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SUPREME COURT  
STATE OF WASHINGTON  
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No. 98183-3

**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**BARNEY & CAROLLYN YORKSTON, Petitioners,**

**v.**

**WHATCOM COUNTY, Respondents**

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**ANSWER TO PETITION FOR REVIEW**

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**A. IDENTITY OF RESPONDENT**

Respondent, Whatcom County, by George Roche, deputy prosecutor for Whatcom County, hereby requests that the petition for review be denied.

**B. ISSUES PRESENTED FOR REVIEW**

1. Whether this Petition involves an issue of substantial public interest pursuant to RAP 13.4(b)(4).
2. Whether the Court of Appeals opinion permitted a taking of private property in violation of the United States Constitution requiring review under RAP 13.4(b)(3).
3. Whether the Court of Appeals engaged in independent fact finding in this case, which warrants review under RAP 13.4(b)(2).

**C. FACTS**

Substantive facts

This Petition concerns a Whatcom County road currently known as Birch Bay Drive. Historically Birch Bay Drive in various sections has been known as: Road No. 22, Road No. 46, Road No. 22-46, the Ferndale and Birch Bay Road, the Birch Bay Shore Rd, and/or Lateral Highway 2.

The roadway at issue was established prior to Statehood. The first legislative action involved in this Petition occurred on February 14, 1876 when landowners petitioned the territorial Whatcom County government for the creation of a road, later named Road No. 46. Road No. 46 was

petitioned as a private road absent any reference to a width of right of way, and the petition established the road from Birch Bay east to a point on the line between Sections 31 and 32, Twp. 40 N., Range 1 E. Road No. 46 was not surveyed or platted at that time.

The second legislative action at issue began on November 8, 1877 as a petition for a road, which was later named as Road No. 22. Road No. 22 had a specified width of 30', and was established as such by Order of the County Commissioners on August 6, 1878. The Petitioners maintain that the creation of Road No. 22 is the binding legislative action that established the right of way for the properties at issue in this Petition, and that both the trial court and the Court of Appeals erred by not finding that this 30 foot right of way is still the legal width of the sections of Birch Bay Drive formerly known as Road No. 22.

The third legislative action involved in this Petition began in March of 1883 as residents of the area between the east end of the road originally petitioned in 1876 as Road No. 46, and the Semiahmoo and Whatcom Road to the east commenced a process to establish a road connecting those two previously established roads. A petition was submitted in May of 1883 and the road was surveyed on August 7, 1883. The road was ordered to be established and was entered into the County's Road Book as County Road No. 42.

The fourth legislative action involved in this Petition occurred on August 7, 1883 when the County Commissioners ordered that all of the unsurveyed portions of the travelled roads from the ferry at the Nooksack river (near the town of Ferndale) to Birch Bay, and up and around the bay to Lot 1, Section 23, Township 40 North, Range 1 West, be surveyed, and be known as the Birch Bay and Ferndale Road. In September of 1883 the County's Surveyor performed the survey of what was subsequently designated as County Road 42, and, pursuant to this new order, surveyed roads at both ends of County Road 42. These roads became designated as County Road 46 on the west and County Road 47 on the east. In his field notes for those surveys, the County Surveyor referred to both of those segments as the Ferndale and Birch Bay Road. On January 15, 1884 the County published a notice to the affected landowners in the *Reveille*, which outlined the intent to designate the entire road from the Ferndale ferry crossing to Birch Bay as a county road. On February 5, 1884, the County Commissioners issued an order stating:

In the matter of the resurvey of portions of travelled road between Ferndale Ferry and Birch [sic], is ordered that the Plat and Field Notes of portions of the said roads be received and accepted and no objections having been made in writing or otherwise to the legalization of said Road . . . . said Road is hereby declared a legal lawful County Road.

The record is thereafter silent until March, 1916, when the County Engineer had the road resurveyed from Harborview Road on the east to the section line between Sections 23 and 24, Twp. 40 N., R. 1 W. on the west. The map showing the surveyed area referred to the road as County Roads No. 22 – 46, and further noted a Road 60 feet wide.

