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NO. 347401

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION THREE

CITY OF UNION GAP,

Plaintiff/Appellant,

v.

PRINTING PRESS PROPERTIES, L.L.C.,

Defendant/Respondent

APPELLANT'S OPENING BRIEF

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GLOSSARY

“**Boulevard**” means West Valley Mall Boulevard

“**County**” means Yakima County

“**Deed**” means the quitclaim deed executed by Printing Press to Union Gap, recorded March 21, 2001.

“**Driveway**” means the proposed right-in driveway on the Property

“**Development Agreement**” means the Development Agreement between Union Gap and Printing Press, recorded April 7, 2010

“**Lowe’s**” means Lowe’s HIW, Inc.

“**LUPA**” means Washington’s Land Use Petition Act

“**NHS**” means National Highway System

“**Printing Press**” means Printing Press Properties, L.L.C.

“**Project**” means the West Valley Mall Boulevard Extension Project

“**Property**” means that real property identified in Appendix A, comprising parcels owned by Lowe’s and Printing Press

“**Trial court**” means Superior Court of Washington in and for Yakima County

“**Union Gap**” means City of Union Gap

“**Yakima**” means City of Yakima

1. INTRODUCTION

West Valley Mall Boulevard is a new, four-lane “Intermodal Connector” under the National Highway System. It is owned and maintained by Union Gap. Printing Press, a private developer, has attempted to construct a new private Driveway from the Boulevard to gain additional access to certain Property owned by Printing Press and Lowe’s. Currently, the Property already has vehicular access from Longfibre Road, built by Union Gap under a development agreement with Printing Press.

The Printing Press Driveway is a safety hazard. Drivers at this location have limited visibility as the Boulevard rises and falls over adjacent train tracks. Allowing slow-moving vehicles from the Driveway to pull directly into fast-moving Boulevard traffic (40 mph speed limit) when visibility is limited is unsafe. It is equally unsafe to allow fast-moving Boulevard traffic to suddenly slow down or stop in order to turn off the Boulevard into the Driveway. Accordingly, from the inception of Boulevard design and construction, Union Gap has limited private access driveways at this location, including its rejection of the Printing Press Driveway.

Union Gap, as Boulevard owner, has authority to prohibit Printing Press from constructing its potentially dangerous Driveway *and*, in the process, from damaging Union Gap’s road facilities. Printing Press has no access rights to the Boulevard. Printing Press already has unobstructed access to the Property from an extended Longfibre Road, and therefore under Washington law governing access rights for abutting landowners,

Printing Press has no right to *additional* access from the Boulevard. Moreover, Printing Press is not entitled to the additional access it seeks simply by virtue of the fact that the Boulevard was constructed along its boundary.

Further, Printing Press has quitclaimed by deed to Union Gap any interest it may have had in the Boulevard right-of way, without reserving any access right. In addition, in the development agreement that resulted in the extension of Longfibre Road (and greater access for Printing Press), Printing Press acknowledged Union Gap's right to restrict Boulevard access. Without any property rights in the Boulevard, Printing Press simply has no authority to proceed with its unsafe project without Union Gap's permission, which for good reason has never been granted.

2. ASSIGNMENTS OF ERROR

The Court's August 12, 2016 oral opinion is incorporated by reference into its September 9, 2016 Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Cross-Motion for Summary Judgment. Union Gap assigns error to those orders, including specifically the following findings and conclusion made in the September 9, 2016 order.

2.1 Errors in Factual Findings.

2.1.1 The Property was conveyed through a voluntary sale, not a condemnation proceeding. The trial court erred in finding that Union Gap conducted the "condemnation" of the Boulevard right-of-way along the Property.

2.1.2 In listing the undisputed facts upon which its “decision rests,” the trial court omitted a material fact in this dispute: Printing Press has always had, and continues to have, access to its property from Longfibre Road.

2.2 Errors in Conclusions of Law.

2.2.1 The trial court erred in concluding that Union Gap, owner of the Boulevard, has no ownership right to enjoin the Driveway.

2.2.2 The trial court erred in concluding that Printing Press holds easement rights (by operation of law) in the new Boulevard.

2.2.3 The trial court erred in concluding that Printing Press’s Deed to Union Gap did not “extinguish” any access rights Printing Press may have had in the Boulevard (such access rights having never existed before the Deed).

2.2.4 The trial court erred in concluding that a municipality cannot extinguish a property owner’s access rights to a road through a condemnation proceeding or voluntary acquisition.

2.2.5 The trial court erred in concluding that Union Gap cannot enforce the Development Agreement because enforcement of the Agreement is tantamount to Union Gap regulating property outside its jurisdiction.

2.2.6 The trial court erred in concluding that Union Gap waived its right to restrict access to the Boulevard by not filing a LUPA challenge at the City of Yakima.

2.2.7 The Court erred in awarding Printing Press its legal fees and costs as the prevailing party, instead of awarding fees and costs to Union Gap.

3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

3.1 “While a city cannot exercise governmental authority outside its corporate limits, the municipality may exercise its right to own and use property for legitimate city purposes outside its boundaries.” *State v. Clausen*, 157 Wash. 457, 460, 289 P. 61, 63 (1930). While the section of Boulevard Printing Press hopes to access is located outside of Union Gap’s jurisdiction, Union Gap owns and maintains the Boulevard. In concluding that Union Gap has no authority to control the Boulevard, did the trial court violate *Clausen* and confuse ownership authority with regulatory authority?

3.2 “Without a denial of access to the property, even abutting owners do not have a property right in a particular street. . . . The right of an abutting property owner is the right of access to the property, not access to the particular street.” *TT Properties v. City of Tacoma*, 192 Wn. App. 238, 249, 366 P.3d 465, 471 (2016). Printing Press has never had a right of access to the Property from the Boulevard. Printing Press does, however, continue to enjoy complete access to the Property from Longfibre Road. Because Printing Press already has access rights from Longfibre Road, should its claim of right for additional access be rejected?

3.3 Under RCW 64.04.050, a grantor of a quitclaim deed “assigns in fee of all the then existing legal and equitable rights of the

grantor in the premises therein described.” RCW 64.04.050. Printing Press conveyed its entire interest in the Boulevard to Union Gap under the Deed. Did Printing Press extinguish any possible easement rights to the Boulevard when it executed a quitclaim deed to Union Gap?

3.4 In the alternative, under RCW 8.12.210, title to any property taken by condemnation “shall be vested in fee simple in such city or town.” Printing Press’s conveyance Deed to Union Gap was to the “same extent and purpose as if the rights granted had been acquired under Eminent Domain statutes.” Did Union Gap take title free and clear of any possible easement claims by Printing Press?

3.5 Under the Development Agreement, Printing Press acknowledged that driveway access to the Printing Press Property from the Boulevard was subject to Union Gap’s review and approval. In exchange, Union Gap funded and constructed new, additional access to the Printing Press Property by extending Longfibre Road. Is Union Gap entitled to fully enforce the Development Agreement against Printing Press and deny Boulevard access?

3.6 LUPA bars claims that “depend upon” or “arise from” land use decisions that have not been timely appealed through an administrative hearing process. Union Gap’s claims, however, do not depend upon or arise from any land use decision. Rather, Union Gap’s claims arise from its ownership of the Boulevard and those rights given by Printing Press to Union Gap under the Development Agreement and Deed. Are Union Gap’s claims nonetheless barred by LUPA?

3.7 The Development Agreement includes a broad prevailing-party attorney-fee provision. Should the court award Union Gap its attorney's fees and costs on appeal and at the trial court?

4. STATEMENT OF THE CASE

4.1 Historically, Printing Press Accessed its Property From Upper Longfibre Road Only.

Before there was the Boulevard, the Property was accessed by Longfibre Road. That road for years was a dead-end road running north/south from Washington Avenue.¹ An aerial photograph taken in late July 2002 of both Longfibre Road and the Property [attached as Appendix A] identifies access from Upper Longfibre Road only.

4.2 In 2001, Printing Press Voluntarily Conveyed to Union Gap Its Entire Interest in the Right-of-Way for Extension of the Boulevard.

