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DIVISION II

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No. 36801-3

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

FAME DEVELOPERS, LTD., WILLIAM N. HULETT
and PENELOPE A. HULETT, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Before the slides of 1997, the Hulets, their tenants, and their predecessors enjoyed reasonable and convenient access to their properties via Gertie Johnson Road. Indeed, Gertie Johnson Road provides the only access to those residences. There is no evidence of any break in the use of Gertie Johnson Road since construction of the Hulett residences in 1915 and 1961. As the Hulets have owned the properties since the 1970s, they have personal knowledge of the use of Gertie Johnson Road for a period well in excess of ten years.

At no time prior to filing its motion for summary judgment in 2007 did the City of Bainbridge Island ever claim that the Hulets, their tenants, and their predecessors could not lawfully access their properties via Gertie Johnson Road. It was only in defense of a claim for damages that the City claimed the right to exclude the Hulets – indeed, that the actions of the Hulets and others in crossing the 15-foot alleged unopened right-of-way were criminal.

Fortunately, settled law allows this Court to rectify this wrong. First, the Hulets presented substantial evidence that the Manitou Plat did not dedicate the 15-foot strip to the City and that the Hulets in fact have a right of access. The trial court should not have entered summary judgment in favor of the City in light of this evidence. Second, whether or not

the City “owns” this strip, the Huletts introduced substantial evidence that they suffered “special damage” compensable as a taking of their right of access. Whether or not the Huletts’ properties “abut” Gertie Johnson Road, they have lost the sole access to their properties, and must be compensated accordingly.

II. ARGUMENT

A. This Court’s Review Is De Novo.

The City first tries to convince this Court that its review is limited. It does so by claiming that what this Court is reviewing is the trial court’s denial of reconsideration, not the trial court’s granting of summary judgment. That gambit should fail.

The decision below was first and foremost a grant of summary judgment, subsequently reviewed in light of new evidence pursuant to this Court’s order: “The trial court must enter findings of fact and decide whether the appellant *has raised a material issue of fact that precludes summary judgment.*” (Emphasis added.) In other words, pursuant to the limited remand, the trial court was to consider anew whether summary judgment was appropriate, not whether the requirements of Civil Rule 59 (for reconsideration) were met.

The City does not dispute that summary judgment orders are reviewed *de novo*. *Mike M. Johnson, Inc. v. County of Spokane*, 150

Wn.2d 375, 386 n.4, 78 P.3d 161 (2003). The City also does not dispute that in the ordinary course a superior court's findings of fact on summary judgment are superfluous and entitled to no weight. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 249 n.10, 178 P.3d 981 (2008); *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991).

Where a trial court grants summary judgment then denies a motion for reconsideration, evidence offered in support of the motion for reconsideration "is properly part of the this court's consideration," *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674 n.6, 911 P.2d 1301 (1996), as it reviews *de novo* whether there are disputed facts that preclude summary judgment. The fact that reconsideration is denied does not convert review to the more deferential abuse of discretion standard.

The Hulett's admit confusion as to why this Court's remand order sought entry of findings. The matter was not before the court below for trial (where findings and conclusions would be required), but on the City's motion for summary judgment and the Hulett's motion for reconsideration. By rule, findings are explicitly not required on motions, with limited exceptions not applicable here. CR 52(a)(5). Although the City concludes that this Court, by requiring findings, meant that its review is now for abuse of discretion, it cites no authority for that remarkable proposition,

and the Huletts have found no Washington case holding that denial of reconsideration must be supported by findings and conclusions.

In short, this Court's review is *de novo*.

