No._____

Court of Appeals No. 57873-5-II

SUPREME COURT
OF THE STATE OF WASHINGTON

EAGLE HARDWARE & GARDEN, INC. d/b/a LOWE'S COMPANIES, INC., a North Carolina Corporation, KUEIFOUN, INC. d/b/a THE HERBAL GARDEN, a Floria Corporation, THE CENTER AT 4815 LLC, a Washington limited liability company, and OGLE PROPERTIES, LLC, a Washington limited liability company,

Petitioners,

v.

MAJID NAYERI and BITA ABIDAN,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

This petition asks whether a real estate speculator can leverage Washington's private condemnation statute to gain access to a parcel that he knew would become landlocked as a result of his purchase.

Respondents Majid Nayeri and Bita Abidian (together "Nayeri") purchased property from the Washington State Department of Transportation ("WSDOT") subject to the condition that WSDOT would not allow access through the remainder of its adjoining property, making the purchased properties "landlocked." As a result, Nayeri[1] received a deeply discounted purchase price – $300,000 less than WSDOT valued the same land a decade earlier. He also knew that he would need to find a different access route.

[1] Although both Nayeri and Bita Abidian are named parties, Nayeri testified that Abidian does not play any role in the couple's investments. CP 167. For simplicity, this briefing refers to both parties as "Nayeri." No disrespect is intended.

Nayeri was unsuccessful in securing a voluntary easement from WSDOT or any of the other neighboring property owners, despite efforts both before and after the purchase. He now seeks to improve the return on his investment by condemning access under chapter 8.24 RCW.

Nayeri's claim is contrary to this Court's decision in *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 282 P.3d 1083 (2012), which prevents a property owner from landlocking himself and then condemning access. The trial court correctly dismissed his suit on summary judgment. The Court of Appeals improperly reversed, distinguishing *Ruvalcaba*.

Petitioners ask this Court to reverse the Court of Appeals decision and reinstate the grant of summary judgment. The Court should hold, as a matter of law, that a party cannot buy property he knows is or will be landlocked and then condemn access through an alternative route.

II. IDENTITY OF PETITIONERS

Petitioners are The Center at 4815 LLC and Eagle Hardware & Garden, Inc., d/b/a Lowe's Companies, Inc. (together the "Petitioners").

III. COURT OF APPEALS DECISION

Petitioners seek review of the published decision by the Court of Appeals, Division Two, dated April 30, 2024, attached at Appendix 1.

IV. ISSUE PRESENTED FOR REVIEW

Can a party purchase a portion of an existing parcel that he knows will become landlocked as a result of the purchase and, having failed to secure access either before or after the purchase, privately condemn an easement across neighboring properties?

V. STATEMENT OF THE CASE

A. The Nayeri Property is an undeveloped parcel that WSDOT surplussed following a highway project.

The property at issue is made up of two undeveloped parcels (parcel numbers 6135000227 and 6135000228) (the "Nayeri Property") sandwiched between SR-16 and several

adjoining properties. *See* CP 11, 385. Each of the non-WSDOT parcels is improved with commercial facilities. To the north is a Lowe's retail store, operated by Eagle Hardware & Garden, Inc. CP 11. Three parcels are directly south, two of which are owned by Kueifoun, Inc., doing business as The Herbal Garden (the "Kueifoun Property"), CP 185-86; the other is owned by The Center at 4815 LLC, which leases to an engineering firm, Sitts & Hill Engineers, Inc., which is owned by the same persons (the "Center Property"), CP 536. To the west is a parcel formerly owned by Ogle Properties, LLC (the "Ogle Property"). *See* CP 365. The WSDOT property sits to the east and is occupied by an offramp for SR-16. CP 11. The various properties and ownership interests are shown below (*see* CP 409):

In the early 2000s, WSDOT had targeted the Nayeri Property as part of the development of the SR-16 interchange. CP 43-44. At the time, the property was owned by Leeanne Deering-Davis, *see* CP 127, who also owned the three parcels to the south of the Nayeri Property, CP 535.

Over multiple years, WSDOT and Deering-Davis discussed condemnation of the Nayeri Property. CP 38-40. One key point was the project's impact on access – because the new interchange required removing the local surface street, Mullen

Street, access to the Nayeri Property would be limited. CP 38, 49. In the course of discussions, WSDOT recognized the impact reduced access would have on property value and, as a result, reduced its valuation by as much as 85 percent. CP 50. An appraisal prepared for Deering-Davis also confirmed that WSDOT's elimination of Mullen Street would "remove all practical physical access to the site, rendering the site unbuildable" and therefore resulting in a "complete take." CP 87. Deering-Davis's appraisal valued the property before WSDOT's acquisition at $352,000. CP 68.

WSDOT ultimately agreed to compensate Deering-Davis for the lost access. In its settlement memorandum, WSDOT's negotiation supervisor concluded that the Nayeri Property would "become[] uneconomic in the after condition because it looses [sic] all access along Mullen Street." CP 123. WSDOT conceded that a jury would award Deering-Davis her appraised value, CP 124, and on that basis provided $800,115 in total

settlement value[2] to Deering-Davis, CP 123. Deering-Davis deeded the Nayeri Property to WSDOT in 2005. CP 127-29.

Following construction of the SR-16 offramp, WSDOT determined that the property should be sold as surplus. CP 131-32, 134-35. WSDOT's surplus review noted that the Nayeri Property was "an uneconomic remainder" with "no direct access to SR 16." CP 131. WSDOT initially offered to sell the property to abutting property owners for $122,800, with the caveat that direct access to Mullen Street (now the SR 16 offramp) "will be prohibited." CP 134. No abutting owner was interested.

B. Nayeri purchased the property as an investment knowing he lacked legal access.

Majid Nayeri is a self-described "real estate investor." CP 151-52. He began investing in real estate nearly two decades ago when, concerned with his dwindling 401(k), he decided to purchase several properties in California. CP 152. He has since

[2] The value also took into consideration the loss in value caused by the elimination of Mullen Street to Ms. Deering's three remaining parcels.

bought and sold a couple hundred properties throughout the country, CP 151, and currently holds upwards of 80 individual parcels, CP 155. Only one of the properties Nayeri has purchased is developed; the rest are "vacant land," nearly all in residential areas. CP 153-54. Nayeri treats these properties as commodities to buy and sell, CP 154, and claims to have profited between $500,000 and $1 million, CP 163.

To find investment properties, Nayeri looks at the Multiple Listing Service as well as land investment sites and online postings by departments of transportation. CP 155-56.

In 2015, Nayeri found WSDOT's advertisement for the subject property. CP 164. He spent a few weeks investigating, CP 173, to learn more about the property and Tacoma's vacant land market. CP 164. Nayeri has never physically visited the property but had a realtor look in person, who advised that the properties were "the ugliest land he had seen" due to the topography. CP 165-66, 439-40. Through that investigation,

Nayeri learned that the property would have no legal egress or ingress. CP 174-75, 187.

Nayeri ultimately purchased the property in September 2015. As part of the purchase agreement, Nayeri conceded he could not access the property from the WSDOT parcel, thereby landlocking the property. CP 177. The purchase price reflected the lack of access – $46,300, a reduction of over $300,000 compared to the valuation ten years earlier. CP 235-36.

On the same day he purchased the property for $46,300, Nayeri listed the property for sale for $650,000. CP 441. The property is presently assessed for tax purposes for a total of $43,500. CP 441.

