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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FAME DEVELOPERS, LTD., WILLIAM N. HULETT
and PENELOPE A. HULETT, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

REVISED OPENING BRIEF OF APPELLANTS

Alan S. Middleton
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

Attorneys for Appellants

ORIGINAL

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I. INTRODUCTION

In 1997, a landslide on Bainbridge Island covered Gertie Johnson Road, a public right-of-way that served as the only access point William and Penelope Hulett had to their two homes. Despite repeated requests to the City of Bainbridge Island that it remove the landslide debris, and despite the fact that the City applied for and received government funds to complete that task, the Road remains unopened and unrepaired to this day. As a result, for the past eleven years the Huletts have been unable to access or maintain – and certainly not live in – their homes, which have fallen into disrepair.

Due to the slide that covered Gertie Johnson Road and other slides that affected other houses in the Huletts' neighborhood, the City determined that the Huletts' homes were unsafe and gave them "red tags." A red-tagged home may not be occupied. In order to make the houses safe, according to the City, the Huletts must build a retaining wall on the base of a slope behind the homes to protect them from future landslides – even though no slides have occurred on their property. In order to build the wall, the Huletts will need to bring construction equipment and machinery onto their properties. But the landslide debris covering the Road makes even pedestrian access dangerous – and vehicular access of any kind impossible. In addition, it is futile to construct such a wall to

protect the Huletts' homes if they cannot access them via a public road. In short, until the City reopens Gertie Johnson Road, the Huletts are stuck in limbo and must watch their retirement homes steadily deteriorate.

Under well-established Washington law, an owner has a property right in the ability to access his property. While the City, of course, is free to close (or decline to repair) an open public right-of-way, it must compensate the property owners who are unable to access their properties as a result of the closure. The City does not dispute this basic proposition. Nevertheless, the City has not repaired or reopened Gertie Johnson Road, but it also has not compensated the Huletts for their lost property right of access.

The City instead argues that the landslide did not infringe on a property right because the Huletts never had any right to access their property in the first place. The City points to a 15-foot strip of land – the ownership of which is the subject of dispute – which, it says, separates the Huletts' property from the terminus of Gertie Johnson Road. The Huletts, and the owners before them, have walked over that strip of land to access their homes for decades. Nonetheless, the City now claims that this use was illegal because the City owns the land and, therefore, the Huletts had no legal right to cross it to access their property. The lack of legal access, the City argues, means that no property right was infringed by its failure to

reopen Gertie Johnson Road. The trial court agreed and granted summary judgment to the City on the Huletts' property takings claim.

The City's evidence in support of its assertion that it owns the 15-foot strip of land as an unopened right-of-way boils down to its own statement that it is so. To counter, the Huletts presented evidence showing that the City's alleged right-of-way expired in 1899. Given the disputed nature of this central fact, the trial court's order granting summary judgment was manifestly improper and must be reversed.

But even taking the City at its word, the right to access one's property exists not only for properties that "abut" the closed street, but also for properties that suffer a "special or peculiar damage differing in kind from that of the general public" due to the government's decision to close or not reopen a road. Here, the City's decision to not reopen Gertie Johnson Road – the only way the Huletts can access their property – has caused them significant and unique harm. Because it has taken one of the Huletts' valuable property rights, the City must pay just compensation to make them whole.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the City's motion for summary judgment.

2. The trial court erred in denying the Huletts' motion for reconsideration.

3. The trial court erred in re-affirming its grant of summary judgment to the City after hearing the additional evidence on remand.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether genuine issues of material fact regarding the ownership of the 15-foot strip of land preclude summary judgment in the City's favor? (Assignments of Error 1, 2, 3).

2. Whether an owner of property that does not "abut" a public road, but nevertheless relies on that road as his sole means of access, may seek damages for denial of access when the government closes (or fails to reopen) that road? (Assignment of Error 1).

3. Whether genuine issues of material fact regarding the extent to which the Huletts' property access was impaired preclude summary judgment in the City's favor? (Assignment of Error 1).

4. Whether the Huletts were required to exhaust administrative remedies before filing this suit when (a) their case involves a physical, as opposed to a regulatory, taking, and (b) exhaustion would have been futile in any event? (Assignment of Error 1).

IV. STATEMENT OF THE CASE

A. Rolling Bay Walk Neighborhood and the Huletts' Homes.

The Huletts own two houses on the eastern shore of Bainbridge Island in a small, secluded neighborhood called Rolling Bay Walk.[1] CP 4, CP 505 ¶ 2. The homes on Rolling Bay Walk are located at the base of a steep hillside, so that the homes are bounded by water in front and a 120-foot cliff in back. CP 53. The homes line the beach in a general north-south line. *Id.*; *see generally* CP 366. The Huletts own the northernmost property, 10820 Rolling Bay Walk ("House No. 1"), CP 505 ¶ 2, as shown on a map of the neighborhood. CP 23. They also own House No. 4, 11184 Rolling Bay Walk, which is three houses to the south of House No. 1. CP 23, CP 505 ¶ 2. The Huletts, who live in Ohio, bought House No. 1 in 1979, and House No. 4 in 1974. CP 3, CP 505-06 ¶ 2.

Mr. Hulett's parents lived in House No. 4 for ten years, from approximately 1981 to 1991, and the Huletts and other family members have used House No. 4 on many occasions for family gatherings. CP 506 ¶ 3. The Huletts vacationed and celebrated Christmas holidays in House No. 4, and their son, Michael, lived in it for six moths in 1991. *Id.* At

[1] Title is formally held by Fame Developers, Ltd. ("Fame"). The Huletts are the sole shareholders of Fame, and the two houses at issue are the sole significant assets of Fame. CP 3, CP 505 ¶ 2.

certain times, they have also rented the houses to tenants. CP 511 ¶ 22. The Huletts (including Michael) have long planned to move back to Bainbridge Island and occupy both homes; the City's failure to maintain Gertie Johnson Road has put those plans on indefinite hold, however. CP CP 506 ¶ 3.

The owners of houses at the southern end of Rolling Bay Walk – Houses No. 5 and higher – gain access by Ocean Drive, which descends the hill and terminates in a parking area at the edge of the neighborhood. CP 506 ¶ 4. Residents park their cars in a commonly-shared lot, then walk (or drive) along a walkway running along the seawall as far north as House No. 5. *Id.* The walkway is a privately-owned access easement shared by the homes at the southern end of the neighborhood. *Id.* The four homes to the north, including the two Hulett residences, do not have rights in that easement. *Id.* In fact, the residents to the south have consistently objected to the northern owners' use of the easement and use of the walkway passing the southern homes. CP 649 (Hulett Supp. Dec. ¶ 4); *see also* CP 270, CP 273-74, CP 330 ¶ 12.

