102363-4

No. 84712-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

CITY OF EDMONDS,
a Washington Municipal Corporation,

Respondent,

v.

THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS,
a Washington Nonprofit Corporation,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The Association of Apartment Owners of the Edmonds Ebb Tide ("Ebb Tide") asks this Court to review the decision terminating review set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division I filed its published opinion in this case on August 21, 2023. A copy is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did Division I's published opinion misapply the criteria for the justiciability of a UDJA action, in particular, where it failed to properly address whether a court could deliver a final, conclusive result as to a project whose plans were only 30% complete and numerous construction-related issues needed to be addressed?

2. Did Division I's published opinion contravene well-established cases on the principles for the interpretation of an easement where the court concluded that easement extended underground and was exclusive, when the easement did not so provide, ignoring extrinsic evidence that the parties in 1977 never intended the easement to permit a massive elevated walkway with pilings driven into the ground, for the exclusive use of the public, thereby destroying the views and beach access for a waterfront condominium?

D. STATEMENT OF THE CASE

Division I's published opinion is predicated upon an abbreviated factual recitation that omits critical facts regarding the easement at issue here. Op. at 2-5.

For example, the opinion barely acknowledges that Ebb Tide is a 5-story, 25-unit *waterfront* condominium in Edmonds; that looks directly onto Puget Sound, with a common area beach-side patio for use by all residents; the patio sits above a bulkhead looking over the Ebb Tide's private sandy beach. CP 60. Ex. 125. Ebb Tide owners have direct access to the beach and shoreline by stepping over the bulkhead from the patio, never leaving the Ebb Tide property. RP 424-25. Historically, they anchored sailboats offshore and rowed boats directly to the beach. *Id.*

Division I's opinion also ignores the sheer scale of the City's proposed elevated walkway, nowhere stating that although not final in design, the walkway will require at least *seven* large steel 30" diameter foundation pier/piling structures pounded into the property to support a horizontal walkway ten

feet wide (the full width of the easement) and running across the entire 154-foot width of the Ebb Tide beach. *Compare* Ex. 1, 19, 21.

The proposed walkway, extending over the entire easement area, will eliminate Ebb Tide owners' right to cross the beach, ex. 21 at 9-10, and will be a continuation of its "waterfront promenade," with no beach-level public access. *Id.*; Ex. 3. It will have a solid wall-like appearance viewed from the Ebb Tide patio. Ex. 19, 21. The walkway will be higher than that patio floor, meaning Ebb Tide owners sitting on their patio, and all first-floor condominium units, will no longer see the waterfront, but only the walkway wall with people walking several feet higher and looking down on them. Ex. 21 at 12-14. The elevated walkway will deprive Ebb Tide owners of any use of the easement area. Ex. 19, 21, 138a at 14.

But perhaps the most profound omission in Division I's opinion is its neglect of the full 46-year history of the City's walkway actions. Most critically in June 1977, a City-

commissioned study first examined the feasibility of a walkway at this site. The City's structural engineers prepared a comprehensive report, which Division I ignored in its opinion. That 1977 report noted strong opposition to any walkway, *id.* at 16, and largely agreed with Ebb Tide's former owners that an elevated walkway "would be visually objectionable and interfere with Ebb Tide's beach access. *Id.* That report *rejected* the possibility of an elevated walkway on the beach, *id.*, in favor of a beach surface walkway. *Id.* Ultimately, the City abandoned even its 1977 effort at securing a beach walkway.

In 1983, Ebb Tide's new owners conveyed an easement to the City for $1. Ex. 1. (*See* Appendix.) That easement did not identify any contemplated "public improvements, facilities, utilities, and necessary appurtenances," nor did it expressly confer an exclusive right to the City, allowing it to exclude Ebb Tide from using the easement area. *Id*. It made no reference to any City right to construct anything *under* the surface of the property. *Id.*

Division I's recitation of what the parties intended in 1983 is incomplete, particularly given the City's 1977 report. Op. at 2, 12-13. The City's attorney who negotiated the easement in 1983, Scott Snyder, testified that the easement negotiations arose from trespass complaints by Ebb Tide owners and the City's desire to address that concern with an easement linking the City-controlled beaches to the north and south of the Ebb Tide's beach. Ex. 20 at 11. Any walkway was supposed to be "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." *Id*. at 15-16. Snyder testified that Ebb Tide wanted pedestrians away from the seawall so they could use their patio with reasonable privacy, *id*. at 13, without interruption of their views, or disruption of their use of the common areas and views. *Id*. at 17. Critically, Ebb Tide did not want "a large fishing peer-like [sic] structure blocking their view." *Id*.[1] The easement

[1] The nearby Edmonds fishing pier, was built around 1978 had a deck level varying from 16 to 21 feet. Ex. 39; CP 1764-67.

contained no plan for any specific improvements and the language regarding improvements was merely a "place holder" for the future, according to Snyder, a point again ignored by Division I. *Id*. at 15. Nothing about the easement's negotiation contemplated exclusive use by the City or the destruction of Ebb Tide's historic water views or beach access.

Sixteen years later, in 1999, a proposal for an elevated walkway in the easement surfaced for the first time when the City's Planning Board proposed such an elevated walkway and the City Council preliminarily approved it. Ex. 9, 10, 11, 12, & 13. The elevated walkway mirrored the elevated walkway proposed in this lawsuit. Ex. 36. The City retained the same engineering firm that prepared the 1977 report, ex. 36, to prepare reports to the Board and to make presentations to the City. Ex. 10, 11, 13. Ebb Tide continued to oppose an elevated walkway.

Division I's opinion makes no note of this intent to avoid a huge elevated project.

Ex. 42 at 2. *See also*, Ex. 40 (Ebb Tide opposition).[2] Based on Ebb Tide's opposition and impracticality of the proposed walkway within the easement's height limitation, the City once again terminated any plan for an elevated walkway. Ex. 13 at 16. Division I acknowledges the City's abandonment of its 1999 effort, op. at 4, but offers no explanation of why Ebb Tide opposed the elevated walkway, if the Court's interpretation of the $1 easement as contemplating an elevated walkway is correct.

In 2016, seventeen years later, the City yet again proposed a massive, elevated walkway that is the subject of the City's action for declaratory relief.

Below, the trial court ruled that the easement was ambiguous, but the parties intended some sort of "improved walkway." CP 1576-77, 3050. But after a bench trial, the trial

[2] This opposition, consistent with the opposition to an elevated walkway in 1977, renders implausible any notion that the 1983 easement was intended by Ebb Tide as grantor to relinquish views/beach access for the sum of $1.

court concluded that Ebb Tide intended to grant an exclusive easement across its entire private beach, cutting off its own access, as well as the resulting negative impacts on views and privacy. CP 75-76. The court entered a declaratory judgment that the "Planned Improvements," a conceptual design for the elevated walkway, initially annexed to the City's complaint, CP 3874-77; ex. 19, was the basis for a final resolution of the parties' dispute, although only 30% complete; the court ruled that any final design had to be "materially consistent with the Planned Improvements." CP 64-67, 69-71.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) Division I's Published Opinion Contravenes This Court's Decisions on a Justiciable Controversy in a Declaratory Judgment Action

Before declaratory relief may be granted under the Uniform Declaratory Judgment Act, RCW 7.24 ("UDJA"), a threshold issue is whether the controversy is justiciable. Division I's published opinion is contrary to opinions of this Court and the

Court of Appeals on UDJA justiciability, meriting review. RAP 13.4(b)(1), (2).

Justiciability is a threshold issue. *Coppernoll v. Reed*, 155 Wn.2d 290, 300, 119 P.3d 318 (2005). This Court has defined a "justiciable controversy" under a four-part test. *To-Ro Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (*quoting Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). The fourth factor – whether a final, conclusive result can be ordered – is at stake here.

But rather than confront the justiciability elements this Court has repeatedly articulated in UDJA actions, Division I's opinion pivots to a discussion at length of ripeness. Op. at 5-7. Only belatedly does it address the fourth justiciability element. *Id.* at 7-8.

Washington law has not described in detail when a final, conclusive result is established.[3] Regarding that fourth

[3] This Court has been clear that advisory opinions must be avoided in declaratory judgment actions. *Walker v. Munro*, 124

justiciability element, in *Bloome v. Haverly*, 154 Wn. App. 129, 141-42, 225 P.3d 330 (2010), Division III held that where there were no firm building plans for a project, declaratory relief was inappropriate because no final conclusive relief was yet possible. In its opinion, Division I asserts that *Bloome* is "distinguished easily," op. at 9, stating that the Planned Improvements are enough to guide the trial court. But that bald assertion does not come to grips with the fact that *more litigation*, not a final, complete resolution of the controversy may be necessary to address the City's needed construction easement and the IBC safety rail question, and whether the City's final project, predicated upon building plans only 30% complete, will be "materially consistent" with the Planned Improvements is a question fraught with potential controversy. *Bloome* was clear – no building plans, no final, complete resolution of the parties' controversy for UDJA relief. 154 Wn. App. at 141-42 (in the

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Wn.2d 402, 414, 879 P.2d 920 (1994).

absence of building plans addressing the construction of a downhill building without interference with the uphill owners' views, no *conclusive* resolution of the parties' controversy was possible).

This need for final, complete relief is consistent with this Court's treatment of relief for specific performance where specificity as to what must be performed for equitable relief to be granted is essential. In *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993), for example, this Court held that there must be clear and unequivocal evidence of the terms and character of the contract before specific performance is awarded. The evidence must leave "no doubt." *Id.*[4] Like justiciability under the UDJA, a court must be able to afford *conclusive relief* to the party seeking specific performance.

Division I's published opinion is contrary to *Bloome*; the

[4] Division I dismissed this analysis without substantively addressing it; instead, it simply ignored the analogy falling back on the literal fact alone that specific performance is not an issue. Op. at 9 n.2.

trial court's decision could not result in a final, conclusive resolution of the parties' dispute. Division I offers no firm ground in its opinion as to when a decision can be final, conclusive. Moreover, it simply ignores relevant facts. For example, the City's "Planned Improvements" for the walkway were about *30% complete*. CP 1438. It was also undisputed that the City's walkway project would require use of Edd Tide property for construction that was outside the terms of the easement, CP 1598.[5]

[5] The City admitted in discovery that it would have to condemn a temporary construction easement for an undetermined additional portion of the Ebb Tide beach for an as yet undetermined period of time to facilitate construction of the elevated walkway, including the pile-driving of at least seven steel pilings to a depth of up to fifty feet. CP 109, 191; Ex. 138a. at 2-4.

