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DIVISION III  
STATE OF WASHINGTON  
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NO. 347401

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COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION III

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CITY OF UNION GAP,  
Plaintiff/Appellant,

v.

PRINTING PRESS PROPERTIES, L.L.C.,  
Defendant/Respondent

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**RESPONDENT PRINTING PRESS PROPERTIES  
RESPONSE BRIEF**

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**Appendices:**

Appendix A - Parcels owned by Lowe’s and Printing Press

Appendix B - All of the Printing Press property and adjacent Valley Mall Boulevard is located within the Yakima city limits. CP 579.

Appendix C - The access was designed by engineers and included deceleration lanes, turning area and public road dedications. CP 584.

Appendix D - The agreement identified the pre-existing municipal boundary which was in the center of Valley Mall Boulevard. CP 613.

## GLOSSARY

**“Valley Mall Boulevard” or “Boulevard”** means Valley Mall Boulevard from I-82 to Yakima Air Terminal

**"County"** means Yakima County

**"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

**“Permits” or “Commercial Approach Permits”** mean collectively the following land use permits issued by City of Yakima (1) grading permit (Permit No. BLD-15-1137) (CP 659-662); and (2) Engineering Permit – New Commercial Approach off Valley Mall Boulevard (Permit No. EXC – 15-448) (CP 664-665).

**"Printing Press"** means Printing Press Properties, L.L.C.

**"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**

Printing Press is the owner of commercial property located in the City of Yakima, Washington. The property is in an area of significant commercial development and abuts Valley Mall Boulevard. The municipal boundary between Yakima and Union Gap lies at the centerline of Valley Mall Boulevard. All of the Printing Press property and the adjacent portion of Valley Mall Boulevard lie solely within the Yakima municipal boundaries. No part of the property or roadway is within Union Gap jurisdiction. Despite the clear delineation of jurisdictional boundaries, Union Gap seeks to assert land use authority outside of its jurisdictional boundaries.

This story begins with a simple land use application. In 2015, Printing Press applied to City of Yakima for commercial access permit authorizing construction of a right-in approach to its property from Valley Mall Boulevard. Both the property and road segment are within exclusive land use authority for Yakima city limits. Public road approaches are subject to standards and regulations adopted by City of Yakima. The proposed approach met or exceeded all design standards and regulatory requirements. Staff reviewed engineering design, location, transportation and safety impacts, and public access. There were no requested variances

or modifications to adopted design or safety standards. Based on the review, Yakima issued two permits authorizing the right-in commercial approach from Valley Mall Boulevard. Despite knowledge of the decisions, Union Gap chose not to file an appeal either land use permit.

Union Gap now seeks to collaterally attack the land use decisions and extend its regulatory authority beyond municipal boundaries. Union Gap builds its house of cards upon the theory that Valley Mall Boulevard is “private property” and as “owner” of the roadway it can prohibit and control usage of the public facility. This obtuse path is required because Union Gap failed to file a timely appeal of the land use decision under the Land Use Petition Act (LUPA). It is well established that the failure to file a timely appeal under LUPA bars collateral attack on land use decision. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005); *Samuel’s Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 464-65, 54 P.3d 1194 (2002); and *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 829, 175 P.3d 1040 (2008).

The focus of Union Gap’s arguments have changed and morphed over the course of this proceeding.<sup>1</sup> The current theory is that purported

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<sup>1</sup> References to the *Amended Clerks Papers* are referenced as “CP” together with applicable page and paragraph number. Union Gap’s *Complaint* was based upon a claim that Printing Press had breached the terms and conditions of a Development Agreement. CP 3-13. Additional arguments have included (1) property owners do not hold access rights to abutting roadways; (2) Printing Press relinquished or transferred access rights

“private property” and “ownership” rights trump constitutional mandates, established case authority and statutory directives. The Achilles’ heel of Union Gap’s current argument is that Valley Mall Boulevard is *not* private property – it is a *public road*. Abutting property owners possess access easements as a matter of law. The right of access to Valley Mall Boulevard is recognized in adopted ordinances of both Yakima and Union Gap. The point of conflict is that Union Gap wants to exercise its authority outside of its jurisdictional boundaries. The Washington Constitution however, prohibits the exercise of regulatory authority outside of its municipal boundaries. WASH. CONST. art. XI, §11.

## **2. ASSIGNMENTS OF ERROR**

**2.1 Errors In Factual Findings.** Union Gap has identified two purportedly incorrect “factual findings”.<sup>2</sup> The reference is irrelevant to appellate review. The trial court entered summary judgment in favor of Printing Press based on an agreed record and this court reviews summary judgment orders *de novo*. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

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through condemnation process; and (3) private property rights trump all other constitutional, statutory and case authority.

<sup>2</sup> Union Gap objects to the fact Judge Hahn determined that property acquisition was through a *condemnation* process. *Appellant’s Opening Brief* 2-3. The uncontroverted facts are that Union Gap acquired Printing Press property on behalf of Yakima utilizing condemnation authority and procedures. CP 399 and 927-936.

**2.2 Errors In Conclusions of Law.** Judge Hahn’s decision is consistent with applicable law. CP 1108-1110.

**3. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**3.1** Does Union Gap have either property rights or regulatory authority over portions of Valley Mall Boulevard lying outside its jurisdictional boundaries and within Yakima city limits? (Union Gap Issue 3.1).

**3.2** Is Union Gap barred from challenging Commercial Approach Permits issued by City of Yakima because of its failure to file timely petition under the Land Use Petition Act (LUPA) (Union Gap Press Issue 3.6).

**3.3** Does an adjacent property owner have a right of access to conventional public road? (Union Gap Issue 3.2).

**3.4** Did Printing Press relinquish access rights to Valley Mall Boulevard through delivery of the Quit Claim Deed in context of original condemnation processes for development of Valley Mall Boulevard? (Union Gap Issue No. 3.3 and 3.4).

**3.5** Does the Development Agreement specifically prohibit access from Printing Press property to Valley Mall Boulevard? (Union Gap Issue No. 3.5).

3.6 Should the court award attorney's fees and costs to the prevailing party under Development Agreement paragraph 8? (Union Gap Issue 3.7)

#### 4. STATEMENT OF THE CASE

##### 4.1 Printing Press Property, Municipal Boundaries and Land Use Decision.

(a) **Printing Press Property Lies Solely within Yakima Jurisdictional Limits and is Subject to Yakima Development Regulations.** Printing Press is the owner of three parcels of real property located in City of Yakima, Washington.<sup>3</sup> The property is located in a fast growing commercial area that includes Costco, Lowe's, Bud Clary Toyota and Printing Press' manufacturing plant. Two vacant parcels directly abut Valley Mall Boulevard. CP 579.

Valley Mall Boulevard divides the cities of Yakima and Union Gap.<sup>4</sup> The municipal boundary lies at the centerline of Valley Mall

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<sup>3</sup> Printing Press owns three (3) parcels designated Assessor Parcel Nos. 191331-43411, -43412 and - 44402. Two of the parcels are vacant and available for retail development. (Lots 3A and 4A) CP 579. The third parcel is the site of the Printing Press manufacturing facility. (Lot 1) CP 579. The Printing Press Property originally consisted of a large single parcel that was subsequently divided for commercial development. The northerly portion of the property (Lot 2) is now occupied by Lowe's retail store. CP 579. *Appendix B.*

<sup>4</sup> The Printing Press properties were originally annexed to the City of Yakima on January 8, 1968. *City of Yakima Ordinance No. 988.* CP 573-576. At the time of the annexation, Valley Mall Boulevard had not been conceived, designed or constructed. The municipal boundary was established on the south line of Section 32. The boundary line has remained unchanged since the time of annexation. CP 589.

Boulevard – the north half of the roadway is in Yakima and the south half of the roadway is in Union Gap. CP 579. All of the Printing Press property and adjacent Valley Mall Boulevard is located within the Yakima city limits. CP 579. *Appendix B*. No portion of the property or adjacent roadway lies within Union Gap’s jurisdictional boundaries. Union Gap does not dispute the location of the municipal boundary or Yakima’s jurisdictional authority.

Land use development of the property is subject to Yakima zoning and development regulations. Retail development is permitted on the property with road and approach access from Valley Mall Boulevard governed by specific ordinance requirements.<sup>5</sup> Commercial driveway approaches must comply with adopted design standards (width, construction details, posted speeds, etc.); meet established locational requirements; comply with YCC Title 12 requirements (street, sidewalk, water and sewer); and satisfy standards for excavation of public rights-of-

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<sup>5</sup> CP 996 ¶4 and 1003-1017. The property is zones General Commercial (GC). A permit is required for all driveway approaches and curb cuts. YMC 8.64.020-.040. “Driveway approach” means an area, construction or improvement between the roadway of a public street to a definite area of the private property, such as a parking area, driveway...intended and used for the ingress and egress of vehicles. YMC 8.64.010(b). All commercial approaches also require issuance of an excavation permit. YMC 8.64.020 and YMC 8.72.030. Driveway locations are governed by YMC 15.06.065 (development standards under the Yakima Urban Area Zoning Ordinance. Variances may be requested from applicable standards. YCC 8.64.120.

way. All applications are reviewed and approved by Director of Community Development and City Engineer.

