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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NO. 43033-9-II

Mr. Earl Iddings,

Appellant

v.

Mr. Michael & Mrs. Sue Griffith, *et al.*,

Respondents

AMENDED OPENING BRIEF OF APPELLANT EARL IDDINGS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Change comes to all things, even historic, secluded Dewatto Bay Washington. Locals first used Dewatto Bay as a sheltered nook for log booms in the early 1900s and then as a harbored respite from the area's growth and urban sprawl. When change comes to precious places, tension arises. How much change? How fast the change? What is a proper balance between the new and that which came before? How does one strike a balance to find the measure of responsible, balanced change?

The Iddings family has owned real property at Dewatto Bay since 1959.(VR Vol. II Pg. 54). Earl J. Iddings (the "Appellant" or "Iddings") currently owns, among other local parcels, the real property located at 810 NW Dewatto Beach Drive (the "Iddings Property"). (VR Vol. II Pg. 53) The Iddings Property is waterfront property on Dewatto Bay located just beyond the last paved portion of a county road known as Dewatto Beach Drive. (Testimony of Mr. Cates Pgs. 38-39) Dewatto Beach Drive commences at an intersection with Dewatto Holly Road and then runs parallel to the shoreline until it terminates at the Griffith and Iddings' property line. (CP 252, FF 5) Dewatto Beach Drive is narrow, undulating like most shoreline roads, unlit, and about a mile in length. (Ex. 25) The road serves both the seasonal and full time residents of Dewatto Bay. (VR

Vol. II Pg. 54)

In about May 2006, Woodinville resident Michael Griffith, (the “Respondent” or “Griffith”), used the internet to find a piece of Dewatto Bay real property for sale. (VR Vol. IV Pg. 16) He had never seen the property before he bought it off the internet. (VR Vol. IV Pg. 16) The Griffith Property is located adjacent to the Iddings Property with the last paved section of Dewatto Beach Drive terminating on his property (the “Griffith Property”). (VR Vol. IV Pg. 18, VR Vol. IV Pg. 39) The bulk of the Griffith’s Property is separated from the shoreline by Dewatto Beach Drive, which sits just a few feet from the water’s edge. (CP 652) And, Dewatto Beach Drive is separated from the bulk of Griffith’s Property by two things: (1) a fifty-foot bluff, and (2) a wide, flat area that had been used in the past for a vehicle to turnaround or park. (CP 652) The sand bluff can be seen from miles down the length of Hood Canal. As Mr. Griffith testified, the bluff’s bank is vertical and sandy with migratory birds nesting in it. (VR Vol. IV Pg. 7) Finally, the nesting sites are used by a migratory bird known as the Pigeon Guillemots. (VR Vol. IV Pg. 7) The nest sites receive some protection under state and federal law that effectively requires the protection of the nests from destruction. (VR Vol. IV Pg. 7)

Mr. Griffith wanted beach access from his property to Dewatto Beach Drive. (CP 651-652) To gain access he would have to do what no one, who had owned his parcel of land, had done before, he would have to scale the fifty-foot, near vertical bluff and cross over the vehicle turnaround located at the end of the Mason County Road, Dewatto Beach Drive. (CP 652 and CP 653).

But, first he would need a permit. In about 2007, Mr. Griffith commenced the permitting process with Mason County. (CP 652, VR Vol. IV Pg. 10) From 2007 to now, the Griffith permitting process has wandered through the Mason County approval process. At one point, Mr. Griffith did obtain approval to build an access structure that used a number of giant light-colored cement blocks stacked on top of one another like giant Legos. (VR Vol. IV Pg. 8) However, an issue arose during the Mason County permitting process with respect to the width of the public right-of-way centered on Dewatto Beach Drive. (CP 652) The parties tried the issue before the Honorable Carol Murphy of Thurston County during early November 2011. (CP 651) Currently, Mr. Griffith lacks the required permits for access to Dewatto Beach Drive.

At trial, the Court assessed the issue regarding the width of the Dewatto Beach Drive right-of-way under the doctrines of common law

dedication and prescriptive public easements. (CP 651-656) As part of this assessment, the trial Court considered two competing unrecorded official documents known as Waiver of Claim for Damages and Consent to Locate Road (“Waiver”). (CP 652) These Waivers respectively placed the right-of-way width at 20 and 30 feet from Dewatto Bay Drive’s centerline. (CP 652). Because these Waivers are not determinative of the width of the right-of-way issue, the trial Court considered other evidence. The trial Court took the testimony of the parties’ respective surveyors and eye witnesses to Mason County’s maintenance of the Dewatto Bay Drive right-of-way and of the public’s use of the right-of-way. (CP 651-656) Iddings called the following witnesses: Mr. Steven Ottmar, a surveyor; Mr. Jeremy Hicks, Fire Inspector for Mason County Fire District #2; Mr. Robert Thuring, Mason County Public Works Eng. (ret.); Mr. David Clevenger, Mason County Public Work Road Maintenance and Operations Supervisor for District #2; Mr. Lloyd Iddings, longtime Dewatto Bay property owner and seasonal resident; Mr. Tim Clements, longtime Dewatto Bay property owner; Mr. Gregory Miller, longtime North Shore Dewatto Bay property owner; Mr. Earl Iddings, Dewatto Bay property owner; and Mr. Kell McAboy, former Mason County Planning Department Planner. Griffith called the following witness: Mr. Peter

Martinez, Griffith's adjoining Dewatto Bay property owner; Mr. Sydney Bechtolt, Jr., a surveyor; Mr. James McLean, Mason County Public Works as an Instrument technician.; Mr. George Cates, Mason County Public Works as an Equipment Operator; Mr. Dale Fassio, Mason County Public Works as an Equipment Operator; Mr. Eric Bush, Mason County Public Works as a Right-of-Way Manager/Property Manager, and Mr. Michael Griffith. Iddings has provided the Court and all other parties with verbatim reports of all witnesses.

The scope or width of the right-of-way was a major issue during the trial. Under the doctrine of common law dedication, the key factual question before the trial Court in determining the width of the right-of-way was the scope of the municipal and public acceptance of the right-of-way by maintenance and use. *Sweeten v. Kauzlarich*, 38 Wn.App 163, 168, 684 P.2d 789 (1984). Under the doctrine of prescriptive rights, the key factual question before the trial court in determining the width of the right-of-way was the historical municipal maintenance and public use of the right-of-way for the prescribed period. *King County v. Hagen*, 30 Wn.2d 847, 856, 194 P.2d 357 (1948); *Sparks v. Douglas County*, 39 Wn.App 714, 695 P.2d 588 (Div. III 1985).

