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SEP 20 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29126-0-III

(Grant County Superior Court No. 08-2-00734-7)

IN THE COURT OF APPEALS, DIVISION THREE
FOR THE STATE OF WASHINGTON

WILSON & SON RANCH, LLC,
a Washington limited liability company,

Appellant,

vs.

PHILLIP M. HINTZ AND SHANNON M. HINTZ,
husband and wife,

Respondents.

BRIEF OF APPELLANT

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Attorney for Appellant

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INTRODUCTION

This lawsuit is a dispute between two neighbors. The Appellant is Wilson & Son Ranch (Wilson), a family run cattle and hay business. The Respondents are Phillip and Shannon Hintz (Hintz). An easement exists through the Wilson property in order to access the Hintz property. The easement has been in place for over 30 years.

Hintz recently started an outdoor events business with a Conditional Use Permit (CUP) allowing up to 28 events per year and an average of 200 guests per event. Clerk's Papers (CP) 75:12; Verbatim Report of Proceedings, March 1, 2010 (VPR) 102:7-8. The events are weddings and similar social events. Wilson contends this use exceeds the scope of the easement and is a change in character of the easement that increases the burden on their agricultural activities. Hintz argues that hosting outdoor events is within the contemplated "normal development" of the property and therefore does not exceed the permissible scope of the easement. Moreover, Hintz contends that they may expand the gravel road and force Wilson to remove an existing center pivot irrigation structure. The trial court ruled in favor of Hintz and this appeal follows.

ASSIGNMENTS OF ERROR

Appellant assigns the following errors.

1. The trial court erred in Finding of Fact No. 11, stating that

Jones “did not impose any limitations or restrictions on his use of the easement.” The issues pertaining to this assignment concern the scope of the easement retained by Jones.

2. The trial court erred in Finding of Fact No. 12 in stating that Jones was not using the express easement when he utilized the gravel road. The trial court erred in Findings of Fact No. 42, 43, and 44, stating that the center irrigation pivot is located within the express easement. The issues pertaining to these related assignments concern whether the express easement has been relocated by mutual consent of the owners of the dominant and servient estates.

3. The trial court erred in Conclusion of Law No. 10, stating that Jones did not intend to restrict the scope of the easement. The trial court erred in Conclusion of Law No. 12, stating that Hintz’ use constitutes “normal development” allowed under the law. The trial court erred in Conclusion of Law No. 13 regarding whether Hintz’ outdoor events business exceeds the scope of the easement. The issues pertaining to these related assignments concern the evidence and law related to the permissible scope of the easement.

4. The trial court erred in Conclusion of Law No. 14 in finding a prescriptive easement in favor of Hintz. The issues pertaining to this assignment concern whether the express easement was relocated to the

existing gravel road by mutual consent of the owners of the servient and dominant estates.

5. The trial court erred in Conclusions of Law No. 22, 23, and 24 regarding the center pivot being located in the express easement. The issues pertaining to this assignment concern whether the easement has been relocated by mutual consent of the owners of the servient and dominant estates.

STATEMENT OF THE CASE

The story of this case begins with Herman Jones. He was the owner of a large parcel of property in Grant County near Moses Lake, referred to as Farm Unit 55, Irrigation Block 40. Jones purchased this parcel in 1968 to use as a hunting area for pheasants and waterfowl. CP 70:20-21.

The large eastern portion of Farm Unit 55, Block 40, was irrigated and used for farmland. Jones leased that area to a farmer. CP 70:23; VRP 25:19-21. The western portion of the property dipped down a hill to a lower elevation where there was a wetland area and natural springs. CP 70-71. That area was not irrigated or farmed and was physically separated from the upper irrigated pastures by a barbed wire fence. CP 71:4-7. Although Jones also hunted in the pastures for pheasants, the western portion of the property across the fence line was the primary hunting area

for Jones. VRP 24:16-20.

To understand the general layout, the Court is directed to Trial Exhibit 15 (copy provided here for convenience as Attachment A). As can be seen, Stratford Road runs along the eastern boundary of Farm Unit 55, Block 40. It is a paved public road and serves as an arterial for the general area.

At the northeastern corner of the parcel is the beginning of Private Road 11.5. This gravel road enters the Wilson property and is used for access by Wilson and Hintz. CP 71:15-22.

The gravel road proceeds from Stratford Road and runs west along the northern boundary of the property. CP 71:15-16. At about the midpoint of the northern boundary line of Farm Unit 55, Block 40, the gravel road veers away from the boundary line and proceeds in a southwesterly direction. CP 71:18. The layout of the gravel road is depicted on Trial Exhibit 1 (copy at Attachment B) and Trial Exhibit 17 (Attachment C) (gravel road highlighted in orange).

When Jones owned Farm Unit 55, Block 40, the gravel road was already in existence. Indeed, Jones used the gravel road for his own access within the parcel, and particularly to reach the western portion of the property where he hunted for pheasants and waterfowl. CP 71:22. Jones testified that the gravel road is still located in the same route. VRP

42:1-3. Other witnesses, including Respondent Phillip Hintz, also testified that the gravel road has not changed. VRP 114:9.

In 1973, Jones was hunting the property less often, and no longer had a lease tenant for the farmland, so he decided to sell the irrigated portion of Farm Unit 55, Block 40. VRP 28:22-25. Accordingly, Jones sold the eastern portion of his property to Larson. CP 71:23-26.

Significantly, Jones retained the western, non-irrigated portion of the property to continue his hunting activity. CP 71:26; 72:1. Accordingly, Farm Unit 55, Block 40 was split into two parcels. The western portion retained by Jones is shown on Trial Exhibit 16 as the “blue” area. (Attachment D). The uncolored eastern portion of Farm Unit 55, Block 40 was conveyed to Larsen.