Ironically, the trial court denied the Ebb Tide's summary judgment motion *raising the construction easement* issue as a basis for denying declaratory relief, as "unripe." RP 21. However, if that issue was unripe, the City's request for declaratory relief based on a merely "conceptual" design was then clearly unripe as well.

An additional question was whether the project would require safety railings required by the International Building Code ("IBC");[6] if they were mandated, the walkway would violate the easement's 17.00 MLLW height limitation. CP 1120, 3327-46 (safety railings); RP 234 (walkway with railings would be 25 MLLW). If required, safety rails would add approximately another 42 inches to the height of the walkway, well above the easement's height limitation. RP 234; CP 1120. Division I's opinion glided past all these facts.

Because a final, conclusive decision based on a merely 30% complete conceptual design for which no permits have been obtained and with attendant construction issues could not be rendered, the controversy here was not justiciable and Division I

[6] Ebb Tide planned to provide expert testimony that safety railings were IBC-mandated by Washington law, and, therefore, the proposed elevated walkway would be above the easement's height limitation. CP 307-19, 3327-46; *see* WAC 51-50 et seq. However, the City moved in *limine* to exclude any mention of the IBC at trial as "irrelevant." CP 1432-37. The trial court granted the motion. RP 21-43; CP 223-25.

erred in entering a declaratory judgment. Review is merited. RAP 13.4(b)(1), (2).

(2) Division I's Published Opinion Contravenes Washington Law on Multiple Levels as to the Easement's Interpretation

In addressing an easement, this Court has historically looked to the parties' intent, focusing on the express language of the easement. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981); *City of Seattle v. Nazarenus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). Moreover, this Court has construed easements strictly in accordance with their terms to give effect to the parties' intent. *Sanders v. City of Seattle*, 160 Wn.2d 198, 214-15, 156 P.3d 874 (2007). A servient estate should not be "subjected to a greater burden than that originally contemplated by the easement grant." *Rupert v. Gunter*, 31 Wn. App. 27, 31, 640 P.2d 36 (1982); *Green v. Lupo*, 32 Wn. App. 318, 324, 647 P.2d 51 (1982). When an easement does not state that it is exclusive as against use by the grantor, by law, it is nonexclusive. *Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 784-

85, 425 P.3d 560 (2018).

If ambiguity exists in an easement, extrinsic evidence is admissible to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions. *Nazarenus*, 60 Wn.2d at 665.

Motions practice below resolved some of the issues as to this easement.[7] On summary judgment, the trial court ruled the easement was valid and enforceable, but ruled on Ebb Tide's motion that the easement was ambiguous, requiring extrinsic evidence to analyze the parties' intent. CP 3051. A later summary judgment order determined that the City's contracted surveyors "intended the height limitation in the easement to be calculated as 1.84 feet above the finished first floor elevation of the Ebb Tide." CP 2235-36. A third motion determined that the easement allowed "the construction of an improved walkway in

[7] The orders are in the Appendix.

the easement area." CP 1576-77. The order did not say "elevated walkway," but "improved walkway," which would include the beach-level boardwalk contemplated by the City in 1977. *Id.*

Division I's published opinion was flawed in three key respects as to the easement's scope.

(a) The Easement Does Not Extend Underground

The omission of language allowing construction or installation of structures below the easement area is crucial, as this Court ruled in *Coleman v. Everett*, 194 Wash. 47, 49-50, 76 P.2d 1007 (1938). There, the Court specifically held that an easement containing language that it extended "along and under" a property did not mean that it could be applied *above* the property. *Accord*, *Commonwealth ex rel. Bell Tel. Co. v. Warwick*, 40 A. 93, 94 (Pa. 1898) ("The grant however of authority to run and maintain wires "over and through" the streets, did not include permission to lay them under, below or beneath.") (quoted in *Coleman*, 194 Wash. at 50).

Because the easement was drafted by the City,[8] if it intended to construct an elevated walkway with support pilings installed underground or at least have a "placeholder" for such a structure, it should have provided for access *under* the easement area. *See, e.g.*, *Murphy v. Hendrickson*, 8 Wn. App. 2d 150, 156, 437 P.3d 736, *review denied*, 193 Wn.2d 1034 (2019) (easement stating: "An easement for ingress, egress and utilities over, across and *under* a strip of land…") (emphasis added); *Rainier View Court HOA v. Zenker*, 157 Wn. App. 710, 716, 238 P.3d 1217 (2010), *review denied*, 170 Wn.2d 1030 (2011) (easement stating: "We hereby convey an easement for ingress, egress and utilities over, *under*, and across the private roads as shown hereon") (underlining added). The easement in this case explicitly says: "over, through, across and upon," not "under,"

[8] As the drafter of the easement, any ambiguities are construed against the City. *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966). Division I avoids this rule by *sua sponte* overturning the trial court order finding the easement ambiguous. Op. at 14 n. 5.

not "below," and not "beneath." Ex. 1 at 1. The City's easement failed to contain such language.

Division I's analysis of *Coleman*, op. at 14-15, was simply wrong. Rather than address this Court's holding there, it avoided it. First, it effectively admits in two places in its opinion that the easement failed to give the City the right to build beneath the surface. Op. at 11 (no limit on depth), 14 (same). The easement placed no limit *on depth* because *it never gave the City the right to build underground*. As Division I acknowledged, op. at 11, the absence of enumerated authority, i.e., the right to build *under* the surface, means that the easement *excluded* it. *Wash. Monumental & Cut Stone Co. v. Murphy*, 81 Wash. 266, 270, 142 P. 665 (1914). Second, its effort to distinguish *Coleman* as "inapposite" makes little sense. This Court in *Coleman* held that in the absence of easement language providing for above the surface construction, such construction was foreclosed; the analysis is no different for language involving construction *below* the surface, as here. When Division I suggests that there is no conduct as yet

from the City from which the parties' intent may be derived, as in *Coleman*, op. at 14-15, that is not true. The City's Planned Improvements contemplate pilings going 50 feet below the surface of the beach to support the elevated walkway, as the trial court noted, CP 75, and the City's plans provided. CP 3877.

Division I's published opinion is contrary to this Court's established authority because it ignores the easement's express language that nowhere extended it underground. Review is merited. RAP 13.4(b)(1), (2).

(b) The Easement Is Not Exclusive

Further, Division I again ignored the express easement language, concluding in a footnote that the easement gave the City what amounted to *exclusive* use of it. Op. at 15 n.6.

Washington recognizes two types of easements: exclusive and nonexclusive. *Johnson*, 5 Wn. App. 2d at 783-84. Easements are generally nonexclusive unless the easement includes clear and unambiguous language of exclusivity. *Id*. at 784-85 (citing *Latham v. Garner*, 673 P.2d 1048, 1051 (Ida.

1983)). The owner of a servient estate typically has the continuing right to use its land burdened by an easement. Unless an easement is exclusive, the owner of the servient estate may use the property as it chooses, so long as its use does not unreasonably interfere with the dominant estate's enjoyment of the easement. *Hayward v. Mason*, 54 Wash. 649, 652, 104 P. 139 (1909); *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002).

Exclusive easements are generally *disfavored* because exclusivity "strips the servient estate owner of the right to use his land." *Latham*, 673 P.2d at 1050. This Court has held that an easement for ingress and egress without any exclusivity language is "simply an easement, and nothing more" and does not convey exclusive rights. *Hayward*, 54 Wash. at 651.

The City admitted the elevated walkway will effectively eliminate Ebb Tide's access to the shoreline from the Ebb Tide patio or from the shore to the patio, as has been usual and customary throughout Ebb Tide's existence. Ex. 138a. at 4; Ex.

21 at 9-10. Diagrams provided by the City confirm that the elevated walkway will block Ebb Tide's direct access to the beach and will force owners to take a circuitous route over the City's neighboring property. Ex. 21 at 9-10 (showing, respectively, Ebb Tide's beach access currently, and future Ebb Tide circulation). Ex. 138a at 5; Ex. 21 at 10.

Division I's answer to these facts was that Ebb Tide owners could simply walk around the elevated walkway to access the beach like the rest of the public. Op. at 15 n.6.[9] Moreover, it ignored the obvious blockage of the owners' views of the water.

The easement here does not contain the word "exclusive," ex. 1, and Division I therefore *facially non-exclusive* should have treated it as non-exclusive after *Johnson*, but failed to do so.

[9] At least this was better than the City's expert notion that Ebb Tide owners, some of whom are elderly, could slide kayaks under the walkway or crawl under it. RP 249, 254-55. That expert also suggested that owners could use a ladder to crawl over the elevated walkway. RP 258.

Division I's published opinion allows for an exclusive easement when the easement never provided for such exclusivity. Review is merited. RAP 13.4(b)(2).

(c) Division I's Published Opinion Erred in *Sua Sponte* Ruling that the Easement Was Unambiguous, Ignoring Contrary Extrinsic Evidence

A third way Division I's published opinion misapplies Washington law on easements is in its highly selective treatment of extrinsic evidence, both in interpreting whether the easement provides exclusivity to the City and generally. Division I addressed extrinsic evidence as to justiciability in a footnote. Op. at 12 n.3. It selects only certain extrinsic evidence to discuss the easement generally. Op. at 12-13.

Division I *sua sponte* overruled the trial court's order finding the easement to be ambiguous. In *Dalton M, LLC v. North Cascades Trustee Servs., Inc.*, __Wn.2d __, __ P.3d __, 2023 WL 5615756 (2023), this Court recently held that the Court of Appeals should not *sua sponte* raise issues not addressed by

the parties.[10] The City here never sought review of the trial court's ruling that the easement was ambiguous. Division I did so on its own, without even alerting the parties that it was contemplating doing so to give the parties a chance to brief or argue the point, rendering the entire 4-day trial in the case a waste of time for the court and the parties.

Division I's departure from proper practice is consequential in two respects. First, as to exclusivity, while extrinsic facts associated with the grant of an easement may raise the possibility that the grant was exclusive, *McCullough v. Anderson*, __ Wn. App. 2d __, 2023 WL 5378006 (2023),[11] that was not true here. Extrinsic evidence did not support exclusive use by the City.