In approximately 2000, Union Gap approached Printing Press to acquire a southern portion of the Property to extend the Boulevard west. The Boulevard is a new National Highway System route, providing the first direct east-west, four-lane divided-arterial between the Yakima Air Terminal and I-82. The Boulevard Project has been included in all of the region's comprehensive plans for decades –Union Gap Comprehensive Plan (1999), Yakima Urban Area Comprehensive Plan (1997), the Yakima Valley Conference of Governments Draft Regional Transportation Improvement Plan (2003), and the Yakima Air Terminal Master Plan Update (1996).²

¹ Amended CP 237, ¶4.

² Amended CP 237-238 ¶5.

Before Boulevard construction, Union Gap adopted an ordinance governing its future use. Union Gap Ordinance 2123 defined the to-be-constructed Boulevard as a “controlled access arterial” subject to “Limited Access Standards.” The Ordinance passed for two reasons: (1) to “provide coordinated standards for the permitting of access points to a controlled access arterial” and (2) to confirm that “[t]he access rights of an owner of property abutting a controlled access arterial are subordinate to the public’s right and interest in a safe and efficient arterial system.” UGMC 9.34.010. Consequently, driveway access to the Boulevard was contemplated only “when other alternatives such as an abutting public street or internal access road are not possible for access.” UGMC 9.34.060(a). The definition of “controlled access arterial” specifically includes “W. Valley Mall Blvd.—From Old Town Road west.” UGMC 9.34.020(3).

Union Gap purchased the land for the Project through a combination of voluntary sales and condemnation proceedings.³ Some of the landowners, those located east of the railway tracks depicted in Appendix A, disputed Union Gap’s authority to condemn their land, located within Yakima. For approximately .52 miles, the centerline of the Boulevard at this location is generally aligned with the boundary line separating Union Gap and Yakima.⁴ Although Union Gap had authority to proceed with the condemnation of property outside its jurisdiction, RCW

³ Amended CP 239 ¶8.

⁴ Amended CP 238 ¶6.

8.12.030, in order to efficiently render the issue moot, Union Gap entered into an Interlocal Agreement with Yakima and secured an assignment of Yakima's undisputed authority to condemn those properties.

Knowing Union Gap would ultimately own and control the Boulevard (despite it being situated, in part, within Yakima), both cities agreed that Union Gap would indemnify Yakima from claims that arise from the "design, construction, reconstruction, installation, repair, maintenance, operation, alteration, or modification of the Valley Mall Boulevard street and transportation improvements (or other public improvements) on the Property."⁵

Printing Press, however, was not part of the landowners' dispute and instead entered into arms-length negotiations with Union Gap. In order to facilitate those negotiations, Union Gap paid Printing Press \$750 to conduct its own appraisal.⁶ In valuing the remaining property after the sale of the right-of-way, Printing Press's appraisal acknowledged that "[i]mmediate access is by Longfibre Road" and that "[w]hen Valley Mall Boulevard is completed, immediate access may not be enhanced due [sic] the rise of the bridge over the railroad tracks...").⁷ That Printing Press would have no access rights from the Boulevard was known and factored in the valuation.

A requirement of federal funding for the Project was to ensure that property owners selling their land received market value. Accordingly,

⁵ Amended CP 250 ¶5.

⁶ Amended CP 239 ¶8.

⁷ Amended CP 324.

Union Gap was required to conduct both an appraisal as well as a review appraisal of the Printing Press property being acquired. The loss in fair market value of the Property upon the sale of the right-of-way to Union Gap was \$36,525 in both appraisals.⁸ To ensure just compensation was paid, Union Gap subsequently paid Printing Press \$45,000 for the right-of-way.⁹ Printing Press accepted this amount and executed the Deed.¹⁰ The Deed provides that Union Gap acquired title “to the same extent and purpose as if the right herein granted had been acquired under Eminent Domain statutes of the State of Washington.”¹¹

4.3 Union Gap Designed, Constructed, Owns, and Maintains the Boulevard.

Following Union Gap’s acquisition of the Boulevard right-of-way and other properties, Union Gap commenced the Project.¹² Union Gap applied its own resources to find all Project funding; entered into all funding agreements; executed all design and construction contracts; completed all property acquisitions; and, paid all consultant and contractor progress payments.¹³ Following construction, specifically in reference to this disputed section of the Boulevard, Union Gap has been responsible for expenses for street lighting, street striping, street sweeping, stormwater facility maintenance, and roadside vegetation control. Union Gap performs snow and ice control, sign maintenance, irrigation, and mows grass

⁸ Amended CP 789 ¶12, Amended CP 949-950.

⁹ Amended CP 789 ¶12.

¹⁰ Amended CP 789 ¶12.

¹¹ Amended CP 394.

¹² Amended CP 239 ¶8.

¹³ Amended CP 786 ¶4, Amended CP 802.

medians.¹⁴ While others contributed funding to the Project,¹⁵ there is no *genuine* dispute over whether Union Gap acquired, designed, constructed, and currently maintains, the Boulevard. An aerial photograph of the Property and the Boulevard (taken in September 2005) is attached as Appendix B.¹⁶

In 2012, with the concurrence of the County and Yakima, Yakima Valley Conference of Government (of which Union Gap and Yakima are members) voted to secure formal federal classification for the Boulevard. Federal mapping now identifies the Boulevard as an Intermodal Connector with limited access.

4.4 To Induce Union Gap to Extend Longfibre Road in 2008, Printing Press Acknowledged Union Gap's Right to Restrict Access.

Approximately seven years after Printing Press conveyed the Boulevard right-of-way to Union Gap, Union Gap and Printing Press executed the Development Agreement.¹⁷ The Agreement was intended to maximize development of the Property and properties to the west. The parties agreed that Longfibre Road would be extended farther south to provide greater access to the Property and that the boundary line separating Union Gap and Yakima would be relocated in order to annex

¹⁴ Amended CP 786 ¶5.

¹⁵ Amended CP 786 ¶4, Amended CP 802.

¹⁶ Amended CP 239 ¶8, Amended CP 401.

¹⁷ Amended CP 239-240 ¶9, Amended CP 403-458.

the entire Property into Yakima.¹⁸ For years, a wedge-shaped corner of the Property had been located in Union Gap.¹⁹

Under the Development Agreement, the parties agreed that, despite the annexation of the entire Property into Yakima, Union Gap (through UGMC Chapter 9.34) would still govern access to the Boulevard and may prohibit driveway access. The Development Agreement reads in pertinent part as follows:

- c. PPI shall incorporate the following access management requirements into all site development plans.
 - i. PPI acknowledges that provisions of UGMC Chapter 9.34 may prohibit direct access to Valley Mall Boulevard. Any access to the property from Valley Mall Boulevard shall be subject to municipal review and conditioning at time of project permit application.²⁰

Union Gap would not have executed the Development Agreement if it had known of Printing Press's current plan to construct driveway access from the Boulevard over Union Gap's objection.²¹ Access to and from the Property was always intended to be from Longfibre Road only.²²

¹⁸ Amended CP 239-240 ¶9.

¹⁹ A diagram of the wedge-shaped piece at issue was included as Exhibit B to the Development Agreement, Amended CP 414.

²⁰ Amended CP 406.

²¹ Amended CP 239-240 ¶9.

²² Amended CP 239-240 ¶9.

Chapter 9.34 UGMC, Supra. The Development Agreement includes a prevailing-party attorney-fee provision.²³

4.5 Union Gap Has Consistently Restricted Private Access onto West Valley Mall Boulevard for Driver Safety.

4.5.1 Traffic Standards.

Sightlines are obstructed by a rise and fall in the Boulevard as it crosses over train tracks located east of the Property.²⁴ High-speed drivers on the Boulevard would not timely see, and therefore collide into, drivers merging onto the Boulevard from a private driveway.²⁵ Drivers on the Boulevard slowing down or stopping to enter into driveways like the one proposed by Printing Press could cause rear-end collisions and traffic congestion.²⁶ Driver safety is truly a concern for Union Gap, particularly on this section of the Boulevard, where, in the last three years, there have been twenty-nine documented road accidents.²⁷

Consequently, such private driveways are restricted on the Boulevard, including the properties immediately south of the Property and the local Costco property to the southwest.²⁸ A single private access driveway exists between Old Town Road (east) and S. 3rd Ave (west) – pre-existing access that predates the Boulevard. No new driveway access has been approved in this area since construction of the Boulevard. In fact, Union Gap has denied at least three requests for private direct access

²³ Amended CP 409 ¶8.

