

No. 43033-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

EARL IDDINGS, et al, Appellants

V.

MICHAEL AND SUE GRIFFITH, et ux, et al, Respondents

Appeal from the Superior Court of Thurston County
The Honorable Judge Carol Murphy

No. 10-2-02395-7

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Iddings' first three assignments of error are premised upon Iddings' misapprehension of fact. Iddings asserts that the trial court erred by relying on a recent site-survey to establish a right-of-way on Dewatto Bay Drive. Iddings asserts that the court, instead of relying on a current site-survey, should have considered historical evidence of public use and county maintenance of Dewatto Bay Drive in order to determine the scope of the right-of-way, which was pre-existing. Iddings asserts that the right-of-way was pre-established by historical public and county acceptance of a common law dedication and by a prescriptive easement. Mason County counters that, contrary to Iddings' assertion, the trial court did consider historical evidence to determine the scope of the historical right-of-way. Mason County asserts that the current site-survey merely provided a clear, exact measurement of the historical right-of-way. *Did the court err by considering all the evidence presented at trial, weighing the evidence in accordance with the court's assessments of credibility and reliability, and then, as the trier of fact, determining the scope of the historical right-of-way while relying upon the current site-survey to provide a quantitative measurement of the historical right-of-way?*
2. Iddings presents a number of cases to support his legal assertion that the court was required to find that the right-of-way at issue in this case is 30 feet rather than 22.55 feet as found by the trial court. However, Iddings' interpretations of the cases he cites fail to properly distinguish the legal elements of prescriptive easements from those of common law dedications. *Notwithstanding the unique facts of the instant case, does established precedent regarding the law of prescriptive easements or common law dedications, or both, require a right-of-way of 30 feet in the instant case?*
3. Iddings asserts that RCW 36.86.010 requires that all county right-of-ways must extend to a width of 60 feet, but Iddings fails to acknowledge the exceptions to RCW 36.86.010. *In the*

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instant case, where the unique terrain makes a right-of-way of greater than 22.55 feet impractical (measured from the center of the roadway), does RCW 36.38.010 nevertheless require a 60 foot right-of-way (measured as 30 feet from the center of the roadway)?

4. Iddings cites Mason County Code provisions that have no applicability to the instant case and cites other Mason County Code provisions without acknowledging the exceptions to those provisions. *Do these code provisions, notwithstanding the unique circumstances on Dewatto Beach Drive, require a right-of-way of 30 feet?*

B. FACTS AND STATEMENT OF THE CASE

Michael Griffith, who is the defendant-respondent in this matter, owns property on Dewatto Beach Drive in Mason County, Washington. RP (Vol. IV) 4. Without ever having seen or visited the property, Griffith purchased the property in 2006 on the internet. RP (Vol. IV) 4, 16.

Griffith's property is about eight-tenths of an acre. RP (Vol. IV) 4. About 125 feet of Griffith's property is alongside Dewatto Bay. RP (Vol. IV) 4, 17. Dewatto Beach Drive crosses Griffith's property near the water's edge. RP (Vol. IV) 4, 17. On the non-water side of Dewatto Bay, there is an approximately 50-foot, vertical bluff. RP (Vol. IV) 4, 7. Most of Griffith's property is located above the 50-foot bluff. RP (Vol. IV) 4.

The distance from the centerline of Dewatto Beach Drive to rocks that line the shore is only 12 or 13 feet. RP (Vol. IV) 17. On the opposite

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side of the road, it is not more than 22.5 feet from the centerline to the toe of the slope of the vertical bluff that separates most of Griffith's property from access to the road. RP (Vol. I) 119, 131; RP (Vol. III) 96; Ex. 12, 33, 62.

Griffith's only access to the main portion of his property, which is above the 50-foot bluff, is to climb up the 50-foot bluff on foot. RP (Vol. IV) 5. To obtain better access to his property, Griffith decided to build a driveway up the bluff. RP (Vol. IV) 5-6. In preparation of building the driveway, Griffith hired an engineer, had a topographic map prepared, and applied for a variety of required permits. RP (Vol. IV) 6-7.