Ultimately, the trial Court determined that with respect to the

Dewatto Bay Drive right-of-way, a common law dedication occurred. (CP 653-654, FFs 13-22). The trial Court determined that the scope or width of the right-of-way was 22.5 feet from the centerline as determined by the survey prepared by Mr. Bechtold (the “Bechtold Survey”). (CP 655, FF 31) The trial Court also noted favorably the testimony of Mr. Bush, the Mason County Right of Way Manger, who based his findings on the Bechtold Survey to reach, quite predictably, the same measurements as Mr. Bechtold. The trial Court also found or concluded that prescriptive rights had been established to the same right-of-way as created and established by the common law dedication. (CP 655, FF 34) The Court’s findings noted extensive testimony that was vague, inexact, or conflicting that included use and municipal maintenance to the vertical slope of the bluff, but the Court restrained itself from expanding the scope of the right of way or turnaround beyond the measured distances that were presented to the Court during trial. (CP 655)

Notably, the trial Court failed to reference in its Findings of Fact and Conclusions of Law that nearly all witnesses noted that the public used distance between the landward side of Dewatto Beach Drive and the bluff’s vertical face as the historic turnaround. (VR Vol. I Pg. 157; VR Vol. I Pg. 172 and VR Vol. II Pg. 11) Witnesses who worked for Mason

County similarly testified that Mason County maintained the turnaround to the vertical face of the bluff on a periodic maintenance schedule (VR Vol. II Pg. 11; VR Vol. I Pg. 164; VR Vol. I Pg. 152). No witness offered contradictory testimony. Hence, the trial Court limited its findings and conclusions to the measured surveyed distances. (CP 653-654) The trial Court's reliance on the Bechtold Survey and Bush Testimony, which was also turn based on the Bechtold Survey (RP Vol. V Pg. 49, RP Vol. V Pg. 55, CP 509) stood in contrast to the absence of any evidence regarding the scope of the public's historical use or of Mason County's historical maintenance of the right-of-way. Further, the trial Court's findings failed to include any evidence correlating the Bechtold Survey or the Bush Testimony to the historical use or maintenance of the right-of-way. Thus, trial Court found that the measurements of conditions existing on the day that Mr. Bechtold shot his survey came to establish years of public use and years of municipal maintenance. Iddings cites such a finding as error based on the reasoning that a snapshot in time of right-of-way conditions is insufficient to establish the historical use and maintenance of the right-of-way—in the same reasoning that one polaroid picture does not equal a movie.

In reaching its decision, the trial Court failed to address RCW

36.86.010 and MCBC 14.17.090. In particular, the trial court failed to make any finding as to when the common law dedication occurred or when the prescriptive rights ripened into vested rights. Without these findings, the Court cannot determine the applicability of 36.86.010 and MCBC 14.17.090.

RCW 36.86.010 states that Washington State county roads shall be 30 feet from the centerline in width to be the necessary and proper right of way width. *Id.* Washington's Legislature proscribed this "30 foot from the centerline distance" as the necessary and proper width of county road right of ways since at least 1937. MCBC 14.17.090 requires a turnaround on dead-end fire apparatus access roads (longer than 300 feet) with the turnaround width being sufficient for fire apparatus to turn around within 150 feet of any facility or structure. The turnarounds required by MCBC appear to exceed the turnaround width found by the Court by a large margin.

Iddings appealed the trial Court's decision to resolve four questions raised by the trial Court's decision. First, under the doctrines of common law dedication and prescriptive easements, must the Court's determination of a right of way's width be limited to measured distances or may it be determined by reference to historic landmarks, like the

vertical face of a bluff that may be formally measured at a later date? Second, may a trial court rely solely on one survey of existing conditions to establish the scope of a common law dedication or prescriptive rights? Third, does the right of way width established by RCW 36.86.010 apply to Dewatto Bay Drive? Last, does MCBC 14.17.090 apply to the Dewatto Bay Drive turnaround and therefore require a turnaround at the end of Dewatto Bay Drive wider than 22.5 feet from the centerline of Dewatto Bay Drive?

In bringing this appeal, Mr. Iddings is not seeking to keep time in a bottle or to stop change. Mr. Iddings, a third generation Dewatto Bay resident, simply wants to balance the change in a manner that preserves Dewatto Bay's splendor for years to come. Change happens and memories are for the past, but change should not come at the expense of the safety and wellbeing of those who live at, visit, or enjoy Dewatto Bay. Lives may be saved by having the proper width for the right of way and for having a turn around that facilitates the rapid access and departure for fire apparatus and life safety vehicles. One day the cement urbanization of Woodinville will come to Dewatto Bay; Mr. Iddings only asks that the arrival of that day be balanced with the safety and health needs of those who came before Mr. Griffith.

II. ASSIGNMENTS OF ERROR

1. The lower court erred when it determined the scope of municipal acceptance of a common law dedication by reliance on a recent site-conditions survey as opposed to evidence of the scope of historical maintenance as established by trial testimony and landmarks. CP 654, FFs 13-22.
2. The lower court erred when it determined the scope of public acceptance of a common law dedication by reliance on a recent site-conditions survey as opposed to evidence of the scope of historical use as established by trial testimony and landmarks. CP 654, FF 23-28, 30-33.
3. The lower court erred when it determined the scope of public prescriptive rights by reliance on a recent site-conditions survey as opposed to evidence of the scope of historical use as established by trial testimony and landmarks. CP 655, FFs 25-34.
4. The lower court erred in concluding that the Dewatto Bay Drive right of way was 22.55 feet from the centerline wide when Washington law requires, as necessary and proper, that county road right-of-ways be 30 feet from the centerline wide. CP 655, FFs 22-34.
5. The lower court erred in concluding that the turnaround serving the dead end portion of Dewatto Bay Drive was 22.55 feet from the centerline

wide when the local fire code required a wider turnaround of 45 feet from the centerline or sufficient width for fire apparatus to turn around. CP 655, FFs 22-34.

III. STATEMENT OF ISSUES

1. **County Acceptance of a Common Law Dedication:** May a municipal entity accept a common law dedication of a right-of-way by historical and systematic maintenance of the right-of-way with the scope of such an acceptance being defined by the historical scope of such maintenance as defined by existing trial testimony and landmarks.

Assignment of Error 1

2. **Public Acceptance of a Common Law Dedication:** May the public accept a common law dedication of a right-of-way by its historical, continuous use of the right-of-way with the scope of the right of way being determined by the scope of such use as defined by trial testimony and existing landmarks. **Assignment of Error 2**

3. **Determining Width of Public Prescriptive Easement:** Is the scope of a prescriptive easement determined by historical, actual use of an area or by measurements taken from a recent site-conditions survey.