In 1930, the County constructed Lateral Highway No. 2 along Birch Bay, which was over existing County Road 46. The survey of Lateral Highway No. 2 showed a right-of-way of 60 feet throughout the entire distance, including the full distance of the portion of County Rd. 46 which is in dispute here. The specifications for road construction provided that clearing and grubbing be done to a width of 40 feet from the center line with greater or lesser distances in width as particular circumstances warranted. Culverts of varying lengths were installed under the road for drainage purposes and additional lengths of culvert were specified in supplemental provisions to the project documents. The length of culvert thus provided for extended up to 45 feet from one side of the road to the other at various points.

Surveys and plats of other properties along this stretch of Birch Bay Drive show the road as having a right-of-way 60 feet in width. The County has long administered and maintained the right-of-way throughout this area of Birch Bay Drive commensurate with its position that the right-

of-way is 60 feet wide. The class representative Plaintiffs, the Yorkstons, previously petitioned the County for an encroachment permit in relation to the right of way at issue.

Procedural facts

On February 23, 2015 Petitioners filed this declaratory judgment action under the Washington State Uniform Declaratory Judgment Act, RCW 7.24, seeking a determination on the width of a county road right-of-way. On September 24, 2015 the matter was certified as a class action, with the Yorkston Petitioners representing the class. Trial occurred September 26-27, 2017, with supplemental argument on December 4, 2017; the Court's oral decision was delivered on January 3, 2018. Findings of fact and conclusions of law, and a final order of judgment, were entered on May 29, 2018. The Petitioners filed their Notice of Appeal on June 8, 2018, and Respondent filed their Notice of Cross-Appeal on June 21, 2018.<sup>1</sup>

At the conclusion of briefing and oral argument Division One of Washington Court of Appeals published their opinion affirming the trial court on January 21, 2020.

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<sup>1</sup> While Respondents have maintained an alternative argument of easement by prescription, that issue will be waived for purposes of this answer.



**D. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW**

**1. This Petition does not involve a matter of substantial public interest requiring review pursuant to RAP 13.4(b)(4).**

Pursuant to RAP 13.4(b)(4) the Court may exercise its discretion to take up moot cases when there exists matters of substantial public interest that merits the Court's consideration. See Sorenson v. City of Bellingham, 80 Wash. 2d 547, 558, 496 P.2d 512, 518 (1972), citing, State ex rel. Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P.2d 759 (1937); National Elec. Contractors Ass'n v. Seattle School Dist. 1, 66 Wash.2d 14, 400 P.2d 778 (1965); Grays Harbor Paper Co. v. Grays Harbor County, 74 Wash.2d 70, 442 P.2d 967 (1968). The Court has traditionally looked at three important factors to take measure of the public interest at issue: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. Sorenson, 80 Wash. 2d at 558.

Here, the Petitioner asserts that this Court should accept review of the Court of Appeals decision because the County's adopted beach reconstruction plans along Birch Bay allegedly affect the property rights

of over one hundred land owners in the Birch Bay area, and could further affect an unknown number of other roads created in the 1800s.

The County asserts that the adopted beach reconstruction plans along Birch Bay involve entirely different matters of public interest, namely: environmental restoration of shoreline habitat, the protection of vehicular and pedestrian travel along publicly available roads, walkways and tidelands, and flood mitigation.<sup>2</sup> This municipal legislative action was only taken after a period of significant public comment, and was not factually relevant to declaratory judgment action heard by either the trial court, or the Court of Appeals.<sup>3</sup>

The Petitioners' assertions do not present matters of substantial public interest. At its essence this action for declaratory judgment presented private property matters shared by a small class of property owners near the area of Birch Bay. These property issues are not shared by the public as a whole, but are limited in their scope to the relatively small Plaintiff class of property owners. These unique real property issues are

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<sup>2</sup> The County's Public Works Department has a significant description of the Birch Bay shoreline project available online at:

