

DIV III # 345858

No. 92423-6

Received  
Washington State Supreme Court  
E MAR 17 2016

Ronald R. Carpenter  
Clerk

THE SUPREME COURT  
OF THE STATE OF WASHINGTON

COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an  
Association of multiple concerned residents of the Chiliwist Valley, RUTH  
HALL, ROGER CLARK, JASON BUTLER, WILLIAM INGRAM,  
LOREN DOLGE, Residents and property owners in the Chiliwist Valley,

Appellants,

vs.

OKANOGAN COUNTY, a Municipal Corporation, and Political Subdivision  
of the State of Washington: RAYMOND CAMPBELL, SHEILAH  
KENNEDY, and JAMES DETRO, Okanogan County Commissioners;  
JOSHUA THOMPSON, Okanogan County Engineer; and GAMBLE LAND  
& TIMBER Ltd., A Washington Limited Partnership,

Respondent.

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APPELLANT'S OPENING BRIEF

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Barnett N. Kalikow  
KALIKOW LAW OFFICE  
ATTORNEY FOR APPELLANTS  
1405 Harrison Ave / Suite 202  
Olympia, WA 98502  
(360) 236-1621  
WSBA # 16907

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I FACTS OF THE CASE

Okanogan County placed the entire length of Three Devils Road between the Chiliwist Valley and the U. S. Forest Service boundary into the county road roster in 1955 (Staff report, Bates 009-010) except that a small portion passes through DNR land. It is a primitive road, meaning that the County does not do regular maintenance on it. RCW 36.75.300.

Gamble Land & Timber Ltd. petitioned the county to vacate the portion of that road which passed through its property. The petition was signed by Cass Gebbers and corrections to the petition initialed by Jon Wyss a member of the Gebbers family on behalf of the Company, (Bates 001) which is a limited partnership within the Gebbers Family.

Commissioner Raymond Campbell is a close friend and confidant of the Gebbers family, so close in fact that he was chosen to give the eulogy at patriarch Dan Gebbers funeral in 2014. CP 1201

On March 17, Public Works Director Perry Huston issued a memorandum (CP 430 et seq.) that explained the appearance of fairness doctrine, instructed that the road vacation hearing was quasi judicial and the ability of the Commissioners to avoid any improper appearance if they thought it might exist by

“remand[ing] the petition to the Office of Hearing Examiner to conduct the public hearing. The final decision would still be made by the Commissioners based on consideration of the record and recommendation of the Hearing Examiner.” CP 431-32. (Mr. Huston in erroneously used the Appearance of Fairness statutes in chapter 42.36 accidentally in place of the statute (RCW 36.87.060) that allows a hearing examiner to hear road vacation cases. But he also cited chapter 42.36 appropriately in the memo on the appearance of fairness issue. We do not consider this error significant.)

The Commissioners chose to allow the Hearing Examiner to hear the vacation case as that option was presented by the Planning Director.

On March 12, the County Engineer, Mr Thompson, submitted his report on the road, which was especially significant for three things: 1) He found that there would be no public benefit from the vacation; 2) He repeated the assertion in the Petition for vacation that the connecting road to the forest service from the terminus of Three Devils was closed and gated; and 3) Very little usable data on public use existed because they had stopped keeping data in 2005. CP136

On March 17, Mr. Colbert of the Forest Service copied public works personnel with a reply to a citizen who had asked about the status of the forest

service road connecting to Three Devils. In his emailed reply, he stated that the road was not permanently closed, just temporarily for maintenance and repair and would likely not be closed as long as it connected to a county road. CP 698-99

The Engineer, Mr. Thompson, chose not to alter his report in any way before the hearing several weeks later.

The public, especially the residents of the Chiliwist submitted a many pages of public comment opposed to the vacation, including a petition with 228 signatories (CP 542-568) urging the Commissioners not to vacate the road. Prehearing written submissions of at least 21 people urged the road be kept open for their continued public use and public safety. CP 365-72;383-391; 685-695;712-714) and additional 16 commented at hearing not only that they used three Devils Road for recreation and access to public lands, but that it was vital as an escape route in case of fire or flood in the valley. CP 739-740

The Hearing Examiner made detailed findings on overwhelming evidence to conclude that the road was useful for recreation, access to public lands and necessary for public safety and, based on the engineer's own report, that vacation would serve no public benefit.

Following determination by the hearing examiner, Gamble submitted a

motion for reconsideration, followed some days later with a brief on reconsideration along with a new affidavit by Cass Gebbers and a number of attachments, maps and other evidence.

None of this material was provided to counsel for the Chiliwist residents, both of whom had appeared in this matter.

The hearing examiner found no basis for reconsideration and rejected the additional exhibits and declarations as filed after the record was closed.

The Hearing examiner's decision was transmitted to the Commissioners.

The Commissioners adopted none of the Hearing Examiner's findings or conclusions and gave no reason based on the hearing record why they rejected that material. They made their own findings based exclusively on representations of the applicant, some of which appears to have been introduced after the record was closed and rejected by the Hearing Examiner.

A writ of Certiorari or in the alternative, Prohibition was issued by Judge Christopher Culp who thereafter recused himself. The Parties thereafter agreed that the case should proceed under Certiorari/Review.

The Superior Court, Judge Hotchkiss presiding, ruled that the action to vacate the road was purely a legislative function of Commissioners and a matter

of their sole discretion, and not quasi judicial, and affirmed the Commissioner Action. Appellants thereafter petitioned this court for direct review to determine the nature and review procedures in rural county road vacation processes, and determine issues of Appearance of fairness and due process in such procedures.

## II ISSUES FOR REVIEW

1. Is a county road vacation hearing under RCW 36.87.050-060 a legislative/administrative process or a quasi-judicial process?
  - a) When the courts have repeatedly held that road vacation decisions are reviewed by writ of review, is that indicative or conclusive that the decision is quasi-judicial?
  - b) When a statute such as RCW 36.87.050-060 calls for the decision making body to hold a hearing and make specific findings and conclusions on defined issues based thereon, is that indicative or conclusive that the decision is quasi-judicial in nature?
  - c) When a statute allows for a private party to request a public benefit such as vacation of a right-of-way encumbrance across its property, and that statute requires a public hearing on the granting or denial of the benefit, is that fact indicative or conclusive that the

decision is quasi-judicial in nature?

2. Does the appearance of fairness doctrine apply to a County Road vacation process under RCW 36.87.050-060, where the record discloses at least one commissioner has intimate business and personal ties to the vacation applicant family, and multiple *ex parte* contacts occurred between the applicant representatives and all county commissioners, which the commissioners did not disclose?
3. Do the findings of fact by a hearing examiner assigned by the Commissioners under RCW 36.87.060, and who was the only officer to hear evidence at the statutory hearing, require deference by the superior court.
4. Was the Commissioner decision to grant the application to vacate 3-Devils Road arbitrary, capricious and irrational?
5. Do appellants have standing to challenge this road vacation?
  - a) Are there different standards for standing between rural county roads and city streets or other urbanized roads for challengers to a road vacation; specifically do residents who do not abut the portion of a rural county road sought to be vacated but live in the

vicinity of such section and use the section sought to be vacated regularly have standing under Chapter 36.87 RCW to challenge vacation to a rural county road?

b) Do residents of an enclosed valley have standing to challenge a road vacation for a road leading out of that valley in an area that has been repeatedly devastated by wildfire?