Yakima and Union Gap previously addressed development and access jurisdiction from Valley Mall Boulevard. In 2012, Lowe's proposed to move its retail store from Union Gap to the Printing Press property. Access to the facility was from both Valley Mall Boulevard and Longfibre Road. In the context of the Lowe's development, Union Gap raised an issue regarding "...the jurisdiction of the City of Yakima and the City of Union Gap regarding the right-of-way off Valley Mall Boulevard along the frontage of Lowe's proposed development." CP 1044-1045 and 1050-1052. Yakima City Attorney responded and unambiguously stated that - "...the centerline of Valley Mall Boulevard constitutes the boundary between cities of Yakima and Union Gap ...." CP 1051. City Attorney then confirmed that the commercial approach proposed by Lowes - a (right-in/right-out or RIRO) from Valley Mall Boulevard - was within Yakima's exclusive jurisdiction:

*The proposed location of the RIRO to access the Lowe's development lies within the City of Yakima, and is subject to the City of Yakima's jurisdiction and development standards. Consequently, the City of Yakima has jurisdiction over the right-of-way of Valley Mall Boulevard at this location, and the commitment by the City of Yakima to approve a RIRO along that portion of Valley Mall Boulevard is within its jurisdiction as affirmed.*

CP 1052. Union Gap did not and has not objected to this determination. Printing Press' road approach is at the same location as that proposed by Lowe's.

**(b) Printing Press Submitted and Received Authorization for Commercial Approach from City of Yakima.** In the fall of 2015, Printing Press submitted land use applications to Yakima for approval of a *right-in* only commercial access to its property from Valley Mall Boulevard. CP 591. Both the property and road approach location were within Yakima jurisdiction. CP 569. The access was designed by engineers and included deceleration lanes, turning area and public road dedications. CP 584. *Appendix C.* The application conformed to all applicable design, engineering and land use regulations. Printing Press sought no variances or exceptions.

Yakima reviewed the applications. CP 591. The review specifically analyzed approach location, engineering design, traffic safety and stopping site distance. CP 997-998. The proposed access provided more than twice the required stopping distance on Valley Mall Boulevard. CP 998. Two permits were issued by City of Yakima: (1) a grading permit (Permit No. BLD-15-1137) issued on September 25, 2015; and (2) an Engineering Permit for "New Commercial Approach Off Valley Mall Blvd." (Permit No. EXC-15-448) issued on December 1, 2015. CP 659-662 and 664-665.

Union Gap has approved similar approaches on adjacent properties within its jurisdiction. CP 591 ¶13.<sup>6</sup>

The permits were conditioned on dedication of a *public easement* “for the purpose of constructing, installing, maintaining and operating a street access and sidewalk.” CP 569 ¶8 and 586-87. Printing Press executed, delivered and recorded the required Easement Deed on November 9, 2015. CP 586. Contrary to Union Gap’s characterization that the road approach is a “private driveway”, the commercial approach is a *public access*.<sup>7</sup>

Union Gap was fully aware of the land use decisions and failed to appeal either decision. CP 591.

**(c) Yakima Addressed Commercial Approach Design Standards, Transportation Impacts and Safety Considerations in the Permit Review Process.** Union Gap argues that its concern regarding the

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<sup>6</sup> Union Gap allowed a right-in commercial access to Bud Clary Toyota. CP 591. The Clary property is immediately adjacent to the Printing Press property on the west side. Union Gap also approved a right-in/right-out to property located immediately south of the Printing Press property. *Id.* Both properties are located within the Union Gap municipal boundaries and were the sites of approved commercial development.

<sup>7</sup> Union Gap has repeatedly characterized the commercial approach as a “private driveway.” *Appellant’s Opening Brief – 12-13* and CP 776-777. Reference is also made to UGMC 9.34.060 which applies to “private direct access” to a controlled access arterial. CP 794. Printing Press did NOT propose a “private driveway”. Printing Press granted a “public easement” for the commercial approach and the access would be fully available for public use.

commercial road approach is not politically motivated but rather based on safety considerations. *Appellant's Opening Brief* – 28-30. There are three primary components to the argument: (1) the sightlines are obstructed by a rise and fall in the Boulevard as it crosses over the train tracks to the east; (2) consultants (HLA Engineering and Land Surveying) determined that proposal did not meet acceptable design standards; and (3) there are undocumented “road accidents in this area.”<sup>8</sup> Safety considerations were a part of Yakima’s permit review process. should have been reviewed through a LUPA appeal process.

The commercial approach exceeds applicable design and site distance standards. CP 998. Union Gap sole substantive argument was that there was insufficient *passing site distance* for the commercial approach to Printing Press Properties.<sup>9</sup> “Passing site distance” is not the applicable standard. Yakima Chief Engineer corrected the mistake and provided the following opinion:

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<sup>8</sup> Union Gap provided no specific documentation regarding consultations or opinions from HLA. CP 240-241. The only conclusion drawn from the consultation was that there was insufficient *passing site distance*. CP 241.

<sup>9</sup> Union Gap offered only the comments of Dennis Henne, Public Works Director, that there was insufficient “passing site distance” on Valley Mall Boulevard at the point of the commercial approach. CP 240-241 ¶11. Mr. Henne is not a licensed professional engineer and provided no qualifications to support engineering opinions. Brett Sheffield P.E., Chief Engineer for the City of Yakima, quoted from *American Association of State Highway and Transportation Officials (AASHTO) Policy Geometric Design of Highways and Streets* and noted that policy guidelines recognize that “it is not necessary to consider passing site distance on highways or streets that have two or more traffic lanes in each direction.” Valley Mall Boulevard is a four lane facility.

*Mr. Henne simply referenced an inapplicable [passing site distance] standard. Valley Mall Boulevard is a four-lane divided roadway. The applicable design standard in the current situation is "Stopping Site Distance". AASHTO Stopping Site Distance on Grades lists the stopping site distance for a 9% downgrade, as found directly East of the proposed right-turn location, as 427 feet. The access location proposed by Lowe's and PPI provides approximately twice the required stopping site distance. ...[T]he site distance at this location is approximately double that of the required stopping site distance, and the proposal by Printing Press Properties, LLC does not include a right-turn access directly onto Valley Mall Boulevard.*

CP 998. Union Gap did not offer contravening evidence or opinion.

Union Gap next contends that it consulted with HLA Engineering and Surveying regarding "each street's safety and design." *Appellant's Opening Brief* at 15. No foundation, evidence or testimony was provided to support this hearsay argument. On the other hand, Printing Press provided direct testimony from Yakima Chief Engineer who summarized the opinion expressed by HLA in context of reviewing similar access in Lowe's development:

The only opinion provided by HLA regarding the Lowe's Home Improvement Center development's proposal was that a right-turn access should not be allowed *onto* Valley Mall Boulevard. The current proposal by Printing Press Properties, LLC does not include a right-turn access directly onto Valley Mall Boulevard.

CP 996-997 ¶7. Union Gap's own traffic expert did not object to a right-in access to Printing Press property. Union Gap also failed to provide

any substantive evidence with respect to purported “road accidents in the area.”

Finally, Union Gap makes no arguments that City of Yakima’s design standards and regulations are incorrect, insufficient or inconsistent with recognized design criteria. Yakima has competent and qualified professional planning and engineering staff that reviewed and approved the approach.

#### **4.2 Acquisition, Development and Construction of Valley Mall Boulevard.**

##### **(a) Development and Construction of Valley Mall Boulevard.**

Union Gap argues that it is the “owner” of Valley Mall Boulevard and has the sole and absolute right to regulate land uses associated with the public roadway. The argument is that the roadway is “private property” and Union Gap may deny private driveway access outside its boundaries. *Appellant’s Opening Brief – 21*. There is simply no credible factual foundation for this contention.

To begin, Valley Mall Boulevard is neither a private road nor piece of private property – it is a *public road* segment developed through the collaborative efforts of the State of Washington Department of Transportation (WSDOT), Federal Highway Administration (FHWA), Yakima County, and cities of Yakima and Union Gap. CP 995 ¶2 and

1045 ¶5. Valley Mall Boulevard was intended to serve as a new east-west regional corridor from I-82 to the Yakima Air Terminal. CP 996-996 ¶2-4. The proposed road corridor passed through both Yakima and Union Gap. CP 1045.

The total project cost was \$21,518,260 with the majority of funding from federal and state resources. CP 1001. The funding was as follows:

WA Transportation Improvement Board	\$10,626,278
WA Freight Mobility Board	\$ 4,000,000
Yakima County SIED Grant/Loan	\$ 800,000
Rural Economic Revitalization Grant	\$ 795,000
Regional STP Competition	\$ 350,000
STP Regional Funds	\$ 114,000
BRAC-FED	\$ 800,000
US Congressional Appropriation	\$ 1,500,000
City of Union Gap	\$ 1,434,922
City of Yakima	\$ 552,835
Yakima County	\$ 384,950
WSDOT - State	\$ 10,000
Private Donation	\$ 12,175

Union Gap contributed less than 7% of the total project cost. Yakima and Yakima County also made significant financial contributions. The point is that Valley Mall Boulevard was not a Union Gap project – it was a collaborative effort of many jurisdictions. And the roadway is certainly not “owned” by Union Gap.