²⁴ Amended CP 240-241 ¶¶11 and ¶12.

²⁵ Amended CP 241 ¶12.

²⁶ Amended CP 241 ¶12.

²⁷ Amended CP 788 ¶10.

²⁸ Amended CP 241-242 ¶13, Amended CP 492.

to the Boulevard from property owners in the immediate area, including Costco.²⁹

4.5.2 Consistent Union Gap Application.

At the trial court, Printing Press wrongly asserted that Union Gap has “authorized” two right-in private driveways in the area: one located across the Boulevard from the Driveway; the other on the same side of the Boulevard but farther west.³⁰ Printing Press concluded that “Union Gap has chosen to commence litigation against PPI in an effort to prohibit similar commercial access.³¹ PPI believes this was done solely for anticompetitive purposes.”³²

Printing Press is factually incorrect. Public Works Director Dennis Henne confirmed that the “driveway” opposite the Printing Press Property is actually Promenade Street.³³ This public street does not create the same personal injury risks as the Printing Press private driveway because as discussed below: (1) it has a much longer deceleration lane; and (2) Promenade Street doesn’t present the same site-distance concerns.

The Driveway’s deceleration lane has insufficient space for adequate vehicle stacking.³⁴ Printing Press’s stacking distance is only fifty five feet from the pedestrian crossing to the Boulevard. Therefore it is not adequate in length to safely hold more than two cars without causing

²⁹ Amended CP 786-787 ¶6.

³⁰ Amended CP 668, ln. 11-13.

³¹ Amended CP 668, ln. 14-15.

³² Amended CP 668, ln. 15-16.

³³ Amended CP 242 ¶14, Amended CP 787 ¶7.

³⁴ Amended CP 787 – 788 ¶8.

slowing, stopping, or lane changes on the Boulevard.³⁵ In contrast, Promenade Street's stacking distance is no less than 280 feet.³⁶ According to AASHTO³⁷ Geometric Design of Highway and Streets manual, Exhibit 3-1, "Stopping Sight Distance" table, the recommended stopping distance is no less than 153.6 feet when traveling at 40 mph on a *flat*, dry surface.³⁸

Promenade Street doesn't present any site-distance concerns. Eastbound drivers pulling into Promenade Street's deceleration lane will not have their vision impaired by the railway bridge, which is located *after* the deceleration turn off.³⁹ Westbound drivers, in contrast, would have their vision impaired by the twenty-seven-foot-tall bridge, which is located *before* the Printing Press driveway at the bottom of the downhill grade.⁴⁰ As a result of vision impairment, and speed, westbound drivers would have inadequate time to brake when drivers ahead of them slow down or stop before entering the proposed Printing Press deceleration lane.⁴¹

The other complained-of private "driveway" access is at the Bud Clary auto-dealer property, located west of the Property on the other side of Longfibre Road.⁴² Again, this is not a private driveway access. Union Gap plans a *public street* to provide access to an over fifty-acre

³⁵ Amended CP 787-788 ¶8.

³⁶ Amended CP 787-788 ¶8.

³⁷ American Association of State Highway and Transportation Officials.

³⁸ Amended CP 787-788 ¶8, Amended CP 925, AASHTO Geometric Design of Highway and Streets Manual, Exhibit 3-1. "Stopping Sight Distance" Table

³⁹ Amended CP 787 ¶7.

⁴⁰ Amended CP 787 ¶7.

⁴¹ Amended CP 787 ¶7.

⁴² Amended CP 668, ln. 11-13.

undeveloped area.⁴³ The public street will connect to an extended Goodman Road and to other interior streets in order, in part, to avoid direct private driveway access to the Boulevard.⁴⁴ The public street will have a longer deceleration lane than the Driveway and, in addition, is located farther away than the Driveway from the view-obstructing bridge (1,112 feet from the uphill end of the Printing Press deceleration lane).⁴⁵

Union Gap consulted with HLA Engineering and Land Surveying regarding each street's safety and design. Traffic studies facilitated Union Gap's decision-making.⁴⁶ Ultimately, both public street projects have been carefully vetted by Union Gap, and neither poses safety concerns, in contrast to the Driveway.⁴⁷

4.6 Printing Press Sold a Portion of the Property to Lowe's.

Lowe's now owns the northern portion of the Property. Mapping attached as exhibits to Printing Press's and Lowe's Easements, Covenants, Conditions, and Restrictions identifies the existing Longfibre Road access and the proposed "optional access" from the Boulevard.⁴⁸ Attached as Appendix C is an aerial photograph taken in 2013 depicting the new Lowe's home improvement store and the location of the proposed Driveway. Under its agreement with Lowe's, if Printing Press secures permitting for the optional access (the Driveway) within five years of

⁴³ Amended CP 788 ¶9, Amended CP 927.

⁴⁴ Amended CP 788 ¶9.

⁴⁵ Amended CP 788 ¶9.

⁴⁶ Amended CP 788 ¶10.

⁴⁷ Amended CP 787 ¶7.

⁴⁸ Amended CP 493-494, ¶2, Amended CP 496-559.

Lowe's opening for business, Lowe's will fully reimburse Printing Press for all actual permitting and construction costs up to \$170,000.⁴⁹ Printing Press is solely responsible for legal costs incurred securing requisite governmental approvals. Lowe's determined to not pursue such approvals after Union Gap advised that the Driveway could not proceed. Printing Press's "site development plan" with Lowe's does not include the requisite language requiring Union Gap approval to access to the Boulevard which, under the Development Agreement, was supposed to be in all "site development plans."

4.7 Printing Press Has Advanced a Driveway Project Rejected by Union Gap.

Consistent with the parties' promises in the Development Agreement, Printing Press originally submitted permit applications for the Driveway to Union Gap.⁵⁰ Union Gap carefully reviewed the permit application. It consulted with HLA Engineering and Land Surveying regarding safety concerns over site, distance, and speed, and consulted applicable highway design standards. Union Gap ultimately determined that the Driveway would not meet generally acceptable design practices for an Intermodal Connector and was unsafe. Accordingly, Union Gap properly denied the Driveway permit.⁵¹ No appeal was taken from that denial.

⁴⁹ Amended CP 507-508, Section 2.2(C)(iv) of the CC&RS.

⁵⁰ Amended CP 240 ¶11, Amended CP 463, Permit Application.

⁵¹ Amended CP 240-241 ¶11.

Instead, Printing Press withdrew the application and submitted new applications to, and received approvals from, Yakima.⁵² Yakima issued an excavation permit to Printing Press related to a “New Commercial Approval off Valley Mall BLVD” purporting to authorize (in part) the Driveway.⁵³ Yakima also issued at least one other permit related to the Driveway.⁵⁴ Yakima’s permit calls not only for the installation of the Driveway, but also the destruction of existing Boulevard improvements, including sidewalks and curbing.⁵⁵

Notwithstanding that Printing Press has been advised by Union Gap, in writing, that it has no authority to construct the Driveway,⁵⁶ Printing Press pushed forward with construction activities on the Property. Although, it stopped short of cutting curbs and accessing the Boulevard.

4.8 Cross Motions for Summary Judgment.

On March 25, 2016, Union Gap brought this action. Union Gap summarized its position in its Complaint as follows:

Washington cities generally have the right to control the real property they own, including city roads. Accordingly, a private property owner cannot compel a city to allow direct access to a city-owned road where: (1) there is no history of any access prior to the Boulevard’s construction, i.e., Union Gap is not denying an existing access right; (2) under a Development Agreement, Union Gap and the private developer already agreed that direct access onto the Boulevard is prohibited; (3) Union Gap provided (at great expense) the Defendant alternative access from an adjacent

⁵² Amended CP 240-241 ¶11.

⁵³ Amended CP 240-241 ¶11, Amended CP 476-485.

⁵⁴ Amended CP 240-241 ¶11, Amended CP 487-490.

⁵⁵ Amended CP 478, Right of Way Excavation Permit Fees.