Lacking access from the south, owners of the four northern homes have only one way to access their properties: Gertie Johnson Road. CP 506 ¶ 5. Gertie Johnson Road is a public right-of-way owned and maintained by the City; it descends the hill to the northern properties and

terminates in a turnaround area. CP 53. For decades, the residents of the four northern houses on Rolling Bay Walk have used the widened area at the end of Gertie Johnson Road for parking their cars. CP 506 ¶ 6, CP 525-27 ¶ 6. The City acknowledges that the Huletts and other homeowners were permitted to park in this location. CP 581.

Since Houses No. 1 through 4 were built, their owners have accessed their properties by crossing a 15-foot strip of land at the end of Gertie Johnson Road. CP 289, CP 506 ¶ 5. The question of who owns the strip and whether the Huletts had a legal right to cross it is disputed. It appears that the strip of land was originally contemplated as an extension of Valley Road (*see* CP 289 ("vicinity map" in lower left corner)) that was never opened, which is not surprising given that it would be physically impossible to extend Valley Road down the steep hillside.

B. Landslides in Rolling Bay Walk Neighborhood.

The hillside that overlooks the Rolling Bay Walk neighborhood has experienced a number of landslides over the years, some of which damaged neighborhood homes and one of which resulted in loss of life. The Huletts' residences were constructed in 1915 and 1961; neither residence has suffered landslide damage during the Huletts' ownership, and the Huletts are aware of no such damage prior to their ownership. CP 506-07 ¶ 7.

1. In late 1995 and early 1996, the City realized that Gertie Johnson Road was starting to crack and sink. CP 35, CP 47, CP 52. It retained an expert, Myers Biodynamics, to assess the problem and suggest repairs. CP 36, CP 47. Myers concluded that multiple factors were contributing to the Road's decline. CP 55-56. In late January 1996, the City temporarily patched the Road and planned for more permanent repairs during the summer. CP 52, CP 399.

In April 1996, more rains came and caused two landslides in Rolling Bay Walk neighborhood, one of which caused minor structural damage to a home (No. 11), and the second of which wiped one home (No. 9) off its foundation. CP 88. The Huletts' homes were untouched. City officials evacuated the area and "red tagged" Houses No. 8 through 11, which included the homes adjacent to the two that had been damaged in the slides. CP 108, CP 400. A house that receives a "red tag" cannot be occupied unless an owner commissions an engineering consultant to conduct a detailed analysis and demonstrates that he or she has complied with the consultant's recommendations. CP 108, CP 235, CP 400. Only then will the City lift the red tag.

After the April 1996 slides, several property owners on Rolling Bay Walk hired an engineering firm, GeoEngineers, to "evaluate the probable trigging factors for the recent slides and to recommend means of

reducing potential damage from future land slides." CP 88. GeoEngineers concluded that "the ultimate causes of the landslides were the soils (impermeable) and topographic (steep) conditions at the site, and . . . the immediate cause . . . was saturation of the surficial material by infiltrating direct rainfall." CP 90. In order to minimize the risk of future landslides, the report recommended that the City "provide a drainage system along Mountain View Drive [the road at the top of the hillside] . . . sufficient to receive the discharge along the top of the slope." CP 91. The City did not follow this recommendation.

2. On the morning of January 19, 1997, another landslide occurred – this time with tragic consequences. CP 26. A landslide hit House No. 6 and pushed the structure into the water. *Id.* A family of four, including two children, were killed. *Id.*

The City assessed the potential risk to the remaining homes, and it determined that six were unsafe to occupy. CP 28, CP 122, CP 126, CP 402. It issued red tags for Houses No. 4, 5, 7, 8, 10, and 11. *Id.* House No. 4 is the Huletts' southern property. CP 505 ¶ 2. The remaining homes in the slide area – including House No. 1 – received yellow tags, meaning that they were "at risk" but still permissible to occupy. CP 131, CP 354.

The City informed homeowners that the red tags would not be

removed until the owners hired an engineer to evaluate the slope, implemented the engineer's recommendations, and proved to the City that the recommended improvements were made. CP 353. In February 1997, several property owners again hired GeoEngineers to "evaluate the factors involved in the landslides . . . and to recommend means for reducing the potential risk and damage from future landslides." CP 359.

3. On March 18, 1997, a series of landslides occurred. House No. 10 was knocked off its foundation, House No. 5 sustained damage, and the terminus of Gertie Johnson Road was covered with mounds of landslide debris. CP 138-39. A few days later, another landslide deposited more debris on the Road. CP 141. The City red-tagged House No. 1, as well as Houses No. 2, 3, and 12. CP 139. The City also updated its red tag on House No. 4. CP 157. None of the March landslides damaged the four homes at the north end of Rolling Bay Walk. CP 507 ¶ 10.

The March landslides did have a significant impact on those homes, however, because they rendered the terminus of Gertie Johnson road impassable. CP 507-08 ¶ 11. As a result (and to this day), neither personal cars nor emergency vehicles can approach the homes at the northern end of Rolling Bay Walk. *Id.* Because the widened terminus point of Gertie Johnson Road is now covered, approaching vehicles cannot turn around where the Road ends, and pedestrians seeking access must

undertake a dangerous climb over substantial debris or walk along a narrow corridor at the top of the seawall. *Id.* The City also cut off water and other utilities for the Rolling Bay Walk houses, which have not been restored. CP 508 ¶ 12.

According to the City's consultants, one of the causes of the landslides that damaged Gertie Johnson Road was a poorly designed and maintained storm water drainage system installed by Bainbridge Island. *See* CP 141-42. The system overflowed, thus causing "a bypass or surcharge of the drainage catchbasin," which "resulted in surface water flows discharging onto the top of the ravine slope instead of being routed by piping to the beach. Erosion and landsliding likely occurred due to the water surcharge and incident rainfall on the ravine slope." CP 142. Additional contributing factors were the City's poor design of road cuts for Gertie Johnson Road and the City's failure to deal with surface water originating from the City's rights-of-way located above the Huletts' properties. CP 142, CP 250, CP 369.

4. In July 1997, GeoEngineers finished its report. CP 362. Similar to its report after the April 1996 slide, GeoEngineers concluded that "the ultimate causes of the landslides were the soils (impermeable) and topographic (steep) conditions at the site, and . . . the immediate cause . . . was saturation of the surficial material by infiltrating water from

melting snow, direct rainfall, and possible stormwater discharges near the top of the slope." CP 368. GeoEngineers recommended measures to mitigate damage from future landslides, including the construction of "a large catchment wall that would provide substantial protection to the structures along the [bottom] of the slope." CP 370.

GeoEngineers also determined that owners could occupy the remaining homes during the summer and, if dry weather persisted, through October. CP 371. The City's consultants agreed with this recommendation. CP 164, CP 166, CP 168. So long as landslide debris covered Gertie Johnson Road, however, the owners of Houses 1 through 4 could not access their homes, even in the summer. CP 170, CP 218.