The engineer's plan to build the driveway up the bluff required the placement of a concrete-block wall to hold up the side of the bluff. RP (Vol. IV) 8. Griffith's neighbor, Earl Iddings, opposed Griffith's plan to build a driveway up the bluff. RP (Vol. IV) 10. The planned placement of the concrete blocks led to a dispute about the width of the county's right-of-way along Dewatto Beach Drive. RP (Vol. IV) 10-17.

In 1912 a prior owner of the affected property executed a "waiver" that allowed a 20 foot right-of-way (measured from center of roadway) for Dewatto Beach Drive. RP (Vol. I) 10-11, 19; RP (Vol. III) 60-66, 73; Ex. 32. There was a purported second waiver for a 30 foot right-of-way

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(measured from center of roadway), known as the "Beebe Waiver," in 1957. RP (Vol. I) 17-18; RP (Vol. III) 60, 73, 77. The trial court found that the plaintiffs "failed to show that the Beebe Waiver was a dedication applicable to Dewatto Beach Drive at the location at issue." CP 653 (Finding of Fact No. 15). Neither the 1912 nor the 1957, Beebe Waiver, were recorded. RP (Vol. I) 42, 104-105; RP (Vol. III) 66.

Griffith hired Sidney Bechtoldt, a licensed professional surveyor, to survey the property and to locate the right-of-way. RP (Vol. III) 57-59. Evidence showed that the maximum historical width of the right-of-way was 22.55 feet (measured from the centerline of the road), but Iddings disputes this evidence and claims instead that the county has maintained and the public has used a larger width than 22.55 feet, but that the full extent of it has been reduced by slough falling from the vertical bluff. RP (Vol. I) 100-102, 125, 145-146; RP (Vol. II) 33; Ex. 12, 33.

The trial court found that "credible testimony" showed that Mason County had maintained a turnaround on Griffith's property, but the court also found that testimony about the width of the Mason County's acceptance of the common law dedication was "conflicting." CP 653 (Findings of Fact No. 17, 18). The trial court, as the finder of fact, found that evidence disputing a right-of-way of 22.55 feet was "vague,"

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"inexact," or not based upon personal knowledge. CP 654 (Findings of Fact No. 20, 21, 25, 28, 29). The court noted that Mr. Brush, who was a witness presented by Griffith, "testified very credibly as to Mason County's process for determining the scope of historical public use." CP 655 (Findings of Fact No. 30).

The court found that "[t]here was no testimony that the public ever used an area wider than Dewatto Beach Drive as it currently exists for a public road." CP 654 (Finding of Fact No. 24). The court found that Griffith's surveyor, Bechtoldt, "was a credible witness." CP 655 (Finding of Fact No. 32). Based upon Bechtoldt's survey, admitted as Exhibit 12, and "all the evidence admitted at trial," the court found that the right-of-way is 22.55 feet. CP 654 (Finding of Fact 22); CP 655 (Findings of Fact No. 31, 32, 33, 34).

C. ARGUMENT

1. Iddings' first three assignments of error are premised upon Iddings' misapprehension of fact. Iddings asserts that the trial court erred by relying on a recent site-survey to establish a right-of-way on Dewatto Bay Drive. Iddings asserts that the court, instead of relying on a current site-survey, should have considered historical evidence of public use and county maintenance of Dewatto Bay Drive in order to determine the scope of the right-of-way, which was pre-existing. Iddings asserts that the right-of-way was pre-established by historical

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public and county acceptance of a common law dedication and by a prescriptive easement. Mason County counters that, contrary to Iddings' assertion, the trial court did consider historical evidence to determine the scope of the historical right-of-way. Mason County asserts that the current site-survey merely provided a clear, exact measurement of the historical right-of-way. *Did the court err by considering all the evidence presented at trial, weighing the evidence in accordance with the court's assessments of credibility and reliability, and then, as the trier of fact, determining the scope of the historical right-of-way while relying upon the current site-survey to provide a quantitative measurement of the historical right-of-way?*

The primary theme of Iddings' assignments of error is that he disputes the trial court's finding that the Dewatto Beach Drive right-of-way is 22.55 feet rather than the 30 feet or more as asserted by Iddings. (Brief of Appellant, at p.9-10). But Iddings' assignments of error, and particularly his first three assignments of error, do not resemble any finding of fact nor any conclusion of law by the trial court. Although Iddings' assignments of error could be interpreted to be assigning error to conclusions of law, rather than issues of fact, each of the assignments is premised upon an assertion of fact by Iddings that does not appear in the trial court's findings of fact.

