

FILED

JUN 15 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289753

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

JOEL K. FREUDENTHAL and DEBRA S. BARNES,
husband and wife,

Respondents,

v.

JUAN GUTERREZ and CHERYL GUTIERREZ,
husband and wife,

Appellants,

RESPONDENTS' BRIEF

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ISSUES PRESENTED FOR REVIEW

ISSUE 1: Can the Appellants rely on extrinsic parol evidence to change an unambiguous, unconditional 14-foot wide easement into a conditional easement?

ISSUE 2: Do the Respondents have an right to use a 16-foot wide easement to cross the Appellants' property?

ISSUE 3: Did the trial court properly strike the five late-filed declarations relied upon by the Appellants.

ISSUE 4: Did the trial court have jurisdiction to rule on the 16-foot wide easement?

STATEMENT OF THE CASE

The Respondents (the "Freudenthals") provide this separate statement of the case. They strongly object to the statement of the case provided by Appellants (the "Gutierrezes"). Their statement of the case does not comply with the RAP 10.3(a)(5). The statements of fact are far from fair, many of the facts have no citation to the record and are unsupported by the record, and the Gutierrezes' statement is essentially an argument.

Before providing their statement of the case, the Freudenthals need to address a particularly objectionable aspect of the Gutierrezes' statement of the case. The Gutierrezes undertake a not-so-subtle effort to place the

Freudenthals in a bad light by painting them as some type of gun-toting ogres: threatening people, destroying property, killing livestock, and otherwise disturbing the simple peace and tranquility of an otherwise harmonious neighborhood. Appellants' Brief, p. 5 – 6.

The Gutierrezes quote extensively from a declaration of William Gilman (CP 42-48). Appellants' Brief, p. 5, footnote 3. This declaration stricken by the trial court. (CP 559-60.) Furthermore, it was filed late, just minutes before the trial court entered its order. (CP 34, 42.) The Freudenthals have not had an opportunity to dispute the allegations. Furthermore, the allegations are entirely irrelevant. The alleged facts have nothing to do with the legal right of the parties. The Gutierrezes never make any argument from the alleged facts. Their sole purpose in setting forth those alleged facts is to precondition this Court's view of the Freudenthals, to make them appear less sympathetic. The Freudenthals ask the Court to disregard these slanderous and irrelevant allegations.

The Freudenthals' Statement of the Case

The Freudenthals and the Gutierrezes are adjoining neighbors. (CP 454, 461.) The configuration and the location of each of their properties are shown on Appendix A hereto. (*Id.*) Along the east line of both the Gutierrezes' property and the Freudenthals' property are two adjacent

access easement easements: a 14-foot wide easement (“14-Foot Easement”) and a 16-foot wide easement (“16-Foot Easement”)¹. (CP 119, 127-28, 456, 468-69.) The combined easements provide a 30-foot wide easement that serves ten different parcels. (*Id.*, 320, 323.) The two easements connect the Freudenthals’ property to the county road. (CP 455.) Within the 30-foot strip is a narrow gravel road approximately eight feet wide known as Dickerman Lane. (CP 459.) The centerline of Dickerman Lane lies within the 16-Foot Easement. (CP 456, 459, 469) (See pages 2 and 4 of Appendix B (from CP 468-69).)

Sometime after 2002 the Gutierrezes paid for and installed a fence running down the middle of the 16-Foot Easement. (CP 418, 426, 457, 469.) The fence was installed along the easterly edge of Dickerman Lane. (CP 348.)

The Freudenthals grow hay on their property. (CP 457.) They need to use a hay swather to cut the hay. (*Id.*) With the fence in place the Dickerman Lane road is too narrow to bring a swather through. (*Id.*) If the fence were removed, the Freudenthals could use the 16-Foot Easement to bring in the swather. (*Id.*) Additionally, removing the fence would

¹ Detail D, E, and F on pages 2 and 4 of Appendix B (CP 468-69) show the location of the two easements where they cross the Gutierrezes’ and Freudenthals’ property. (See pages 2 and 4 of Appendix B (CP 468-69).)

provide additional areas to store snow plowed from Dickerman Lane in the winter. (CP 458.)

In addition, the Freudenthals would like to use the 14-Foot Easement to locate some graveled turnouts on the Gutierrezes' property so that cars and trucks could pass on the narrow Dickerman Lane. (CP 460.) Currently, when two vehicles meet each other on the road, one vehicle is forced to back down the road to permit the other to pass, or it must pull off the road into the Gutierrezes' orchard area, but not in the winter, and otherwise only when the weather permits. (CP 459-60.)

The Freudenthals filed a motion for summary judgment, seeking an injunction requiring the Gutierrezes to remove the fence, and seeking a determination that they have a right to use the 14-Foot Easement for ingress and egress to their property, including the placement of turnouts and other improvements within the easement.² (CP 483.)

The Gutierrezes filed a cross-motion for summary judgment seeking a determination that (i) the Freudenthals' right to use the 16-Foot Easement was limited to the 8-foot width of Dickerman Lane; and that (ii) the use of 14-Foot Easement was conditional and could not be used until one of the appurtenant properties was subdivided. (CP 354.)

² Other issues were raise below, but are not the subject of this appeal.

Regarding the 14-Foot Easement, the Gutierrezes argued below that the easement is conditional and cannot be used until one of the appurtenant properties is further subdivided (CP 233, 332.) In support of their argument they submitted three declarations. (CP 233, 280, 316, 330). These declarations state that the easement was not to be effective until one of the appurtenant parcels was subdivided. (CP 282, 317-18, 332.)

The Freudenthals were not parties to the 14-Foot Easement. (CP 388.³) However, their predecessor in interest, Angeline Olson, was. (CP 388, 463.) They contended below that the 14-Foot Easement is unambiguous, and that extraneous evidence is not admissible to vary the express terms of the easement. (CP 202.)

Oral arguments on the motions for summary judgment were heard on March 3, 2010. (CP 558.) At that time the trial court ruled from the bench in favor of the Freudenthals, granting their motion and denying the Gutierrezes' cross-motion for summary judgment. (CP 558-59.) A month later, on April 9, 2010, the presentation hearing was held. At that hearing the Gutierrezes offered for the first time the following five declarations (CP 559):

³ The trial court was asked to take judicial notice of all recorded documents referred to by Respondents at the trial court. (CP 111, 192, 209, 358.) No objection was made.

- Declaration of William Gilman (CP 42 – 48.)
- Second Declaration of Cheryl Gutierrez (CP 49 – 64.)
- Declaration of James Dimick (CP 65 – 69.)
- Third Declaration of Juan Gutierrez (CP 70 – 71.)
- Declaration of Warren D. Ernst (CP 72 – 76.)

Because the five declarations were late, the trial court struck them for purposes of the two summary judgment motions. (CP 560). The five declarations were not included in the summary judgment order as the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. (CP 36-37.)

In this Court the Freudenthals brought a motion for an order requiring the Gutierrezes to correct or replace their brief. That motion was ultimately denied. However, in their Response to Motion for Order Requiring Correction or Replacement of Appellants' Brief ("Response to Motion"), the Gutierrezes argue for the first time that the trial court did not have jurisdiction because necessary parties were not joined to the action. (Response to Motion, pp. 12 – 14.) Although the Gutierrezes have not moved to amend their brief, so that they may raise and argue the jurisdictional argument in their brief, the Freudenthals assume that they still intend to assert the lack of jurisdiction claim. Accordingly, the Freudenthals will address that issue as well.

ARGUMENT

This appeal involves the Freudenthals' right to use two separate easements: a 14-foot wide easement ("14-Foot Easement") created by the Gutierrezes and others in 2003; and a 16-foot wide easement ("16-Foot Easement") created in 1904. The two easements lay side by side, forming a total easement 30 feet in width. In creating the 14-Foot Easement, the Gutierrezes expressly stated that their intent was "that an Easement be created to widen the existing 16 foot wide road to a total of 30 feet in width (16 foot wide road plus 14 foot wide easement granted herein; equaling 30 feet)." (CP 391.)

Both easements cross the Gutierrezes' property, the Freudenthals' property, and other people's properties, and benefit the Freudenthals' property. (CP 388-97, Appendix B (CP 468-69).) Although the two easements lie side by side, the legal issues related to each are distinct. The two easements will be analyzed separately. The Court's decision on one easement will not validate or invalidate the summary judgment on the other.

This is an appeal of a summary judgment. The standard of review was succinctly described in *Heg v. Alldredge*, 157 Wn.2d 154, 160-61, 137 P.3d 9 (2006):

When reviewing a summary judgment order we evaluate the matter de novo, performing the same inquiry

as the trial court. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. We consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. (Citations omitted.)

The summary judgment entered by the trial court meets this standard.

This Court should affirm.

POINT I.
THE FREUDENTHALS HAVE A PRESENT
RIGHT TO USE THE 14-FOOT EASEMENT

Along the east side of Gutierrezes' property (as well as along the Freudenthals' property and other people's property) is a 14-Foot Easement for ingress/egress and utilities. (CP 388-97, 468-69, Appendix B (CP 468-69).) That easement was created by the Gutierrezes and others in 2003 by an instrument titled "Easement for Ingress/Egress and Utilities," recorded under Yakima County Auditor's File No. 7334366. (CP 388-97, attached as Appendix C.) The 14-Foot Easement benefits ten separate parcels, including the Freudenthals' property. (CP 388-97.)

The Freudenthals wish to use the 14-Foot Easement to place graveled turnouts for Dickerman Lane. (CP 460.) Dickerman Lane is a narrow road of about eight feet in width and serves 10 separate legal parcels. (CP 459, 388-97.) Vehicles cannot pass each other and stay on the road.

(CP 459-60.) When two vehicles meet, one vehicle has to back down the road to permit the other to pass, or it must pull off the road into the Gutierrezes' orchard area. (*Id.*) However, pulling off the road into the Gutierrezes' orchard is only possible during the non-winter months. Even then, it is possible only when the ground is not soft or muddy through irrigation or rain. (*Id.*) Pulling off the road is never possible during the winter months when the snow has been piled up along the sides of the road. During those times the only option is to back down the road. (*Id.*)

The only place the graveled turnouts can be located is within the 14-Foot Easement. (CP 460.) This use clearly falls within the "ingress/egress and utilities" purpose of the 14-Foot Easement. (CP 324.)

The Freudenthals discussed installing these turnouts with the Gutierrezes. The Gutierrezes told them that they do not have a right to use the 14-Foot Easement for that purpose or for any other purpose. (CP 460.)

The Freudenthals asked the trial court to determine that they have a right to use the 14-Foot Easement for ingress and egress to their property, including the right to place turnouts within the easement. (CP 483.) There are no genuine issues of material fact and the trial court granted summary judgment to the Freudenthals. The trial court held that the 14-Foot Easement "is not ambiguous and is subject to no conditions to its

present use and enforceability,” that it “is currently enforceable and benefits and is appurtenant to [the Freudenthals’] property,” and that the Freudenthals “may place graveled turnouts within the said 14-Foot Easement.” (CP 37.)