⁵⁶ Amended CP 241 ¶11, Amended CP 468-470.

public road, as contemplated under the parties' Development Agreement; and (4) Union Gap originally purchased the property in fee from the Defendant (not just a right-of-way) in a fully-negotiated transaction, paying the Defendant \$45,000 for all rights to the property, including the right to exclude.⁵⁷

Union Gap moved for summary judgment on July 14, 2016. That same day, Printing Press also moved for summary judgment. An approximately two-hour hearing was conducted on August 8, 2016. By letter of August 12, 2016, the trial court issued its "oral opinion" ruling in favor of Printing Press. The oral opinion was subsequently incorporated by reference into an Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Cross-Motion for Summary Judgment (September 9, 2016).⁵⁸ Union Gap timely appealed (September 22, 2016).

5. SUMMARY OF ARGUMENT

It is undisputed that Union Gap owns the Boulevard. As owner of the Boulevard, Union Gap may restrict driveway access to the Boulevard for legitimate reasons. *State v. Clausen*, 157 Wash. 457, 460, 289 P. 61, 63 (1930). In denying Printing Press's request to construct the Driveway for safety reasons, Union Gap properly exercised its ownership rights.

Printing Press has no access rights to the Boulevard. Before the Boulevard, Printing Press never had access rights from the south and had

⁵⁷ Amended CP 4.

⁵⁸ The Court also issued an Order to Correct the Record, based on a stipulation by the parties. The stipulation was necessary to correct an erroneous factual position taken by Printing Press, that Union Gap had acquired the Printing Press property as agent of Yakima under the Interlocal Agreement. Printing Press later conceded that the Interlocal Agreement pertained to different properties.

always accessed its property from Longfibre Road. Accordingly, when Printing Press quitclaimed the Boulevard right-of-way to Union Gap, Printing Press had no access rights at this location because the Boulevard did not yet exist. *State v. Calkins*, 50 Wn. 2d 716, 719, 314 P.2d 449, 450 (1957). Even if such rights had existed, however, they were extinguished by quitclaim deed, in exchange for which Printing Press negotiated and received full compensation.

After the Boulevard was constructed, Printing Press was not automatically vested with Boulevard access rights simply by virtue of being an abutting landowner. *State v. Calkins*, 50 Wn. 2d 716, 719, 314 P.2d 449, 450 (1957). To establish such rights, Printing Press was required to demonstrate that it had no other access to its property. *TT Properties v. City of Tacoma*, 192 Wn. App. 238, 249, 366 P.3d 465, 471 (2016). Accordingly, it is fatal to Printing Press's claim for a right of Boulevard access that Printing Press has always had complete access to the Property from Longfibre Road, recently extended and improved by Union Gap under Development Agreement. In fact, in exchange for that improved access, Printing Press acknowledged that access to the Boulevard was subject to Union Gap's review and approval. Printing Press is therefore bound to Union Gap's ownership and contractual authority to restrict Boulevard access.

6. ARGUMENT

6.1 Standard for Review.

The Court of Appeals should apply the same standard of review as the trial court to determine whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Parkin v. Colocousis*, 53 Wn. App. 649, 653, 769 P.2d 326, 328 (1989). This standard of review is *de novo*. Accordingly, the trial court’s conclusions and findings are not given the level of deference required under other, stricter standards of review. *Parkin*, 53 Wn. App. at 652–53 (for instance, a party may for the first time on summary judgment appeal challenge an affidavit because “appellate court engages in the same inquiry as the trial court.”).

By filing cross-motions for summary judgment, the parties essentially conceded that there were no material issues of fact. *Tiger Oil Corp. v. Department of Licensing, State of Wash.*, 88 Wn. App. 925, 930, 946 P.2d 1235, 1237 (1997). Therefore, the thrust of the Court of Appeals’ review is whether the trial court’s legal conclusions were correct or erroneous in light of those undisputed and material facts. *Tiger Oil*, 88 Wn. App. 925, 930, 946 P.2d 1235, 1237 (1997).

6.2 As Owner of the Boulevard, Union Gap May Deny Private Driveway Access Outside its Boundaries.

A city has the authority and discretion to control its own property for legitimate reasons. *State v. Clausen*, 157 Wash. 457, 460, 289 P. 61, 63 (1930); *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983) (in upholding government's restriction on speech, the court held "[a]s we have stated on several occasions, 'the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" (internal citations omitted).

The authority of a city to control its *own property* is separate and apart from its police power authority to regulate the *property of others*. *Clausen*, 157 Wash. at 460. The trial court failed to recognize this distinction,⁵⁹ falling into the exact trap warned against in *Clausen*:

The rule that a municipal corporation cannot exercise its governmental authority outside its limits has nothing to do with the case at bar. While a city cannot exercise governmental authority outside its corporate limits, the municipality may exercise its right to own and use property for legitimate city purposes outside its boundaries.

State v. Clausen, 157 Wash. 457, 460, 289 P. 61, 63 (1930).

In *Clausen*, the City of Walla Walla sought a writ of mandamus requesting that the state auditor accept bonds issued by the city for a new airport located outside the city's limits. *Id.* at 457-58. The state auditor

⁵⁹ *See generally*, Amended CP 1108-1110.

had refused to accept the bonds, arguing the city “has no authority to expend money for airport development outside its city limits.” *Id.* In contrasting municipal police powers to regulate use of private property, and municipal property rights, the Supreme Court expressly acknowledged that the “municipality may exercise its right to own and use property for legitimate city purposes outside its boundaries.” *Id.* at 460. That *Clausen* involved an airport outside of a Walla Walla’s city limits and this dispute involves a boulevard outside Union Gap’s limits is of no consequence. Both improvements are for public use, and both uses are within a city’s authority. RCW 8.12.030 (providing cities authority to condemn property outside their limits for a boulevard).

Here, Printing Press makes the same erroneous jurisdictional argument rejected by *Clausen*, pronouncing that “City of Yakima has sole jurisdiction over commercial approaches to Valley Mall Boulevard and land use decisions regarding the PPI Property.”⁶⁰ True, this very short section of the Boulevard (to the centerline only) is within the Yakima’s jurisdiction. But, as the Supreme Court has held, “[t]he rule that a municipal corporation cannot exercise its governmental authority outside its limits has nothing to do with the case at bar.” *Clausen*, 157 Wash. at 460. Accordingly, what is germane to this case, and what compels the Court to reverse the trial court, is Union Gap owns the Boulevard in fee simple and, accordingly, is vested with broad discretion to control its property for “legitimate” reasons, such as driver safety.

⁶⁰ Amended CP 667, ln. 9-10.

The trial court's misapplication of *Clausen* and conflation of ownership rights and regulatory authority is obviated from its conclusion that "[w]hen Union Gap justifies its position against the proposed ingress lane it relies on Ordinance #9.34. In so doing, it is attempting to exercise its regulatory powers within another jurisdiction, and this is it cannot do."⁶¹

However, the authority supporting Union Gap's denial of access is not Chapter 9.34 UGMC, as suggested by the trial court. Rather, Union Gap's authority for denying access arises from its ownership rights in the Boulevard (and its contract rights under the Development Agreement). Even without Chapter 9.34 UGMC, Union Gap would nonetheless have authority to control the Boulevard by virtue of its ownership rights. Chapter 9.34 UGMC is simply the means by which Union Gap uniformly exercises both its ownership authority and regulatory authority over its Boulevard. Union Gap applies property and regulatory authority equally and fairly to those seeking access both within and outside its jurisdiction.

Union Gap has always owned, controlled, and maintained the Boulevard, consistent with its property rights as articulated in *Clausen*. Prior to its construction, both Union Gap and Yakima planned for the Boulevard's crossing through a part of Yakima jurisdiction. Yet, Union Gap alone executed the relevant design and construction contracts, secured the right-of-way, and organized the various funding. Yakima even sought indemnification from Union Gap against claims that arise from the

⁶¹ Amended CP 1109.

“design, construction, reconstruction, installation, repair, maintenance, operation, alteration, or modification of the Valley Mall Boulevard street and transportation improvements (or other public improvements) on the Property.” Today, Union Gap is responsible for the Boulevard’s expenses: street lighting, street striping, street sweeping, stormwater facility maintenance, and roadside vegetation control. Union Gap performs snow and ice control, sign maintenance, irrigation, and mows grass medians.

Without an access easement or other permission, Printing Press has no right to use Union Gap property without Union Gap’s permission. As a matter of law, as owner of the Boulevard and the party charged with maintaining it, Union Gap has authority to deny the proposed access it has legitimately deemed dangerous, irrespective of the limits of its regulatory jurisdiction.