C. Nayeri unsuccessfully attempted to negotiate access through adjacent properties.

Having severed one portion of WSDOT's property from the remainder that had access to a right-of-way, Nayeri landlocked himself and went about finding alternative access. Either before or immediately after purchasing the property, Nayeri contacted the owner of the adjacent Ogle Property. CP

178.[3] Although that owner was open to granting an easement if her neighbor was also willing to take part in that discussion, CP 179, Nayeri was unable to reach any agreement with either the Ogle Property owner or the neighbor. CP 179-80.

After that initial failed attempt, Nayeri tried other options. He reached out to WSDOT, which confirmed that it "will ***not*** allow any access to any portion of the SR 16 right-of-way." CP 248 (emphasis in original). Nayeri's hardest push, however, was to gain access through the Lowe's property. In 2018, Nayeri retained several consultants to identify whether a route through Lowe's was possible. Lowe's ultimately rejected his proposal.

Before filing this lawsuit, Nayeri had a survey prepared that identified three theoretical access points, although without further explanation as to their viability. CP 365. Access point #1

[3] Nayeri's testimony suggests that he contacted the Ogle Property owner before his purchase. *See* CP 178 ("I recall that I contacted – maybe even beforehand had contacted Ogle Properties to get an easement.") The exact timing is less important, however, than Nayeri's unambiguous testimony that he knew that the property would be landlocked at the time of purchase. CP 174-75.

was through the Lowe's parking lot to the north; access point #2 was through the Kueifoun Property to the south, with a dogleg through the Center Property before reaching Center Street; access point #3 would extend directly through the entirety of the Center Property. CP 365.

Nayeri also prepared additional reports addressing access, each of which focused exclusively on the Lowe's route. A traffic impact analysis attempted to assess the potential effect on Lowe's of a theoretical 10,000-square-foot office building on the Nayeri Property. CP 265. That value was determined to be $10,000, CP 288, but the report made no effort to determine the impact related to Nayeri's two other proposed routes. Similarly, an appraisal attempted to determine the market value of "the fee simple interest" of the Lowe's Property if Nayeri acquired 990 square feet from that site, which accounts only for four parking spaces Lowe's would lose to an access route as opposed to the entire route of the easement through the Lowe's property,

including improvements like sidewalks, bike lane, and landscaping. CP 292.

D. Nayeri filed suit to condemn a private way of necessity, which was dismissed by the trial court but revived by the Court of Appeals.

Nayeri ultimately failed to secure access. To force the issue, he filed this suit in April 2021 against each adjoining private landowner, seeking a private way of necessity under chapter 8.24 RCW. CP 1-9.[4]

On summary judgment, The Center and Lowe's argued that Nayeri could not demonstrate the "reasonable necessity" required for condemnation under this Court's decision in *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 282 P.3d 1083 (2012). CP 432-26, 528. As explained below, that case held on summary judgment that the would-be condemnors could not

[4] Nayeri voluntarily dismissed his claims against The Center only to later re-assert those claims, apparently in response to a demand from Lowe's. *See* RP (Jan. 6, 2023) 5. Ogle Properties was dismissed and has not been pulled back into this matter. *See* CP 483. Kueifoun, Inc. never responded to the lawsuit, but Nayeri never sought an order of default or default judgment.

establish reasonable necessity as matter of law after they had landlocked their own property and turned the purpose of the statute on its head.

The Superior Court granted the motion and dismissed Nayeri's claims against all defendants. CP 587-89. The Court of Appeals reversed, in part distinguishing *Ruvalcaba*, concluding that "knowing purchase of landlocked property *alone* should not be the basis for summary judgment" and that "Nayeri bought landlocked property; he did not landlock it himself." Appendix 1 at 13. The court also suggested that it made a difference that he waited only a couple years before seeking to condemn access, rather than the decades at issue in *Ruvalcaba*. Appendix 1 at 13.

VI. ARGUMENT

A. To Condemn a Private Way of Necessity, the Condemnor Must Show "Reasonable Necessity" Based on the Totality of Circumstances.

The starting place for property rights in Washington is a broad constitutional protection: Wash. Const. art. I, § 16 (amend.

9). Carved from that protection, a limited exception allows for private ways of necessity: "Private property shall not be taken for private use, except for private ways of necessity . . . ." *Id.* To carry out that exception, the legislature established a cause of action under chapter 8.24 RCW, by which a landlocked property owner can condemn a private way of necessary:

> An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity.

RCW 8.24.010. The purpose of both the constitutional exception and statute is to provide a remedy for landlocked property, based on a policy goal of allowing land to be put to use. *Ruvalcaba*, 175 Wn.2d at 6, 8.

In carrying out that statute, courts have enforced clear limits. This Court has emphasized that a condemnee's interests cannot be "lightly regarded or swept away merely to serve the

convenience or advantage of a stranger." *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982). The condemnation statute is "not favored" and therefore must be "construed strictly," to protect the condemned property owner's "constitutional right to the protection of one's property." *Id.*

A condemned way of necessity must "'be reasonably necessary under the facts of the case, as distinguished from merely convenient or advantageous.'" *Ruvalcaba*, 175 Wn.2d at 7 (quoting *Brown*, 97 Wn.2d at 367). In assessing reasonable necessity, the reviewing court must consider "the entire situation." *State v. Gilliam*, 163 Wash. 111, 113, 300 P.173 (1931). It is the condemnor's burden to prove reasonable necessity. *Ruvalcaba*, 175 Wn.2d at 7. It is not sufficient for the condemnor to merely claim that condemnation is necessary to provide ingress and egress. Other factors must be considered in evaluating "*reasonable* necessity." *State v. Superior Ct. for Chehalis County*, 82 Wash. 503, 508, 144 P. 722 (1914) (emphasis added).

Under Washington law, whether condemnation is reasonable involves many factors:

> . . . [T]he word 'necessity,' as used in the statute, '***does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity***, under the circumstances of the particular case, dependent upon the practicability of another route [here another location], considered in connection with the relative cost to one, and probable injury to the other.

Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 600, 73 P. 670 (1903) (emphasis added); *see also Dreger v. Sullivan*, 46 Wn.2d 36, 40, 278 P.2d 647 (1955) (applying the discussion of "reasonable necessity" from *Samish River* to private condemnation under 8.24 RCW). One necessary consideration "is the injury to the property across which the right of way is sought." *State v. Gilliam*, 163 Wash. 111, 300 P. 173 (1931).

To show reasonable necessity, the condemnor must also provide a development plan, because "without some definite stated plan of improvement, this necessity cannot be shown." *Port of Everett v. Everett Imp. Co.*, 124 Wash. 486, 494, 214 P. 1064 (1923). Without that detail, it is impossible to know

whether the condemner's imagined purpose could be achieved or is reasonably necessary.

Another requirement is consideration of the burden placed on the condemnee's property. Chapter 8.24 RCW requires courts to give "considerable weight" to the condemnee's burden. *Wagle v. Williamson*, 61 Wn. App. 474, 481, 810 P.2d 1372 (1991). For a proposed route to be appropriate it "must not differ from and must not be incompatible with the use to which it is already being put by the condemnees." *Brown*, 97 Wn.2d at 368.

