

74631-6

74631-6

No. 74631-6-I  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ROBERT BOYD and MARGARET WEIDNER,  
Appellants/Cross-Respondents,

v.

SUNFLOWER PROPERTIES, LLC,  
Respondent/Cross-Appellant.

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**BRIEF OF APPELLANTS/CROSS-RESPONDENTS**

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**EXHIBITS**

Exhibit A – Color copy of Curtis Johnson Survey found at CP 427-428.

Exhibit B – Color copy of CP 151.

Exhibit C – Copy of San Juan County Code, Chapter 18.60.100 and Figure 6.1

**TABLE OF AUTHORITIES**

***Washington Supreme Court Cases***

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*Bailey v. Hennessey*,  
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***County Codes***

**San Juan County Title 18**

Chapter 18.60.100(A) and (A)(7) and Figure 6.1 ..... 16, 17, Exhibit C

# **EXHIBIT A**

# Topographic Survey

Topographic Survey of the property located at the intersection of the Ger Lane Centreline and the property line. The survey was conducted on the 15th day of August, 2023. The survey was conducted by the Surveyor General of the State of Alaska, and the results are shown on this map. The survey was conducted in accordance with the rules and regulations of the State of Alaska, and the results are shown on this map. The survey was conducted in accordance with the rules and regulations of the State of Alaska, and the results are shown on this map.