6. Does the different wording, standards, and processes set forth in Chapter 35.79 RCW on city street vacations in contrast to Chapter 36.87 RCW on county road vacations require a different standard of review and analysis of review in the courts?

7. Does the difference in the manner in which non-platted county roads are established, especially when established by public use, affect the standard of review and analysis of review of vacation by the courts?

8. Did the Commissioners' actions violate appellants' Due Process rights and Equal Protection rights such that they are entitled to attorney fees and costs in this action?

### III ASSIGNMENTS OF ERROR

1 The court erred in holding that a county road vacation process under

RCW 36.87.020 - 060 and ordinance thereon was a legislative rather than a quasi judicial act.

- 2 The court erred in holding that where an applicant for a road vacation under Chapt. 36.87 RCW had ex parte contacts with all commissioners which they did not disclose, when other public input was directed to the statutory public hearing no violation of the appearance of fairness doctrine, due process or equal protection of the laws occurred.
- 3 The court erred in holding that when a county commissioner had intimate multiple intimate personal and family ties to the applicant family in a road vacation action under Chapt. 36.87 RCW, which he failed to ever disclose during any hearing process, no violation of the appearance of fairness doctrine, or principles due process or equal protection of the laws occurred.
- 4 The court erred in finding that appellants standing in this vacation challenge was based solely on their pleading that it was a danger to them and was arbitrary and capricious, and not that they were otherwise within the zone of persons whose interest was protected by vacation statutes.
- 5 The court erred in failing to find violations of due process, equal

protection, and collusive practices sufficient to reverse the Commissioner's action and award sanctions to appellants both below and in this court under 42 USC § 1988.

IV ARGUMENT

A) BOTH PLAIN STATUTORY LANGUAGE AND CASE LAW INTERPRET ROAD VACATION ACTIONS ON OWNER PETITION TO BE JUDICIAL IN NATURE

1) Both County Road Vacation and City Street Vacation Processes Are Ordinarily Reviewed by Writ of Review Which Is Reserved for Quasi Judicial Actions

It is settled law that the statutory writ of review is reserved for review of judicial and quasi-judicial acts by inferior bodies. This black letter law, as set forth in RCW 7.16.040, has not been contested anywhere in this case :

A writ of review shall be granted by any court, except a municipal or district court, when an inferior tribunal, board or officer, ***exercising judicial functions***, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

*id.* ( ***emphasis added*** )

In *Raynes v. City of Leavenworth*, 118 Wn. 2d 237, 244, 821 P.2d

1204 (1992), this court interpreted the statute as follows:

Thus, in order to issue a writ of review, the court must find (1) that an

inferior tribunal (2) *exercising judicial functions* (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law. id. ( *emphasis added* )

The appellate courts in modern times have uniformly instructed that court review of both county road vacations under Chapter 36.87 RCW and city street vacations under Chapter 35.79 RCW, are reviewed by writ of review/certiorari under chapter 7.16 RCW.

The following cases make this explicit:

1. *Federal Way v. King County*, 62 Wn. App. 530, 534, 815 P.2d 790 (1991): “certiorari is proper method to initiate review of a road vacation ordinance claimed to be contrary to existing law.” (Citing *DeWeese*, below.)
2. *Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 240-241, 653 P.2d 1355 (1982): “Because superior court review was by writ of certiorari, RCW 7.16.120, the court was limited to review of the record before the Board and to a determination of whether the Board's action was arbitrary and capricious or contrary to law.”
3. *DeWeese v. Port Townsend*, 39 Wash. App. 369, 371 - 372, 693 P.2d 726 (1984): “Robert and Kristine DeWeese and Stephen and Jeneen Hayden, challenging the vacation ordinance, petitioned the superior court for a statutory writ

of certiorari. . . . “At the outset, we note that certiorari is a proper method for initiating judicial review of a city ordinance claimed to be illegal.”

The syllogism would appear complete: Statutes and case law instruct that only quasi judicial acts are reviewable by writ of review and case law instructs that road vacations are generally reviewed by writ of review. Ergo the courts believe that they are quasi judicial acts.

In the Respondents’ briefing and judicial opinion in this case we have seen nothing that addresses this basic logic, and the court found contrary to it CP \_\_\_\_.

But we believe it is more than this logical equation that dictates the judicial nature of the decision the Board made in this case.

2. A County Road Vacation under Statute Is by its Nature a Judicial Decision

These things are basic indicia of judicial action:

- a) An **advertised public hearing** before the commissioners or a hearing officer must be held for the **taking of testimony** from the general public, **specifically on the issue of usefulness** on the road. RCW 36.87.050-060.
- b) A **finding** must be made that the road is “useless/not useful” (RCW 36.87.020/ 060) as part of the road system.

c) A separate **finding** must be made that the public will be benefitted by the vacation. RCW 36.87.060.

Thus, the statutory process requires that after an application is made, and the commissioners or their designated hearing officer hear the evidence and they decide, based on that evidence, two statutory questions: uselessness of the road and Public benefit from vacation. The statute requires a straightforward application of the facts to existing law, the quintessential quasi judicial process. The factors for determining if the action is judicial in nature are set forth in *Chaussee v. Snohomish County Council*, 38 Wn.App 630, 634-635, 689 P.2d 1084 (1984):

The 4-part test for determining whether administrative action is quasi judicial is:

(1) whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. (Citations omitted)

Here, the various administrative actions fit within these four criteria. The hearing examiner's and Council's actions amounted to the application of law, SCC 20A, to particular facts. Such a function is one historically performed by courts and a court could have been charged with making such decision. The actions further amounted to applying existing law to past or present facts and resembled the ordinary business of the courts. ***An administrative agency which applies existing legislation and policy to specific individual interests is not legislative, but quasi***

*judicial in character*. See *Cooper v. Board of Cy. Comm'rs*, 101 Idaho 407, 614 P.2d 947 (1980). (*emphasis added*)

Id.

When we substitute the procedure and necessary findings set forth in RCW 36.87.050-060 for the Snohomish County Code sections cited in *Chaussee* the fit is nearly exact. Indeed, Since this action commenced with an application from a private party, requesting private relief (from a public encumbrance), it is hard to see how the *adjudication* of such an application is anything other than quasi-judicial in nature. “*An administrative agency which applies existing legislation and policy to specific individual interests is not legislative, but quasi judicial in character*” *Chaussee, supra, loc cit.*

B) BOTH FAIRNESS AND THE NOTIONS OF BASIC DUE PROCESS AND EQUAL JUSTICE WHICH GAVE RISE TO THE APPEARANCE OF FAIRNESS DOCTRINE HAVE BEEN VIOLATED

1. Regardless of Whether This Vacation Process Violated Chapter 42.36 – and We Believe That it Did – it Violated Basic Constitutional Due Process Norms

Respondents have argued and the court found, that the vacation process outlined above is legislative rather than quasi-judicial in nature – which we dispute as the central error of their case. For multiple reasons set forth immediately above

we believe a “legislative” classification cannot stand. On this foundation, however, they build their argument that appearance of fairness doctrine does not apply under Chapter 42.36 RCW because the doctrine as codified only applies to quasi-judicial actions. and this is not one.

