NO. 328783-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

TOM G. LUTZ and KAREN LUTZ, husband and wife,

Plaintiffs/Respondents,

v.

LISA BUFFINGTON,

Defendant/Appellant,

APPEAL FROM THE SUPERIOR COURT

HONORABLE RANDALL KROG

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR NO. 2: The Trial Court Erred by Entering the Order of Denial Dated February 27, 2014.

Issues Pertaining to Both the Above Assignments of Error:

Issue No. 1: Should this action have been dismissed because it was a compulsory counterclaim in the prior action between the parties?

Issue No. 2: Should this action have been dismissed because necessary parties were not joined?

ASSIGNMENT OF ERROR NO. 3: The Trial Court Erred by Entering the Amended Ruling of the Court.

ASSIGNMENT OF ERROR NO. 4: The Trial Court Erred by Entering the Judgment/Decree Condemning/Granting Private Way of Necessity.

Issues Pertaining to Both the Above Assignments of Error:

Issue No. 1: Were the plaintiffs entitled to a private way of necessity when they have an easement implied by necessity over land once owned by their grantor?

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Issue No. 1: Did sufficient evidence justify the trial court's decision on compensation when plaintiffs' appraiser relied on the sales comparison approach to establish value; did not identify any comparable transactions; and acknowledged that the value of the easement that the plaintiffs' sought in this action could be based on the amount necessary for the plaintiffs to secure alternate access to a public road?

STATEMENT OF THE CASE

I. Underlying Facts.[1]

Ponderosa Park is a subdivision near Goldendale in Klickitat County, Washington. The parcels within the subdivision are all approximately five (5) acres in size. It was platted in 1978-79. (CP 177) A

[1] This case was tried to the court. By its terms, the Amended Ruling of the Court is its Findings of Fact and Conclusions of Law. There is little dispute concerning most of the factual matters. Therefore, most of the references will be to the Amended Ruling of the Court. The references will be to a page within the Clerk's Papers and a paragraph. The legend "FF" will refer what the Amended Ruling of the Court calls Findings of Fact. Some of the Conclusions of Law also contain factual findings. Where appropriate, these will be designated as "CL."

homeowners' association called Ponderosa Park Owners Association was incorporated to govern the subdivision in 1977. There have been Covenants, Conditions and Restrictions (CCRs) in place for the subdivision since its inception. The CCRs have been amended from time to time. The most recent amendment was adopted in 1999. There are private roads within the subdivision. Their maintenance and use is governed by the CCRs. Among these private roads are Tamarack Road and E. Ponderosa Drive. (CP 177, FF 1; Ex. 21, 38)

The developers of Ponderosa Park were William Kershaw, Jr., Lawrence Letterman, and Margaret Letterman. The land within the subdivision was owned by Ponderosa Parcels, Inc. Mr. Kershaw and the Lettermans were principals of Ponderosa Parcels, Inc. (Ex. 10, 42)

Plaintiffs/Respondents Tom Lutz and Karen Lutz (the Lutzes) own property outside but adjacent to Ponderosa Park. The parties and the trial court have referred to the Lutzes' parcels by their tax lot number as shown on Exhibit 20. These are lots 110, 112, and 113.

Mr. Lutz and his then spouse purchased Lot 113 in 1973 for $2,500.00. The parcel had no access to any public road. Mr. Lutz reached the road by going onto E. Ponderosa Drive to Aspen Road, another private

road within Ponderosa Park, and approaching Lot 113 on foot. (CP 177, FF 2)[2]

On March 24, 1996, Lisa Buffington and her now deceased husband, Dennis Lemler, entered into a Real Estate Contract with Ponderosa Parcels, Inc. to purchase Lot 82 of Ponderosa Park. The contract filed of record with the Klickitat County Auditor on March 25, 1996. (CP 178, FF 6; Ex. 9)[3] As can be seen, Lot 82 forms a right triangle. (Ex. 20, 21)

Ernest Brokaw and E. Jean Brokaw sold Lots 110 and 112 to the Lutzes in 1996. The transaction is evidenced by a Statutory Warranty Deed filed with the Klickitat County Auditor on September 30, 1996. (CP 178, FF 3; Ex. 7) These lots were part of a larger holding that had been in the Brokaw family for many years. The Brokaws retained other land that fronts on Pipeline Road, a public thoroughfare. (CP 178, FF 3; Ex. 56)

At the time of the conveyance in 1996, there was no road or other path over the Brokaw property between Pipeline Road and Lots 110 and 112. There was also no discussion about the Brokaws granting an easement to the Lutzes over their property to Pipeline Road. (CP 178, FF 3, 5)

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[2] Aspen Road is depicted on Exhibit 21.
[3] Ponderosa Parcels, Inc. issued a Fulfillment Deed in March of 2006. (Ex. 10)

Also on September 30, 1996, Ponderosa Parcels, Inc. granted an easement to Mr. Lutz across the northern sixty feet of Lot 82. The land over which this easement ran formed another right triangle at the lot's north end. The easement was described as a "non-exclusive perpetual EASEMENT 60 feet in width which easement is for the purpose of ingress and egress" over Lot 82, Ms. Buffington's parcel. The easement by its terms ran in perpetuity with Lot 110 only. The Lutzes were also granted a non-exclusive perpetual easement for the use of all roads located within all recorded plats of Ponderosa Park. (CP 68; Ex. 8) Ms. Buffington was not advised of this easement and did not consent to it. (CP 178, FF 6)

The Lutzes then placed one manufactured home on Lot 110 and another on Lot 113. They constructed a gravel road that they called "Lutz Parkway" to provide access for the two manufactured homes. Lutz Parkway goes over the north sixty (60) feet of Lot 82 and intersects with Tamarack Road, one of the private roads in Ponderosa Park. The persons residing in the manufactured homes would go over Tamarack Road to E. Ponderosa Drive and then take E. Ponderosa Drive to the public thoroughfare, Pipeline Road. (CP 179 FF 9, 11)

In 1997, Mr. Kershaw, the Lettermans, and Ponderosa Parcels, Inc. deeded private road easements within the subdivision to all the subdivision's lots. (CP 85-88; Ex. 42)