**NORTH**  
 Bearing Base

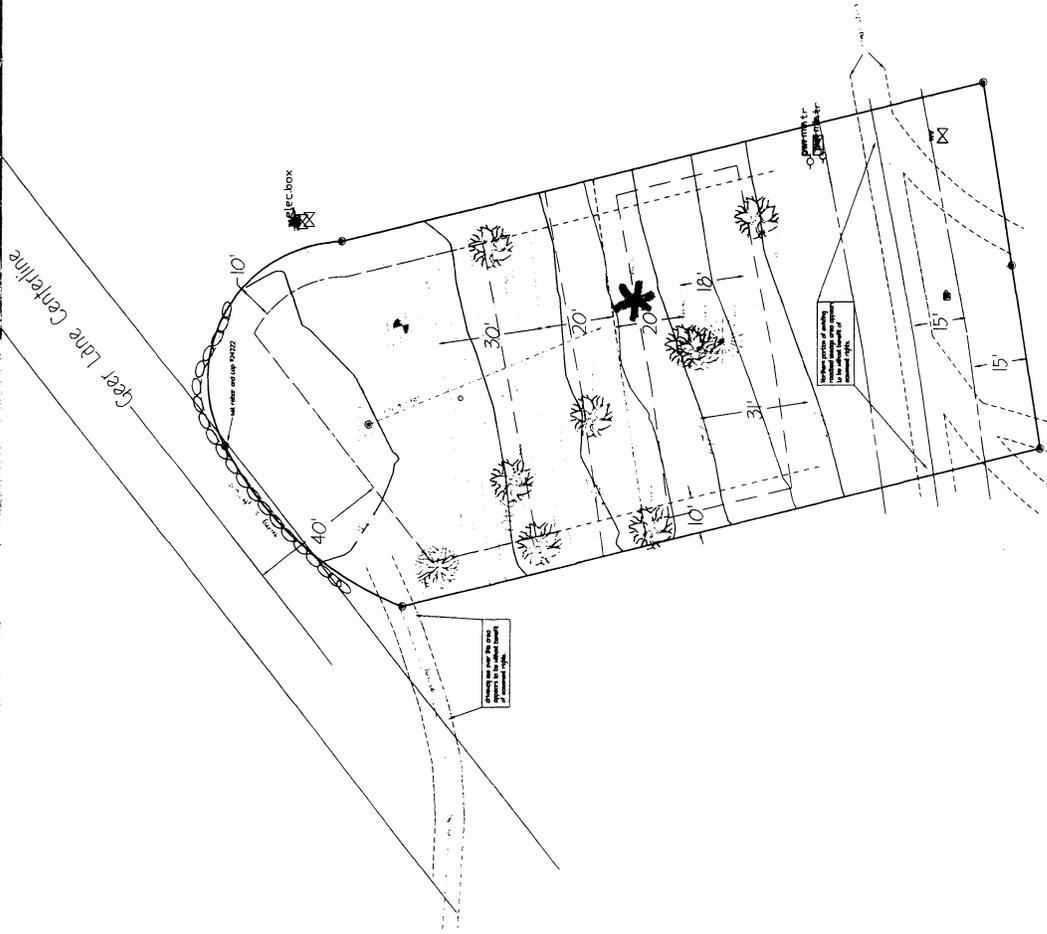


Legend



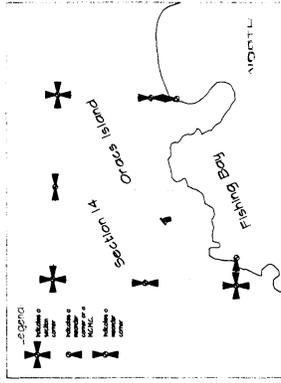
Legal Description

Section 14, Township 14N, Range 14E, Alaska



SECTION 14, TOWNSHIP 14N, RANGE 14E, ALASKA

Family Map and Section Map



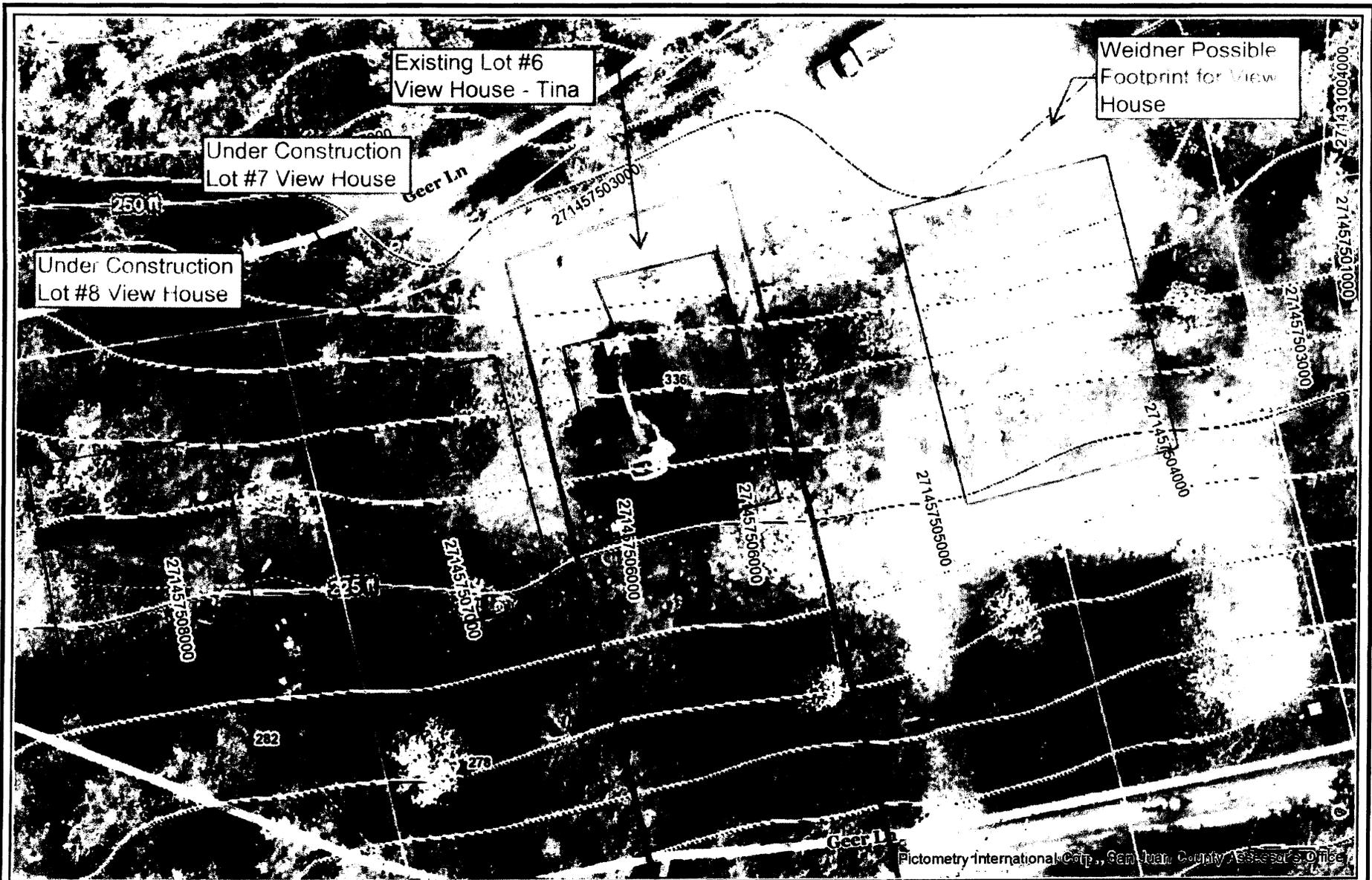
Boyd - Weidner







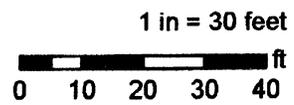
# **EXHIBIT B**



Pictometry International Corp., San Juan County Assessor's Office



*This map is derived from San Juan County's Geographic Information System (GIS). It is intended for reference only and is not guaranteed to survey accuracy. The information represented on this map is subject to change without notice.*



**Boyd/Weidner Possible View House Footprint adjacent to Lot**

# **EXHIBIT C**

**18.60.100 Roads – Private roads.**

The following requirements apply to all private roads serving more than two parcels, except for roads requiring less than 1,000 cubic yards of grading, and to all new subdivision and short subdivision roads.

A. Road Design Standards. The following design standards are applicable to all private roads:

1. Maximum grade allowed (gravel), 16.0 percent; maximum grade allowed (paved), 22.0 percent;
2. Minimum grade allowed, 1.0 percent;
3. Minimum curve radius allowed, 50 feet;
4. All roads and easements shall meet the minimum standards set forth in Table 6.3, Minimum Standards for Private Roads and Easements;
5. In applying the standards in Table 6.3, the total number of existing and proposed parcels served by the entire road shall be counted;
6. All dead end subdivision and short subdivision roads shall end in a cul-de-sac or “hammerhead” turn-around constructed in accordance with the construction standards accepted by the County engineer;
7. Private road intersections with County roads shall be constructed in accordance with the construction standards for driveway access permits (Figure 6.1), except that the width shall be as required in this subsection;
8. Storm drainage and culvert sizing shall be based upon an engineering analysis and the standards of SJCC 18.60.060(B) and 18.60.070. Maximum length of surface drainage for roadside ditches before discharging onto adjacent property or into a natural drainageway shall be 1,000 feet. The minimum size of road crossing-culverts shall be eight inches in diameter; however, where the private road or driveway meets the County road, a minimum of 12-inch diameter shall be required.

B. Road Materials. The following standards apply to materials for roads:

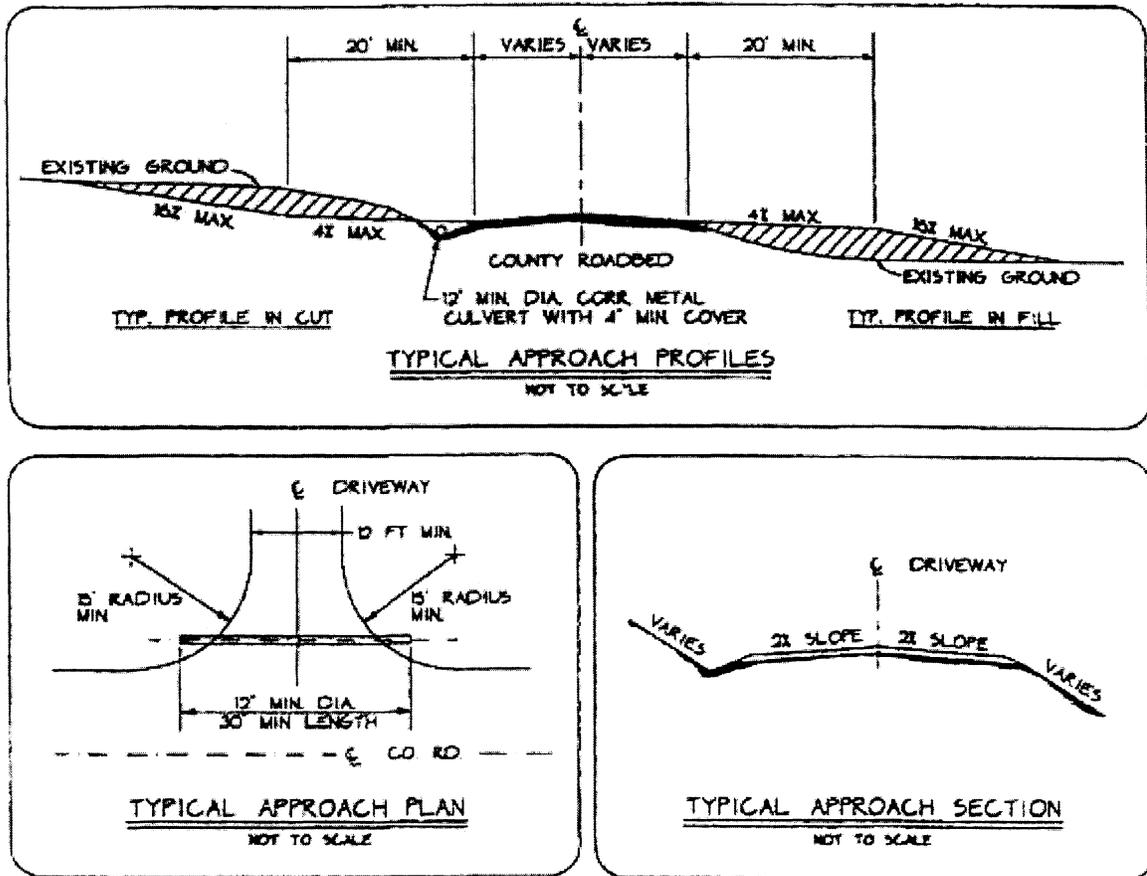
1. The source of surfacing materials must be approved by the County engineer before construction.
2. Plain concrete, reinforced concrete, corrugated metal pipe, or approved corrugated polyethylene drainage tubing and fittings may be used for drainage.

C. Road Construction Standards. The following standards apply to construction of roads:

1. Clearing and grubbing material shall be removed from rights-of-way.
2. All embankments shall be compacted in layers by heavy equipment.
3. No deleterious material shall be allowed in embankments or roadbeds.
4. All slopes shall be uniformly graded.
5. The gravel base shall be graded sufficiently to allow an even surface for vehicular traffic.