Union Gap incorrectly claims that it entered into “all” of the contracts and paid “all” consultants and progress payments. *Appellant’s Opening Brief, 9-10.* Union Gap ignores, however, one important fact. Because Union Gap’s lack of qualifications, Yakima served as Certification Acceptance (CA) agency for the project. CP 923 and 996 ¶3. The CA agency responsibility and approving authority for administering Federal Highway Administration (FHWA) funded projects. *Id.* Yakima was responsible for review and approval of all project design, plans, specifications; utility and railroad agreements; consulting and engineering agreements; public hearings; construction estimates; award and execution of construction contracts; construction administration; and other aspects of the project. CP 996.

The Valley Mall Boulevard transportation corridor required acquisition of properties lying within both Yakima and Union Gap. Printing Press property was within Yakima jurisdictional boundaries. CP 1046. Yakima and Union Gap agreed that Union Gap would act as Yakima’s “agent” and have lead responsibility for acquisition of necessary right of way. *Id.* Printing Press confirmed the shared condemnation process.

The project involved potential condemnation of a portion of the southern part of our property. *Since our property was within the jurisdictional limits of the City of Yakima, we were uncomfortable negotiating with Union Gap with respect to the property condemnation and acquisition.*

*Yakima and Union Gap acknowledged that our property was located within the City of Yakima and it was agreed that Union Gap would act on behalf of Yakima in the condemnation process. We then began negotiations with Union Gap for the acquisition of the public right-of-way.*

CP 589. Yakima City Attorney also confirmed the agreement:

*Union Gap acted as “agent” for City of Yakima. It did not change municipal boundaries, relinquish jurisdictional authority or otherwise modify land use authority with respect to properties lying within the City of Yakima. Specifically with respect to Union Gap’s argument that City of Yakima assigned all regulatory authority with respect to those segments of Valley Mall Boulevard ... it is also accurate to say that the City of Yakima did not and would not relinquish jurisdictional authority or responsibilities over property within its municipal boundaries. City has been and remains clear and unambiguous in this position.*

CP 1046 ¶7. At no point did Union Gap offer contravening evidence or dispute these facts. Union Gap, Yakima and Printing Press proceeded with right-of-way negotiations based on these facts.

**(b) Valley Mall Boulevard Was Not Developed or Established as a “Limited Access Facility”.** Union Gap neither alleges nor establishes that Valley Mall Boulevard was developed as a “limited access facility”.<sup>10</sup> The legislature has established specific procedures and

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<sup>10</sup> Union Gap states that “...[b]efore Boulevard construction, Union Gap adopted an ordinance [Ordinance No. 2123] governing its future use.” *Appellant’s Opening Brief* - 7. Reference is made in arguments that the Boulevard is a “controlled access arterial”. This is not the same as a “limited access facility” established under RCW 47.52. Ordinance

processes in RCW 47.52 for eliminating abutting landowner access to public streets and highways. Union Gap did not follow these procedures.

A “limited access facility” is defined as follows:

*...a highway or street especially designed or designated for through traffic, and over, from or to which owners or occupants of abutting land, or other persons, have no right or easement, or only a limited right or easement of access, ... by reason of the fact that their property abuts such limited access facility, or for any other reason to accomplish the purpose of a limited access facility.*

RCW 47.52.010. In order to establish a “limited access facility,” the local jurisdiction is required to develop and report a specific plan, provide notice to abutting property owners, conduct public hearings and adopt a final plan with specific findings and order. Union Gap did not follow any of these procedures. See e.g. RCW 47.52.131-.139. Valley Mall Boulevard was developed as a conventional public road.

Union Gap references Ordinance 2123 and purported designation of Valley Mall Boulevard as a “controlled access arterial.” CP 792-800. This is misleading. A “controlled access arterial” is not a “limited access facility.” Ordinance 2123 recognizes that “[e]very owner of property which abuts a controlled access arterial has the right to reasonable access

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No. 2123 does not apply to properties outside of Union Gap city limits and does not prohibit access to Valley Mall Boulevard.

to that roadway. ...”. CP 793. More significantly, Ordinance 2123 does not apply outside Union Gap city limits.

**(c) Printing Press Negotiated a Sale of Right-of-Way But Did Not Assign or Transfer Access Rights.** A portion of the Printing Press property was acquired for Valley Mall Boulevard right-of-way under threat of condemnation. See CP 903-934. Printing Press appraised the takings at \$125,600. CP 283. Union Gap disputed the valuation and settlement was reached for \$45,000. CP 930, 934 and 936. The difference between payment and fair market value was donated by Printing Press to the project. CP 398-399 and 934-936.

Union Gap argues, without supporting evidence or testimony, that Printing Press conveyed access rights to the new public road. Printing Press (Jay Sentz) specifically testified that the “...property acquisition did not include purchase of ‘access rights’ to the new roadway.” CP 589 ¶5. Union Gap’s only argument is an obtuse reference to the property appraisal which noted that “...immediate access may not be enhanced due to the rise of the bridge over the railroad tracks.” CP 324. Union Gap did not provide testimony from the appraiser, condemnation consultant or any city official. The reference simply means that the appraiser determined that there was no “enhancement value” or “special benefit” to the Printing

Press property resulting from the project.<sup>11</sup> As a consequence, the appraiser did not increase the “after value” of the property for purposes of determining just compensation.

With respect to road access, it is significant that neither Union Gap nor Yakima have prohibited access to Valley Mall Boulevard. Each jurisdiction reviews access applications through permit processes.<sup>12</sup>

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<sup>11</sup> Acquisition of property for the Valley Mall Boulevard is subject to *Uniform Appraisal Standards for Federal Land Acquisition (2000)*. UASFLA Section B-12 addresses an offset for benefits conferred on property by reason of a public project. The rule includes the following:

In a partial acquisition, when the market value of the remainder property is being estimated, federal law requires that consideration be given to special benefits that are capable of present estimate and reasonable computation.

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Appraisers should give the same consideration to benefits as they do to damages in estimating values of remainder properties. Benefits can take many forms, such as when the project has caused the remainder to have ..., *frontage on a better road*, .... An upward shift in the highest and best use of the remainder property is often an indication of special benefits, and special benefits must be considered when appraisers estimate the value of remainder properties, even though other lands may enjoy the same benefits from the project.

Appraisers found no “enhancement value” arising from frontage on a better road.

<sup>12</sup> Union Gap has established standards for access to “controlled access arterials”. UGMC Chapter 9.34. UGMC 9.34.010(B) recognizes that “...every owner of property which abuts a controlled access street has the right to reasonable access to that roadway...” The ordinance provides that “...every access point to a controlled access arterial ... shall be subject to the issuance of an access permit by the director.” UGMC 9.34.030.

Yakima requires a commercial approach permit.<sup>13</sup> Yakima Chief Engineer for summarized access requirements as follows:

Valley Mall Boulevard is a divided urban arterial connecting I-82 and Yakima Air Terminal. *Within the City of Yakima, access from abutting properties is permitted, subject to commercial road approach review and approval.* Approach, curb cut and roadway excavation standards are set forth in YMC Ch. 8.64 and Ch. 8.72. See attached ***Exhibit 2.***

CP 996 ¶4. Union Gap recognizes similar access right under its municipal ordinance. UGMC 9.34.030 recognizes that “every owner of property which abuts a controlled access arterial has the right to reasonable access to that roadway.” Assertions that Printing Press conveyed or lost access rights is in direct conflict with adopted ordinances.

#### **4.3 Printing Press and Union Gap Development Agreement.**

In 2006, Union Gap approached Printing Press about participating in a public-private partnership for road, water and intersection improvements at Valley Mall Boulevard and Longfibre Road. CP 589-590, ¶6-8. The project and all improvements were within Union Gap city limits. The estimated cost for road, water and intersection improvements was \$822,000. The project was partially funded by a grant/loan from Yakima County Development Association. Printing Press, Bud Clary Toyota and

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Union Gap shared the remainder of project costs. CP 604-605. Printing Press also dedicated right-of-way and easements for the improvements. The negotiation culminated in the execution of a Development Agreement. (“Development Agreement”). CP 602-657.

**(a) Development Agreement Applies Only to Printing Press Property Lying Within Union Gap Municipal Boundaries.** The Development Agreement is clear and unambiguous with respect to the property subject to the agreement. It applies only to that portion of Printing Press property located within Union Gap city limits (i.e. property “lying westerly of the city limits of Yakima, Washington”). CP 610. The agreement did not extend to that portion of the Printing Press property within Yakima city limits. CP 590.

The Development Agreement provides:

1. Proposed Private Development. PPI owns or controls certain real properties *located in the City of Union Gap, commonly known as the PPI site, legally described on Exhibit “A” attached hereto and incorporated herein by this reference.* It is the intent of PPI to sell and/or develop the *subject property* with commercial or light industrial land uses consistent with applicable municipal development standards.