C. The City's Failure To Repair Gertie Johnson Road.

After the March 1997 landslides covered Gertie Johnson Road and made it impossible to access the four northern properties, including Houses No. 1 and 4, the City informed the Huletts (and other residents) that while Gertie Johnson Road would remain closed for the time being, the City was actively investigating the appropriate course of action to reopen the Road. CP 162, CP 374.

In fact, in September 1997, the City applied for a governmental grant to clean and restore Gertie Johnson Road, as well as to buy out the remaining homes on Rolling Bay Walk and convert the area to public open

space. CP 160, CP 162, CP 174, CP 177-79, CP 374. The application for funds to support a buy out was denied because the risk to homeowners and the likelihood of additional property damage was too tenuous: the City failed to show that the potential for future slides "pose[d] a significant risk to health and safety if left unsolved." CP 216.

The City ***did*** receive emergency funds "for clearing the lower part of Gertie Johnson [Road]." CP 374. In October 1998, however, the City requested that the State ***de***-authorize the funds. CP 230; *see also* CP 232. The City purportedly believed that removing the debris "could contribute towards another slide."[2] CP 230.

As the years dragged on with no action by the City and no way to access their properties, the Huletts' homes fell into disrepair. The City "received several calls and written complaints concerning vandalism, break-ins, health issues and concerns about potential fires in the [Huletts' homes]," which "have suffered damage from break-ins and are regularly being entered, and vandalized." CP 235. The Huletts boarded the houses, but without utilities, they cannot install alarms to prevent break-ins and

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[2] The Huletts requested additional time pursuant to CR 56(f) in which to retain an expert to provide an opinion whether removing the debris on Gertie Johnson Road would destabilize the slope. CP 516. That motion was denied. CP 593-94. In any event, the City's rationale for not reopening the road is irrelevant to the takings analysis, as even the City has admitted. CP 579.

vandalism. CP 510 ¶ 18. Nor can they heat the homes to protect against the weather. *Id.* The lack of access also hinders the City's ability to provide meaningful police protection, and it makes it more difficult, if not impossible, for the City to respond in the event of a fire. CP 510 ¶ 17.

But most importantly, the lack of access has made it impossible for the Huletts to make any of the repairs and modifications to the hillside needed to lift the red tags from Houses No. 1 and 4 – the heavy vehicles and equipment necessary to bore or drive pilings to shore up the hillside cannot get near their homes because of the landslide debris. CP 510-11 ¶ 19. And access from the south is not possible because (a) the southern owners will not allow others to use their easement, and (b) even if the Huletts obtained such permission, vehicles of any size could not reach their homes from the south because after the easement ends at House No. 5, there is only a walkway that narrows to less than three and a half feet. CP 320; CP 649 (Hulett Supp. Dec. ¶ 4).

The City continued to tell the Huletts, who repeatedly contacted the City, that it was looking for a solution to the problem. As recently as May 17, 2004, the City stated that it would reopen Gertie Johnson Road once the work "fits in with other City priorities and funding opportunities." CP 511 ¶ 20.

The Huletts joined other property owners in December 2004 in

applying for a Shoreline Conditional Use Permit (SCUP) to construct a retaining/catchment wall behind their homes that would reduce the overall risk of landslide damage and cause the City to lift the red-tags so that owners could occupy their homes year-round. CP 244, CP 246, CP 511 ¶ 21. The City and State approved the permit, concluding that "the project as designed would provide an adequate factor of safety for the subject property and that geotechnical risks to adjacent properties would not be increased." CP 320; *see also* CP 279-82, CP 284-86. The Huletts also hired GeoEngineers to design a catchment wall for their properties, using as a template the catchment/retaining walls that had been approved and constructed behind House No. 5. CP 254-64, CP 266-68.

But with no way to access their homes to construct the wall (and no way to access the properties even if suitably protected), neither the Huletts nor the other two owners of the four northern homes have been able to construct such a wall. CP 511 ¶ 21. Indeed, after southern owners objected, the City conditioned approval of the SCUP by declaring that only those homes having easement rights in Rolling Bay Walk may use that easement for construction purposes. CP 330 ¶ 12; *see also* CP 270 (letter from southern owner to City objecting to northern owners' use of easement to construct wall), CP 273-74 (same). The four northern homes must obtain access for construction either from the water or Gertie

Johnson Road. CP 330 ¶ 12.

The properties with rights of access via the south have constructed retaining/catchment walls that protect their homes from landslide damage.[3] CP 289. The City has lifted the red tags on some of those homes, allowing them to be occupied.

D. Harm to the Huletts.

The City's failure to reopen Gertie Johnson Road has significantly harmed the Huletts. CP 511-12. From a monetary standpoint, at the time of the March 1997 slides, one of their homes was renting for $1,000 per month, and another was renting for $1,045 per month. *Id.* Each home was valued at approximately $350,000. *Id.* Because the homes are now uninhabitable – and will remain so until the Road is reopened – Kitsap County revised the property taxes for the two parcels, adjusting the value of the land to $10,000 per parcel and assigning no value to the two residential structures. *Id.* There is no insurance coverage to compensate the Huletts for their loss because the properties themselves suffered no physical harm. *Id.*

Beyond the monetary harm, however, the City's failure to reopen

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[3] Catchment/retaining walls do not actually prevent landslides. Rather, they protect structures from slides when they occur. Thus, owners must maintain the capacity of the catchment area by promptly removing debris from behind the wall. CP 320, CP 370. Such on-going maintenance requires access to the property.

Gertie Johnson Road has jeopardized the Huletts' long-standing plans to retire on Bainbridge Island. *Id.* Until the Road is cleared, the Huletts cannot undertake the steps necessary to remove the red tags from their homes, such as building a retaining/catchment wall like their neighbors to the south. Their retirement plans thus remain on hold.

E. Procedural History.

The Huletts filed suit in Kitsap County Superior Court on May 3, 2005. CP 1-11. Their complaint alleged four causes of action. First, the City was negligent in its "failure to exercise ordinary care in the design, construction, repair or maintenance of its public roads, streets or highways and storm water conveyance systems." CP 8. Second and third, by failing to clear the landslide debris covering Gertie Johnson Road, the City has effected a taking of property that requires it to compensate the Huletts for their loss.[4] CP 8-9. Fourth, the Huletts alleged violations of equal protection and substantive due process, claiming damages under 42 U.S.C. § 1983. CP 9-10.

On July 27, 2007, the City filed a 58-page motion for summary judgment with 58 exhibits. While the City attempted to paint the Huletts as insensitive and money-hungry, the substance of its motion was based on

[4] The second and third causes of action were pleaded separately as either a "temporary" or a "permanent" taking.

a singular proposition: that the Huletts had no legal right to access their property across the 15-foot strip of land separating their property from Gertie Johnson Road and, therefore, the Huletts did not have a property right that was infringed by the City's failure to reopen the Road. CP 423-25. The City also argued that the Huletts' claims of negligence and equal protection and substantive due process violations were barred by the two- and three-year statute of limitations periods, respectively. CP 430-32, CP 439, CP 448-49. The City did not argue that the Huletts' taking claim was barred, although it did argue that that claim was not ripe because the Huletts had purportedly failed to exhaust their administrative remedies. CP 435-38.