On review, evidence is viewed in the light most favorable to the party who prevailed at trial, and deference is given to the trial court's determinations of witness credibility and the resolution of conflicting

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testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004). When appellant challenges the trial court's findings and there is conflicting evidence presented at trial in regard to that finding, the reviewing court need only consider the evidence that is most favorable to the respondent in support of the challenged finding. *Matter of Estate of Lint*, 135 Wn.2d 518, 533, 957 P.2d 755 (1998).

Some of the trial court's findings of fact might be properly interpreted as conclusions of law, and if conclusions of law are erroneously labeled as findings of fact, the reviewing court reviews them de novo as conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007).

"Where, as here, a mixed question of law and fact exists, it is 'within the province of the trier of fact to determine from conflicting evidence the existence of facts necessary to constitute' dedication, 'and such factual findings will not be disturbed on appeal when they are amply sustained by the record.'" *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 166, 684 P.2d 789 (1984), quoting *Peeples v. Port of Bellingham*, 93 Wn.2d 776, 771, 613 P.2d 1128 (1980)(overruled on other grounds by *Chaplin v. Sanders*, 100 Wn.2d 853, 861-862, n. 2, 676 P.2d 431 (1984)).

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Contrary to Iddings' assertions, the trial court in the instant case considered "all of the evidence." CP 654 (Finding of Fact No. 22). The court considered the historical use of Dewatto Beach Drive and found that "[t]here was no testimony that the public ever used an area wider than Dewatto Beach Drive as it currently exists." CP 654 (Finding of Fact No. 24). "After considering all [emphasis added] of the evidence produced at trial," the court found that "Mason County maintained... a width of 22.55 feet." CP 654 (Finding of Fact No. 24).

2. Iddings presents a number of cases to support his legal assertion that the court was required to find that the right-of-way at issue in this case is 30 feet rather than 22.55 feet as found by the trial court. However, Iddings' interpretations of the cases he cites fail to properly distinguish the legal elements of prescriptive easements from those of common law dedications. *Notwithstanding the unique facts of the instant case, does established precedent regarding the law of prescriptive easements or common law dedications, or both, require a right-of-way of 30 feet in the instant case?*

In the body of his brief, Iddings cites a number of cases to argue his position that the right-of-way is greater than 22.55 feet, but Iddings erroneously interprets the holding or applicability of these cases.

In the case of *Sparks v. Douglas County*, 39 Wn. App. 714, 695 P.2d 588 (1985), Sparks, who owned property, executed a "Right of Way

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Deed" and granted to Douglas County a 40-foot wide right-of-way for a road on his property. *Id.* at 716. In 1980, after the county had for many years maintained and used a blacktop road that occupied a fractional portion of the 40-foot right-of-way, a dispute arose over the location and size of the easement. *Id.* at 716-717.

The deed was later found to be defective because it lacked a sufficient legal description of the affected property, but the court found that Douglas County nevertheless had a prescriptive easement over the 40-foot right-of-way. *Id.* at 717. Even though Douglas County had maintained a road and blacktopped only a portion of the easement, which was less than 40 feet, and had not exercised any control over the land beyond the blacktop, the court found that the prescriptive easement extended to include the entire 40-foot right-of-way. *Id.* at 718-719. (Thus, *Sparks v. Douglas County* is a case that pertains to prescriptive easements but does not address common law dedications.)