In order to access the western parcel that Jones retained, he needed to pass through the parcel that he sold to Larsen. Accordingly, Jones reserved an easement for ingress and egress. CP 72:3-7. The easement reservation states in part:

Reserving to the GRANTOR a non-exclusive easement for ingress and egress over and across a strip of land 20 feet in width described as follows:

CP 72:7-8. The complete description is provided at Trial Exhibit 2 (copy provided at Attachment E)

Jones continued to hunt on the western parcel that he retained.

Throughout his ownership he used the gravel road as the sole means of access to that parcel. CP 71:22.

In 1978, Jones sold the western parcel to Colin Skane. CP 72:24. As with Jones, Skane also used the gravel road as the sole means of access to the western parcel. CP 73:9. Skane established a residence on the property and started a fish hatchery. CP 73:1-2. The property is zoned Agriculture (AG). CP 75:23. Under that zoning designation, “agricultural activities” is defined by the Grant County Code (GCC) to include “livestock management, such as breeding, birthing, feeding, and care of animals, birds, honey bees, **and fish ...**” GCC 25.02.030. Accordingly, the fish hatchery business started by Skane was an agricultural use of the property.

In 1990, Skane sold the western parcel to Phillip and Shannon Hintz, the Respondents in this appeal. CP 73:10. Hintz continued to use the property for the commercial production of fish. CP 73:11. That use continued until approximately 2000.

In 2001, Hintz conveyed a substantial part of their property to the Grant County PUD. Accordingly, the original Farm Unit 55, Block 40 was now divided into three parcels. Those parcels are depicted on Attachment B, and labeled as the Wilson parcel, the Hintz parcel, and the PUD parcel.

As with their predecessors, Hintz' sole means of access is the gravel road. In 1997, Hintz constructed a large gate at the entrance to their property. VRP at 159:20-25. The gate is supported on each side by a tower structure. A photo of the gate is shown on Trial Exhibit 13, page 8, and is reproduced for convenience at Attachment F. The gate is 20 feet wide. VRP 115:14. The photo also shows the gravel road as it passes through the gate entry. The Court will also notice that the gate is located at the top of the hill and that the Hintz property is below at a lower elevation.

In 2007, Hintz applied for a Conditional Use Permit (CUP) to operate an outdoor events business on the Hintz parcel. CP 75:11. That business would utilize the property for outdoor weddings, family reunions, corporate picnics, and similar events. Grant County issued the CUP which authorizes 28 events per year. CP 75:12. In granting the CUP, the Hearings Examiner explicitly did not address whether the scope of the easement reserved by Jones was sufficient to allow access for an outdoor event business. CP 75:14-15.

Shortly before Hintz applied for the CUP, Wilson & Son Ranch purchased the large eastern parcel that was conveyed by Jones to Larsen. Larsen owned the property until 1995, when he sold it to Knopp. CP 73:24-25. Knopp used the parcel for agricultural purposes until 2001 when

he sold it to Walters Land & Livestock LLC (Walters). CP 73:26; 74:1.

Walters then sold to Wilson in March 2007. CP 74:10.

Les Wilson is a retired state patrol trooper. His son, Scott Wilson, is a math teacher in the Moses Lake School District. Les Wilson, his wife Judy Wilson, and their son Scott Wilson, together run the cattle business on their property. VRP 54:11-12; VRP 82:1-6.

Although Wilson could not prevent issuance of the CUP, Wilson contends that operation of the outdoor event business exceeds the scope of the easement retained by Jones. The trial court ruled against Wilson and concluded that the Hintz outdoor events business was within the “normal development” of the property and therefore was within the scope of the easement. CP 80:19-23. Wilson contends that the evidence and findings do not support that conclusion.

This case also concerns the location of the easement. The parties do not dispute that as the gravel road runs along the northern property line, the road lies within the easement area described on the Jones deed to Larsen. However, as the gravel road veers southwesterly away from that northern boundary line, the gravel road as built does not lie entirely within the area described by the Jones deed to Larsen.

The trial court determined that, *to the extent the gravel road was not actually located within the described easement area*, Hintz and their

predecessors had acquired an easement by prescription. CP 81. Furthermore, the easement area actually described in the deed was ruled by the court to still be a valid easement location. CP 83. Therefore, if Hintz wants to use that express easement area in addition to the prescriptive easement area and thereby expand the road, Hintz could do so. Moreover, if Hintz wants to expand the road into this additional area, Wilson will be required to remove a center pivot irrigation structure from its current location. CP 83. Hintz has stated his intent to widen the road and utilize the prescriptive easement area and the express easement area. VRP 136:5-17.

At present, the center pivot that would have to be moved is located on the south side of the gravel road, in the vicinity of where the gravel road enters the Hintz property. A photo of that center pivot is depicted at Trial Exhibit 13, page 7, and is reproduced here for convenience at Attachment G. The Court will notice the south side gate tower in the near background.

Wilson contends that the trial court erred in ruling that a prescriptive easement has been established. Rather, Wilson contends that the easement as described in the deed was simply relocated to the “as built” location by mutual consent of all the parties. Accordingly, Hintz continues to have a 20 foot easement, and it is the gravel road that has

always served as the actual and sole route of travel for the easement.

By recognizing that the original 20 foot easement reserved by Jones has been partially relocated by mutual consent to the as-built gravel road, the center pivot cannot be required to be removed. The center pivot is well outside of the 20 foot strip used by the gravel road. Hintz can force the removal of the irrigation pivot only if he has both a prescriptive right and the express easement thereby providing greater land area to further widen the gravel road. Of course, removal of the center pivot will take agricultural land out of production.

ARGUMENT

I.

