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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 301290-III

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

89348-9

MIKE WALCH and MARCIA WALCH,
husband and wife,

Petitioners

v.

KERRY A. CLARK and PATRICIA L. CLARK, husband and wife;
W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company;
ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN,
husband and wife,

Respondents.

PETITION FOR REVIEW BY
THE SUPREME COURT OF WASHINGTON

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II. IDENTITY OF PETITIONERS

Petitioners Mike Walch and Marcia Walch, husband and wife, hereinafter Walch or Walches, are the Appellants in the Court of Appeals and Plaintiffs at trial.

III. COURT OF APPEALS DECISION

The decision at issue is the unpublished opinion, *Walch et al. v. Clark et al.*, No. 30123-III, filed July 23, 2013.

IV. ISSUES PRESENTED FOR REVIEW

1. Does the Decision of the Appellate Court conflict with the right of private condemnation, pursuant to Statute and the Washington State Constitution, which effectuates the overriding public policy against rendering landlocked property useless?

2. Does the Decision of the Appellate Court conflict with an existing Federal statute and a decision of the Washington Supreme Court which held that a party can never obtain a prescriptive right to cross the railroad land?

3. Does the Appellate Court's interpretation of a "reasonable necessity" involve a substantial public interest because it imposed an

unreasonable and costly burden on the Walches to establish definitively the future use of the property?

4. Does the Appellate Court's interpretation of a "reasonable necessity" involve a substantial public interest because it requires landowners without legal access to trespass on neighbors' lands and be caught and barred before a statutory easement of necessity can be sought?

V. STATEMENT OF THE CASE

Appellants Walch are the owners of Rainier Skyline Excavators, Inc. (RSE), a company that designs, builds and delivers portable hydraulic track drive skyline excavators, buckets, teeth and accessory equipment (Trial Court Finding of Fact 7 & 8; Ex. 40). These systems incorporate redesigned cable logging systems to span areas and are used to harvest gravel and sand below water tables (RP Vol. I, p. 10; Ex. 40). In 2000, the Walches became interested in the property in Cle Elum, Washington because it had a large pond (Dalle pond) on the property; the Walches intended to use the land to demonstrate, display and sell RSE's machinery as well as to manufacture excavators on their land (Finding of Fact 8; RP Vol. II, pp. 19 & 21). Many components of this equipment are transported on extra-long lowboy trailers, called super-loads. These super-loads can be

up to 165 feet in length and can carry several hundred thousand pounds (Finding of Fact 9). The Dalle pond is an artificial pond created by the removal of gravel during the development of Interstate 90 in the 1960's (CP p. 8).

On May 12, 2004, the Walches purchased the property. Their Real Estate Contract (Ex. 1) identified access to the property by way of an existing easement over the property to the East of the Walches' land, then through the Burlington Northern & Santa Fe Railroad (BNSF) corridor "so long as the railroad shall allow," then connecting to Owens Road, a private road (RP Vol. I, p. 126; Ex. 54/Appendix A; & Ex. 45/Appendix B). The grantors owned no interest in Owens Road. At Owens Road the access proceeds North through the BNSF corridor, across a BNSF private railroad crossing to the North Edge of the BNSF corridor where Owens Road becomes a public right of way known as First Street owned by the City of Cle Elum (RP Vol. I, pp. 125-26; Ex. 54/Appendix A; Ex. 45/Appendix B; & Ex. 57). The City of Cle Elum does have a private agreement with the Owens Family to use Owens Road South of the BNSF railroad crossing from the North Line of Section 36 to the City of Cle Elum's sewage treatment plant (RP Vol. I, p. 126; Ex. 58). However, no written agreement exists as to the railroad corridor and crossing granting permission for the City or any landowner South of the crossing to use the

railroad corridor and crossing. The parties stipulated that the Walches' legal access does not include the railroad corridor two hundred feet (200') North and South of the centerline and that no permits exist for the Walches or the City of Cle Elum to cross the BNSF Railroad corridor or private crossing (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9; Ex. 54/Appendix A; & Ex. 45/Appendix B). An alternate route takes the Walches to the privately held portion of Owens Road, but gives the Walches no legal right to use that road (Ex. 54/Appendix A; & Ex. 45/Appendix B) and it still requires the Walches to use the railroad corridor and crossing. The Walches did attempt to obtain a railroad crossing and access directly to the North of their property, but BNSF refused to consider any additional unguarded railroad crossings (RP Vol. II, p. 46).