6.3 The Development Agreement Includes Contractual Authority to Reject the Driveway.

Under the Development Agreement, Union Gap’s objective was to ensure that Printing Press, and those bound by its “site development plans,” must comply with UGMC 9.34, even when the Property was not in Union Gap’s jurisdiction. Without this requirement expressly stated in site development plans, subsequent purchasers might assume that, because their property is located in Yakima, they needed to seek access approval from Yakima only. The binding site language avoids that problem.

Years after Printing Press had begun enjoying the benefits of an extended Longfibre Road, and after its request to gain additional access

from the Boulevard had been denied by Union Gap, Printing Press first disputed the intent of the Development Agreement. Printing Press argued that, at most, the Development Agreement is only binding with respect to that limited wedge-shaped piece located in Union Gap at the time the Development Agreement was executed (later annexed into Yakima). The trial court agreed, focusing exclusively on the fact that the “legal description of the property in question was the wedge-shaped piece” and concluding that, at most, the Development Agreement “only applies to the wedge-shaped portion.”

However, the Development Agreement language restricting access to the Boulevard was supposed to be included in “all site development plans” regarding access to the “property.” To that end, the Development Agreement expressly states that “[a]ny access to *the property* from Valley Mall Boulevard *shall* be subject to municipal review and conditioning at time of project permit application.”⁶² The term “the property” is an undefined term. However, if given its common meaning and harmonized with other references to “PPI Property” in the Development Agreement, the term “property” means the entire Property. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265, 1268 (2007) (internal citations omitted) (“When interpreting a contract, [courts] give undefined terms their plain, ordinary, and popular meaning . . . [a]nd harmonize clauses that seem to conflict.”).

⁶² Amended CP 239-240 ¶9, Amended CP 407.

For instance, the Development Agreement expressly acknowledges that “[t]he PPI Property is currently subject to split jurisdiction between City of Yakima and City of Union Gap.”⁶³ The term “PPI Property,” then, cannot possibly mean that wedge-shaped piece of property, which was located exclusively in Union Gap at the time. It was the larger PPI Property that was split.

Similarly, the parties agreed that, upon execution of the Development Agreement and subsequent annexation, “the entire PPI parcel will be incorporated in to the City of Yakima.”⁶⁴ The “entire PPI Parcel” therefore means the entire Printing Press Property. Exhibit B to the Development Agreement labels the entirety of the Property as the “PPI Property.” Consequently, where “PPI Property” and “PPI Parcel” refer, each of them, to the entire Property, “the property” has the same meaning. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713 (2014) (the court will “view the contract as a whole, interpreting particular language in the context of other contract provisions.”)

In contrast, the Development Agreement defines the “**PPI site**” as that wedge-shaped corner located within Union Gap.⁶⁵ The fact that the legal description of the PPI site is included in the Development Agreement does not mean, as the trial court concluded, that the parties only intended to limit access from the PPI Site to the Boulevard. The most dangerous section of the Boulevard is that section closest to the bridge, not the

⁶³ Amended CP 405.

⁶⁴ Amended CP 405.

⁶⁵ Amended CP 405.

wedge-shaped area. There is no evidence that either party intended to simply prevent driveway access in the wedge-shaped section. They intended to prevent driveway access through all access-controlled sections of Boulevard.

Of course, while a development agreement under RCW 36.70B.170 generally acts to vest the rights of a private party with respect to regulation and development of *its own property*, there is nothing in this statutory regime that prohibits the situation here: a private owner and a public owner agreeing on the rights of that private party to use *the public owner's property*. Admittedly, RCW 36.70B.170 states that “a local government may enter into a development agreement with a person having ownership or control of real property within its jurisdiction.” RCW 36.70B.170. However, this statutory authority to execute a development agreement concerning a private owner’s property does not, *ipso facto*, foreclose the private owner and the local government, in the same agreement, from also agreeing on the terms of use concerning the local government’s property, as Union Gap and Printing Press did here concerning the Boulevard. RCW 35A.11.010 (a city “may contract and be contracted with”).

Lastly, Printing Press’s own conduct belies the interpretation it offers. In interpreting a contract, the Court not only examines the circumstances surrounding the making of the contract, but also the subsequent acts and conduct of the parties to the contract. A court’s goal in interpreting a contract is to determine the intent of the parties. *Deep*

Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 248, 215 P.3d 990, 1001 (2009). Here, the site of the Driveway has for decades been within the Yakima city limits. Yet, Printing Press's first building permit application for the Driveway was to Union Gap, not Yakima. This conduct demonstrates that, although the Property was within Yakima, Printing Press understood that Union Gap owned the Boulevard and, consistent with the Development Agreement, also understood that Union Gap controlled Boulevard access.

6.4 Union Gap's Safety Concerns are Legitimate and Genuine.

Notwithstanding its property and contract rights, Union Gap's decision to deny access to the Boulevard must be reasonable. *Clausen*, 157 Wash. at 460. The trial court did not squarely answer this question, but the Court of Appeals may do so in conducting its de novo review. *Folsom v. Burger King*, 135 Wn. 2d 658, 663, 958 P.2d 301, 305 (1998).

The undisputed facts are as follows: (1) The Boulevard is designed as an Intermodal Connector with limited access points; (2) Boulevard sightlines are obstructed by a rise and fall in the Boulevard as it crosses over train tracks located east of the Property; (3) Union Gap consulted with HLA Engineering and Land Surveying regarding safety concerns over site, distance, and speed, and consulted applicable highway design standards; (4) Union Gap ultimately determined that the Driveway did not meet generally acceptable design practices for an Intermodal Connector, and there is a risk that high-speed drivers on the Boulevard

would not timely see, and therefore collide into, drivers slowing down or stopped to enter into Printing Press's Driveway; (5) in the last three years, there have been twenty nine documented road accidents in this area; and (6) Union Gap has consistently denied Boulevard driveway access since its construction.

Union Gap's decisions are not politically motivated. After all, the City facilitated the Property's development through the Development Agreement and its de-annexation and annexation of the Property's corner to Yakima. Printing Press wrongly suggests that Union Gap's decision to deny access is due to a "heated competition for development projects" between Union Gap and Yakima.⁶⁶ Of course, there are no facts to support this assertion. To the contrary, Union Gap facilitated Printing Press's Property development Property by extending Longfibre Road south to provide greater access, and by agreeing to annex the Property entirely into Yakima. Through Union Gap's cooperation, that development will continue, regardless of the Driveway. The Property has complete internal circulation and access to Longfibre Road because of Union Gap. Union Gap is not objecting to the development it actually facilitated. Its decision-making is based on driver safety concerns, not politics.

Union Gap has consistently denied private driveways on the Boulevard and at this location. The other claimed "driveway" projects are in fact public roads designed to approved standards. Those public roads

⁶⁶ Amended CP 668, ln 3-4.

will give landowners access to their property and avoid any need for Boulevard driveway access. Approving one public road prevents multiple driveways, consistent with the purpose of the Intermodal Connector. And, as stated above, these two public roads do not raise safety concerns, in contrast to the Driveway.

Given the undisputed facts, as well as the broad discretion afforded Union Gap to control its own property, the Court of Appeals should conclude that Union Gap's decision to deny access was legitimate.

6.5 Printing Press's Access is From Longfibre Only.

The Property has for years had complete access to Longfibre. This is undisputed. It is precisely because of this pre-existing access that Printing Press's claim for additional access from the Boulevard must be dismissed as a matter of law. In Washington, abutting property owner do not have a property right in a particular street if they already have other access to their property:

Without a denial of access to the property, even abutting owners do not have a property right in a particular street The right of an abutting property owner is the right of access to the property, not access to the particular street.

TT Properties v. City of Tacoma, 192 Wn. App. 238, 249, 366 P.3d 465, 471 (2016).

In *TT Properties*, a private landowner, TT Properties ("TTP"), claimed that, among other things, the City of Tacoma had unconstitutionally taken its property without paying just compensation.

Id. at 244. TTP alleged the City had unlawfully allowed Sound Transit (for a rail project) to permanently close a part of Delin Street, which had been used by TTP to access its Pacific Avenue property. *Id.* at 243-44.