B. The Huletts Have a Property Interest in Access to Their Homes.

The City based its motion for summary judgment on the simple proposition that *the City* owned the 15-foot strip at issue. CP 425-26; City Br. at 13. It argued that the Huletts' access was "illegal to begin with" because Bainbridge Island Municipal Code (BIMC) 12.32.020 prohibited use of unopened rights-of-way for access, *id.*, despite the fact that the City's predecessor, the City of Winslow, was not even incorporated until 1947, after the oldest of the Hulett homes was constructed. It also argued that the Huletts could not claim ownership by adverse possession against the City as a municipality. CP 426 n.33. In short, the City argued that the City could *categorically* prevent the Huletts from accessing their properties across the 15-foot strip such that the Huletts had no right that could be taken. In response, the Huletts introduced substantial evidence that the City *did not own* the strip and that the City could not categorically exclude them. Consequently, the Huletts could acquire rights of access through adverse possession. Summary judgment was inappropriate.

1. The City Does Not Own the 15-Foot Strip.

a. The Plat of Manitou Did Not Dedicate the Strip to the City.

The Plat of Manitou did not dedicate the 15-foot strip as a right-of-way. Unlike every other right-of-way depicted on the Plat, the 15-foot strip was not marked as such on the face of the Plat. That omission must be given meaning. The strip as depicted covers *only half* of the right-of-way lost in 1899 by expiration of the statutory deadline for exercise of the order of establishment. It is undisputed that the 15-foot strip was unusable as a road – it falls off a steep cliff. Accordingly, it also made absolutely no sense to dedicate a right-of-way in that location. In light of these facts, the trial court erred in entering summary judgment to the contrary.

b. That Government Maps Allegedly Depict the 15-Foot Strip as City Property Is Irrelevant.

It is irrelevant that City or County maps depict the 15-foot strip as City property. The City offered no evidence concerning how those maps came into being or otherwise verifying their accuracy. The City presented no evidence or authority that the maps themselves constitute a dedication or transfer of rights; consequently, the maps can only depict information drawn from other sources – such as the 1894 establishment and purported 1908 plat dedication. As noted in the Huletts’ opening brief, the County

itself disclaims any warranty as to the accuracy of the GIS maps. CP 791-97.

The absurdity of the City's argument is underscored by the fact that the County GIS map is *clearly wrong*. The GIS-generated map contains a glaring error: it identifies the northern 15-feet of the original 30-foot establishment in 1894 as City property (CP 793 ¶ 6; *see also* CP 746-50) even though the City admits in this proceeding that that strip of land has not been under City control since 1899. Being so clearly wrong in one respect, there is no assurance that the maps are accurate in any other.

In light of this clear error and the lack of any evidence or authority establishing that these maps are dispositive, the Court should not permit the City to rely on them.

c. The Hulett's "Expert" Did Not Testify That the City Owned the Property.

The City lays heavy emphasis on a statement made by counsel for the Hulett's in arguing that the Hulett's "admitted" the City owned the 15-foot strip. In short, in moving for reconsideration based upon newly-discovered evidence, Mr. Middleton stated that Mr. Waite, who had searched County records at the behest of the Hulett's, had told him that the alleged right-of-way was City property. Subsequently, after reviewing the

Plat of Manitou, counsel came to a different conclusion. By submitting Mr. Middleton's declaration concerning Mr. Waite's statements to him, the Hulett's sought simply to negate any argument that they had not been diligent in discovering the new evidence.

The City latches onto this statement but vastly oversells what Mr. Waite in fact has testified. In the declaration submitted to the trial court earlier this year following remand (the only one in which Mr. Waite offers an opinion), Mr. Waite stated clearly:

8. Before providing these documents to Mr. Middleton in 2007, I accessed the Kitsap County GIS system to review Mr. Hulett's and surrounding parcels. Based on that review, it appeared to me that the alleged right of way was City property simply because there was no tax parcel number assigned; however, that conclusion was not based upon any detailed analysis of the data. In fact, the County disclaims warranties of the accuracy of GIS data, and there is no substitute for a detailed survey, which I have not done.

CP 778.

As noted in the preceding section, the County GIS database is imperfect at best, and demonstrably in error here. Consequently, Mr. Waite's statement, as relayed in Mr. Middleton's declaration, is no substitute for interpretation of the Plat of Manitou on which the City relies.

d. The Hulett's Tort Claim Does Not Establish That the City Owns the Property.