In 2004, the Brokaws sold the remainder of their holdings in the area, including the land that fronts on Pipeline Road, to Gene Cyrus and Judith Cyrus (the Cyruses)[4] (CP 178, FF 3; Ex. 30) The Cyruses subsequently divided a portion of this property into two short subdivisions of four parcels each. They created Dancing Mountain Road as a private road between the two short subdivisions. Dancing Mountain Road intersects with Pipeline Road. (CP 178, FF 3; Ex. 22, 31, 32)

The Lutzes' tenants have not endeared themselves to Ms. Buffington and other Ponderosa Park residents. The tenant on Lot 113 has been investigated for marijuana production. There have also been instances of discharge of firearms near the property. The tenants have exceeded the posted speed limits on the subdivision's private roads. They have been noisy. They have allowed their dogs to roam freely. (CP 181, FF 23) This is upsetting to Ms. Buffington because she and Mr. Lemler bought Lot 82 because of its semi-rural nature and their desire to recreate there. (CP 178, FF 7)

The Appendix contains Exhibits 20 and the first of two pages of Exhibits 21 and 22. Exhibit 20 shows Lots 110, 112, and 113 along with Ms. Buffington's Lot 82. To the east and southeast of Lot 113 is land

[4] By this time, Mr. Brokaw had passed away. The deed given to the Cyruses was signed by Mrs. Brokaw and a daughter, Margaret Brokaw.

marked as Lots 9-14. This property is part of the land retained by the Brokaws in 1996 and sold to the Cyruses in 2004. Pipeline Road is east of the parcels pictured on Exhibit 20. Exhibit 21 is a map of lots within Ponderosa Park. The subdivision's private roads, including Aspen Road, Tamarack Road, and E. Ponderosa Drive are depicted here. (Exhibit 22 is a section map) The area in question is in a rectangle toward the bottom of the map. It shows all roads of interest here including Aspen Road, Tamarack Road, E. Ponderosa Drive, Lutz Parkway, Dancing Mountain Road, and Pipeline Road.

II. The First Suit.

In 2006, Ms. Buffington sued to invalidate the grant of the easement over Lot 82 in that case entitled *Buffington v. Lutz,* Klickitat County Superior Court No. 06-200257-7. The court concluded that Ponderosa Parcels, Inc. did not have the authority to grant the easement that it granted to Mr. and Mrs. Lutz over Lot 82. It further ruled that the Lutzes were on notice of the inability of Ponderosa Parcels, Inc. to grant them the easement because of the prior recording of the CCRs and the Real Estate Contract to Ms. Buffington and Mr. Lemler. It quieted title in Lot 82 free of all claims that the Lutzes might make under the terms of the easement. It stayed the effectiveness of the decree quieting title for a period of ninety (90) days. The court declined to rule on the validity of the

grant of the easement over the other private roads within Ponderosa Park. (CP 49-56; CP 180, FF 17; Ex. 1, 40)

III. Proceedings in the Present Action.

On June 30, 2009, the Lutzes filed this action seeking to condemn a private way of necessity over Lot 82. (CP 1-7) Their Amended Petition was filed on April 5, 2011. (CP 8-13) Ms. Buffington answered the Amended Petition. As affirmative defenses, she stated that the action was barred because it amounted to a compulsory counterclaim that should have been brought in the previous action. She also alleged that the Lutzes had failed to join necessary parties consisting of other owners of lots within Ponderosa Park. Her answer was filed on June 7, 2012. (CP 16-18) The Lutzes took no action to join any other lot owners within Ponderosa Park. (CP 27)

On January 8, 2014, Ms. Buffington moved for summary judgment to dismiss the action. (CP 19-36) Her motion was based on two contentions. She first asserted that the action to condemn the private way of necessity was barred because it should have been raised as a compulsory counterclaim in *Buffington v. Lutz, supra.* She also argued that the matter should be dismissed for failure to join other homeowners as necessary parties. These were the owners whose lots were encumbered by easements for Tamarack Road and E. Ponderosa Drive, part of the

necessary route for anyone using the Lutz parcels. In support of the latter claim, she contended that Ponderosa Parcels, Inc. had no authority to grant the Lutzes an easement for private roads within the subdivision.

The court denied Ms. Buffington's motion for summary judgment. It ruled that the present action was not a compulsory counterclaim and that the other homeowners were not necessary parties. (CP 170-75)

The matter was subsequently tried to the court. It issued the Amended Ruling of the Court on August 15, 2014, and the Judgment/Decree Granting Private Way of Necessity on September 11, 2014. (CP 176-87, 193-96) These rulings allow the Lutzes a private way of necessity for the benefit of Lots 110, 112, and 113; granted compensation to Ms. Buffington; and awarded Ms. Buffington's attorney's fees.[5] Ms. Buffington then appealed. The Lutzes have not cross appealed.

ARGUMENT

ASSIGNMENT OF ERROR NO. 1: The Trial Court Erred by Entering the Ruling of the Court Dated February 1, 2014.

ASSIGNMENT OF ERROR NO. 2: The Trial Court Erred by Entering the Order of Denial Dated February 27, 2014.

[5] The precise content of the rulings at issue in this appeal will be discussed below.

I. Standard of Review.

The trial court denied Ms. Buffington's motion for summary judgment and effectively struck her affirmative defenses. Since the matter was decided on summary judgment, the Appellate Court reviews the trial court's decision *de novo* performing the same inquiry as did the trial court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

Summary judgment is appropriate if the pleadings, depositions and other materials show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). There are no disputed facts on the issues presented by Ms. Buffington's summary judgment motion. The legal issues can therefore be decided summarily. As will be seen, the trial court misinterpreted the law, and its decision amounted to error.

II. The Lutzes' Action to Condemn a Private Way of Necessity Is a Compulsory Counterclaim That They Should Have Brought in *Buffington v. Lutz*.

The failure of a party to plead a compulsory counterclaim will prevent that party from subsequently bringing a separate action on that claim. *Schoeman v. New York Life Insurance Co.*, 106 Wn.2d 855, 726

P.2d 1 (1986); *Krikava v. Webber*, 43 Wn.App. 217, 716 P.2d 916 (1986). This notion is based on CR 13(a), which provides as follows in pertinent part:

> **Compulsory Counterclaims.** Pleadings shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication, the presence of third parties of whom the court cannot acquire jurisdiction. . .