The property of each Respondent lies to the West of the Walch property (Exs. 45, 52; Ex. 54/Appendix A; & Ex. 45/Appendix B), in Swiftwater Business Park. All property owned by the parties is North of Interstate 90 and South of the BNSF railroad tracks and is zoned by the City of Cle Elum as being within its Industrial District (Cle Elum Municipal Code, Chapter 17.36.)

On August 9, 2010, the Walches filed a Complaint To Establish Easement From Prior Use And/Or Prescription; Or Alternatively An

Easement By Necessity Pursuant to RCW 8.24.010 et. seq. (CP 1 – 63). On January 14, 2011, pursuant to a stipulation by all parties, the Court entered its Order dismissing the Walches' claim for an easement from prior use, with prejudice. On February 8, 2011, the Trial Court entered its order for partial summary judgment dismissing, with prejudice, the Walches' claims for prescriptive easements over and across the lands of Clark, Clark LLC and Folkman. The statutory claim proceeded to bench trial.

The Walches sought a thirty (30) foot easement by necessity, asserting their property was landlocked because they have no legal or condemnable right to cross the railroad right of way, at the Owens Road crossing or otherwise, and because the Easterly access route was unsuitable for Walches' heavy excavator equipment, including commercial extra long lowboy traffic: the super-load lowboy hauling equipment would be forced to traverse an elevated railroad crossing, risking the danger that it would get "high-centered" and caught on the tracks (RP Vol. I, p. 37; RP Vol. II, p. 44; 48-49). Additional physical obstacles included 1) the inability to negotiate the turns at Owens Road at the Dalle intersection; 2) the inability to negotiate turns at the intersection at First Street and Owens Road; 3) the inadequate width of Owens Road; and 4) the grade level at the Owens Road crossing. Each of the barriers

renders it impossible for the Walches to drive the RSE super-load lowboys (some as long as 165 feet) to and from their property. As a result of these legal and physical constraints, it is virtually impossible to use the Easterly Dalle Road access, necessitating an alternate right-of-way across the Clark and Folkman lands (RP Vol. I, pp. 42-44 & 56; Vol. II, pp. 47, 49, 73; Exs. 46 & 47).

In addition, the statutory easement by necessity was pursued because the Walches have no legal access to their property and cannot get their access insured (Ex. 9); the Walches do not have a revocable BNSF permitted easement for access to their property, and BNSF was not willing to grant a revocable easement along its corridor (RP Vol. II, pp. 4-5; & Ex. 9). Further, the Walches cannot get bank financing to construct their manufacturing facility because of this condition of the title (RP Vol. II, p. 10). The Walches were unable to obtain direct access over the railroad tracks and corridor directly to the North of their property (RP Vol. II, p. 46). They did file an Application for Purchase of Railroad Land (Ex. 114) on October 27, 2010, but BNSF has taken no action on that application (RP Vol. II, p. 40). The Walches have not sought a revocable permit to cross the railroad at the Owens Road Private Crossing (RP Vol. II, p. 43).

On May 24, 2011, the Trial Court issued its Memorandum Decision (CP 246-51) and on July 11, 2011, it entered Findings of Fact

and Conclusions of Law (CP 445 – 454). Judgment was entered dismissing Walches’ claim of an easement by necessity under RCW 8.24.010, without prejudice, and granting each Defendants’ counterclaim to quiet title in their respective properties (CP 461-65; 466-69). The court also awarded Clark, Clark LLC and Folkman their attorney fees and costs (CP 455-57; 458-60), failing to segregate the common law fees and costs from the statutory fees and costs allowed under the private condemnation statute. Reconsideration was denied on July 21, 2011 and Notice of Appeal was filed on August 4, 2011. On July 23, 2013, the Court of Appeals, Division III, issued an unpublished decision affirming the denial of an easement by necessity and reversing and remanding the award of common law attorney fees and costs to the Respondents. (Ex. 54/Appendix A; & Ex. 45/Appendix B).

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Decision of the Appellate Court Conflicts with the Right of Private Condemnation, Pursuant to Statute and the Washington State Constitution, which Effectuates the Overriding Public Policy Against Rendering Landlocked Property Useless.