The City likewise makes much of statements made in the Hulett's tort claim, which relied upon the Kitsap County GIS system. The City's reliance is misplaced. As noted in a declaration of Mr. Hulett filed with the trial court:

2. The City of Bainbridge Island (the "City") has submitted a copy of the tort claim I filed with the City in an effort to "prove" that the City "owns" the 15-foot strip abutting my property. In preparing the tort claim, I relied upon the County GIS system to produce a map of the area. I had no independent knowledge of the ownership status of the 15-foot strip, and the GIS system itself is not a document conveying title.

3. The only original document identified or produced by anyone in this proceeding purporting to address ownership of the 15-foot strip is the Plat of Manitou. In other documents, Kitsap County (the City's predecessor) has treated the 15-foot strip as private property, not public. The interpretation of that Plat is discussed at length in the brief and other materials filed with this Court. At the time I prepared the tort claim, I did not have a copy of the Manitou Plat and therefore was not aware that the Plat in fact does not dedicate this 15-foot strip to the City.

4. The County GIS system is a tool, not the final word on ownership. As someone once famously said, "garbage in, garbage out." Apparently, with respect to the alleged right-of-way at issue, it was "garbage in." The GIS map attached to my tort claim itself states "THIS MAP IS NOT A

SUBSTITUTE FOR FIELD SURVEY.” The present online disclaimer reads:

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5. At the time I relied upon the GIS system, I had no inkling that the data could be as erroneous as it now appears it is. To begin with, the GIS system indicates the southern half of the alleged 15-foot right of way as indistinct from Gertie Johnson Road – in other words, City property. We all know, however, that the Plat of Manitou does not in fact dedicate a right of way in this area, and no party has identified or produced any other instrument by which the County as the City’s predecessor would have acquired title.

6. Second, the GIS data is indisputably wrong in identifying the *north* fifteen feet as City property. The City has admitted throughout these proceedings that it would have acquired this portion of the alleged right of way through an Order of Establishment entered in 1894. The City does not dispute that this right of way was never opened; consequently, under the law of the State of Washington then and now, the right-of-way was abandoned.

CP 792-93.

In short, the Huletts’ “admission” is simply not what the City would have this Court believe.

e. The 1990 Vacation Proceedings Are Evidence That the City Does Not Own the 15-Foot Strip.

The City does not dispute that vacation proceedings occurred in 1990 affecting a portion of the claimed right-of-way above the bluff, even though the strip adjacent to the Hulett property was unaffected. Instead, the City questions the relevance of that proceeding. The relevance is clear. First, in the process of considering and approving the order vacating

the right-of-way, the applicant demonstrated that “[t]he right-of-way to be vacated extends out over the edge of a steep bluff, approximately 150-200 feet high.” CP 787. In granting the petition, the County found that the “road should be vacated; said road is not now in use, and has not been in use; it will not be advisable to preserve this road for general road system in the future; and that the public will be benefited by the vacation.” CP 635-36; CP 614 (strip “had absolutely no utility as a road”). The vacation included “[t]he unused portion of Valley Road.” CP 787. What this says is that it is *illogical to conclude that a right-of-way was intended by the Plat of Manitou*. The strip has “absolutely no utility as a road” for the obvious reason that it would be unsafe to have drivers drive over the edge of a steep bluff approximately 150-200 feet high.

Second, in these proceedings, a County Commissioner confirmed that the purported right-of-way in question was, in fact, “*private property*, not public property.” CP 613. “[T]he County had originally thought the property was publicly-owned, but . . . it was not.” *Id.*

The City claims that the Commissioner’s statements were inadmissible and irrelevant, but the cases it relies upon are easily distinguished

- *United States v. Morgan*, 313 U.S. 409 (1941), was a case involving the authority of the U.S. Secretary of Agriculture and a challenge to action taken by the Secretary based upon bias

arguably demonstrated in a letter written by the Secretary. The Court rejected the challenge, but considered the letter. Nothing in the opinion suggests that the statements of fact made by a county commissioner are inadmissible.