The Gutierrezes claim that summary judgment was not proper because a genuine issue of fact exists as whether the 14-Foot Easement is currently enforceable. They claim that the 14-Foot Easement can be used “only in conjunction with subdivision of a benefitted appurtenant estate.” Appellant’s Brief, pp. 35-36. They have declarations from two of the six parties to that easement as to the intent of the original parties to the easement. (CP 317-29, 331-32.) Additionally, they have a declaration from a consultant who was involved with the easement. (CP 280-83.) Relying on these three declarations they state:

“The original parties’ intent and subsequent actions are clear and uncontroverted – the easement was for the purpose of facilitating subsequent subdivision of appurtenant property; the servient owner would continue to farm the easement area until required for subdivision activities”

Appellant’s Brief, pp. 35-36. They argue that a question of fact exists because: “Freudenthal presented no evidence to controvert the statements of the original parties to the agreement.” Appellants’ Brief, p. 38.

It is true that the Freudenthals have provided no facts, outside of

the language of the document itself, regarding the intent of the easement. However, the language of the document is clear and unambiguous. The 14-Foot Easement provides a present, unconditional grant of an easement.

Contrary to the Gutierrezes' statements that the 14-Foot Easement is conditional on a future subdivision of appurtenant property, the 14-Foot Easement contains no conditional language. Additionally, the only language that even refers to subdivision is the following:

“THE GRANTOR(S) acknowledge that it is the intent of the Grantee(s), if possible, to subdivide their respective parcels of real property and that the easements granted herein shall be for the benefit of not only the existing parcels of real property owned by Grantees(s) but any portion or portions thereof that may be created in the future as a result of subdivision.” (CP 394.) (Emphasis added.)

There is nothing conditional in this language. In fact, this language suggests just the opposite. Here, the parties acknowledge that subdivision may not be possible. Yet, they still refer in the present tense to the “easements granted herein,” and state that those easement benefit “the existing parcels of real property owned by Grantees(s).” (*Id.*) There is no suggestion that the easement is not usable until subdivision occurs.

Other language in the 14-Foot Easement indicates that it is not conditional. First, the final “Whereas” paragraph on page four of the document indicates an immediate intent to create an easement. It states: “all of the Owners described above desire that an Easement be created to wi-

den the existing 16 foot wide road to a total of 30 feet in width.” (CP 391.) If a future subdivision condition was intended by the parties, this would be the perfect place to describe that condition.

Second, in the conveyancing language of the document there is no condition set forth. In each instance the party conveying the easement states that he or she “HEREBY, grants and conveys . . . a 14-Foot Easement . . .” (CP 392-93.) Again, this language constitutes an immediate conveyance of an easement, not a conditional conveyance. The word “hereby” indicates that by signing the document the grantor intended that easement be created at that very moment. There is no condition precedent. An unconditional easement was created.

Third, the document states that the granted easement “shall be for the use and benefit of Parcels A through H, shall be appurtenant to and shall run with the real properties . . .” (CP 393.) Again, this is no conditional grant. The easements were to run with the benefited properties. If the easement was intended to be conditional, this would be another good place to put in the condition. The Easement contains no condition.

There is no genuine issue of fact regarding the language of the easement or its meaning. The document is unambiguous. There is nothing in the document suggesting that it is conditional in any way.

The 14-Foot Easement is specifically described in the Freudenthals' deed. (CP 463.) The Freudenthals have a right to rely on the clear expression of intent unambiguously set forth in that document. If some of the grantors of that easement had a different intent than what was stated in the Easement, the Freudenthals would certainly have no notice of that intent. The document itself is clear. They had no duty of inquiry find out if the original parties had different intent. They are innocent purchasers for value.

As mentioned above, the Gutierrezes have provided three separate declarations in support of their view of the intent of the document. (CP 280-83, 316-18, 330-32.) Only two came from the original six parties. These declarations provide detail regarding the reasons some of the parties agreed to the easement in the first place, and the intent of some of the parties that the easement be conditional.

The problem with the Gutierrezes' declarations is that none of the statements made in those declarations can be used to determine the intent of the easement. Those declarations do not create issues of *material* fact. "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

In their brief, the Gutierrezes admit that “The intent of the original parties to an easement is determined from the deed as a whole.” Appellants’ Brief, p. 36. However, they go on to argue that extrinsic evidence is admissible to show the original parties’ intent. In support of their position they quote from *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) as follows: “. . . extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties’ prior conduct or admissions.” Appellants’ Brief, p. 36.

The Gutierrezes misquote the *Sunnyside Valley* case. They omit critical language that changes the meaning of the quoted language. When the omitted language is added back in, the *Sunnyside Valley* case is fatal to their position. The complete language from the *Sunnyside Valley* case is as follows (the bolded text is the text omitted by the Gutierrezes):

“The intent of the original parties to an easement is determined from the deed as a whole. If the plain language is unambiguous, extrinsic evidence will not be considered. If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties’ prior conduct or admissions.” (Citations omitted.)

Sunnyside Valley Irrigation District, 149 Wn.2d at 880. The *Sunnyside*

Valley case is clear, the only time extrinsic evidence can be considered is if an ambiguity exists in the deed. In the 14-Foot Easement there is no ambiguity.

This rule is stated in a number of other cases. In *Green v. Lupo*, 32 Wn.App. 318, 322, 647 P.2d 51 (1982), the court stated:

“It was the duty of the court in construing the instrument which created the easement to ascertain and give effect to the intention of the parties. The intention of the parties is determined by a proper construction of the language of the instrument. ***Where the language is unambiguous other matters may not be considered***; but where the language is ambiguous the court may consider the situation of the property and of the parties, and the surrounding circumstances at the time the instrument was executed, and the practical construction of the instrument given by the parties by their conduct or admissions.” (Emphasis added.)

See also *Zobrist v. Culp*, 95 Wn.2d 556, 627 P.2d 1308 (1981) (“The intent is to be derived from the whole instrument, and if ambiguity exists, the situation and circumstances of the parties existing at the time of the grant are to be considered.”).

The *Sunnyside Valley* case is very exacting on this point: “If the plain language is unambiguous, extrinsic evidence will not be considered.” *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880. The *Green* case states it this way: “The pivotal issue in deciding the propriety of admitting parol evidence is whether the written instrument is ambiguous.” *Green*,

32 Wn.App. at 323. The rule is clear, if the 14-Foot Easement is not ambiguous, extrinsic evidence will not be considered.

Whether or not the 14-Foot Easement is ambiguous, and thus whether Gutierrezes' extraneous facts can be considered, is a question of law to be determined by this Court. *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 115, 411 P.2d 868 (1966) ("the determination of whether a written instrument is ambiguous is a question of law for the court"); *Schwab v. Seattle*, 64 Wn.App. 742, 751, 826 P.2d 1089 (1992) ("Determination of whether a written instrument is ambiguous is a matter of law to be determined by the court.")

The 14-Foot Easement is ambiguous only if "its terms are uncertain or capable of being understood as having more than one meaning." *Green*, 32 Wn.App. at 323. Here, the Gutierrezes contend that the easement "may be exercised only in conjunction with subdivision of a benefited appurtenant estates." Is any of the language of the 14-Foot Easement susceptible of being understood as having that meaning? That is the "pivotal issue" this Court needs to determine before it even considers the Gutierrezes' extraneous facts.

The Gutierrezes do not even argue that the 14-Foot Easement is ambiguous. In fact, they do not even discuss the terms of the 14-Foot

Easement, or point to any language of that document to support their position. To them the language of the 14-Foot Easement appears to be irrelevant. This Court should hold as a matter of law that the easement is not ambiguous. Once that determination was made, the Gutierrezes' "extrinsic evidence will not be considered." *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880.

Despite the clear holding of the *Sunnyside Valley* case, the Gutierrezes claim that their extrinsic parol evidence can be considered because of the "context rule" set forth in *Berg v. Hudesman*, 115 Wn2d 657, 663, 801 P. 2d 222 (1990). The Gutierrezes err. The *Berg* context rule is not applicable to an easement.

In *Olson v. Trippel*, 77 Wn.App. 545, 553, 893 P.2d 634, *review denied*, 127 Wn.2d 1013 (1995), the court was asked to apply the context rule to an easement. The court stated that the context rule:

"cannot be applied in a dispute between an original party and a subsequent purchaser who is not under a duty of inquiry. To hold otherwise would be to require that a subsequent purchaser investigate not only the chain of title, but also the 'context' within which each conveyance in the chain was executed. That would be an impractical burden, perhaps an impossible one, and would virtually destroy the utility of the real estate recording system. Because the Olsons were subsequent purchasers not under a duty of inquiry, we hold that the context rule does not apply in this case."

Olson, at 553. Here, the Freudenthals are subsequent purchasers. (CP 463-64.) As is pointed out above, their deed specifically describes the 14-Foot Easement. They had no duty of inquiry. The context rule does not apply.

When the Supreme Court stated in *Sunnyside Valley* that “If the plain language is unambiguous, extrinsic evidence will not be considered” (*Sunnyside Valley Irrigation District*, 149 Wn.2d at 880), it certainly would have been aware of the context rule. Yet, it did not apply that rule to interpreting an easement. For easements, if the plain language is unambiguous, “extrinsic evidence will not be considered.” *Id.*

The Freudenthals anticipate that the Gutierrezes will cite in their reply brief the case of *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999). In that case the Supreme Court applied the context rule to interpret a restrictive covenant. That case is not applicable to easements for two reasons. First, *Hollis* is limited to interpreting restrictive covenants. The Court expressly stated that it was not going to “carve out an exception to the Berg rule in cases which call for the interpretation of restrictive covenants” *Hollis, supra* at 696 (emphasis added.) In discussing whether the context rule applied to real property documents, the Supreme Court in *Hollis* noted the *Olson* case, which involved an easement. Yet, it did not

overrule that case. It did not apply its holding to all other types of real property documents.

Second, and more significantly, the Supreme Court decided the *Sunnyside Valley* case four years after *Hollis*. Without referring to *Hollis* at all, the Supreme Court stated that the “intent of the original parties to an easement is determined from the deed as a whole. If the plain language is unambiguous, extrinsic evidence will not be considered.” *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880 (citations omitted).

Even if *Hollis* did apply to interpreting easements, under *Hollis*, the Gutierrezes’ declarations still would not be relevant. The *Hollis* case is a parallel to this case. In that case one of the parties sought to use an affidavit to modify the plain terms of a restrictive covenant. The restrictive covenant stated: “This plat is approved as a residential subdivision and no tract is to have more than one single family residential unit.” *Hollis*, 137 Wn.2d at 839. The appellant in that case, Garwall, commenced mining operations on one of the tracts. The trial court enjoined that action, as being inconsistent with the restrictive covenants. In *Hollis*, Garwall argued that the trial court erred in refusing to consider extrinsic evidence contained in the affidavit of one Ron Matney. That evidence showed that the developers intended that the residential restriction in the

restrictive covenants apply only to the smaller parcels of land, and were not intended to apply to the large parcel owned by Garwall.