Const. Art. 1 § 16 (amend. 9) provides: “Private property shall not be taken for private use, except for private ways of necessity.” This express provision reserves for private citizens the power of eminent

domain. See generally *State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al.*, 77 Wash. 585, 137 P. 994 (1914).

In its current form, RCW 8.24.010 is a broad grant of eminent domain power to private citizens for private use:

[a]n 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 the proper use and enjoyment to have and maintain a private way of necessity may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity.... The term 'private way of necessity,' as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads... over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

Rendering title unmarketable and forever sealing valuable resources of the State does not serve the public or private interest expressed in the Washington Const. Art. 1, § 16 (amend. 9) and the private condemnation statute, RCW 8.24.010.

The effect of the Appellate Court's decision basically renders the Walch property useless. In essence, because there is a remote and speculative chance that the City of Cle Elum may not grant permits for the Walches' intended use of the property, all legal access has been denied. And, because Walches' permissive use of the railroad corridor has not been actually terminated or physically barred, they cannot make any

beneficial use of their property. For example, they cannot secure financing to develop their land without having an insurable access (RP Vol. II, p. 10). Landlocked property is greatly discouraged in Washington. See Const. Art. 1, § 16 (amend. 9); RCW 8.24.010; *State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al.*, 77 Wash. 585, 137 P. 994 (1914); and *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965) (discussing public policy against rendering landlocked property useless). It is in the interest of the public welfare to fully utilize the resources of this state. See *Mountain Timber Co.*, 77 Wash. at 588-89. Indeed, to hold otherwise would render property, natural resources, and the public benefits of both, useless.

B. The Decision of the Appellate Court Conflicts with an Existing Decision of the Washington Supreme Court Stating That a Party Seeking Private Condemnation is not Precluded From Establishing a Reasonable Necessity Merely Because the Landowner has Alternative Permissive Access.

The Appellate Court erred concluding that the Walches' property was not landlocked because existing access, used without permission or permit, was evidence that a necessity did not exist in the proposed private condemnation action (Opinion at 7). Basically, both the Trial Court and the Court of Appeals imposed a precondition that the Walches be denied use of the private railroad crossing or corridor as a prerequisite to

establishing necessity. The proof was clear that Walch lacked legal access to their property, and the parties stipulated that there were neither public or private permits to traverse the railroad corridor or to use the railroad crossing (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1 & 9; Ex. 54/Appendix A; & Ex. 45/Appendix B). The Walches' Dalle Road easement runs over the railroad corridor without written permission and traverses the railroad crossing without permit. And, although the Walches have an alternative, contingent easement route should the Dalle Road section in the corridor be withdrawn, this alternative does not resolve the issue. That route ends before it connects to Owens Road (Ex 54/Appendix A; & Ex. 45/Appendix B) and, at the point of intended connection, Owens Road is a private road which the Walches have no legal right to use (RP Vol. I, p. 126). Even if Owens Road were a legal route for the Walches, it still bisects the railroad corridor and necessitates the trespassory use of the railroad crossing (Ex. 54/Appendix A; & Ex. 45/Appendix B).

Despite these facts, the Trial Court concluded, and the Appellate Court affirmed, that the Walches' property was not landlocked, and necessity had not been established, because their trespassory access has not been denied or withdrawn (Conclusion of Law 1, 2, 3). Such a requirement does not exist. In fact, in *Brown v. McAnally*, 97 Wn.2d 360, 367-68, 644 P.2d 1153 (1982), this Court stated:

We have long recognized that if one is otherwise entitled to a private way of necessity it may be condemned where an existing private way is already established. *State ex rel. Polson Logging Co. v. Superior Court*¹, *supra*; *State ex rel. Colyn v. Superior Court*, 132 Wash. 411, 232 P. 282 (1925). *See also State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson*, 25 Wn.2d 499, 504, 171 P.2d 189 (1946). The single fact that a potential condemner may previously have leased or otherwise contracted with the condemnees for an easement does not in and of itself prevent the potential condemner from condemning a private way of necessity as a joint use. *State ex rel. Polson Logging Co. v. Superior Court, supra* at 568 (potential condemner sought to condemn a private way of necessity over an easement already leased to the condemner). *Similarly under this approach, a potential condemner should not be prevented from condemning a private way of necessity merely because the condemner may enjoy the permissive user of a "way"*.