6. Driveways shall have culverts when needed.
7. Whenever feasible, underground utilities, together with service crossings, shall be installed after the subgrade has been completed, but before surfacing has been placed.

Figure 6.1 — Construction Standards for Driveway Access Permits



TYPICAL APPROACH NOTES:

1. APPROACH GRADE MUST BE NO GREATER THAN + OR - 4% WITHIN 20 FT. OF THE COUNTY ROAD SHOULDER.
2. APPROACH MUST HAVE A CRUSHED GRAVEL SURFACE A MINIMUM OF 20 FT. FROM COUNTY ROAD SHOULDER.
3. CULVERTS (IF REQUIRED) MUST BE CORRUGATED METAL PIPE AND HAVE A MINIMUM OF 4 IN. OF COVER.
4. APPROACHES SHALL INTERSECT COUNTY ROAD AS NEAR 90 DEG. AS POSSIBLE AND NOT LESS THAN 60 DEG.
5. APPROACH MUST BE CROWNED AND DITCHED.
6. A 20 FT WIDE APPROACH WIDTH MAY BE REQUIRED AT THE COUNTY ENGINEER'S DISCRETION.
7. MINIMUM SIGHT DISTANCE SHALL BE AS FOLLOWS:

SPEED	MIN SIGHT DISTANCE
45	450 FT
35	350 FT
25	250 FT
20	200 FT

SIGHT DISTANCE TO BE MEASURED FROM A POINT ON THE APPROACH ROAD AT LEAST 10 FEET FROM THE EDGE OF THE TRAVEL LANE AND MEASURED FROM A HEIGHT OF EYE OF 3.75 FEET ON THE APPROACH ROAD TO A HEIGHT OF OBJECT OF 45 FEET ON THE COUNTY ROAD. ANY VARIATION REQUIRES APPROVAL OF THE COUNTY ENGINEER.

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LLC ,  
  
Respondent/Cross-Appellant.

No: 74631-6-I

BRIEF OF APPELLANTS

**I. INTRODUCTION**

Appellants Robert Boyd and Margaret Weidner (“Boyd/Weidner”) purchased two vacant lots from Respondent Sunflower Properties, LLC (“Sunflower”) on August 29, 2008, in Eastsound, Orcas Island. They purchased the lots with the intent to build a home thereon. The lots were advertised as view lots, with views out onto Fishing Bay. The advertisement and listing information also indicated that the access to the

lots was by way of a gravel driveway which was privately maintained.<sup>1</sup> A gravel driveway (the “Gravel Drive”) spurs off of Geer Lane, the main access road, and provides access to these parcels.<sup>2</sup> The Gravel Drive terminates in the middle of the flat northern portion of the lots.<sup>3</sup>

Boyd/Weidner’s purchase included the two listed lots (Lot 4 and 5), and a portion of a third lot (Lot 3) which was incorporated into Lot 4 by boundary line adjustment, in order to give Boyd/Weidner a larger, flat, building area.<sup>4</sup> The lots are incredibly steep, with an average grade of over 30% from the bottom of the lot to the building site at the top, which is the only flat ground.<sup>5</sup> Several years after closing, Boyd/Weidner were informed that they could not use, and did not have an easement over, the Gravel Drive.<sup>6</sup> Sunflower has been using the Gravel Drive to access these lots since 2001, when they bought the land.<sup>7</sup> Sunflower testified previously that the Gravel Drive was in existence prior to their purchase of the lots.<sup>8</sup>

Boyd/Weidner filed their original Complaint in this matter on February 26, 2015, seeking an implied easement over the Gravel Drive.

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1 CP 446.

2 **Id.** and CP 658.

3 **See**, CP 400 and CP 377.

4 CP 451.

5 **See**, CP 428 and CP 151. Grade is calculated by dividing the rise in elevation by the run, or distance traveled.

6 CP 438 – 440.

7 CP 240 – 245.

8 CP 405, ln. 19-25 and CP 527, ln. 13-17.

The Gravel Drive is the only reasonable means of access to the Boyd/Weidner Property. The only other option is to punch in a switch-back driveway from the south, and then up the entire length of the property to the building site at the top. This would be incredibly expensive to accomplish as well as immensely inconvenient. Further, it may not even be possible, given San Juan County development requirements and the steepness of the grade.<sup>9</sup>

The trial court denied Boyd/Weidner's motion for summary judgment on the issue and granted Sunflower's motion for summary judgment, finding, in error, that there had not been sufficient prior use of the driveway to find an implied easement.<sup>10</sup> However, the trial court clearly misconstrued the law in this instance and it appears they applied a standard of prior use which is more akin to an easement by prescription. Finding an implied easement does not require any specific duration or constant prior use; it only requires that there was some prior use and that prior use is balanced with the necessity of the implied easement. The more it is necessary, or inconvenient for Boyd/Weidner to access their property any other way, the less prior use needs to be shown. Boyd/Weidner have presented a clear case for an implied easement over the Gravel Drive and

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<sup>9</sup> See discussion on page 15-16 herein for San Juan County Development Code requirements and calculation of lot grade.

<sup>10</sup> CP 765-766

request that the Court of Appeals reverse the trial court's ruling on these summary judgment motions.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that Boyd/Weidner were required to prove that there was "apparent and continuous use" of the easement, prior to severance of title, without regard to the necessity of the easement.
2. That the trial court erred in finding that the evidence of prior use provided by Boyd/Weidner was not sufficient to grant an implied easement even though the evidence presented shows that the degree of necessity for the easement is more than the required "reasonable necessity" standard and as such the requirement of "use" is lessened.
3. The trial court erred in finding that Boyd/Weidner did not provide competent evidence that there had been prior use of the Gravel Drive to access Boyd/Weidner's Property.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The controlling authority states that the element of "use" for an implied easement is defined as, "when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title."<sup>11</sup> The Washington Supreme Court has held that unity of title and subsequent separation are

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<sup>11</sup> *Adams v. Cullen*, 44 Wash.2d 502, 505-506, 268 P.2d 451 (1954).

the only absolute requirements to finding an implied easement; use and necessity are merely aids to construction of the parties' intent.<sup>12</sup> Therefore, is a party seeking the establishment of an implied easement required to prove "apparent and continuous use" of that easement without regard to the necessity?

2. Boyd/Weidner provided evidence that (1) the northern portion of the property is the only buildable site on the lots, (2) the Gravel Drive is the only access point ever created or used to access the northern portions (or any portion) of the property, (3) northern access to the lots increases the value of the property, and (4) the installation of an access drive from the southern portion of the property would be impractical, inconvenient, and exceedingly expensive. Given that all they need to prove is the "reasonable necessity"<sup>13</sup> of the implied easement, did the evidence presented by Boyd/Weidner establish that the necessity of the implied easement is great enough that the standard of use is lowered and their showing of some prior use is sufficient to grant the implied easement?

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<sup>12</sup> See, *Bailey v. Hennessey*, 112 Wash. 45, 48-49, 191 P. 863 (1920); *Evich v. Kovacevich*, 33 Wash.2d 151, 156, 204 P.2d 839 (1949); *Adams v. Cullen*, at 505, 268 P.2d 451, 453 (1954); *Hellberg v. Coffin Sheep, Co.*, 66 Wash.2d 664, 667-668, 404 P.2d 770 (1965); *Roberts v. Smith*, 41 Wash.App. 861, 864-865, 707 P.2d 143 (1985).