- *Goebel v. Elliott*, 178 Wash. 444, 447-48, 35 P.2d 44 (1934), rejects the use of statements by a legislator to impute motive. Here, the Hulettts do not seek to impute motive to the County Commissioners' actions in vacating the right-of-way uphill from the Hulettts; rather, the statement that is admissible as an admission that the County, the City's predecessor, did not own the property. *Goebel* does not bar use of the statement for that purpose.
- *Cornelius v. Seattle*, 123 Wash. 550, 213 P. 17 (1923), although interesting as perhaps the only reported case addressing the constitutional right to "swill," is irrelevant. Like *Goebel*, the issue considered by the Court in *Cornelius* was whether it was appropriate to inquire into the "motives that actuated members of the city council in voting for the bill."
- The City's citation of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is simply odd. Admissibility of statements by legislators is not addressed, except in the dissent; there, the

dissent goes no further than to speak of alleged illicit motive – not the admissibility of statements of fact.

Although the City argues that the evidence submitted by the Huletts was inadmissible, the City did not move to strike that evidence and does not assign error to the trial court’s consideration of that evidence. Moreover, as the United States Supreme Court has recognized, Rule 56(e) requires only that affidavits on summary judgment “set forth facts as would be admissible at trial,” not that they be “admissible evidence” itself. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986) (“[w]e do not mean that the non-moving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment”); *see also Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (on remand, summary judgment motion defeated by nonmovant’s proffering of letter indicating favorable testimony from fact witness to be called at trial). What this means is that “at the summary judgment stage, the focus is not on the form of the evidence as it is presented in an affidavit, but rather, whether at trial the matter stated in the affidavit would constitute admissible evidence.” 11 MOORE’S FEDERAL PRACTICE § 56.14[1][d] (Matthew Bender 3d ed.).

The trial court properly considered this evidence; it simply drew the wrong conclusion.

2. The Huletts Did Not Have To Prove Title To Survive Summary Judgment, But Introduced Evidence Sufficient To Survive Summary Judgment.

The City blandly asserts that “the question here is not whether *the City* owns the property, but whether *Appellants* own the property.” Br. at 25. But on summary judgment, the City argued that *the City* owned the 15-foot strip and had the categorical right to exclude the Huletts from accessing their properties over it. To permit the City now to turn the tables and argue a lack of evidence that the Huletts had met an element of adverse possession is improper. *See Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976).

In any event, the evidence presented to the trial court was sufficient to raise a disputed issue of material fact as to the Huletts’ right to cross the 15-foot strip to access their homes. The City candidly admits that the Huletts need not demonstrate fee title. Br. at 27 (“Appellants do not have to prove actual fee ownership ... to establish a takings claim.”). Specifically, an easement would suffice.

The Huletts have candidly admitted that they do not know who the actual owner of the fifteen-foot strip is. Because it is silent on the 15-foot strip, the Manitou Plat is “defective.” Until a defect in a plat is cured, a dedication is not accomplished, VI WASHINGTON STATE BAR

ASSOCIATION, WASHINGTON REAL PROPERTY DESKBOOK § 91.3(2)(f) (3d ed. 1996), and title would remain in the owners of the plat or their successors. The Manitou Plat was executed by B.J. Blomskog, Anna Blomskog, Hugo Slettengren, and Olivia Slettengren. CP 784. Any property not properly dedicated in the plat or otherwise disposed of likely would belong to their descendants, whose identities are not at present known.

To establish a prescriptive easement, a claimant must prove use of the servient land that is (1) open and notorious; (2) over a uniform route; (3) continuous and uninterrupted for ten years; (4) adverse to the owner of the land sought to be subjected; and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). Importantly, where the right claimed is an easement, ***there is no presumption of permissive use, id.*** at 153-54, and the use ***need not be exclusive, id.*** at 151-52.