B. Nayeri Cannot Establish "Reasonable Necessity" Under this Court's Decision in *Ruvalcaba v. Kwang Ho Baek.*

This Court addressed reasonable necessity in *Ruvalcaba*, concluding that a condemnor's inequitable conduct, including voluntarily landlocking themselves, precludes a finding of reasonable necessity as a matter of law. The Ruvalcabas owned a parcel that originally could be accessed directly from 42nd Avenue Northeast. *Ruvalcaba*, 175 Wn.2d at 4. They later sold the eastern portion of the parcel, retaining only a western portion

that had no access to a right-of-way. *Id.*[5] Thirty-five years later, the Ruvalcabas petitioned for a private way of necessity to a different right-of-way, Northeast 135th Street, which required a route crossing multiple parcels, claiming that they had not learned until only three years before filing suit that the landlocked parcel was suitable to build a residence.[6] *Id.* They also alleged that the portion of their property with access to 42nd Avenue included a steep slope that made it impracticable to build a roadway, although this access issue was in dispute. *Id.* at 4-5.

On appeal from summary judgment, the Court of Appeals held that there was a question of fact as to whether the Ruvalcabas could establish reasonable necessity. *Ruvalcaba*, 159 Wn. App. at 712. The court concluded there were facts that could show why the Ruvalcabas had a reasonable need for

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[5] Before completing the sale, the Ruvalcabas had tried to obtain easements sufficient to reach 135th Street, but obtained only some of the needed agreements. *Ruvalcaba v. Kwang Ho Baek*, 159 Wn. App. 702, 706, 247 P.3d 1 (2011), *rev'd*, 175 Wn.2d 1.

[6] The owners of the severed portion of the Ruvalcabas' property were also joined. *Ruvalcaba*, 159 Wn. App. at 707.

condemnation, including that the availability and value of their property may have dramatically changed and impacted economic feasibility of constructing a road, and the costs and techniques for building up steep slopes may have improved, especially in relation to land value. *Id.* Moreover, the court expressly rejected the condemnees' proposal for a "clean hands" requirement, which would have prevented operation of chapter 8.24 RCW for a landowner who voluntarily landlocks his or her own property. *Ruvalcaba*, 159 Wn. App. at 711.

This Court unanimously reversed. This Court rejected the Court of Appeals' suggestion that a condemnor need not have clean hands, explaining that the Ruvalcabas' action was "a flagrant abuse of the reasonable necessity doctrine" that "essentially turn[ed] our stated public policy goal [against making landlocked property useless] on its head." *Ruvalcaba*, 175 Wn.2d at 8. And although this Court declined to apply a bright-line rule that would automatically prevent condemnation whenever a landowner had become voluntarily landlocked her

property – noting that such a ruling "would reach further than the facts that have presented in this case" – it had no trouble concluding that "no reasonable finder of fact could find that there was reasonable necessity" for the Ruvalcabas' proposed condemnation. *Id.* at 8.

Here, Nayeri is in a position legally identical to the Ruvalcabas. He came to the Nayeri Property with full knowledge that, after his purchase, it would be landlocked without legal access to any neighboring right-of-way. CP 174-75, 187. He benefited from that lack of access in the form of a massively reduced purchase price – more than $300,000 less than what WSDOT had paid a decade earlier. *Compare* CP 68 (valuing the Nayeri Property at $352,000), *with* CP 236 (purchasing Nayeri Property for $46,300). Nayeri's leverage of the private condemnation statute is therefore precisely the type of "flagrant abuse of the reasonable necessity doctrine" that, if allowed, would "erode[] the protections for private property"

under the Washington Constitution and "will not be tolerated" under *Ruvalcaba*, 175 Wn. 2d at 8.

The situation is particularly troublesome because Nayeri does not even pretend to be using the statute for its intended purpose of putting property to use. As is clear from his lack of even a vague development plan, Nayeri is simply leveraging private condemnation for his immediate self-enrichment, to bolster "the dwindling portfolio that [he] had in [his] 401(k)." CP 152. His method is to take advantage of his neighbors: after purchasing property at a deep discount – which he knew would lack access because of that same purchase – he hopes to increase that property's value in a way that places severe limits on a neighboring property.

There are practical problems to Nayeri's scheme, like identifying what access is needed, CP 463, or the law's requirement that necessity can exist only when there is a "definite plan" for development, *Everett Imp.*, 124 Wash. at 494. Because Nayeri has not presented any development plan, or even defined

the size and scope of the easement he seeks, he cannot show that his proposed condemnation is reasonable. CP 442-44, 463 ("'Plaintiffs have not provided a site plan or any details for their actual proposed use for Plaintiffs' parcels' for him (or anyone else) to assess the feasibility of commercial development.").

Furthermore, Nayeri's proposed condemnation would impose severe burdens on his neighbors. An easement through the proposed location near Lowe's' contractor bay would eliminate most if not all of the parking spaces along the southern property line and eliminate the viability of the contractor bay and southern entrance to the store. CP 444, 459, 465-66, 470-76, 471. An easement through The Center's parking lot would be similarly impactful, removing existing employee and secure parking, preventing anticipated expansion of the building, and overburdening existing agreements that limit the traffic volume in the parking lot and entrance to the parcels. CP 529-30, 536-37.

Nayeri's request discards any pretext of pursuing "the overriding public policy goal against making landlocked property useless." *Ruvalcaba*, 175 Wn.2d at 8. No reasonable person could conclude that Nayeri's claim is reasonably necessary given his intentional conduct.

C. This Court Should Accept Review Under RAP 13.4(b)(1) Because the Court of Appeals' Decision Conflicts with *Ruvalcaba*.

As in *Ruvalcaba* itself, and contrary to this Court's decision in that case, the Court of Appeals' decision gets the "reasonable necessity" analysis wrong. The Court of Appeals focused its decision on this Court's dicta in *Ruvalcaba* that "there is no bright-line rule that knowing purchase of a landlocked property bars future private condemnation." Appendix 1 at 13. Although this premise is correct, it does not answer the relevant question, which is whether there is a legal basis for Nayeri to establish *reasonable* necessity.

The Court of Appeals' decision veered off course because it relied on multiple incorrect factual conclusions. First, the court

suggested that "Nayeri bought landlocked property; he did not landlock it himself." Appendix 1 at 13. That summary is inconsistent with the record: immediately before Nayeri's purchase, the subject parcel was owned by WSDOT and WSDOT had legal access to and from the parcel, as shown in rough form in the image at page 4, *supra*. If the parcel was not landlocked when WSDOT owned it but became landlocked upon WSDOT's sale to Nayeri, it was Nayeri's purchase that caused the problem he is now attempting to solve. As in *Ruvalcaba*, Nayeri landlocked the property himself.

Second, the Court of Appeals stated that "Nayeri could not have otherwise obtained an easement to access State Route 16 from his land." Appendix 1 at 13. This claim is again unsupported by the record, in at least two regards.

To begin with, although it is true that a private party cannot condemn access across State land, *Granite Beach Holdings, LLC v. State ex rel. Dep't of Nat. Res.*, 103 Wn. App. 186, 202, 11 P.3d 847 (2000), that limitation plainly does not prevent the State

from voluntarily agreeing to an easement. Nayeri gave up any such right in his purchase agreement, which "said [he] would not be able to use SR 16 to get in and out of [his] properties." CP 177. By purchasing his property without securing a voluntary easement across the remainder of the WSDOT parcel, Nayeri both landlocked that parcel and knowingly gave up the right of access that existed up to the day of his purchase. The situation would be no different had Nayeri purchased the property from a private seller but covenanted against access to a right-of-way opposite that seller's remaining property. As in *Ruvalcaba*, Nayeri willingly came to his property having given up access.