The defective deed was viewed as evidence of the parties' intent to grant a 40-foot easement. *Id.* at 717. And the court found that the 40-foot easement was necessary to maintain an unobstructed view of the roadway so as to prevent accidents. *Id.* at 718-719. The *Sparks* court concluded its analysis by emphasizing that "[a]n appellate court will not retry factual

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issues of a case but will only review the record to determine if the findings are supported by substantial evidence." *Id.* at 722, citing *In re Marriage of Smith*, 100 Wn.2d 319, 324, 669 P.2d 448 (1983); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959).

In the case of *In re West Marginal Way in Seattle of Seattle*, 109 Wash. 116, 186 P. 644 (1919), the City of Seattle condemned a 100-foot width of land but asserted that it contained a county road with a 60-foot right-of-way that it claimed by prescriptive user. *Id.* at 117, 119. The City wanted to subtract the value of the 60-foot right-of-way from the 100-foot condemnation to determine the cost of the condemnation. *Id.* at 117-118. The road was 10 to 12 feet in width and had been used by the public for more than 30 years. *Id.* at 118-119. Both the existence and the width of the right-of-way were in dispute. *Id.* 118.

The court found that "the right to the roadway was acquired by prescription" because the public had used the road for many years and also because public money was used to maintain the road. *Id.* at 119. (Thus, *In re West Marginal Way* is a case that pertains to prescriptive easements but does not address common law dedications.)

The City of Seattle maintained that the prescriptive easement included the entire claimed 60-foot right-of-way, but the affected property

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owner claimed that the easement only included the 10 to 12 feet of roadway that was actually used as a roadway. *Id.* at 120. But when the road was originally declared by the county, "[t]he county actually laid out and surveyed a road 60 feet in width." *Id.* at 120. The court found that the prescriptive easement included the entire 60-foot claimed right-of-way, and in support of this finding the court cited its prior decision from the case of *City of Olympia v. Lemon*, 93 Wash. 508, 161 P. 363 (1916), and also quoted from the court's prior decision in *Yakima County v. Conrad*, 26 Wash. 155, 66 P. 411(1901), as follows:

After the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case.

In re West Marginal Way at 120, quoting *Yakima County v. Conrad* at 159, and citing *Olympia v. Lemon* at 510.

In re West Marginal Way is distinguished from the instant case because *Marginal Way* involved a prescriptive easement that was derived from a "road which was used by the public... by reason of the original roadway which was established by the county commissioners 60 feet in width." *In re West Marginal Way* at 122.

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City of Olympia v. Lemon, 93 Wash. 508, 161 P. 363 (1916), is distinguished because it did not involve the creation of a new road, but instead involved a minor extension of the length of an existing road. Because the width of the right-of-way of the road was 30 feet as it existed before it was extended and the right-of-way width of adjacent streets were also 30 feet, and because the court found that "at the time the rights of the public became fixed in this road the maximum width of county roads was 60 feet, and the minimum width 30 feet," the court held that the prescriptive easement was not limited to the width of the roadway actually used, but that it instead extended to include a 30-foot right-of-way. *City of Olympia v. Lemon*, 93 Wash. 508, 511, 161 P. 363 (1916).

In *Yakima County v. Conrad*, 26 Wash. 155, 66 P. 411(1901), as in the instant case, evidence regarding the width of the disputed right-of-way was "not very clear." *Id.* at 159. The plaintiffs alleged a right-of-way of 60 feet. *Id.* at 156. But the court affirmed the trial court's finding and decision that the right-of-way was 40 feet. *Id.* 159.

The court noted that "at the time the rights of the public became fixed in this road the maximum width of county roads was 60 feet, and the minimum width 30 feet." *Id.* at 159. The court reasoned that "[t]his is a circumstance that the court could take into consideration in fixing the

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width of the road." *Id.* at 159. The court did not hold that the minimum or maximum road widths were controlling of the question, but only recognized this factor as a circumstance appropriate for consideration. *Id.*

The court held that the width of the disputed right-of-way was not limited to the width of the "beaten path," but instead was the width that "is reasonably necessary for the public easement of travel" and that it "must be determined from a consideration of the facts and circumstances peculiar to the case." *Id.* at 159.