The Huletts opposed the City's motion, arguing that the City presented no evidence that it actually held title to the 15-foot strip of land. Verbatim Report of Proceedings ("RP"), at 18. Moreover, even if the City did own the 15-foot strip, the Huletts still had a right to access their property that has been taken from them. CP 468-71, CP 487-88. As for the statute of limitations issue, the Huletts argued that the continuing harm of the City's action (or, more accurately, inaction) tolled the limitations period. CP 483-86, CP 493-94, CP 499-500. Finally, they argued that there is no exhaustion requirement for challenges to physical takings, and exhaustion would have been futile anyway. CP 488-91.

The Huletts also moved for additional time under CR 56(f) to obtain additional affidavits to bolster their opposition to the summary judgment motion. CP 514-17. Finally, the Huletts moved to strike a number of exhibits submitted by the City. CP 529-31. The City opposed both motions. CP 577-85, CP 586-92.

The trial court (Judge Jay B. Roof) held a hearing on the summary judgment motion on August 24, 2007. The City re-asserted that it owned the land, and its counsel told the court: "[T]his isn't private property. This is city-owned property. It is an unopened right-of-way that is controlled by the City of Bainbridge Island. . . . And there's no evidence in the record to the contrary that the City doesn't own or control this unopened right-of-way. None." RP, at 23-24.

At that time, which was only one month after the City filed its motion for summary judgment, the Huletts did not have any information to challenge the City's representations, CP 610 ¶ 4, although they did argue that the City's bare assertion of ownership rights was insufficient to establish ownership without further investigation, RP, at 18.

On August 27, 2007, the trial court granted the City's motion for summary judgment. CP 593-94. The court also denied the Huletts' motion to strike and their CR 56(f) motion for additional time. *Id.* The trial court's order did not provide any explanation for its decision. *Id.*

On the same day, the Huletts discovered evidence showing that the City did not own the 15-foot strip of land. CP 610-11. To the contrary, any claim the City had expired by statute in 1899. CP 611; *see*, *infra*, pp. 25-27. The Huletts immediately prepared and filed a supplemental memorandum to alert the trial court, but they learned soon thereafter that the court had already issued its decision. CP 611.

Relying on this newly-discovered evidence showing that the City's representations regarding the ownership of the 15-foot strip were false (or, at the very least, highly questionable), the Huletts moved for reconsideration of the trial court's order granting summary judgment to the City. CP 595-608. Given that ownership of the land was unclear and the evidence indicated that the City did ***not*** own it, the Huletts argued that the trial court should reconsider its determination that there was no genuine issue of material fact.

The trial court denied the Huletts' motion without explanation on September 11, 2007. CP 638. This timely appeal followed. CP 639-44.

While preparing the Huletts' Opening Brief, however, the Huletts' counsel realized that while the evidence that was discovered after the summary judgment argument was sent to the trial court on August 29, 2007, it was never actually filed. Because the materials were not actually filed, they did not appear on the trial court's docket and, therefore, could

not be included in the Huletts' designation of Clerk's Papers. Believing that this Court needed these materials to undertake a full and fair review of this case, the Huletts filed a Motion to Supplement the Record on Appeal together with their Opening Brief. The City opposed the motion.

Commissioner Schmidt conditionally denied the Motion to Supplement the Record, and the Huletts filed a Motion to Modify. This Court granted the Motion to Modify on July 14, 2008, finding that the Huletts had "met the additional evidence criteria under RAP 9.11," and ordered as follows:

> [W]e stay this matter and remand it to the trial court to consider the appellants' evidence and any evidence the City presents regarding ownership of the disputed 15-foot strip of land abutting the public road. The trial court must enter findings of fact and decide whether the appellant has raised a material issue of fact that precludes summary judgment. The parties must designate these findings, as well as any additional evidence produced during the hearing, if they wish this [C]ourt to further consider this matter following remand. This order does not terminate our review. If the parties wish to terminate review following remand, or if the trial court rules that a trial is necessary, review will be terminated by later order.

In response to this Court's order, on November 12, 2008, the superior court issued its own order directing the parties to file any "additional evidence and briefing regarding ownership of the disputed 15 foot strip of land abutting the public road." CP 680. The parties did so,

and the superior court heard argument on January 9, 2009. Shortly thereafter, on January 16, 2009, the superior court entered an order that re-affirmed its original order granting summary judgment to the City on the Huletts' takings claim and included the findings of fact requested by this Court. CP 798-801.

V. STANDARD OF REVIEW

Summary judgment orders are reviewed *de novo*; the appellate court performs the same function as the trial court. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386 n.4, 78 P.3d 161 (2003). Summary judgment is appropriate only when there are no genuine issues of material fact. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Telford v. Thurston County Bd. of Com'rs*, 95 Wn. App. 149, 157, 974 P.2d 886 (1999).

A superior court's findings of fact on summary judgment are entitled to no weight. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 249 n.10, 178 P.3d 981 (2008) (superior court "findings and conclusions are inappropriate on summary judgment"); *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) ("findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court").

VI. ARGUMENT

BECAUSE GENUINE ISSUES EXIST AS TO POTENTIALLY DISPOSITIVE FACTS, THE TRIAL COURT ERRONEOUSLY DISMISSED THE HULETTS' TAKING CLAIM.

The City made three arguments in support of its motion to dismiss the Huletts' takings claim: (1) the Huletts do not have a property interest in access to their homes; (2) even if they had a property interest, the Huletts' right of access has not been substantially impaired by the City's failure to reopen Gertie Johnson Road; and (3) they failed to exhaust their administrative remedies. None of these arguments survive scrutiny, and the first and second arguments, at the very least, involve disputed issues of material fact that render summary judgment improper.[5]

A. The Huletts Have a Property Interest in Access to Their Homes.

Restricting access to a street, either by an affirmative action or the failure to act, "interfere[s] with the right of access as that property interest has been defined by our law." *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977). This case hinges on whether the Huletts had the right to access their property by crossing the 15-foot strip of land at the end of Gertie Johnson Road. If so, even the City acknowledges that takings case law requires it to either repair the road or pay damages:

[5] The Huletts do not seek review of the trial court's grant of summary judgment on their negligence, equal protection, and substantive due process claims.

"cases indicate that if there is a property right to access . . . the City is responsible to restore the road or pay damages to qualifying property owners even if the road closure was not a result of the City's own negligence." CP 579 n.4.