A liberal and broad construction is given to CR 13(a) to avoid a multiplicity of suits and to insure that all controversies among the parties will be settled in one action. *Schoeman v. New York Life Insurance Company, supra,* 106 Wn.2d at 864; *Chew v. Lord,* 143 Wn.App. 807, 816, 181 P.3d 25 (2008).

As CR 13(a) states, a compulsory counterclaim must arise out of the same transaction as the plaintiff's claim. A counterclaim arises from the same transaction if it is logically related to plaintiff's initial claim. *Schoeman v. New York Life Insurance Company, supra,* 106 Wn.2d at 865-866. Ms. Buffington's quiet title action — *Buffington v. Lutz, supra* — is logically related to the Lutzes' attempt to condemn a private way of necessity. Both claims deal with whether or not and upon what terms the Lutzes can cross Ms. Buffington's property. The court determined in *Buffington v. Lutz, supra,* that the Lutzes did not have a valid easement to

do so. In this case, the Lutzes sought to condemn the easement that they did not validly have. The two are therefore logically related, and the Lutzes attempt to condemn a private way of necessity is a compulsory counterclaim under the terms of CR 13(a).

There is one exception to the compulsory counterclaim rule. A defendant need not plead any claim that matures after his or her answer has been filed. That exception comes from CR 13(e), which reads as follows:

> **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with permission of the court, be presented as a counterclaim by supplemental pleading.

The Lutzes claimed, and the trial court agreed, that the claims the Lutzes brought in this case did not mature until after the Court entered judgment in *Buffington v. Lutz, supra.* (CP 173) That conclusion was not correct.

The exception is discussed in Wright, Miller & Kane *Federal Practice and Procedure* §1411 (1990) as follows:

> This exception to the compulsory counterclaim requirement necessarily encompasses a claim that depends upon the outcome of some *other* lawsuit and thus does not come into existence until the action upon which it is based has terminated. . .However, a counterclaim will not be denied treatment as a compulsory counterclaim solely because recovery on it depends on the outcome of the main action. This approach seems sound when the counterclaim is based on pre-action events and only the

> right to relief depends upon the outcome of the main action.

This view was adopted by the Court in *Chew v. Lord*, *supra*, 143 Wn.App. at 814, and in *Lane v. Skamania County*, 164 Wn.App. 490, 498, 265 P.3d 156 (2011).

Under this test, the Lutzes' claim to condemn a private way of necessity had matured when Ms. Buffington sued in *Buffington v. Lutz, supra*. The easement granted by Ponderosa Parcels, Inc. was invalid the moment it was executed because, as the Superior Court found, Ponderosa Parcels, Inc. lacked the authority to grant it. In fact, and once again as the court concluded in *Buffington v. Lutz, supra*, the Lutzes were on notice of the infirmity of the easement because that infirmity was apparent from public record. (CP 54; Ex. 40, p. 6; CL 3) This conclusion is especially apt where Lots 112 and 113 are concerned. The easement granted to the Lutzes in 1996 was appurtenant only to Lot 110. The Lutzes were simply not given an easement meant to benefit Lot 112 or Lot 113. They were on notice that they had no easement over Lot 82 that would benefit these two lots.

The Lutzes are expected to contend that their claim had not matured until after the Superior Court invalidated the easement they received in 1996. This argument fails. All the court did in *Buffington v.*

Lutz, supra, was to declare in 2009 a state of affairs that had existed since the easement was granted in 1996.

It is true, of course, that the Lutzes' would have to condemn a private way of necessity under RCW 8.24 only if Ms. Buffington successfully invalidated the easement in *Buffington v. Lutz, supra.* But as stated above, a counterclaim is compulsory even though recovery on it depends on the outcome of the main action. The action to condemn a private way of necessity is still, therefore, logically related to the action to invalidate the easement and a compulsory counterclaim in *Buffington v. Lutz, supra.*

The Lutzes' action for relief under RCW 8.24 was logically related to Ms. Buffington's claim to invalidate the easement that they received in 1996. This claim had matured prior to their filing their answer in *Buffington v. Lutz, supra.* It was therefore a compulsory counterclaim in that action. The trial court erred by failing to grant summary judgment dismissing the instant action on that basis.

III. The Lutzes' Did Not Join Necessary Parties.

The Lutzes and their tenants must go over E. Ponderosa Drive to Tamarack Road and over Tamarack Road to Ms. Buffington's parcel to reach the Lutzes' property. This route takes them over land in twenty (20) other lots. (CP 95-96) The Court did not have jurisdiction over the matter

because the owners of those lots had not been joined. The Lutzes' action should have been dismissed on that basis.

A court lacks jurisdiction to act if all necessary parties are not joined. *Henry v. Town of Oakville*, 30 Wn.App. 240, 243, 633 P.2d 892 (1981); *Treyz v. Pierce County*, 118 Wn.App. 458, 462, 76 P.3d 292 (2003). The definition of a necessary party is stated in CR 19(a) as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already a party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligation by reason of his claimed interest. . .

All the homeowners in Ponderosa Park are necessary parties to this action because they each have a right in the land comprising Tamarack Road and E. Ponderosa Drive. At very least, the owners of land encumbered by the easements for Tamarack Rd. and E. Ponderosa Dr. are necessary parties because the route to be taken by the Lutzes and their tenants goes over their property. Therefore, complete relief cannot be afforded among the parties because complete relief requires determination

of whatever rights the Lutzes' have to the entire proposed route between their property and Pipeline Road. That makes the other owners necessary parties pursuant to CR 19(a)(1). They are also necessary parties under CR 19(a)(2)(A) because of their claimed interest to the land that they own and the rights of others to pass over it and their inability to protect that interest unless they are made parties.

It is sufficiently clear that all parties claiming an interest in land subject to a claim of private way of necessity must be joined that such persons have been added without controversy in other cases. For example, in *Brown v. McAnally*, 97 Wn.2d 360, 644 P.2d 1153 (1982), corporations owning utilities along a private road that was the pathway were joined in the plaintiff's private condemnation action. A homeowners association was added as a necessary party because it had taken ownership of the fish ponds that were the subject of the action to condemn a way for transporting water for domestic use and to ponds for fish propagation in *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 18 P.3d 540 (2001).