<sup>13</sup> Reasonable Necessity is defined as: "Whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." *Adams v. Cullen*, at 505-506. And, "the so-called 'necessity' upon which the judges rely is in fact no necessity at all, but a mere beneficial and valuable convenience." *Bushy v. Weldon*, 30 Wash.2d 266, 304-305, 191 P.2d 302 (1984).

3. Was the evidence presented to the trial court that (1) the Gravel Drive had been installed and used prior to Sunflower's purchase of the lots, (2) the Gravel Drive was used by Sunflower to access Lots 3, 4, 5, and 6 and to store materials, vehicles, and trailers, from their purchase in 2001 to date, and (3) that Sunflower advertised the Lots for sale by reference to the Gravel Drive, including photographs, sufficient evidence of "prior use"?

#### **IV. FACTUAL BACKGROUND**

##### **1. Chain of Title**

In 1972, Lester and Ruth Geer ("Geer") acquired a parcel of land in Eastsound, Orcas Island from Edward and Ethel Simonson ("Simonson") by way of real estate contract.<sup>14</sup> The entire parcel acquired by Geer is reflected on the survey map of the Geer Short Subdivision, from on or about April 1979, and encompasses all of Lot 1, Lot 2, and the Tract (hereinafter "Geer Lots" and "Tract") which are identified on that survey map.<sup>15</sup> The whole parcel transferred by Simonson was originally platted in the Fishing Bay Addition to Eastsound.<sup>16</sup>

On July 13, 1979, Geer quit claimed the Tract to Arthur Perry and Leslie Geer Perry ("Geer Perry") in consideration of "love and

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14 CP 181 – 185.

15 CP 224.

16 CP 181-185.

affection”.<sup>17</sup> Geer Perry already owned Lots 4, 5, 6, 7, 8, and the west half of Lot 3 in Block 5, Gailey’s First Addition (“Gailey’s Lots”), which lie directly to the south of the Tract and the property still owned by Geer, which was subdivided in August of 1979 as mentioned previously. Geer Perry transferred all of the Gailey’s Lots and the Tract to Timothy and Katherine Cardinale in 1981.<sup>18</sup> Cardinale transferred all of the Gailey’s Lots and the Tract to Linda Monday in 1997.<sup>19</sup> Monday transferred that same property to Sean DeMerritt of Sunflower in 2001.<sup>20</sup> Sunflower obtained the exact same land which was owned by Geer Perry, including the Gailey’s Lots and the Tract.

By way of boundary line adjustment in 2002, Sunflower reconfigured the Gailey’s Lots and incorporated most of the Tract into the new Lot 3, and small portions into the new Lots 4, 5, 6, and 7, prior to listing any of the Lots for sale.<sup>21</sup> Before and after subdividing, the Gravel Drive existed across those parcels, providing access to the main road known as Geer Lane.

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17 CP 205 – 208.

18 CP 215 – 220.

19 CP 234 – 238.

20 CP 240 – 245.

21 CP 247 – 251. For reference: San Juan County Parcel Nos. 271457503 (“Lot 3”), 271457504 (“Lot 4”), 271457505 (“Lot 5”), and 271457506 (“Lot 6”).

## 2. Easements of Record

The Geer Lots were originally granted to Geer together with an easement for ingress, egress and utilities running from San Juan County road “Lover’s Lane” and connecting to the vacated High Street.<sup>22</sup> They were also granted subject to an easement for ingress, egress, and utilities, which ran east from the southwest corner of the Geer Lot 2 for 110 feet, then 270 feet to the northeast, then north for 193 feet.<sup>23</sup> The access easement essentially carves out the Tract from Lot 2.<sup>24</sup> This easement now forms the upper part of Geer Lane. The Tract was benefitted by an easement for this upper part of Geer Lane dating back to the original conveyance from Simonson to Geer in 1972.<sup>25</sup> This is the only easement of record which specifically benefits (and burdens) the Tract land and the legal description of the 30 foot easement and the 15 foot easement has clearly followed the conveyance of the Tract property from deed to deed.<sup>26</sup> This is a right appurtenant that runs with the underlying land, as legally described, not the tax parcel identification number or numerical lot description.

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22 See, CP 181-185. The vacated High Street was then incorporated into the southern portion of all of the Gailey’s Lots.

23 See, CP 181-185 and CP 224.

24 See, CP 224.

25 CP 181-185.

26 See, CP 181-185, CP 205 – 280, CP 215 -220, CP 234 - 238, CP 240 – 245, and CP 247 - 251.

The Tract was never benefitted by an express easement across the southern portion of Lots 4, 5, 6, 7, 8 or the west half of Lot 3. Two specific easements were recorded which granted Geer and the Geer Lots access across all of upper and lower Geer Lane (under recording number 108188) and one which granted Geer Perry access over the portions of upper and lower Geer Lane to which they did not already have access by virtue of their ownership of the underlying land (under recording number 108915).<sup>27</sup> The Tract also has no appurtenant claims to access via the vacated High Street, because the Tract was not originally platted as part of Gailey's First Addition.<sup>28</sup> The Tract land has an appurtenant right to access upper Geer Lane.

None of Sunflower's predecessors in interest ever conveyed easement rights to the Tract covering the southern portion of Geer Lane which crosses over the Gailey's Lots because they have remained in unified ownership all the way through Sunflower's purchase until the transfer to Boyd/Weidner and those easements would have been extinguished by merger. The Tract has never had legal deeded access over most of lower Geer Lane and still does not. Of note, Sunflower's boundary line adjustment of the Gailey's Lots in 2002 failed to extend express

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<sup>27</sup> See, CP 200 - 203 and CP 210 - 213.

<sup>28</sup> CP 181 - 185.

easement rights across the entirety of lower Geer Lane for use by all of the new lots and owners.

### **3. Listing and Boyd/Weidner's Purchase**

As part of their development of the subdivided lots, Sunflower partially cleared and leveled the flat area on Lot 3, Lot 4 and Lot 5.<sup>29</sup> They also laid down additional gravel on the Gravel Drive and built up an existing retaining wall which now forms part of the northern boundary of Boyd/Weidner's property.<sup>30</sup> The north end of the lots sits at the top of a steep slope and has water views of Fishing Bay.

After subdividing, Sunflower advertised the sale of Lots 4 and 5 on the Northwest Multiple Listing Service.<sup>31</sup> The listing represented the permanent availability of the Gravel Drive to those lots and indicated that access to the lots was via "Driveway to property on right hand side" and specified the "Road Info" as "Gravel, Privately Maintained". The listing included photographs of the lots and included a view of the Gravel Drive.<sup>32</sup> The Gravel Drive forks off from Geer Lane and ends shortly after crossing over the western boundary of the adjusted Lot 4 and Lot 5.<sup>33</sup>

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29 CP 181-185 and CP 369 – 370.

30 CP 181-185 and CP 369 – 370.

31 CP 372 – 375.

32 CP 648.

33 CP 377.

On or about August 29, 2008, Sunflower conveyed Lots 4 and 5, and a portion of Lot 3 (collectively, the “Boyd/Weidner Property”) to Boyd/Weidner.<sup>34</sup> That portion of Lot 3 was added to Lot 4 by way of boundary line adjustment so that Boyd/Weidner purchased only two distinct tax lots.<sup>35</sup> When Boyd/Weidner purchased additional land from “Lot 3” in their purchase of Lots 4 and 5, they purchased land which was originally part of the Tract, not Lot 3 as platted in Gailey’s First Addition.<sup>36</sup> The lots are situated adjacent to one another. Sunflower retained ownership of a portion of Lot 3 (the portion of Lot 3 retained by Sunflower is hereinafter referred to as the “Sunflower Property”).