The Supreme Court, in applying the *Berg* context rule, upheld the trial court's refusal to consider the extrinsic evidence. The Court stated:

“Additionally, the affidavit of Ron Matney shows that the intent of the subdividers was to restrict (not permit) at least the smaller parcels to residential use. The interpretation suggested by Garwall would require this court to redraft or add to the language of the covenant. Under Berg, the extrinsic evidence offered would not be admissible for this purpose. Extrinsic evidence is to be used to illuminate what was written, not what was intended to be written.”

Hollis, 137 Wn.2d at 696-97 (emphasis added). The Court went further and stated that the “extrinsic evidence offered by Garwall is not admissible under *Berg* to modify the language of the restrictions.”

Here, the declarations submitted by the Gutierrezes would not *illuminate* the language of the 14-Foot Easement. Rather, those declarations purport to show “what was intended to be written.” The declarations modify language of the 14-Foot Easement. The Gutierrezes seek to insert a condition into the easement that does not exist. They want the easement to say that it can be used only when a subdivision occurs. In order for that condition to be included this Court will have to add language to the easement. The *Berg* context rule does not permit that type of change.

The *Hollis* case is very clear on the limits of the context rule. Ad-

missible extrinsic evidence does not include: “evidence that would show an intention independent of the contract,” or “evidence that varies, contradicts or modifies the written language of the contract.” *Hollis*, 137 Wn.2d at 695. See also *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005), where the Supreme Court:

“Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used to determine the meaning of *specific words and terms used* and not to show an intention independent of the instrument or to vary, contradict or modify the written word.” (Citing *Hollis*, emphasis in the original, internal quote marks omitted.)

The Gutierrezes’ declarations violate both of these restrictions. The declarations do not seek to explain the terms of the easement. The Gutierrezes do not even discuss the terms of the easement in their brief. The Gutierrezes’ declarations seek to establish an intention that does not exist in the easement. They seek to modify the terms of the easement by adding a condition that simply is not there. They seek to establish an intent that is independent of the easement document itself. Thus, even if the *Berg* context rule did apply to unambiguous recorded easements, the Gutierrezes’ declarations are not admissible and do not create an issue of material fact.

The trial court properly determined that the Gutierrezes’ declarations do not create an issue of material fact. This Court should affirm the

summary judgment on the 14-Foot Easement.

POINT II.
THE FREUDENTHALS HAVE A RIGHT TO
USE THE ENTIRE 16-FOOT EASEMENT

In response to the trial court's order that the Gutierrezes remove the fence from the 16-Foot Easement, the Gutierrezes make the following arguments: First, there is no recorded easement for the 16-Foot Easement. Second, without a recorded easement, the Freudenthals can only use the established road—they are not entitled to expand their easement rights to use areas on the east side of the existing fence. Third, the Freudenthals had a floating easement that became fixed when the road was constructed. Fourth, any right to use the portion of the easement east of the fence was lost through adverse possession. None of these arguments have merit. Each will be discussed separately below.

1. The 16-Foot Easement was created by deed in 1904.

The Gutierrezes contend that there is no recorded easement for the 16-Foot Easement benefiting the Freudenthals' property. At the trial court the Gutierrezes provided a number of deeds from the early 1900's. (CP 256-79.) However, except for passing references found buried in footnotes 9 and 14 of their brief, the Gutierrezes do not discuss those deeds or the deeds the Freudenthals pointed to at the trial court level. They simply

state, without any citation to the record, that the trial court “acknowledged that there was not legal document creating the easement.” Appellants’ Brief, p. 14. They also state, again without any citation: “Despite a request from counsel, the trial court could not or would not identify a recorded document granting the purported easement.” *Id.* at 18.

The deeds and documents submitted by the parties to the trial court are important. They show the creation of the 16-Foot Easement.

In reviewing these deeds and documents, the Court should keep in mind that “No particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement are sufficient.” *Beebe v. Swerda*, 58 Wn.App. 375, 379, 793 P.2d 442 (1990).

The Freudenthals’ property and the Gutierrezes’ property are located within Section 27, Township 14 North, Range 18 East, W.M. (CP 463-65.) In 1888 and 1898, The Selah Valley Company received two deeds conveying to it the entirety of section 27. (CP 259-60, 263-66.) In June, 1902, the Selah Valley Company deeded the following property to a P. O’Neal (CP 268-69, 271):

The S½ of the N½ and the N½ of the S½ of the SW¼ of the SW¼ of section 27, except a strip of land 12 feet in width off the north side of said land for road purposes.

This property is the south portion of the Freudenthals’ property. (CP 463-

65.) The property conveyed in the deed is shown in the sketch attached as Appendix D (with the current parcel configurations also shown).⁴

These June 1902 deeds do not convey a easement to a county road. The reason is simple. In June, 1902, there was no county road. The petition to establish a county road known as Speyers Road was filed in April, 1902. (CP 214-15, 217.)⁵ P. O'Neal was one of the petitioners. (CP 214.) The county road was established in October, 1902, after P. O'Neal received his deed. (CP 217.) Importantly, the new road did not touch the property conveyed in 1902 to P. O'Neal. (CP 199-200, 268-71.)

In 1904, after the county road had been established, the Selah Valley Company then deeded the following property to a F.E. Reynolds (CP 220):

The N $\frac{1}{2}$ of the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ and the S $\frac{1}{2}$ of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of section 27, except a strip of land 16 feet wide off the E. line for road purposes. The property conveyed in the deed is shown in the sketch on the following page. (Emphasis added.)

That property was connected to the newly created county road.

⁴ This sketch and the sketch attached as Appendix E are demonstrative only, and provide a graphic representation of the property conveyed by the deeds. The two sketches were discussed with the trial court. (CP 208-10.)

⁵ The Freudenthals asked the trial court to take judicial notice of 1902 deeds, subsequent deeds, and the petition and other relevant documents. (CP 209). No objection was made.

(CP 199, 220.) The property conveyed in the 1904 deed is shown in the sketch attached as Appendix E (CP 210). As can be seen in the sketch, the 1904 deed conveyed the entirety of what ultimately became Gutierrezes' property as well as part of the Freudenthals' property. Most importantly, that document created a 16-Foot Easement running from the newly created county road to the property conveyed to P. O'Neal in the 1902 deed. (CP 220.) In other words, the 1904 deed created a 16-foot easement running from the P. O'Neal's property to the county road.

A similar fact situation occurred in *Queen City Savings And Loan Association v. Mechem*, 14 Wn.App. 470, 543 P.2d, 355 (1975). There the deed excepted a 60-foot strip of land for road. The deed did not indicate which property was benefited by the road. However, the court held that the exception created an easement that was appurtenant to the lands previously conveyed by the grantor. Here, the easement terminated at the lands previously conveyed by the Selah Valley Company.

The only reasonable conclusion is that the 16-Foot Easement benefits the Freudenthals' property. Not only was the easement created by the grantor who had previously conveyed the Freudenthals' property without an easement, the easement terminated at the Freudenthals' property. That circumstance shows that the easement benefits the Freudenthals' property.

Kirk v. Tomulty, 66 Wn.App. 231, 240, 831 P.2d 792 (1992) (“fact that the easement was described as extending to the eastern boundary of the subdivision is consistent only with an intent that it serve the adjacent property”); *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 145 P.3d 411, 416 (2006) (“An easement extending to the end of a servient property is consistent with an intent to serve the adjacent property”).

It makes no difference that the 16-Foot Easement is not mentioned in subsequent deeds as benefiting the Freudenthals’ property. “It is well settled that appurtenant easements are transferred to the owner of the dominant estate with title to the property even if not mentioned in the deed.” *810 Properties v. Jump*, 141 Wn.App. 688, 170 P.3d 1209, 1215 (2007).

It is abundantly clear that the 16-Foot Easement excepted from the Gutierrezes’ property benefits the Freudenthals’ property. They have a 16-Foot Easement, created by a recorded document. They are entitled to the full use of that easement. The Gutierrezes have not presented any contrary evidence. There is no issue of fact on the effect of the 1904 deed. The trial court properly determined that the Freudenthals are benefited by the 16-Foot Easement.

The Gutierrezes argue that the *Queen City* case raises issues of fact. Appellants’ Brief, p. 20, n. 16. They contend that a determination of

the grantor's intent is an issue of fact. Yet, they point out no additional facts for the Court to consider.

The Gutierrezes have acknowledged that the 16-Foot Easement exists and benefits the Freudenthals' property. In the Easement for Ingress/Egress and Utilities, attached as Appendix C, the Gutierrezes make the following statements (CP 391):

WHEREAS, a 16 foot wide road presently exists pursuant to an Agreement dated June 13, 1967 and recorded under Yakima Auditor's File Number 2139267, Vol. 693, Pg. 145, and described as follows:

The East 16 feet of the South half of the Northwest quarter of the Southwest quarter and the East 16 feet of the North 3/4 of the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 16, E.W.M., Yakima County, State of Washington.

WHEREAS, said 16 foot road is presently for the benefit of Parcels A, B, C, D, E, F and H as indicated above, and said owner's [sic] desire to include Parcel G.

WHEREAS, all of the Owners described above desire that an Easement be created to widen the existing 16 foot wide road to a total of 30 feet in width (16 foot wide road plus 14 foot wide easement granted herein; equaling 30 feet),

These statements are significant for several reasons. First, the 16-foot wide road described in the recitals is the 16-Foot Easement excepted from the Gutierrezes legal description. The two documents describe the same

easement. (CP 391, 417, 421, 468-69.) Second, the Freudenthals' property is described as being one of the properties benefited by the 16-foot wide road. (Their property is identified as parcels B, C, and D in that document.) (CP 389-90, 463-65.) Third, the Gutierrezes clearly state their intent to combine 14-Foot Easement and the 16-Foot Easement, to create an easement 30 feet in width.

Despite their clear, unambiguous statements in the 2003 Easement for Ingress/Egress and Utilities, the Gutierrezes now contend that the 16-Foot Easement does not exist at all, and if it does exist, it is limited to the 8-foot width of Dickerman Lane.

In 1967 the Freudenthals and the Gutierrezes' predecessors in interest⁶ signed an Agreement recorded under Yakima County Auditor's File No. 2139267 (CP 402-05). That agreement legally described the 16-foot wide strip that crosses the Gutierrezes' property by metes and bounds, and states that said 16-Foot Easement:

“is used as a roadway by all the above parties for ingress and egress to the respective properties above described and all of the above parties are desirous that said roadway be maintained in good condition for road purposes.”

⁶ There is no dispute that the parties to the agreement included the Freudenthals and the Gutierrezes' predecessors in interest. (CP 79, 84-89, 454, and compare 401 CP 402 with CP 421.)

This document clearly indicates that entire 16-Foot Easement then existed and benefited the Freudenthals' property, not simply eight feet of that 16-Foot Easement.

The Gutierrezes argue that this 1967 document is not sufficient to create an easement. True, the document does not it does not have any granting language. However, it certainly indicates that the Gutierrezes' property is burdened by an already existing 16-foot wide roadway.