(Italics added). This clearly indicates that a denial or withdrawal of permission is not a prerequisite to a finding of necessity.

C. The Decision of the Appellate Court Conflicts with an Existing Federal Statute and a Decision of the Washington Supreme Court Holding that a Party can Never Obtain a Prescriptive Right to Cross the Railroad Land.

The Walches have no legal access to their land. The Trial and Appellate Courts below faulted the Walches for not seeking permission to

¹ See full case reference: *State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn.2d 545, 562-63, 119 P.2d 694 (1941)

cross the railroad corridor to get to a public road. Even if such permission were to be granted, the Walches could never be confident that such permission would not be revoked, nor could they ever establish a legal access over the railroad by prescription. *State of Washington v. M.C. Ballard*, 156 Wash. 530, 287 P. 27 (1930). In that decision, this Court applied an act of Congress, passed in 1904 (33 U.S. Stat. at Large, p. 538), which declared:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any Act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained."

156 Wash. at 533. BNSR Railroad is the successor to the Northern Pacific Railroad. Before this law, the Supreme Court of the United States had held that no portion of the railroad right of way could be alienated, and that no title thereto could be acquired under the statute of limitations. *Northern Pacific R. Co. v. Townsend*, 190 U.S. 267, 47 L. Ed. 1044, 23 S.

Ct. 671. After the enactment of the 1904 statute, the United States Supreme Court held that the act of Congress confirmed titles acquired within the outer one hundred feet of the two-hundred-foot right of way existing on each side of the center line of the railroad, whether acquired by grant or by adverse possession; however, any title acquired by adverse possession must have ripened into a complete title by such adverse holding *prior* to the enactment of the act of 1904, and *that only such titles by adverse possession as had become fully vested prior to that time were confirmed by the act.* 156 Wash. at 533 (citing *Northern Pacific R. Co. v. Ely*, 197 U.S. 1 (1905) and *Northern Pacific R. Co. v. Concannon*, 239 U.S. 382 (1915)).

Had the Walches' alternate route encompassed only private land it might have been reasonable to require them to take legal or informal steps to establish that route. However, the reasonableness of their necessity was shown by the fact that they could *never* secure a permanent, vested legal right to traverse the railroad property. The Appellate Court erred in concluding a reasonable necessity had not been shown due to the Walches' failure to attempt such a futile act or to seek road improvements over a road they could never legally acquire a permanent right to use (Opinion at 7).

D. The Trial and Appellate Courts' Interpretation of a "Reasonable Necessity" Involves a Substantial Public Interest Because it Imposed an Unreasonable and Costly Burden on the Walches to Establish Definitively the Future use of their Property.

According to Matt Morton, City Administrator for Cle Elum, the Walches' intended use of the property to manufacture and display the portable skyline excavator is permitted within the Industrial District, as defined by Chapter 17.36 of the Cle Elum Municipal Code (RP RP Vol. I, p. 72; Ex. 43 & Ex. 106; *see also* Testimony of Mike Walch, RP Vol. II, pp. 28-29). Morton indicated that it was premature to give an opinion as to whether the use would be a conditional use, and that any permit application would have to be reviewed in light of the Critical Area Ordinance (RP Vol. I, pp. 90-92; Ex. 107)². The Appellate Court noted that Morton testified that no permit applications had been filed by the Walches. Based on this, the Appellate Court concluded that the Walches did not establish a reasonable necessity because they had no guarantee that a future use of their property would include situating the RSE manufacturing business on the property (Opinion at 8-9). This

² That ordinance expressly contains a "reasonable use" exception regarding road setback requirements which would have to be invoked no matter what use the Walches were to make of the property, because the land has laid dormant beyond the one-year grandfathering clause (RP Vol. I, pp. 92-93; & Ex. 107). Under the lower court's logic, *any* use of the property whatsoever would be speculative because an exception is not guaranteed.

“guarantee” exceeds the standards required to establish a reasonable necessity, and it ignores the ministerial nature of the permitting process. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998); and *State ex rel. Klappa v. Enumclaw*, 73 Wn.2d 451, 439 P.2d 246 (1968). The court in *Mission Springs, Inc.*, further explained that a building *or use permit* must issue as a matter of right upon compliance with an ordinance. The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals owning affected property to questions of policy in administrative matters would be unconstitutional. As simply put in *Mission Springs, Inc.*, neither a grading permit, building permit, *nor any other ministerial permit* may be withheld at the discretion of a local official to allow time to undertake a further study or for any other such reason. The court in *Enumclaw* also stated that even where discretion is involved in determining compliance with a local code, a court has the

power to require the permit to be issued conditionally, and to further require the officials to perform their discretionary function upon receipt of the applicant's plans and specifications.