CP 604 ¶1. The agreement applied to Printing Press property “...located in the City of Union Gap” and legally described as follows:

That part of the southeast quarter of the southwest quarter of the southeast quarter of Section 3, Township 13 North, Range 18 East W.M., *lying westerly of the city limits of Yakima, Washington.*

CP 612. The Development Agreement clearly applies only to property (1) located in the City of Union Gap, and (2) legally described in Exhibit “A” – i.e. that portion of the property “lying westerly of the city limits of Yakima, Washington.”<sup>14</sup> The road approach location lies easterly of Yakima City limits.

Union Gap and Printing Press also reaffirmed the municipal boundaries in Exhibit B to the Development Agreement. CP 613. The agreement identified the pre-existing municipal boundary which was in the center of Valley Mall Boulevard. *Appendix D.* CP. 613. Yakima coordinated with Union Gap on a boundary adjustment and noted that

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<sup>14</sup> At the time of the Development Agreement, a majority of the Printing Press property was located in Yakima. CP 689. The municipal boundaries split the property diagonally from north to south. CP 569 ¶5 and 579. The parties sought to address and resolve this issue.

The PPI property is currently subject to split jurisdiction between City of Yakima and City of Union Gap. The approximate location of the current municipal boundary is set forth on attached Exhibit B. *City of Union Gap and PPI acknowledge that the current location of municipal boundaries creates an impediment to property development and it is agreed that both parties will cooperatively participate in the relocation of the municipal jurisdictional boundaries. It is agreed that the entire PPI parcel will be incorporated into the City of Yakima. All of the road right-of-way improvements for Longfibre road as it extends north from Valley Mall Boulevard shall be within the jurisdiction of the City of Union Gap.*

CP 604 ¶2.

“...Union Gap recognized and agreed that the centerline of Valley Mall Boulevard continued to be the jurisdictional boundary between the Cities.” CP 1047. Union Gap did not dispute these facts.

Printing Press provided a surveyed boundary of the before and after municipal boundaries. CP 579. *Appendix B*. The proposed commercial road approach from Valley Mall Boulevard is located solely within the original jurisdictional limits of the City of Yakima. CP 569 and 579. Union Gap did not dispute any of these facts.

**(b) Development Agreement Does Not Prohibit Access to Valley Mall Boulevard.** Union Gap has alleged that under the Development Agreement “... Chapter 9.34 Union Gap Municipal Code applied and specifically prohibited direct access to West Valley Mall Boulevard.” CP 7 ¶21. The Development Agreement simply does not contain such prohibition.

Development Agreement ¶3(c) contains the operative language and provides:

(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 Blvd.* Any access to the property

from Valley Blvd. shall be subject to municipal review and conditioning at the time of project permit application.

CP 605. Development Agreement neither mandates application of UGMC Chapter 9.34 nor “specifically prohibits direct access to West Valley Mall Boulevard.” Development Agreement simply recognizes that UGMC Chapter 9.34 “may prohibit” direct access to Valley Mall Boulevard. The provision is applicable only to that portion of the Printing Press property lying within the Union Gap city limits. CP 579. (i.e. Boulevard frontage abutting Lot 3A where all of the Boulevard is in Union Gap city limits). The ordinance does not and cannot apply outside Union Gap city limits. The road approach area has always been within Yakima boundaries.

## **5. ARGUMENT**

### **5.1 Standard for Review.**

Printing Press and Union Gap submitted cross-motions for summary judgment and acknowledged that there were not material issues of fact. *Appellant’s Opening Brief – 20*. Judge Hahn granted Printing Press’ motion for summary judgment and issued a letter opinion summarizing the decision. CP 1108-1110. This court reviews an order of summary judgment de novo, engaging in the same inquiry at the trial

court. *Keck v. Collins*, 184 Wn. 2d. at 370. The court considers only evidence and issues that parties called to the trial court's attention. *Id.*

Summary judgment is proper if "...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 judgment as a matter of law." CR 56 (c). A party may not rest upon mere allegations but must set for the specific facts. *Young v. Key Pharmaceuticals, Inc.*, 164 Wn.2d 216, 225, 819 P.2d 814 (1989). Judgment must be supported by competent evidence and not based on hearsay. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331, P.3d 40 (2014). Speculation, conjecture, conclusory statements and argumentative assertions will neither support nor defeat a motion for summary judgment. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 .2d (1986).

## **5.2 Union Gap Failed to File Timely Appeal of Permit Decision Under Land Use Petition Act (LUPA).**

Printing Press applied for and received all required land use permits for commercial access to its property from Valley Mall Boulevard. The property, road approach location and arterial road segment (i.e. Valley Mall Boulevard) area located exclusively within Yakima jurisdictional boundaries. CP 569 ¶¶6 and 7. Despite knowledge of the decisions, Union

Gap chose not to appeal either land use decision. Union Gap now seeks to circumvent and collaterally attack the land use decisions and permits. The failure to file a timely appeal under Land Use Petition Act (LUPA) bars collateral attack on the land use decisions. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000); *Chelan County v. Nykreim*, 146 Wn.2d 904, 5 P.3d 1 (2002); and *Samuel's Furniture Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002).

**(a) Commercial Approach Permits Were Land Use Decisions**

**Subject to LUPA Appeal Requirements.** Yakima issued two permits for the commercial road approach: (1) a grading permit for site work – Permit No. BLD-15-1137 (September 25, 2015); and (2) a permit for “New Commercial Approach off Valley Mall Boulevard” – Permit No. ESC-15-448 (December 1, 2015). CP 659-662 and 664-665. Union Gap does not directly challenge Yakima’s jurisdictional authority or challenge the substantive basis for the decisions. Union Gap’s sole appellate argument is summarized as follows:

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.

*Appellant's Opening Brief - 38.* It is argues that the claims do not “arise from” the land use decisions. This is a strange argument since the purpose

of this lawsuit is to enjoin the exercise of rights granted by the permits. See Union Gap *Complaint VIII 3* (seeking “[e]ntry of a permanent injunction that enjoins Printing Press from constructing an access driveway to Printing Press Property from West Valley Mall Boulevard) CP 12. land use rights authorized by the Yakima permits.

To begin, LUPA was enacted as “...the exclusive means of judicial review of land use decisions.” RCW 36.70C.030(1). LUPA’s stated purpose “is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. The parties must strictly adhere to the procedural requirements that promote finality, predictability and efficiency. *Durland v. San Juan County*, 182 Wn. 2d 55, and *Knight v Yelm*, 173 Wn. 2d 325, 338 (2011). LUPA’s “...underlying rationale is that prolonged uncertainty is manifestly unfair to land owners who seek a final determination of their property’s status.” *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 845, 175 P.3d 1050 (2008); and *Samuels Furniture*, 147 Wn. 2d at 458. Union Gap acknowledges the legislative intent and purpose. *Appellant’s Opening Brief* 36-37.

There is no dispute that the permits issued by the City of Yakima were “land use decisions.”<sup>15</sup> LUPA applies to both ministerial and quasi-judicial land use decisions.<sup>16</sup> Grading and building permits have been consistently recognized as “land use decisions.”<sup>17</sup>

LUPA provides stringent deadlines for review of land use decisions. *Asche v. Bloomquist*, 132 Wn. App., 784, 799, 133 P.3d 475 (2006). RCW 36.70C.040(3) requires a petitioner to file a LUPA action within 21 days of a “land use decision.” It adds that “the court may not grant review, *unless the petition is timely filed with the court and timely served.*” RCW 36.70C.040(2)<sup>18</sup>. A land use decision is issued on the date

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<sup>15</sup> A “land use decision” is defined by LUPA to include “...(a) an application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred or used”. RCW 36.70C.020(1). Commercial road approaches require review and issuance of permits before property may be improved or commercial approach constructed.

<sup>16</sup> *Chelan County v. Nykreim*, 146 Wn.2d at 927 (2002) (holding that county’s challenge to an administrative boundary line adjustment was not timely filed).

<sup>17</sup> Grading permits, building permits, and similar administrative approvals have been held to be “land use decisions”. See e.g. *Samuel’s Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440 (2002) (fill and grade permit and building permits are “land use decisions”); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005)(grading permit and extensions); and *Twin Bridge Marine Park, LLC v. Department of Ecology*, 162 Wn.2d 825, 175 P.3d 1050 (2008) (appeals of building permit determinations must be filed under LUPA).

<sup>18</sup> The courts have analyzed LUPA and affirmed its stated purpose of establishing uniform and expedited judicial review of local decisions. See, e.g. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d at 180-81 (a challenge to a Chelan County decision concerning residential development permits under the Growth Management Act must be brought under LUPA); *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002)(declaratory action by county overturning a prior boundary line adjustment must be filed through LUPA); *Twin Bridge Marine Park, LLC v. Department of Ecology*,

it is entered into the public record. RCW 36.70C.040(4)(c). In this case, the applicable dates were September 25, and December 1, 2015. Once the opportunity to challenge a land use decision has passed, the decision is final and binding. *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 181.

**(b) Union Gap Improperly Seeks to Collaterally Attack Land Use Decisions.** Because of its failure to file a timely appeal, Union Gap now seeks to collaterally attack the decision through an assortment of obtuse theories. Union Gap seeks to enjoin construction and use of the commercial public access but ironically contends that the present action does not “depend on” or “arise from” the permits. *Appellant’s Opening Brief-37*. This lawsuit, however, arises directly from the issuance of the commercial approach permits. Yakima exercised its exclusive jurisdiction and issued permits for access to the public roadway.