The City has maintained that the Huletts (and owners of Houses No. 2 and 3) had no right to cross the 15-foot strip because it is an "unopened" right-of-way owned by the City. In other words, the City maintains that all these years, residents were illegally crossing this strip of land to access their properties. *See* RP, at 3-4 (City's attorney: "Plaintiffs never ever had a legal right of access to either one of their properties."). Yet the City also acknowledges that the Huletts have no right to access their property from the south via Rolling Bay Walk. *Id.* at 6. Thus, as the City sees it, the Huletts have ***never*** had a legal right to access their property and, therefore, the City has not infringed on their property rights by refusing to reopen Gertie Johnson Road.

The City is wrong for two reasons. ***First***, the argument that it was illegal for the Huletts to cross the 15-foot strip of land is premised on the assumption that the City owns it. Yet the ownership status of that land is anything but clear, and, in fact, it might belong to the Huletts. The Huletts submitted three pieces of evidence showing that the City does not own or otherwise control the strip of land. To support its own claim to ownership,

the City has simply said that it owns the property.

Second, even if the City did own the 15-foot strip and, thus, the Huletts' property did not "abut" Gertie Johnson Road, they still may claim damages for the City's denial of access. Owners whose property does not "abut" a road are entitled to damages if their access is destroyed or substantially impaired, causing them to suffer "special or peculiar damage differing in kind from that of the general public." *Kemp v. Seattle*, 149 Wash. 197, 200-01, 270 P. 431 (1928).

1. The City Does Not Own the Fifteen-Foot Strip of Land.

While it is unclear exactly who presently owns the 15-foot strip of land at the end of Gertie Johnson Road, one thing is clear: the City does ***not*** own it. The unopened right-of-way allegedly separating the Huletts' residence from Gertie Johnson Road was vacated by operation of law in 1899.

1. On June 25, 1894, the alleged right-of-way was "established" by an Order of Establishment of County Road, in Case No. 383 of the Kitsap County Superior Court. CP 781-82. The right-of-way was a ***30***-foot strip of land that ran over the steep cliff down to the water. *See* CP 295. The Order of Establishment granted the "petition . . . for establishment of a county road," and ordered that the "road . . . is hereby

established as surveyed, and ***the same may be opened*** as provided by law for the opening of public roads . . . ." CP 781 (emphasis added). The Order did not purport to convey any ownership interest to the County.

Washington law provided (and still provides) that any county road that remains unopened for five years after the order granting authority to open the same is ***vacated***:

> Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time.

1889-90 Wash. Laws, ch.19, § 32, p. 603. That law has continued in effect with modest changes and is currently in effect as RCW 36.87.090.

By "authoriz[ing]" the County to open the road, the 1894 Order started the five-year period under Washington law. While the County opened parts of the right-of-way, the portion of the right-of-way adjacent to the Hulett property was never opened. The statute, as it existed in 1890, was self-executing – at the end of five years, the road, or portion thereof, "shall be . . . vacated" if the government does not open it. Thus, the City's right-of-way expired in 1899 by operation of law, and the City has conceded this fact. CP 730 ¶ 5 ("Because the portion of the right of way at issue here was never opened, the City considers that portion vacated as

of 1899 pursuant to state statute.").

2. While acknowledging that its right-of-way expired in 1899, the City argues, and the superior court agreed, that *half* of the expired right-of-way – namely, the 15-foot strip at issue here – was given back to the City in 1908 when the County recorded the Plat of Manitou Park. CP 295 (labeling fifteen-foot strip as "15 foot r/w dedicated by the Plat of Manitou Park – never opened"). The City is wrong.

In that Plat, the owners dedicated to the public ***only*** "the streets, Roads and avenues . . . shown" on the illustration at Waite Dec., Ex. B. CP 784. The northern edge of the Plat identifies a 15-foot strip immediately south of the section line, which is the strip of land the City now argues is its unopened right-of-way. *Id.* On the Plat, however, the strip is not "shown" as a "street[]," "road[]," or "avenue[]" – indeed, it is not designated as anything. *Id.* In other words, the Plat did not dedicate the strip to the County; it remained private property.

To argue that the Plat actually did dedicate the 15-foot strip as a right-of-way, the City has the burden of proving that the Plat actually accomplished such a dedication. 11A E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 33.11 (3d ed. 2000). "[A] dedication is an unequivocal, affirmative act that is shown by affirmative evidence." *Id.* The owner's intent to make a dedication must be adduced "***from the plat***

itself . . . as that furnishes the best evidence thereof." *Deaver v. Walla Walla Cty.*, 30 Wn. App. 97, 99, 633 P.2d 90 (1981) (emphasis added). "The intention of the owner in making the plat is to be ascertained from all the marks and lines appearing thereon." *Id.* (quotations omitted). Where the plat is ambiguous, parol evidence, such as actual use of the allegedly dedicated right-of-way, may be sufficient to prove an intent to dedicate. *Id.* at 100.

Because the Manitou Park Plat limits its dedication to "all the streets, Roads and avenues ***hereon shown***" and the 15-foot strip is not labeled on the Plat with any of those terms (or any term at all), it is plain that the Plat owners had no intent to dedicate a right-of-way in that land to Kitsap County or to the public. Notably, specific dedications appear elsewhere on the Plat – e.g., Ocean Drive, Mountain View Boulevard – which indicates that the Plat's silence with respect to the 15-foot strip of land was intentional.

Moreover, even if the Plat were ambiguous, which it is not, the City has consistently asserted that the "right-of-way" has never been opened. Therefore, there is no evidence of the public's use of the "right-of-way" that might tend to show that there was an intent to dedicate the strip of land as a right-of-way. In short, the City did not acquire

ownership of the 15-foot strip of land at the end of Gertie Johnson Road through the Plat.

The superior court, however, disagreed, finding that although the 15-foot strip is "unlabeled" on the Plat – unlike the other clearly-labeled streets and roads – the strip of land "is 'shown' on the Plat in accordance with the words of dedication." CP 799. But simply because a piece of land is "shown" on the Plat does not mean that the Plat owners were dedicating it to the County. Indeed, dozens of individual home parcels are "shown" on the Plat, but there is no suggestion that the Plat owners were giving that land to the County.

Rather, the Plat provides that it is ***only*** "the streets, Roads and avenues hereon shown" that are dedicated to the County, and the 15-foot strip is not shown as a street, road or avenue. Nor could it have been intended to be dedicated as a street, road or avenue because the strip covers a 120-foot cliff, at the bottom of which is a body of water. Putting to one side the question whether fifteen feet is even wide enough for a road, it would have made no sense for the land to be dedicated as street, road or avenue because it was completely unsuited for such use.

Without a dedication, the 15-foot strip does not belong to the City, nor is it a "right-of-way" subject to City regulation. Instead, it is private property (perhaps belonging to the Huletts), and the Huletts and the two

other owners of the northern properties at Rolling Bay Walk would have at least acquired access rights by adverse possession by their use, for decades, of that land to access their homes.[6]

3. That the 15-foot strip at issue here is private property is further bolstered by later vacation proceedings, in which Bainbridge Island declared that a part of the strip farther up the slope was "private property." In 1990, the MacIntyres, owners of property abutting Valley Road, petitioned Kitsap County to vacate the "unused right-of-way commencing at the intersection of N.E. Valley Road and Manitou Beach Drive N.E. . . . running thence west on Valley Rd. N.E." CP 787. "The right-of-way to be vacated extends out over the edge of a steep bluff, approximately 150-200 feet high." *Id.* This portion of land is part of the same strip of 15-foot land relevant here, only farther up the slope.