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[10] The *Dalton M* court specifically noted that before an appellate court surfaces an issue *sua sponte*, RAP 12.1 requires that the issue be essential to properly decide the case and the parties should have the chance to brief the issue. *Id.* at *6.

[11] To sustain its position, Division I even resorts to citing a case, *In re Marriage of Bronstein*, 167 Wn. App. 1003, 2012 WL 927105 (2012) that may not be cited. GR 14.1(a).

Nothing here documented any grantor intent in 1983, particularly after the City's 1977 report, to give up beach access or views. There did not need to be an "unreconcilable conflict " between the City's desire for a walkway over the easement area and Ebb Tide's access, views, and privacy. The public and Ebb Tide could have had "due and reasonable enjoyment" of the easement as intended for almost forty years; a walkway on the beach surface, *as was contemplated in 1977*, could have accommodated the public's and Ebb Tide's respective needs. It was simply erroneous for Division I to ignore 1977's activities, which are essential extrinsic evidence surrounding the 1983 grant of a "placeholder" easement by Ebb Tide for $1.

Additionally, Division I's decision to suddenly conclude the easement had become unambiguous was designed to justify its determination to ignore the full extent of the easement's 46-year history.

Proper treatment of the extrinsic evidence makes clear that the trial court's interpretation of the easement as authorizing a

massive elevated walkway with pilings 50 feet into the beach is flatly wrong. To sustain the trial court's position on the easement, Division I had to ignore the events of 1977 and 1983. The only walkway authorized after the 1977 City report was a surface-level one.

The 1983 easement was a "placeholder." It did not authorize underground construction or exclusive use by the City. The evidence at trial established that the parties likely intended some future "improved walkway" at beach level. Ex. 20 at 15-16. Beach-level boardwalks were feasible in 1983. RP 340. They were not an "absurd result" at that time, as Division I concluded.

Ultimately, Division I's published opinion actually advances an absurd result, when it makes no effort to explain why Ebb Tide's owners who historically opposed an elevated walkway that destroyed the beach access and views of their waterfront condominium would, all of a sudden, drop that opposition, for the City's payment of $1, destroying the central feature of their condominium.

Division I's published opinion's improper treatment of extrinsic evidence merits review. RAP 13.4(b)(1), (2).

(3) Division I's Published Opinion Involves an Issue of Substantial Public Importance This Court Should Resolve

In addition to Division I's defiance of Washington law on UDJA ripeness and the law of easements, its published opinion merits review under RAP 13.4(b)(4) because it is a published opinion involving public easements. This is not merely a simple controversy about an Edmonds beach walkway. Rather, if governments, whether local governments of all types or the State itself, who receive easements from citizens, are encouraged by the courts like Division I to flout the express language of such easements at property owners' expense, the result will be additional litigation with attendant takings claims. Certainty in this area of the law is important for citizens and governments alike.

Moreover, this Court has not addressed the interpretation of an easement for many years. This is an issue of interest to

bench and bar, meriting this Court's attention. Review is merited. RAP 13.4(b)(4).

F. CONCLUSION

For the foregoing reasons, this Court should grant review. This Court should reverse the trial court's judgment and remand with directions to dismiss the City's case. Costs on appeal should be awarded to Ebb Tide.

This document contains 4,555 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 11th day of September, 2023.

Respectfully submitted,

/s/ Philip A. Talmadge
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WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
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(206) 574-6661

Stephan D. Wakefield
WSBA #22762
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WSBA #46597
First Avenue Law Group, PLLC
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(206) 447-1900

Attorneys for Petitioner
The Edmonds Ebb Tide Association
of Apartment Owners

APPENDIX

FILED

2018 NOV -6 PM 4:06

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

The Honorable Joseph P. Wilson
Judge's Civil Motions
Hearing Date: October 9, 2018
Hearing Time: 9:00 a.m.
With Oral Argument

17-2-09476-31
ORGSJ 95
Order Granting Summary Judgment
4180090

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington municipal corporation, Plaintiff, v. THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS, a Washington nonprofit corporation, Defendant.	Case No. 17-2-09476-31 ORDER GRANTING DEFENDANT EBB TIDE'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING PLAINTIFF CITY OF EDMONDS'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the undersigned Judge of the Snohomish County Superior Court upon Defendant's Motion for Summary Judgment and Plaintiff's Revised Motion for Summary Judgment, and the Court having reviewed the following pleadings (all documents include their exhibits, if any):

1. Defendant's Motion for Summary Judgment
2. Declaration of Stephan D. Wakefield.
3. Declaration of John T. Yip.
4. Declaration of Leigh Bennett.
5. Declaration of Rita Speiser.
6. Declaration of Todd Parker.
7. Declaration of Theresa Swan.
8. Declaration of Esther Drouin.
9. Declaration of Virginia Douglas.
10. Declaration of Carmen Holt.
11. Declaration of Molly Smith.
12. Declaration of Larry Hoppe.
13. Declaration of James Braun.

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14. Plaintiff's Revised Motion for Summary Judgment.
15. Declaration of Suzanne Lieberman.
16. Declaration of Beth Ford.
17. Response to Plaintiff's Revised Motion for Summary Judgment.
18. Supplemental Declaration of Stephan D. Wakefield.
19. Declaration of Jeffrey Bentley.
20. Declaration of Will Martin.
21. Declaration of James Selleck.
22. Plaintiff's Response to Defendant's Motion for Summary Judgment.
23. Declaration of Beth Ford (filed with Plaintiff's Response).
24. Defendant's Reply.
25. Plaintiff's Reply.
26. Records and files herein.

* Pursuant to the Order Granting Motion to Strike entered herewith, the court struck and did not consider the Declaration of Philip Abenroth, Declaration of Carrie Hite, or the Third Declaration of Beth Ford, all of which were filed with the Plaintiff's Reply.

Having heard the arguments of the parties and being otherwise duly informed under the premises, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. Defendant's Motion for Summary Judgment is GRANTED and DENIED in part. Pursuant to CR 56(d), the court hereby enters the following express findings as facts that appear without substantial controversy:

a. On or around November 4, 1983, the Defendant's predecessor, Olympic Properties, Inc, granted a valid Access Easement to the City of Edmonds (hereinafter the "Easement").

b. The Easement is ambiguous as to whether it provides the City of Edmonds a right to construct an elevated walkway in the Easement Area, including but not limited to the Planned Improvements described in the Complaint.

c. Extrinsic evidence must be considered and is relevant to determine the party's intent to allow the City to construct a walkway in the Easement Area, including but not limited to the Planned Improvements in the Complaint.

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Based on the foregoing findings and the parties' pleadings and oral argument, and finding no just reason for delay on entering summary judgment on the issue of the Easement's validity or ambiguity, the Court hereby concludes that the Easement is a valid conveyance of an express easement. Further, the Easement is ambiguous regarding whether the Plaintiff may construct an elevated walkway on the Easement area including but not limited to the Planned Improvements described in the Complaint. Extrinsic evidence is therefore admissible to construe the ambiguous Easement.

2. Plaintiff's Revised Motion for Summary Judgment is DENIED.

3. This Order does not prevent the parties from filing motions for summary judgment, at their discretion, regarding issues other than the Easement's validity or ambiguity, which are already fully adjudicated above.

DONE IN OPEN COURT this 5 day of November, 2018.

The Honorable Joseph P. Wilson

PRESENTED BY:
HECKER WAKEFIELD & FEILBERG, P.S.

/s/ Stephan Wakefield
Stephan D. Wakefield, WSBA #22762
John T. Yip, WSBA #46597
Attorneys for Defendant Ebb Tide

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:
LIGHTHOUSE LAW GROUP PLLC

Jeffrey Taraday, WSBA #28182
Beth Ford, WSBA #44208
Attorneys for Plaintiff City of Edmonds

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17-2-09476-31
ORGPSJ 196
Order Granting Partial Summary Judgment
7276146

FILED

2019 DEC 17 AM 10: 3[illegible]

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

Hearing Date: December 17, 2019
Hearing Time: 9:30am
The Honorable Richard T. Okrent
Department 2

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington Municipal Corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS, a Washington Nonprofit Corporation,

Defendant.

No.: 17-2-09476-31

[PROPOSED] ORDER GRANTING PLAINTIFF CITY OF EDMONDS' THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the Court on the Plaintiff City of Edmonds's Third Motion for Partial Summary Judgment. Having come on for hearing before the above-captioned Court, and the Court having reviewed the following:

1. Plaintiff City of Edmonds's Third Motion for Partial Summary Judgment; and
2. Declaration of Beth Ford in Support of the City's Third Motion for Partial Summary Judgment, with attached exhibits; and [L SEP]
3. Defendant's opposition to the City's Third Motion for Partial Summary Judgment, if any; and [L SEP]
4. Plaintiff's Reply on its Third Motion for Partial Summary Judgment, if any. [L SEP]

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HAVING heard the arguments of the parties and being otherwise duly informed under the premises, it is hereby **ORDERED, ADJUDGED AND DECREED** that Plaintiff City of Edmonds' Third Motion for Partial Summary Judgment is **GRANTED**.

Pursuant to CR 56(d), the Court hereby enters the following express findings as facts that appear without substantial controversy:

a. There is no genuine issue of material fact that the plain language of the Access Easement ("public improvements, facilities, utilities and necessary appurtenances") allows for construction of an improved walkway.

b. There is no genuine issue of material fact that the extrinsic evidence of the circumstances surrounding the drafting of the Access Easement demonstrates that construction of an improved walkway was contemplated by the parties.