THE EASEMENT LOCATION IS THE “AS BUILT” LOCATION OF THE GRAVEL ROAD

The first issue concerns the location of the easement. The parties have agreed that as the gravel road veers southwesterly, a portion of the gravel road is not located within the area described on the deed from Jones to Larsen. However, the undisputed evidence shows that the predecessor owners of the servient and dominant estates have mutually agreed to a relocation of the easement to the “as-built” location of the gravel road.

The trial court concluded that use of the gravel road, *to the extent it was situated outside of the express easement area*, met the requirements

for a prescriptive easement. This conclusion was error. The essential flaw is that Hintz already had a right to utilize the entire gravel road *without acquiring any prescriptive easement*. Accordingly, there was no further property right for Hintz to acquire.

A. An Easement can be Relocated by Mutual Consent.

Wilson contends that the trial court erred in finding a prescriptive easement because, *to the extent a portion of the gravel road is located outside of the express easement*, the owners of the dominant and servient estates long ago mutually consented to the shifted location.

With respect to an easement, it is settled in Washington that neither the dominant or servient estate may *unilaterally* relocate an easement. However, the landowners themselves may mutually consent to relocation of an easement. In *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (2002), Division 1 reviewed the case law and concluded that

Washington adheres to the traditional rule that easements, however created, are property rights, and as such are not subject to relocation absent consent of both parties. We so hold.

Id. at 207. Although stated in the negative, *MacMeekin* clearly authorizes relocation of an easement by mutual consent. *See also Crisp v. VanLaecken*, 130 Wn. App. 320, 325, 122 P.3d 926, 928 (2005) (following *MacMeekin* and citing *Coast Storage Company v. Schwartz*, 55

Wn.2d 848, 854, 351 P.2d 520, 525 (1960) (consent required of all interested parties to relocate express easement)).

B. The Undisputed Facts Show Mutual Consent to the As-Built Gravel Road as Being the Easement Road.

In the present case, mutual consent is demonstrated by the actions and intent of the parties to the deed, namely Jones and Larson. It is well recognized that in construing a deed, “the intent of the parties is of paramount importance and the court’s duty to ascertain and enforce.” *Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996). Here, the circumstances surrounding the deed, and the subsequent conduct of the parties, show that Jones and Larsen intended to establish the gravel road as the easement road for ingress and egress. Accordingly, to the extent it was necessary, those parties mutually accepted the gravel road as the correct location of the easement.

Most compelling is the conduct of these parties. From the very beginning of the easement, Jones used the gravel road as his easement for ingress and egress. CP 71:22. This conduct shows mutual consent to the gravel road as being the location for the easement. If that was not the intent, Jones’ conduct would have been deliberately and wrongfully trespassing onto Larsen’s property. Of course, there is no evidence that Jones had such a wrongful intent. Rather, the actual use of the gravel road

for ingress and egress shows that the parties understood the as-built gravel road to be the location for the ingress/egress easement. There is no contrary evidence.

With respect to the surrounding circumstances, it is undisputed that the gravel road already existed when the easement was created. Moreover, even before the sale to Larsen, Jones had been using the gravel road for ingress and egress to the western side of his property. Under this circumstance, it makes no sense for Jones to establish the easement in a different location than the existing gravel road. To the extent the deed may have partially failed to locate the easement within the existing gravel road, the acceptance by all parties of the entire gravel road as the “easement road” corrects that mistake.

In a similar manner, the surrounding circumstances show that it would make no sense for Larsen to intend the easement to be located anywhere but on the existing gravel road. Larsen purchased the servient estate for farming purposes. Under that circumstance, it would be contrary to his farming intent to also intend that the easement be located on otherwise available farmland, thereby reducing the farmable area. Obviously, these circumstances show that Larsen intended and accepted that the easement retained by Jones, and used by Jones, was located on the existing gravel road, rather than located further into the pasture.

The subsequent conduct of all other owners of the dominant and servient estates further underscores the acceptance of the entire gravel road as being the access easement. Namely, all other parties mutually followed this same pattern of using the gravel road as the easement road.

Jones testified that the gravel road today is the “same road” that he was driving in the 1970’s. VRP 42:1-2. Shannon Hintz further corroborated that during the Hintz ownership from 1990 to the present, Hintz used the gravel road for access and it has “never changed.” VRP 114:9. Likewise, Phillip Hintz testified that his predecessor, Colin Skane, accessed the property using the same gravel road, and that there was no other means of access.

Q. All right. Mr. Hintz, at the time you purchased the commercial fish hatchery property from Mr. Skane, how was Mr. Skane accessing his property?

A. The property was accessed from a gravel road that went from Stratford directly west into the property.

Q. And at the time you purchased the property back in 1990, how did you access the property after you purchased it.

A. I accessed it the same way.

Q. Is there any other access – ingress/egress access to your property?

A. No, there’s not.

Q. And has there ever been any other ingress or egress access?

A. No.

Q. Do you currently access your property via the gravel road to which you’ve been discussing?

A. Yes, I do.

VRP 125:7-24. Randy Knopp, a prior owner of the servient estate (now

owned by Wilson) testified as follows:

Q. Okay. Did the Hintzes have to cross your property in order to gain access to Stratford Road?

A. They used the designated road that was designed for access to their property.

VRP 164:13-16. The testimony refers to the “designated road” that was “designed for access.” This is, of course, correct. The road is obviously an access road, designed for access, and used for access by all prior owners of the dominant estate (*i.e.*, Jones, Skane, and Hintz).

Under these circumstances, the undisputed evidence shows that the gravel road has been accepted as the location of the express easement reserved by Jones. Wilson does not contend that the express easement was abandoned; rather, it was simply relocated (in part) to conform to the location of the as-built gravel road. This is consistent with, and gives effect to, the original intent of the grantor and grantee.