Despite their petition, the MacIntyres did not concede that the

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[6] An individual may acquire title to property by adverse possession when the possession is exclusive, actual and uninterrupted, open and notorious, and hostile for ten years. *ITT Rayonier Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Possession is exclusive if it is what one would expect of a titled property owner, considering the nature and location of the land. *Id.* at 759. It is open and notorious if the original owner had or should have had knowledge that the occupancy constituted an ownership claim. *Riley v. Anders*, 107 Wn. App. 391, 396, 27 P.3d 618 (2001). Finally, possession is hostile if the untitled possessors treated the property as a true owner would have throughout the ten-year period. *Chaplin v. Sanders*, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984).

right-of-way actually existed or that they did not already own the property constituting the purported right-of-way. CP 786. In proceedings before the County, the County Commissioner confirmed that the purported right-of-way in question was, in fact, "***private property***, not public property." CP 613 (emphasis added). "[T]he County had originally thought the property was publicly-owned, but . . . it was not." CP 617. While recognizing that the land was private property – and thus, did not require vacation – the County nevertheless granted the petition to vacate: the "road should be vacated; said road is not now in use, and has not been in use; it will not be advisable to preserve this road for general road system in the future." CP 635; *see also* CP 614 (strip "had absolutely no utility as a road"). The vacation included "[t]he unused portion of Valley Road." CP 635.

In short, the 1990 vacation proceedings give rise to a genuine issue of fact because they indicate that the 15-foot strip of land at issue here is private property, just like the portion of the same strip farther up the slope that was vacated.

The superior court, however, dismissed the 1990 vacation proceedings because the County "did not vacate the 15-foot piece of land in question," and the Commissioner's comment that the land was private property is "inconsistent with the county action of vacation because the

county may only vacate public land." CP 800. The Huletts, of course, recognize that the 1990 vacation proceedings did not vacate the portion of the 15-foot strip that is at issue here, but the proceedings are relevant because the County described a portion of the ***same*** strip, only farther up the hill, as "private property." If the upper portion was "private property," there is no reason why the lower portion of the same strip is not also private.

Moreover, while the property owners disputed that the land was public property to begin with – and, eventually, the County also recognized that the upper portion was "private property" – they proceeded with the vacation proceedings to avoid having to resolve the matter in court. CP 786. Had the County not made the initial mistake of believing that the land was public property – as the Commissioner recognized, "the County had originally thought the property was publicly-owned, but . . . it was not," CP 617 – the proceedings probably could have been avoided entirely.

4. In contrast, the "evidence" the City has cited to support its assertion that the 15-foot strip of land belongs to it is a composite of an unauthenticated aerial photograph showing the purported "property and public right of way borders" and including notes, the authorship of which

is unclear. CP 20 ¶ 60, CP 295.[7] With respect to the strip of land at issue here, the notes read "15 foot [right-of-way] dedicated by the Plat of Manitou Park – never opened." CP 295. On remand, the City submitted another aerial map with the added notes of Mr. Randy Witt, the City's Director of Public Works, "as an explanation of the various right of way sections at issue." CP 731 ¶ 10, 734-35. The map purportedly "clearly indicates both the vacation of the earlier right of way and the subsequent rededication of the 15-foot section by the Plat of Manitou Park." CP 731 ¶ 9. However, the map shows no such thing – rather, it is simply Mr. Witt's ***own notes*** on the map that assert that the 15-foot strip at issue here is a "right of way." CP 734-35. In other words, the City's evidence of ownership still amounts to only its own bare assertion.

On remand, the City also relied on the Huletts' purported admission in their verified claim for damages that the 15-foot strip was "City property." CP 719-20. The City's reliance on that alleged "admission" is a makeweight. Mr. Hulett labeled the 15-foot strip as "City property" in reliance on the County's own GIS system; he had no

[7] The City itself admitted the composite aerial photo "is clearly not intended to show exactly the exact relationship of property lines to physical features on the ground." CP 583. Nevertheless, it asserts that the photo "make[s] it clear that there is a 15-foot unopened right-of-way between Plaintiffs' property and the right-of-way for Gertie Johnson Road." *Id.* The Huletts moved to strike this exhibit pursuant to ER 602, ER 801-02, and ER 901. CP 530. That motion was denied. CP 593-94.

independent knowledge of the ownership status of the land and did not have a copy of the Plat of Manitou at that time. CP 791-92 ¶¶ 2-3. The GIS system is not the definitive word on the ownership of a piece of land. Indeed, the GIS map attached to the Huletts' tort claim provides that "THIS MAP IS NOT A SUBSTITUTE FOR FIELD SURVEY" (CP 749), and the online disclaimer cautions that the County "MAKE[S] NO REPRESENTATIONS ABOUT THE SUITABILITY OF THE INFORMATION . . . FOR ANY PURPOSE" and "DISCLAIM[S] ALL WARRANTIES AND CONDITIONS WITH REGARD TO THIS INFORMATION." CP 792 ¶ 4. Indeed, even the City itself would have to admit that the GIS-generated map contains a glaring error: it identifies the northern 15-feet of the original 30-foot establishment in 1894 as City property (CP 793 ¶ 6; *see also* CP 746-50) even though the City admits in this proceeding that that strip of land has not been under City control since 1899.[8]

In short, and at the very least, evidence of the expiration of the authorization to open the right-of-way, the silence of the Plat of Manitou Park, and the 1990 vacation proceedings all give rise a disputed issue of

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[8] And it should go without saying that the Huletts' mistaken reliance on the GIS system does not change who actually owns the 15-foot strip of land. If the Huletts had labeled the strip as "Matt Hasselbeck's property," that would not make it so.

material fact that precludes summary judgment – especially considering that the City simply relies on its own assertion that the strip of land belongs to it. Ownership of the 15-foot strip is potentially dispositive in this case, and the Huletts have presented strong evidence that the City, contrary to its repeated representations, does not own the strip. This Court should reverse the trial court's order and remand for further proceedings on this question.