Based upon these uncontroverted facts, the Court concludes that the phrase "public improvements, facilities, utilities and necessary appurtenances" contained in the Access Easement allows for the construction of an improved walkway in the easement area

DONE IN OPEN COURT this 17 day of June, 2019

JUDGE ~~JANICE E. ELLIS~~

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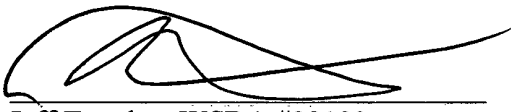
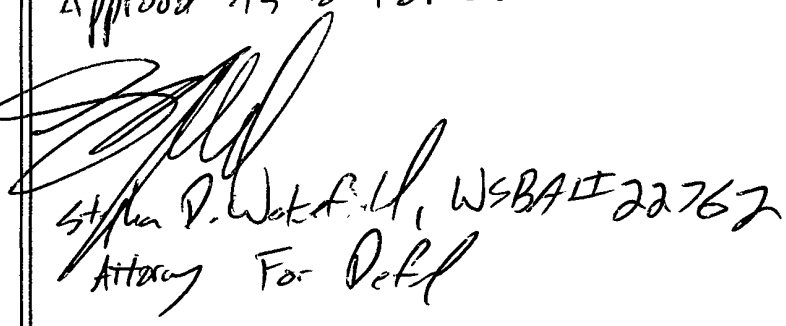
Respectfully submitted:

LIGHTHOUSE LAW GROUP PLLC



Jeff Taraday, WSBA #28182
Beth Ford, WSBA #44208
Attorneys for Plaintiff City of Edmonds

Approved As To Form



Steven D. Wakefield, WSBA # 22762
Attorney For Def'd

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17-2-09476-31
ORGPSJ 164
Order Granting Partial Summary Judgment
6188899

FILED
2019 JUL 26 AM 10:38
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

Hearing Date: July 26, 2019
Hearing Time: 9:00am
The Honorable Janice E. Ellis
Department 12

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington Municipal Corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS, a Washington Nonprofit Corporation,

Defendant.

No.: 17-2-09476-31

~~[PROPOSED]~~ ORDER GRANTING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on the Plaintiff City of Edmonds's Revised Motion for Partial Summary Judgment. Having come on for hearing before the above-captioned Court, and the Court having reviewed the following:

1. Plaintiff City of Edmonds's Revised Motion for Partial Summary Judgment; and
2. Declaration of Phillip Abenroth, PLS, in Support of the City's Revised Motion for Partial Summary Judgment, with attached exhibits; and
3. Declaration of Beth Ford in Support of the City's Revised Motion for Partial Summary Judgment, with attached exhibits; and
4. Defendant's opposition to the City's Revised Motion for Partial Summary Judgment, ~~if any~~, ~~and~~
5. Plaintiff's Reply on its Revised Motion for Partial Summary Judgment, ~~if any~~.
6. Declaration of Carl Sorensen, and
7. Decalaration of John T. Yip

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HAVING heard the arguments of the parties and being otherwise duly informed under the premises, it is hereby **ORDERED, ADJUDGED AND DECREED** that Plaintiff City of Edmonds' Revised Motion for Partial Summary Judgment is **GRANTED**.

Pursuant to CR 56(d), the court hereby enters the following express findings as facts that appear without substantial controversy:

a. The ~~parties to~~ surveyors who drafted the Access Easement intended for the height limitation of the Access Easement to be calculated as 1.84 feet above the finished first floor elevation of the Ebb Tide Condominium.

Based upon these uncontroverted facts, the court concludes that the height limitation of the Access Easement is calculated as 1.84 feet above the finished first floor elevation of the Ebb Tide Condominium.

DONE IN OPEN COURT this 26th day of July, 2019

JUDGE JANICE E. ELLIS

Respectfully submitted:

LIGHTHOUSE LAW GROUP PLLC

Jeff Taraday, WSBA #28182
Beth Ford, WSBA #44208
Attorneys for Plaintiff City of Edmonds

Approved as to form;
Notice of presentation waived

Stephen D. Wakefield #22762
Attorney For Ebb T.I.

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Superior Court of the State of Washington for Snohomish County

SNOHOMISH COUNTY COURTHOUSE
3000 Rockefeller Avenue M/S #502
Everett, WA 98201-4060
(425) 388-3435

October 14, 2022

To All Parties of Record

Re: *City of Edmonds v. Association of Apartment Owners of the Edmonds Ebb Tide*
Snohomish County Superior Court Cause No. 17-2-09476-31

This matter came before the Court pursuant to the City of Edmonds' (hereinafter "City") action seeking a Declaratory Judgment clarifying the real property rights associated with the easement granted to it by the predecessor-in-interest of the Association of Apartment Onwers of the Edmonds Ebb Tide (hereinafter "Ebb Tide). Specifically, the City seeks a declaration that the easement authorizes it to construct an elevated walkway similar to the Conceptual Plan attached to its Complaint. For the reasons set forth herein, the Court grants the City's request for a Declaratory Judgment and confirms that the easement rights held by the City are sufficient to allow it to construct an elevated walkway similar to the Conceptual Plan design.

In construing an easement, the court is required to carry out the intention of the parties. *Beebe v. Swerda,* 58 Wn. App. 375, 379-380 (1990). The intent of the original parties to an easement is determined from the deed as a whole. *Sunnyside Valley Irr. Dist. v. Dickie,* 149 Wn.2d 873, 880 (2003). The Court's primary objective is to effectuate the intent of the parties who created it. *Wilson & Son Ranch, LLC v. Hintz,* 162 Wn. App. 297, 306 (2011). It is also the goal of the court to interpret an easement so as to carry out the purpose for which the easement was created. *Restatement Third of Property: Servitudes,* Section 4.1(1) (2000). Where an easement is ambiguous, extrinsic evidence may be used to illuminate the intent of the parties. *Berg v. Hudesman,* 115 Wn.2d 657 (1990). Extrinisic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in absence of fraud, accident or mistake. Id. at 669. Extrinsic evidence is admissible to prove omitted but not inconsistent terms, if the contract is ambiguous or not fully integrated. Id. at 662. The Court is allowed to consider the surrounding circumstances leading to execution of the agreement, including the subject matter of the contract as well as the subsequent conduct of the parties, not

for contradicting what is in the agreement, but for the purpose of determining the parties' intent. Id. at 666-667. This is known as the "context rule."

There are limits, however, to this type of evidence. It may not be admitted for the purpose of importing into a writing an intention not expressed therein. Id. at 669. This includes evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; evidence that would show an intention independent of the instrument; or evidence that would vary, contradict or modify the written word. *Hollis v. Garwall, Inc.,* 137 Wn.2d 683, 695 (1999).

The easement in question is located on a strip of land running across the 100-foot wide western frontage of the Ebb Tide's condominium real property situated on the Edmonds waterfront on Puget Sound. The easement is approximately 10-feet wide and is the last unbuilt portion of a public walkway the City has been working to construct along the waterfront since 1977.

The property known as the Ebb Tide was originally purchased by the Nelson family in 1963. They built a twenty-unit apartment building on the site in 1965 known as the "Nelson Apartments." The family maintained and operated the apartments until it was sold in the Spring of 1983 to Olympic Properties. Prior to the sale, the Nelsons had encountered problems with trespassers who would frequently walk along the patio area, on the seawall protecting the patio from the sandy beach, and across their beach.

The Nelsons were aware of the City's desire to construct a waterfront promenade that would extend from Brackett's landing and the ferry terminal to the north, all the way along Puget Sound to the southern edge of the City. The Nelsons understood that the City's plans included a walkway in front of their apartment building and objected to it. The *1977 Feasibility Study for Public Access to the Waterfront* prepared by the City's consultant, Reid, Middleton and Associates Inc., described the Nelson's opposition to the walkway. It stated:

> The owners of the apartment building express strong objection to the proposed construction of a public walkway along the beach side of this patio, feeling that it will constitute an invasion of the beach and of the privacy of the tenants on the patio.
>
> Their expressed concern is shared to some extent, and it is agreed that a walkway constructed next to the patio on posts to provide position above wintertime wave action, could be visually objectionable, could give an impression of invasion of privacy to the patio, and could constitute an unwelcome and inconvenient interference with access from the apartment house to the beach. However, a paved walkway constructed on the sand at beach level would not be unsightly nor afford any interference with access to the beach. Furthermore this walkway constitutes the only obstacle to the development of a waterfront walkway of tremendous public value with continuity from the Senior Center all the way to the Union Oil Company Beach. . . . [This] is of such great importance that the City should exercise its rights of eminent domain to secure the walkway right-of-way past the Nelson Apartments in accordance with the recommended concept.

(Exhibit 6 at page 16). Dr. Marvin Nelson, the original owner's son, testified that his parents were not in favor of a boardwalk on posts or a beach-level boardwalk and were not considering it. For its part, the City did not exercise its right of eminent domain over the Nelson Apartments beachfront property and focused on other projects instead.

Six years later in 1983, the Nelsons sold the apartment to a corporation known as Olympic Properties, Inc. After its purchase, Olympic Properties converted the apartments to condominium uses and sold the apartment units to various individuals. The building became commonly known as the "Ebb Tide." After that time, although they retained ownership in a single unit in the building, the Nelsons were not involved in negotiating the easement. Unlike the prior owners, Olympic Properties, Inc. was prepared to enter into a negotiation with the City to resolve the trespassing complaints and create a public walkway connection for the City.

W. Scott Snyder was a junior associate attorney representing the City of Edmonds in 1983 regarding the easement issue, and the Ebb Tide's complaints regarding trespassing on their beachfront patio. He is the only living or competent witness who was involved in the negotiation and drafting of the easement language. Mr. Snyder testified that the trespassing complaints led to a series of discussions with Ebb Tide about how to resolve the problem, given the City's desire to complete its public walkway link to its park on the other side of the Ebb Tide property.

He testified, "We were looking for ways to redirect traffic out onto the tide flat, and this led to a discussion of how to do so; the City installing signage, looking for an easement or right of passage, and one of the primary elements in that discussion was what form that walkway or easement would take. . . ." (Exhibit 20 at p. 12) He stated that the Ebb Tide owners "wanted the public away from their seawall so that they could use their patio with reasonable privacy." (Exhibit 20 at p. 13) He stated that there was no design or engineering discussed for the walkway at that time, because there was no funding for the project. Id. According to Mr. Snyder, the 17-foot height restriction came about from a casual conversation:

> The calculation of the datum points was based on a couple of the Ebb Tide board members and I standing on their lawn with a beer and looking out towards the sunset one night trying to figure out an appropriate height would be—could be for some sort of modest walkway, and Lovell-Sauerland came up with the datum point."

(Exhibit 20 at p. 34). He was told that the Ebb Tide and Olympic Properties did not want a large structure along the scale of the fishing pier. Their discussions led to an easement that would be a placeholder for future construction of a walkway at or below a level that would not interrupt their views as they stood on the patio. This is how they arrived at the height limit. Id. at p. 14.