Union Gap’s sole argument is that “...Yakima has no ownership in the Boulevard and therefore cannot possibly convey property rights to Printing Press ... by approving a grading permit.”<sup>19</sup> *Appellant’s Opening Brief– 38*. Union Gap specifically challenges Yakima’s jurisdiction and authority to issue the access permits. In essence, Union Gap is alleging that

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162 Wn.2d at 844 (2008)(Ecology barred from challenging building permit where it failed to file LUPA appeal within 21 days).

<sup>19</sup> It should be noted that Yakima issued more than a “grading permit”. It also issued a driveway approach permit which allows access to a public street. YCC Ch. 8.64.

Yakima does not have jurisdiction over that portion of Valley Mall Boulevard located within Yakima city limits. LUPA authorizes review of land use decision if the “...decision is *outside the authority or jurisdiction* of the body or officer making the decision; ....” RCW 36.70C.130(1)(e).<sup>20</sup> Challenges to jurisdiction and authority must be brought in a LUPA appeal and cannot be raised in collateral actions. *Samuel’s Furniture, Inc. v. Department of Ecology*, 147 Wn.2d at 450-52. Union Gap had available remedies and chose not to exercise those rights.

In this case, Union Gap sought injunctive relief to “...permanently enjoin Printing Press from cutting existing curbing and related facilities and building a driveway access to the Printing Press Property from West Valley Mall Boulevard.” CP 12. Stated in another way, Union Gap seeks to enjoin the exercise of Printing Press rights under the land use permits. The court in *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.2d 475 (2006) dealt with a virtually identical claim and held that a land use decision may not be collaterally attacked through a separate public nuisance action. *Asche*, 132 Wn. App. at 801.<sup>21</sup> The court in *Asche*, recognized the

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<sup>20</sup> Union Gap argues that “...[a]t most the permits that Printing Press secured from Yakima allow it to make improvements on the Property” *Appellant’s Opening Brief* – 38. The road approach permit, however, allows direct access to the public roadway. YCCC CH. 8.64. CP 1003-1005. The excavation permit allows construction *within* the public roadway. YCC CH. 8.72. CP 1008-1017.

<sup>21</sup> In *Asche*, a neighboring property owner failed to file a LUPA appeal related to issuance of a building permit for residential construction on adjoining property. The court

interests of an adjacent property owner and determined that injunctive relief was available through a LUPA appeal. *Id.* 132 Wn. App. at 793 (“...LUPA allows a stay of the action pending review and that a reversal still provides the same relief as an injunction”).<sup>22</sup> In the same manner, Union Gap would have been entitled to injunctive relief if successful in the LUPA appeal.

LUPA bars collateral attacks “...where the arguments arise directly from the ...land use decision.” *Holder v. City of Vancouver*, 136 Wn. App. 104, 108, 147 P.3d 641 (2006), (holding that LUPA bars consideration in collateral proceeding of issues “...that arise directly from Hearing Examiner’s land use decision.”). The current lawsuit would be

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found that the adjacent property owner had standing to challenge the building permit because it was a “person aggrieved or adversely affected by the land use decision”. RCW 36.70C.060. In this instance, Union Gap argues that it is an aggrieved adjacent property owner. It was further recognized that LUPA authorized the court to issue an injunction prohibiting the construction of the residential improvement. It was noted:

Accordingly, had the Ashes’ properly filed a petition under LUPA, they would have been able to redress the injury to their view by stopping construction.

*Id.*, 132 Wn. App. at 793. Union Gap could have secured injunctive relief under LUPA with respect to jurisdiction and safety issues. The legal principal also affirmed in *Brotherton v. Jefferson County*, 160 Wn. App. 699 (2011) (holding that failure to file a timely LUPA appeal barred collateral attack on underlying ordinances).

<sup>22</sup> Union Gap specifically sought both declaratory and injunctive relief. The Complaint states that “...Union Gap has a clear legal right to permanently enjoin Printing Press from cutting existing curbing and related facilities and building driveway access to the Printing Press Property from West Valley Mall Boulevard.” CP 11-12. RCW 36.70C.140 recognizes that the court in a LUPA appeal “...may make such an order as it finds necessary to preserve the interests of the party and the public, ....” Injunctive relieve was available through the LUPA appeal process.

unnecessary “but for” the issuance of the permits. Union Gap’s arguments and requested relief directly “arise from” the land use decisions and are barred by LUPA. The prohibition on collateral attack serves LUPA’s “...strong public policy favoring administrative finality in land use decision.” *Samuel’s Furniture*, 147 Wn.2d at 458 holding belated enforcement actions undermine finality and improperly place at risk a property owner that relies in good faith on a local government determination).

**5.3 Union Gap Incorrectly Asserts that Purported Ownership of Valley Mall Boulevard Allows the Exercise of Regulatory Authority Outside of Its Jurisdictional Limits.**

Union Gap offers the novel and unsubstantiated argument that as “owner” of Valley Mall Boulevard it has the authority to regulate use of the public roadway and properties *lying outside of its jurisdictional limits*. An artificial distinction is fabricated between private property rights and the exercise of regulatory authority. It is argued that purported private property rights trump both constitutional and statutory authorities. This argument fails on many levels.

**(a) Exercise of Police Powers Outside of Jurisdictional Boundaries Violates Washington Constitution Article XI, Section 11.**

Union Gap acknowledges that it does not have authority to exercise land

use controls outside of its jurisdictional boundaries. *Appellant's Opening Brief*– 4. This fundamental principle is embedded in constitutional law. Under the Washington Constitution, “Any county, city, town or township may make and enforce *within its limits* all such local police, sanitary and other regulations as are not in conflict with general laws.” WASH CONST. art. XI, § 11 (emphasis added). Zoning is an exercise of police power that regulates the use of property. *First Covenant Church v. City of Seattle*, 120 Wn.2d 203, 222, 840 P.2d 174 (1992). The courts have consistently and uniformly recognized that municipalities may not impose zoning regulations, directly or indirectly, beyond city borders. *MT Development, LLC v. City of Renton*, 140 Wn. App. 422, 430, 165 P.3d 427 (2007)(holding that imposition land use regulations as condition to sewer service outside jurisdictional boundaries is unlawful). Union Gap seeks to circumvent this constitutional mandate through the artifice of purported private property ownership. There is no authority for this proposition.

**(b) Union Gap Provides No Legal Authority To Support the Proposition of “Private Ownership” of Public Roadways.** There is no Washington legal authority supporting the proposition that principles of “private ownership” apply to public roadways. Union Gap simply argues that “[w]ithout an access easement or other permission, Printing Press

has no right to use Union Gap property without Union Gap's permission.”  
*Appellant's Opening Brief* – 24. The argument is simply contrary to the facts and applicable law.

To begin, the courts of Washington Union have consistently recognized that “...[i]t is well established that the owner of land abutting a conventional highway has an easement of ingress and egress.” *State v. Calkins*, 50 Wn.2d 716, 718, 314 P.2d 449 (1957). This principle has been recognized by the courts for more than 125 years. *Brown v. City of Seattle*, 5 Wash. 35, 42, 31 P.313 (1892) (“...a street is laid out for the benefit of abutting lots as well as for the public passage, the land and the lots retaining the easement of access over the land and the street.”). There should be no legal question that an abutting land owner possesses an access easement to public roads in the absence of roadway development as a “limited access facility” under RCW Ch. 47.52. *Calkins*, 50 Wn.2d at 719. Printing Press has an access easement as a matter of law. That access right is subject only to zoning and regulatory controls of the jurisdiction with constitutional regulatory authority. In this case, Yakima, not Union Gap, has such authority.

Union Gap relies exclusively on *State ex rel. City of Walla Walla v. Clausen*, 157 Wash. 457, 289 P. 61 (1930). This case is inapposite. In

*Clausen*, the City of Walla Walla sought a writ of mandamus compelling the state auditor to accept bonds issued by the city for a new municipal airport located outside the city limits. The state auditor refused to accept the bonds because “[t]he City of Walla Walla has no authority to expend money for airport development outside its city limits.” *Id.* 157 Wash. at 458.<sup>23</sup> The court rejected the Auditor’s position and held that the municipality had authority to issue bonds for a municipal airport. The court in *Clausen* specifically recognized that rules regarding municipal police powers “...have nothing to do with the case at bar.” *Id.* 157 Wash. at 460. That is, the statutory and constitutional limitation prohibiting the exercise of police powers outside of jurisdictional boundaries have no impact on bond financing or property acquisition.

Second and significantly, public roadways are not “private property”.<sup>24</sup> Valley Mall Boulevard is a “public” roadway developed as a

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<sup>23</sup> State law authorized municipalities to acquire and maintain sites and facilities for aerial transportation but was silent as to whether the airport must be within corporate limits. *Id.* 157 Wash. at 459. The court concluded that the aviation act should be construed liberally and allowed the bond financing of public facilities outside of jurisdictional boundaries.

