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DIVISION III
STATE OF WASHINGTON
By _____

NO. 301290-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MIKE WALCH, et al.,

Appellants,

v.

KERRY A. CLARK, et al.,

Respondents.

RESPONDENT FOLKMANS' RESPONSE BRIEF

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I. INTRODUCTION

This case involves a private condemnation action under RCW 8.24.010 with associated implied and prescriptive easement claims brought by Appellant Mike Walch (“Walch” or “Walches”) for a 30 foot roadway to support the future development of his Industrial zoned property. Walches’ claims of being “landlocked” are unique under Washington law because all affected parcels because of their geography are dependent upon physical access over Burlington Northern Santa Fe (“BNSF”) railroad right-of-way. Walch claims he has no insurable “legal” access over an existing Owens Road railroad crossing; and that this crossing does not support the use of “super load lowboys” needed for his future manufacturing project, while the Respondent Folkman and Clark properties would allow a more suitable access.¹

Walches’ appeal rests on not seeking a crossing permit from BNSF while relying on the inability to use the easterly Owens Road crossing for 165 foot long super lowboy trailers tailored to Walches’ future development plans. Walches’ claims ignore sixteen (16) other permitted land uses and other vehicles that commonly use the Owens Road crossing for their business. The trial court determined that where Walch enjoyed

¹ Trial Court Memorandum dated May 24, 2011, Pages 1-2; CP 247-249.

existing physical access for these other uses that had not been withdrawn or revoked by the railroad company, a separate westerly access over the Folkman and Clark properties was a mere convenience or advantage and was not reasonably necessary for access.

II. STATEMENT OF THE CASE

1. The Walches, Folkmans, and Clarks are abutting owners located in the City of Cle Elum (“City”) in Kittitas County that are required by geography to physically access their property over BNSF right-of-way or BNSF crossings. Plaintiffs’ Exs. 45, 52 & 54; Pl.’s Appendix A & B.

2. Walches’ complaint contained three alternative easement claims of an implied easement through unity of title, prescriptive use, and statutory necessity under RCW 8.24.010 over the Folkman and Clark properties.

3. Walches’ easement claims alleged and incorporated common facts to support three access locations in his prayer for relief over the Folkman and Clark properties. CP 1-11.

4. The trial court entered a Memorandum Decision on Feb. 2, 2011 (CP 987-994) on motions for summary judgment that dismissed Walches’ prescriptive use claims finding *inter alia* that: “[t]hey have completely failed to establish that they, or their predecessors in interest (the Dalle Family), have ever used the alleged prescriptive routes for a continuous and uninterrupted 10 year period...”

The plaintiffs [Walches] acquired a title to their real property from the Estate of Reno J. Dalle pursuant to Real Estate Contract dated May 12, 2004 and recorded in Kittitas County on June 21, 2004. The Dalle family had owned what is now the plaintiffs' property for over 80 years prior to 2004. The defendants' properties are located to the west of the plaintiffs' property, lying between the plaintiffs' property and the westernmost Cle Elum exit off of Interstate 90 (Exit 84 onto Oakes Avenue). According to Dalle family members, the Dalle family never accessed their property from the west over either the alleged "Dalle Road Extension" or BNSF corridor road. Historically, the Dalle family members indicate they accessed their property from the east, over Owens and Dalle Roads. There is no evidence a road ever existed along the alleged route identified by the plaintiffs in their complaint as an extension of Dalle Road leading from the plaintiffs' property to Oakes Avenue.

With respect to the claim for a prescriptive easement parallel to the BNSF corridor, the parties agree any road existing in the BNSF corridor is not condemnable and that any claim by plaintiffs within the corridor is not subject to prescriptive easement. Now, in written and oral argument in opposition to the defendants' motion plaintiffs claim a second road existed parallel to and south of the BNSF corridor road alleged in their complaint which traverses through property owned by the Clark Family LLC. The Clark Family LLC purchased its property separately from the railroad in 2004.

The Grangers were the predecessors in interest to the Folkmans and Clarks and owned those parcels from 1986 when they purchased them from Plum Creek Timber Company with Thomas A. McKnight and Jamie L. McKnight. Those parties partitioned the property. McKnights owned the westerly 4.05 acres and the Grangers became sole owners of the remainder of the property to the east. McKnights sold their 4.05 acre parcel to Folkmans in 2002 and Grangers sold their portion of the property to the Clarks and Roger Overbeck in 2002. When the Grangers and McKnights purchased the property in 1986 there were no roads over the property and according to the Grangers the property was so uneven and covered with trees and debris one could not drive on it even from the west off of Oakes Avenue or from anywhere. They

accessed the property by foot from the north across the railroad tracks. Grangers obtained a permit across the railroad right-of-way from Oakes Avenue to the property and leveled and cleared the property so they could access it from the west off Oakes Avenue. Their access never extended across their properties to the property owned by Reno Dalle (now the plaintiffs' property). Moreover, within Grangers' knowledge no one else ever used their properties to access the Dalle property.