On November 4, 1983, Olympic Properties granted the City an access easement as follows: "*...a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities and necessary appurtenances, over, through, across and upon the following described property, situated in Snohomish County, Washington . . .*" (Exhibit 1) The legal description granted the City a 10-foot wide easement roughly 10 feet seaward of the bulkhead, spanning the 100-foot frontage of the Ebb Tide

property. It limited the height of the easement to no more than 17 feet (1.84 feet above the finished floor elevation of the Ebb Tide). There were no other restrictions or reservations of rights in the easement.

Mr. Snyder testified that the easement was drafted by the City's consultant but the idea was his. He stated that should funding become available, the City wanted "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." (Exhibit 20 at p.15). Mr. Snyder drafted the language imposing the height restriction into the easement. He communicated with both the Ebb Tide Homeowners Association and Olympic Properties about the height restriction language. At the time, Olympic Properties still owned a majority of the units in the Ebb Tide building and had the votes to grant the easement. (Id. at p. 17).

The City now proposes to construct an elevated walkway across its easement below the height limit of 17 feet as shown in the Conceptual Design attached to its Complaint. (Exhibit 19) The walkway will be placed on pilings to anchor it from the forces of the tide, currents, wave and wind. The pilings are necessary to maintain the stability of the walkway within the easement area. The proposed design would connect the last portion of the public beachfront walkway.

According to the City's expert, John Barker, the completed public improvements made to the north and south of the Ebb Tide property demonstrate the City's knowledge and desire to maintain its pedestrian walkway up and out of the tidal zone where it would be inundated daily by tides and subject to damage and erosion. The proposed design is consistent with the parties' intent that the public walkway would connect the City's walkway system, but also swing out away from the Ebb Tide patio giving them more privacy and designating where the public could walk to prevent trespassing. The proposed Conceptual Design is significantly lower than the fishing pier structure, as desired by the Ebb Tide owners.

By placing the easement approximately 10 feet away from the Ebb Tide's sea wall, the parties had to know that a constructed public pathway of up to 17 feet in height would impact a portion of the Ebb Tide's upper beach property and access to the water. The parties are presumed to know the impact of the rights they granted in the easement.

The Ebb Tide argues that the parties only intended to construct a beach-level boardwalk or some sort of walkway that would have no impact on its views, beach access or patio privacy. However, the easement contains no such restriction and to read the easement in this way contradicts its express terms that granted the City "the right to construct and maintain public improvements, facilities, utilities and necessary appurtenances," subject to the 17-foot height limit. (Exhibit 1) Additionally, their argument contradicts the evidence presented by Scott Snyder, the fact that this easement was mutually negotiated, and the fact that the parties used the Ebb Tide's first floor level as the height measurement beyond which they could not construct. In order to find in favor of the Ebb Tide, the Court would have to import several new terms that would further restrict the City's use of its easement. The law simply doesn't allow it. *Hollis v. Garwall, Inc., supra.*

No evidence was presented that either the City or Olympic Properties was dissatisfied with the terms of the easement granted in 1983. Dissatisfaction by current property owners of the Ebb Tide is not a legal basis to undermine the rights previously granted to the City by their predecessor.

Based on all of the evidence presented, and determining the easement as a whole, the Court concludes that the City's design is consistent with the easement in all respects. The design does not impact the Ebb Tide's views or beach access beyond what was contemplated by the parties at the time the easement was drafted. The 17-foot height limit is not exceeded.

The City of Edmonds is granted a declaratory judgment in its favor. This letter constitutes the Court's Findings of Fact, Conclusions of Law and Decision herein. As the prevailing party, the City shall immediately draft a proposed Final Judgment and Order to be circulated to the Ebb Tide's attorneys for its review. If an agreed order is not achieved within five (5) days after receipt, the parties shall note a hearing for presentation of the Final Judgment and Order.

Sincerely,

The Honorable Millie M. Judge
Judge of the Snohomish County Superior Court

17-2-09476-31
JD 300
Judgment
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HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WASH

The Honorable Millie M. Judge

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington Municipal Corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS, a Washington Nonprofit Corporation,

Defendant.

No.: 17-2-09476-31

~~[PROPOSED]~~ FINAL JUDGMENT AND ORDER

JUDGMENT

This matter came before the Court upon Plaintiff City of Edmonds' (hereinafter "City") Complaint for Declaratory Judgment with regard to the Access Easement granted to it by Defendant Edmonds Ebb Tide Association of Apartment Owners' (hereinafter "Ebb Tide") predecessor-in-interest. The City brought a declaratory judgment action to establish that it has sufficient property rights to construct a walkway within the easement area, the final design of which will be materially consistent with the Planned Improvements as attached in the Exhibit B to the City's Amended Complaint.

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The Court conducted a four-day bench trial on this matter between October 10 and October 13, 2022. The Court received evidence in the form of exhibits, deposition transcripts, and witness testimony. After viewing the property and its vicinity, and after carefully reviewing all of the evidence, testimony, and arguments presented by the parties' counsel, the Court filed its written decision on October 14, 2022, which contained the Court's findings of fact, conclusions of law, and decision.

In accordance with its written decision, the Court grants the City's request for a Declaratory Judgment and confirms that the City has sufficient property rights to construct a walkway within the easement area, the final design of which will be materially consistent with the Planned Improvements as attached as Exhibit B to the Amended Complaint.

ORDER

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Pursuant to RCW 7.24.020 and 7.24.030, the City of Edmonds is granted a declaratory judgment in its favor.

2. The City has sufficient real property rights to construct a walkway within the easement area, the final design of which will materially consistent with the Planned Improvements as attached as Exhibit B to the Amended Complaint.

3. Pursuant to RCW 7.24.100, the City of Edmonds, as the prevailing party, is entitled to such award of costs as may seem equitable and just, to be determined through a forthcoming cost bill.

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IT IS SO ORDERED.

DATED this 31st day of October, 2022

JUDGE MILLIE M. JUDGE

Presented by:

LIGHTHOUSE LAW GROUP PLLC

Jeff Taraday, WSBA No. 28182
Beth Ford, WSBA No. 44208
Attorneys for Plaintiff City of Edmonds

Approved as to form; notice of presentation waived:

FIRST AVENUE LAW GROUP PLLC

Stephan D. Wakefield, WSBA No. 22762
John T. Yip, WSBA No. 46597
Steven Stolle, WSBA No. 30807
Attorneys for Defendant Ebb Tide

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Tel. 206-273-7400 • Fax 206-273-7401

250 5TH AVE. NORTH
EDMONDS, WA 98020

4.00

ACCESS EASEMENT

THIS INDENTURE, made this 4th day of Nov., 1983, by and between Olympic Properties Inc., a Washington corporation, and assigns, hereinafter called the "Grantor", and the City of Edmonds, a municipal corporation of the State of Washington, hereinafter called the "Grantee."

WITNESSETH:

That the said Grantor for and in consideration of one dollar to Grantor in hand paid by said Grantee, mutual benefits accruing and other valuable, legal consideration, receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said Grantee a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities and necessary appurtenances, over, through, across and upon the following described property, situate in Snohomish County, Washington, more particularly described as follows:

Commencing at a point on the Westerly margin of right-of-way of Burlington Northern Railroad 50.00 feet Northerly from the South line of Government Lot 2, Section 23, Township 27 North, Range 3 East W.M., as measured along said westerly margin; thence North 41°00'00" East along the Westerly margin of said right-of-way, a distance of 100.00 feet; thence North 49°00'00" West, perpendicular with said right-of-way margin, a distance of 149.61 feet to the Government meander line of the waters of Puget Sound; thence North 51°19'24" East, along said meander line, a distance of 6.91 feet to the Easterlymost corner of Parcel A, as described on Sheet 1 of the Plat of Ebb Tide, a condominium, as recorded in Volume 44 of Plats, on pages 175 through 181 inclusive, records of Snohomish County, Washington; thence North 38°37'00" West, along the Northeasterly line of said Parcel A, a distance of 60.00 feet to the True Point of Beginning; thence continuing North 38°37'00" West a distance of 10.00 feet; thence South 47°52'11" West, a distance of 99.60 feet to a point on the Southwesterly line of said Parcel A; thence South 38°37'00" East, along said Southwesterly line of said Parcel A, a distance of 10.00 feet; thence North 47°52'11" East, a distance of 99.60 feet to the True Point of Beginning.

Situated in Snohomish County, Washington.

The Grantee, its successors, agents, or assigns, shall construct, install, or erect no structures or improvements upon or within the above described easement right of way, whereby any portion thereof extends above a horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water).

This Agreement shall be an appurtenant easement running with the land and shall be binding on the Grantor, its successors and assigns forever for the benefit of the

Grantee as owner of real property located immediately adjacent to the north and south of the subject property.

OLYMPIC PROPERTIES, INC.

BY _____
James R. Braun, President

and BY _____
Warren J. Murphy, Vice President

STATE OF WASHINGTON)
)
COUNTY OF)