In the instant case, there was testimony to the effect that the land use permit that the Walches would need for their planned business was in the nature of a conditional use permit under a zoning ordinance (RP Vol. I, p. 90). Such a permit comes within the principles set forth above. A conditional use is a use that is not expressly permitted or prohibited by the zoning code and that is allowed when specific and special conditions are imposed. *Kelly v. Chelan County*, 157 Wn. App. 417, 237 P.3d 346 (2010).

Here, there is a barrier to the Walches' ability to obtain the necessary permits: they cannot obtain financing to conduct the engineering studies and pursue the permit process because they do not have legal, insurable access to their land (RP Vol. II, p. 10). The Court below erred by concluding that the Walches could not establish a reasonable necessity to condemn a private way of necessity because their intended use was speculative (Opinion at 7). The Appellate Court conceded that there was no legal impediment to the Walches' approach of seeking access before developing the property (Opinion at 8). Nonetheless it imposed an unreasonable burden on the Walches to establish a guarantee that they will

be permitted to engage in the proposed use of the property³. No land use permit is ever “guaranteed” but Walches may well be able to make it the ministerial, nondiscretionary duty of the appropriate officials to issue necessary permits if they comply with applicable requirements. That is more than enough to make their proposed use of the property a viable potential use, not a merely speculative one, requiring the kind of access to the property which they seek in this action.

The Walches’ intended use is entirely consistent with the allowed uses within the Industrial District: the manufacture and demonstration of RSE machinery and equipment. Under the private condemnation statute, a landowner is entitled to the beneficial uses of the land. The only requirement is that the owner demonstrates a reasonable need for the easement for the use and enjoyment of their property. *Hellberg v. Coffin Sheep Co.* 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965); and *Kennedy v. Martin*, 115 Wn. App. 866, 63 P. 3d 866 (2003). *Nothing in the statute requires that the use be restricted to presently existing uses.* In fact, such a requirement is counter to the interest of the public welfare to fully utilize

³ Although the Trial Court, in its Findings of Fact No. 14 referenced the critical areas ordinance in light of the Dalle ponds which Plaintiffs described as the Dalle Wildlife and Fish Propagation Ponds, it erroneously overlooked the testimony of Mike Walch that his equipment is used in other pit ponds that are stocked by the Fisheries Department and that in his experience, it is easy to get the permits from the Department of Ecology (RP Vol. II, pp. 11-13).

the resources of this state. *See Mountain Timber Co., supra*, 77 Wash. at 588-89.

The fact that the Walches had not applied for permits and conducted engineering studies because they lacked legal access to their land was not a fact justifying a finding that no reasonable necessity existed. Landowners should not be subject to such an unreasonable and costly burden in order to gain legal access to their land.

E. The Appellate Court's Interpretation of a "Reasonable Necessity" Involves a Substantial Public Interest Because it Requires Landowners Without Legal Access to Trespass on Neighbor's Lands and be Caught and Barred Before a Statutory Easement if Necessity can be Sought.

The Walches' grantor never had title to these lands and therefore could not convey an easement to the Walches' property. The Appellate Court concluded that the Walches' property was not landlocked, despite the fact that the only access available to the Walches required them to trespass on the railroad corridor, a private road (Owens Road) and an unpermitted railroad crossing. Such a conclusion involves a substantial public interest because it essentially requires one owning landlocked property to violate Washington law and be caught violating the law and

barred from use before seeking relief under the private condemnation statute.

Washington has a long tradition of protecting private property interests from unwanted intrusions. There are both criminal statutes prohibiting trespass as well as common law definitions of the offense. Prior to statehood, Washington allowed individuals to exclude others from their property. See, e.g., Laws of 1869, § 64, p. 212; Laws of 1873, § 67, p. 195. In the intervening years, the law has not changed in that regard. *State v. Johnson*, 75 Wn. App. 692, 879 P.2d 984 (1994), *review denied*, 126 Wn.2d 1004, 891 P.2d 38 (1995) (search and seizure case). A person is guilty of second degree criminal trespass if he or she “knowingly enters or remains unlawfully in or upon premises of another . . .” RCW 9A.52.080(1).