The trial court rejected TTP's argument and orally granted the City's summary judgment motion on the grounds that TTP "still [has] access, and the City can go ahead and vacate a street if they want; but [TTP still has] access on two points" at the Pacific Avenue property. *Id.* at 245. The Court of Appeals affirmed.

The foundation of any takings claim is that "the claimant must prove a property right." *Id.* at 247 (citing *Granite Beach Holdings, LLC v. Dep't of Nat. Res.*, 103 Wn. App. 186, 205, 11 P.3d 847 (2000)). Accordingly, the Court in *TT Properties* evaluated whether TTP had a right to access its property from a particular street, meaning TTP could proceed with a takings claim for the closure of Delin Street, or whether an owner is only entitled to a point of access to its property, meaning TTP could *not* proceed with a takings claim due to its alternative access. *Id.* at 248-249. The Court held that the "right of an abutting property owner is the right of access to the property, not access to the particular street." *Id.* at 249. Accordingly, "[w]ithout a denial of access to the property, even abutting owners do not have a property right in a particular street." *Id.* at 249.

TT Properties borrowed heavily from a large body of Washington law concerning street vacations. When a street is vacated, a "landowner whose land becomes landlocked or whose access is substantially impaired

as a result of a street vacation is said to sustain special injury.” *Id.* at 248 (quoting *Hoskins v. City of Kirkland*, 7 Wn. App. 957, 960–61, 503 P.2d 1117 (1972)). However, “if the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged.” *Id.* In that instance, the landowner “has no legal right to prevent the vacation *because no legal right of his has been invaded.*” *Id.* at 961.⁶⁷

Here, like TTP, Printing Press has existing access to its property, constructed by Union Gap. Printing Press therefore has no basis for asserting access to the Boulevard in addition to its access from Longfibre Road.

6.6 Printing Press Has Never Had Easement Rights to the Boulevard.

When a new limited access highway is constructed next to private property “there is no taking of [the abutting owner’s] easement of access, because such an easement has never in fact existed.” *State v. Calkins*, 50 Wn. 2d 716, 719, 314 P.2d 449, 450 (1957). The question is stated:

[w]hy should A’s rights suddenly change [by construction of a new road]? The freeway was never intended, from its inception, to provide land service to A. Rather it was intended to be a *traffic service road*.

⁶⁷ Consistent with this body of law, UGMC 9.34 expressly permits Union Gap to deny private driveway access to the Boulevard, but only “when other alternatives such as an abutting public street or internal access road are not possible for access.” UGMC 9.34.060(a).

State v. Calkins, 50 Wn.2d 716, 719, 314 P.2d 449, 450-51 (1957) (quoting *Freeways*, 3 *Stanford Law Review* 298, 307 (1957)) (emphasis added). The answer is:

[S]ince A never had a right of access across his property line before, and since no such right was even impliedly given to him by the state, he does not now have a right of access across his property line to the freeway.

Id.

The Boulevard is an “Intermodal Connector” under the National Highway System, designed for the purpose of connecting Yakima Air Terminal to I-82. Union Gap Ordinance 2123 defined in 1998 the to-be-constructed Boulevard a “controlled access arterial” subject to “Limited Access Standards.” The Ordinance confirmed that “[t]he access rights of an owner of property abutting a controlled access arterial *are subordinate to the public’s right and interest in a safe and efficient arterial system.*” UGMC 9.34.010 (emphasis added).

The Boulevard was never intended to provide access to the Property, and Printing Press has never had access (road or otherwise) to the Boulevard before. Accordingly, as posed in *Calkins*, why should Printing Press’s rights suddenly change by construction of the Boulevard? Pursuant to *Calkins* and its progeny, the answer is those rights do not change. Printing Press has never had access rights to the Boulevard. Because Printing Press has complete access from Longfibre, it has no basis in law to claim access to the Boulevard simply by virtue of the Boulevard’s construction.

6.7 Printing Press Extinguished Any Easement Rights it May Have Held When it Executed the Deed.

What makes this case particularly distinguishable from other access cases (typically either condemnation or inverse condemnation disputes) is that Union Gap already paid Printing Press for title free and clear of any property rights held by Printing Press. The purchase price accounted for no access to the Boulevard, and *no easement rights were reserved in the deed*. By statute, any grantor of a quitclaim deed “assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described.” RCW 64.04.050. Thus, the Deed conveyed any interest Printing Press may have had in the right-of-way. No right was reserved.

The Deed provides that Union Gap takes title “to the same extent and purpose as if the right herein granted had been acquired under Eminent Domain statutes of the State of Washington.”⁶⁸ If the property had been condemned under eminent domain statutes (it was not), Printing Press would still have no access to its property from the Boulevard. When a city takes land by condemnation, it takes title free and clear. RCW 8.12.210 (“the title to any property so taken [by condemnation] shall be vested in fee simple in such city or town.”). Moreover, “collateral attacks on condemnation proceedings are prohibited unless procured by fraud, lack of jurisdiction, or an otherwise void judgment.” *Pelley v. King Cty.*,

⁶⁸ Amended CP 394.

63 Wn. App. 638, 641, 821 P.2d 536, 538 (1991) (citing 6 J. Sackman, *Nichols' Eminent Domain*, § 26.72 (3d ed. 1990)).

The trial court held that “the quitclaim deed does not extinguish this [access] right. If it did, condemnations such as this one would automatically extinguish an abutting owner’s ability to use the roadway and there is no case law that supports that this theory is correct.”⁶⁹ There are three reasons why the trial court’s conclusion is legally and factually incorrect.

First, as discussed above, because Printing Press had access to Longfibre Road even before Longfibre was extended, under *TT Properties*, Printing Press has no right of additional access to the Boulevard in the first instance. Second, under *Calkins*, Printing Press was not automatically vested with property rights to the new limited access Boulevard once it was constructed, especially when it already has access from Longfibre.

Third, contrary to the trial court’s conclusion, Washington law has long held that condemnations can and do “automatically extinguish an abutting owner’s ability to use the roadway.” See, e.g. WILLIAM B. STOEBUCK AND JOHN W. WEAVER, *Property – Loss of access to public ways*, 17 Wash. Prac, Real. Estate § 9.11. In a condemnation proceeding, so long as a city has the requisite authority to condemn, there is no question a city may extinguish access rights. See, e.g., *Keiffer v. King Cty.*, 89 Wn. 2d 369, 372, 572 P.2d 408, 409 (1977). Rather, the question

⁶⁹ Amended CP 1109.

that typically arises is *how much* a city pays for restricting such access. In the event a property owner has alternative access, the city may pay nothing. That is the essence of *TT Properties*. If, on the other hand, the city condemns all existing vehicular access rights, that action can either be a complete taking or substantial one, requiring just compensation. But, either way, the city may acquire the property and extinguish access rights.

Here, Printing Press urged the trial court to conclude that Printing Press's access rights essentially "trump"⁷⁰ the Deed. In treating the original conveyance as a condemnation, Printing Press would nevertheless require Union Gap to conduct a second condemnation of the same land in order to extinguish Printing Press' access to the Boulevard. Washington law does not support this double-condemnation theory. By statute, once a property right is condemned by a city or voluntarily transferred, the conveying party relinquishes any interest it has in that property. RCW 64.04.050; RCW 8.12.210.

6.8 To Protect its Rights and Prevent Trespass, Union Gap Was Not Required to File a LUPA appeal at Yakima.

LUPA's 21-day deadline to file a lawsuit challenging a land use decision was created because Washington has "recognized a strong public policy supporting administrative finality in land use decisions." *Skamania Cty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241, 250 (2001). "If there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property."

⁷⁰ Verbatim Report of Proceedings, Pg 56, ln 13.

Id at 49 (quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974)). The 21-day period was established, then, to allow owners to build on their own property without further interruption. It is not, and never has been, a mechanism that allows one owner to quickly secure property rights over another's property (the Printing Press argument made here).