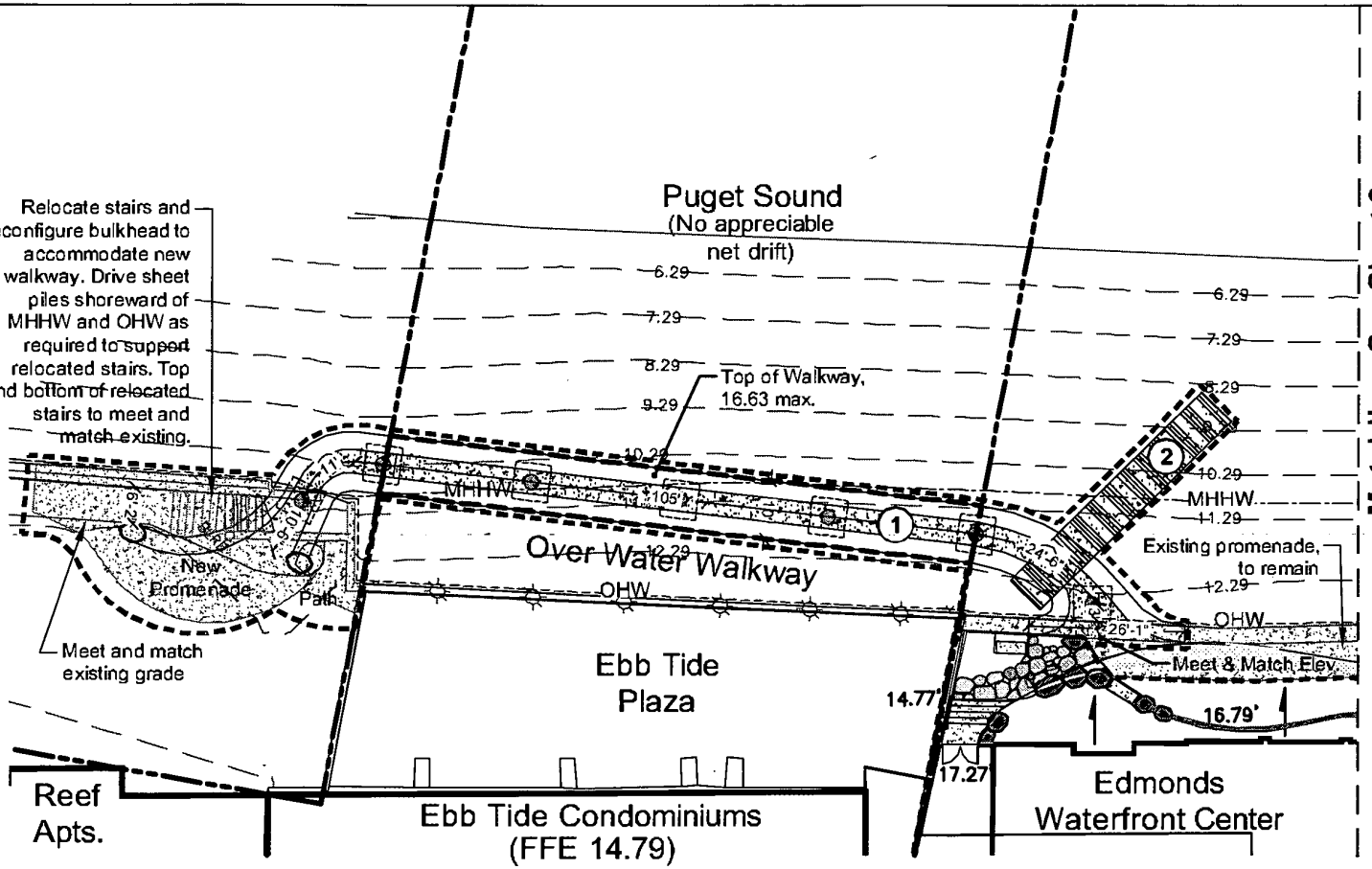
On this 4th day of November, 1983, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Warren Murphy and James R. Braun, to me known to be the Vice President and President of Olympic Properties, Inc., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and an oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal hereto affixed the day and year first above written.

_____
NOTARY PUBLIC in and for the State of Washington, residing at Edmonds

VOL 1815 PAGE 2612

8811070085



Note: Refer to the *Critical Areas Report and Mitigation Plan* (Hererra, 2017b) for more details about impact areas for this project.

IMPACT AREAS

	Total	Waterward MHHW	Landward MHHW
① Steel Driven Piles	35 SF/63 CY	10 SF/18 CY	25 SF/45 CY
② Remove Concrete Foundation	317 SF/117 CY	157 SF/58 CY	160 SF/59 CY

LEGEND

- Parcel Lines
- Project Limits
- 13.0' — Proposed Spot Elevation
- 2% TYP — Proposed Direction of Slope
- Concrete Foundation
- Beach Nourishment
- Steel Pilings
- MHHW — Mean Higher High Water
- OHW — Ordinary High Water

APPLICANT: City of Edmonds Parks, Recreation, and Cultural Services Department

PROJECT: Edmonds Waterfront Redevelopment Project

US ARMY CORPS OF ENGINEERS REFERENCE NO:

Community Design Center
402 15th Avenue East
Seattle, Washington 98112
206.329.8300
206.329.5494 fax

WATERBODY: Puget Sound
CITY: Edmonds
COUNTY: Snohomish
STATE: Washington
SECTION: SE¼ of Section 23
TOWNSHIP: 27 N
RANGE: 3E., WM

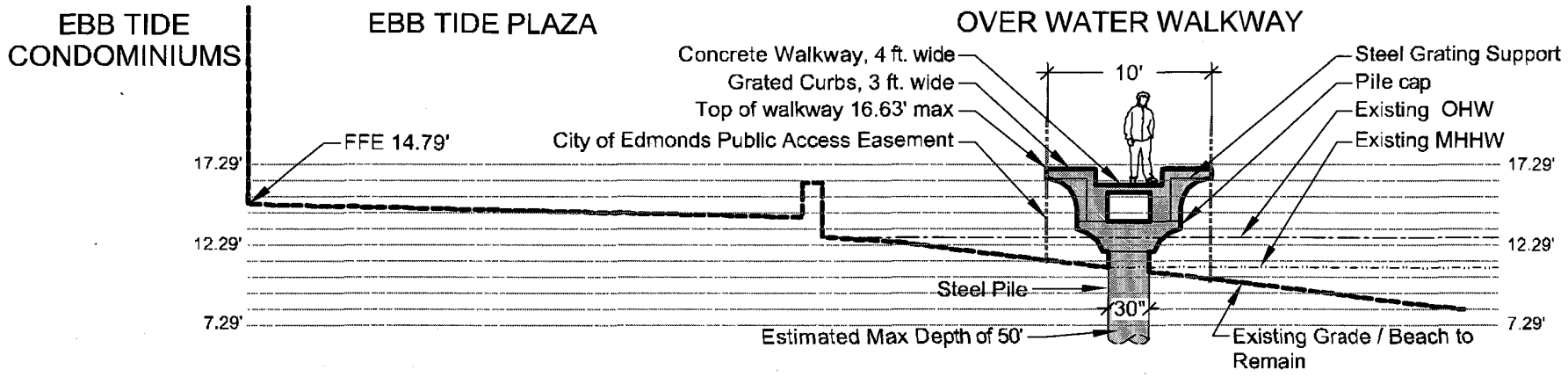
LATITUDE: 47°48'42.13"N
LONGITUDE: 122°23'6.49"W
ADDRESS: 220 Railroad Ave Edmonds, WA 98020-4133

TITLE: GRADING AND DRAINAGE PLAN SOUTH

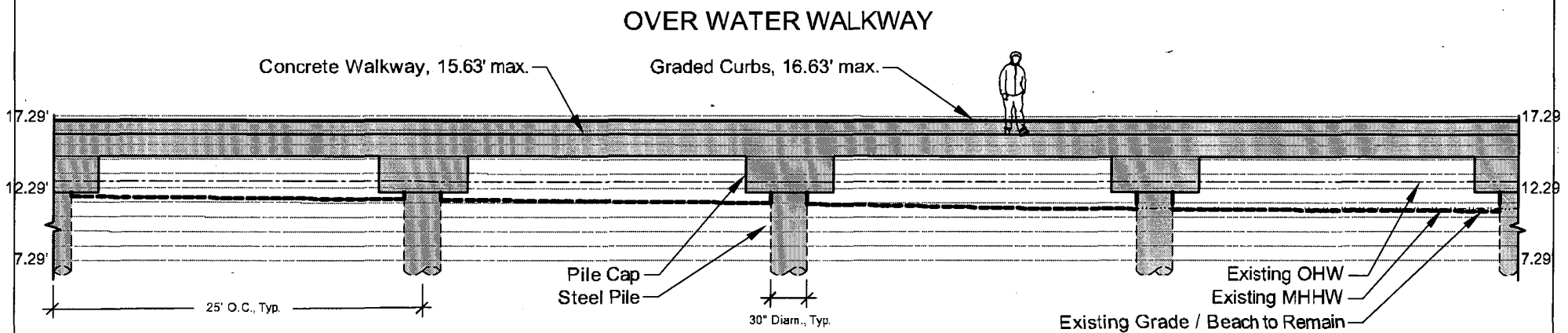
DATE: 08.29.2017
REVISION DATE: 07.02.2019
SHEET: 08 OF 14

0 15' 30'
Scale: 1" = 30'-0"

Vertical Datum: MLLW
Horizontal Datum: NAVD83/91
To convert from MLLW to NAVD88 subtract 2.29ft.



E/05 SECTION E-e
Scale: 1" = 10'-0"



F/05 SECTION F-f
Scale: 1" = 10'-0"

APPLICANT: City of Edmonds Parks, Recreation, and Cultural Services Department	PROJECT: Edmonds Waterfront Redevelopment Project		US ARMY CORPS OF ENGINEERS REFERENCE NO:	
Community Design Center 402 15th Avenue East Seattle, Washington 98112 206.329.8300 206.329.5494 fax	WATERBODY: Puget Sound CITY: Edmonds COUNTY: Snohomish STATE: Washington SECTION: SE¼ of Section 23 TOWNSHIP: 27 N RANGE: 3E., WM	LATITUDE: 47°48'42.13"N LONGITUDE: 122°23'6.49"W ADDRESS: 220 Railroad Ave Edmonds, WA 98020-4133	TITLE: SECTIONS 03	DATE: 08.29.2017 REVISION DATE: 07.02.2019 SHEET: 12 OF 14

Vertical Datum: MLLW
Horizontal Datum: NAVD83/91
To convert from MLLW to NAVD88 subtract 2.29ft.

FILED
8/21/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF EDMONDS, a Washington Municipal Corporation, Respondent, v. THE EDMONDS EBB TIDE ASSOCIATION OF APARTMENT OWNERS, a Washington Nonprofit Corporation, Appellant.	No. 84712-1-I DIVISION ONE PUBLISHED OPINION

FELDMAN, J. — Edmonds Ebb Tide Association of Apartment Owners (Ebb Tide Association) appeals a trial court's final judgment and order granting declaratory relief in favor of the City of Edmonds (the City) under the Uniform Declaratory Judgment Act (UDJA). The trial court's judgment and order declares that an access easement (the Easement) that Ebb Tide Association's predecessor-in-interest granted to the City provides sufficient real property rights to enable the City to construct a public walkway as described and specified by the City in the trial court proceedings. We reject Ebb Tide Association's arguments and affirm.

I

Ebb Tide Association is the current owner of a five-story, twenty-unit building (the Building), which was originally constructed in 1965. The Building is located on the waterfront, and members of the public have for many years trespassed over the Building's private patio rather than walking on the adjacent beach. Occupants of the Building have complained to the City, which led to conversations about how to resolve the issue. *Id*.