Boyd/Weidner relied on Sunflower’s listing with respect to the use of the Gravel Drive when they purchased the Boyd/Weidner Property. The portion of the Sunflower Property which lies to the west of the Boyd/Weidner Property forms part of the Gravel Drive. Boyd/Weidner must cross over the Sunflower Property/Gravel Drive if they wish to access their property from the main road.<sup>37</sup> Current photos and even

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34 CP 379 -395.

35 CP 259 – 265.

36 See, CP 179, CP 222 – 224, and CP 247 – 251 for reference and comparison of lot configurations.

37 CP 377.

Google Earth show the location of the Gravel Drive which still exists and has always provided access to the Boyd/Weidner Property.<sup>38</sup>

Boyd/Weidner initially offered to purchase more of Lot 3 than was conveyed to them in the boundary line adjustment, essentially the entire portion of Lot 3 lying directly north and west of Lots 4 and 5.<sup>39</sup> Sunflower was only willing to grant them a portion of Lot 3 up to an existing retaining wall, which provided Boyd/Weidner a larger flat building lot and additional privacy.<sup>40</sup> However, Sunflower acknowledged that they specifically kept the small portion of Lot 3 between the Boyd/Weidner Property and Lot 6 and Geer Lane in order to store building material for constructing the rest of Lot 3, because it was flat.<sup>41</sup>

Sunflower did not disclose to Boyd/Weidner that they had not included any easement rights over the portion of the Sunflower Property, which forms part of the Gravel Drive, in their subdivision of the properties. Not once did they mention that the Gravel Drive would not provide access to Lots 4 and 5 after Boyd/Weidner completed their purchase.<sup>42</sup> The Seller Disclosure Form 17 filled out by Sunflower for both Lots states on page 1 that there is a private road or easement for

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38 CP 397- 400.

39 CP 402.

40 CP 451.

41 See, CP 407 – 409. See also, CP 635 and CP 660 – 663, photographs taken by Margaret Weidner showing the storage of materials and trailers by Sunflower.

42 CP 452.

access to the property and that there are rights of way, easements or access limitations that might affect the use of the property.<sup>43</sup> Sunflower wrote in “Geer Lane Access” with no other information.<sup>44</sup> Boyd/Weidner had no way to know that they were not granted access to their property using the Gravel Drive as that is the only private drive or apparent easement leading to the Boyd/Weidner Property.<sup>45</sup>

Additionally, the statutory warranty deed which conveyed title to Boyd/Weidner has **six easements** in the legal descriptions alone, and the attached title exclusions page shows at least ten other easements, boundary line adjustments, or plat covenants which the Boyd/Weidner Property is either benefitted by or subject to.<sup>46</sup> Even with a careful review of the title report and available recorded documents, Boyd/Weidner could not have reasonably ascertained that they could not access their property by way of the advertised driveway.<sup>47</sup>

#### **4. Boyd/Weidner Development of the Property**

The Boyd/Weidner Property sat vacant until Boyd/Weidner began making plans to develop their lot in 2011-2012.<sup>48</sup> They hired an architect to start drawing up plans to build a residence on the Property and a

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43 CP 415 – 419.

44 CP 415 – 419.

45 CP 451- 452.

46 CP 421 – 426.

47 CP 451.

48 CP 451.

surveyor to put stakes down for estimated building sites and to stake the edges of the lot and estimate slope and topography for building purposes.<sup>49</sup> The surveyor specifically stated to Boyd/Weidner that he would map access and easement points but was not confirming their existence or whether they had been vacated, only noting them (or their absence) on the map for Boyd/Weidner's informational purposes.<sup>50</sup>

Boyd/Weidner purchased the Boyd/Weidner Property with the intent to build a home on the vacant land and with the intent to regularly use the Gravel Drive for ingress and egress to their new home.<sup>51</sup> In 2014, Boyd/Weidner sent emails to Sunflower as well as Tina Mierzeski, the owner of Lot 6, regarding their intention to begin construction in the spring of 2015 and that contractors would be using the Gravel Drive to access the Boyd/Weidner Property.<sup>52</sup> Sunflower responded to this by letter on October 19, 2014, in which they stated that Boyd/Weidner did not have legal access to the Boyd/Weidner Property using the Gravel Drive and also proposing several options for the parties to work out their issues.<sup>53</sup>

Boyd/Weidner reasonably believed when they purchased the Boyd/Weidner Property that they would have ingress and egress over the

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49 CP 428.

50 CP 451.

51 CP 451 - 452.

52 CP 435 - 437.

53 CP 438 - 440.

Sunflower Property via the Gravel Drive.<sup>54</sup> Sunflower has denied, and continues to deny, Boyd/Weidner's legal access to the Gravel Drive.<sup>55</sup> Sunflower frequently blocks the Gravel Drive with building supplies and trailers.<sup>56</sup> Without the use of the Gravel Drive, Sunflower basically sold Boyd/Weidner a landlocked parcel, to which they currently have no legal access to the only viable building site.

#### **5. San Juan County Code Provisions and Access from the South**

If unable to use the Gravel Drive, Boyd/Weidner discovered that the only other possible route from the only building site on the Boyd/Weidner Property to a main road would be substantially less convenient, impracticable (if not impossible) and prohibitively expensive for Boyd/Weidner.<sup>57</sup> This alternative route would require the construction of a very long driveway, with multiple switchbacks carved into the side of their lots to connect the only building site on the Boyd/Weidner Property to the southern boundary which borders the lower portion of Geer Lane.<sup>58</sup>

The elevation change from the southern boundary of the Boyd/Weidner Property to the buildable site at the top is roughly 50 feet – the elevation at the road is 200 feet and the elevation at the base of the

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54 CP 451 - 453.

55 CP 451 - 452.

56 CP 635 and CP 660-663.

57 CP 452 – 453 and CP 636-637.

58 CP 452 – 453 and CP 636-637.

building site is 250 feet.<sup>59</sup> The average grade of the incline of the lot is 33% from the edge road. Grade is calculated by dividing the change in elevation by the distance from the edge of the Geer Lane road bed to the edge of the building area at the north end of the lot.<sup>60</sup> The lot is roughly 150 feet from those two points.<sup>61</sup>

San Juan County Development Code requires that all driveways and private roads have a maximum grade of 16% for gravel, and that within 20 feet of the connecting roadway (the “approach”) the grade is no more than 4%.<sup>62</sup> According to the Curt Johnson Survey, it is roughly 28 feet from the edge of the existing road (at 200 feet elevation) to the 210 foot elevation band, which is a grade of 35%. Boyd/Weidner would be required to decrease the current grade by at least 88.5% in order to obtain a driveway permit. It would be almost impossible to do that with a straight

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<sup>59</sup> See, CP 428 and CP 151. Survey by Curtis Johnson shows elevation banding from above Geer Lane at 210 to the building site at 250. The San Juan County Polaris Property Search image shows the elevation banding at Geer Lane at 200 and the building site at 250. **Color copies are attached hereto as Exhibit A and Exhibit B.**

<sup>60</sup> Grade or slope is calculated by dividing the rise by the run (change in elevation/distance). 50 feet in elevation change divided by 150 feet of distance = .33

<sup>61</sup> See, CP 427-428 and CP 367. Curtis Johnson survey shows the distance from the edge of the Geer Lane road bed to the “dot” located in the 250 banded building area as roughly 150 feet of distance. According to the 2002 Sunflower boundary line adjustment, the lengths from north to south of Lot 4 and Lot 5 (prior to the 2008 boundary line adjustment) were 186.91 and 186.96 feet, respectively.