The Huletts introduced evidence that they or their tenants had accessed their properties across the 15-foot strip for well in excess of ten years. The Huletts bought the properties in 1974 and 1979, transferring ownership in 2003 to Fame Development. CP 505-06 ¶ 2. Mr. Hulett's parents lived in House No. 4 for ten years, from 1981 to 1991. CP 506 ¶ 3. Mr. and Mrs. Hulett and other members of the Hulett family had used

House No. 4 for vacations, Christmas holidays, and their son Michael lived there for six months in 1991. *Id.* They therefore have ample basis on which to testify concerning access.

As Mr. Hulett testified, lacking any access from the south, owners of the four homes at the north end of Rolling Bay Walk (including both Hulett homes) have only one way to access their properties – via Gertie Johnson Road and across the 15-foot strip. *Id.* ¶ 5.

When the Huletts bought their homes, a parking or turn-around area at the end of Gertie Johnson Road was well-established – broad and paved. Residents of the four houses at the northern end of Rolling Bay Walk used the area for vehicular access (including emergency vehicles) and parking. *Id.* ¶ 6. In fact, as the City notes in its brief, occupants of the four northern houses parked their cars in the 15-foot strip now at issue.

Given these facts, the Huletts establish each of the five elements of a prescriptive easement. The use was certainly open and notorious, over that portion of the 15-foot strip separating Gertie Johnson Road from Rolling Bay Walk, continuous and uninterrupted for ten years, and there is no evidence that the access was a “neighborly accommodation” and not adverse. *N. W. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85, 123 P.2d 771 (1942) (“[P]roof that use by one of another’s land has been open, notorious, continuous, uninterrupted, and for the required time, creates a

presumption that the use was adverse ...”). The fact that the Hulettts have not identified a specific owner of the property does not defeat their claim. The property is clearly “owned” by someone – likely the descendants of B.J. Blomskog, Anna Blomskog, Hugo Slettengren, and Olivia Slettengren, the signators on the original plat.

This evidence created triable issues on all elements of a claim to an easement by prescription, and it was error for the trial court to dismiss.

C. The Hulettts May Claim “Special Damage” and Recover from the City Because Access to Their Property Has Been Destroyed or Substantially Affected.

1. The Hulettts’ Properties Need Not “Abut” Gertie Johnson Road.

A property owner has a vested right in access to a public right-of-way, and may sue for damages for deprivation of that right, if *either* (1) the owner’s property directly abuts the right of way; *or* (2) if “access to property is interfered with and *he suffers special or peculiar damage differing in kind from that of the general public.*” *Kemp v. Seattle*, 149 Wash. 197, 200-01, 270 P. 431 (1928) (emphasis added; citations omitted); *accord Hoskins v. Kirkland*, 7 Wn. App. 957, 960-61, 503 P.2d 1117 (1972).

The City does not challenge this authority, but claims in response that the Hulettts must demonstrate that their properties abut some right-of-

way before the “special damage” prong of this test applies. Because the 15-foot strip intervenes, the City claims, the Hulettts do not abut any right-of-way *and* cannot suffer “special damage” under this test. The City’s argument, however, reads a limitation into the cases that does not exist, as the test is clearly stated in the alternative: (a) the owner’s property clearly abuts the right-of-way; *or* (b) “access to property is interfered with and *he suffers special or peculiar damage differing in kind from that of the general public.*” If the courts had intended that property must abut in all cases, they would have said so.

It is fair to say that facts identical to those presented in this case have never been addressed by a Washington court. Specifically, no case has addressed a situation where, as here:

- owners and tenants have accessed their properties from an admitted public right-of-way (Gertie Johnson Road) for decades;
- across an allegedly unopened right-of-way (the 15-foot strip);
- without objection by the municipality that allegedly owns the unopened right-of-way; and
- there is no other access to the properties in question.

Although no case has addressed precisely these facts, however, Washington cases state general principles from which this Court may find in the Hulett's favor.