After considering the facts and circumstances peculiar to the case, the court affirmed the trial court's decision holding that the right-of-way was 40 feet. The court concluded that "[i]t is generally a question of fact to be determined under the circumstances of each particular case, and the easement may be as broad as the public require for passing as well as traveling in one direction." *Id.* at 159-160.

A common thread that runs through each of these cases is that as a matter of law the width of a prescriptive easement is not limited to the width that has actually been used but that it may, in appropriate cases, extend to include a larger area, but the actual width of the right-of-way is a question of fact to be determined by consideration of the facts and circumstances peculiar to each case. *Yakima County v. Conrad*, 26 Wash.

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155, 159-160, 66 P. 411(1901); *City of Olympia v. Lemon*, 93 Wash. 508, 511, 161 P. 363 (1916); *In re West Marginal Way in Seattle of Seattle*, 109 Wash. 116, 120, 186 P. 644 (1919); see also, *Hamp v. Pend Oreille County*, 102 Wash. 184, 187, 172 P. 869 (1918) (The width of a prescriptive easement, though not as a matter of law limited to the width of the "actual beaten path," is nevertheless "generally a question of fact to be determined under the circumstances of each particular case").

Though similar in analysis and result, there is a distinction between prescriptive easements and common law dedications. The case of *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 684 P.2d 789 (1984), involves a dispute regarding the width of a right-of-way, but *Sweeten* is distinguished from *Conrad*, *Lemon*, and *West Marginal Way* because it examines an easement obtained by common law dedication rather than a prescriptive easement.

In *Sweeten*, owners of property executed a 20-foot wide dedication for a road, but the dedication was evidenced by an unsigned, unrecorded plat. *Sweeten v. Kauzlarich*, 38 Wn. App. at 165. The portion of the dedication actually used was a narrow strip, but in 1974 *Sweeten* sued to establish the dedicated easement as it was described on the unrecorded, unsigned plat. *Id.*

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The court found that because the plat was not recorded, the dedication did not satisfy the requirement of an express dedication but that the plat did evidence the intent of the landowner to grant a dedication. *Id.* at 166-167. The court found that the dedication did, therefore, operate as a common law dedication. *Id.*

Kauzlarich argued that the common law dedication was limited to the part of the width of the dedication that had actually been accepted by the public; Sweeten argued that acceptance of any part of the dedication was an acceptance of the entire width originally intended to be dedicated. *Id.* at 167. The court, reasoned that "[w]here dedication of a public highway is presumed from user..., the presumptive grant cannot be broader than the user, and is confined to the tract actually used." *Sweeten* at 167, quoting 26 C.J.S. *Dedication* § 44, 494. Additionally, the *Sweeten* court acknowledged that "Washington courts have also recognized that the width of a dedicated road, although presumed to be dedicated to the full width reasonably necessary for public travel, depends upon the facts and circumstances of the case." *Sweeten* at 167-168 (citations omitted). The *Sweeten* court ultimately held that the unrecorded plat established a common law dedication that was accepted by user but that the width of the

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dedication was limited to the width that was actually used. *Sweeten* at 165, 170.

In the instant case, Dewatto Beach Drive is only a few feet from Dewatto Bay on one side of the road and is bordered by a 50 foot bluff on the other side. RP (Vol. IV) 4, 7, 17. On the bluff side of Dewatto Beach Drive, there is only 22.55 feet from the centerline of the road to the toe of the slope of the bluff. RP (Vol. I) 119, 131; RP (Vol. II) 33; RP (Vol. III) 96; Ex. 12, 33, 62. Griffith has no access to his property except to cut away a part of the bluff, place concrete blocks, and build a driveway up the bluff. RP (Vol. IV) 4. These facts show that, as evidenced by current usage, 22.55 feet is a right-of-way that is within that which is reasonably necessary for public travel as determined by the trial court's "consideration of the facts and circumstances peculiar to the case." *In re West Marginal Way* at 120, quoting *Yakima County v. Conrad* at 159, and citing *City of Olympia v. Lemon* at 510.