The Appearance of Fairness Doctrine requires that public hearings that affect rights and liabilities of citizens not only must be procedurally correct, they must also appear fair to the participants and the public. See *Smith v. Skagit County* 75 Wn.2d 715, 453 P.2d 832 (1969).

Insofar as a particular action is claimed unlawful under the Doctrine – and illegality is based on the *appropriate* application of basic requirements of due process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution – the state statute falls away and only the Constitution rules. See Article 6, U.S. Constitution. *cf.* RCW 42.36.110. And see, *Harris v. Hornbaker*, 98 Wn.2d 650, 664 *et seq.*, 658 P.2d 1219 (1983), Utter, J. Concurring, criticizing the “Doctrine” as merely restating basic Due Process requirements when properly used.

Here is the relevance of these principles to this case: When powerful interests apply for a public benefit and go behind closed doors with decision makers, and those decision makers emerge from secret meetings and thwart the

overwhelming will of the impacted community by acceding to the application of those powerful interests, basic principles of equal justice and due process have been compromised. We have not just described this case, we have described *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969), which gave Washington the appearance of fairness doctrine.

Although the doctrine has been codified and created a case law of technical rules for its application and volumes of professional commentary, this case takes us back to the essential Constitutional underpinnings of the foundation case.

The right to be heard implies a reasonable hope of being heeded. The right to be heard in a public hearing contemplates that, although the legislative body may, in finally deciding the matter, draw upon all kinds and sources of information including the opinions of experts, the hearing must be conducted as to be free from bias and prejudice; it must not only be open-minded and fair, but must have the appearance of being so. The word *hearing* in a statute shows a manifest purpose to afford due process of law. *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 [at 182], 83 L.Ed. 111, 59 S.Ct. 160 (1938). (*emphasis in the original*)

*Smith v. Skagit County*, 74 Wn.2d 715 at 741

In *Smith* what made the action unfair and constituted a violation of basic due process was the fact that,

When the planning commission announced at the close of a public meeting that it would go into executive session, it was within its rights. But when,

pursuant to this announcement of a closed session, it invited representatives of the aluminum company and other powerful advocates of the zoning changes to attend and be heard, but deliberately excluded opponents of the proposed rezoning, the hearing lost one of its most basic requisites — the appearance of elemental fairness. Deprived of this essential appearance of fairness, the hearing failed to meet the statutory tests.

75 Wn.2d at 742-743

In our case, the opponents of the vacation were required to testify on the record in open **public** hearings prescribed by statute (RCW 36.89.060) whereas the applicant's representatives were allowed to individually and privately contact the commissioners, totally outside the hearing process, unannounced, with no record made. CP 392.

This is precisely what the *Smith* Court found *Constitutionally* intolerable. *Smith, supra* at 741 citing *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 [at 182].

The only difference was that in *Smith*, the application was for a rezone allowing an aluminum plant on a rural residential zoned island, contrary to the wishes of the residents of that (Guemes) Island, and in our case it is the application by a large landowner to vacate a public road through its property contrary to the wishes of virtually the entire rural (Chilwist) valley and surrounding area served by

that road. CP 542-568

2. Judge Hotchkiss Found That Such a Significant Conflict of Interest Existed for Commissioner Campbell in this Action That, Were the Action in Any Manner Quasi Judicial, He Could Not Serve.

These are the words of Commissioner Ray Campbell himself describing his long and intimate relationship with the Gebbers family personally – the applicant family here – and their land interests:

Okanogan County Commissioner Ray Campbell described [Dan] Gebbers as “a good friend” he’d known since the late 1980's when Campbell began working on real estate deals with him. “He was always fair and honest, and the type of person whose word could be trusted with a handshake,” Campbell said

“I helped him put together a lot of land deals,” he said. “We would visit, look at projects.”

Omak Chronicle 10/29/2014

Indeed, the relationship between the commissioner and the Gebbers family was so intimate that they asked him asked to be the sole eulogist at the funeral of the family patriarch, Dan Gebbers:

The 11 A.M. [Dan Gebbers funeral] service started with Steve Riggan, a nephew, playing prelude music and a welcome by Pastor Greg Thom with Danny’s close friend Ray Campbell giving the Eulogy filled with anecdotes about the great man’s life and times over the past 84 years.

Quad City Herald, November 7, 2014, CP 1201

The conflicts were so egregious that Judge Hotchkiss was moved to write,

“If Commissioner Campbell were sitting in any quasi-judicial arena, he would be required to recuse himself.” CP 82.

Not only did he not recuse himself, he never even mentioned his deep personal and commercial connection with the family and its land holding in any discussion of his action on the Gamble Land vacation application Cf. RCW 42.36.060.

The Appearance of Fairness statute, Chap. 42.36 RCW, does not even speak to the issue of direct conflicts of interest and known personal biases, but this court and many appellate courts have:

The appearance of fairness doctrine, which has been developed to assure the highest public confidence in the governmental processes which result in zoning changes and land planning measures, is invoked to invalidate a decision when a member of the deciding body has an interest which might have substantially influenced his individual vote even if that interest did not actually affect him. *Narrowsview Preservation Ass'n v. Tacoma*, 84 Wn. 2d 416, 526 P.2d 897 (1974). ***The appropriate test is whether a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, [would] be reasonably justified in thinking that partiality may exist.*** *Swift v. Island County*, 87 Wn. 2d 348, 361, 552 P.2d 175 (1976).

*West Slope Community Council v. City of Tacoma*, 18 Wn. App. 328, 335, 569 P.2d 1183 (1977) (***emphasis added***). Accord, *City of Lake Forest Park v. Washington*, 76 Wn. App. 212, 884 P.2d 614 (1994)

The doctrine does not require a showing that actual influence was exerted to bring about the decision made, but only that some interest may have

substantially influenced a board or commission member. *Byers v. Board of Clallam County Comm'rs*, 84 Wash. 2d 796, 529 P.2d 823 (1974); *Narrowsview Preservation Ass'n v. Tacoma*, supra. See *Dana-Robin Corp. v. Common Council*, 166 Conn. 207, 348 A.2d 560 (1974). ***The administrative tribunals which perform judicial or quasi-judicial functions must be as above suspicion and reproach as courts themselves.*** *State ex rel. Barnard v. Board of Educ.*, 19 Wash. 8, 52 P. 317 (1898).

*Fleck v. King County*, 16 Wn.App. 668, 671, 558 P.2d 254 (1977) (emphasis added)

3. *Harris v. Hornbaker*

The case of *Harris v. Hornbaker*, 98 Wn.2d 650, 658 P.2d 1219 (1983)

is instructive on this court's application of fairness and due process issues on county commissioner road decisions.