<sup>24</sup> The courts have recognized that “...the very essence of the nature of property is the right to its exclusive use.” *Holmquist v. King County*, 192 Wn. App. 551, 561, 368 P.3d 234 (2016). Private property rights have been analogized to a “bundle of sticks” which includes the right to possess, exclude others and dispose of the property. See e.g. *Manufactured Housing Communities v. State*, 42 Wn.2d 347, 364, 13 P.3d 183 (2000). A public roadway is the antithesis of private property.

regional facility through the collaborative efforts of many jurisdictions.<sup>25</sup>

In the context of eminent domain, condemnation is authorized where (1) the use is really public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose. *HTK Management, LLC v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). The acquisition of property for public use is not satisfied where there are retained private use or ownership rights. *In re Petition of Seattle (Westlake I)*, 96 Wn.2d 616, 627-628, 638 P.2d 549 (1981). Valley Mall Boulevard was acquired and developed as a public roadway.

Third, Union Gap is not the “owner” of Valley Mall Boulevard in areas within Yakima jurisdictional limits. Union Gap acted as “agent” for Yakima in securing the right-of-way. CP 1046. Union Gap has not disputed the agency relationship. An agent under these circumstances is a fiduciary and must disclose all facts and benefits derived from the agency. See e.g. *Moon v. Phipps*, 67 Wn.2d 948, 411 P.2d 157 (1966). CP 1046.

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<sup>25</sup> A city or town ... is authorized and empowered to condemn land and property, ... for streets, avenues, alleys, highways, bridges, approaches, culverts, drains, ditches ... *within the limits of such city...* RCW 8.12.030. There is limited authority to purchase property outside of jurisdictional limits including public parks, drains and sewers, water facilities and “drives and boulevards.” *Id.* Eminent domain statutes are to be strictly construed with respect to scope and purpose. *City of Des Moines v. Hemenway*, 77 Wn.2d 130, 133, 437 P.2d 171 (1968) (“statutes delegating condemnation powers are to be strictly construed.”). Union Gap did not have the authority to condemn property for “streets” outside of its jurisdictional boundaries. That is the reason that City of Yakima worked on a collaborative basis and authorized Union Gap to proceed on its behalf with respect to acquisition of properties within the jurisdictional boundaries of the City of Yakima.

Printing Press proceeded with right-of-way negotiations based on Union Gap and Yakima's acknowledgment that Union Gap was acting only as an "agent" for Yakima. CP 589. Union Gap did not refute or contravene any of these facts.

Fourth, a municipality owning private property outside of its jurisdictional boundary is subject to zoning regulations of the municipality with jurisdiction over the property. See e.g. *City of Everett v. Snohomish County*, 112 Wn. 2d 433, 443-44, 772 P.2d 992 (1989) (holding city subject to county zoning rules for waste disposal facility located in county). Yakima zoning regulations control land use of all properties within its jurisdiction. Union Gap's purported "private property" lies within Yakima boundaries is subject to Yakima regulatory authority.

Finally, Union Gap seeks to distinguish between "ownership rights" and "regulatory authority." The fact is that Union Gap seeks to regulate Printing Press' property usage. Growth Management Act (GMA) defines "regulation" as "...the controls placed on development or land use activities by a county or city...." RCW 36.70A.030(4).<sup>26</sup> Union Gap admits the conflation of ownership and regulation when it argues

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<sup>26</sup> Merriman-Webster Dictionary defines "regulating" as a transitive verb "...to bring under control of law or constituted authority...." Union Gap is seeking to regulate Printing Press' use and access to a public facility.

“...Chapter 9.34 is simply the means by which Union Gap uniformly exercises *both its ownership authority and regulatory authority* over its Boulevard” *Appellant’s Opening Brief* – 23. The argument is much like debates over money – when they say it’s not about regulation, it’s about regulation.

#### **5.4 Development Agreement Does Not Prohibit Access to Valley Mall Boulevard.**

Union Gap claims that the Development Agreement mandates application of UGMC Chapter 9.34 and has “...specifically prohibited direct access to West Valley Mall Boulevard.”<sup>27</sup> It is argued that the court should (1) disregard the clear and unambiguous legal description of property subject to the agreement and adopt a broader unwritten definition of “property”; (2) disregard statutory prohibitions limiting development agreements to properties within jurisdictional boundaries (RCW 36.70B.170); and (3) speculate regarding Union Gap’s subjective but unsubstantiated intent. None of Union Gap’s arguments are supported by the factual record. They are pure speculation, conjecture and argument.

A touchstone of contract interpretation is the parties’ intent based on the objective manifestations of the agreement. *Hulbert Revocable*

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<sup>27</sup> *Complaint for Breach of Development Agreement* 5:23-25. CP 7.

*Living Trust v. Port of Everett*, 159 Wn. App. 389, 399, 235 P.3d 779 (2011). Under the objective theory of contract interpretation, a court must attempt to ascertain the intent of the parties from the ordinary meaning of the words within the contract. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 115 P.3d 262 (2005). Unexpressed subjective intent is generally irrelevant to contract interpretation. *Id.*

To begin, the Development Agreement specifically identifies the property that is subject to the agreement. The agreement applies to Printing Press property “...located in the City of Union Gap” and legally described as follows:

That part of the southeast quarter of the southwest quarter of the southeast of Section 31, Township 13 N. Range 18 East W.M. *lying westerly of the city limits of Yakima, Washington.*

CP 604 and 612. It does not apply to that portion of the Printing Press property located “in the city limits of Yakima.” A court shall not read ambiguity into a contract that is otherwise clear and unambiguous. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965); and *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 420, 349

P.3d 889 (1995).<sup>28</sup> Union Gap argues that general terms prevail over specific terms.<sup>29</sup> It is a well-established principle of contract interpretation, however, that "...specifications and exact terms are given greater weight than general language." *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 354, 103 P.3d 773 (2004).

Second, Union Gap's posited interpretation is in direct conflict with statutory authority for development agreements. RCW 36.70B.170 provides that "...a local government may enter into a development agreement with a person having ownership or control of real property *within its jurisdiction.*" The authorization does not extend to properties

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<sup>28</sup> At the time of the Development Agreement, a portion of the Printing Press property was located within the municipal boundaries of the City of Union Gap and a larger portion within the boundaries of the City of Yakima. See footnote 14. The municipal boundary cut across the property on a diagonal basis and created a triangular section within Union Gap boundaries at the corner of Valley Mall Boulevard and Longfiber Road. A condition to Printing Press's participation in the project was that the municipal boundaries be amended so that all of the Printing Press property was located within the City of Yakima.

<sup>29</sup> Printing Press provided a declaration which specifically stated that the agreement "...did not extend to other portions of the PPI property which continue to be within the jurisdiction of the City of Yakima." CP 590. The sole testimony offered by Union Gap was the Declaration of Dennis Henne in which it was stated:

Union Gap would not have executed the Development Agreement if it had known of Printing Press's plan to nonetheless construct private driveway access from the Boulevard for the shopping center. Access to and from the Original Printing Press Property was intended to be from Longfibre Road only.

CP 239-240. Under the objective manifestation theory of contracts, the court examines the parties' intent by focusing on the objective manifestations of the agreement and the unexpressed subjective intent is irrelevant. *Hearst Communications, Inc.*, 154 Wn.2d at 503. The court will not interpret what was intended to be written but what was written. *Id.* 154 Wn.2d at 504.

*outside its jurisdiction.* A contract must be construed in the context of applicable statutory warranty.

Third, Union Gap seems to have abandoned reference to the operative language of the agreement. Development Agreement (3)(c)(i) provides:

- i. PPI acknowledges the 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 the time of project permit application.

CP 605. The language is clear and unambiguous – UGMC Chapter 9.34 *may prohibit* access to portions of Printing Press Property located within Union Gap city limits. First, the “provisions of UGMC Chapter 9.34” cannot be applied outside of Union Gap city limits WASH. CONST. art. XI, §11. Second, the definition of “may” recognizes that the word may is used to express a contingency or possibility.<sup>30</sup> The trial court correctly

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<sup>30</sup> *Dictionary.com* defines “may” as an auxiliary verb as follows:

1. (Used to express possibility):  
*It may rain.*
2. (Used to express opportunity or permission):  
*You may enter.*
3. (Used to express contingency, especially in clauses indicating condition, concession, purpose, result, etc.):  
*I may be wrong but I think you would be wise to go. Times may change but human nature stays the same.*
4. (Used to express wish or prayer):  
*May you live to an old age.*
5. *Archaic.* (Used to express ability or power).

concluded that this provision "...can only mean it might deny access on that portion of PPP subject to the development agreement. Because Union Gap cannot regulate outside its jurisdiction, the contract cannot be interpreted to allow it to do so." CP 1110.

Finally, the Development Agreement confirmed both pre-existing and future municipal boundaries. CP 604 ¶2 and Exhibit B. The agreement specifically reaffirmed the pre-existing boundary located near the centerline of Valley Mall Boulevard. Yakima City Attorney affirmed this fact when addressing jurisdictional authority over road approaches. CP 1051.

...The provisions of the Development Agreement are relevant to establish that the City of Union Gap recognized and agreed that the centerline of Valley Mall Boulevard constitutes the jurisdictional boundary between the City of Union Gap and the City of Yakima for a significant portion of the Sentz [Printing Press] property's southerly boundary.