One lesson that *cannot* be derived from the cases is that an owner must both "abut" a right-of-way *and* suffer "special damage" before a right to be compensated will be recognized. To begin with, with the exception of the *Yarrow First Assocs.* case discussed below, in each of the cited cases discussed in the City's brief, not only did the property owner not "abut" the right-of-way in question, but *the property owner also failed to demonstrate that it had suffered "special damage" relating to access.* For example, in *Kemp v. Seattle*, 149 Wash. 197, 270 P. 431 (1928), the plaintiff claimed a loss of view, not of access. In *Taft v. Washington Mut. Sav. Bank*, 127 Wash. 503, 221 P. 604 (1923), access was not at issue; rather, the plaintiffs objected to the cutting off of a view. In *Ponischil v. Hoquiam Sash, Etc. Co.*, 41 Wash. 303, 83 P. 316 (1906), the plaintiffs continued to have reasonably convenient access to their property despite the vacation of a street. In *Mottman v. Olympia*, 45 Wash. 361, 88 P. 579 (1907), the plaintiffs continued to have convenient access by two other streets. In *Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958), the plaintiff's "principal" (though not exclusive) access would have been denied, but the resulting detour (one

block) was deemed not significant. In *State v. Wineberg*, 74 Wn.2d 372, 444 P.2d 787 (1968), the condemnee could not recover for the loss of access to a right-of-way when he continued to have access to his property by other reasonable means. In *London v. City of Seattle*, 93 Wn.2d 657, 611 P.2d 781 (1980), the plaintiff had access to another street, so her access was not destroyed. In *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.*, 96 Wn. App. 288, 980 P.2d 779 (1999), plaintiff did not abut the road subject to closure. Although it abutted another right-of-way, the court remanded for trial. In *Hoskins v. City of Kirkland*, 7 Wn. App. 957, 503 P.2d 1117 (1972), the plaintiffs retained alternative means of access to their properties.

A more pertinent case is *Yarrow First Assocs. v. Clyde Hill*, 66 Wn.2d 371, 403 P.2d 49 (1965). In *Yarrow*, the opinion does not state whether the property at issue in fact abutted 96th Avenue NE, the street proposed to be vacated, merely that the street provided the “sole access” to the plaintiffs’ property. Apparently, whether the property “abutted” 96th was of no importance to the Court’s opinion, as the street provided the “sole access.” Although other circumstances made the proposed vacation objectionable, the issue clearly uppermost in the Court’s mind was that the vacation would leave the plaintiffs’ property landlocked.

Here, the City's decision not to reopen Gertie Johnson Road has left the Huletts landlocked, as in *Yarrow First Assocs.* That clearly constitutes "special damage," and no Washington case has held that the Huletts must also prove that their property directly abutted Gertie Johnson Road.

2. The Huletts Presented Substantial Evidence that Access to Their Properties Was Substantially Impaired.

It is beyond dispute that "a landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury." *Hoskins*, 7 Wn. App. at 960 (citing *Yarrow First Assocs. v. Clyde Hill*, 66 Wn.2d 371, 403 P.2d 49 (1965)). A refusal to clear a blocking landslide has the same effect.

The City downplays the degree to which the Huletts' access to their properties has been affected. But Mr. Hulett testified that the March landslides had a significant impact because they rendered the terminus of Gertie Johnson road impassable. CP 507-08 ¶ 11. As a result (and to this day), neither personal cars nor emergency vehicles can approach the homes at the northern end of Rolling Bay Walk. *Id.* Because the widened terminus point of Gertie Johnson Road is now covered, approaching vehicles cannot turn around where the Road ends, and pedestrians seeking access must undertake a dangerous climb over substantial debris or walk

along a narrow corridor at the top of the seawall. *Id.* Perhaps even more important, no construction vehicles could approach the Hulett's properties to perform the work the City says is required to allow the Hulett's to reoccupy them. CP 511 ¶ 21.

The City does not dispute that “the question of degree of impairment of access [is] an issue of fact.” *Keiffer v. King County*, 89 Wn.2d 369, 374, 572 P.2d 408 (1977). “[T]he trier of fact should determine whether adequate access to a particular property exists only after taking into consideration other factors such as safety, reasonableness, and commercial practicalities.” *Union Elevator & Warehouse Co., Inc. v. Department of Transp.*, 96 Wn. App. 288, 293-94, 980 P.2d 779 (1999); *see also id.* at 296. The facts are clearly disputed concerning the extent of impairment; this dispute should have precluded summary judgment.