<sup>62</sup> San Juan County Title 18, Chapter 18.60.100(A) and (A)(7) and Figure 6.1. A true and correct copy of Figure 6.1 is attached hereto as **Exhibit C.**

approach to Geer Lane and in only 20 feet of distance.<sup>63</sup> Further, the driveway must be a minimum of 12 feet wide, per Figure 6.1 under San Juan County Code, Chapter 18.60.100 and any curves must have a minimum radius of 50 feet.<sup>64</sup> Even with switch-backs carved into the grade it would seem that it would be difficult to comply with the County Code requirements. Even if possible, the cost associated with such a plan would be prohibitive to Boyd/Weidner and frustrate the purpose of purchasing the Boyd/Weidner Property.

Sunflower obtained an estimate from an excavation contractor who stated that it would cost him \$10,000.00 to install such a driveway.<sup>65</sup> However, his testimony also states that he doesn't think that a private road requires engineering or county approval, which is directly at odds with the requirements of the San Juan County Code.<sup>66</sup> Sunflower's estimated figure does not take into account engineering, planning, or permitting, which would obviously increase that \$10,000.00 estimate. There is not currently, nor has there even been, an access drive from the southern portion of the

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63 San Juan County Title 18, Chapter 18.60.100(A) "Road Design Standards. The following design standards are applicable to all private roads: 1. Maximum grade allowed (gravel), 16.0 percent; maximum grade allowed (paved), 22.0 percent; 2. Minimum grade allowed, 1.0 percent; 3. Minimum curve radius allowed, 50 feet...."

64 Chapter 18.60.100(A)(7) Private road intersections with County roads shall be constructed in accordance with the construction standards for driveway access permits (Figure 6.1), except that the width shall be as required in this subsection;

65 CP 413, ln 14-18.

66 CP 413, ln 14-18.

Boyd/Weidner Property.<sup>67</sup> The slope is not cleared and covered in native vegetation and rocks.<sup>68</sup>

Sunflower even acknowledged that the use of the Gravel Drive for access to the Boyd/Weidner Property increases the value of the Lots. Upon questioning by Boyd/Weidner's counsel, Sunflower Managing Member Sean DeMerritt stated that, "[h]aving access from the upper section that I think you're referring to would make their Lots 4 and 5 likely more valuable."<sup>69</sup> Sunflower also acknowledged that the northern part of Lot 4 is the only flat or buildable surface on the Lot, and that he would build a house right at the edge of slope and use the flat portion for garden or other "useable, walkable ground."<sup>70</sup> Additionally, this is the most highly-elevated portion of the lot, thereby providing the most suitable location for home-building in order to get the best views of Fishing Bay and out into Eastsound. In fact, the views were so important to Sunflower and the marketing of the property that they recorded a view easement with the San Juan County Recorder under Instrument No. 2008-0829027.<sup>71</sup>

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67 CP 452.

68 **Id.**

69 CP 405, ln. 14-18.

70 CP 406, ln. 5-20.

71 CP 430 – 433.

## **V. LEGAL ANALYSIS**

On appeal, the appellate court reviews the ruling on a motion for summary judgment on a *de novo* basis, engaging in the same analysis as the trial court.<sup>72</sup> Both the law and the facts will be reconsidered by the appellate court.<sup>73</sup> Summary judgment denial is subject to review if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.<sup>74</sup>

### **A. Implied Easements, In General.**

The facts of the current case are almost identical to those necessary to find an implied easement.

An implied easement may arise (1) when there has been unity of title and subsequent separation; (2) when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title; and (3) when there is a certain degree of necessity that the quasi easement exist after severance. Unity of title and subsequent separation is an absolute requirement. The second and third characteristics are aids to construction....<sup>75</sup>

For unity of title to be severed, the parcels which are benefitted by or burdened by the easement must come into separate ownership. A Supreme Court case specifically discussing implied easements clarified this principle by noting that the “severance” element for an implied easement

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<sup>72</sup> *Mahoney v. Shinpoch*, 107 Wash. 2d 679, 732 P.2d 510 (1987).

<sup>73</sup> *Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526 (1990).

<sup>74</sup> *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wash. App. 791, 65 P.3d 16 (2003).

<sup>75</sup> *Adams* at 505-506, 268 P.2d 451 (1954).

occurred “at the time the unity of title has been dissolved by a division of the property **or** a severance of the title...”<sup>76</sup> The severance element is met when a larger parcel is divided and a portion thereof transferred out of common ownership or the common ownership of two separate parcels is severed by a transfer to another party.

The trial court properly held that “it is not disputed that Defendant at one time owned Lot 3, Lot 4, and 5 and that the unity of title element is satisfied.... the Court is persuaded that Defendant’s sale of Lots 4 and 5 to Plaintiffs, while retaining Lot 3, satisfies the severance element.”<sup>77</sup> Further, the chain of title documents referenced on Pages 6 – 8 herein, show that the lots in question transferred from Simonson to Geer; from Geer to Geer Perry (the Tract); from Geer Perry to Cardinale (Tract and Gailey’s Lots); Cardinale to Monday (Tract and Gailey’s Lots); and from Monday to Sunflower (Tract and Gailey’s Lots) in the exact same configuration. Only when Sunflower sold the reconfigured Lot 4 and Lot 5 to Boyd/Weidner did that chain of unified ownership finally break.

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<sup>76</sup> *Evich v. Kovacevich*, at 156, 204 P.2d 839 (1949) [emphasis added].  
<sup>77</sup> CP 765.

**B. Issue 1.** When controlling authority states that the element of “use” for an implied easement is defined as, “when there has been an apparent and continuous quasi easement existing for the benefit of one part of the estate to the detriment of the other during the unity of title”; and where the Washington Supreme Court has held that unity of title and subsequent separation is the only absolute requirement for an implied easement, is a party seeking the establishment of an implied easement required to prove “apparent and continuous use” of the easement without regard to necessity?

The trial court ruled that Boyd/Weidner failed to produce competent evidence “on the continuous use element” and that therefore “the Court will not address the reasonable necessity element.”<sup>78</sup> This holding is in direct conflict with the controlling authority on implied easements. The Supreme Court of Washington has held that “necessity alone justifies the inference of an easement without regard to other circumstances” and that “necessity without reference to any prior use may justify the implication of an easement in favor of the conveyee though a like necessity would not justify an implication in favor of the conveyor....”<sup>79</sup>

In this case, the conveyee is Boyd/Weidner, and what they are seeking is essentially an easement by implied grant, as opposed to an implied easement by reservation, which are both discussed in the *Adams v. Cullen* case. That case specifically held that if the necessity is great enough, use does not even have to be a factor. A party seeking an

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<sup>78</sup> CP 766.