Accordingly, because LUPA pertains to land use decisions, the 21-day appeal deadline only bars claims that “depend on” or “arise from” a land use decision. *Asche v. Bloomquist*, 132 Wn. App. 784, 799, 133 P.3d 475, 482 (2006) (“Because their particular claim depends on whether the building permit violated the zoning ordinance, we hold that LUPA precludes this public nuisance claim.”); *Brotherton v. Jefferson Cty.*, 160 Wn App. 699, 705, 249 P.3d 666, 668 (2011) (“the Brothertons’ arguments arise directly from the County's final land use decision. Accordingly, LUPA applies.”). Claims that do not depend on the “land use decision” are not barred by LUPA. *Id.*

Here, Union Gap’s claim to property and contract rights do not arise from the Yakima permits. Indeed, Printing Press only sought these permits *after* Union Gap had expressed safety concerns and denied the Driveway. Printing Press’s efforts to frame this matter as Union Gap circumventing LUPA are an erroneous application of LUPA.

For example, assume Owner A applies for a building permit to make improvements on its own property, including new driveway access over Owner B’s property. Owner B fails to challenge that permit within

twenty one days. Conceivably Property Owner B may be foreclosed from challenging certain aspects of the permit with respect to construction on Owner A's property. However, Owner B's failure to object and file a LUPA challenge does not result in Owner A automatically securing easement rights over B's property on day twenty two of the permit approval. The same is true here. At most, the permits that Printing Press secured from Yakima allow it to make improvements on the Property. They do not, however, grant new easement or other rights to Union Gap's Boulevard. *See, e.g., Hanna v. Margitan*, 193 Wn. App. 596, 373 P.3d 300, 306 (2016) (omission of easement from municipal-approved short plat does not result in extinguishment of the easement rights simply by virtue of the short plat's approval). Those rights must be conveyed or reserved by a grant or reservation in a written instrument. RCW 64.04.010. Obviously, if access rights could be secured in the manner proposed by Printing Press, the entire land recording system would be turned on its head. Yakima has no ownership in the Boulevard and therefore cannot possibly convey property rights to Printing Press through a properly executed deed, let alone by approving a grading permit.

6.9 Union Gap is Entitled to Declaratory and Injunctive Relief.

Jurisdiction is invoked under the Washington's Uniform Declaratory Judgments Act, Chapter 7.24 RCW, when there is a justiciable controversy: (1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant,

hypothetical, speculative, or moot disagreement (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137, 139 (1973). Here, there is an actual, present and existing dispute between Union Gap and Printing Press regarding Boulevard Driveway access. The parties have genuine and opposing interests regarding the demolition of Union Gap's existing improvements and construction of the Driveway. Those opposing interests are direct and substantial. The Driveway would result in damage to Union Gap property, disrupt traffic on the Boulevard, be inconsistent with Union Gap's road plans and regulations, and create unsafe conditions. A judicial determination of this Complaint will be final and conclusive.

Under RCW 7.24.080, the Court has authority to issue further relief in addition to entering a declaratory judgment. That relief includes a permanent injunction. *Kucera v. State, Dep't of Transp.*, 140 Wn. 2d 200, 209, 995 P.2d 63, 68 (2000). A permanent injunction has been established as an appropriate remedy to prevent trespass. *Hedlund v. White*, 67 Wn. App. 409, 418, 836 P.2d 250, 256 (1992) (it is "manifestly unreasonable" to deny an injunction against the trespass). The Driveway and damage to existing improvements will constitute a continuing and indefinite trespass. It would therefore be manifestly unreasonable to deny a permanent

injunction proscribing Printing Press from constructing and using its Driveway.

6.10 Union Gap is Entitled to an Award of Attorney's Fees at the Trial Court and Court of Appeals.

The Development Agreement includes a prevailing-party attorney-fee provision, providing for reimbursement of the prevailing party's fees and costs for any action that arises from or pertains to the Development Agreement. This action arises from and pertains to the Development Agreement, which specifically addresses the access issues now before the Court. Therefore, as the prevailing party in this action, Union Gap is entitled under the Development Agreement to an award of its attorney's fees and costs incurred both at the trial court and on appeal.

7. CONCLUSION

For the foregoing reasons, Union Gap respectfully requests that the Court of Appeals reverse the trial court, grant injunctive and declaratory relief in favor of Union Gap, and award Union Gap its attorney fees and costs incurred on appeal and at the trial court.

RESPECTFULLY SUBMITTED this 24 day of February, 2017.

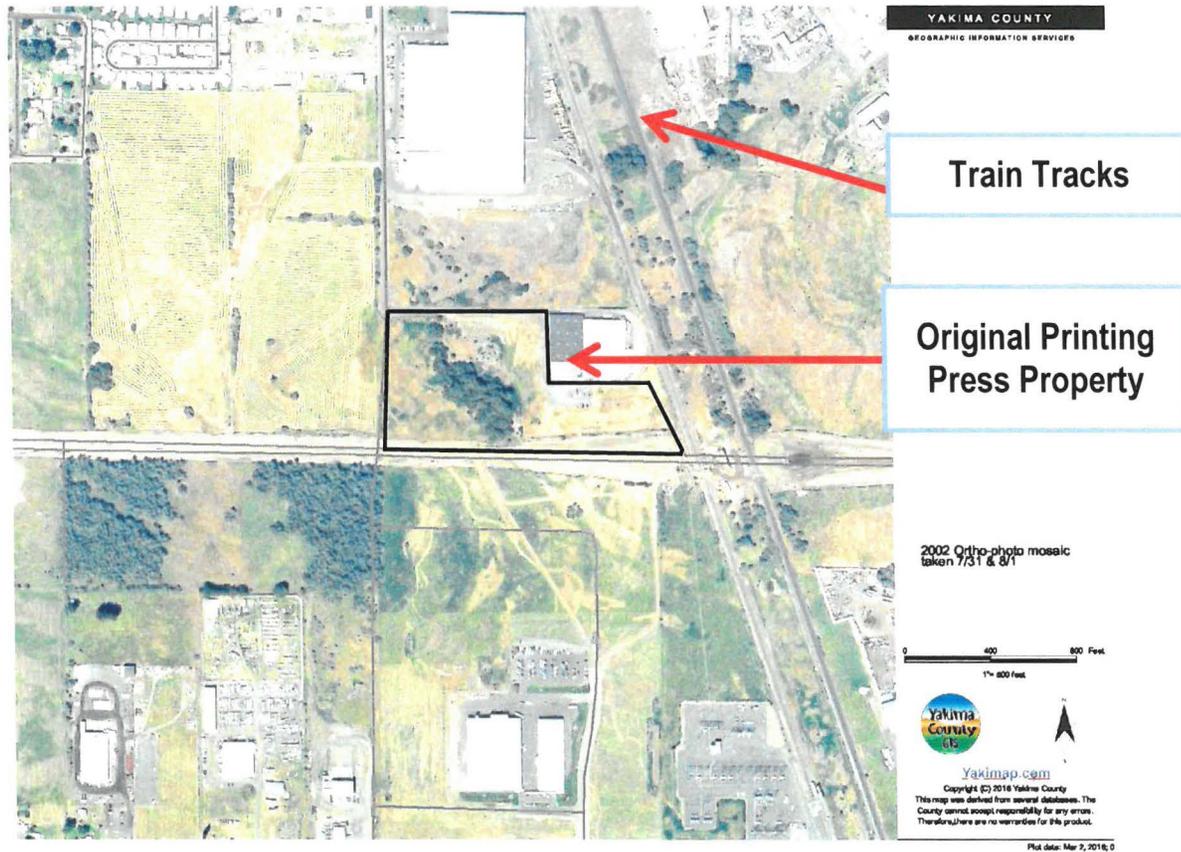
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Telephone: (206) 447-4400
Facsimile: (206) 447-9700