In *Harris*, the Franklin County Commissioners were invited by the State to locate an interchange to a planned state highway as part of a 6-year road plan, and held hearings in order to make the necessary determinations. Two alternative locations for the interchange emerged from the process, each with its adherents. Advocates of the site not chosen protested that there was prejudgment of the issue before hearing constituting bias and that the hearing held was fundamentally unfair. *id.* at 656

This court held that Appearance of Fairness requirements did not apply in a decision where the commissioner were making planning decisions that were

wholly legislative: Deciding *where to place* a road was a matter of legislative judgment, and in fact in this case was part of a larger 6-year transportation plan; the fact that two opposing factions were contesting the issue was a matter of happenstance and could not convert it into a judicial decision. Indeed, the court pointed out, in such a planning endeavor commissioners could ignore both parties and choose their own interchange location as long as the decision was not arbitrary and capricious. 98 Wn.2d at 658-659.

All of the factors in *Harris* that militated against the imposition of fairness standards, argues for them in the case at bench. This is not a matter of road placement or part of a general road planning effort, it is an application from a specific landowner to disencumber its property. The decision options are not unfettered, and the choice is strictly binary: “yes” or “no” to vacation of a specific public road. The decision is based on explicit statutory standards, (uselessness of the road and public benefit by vacation) upon which evidence must be taken, findings made, and a decision rendered. RCW 36.87.060.

Users have a right to be *fairly* heard on matters of usefulness, and the benefitted have a right to be *fairly* heard on matters of public benefit. They were not, and could not be when at least one of the decision-makers had intimate

personal and business relationships with the applicant, and all of the decision makers were meeting behind closed doors with the applicant.

C) THE HEARING EXAMINER'S FINDINGS OF FACT DESERVE DEFERENCE

1. Only the Hearing Examiner Took Live Testimony and Was Able to Create the Record

Although the hearing examiner's decision is not binding on the commissioners and they make the ultimate decision., they do not have the discretion to simply ignore his findings.

We have found no precedent of courts reviewing *findings* of a hearing officer that were countermanded by a decision maker who did not hear the evidence, and who gave the hearing examiner the power to make those findings. It may be unique in the law.

It is important to note that the Commissioners *could* have heard all matters themselves. They *chose*, however, to task the hearing examiner to do so, and for him to make appropriate findings and recommendations.

The commissioners took this step after Planning Director Perry Huston issued a memorandum (CP 430 et seq) that explained the appearance of fairness

doctrine and the ability of the Commissioners to avoid any improper appearance if they thought it might exist in what he explicitly instructed was a quasi judicial proceeding by “remand[ing] the matter Office of Hearing Examiner to conduct the public hearing. CP 431-31.

Although the statute, RCW 36.87.060, does not require the Hearing Examiner to produce written findings, the Okanogan County Code section on his conduct of public hearings does require it.

The decision will be contained in a written order with supporting findings and conclusions. The order will be issued no later than 10 working days after the record closes;

OCC 2.65.120 (J)  
(Appendix A hereto)

There is certainly the inference in this sequence that the commissioners recognized the possibility of an appearance of impropriety and chose to insulate themselves from that inference by appointing the County Hearing Examiner to hear the matter and make findings and a recommendation. That they chose to ignore his findings and recommendation without explaining why his factual findings were erroneous, is equally suggestive that the decision was actually improper.

Generally, when a hearing officer is charged with taking the evidence and making findings and recommendations to another, the hearing officer’s factual

findings are given the deference both by the decision maker and ultimately by the reviewing court regardless of who makes the actual decision. The obvious reason is that the hearing officer reviews the whole record, hears the actual testimony, and can assess credibility and demeanor of witnesses. Those who later may have access to the record of the proceeding cannot do that.

Bar disciplinary proceedings are a close analogy.

In such proceedings, a hearing officer hears all the evidence, the Disciplinary Board reviews the record and the officer's findings and the officer's recommendation for sanction, and decides independently on sanction. This Court ultimately imposes sanction at its discretion. This Court gives deference on factual matters to the hearing officer for the reasons stated, and usually to the Disciplinary Board on the appropriate sanction if any. *In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 744, 122 P.3d 710 (2005); *In Re Disciplinary Proceeding Against Stansfield*, 164 Wn.2d 108, 187 P.3d 254 (2008).

In those instances when a local hearing officer's findings are appealed directly to superior court and the issue is one of mixed law and fact, the reviewing court *must* adopt the findings of the officer unless "clearly erroneous" under the record, and only if there is a debatable legal interpretation involved in the ultimate

question does the court have a role. *Clarke v. Shoreline School District No. 412*, 106 Wn. 2d 102, 109-110, 720 P.2d 793 (1986), citing *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 324-25, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983).

Whether a road is useful or useless within the county road system appears to be a fairly straightforward issue dictated by findings of fact. This is what the hearing examiner concluded:

Three Devils Road is useful to the County Road system as an emergency evacuation route, as a scenic drive, and as a connector to National Forest Lands to the West. It is therefore useful to the County Road system ( Conclusion 8, ( CP742).

He based this conclusion on the finding that

The opponents have provided clear and compelling written and oral testimony that the road is important to the area residents particularly as an escape route in the event of wildfire, and to a lesser degree as a recreational road, a connector to other public roads, and as a scenic drive. (CP 742)

Given the fact that at least one of the Commissioners, Mr. Campbell, was ethically compromised by his association with the applicant, we would suggest that the commissioners were required to credit these findings unless clearly erroneous, and to do otherwise is arbitrary and capricious, and frankly, given the status of the Chiliwist as an enclosed valley surrounded by undeveloped rugged terrain, it defies

common sense.

2. The Examiner's Findings Were Not Clearly Erroneous.

“Clearly erroneous” means that after reviewing the record as a whole, the court is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

When over two hundred local residents petition the commissioners (CP 542-565.) to keep the road open, one can assume some significant number of them are doing so for its utility, not nostalgia, and the road is not useless beyond the clearly erroneous standard. Examiner Finding 17, CP 738.

When dozens of people take the time to write comments or actually show up and testify as to their use of Three Devils Road for recreational access to the national forest (Loren Dolge who lives right at the mouth of Three Devils Road, testified that during hunting season three dozen or so cars per day travel the road for access to the national forest, (CP 1019-1021); communication with the Methow Valley, (e.g. Littlefield testimony CP 1013-14), or its own scenic beauty, the road is not useless beyond the clearly erroneous standard.

When the roads supervisor for the forest service writes an official letter,

including the forest service shield, stating that the forest service road connecting to Three Devils would likely remain open as long as it connected to a county road because of the value of public access to public lands, (CP698-99), the road is not useless, beyond the clearly erroneous standard.

But those are only the extra validation.

More than a dozen people testified and/or submitted written comment to the fact that they lived or had property in the Chiliwist and considered Three Devils Road to be a vital route in case of fire. Among the more compelling were the following examples of its recent use in saving lives.