The 2003 Easement for Ingress/Egress and Utilities (CP 388-97, Appendix C) does contain the necessary granting language. "No particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement are sufficient." *Beebe v. Swerda*, 58 Wn.App. 375, 379, 793 P.2d 442 (1990). All that is required is that the words used "demonstrate a present intent to grant or reserve an easement." *Zunino v. Rajewski*, 140 Wn.App. 215, 222, 165 P.3d 57 (2007). The 2003 Easement for Ingress/Egress and Utilities clearly indicates a present intent to grant an easement 30 feet in width, by granting an additional 14 feet to the existing 16 feet. The grant of the 14 feet is premised on the acknowledgement by all of the parties that a current 16-Foot Easement existed. In addition, the parties agreed that the 16-Foot Easement, which then did not benefit Parcel G, would thereafter benefit parcel G. (CP 391.) The parties

intended to grant a 16-Foot Easement if that easement did not already then exist. How else can the following language from that instrument be interpreted: “[A]ll of the Owners described above desire that an Easement be created to widen the existing 16 foot wide road to a total of 30 feet in width (16 foot wide road plus 14 foot wide easement granted herein; equaling 30 feet).” (CP 391.) For this reason the trial court was correct in holding that the 16-foot road “was recognized by Defendants Gutierrezes and others in that certain easement recorded under Yakima County File No. 7334366, and the road was created at least by that date.”⁷ (CP 19.)

2. The Freudenthals have a prescriptive easement under color of title covering the entire 16-Foot Easement.

Even if the Gutierrezes were right in arguing that there is no deed granting the 16-Foot Easement, the Freudenthals would still have the right to use the full width of the 16-Foot Easement. The reason: They have color of title. The Gutierrezes acknowledge that the Freudenthals’ have a prescriptive right to use at least a portion of 16-Foot Easement. That prescriptive right, combined with color of title, gives the Freudenthals a prescriptive easement for the entire 16-foot strip.

⁷ The Gutierrezes misquote this portion of the trial court’s order. They omit the words “at least,” suggesting that trial court ruled that the 2003 easement was the document that created the 16-Foot Easement Appellant’s Brief, p. 19.

The controlling case is *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 455 P.2d 372 (1969). That case involved a 100'-wide easement for a canal. The easement was granted in 1894 by co-tenants who owned only a fifty percent interest in the property. Since not all co-tenants joined in the easement, the grant of the easement was defective.

For 74 years the canal company operated a canal over the easement. One of adjoining property owners built an improvement that encroached into the easement area described in the 1894 deed. The canal company sued to have the improvement removed. The property owner defended by pointing out the defect in the canal company's title, arguing that the canal company had only a prescriptive easement for the area it was actually using, not the entire width of the easement granted in the 1894 deed.

The Court rejected that defense:

“It is abundantly apparent that plaintiff claims its 50-foot easement on both sides of the canal center line under color of title. *Even though the conveyance be defective or void, the true owner will be deemed disseized to the extent of the boundaries stated in the conveyance by the adverse claimant's possession of a part of the premises.*

“The rule is well stated in 3 Am. Jur. 2d Adverse Possession § 27, at 109:

“It is the general rule that where property is held under color of title possession of the entire property is not required for purposes of adverse

possession. Correlatively, it is a well-settled general rule that one who enters upon land under color of title, such as a deed, and possesses only a part of the land, will be deemed to have possession of the entire tract to the limits of the boundaries described in the color of title for purposes of adverse possession, . . . The constructive seisin in deed is the equivalent of actual seisin.”

Yakima Valley Canal, supra at 93 (emphasis added).

In this case the Freudenthals’ predecessor in interest (CP 463) received a deed in 1967 that expressly conveyed an easement identical to the 16-Foot Easement. (CP 84, 391, 403.) That deed, as well as the 1967 road agreement (CP 402) provide the Freudenthals with color of title. Anyone reviewing the record would conclude that the Freudenthals had an easement over the 16-foot strip.

The Gutierrezes acknowledge that the Freudenthals have a prescriptive easement to use of Dickerman Lane. That prescriptive use, coupled with color of title, is sufficient to establish a prescriptive easement for the full width of the easement described in the 1967 deed and in the 1967 agreement. As the Court stated in *Yakima Valley Canal, supra* at 94: “where one’s occupancy or adverse user is under color of title that is a matter of public record, possession or user of a portion is regarded as coextensive with the entire tract described in the instrument under which possession is claimed.” Thus, the Freudenthals’ right to use the 16-Foot

Easement is coextensive with the legal description of the 16-Foot Easement in the 1967 deed and 1967 road agreement, and is not limited to the width of Dickerman Lane. Thus, even if the 1904 deed or the 2003 Easement for Ingress/Egress did not convey the 16-Foot Easement, they have a prescriptive right to use the entire width of the 16-Foot Easement.

The Freudenthals acknowledge that this color-of-title argument was not argued before the trial court. However, the existence of the easement was pled, and the supporting facts were all before the trial court. Therefore, this issue can be argued before this Court. “An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” *Kinney v. Cook*, 150 Wn.App. 187, 192, 208 P.3d 1 (2009).

3. The 16-Foot Easement is not a floating easement.

The Gutierrezes contend that the 16-Foot Easement is only a floating easement, and does not extend to the full width of the 16-Foot Easement. They contend that the easement became fixed when Dickerman Lane was established.

In discussing the 1967 agreement (CP 402) the Gutierrezes discuss the road as if it has no description, as if its boundaries are determined by its use, or as if its boundaries are not known. E.g., Appellant’s Brief, pp.

22, 24. They confuse the 8-foot wide Dickerman Lane with the 16-foot wide “existing roadway” described in the various documents. They fail to point out that in every document describing the 16-Foot Easement (sometimes as “existing roadway” and sometimes as a “road”), the roadway or road is legally described by metes and bounds. There is no question fact as to its width or its location. The “existing roadway” referred to in the documents is always legally described as being 16-feet wide. (CP CP 84, 220, 391, 403, 421.) It is never limited to the location of Dickerman Lane. Even if Dickerman Lane has been used in the same manner for more than 100 years (as the Gutierrezes claim, without any citation to or support from the record), that would not change the express grant of the easement—which is 16-feet wide.

The floating easement doctrine does not apply to these facts. That doctrine applies only to easements that are “defined in general terms, without a definite location or description.” *Sunnyside Valley Irrigation District*, 149 Wn.2d at 880. The easement involve here had a definite location and a definite description. It could not be described with any more particularity. Its location was described by metes and bounds as the East 16 feet of the Gutierrezes’ property. (CP 84, 220, 391, 403, 421.) Accordingly, the floating easement cases are not relevant and the width of Dick-

erman Lane does not affect the width of the easement.

The Freudenthals are not attempting to expand the 16-foot wide “existing roadway” or easement, as the Gutierrezes argue. They only seek to use more of the 16-feet of easement than is presently being used. The easement currently exists. The Freudenthals have a right to use the entire width of the easement. Therefore, the Gutierrezes’ argument that the documents do not contain language allowing an expansion of the “existing roadway” or the “existing easement right,” is irrelevant. The Freudenthals are not seeking that type of expansion.

In connection with this issue, the Gutierrezes seem to draw a distinction between what is described as a “roadway” in the 1967 agreement, or as a “16 foot road” in the 2003 easement, and an easement. This distinction has no merit. The 1904 deed, the document that initially created the 16-foot wide strip, stated that the strip was “for road purposes.” (CP 220.) The Gutierrezes’ deed, which excepts the 16-foot wide strip from their legal description, states that the 16-Foot Easement is “for roads.” (CP 421.) The Court in *Queen City Savings and Loan Association*, 14 Wn.App. 470, 543 P.2d, 355 (1975), addressed the same question and, based on similar facts, concluded that such an the exception created an easement. True, this is a factual question. However, the facts that are per-

tinents are those that existed in 1904, “at the time of making the deed” that created the 16-Foot Easement. *Queen City, supra* at 475. Those facts were discussed above. The Gutierrezes point to no facts showing that an easement for road purposes was not created over the 16-Foot Easement. When the 1967 agreement or the 2003 easement refer to the same 16-Foot Easement as roadway or road, they are describing an easement, not the 8-foot wide Dickerman Lane.

4. The 16-Foot Easement was not lost through adverse possession.

The Gutierrezes suggest that the 16-Foot Easement may have been extinguished through adverse use. They do not specifically discuss any facts to support the claim of extinguishment through adverse use. The only facts they are likely referring to are the telephone poles, irrigation line, trees, and fence located in the easement. Of course, the telephone poles, irrigation line, and trees are irrelevant to the issue because the summary judgment does not address those items. Furthermore, “[m]ere non-use, for no matter how long a period, would not extinguish the easement.” *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962). “During the period of nonuse, the servient estate may use the land subject to the easement in any way that does not permanently interfere with the easement’s future use.” *Cole v. Laverty*, 112 Wn.App. 180, 185, 49 P.3d 924

(2002). The telephone poles, irrigation line, and trees do not interfere with the Freudenthals' intended use.

The construction of the fence is clearly not sufficient to create adverse possession—since it was constructed after 2002 and the complaint was filed in 2009. (CP 426, 515.) The required 10 year period has not run. There are no issues of fact supporting the Gutierrezes claim of adverse possession over a portion of the 16-Foot Easement.

POINT III.
NO ISSUES OF FACT EXIST REGARDING
THE GUTIERREZES' REASONABLE USE
OF THE EASEMENT AREA

For both the 14-Foot Easement and the 16-Foot Easement the Gutierrezes contend that issues of fact exist regarding their right to use the easement areas. Regarding the 16-Foot Easement the Gutierrezes argue that “Expansion of the roadway is not required for reasonable farm use or ingress and egress,” citing in support the declaration of Barbara Walkenhauer, which states that the “existing road [is] adequate for all farm vehicles and operations.” Appellants' Brief, p. 32.

The Walkenhauer declaration is insufficient to create an issue of fact. The Freudenthals' provided specific evidence of why the fence prevented them from getting their hay swather down the road. (CP 457.) The swather is a necessary implement for the Freudenthals' farming operation.

(*Id.*) The Walkenhauer declaration only states a broad conclusion that the “existing road [is] adequate for all farm vehicles and operations.” (CP 316-18) That is not sufficient to create an issue of fact. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). (“Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.”).

The Gutierrezes cite *Thompson v. Smith*, 59 Wn.2d 397, 407, 367 P.2d 798 (1962) in support of their position. The *Thompson* case involves a completely different set of facts than this case. In *Thompson*, the servient land owner poured a concrete slab over a reserved, but unused road easement. The easement owner sued to have the slab removed, even though he was not using the road easement at that time and did not have an intention to use it. In this case, the Freudenthals want to use the easement area and are suing to have an interference to their use removed.

In *Thompson*, the Supreme Court allowed the slab to remain—for a time. However, the Court was very clear on what was to happen when the easement owner wanted to use the easement: “[I]f and when such a roadway is put in, the slab, if it is an interference, would have to be removed.” *Thompson, supra* at 409 (emphasis added). There is no factual issue at that point. In this case the Freudenthals want to use the portion of the

easement that is blocked by the fence. Under *Thompson* the fence “would have to be removed.” There are no factual issues.