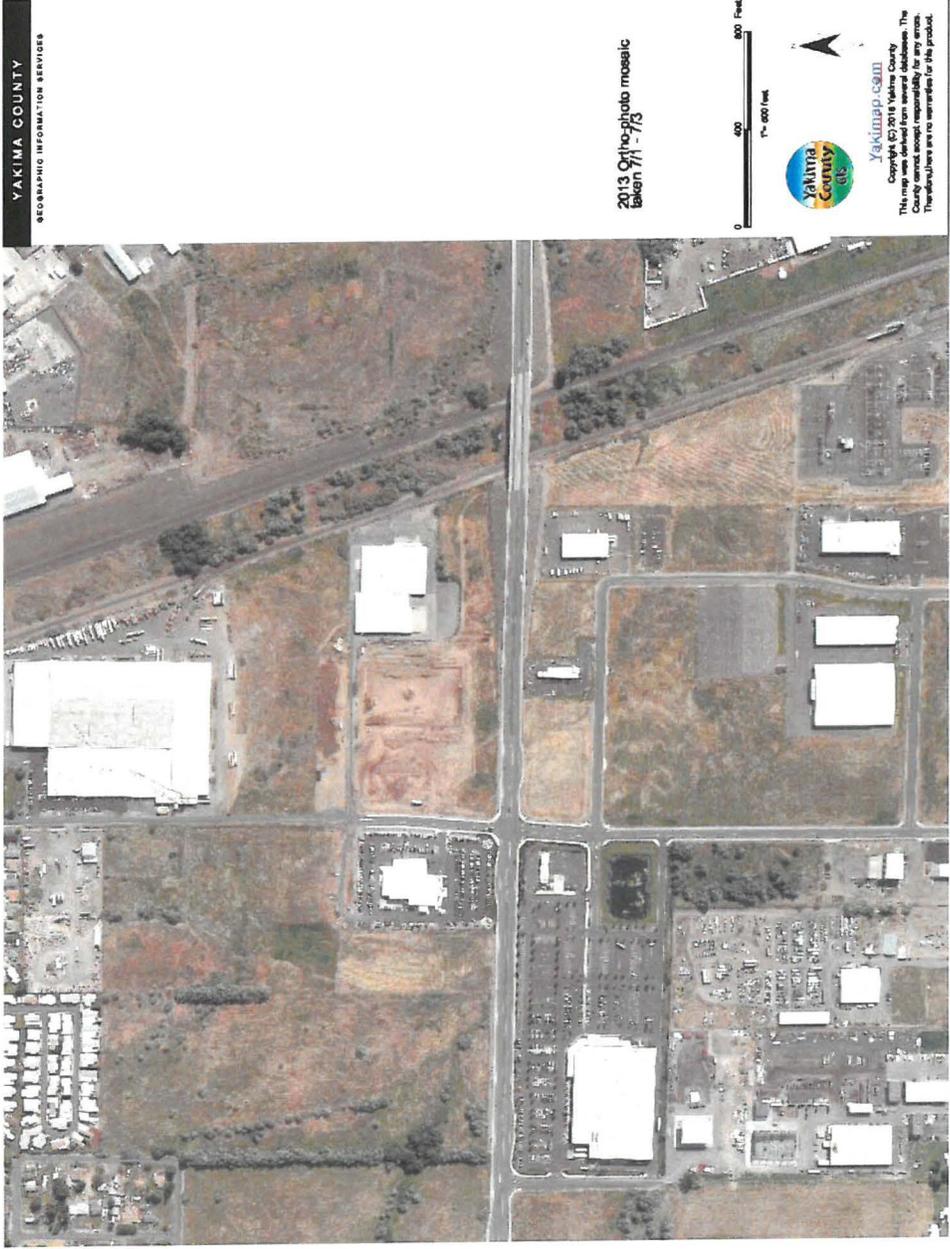
Email: colm.nelson@foster.com
Email: steve.dijulio@foster.com
*Special Assistant City Attorneys for the
Plaintiff/Appellant City of Union Gap*

APPENDICES

Appendix A – 2002 Aerial Photograph – Before Boulevard



Appendix B – 2005 Aerial Photograph – With Boulevard



YAKIMA COUNTY
GEOGRAPHIC INFORMATION SERVICES

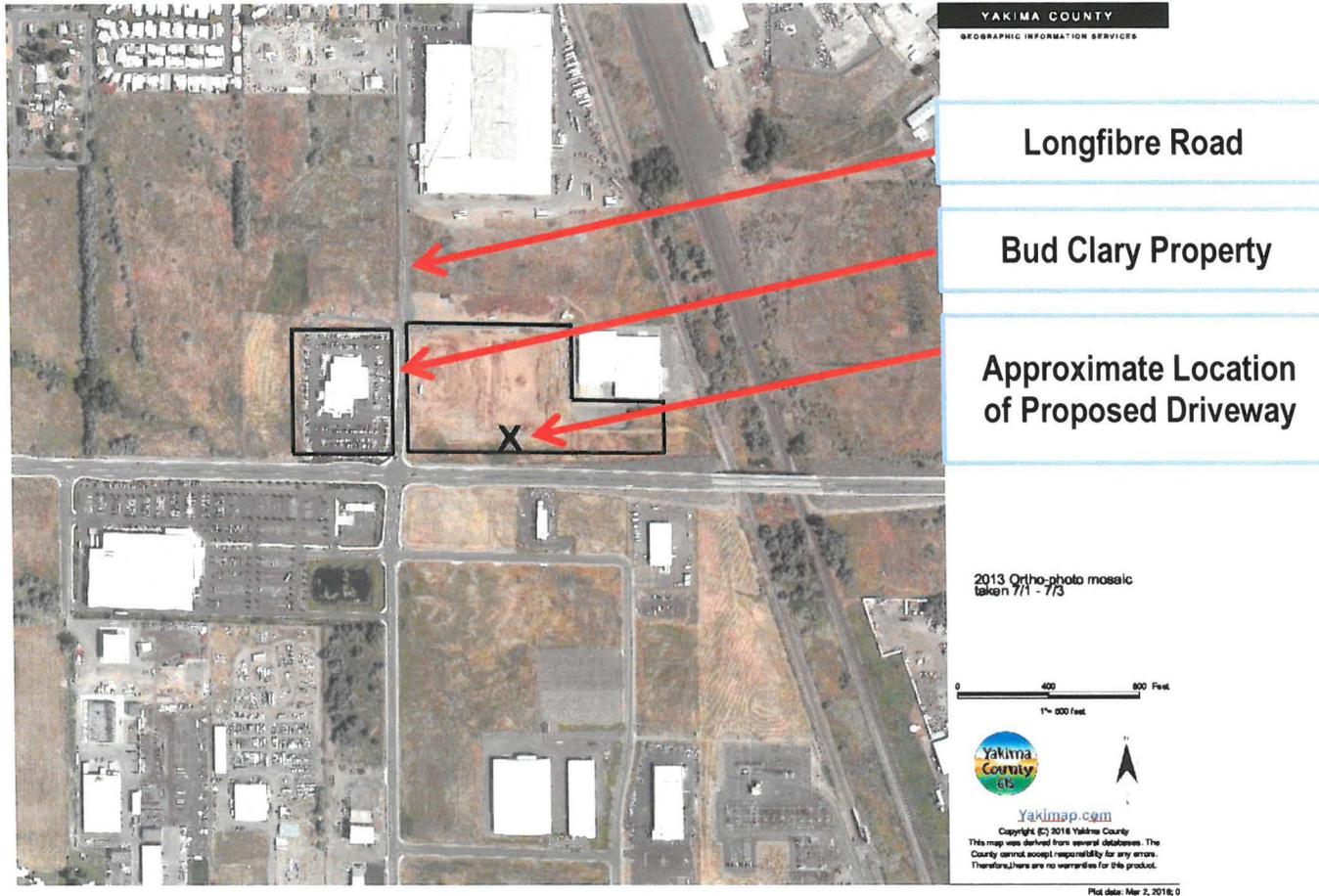
2013 Ortho photo mosaic
from 11-7/05



Yakimap.com
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This map was derived from several databases. The
County cannot accept responsibility for any errors.
There are no warranties for this product.

File date: Mar 7, 2016 0

**Appendix C – 2013 Aerial Photograph – With Boulevard
and Location of Proposed Driveway**



CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on the date set forth below I caused the foregoing document to be served in the manner noted below, and pursuant to the parties' e-service agreement, on the following persons:

Mr. James C. Carmody
Meyer, Fluegge & Tenney, P.S.
230 Sound Second Street
P. O. Box 22680
Yakima, WA 98907-2680
BUSINESS (509) 575-8500
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*Counsel for Defendant/Respondent Printing
Press Properties, L.L.C.*

<input type="checkbox"/>	via hand delivery
<input checked="" type="checkbox"/>	via e-mail
<input checked="" type="checkbox"/>	via U.S. Mail

DATED this 24th day of February, 2017, at Seattle, Washington.


Jan D. Howell
Legal Assistant