.M. and recorded in Volume 1 of Road Waivers, Page 642, records of Jefferson County.

P.M. Richardson, County Auditor
By Marion N. Bruzas, Deputy
Recorded O Indexed M Proof Read R.

The above is a true and correct copy of the G.F. McGrew deed to Jefferson County as recorded in Volume 1 of Road Waivers page 642.
Signed:

Auditor of Jefferson County

C 2

QUIT-CLAIM DEED

The grantor...s...herein ...G. F. McGrew...

~~in SW¼ NW¼ Sec 7, Tp 26 N. R 1W W. Mer.~~

for the consideration of...One... Dollars and also of benefits to accrue to...him...by reason of laying out and establishing a public road through...this...property, and which is hereafter described, convey...s, release...s and quit-claim...s to the County of...Jefferson...State of Washington, for use of the Public forever, as a public road and highway, all interest in the following described real estate, viz:

A right of way for road, from point where present county road enters their property, thence in a generally northerly direction to the north boundary of their property. This road to follow the eastern boundary as nearas possible except where natural obstacles prevent, all in SW¼ NW¼ Sec. 7, Tp. 26 N., R. 1W., W. Mer.,

situated in the County of...Jefferson... State of Washington.

Dated this...10th...day of...April... A. D. 1943

WITNESSES:

Gawthutread

Archie L Bailey

G. F. McGrew

C 3

Appendix D

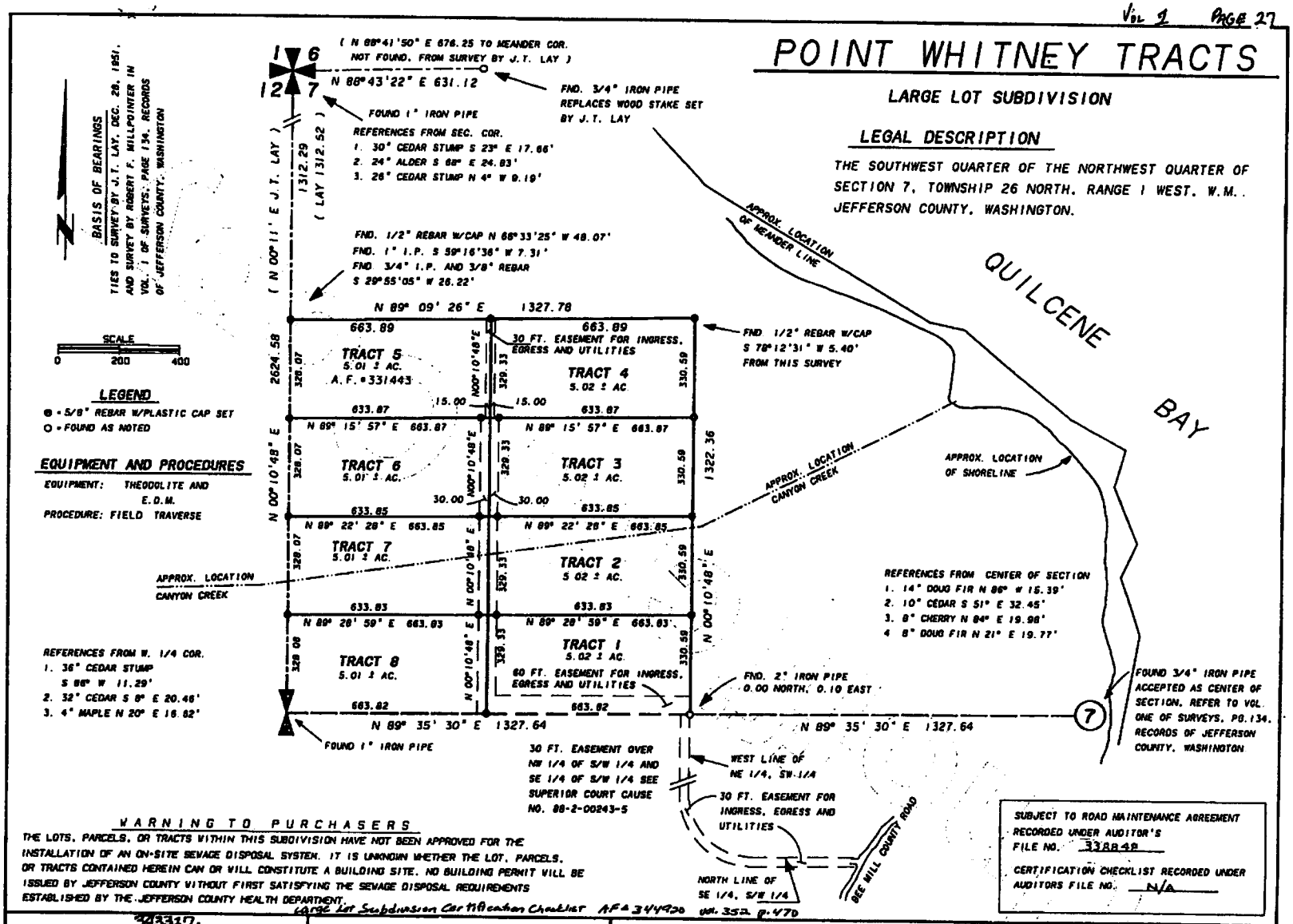
Vol 1 Page 27

POINT WHITNEY TRACTS

LARGE LOT SUBDIVISION

LEGAL DESCRIPTION

THE SOUTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 7, TOWNSHIP 26 NORTH, RANGE 1 WEST, W.M., JEFFERSON COUNTY, WASHINGTON.



WARNING TO PURCHASERS

THE LOTS, PARCELS, OR TRACTS WITHIN THIS SUBDIVISION HAVE NOT BEEN APPROVED FOR THE INSTALLATION OF AN ON-SITE SEWAGE DISPOSAL SYSTEM. IT IS UNKNOWN WHETHER THE LOT, PARCELS, OR TRACTS CONTAINED HEREIN CAN OR WILL CONSTITUTE A BUILDING SITE. NO BUILDING PERMIT WILL BE ISSUED BY JEFFERSON COUNTY WITHOUT FIRST SATISFYING THE SEWAGE DISPOSAL REQUIREMENTS ESTABLISHED BY THE JEFFERSON COUNTY HEALTH DEPARTMENT.

LARGE Lot Subdivision Certification Checklist AF# 344930 Vol. 352 p. 470

SUBJECT TO ROAD MAINTENANCE AGREEMENT RECORDED UNDER AUDITOR'S FILE NO. 338848

CERTIFICATION CHECKLIST RECORDED UNDER AUDITORS FILE NO. N/A

AUDITOR'S CERTIFICATE

343317.

Filed for record this 4th day of Sept 1991 at 8:44 A.M. in book 1 of Surveys at page 27, at the request of MERLE B. LINDGREN.

Deputy County Auditor

SURVEYORS CERTIFICATE

This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of MARVIN LORENZEN in FEB., 1991

Certificate No. 12309 Merle B Lindgren

SURVEY FOR
MARVIN LORENZEN
IN
SW 1/4, NW 1/4
SEC. 7, T 26 N., R 1 W., W.M.