The City, in turn, owns the surrounding waterfront property and has developed that property by creating parks and walkways. The City has for many years wanted to build a continuous walkway along the waterfront connecting the Edmonds-to-Kingston Ferry north of the Building to a park and fishing pier south of the Building. The missing link in that walkway is on the waterfront side of the Building.

Olympic Properties purchased the Building in June 1983, renamed it the Ebb Tide, converted the units into condominiums, and created the Ebb Tide Association to comply with Washington's condominium statute. Shortly after purchasing the Building, Olympic Properties sought to eliminate public trespass across the Building's private patio. Olympic Properties and the City concluded that this could be done by creating an access easement so that the City could build a walkway that would redirect pedestrian traffic out onto the beach and away from the patio.

Signed in November of 1983, the Easement states in relevant part as follows:

That the said Grantor for and in consideration of one dollar to Grantor

in hand paid by said Grantee, mutual benefits accruing and other valuable, legal consideration, receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said Grantee *a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities, and necessary appurtenances, over, through, across, and upon the following described property,* situate[d] in Snohomish County, Washington, more particularly described as follows:

> Commencing at a point on the Westerly margin of right-of-way of Burlington Northern Railroad 50.00 feet Northerly from the South line of Government Lot 2, Section 23, Township 27 North, Range 3 East W.M., as measured along said westerly margin; thence North 41°00'00" East along the Westerly margin of said right-of-way, a distance of 100.00 feet; thence North 49°00'00" West, perpendicular with said right- of-way margin, a distance of 149,61 feet to the Government meander line of the waters of Puget Sound; thence North 51°19'24" East, along said meander line, a distance of 6.91 feet to the Easterlymost corner of Parcel A, as described on Sheet 1 of the Plat of Ebb Tide, a condominium, as recorded in Volume 44 of Plats, on pages 175 through 181 inclusive, records of Snohomish County, Washington; thence North 38°37'00" West, along the Northeasterly line of said Parcel A, a distance of 60.00 feet to the True Point of Beginning; thence continuing North 38°37'00" West a distance of 10.00 feet; thence South 47°52'11" West, a distance of 99.60 feet to a point on the Southwesterly line of said Parcel A; thence South 38°37'00" East, along said Southwesterly line of said Parcel ·A, a distance of 10.00 feet; thence North 47°52'11" East, a distance of 99.60 feet to the True Point of Beginning.
>
> Situated in Snohomish county, Washington.

The Grantee, its successors, agents, or assigns, shall construct, install, or erect no structures or improvements upon or within the above described easement right of way, whereby any portion thereof extends above a horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water).

(Emphasis added.). The Easement thus allows the City to complete its

continuous walkway along the Edmonds Waterfront—and thereby address the ongoing trespass complaints—so long as the improvements, facilities, utilities, and necessary appurtenances do not extend beyond the dimensions or above the elevation prescribed by the Easement.[1]

The City did not immediately begin building the proposed walkway because it lacked necessary funding to do so. Sixteen years later, in 1999, the City formally proposed building an elevated walkway across the strip of land designated in the Easement, but terminated the project because of Ebb Tide Association's sustained opposition. Seventeen years later, in 2016, the City again proposed an elevated walkway, which was similar to the 1999 proposal and was known as the "Planned Improvements." Once again, Ebb Tide Association opposed construction of the elevated walkway and argued, among other things, that the Easement does not establish sufficient real property rights to construct a walkway in accordance with the Planned Improvements.

To address the Ebb Tide Association's continued opposition, the City filed a complaint seeking a declaratory judgment that it "has the right to construct the Planned Improvements within the easement area." After a four-day bench trial, the court granted the City's request for declaratory relief. The trial court's final judgment and order states, "[t]he City has sufficient real property rights to

[1] The trial court record conclusively establishes that (1) the easement area ("the following described property") is a 10-foot wide and approximately 100-foot long strip of beach roughly 6-feet waterward from the patio seawall on the north end and 12-feet waterward from the patio seawall on the south end, and (2) the height restriction ("an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water)") equates to 1.84 feet above the finished first floor elevation of the Building. Neither point is disputed here.

construct a walkway within the easement area, the final design of which will [be] materially consistent with the Planned Improvements . . . ."

Ebb Tide Association appeals.

II

A. Ripeness

Ebb Tide Association's lead argument is that the trial court should have dismissed the City's claim on ripeness grounds. We disagree.

Under the UDJA, "[a] person interested under a deed . . . may have determined any question of construction . . . arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. The UDJA requires a justiciable controversy, which "encompasses the concepts of ripeness." *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 847, 474 P.3d 589 (2020). The ripeness inquiry, in turn, is governed by a four-part test:

> In determining whether a claim is ripe for review, we consider [1] if the issues raised are primarily legal, and [2] do not require further factual development, and [3] if the challenged action is final. We also consider [4] the hardship to the parties of withholding court consideration.

Id. at 856 (internal citation omitted). "The justiciability of a claim is a question of law we review de novo." *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn. App. 427, 432, 260 P.3d 245 (2011) (citing *Coppernoll v. Reed*, 155 Wn.2d 290, 299-301, 119 P.3d 318 (2005)).

Each of the ripeness considerations is satisfied here. First, the issues raised by the City's claim are primarily legal. The City's declaratory judgment claim requires the court to interpret the Easement and determine whether it grants sufficient real property rights to construct the proposed walkway as

described and specified by the City. As with any written contract, the proper interpretation of a written agreement regarding real property rights "is a question of law." *Bloome v. Haverly*, 154 Wn. App. 129, 137, 225 P.3d 330 (2010) (interpreting restrictive covenant).

Second, the issues raised "do not require further factual development." *Alim*, 14 Wn. App. 2d at 856. As explained in *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 767, 265 P.3d 207 (2011), this consideration requires "the basic facts underlying a dispute to be resolved before the dispute reaches court." Here, those basic facts include the Easement itself, design documents showing the material structural components of the proposed walkway (the Planned Improvements), the City's stated intent to construct the walkway in accordance with those design documents, and Ebb Tide Association's opposition to the project. Because these basic facts are known, factual development is not required and the second ripeness consideration is satisfied.

Third, the challenged action is final. The trial court's final judgment and order reflects and incorporates its prior rulings that the Easement is valid (CP 3049-51), that the height restriction in the Easement equates to 1.84 feet above the finished first floor elevation of the Building, and that the phrase "public improvements, facilities, utilities and necessary appurtenances" in the Easement should be read to encompass some kind of improved walkway. Ebb Tide Association does not challenge any of these rulings.

The trial court's declaratory judgment ruling is also final. The City explained in its complaint that it had "engaged consultants to create a design for a walkway that would be constructed within the easement area" and it attached

to its complaint design documents showing the proposed walkway (the Planned Improvements). The trial court, in turn, granted that limited relief, stating that "the City has sufficient real property rights to construct a walkway within the easement area, *the final design of which will [be] materially consistent with the planned improvements* . . . ." (Emphasis added.) So limited, the trial court's judgment and order granting declaratory relief in favor of the City is final and thus the third ripeness consideration is likewise satisfied.

Fourth, Ebb Tide Association does not (and cannot) contest that withholding declaratory relief to the City would create substantial hardship—thus satisfying the fourth ripeness consideration. Our Supreme Court noted in *Jafar v. Webb*, 177 Wn.2d 520, 525, 303 P.3d 1042 (2013), that "current hardship" is not a strict requirement for ripeness. Here, if declaratory relief were withheld, the City would be left without a determination of whether the Easement provides sufficient real property rights to build the proposed walkway and progress toward completing the project would be stifled.

Notwithstanding the above analysis, Ebb Tide Association argues that declaratory relief cannot properly be granted here because the design of the proposed walkway is only 30 percent complete and omits certain features (such as railings and a wider walkway) that might cause the walkway—*as ultimately constructed*—to exceed the scope of the Easement as interpreted by the trial court. Expressed in terms of ripeness, Ebb Tide Association contends that further factual development is required (the second ripeness consideration) and the trial court's judgment and order granting declaratory relief in favor of the City cannot be final (the third ripeness consideration) because the court's decision to

grant such relief is expressly premised on a "conceptual design" that is subject to change.

Ebb Tide Association's argument misconceives and misapplies the relevant ripeness considerations. The second ripeness consideration does not ask whether a party opposing declaratory relief (like Ebb Tide Association here) can hypothesize some factual development that could potentially affect or even obviate a trial court's ruling granting declaratory relief. Rather, it asks whether "the issues raised . . . do not *require* further factual development." *Alim*, 14 Wn. App. 2d at 856 (emphasis added). As discussed above, no such development is required here. And while the trial court's judgment and order granting declaratory relief in the City's favor does not address any and all potential contingencies, it is a final determination of each of the discrete issues discussed above, including whether the Easement grants the City sufficient real property rights to construct the walkway in accordance with the Planned Improvements. On this record, the City's claim is sufficiently ripe for judicial review.

For similar reasons, Ebb Tide Association's reliance on *Bloome* is misplaced. Applying justiciability principles, the court in *Bloome* held that a trial court cannot properly grant declaratory relief under the UDJA where "the record does not contain facts necessary for a court to resolve the apparent underlying dispute between the parties." 154 Wn. App. at 141. As the court explained, the record in *Bloome* did not contain those basic facts:

> Bloome has not put forth any construction plan over which the parties have had the opportunity to litigate as to its conformance with the covenant. Nor has he established that it is, in fact, impossible to construct a building on the downhill parcel without interfering with the view from the uphill parcel. In the absence of a dispute over whether

> actual building plans satisfy the covenant or of other evidence establishing a necessary minimum degree of interference with the view from the uphill property, a declaratory judgment as requested by either party would not conclusively settle the controversy between them.

Id. at 141-42. The court also noted that "nothing in the record indicates that Bloome either planned or plans to construct a building on the downhill parcel." *Id*. at 137. In the absence of such evidence, this court reversed the trial court's declaratory judgment on justiciability grounds because "the record does not establish the existence of an actual, mature dispute that could be conclusively resolved by the requested relief." *Id.* at 147.