Assignment of Error 3

4. **Use of Measurements taken from One Recent Site-conditions Survey to Establish the Scope of Acceptance for a Common Law Dedication and for the Scope of Prescriptive Rights:** May a trial Court establish historical maintenance and use over a period of years by measurement evidence taken from one recent site-conditions survey that was based only on the site conditions on the day of the survey and not on any information or data of historical use or historical maintenance of any length of time. **Assignments of Error 1- 3**
5. **Application of State Law Right of Way Width Requirements for the County Road Dewatto Beach Drive:** May the width of a common law right-of-way dedication creating a county road violate the state law width requirement for such county roads when Washington's legislature determined that the required width was necessary and proper for such county roads. **Assignment of Error 4**
6. **Application of Mason County's Fire Code:** May the width of a turnaround created by a prescriptive easement or common law dedication violate the width requirements for such turnarounds set forth in the applicable fire code. **Assignment of Error 5**

IV. STATEMENT OF THE CASE

The Iddings family has owned real property at Dewatto Bay since

1959.(VR Vol. II Pg. 54). Earl J. Iddings (the “Appellant” or “Iddings”) owns property located at 810 NW Dewatto Beach Drive (the “Iddings Property”). The Iddings Property is waterfront property on Dewatto Bay located just beyond the last paved portion of a county road known as Dewatto Beach Drive. Before the Dewatto Beach Drive terminates at the Iddings Property, it runs parallel to the shoreline until it intersects with Dewatto Holly Road. Between this origination point and the Iddings Property, Dewatto Beach Drive follows the undulating shoreline. Dewatto Beach Drive is narrow, unlit, and about a mile in length. (Trial Exhibit 25) The road serves both the seasonal and full time residents of Dewatto Bay.

In about May 2006, Woodinville resident Michael Griffith, (the “Respondent”), used the internet to find a piece of Dewatto Bay real property for sale. (VR Vol. IV Pg. 16) He had never seen the property before he bought it off the internet. (VR Vol. IV Pg. 16)

In about 2007, Mr. Griffith commenced the permitting process with Mason County. (CP 652, VR Vol. IV Pg. 10) From 2007 to now, the Griffith permitting process has wandered through the Mason County approval process. At one point, Mr. Griffith did obtain approval to build an access structure that used a number of giant light-colored cement blocks stacked on top of one another like giant Legos. (VR Vol. IV Pg. 8)

However, an issue arose during the Mason County permitting process with respect to the width of the public right-of-way centered on Dewatto Beach Drive. (CP 652) The parties tried the issue before the Honorable Carol Murphy of Thurston County during early November 2011. (CP 651) Currently, Mr. Griffith lacks the required permits for access to Dewatto Beach Drive.

At trial, the Court assessed the issue regarding the width of the Dewatto Beach Drive right-of-way under the doctrines of common law dedication and prescriptive public easements. (CP 651-656) As part of this assessment, the trial Court considered two competing unrecorded official documents known as Waiver of Claim for Damages and Consent to Locate Road (“Waiver”). (CP 652) These Waivers respectively placed the right-of-way width at 20 and 30 feet from Dewatto Bay Drive’s centerline. (CP 652). Because these Waivers are not determinative of the width of the right-of-way issue, the trial Court considered other evidence. The trial Court took the testimony of the parties’ respective surveyors and eye witnesses to Mason County’s maintenance of the Dewatto Bay Drive right-of-way and of the public’s use of the right-of-way. (CP 651-656)

Ultimately, the trial Court determined that with respect to the Dewatto Bay Drive right-of-way, a common law dedication occurred. (CP

653-654, FFs 13-22). The trial Court determined that the scope or width of the right-of-way was 22.5 feet from the centerline as determined by the survey prepared by Mr. Bechtold (the "Bechtold Survey"). (CP 655, FF 31) The trial Court also noted favorably the testimony of Mr. Bush, the Mason County Right of Way Manger, who based his findings on the Bechtold Survey to reach, quite predictably, the same measurements as Mr. Bechtold. The trial Court also found or concluded that prescriptive rights had been established to the same right-of-way as created and established by the common law dedication. (CP 655, FF 34) The Court's findings noted extensive testimony that was vague, inexact, or conflicting that included use and municipal maintenance to the vertical slope of the bluff, but the Court restrained itself from expanding the scope of the right of way or turnaround beyond the measured distances that were presented to the Court during trial. (CP 655)

At trial, the collective testimony was consistent when it came to the public's use of the Dewatto Bay Drive turnaround and right of way. The testimony is that the public made consistent use for decades of the turnaround and right of way from the edge of the paved surface of Dewatto Bay Drive to the vertical face of the bluff on Griffith's Property. See e.g. Testimony of Mr. Thuring (VR Vol. I Page 83, Testimony of Mr.

Clevenger (VR Vol. I Page 153), Testimony Mr. Lloyd Iddings (VR Vol. I Page 181), Testimony of Mr. Clements (VR Vol. II Page 8), Testimony of Mr. Miller (VR Vol. II Page 46), Testimony of Mr. Earl Iddings (VR Vol. II Page 59).

The trial testimony was equally consistent in that Mason County maintained the turnaround from the road's surface to the bluff's vertical face. See e.g. Testimony of Mr. Clevenger (VR Vol. I Page 164), Testimony Mr. Lloyd Iddings (VR Vol. I Pages 171, 175), Testimony of Mr. Clements (VR Vol. II Pages 13, 14), Testimony of Mr. Earl Iddings (VR Vol. II Pages 55, 56), Testimony of Mr. McAboy (VR Vol. IV Page 40), Testimony of Mr. Griffith (VR Vol. IV Page 7), Testimony of Mr. Hicks (VR Vol. I Page 54-55 testimony regarding trial Exhibit 25).

The trial Court noted that much of the trial testimony was vague, inexact, or uncertain because no witness to the County's maintenance or to the Public's use had measured the distance between the edge of the payment and the vertical face of the bluff. (CP 654) The trial Court cut through the vague, inexact evidence by relying on the testimony of Mr. Brush, the Mason County Right of Way Manager, whom the trial court found to be very credible. (CP 655, FF 30) The trial court also relied on the testimony (and survey) of Mr. Bechtolt, whose February 2009 survey

of the turnaround measured 22.55 feet from the Dewatto Bay Drive centerline to the widest point of the turnaround—as the turnaround existed in February 2009. (CP 655, FF 31)

Bechtolt Survey and its Limitations

Bechtolt conducted his survey in February 2009. RP (Vol. IV) P. 58 Inn. 8-25. No party presented evidence at trial in the form of a survey that predated this dispute. Although Iddings presented consistent witness testimony from both the local Dewatto Bay public and from County employees regarding the public's use and Mason County's maintenance of the Dewatto Bay Drive right-of-way, neither Iddings nor Griffith had a survey that predated the dispute.

The lack of competing survey evidence would seemingly place the Bechtolt Survey in a definitive position. However, as the facts below indicate, the Bechtolt Survey fails to measure the turnaround's historical use and maintenance. The integrity of relying on the survey as a trustworthy measurement is further diminished because the County ultimately tied its adoption of the Bechtolt Survey to a side-deal between it and Griffith. See e.g., the Trial Testimony of Sydney Bechtold (RP Vol. III Pgs. 57-77).