The instant case is unique because it arises out of a common law dedication of 20 feet that was expanded by 2.55 by prescriptive easement. RP (Vol. I) 10-11, 19, 100-102, 125; RP (Vol. II) 33; RP (Vol. III) 60-66, 73; Ex. 12, 32, 33; CP 652 (Finding of Fact 10); CP 655 (Finding of Fact 34). Thus, the area actually used is 22.55 feet. Because the scope of a

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common law dedication is restricted to the area actually used, the right-of-way as derived from the common law dedication would be at most 22.55 feet, but could be only 20 feet if the scope is limited to the extent of the original dedication.

Iddings bears the burden of proving the extent of the prescriptive easement by a preponderance of the evidence. *Hebish v. Pacific County*, 168 Wash. 91, 92, 10 P.2d 999 (1932). None of the cases cited above in regard to prescriptive easements stand for the proposition that an encroachment of 2.55 inches beyond what was expressly intended by a dedication would by default lead to a 60-foot right of way. Instead, the cases stand for the proposition that the extent of a prescriptive easement is dependant upon the facts and circumstances peculiar to each case. In the instant case, the terrain of Dewatto Beach Drive, and Griffith's otherwise restricted access to his property, are peculiar facts that support the trial court's ruling.

3. Iddings asserts that RCW 36.86.010 requires that all county right-of-ways must extend to a width of 60 feet, but Iddings fails to acknowledge the exceptions to RCW 36.86.010. *In the instant case, where the unique terrain makes a right-of-way of greater than 22.55 feet impractical (measured from the center of the roadway), does RCW 36.38.010 nevertheless require a 60 foot right-of-way (measured as 30 feet from the center of the roadway)?*

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Iddings asserts that RCW 36.86.010 requires the court to stretch the right-of-way from 22.55 feet to 30 feet from the centerline. But RCW 36.86.010 declares as follows:

From and after April 1, 1937, the width of thirty feet on each side of the center line of county roads, exclusive of such additional width as may be required for cuts and fills, is the necessary and proper right-of-way width for county roads, unless the board of county commissioners, shall, in any instance, adopt and designate a different width. This shall not be construed to require the acquisition of increased right-of-way for any county road already established and the right-of-way for which has been secured.

The language of RCW 36.86.010 merely declares what the "necessary and proper" width for the right-of-way is; it does not require a particular right-of-way width. *Id.* Particularly, the statute specifically does not require that the right-of-way of previously established roads be expanded. *Id.*

Regardless when the right is first asserted in court, the rights of a prescriptive easement vest when there has been an "open, notorious, and adverse use [of the property] for more than ten years. *King County v. Hagen*, 30 Wn.2d 847, 856, 194 P.2d 357 (1948). RCW 36.86.010 applies to roads that are created after April 1, 1937. *Id.* In the instant case, the landowner's 20-foot from centerline dedication was granted in 1912. At some unknown time over the years, the dedicated right-of-way apparently

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crept out an additional 2.55 feet (apparently by prescriptive easement) as shown by credible measurement of the area that was maintained by the county and used by the public. RP (Vol. I) 100-102, 125, 145-146; RP (Vol. II) 33; Ex. 12, 33.

The facts peculiar to the instant case make a 30 foot right-of-way impractical. RCW 36.86.010 declares what is necessary and proper by default, but the actual width of a prescriptive right-of-way should be determined from the unique facts of each case. *In re West Marginal Way in Seattle of Seattle*, 109 Wash. 116, 120, 186 P. 644 (1919); *City of Olympia v. Lemon*, 93 Wash. 508, 510, 161 P. 363 (1916); *Yakima County v. Conrad*, 26 Wash. 155, 159, 66 P. 411(1901).