This conclusion is supported by case law. As set forth above, Washington recognizes that the dominant and servient estates can mutually consent to a relocation of an express easement.¹

¹ Slightly different in remedy, but consistent in principle, is the ability of the Court to reformulate the deed. As stated in *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 844, 999 P.2d 54, 59-60 (2000), “Considering the undisputed evidence that the Dorseys and Feathermans intended to create an easement along an existing road, the trial court’s reformation of the document to reflect this intent was proper.”

C. The Trial Court's Conclusion That Hintz Acquired a Prescriptive Easement Over a Portion of the Gravel Road is not Supported by the Evidence or Law

The only factual findings related to prescriptive use of the gravel road is that Hintz "never asked" for permission to use the gravel road. Findings of Fact Nos. 24 and 28. Such a finding may have relevance in a case where an easement does not otherwise exist. However, in the present case, an easement does exist.

Any finding that use of the gravel road was "adverse" is not supported by substantial evidence. As shown above, the undisputed evidence shows that the location of the easement was accepted by the dominant and servient estate owners to be the as-built gravel road. Moreover, the fact that Hintz "never asked" for permission actually further supports the contention that the gravel road was long accepted as being the easement road. Under these circumstances, there is not a sufficient quantum of evidence for a rational, fair-minded person to conclude that use of the gravel road by Hintz, or others, was adverse. Rather, the evidence consistently shows that the gravel road was accepted as the easement reserved by Jones. Accordingly, Hintz already had a right to utilize the entire gravel road without relying on any claim of a prescriptive right.

In short, use of the entire gravel road by Jones, and later by Skane

and then Hintz, was mutually agreed to be within the rights of the dominant estate. This means there could be no prescriptive right as a matter of law. The trial court decision finding a prescriptive right should be reversed.

II.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE HINTZ' OUTDOOR EVENTS BUSINESS DOES NOT EXCEED THE SCOPE OF THE EASEMENT

A. The Easement Has a Limited Scope.

As a preliminary issue, Wilson must address Finding of Fact number 11, in which the trial court determined that “Jones did not impose any limitations or restrictions on his use of the easement.” That finding is not supported by the evidence.

The language of the easement clearly states that it is limited to 20 feet in width. This limitation on width operates as a practical and real limitation on the scope of the easement. For example, any use that requires a width greater than 20 feet is necessarily beyond the scope of the easement.

The easement also is expressly limited to the purpose of ingress and egress. This purpose is stated expressly and also operates as limitation on the scope of the easement. For example, using the easement

for a parking lot would be a change of use that clearly exceeds the scope of the easement.

Finally, with respect to easements, the general rule is that the dominant estate cannot change its use so as to increase the burden on the servient estate.

It is the rule that the owner of the dominant estate can make no larger use of his easement or change its character in any way so as to increase the burden on the servient estate.

Little-Wetzel Company v. Lincoln, 101 Wash. 435, 445, 172 P. 746 (1918).

To implement this rule, the court must determine what scope of use is permissible for the particular easement. The framework for this determination is as follows:

In determining the permissible scope of an easement, we look to the **intentions of the parties** connected with the original creation of the easement, the **nature and situation of the properties** subject to the easement, and the **manner in which the easement has been used** and occupied.

Logan v. Brodrick, 29 Wn. App. 796, 799, 631 P.2d 429, 431 (1981)

(emphasis added) (citing *Evich v. Kovacevich*, 33 Wn.2d 151, 157, 204 P.2d 839 (1949)).

Accordingly, Washington law recognizes that the intent of Jones and Larson, the nature of the properties, and the manner of use, will also limit the scope of the easement. In short, the finding that Jones did not impose “any limitations” on the easement is overly broad, is not supported

by the express language of the easement itself, and is contrary to Washington law.

B. The Outdoor Events Business is a Change in Character of Use that Exceeds the Permissible Scope of the Easement.

The trial court concluded that “Hintz’ transformation of his property from a commercial fish hatchery to a venue for temporary outdoor events” constitutes “normal development” of the property. CP 80:19-23. Wilson will respond on two levels. First, substantial evidence does not support any finding that the outdoor events business is within the contemplated and permissible scope of use of the easement. Specifically, the character of the Hintz’ use is different in nature because it is a non-agricultural use. Moreover, as a matter of law, the outdoor events business is not a “normal development” of the parcel. By requiring a Conditional Use Permit, the events business is necessarily not a regularly or normally permitted use. Finally, Hintz has conceded that the 20 foot width of the existing easement is not sufficient to provide adequate access to his property for the outdoor event business. Accordingly, the trial court’s finding that the outdoor event business is normal development and within the scope of the easement is not supported by substantial evidence.

Second, Wilson will show that there is no basis for the court to expand the easement’s scope to accommodate the outdoor events business.

Taking such a step is contrary to law as established in *Sunnyside Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003).

1. Substantial Evidence Does Not Support Any Finding That The Outdoor Events Business Is Within The Permissible Scope of Use of the Easement

Applying the factors set forth in *Logan v. Brodrick* inescapably leads to the conclusion that the outdoor events business is a change in the character of use. A contrary finding is not supported by substantial evidence.

a. The Character of Use.

First, the narrow intent of the original parties to the grant of the easement is provided by the testimony of Jones.

Q. And did you, when you retained what I'll call the west portion of the property and sold off that portion just referred to, did you reserve an access easement to get there?

A. Yes, I did.

Q. And what was the purpose of that?

A. That was to continue to get to the property for hunting.

...

Q. Was the reservation of that easement, was it for anything other than you accessing the west portion to hunt?

A. At the time I sold the property and retained the easement, that was the only – that was the only reason that I retained it at that time.