Since the route to the Lutz property from the public thoroughfare goes over E. Ponderosa Drive and Tamarack Road, the Lutzes must demonstrate that they have the right to do so. That means that they must join all the property owners whose land must be traversed to get from their

land to the public thoroughfare, Pipeline Road. Otherwise, any relief the Lutzes obtain will necessarily be incomplete, and complete relief cannot be accorded among those already parties as CR 19(a) requires.

This is not some technical procedural issue having no substantive import. The easement that the Lutzes were given over all roads within Ponderosa Park — including Tamarack Road and E. Ponderosa Drive — is not valid. The right of creation of easements is allowed for purposes incident to the development of the property as discussed in Article V, Section 11 of the CCRs. (CP 82) That means that any easement must be for some purpose that benefits Ponderosa Park. Conversely, it cannot be for some purpose that serves land outside of the subdivision's boundaries such as the land the Lutzes own. The grant of the easement was therefore not valid for that reason. Furthermore, Ponderosa Parcels, Inc. had no power to grant any easement. Only the incorporators had any power to grant easements as Article V, Section 11 of the CCRs states. Those are the incorporators of the Ponderosa Park Association as stated in Article I, Section 7 of the CCRs. (CP 77) Those are Mr. Kershaw and the Lettermans, not Ponderosa Parcels, Inc. (Ex. 34)

Furthermore, use of the roads is limited by the CCRs. They can be used only be owners of lots within the subdivision as Article I, Section 7 of the CCRs states. (CP 77) As discussed in Article I, Section 6, and

Article III, Section 2 of the CCRs, members of the association can delegate their rights to use common areas such as private roads. This delegation is limited, however, to family members and tenants who have a leasehold interest for more than thirty days. (CP 77-78) The Lutzes were not owners of lots within the subdivision or members of the association in September of 1996 when they received the grant of easement from Ponderosa Parcels, Inc. The CCRs prohibited a grant from using the roads within the development for that purpose.

Finally, an easement appurtenant cannot be conveyed in the absence of a conveyance of the dominant tenement. Restatement (Third) *Property* §5.6. There is a strong presumption that every easement is appurtenant. *Roggow v. Haggerty*, 27 Wn.App. 908, 621 P.2d 195 (1980); *Green v. Lupo*, 32 Wn.App. 318, 647 P.2d 51 (1982). Since Ponderosa Parcels, Inc. did not convey the entire development to Mr. and Mrs. Lutz, they could not convey an easement to go over all roads within the subdivision.

The Lutzes may argue that the easement over the remainder of the private roads within the subdivision is valid. That misses the point. The other owners of property within the subdivision have an interest in the land that Lutzes want to use for their route. They are necessary parties for

that reason and must be joined so that the relative rights of the parties can be determined.

The Lutzes' preferred route is over Ms. Buffington's parcel, then to Tamarack Road, and then to E. Ponderosa Drive to Pipeline Road, which is the public thoroughfare. All persons owning land along that route are necessary parties. The trial court erred by not requiring that they be joined as necessary parties.

IV. Conclusion.

The Lutzes' action should have been dismissed at summary judgment for failing to join necessary parties and because their suit amounted to a compulsory counterclaim that should have been brought in *Buffington v. Lutz, supra.* The trial court erred by ruling to the contrary.

ASSIGNMENT OF ERROR NO. 3: The Trial Court Erred by Entering the Amended Ruling of the Court.

ASSIGNMENT OF ERROR NO. 4: The Trial Court Erred by Entering the Judgment/Decree Condemning/Granting Private Way of Necessity.

I. Introduction.

The Lutzes were not entitled to condemn a way over Ms. Buffington's lot because they had the right to go over the property that the Brokaws had conveyed to the Cyruses. Their delay in bringing the action

shows the absence of any necessity. The trial court therefore erred by allowing them to condemn the private way of necessity.

II. Standard of Review.

This matter was tried to the court. On review, the appellate court determines whether the trial court's findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law and the evidence. *City of Tacoma v. State,* 117 Wn.2d 348, 361, 816 P.2d 7 (1991); *Brotherton v. Kralman Steel Structures, Inc.,* 165 Wn.App. 727, 734, 269 P.3d 307 (2011). There is no dispute about the findings of fact that bear on this issue.[6] They do not, however, support the trial court's conclusion of law that the Lutzes were allowed to convey a private way of necessity over Ms. Buffington's land.

III. The Lutzes Were Not Entitled to a Private Way of Necessity Because an Easement Implied by Necessity Was Available to Them.

A party seeking a private way of necessity under RCW 8.24 must show the absence of any easement, either express or implied, that would otherwise allow access to an allegedly landlocked piece of land. *State v.*

[6] As will be argued below, the Lutzes have an easement implied by necessity over the land the Brokaws conveyed to the Cyruses to get to Pipeline Road. In Finding of Fact No. 27 at CP 182, the trial court stated that the Lutzes have "no implied access rights" over the Cyruses' property. This statement is actually a conclusion of law in the context of this case. It should be reviewed as such. *Woodruff v. McClellan,* 95 Wn.2d 394, 396, 622 P.2d 1268 (1980). Furthermore, there is no need to assign error to Finding of Fact No. 27. *Noble v. Lubrin,* 114 Wn.App. 812, 817-18, 60 P.3d 1224 (2003).

Superior Court of Kitsap County, 107 Wash. 228, 233, 181 P. 689 (1919); *Dreger v. Sullivan,* 46 Wn.2d 36, 278 P.2d 647 (1955); *Roberts v. Smith,* 41 Wn.App. 861, 864, 707 P.2d 143 (1985). The Lutzes did not meet that burden of proof because the findings of fact that the Court made showed that they had an easement implied by necessity.