CP 1051. City Attorney then stated that Printing Press property and the commercial access location lie "...within the City of Yakima and is subject to City of Yakima's jurisdictional and development regulations." CP 1052. Union Gap did not object to this interpretation or legal position.

**5.5 Valley Mall Boulevard is a Public Road and Abutting Owners Have Access Rights Subject to Reasonable Ordinance Requirements.**

Union Gap offers a series of disconnected arguments to support an argument that Printing Press has no legal right to access Valley Mall Boulevard. The arguments are: (1) an abutting land owner has no right of access to an adjacent public road or street; (2) Printing Press had no pre-existing easement rights to Valley Mall Boulevard; and (3) conveyance of property by condemnation deed extinguished access rights. These arguments are not supported by applicable law.

**(a) Yakima and Union Gap Both Permit Access to Valley Mall Boulevard Through Adopted Development Regulations.** To begin, Union Gap's arguments regarding access rights are simply red herrings. Both Yakima and Union Gap allow abutting property owners access to Valley Mall Boulevard. Access and commercial approaches are authorized through permit process administered by the municipality with jurisdiction. Neither jurisdiction has taken a position that access is absolutely prohibited.

Yakima confirmed abutting property road access rights within its jurisdiction. Yakima City Engineer summarized procedures as follows:

Valley Mall Boulevard is a divided urban arterial connecting I-82 and Yakima Air Terminal. *Within the City of Yakima, access from abutting properties is permitted subject to commercial road approach review and approval.* Approach, curb cut and

roadway excavation standards are set forth in YMC Ch. 8.64 and Ch. 8.72.

CP 996 ¶4. Union Gap recognizes similar access rights within its jurisdictional boundaries.<sup>31</sup> The scope of zoning and regulatory authority is limited to jurisdictional boundaries. WASH CONST. ART XI, §11.<sup>32</sup>

It is incongruous to argue Printing Press has no access rights when applicable regulatory authority specifically recognizes such right. Printing Press applied for and received all required permits for construction of the commercial approach to its property.

**(b) An Abutting Property Owner Has Well Established Access Rights to Adjacent Roads, Streets and Highways.** Union Gap argues that an abutting landowner does not have access rights to an adjoining conventional street, road or highway. *Appellant's Opening Brief 18-19 and 30-32*. This is simply an incorrect statement of law. It is well

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<sup>31</sup> Union Gap has also recognized the right of abutting landowners to access Valley Mall Boulevard. UGMC 9.34.030(b) states that "...[e]very owner of property which abuts a controlled access arterial [e.g. Valley Mall Boulevard] has a right to reasonable access to the roadway." UGMC 9.34.030(b). Union Gap has authorized commercial approaches to abutting properties within its jurisdiction such as Printing Press' next door neighbor Bud Clary Toyota of Yakima. CP 591 ¶13.

<sup>32</sup> YMC 8.72.030 defines "street" to mean and include "...any street, highway, sidewalk, alley, avenue, easement granted to or held by city for public use, or other public way or public grounds in the city." (Italics added). "Driveway approach" is defined as "...an area, construction or improvement between the roadway of a public street to a definite area of private property." YMC 8.64.010. All approaches must comply with YMC Title 12 (Development Standards) and driveway location standards of YMC 15.06.065.

established in Washington that an abutting landowner has an easement for ingress and egress to public roadways. This fundamental principle was recognized in *State v. Calkins*, - the case relied upon by Union Gap.<sup>33</sup>

It is well established that the owner of land abutting upon a conventional highway has an easement of ingress and egress. This has been treated as a property right, attached to the land.”

50 Wn.2d at 718. This court recently reaffirmed this fundamental legal principle.

The owner of property that abuts a public street or highway has an easement of access for ingress and egress to and from such roadways. *State v. Calkins*, 50 Wn.2d 716, 718, 314 P.2d 449 (1957). This right of ingress and egress to a public way attaches to the land and is a property right “as complete as ownership of the land itself.” *Walker v. State*, 48 Wn.2d 587, 590, 295 P.2d 328 (1956).

*Williams Place, LLC v. State ex. Rel. Department of Transportation*, 187 Wn. App. 67, 84, 348 P.3d 797 (2015). Property abuts a public street or

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<sup>33</sup> *State v. Calkins*, 50 Wn.2d at 718 (1957). Union Gap relies upon *Calkins* to support an argument that “[Printing Press} has no basis in law to claim access to the Boulevard simply by virtue of the Boulevard’s construction.” *Appellants Opening Brief* 32-33. Union Gap misstates the holding. In *Calkins*, the court addressed the measure of damages in a condemnation case arising from the development of a new “limited access facility” established pursuant to RCW 47.52.010 et seq. The court recognized that access to an *existing roadway* is a property right but found that “...where a new *limited-access highway* is established by condemnation in an area where no highway previously existed, there is no taking of an easement of access because such an easement never in fact existed.” *Id.* 50 Wn.2d at 718. The court did recognize that an abutting property owner may, however, be entitled to “severance damages.” *Id.*, 50 Wn.2d at 719. The significant point is that Valley Mall Boulevard was not constructed as a “limited access facility.” What is significant, however, is that the court confirmed the well-established principal that an owner of abutting land has an easement for ingress and egress to a “conventional highway”. Valley Mall Boulevard was not a limited access facility.

highway “when there is no intervening land between it and the street.” *Id.*, 187 Wn. App. at 85. There are no intervening lands between the Printing Press property and Valley Mall Boulevard. Printing Press has legal access to Valley Mall Boulevard.

Union Gap further argues that Washington law “...has long held that condemnations can and do ‘automatically extinguish an abutting owner’s ability to use the roadway.’”. *Appellant’s Opening Brief* 35-36. Union Gap quotes from William B. Stoebuck and John W. Weaver *Property – Loss of Access to Public Ways*, 17 Wash. Prac., Real Estate § 9.11. The problem is that Union Gap failed to provide the court with a complete quote from the secondary source.

*Except for highways that are established as limited-access highways, streets and roads are designed not only to move the traveling public but also to give abutting landowners access to the system of public ways. For ingress and egress to and from such land-service ways, an abutting owner has, by judicial doctrine, an easement of access. This is quite separate from the public’s right to traverse the public way. It is an easement appurtenant to the abutters land, an easement in which the dominant tenement is that land and the servient tenement is the public way, whether the public owns the way in fee or has itself only an easement in it. ...*

(Italics added). This fundamental property right – an easement of access to public roads – has been recognized for 125 years. *Brown v. City of Seattle*, 5 Wash. 35, 42, 31 P. 313 (1892)(“...a street is laid out for the benefit of abutting lots as well as for the public passage, the land in the

lots retaining the easement of access over the land in the street.”); and *Lund v. Idaho & W.N.R.R.*, 50 Wash 574, 576, 97 P. 665 (1908). The easement of access exists as a matter of law and may be terminated only through establishment of a “limited access facility”. Valley Mall Boulevard was not developed as a “limited access facility”.

Union Gap finally argues that access to public roadways can be denied where alternative access is available. *Appellant’s Opening Brief*—30-32. Reliance is placed on the case of *TT Properties v. City of Tacoma*, 192 Wn. App. 283, 366 P.3d 465 (2016).<sup>34</sup> *TT Properties* is an inverse condemnation case arising from City of Tacoma and Sound Transit’s acquisition of right-of-way for commuter rail service from the Tacoma Dome to Lakewood. The court held that termination of street access is not a *per se* taking but is compensable if access is substantially impaired. *Id.* 192 Wn. App. at 472. *TT Properties* is simply inapposite to the present case. This present case does not involve condemnation, takings or substantial impairment. It is a case where the property owner was granted

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<sup>34</sup> *TT Properties* is an inverse condemnation case arising from a commuter rail project instituted by City of Tacoma and Sound Transit. The project resulted in the closure of a public street (Delin Street) that provided access to abutting parcels. The trial court granted summary judgment based on the availability of alternative access. The Court of Appeals reversed the dismissal of the inverse condemnation claims and found material issues of fact regarding a taking based on substantial impairment of access. *TT Properties*, 192 Wn. App. at 247. The primary determination was that removal of access was not a *per se* taking but rather must be evaluated under the “substantial impairment” standard. *Id.*, 192 Wn. App. at 247-48.

commercial access to a public roadway under applicable ordinance provisions.<sup>35</sup>

**(c) Printing Press Execution and Delivery Deed Did Not Extinguish Access Rights to Public Roadways.** Union Gap next argues that it has “...already paid Printing Press for title free and clear of any property rights held by Printing Press.” *Appellant’s Opening Brief – 34-36*. Absolutely no evidence is presented in support of this speculative proposition.<sup>36</sup>

The sole evidence in the record is that Union Gap did not acquire “access rights” to the new roadway. Jay Sentz specifically testified as follows:

The negotiations resulted in an agreement with respect to the purchase of a portion of our property. The amount paid for the right-of-way was \$45,000 which did not represent the fair market value. PPI agreed to donate the excess value to the public project. *The property acquisition did not include purchase of “access rights” to the roadway.* It also retained the municipal boundaries established by the

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<sup>35</sup> Unlike Union Gap ordinances, Yakima ordinance provisions do not require consideration of alternative access options. YCC 8.64.050 (Prohibited locations) and YCC 15.06.065 (Driveway locations). Union Gap includes alternative access review as part of its permitting process. UGMC 9.34.030(b).