MERLE B. LINDGREN
PROFESSIONAL LAND SURVEYOR
P.O. BOX 326 (206) 877-5647
HOODSPORT, WASHINGTON 98548

DWN BY BLC	FEB. 1991	JOB NO. 91-02
CHKD BY MBL	SCALE 1" = 200'	SHEET ONE OF ONE

L.S. Vol 1 Pg 27

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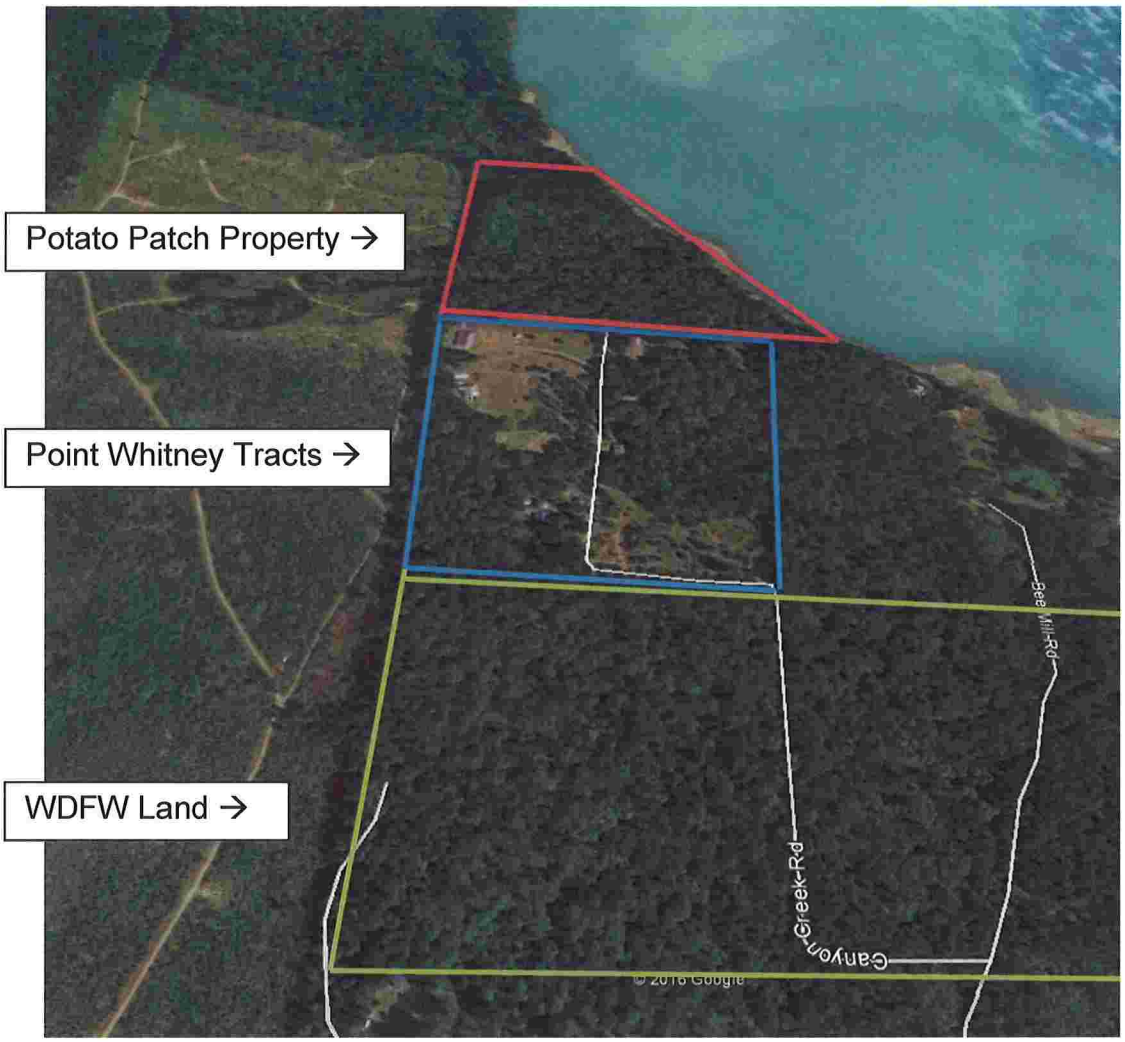
D 1

Appendix E

Defendants-Respondents submitted this color copy of the map depicting Canyon Creek Road as part of their motion for summary judgment in the trial court. In compiling and transmitting the Clerk's Papers, the superior-court clerk produced a black-and-white copy of this map as part of the record on appeal. Appellant Potato Patch used the color copy of this map as an illustrative exhibit at the oral argument before Division Two. Potato Patch reproduces a color copy of this map as Appendix E to its Petition for Review for the Court's convenience.

undeveloped land, as depicted by the aerial photo below. With the exception of some logging to the west (left) and the creation of the Point Whitney Tracts, this area has remained largely unchanged since 1990.[2]



C. The Private Canyon Creek Road Was Created Exclusively for the Benefit of the Point Whitney Tracts

In 1990, the owner of what is now the Point Whitney Tracts entered into a stipulation with a neighboring land owner which provided the Point Whitney Tracts, and only the Point Whitney Tracts, a private easement over the land highlighted in green above. The easement held by the Point Whitney Tracts is restricted to the

[2] Declaration of David Greer Nielsen ("Nielsen Decl.") at ¶ 2.