An easement implied by necessity arises when the grantor conveys part of his or her land, retains part, and after the conveyance it is necessary to cross the grantor's parcel to reach a street or road from the conveyed parcel. In that situation, the grantor is deemed to have granted an easement for ingress and egress over his or her property to the grantee so that the property will not be landlocked. The necessity must exist at the date the common parcel was severed. Only the unity of title and subsequent separation are requirements for the implied easement. The element of necessity merely aids in determining the intent to create an implied easement. That intent is implied when a grantor sells landlocked property. *State v. Superior Court, supra; Hellberg v. Coffin Sheep Co.,* 66 Wn.2d 664, 667, 404 P.2d 770 (1965); *Roberts v. Smith, supra; Visser v. Craig,* 139 Wn.App. 152, 158-59, 159 P.3d 453 (2007). The unity of title may be either immediate or remote. The parcels in question must, at some point, have been under common ownership. *Leinweber v. Gallaugher,* 2 Wn.2d 388, 391, 98 P.2d 311 (1940); *Todd v. Sterling,* 45 Wn.2d 40, 42, 273 P.2d

245 (1954). The easement implied by necessity may be enforced against subsequent grantees of the common grantor. *Fossum Orchards v. Pugsley,* 77 Wn.App. 447, 892 P.2d 1095 (1995); *Woodward v. Lopez,* 174 Wn.App. 460, 300 P.3d 417 (2013).

All of the requirements for an easement implied by necessity are met here and are set out in Findings of Fact No. 3. The Brokaws were the common grantor. They owned the parcels they sold to the Lutzes and also the property they sold to the Cyruses. All the land had been in the Brokaw family since 1952. The unity of title therefore existed. The necessity to cross the Brokaw/Cyrus land to get to a street or road is obvious. The Lutzes' lots are landlocked. The land the Cyruses bought from the Brokaws fronts on Pipeline Road. This means that an easement implied by necessity exists. The Cyruses are the Brokaws' grantee. This easement can be enforced against them.

The trial court concluded that there was no implied easement because there was no existing road over the Brokaw property to the lots sold to the Lutzes at the time of the 1996 sale. (CP 183, CL 8) The presence of a pathway is not necessary to make out an easement implied by necessity. 3 *Tiffany Real Property* § 792. As Professors Stoebuck and Weaver have stated:

> Essentially, the difference between easement implied from necessity and easement implied from prior use is that, with those implied from necessity, there need to be no pre-existing use. It is possible to have a case that fits both categories, as land that will have no access after a severance unless a pre-existing roadway is kept open. This was the fact pattern in *Hellberg v. Coffin Sheep Company,* one of the leading easement of necessity cases in the United States.

Stoebuck and Weaver, *Real Estate: Property Law* 17 Wash.Prac. § 2.5. The Court made this clear in *Hellberg v. Coffin Sheep Company, supra.* It allowed an easement based on both the easement implied by necessity and the easement implied by prior use. 66 Wn.2d at 666. It then discussed each theory separately. As to the easement implied by necessity, it stated:

> The theory of the common law is that where land is sold. . . that has no outlet, the vendor. . . by implication of law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser. . .to have access to his property. . .
>
> Under the findings of the trial court, Hellberg has no access from his leased land to any highway except over the land of Coffin, the lessor, by way of the old Coffin Road. The right of the landlocked tenant to ingress and egress over his lessor's property cannot be gainsaid.

66 Wn.2d at 667. In coming to the same conclusions, the Court of Appeals stated in *Roberts v. Smith, supra,* 41 Wn.App. at 865:

> Even if the plaintiffs are correct that evidence does not establish the existence of an apparent and continuous quasi easement, a special situation exists when a grantor sells a portion of the property that has no ingress or egress. Unity of title and subsequent separation are

> absolute requirements for implied easement; the elements of apparent and continuous quasi easement and necessity are merely aids in determining intent to create an implied easement. *Hellberg v. Coffin Sheep Co. supra.* However, the intent to create an access easement over grantor's land is implied when a grantor sells landlocked property. *State ex. rel. Carlson v. Superior Court, supra.* The intent arises of out of contract and is based on estoppel. *State ex rel. Carlson v. Superior Court, supra.*

The only requirements for an easement implied by necessity are a common grantor conveying land that has no outlet while retaining property fronting on a public way. The presence of an existing use is not necessary to make out an easement implied by necessity. The trial court erred by ruling to the contrary.

The Lutzes are expected to argue that an implied easement must include an already existing use based on cases such as *Bailey v. Hennessey,* 112 Wash. 45, 191 P. 863 (1912); *Berlin v. Robbins,* 180 Wash. 176, 38 P.2d 1047 (1934); *Hubbard v. Grandquist,* 191 Wash. 442, 71 P.2d 410 (1937); *White v. Berg,* 19 Wn.2d 284, 412 P.2d 260 (1943); *Evich v. Kovacevich,* 33 Wn.2d 151 (1949); *Bushy v. Weldon,* 30 Wn.2d 266 (1948); *Adams v. Cullen,* 44 Wn.2d 502, 268 P.2d 451 (1954); and *McPhaden v. Scott,* 95 Wn.App. 431, 975 P.2d 1033 (1999). All these cases dealt with whether an easement implied from prior use existed. The issue in each was whether sufficient necessity existed to imply the

easement. None considered whether an easement implied by necessity was also present. The cases are therefore not helpful.

There are practical differences between an easement implied by prior use. Such an easement requires 1) a former unity of title and subsequent separation; 2) a prior apparent and continuous quasi-easement for the benefit of one part of the estate burdening another part; and 3) a reasonable necessity for the easement in order to secure and maintain the quite enjoyment of the purported dominant estate. *Bailey v. Hennessey, supra; Hellberg v. Coffin Sheep Company, supra,* 66 Wn.2d at 667-68; *Roberts v. Smith, supra,* 41 Wn.App. at 864. The first element is identical to the easement implied by necessity. A key difference is the level of necessity required to impose the easement. As the statement from *Hellberg v. Coffin Sheep Company, supra,* quoted above suggests, an easement implied by necessity requires strict necessity — a parcel that is landlocked. A more relaxed necessity will support an easement implied from prior use. For example in *Bailey v. Hennessey, supra,* perhaps the seminal case in this regard, an easement implied by prior use was made out by a long established utilization of a rear alley for truck deliveries of hay, grain, and feed although the owner of purported servient parcel had street access at the front of his building. The Court stated that what

amounted to business convenience was sufficient to make out the element of reasonable necessity. 112 Wash. at 51.[7]

There would have been no easement implied by necessity in *Bailey v. Hennessey, supra,* because there was access and an outlet — albeit not a convenient one. Nonetheless, the Court found an easement implied by prior use. In the same way, an easement implied by necessity can be present where an easement implied by prior use would not be — because of the absence of any apparent prior path, road, or way. As noted above, Professors Stoebuck and Weaver confirm that this can occur. In our case, we don't have an easement implied by prior use because there was no prior use. We do have, however, an easement implied by necessity because Lots 110 and 112 are landlocked and there would be no outlet in the absence of some easement.