VRP at 29:10-25; 30:1. Jones also testified that the parcel had a small cabin with electricity that he would stay in during his hunting trips. VRP 30:13-16.

Hintz will point out that while Jones' purpose was only to access the property for hunting, Jones also recognized that the scope of the easement was sufficiently broad to allow his successor, Colin Skane, to operate a commercial fish hatchery and to establish a residence there. CP 80:7. Hintz contends, and the trial court agreed, that because Skane had a "commercial" use of the property, it is permissible to operate a different type of "commercial" use and still be within the scope of the easement.

That conclusion does not withstand scrutiny. The zoning for this property is Agriculture. Of course, the fish hatchery is an "Agricultural activity." Under the Agriculture zoning for this property, livestock maintenance, which includes raising fish, is an agricultural use. GCC 25.02.030.

It is clear that while access for hunting is too narrow of scope, the historic use of the easement has always been limited to commercial uses that are **agricultural** in character. This is consistent with the surrounding property, and particularly the servient estate.

In contrast, hosting outdoor events is not an Agricultural use. Hosting events might be a profitable business, but it does not involve raising crops or livestock. It is a use that is different in character and nature than previous commercial uses.

The fact that agricultural uses are commercial, and that hosting

events is commercial, does not mean that a commercial fish hatchery and a commercial events business are of the same character. Such logic would mean that any commercial use is of the same character as the fish hatchery use.

In light of the Agricultural zoning designation, the agricultural use of the servient estate, and the historic agricultural use of the dominant estate, the factors in *Logan v. Brodrick* show that the permissible scope of the easement should be for ingress and egress that is related to an agricultural use. Such a limitation is consistent with the intent and use of the original parties, the agricultural nature of the subject properties, and the historic use of the easement. Of course, hosting outdoor events is not an agricultural use. Accordingly, the Hintz' business imposes a change in the nature and character of use.

b. "Normal Development" of the Property.

Hintz will contend that because a CUP was issued, this shows that "Hintz' transformation of the property" is within "normal development" of the property. The trial court agreed, but provided no authority for this legal conclusion. CP 80:19-23.

The fact that the CUP was issued does not show the event business is "normal development," rather it shows the event business is a special and exceptional use of the property. A correct understanding of the

purpose of a conditional use permit is necessary.

Lawyers who do not regularly practice planning-zoning law are often confused about the definition and role of a conditional use. Washington and some states customarily use the term “conditional use” or “special use” for what is in other states called a “special exception.”

William B. Stoebuck & John W. Weaver., 17 Washington Practice: Real Estate § 42 (2d ed. 2010). Professor Stoebuck continues:

The concept is that certain uses, for example the site of an electric power substation in a residential zone, may be desirable to have but are somewhat **discordant with the regularly permitted uses** and so should be controlled on an ad hoc basis.

Id. (emphasis added). In the above quoted article, Professor Stoebuck directs the reader to a Minnesota case as providing one of the best discussions explaining conditional uses. *Id.* at n.3.

By this device [conditional use permit], certain uses (e.g. gasoline service stations, electric substations, hospitals, schools, churches, country clubs, and the like) which may be considered essentially desirable to the community, but which should not be authorized generally in a particular zone because of considerations such as current and anticipated traffic congestion, population density, noise, effect on adjoining land values, or other considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending on the facts and circumstances of the particular case.

Zylka v. City of Crystal, 283 Minn. 192, 195, 167 N.W.2d 45, 49 (1969).

In other words, a conditional use is not a regularly permitted use or normal development; rather, it is special and exceptional development.

Rather than establishing a common character with regularly permitted agricultural uses, the CUP establishes that the business of hosting outdoor events, while generally desirable in the community, is substantially different in character. The trial court's reliance on the CUP to justify the outdoor event business as normal development is unsupportable.

c. Hintz Concedes that the 20 Foot Wide Easement is Insufficient to Meet Access Needs.

Phillip Hintz testified that he plans to widen the existing access road. Moreover, he plans on widening the road to such a degree that the center pivot will have to be removed. As of this writing, Hintz has followed through with this intent and has demanded in writing that Wilson now remove the center pivot to make room for a wider access road.

Phillip Hintz testified as follows:

Q. ... Are you concerned about the presence of that center pivot irrigation in the express easement?

A. Yes, I am.

Q. And why are you concerned about that?

A. I don't – I want to maintain my legal right to use my easement and **I want to widen the road so it's easier access.**

Q. And so as you sit here today, are you asking the court to require Mr. Wilson to move the center pivot outside of the express easement so that you can fully utilize your express easement?

A. Yes, I am.

VRP 136:5-17 (emphasis added).

The record does not include any plans or specifications for how

wide Hintz intends the access road to be. However, a general idea can be determined by viewing the photos on pages 7 and 8 of Trial Exhibit 13 (Attachments F and G). Those photos show the Hintz' gate, the existing gravel road approaching the gate, and the center pivot on the south side of the gravel road that Hintz wants removed. For a point of reference, the width of the gate is 20 feet. VRP 115:14. The photos show that any road widening that requires removal of the center pivot must be a fairly substantial widening project.

The CUP authorizes Hintz to conduct 28 outdoor events. Shannon Hintz testified that the web site advertises that the site can hold up to 500 people per event. VRP at 101:23-25, 102:1. Apparently, Hintz believes the existing easement is inadequate to meet the growing needs anticipated for their business.