The Gutierrezes also cite *Logan v. Brodrick*, Wn.App. 796, 800, 631 P.2d 429 (1981). The *Logan* case also does not apply. The question in *Logan* was whether the easement owner’s use was an “unreasonable deviation from the original grant of the easement.” *Id.* That issue is not involved in this case.

Finally, the Gutierrezes argue that a number of cases have allowed land owners to install gates and fences along an easement, and the reasonability of the placement of the fence is a question of fact. They cite *Rupert v. Gunter*, 31 Wn.App. 27, 640 P.2d 36 (1982); *Brown v. Voss*, 105 Wn.2d 366, 715 P. 2d 514 (1986); *Standing Rock Homeowners Ass’n. v. Misich*, 106 Wn.App. 231, 23 P.3d 520 (2001); and *Lowe v. Double L Properties, Inc.*, 105 Wn.App 88, 20 P.3d 500 (2001). None of these cases are applicable to this case. In none of those cases did not fence completely prevent a party from using the easement for its intended purpose. However, that is the case here. Because of the fence, the Freudenthals cannot use the easement to bring in their hay swather. (CP 457.) The fence acts as an absolute impediment to that use. No cases support that.

When the Gutierrezes and others created the 14-Foot Easement,

they unequivocally stated: “[A]ll of the Owners described above desire that an Easement be created to widen the existing 16 foot wide road to a total of 30 feet in width.” (CP 391.) The Gutierrezes clearly intended to create 30-foot wide easement. Yet, they now contend that the placement of the fence is reasonable, even though its presence limits the 30-foot wide easement to the 8-foot wide Dickerman Lane. Reasonable persons could not reach that conclusion. So, it is not create an issue of fact. *Heg*, 157 Wn.2d at 160-61.

Regarding the 14-Foot Easement, the Gutierrezes claim that issues of fact exist as to the “reasonable and/or required use of the Additional (14-foot) Easement.” Appellants’ Brief, p. 39. The Gutierrezes are not clear in what they are arguing. They do not clearly state what that factual issue is. All they say is: “Gutierrez provided evidence that the existing roadway was adequate for all anticipated residential and agricultural usage.” *Id.* It appears they are suggesting that before the Freudenthals can use the 14-Foot Easement the Court must weigh the relative hardship of their non-use with the relative hardship to the Gutierrezes of their use. They suggest that the Court has to balance the relative interests of the parties before it can permit an easement owner to use an easement. This, they contend, creates an issue of fact. This is a new argument, not raised at the

trial level.

If the Gutierrezes were correct, no one could ever obtain a summary judgment on an easement. Under their theory, a balancing would always have to occur, raising an issue of fact. The only case cited by the Gutierrezes in this section of their brief is the *Thompson* case. As is pointed out above, *Thompson* did not authorize any balancing, or measurement of relative hardship. *Thompson* was clear—when the easement owner’s intended use is within the scope of the easement “the use by the owner of the fee must yield.” *Thompson, supra.* at 408, quoting *Colegrove Water Company v. City of Hollywood*, 151 Cal. 425, 429, 90 P. 1053 (1907). The only relevant factual question is whether the Freudenthals intended use of the 14-Foot Easement is within the scope of the easement. The Gutierrezes have presented no admissible evidence showing that their use is not within the scope of the easement. Consequently, there are no genuine issues of fact. The trial court properly entered summary judgment on the 14-Foot Easement.

The “relative hardship” doctrine has never been applied in this context. It has been applied where there is an innocent encroachment on an easement. E.g., *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 847, 999 P.2d 54 (2000); *Brown v. Voss*, 105 Wn.2d 366, 375, 715 P.2d 514 (1986).

But, it has never been applied when an owner grants an easement and then demands that the easement owner prove that his need to use the easement is greater than the owner's need to use the easement area.

This issue was raised in the *Heg* case. At the Court of Appeals level the appellant made the same "relative hardship" argument that the Gutierrezes appear to be making. *Heg v. Alldredge*, 124 Wn.App. 297, 300, 99 P.3d 914 (2004). The Court of Appeals modified the trial court's ruling "to expressly preserve the relative hardship issues for future review." *Id.* at 313. On appeal, the Supreme Court, while acknowledging that the Court of Appeals had preserved the relative hardship determination, completely overturned the Court of Appeals' ruling in its entirety, including the modification that preserved the relative hardship issues for future review. *Heg*, 157 Wn.2d at 160, 167. Thus, the Supreme Court did not adopt the Court of Appeals' acceptance of the relative hardship doctrine. There is no case that applies the relative hardship doctrine in this context.

Even if the relative hardship doctrine applied, the Gutierrezes have only made general allegations that the Freudenthals' intended use of the easement will have some negative impact on them. That is insufficient to create an issue of fact. *Thompson v. Everett Clinic*, 71 Wn.App. 548, 555,

860 P.2d 1054 (1993) (“Broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment”). There are no issues of fact.

POINT IV.

THE FIVE LATE FILED DECLARATIONS WERE PROPERLY EXCLUDED FROM CONSIDERATION

A month after the Gutierrezes lost the motions for summary judgment, and just minutes before the trial court entered its written order, the Gutierrezes submitted five new declarations. In these new declarations the declarants claim that they, and not the Gutierrezes, own the fence. (CP 67, 71, 73.) They also claim that the neighbors own the property lying east of the fence, not the Gutierrezes. (CP 71, 73.) From this the Gutierrezes argue that the trial court wrongfully ordered the Gutierrezes to remove someone else’s fence. The trial court struck those declarations for purposes of the summary judgment motions. (CP 560.)

When a declaration is stricken by the trial court, the declaration has a restricted status on appeal. Unless this Court rules that the trial court abused its discretion in striking the declarations, this Court cannot consider the stricken declarations in making its de novo review of the summary judgment. The stricken declarations are not a part of the record for purposes of the appellate court’s de novo review.

This rule is stated in *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn.App. 516, 522, 125 P.3d 134 (2004):

“Because the trial court acted within its discretion in striking the O’Neills’ supplemental declarations as untimely filed, the declarations are not within the scope of this record on review. The record before this court thus consists of the evidence that the trial court relied upon in entering its summary judgment.” (Emphasis added.)

Thus, unless the Gutierrezes can establish that the trial court abused its discretion in striking the five declarations, those declarations cannot be used by this Court to review the summary judgment.

The Gutierrezes have not assigned error to the trial court’s action in striking those declarations. That is the proper way to handle the issue. See *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, n. 1, 909 P.2d 291 (1996). They do not even address the issue in their brief. Although the trial court entered its order striking the declarations after the Gutierrezes filed their brief, they have resisted all efforts to have them revise their brief to address the issue.

The Supplemental Order is very clear that the five declarations were rejected by the trial court and they “were deemed not available to the Court for its consideration of the two summary judgment motions.” Since the five declarations were not a part of the summary judgment motions at the trial court level, and since the Gutierrezes have not shown that the trial

court abused its discretion, those declarations cannot be considered by this Court in reviewing the summary judgment.

The reason for excluding the stricken declarations from this Court's de novo review is simple: "the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). See also *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993); *Mulcahy v. Farmers Ins. Co. of Wash.*, 149 Wn.2d 1027, 78 P.3d 656 (2003). If the trial court properly excluded the five declarations from consideration, the only way this Court can perform the same inquiry is to also exclude the five declarations from its de novo review of the summary judgment. This court must use the "same record" that was used by the trial court.

This "same record" rule is stated in *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993):

"Furthermore, in reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court. Therefore, in deciding this challenge to the grant of summary judgment in favor of Scott, we review the same record that was available to the trial court . . ." (Emphasis added, citations omitted.)

The Supreme Court reiterated this rule in *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996)

(“we review the same record that was available to the trial court”) See also *Jobe v. Weyerhaeuser*, 37 Wn.App. 718, 727, 684 P.2d 719, *review den'd*, 102 Wn.2d 1005 (1984) (“We therefore consider the same record as that considered by the trial court”).

Once the trial court struck the five declarations, they were not part of the record reviewed by the trial court for purposes of the summary judgment. Unless the Gutierrezes can establish an abuse of discretion in striking those declarations, those declarations are not available to this Court for its review, and do not create genuine issues of fact. Therefore, the Gutierrezes’ discussions about third party rights are not applicable. For the reasons discussed below, the trial court did not abuse its discretion.

POINT V.

THE TRIAL COURT HAD JURISDICTION OVER THE 16-FOOT EASEMENT ISSUES

On pages 12 – 14 of their Response to Motion for Order Requiring Correction or Replacement of Appellants’ Brief, filed with this Court on November 15, 2010 (“Response to Motion”), the Gutierrez contend that the trial court lacked jurisdiction because necessary parties not joined in this litigation. They do not specifically identify who the necessary parties are. They simply state that “other property owners have an affected interest in the property and improvements that the trial court ordered Gutierrez

to remove.” *Id.* at 14. They also refer to “Adjacent property owners.” Presumably, the necessary parties they are referring to are at least some of the neighbors who provided the late-filed declarations.

It is difficult to address in specific terms the Gutierrezes’ jurisdictional argument because their argument is so general. However, the Freudenthals assume that the claimed “necessary parties” are those that assert an interest in the fence that the trial court ordered to be removed.

The Gutierrezes provide no analysis as to why these neighbors are “necessary parties,” except to say “When a judgment leaves a party in a ‘position in which it must sue to enforce its rights,’ the parties is a party with an ‘affected interest’ under RCW 7.24.110.” Response to Motion, p. 13, quoting *Henry v. Town of Oakville*, 30 Wn.App. 240, 633 P.2d 892 (1981). The problem with this analysis is that RCW 7.24.110 does not apply to the fence. Although the Freudenthals sought for declaratory relief on some issues, they did not seek for declaratory relief regarding the fence. It sought for injunctive relief. (CP 483, 497, 500.) Therefore, the rules under RCW 7.24.110 do not apply. If the neighbors are to be “necessary parties,” they must so qualify under CR 19. The Gutierrezes provides no analysis of that question.

The Gutierrezes raise this issue at a very interesting point. The

complaint filed in this case was very clear that the Freudenthals wanted the fence moved. (CP 500.) The motion for summary judgment was clear that they wanted the fence moved. (CP 483.) In the more than one year between the filing of the complaint and the entry of the summary judgment, the Gutierrezes never once attempted to bring in the neighbors as necessary parties. In fact, in responding to the motion for summary judgment, the Gutierrezes never stated that the fence belonged to someone else. All they said was: "The fence was placed near the telephone poles and an existing row of poplar trees. Each neighbor appreciated and approved of the fencing." (CP 331.) And:

"We installed a wire fence on the easterly edge of Dickerman Lane in order to limit use and access of the roadway for properties located to the east of the road. The fencing does not limit the use of the road and is close to both irrigation lines, water risers and poplar trees. The fence was installed with the concurrence of all property owners including Angeline Olson." (CP 348.)