4. Iddings cites Mason County Code provisions that have no applicability to the instant case and cites other Mason County Code provisions without acknowledging the exceptions to those provisions. *Do these code provisions, notwithstanding the unique circumstances on Dewatto Beach Drive, require a right-of-way of 30 feet?*

Iddings asserts that Mason County Code § 16.38.050 requires a right-of-way of a 50-foot radius at the end of county roads for a turnaround. (Brief of Appellant at p. 34). However, it is apparent that this is a typographical error and that Iddings intends to cite Mason County Code § 16.28.050. But this code provision does not apply to this case,

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because it only applies to the platting of subdivisions and to the "division of land into four or fewer lots," Mason County Code § 16.04.020. This provision of the Mason County Code does not operate to expand the size of a preexisting prescriptive easement or common law dedication. Still more, Iddings has provided no citation to the record or authority to support a finding that this code provision was in effect when the prescriptive easement and the common law dedication at issue in this case vested. Finally, if any party has a grievance regarding a provision of Title 16 of the Mason County Code, the sole remedy is an appeal to the hearings examiner. Mason County Code §§ 15.11.010, 15.11.040.

Iddings is asserting that the right-of-way, whenever acquired, must be 30 feet as he claims because there is a Mason County Ordinance that requires in certain cases that specific persons or entities who apply for building code permits in Mason County on dead-end roads must, unless exempted or excepted, provide "provisions for the turning around of fire apparatus." Mason County Code § 14.17.090 (Ord. No. 44-10, May 25, 2010).

Mason County Code § 14.17.150 provides an exemption, to § 14.17.090, as follows:

When access roads cannot be installed to these standards due to topography, waterways, nonnegotiable grades or other

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similar conditions, the fire marshal is authorized to require additional fire protection or mitigation as specified in Section 901.4.3 of the 2009 IFC. The fire marshal may also approve access roads which do not meet these requirements if the road provides reasonable access under the individual facts of the case.

(Mason County Ord. No. 44-10, May 25, 2005).

Additionally, Iddings has not shown that there was any fire apparatus access road ordinance in effect when the prescriptive easement or common law dedication vested in this case. There is no credible evidence in the record that a larger area than 22.55 feet has been used as a turnaround on Dewatto Bay Drive for fire apparatus or for any other purpose, much less that any such alleged turnaround has been used for the period of time necessary to create a prescriptive easement. And an ordinance that is enacted after a dedication has vested or after a prescriptive easement has vested does not, necessarily, act as an expansion of the easement.

Finally, whether the fire marshal or Mason County issues a driveway connection permit or other permit of the kind regulated by Mason County's fire apparatus access road ordinance is not determinative of the size of a disputed right-of-way. Mason County Code § 15.11.010 mandates that administrative decisions regarding fire apparatus access roads, driveway connection permits, and the like, must be appealed first to

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a hearings examiner. An aggrieved party is restricted from a judicial appeal unless the administrative appeal process has been timely exhausted. Mason County Code § 15.11.040.

The fire apparatus access road issue is not properly before this court because Iddings has not exhausted his administrative remedies on this permit issue. And, still more, the fire apparatus access road issue does not determine the size of the prescriptive easement or the size of the common law dedication, but instead, is only relevant to whether and under what conditions a driveway permit should issue.

D. CONCLUSION

The facts and applicable law support the trial court's ruling in this matter. There was only one trier of fact in this trial, and that was the trial judge. The trial judge is not bound to accept the testimony of any witness. The trial judge may rightly assess the credibility of each witness and assess the weight to given to any evidence. The trial court judge considered all the evidence, and from that evidence the trial judge determined the width of the historical right-of-way on Dewatto Beach Drive. That historical distance was measured by a recent survey to be 22.55 feet.

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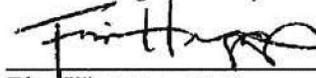
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The unique and peculiar circumstances of Dewatto Beach Drive make it impractical to demand or require a right-of-way greater than 22.55 feet. The common law dedication upon which the right-of-way is founded was at its origin intended to be 20 feet. The encroachment over time of an additional 2.55 feet does not work to create a default encroachment of ten feet, for a total of 30 feet, where unique circumstances make a further encroachment impractical.

Mason County requests that Iddings' appeal be denied and the ruling of the trial court be affirmed.

DATED: January 4, 2013.

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