This is understandable in light of how the traffic arrives for an event. Although set up people, caterers, servers, musicians and sound technicians, *etc.* may arrive earlier, most of the guests arrive at or near the starting time of the event. Shannon Hintz testified that most of the events are weddings and that "the average number of guests for events has been about 200." VRP 102:7-8. Typically, wedding guests are at least attempting to arrive on time. In other words, guests arrive in a bunch, within a relatively short span. This kind of traffic on the easement road is

very different in nature from a fish hatchery with a handful of employees

Although Phillip Hintz does not explain why the existing gravel road is insufficient, it does not require much consideration to understand that handling a large volume of vehicles all at once requires a wider access. Regardless of the lack of explanation, Phillip Hintz has testified to the need to make the access wider than the existing gravel road, and that the space now occupied by the center pivot will need to be utilized. This testimony is an implicit concession that a 20 foot easement is not adequate for the event business. Likewise, it is a concession that the volume and type of traffic is beyond the scope of the easement.

B. The Trial Court Erred Because There Is No Finding That The Express Terms of the Easement Manifest A Clear Intent To Expand The Scope of the Easement

The court in *Logan v. Brodrick* stated that “it may be assumed the parties had in mind the natural development of the dominant estate.” *Logan*, 29 Wn. App. at 800. Although the above analysis shows that Hintz’ CUP for an outdoor event business is not normal or regularly permitted development, there is also some question as to whether this statement from *Logan* is even good law.

Logan was decided in 1981 by Division 1. However, in 2003, a unanimous Washington Supreme Court held as follows:

[A]n easement can be expanded over time if the express terms of the easement manifest a clear intention by the original parties to modify the initial scope based on future demands. The face of the easement must manifest this clear intent.

Sunnyside Valley Irrigation District, 149 Wn.2d at 884.

Of course, in the present case, the face of the easement reserved by Jones does not manifest any clear intent that the easement may be expanded over time. Nor did the trial court render any such finding. Accordingly, the expansion of the scope of the easement to meet what the trial court characterizes as “normal development” is unwarranted as a matter of law.

CONCLUSION

The owners of the servient and dominant estates long ago mutually consented to relocate the express easement to conform to the location of the gravel road. That gravel road has consistently been treated and understood by all property owners as being the easement road that was retained by Jones. This Court should give effect to that intent.

If this Court rules that the express easement was partially relocated as necessary to conform to the route of the gravel road, there will be two further impacts on the issues before the Court. First, it will mean that the trial court decision finding a prescriptive right in the gravel road should be reversed. Rather than a prescriptive right, Hintz has an express easement

in the gravel road, just as has always been the case. Second, it means that the center pivot is not located within the express easement because that easement has been relocated to the as built gravel road. Accordingly, the trial court decision allowing Hintz to force the removal of the center pivot should be reversed.

Once the Court resolves those issues, the Court then should address the permissible scope of the easement. As set forth above, the Hintz' outdoor events business is a change in the character of the use of the easement. Moreover, the use is not within the normal development of the property, but is an exceptional and special use. Finally, Mr. Hintz has effectively conceded that the use of the existing 20 foot gravel road is insufficient for adequate access for the outdoor events business. Accordingly, such use must, as a matter of law, exceed the scope of the easement.

For all the foregoing reasons, the Court is respectfully requested to reverse the trial court as described here.

RESPECTFULLY submitted this 17th day of September, 2010.

GROEN STEPHENS & KLINGE LLP

By: John M. Groen by Brian D. [Signature]
John M. Groen, WSBA #20864
Attorney for Appellant WSBA #36526

DECLARATION OF SERVICE

I, Linda Hall, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On September 17, 2010, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Nicholas L. Wallace
Schultheis Tabler Wallace,
PLLC
56 C St. NW
P.O. Box 876
Ephrata, WA 98823

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

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

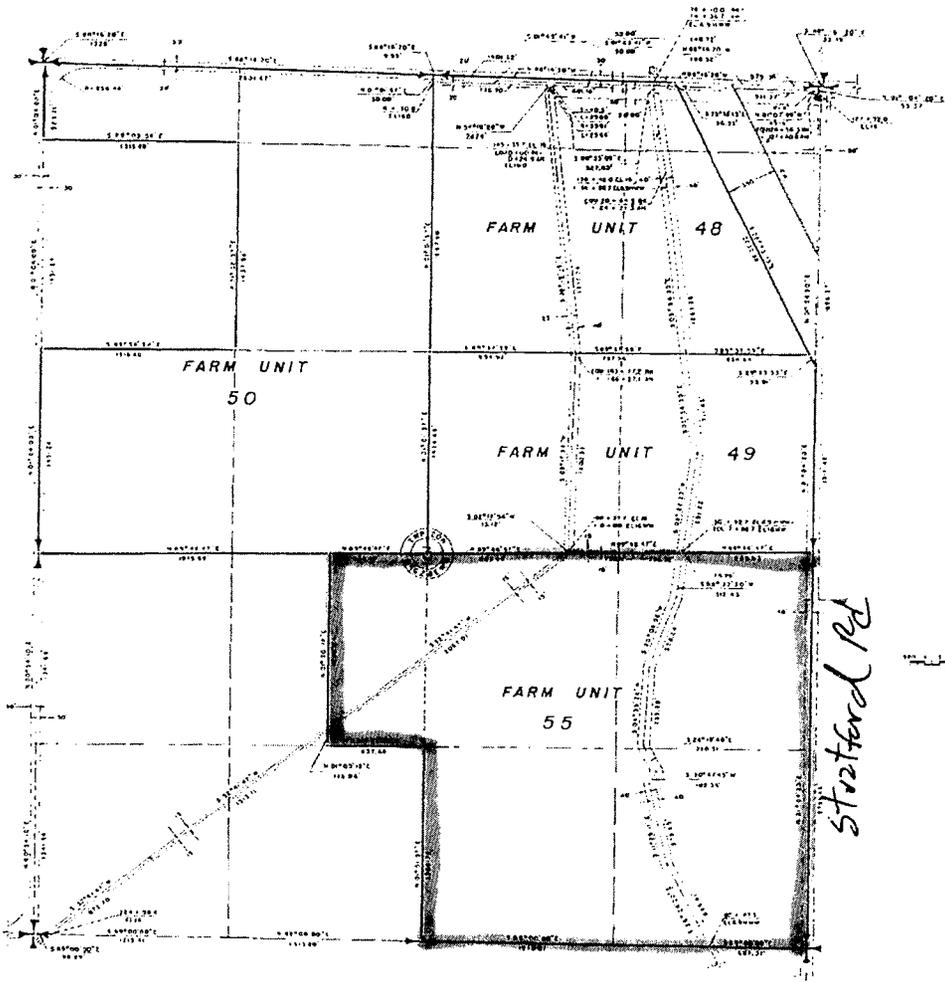
Executed this 17th day of September, 2010 at Bellevue,
Washington.