Not a hint that someone else had an ownership interest in the fence. It was not until after the trial court issued its oral ruling against the Gutierrezes and required them to remove the fence did they provide declarations stating that someone else owned the fence. This seems to be opportunistic. In any event, the Gutierrezes determined early on that their neighbors were not necessary parties. They should not be permitted at this time to make

that claim.

The Gutierrezes claim that they can raise the lack of a necessary party for the first time on appeal. They cite *DeLong v. Parmelee*, 157 Wn.App. 119, 236 P.3d 936 (2010). This is a Division II case. There is a split of opinion at the Court of Appeals' level on this issue. In *Draper Machine Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983), a Division I case, the Court held that the question of indispensable parties not joined as required by CR 19(a) does not involve fundamental rights and will not be considered when raised for the first time on appeal. Under the circumstances of this case, with the Gutierrezes being the only parties having any knowledge that the neighbors claimed an interest in a fence, that the Gutierrezes paid for and installed, it would be improper to allow them to raise this issue for the first time on appeal. Particularly, when they did not even argue the issue in their brief.

Even if the jurisdictional question can be raised for the first time on appeal, the issue is moot. The fence has already been removed. These neighbors, who claim an interest in the fence, have filed declarations stating: "Juan Gutierrez removed the fence and associated materials during the middle of April, 2010. All of the fence and fencing materials that were installed in 2003 were completely removed by Mr. Gutierrez." (CP 568.)

And:

“ . . . Juan Gutierrez removed the entire fence from Bill Gilman’s property to Jim Dimick’s property. The entire fence that was installed in 2003 was removed with the materials placed on our property. The fence removal was complete on or about April 19, 2010. There was no remaining portion of the fence in place. Juan Gutierrez fully complied with the Court Order.” (CP 572.)

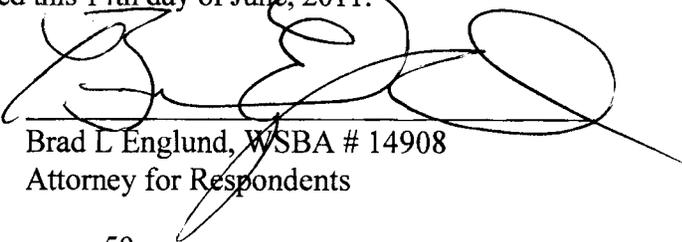
If the Court determines that the trial court lacked jurisdiction to order the fence removed and remands the matter to the trial court, there is nothing left to be done. The fence has been removed. It was removed before the Gutierrezes filed their appeal. The issue is moot.

One final point regarding jurisdiction, the jurisdiction argument applies only to the portion of the order requiring the Gutierrezes to remove the fence. It does not relate to any other parts of the order—including the part that determines that the entire width of the 16-Foot Easement benefits the Freudenthals’ property.

CONCLUSION

For the foregoing reasons the Freudenthals request that the Court affirm the summary judgment order entered by the trial court in all respects.

Respectfully submitted this 14th day of June, 2011.



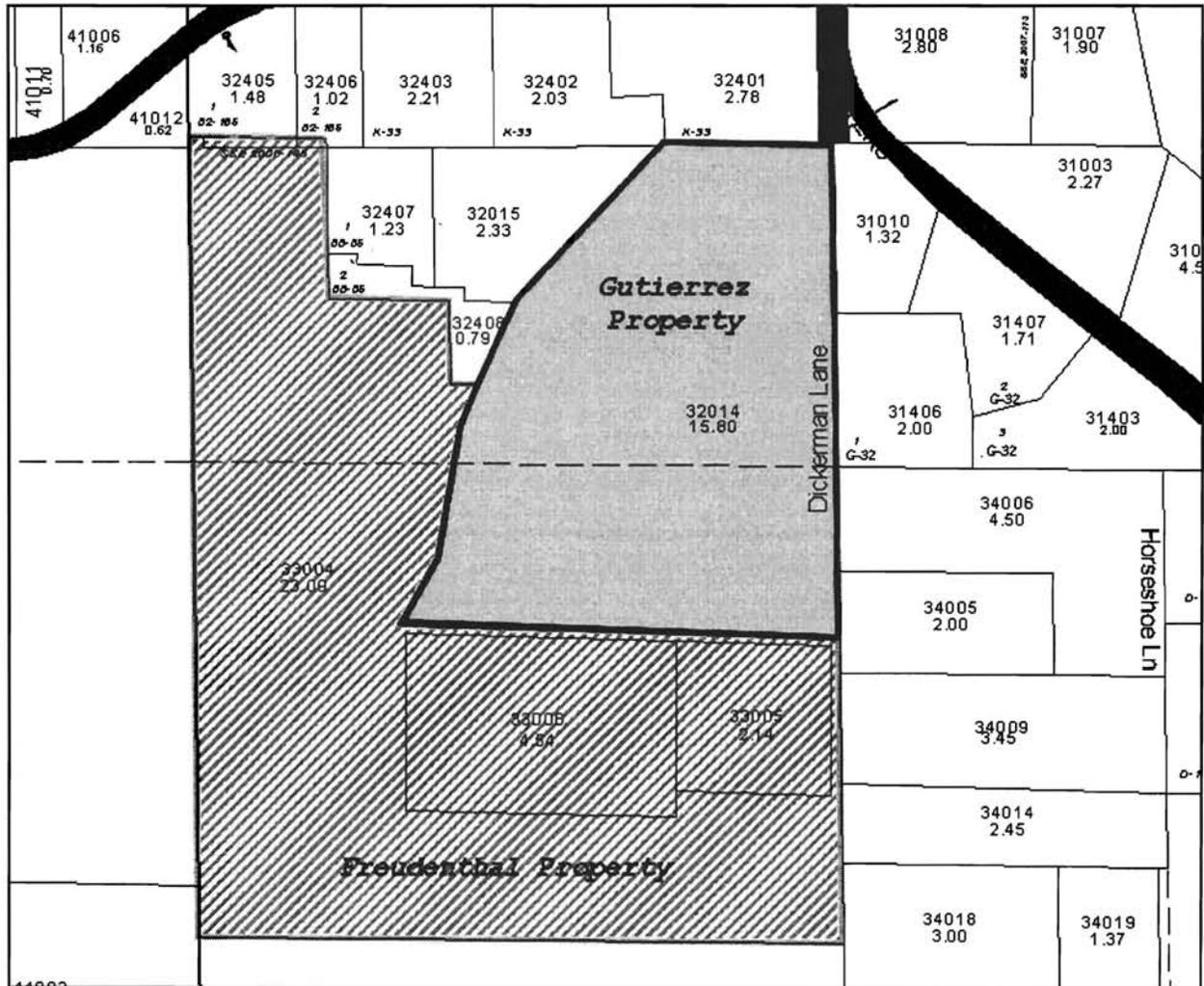
Brad L Englund, WSBA # 14908
Attorney for Respondents