Mr. Brush's trial testimony emphasized the centrality and

singularity of the Bechtolt Survey to the County's position in this matter.

4 Q. At that time did you believe that -- what was your belief
5 about the traditional size of the turnaround at that point in
6 August?
7 A. Well, we had been pulled to both sides of the dispute I think.
8 Both sides are quite persuasive. We decided in the end,
9 however, that the Agate land survey data was probably the most
10 reliable. It was based upon physical measurements, and we
11 thought that that was the best evidence that we had.
12 Q. To your knowledge was that Agate survey the only information
13 that you had regarding the toe of slope in its natural
14 condition before any work had been done by Mr. Graffith?
15 A. Yes.
16 Q. So you revert back to the 22 and a half feet, correct?
17 A. That's correct.
18 Q. And that's based on the survey done by Sid Bechtold, the Agate
19 survey.
20 A. Yes.

RP (Vol. V) P. 15 Inn. 6-20, CP 495. From this testimony, Mr. Brush makes clear that the County had no other hard evidence that produced a measurable distance—let alone the distance of 22.55 feet. The Bechtolt Survey was the only source of this information.

In his trial testimony, Mr. Brush goes on to testify that he (and pretty much anyone else who looked at this survey) understands that the Bechtolt Survey is limited because it measured the state of the turnaround when it contained loose fill material that was otherwise normally removed by the County. RP (Vol. V) P. 51 Inn. 6-13, CP 510, 540. In fact, Mr. Brush was clear during his trial testimony about Trial Exhibit 17, which is an official letter dated April 20, 2010 from Mason County Department of

Public Works to Mr. Griffith. In this exhibit, Mr. Brush ultimately expresses his understanding that the historic use and maintenance of the turnaround extended eight feet beyond the distance measured by Mr. Bechtolt. The Exhibit 17 letter specifically stated, “[w]e have concluded that, while Mr. Bechtolt’s survey is based on actual measurements taken in February of 2009, the historical turn-around space at the time had been reduced by sand that had sloughed off the face of the bluff.” Exhibit 17 continues by stating that the turnaround width is eight feet greater than the distance measured by Bechtolt. Id. It is important to note that Trial Exhibit 17 is an official letter from the Mason County Department of Public Works and that no party presented trial testimony from an authorized speaking agent for the Department of Public Works that contradicted the sum and substance of Trial Exhibit 17.

In Trial Exhibit 16, a May 25, 2010 email from Mr. Bush to Mr. Griffith, Mr. Brush wrote that the then present understanding of the Mason County Public Works Department was:

Unfortunately, our present understanding of the situation regard the turn-around is based not only on what we have heard from Mr. Iddings and his neighbors, but also on the experience of our own road crew. With that information, we believe that the historical width of the turn-around has been as great as 30.5 feet from the centerline.

Trial Exhibit 16, CP 575. Hence, from the Trial Exhibits one can see how

Mason County Department of Public Works established the fact that it considered both the public use and the County maintenance of the turnaround to extend eight feet beyond the distance measured by the Bechtolt Survey in February 2009. Mason County held this position until August 2010.

The events of August 2010 will be addressed in detail below, but first one must understand the side-deal Mason County cut with Griffith in March 2010 to appreciate the Bechtolt Survey's currency in this dispute. The survey had a life of its own before it got to the trial court's Findings of Fact and Conclusions of Law. As detailed below, prior to August 2010 the County accorded the survey much less importance. In fact, in March 2010, the survey was not the bright guiding star we see in the trial court's Findings of Facts but rather a dim, diminutive star in a constellation of facts.

Mason County's Side-Deal with Griffith based on Mason County accepting the Bechtolt Survey

Mr. Brush met with Mr. Griffith in March 2010 at the Griffith property to discuss the turnaround. (RP Vol. V Pp. 48-49, CP 534) During this meeting the County wanted the turnaround cleared of debris and Mr. Griffith wanted his Road Access Permit. The parties reached an agreement. The agreement between the Mason County Department of

Public Works and Griffith was simple:

	49
1	meet personally?
2	A. We did on-site.
3	Q. Okay. And you reached an agreement.
4	A. Yes.
5	Q. And the agreement was make it look like Sid Bechtold's map,
6	and in exchange for that, what was he going to get?
7	A. His road access permit.

(RP Vol. V P. 49 Inn. 1-7, CP 555). Under this side-deal, the County would grant Griffith his road access permit if he could just make his property match the dimensions and measurements of the Bechtolt Survey. It was a simple deal—too simple.

The side-deal did not last long. As demonstrated by Trial Exhibit 17, the County killed the deal by April 20, 2010. The deal's death set off a flurry of emails and letters. Mr. Griffith responded to the County's backing out of the deal by an email, dated April 26, 2010, expressing his frustration with the County's breaking of the side-deal. (See the lower first page of Ex. 1). Griffith's April 26, 2010 email provides in relevant part:

ran it thru your legal dept. As you know this wasn't our agreement. The agreement was that I wouldn't place the blocks on the ROW. That ROW was 40ft unless the county maintained more. We also agreed that Sid's Topo was the what the county had maintained. We made that agreement in good faith. We met down at the property on March 25th and my hired excavator cleaned up the turn around. I also re-submitted my drawings, to the county, with revisions to show the new ROW dimensions.

What was suppose to happen next was that my Road Access Permit would be granted. Now I

Ex.1. This side-deal imbued the Bechtolt Survey with a meaning both separate from what it actually measured and separate from the relevance and value to determining the public's historical use and of the County's historical maintenance of the turnaround. The County had moved from the role of right-of-way chronicler to the role of deal-maker. The width of the right-of-way had become the currency of this new commerce.

Griffith Responds to Mason County Reversal on the Side-deal

Griffith responded to his reversal of fortune by counsel, Mr. Morris. On June 16, 2010, Mr. Morris emailed Mr. Brush regarding the County's treatment of the right-of-way issue to ensure that the County understood that Griffith would respond with litigation if needed to maintain the benefit of a 40 foot right of way. Ex. 20. Five days later, Mr. Brush emailed Mr. Morris to inform him that the County would be postponing its work on the turnaround for the time being. Ex. 19. By August 3, 2010, Mr. Brush emailed Mr. Morris again to complete the County's abandonment of the position that Griffith needed to remove any

material from the turnaround beyond the Bechtolt survey. Ex. 18. Mr. Brush described his August 3, 2010 email best when he emailed Ms. Debbera Coker from the Mason County Building Department on October 14, 2010 the following cover notation on his forward of the August 3, 2010 email to Ms. Coker:

This email is a response to Mike Griffith's attorney, who threatened a lawsuit if we proceeded to remove material from the turn-around area to restore it to what we think was its previous size. We were going to do that because Mr. Griffith had not done it per our request.