Linda Hall

ATTACHMENT A

COLUMBIA BASIN PROJECT - IRRIGATION BLOCK 40
GRANT COUNTY, WASHINGTON



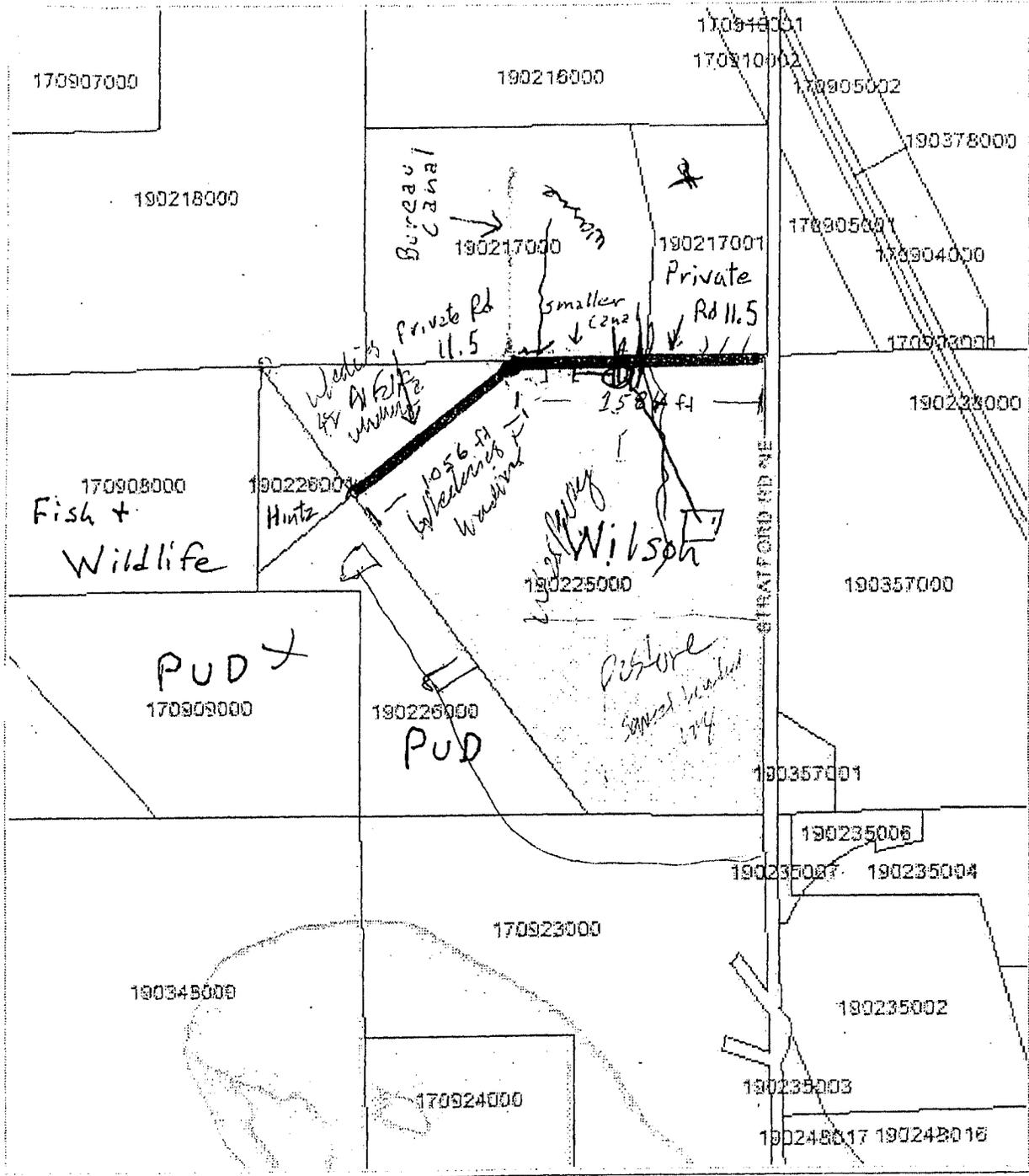
LEGEND

- Boundary of Units
- - - - - Right of Way for Roads
- · · · · Right of Way for Canals
- · · · · Right of Way for Drains
- · · · · Right of Way for Proposed Roads
- 48 Unit Number

Drawn by J.M. NEW
Checked by F.W. SNEY
Surveyed by
M.C. CHRISTENSEN
Chief, Engineering Division
Date 8-26-1957

I certify that this is a true and correct copy of the Survey Record of the Farm Unit Part of Irrigation Block 40.
H. E. KILLEN
Regional Director
Date 8-26-57

ATTACHMENT B



Grant County
 35 C St. / PO Box
 Ephrata, WA 988
 (509) 754-2011

Legend

- Roads
- Parcels
- Hydro
- Cities
- County Boundary



Comments

ATTACHMENT C

ATTACHMENT D



190219000

190217000

190217001



Grant County
35 C St / PO Box 37
Ephrata, WA 98823
(509) 754-2011

170909000

190219001

FU 55 BLK 40

190225000

170909000

190225000

190349000

170923000

Legend

Roads



Parcels

STRAIT FARR RD

ATTACHMENT E

MAY 11 2007

M-201



698041

LARSON FOWLES, PLLC

FILED OR RECORDED BOOK OF _____ PAGE _____

SAFECO TITLE INS.