Bloome is distinguished easily. Perhaps most important, the City here, unlike the parties in *Bloome*, did not fail to "put forth any construction plan over which the parties have had the opportunity to litigate as to its conformance with the [Easement]." *Id.* at 142. As discussed above, the City attached to its complaint design documents showing the material structural components of the proposed walkway (the Planned Improvements). And in sharp contrast to *Bloome*, there is no doubt that the City plans to construct the proposed walkway in accordance with the Planned Improvements. Thus, unlike in *Bloome*, the record here establishes the existence of an actual, mature dispute that could be conclusively resolved by the requested relief.[2]

[2] Just prior to oral argument, Ebb Tide Association submitted a Statement of Additional Authority citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993), for the proposition that "Washington courts . . . require clear and unequivocal evidence of the terms and character of the contract before specific performance is awarded." At oral argument, Ebb Tide Association's appellate counsel tied this authority to the ripeness issue. This argument is improper in two respects. First, the "purpose of RAP 10.8 is to provide parties with an opportunity to bring to the court's attention cases decided after the parties submitted their briefs." *Whitehall v. Emp't Sec. Dep't*, 25 Wn. App. 2d 412, 419 n.3, 523 P.3d 835 (2023) (quoting *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 782 n.16, 508 P.3d 193 (2022) (internal quotation marks omitted)). Here, *Kruse* was decided 30 years *before* the parties submitted their briefs. Second, there is no claim

The City's claim for declaratory relief is sufficiently ripe for judicial review. The trial court did not err in deciding the claim on the merits, just as we do below.

B. The Easement

Regarding the merits of the City's claim, Ebb Tide Association argues that the trial court erred in ruling that "the City has sufficient real property rights to construct a walkway within the easement area, the final design of which will [be] materially consistent with the Planned Improvements." The interpretation of a contract regarding real property rights is a question of law, which we review de novo. *Bloome*, 154 Wn. App. at 137. While we disagree with the trial court's ruling that the Easement is ambiguous, we affirm the trial court's final judgment and order granting declaratory relief in the City's favor on additional grounds. *See Huff v. Wyman*, 184 Wn.2d 643, 648, 361 P.3d 727 (2015) ("we may affirm the trial court on any basis supported by the briefing and record below").

As noted previously, the principal issue below was whether the Easement granted the City sufficient property rights to construct the proposed walkway. On that issue, there is no dispute that the proposed walkway, as set forth in the Planned Improvements, does not extend beyond the Easement right of way ("the following described property") or above the specified height restriction ("an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water)"). Instead, the dispute centers on whether the proposed walkway can extend below the surface of the beach. Because the Easement does not expressly address that issue (for example, it does not provide a lower elevation

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for specific performance in this case, so even if we overlook the date that *Kruse* was decided the opinion is not in any event helpful to the Court.

restriction similar to the upper elevation restriction), the trial court concluded that it is ambiguous.

We disagree with the trial court's ruling that the Easement is ambiguous. The Easement grants the City "a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities, and necessary appurtenances, over, through, across, and upon the following described property." It then limits the space in which those improvements can be constructed in two ways. First, through a detailed description of the "following described area," the Easement limits the *horizontal* dimensions of the permissible improvements. *See supra* at n.1. And second, through a detailed description of the "horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water)," the Easement limits the *height* of the permissible improvements. *Id.* Critical here, the Easement places no limitations on the *depth* of the permissible improvements. The Easement is not ambiguous in that regard; the express, unambiguous language of the Easement does not limit the depth of the permissible improvements. The trial court mistook the *absence of a limitation* regarding depth as ambiguity. *See, e.g., Wash. Monumental & Cut Stone Co. v. Murphy*, 81 Wash. 266, 270, 142 P. 665 (1914) ("The contract itself would hardly seem ambiguous, since, by particularizing the things included . . . it excluded all things not enumerated.").

But even if we were to agree with the trial court that the Easement is ambiguous with regard to depth, the result would be the same. When the meaning of a contract affecting real property is unclear, "we must consider the

surrounding circumstances that tend to reflect the intent of the drafter and the purpose of [the agreement]." *Bloome*, 154 Wn. App. at 138 (internal quotation marks omitted); *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1(1) (AM. LAW INST. 2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."). Having concluded that the Easement is ambiguous, the trial court admitted extrinsic evidence to ascertain the intent and purpose of the agreement. "When interpretation depends on factual determinations such as the credibility of extrinsic evidence or a choice among reasonable inferences to be drawn from extrinsic evidence, we review the fact finder's determinations of such matters for substantial evidence." *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). While we disagree with the trial court's ruling that the Easement is ambiguous, we agree with the City that substantial evidence supports the trial court's analysis.[3]

Scott Snyder, a City attorney who was involved in drafting the Easement, testified regarding two complementary purposes of the Easement. The first was to provide "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat." The second was "to have a designated pathway" and thereby address residents' trespass concerns. *Id*. These

[3] Even if the Easement is ambiguous and extrinsic evidence is necessary to interpret it, this does not affect the ripeness inquiry. *See, e.g., In re Marriage of Bronstein*, 167 Wn. App. 1003, *5 (2012) (consideration of extrinsic evidence to interpret property settlement agreement did not preclude judicial review on ripeness grounds, holding "While deciding the issue requires more evidence, it does not require further factual development."). While *Bronstein* is unpublished, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a reasoned decision." GR 14.1(c).

purposes cannot be achieved if, as Ebb Tide Association asserts, the Easement does not permit the City to construct pilings below the surface of the beach. Two witnesses so testified. Dr. Jeff Parsons, an environmental engineer, testified that without below-ground pilings a walkway would fall apart shortly after installation. Dr. Willie Ahn, an expert in marine structures, similarly testified that a walkway built without pilings on the Easement right of way would deform, crack, and eventually wash away because of the active currents in the area. Because below-grade structures are necessary to achieve the intent and purposes of the Easement, the trial court correctly interpreted the Easement to permit such improvements.

The trial court's interpretation of the Easement is also consistent with several principles of contract construction. We "must avoid construing contracts in a way that leads to absurd results." *Grant County Port Dist. No. 9 v. Wash. Tire Corp*., 187 Wn. App. 222, 236, 349 P.3d 889 (2015). Additionally, "[o]ur goal is to interpret the agreement in a manner that gives effect to all the contract's provisions" and "harmonize clauses that seem to conflict." *Nishikawa v. U.S. Eagle High, LLC.,* 138 Wn. App. 841, 849, 158 P.3d 1265 (2007).[4] And lastly, differences in contract wording indicate differences in intended meaning. *See, e.g., Sunbreaker Condo. Ass'n v. Travelers Ins. Co*., 79 Wn. App. 368, 376-78, 901 P.2d 1079 (1995) (policy structure and language evidenced intent to treat dry rot and wind-driven rain differently as distinct perils).

[4] *See also* RESTATEMENT § 4.13, cmt. b ("the holder of an easement . . . is entitled to make any use of the servient estate that is reasonable for enjoyment of the servitude, including the right to construct, improve, repair, and maintain improvements that are reasonably necessary").

Each of these principles of contract construction supports the trial court's interpretation of the Easement. The Easement allows the City to construct and maintain public improvements through the designated corridor so long as the improvements do not extend above a "horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water)." This upper height limit is more than ten feet above beach level and would be rendered superfluous if, as Ebb Tide Association asserts, the Easement does not permit the City to construct a below-grade foundation. As the City's witnesses testified, such a walkway would fall apart and wash away. We should avoid that absurd result. And while the Easement limits the area and height of the permissible improvements, it does not similarly limit depth. Under Washington law, this difference confirms, as the trial court ruled, that the Easement does not limit the depth of the proposed walkway.[5]

Lastly, *Coleman v. City of Everett*, 194 Wash. 47, 76 P.2d 1007 (1938), cited by Ebb Tide Association in support of its argument, is inapposite. The issue in *Coleman* was whether the term "along" in an easement permitted projects to be built above ground. *Id.* at 49. The court determined that the easement did not permit water lines to be built above ground, in part, because the city first laid the pipe under the surface of the easement and then later proposed constructing a pipeline above ground. *Id.* at 49-50. Here, in contrast, the City has not yet constructed any improvements on the Easement right of way, so there is no

[5] Ebb Tide Association relies instead on the rule that a contract should generally be construed against its drafter. But "a reviewing court should not resort to the rule of interpretation that construes an agreement against its drafter unless the intent of the parties cannot otherwise be determined." *Wash. Prof'l Real Estate LLC v. Young*, 163 Wn. App. 800, 818, 260 P.3d 991 (2011). Here, the intent of the parties can readily be ascertained as indicated in the text above.

conduct from which to derive the parties' intent as the court did in *Coleman*. Additionally, as discussed above, the essential purpose of the Easement cannot be achieved in the absence of a proper foundation. For these reasons, Ebb Tide Association's reliance on *Coleman* is misplaced.[6]

III

The trial court correctly concluded that "the City has sufficient real property rights to construct a walkway within the easement area, the final design of which will [be] materially consistent with the Planned Improvements," and granted declaratory relief in the City's favor. We affirm.

Feldman, J.

WE CONCUR:

Díaz, J.

Chung, J.

[6] Ebb Tide Association's remaining arguments are insubstantial and can be addressed summarily. First, Ebb Tide Association claims that "the trial court erred in granting the declaratory relief because the Planned Improvements [would] create an exclusive use of a non-exclusive easement." An exclusive easement precludes the servient estate from using the easement area and, in effect, passes fee simple title to the grantee. *Johnson v. Lake Cushman Maint. Co.*, 5 Wn. App. 2d 765, 784-85, 425 P.3d 560 (2018). Here, in contrast, the walkway will be open to the public and Ebb Tide Association and its members retain the right to use the land in ways not inconsistent with the uses granted in the Easement. Second, Ebb Tide Association argues, "In seeking to convert a non-exclusive easement to the City's exclusive use, the City sought, and the trial court effected, an improper taking without just compensation in violation of the Washington Constitution." Ebb Tide Association largely abandons this argument in its reply brief, which clarifies that such a taking occurred (if at all) only if the trial court "misconstrue[d] the easement to grant rights to the City not provided therein." As explained in the text above, that did not occur here. Ebb Tide Association's takings argument thus fails.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Division I Cause No. 84712-1-I to the following:

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Original electronically delivered to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 11, 2023, at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

September 11, 2023 - 1:08 PM

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Superior Court Case Number:	17-2-09476-3

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