1. Signe Butler submitted a comment pointing out that not only had she and her family driven Three Devils for its own beauty over the years, she had seen fire crews accessing the Chiliwist over Three Devils Road to fight active wildfires, thereby protecting lives and property. CP 372.

2. Tori Stone, and her parents, Dick and Bonnie Fuller both submitted written comment, CP 399 & 383 respectively, and Ms. Stone showed up at hearing so she could “look [the hearing examiner] in the eye” to tell him that her husband was alive today because of Three Devils Road when he

got trapped by smoke and fire on his way home to the Chiliwist using other back roads during the Carlton Complex fires and only escaped over Three Devils and made it home alive. CP1030-32 Her parents pointed out that his ability to access Three Devil Road ahead of the fire, and warn others to get out, likely saved the lives of his own family, his parents, the Fullers, and their neighbors.(CP 383).

- D) THE COMMISSIONERS' ACTION IN IGNORING THE FINDINGS OF THE HEARING EXAMINER AND THE TESTIMONY OF THE CITIZENS WAS ARBITRARY, CAPRICIOUS, IRRATIONAL, AND CONSTITUTES A MANIFESTLY UNREASONABLE DANGER TO THE PUBLIC
1. Even Purely Legislative Acts by Commissioners Are Subject to Court Review and Reversal If They Are Manifestly Unreasonable, Arbitrary And Capricious

As the court pointed out in *Harris v. Hornbaker*, supra,

[Municipal ]legislation is not to be nullified by the judicial branch of government **unless** the enactment contravenes the constitution or is manifestly unreasonable, arbitrary and capricious.

*Id.*, 98 Wn.2d at 657, quoting *Fleming v. Tacoma*, 81 Wn. 2d 292, 301, 502 P.2d 327 (Neill, J., concurring) (brackets in the original) (**emphasis added**)

When commissioners ignore the kind of testimony from essentially the

entire community that the road in question is not only useful but vital, and further ignore a hearing examiner finding of fact that this is so, the *Harris* standard for appropriate judicial intervention is clearly met. It is the kind of willfully unreasonable behavior which is the very definition of arbitrary and capricious action, which is:

willful and unreasonable action, without consideration and [in] disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been reached

*Barrie v. Kitsap County*, 93 Wn. 2d 843, 850, 613 P.2d 1148 (1980)

The Hearing Examiner took a full day of testimony and found the case compelling that the road is both useful and in fact vital. (CP 741). He pointed to the live testimony of 16 people and the prehearing written submissions of two score more, The petition of 228 people all but a few of whom were residents of the Chiliwist valley and surrounding areas. There was no public testimony that the road was “useless” except from the applicant, and he found none. (Finding 16, CP 738) There was no public testimony that the public interest would be benefitted, and in fact even the engineer’s report agreed that it would not be so benefitted. (CP 356, # 5)

The commissioners' ignored virtually all the testimony and all the findings, and voted to vacate anyway. That appears to be the very definition of "willful and unreasonable action, without consideration and [in] disregard of facts or circumstances."

"Manifestly unreasonable" is the term this court used to describe void even legislative action in *Harris*. The term is used to define what constitutes abuse of discretion by a judicial officer:

"Abuse of discretion means the decision is manifestly unreasonable or is based on untenable grounds or untenable reasons." *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 584, 216 P.3d 1110 (2009) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)), accord *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 287 P.3d 551 (2012).

We would posit that an action that puts the residents of an enclosed valley in danger by cutting off one of its fire escape routes and fire-fighting access routes, and finding that road "useless," is manifestly unreasonable and an abuse even of legislative discretion, let alone judicial discretion.

2. Respondents' Arguments in Defense of the Commissioners' Action Are Themselves Clearly Erroneous and Manifestly Unreasonable

Gamble Land and the County have countered making two arguments: 1) There are other escape routes from the valley in case of fire, and 2) Usefulness of the road for individuals who use it, is different than usefulness "as a part of the county road system" and the commissioners are the only ones who can determine such "system" utility.

a) Other Escape Routes

This is a theoretical argument that has nothing to do with the reality of wildfire in an enclosed valley as the Stone, Butler and Fuller testimony so clearly demonstrate. Wildfires in mountainous or hilly terrain do not follow regular rules. They can change direction without warning, create their own wind, and can be burning in a half dozen separate locations within a limited geographic area at the same time. The fire season that has not quite passed in Okanogan County is a graphic demonstration of all these principles, as were the Carlton Complex fires in 2014.

All of the lines on paper that Gamble posits as "alternate" escape routes are five to ten miles long, mostly through rugged mountainous back country, and pass through a combination of DNR, National Forest and private land. CP \_\_\_\_\_

During the middle of a fire season like the one just past, where power and communication are knocked out at various times, a resident of the valley will not necessarily know either the precise location of every fire or the current passability of each mountain road. The residents would have to use their best judgment as to which way out would offer the best chance of survival. More than a dozen testified that for them, in certain instances, that would be Three Devils Road. The Hearing Examiner had a right to believe they were not lying, and he is the one who looked them in the eye, not the Commissioners.

As Judge Hotchkiss himself remarked when Gamble tried to make this argument, “Doesn't that depend on where the fire is coming from?” RP 33 (9/18/15)

b) Usefulness “As Part of the County Road System”

Defendants argue that just because certain people use a road does not make it “useful as part of the county road system” in the words of the statute, and the commissioners have some ability to determine that issue independent of the facts found by the hearing examiner.

This appears to us as sophistry. The record established that a large number of people use the road for recreation, access to public lands,

communication with the Methow Valley, and as an escape route (or warning route or fire fighting access route) during wildfires. These are all lawful -- indeed vital -- uses of a county road. If there is some metaphysical meaning to the phrase “useful as part of the county road system” aside from the fact that a large number county residents use it for lawful road purposes and believe that it is necessary for their safety and well being, the Respondents must better define it.

Case law does not assist them. The only case where we can find the distinction referred to is *Bay Industry Inc. v. Jefferson County*, 33 Wn. App. 239, 653 P.2d 1355 (1982) where the court held that if a road is useful but not vital for one and only one party, that fact does not constitute usefulness within the county road system. 33 Wn. App at 241-242. *Bay Industry* has no application in this instance where hundreds of people have demanded by petition that the road be kept open and its usefulness to a whole valley of persons was demonstrated to the satisfaction of the hearing examiner after hours of public testimony.

- E) THE STATUTORY DIFFERENCES BETWEEN CHAPTER 35.79 RCW ON CITY STREET VACATIONS IN CONTRAST TO CHAPTER 36.87 RCW ON COUNTY ROAD VACATIONS REQUIRES A DIFFERENT STANDARD OF REVIEW AND ANALYSIS OF REVIEW IN THE COURTS?

Because of the paucity of decisional law from this court on the county road

vacations process, the implications of the essential differences between the establishment and vacation under unincorporated county jurisdiction on the one hand, and that of incorporated cities and towns on the other, have never been articulated by this court.

As a result, the lower courts have had to rely almost exclusively on this court's jurisprudence on city street vacations, which we believe has led to Procrustean violence on the clear legislative intention stated in RCW 36.87.020-060 and brought us here.