JAN 25 3 05 PM '80

FRANCES WARDEN, CLERK GRANT COUNTY, WA.

WARRANTY FULFILLMENT DEED

DEPUTY

THE GRANTOR, HERMAN L. JONES, a single man dealing in his sole and separate property, for and in consideration of Ten Dollars and other good and valuable consideration (\$10.00), in hand paid, conveys and warrants to DARELL H. LARSON and ALICE LARSON, husband and wife, the following described real estate, situated in the County of Grant, State of Washington.

55

That portion of Farm Unit 55, Irrigation Block 40, Columbia Basin Project, lying in the South 1/2 of Section 3, Township 20 North, Range 28 E.W.M., Grant County, Washington, described as: All of said Farm Unit 55 EXCEPT that portion lying southwesterly of a line described as: Beginning at the center of said Section 3, said point also being on the north line of said Farm Unit; thence South 89°46'47" West along the North line of said Farm Unit 658.49 feet to the Northwest corner of said Farm Unit, said point also being the True Point of Beginning; thence South 34°52' East 3363.1 feet to a point on the South line of said Section and Farm Unit, said point bearing North 89°00' West a distance of 1313.69 feet from the Southeast corner of said Section and Farm Unit.



TOGETHER WITH an easement appurtenant to the above described land for the purpose of watering cattle and livestock, including the right to run cattle and livestock over and across the lands included in said easement to and from any waters located thereon. Said easement being over, upon and across the following described land: Beginning at the Northwest corner of said Farm Unit 55, Irrigation Block 40; thence South 34°52' East 2322.1 feet to the True Point of Beginning; thence continuing South 34°52' East 200 feet; thence South 55°08' West 450 feet; thence North 34°52' West 200 feet; thence North 55°08' East 450 feet to the True Point of Beginning.

The rights included in this easement shall include the right to fence the same.

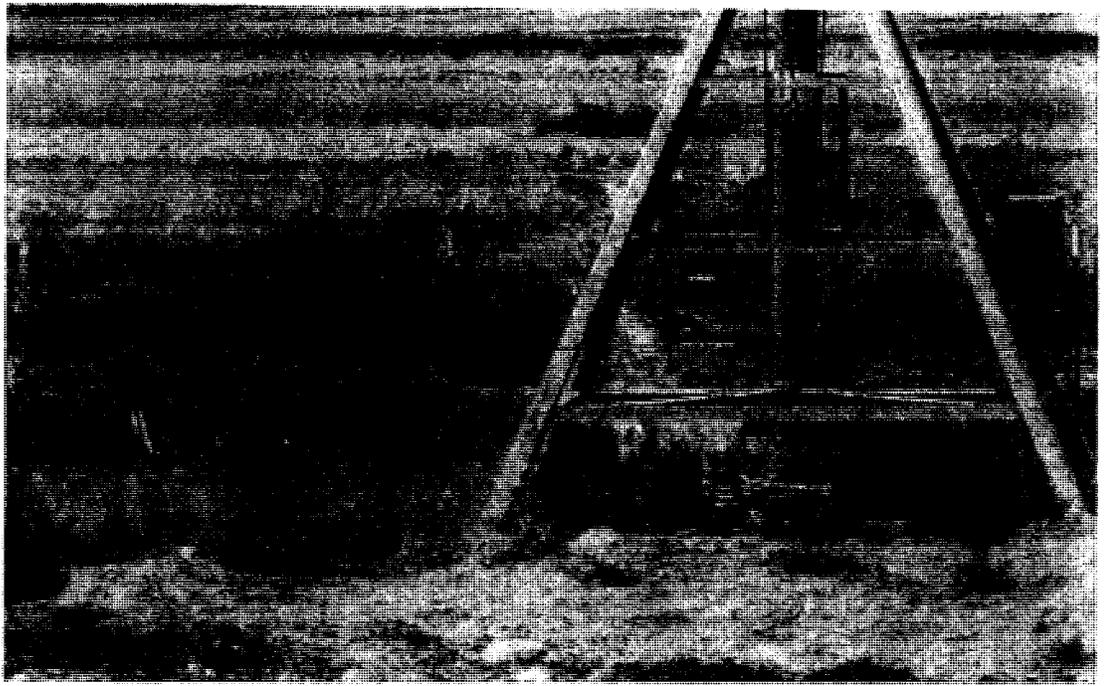
Reserving to the GRANTOR a non-exclusive easement for ingress and egress over and across a strip of land 20 feet in width described as follows: A strip of land 20 feet in width parallel to and Southerly of the East-West center line of Section 3, Township 20 North, Range 28 E.W.M., beginning at the intersection of said center line with the county road known as the Stratford Road; thence Westerly along said center line to the Easterly intersection of the right of way of the existing USBR irrigation ditch with said center line; thence a strip of land 20 feet in width parallel to and along the Easterly right of way line of said USBR ditch to the intersection of said right of way line and the Westerly line of the property which is the subject of this contract and first above described. This easement shall be appurtenant to that portion of Farm Unit 55, Irrigation Block 40, Columbia Basin Project, not covered by this contract.



Rev. 4/2/80

RETURN TO →

ATTACHMENT F



ATTACHMENT G