<http://www.co.whatcom.wa.us/2560/Birch-Bay-Dr-Project-Summary>

<http://www.co.whatcom.wa.us/2561/Project-Goals>

<http://www.co.whatcom.wa.us/2562/DesignPlans>

<http://www.co.whatcom.wa.us/2563/PermitsStudies>

<http://www.co.whatcom.wa.us/2565/MeetingsPresentations>

<http://www.co.whatcom.wa.us/2566/History-of-Beach-Reconstruction>

<http://www.co.whatcom.wa.us/3109/Archived-Project-Updates>

<sup>3</sup> The relevance of the Birch Bay Shoreline Project is that it provided Petitioners with motive to bring the underlying action for declaratory judgement.

unlikely to present themselves in other settings due to the highly unique factual narrative that was presented at trial. The applicable laws at issue in this particular case were the Washington Territorial laws of the 1800s. Due to the substantial evolution of real property laws in Washington State an authoritative decision meant to guide public officials is unnecessary.

Therefore, Petitioners have failed to present a matter of substantial public interest and review on this issue should be denied.

**2. The statute of limitations for a takings claim in this case expired in 1894.**

The Petitioner asserts that this Court should accept review of the Court of Appeals decision to redress an unconstitutional taking of private property by the government. It should be noted that a cause of action based on unconstitutional taking, or eminent domain, was never plead. However, the concept of a taking has been vocalized at every stage of the proceedings. As the Court of Appeals stated in their opinion:

We next address what, precisely, is at issue between the parties. Yorkston does not seek to invalidate the 19th century Commission order designating the road or to pursue a takings claim that, if asserted, would be well past stale. Instead, Yorkston brought the present action seeking declaratory judgement.

*Petition for Review*, Appendix A pg. 10 (Hereinafter, *Appendix A*). RCW 4.16.020 establishes a ten year statute of limitations for the recovery of

real property. See also Aylmore v. City of Seattle, 100 Wash. 515, 517–19, 171 P. 659, 660 (1918).

Here, a taking claim was not litigated due to the futility of raising such an issue. If a taking were to have occurred, the governmental action at issue would have been the order of the Whatcom County

Commissioners entered on February 5, 1884 stating:

In the matter of the resurvey of portions of the travelled road between Ferndale Ferry & Birch [Bay] is ordered that the Plat and Field Notes of the Portions of the said roads be received and accepted, and no objections having been made in writing, or otherwise to the legalization of said Road, it is ordered that in accordance with chapter CCXXXVI of the Code of Washington, said Road is hereby declared a legal lawful County Road and the said Plat and Filed notes are hereby ordered recorded.

*Appendix A* at pg. 4. Prior to the issuance of this order a notice was published in the local newspaper *Reveille*, which put the affected landowners on notice of Whatcom County’s intent to take this legislative action.<sup>4</sup> In the February 5, 1884 Order the County Commissioners outlined the absence of objections to the creation of the road. Between February 5, 1884 and February 5, 1894 no taking cases were brought in relation to the roadways at issue here. Currently a taking claim would be time barred.

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<sup>4</sup> The record demonstrated that one landowner in particular was closely related to both the 1877 petition for Road 22 and the February 5, 1884 order establishing the Ferndale Ferry to Birch Bay Road. As both a Whatcom County Commissioner, and an affected landowner, B.H. Bruns was uniquely situated to prevent the alleged taking at issue in this Petition.

Therefore, the Court of Appeals did not permit a taking of private property in violation of the United States Constitution, and review under RAP 13.4(b)(3) is not warranted.