Moreover, it is undisputed that, at the time of his purchase, Nayeri understood he would need alternative access and tried to secure that access. He had approached at least two neighboring private property owners but was unsuccessful in getting them to enter an easement voluntarily. *See* CP 174 ("I knew that I had to get access"); CP 178 ("I contacted – maybe even beforehand had contacted Ogle Properties to get an easement."). It is therefore

simply not the case that "Nayeri could not have otherwise obtained an easement" through some other route, as the Court of Appeals suggests. Appendix 1 at 13. He tried to do so and failed, which is precisely the scenario denounced by this Court in *Ruvalcaba*, 175 Wn.2d at 7, and should preclude condemnation.

The Court of Appeals' decision allows would-be condemnors to negotiate favorable purchase terms when buying property, only to turn around and profit at the expense of their neighbors. That decision is in direct conflict with *Ruvalcaba*; this Court should accept review to consider that conflict. RAP 13.4(b)(1).

D. This Court Should Accept Review Because the Circumstances Establishing Reasonable Necessity Raise an Issue of Substantial Public Interest.

This Court should accept review for the additional reason that the circumstances in which a party can pursue private condemnation raise issues impacting the public interest. *See* RAP 13.4(b)(4). As noted in *Ruvalcaba*, private condemnation places in tension two competing interests: a public policy goal

that favors putting property to use against the Washington Constitution's protection of private property. *Ruvalcaba*, 175 Wn.2d at 8 (citing Wash. Const. art. I, § 16).

This case highlights that tension in a manner similar to, but legally distinct from, the issues considered in *Ruvalcaba*. While that case addressed a property owner's decision to restrict access to property she already owns, this case raises the related but novel issue of what happens when the condemnor does not already own the property at issue.

If the Court of Appeals' published decision stands, Washington law will encourage abuse of Chapter 8.24 RCW, exactly like Nayeri has done. Speculators will be empowered to purchase land knowing it is or will become landlocked upon purchase, fail to negotiate an access easement, and turn around and sue each of his or her neighbors. Simply put, the Court of Appeals' decision gives investors and flippers no incentive to negotiate access in good faith when they can simply sue for private condemnation instead.

There are many good faith uses for private condemnation under Chapter 8.24 RCW. For example, condemnation is reasonably necessary where a property becomes landlocked by virtue of changed regulations or zoning, shifts in the geological landscape, or public condemnation of a prior access route.

The Court of Appeals' decision in *Lutz v. Buffington*, 2016 WL 821327, noted at 192 Wn. App. 1058 (Mar. 2, 2016), illustrates the difference between a good faith use of the statute and the facts presented in this case. There, The Lutzes had negotiated for an easement when they purchased their property in 1996 that they genuinely believed provided them legal access to their property. *Id.* at *1. Buffington successfully convinced the trial court to revoke the easement in 2006, because the original grantor lacked legal authority to allow the easement across her property. The Lutzes successfully brought a private condemnation action, and the Court of Appeals affirmed, noting the Lutzes' efforts to obtain what they believed was legal access at the time of their purchase:

> Ms. Buffington points to the fact that the Lutzes purchased lots 110 and 112 in 1996 and waited until 2009 to commence the action. But this case is nothing like *Ruvalcaba*. ***The relevant voluntary affirmative act of the Lutzes was to negotiate for and acquire what they believed was legal access at the time they acquired lots***. . . . Nothing about the Lutzes' actions abused the reasonable necessity doctrine.

Id. at *18 (emphasis added).

The Lutzes' condemnation was in good faith and to remedy an unforeseen situation. By contrast, Nayeri knew that the parcels would become landlocked upon his purchase and his failure to negotiate access. He received a steeply reduced price and turned around and sued his neighbors for access. If an access easement is condemned, Nayeri will be able to sell the property for a steeply increased sale price. This inherent inequity is highlighted by the different outcomes of *Ruvalcaba* and *Lutz*. Nayeri's abuse of Chapter 8.24 RCW is undoubtedly within line of reasoning applied to the facts of *Ruvalcaba*.

To the extent this case is not directly controlled by *Ruvalcaba*, this Court should clarify the situations in which a

party may benefit from Chapter 8.24 RCW. An answer to that question by this Court will inform not only surplusing of State-owned land, but also the extent to which buyers of privately owned real estate must account for access at the time of purchase.

VII. CONCLUSION

For the reasons set out above, Petitioners respectfully request that this Court grant this petition for review under RAP 13.4(b)(1) and (4), reverse the Court of Appeals, and affirm the trial court.

RESPECTFULLY SUBMITTED this 30th day of May, 2024.

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In compliance with RAP 18.17, this brief is certified to contain 4,841 words.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 30th day of May 2024, at Seattle, Washington.

s/ Sareana Farnam
Sareana Farnam
Legal Assistant to Christopher Pierce-Wright

Appendix 1
57873-5-II Published Opinion

Filed
Washington State
Court of Appeals
Division Two

April 30, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MAJID NAYERI and BITA ABIDIAN, Appellants, v. EAGLE HARDWARE & GARDEN, INC. d/b/a LOWE'S COMPANIES, INC., a North Carolina Corporation, and THE CENTER AT 4815 LLC, a Washington limited liability company, Respondents, KUEIFOUN, INC d/b/a THE HERBAL GARDEN, a Florida Corporation, and OGLE PROPERTIES, LLC, a Washington limited liability company, Defendants.	No. 57873-5-II PUBLISHED OPINION

GLASGOW, J.—Article I, section 16 of the Washington Constitution and RCW 8.24.010 allow a party to condemn a private way of necessity (usually an easement) across another's property in order to access land that is otherwise inaccessible. The doctrine allows private condemnation only when the access sought is reasonably necessary for the condemnor to use and enjoy their land.

Dr. Majid Nayeri bought two undeveloped landlocked parcels in Tacoma from the Department of Transportation. The property was zoned for commercial development but contained

steep slopes. After trying to negotiate access easements through neighbors' properties for several years, Nayeri sued multiple neighbors, including Eagle Hardware & Garden, d/b/a Lowe's, and The Center at 4815 LLC, seeking to condemn an easement under RCW 8.24.010.

Lowe's moved for summary judgment. It argued that an easement was not reasonably necessary because Nayeri knew the property was landlocked when he bought it and because it was legally impossible to develop the property due to the difficulty of securing permits and meeting other requirements in the Tacoma Municipal Code. The trial court granted the motion, dismissed the case, and awarded Lowe's and The Center statutory attorney fees.

Nayeri appeals. He argues that there was a genuine dispute of material fact as to whether an easement was reasonably necessary to access and develop his property. He also asserts that we should reverse the trial court's award of attorney fees and require the trial court to reconsider its fee award in light of our reversal of summary judgment. Lowe's and The Center seek appellate attorney fees.

We reverse the order granting summary judgment and remand for further proceedings consistent with this opinion, but affirm the order awarding attorney fees under the statute. We grant appellate attorney fees to Lowe's and The Center.

FACTS

I. BACKGROUND

In 2005, the Department of Transportation bought two adjacent undeveloped parcels of property as part of a project to construct a new off-ramp from State Route 16 in the city of Tacoma. Although the eastern parcel originally bordered a road on its eastern edge, the construction of the off-ramp eliminated that road, rendering the parcels landlocked.

The landowner who sold the parcels to the Department also owned three developed parcels immediately to the south, which all had access to Center Street on their southern borders. The landowner sold one of those parcels in 2008 to The Center and the other two parcels in 2016 to Kueifoun. The Center granted Kueifoun an access easement that resulted in Kueifoun and The Center having a shared driveway on The Center's property. The undeveloped parcels were bordered on the north by a Lowe's store.

Br. of Resp't Lowe's at 5.