<sup>79</sup> *Adams* at 509.

easement by implied grant only has to prove “reasonable necessity”, whereas easement by implied reservation requires a showing of “strict necessity”.<sup>80</sup>

In *Adams v. Cullen* the Court found an implied easement for use of a driveway based upon prior use of the driveway and the necessity for the grantee to use it for enjoyment of their property. The Court gave weight to the evidence that there had never been a driveway to the benefitted portion of the grantee’s parcel from their other option for legal access off of another street.<sup>81</sup> The Court in that case was applying a strict necessity standard, not merely reasonable necessity. In the present case, there has never been another access point to the Boyd/Weidner Property (or to any of the neighboring lots) from any point on upper or lower Geer Lane other than the Gravel Drive. The topography of the Boyd/Weidner Property shows that even if a driveway could be constructed from the southern portion, it would no doubt be expensive to install and moreover “not a satisfactory substitute for the present driveway.”<sup>82</sup> Implied easements do not require that Boyd/Weidner have no other possible way to access their Property.

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<sup>80</sup> *Id.* at 507 - 508.

<sup>81</sup> *Id.* at 510. “There is no evidence that there ever had been a driveway to the carriage house apartments from Riverside avenue. It is apparent from the many photographs in evidence that if such a driveway could be constructed, it could only be done at great cost and would not be a satisfactory substitute for the present driveway....”

<sup>82</sup> *Id.* at 510.

The balance between necessity and use is summarized by the

*Adams* Court thusly:

Not only may the implication arise in favor of the conveyor when a prior use has been made, but it may arise even though no use of the land corresponding to the use claimed had ever been made prior to the conveyance. **If land can be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the conveyor or the conveyee on the basis of necessity alone without reference to prior use....** Eventually, without its being possible to draw any precise line, necessity will not be sufficiently great to justify the implication except as it is strengthened by reference to a prior use of the land. In the different situations that may appear, a constantly decreasing degree of necessity will require a constantly increasing clearness of implication from the nature of the prior use.<sup>83</sup>

The Court clearly holds that necessity alone is enough to find an easement by implication, and only as necessity decreases does the prior use become a more important factor.

Further, the *Adams* Court summarized the state of the law on implied easements and noted that, “In the greater number of cases, its necessity to the use of land of the claimant is the circumstance that contributes most to the implication of an easement.”<sup>84</sup> From the reading of these cases, the weight and importance of the elements of an implied easement are (from most important to least) 1) Unity of title and subsequent severance; 2) Necessity; 3) Prior Use. Instructively, the Court

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<sup>83</sup> *Id.* at 508-509 [emphasis added].

<sup>84</sup> *Id.* at 508.

also noted that “the rule is not a hard and fast one, and that the presence or absence of either or both of these requirements is not necessarily conclusive.”<sup>85</sup> Boyd/Weidner’s alleged failure to provide evidence establishing “apparent and continuous use” of the Gravel Drive should not have been fatal to their claim for an implied easement in light of the Supreme Court’s clear emphasis that necessity is the more critical factor. The trial court clearly erred in dismissing Boyd/Weidner’s claims on this basis.

**C. Issue 2.** Given that all Boyd/Weidner needed to prove is the “reasonable necessity” of the implied easement, did the evidence presented by Boyd/Weidner establish that the necessity of the implied easement is more than reasonable, and therefore the standard of use is reduced and the showing of some prior use is sufficient to grant the implied easement?

As discussed above, the Washington Supreme Court has held that the degree of necessity required for an easement by implied grant is “reasonable necessity.”<sup>86</sup> Many other cases define and provide context for what constitutes reasonable necessity under the circumstances. The Court in *Adams* notes that reasonable is defined as “whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute.”<sup>87</sup>

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<sup>85</sup> *Id.* at 506. See also, *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 668, 404 P.2d 770 (1965).

<sup>86</sup> *Id.* at 507 - 508.

<sup>87</sup> *Id.* at 505-506.

The Washington Supreme Court in *Bushy v. Weldon* held that,

The degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. It is sufficient if full enjoyment of the property cannot be had without the easement, or if it materially adds to the value of the land. It has been contended that the use of the word 'necessary' in these cases is misleading; that the so-called 'necessity' upon which the judges rely is in fact no necessity at all, but a mere beneficial and valuable convenience.<sup>88</sup>

The *Bushy v. Weldon* case is one where the appellant was seeking quiet title to a driveway and the Court denied that request and instead granted an implied easement over that driveway to the respondent. The driveway existed prior to either party purchasing their respective properties, although it was installed initially while the properties were in common ownership many years prior. The Court considered the following factors in determining whether it was reasonable for Weldon to establish a second driveway within her own property:

Inasmuch as appellant urgently insists that respondent should be compelled to construct another driveway on the south side of her property, it seems necessary to describe to some extent the condition of respondent's home.... If the respondent were compelled to build a new driveway on the south portion of her property, it would require the construction of an eight foot driveway from the curb of the street to the rear of the house, **a distance of 140 feet**.... The location of a new driveway **would require the building of a retaining wall** along the south boundary of respondent's property.... Appellant contends that respondent could at

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<sup>88</sup> *Bushy v. Weldon*, 30 Wash.2d 266, 270, 191 P.2d 302 (1984).

reasonable cost build a driveway along the south border of her property; that she should be compelled to so....<sup>89</sup>

Those factors are similarly present in the current case. Boyd/Weidner would also be required to seek a new, secondary access point from the south.<sup>90</sup> The driveway would have to span 150 vertical feet, and would likely be twice that in actual length, given the need for switch-backs to accommodate the steep grade.<sup>91</sup> Further, the sloped, wooded lot would be reduced to nothing more than a continuous driveway from top to bottom, significantly marring the appearance of the property.<sup>92</sup>

The *Bushy* Court found that the driveway was necessary for the reasonable enjoyment of the respondent's property. They found it compelling that the trial court determined that the value of the property would be decreased by access from the south and that another driveway would be a "detriment" to the appearance of the property.<sup>93</sup> Both of those factors are present in the current case. Sunflower even admitted that the Boyd/Weidner Property was more valuable with access to the north and less valuable with access from the south.<sup>94</sup>

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<sup>89</sup> *Id.* at 271, 191 P.2d 302 (1984).

<sup>90</sup> CP 452.

<sup>91</sup> CP 428.

<sup>92</sup> CP 452.

<sup>93</sup> *Bushy* at 271.

<sup>94</sup> CP 413, ln. 2-9. "Q: Is [Boyd/Weidner' Property] worth more if there's access from the north through the subject driveway? A: Yes, likely. Q: ...Is [Boyd/Weidner' Property] worth less if the only access is from the South? A: yes, depending on how they develop it."

Further, the “reasonable necessity” discussed by these courts doesn’t even have to apply to the use of the entire parcel. In *Hellberg* the Supreme Court noted that it only needed to be shown as “reasonably necessary for the fair enjoyment **of the portion benefited** by such use.”<sup>95</sup> In the present case, the only way for Boyd/Weidner to enjoy the northern part of their property, the flat, buildable, portion, is for them to use the Gravel Drive.<sup>96</sup> The Gravel Drive itself terminates in the boundaries of Lot 4 and 5.<sup>97</sup> Their only other option completely alters the land they purchased. The Court in *Hellberg* granted an implied easement to the party seeking it, even though they were only a tenant, because the easement was required for the fair enjoyment of the portion of the property currently served by an existing driveway, despite the fact that the property could technically be accessed from a different location.