At common law, trespass has been defined in its largest and most extensive sense, as signifying any transgression or offence against the law of nature, or society, or of the country in which we live; whether it relates to a man's person, or his property. *Welch v. Seattle & M. R. Co.*, 56 Wash. 97, 105 P. 166 (1909). In *Peters v. Vinatieri*, 102 Wn. App. 641, 9 P.3d 909 (2000) the appellate court adopted the Restatement definition of trespass: “A person ‘is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected

interest of the other, if he intentionally . . . enters land in the possession of the other, or causes . . . a third person to do so.'" (citing RESTATEMENT (SECOND) OF TORTS § 158 (1965); and *see Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 681, 709 P.2d 782 (1985)).

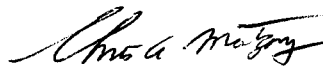
The Appellate Court's decision that the Walches' land was not landlocked and affirming the Trial Court's finding that the Walches could not establish a reasonable necessity because they had not been caught and barred from trespassing to use this illegal access violates the public policy protecting private property rights and against rendering landlocked property useless.

VII. CONCLUSION

For the foregoing reasons, Petitioners Mike Walch and Marcia Walch, husband and wife, respectfully request that their Petition for Discretionary Review be granted.

DATED the 25th day of September, 2013

Respectfully submitted by,



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APPENDIX

A

APPENDIX

B

Google Maps

Google Maps

Google maps

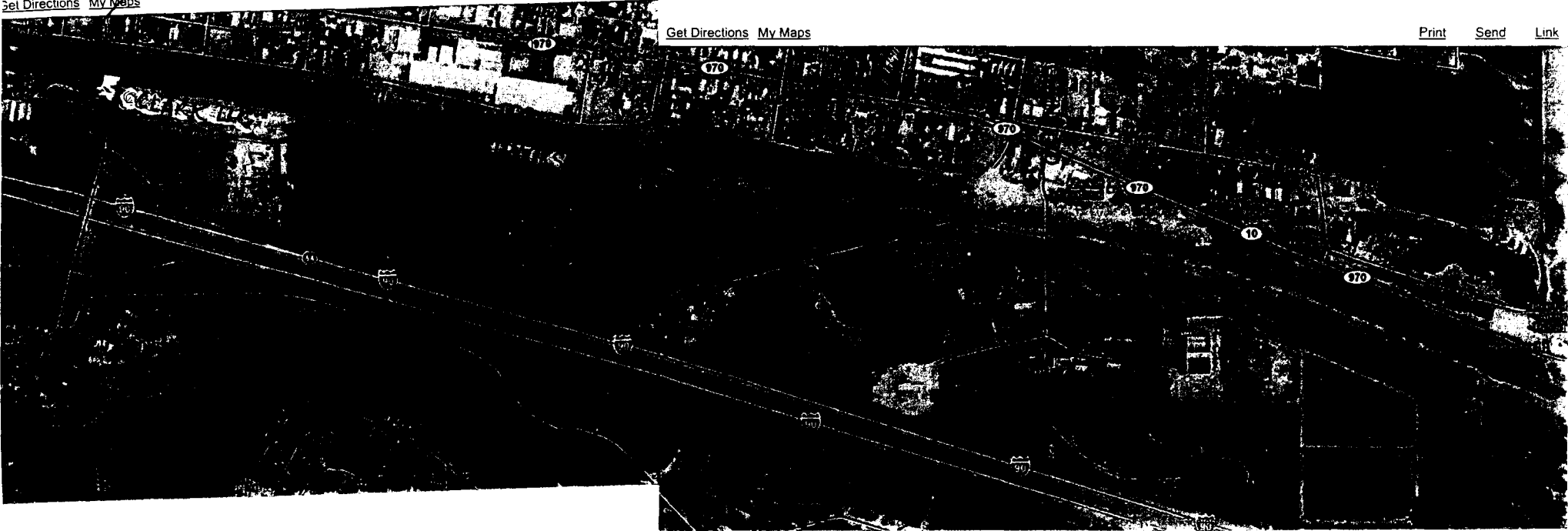
Google maps

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Trial Exhibit 45 - annotated to identify locations

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11/23/2010