Ex. 21. Hence, we know from the trial exhibits that Mason County experienced pressure in late 2010 to walk away this historical use and maintenance of the turnaround that was unrelated to the historical facts on the ground at Dewatto Bay. It is interesting to note that even in October 2010, Mr. Brush still maintained an independent belief that the turnaround's historical size was larger than the measurements of the Bechtolt Survey.

Mr. Brush's trial testimony confirmed the significance of the June 16, 2010 email Ex. 20 on the County. When asked if the June 16, 2010 email conveyed any new information to the County about the historical use of the turnaround or of its maintenance by the County, Mr. Brush confirmed that the email failed to offer the County any new information helpful to determining the turnaround's size and that the only new

information in the email was the threat of litigation from a lawyer—Griffith’s lawyer. (RP Vol. V Pg. 67-68 Inn. 15-24, CP 559). The evidence at trial showed that once the County abandoned its position regarding the historical use and maintenance of the turnaround being greater than the Bechtolt Survey, the County never really looked back. The County changed its position with respect to abandoning the turnaround’s historical use and maintenance without any new evidence coming to it—aside from the June email from Griffith’s lawyer threatening litigation.

Mason County’s Adoption of the Bechtolt Survey as a Middle Ground

As indicated above, Mr. Brush testified at the trial that the County came to see its role as one of mediating what it saw as a dispute between Iddings and Griffith.

3 | A. I guess, you know, what I've learned from this whole process
4 | is that what we were trying to do is find a resolution to a
5 | dispute and a dispute over what the dimensions of a turnaround
6 | actually would be in a situation where the dimensions really
7 | were changing all the time. And I certainly believe that the

(RP Vol. V Pp. 72 Inn. 3-7, CP 509). Mr. Brush recognized that the County was trying to mediate the dispute between the parties when they

were not skilled or trained to do so. Id. at lnn 19-22. In fact, Mr. Brush considered a turnaround measurement of 22.55 feet (the distance of the Bechtolt Survey) a happy medium between the two parties. (RP Vol. V Pp. 55 lnn. 14-23, CP 509) Despite considering the Bechtolt distance a happy medium, Mr. Brush still believed that the traditional area of the turnaround was larger than the Bechtolt area of the turnaround. (RP Vol. V Pp. 74 lnn. 12-16, CP 538) Mr. Brush confirmed that his belief was formed on his personal factual investigation, his personal site visits, his discussions with County personnel, and his discussions with neighborhood citizens with knowledge of the turnaround area. Id. at lnn.15- 25. In short, Mr. Brush confirmed that his informed and trained personal belief was that the turnaround area was larger than the size of the Bechtolt turnaround area. Yet, despite the belief of Mason County's Right-of-way Manager as to the historic use and size of the turnaround area, Mason County adopted the Bechtolt Survey measurements for the turnaround as contemplated by its side-deal with Griffith, as envisioned by its mediation efforts, and as needed to avoid the litigation suggested by Griffith's lawyer.

V. ARGUMENT

Every witness with knowledge of the Mason County's use and maintenance of the Griffith Property and the Dewatto Bay Drive right-of-

way testified that Mason County maintained the both the right of way and turnaround on a consistent, regular basis by keeping it cleared of slough from the landward edge of Dewatto Beach Drive to the toe of the bluff's vertical face. No witness contradicted this evidence.

Every lay witness testified that the general public used Dewatto Beach Drive and the turnaround consistently for decades. The evidence is that the public used the turnaround for campers, trucks, and boat trailers. People even tried to camp in the turnaround. No witness or other evidence contradicted this evidence. Hence, Iddings relies on substantial evidence regarding the use by Mason County and the Public with respect to the below arguments.

A. Standard of Review

Dedication of a right of way is a mixed question of law and fact. Sweeten v. Kauzlarich, 38 Wash. App. 163, 166, 684 P.2d 789 (Div. III 1984). However, whether a common-law dedication has occurred is a legal issue. Id.

With respect to prescriptive easements, the width of a particular easement is generally a question of fact to be determined under the circumstance of each particular case. Olympia v. Lemon, 93 Wash. 508, 511 161 P. 363 (1916).

B. Facial Reliance on the Bechtold Survey is Problematic

The County focuses at great length on the trial court's finding of fact that the Bechtolt Survey established the historical use and maintenance of the Dewatto Bay Drive turnaround on the Griffith's property. RP (Vol. I) P. 164. The County places similar weight on the trial Court's reliance on Mr. Brush's testimony. (FF 30)

But all this is undermined by Mr. Brush's trial testimony. During the trial, Mr. Brush testified that the historical use and maintenance of the turnaround exceeded the area surveyed by Bechtolt. CP 553. Mr. Brush in his trial testimony qualified the County's apparent reliance on the Bechtolt Survey by stating that County championed the Bechtold surveyed distance because it was attempting to mediate the differences between Iddings and Griffith, because of Griffith's threat of litigation, and because of the side-deal that Mr. Brush made with Griffith. In addition to Brush's testimony, Iddings notes that certain trial exhibits show that Mason County concluded in April 2010 that the area of historical use and maintenance exceeded the area of the Bechtolt survey by eight feet. CP 542. In fact, Mr. Brush testified at trial that he still retained the belief that the historical area of the turnaround exceeded the surveyed area by eight feet. Ex. 17, CP 542.

Lastly, Mr. Brush's trial testimony and related trial exhibits

indicate that Mason County recognized that the Bechtolt Survey measured the area of the turnaround at a time when considerable loose fill had sloughed off the 50 foot bank downward to fill the turnaround area and that as such the Bechtolt Survey represented the turnaround only as of February 2009, but not the turnaround's historical, larger size. Ex. 17, CP 542.

All of this goes to Iddings' primary contention on this Appeal that the trial court's Findings of Facts fail to include findings that relate to the historical use and maintenance of the turnaround. Instead, the trial court based its conclusions of law on a finding of historical use and maintenance comprised of a site survey limited in applicability to February 2009 and on evidence that the County relied on this limited survey for reasons not related to the size of any right-of-way.

Iddings counter's this error by pointing to seven trial witnesses' that all testified consistently that the County maintained the turnaround past 22.55 feet and up to the bluff's vertical face. This count does not include Mr. Brush's written comments in Ex. 17. Iddings further points to no less than six trial witnesses' on the issue of the public's use that all testified consistently that the public used the turnaround past the distance measured by the Bechtolt Survey and up to the bluff's vertical face.

Reliance on Bechtolt's survey evidence and Brush's trial evidence might have some merit if it included any evidence of historical use or maintenance. In fact, the trial Court's Findings of Fact and Conclusions of Law are devoid of any finding or conclusion linking Bechtolt's survey or Brush's trial evidence to any historical maintenance or use of the Dewatto Bay Drive right-of-way. In fact the exact opposite is true because when Mr. Brush testified during the trial as to the historical use and maintenance of the turnaround, his testimony supported Iddings' contention that the turnaround was historically larger than the Bechtolt Survey.