In 2007, when the Department no longer needed the undeveloped parcels for the construction project, it designated the parcels as surplus and posted them for sale. Nayeri buys and sells land as investments. In 2015, Nayeri bought the parcels. The sale contract expressly provided

that Nayeri "shall have no right of ingress and egress to, from[,] or between [State Route] 16" and the parcels. Clerk's Papers (CP) at 236.

II. LAWSUIT

After attempting to negotiate access to the parcels through neighboring properties for several years, Nayeri sued the owners of the neighboring properties. Nayeri sued Eagle Hardware & Garden, d/b/a Lowe's, and The Center at 4815 LLC.[1] Nayeri sought to condemn an easement across one of the neighbors' properties to access his land under RCW 8.24.010, which allows a property owner to condemn "a private way of necessity" if their land "is so situate with respect to the land of another that [the private way] is necessary for its proper use and enjoyment." RCW 8.24.010.

The complaint asserted that Nayeri purchased the property "to construct a 10,000 square foot general office building." CP at 6. He requested 30-foot-wide access by way of an easement on the Lowe's property or a 24-foot-wide easement from either Kuiefoun's or The Center's property. The easement would be for ingress, egress, and utilities. And Nayeri sought a temporary construction easement through whichever property provided the access point.

A. Summary Judgment Arguments

1. Lowe's and The Center's arguments and evidence

In December 2022, Lowe's moved for summary judgment and The Center joined the motion. Lowe's argued that there was no dispute of material fact and that an easement over its property was not "legally possible, let alone reasonably necessary." CP at 419. Specifically, it

[1] Nayeri also sued Ogle Properties LLC and Kueifoun Inc., a Florida corporation which never responded or appeared. Nayeri later voluntarily dismissed Ogle and The Center, but then readded The Center.

reasoned that it was impossible for Nayeri to develop his property without being granted several municipal code variances and additional easements, which Nayeri had not yet sought. And the easement Nayeri sought over the Lowe's property would interfere with the store's contractor bay and would remove several parking stalls. Thus, Lowe's believed that Nayeri's proposed easement through its property was "neither feasible [nor] reasonable." CP at 423.

Lowe's also asserted that there were "geologically preferable" alternate easements and possibly an implied easement of necessity through The Center's or Kuiefoun's property. CP at 431. Finally, Lowe's contended that Nayeri was precluded from condemning an easement because he knew the parcels were landlocked when he bought them.

Lowe's submitted a geotechnical firm's report that Nayeri commissioned in 2019. The report explained that, unless the city granted an exception, it was unlikely Nayeri could develop his parcels due to municipal code buffer requirements for the steep slopes. The geotechnical firm anticipated the city would grant an exemption because the slopes were the result of "past grading activities" rather than naturally occurring. CP at 372. It then explained that a retaining wall or daylight basement would likely be required as part of any structure built on the property. Overall, the report concluded that "the proposed development of the project area appears feasible from a geotechnical standpoint." CP at 374. And it asserted that development would likely be permitted under the municipal code as long as a geotechnical firm could "demonstrate that the improvements would not adversely affect the stability of adjacent properties" based on design information from a prospective developer. CP at 375.

Lowe's provided a declaration from an engineer asserting that developing the property was "largely impossible given the steep slopes . . . and the related regulatory slope buffers and building

setbacks" in the municipal code. CP at 463. While the engineer acknowledged the geotechnical firm's expectation that the city would grant an exemption to the buffer requirements for a reasonable design plan, he stated that Nayeri had "not provided a site plan, access design layout," or any other details for his proposed use of the land "other than to vaguely say" he anticipated a future owner would "build a 10,000 [square foot] commercial use building." CP at 463-64.

The Lowe's engineer believed that municipal regulations would severely hinder developing the property. He explained that, based on the geotechnical report, much of Nayeri's property constituted both an erosion and "landslide hazard area," requiring any building to be set back from the slope under the municipal code. CP at 463. He stated that Lowe's had submitted a preliminary development request for Nayeri's property to the city. He asserted that the city produced a memo stating that, due to how the parcels had been zoned, nothing could be built on the parcels without approval from a hearing examiner and the city council. And he noted that the city "requires a parking analysis, which has not been completed, and *may* also necessitate a parking variance." CP at 465 (emphasis added). The engineer listed other hurdles to development, such as biodiversity and stormwater analyses.

Lowe's also submitted a declaration from an engineering geologist. The geologist stated that, because of the steep slopes to the west, the only possible access from the Lowe's property would be "directly across" from the contractor bay and required eliminating several parking spots for the bay. CP at 471. He asserted that "from a geological standpoint," access from Kueifoun's property would be "superior to access through the Lowe's property." *Id.* The Lowe's geologist did not discuss the geotechnical firm's report.

The Center largely joined with the Lowe's motion but argued that a condemnation through its property would "gut The Center's employee and visitor parking and equipment storage." CP at 531. And it asserted that there was no implied easement of necessity through its property. The Center attached a declaration from an engineer who worked there. This engineer explained that an easement through The Center's property would significantly impact operations by requiring the removal of security fencing used to protect valuable survey vans and equipment and the loss of roughly 10 parking spots. The Center also asserted that access through Kuiefoun's property was untenable because the access easement The Center had granted Kuiefoun for the shared driveway allowed only 200 trips per day, and Kuiefoun was already "close to, if not exceeding" that limit. CP at 535.

2. Nayeri's arguments and evidence

Nayeri argued that there was a question of material fact as to whether he was entitled to condemn an easement, and that the statute required "the selection of the appropriate route among multiple alternative routes . . . *only after* the finding of whether a plaintiff is entitled to a private way through condemnation action." CP at 485. He noted that there was no dispute that the parcels were landlocked. Nayeri asserted that a trier of fact needed to weigh the circumstances of the case "to determine which of the three access points" was the most suitable. CP at 494. He agreed with The Center that there was no implied easement to access the parcels.

Nayeri attached a declaration from an engineering geologist who evaluated reports and records related to the property and visited the property in January 2023. Although the geologist acknowledged that the property contained significant slopes, he stated that the site did not meet the other criteria defining landslide hazard areas. *See* TACOMA MUNICIPAL CODE (TMC)

13.11.720(A)(1)-(2). In particular, he noted that the ground was glacial till which, due to compression from glaciers, had "low permeability and high shear strength," so "slopes in the material will stand at a relatively high angle without failing." CP at 500. And the geotechnical firm's report stated that "[n]o hydrologic features were observed on site, such as seeps, springs, ponds and streams" that could contribute to erosion and landslide risk. CP at 372.

Nayeri's geologist believed that it was possible to develop the parcels. Based on geologic maps, he concluded that some of the slopes on the property were "man-made cut slopes which were created during development of the properties to the south." CP at 500. And he expressly disagreed with the Lowe's engineer's "conclusion that buffer and setback areas are required for the steep slopes and would limit site access or development" because the municipal code allowed exceptions to setback requirements when the risk could be "minimized by engineering, design, or modified construction practices." CP at 501; TMC 13.11.715(A). "[E]ven if Erosion or Landslide Hazard areas did exist on the site, the steep slope areas could be mitigated through common geotechnical engineering means and practices in order to make the site buildable while protecting public safety as allowed under [the municipal code]." CP at 501. The geologist stated that it was his "professional opinion" that "the geologic and geotechnical conditions currently found on [the parcels] do not limit or preclude the development of the properties since the steep slopes can be engineered as a part of the development to protect public safety." *Id.*

Nayeri also provided a declaration from an engineer who reviewed reports on the site and visited it in late 2022. The engineer explained that the flattest part of the property was located near the Lowe's property line, making it ideal for a parking lot, with any structure built into the hillside.