Without the ability to use the Gravel Drive, Boyd/Weidner are deprived from enjoying their property as they purchased it, without reasonable access to the only buildable portion of the lots. The degree of necessity is obvious. If they cannot use the Gravel Drive, Boyd/Weidner cannot access the building site until they have engineered and constructed a massive switch-back driveway up the entire length of their property. It

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<sup>95</sup> *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965)[emphasis added].

<sup>96</sup> See, CP 625, ln. 5 – 24. “Q: That is the, in large part, that’s the only level part of [Boyd/Weidner’ Property], is it not? A: The northern part of Lot 4. Q: Yes. A: Yes.”

<sup>97</sup> See, CP 400 and CP 377.

should be noted that in almost every single case which discusses implied easements, the Supreme Court and the Court of Appeals grant an easement to the party seeking it. The Court granted an implied easement in *Adams, Bushy, Hellberg, Evich, Hubbard v. Grandquist*<sup>98</sup>, and *Bailey v. Hennessey*. Sunflower cited to these same cases in their argument at the trial court, but never provided the context that none of these authorities rejected an implied easement.

**Issue 3.** Was the evidence presented to the trial court that (1) the Gravel Drive had been installed and used prior to Sunflower's purchase of the lots, and (2) used by Sunflower to access Lots 3, 4, 5, and 6 and to store materials, vehicles, and trailers from 2001 to date, sufficient evidence of "prior use"?

Sunflower owned all of the Lots at issue in this case and accessed them using the Gravel Drive and Geer Lane, as did the previous owners of the Lots. To this day, the Gravel Drive is used by the owner of Lot 6<sup>99</sup> and Sunflower to access the lots, as it has always been used.<sup>100</sup> The Gravel Drive very clearly terminates within the boundary of the Boyd/Weidner

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<sup>98</sup> *Hubbard v. Grandquist*, 191 Wash. 442, 71 P.2d 410 (1937). Case not specifically cited herein but cited by other authority cited herein.

<sup>99</sup> See, CP 658. Photograph taken by Margaret Weidner showing the owner of Lot 6, Tina Mierzeski, parking her vehicles on the Gravel Drive, in front of the garage which feeds directly into the Gravel Drive.

<sup>100</sup> See, CP 660 – 663. Photographs taken by Margaret Weidner showing Sunflower's use of the Gravel Drive to park cars, store materials, and market neighboring lots.

Property, providing access to it.<sup>101</sup> Sunflower testified that the Gravel Drive was in place prior to their purchase in 2001.<sup>102</sup> They also testified that prior to 2008, in the flat building area now owned by Boyd/Weidner, they removed some trees, bolstered an existing retaining wall (which was installed prior to their purchase) and laid down a load or two of gravel to the area.<sup>103</sup>

The listing materials and photographs used to market the lots for sale included driving directions which instructed potential buyers that the “driveway to the property [is] on the right hand side” off of Geer Lane.<sup>104</sup> The photographs included with the online listing materials even included a shot of the Gravel Drive while standing in the middle of the flat, building, area.<sup>105</sup>

The evidence of prior use is very clear. The Gravel Drive itself was established prior to 2001, and is clearly a road/driveway with clear signs of automobile use. As discussed above, Sunflower used the Gravel Drive

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101 **See**, CP 400. Screen caption of aerial view from Google Maps, dated 10/13/2015 showing the Gravel Drive terminating within the boundaries of Boyd/Weidner’ Property. **See also**, CP 377. Print out from San Juan County Assessor Website for year 2014 (cont) showing Boyd/Weidner’ Property. Lot 5 is highlighted in purple. Vehicles parked in the area belong to Sunflower. Gravel Drive clearly feeds into Boyd/Weidner’ Property and terminates thereon. **See also**, CP 117. The Gravel Drive terminates right next to Boyd/Weidner’s RV trailer.

102 CP 527, ln. 13-17.

103 CP 531, ln. 6 – 25.

104 CP 639.

105 CP 648.

to access the Boyd/Weidner and Sunflower Properties to do some clearing, lay down gravel, shore up the retaining wall, to store materials and trailers, to park, to take listing photographs, and more. Sunflower testified that they didn't want Boyd/Weidner having an easement over the Gravel Drive because it would prevent them from continuing to use it to access the remainder of Lot 3 that Sunflower owned, and to store things or park in that area.<sup>106</sup>

The use of the Gravel Drive was apparent to any potential purchaser of the lots. Sunflower marketed that access. "If the owner of land has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantee will take it with the right to have that favorable condition continued. Upon the severance of the heritage a grant will be implied of all those continuous and apparent easements which had in fact been used by the owner during the unity."<sup>107</sup> Under this ruling, Boyd/Weidner should have the right to have the favorable condition, the use of the Gravel Drive, continued.

The purpose of an implied easement is to protect purchasers from acquiring property for which they would have no other reasonable means of access except over the property of the seller. "The theory of the

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<sup>106</sup> CP 626, ln. 14 – 35, CP 627, ln. 1 – 25.

<sup>107</sup> *Bailey v. Hennessey*, 112 Wash. 45, 50, 191 P. 863 (1920);

common law is that where land is sold (or leased) that has no outlet, the vendor (or lessor) by implication of law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser (or lessee) to have access to his property.”<sup>108</sup>

In this case, pre-Sunflower use of the Gravel Drive can at least be implied by the mere existence of the driveway itself, combined with Sunflower’s own use of the Gravel Drive from 2001 to date, testimony regarding their maintenance and improvements to the Gravel Drive and storage of trailers, materials, and intent to use the Gravel Drive as access to the remaining portion of Lot 3. Boyd/Weidner should not be required to prove that the Gravel Drive was used every day for a certain number of years or some other standard. They have proved prior use, and the degree of necessity for them to continue that use is great enough that the required showing of “use” should be lessened under the *Adams v. Cullen* standard. Further, use is **not** an absolute and required element necessary to find an implied easement. As noted previously, “[u]nity of title and subsequent separation is the only absolute requirement” to finding an implied easement.<sup>109</sup>

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<sup>108</sup> *State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County*, 77 Wash. 585, 588, 137 P. 994 (1914).

<sup>109</sup> *Adams* at 505.

The trial court erred in finding that Boyd/Weidner did not provide sufficient evidence of prior use because they erred in applying an incorrect standard. A showing of use is not even a required element and use certainly cannot be viewed in a vacuum absent an analysis of the necessity of the easement.

## **VI. CONCLUSION**

The Appeals Division should reverse the grant of summary judgment in favor of Sunflower and instead grant summary judgment to Boyd/Weidner. The trial court misapplied the law on implied easements and prioritized the element of prior use over reasonable necessity. The presence of one or the other element is not determinative in an implied easement case and, in fact, the courts in this State have consistently ruled that of the two, necessity is the more important element. Boyd/Weidner provided sufficient evidence of prior use of the Gravel Drive, and have clearly established that their use of the Gravel Drive is more than reasonably necessary. They cannot enjoy their Property as they purchased it without this easement.

Dated this 27<sup>th</sup> day of May, 2016.

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DECLARATION OF SERVICE

I, Rosalie Mobley, state:

On this day I caused the foregoing Brief of Appellant/Cross-Respondent to be delivered by ABC Legal Messengers for delivery no later than May 9, 2016 to the Court of Appeals Division I. On this day I also caused the foregoing to be delivered via email and US Mail to:

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Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9<sup>th</sup> day of May, 2016 at Seattle, Washington.

  
Rosalie Mobley

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