The City appears to argue that *Freeman v. City of Centralia*, 67 Wash. 142, 120 P. 886 (1912), relieves it from liability. Br. at 39. It does not. In *Freeman*, the complaining property owners retained street access to their properties; the degree of impairment to the only means of access was not at issue. And RCW 47.52.041 does not apply, as the statute explicitly applies to the creation of limited access highways. Clearly, by failing to clear Gertie Johnson Road, the City was not creating a limited access highway.

No Washington case has held that all access must be denied before an owner is entitled to compensation. The cases cited by the City, Br. at 39-41, are all from other jurisdictions, and fly in the face of the Washington Supreme Court's specific admonition that "the owner . . . of property abutting upon a public thoroughfare has a right to free *and convenient* access thereto, and that such right carries with it entitlement to just compensation if taken or damaged." *Lenci v. City of Seattle*, 63 Wn.2d 664, 678, 388 P.2d 926 (1964) (emphasis added).

Finally, as noted in their opening brief, the Hulett's do not contest the power of the City to regulate traffic or even ban vehicles from streets if necessary for safety. The Hulett's are not seeking to force the City to reopen Gertie Johnson Road. The could not do so in light of *Burg v. City of Seattle*, 32 Wn. App. 286, 647 P.2d 517 (1982). However, as the *Burg* Court acknowledged, "[c]laims relating to loss of access by reason of the City's failure to repair a street closed by a landslide may give rise to a claim for damages." *Id.* at 295. In short, the City is free to decline to open Gertie Johnson Road, but it must pay for the Hulett's' consequent loss of access.

D. Exhaustion of Administrative Remedies Was Not Required.

The City does not identify a single administrative process or remedy available to the Huletts by which the Huletts could either force the City to reopen Gertie Johnson Road or recover compensation from the City for the taking of their rights of access. Further, the City does nothing to demonstrate that resort to any such process would not be futile. Accordingly, the Court should disregard the balance of the City's arguments concerning exhaustion of remedies.

Exhaustion of remedies was in any event not required, as the invasion here was *physical*. The City does not argue that it closed Gertie Johnson Road by administrative decree, nor could it. Instead, Gertie Johnson Road is inaccessible because landslide debris prevents access. It is this *physical* obstacle, and the City's refusal to remove it, that deprives the Huletts of access.¹

The City makes the unsupported claim that “nearly every one of Appellants’ neighbors have re-occupied their homes by complying with City requirements.” As noted in the Huletts’ opening brief, with no way to access their homes to construct the wall (and no way to access the

¹ The City characterizes as “bizarre” the Huletts’ argument that this is akin to a “facial challenge” to a City regulation. In fact, the Huletts do nothing more than acknowledge that the Washington Supreme Court, in *Guimont v. Clarke*, 121 Wn.2d 586, 605 n.7, 854 P.2d 1 (1993), equated a physical invasion with a facial challenge, and that neither requires exhaustion of administrative remedies.

properties even if suitably protected), none of the owners of the four northern homes (including the Hulett) has been able to construct a retaining wall to enable them to reoccupy. CP 511 ¶ 21. That some other owners on Rolling Bay Walk, with suitable access to their homes, have been able to build does not demonstrate that any administrative remedy is available to the Hulett.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the trial court and remand this case for further proceedings.

RESPECTFULLY SUBMITTED this 12th day of May, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2009, I caused to be sent for filing the REPLY BRIEF OF APPELLANTS via first-class mail to the following:

Clerk of the Court
Washington State Court of Appeals, Division Two
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I further certify that on this 12th day of May, 2009, I caused the REPLY BRIEF OF APPELLANTS to be sent for serving via first-class mail to the following:

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Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 12th day of May, 2009.



Alan S. Middleton