Idding's maintains that the qualified nature of the Bechtolt's Survey evidence and of Brush's trial evidence effectively renders the trial Court's Findings of Fact and Conclusions of Law internally inconsistent. For instance, the trial court's finding of a common law dedication and a prescriptive rights are inconsistent with the trial court's failure to make substantiating factual findings regarding actual historical use and maintenance of the turnaround. This type of internally inconsistency alone can mandate the reversal of such a trial court decision. See, *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 499, 32 P.3d 289 (2001) (reversing and remanding arbitrator's award because of factual inconsistencies apparent on the face of the award).

C. Common Law Dedication

Under Washington common law, private property may be offered for dedication as a public right of way, and becomes a public right of way upon acceptance by either the pertinent government agency or the public. Horton v. Okanogan County, 98 Wash. 626, 168 P. 479 (1917). To establish a public right of way, the offer of dedication is not required to be recorded, nor even in writing. 17 Stoebuck and Weaver, Washington Practice: Real Estate: Property Law § 5.10; City of Spokane v. Catholic Bishop of Spokane, 33 Wash.2d 496, 503, 206 P.2d 277 (1949) (dedication valid “whether by a written instrument or by some act or declaration of the owner manifesting his clear intent to devote the property to public use”). The standard for a common law dedication is much lower than for a statutory dedication. Horton, 98 Wash. at 631-34 (holding that while a “Waiver of Claim for Damages and Consent to Locate Road” lacking legal description of right-of-way was insufficient for statutory road establishment, the waiver was sufficient for common law dedication even though it was not recorded with the county auditor).

Once an owner’s intent to dedicate is established, the determination of whether a common law dedication has occurred is a legal issue. Sweeten v. Kauzlarich, 38 Wash. App. 163, 166, 684 P.2d 789

(1984) (citing Knudsen v. Patton, 26 Wash. App. 134, 611 P.2d 1354, review denied, 94 Wash.2d 1008 (1980)).

Here, the Hon. Judge Murphy found that Mason County maintained the turnaround to a maximum width of 22.5 feet from the centerline of Dewatto Beach Drive. (CP 654) From this finding, the trial Court concluded that 22.5 feet from the centerline was the extent to which the County accepted the dedication. (CP 654) These findings and conclusions taken together evidence the trial Court's conclusion that an intent to dedicate a right of way for Dewatto Beach Drive existed or was otherwise manifested by the Waivers.

1. **Acceptance of the Dedication by Mason County**

Acceptance of a common law dedication can be by either a governmental entity or the public. *Horton*, 98 Wash. at 481-82. Where a county accepts a common law dedication, Washington courts hold that the right of way extends not only to the area the public actually uses but to the full dimensions set forth in the offer of dedication or as reasonably necessary for public travel. See In re West Marginal Way in City of Seattle, 109 Wash. 116, 186 P. 644 (1919); see also Sweeten, 38 Wash. App. at 167 (discussing presumption that scope of dedicated road extends "to the full width reasonably necessary for public travel").

The process of common law dedication and its related acceptance is exemplified in In re West Marginal Way in City of Seattle, 109 Wash. 116, 186 P. 644 (1919). In West Marginal Way, the Court found a common law dedication, but the Court had to decide the width of the dedication when the presented evidence indicated that the county and public actually only used a portion of what would otherwise be a standard sized right of way. Id.

The residents in West Marginal Way petitioned for the establishment of a county road, and the County Commissioners granted the petition. 109 Wn. at 118. A road was ordered open and declared to be a county road, as here. Id. The road was then used for a period of more than 30 years. Id.

The larger factual issue before the West Marginal Way court was whether the created right of way was limited to the width actually used by the public and maintained by the county, or did the right of way width expand to fill the fullest width allowable under the then current statutory law. Like here, the public used a defined measurable width with the “portion of the road actually used [being] from 10 to 12 feet in width.” Id. at 118-120. However, under the applicable right of way statutes for

county roads, a county road was technically required to be 60 feet in width. Id. at 118-120.

Significantly, the West Marginal Way court rejected an argument that the county was only entitled to the 10 or 12 feet of the road actually used. Id. at 120. Instead, the court adopted the reasoning of Lemon and Yakima County v. Conrad, 26 Wash. 155, 66 P. 411 (1901):

After the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case.

Id. (quoting Lemon, 93 Wn. at 511). Because the applicable statute required the county road to be 60 feet in width, the Marginal Way court found that “the county acquired by prescriptive right the whole of the 60-foot road, notwithstanding the fact that but a portion thereof was actually used.” Id. at 120-21 (emphasis added).

Here, the trial Court found that both the public and the County accepted the dedication—but only to a distance of 22.5 feet from the Centerline of Dewatto Bay Drive. Under analysis set forth by the Court in *West Marginal Way*, the Appellant is entitled to the full extent of the statutorily required scope of the right of way (including the turnaround).

With respect to the turnaround, Mason County Code (“MCC”) 16.38.050 requires turnarounds at the end of county roads to have “a minimum right-of-way radius of not less than fifty feet,”¹ or, in other words, a 100 foot wide turnaround area. As discussed below, RCW 36.86.010 mandates a 30 foot from centerline width as the necessary and proper width for county roads in the State of Washington. Hence under RCW 36.86.010, the Appellant is entitled to an unencumbered 60 foot right of way, exclusive of the turnaround width.

Appellant’s assignment of error on this issue goes beyond the fact that the trial Court failed to apply the analysis from the West Marginal Way court to ensure that the accepted right of way complied with the statutory provisions for county roads. Iddings is also concerned that the trial Court limited acceptance to the dedication to 22.5 feet from the Centerline of Dewatto Bay Drive. Iddings is further concerned that the trial court failed to make a finding based on Mr. Brush’s testimony as to what particular use by the County constituted its acceptance of the turnaround dedication.

¹ In addition, RCW 36.86.010 provides that “the width of thirty feet on each side of the center line of county roads, exclusive of such additional width as may be required for cuts and fills, is the necessary and proper right-of-way width for county roads.” A 45 foot right of way would violate RCW 36.86.010.

Absolutely no evidence indicates that Mason County limited its maintenance work in the right of way and turnaround to any measured distance. The testimony and evidence was consistent and uncontroverted that Mason County maintained the turnaround to the vertical face of the bluff on Griffith's property. [Testimony of Mr. Clevenger (VR Vol. I Page 164), Testimony Mr. Lloyd Iddings (VR Vol. I Pages 171, 175), Testimony of Mr. Clements (VR Vol. II Pages 13, 14), Testimony of Mr. Earl Iddings (VR Vol. II Pages 55, 56), Testimony of Mr. McAboy (VR Vol. IV Page 40), Testimony of Mr. Griffith (VR Vol. IV Page 7), Testimony of Mr. Hicks (VR Vol. I Page 54-55 testimony regarding trial Exhibit 25)].