1. Differences in Establishment

Today we think of the county acquiring county roads by public use (prescriptive use by public) as an anomaly. See, e.g., *In re Petition to Declare County Road. Primark Inc.*, 63 Wn. App. 900, 823 P.2d 1116 (1992). The statute that allows this, RCW 36.75.080, exists in only vestigial form. But in earlier time and practice, when the county road system was established, this form of road establishment was the norm and not the outlier. The earlier form of RCW 36.75.080, codified in the highway code of 1937 [Chapt. 187, laws of 1937] as section 10,<sup>1</sup> makes clear that this was the regular historic practice. *No*

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<sup>3</sup>

All public highways in this state, outside incorporated cities and towns and not

*commissioner action was required for historic roads to be legally established county roads*; just public use for ten years. If public funds were expended on road maintenance, the period of public use was reduced to seven years, after which the County road existed without further formality. *id.* (cf. RCW 36.75.070)

It is important to note that the legislature understood that roads established in this way would not necessarily be subject to strict definition; that their path would meander and the roadway would be re-aligned or even rerouted from time to time according to back country conditions. Section 11 of the 1937 code (Laws, chapter 187), specifically referring to roads created according to historic use under section 10, states that irregularities from the actual course of the road

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designated as primary state highways that have been used as public highways for a period of not less than seven years prior to the effective date of this act and are now so used, where the same have been worked and kept up at the expense of the public, and all public highways outside incorporated cities and towns and not designated as primary state highways that may at any time hereafter be and for a period of not less than seven years prior thereto have been so used and the same kept up at the expense of the public, are hereby declared to be lawful county roads within the meaning and intent of the laws governing public highways in this state. All public highways in this state, outside incorporated cities and towns and not designated as primary state highways that have been used as public highways for a period of not less than ten years prior to the effective date of this act and all public highways in this state outside incorporated cities and towns and not designated as primary state highways that may at any time hereafter be and for a period of not less than ten years prior thereto have been used as public highways, are hereby declared to be lawful county roads within the meaning and intent of the laws governing public highways in this state. . . . - § 10, Chapter 187, laws of 1937

in the recorded surveys and other filed document did not invalidate or vacate such county roads. In its vestigial form now codified at RCW 36.75.100, the reference to roads established by historic use is lost. Now such irregularities in the filed road history does not work an invalidation or vacation on *any* county road no matter how established.

But unlike county roads, city streets are wholly a creature of the public record, and public use is not particularly relevant to either their establishment, abandonment or vacation. City streets usually exist legally prior even to the physical existence of the city or its streets, because they are part of the recorded surveyed plat upon which the city is thereafter built. See Chapter 58.08 RCW.

In fact, unlike county roads, even if the actual course of a city street or alley is later at variance with the platted recorded street, the platted portion retains its public character until formally vacated. Such vacation can only be accomplished through strict adherence to the vacation statutes established for cities, now codified at Chapter 35.79 RCW. *Heuston v. Tacoma*, 67 Wash. 92, 120 P.2d 872 (1912).

This explains much of the statutory difference between City and County vacation statutes and is central to the issues that this court should determine.

## 2. Statutory Differences

Because public use determined public status of most county roads whereas the declarant of the city plan determined street location, the legislative schemes for vacation are fundamentally different and reflect this duality. A county road vacation under RCW 36.87.020-060 requires all of the following, which city vacation statutes do not:

- a. An advertised public hearing before the commissioners or a hearing officer for the taking of testimony from the general public specifically on the issue of usefulness on the road. RCW 36.87.050-060.
- b. A finding that the road is “useless/not useful” (RCW 36.87.020/060) as part of the road system.
- c. A separate finding that the public will be benefitted by the vacation. RCW 36.87.060 (This requirement has been judicially imported into the city street vacation process for basic constitutional reasons prohibiting the ceding of valuable public rights for purely private benefit. See *Puget Sound Alumni of Kappa Sigma Inc. v. City of Seattle*, 70 Wn.2d 222, 226-227, 422 P.2d 799 (1967)).

By contrast, in city street vacations, no public notice other than posting is

required and only landowners who abut the portion sought to be vacated are entitled to any specific notice. RCW 35.79.020-030. Although a hearing must be held, no findings of usefulness, lack thereof or any other matters are required. Nowhere is the public specifically invited to testify on the vacation or the usefulness of the road as they are in RCW 36.87.060.

The reasons for these differences and the implications for the judicial review process are obvious when we take note of the nature of these roads and how they came into existence. The people created county roads such as Three Devils Road by their use, therefore they are given a statutory voice and significant consideration as to their continued use before the road can be vacated. Therefore the statutes have create a judicial structure to the county road vacation process.

The Commissioners entirely ignored the voices of the public using these roads, and Court below ruled such behavior within their authority. The plain language of the statutes refute that analysis which is founded almost entirely on city derived precedent.

But city planners create city streets on plans and plats and the only members of the public who have any legally cognizable interest in them are the abutting landowners who require them for access to their homes and who own the

underlying fee interest if they are vacated. RCW 35.79.040.

A major effect of these statutory differences between the establishment and vacation of City streets in contrast to County roads was that it fathered fundamental errors in the Standing analysis.

#### F) STANDING

Okanogan County has asserted that Appellant Coalition of Chiliwist Residents, and individual plaintiffs below, do not have standing to challenge the County's decision, citing such city street vacation cases as *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359, 365, 324 P.2d 1113 (1958)

According to those cases, only residents who abut the portion of a road sought to be vacated or whose reasonable access to their property is compromised, have standing to challenge a vacation. There are two reasons why this "rule" does not apply to this case: 1) If the vacation would cause a threat to health and safety of the challenger, or would otherwise suffered a special damage different in kind than the public (*Capitol Hill Methodist, supra*, loc cit, and see also 366-367); and 2) The rule should not and historically has never been applied to rural county roads. *Elsensohn v. Garfield County*, 132 Wash. 229, 231 P.

799 (1925).

1. Petitioners Have Standing Under Plain Terms of *Capitol Hill Methodist*, and the Court So Ruled

Under *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958), one who alleges a hazard to their property from the road closure and further alleges that the decision to vacate in the face of such danger is arbitrary and capricious has standing to litigate that fact. *Id.* at 367. Judge Hotchkiss, in fact, agreed with this interpretation and granted standing (RP 44-45, 9/18/15). We, of course, do not challenge this finding.

The principle, however, is broader than simply that impairment of reasonable access or exposure to danger alone grants standing.

The general rule in all standing cases is that those specially affected or damaged by the act complained of have standing to contest that act in court: "It must appear that the complaining parties suffered a special damage different in kind and not merely in degree from that sustained by the general public." *Capitol Hill Methodist, supra*, at 365, quoting *Olsen v. Jacobs*, 193 Wash. 506, 76 P.2d 607 (1938).