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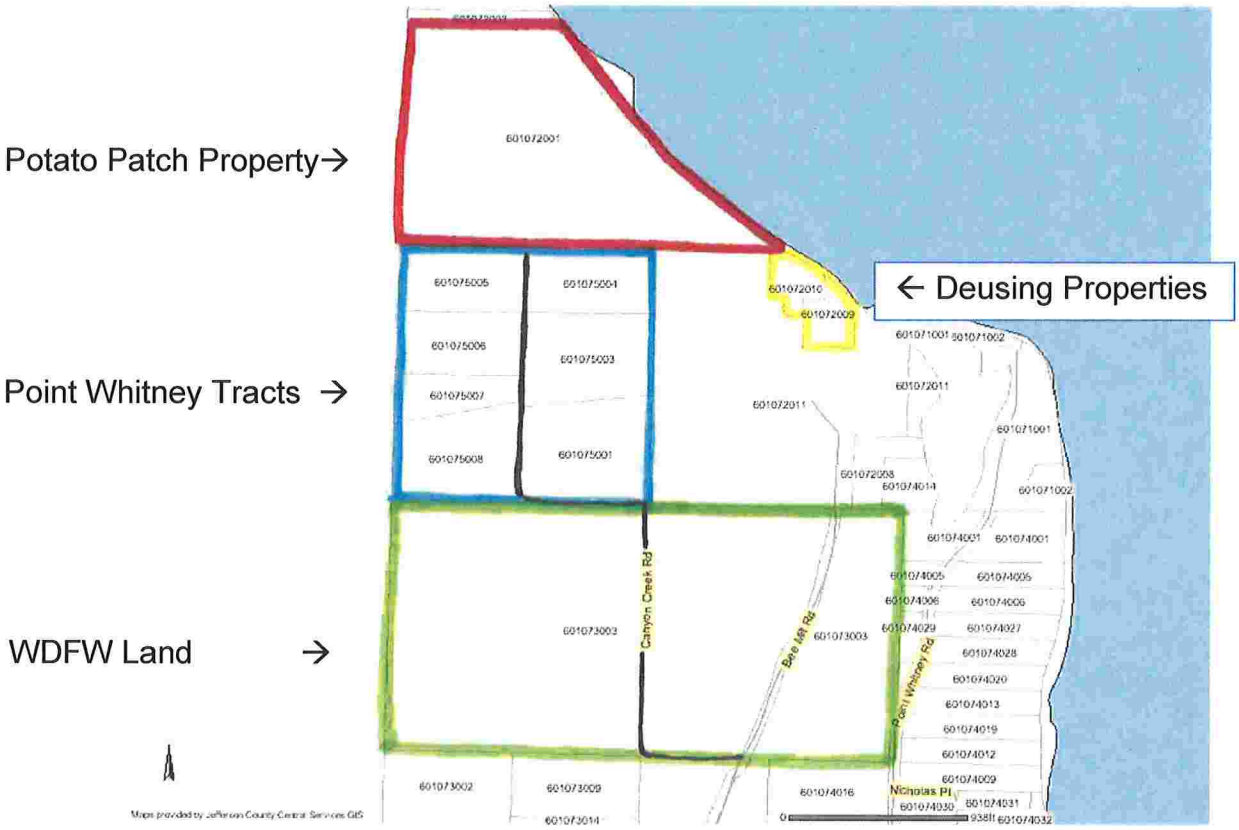
5500 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WA 98104-7096
(206) 682-7090 TEL
(206) 625-9534 FAX

Appendix F

Defendants-Respondents submitted this color copy of the map depicting the location of the Duesing properties in relation to the potato patch and the Point Whitney Tracts as part of their motion for summary judgment in the trial court. In compiling and transmitting the Clerk's Papers, the superior-court clerk produced a black-and-white copy of this map as part of the record on appeal. Appellant Potato Patch used the color copy of this map as an illustrative exhibit at the oral argument before Division Two. Potato Patch reproduces a color copy of this map as Appendix F to its Petition for Review for the Court's convenience.

Property nor the Duesing Properties had any legal road access at the time of Potato Patch's purchase, a fact known to Potato Patch at the time of purchase. Potato Patch purchased these properties for $935,000.[7] As of 2010, Potato Patch and its managing member collectively owned interests in five properties in close proximity to the Point Whitney Tracts.[8] A parcel view of the properties relevant to this dispute is as follows:



Potato Patch and its managing member John Kennell ("Kennell") also have ownership interests in two additional properties north of the Potato Patch Property (not depicted).[9] Historically, Potato Patch and Kennell have accessed these

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[7] Reed Decl. at ¶ 3, Exhibit B.

[8] Kennell Deposition at pp. 10-13 (discussing various properties owned by Kennell and Potato Patch).

[9] Kennell Deposition at p. 11, ll. 7-11.

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CARNEY BADLEY SPELLMAN

March 21, 2019 - 1:33 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	John K. Kennell, as Managing Member of Potato Patch, Appellant v. David Nielsen, et al, Respondents (499886)

The following documents have been uploaded:

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