APPENDICES

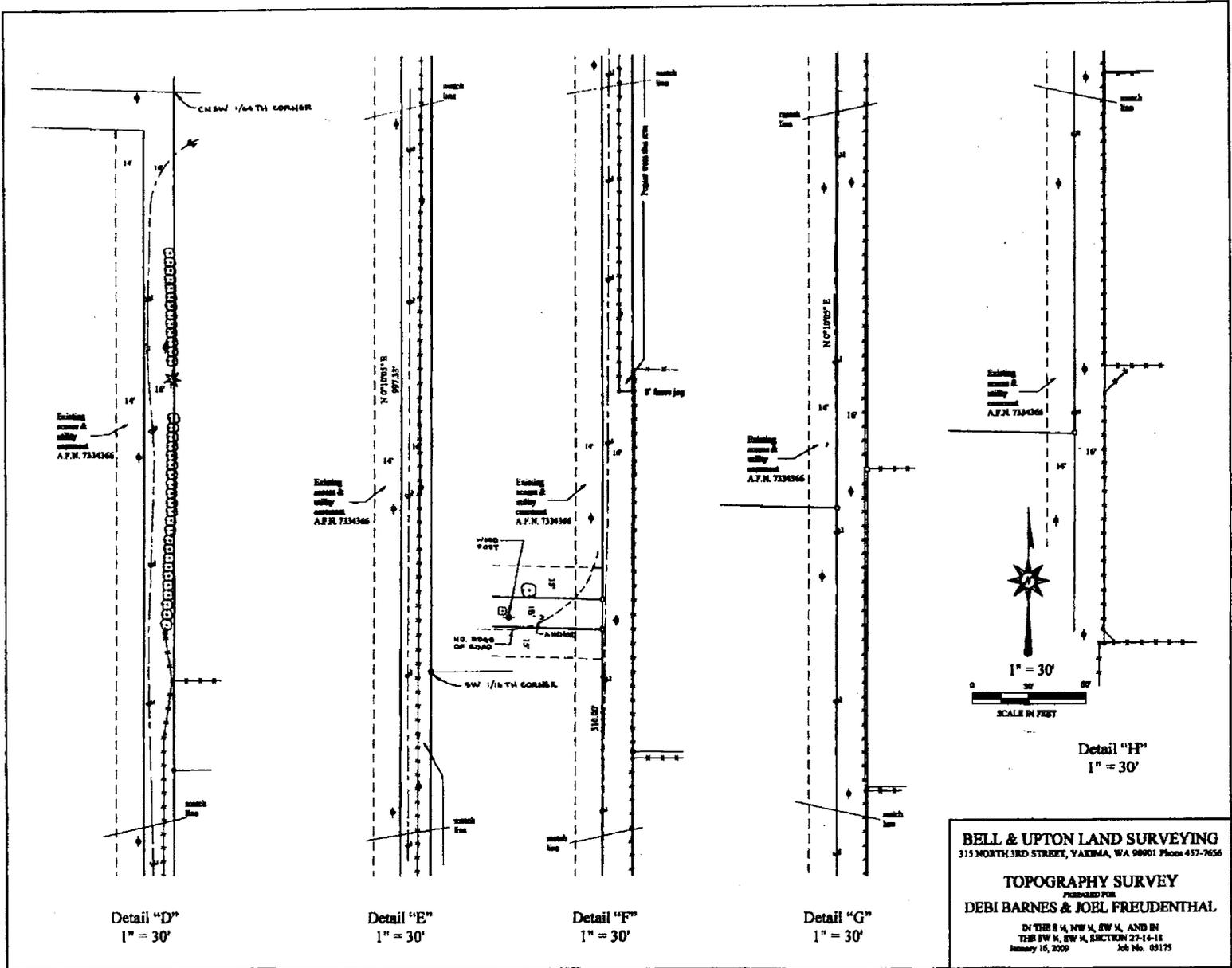
A - E

APPENDIX A

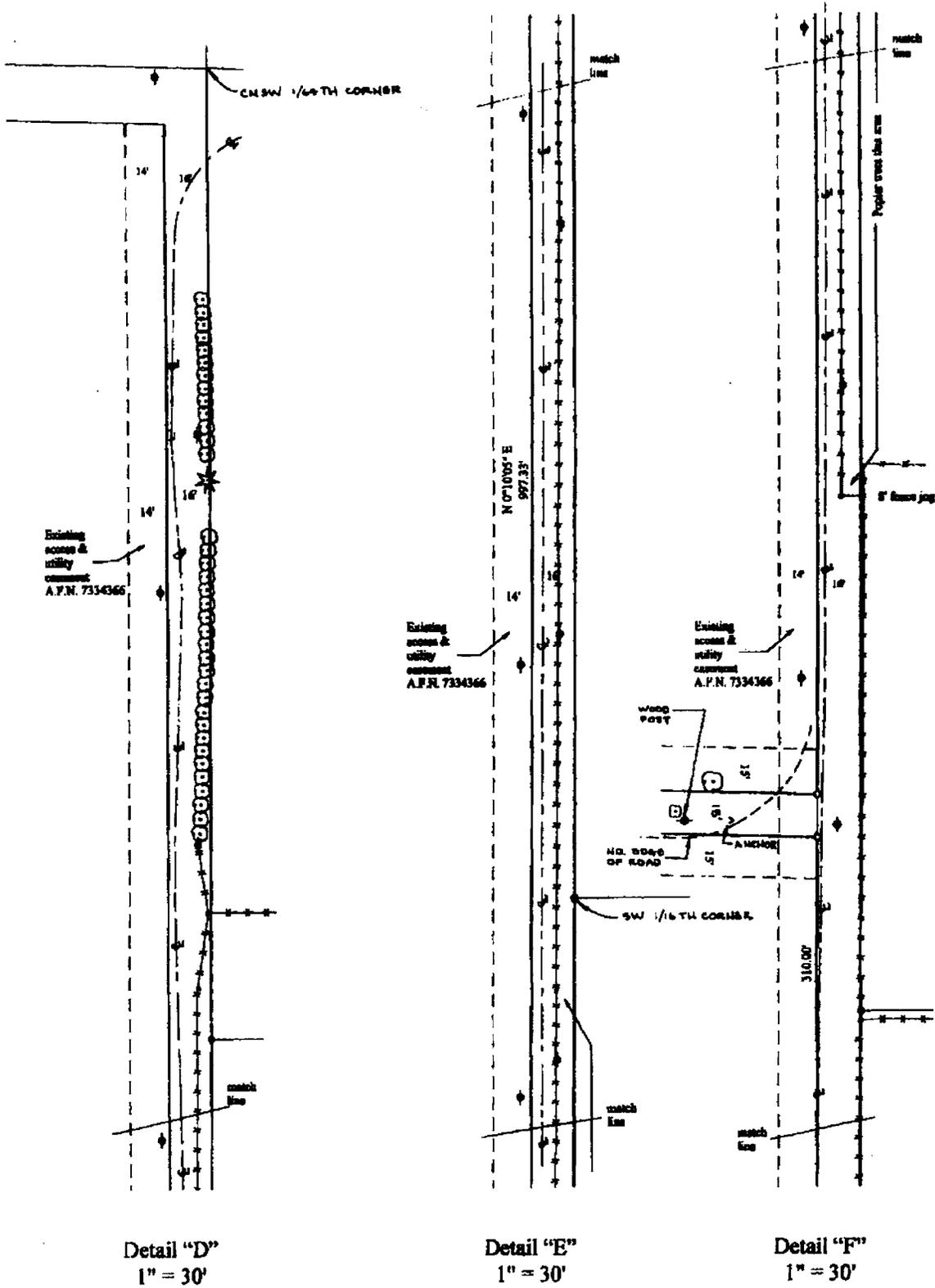
Relative Location of the Freudenthal and Gutierrez Properties



APPENDIX B - 2



APPENDIX B (Detail 2)



APPENDIX C

Easement for Ingress/Egress and Utilities

recorded under Yakima County Auditor's File No. 7334366

When recorded, please return to:
Larson Orchards, Inc.
PO Box 70
Selah, WA 98942

NOT SUBJECT TO
REAL ESTATE EXCISE TAX
U. D. Sub
DEPUTY TREASURER 5-14-2003

Auditor's Cover Sheet

Title of Instrument: Easement for Ingress/Egress and Utilities

Reference number(s) of Documents Assigned or Released: n/a

Grantor(s): Juan Gutierrez and Cherryl Gutierrez, husband and wife
Angeline Olson, a Widow
Douglas R. Miller and Robin F. Miller, husband and wife

Grantee(s): Juan Gutierrez and Cherryl Gutierrez, husband and wife
Angeline Olson, a Widow
Larson Orchards, Inc., a Washington Corporation
Ross Larson and Ruth Ann Larson, husband and wife

Abbreviated Legal Description: SW ¼ of Section 27, Township 14 North, Range 18, E.W.M.;
NW ¼ of Section 34, Township 14 North, Range 18, E.W.M. Yakima County, WA.

Additional legal is on Page 2, 3, 4, & 5 **of document.**

Assessor's Property Tax Parcel/Account number: 181427-32401, 181427-32014, 181427-33004, 181427-33005, 181427-33006, 181427-33002, 181434-22003, 181434-22001, 181434-21402, and 181434-22002.

Prepared by the office of:
Reed C. Pell
1400 Summitview, #102
Yakima, WA. 98902
(509) 457-0233

RCP
RCP

Easement for Ingress/Egress and Utilities -1



UNIFORM PRINTING SPECIFICATIONS

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7334366

Page: 1 of 10

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Yakima Co. WA

EASEMENT FOR INGRESS/EGRESS AND UTILITIES

WHEREAS, Juan Gutierrez and Cherryl Gutierrez, husband and wife, are the Owners of property situated in Yakima County, State of Washington and legally described as follows:

In Section 27, Township 14 North, Range 18, E.W.M.;
Beginning at a point on the 1/16th line, 990 feet North of the Southeast corner of the Southwest ¼ of the Southwest ¼;
Thence North on the same 1/16th line 1000.7 feet;
Thence North 89° 09' West 347.7 feet;
Thence South 42° 08' West 450.3 feet;
Thence South 23° 28' West 287.5 feet;
Thence South 9° 56' West 277.3 feet;
Thence South 32° 13' West 141 feet;
Thence South 88° 29' East 887.4 feet to the point of beginning;
EXCEPT the East 16 feet thereof and the North 20 feet thereof for roads.
Assessor's Tax Parcel Number: 181427-32014 (Parcel A)

WHEREAS, Angeline Olson, a Widow, is the Owner of properties situated in Yakima County, State of Washington and legally described as follows:

The South 310 feet of the North 340 feet of the West 422 feet of the East 438 feet of the South half of the North half and the North half of the South half in the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18 East, W.M.
EXCEPT the East 16 feet for road.
Assessor's Tax Parcel Number: 181427-33005 (Parcel B)

The South 310 feet of the North 340 feet of the West 422 feet of the East 860 feet of the South half of the North half and the North half of the South half in the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18 East, W.M.,
Assessor's Tax Parcel Number: 181427-33006 (Parcel C)

That part of the South half of the Northwest quarter of the Southwest quarter, and of the North half of the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18 East, W.M., lying West



of the following described line:

Beginning at a point 347.7 feet West of the Northeast corner of said subdivision, then South 42° 08' West 450.2 feet, then South 23° 28' West 287.5 feet, then South 9° 56' West 277.3 feet, then South 32° 13' West 141 feet, more or less, to the South line of said North half of said Southwest quarter of the Southwest quarter,

EXCEPT beginning at said point 347.7 feet West of the Northeast corner of said subdivision, then South 42° 08' West 450.2 feet, then West parallel with the subdivision line 391.35 feet, then North parallel with the West line of said subdivision line 333.9 feet to the North line thereof, then East along said subdivision line to the point of beginning, and

EXCEPT beginning at said point 347.7 feet West of the Northeast corner of said subdivision, then South 42° 08' West 450.2 feet to the true point of beginning, then South 23° 28' West 187.5 feet, then West parallel with the North line of said subdivision 60 feet, then North parallel with the West line of said subdivision, 172 feet more or less, to a point in a line 333.9 feet South and parallel with the North line of said subdivision, then East along said line to the true point of beginning,

TOGETHER WITH the South half of the North half and the North half of the South half in the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18 East, W.M.,

EXCEPT the South 310 feet of the North 340 feet of the East 860 feet, and EXCEPT the East 16 feet for road.

Assessor's Tax Parcel Number: 181427-33004 (Parcel D)

WHEREAS, Larson Orchards, Inc., a Washington Corporation, is the Owner of properties situated in Yakima County, State of Washington and legally described as follows:

The South half of the South half of the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18, E.W.M.

Assessor's Tax Parcel Number: 181427-33002 (Parcel E)

And

The East half of the Northwest quarter of the Northwest quarter of Section 34, Township 14 North, Range 18, E.W.M., EXCEPT the North 110 feet of the South 590 feet of the East 280 feet thereof.

Assessor's Tax Parcel numbers: 181427-22001 and 22003 (Parcel F)

And

Lot 2, according to that certain short plat, recorded in Book "K" of Short Plats, page 9, under Yakima County Auditor's File No. 2452305, records of Yakima County, Washington.

Assessor's Tax Parcel Number: 181434-21402 (Parcel G)



WHEREAS, Ross Larson and Ruth Ann Larson, husband and wife, are the Owners of property situated in Yakima County, State of Washington and legally described as follows:

**The North 110 feet of the South 590 feet of the East 280 feet of the East half of the Northwest quarter of the Northwest quarter of Section 34, Township 14 North, Range 18, E.W.M., Yakima County, Washington.
Assessor's Tax Parcel Number: 181434-22002 (Parcel H)**

WHEREAS, Douglas R. Miller and Robin F. Miller, husband and wife, are the Owners of real property situated in Yakima County, State of Washington described as follows:

**Lot "A" of Short Plat, as recorded in Book "K" of Short Plats, Page 33, under Auditor's File No. 2455462, records of Yakima County, Washington.
Assessor's Tax Parcel Number: 181427-32401 (Parcel I)**

WHEREAS, a 16 foot wide road presently exists pursuant to an Agreement dated June 13, 1967 and recorded under Yakima Auditor's File Number 2139267, Vol. 693, Pg. 145, and described as follows:

The East 16 feet of the South half of the Northwest quarter of the Southwest quarter and the East 16 feet of the North ¼ of the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 16, E.W.M., Yakima County, State of Washington.

WHEREAS, said 16 foot road is presently for the benefit of Parcels A, B, C, D, E, F and H as indicated above, and said owner's desire to include Parcel G.