2. Even if the City Owns the Strip of Land, the Huletts Still Have a Property Right of Access.

Even if the City did own the 15-foot unopened right-of-way, that does not answer the question whether the Huletts have a property right to access their homes. To the contrary, a property owner has a vested right in access to a public right-of-way, and may sue for damages for deprivation of that right, if ***either*** (1) the owner's property directly abuts the right of way; ***or*** (2) if "access to property is interfered with and ***he suffers special or peculiar damage differing in kind from that of the general public.***" *Kemp v. Seattle*, 149 Wash. 197, 200-01, 270 P. 431 (1928) (emphasis added; citations omitted); *accord Hoskins v. Kirkland*, 7 Wn. App. 957, 960-61, 503 P.2d 1117 (1972).[9]

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[9] *See also London v. City of Seattle,* 93 Wn.2d 657, 660-61, 611 P.2d 781 (1980); *State v. Wineberg*, 74 Wn.2d 372, 444 P.2d 787 (1968); *Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 324 P.2d 1113

Although Washington cases have not extensively discussed what constitutes "special injury," at a minimum, "a landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury." *Hoskins*, 7 Wn. App. at 960 (citing *Yarrow First Assocs. v. Clyde Hill,* 66 Wn.2d 371, 403 P.2d 49 (1965)); *see also Who, Other Than the Abutting Owner, May Maintain a Suit to Enjoin Closing or Obstructing Street or Highway*, 68 A.L.R. 1285 (2007) (special injury may occur when property owners are "obliged to undergo serious inconvenience in making a difficult or dangerous detour, and particularly if their property is thereby lessened in value"). "If, however, the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged." *Hoskins*, 7 Wn. App. at 960-61. Thus, to maintain an action, the owner's "right of access must be destroyed or substantially affected." *Id.* at 961.

B. The City's Failure to Reopen Gertie Johnson Road Destroyed the Huletts' Right of Access.

The City does not dispute these well-established principles; rather, it argued below that the Huletts have not suffered a substantial impairment

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(1958); *Taft v. Washington Mut. Sav. Bank*, 127 Wash. 503, 221 P. 604 (1923); *Union Elevator & Warehouse Co., Inc. v. Department of Trans.*, 96 Wn. App. 288, 295, 980 P.2d 779 (1999).

of their property right of access. Specifically, the City argued that "the landslide debris that covered the turnaround did not render the location impassable; it merely made it impossible to park a full-sized vehicle on the turnaround." CP 426. Thus, according to the City, "Plaintiffs still have the exact same access as they had before," only now they have to "park further [sic] up the road and walk around the landslide debris field." *Id.*

The City's argument blinks both established case law and reality – the fact that the Huletts can still access their property by foot by trekking over and around unstable landslide debris does not constitute meaningful access.[10] In any event, "the question of degree of impairment of access [is] an issue of fact." *Keiffer*, 89 Wn.2d at 374. "[T]he trier of fact should determine whether adequate access to a particular property exists only after taking into consideration other factors such as safety, reasonableness, and commercial practicalities." *Union Elevator & Warehouse Co., Inc. v. Department of Transp.*, 96 Wn. App. 288, 293-94, 980 P.2d 779 (1999); *see also id.* at 296 (reversing grant of summary judgment because determination whether right of access was "substantially impaired" is "a factual issue for the trier of fact at trial"). Here, at the very least, the parties dispute the extent to which the City's failure to reopen Gertie

[10] Even if the Huletts were somehow able to successfully traverse the mound of debris on foot, they cannot park their car farther up Gertie Johnson Road as the City claims because there is no parking area.

Johnson Road has impaired the Huletts ability to access to their property; this dispute precludes summary judgment.

"[T]he total elimination of access is ***not*** necessary to create liability." *Keiffer*, 89 Wn.2d at 374 (emphasis added). While "[n]ot all impairments of access to property are compensable," such impairments ***are*** compensable if they are "***substantial.***" *Id.* at 372 (emphasis added). *See also Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 365, 324 P.2d 1113 (1958) ("'owners of property abutting on a street or alley have no vested right in such street or alley, except to the extent that their access may not be unreasonably restricted or substantially affected'") (quoting *Taft v. Washington Mut. Sav. Bank*, 127 Wash. 503, 221 P. 604, 606 (1923)).

Indeed, the Washington Supreme Court recognizes that "the owner . . . of property abutting upon a public thoroughfare has a right to free ***and convenient*** access thereto, and that such right carries with it entitlement to just compensation if taken or damaged." *Lenci v. City of Seattle*, 63 Wn.2d 664, 678, 388 P.2d 926 (1964) (emphasis added); *see also* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASH. PRACTICE, REAL ESTATE § 9.11 (2d ed.) (right of access "is generally defined as a right of 'reasonable' access").

In *Keiffer*, for example, the city installed curbing along a road that restricted access to the property owner's business. Prior to the curbing, the owner had access "at all points along their frontage" for cars to pull in and park; after the improvements, the owner's access was limited to "two curb cuts approximately 32 feet long located near each end of the frontage." 89 Wn.2d at 370-71. The trial court found that the "curbing was installed for the purpose of reducing the traffic hazard posed by allowing vehicles to back onto the roadway from [the owner's] property." *Id.* at 371. It further found that the "access provided after the completion of the curb and curb cuts . . . denies reasonable access" to the building and to parking. *Id.*

The Supreme Court affirmed. It held that the first step is to determine if the government has "actually interfered with the right of access." *Id.* at 372. Finding that step easily satisfied – the city restricted the owner's access to the street, it was not merely regulating the volume or flow of traffic – the Court turned to the second step, "the degree of damage." *Id.* at 373. It rejected the city's assertion that compensation was appropriate only when it eliminates "all direct access," and instead held that "compensation must be paid where all direct access is not eliminated, ***if substantial impairment of access is shown***," as it was there. *Id.* (emphasis added).

Similarly, in *Lenci v. City of Seattle*, 63 Wn.2d 664, 388 P.2d 926 (1964), the Court held that the property owner was entitled to compensation even though he still had access to the street. There, a city ordinance provided that the property, which the owner was using as a motor vehicle wrecking yard, could have only ***one*** opening to the street. *Id.* at 666. The city argued that such limitation was within its police power and necessary because unrestricted access "creates an undue burden upon and hazard to the traveling public." *Id.* at 678. The Court did "not seriously disagree with [that] contention." *Id.* The "basic issue," which was "whether the limitation ... is reasonable," still remained, however. *Id.* Despite the fact that the owner still had access to the street, the Court found that the limitation was "unreasonable," and therefore a compensable taking. *Id.* at 678-79.

Keiffer and *Lenci* establish that the government may still be liable for a taking even if its action (or inaction) does not ***eliminate*** access.[11] While it should be obvious that a landslide covering a significant portion of the road is a substantial impairment to access, the Huletts presented

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[11] *Accord State ex rel. Moline v. Driscoll*, 185 Wash. 229, 232, 53 P.2d 622 (1936) ("a change of an established grade of a street or highway may constitute a damage to the property of abutting owners for which they are entitled to recover," even though grade change does not necessarily eliminate access); *Union Elevator*, 96 Wn. App. at 291.

evidence that impairment of their access was and remains substantial. CP 507-08 ¶ 11; *see*, *supra*, pp. 14-15.