Thus, he asserted that access through the Lowe's property was "the preferred choice for traffic flow and ease of access." CP at 518.

B. Trial Court Ruling

At the summary judgment hearing, the trial court repeatedly expressed concern about whether Nayeri needed conditional development permits before an access easement could be deemed reasonably necessary or whether the court could enter an order condemning the easement first when permitting remained uncertain. Lowe's argued that Nayeri needed to "take a step in th[e] direction" of pursuing development plans before he could seek an easement. Verbatim Rep. of Proc. (Jan. 27, 2023) at 13. Nayeri maintained that there was no explicit requirement to get permits before condemning an easement, and permits likely would not be granted without the easement.

The trial court granted the Lowe's motion for summary judgment. It explained that it was not "appropriate for the Court to grant a private way of necessity when it's unknown whether that is even possible to be done, where it's going to be, how much it's going to be, what is the burden to the condemned property" due to the lack of conditional permits or development plans. *Id.* at 41. The court also stated, "[I]f you want to determine that [the easement] was reasonable and all those other factors, you have to know what it is that you're giving up." *Id.* at 41-42.

The trial court awarded Lowe's and The Center attorney fees under RCW 8.24.030. Lowe's received a judgment for $100,000 and The Center received a judgment for $11,500. Nayeri appeals.

ANALYSIS

SUMMARY JUDGMENT

Nayeri argues that the trial court erred by granting summary judgment because there was a genuine issue of material fact about whether an easement was reasonably necessary for the use and enjoyment of his property.

Lowe's and The Center respond that Nayeri failed to demonstrate a genuine dispute of material fact about whether an easement was reasonably necessary. First, the defendants both argue that Nayeri's knowledge that the property was landlocked when he bought it should bar him from seeking an easement. Next, Lowe's asserts that condemnation could not be reasonably necessary because developing the property was legally impossible and "Nayeri's experts failed to rebut any of [the Lowe's] expert testimony" about permit requirements. Br. of Resp't Lowe's at 49. They contend that Nayeri cannot show reasonable necessity without first establishing specific plans and that he will be able to build on the property. The defendants also assert that an easement through either of their properties could not be reasonably necessary because of the impact to their businesses.

We review a summary judgment ruling de novo. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). Summary judgment is appropriate if, when taking the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party, "'reasonable minds could reach but one conclusion.'" *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019) (quoting *Afoa v. Port of Seattle,* 176 Wn.2d 460, 466, 478, 296 P.3d 800 (2013)). An expert opinion on an issue of material fact is sufficient to preclude summary judgment. *Eriks v. Denver,* 118 Wn.2d 451, 457, 824 P.2d 1207 (1992). "But an expert's opinion must be grounded

in fact, and statements based solely on speculation or assumptions will not preclude summary judgment." *Sartin v. Est. of McPike*, 15 Wn. App. 2d 163, 173, 475 P.3d 522 (2020).

Article I, section 16 of the Washington Constitution provides, "Private property shall not be taken for private use, except for private ways of necessity . . . . No private property shall be taken or damaged for public or private use without just compensation having been first made." Correspondingly, the legislature has provided a mechanism to condemn private ways of necessity:

> An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity.

RCW 8.24.010. Once reasonable necessity has been found, if "there is more than one possible route for the private way of necessity," courts must consider certain criteria in selecting the route and weigh the "relative benefits and burdens of the various possible routes . . . to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run." RCW 8.24.025(3). "Although the [private condemnation] statute must be strictly construed, it rests on a public policy to prevent landlocked property from being rendered useless." *Sorenson v. Czinger*, 70 Wn. App. 270, 278, 852 P.2d 1124 (1993).

"[T]he condemnor has the burden of proving the reasonable necessity for a private way of necessity, including the absence of alternatives." *Noble v. Safe Harbor Family Pres. Tr.*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). A landowner's "need for a way of necessity does not have to be absolute" to condemn access under the statute. *Ruvalcaba*, 175 Wn.2d at 7. But the condemnation must be reasonably necessary under the facts of the case, not merely convenient or

advantageous. *Id.* If there is already an existing easement or private way that the condemnor seeks to make joint use of, that use "must not differ from and must not be incompatible with the use to which it is already being put by the condemnees." *Brown v. McAnally*, 97 Wn.2d 360, 368, 644 P.2d 1153 (1982). "In short, it must neither impair nor destroy full use of the existing road by the condemnees." *Id.* And while courts must consider alternative routes that access the same point on a condemnnor's property, courts are not authorized to consider alternative routes that "will not provide access to the part of the condemnor's property which he desires to use." *Sorenson*, 70 Wn. App. at 275.

A. Knowledge That the Property Was Landlocked at Purchase

Lowe's and The Center first argue that Nayeri's knowledge that the parcels were landlocked should bar any ruling that an easement was reasonably necessary to access his property. They rely on *Ruvalcaba* to assert that "a condemner's knowledge that a property is landlocked at the time [the] condemner acquires the property is *prima facie* evidence that a subsequent private condemnation of a private way of necessity under ch. 8.24 RCW is unreasonable." Br. of Resp't Lowe's at 34. We disagree. And a buyer's knowledge that a property is landlocked at purchase does not automatically bar private condemnation under chapter 8.24 RCW.

The Ruvalcabas severed their land in two and sold the parcel with road access, leaving the other parcel landlocked because they did not reserve an easement. *Ruvalcaba*, 175 Wn.2d at 4. They then waited roughly 35 years before seeking to condemn an easement across their neighbors' land, claiming that building a road across the parcel they had sold was financially impracticable. *Id.* at 8. A trial court granted the neighbors' summary judgment motion and the Supreme Court affirmed. *Id.* at 9. The Supreme Court explained that "no reasonable finder of fact could find that

there was reasonable necessity" where "the Ruvalcabas landlocked their own parcel, made claims of reasonable necessity based on financial impracticability, and waited approximately 35 years to bring a condemnation action." *Id.* at 8. But the Supreme Court expressly declined to adopt a bright-line rule that would "automatically preclude[] a private way of necessity any time a landowner voluntarily landlocks [their] own parcel." *Id.* at 7-8.

We recognize that after *Ruvalcaba,* there is no bright-line rule that knowing purchase of a landlocked property bars future private condemnation for ingress and egress in all circumstances. Similarly, we reject Lowe's' request "to find that such knowledge, combined with the severely discounted price Dr. Nayeri paid for the properties, preclude[s] a finding that his attempt to use RCW 8.24.010 is a reasonable necessity." Br. of Resp't Lowe's at 41. Holding that buying property known to be landlocked means the purchaser can never demonstrate reasonable necessity under RCW 8.24.010 would contravene Washington's "overriding public policy goal against making landlocked property useless." *Ruvalcaba*, 175 Wn.2d at 8.

Additionally, Nayeri's knowing purchase of landlocked property *alone* should not be the basis for summary judgment. The facts of *Ruvalcaba* were fairly unique and far more extreme than the facts of the present case. Nayeri bought landlocked property; he did not landlock it himself. And he sued for private condemnation after a few years of failed negotiations with his neighbors; he did not wait 35 years before he began pursuing condemnation. And unlike the Ruvalcabas, who could have reserved an access easement when they landlocked themselves, Nayeri could not have otherwise obtained an easement to access State Route 16 from his land. *Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 725-26, 684 P.2d 719 (1984) (chapter 8.24 RCW does not allow private condemnation of State or municipally owned land). Under these circumstances, Nayeri's

knowledge that the parcels were landlocked at purchase alone does not bar him from pursuing a private condemnation action.