2. The Rule on Standing Being Limited to Abutting Owners Has Never Been Applied in this Court Outside of Urbainzed Setting and Has No Rational

### Basis Outside Urbanized Settings

*DeWeese v. Port Townsend*, 39 Wn.App. 369, 693 P.2d 726 (1984) clarified and explained the *Capitol Hill Methodist* rule on standing. In *DeWeese*, the petitioners challenged a city street vacation, which street abutted a body of water limiting access to such water in violation of RCW 35.79.030. The city and the applicant challenged standing because the challengers did not own property abutting the portion of road sought to be vacated.

The *DeWeese* court explained that standing in city street vacation cases, as in all cases was limited to “the class having a legally protected interest” in the action *id.* at 374, which in most city street vacation cases included only abutting owners, but in that case included those who might reasonably be expected to use the recreational waters whose access was protected by statute.

Because the [water access] proviso protects a general public right, standing to challenge claimed violations must be measured by the standards relating to challenges of any illegal government act. Therefore, we hold that any member of the public has standing who has suffered an injury in fact personal to himself which is arguably within the zone of interest protected by the proviso.

*DeWeese* at 375.

In other words, the statute describing the municipal duties in street vacation circumscribes the zone of protected interest, and one’s standing to challenge. In

*DwWeese* the statute changed, thereby enlarging the zone of interest.

In county road vacations the statutes entirely different, Section E(2) *supra*, the standards for vacation are different, the public participation requirements are different, and thus the zone of interest for standing must be different.

Viewed through this clarifying lense, we can readily see why the municipal or urbanized street vacation rules on standing limit it to abutting owners. In an urbanized setting where,

the only practical effect that it [street vacation] has on appellants' egress and ingress is the deflection one block either east or west of the travel coming from the residence portion . . . that is too slight a consideration, we think, to be controlling in a case of this kind. It will be remembered that the appellants' property does not abut on the street vacated.

*Olsen v. Jacobs*, 193 Wash. 506, 76 P.2 607 (1938) at 511 quoting *Mottman v. Olympia* 45 Wash. 361, 88 Pac. 579.

In a rural county road, however, this rationale for limiting standing vanishes.

*Olsen v. Jacobs, supra*, is the only *county road* vacation case in which this court articulated the *Mottman* rule on standing – a rule which had previously only applied to cities and towns – that standing was generally limited to abutting owners. By the facts of *Olsen*, and its reference to *Mottman* for the rationale, its reasoning is solely limited to platted roads in urbanized settings. Closing county

roads in rural areas, unlike platted streets on a grid in or near urban centers would almost always involve a more significant impact to those in the vicinity than deflection of a city block or two.

In fact, the *Olsen* Court appeared to recognize this fact by its reference to *Elsensohn v. Garfield County*, *supra*, where the persons served by the road, but not abutting it, successfully appealed a demurrer to their complaint alleging *inter alia*, that they were damaged by having to detour as much as six miles to reach their lands. This, said the *Olsen* court (*Olsen* at 512), was sufficient for standing.<sup>2</sup>

G) VIOLATION OF RIGHTS

1. 42 USC §1983

In the context of a writ action such as this, the commissioner's *ex parte* contact, and ethically compromised commissioner, and arbitrary and capricious

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<sup>2</sup>

It is significant that all the cases that *Olsen* cites for its conclusions on standing are city street vacation cases and nearly all were decided *prior* to *Elsensohn, supra*, where the court did not even recognize standing of a non-abutting owner as an issue. In fact, *Taft v Washington Mutual*, 127 Wash. 503, 221 Pac. 604 (1923) a Seattle street vacation case, which *Olsen* cites on the standing issue, was decided just two years prior to *Elsensohn*, and Justice Tolman, who sat on the *Taft* panel and concurred, actually authored *Elsensohn* where he detailed the *county* road vacation statutes as the only law relevant.

action are violations of due process of law. “Arbitrary and capricious” action alone is a per se violation of due process to those prejudiced thereby, and to the extent of such prejudice and harm is a per se violation of 42 U.S.C. § 1983.<sup>3</sup>

That is the precise holding of *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 125, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993). Although we believe that we have made the case that the commissioners’ conduct was more than merely “arbitrary and capricious;” that it crossed into the territory of irrational and even knowing and reckless conduct and collusion, it is not even necessary that we do so. As the *Lutheran Day Care* court held:

In the present case, the trial court can be interpreted as denying appellant's due process claim based on the fact that the County did not act knowingly or recklessly in denying the permit. This is the wrong standard. The standard is arbitrary or capricious and as already discussed, Judge

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Kershner's finding in the certiorari action that the County acted arbitrarily and capriciously in denying the permit conclusively satisfies that standard. Appellant therefore has established as a matter of law and fact that the County violated substantive due process when it denied the conditional use permit.

*Id.*

2. Protectable Rights

a) Life and Property

Putting large numbers of citizens' life and property at risk without due process of law is a facial violation of their constitutional rights under the Fifth and Fourteenth Amendments to the federal Constitution. The overwhelming public testimony of the citizens affected and as found by the Hearing Examiner that the Commissioners' action would do just that. Even if we were to credit the Applicant's statements and the Commissioners' parroting of them that there are other escape routes from the valley, that is irrelevant to the people who needs this one – which is passable and easily navigated (finding 26, CP104) because of the position and direction of the fire.

b. Travel / Liberty

It is axiomatic that fundamental considerations of liberty prevent the state from arbitrarily preventing and hindering citizens from traveling on the public roads that they themselves created through their use. The right to travel is a fundamental

constitutional right. It is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). Certainly, if the County could show a compelling interest commensurate with the right being violated, they might be able to block such access; but they have no interest at all, according to their own findings (No public benefit to vacation; 2<sup>nd</sup> "WHEREAS" clause Bates 895) and in fact are blocking citizens ability to conveniently travel to state and federal public lands, to escape fire or flood, and for recreation and communication with the Methow Valley, arbitrarily and in violation of positive law.

### 3. Collusion

Collusion in the decision making on a road vacation or similar action nullifies that action and works a violation of basic due process to those opposing the action. *Banchero v. City Council*, 2 Wn. App. 519, 522, 468 P.2d 724 (1970), *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn. 2d 359, 368, 324 P.2d 1113 (1958)

Conspiracies or improper collusion are generally shown by circumstantial evidence, not direct evidence. The State is not going to come out and admit a conspiracy or collusion. The courts have long recognized that a meeting of the

minds for improper purposes may be, and usually must be, proved by acts and circumstances sufficient to warrant an inference that the defendants have reached an agreement to act together for the wrongful purpose alleged. *Baun v. Lumber and Sawmill Workers Union*, 46 Wn. 2d 645, 656-657, 284 P.2d 275 (1955). The test of sufficiency of the evidence is that the facts and circumstances relied upon to establish the conspiracy must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. *Id.*

Consider these circumstances:

- 1) Commissioners had close personal relations with the family which controls Gamble Land and Timber Ltd.. In fact, Commissioner Campbell was so close to the Gebbers family that he was the sole eulogist at the funeral of the patriarch of the family, Dan Gebbers last year. Exhibit 6 brief on prohibition / certiorari.
- 2) The Commissioners hired Gebbers family member and agent of Gamble land CP 1220, Jon Wyss, as a contracted advisor to the Commissioners, specifically in the area of public works staffing as late as 2013. Bates 376 -384.
- 3) The Commissioners ignored all the findings of fact and conclusions of law of their own designated Hearings Examiner.
- 4) Not one constituent other than the applicant representatives favored the

vacation or testified that the road was useless, or that its vacation would confer a public benefit; all public testimony was in the nature that the road was useful, used, and served a vital public safety role.