A case from California is squarely on point. In *Clay v. City of Los Angeles*, 21 Cal. App. 3d 577 (1971), the city failed to restore or vacate (with just compensation) a road that had been washed out by a flood and left the plaintiffs' home practically inaccessible. *Id.* at 580. There, plaintiffs could still access their home by walking 300 feet "over a dangerous, unpaved slope" on private property. *Id.* The court rejected the city's argument that plaintiffs still had access:

> The practical result of accepting such a position would be to reduce the easement to ***an empty right somewhat akin to a door opening on a brick wall.*** To hold that under these circumstances the easement remains unimpaired would mean that in no case could compensation for any taking of an easement be awarded. In any case where supervening physical impairment to the exercise of an easement existed, the taking would be excused by mere assertion that only the power to exercise had been taken but the right remained undisturbed. The contention is obviously without practical merit or support in law or equity. It is self-evident that plaintiffs have suffered an impairment of their recognized property right of access.

Id. at 582-83 (emphasis in original).[12] The same rationale applies here.[13]

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[12] The court also rejected the city's argument that it could not be held liable for failing to restore or vacate (with just compensation) the road because plaintiffs' loss of access was not the result of any affirmative act by the city. *Clay*, 21 Cal. App. 3d at 581.

Moreover, in *Keiffer*, *Lenci*, and *Clay* the government cited safety concerns as its reason for impairing property owners' access. Nevertheless, the courts held that the government was still liable for the taking. Thus, the fact that the City allegedly believed that removing the debris on Gertie Johnson Road would destabilize the slope (CP 230, CP 232) does not immunize it from liability for its taking.

Finally, it is important to note that the government's ability to regulate traffic or even vacate a road is not questioned here – rather, the question is whether the government's use of that power rises to the level of a taking. This distinction is evident in *Burg v. City of Seattle*, 32 Wn. App. 286, 647 P.2d 517 (1982), in which the court held that homeowners could not force the city in a mandamus action to repair a road that had been closed by a landslide, but "[c]laims relating to loss of access by reason of the City's failure to repair a street closed by a landslide may give

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[13] It is true that if "'the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged.'" *Mackie v. City of Seattle*, 19 Wn. App. 464, 469, 576 P.2d 414 (1978) (quoting *Hoskins*, 7 Wn. App. at 960-61); *accord Capitol Hill Methodist*, 52 Wn.2d at 365-66; *Freeman v. City of Centralia*, 67 Wash. 142, 120 P. 886 (1912). The kinds of inconvenience in those cases, however, involved the closing of streets within an urban area, so that a property owner had to drive only a few blocks out of his way. *See Capitol Hill Methodist*, 52 Wn.2d at 361, 366; *Mackie*, 19 Wn. App. at 469. That is a far cry from the "inconvenience" of having to traverse landslide debris where previously the owner had a stable path to his property.

rise to a claim for damages." *Id.* at 295; *see also Clay*, 21 Cal. App. 3d at 587 (government was "obliged to either restore plaintiffs' access or to proceed to vacate the street and pay compensation therefor"). In short, the City is free to decline to open Gertie Johnson Road, but it must pay for the Huletts' consequent loss of access.

C. Exhaustion of Administrative Remedies is Not Required for Physical Takings, and Would Have Been Futile Anyway.

The City argued that even if the Huletts did have a property right that it infringed upon, their lawsuit could not proceed because they did not exhaust administrative remedies. This argument fails for two separate reasons. ***First***, exhaustion is not required when a property owner is challenging a physical taking. ***Second***, exhaustion here would have been futile in any event.

1. Exhaustion requirements vary depending on whether the takings challenge is "facial" or "as applied." "It [is] ***not*** necessary for the challengers to exhaust administrative remedies in a ***facial challenge*** … ." *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 333, 787 P.2d 907 (1990) (emphasis added). "In addition to facial challenges to regulations that restrict the use of property, ***other types of facial challenges include***, for example, those alleging [a government action that] ***physically invades*** his or her land." *Guimont v. Clarke*, 121 Wn.2d 586, 605 n.7, 854 P.2d 1

(1993); *see also Philips v. King Cty.*, 87 Wn. App. 468, 477, 943 P.2d 306 (1997) ("there are no conditions precedent to the filing of an inverse condemnation action"). Physical invasions "are subject to categorical treatment and do not require analysis of the purpose of the regulation or the legitimacy of the State's interest." *Guimont*, 121 Wn.2d at 600. Thus, a challenge to a physical invasion is a facial challenge for which exhaustion ***is not required***. Here, the Huletts' property right (access) has been physically invaded by the City's refusal to clear the debris covering Gertie Johnson Road.

2. But even if the Huletts were required to exhaust their administrative remedies, exhaustion would be futile and is therefore excused. The rationale for requiring exhaustion is "[t]he potential for ... administrative solutions" that could "obviat[e] any need to address the constitutional questions." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187 (1985) (quotations omitted). "It is a general rule that when an adequate administrative remedy is provided, it must be pursued before the courts will intervene." *Orion Corp. v. State of Washington*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985). Where there is no "adequate administrative remedy" available, however, exhaustion is not required. *Id.* "The futility exception to the exhaustion doctrine is

premised upon the rationale that courts will not require vain and useless acts." *Id.* at 458.

Here, there is no administrative process in which the Huletts could participate to remove the landslide debris on Gertie Johnson Road, and, until that happens, they cannot address the issues that caused their homes to be red-tagged. Similarly, there is no "variance" or permit that the Huletts could request to remove the debris.

And even if there were some kind of administrative process for removing the debris, it would be futile for the Huletts to engage in it. The fact that the City has (1) not reopened the Road after all these years, (2) turned away funds allocated for that project, and (3) asserted in the trial court that it is unsafe to reopen the road, is a good indication that the debris is there to stay and no administrative proceeding with the City would change that outcome. In *Orion Corp.*, for example, the Court held that exhaustion would have been futile where the government "made a conscious policy choice to preserve [the land] in its natural state" and would not allow any development. 103 Wn.2d at 457. There, as here, it would have been pointless for the property owner to apply for permits and variances. *Id.*

It would also be futile for the Huletts to participate in any kind of administrative process to remove the red tags because they cannot do the

work necessary to protect their homes from future landslides and render them habitable until the City reopens the Road. The futility doctrine "may apply not only in cases where administrative remedies are legally inadequate, but also where those remedies are factually inadequate." *Estate of Friedman v. Pierce Cty.*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989); *accord Orion*, 103 Wn.2d at 458 ("futility can be demonstrated by the factual circumstances of a particular case"). Removing the red tags would be a factually inadequate remedy to the real injury here – a mound of landslide debris that still blocks access to the Huletts' homes.

VII. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the trial court and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of February, 2009.

By

Alan S. Middleton, WSBA #18118
Kristina Silja Bennard, WSBA #37291
DAVIS WRIGHT TREMAINE LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: alanmiddleton@dwt.com;
kristinabennard@dwt.com

Attorneys for Appellants