We agree with Lowe's, however, that Nayeri's knowledge at the time of purchase is a factor that can be considered in any factfinding trial. A factfinder could ultimately find that an easement is not reasonably necessary based in part on Nayeri's knowledge that the property was landlocked at the time of purchase. Nayeri has pointed to no law preventing consideration of this fact as part of the analysis of reasonable necessity.

B. Legal Impossibility

Next, Lowe's relies on *Granite Beach Holdings, LLC v. Department of Natural Resources*, 103 Wn. App. 186, 11 P.3d 847 (2000) to assert that Nayeri cannot demonstrate reasonable necessity because developing the parcels was legally impossible due to regulatory hurdles. It asserts that the various plans, analyses, and variances that Nayeri may have to produce or secure amount to a complete inability to develop the parcels. We disagree.

Regulations that would affect the scope of any future easement are different from the legal impossibility confronted in *Granite Beach*. In that case, Granite Beach bought landlocked property that was "completely surrounded by State trust land and [could] be accessed only by logging roads that run across the State's land." *Granite Beach*, 103 Wn. App. at 190. It sued two entities that had easements part of the way across State land, but none of those easements actually reached Granite Beach's property. *Id.* A trial court dismissed Granite Beach's condemnation claim on summary judgment and Division One affirmed because the easement sought "would not provide full access to the appellants' land." *Id.* at 203. Additionally, the easement Granite Beach sought would have increased the burden on the State's land, "effectively condemn[ing] a new interest in State land,

which is not authorized by chapter 8.24 RCW." *Id.* at 204. Therefore, the condemnation sought in that case was legally impossible because there was no mechanism through which Granite Beach could actually procure access to their property.

In contrast, the fact that additional easements beyond the right of ingress and egress may be required does not prohibit condemnation under the statute. *See Sorenson*, 70 Wn. App. at 278 ("Without access to customary utilities, this landlocked residential property will be rendered useless. The statute [RCW 8.24.010] must be construed to authorize the installation of utilities necessary for residential use."). And competing expert testimony on an issue of material fact can preclude summary judgment. *Eriks*, 118 Wn.2d at 457; *Woodward v. Lopez*, 174 Wn. App. 460, 474, 300 P.3d 417 (2013).

Lowe's argues that an easement was not reasonably necessary because it would be difficult to develop the property due to zoning and permit requirements in the municipal code, and Nayeri has not produced concrete plans of what he intends to build. This does not reach the level of impossibility in *Granite Beach*, where *accessing* the property was legally impossible because it was surrounded by State lands. The legal impossibility in that case stemmed from the fact that the entities Granite Beach sued literally could not give Granite Beach access to its property even if they wanted to, because their easements across State land did not reach the property, and chapter 8.24 RCW did not authorize condemnation of State land. *Granite Beach*, 103 Wn. App. at 204.

We agree that it was legally impossible for Nayeri to condemn access from State Route 16 onto his land. *Id.* at 204. But there was evidence that it was still possible to legally access his land from another party's property, given that several other private properties directly abutted Nayeri's parcels, and an engineer provided a sworn declaration about possible access routes, showing an

easement was feasible at least according to one expert. Under these circumstances, municipal development regulations that affect the scope of what can be *built* on a property are not the same as a legal prohibition on all *access* to the property.

To the extent that development regulations affected the feasibility of development on the property, Nayeri produced a geologist's expert testimony, which Lowe's acknowledged, that the site could be developed in compliance with the municipal code. For example, at least some of the steep slopes were man-made rather than naturally occurring. The geologist's opinion was based on his own inspection of the site as well as the geotechnical firm's report that reached the same conclusion. And Nayeri's engineer agreed that at least part of the property could be built on and identified three possible access points. Because competing expert opinions can preclude summary judgment, *Woodward*, 174 Wn. App. at 474, we hold that there was a genuine dispute of material fact as to whether it was legally possible to develop the property and develop access through a neighboring property.

C. Failure to Meet the Burden of Proof

A party seeking private condemnation under RCW 8.24.010 has the burden to show that the private way of necessity is reasonably necessary for the use and enjoyment of the property. *Noble*, 167 Wn.2d at 17. Lowe's and The Center maintain that Nayeri failed to meet his burden of proof as a matter of law by failing to present evidence of any concrete development plan or progress towards municipal approval of such a plan. We disagree. By itself, the lack of concrete development plans does not bar private condemnation under chapter 8.24 RCW as a matter of law.

The uncertainty of the property's future use is certainly a factor that a trier of fact in a private condemnation proceeding should consider. Uncertainty about the scope and manner of

future use may be a factor that supports a factfinder's ultimate finding that an easement is not reasonably necessary. But the fact that Nayeri sought an easement before securing permits does not alone make him fail to carry his burden of proof as a matter of law. It is true that Nayeri's lack of concrete development plans leaves significant questions about the scope of the easement that a trier of fact could grant. But the scope of access is different than the *necessity* of access. Several experts opined that it was possible to obtain the necessary permits or exemptions from the city, both to build on the property and to access the landlocked property. And the experts made clear that access through one of the neighboring properties would be necessary to build on Nayeri's land. Thus, Nayeri presented enough evidence to defeat summary judgment.

D. Reasonable Necessity and the Burden on the Condemnees

The respondents also argue that the potential burden on their properties prevents any easement onto Nayeri's property from being reasonably necessary as a matter of law. Lowe's insists that Nayeri's "proposed condemnation would severely adversely impact [the] current use of its property, namely, its busy contractor bay." Br. of Resp't Lowe's at 46. Lowe's also asserts that Nayeri's geologist did not contradict the Lowe's geologist's conclusion that one of the other properties "presented geologically preferable access routes." *Id.* at 20. The Center asserts that a condemnation through its property would "remov[e] significant security features" and require substantial construction. Br. of Resp't The Center at 29. We disagree with Lowe's and The Center.

Expert testimony that a route is the only reasonable means of accessing a property is sufficient to create a genuine issue of material fact regarding feasibility and reasonable necessity that precludes summary judgment. *Woodward*, 174 Wn. App. at 473-74. In *Woodward*, the relevant parcel was not landlocked, and the plaintiff sued for a declaratory judgment that she could

access a preexisting easement for ingress, egress, and utilities. *Id.* at 465, 473. She produced a declaration from an engineer and surveyor explaining that, without the easement, the southern parcel's only access to a road required crossing wetland. *Id.* at 466. The trial court concluded, in part, at the summary judgment stage that the plaintiff was not entitled to a private way of necessity, but this court reversed on that issue. *Id.* at 466, 474. Because the plaintiff provided expert testimony that, without access to the easement, she would have had to build a "prohibitively expensive" road across a wetland, we held that she had raised a genuine issue of material fact as to reasonable necessity sufficient to defeat summary judgment. *Id.* at 474.

Here, it is undisputed that Nayeri's property was landlocked because access to State Route 16 was impossible and Nayeri could not condemn access from State land under chapter 8.24 RCW. *Granite Beach*, 103 Wn. App. at 204. Nayeri produced expert testimony that it was feasible to develop the property and that the best location for development would be along the Lowe's property line where the ground was flattest. And while an easement overlaid on any existing private way "must not differ from and must not be incompatible with the use to which it is already being put by the condemnees," the scope and location of the easement are nevertheless matters properly weighed by a trier of fact. *Brown*, 97 Wn.2d at 368.