WHEREAS, all of the Owners described above desire that an Easement be created to widen the existing 16 foot wide road to a total of 30 feet in width (16 foot wide road plus 14 foot wide easement granted herein; equaling 30 feet), NOW, THEREFORE,



Juan Gutierrez And Cheryl Gutierrez, husband and wife, HEREBY, grant and convey unto Angeline Olson, a widow, Ross and Ruth Ann Larson, husband and wife, and Larson Orchards Inc., a Washington Corporation, their heirs, successors and assigns a 14 foot easement for the purposes of ingress/egress and utilities, over, under and across, the East 14 feet of the real property situated in Yakima County, State of Washington and legally described as follows:

In Section 27, Township 14 North, Range 18, E.W.M.;
Beginning at a point on the 1/16th line, 990 feet North of the Southeast corner of the Southwest ¼ of the Southwest ¼;
Thence North on the same 1/16th line 1000.7 feet;
Thence North 89° 09' West 347.7 feet;
Thence South 42° 08' West 450.3 feet;
Thence South 23° 28' West 287.5 feet;
Thence South 9° 56' West 277.3 feet;
Thence South 32° 13' West 141 feet;
Thence South 88° 29' East 887.4 feet to the point of beginning;
EXCEPT the East 16 feet thereof and the North 20 feet thereof for roads.
Assessor's Tax Parcel Number: 181427-32014

Angeline Olson, a widow, HEREBY, grants and conveys unto Ross and Ruth Ann Larson, husband and wife, and Larson Orchards, Inc., a Washington Corporation, their heirs successors and assigns a 14 foot easement for the purposes of ingress/egress and utilities, over, under and across, the East 14 feet of the real property situated in Yakima County, State of Washington and legally described as follows:

The South 310 feet of the North 340 feet of the West 422 feet of the East 438 feet of the South half of the North half and the North half of the South half in the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18 East, W.M.
EXCEPT the East 16 feet for road.
Assessor's Tax Parcel Number: 181427-33005

The South 310 feet of the North 340 feet of the West 422 feet of the East 860 feet of the South half of the North half and the North half of the South half in the Southwest quarter of the Southwest quarter of Section 27, Township 14 North, Range 18 East, W.M.,
Assessor's Tax Parcel Number: 181427-33006

That part of the South half of the Northwest quarter of the Southwest quarter, and of the North half of the Southwest quarter of the Southwest



Dated this 8, day of May, 2003.

Ruth Ann Larson
Ruth Ann Larson

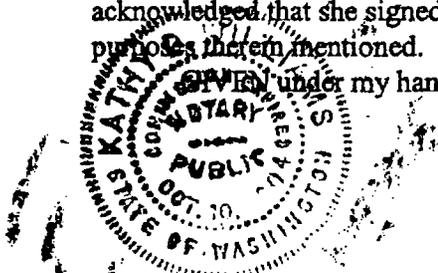
STATE OF WASHINGTON)

) ss.

County of YAKIMA)

On this day personally appeared before me Ruth Ann Larson, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

under my hand and official seal this 8 day of May, 2003.

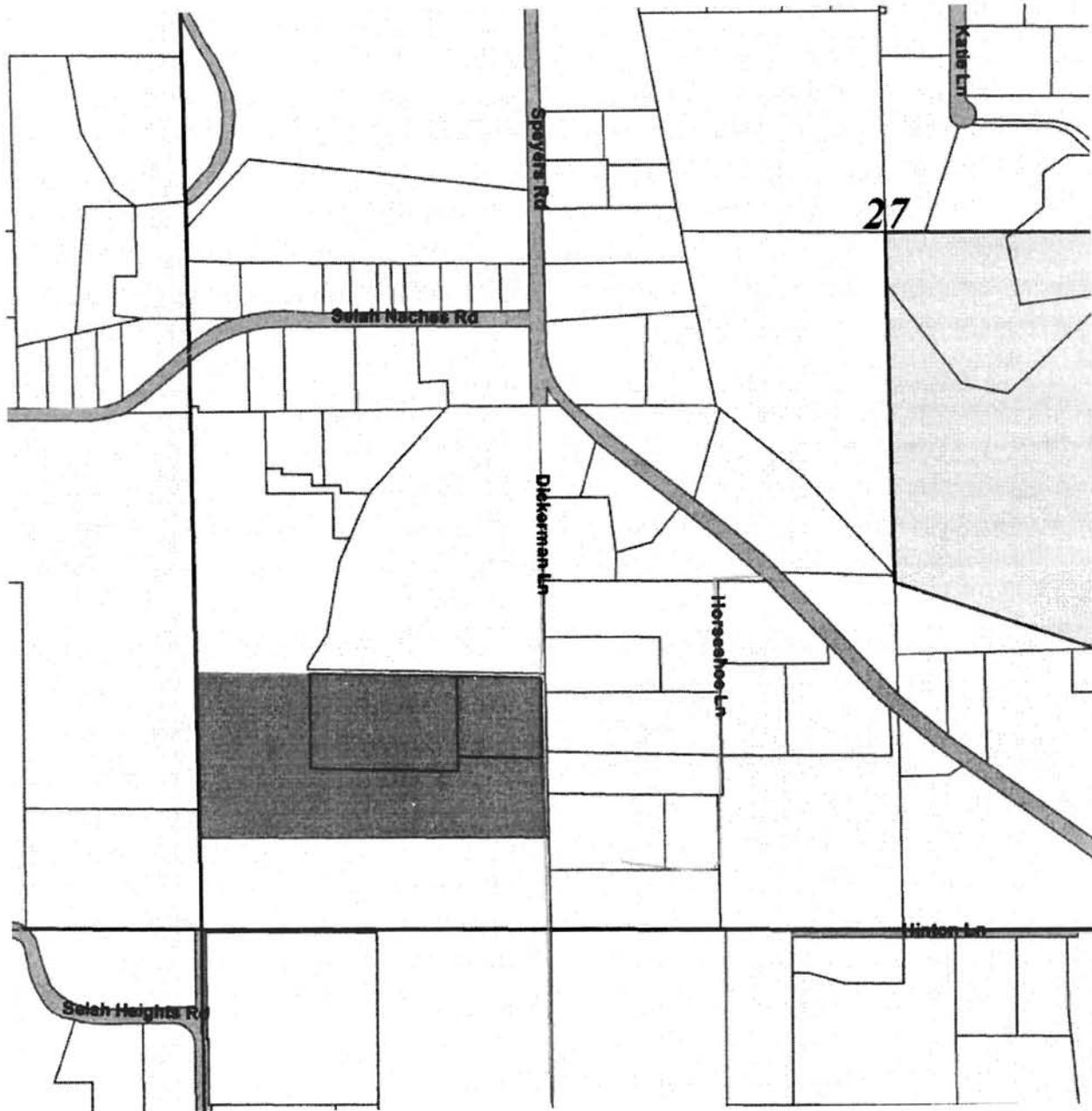


Kathy D. Williams
Notary Public in, and for the State of Washington,
residing at Selah, WA 98942.
My Commission Expires: 10-10-04.

Dated this 8, day of May, 2003.

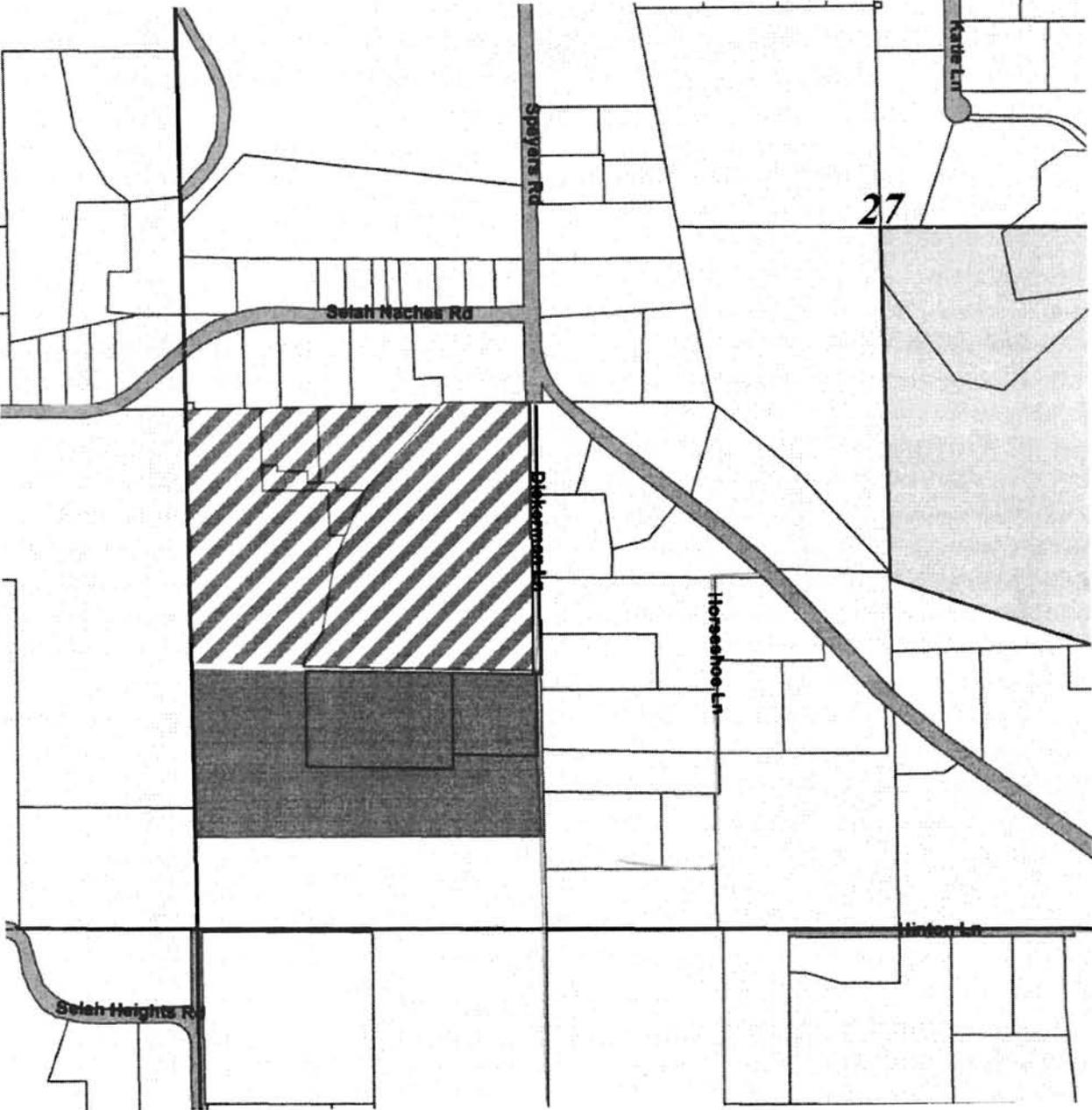


APPENDIX D



APPENDIX D

APPENDIX E



CERTIFICATE OF SERVICE

I certify that on this date I sent by U.S. Mail, postage prepaid a copy of the foregoing Respondents' Brief to the Appellants' attorney, James C. Carmody, Velikanje Halverson P.C., at 405 East Lincoln Ave., Yakima, Washington, 98901, and to the attorney for Angeline Olson, James Adams, of Wagner Luloff & Adams, 110 North 5th Ave., Ste 200, Yakima, Washington, 98902.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

Dated June 14, 2011, at Yakima, Washington.


Julie Queen