5) The Commissioners even recited that the County engineer had found that the vacation would confer no public benefit and it would seem violated the law in vacating the road without a clear finding of a positive public benefit.

The Commissioners' behavior is completely irrational without collusion of some sort

#### H. ATTORNEY FEES/ 42 USC § 1988

Plaintiffs are seeking relief through this writ process made necessary because of the arbitrary and capricious action of the County Commissioners violating their due process rights under 42 U.S.C. §1983. Such violations entitle them to attorney fees when injunctive, or declaratory, or similar action is necessary to prevent damage to life, liberty, and property through illegal action by the state that interferes with a constitutional right. There has been some debate over the question of whether a plaintiff who receives no monetary judgement or other monetary benefit from success but prevails in receiving declaratory, injunctive, or similar relief is entitled to attorney fees under 42 U.S.C. § 1988, in an action under

42 U.S.C. § 1983 for violation of constitutionally protected rights.

But it is settled at this point that when the court's decision prevents violation of a constitutionally protected right, or removes an obstacle to exercise such right, benefitting plaintiff, attorney fees are appropriate. The legal definition of "prevailing," for the purpose of the attorney fee statute, is when actual relief on the merits of plaintiff's claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Lefemine v. Wideman*, \_\_\_\_ U.S. \_\_\_\_, 133 S. Ct. 9, 11 (2012); *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U. S. 782, 792-793, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Farrar v. Hobby*, 506 U.S. 103, 111-112, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

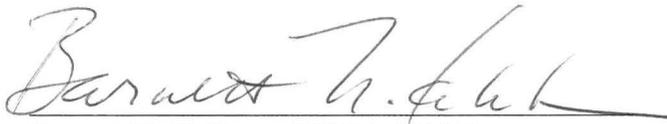
## V CONCLUSION

Judge Hotchkiss in his Decision was clear that but for his belief that there was no challenge to the Commissioners discretionary challenge as a legislative function, he would find the action void for both the appearance impropriety and and the fact of conflicts of interest . That belief was a plain error of law. The Decision and Orders below must be reversed, the writ re-issued, the

commissioners' action reversed and the Appellants awarded costs and attorney fees.

March 14, 2016

KALIKOW LAW OFFICE



Barnett N. Kalikow, WSBA 16907

Attorney for Appellants

Declaration of Service:

Shaana Sweiven, hereby declares under penalty of perjury according to the laws of the State of Washington that she is of legal age and competence, and that on March 14, 2016 she deposited in the mail, postage pre-paid the document to which this DECLARATION is affixed, to the following counsel for the parties hereto.

Nick Lofing  
Thomas O'Connell  
Davis, Arneil Law Firm, LLP  
P.O. Box 2136  
Wenatchee, WA 98807

Albert Lin  
Okanogan County Prosecutor's Office  
P.O. Box 1130  
Okanogan, WA 98840-1130

Mark R. Johnsen  
KARR TUTTLE CAMPBELL  
701 Fifth Avenue, Suite 3300  
Seattle, WA 98104

March 14, 2016

  
Shaana Sweiven

## **Appendix A**

### **Okanogan County Code Office of Hearing Examiner Rules for conduct of Public Hearing**

2.65.120 Public hearing.

A. The public hearing will be informal in nature, but organized so that testimony and evidence can be presented efficiently. The hearing shall include at least the following elements:

1. An introductory outline of the procedure by the hearing examiner;
2. Testimony by department staff which shall summarize the written staff report and provide any additional exhibits or other information the staff believes should be brought to the hearing examiner's attention;
3. Testimony by the applicant and the applicant's witnesses;
4. Testimony from other individuals or organizations wishing to be heard;
5. Questions by the hearing examiner;
6. Rebuttal witnesses (if any). Any participant in the hearing may make all or part of his or her presentation through witnesses;

B. All testimony shall be taken under oath or affirmation;

C. Hearings shall be electronically recorded and the recordings shall be made a part of the record. Copies of the electronic recordings shall be made available upon request and payment of the costs of reproduction;

D. Technical rules of evidence will not be applied. The key requirements for evidence will be relevance and reliability. Relevant and reliable evidence will be admitted if it possesses probative value accepted by reasonable persons in the conduct of their affairs. The credibility of witnesses and the weight of evidence are within the sole discretion of the hearing examiner.

1. Documents, photographs and physical evidence will be admitted as exhibits and each will be assigned an exhibit number. Exhibits will be retained until a decision is rendered and appeal proceedings, if any, have been concluded.

2. The staff report or staff analysis produced by the department will be admitted as Exhibit 1 in every

hearing.

3. Testimony may be presented orally, in writing, or both. Persons giving oral testimony shall be subject to questioning by the hearing examiner. Written testimony may be presented either in advance or at the hearing. When testimony is presented only in writing, the hearing examiner has discretion to leave the record open for written responses by other participants.

4. Any decision by the hearing examiner on the admissibility of evidence shall be final;

E. The hearing examiner may impose reasonable limitations on the nature and length of testimony. In so doing the examiner shall give consideration to:

1. The expeditious completion of the hearing;

2. The need to provide all parties a fair opportunity to present their cases;

3. Accommodating the desires of members of the public to be heard;

At the hearing examiner's discretion, irrelevant or unduly repetitious testimony may be excluded. If all testimony cannot be presented in the time available, the hearing shall be continued;

F. Whenever the views of any formal or informal organization are to be presented, the organization shall designate a representative with authority to coordinate the presentation and to speak for the group. Any communications with the organization by the hearing examiner or by any party during the course of proceedings shall be through the designated representative;

G. Prior to the conclusion of a matter, including appeals therefrom, no communications with the hearing examiner outside of the hearing is allowed on the merits or facts of any matter which has been or will be scheduled to come before the hearing examiner. This prohibition includes, but is not limited to, communications with county employees, applicants, their representative, and others participating in the hearing process;

H. The hearing examiner has the option to visit the site before or after a hearing. If the hearing examiner conducts a post-hearing visit in response to a request made at the hearing by a party, the hearing record will be held open until the site visit is completed;

I. The hearing examiner may continue proceedings or reopen proceedings for good cause at any time prior to the issuance of the decision, subject to notice requirements;

J. The hearing examiner may announce a decision at the hearing. The decision will be contained in a written order with supporting findings and conclusions. The order will be issued no later than 10 working days after the record closes;

K. The department will maintain a copy of the hearing examiner's decision, available for public inspection in the official file of each application or appeal. The applicant and any appellant will receive a copy of the hearing examiner's decision free of charge. Any other person may receive a copy upon payment for reproduction and postage. (Ord. 2014-9 Att. A, 2014; Ord. 94-15, 1994. Formerly 2.65.130).