It doesn't matter that the Lutzes or even the trial court may have considered the route over Ms. Buffington's property more convenient than connecting to Dancing Mountain Road owned by the Cyruses. As the Court said in *Dreger v. Sullivan, supra,* 46 Wn.2d at 38:

> In the absence of any means (by way of easement) of ingress and egress by the Dregers, the order of necessity for a private way of necessity over the Sullivan property would be entirely proper. We do not question that such a route would be more convenient and desirable.

[7] Interestingly, the Court stated that no claim for an easement implied by necessity was made. 112 Wash. at 48.

> However, the order of the court here under review takes the property of one man and gives it to another. A constitutional right is involved which should be lightly regarded or swept away merely to serve convenience and advantage.

Accord, *State ex rel. Carlson v. Superior Court,* 107 Wash. 228, 232, 181 P. 689 (1919).

The Lutzes have always had an easement implied by necessity over the land that the Brokaws conveyed to the Cyruses. That means that they are not entitled to a private way of necessity over Ms. Buffington's lot. The trial court's decision allowing them a private way of necessity therefore amounted to error.

IV. The Lutzes Delayed Too Long in Making Their Claim.

Mr. Lutz acquired Lot 113 in 1973 and bought Lots 110 and 112 in 1996. They waited until 2009 to file this action. This delay negates the necessity for the private way that the Lutzes seek to condemn.

In *Ruvalcaba v. Kwang Ho Baek, supra,* the Court held that parties who had conveyed a portion of their land without reserving an easement thereby rending the retained portion landlocked and did not seek a private way of necessity for over thirty-five years were not entitled to relief under RCW 8.24. The Court stated that a party seeking a private way of necessity must show the necessity and that no necessity existed under the facts presented. The Court focused on two factors in coming to its

conclusion — the plaintiffs' conveying the property on a public thoroughfare without reserving an easement and the plaintiffs' lengthy delay in bringing the action. It stated:

> Here, the Ruvalcabas landlocked their own parcel, made claims of reasonable necessity based on financial impracticability, and waited approximately 35 years to bring a condemnation action. Under this set of factual circumstances, no reasonable finder of fact could find that there was reasonable necessity. The Ruvalcabas are essentially turning our stated public policy goal on its head. They are making a sophisticated, yet convoluted, legal argument regarding financial impracticability to manufacture a cloud on title and, thus, tie up the (neighboring owner who they sued) right to use and convey their land. This strategy was also employed approximately 35 years after the Ruvalcabas voluntarily landlocked their own parcel. Such a flagrant abuse of the reasonable necessity doctrine will not be tolerated because it erodes the protections for private property found Article I, Section 16 of the Washington Constitution. . .

175 Wn.2d at 8.

In our case, the Lutzes did not voluntarily land lock their property by conveying a portion without reserving an easement. They did, however, buy landlocked property without obtaining any easement at all in connection with their purchase of Lot 113 and taking an easement that they should have known was not valid when they bought Lots 110 and 112. And the invalid easement they received in 1996 did not benefit either Lot 112 or Lot 113. They are claiming financial impracticability because

they built improvements in the area based on the easement they should have known was invalid. They also waited thirty-six years after acquiring Lot 113 and thirteen years after buying Lots 110 and 112 before commencing this action. Between 1973 and 1996, they used Aspen Road to access Lot 113 instead of going over Ms. Buffington's parcel. The facts here — chiefly, the lengthy delay and constructing improvements without a valid easement, require the same result as in *Ruvalcaba v. Kwaeng Ho Baek, supra.* The trial court should have found the absence of any necessity and denied the Lutzes any relief.

V. Conclusion.

A person seeking to condemn a private way of necessity must show a necessity and the absence of any other access to a public thoroughfare. The findings of fact that the trial court made show an absence of a necessity and an easement by necessity over the land previously owned by the Brokaws and now owned by the Cyruses. For that reason, the trial court should have denied any relief to the Lutzes' attempt to gain a private way of necessity over Ms. Buffington's parcel. Its failure to do so was error.

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ASSIGNMENT OF ERROR NO. 5: The trial court erred in awarding compensation in the amount of $1,180.00.

I. Introduction.

The Lutzes' appraiser, Eric Walker, concluded that Ms. Buffington was due $1,180.00 for compensation.[8] The Court adopted his opinion. (CP 186, CL 17) This finding was error because that sum is not supported by substantial evidence.

II. Standard of Review.

The amount of damages or compensation is essentially a finding of fact — in this case, the value of the interest in land that is taken. *Baltzelle v. Doces Sixth Ave., Inc.,* 5 Wn.App. 771, 780, 490 P.21d 1331 (1971); *Gay v. Cornwall,* 6 Wn.App. 595, 599, 494 P.2d 1371(1972). Findings of fact must be supported by substantial evidence in the record. Substantial evidence in turn is sufficient evidence to persuade a fair-minded person of the truth of the assertion. *Marriage of Chandola,* 180 Wn.2d 632, 642, 327 P.3d 644 (2014); *Imre v. Kelley,* 160 Wn.App. 1, 6-7, 250 P.3d 1045 (2010).

[8] Two types of compensation are recognized in actions to condemn private ways of necessity. These are compensation for the taking and severance damages based on the harm to the servient parcel. *Shields v. Garrison, infra,* 91 Wn.App. at 385-88. The trial court awarded $1,180.00 for compensation and $11,250.00 for severance damages. (CP 186, CL 16-17) This assignment of error concerns the amount of compensation only. No error is assigned to the determination of severance damages.

The evidence supporting the Court's finding of compensation came from Mr. Walker. No fair-minded person could be persuaded by his testimony. The finding was therefore not supported by substantial evidence.