2. Acceptance of the Dedication by the Public

Even if Mason County had not expended funds for maintenance of the right of way, Plaintiffs would have rights to continued use of the full turnaround space based on their historical public use. When acceptance of a common law dedication occurs only by public use (without government expenditure of funds), there is acceptance — and thus a completed dedication — of the area or width that the public actually uses. Sweeten, 38 Wash. App. at 167-68. In Sweeten, the court stated that acceptance of a common-law dedication may arise: “(1) by express act; (2) by

implication from the acts of municipal officers; and (3) by implication from user by the public” Id. at 168 (quoting Spokane v. Catholic Bishop of Spokane, 33 Wash.2d 496, 503, 206 P.2d 277 (1949)). Sweeten involved a similar dispute regarding “the width of a road dedicated in an unrecorded and unsigned plat.” Id. at 164. With no evidence of government acceptance, the court in Sweeten held that the common law dedication extended to the width of road “actually accepted through public use,” even though the public use consisted of only limited use, “primarily [by] family, friends and business invitees of the lot owners.” Id. at 168.

Here, the trial Court found that the public accepted a common law dedication of the right of way and turnaround. (CP 654) But, the trial Court also went on to find that the testimony regarding the historic use by the public of the turnaround provide “vague” or “inexact” testimony regarding the public’s use of the turnaround. Id. Curiously and paradoxically, the trial Court found the cure to this vague and inexact testimony by creating a precise area of use of 22.5 feet from the centerline of Dewatto Beach Drive. (CP 655)

Finally, Iddings is concerned that the trial court found that the scope of the public’s use was measured and determined by the Bechtolt Survey with the public found to have accepted by its historic use the

precise distance measured by the survey—22.55 feet. (CP. 655 FF 31). Hence, the trial court rendered the factual finding that the public had used the turnaround for decades at precisely the same distance from the Dewatto Bay Drive centerline as the County maintained for decades. The trial court made no factual finding as to the date by which the public or the County manifested their respective acceptance of the common law dedication of the turnaround. The trial court made no factual findings as to how the County personnel and members of the public coordinated their use and maintenance to the same measurements over the decades of use and maintenance. Such multi-decade coordination between the public's use (comprised of random individuals) and the County's maintenance would seem incredible.

To Iddings, this last point in particular gives shape to the argument that the trial Court's Findings of Fact and Conclusions of Law are insufficient or otherwise internally inconsistent on their face to sustain the trial court's decision on appeal. The trial court failed to make critical findings: (1) as to the extent of the public's actual use of the turnaround, (2) the County's actual maintenance of the turnaround, (3) the specific facts effectuating the public's acceptance of the turnaround dedication, (4) the specific facts effectuating the County's acceptance of the turnaround

dedication, (5) the facts relating Bechtolt's Survey to the prior four factual questions; and (6) the testimony or facts relating Mr. Brush's testimony to the first four questions. Rather, the trial court's Findings of Fact and Conclusions of Law read as if the trial court attempted to confine the public's use and the County's maintenance within the distance measured by Bechtolt.

To Iddings, if the trial court concludes the existence of a right-of-way created by a common law dedication, then it must find one of three things: (1) an expressed act of acceptance, or (2) acceptance by implication, or (3) acceptance by use. City of Spokane, 33 Wash.2d at 503. The trial court did none of these in the Findings of Fact and Conclusions of Law. Instead, the trial Court relied on a survey commissioned by a party in the dispute, who was not a member of the public using the right-of-way or an agent of the County. On its face, the survey was unrelated to any act of acceptance of the common law right-of-way, and the trial court failed to render any findings regarding Mr. Brush's testimony linking the survey to either the public or the County's specific acceptance of the dedication. The Findings of Facts even failed to establish a date when either the public or the County accepted the dedication of the turnaround. For these reasons alone, the Findings of

Facts fail to sustain the trial court's Conclusions of Law; which in itself may serve as a sufficient basis to reverse the trial court's decision. See, Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555, 132 P.3d 789 (2006), aff'd, 162 Wn.2d 340, 172 P.3d 688 (2007).

The flaw of trying to force the Findings of Fact through the Bechtolt Survey is contrasted with the overwhelming evidence of actual use by the public and of actual County maintenance. The evidence on both points is consistent throughout each witness and uncontroverted. The County maintained the turnaround area to the vertical face of the bluff on Griffith's property. Testimony of Mr. Clevenger, VR (Vol I) P 164; Testimony Mr. Lloyd Iddings, (VR Vol I) Pp. 171, 175; Testimony of Mr. Clements, (VR Vol. II) Pp. 13, 14; Testimony of Mr. Earl Iddings, (VR Vol. II) Pp. 55, 56; Testimony of Mr. McAboy, (VR Vol. IV) P. 40; Testimony of Mr. Griffith, (VR Vol. IV) P. 7; Testimony of Mr. Hicks, (VR Vol. I) Pp. 54-55 (testimony regarding trial Exhibit 25). Like the County, the public made full use of the turnaround from the water's edge to the vertical face of the bluff. Testimony of Mr. Thuring, (VR Vol. I) P. 83; Testimony of Mr. Clevenger, (VR Vol. I) P. 153; Testimony Mr. Lloyd Iddings, (VR Vol. I Page 181); Testimony of Mr. Clements, (VR

Vol II) P. 8; Testimony of Mr. Miller, (VR Vol. II) P. 46; Testimony of Mr. Earl Iddings, (VR Vol. II) P. 59.

D. Rights Acquired Through Prescription.

To obtain a prescriptive easement, a claimant must prove the following elements: (1) use adverse to the right of the servient owner; (2) open, notorious, continuous, uninterrupted use for ten years; and (3) the servient owner had knowledge of the use at the time when he or she was able to enforce his or her rights. Bradley v. American Smelting & Ref. Co., 104 Wash.2d 677, 694, 709 P.2d 782 (1985); Curtis v. Zuck, 65 Wash.App. 377, 384, 829 P.2d 187 (1992). Unlike adverse possession, a party seeking a non-exclusive prescriptive easement does not have to prove exclusive use of the land. Curtis, 65 Wash.App. at 384.

The Appellant and the public have used the area in a way that has provided them with a prescriptive easement under Washington law. See King County v. Hagen, 30 Wn.2d 847, 856, 194 P.2d 357 (1948) (concluding that “public acquired a prescriptive right to the use of the extension of [an] avenue by its open, notorious, and adverse use thereof for a period of more than ten years”).

Indeed, the trial Court concluded that the Appellant and the public had met the elements of a prescriptive easement with regard to any area

that included the additional 2.55 feet beyond the centerline from the 22.5 feet found by the trial Court with respect to the dedicated right of way. (CP 655)

E. Rights Under RCW 36.75 and RCW 36.86.010

Appellant and the public are entitled to rights as a county road for Dewatto Beach Drive under RCW 36.75. RCW 36.75.070 states, “[a]ll public highways in this state, outside incorporated cities and towns and not designated as state highways, which have been used as public highways for a period of not less than seven years, where they have been worked and kept up at the expense of the public, are county roads.” RCW 36.75.080 provides: “[a]ll public highways in this state, outside incorporated cities and towns and not designated as state highways which have been used as public highways for a period of not less than ten years are county roads.”