**3. The Court of Appeals did not engage in an independent fact finding in violation of RAP 13.4(b)(2).**

When a trial court has weighed the evidence the appellate court will limit its review of the evidence to determine if the trial court's findings were supported by substantial evidence, and whether the conclusions of law were supported by the findings. Prostov v. State, Dep't of Licensing, 186 Wash. App. 795, 819, 349 P.3d 874, 886 (2015). See also Buck Mountain Owner's Ass'n v. Prestwich, 174 Wash. App. 702, 713, 308 P.3d 644, 650 (2013) (as applied to actions for declaratory judgment involving real property). Substantial evidence has been defined as "evidence sufficient to persuade a rational, fair-minded person of the finding's truth." Prostov, 186 Wash. App. at 819-20, citing, Maplewood Estate, Inc. v. Dep't of Labor & Indus., 104 Wash.App. 299, 304, 17 P.3d 621 (2000). The appellate court will review the evidence in the light most favorable to the prevailing party. Prostov, 186 Wash. App. at 820. The appellate court will defer to the trial court's determinations of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

Prostov, 186 Wash. App. at 820. The appellate court will not weigh and evaluate conflicting evidence. Id. at 820.

Here, the Court of Appeals determined that the trial court's findings were supported by substantial evidence, and the trial court's conclusions of law were supported by the findings. See *Appendix A* at pgs. 12-21. The Court of Appeals engaged in a lengthy recitation of the facts presented at trial in their opinion. *Id.* at 1-8. At the Court of Appeals the Petitioner argued that the trial court engaged in a fact-finding of its own that was unsupported by the record.<sup>5</sup> However, the record at trial contained a wealth of documentary evidence assembled from 1884 up to the date of trial. The Court of Appeals viewed that evidence in the light most favorable to the Respondents while evaluating the trial court's findings and conclusions. *Id.* at pg. 16. The Court of Appeals discussed B.H. Bruns as both a landowner and County Commissioner. *Id.* at pgs. 17-18. The Court of Appeals discussed the notice to landowners and the lack of objections noted in the historical record. *Appendix A* at 19. The Court of Appeals discussed the details of the survey of the Ferndale Ferry to Birch Bay Road in light of the survey notes included in the trial record. *Id.* at 19-

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<sup>5</sup> The Petitioner failed to transcribe any of trial court's proceedings, and only submitted a portion of the documentary evidence submitted at trial, but the Court of Appeals elected to use the complete record provided by the Respondent to decide the case on the merits. See *Petition for Review*, *Appendix A* at pgs. 9-10.

20. The Court of Appeals discussed findings related to powers of county commissioners to re-survey roads pursuant to Chapter CCXXXVI of the laws of Washington Territory. *Id.* at 19-20. The Court of Appeals discussed the testimony of three of the four surveyors<sup>6</sup> heard at trial. *Id.* at 19-20. The Court of Appeals discussed the trial court's oral decision, and its consistency with the trial court's written findings. *Id.* at 21. The Court of Appeals did not engage in its own fact-finding as argued by the Petitioner. Instead the Court of Appeals reviewed the lengthy factual record, and found that a rational and fair minded person could find that trial court's findings were based on the wealth of evidence that was presented at the trial.

Therefore, the Court of Appeals did not participate in its own fact-finding, and there is not a basis to grant this Petition under RAP 13.4(b)(2).

## **E. CONCLUSION**

None of the issues identified by the Petitioners in their petition for review meet the standards- under RAP 13.4(b) for this Court's acceptance

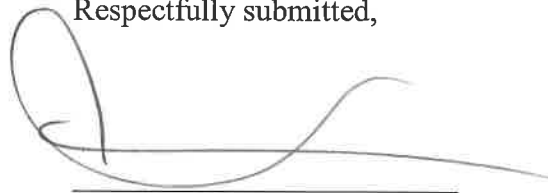
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<sup>6</sup> One surveyor testified on behalf of the Petitioner at trial, and three surveyors testified in support of the Respondent at trial.

of review. The Respondent respectfully requests that the Petition for Review be denied.

DATED this 12<sup>th</sup> day of March, 2020.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized initial 'G' followed by a long, sweeping horizontal line that ends in a small upward curve.

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George Roche #45698  
Deputy Prosecutor  
Attorney for Respondent



**WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION**

**March 12, 2020 - 2:24 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 98183-3  
**Appellate Court Case Title:** Barney M. Yorkston, Jr. and Carollyn D. Yorkston v. Whatcom County  
**Superior Court Case Number:** 15-2-00242-9

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