III. There Was Not Sufficient Evidence to Support the Amount of Compensation.

Compensation for condemned land is based on its fair market value. That is the amount of money that a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed seller, willing but not obliged to sell it would accept taking into consideration all uses to which the property is adapted and might in reason be applied. *Shields v. Garrison,* 91 Wn.App. 381, 385, 957 P.2d 805 (1998).

Mr. Walker used a relatively simple methodology to come to his value opinion. He first acknowledged that definition of value in terms equivalent to what was said in *Shields v. Garrison, supra* — in simplified form, what a reasonable and knowledgeable buyer will pay to a reasonable and knowledgeable seller when neither acts under any compulsion. (Ex. 19, p. 2; RP 46) He set out the three methods of appraising real property. The first is the cost approach. It is based on the notion that no one will pay more for property than what it will cost to build improvements. The

second is the income capitalization approach. It is used for valuing income producing properties such as apartment buildings or shopping centers that produce income in the form of rents to their owners. Value is computed as a function of that income. The third is the sales comparison approach. It is commonly used for residential real estate and is based on the notion that no one will pay more than the value of similar property in the market. Mr. Walker rejected the cost approach and the income capitalization approach and opted to use the sales comparison approach only. (Ex. 19, p. 29) He then concluded that the value of Ms. Buffington's lot was $75,000.00 or $.35 per square foot. He observed that the Lutzes sought an easement over 3,370 square feet of Lot 82. He assumed that the entirety of that amount of square footage would be taken. He then multiplied 3,370 square feet by $.35 per square foot to get a value of $1,180.00 (rounded). (Ex. 19, pps. 59, 67)

While Mr. Walker acknowledged that he was acting under the sales comparison approach, he did not identify any transaction involving a sale of any easement, much less an easement sought by someone in the position that the Lutzes found themselves in after the easement was invalidated. (RP 40-41) Therefore, he could point to no "comparable" sale of such an easement — the essence of a valuation based on the sales comparison approach. In other words, Mr. Walker gave an opinion based

on the sales comparison approach without identifying any comparable sale. His opinion is therefore not based on much of anything and can hardly amount substantial evidence.

Without the benefit of Mr. Walker's sales comparison analysis, we are left with the standard definition of fair market value — what a reasonable and informed buyer will pay and what a reasonable and informed seller will take for an interest in property when neither is compelled to enter into the transaction. Mr. Walker conceded what he could not deny — that the definition of value assumes that both the buyer and the seller are self-interested, that the seller would attempt to maximize what he or she would receive and that the buyer would try to minimize what he or she would have to pay. (RP 46) He agreed that Ms. Buffington would ask the Lutzes to pay about what it would cost them to put their road toward another outlet and that the Lutzes would pay no more than that sum. (RP 53-54) As the trial court found, that sum would be slightly less than $83,000.00, and that Ms. Buffington would ask the Lutzes to pay for an easement over Lot 82. (CP 181, FF 25)

Given this testimony, it is clear that under the definition of value — what a reasonable and knowledgeable buyer would pay to a reasonable and knowledgeable seller with neither required to enter into the transaction — the easement would have a much greater value than a portion of the

entire property's fair market value. The easement is and continues to very valuable to the Lutzes. They need it in order to avoid paying much more to have access in some other direction. Under the unique circumstances presented in this case, no reasonable person could reach a contrary conclusion and adopt Mr. Walker's approach.

Mr. Walker stated that he had never done this type of appraisal before. He decided to use his methodology after discussing the issue with another appraiser. But that appraiser did not have all relevant information and the specific facts of this case. For example, Mr. Walker did not tell the other appraiser that the 1996 easement had been invalidated. He also did not mention that the Lutzes had already built a road and place manufactured homes and that this was not the typical situation where the private way is first condemned and where compensation is paid before improvements are made as required by RCW 8.24.030. (RP 37-38) For that reason, the Lutzes cannot assert that the methodology used is generally accepted.

As all agree, compensation to be awarded under RCW 8.24 is what a reasonable and knowledgeable buyer would pay and what a reasonable and knowledgeable seller would accept for the property if neither was compelled to enter into the transaction. Ms. Buffington stated that she ask just under that cost or a little less than $83,000.00. It is clear that the

Lutzes could be expected to pay no more than that sum. The evidence clearly shows that no reasonable seller would accept $1,180.00 for the easement when the buyer's alternative would be constructing an alternative route at a much greater price. No fair minded person would award compensation at $1,180.00. Therefore, the trial court's finding of fair compensation was not supported by substantial evidence and must be reversed and remanded for a determination of compensation based on the cost to construct an alternative route.

IV. Conclusion.

No fair minded and reasonable person would accept an opinion from an appraiser based on the sales comparison approach when that appraiser cannot identify any comparable sales. Therefore, the trial court's finding concerning compensation was error. On this assignment of error, the Court should reverse the trial court's decision and remand for consideration of compensation based on the Lutzes' cost to construct an alternate route.

STATEMENT PURSUANT TO RAP 18.1(A)

Ms. Buffington is seeking attorneys' fees on appeal. Her claim is based on RCW 8.24.030 which provides as follows in pertinent part:

> In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity,

> reasonable attorneys' fees . . .may be allowed by the court to reimburse the condemnee.

The trial court awarded Ms. Buffington attorneys' fees and costs based on this statute. (CP 195)

Ms. Buffington has claimed that the Lutzes are not entitled to a private way of necessity. If the Court finds in her favor on that point, she is entitled to an award of attorneys' fees. *Beckman v. Wilcox,* 96 Wn.App. 355, 979 P.2d 890 (1999). In that case, the plaintiff condemnor dismissed the action on the morning of trial pursuant to CR 41(a)(1)(B). The trial court awarded attorneys' fees to the defendant condemnee and the Court affirmed. It noted that RCW 8.24.030 did not require the condemnees to obtain more compensation than was offered in order to obtain an attorneys' fee award. 96 Wn.App. at 366. It could not find any limitation on the ability of a court to grant attorneys' fees to the condemnee in the first part of the relevant sentence — "In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity," and that the bringing of the action triggered the condemnor's liability. 96 Wn.App. at 363.