It is certainly possible that Nayeri may not ultimately be able to secure any easement, much less one of the scope that he desires. But taking the facts in the light most favorable to Nayeri, he produced expert testimony that access to the property was necessary for development and that the development itself was feasible. The expert testimony disputing feasibility, and which access point was preferable, did not conclusively establish the absence of a genuine issue of material fact. *Eriks*, 118 Wn.2d at 457. Although Lowe's provided expert testimony that access from the south would

be better from a geotechnical standpoint, this merely set up a battle of the experts regarding alternative routes to access the developable area of the property. *See Sorenson*, 70 Wn. App. at 275. Nayeri's engineer declared that access through the Lowe's property was the optimal route because of traffic regulations. This constituted a genuine dispute of material fact that could not be resolved at the summary judgment stage.

We reverse the order granting summary judgment and remand for further proceedings consistent with this opinion.

ATTORNEY FEES

A. Attorney Fees Below

Nayeri argues that we should reverse the trial court's award of attorney fees to Lowe's and The Center under RCW 8.24.030 and "remand with instructions for the trial court to reconsider its fee awards." Br. of Appellants at 36. We disagree.

RCW 8.24.030 provides that in any action "for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee." We review a trial court's award of attorney fees under the statute for abuse of discretion, which occurs "when it exercises discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons." *Kennedy v. Martin*, 115 Wn. App. 866, 872, 63 P.3d 866 (2003).

"RCW 8.24.030 confers a trial court with discretion to award costs and fees without regard to whether the condemnee prevails." *Beckman v. Wilcox*, 96 Wn. App. 355, 365, 979 P.2d 890 (1999); *Sorenson*, 70 Wn. App. at 279. The statute does not require a taking to have occurred. *Beckman*, 96 Wn. App. at 363. "Further, the bifurcated nature of private way of necessity actions,

where the trial court first determines whether to allow a private way of necessity and then conducts a separate hearing to assess just compensation, justifies an attorney fee award even where there has been no actual taking." *Id.* at 365.

Nayeri's sole basis for seeking a reversal of the fee award is a contention that "the trial court's exercise of its discretion to award attorney fees was based on its erroneous belief that Mr. Nayeri had improperly failed to get his "'other ducks'" lined up before filing this action." Br. of Appellants at 36. But Lowe's and The Center will still be entitled to attorney fees under the statute regardless of whether Nayeri is eventually granted an easement. Nayeri contends that the trial court should reevaluate its attorney fee award and exercise its discretion, understanding that summary judgment was not warranted, but Nayeri has not explained how the trial court's attorney fee analysis would change since the award of fees is unconnected to who prevails. Because the award of attorney fees is unconnected to whoever prevails, the attorney fee statute contemplates that a potential condemnor would, in the court's discretion, bear the brunt of the legal costs of the private condemnation. Thus, we affirm the trial court's award of fees to Lowe's and The Center.

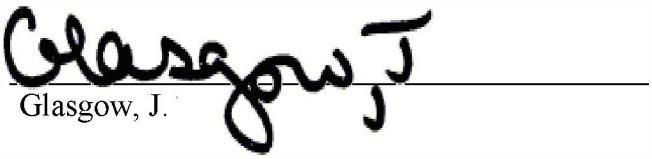
B. Appellate Attorney Fees

Lowe's and The Center also seek appellate attorney fees under RAP 18.1(a) and RCW 8.24.030. Because we affirm the trial court's award of fees under RCW 8.24.030, Lowe's and The Center are entitled to fees on appeal upon compliance with RAP 18.1(d). We grant the requests for appellate attorney fees.

CONCLUSION

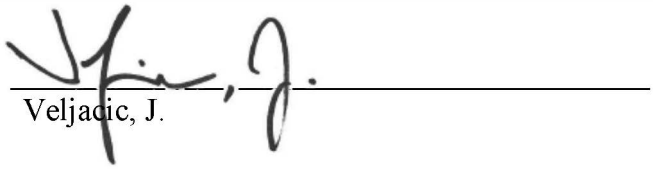
We reverse the order granting summary judgment and remand for further proceedings consistent with this opinion. We affirm the order awarding attorney fees and grant appellate

attorney fees to Lowe's and The Center in an amount to be determined by a commissioner of this court.

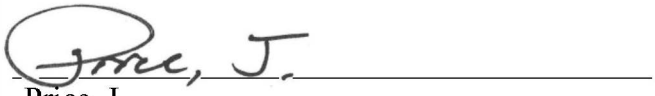


Glasgow, J.

We concur:



Veljacic, J.



Price, J.

Appendix 2
RCW 8.24

Chapter Listing | RCW Dispositions

Chapter 8.24 RCW

PRIVATE WAYS OF NECESSITY

Sections

NOTES:

Additional provisions relating to eminent domain proceedings: Chapter 8.25 RCW.

Adjudication of public use or private way of necessity: RCW 8.20.070.

Appointment of guardian ad litem for minors, incapacitated persons: RCW 8.25.270.

PDF **RCW 8.24.010**

Condemnation authorized—Private way of necessity defined.

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

[1913 c 133 § 1; RRS § 936-1. Prior: 1895 c 92 § 1. Formerly RCW 8.24.020, part.]

PDF **RCW 8.24.015**

Joinder of surrounding property owners authorized.

In any proceeding for the condemnation of land for a private way of necessity, the owner of any land surrounding and contiguous to the property which land might contain a site for the private way of necessity may be joined as a party.

[1988 c 129 § 1.]

PDF **RCW 8.24.025**

Selection of route—Criteria.

If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:

(1) Nonagricultural and nonsilvicultural land shall be used if possible.

(2) The least-productive land shall be used if it is necessary to cross agricultural land.

(3) The relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run.

[1988 c 129 § 2.]

PDF **RCW 8.24.030**

Procedure for condemnation—Fees and costs.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this chapter shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee.

[1988 c 129 § 3; 1913 c 133 § 2; RRS § 936-2. Prior: 1895 c 92 § 2.]

NOTES:

Condemnation by corporations: Chapter 8.20 RCW.

*Railroads—Corporate powers and duties: RCW **81.36.010**.*

Special railroad eminent domain proceedings:
*appropriation of railway right-of-way through canyon, pass or defile: RCW **8.20.140**.*
*extensions, branch lines: RCW **81.36.060**.*
*railroad crossings: RCW **81.53.180**.*
*state university—Rights-of-way to railroads: RCW **28B.20.330**.*

PDF **RCW 8.24.040**

Logging road must carry products of condemnees.

That any person or corporation availing themselves of the provisions of this chapter for the purpose of acquiring a right-of-way for a logging road, as a condition precedent, contract and agree to carry and convey over such roads to either termini thereof any of the timber or other produce of the lands through which such right is acquired at any and all times, so long as said road is maintained and operated, and at reasonable prices; and a failure so to do shall terminate such right-of-way. The reasonableness of the rate shall be subject to determination by the utilities and transportation commission.

[**1913 c 133 § 3**; RRS § 936-3. Prior: **1895 c 92 § 3**.]

Appendix 3
Wa. Const. Art. 1 sec 16

Washington Constitution - Article I, section 16

EMINENT DOMAIN.

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

DICKSON FROHLICH PHILLIPS BURGESS PLLC

May 30, 2024 - 4:10 PM

Transmittal Information

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Appellate Court Case Number:	57873-5
Appellate Court Case Title:	Majid Nayeri, et al, Apps v. Eagle Hardware & Garden, Inc., et al, Resp
Superior Court Case Number:	21-2-05573-9

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