<sup>36</sup> The sole evidence regarding parcel acquisition was provided in two declarations of Dennis Henne. CP 239 and 778-79. Henne offers no testimony regarding acquisition of access rights. All that is included in the record is a hearsay set of condemnation notes. CP 930-31. None of the references discuss or confirm any agreement to terminate access rights to the *new* roadway.

earlier annexation. A portion of the right-of-way remained under City of Yakima jurisdiction.

CP 589 ¶4-5. Union Gap provided no contravening evidence.

Second, delivery of a quit claim deed in the context of condemnation does not extinguish or terminate access rights to a public road. As noted above, the courts have consistently recognized the well-established principal that an abutting land owner has a right of ingress and egress to conventional public roadways. See e.g. *Williams Place, LLC*, 187 Wn. App. at 85. The sole exception is condemnation of right-of-way for a limited access facility (and it is uncontroverted that Valley Mall Boulevard was NOT a limited access facility). Judge Hahn came to the following logical and supportable conclusion:

*The Court agrees with PPP that because Valley Mall Blvd. is not a "limited access facility" PPP, as an abutting landowner, has the right to access its property from it. The quit-claim deed does not extinguish this right. If it did, condemnation such as this would automatically extinguish an abutting owner's ability to use the roadway and there is no case law that supports the proposition that this theory is correct. The Calkins case, cited by both counsel, is illustrative on this point. In Calkins, the State condemned property and built a limited access facility where no road had previously existed. Calkins argued that as an abutting landowner he had a right to access it from his property. The court ruled that he did not .... Thus, it would appear that a limited access facility trumps the right of an abutting landowner to access from his/her property but a non-limited access facility does not.*

Judge Hahn is correct in her legal analysis.

**5.6 Printing Press is Entitled to Award of Attorney Fees on Appeal.**

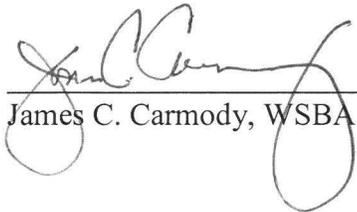
Development Agreement provides that the substantially prevailing party in an action arising out of or pertaining to the agreement is entitled to recover its reasonable attorney fees together with costs and expenses incurred in the litigation. CP 608. The attorney fee provision extends to any appeals or collateral actions. The trial court awarded fees and costs to Printing Press. Union Gap did not appeal that determination. Printing Press requests an award of fees and costs on appeal.

**CONCLUSION**

Printing Press respectfully requests that the Court affirm the trial court award Printing Press its attorney fees and costs incurred on appeal.

Respectfully submitted this 3d day of May, 2017.

MEYER, FLUEGGE & TENNEY, P.S.  
Attorneys for Defendant/Respondent

  
James C. Carmody, WSBA 5205

**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

PURSUANT TO ELECTRONIC SERVICE AGREEMENT

Bronson J. Brown Bell Brown & Rio 410 N. Neel Street, Suite A Kennewick, WA 99336	<input checked="" type="checkbox"/> E-Mail <a href="mailto:Bronson@bellbrownrio.com">Bronson@bellbrownrio.com</a>
P. Stephen DiJulio Colm P. Nelson 1111 Third Avenue, Suite 3000 Seattle, WA 98101-3299	<input checked="" type="checkbox"/> E-Mail <a href="mailto:steve.dijulio@foster.com">steve.dijulio@foster.com</a> <a href="mailto:colm.nelson@foster.com">colm.nelson@foster.com</a> <a href="mailto:ele.sale@foster.com">ele.sale@foster.com</a>

**DATED** at Yakima, Washington, this 3 day of May, 2017.

  
Deborah Girard, Legal Assistant

## APPENDIX A

# Yakima County GIS - Washington Land Information Portal

[\[Print Map\]](#)  
[\[Close Map\]](#)

[Yakimap.com](http://www.Yakimap.com)



2015 Ortho Photography

[WWW.YAKIMAP.COM](http://WWW.YAKIMAP.COM)  
 Yakima County GIS  
 128 N 2nd Street  
 Yakima, WA 98901  
 (509)574-2992



One Inch = 400 Feet

Feet	200	400	600
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[NOT A LEGAL DOCUMENT](#)  
[VERIFICATION](#)

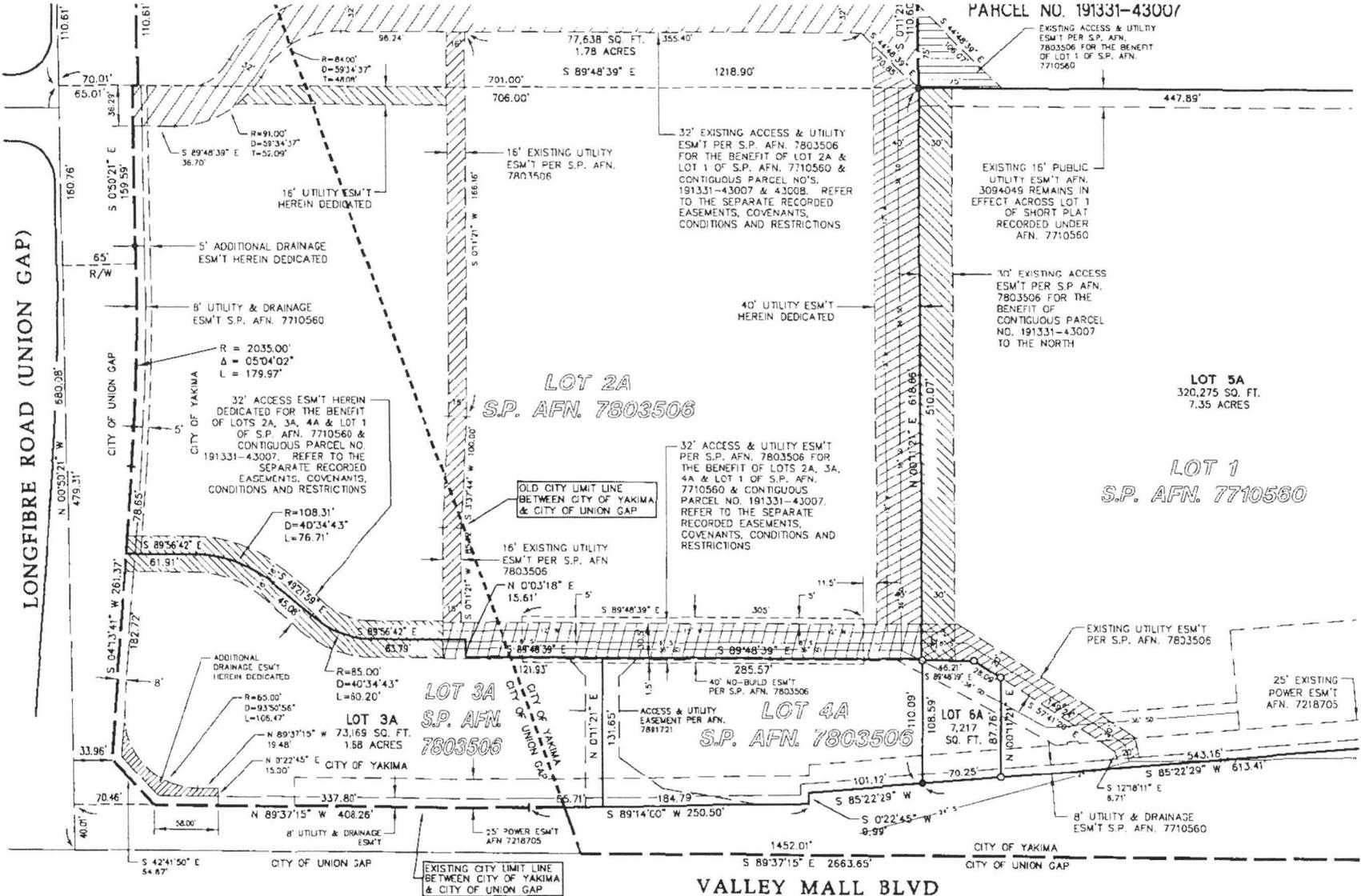
Copyright (C) Yakima County GIS  
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## APPENDIX B

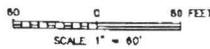
LONGFIBRE ROAD (UNION GAP)

PARCEL NO. 191331-43007



CITY OF YAKIMA

CITY OF UNION GAP



**PLSA** ENGINEERING-SURVEYING-PLANNING  
 521 NORTH 20TH AVENUE, SUITE 3  
 YAKIMA, WASHINGTON 98902  
 (509) 579-6990

**CITY LIMIT SITE MAP**  
 PARCEL NO. 191331 - 43411, 43412 & 43414  
 PREPARED FOR  
 PRINTING PRESS PROPERTIES, L.L.C.

DRAWN BY: RICK  
 DATE: 5/24/2016  
 JOB NO: 16075  
 SHEET NO. 1 OF 1

S 1/2, SE 1/4, SEC. 31, T-13 N, R-19 E, WNW

34740-1 Amended 000579

## APPENDIX C



## APPENDIX D