Here, there is no question that both Dewatto Beach Drive and the related turnaround have been used for over ten years. First, the public turnaround has been part of a public road at least since 1959. For example, neighboring property owner and witness Marlene Iddings wrote, “[t]he county has no right to take away any part of our rd in Dewatto that we have used and needed for over 50 years. All of us have struggled with

a poor turnaround and [it] is worse since Mr. Griffith has shifted the sand bank around, making it just about impassable” (emphasis added). (CP 186)

Second, the public turnaround has been “worked and kept up at the expense of the public” for over seven years. As discussed above, Mason County has regularly maintained the turnaround space in the right of way through the Griffith Parcel at least since 1959. (VR Volume II Page 18) Indeed, the County has explicitly recognized this fact. In his March 2, 2010 letter to Mr. Griffith, Mason County Deputy Director/County Engineer Robert Thuring stated that the public activity in the turnaround area “has established this area as part of the right of way of the road under RCWs 36.75.070 and 36.75.080.” (CP 67-68)

These facts show the public turnaround has been established as part of the county road pursuant to RCW 36.75.070 and RCW 36.75.080. *See Kingston Vill. Corp. v. King County*, 4 Wash. App. 813, 813-14, 484 P.2d 408 (1971) (affirming finding of prescriptive right to use strip of land as roadway based on fact that roadway “had been maintained at county expense for over 7 years”).

As a county road, Dewatto Bay Drive is also subject to RCW 36.86.010, which requires a width of 30 feet from the centerline as the

necessary and proper width for all county roads in Washington State.

RCW 36.86.010 provides in relevant part:

From and after April 1, 1937, the width of thirty feet on each side of the center line of county roads, exclusive of such additional width as may be required for cuts and fills, is the necessary and proper right-of-way width for county roads, unless the board of county commissioners, shall, in any instance, adopt and designate a different width. This shall not be construed to require the acquisition of increased right-of-way for any county road already established and the right-of-way for which has been secured.

Appellant specifically brought RCW 36.86.010 to the trial Court's attention in its trial brief. (CP 431) Yet, the trial Court failed to apply or articulate why this statute did not apply to the Dewatto Bay Drive right of way. The statute either applies or this matter must be remanded to enable the trial Court to make further findings and conclusions as to why the statute fails to expand the width of the county road right of way to its mandated proper and necessary width.

If RCW 36.86.010 applies, then this Court ought to rule that the width of the Dewatto Bay Drive right of way must be expanded to be 30 feet and not 22.5 feet from the centerline of Dewatto Bay Drive.

F. Application of Mason County Fire Code

The trial Court also failed to address the impact of MCBC 14.17.090 from the County Fire Code. MCBC 14.17.090 provides:

A dead end fire apparatus access road longer than 300-ft. is required to provide provisions for the turning around of fire apparatus within 150-ft of any facility or structure.

Fire Inspector Hicks testified at trial but neither party had him testify as an authorized speaking agent. (VR Vol. I Pages 48-81). However, the trial did ask Mr. Hicks a direct question: “Sir, under the current circumstances would Mason County Fire District #2 limit its response to an emergency in that area?” (VR Vol. I Pages 78-79). Mr. Hicks responded: “No.” Id. at 79.

Mr. Hicks did discuss Trial Exhibit 25, which is a November 17, 2010, letter from the Fire Chief of District #2 that states in part:

The Fire District supports the continued use of any past established turn-around area. Elimination of such a turn-around area would have a negative impact on our emergency response capability in your area.

This letter is clear that the elimination of the past established turn-around area would have a negative impact on the fire department’s emergency response. This idea is consistent with the intent underlying MCBC 14.17.090, which is to provide a turnaround for fire trucks and life safety vehicles. Oddly, the trial Court even notes that the other previously used vehicles turnarounds are no longer available. (CP 654) This means that under the current conditions without a turnaround sufficient for fire apparatus, a fire truck or life safety vehicle would have to back down the Dewatto Bay Drive—possibly at night without lights to help the life safety

vehicle navigate the mile long drive. In fact, this almost happened during the winter of 2010-2011 when a full length fire truck responded to a call at the dead end of Dewatto Bay Drive and had to back out the full length of the drive during a dark winter night. (VR Vol. I Page 171-172). MCBC 14.17.090 was intended to prevent this from occurring. Hence, any turnaround obtained by Mason County or the public by common law dedication or prescriptive easement needs to comply with this section of Mason County's Fire Code to protect the public, the residents, and the visitors to Dewatto Bay.

This Court ought to require the application of MCBC 14.17.090 to the Dewatto Bay Drive turnaround and remand the matter to the trial Court for the creation of factual finding sufficient to ensure the compliance with this provision of Mason County's Fire Code.

VI. CONCLUSION

For all these reasons, Iddings respectfully requests that the Court to apply the analysis from the West Marginal Way decision to expand the accepted dedication or prescriptive right of way to the fullest width allowable under the available statutes and ordinances. At a minimum, this would expand the width of the right of way to a width of 30 feet from the centerline of Dewatto Bay Drive under RCW 36.86.010, and it would

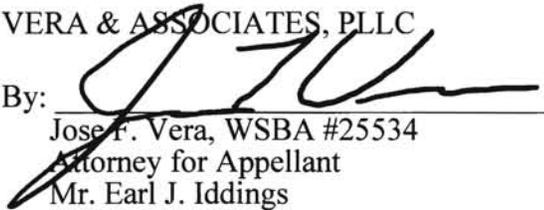
expand the width of the turnaround to a minimum of 100 feet under MCC 16.38.050.

Last, Iddings seeks the application of MCBC 14.17.090 to secure the greatest possible protection for the health and safety of all those who enjoy Dewatto Bay.

DATED this 14th day of December 2012.

Respectfully submitted,

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NO. 43033-9-II

Mr. Earl Iddings,

Appellant

v.

Mr. Michael & Sue Griffith., *et al.*,

Respondents

CERTIFICATE OF SERVICE RE AMENDED OPENING BRIEF

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CERTIFICATE OF SERVICE

I, Michelle Vance, hereby declare under penalty of perjury of the laws of Washington State, that on December 14, 2012, I caused a true and correct copy of the document listed below to be delivered to the below listed parties specified in the manner indicated, which was by email.

DOCUMENTS: Amended Opening Brief

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A handwritten signature in black ink that reads "Michelle Vance". The signature is written in a cursive style with a horizontal line underneath the name.

Michelle Vance
DATE: December 14, 2012
PLACE: Seattle, WA