The condemnee is entitled to attorneys' fees on appeal under the terms of RCW 8.24.030 regardless of whether the condemnee prevails. In *Sorensen v. Czinger,* 70 Wn.App. 270, 852 P.2d 1124 (1993), for example,

the trial court allowed the condemnor a private way of necessity along an alternative route proposed by the condemnee as opposed to the one that the condemnor suggested. The Court reversed this decision on appeal. Nonetheless, it awarded the condemnee attorneys' fees on appeal. It succinctly stated:

> Because RCW 8.24.030 does not limit the award of fees and costs to a prevailing party. . .Mr. Czinger's (the condemnee's) request for attorney fees on appeal is granted.

70 Wn.App. at 279. Our case is indistinguishable. Mr. Czinger did not prevail on appeal but still was entitled to an award of attorneys' fees on appeal. Therefore, if Ms. Buffington is unsuccessful on appeal, she nonetheless is entitled to an award of attorneys' fees because entitlement is based upon her status as condemnee, and is not based on whether she prevails.

For all these reasons, Ms. Buffington is entitled to an award of attorneys' fees on appeal regardless of the Court's decision.

CONCLUSION

The trial court erred as discussed above. On the basis of Assignments of Error Nos. 1-4, the Court should reverse the Judgment/Decree Granting Private Way of Necessity with directions to dismiss the action with prejudice. Alternatively, the Court should reverse

the Judgment/Decree Granting Private Way of Necessity and remand with directions to determine compensation for the taking based on the cost of Lutzes' constructing an alternate route. In any event, Ms. Buffington is entitled to attorneys' fees on appeal.

DATED this 12 day of _____, 2015.

BEN SHAFTON, WSB #6280
Of Attorneys for Defendants/Appellants

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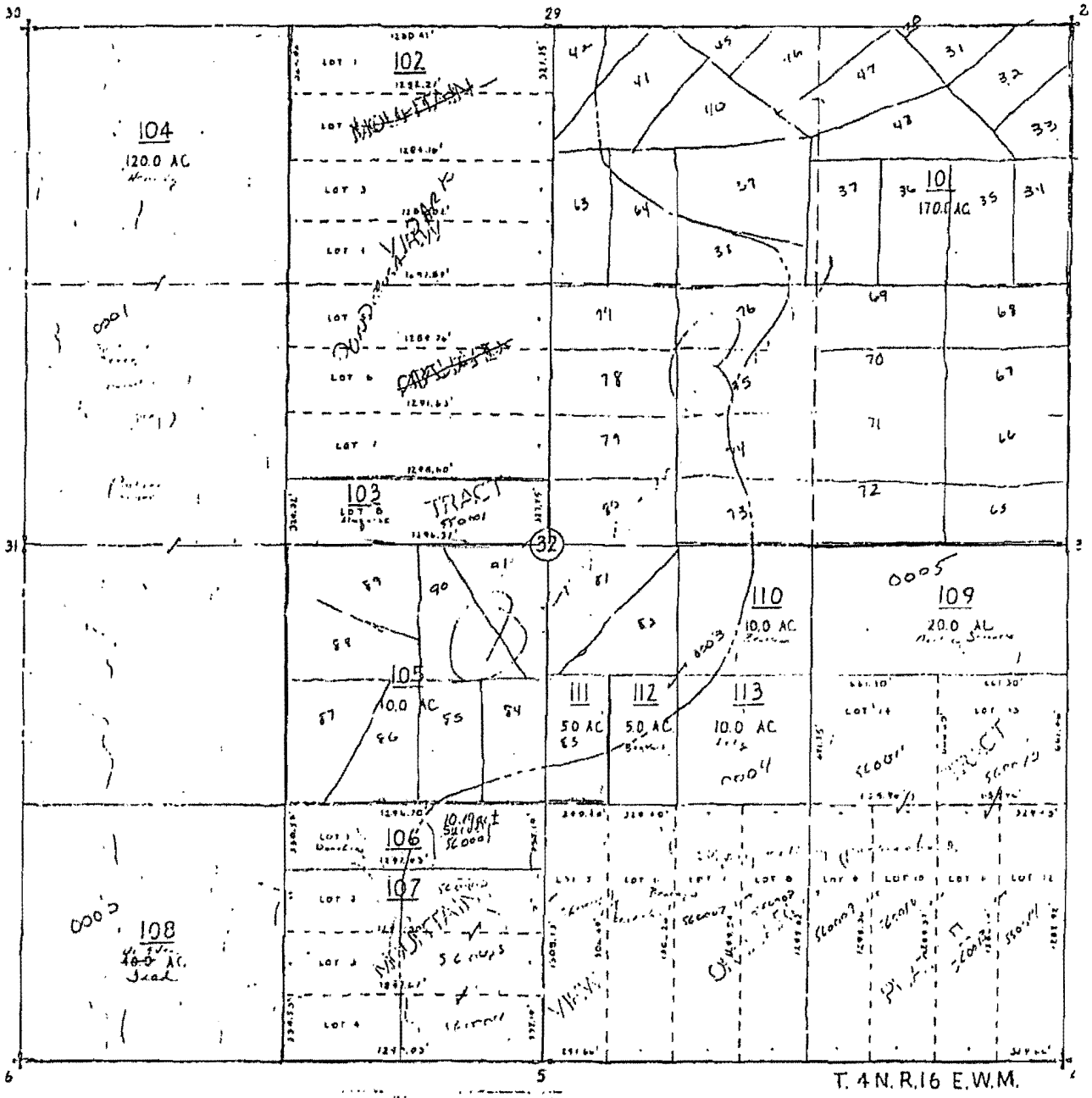
APPENDIX

SECTION 32, T. 5 N., R. 16 E. W.M.



The company has not surveyed the premises described in this report. This sketch is furnished without charge solely for the purposes of assisting in locating said premises and the company assumes no liability as to the validity, location or ownership of any easements or other matter shown thereon nor for inaccuracies therein. This sketch does not purport to show all highways, roads and easements adjoining or affecting said premises nor is it a part of the report, commitment, policy or other title evidence to which it may be attached.

ponderosa village

TOWNSHIP 5 NORTH, RANGE 16 EAST