When McKnights and Grangers purchased the properties now owned by the defendants a barbed wire fence ran the entire length of the property between the Dalle property and what is now the Clark property and no effort was ever made either by way of the alleged "Dalle Road Extension" or by the BNSF corridor road to access the Dalle property to the east.

With respect to the BNSF corridor road Walch attempts to create a genuine issue of fact by contradicting his deposition testimony wherein he stated that the alleged BNSF corridor road was within 100 feet of the railroad tracks and could be as close as 50 feet. Even if there was a road there is no evidence that it was ever utilized by the Walches or their predecessors in interest (the Dalles) as access to the property for the continuous, uninterrupted period of 10 years..." CP 987-994; Appendix ("App."). 5; (Emphasis added).

5. Walches' implied easement claims based upon a common grantor through unity of title²were dismissed by stipulation³ after his own title expert concluded that his records search could not support "...any unity of title between the Walch property and the properties owned by the Folkmans and Clarks." CP 149.

² CP 5-6.

³ CP 452.

6. Following a trial without jury on May 10th through May 11, 2011, the trial court entered a Second Memorandum Decision on May 24, 2011 dismissing Walches' easement by necessity claims under RCW Chapter 8.24. CP 246-251. This Memorandum was later incorporated as findings of fact and conclusions of law by the trial court at App. 1:

The plaintiffs purchased real property situated in Cle Elum Washington in May, 2004. Access to plaintiffs' property is outlined in the real estate contract and is by way of an existing easement over the Dalle property to the east of the plaintiffs' property, east over and across a Burlington Northern Santa Fe Railroad corridor and then north over and across the Burlington Northern Santa Fe Railroad crossing to Owens Road. The City of Cle Elum owns the public right of way of Owens Road from North First Street in the City of Cle Elum to the north edge of the Burlington Northern Santa Fe right of way. The City of Cle Elum also has a private agreement with the Owens family to use Owens Road south of the Burlington Northern Santa Fe railroad crossing to the City of Cle Elum sewage treatment plant. Peninsula Trucking also uses the same Owens Road to access its facilities to the south on Owens Road as do several private residences. None of these parties has been issued permits from Burlington Northern Santa Fe to cross the railroad right of way.

The plaintiffs own Rainier Skyline Excavators, Inc. (RSE) and intend to locate that business on their Cle Elum property. RSE designs and manufactures the world's largest portable hydraulic track drive skyline excavators, buckets, teeth and accessory equipment. The Walches intend to use their Cle Elum property to demonstrate their portable skyline excavator in conjunction with the Dalle pond on their property and either manufacture or assemble several components of the skyline excavator on their property. Many components of the portable skyline excavator are transported by long and extra-long lowboy trailers, called super loads. These super loads can be up to 165 feet in length and carry several hundred thousand pounds.

The defendants own property to the west of the Walch property situated in the Swiftwater Business Park. The Clarks and the Folkmans have spent the last five years developing the Swiftwater Business Park, improving the building now housing Marson & Marson Lumber, developing and housing a glass company and constructing a two story office building which houses the Kubota Tractor dealership and other tenants. Clark, LLC has spent time and money to short plat its property immediately north of Clarks, which it purchased from Burlington Northern Santa Fe.

The property of all parties is presently zoned by the City of Cle Elum industrial as defined by Chapter 17.36 of the Cle Elum Municipal Code. According to Matt Morton, Cle Elum city administrator, no land use applications have ever been submitted by the plaintiffs for the intended use by their company RSE on the property they now own. Moreover, while the intended uses by the plaintiffs of their property may be permitted outright in the industrial zone if they are developed and used in the manner that complies with the performance standards and aesthetics objectives of Chapter 17.36 of Cle Elum city code, Mr. Morton also pointed out that there is no guarantee of granting any application until it was submitted and reviewed and reconciled with the City of Cle Elum Critical Areas Ordinance, especially because of the Dalle ponds situated on the Walch property, which Walch has described as the Dalle wildlife and fish propagation ponds.

The Walches seek a 30 foot easement by necessity, claiming their property is "landlocked" because they have no legal right to cross the railroad right of way over Owens Road and the super load lowboys needed to transport their equipment cannot traverse the railroad crossing over Owens Road or make an immediate right turn down the railroad corridor. At trial the plaintiffs claimed that the easement by necessity they sought should be off of Swiftwater Boulevard through the Folkman/Clark properties in a south easterly direction along the southern edges of the defendants' properties immediately inside the DOT right of way fence to meet the plaintiffs' property at the southwest corner thereof. CP 247-249; App. 1.

7. In additional Findings of Fact, the trial court found at CP 447-449 that: (a) the Clarks and Folkmans spent the last five years developing the Swiftwater Business Park, including the Clarks' improvement of the building now housing Marson & Marson Lumber, developing a glass company, and constructing a two-story office building which houses the Kubota tractor dealership and other tenants; (b) the property of all parties is presently zone Industrial under CEMC Chapter 17.36; (c) no land use applications have ever been submitted by the Walches for their intended RSE use on the Walch property;⁴ and that (d) there is no guarantee of granting any land use application by Walch until it is submitted and reviewed and then reconciled with the City's critical areas ordinance because of ponds situated on the Walch property that Walch described as the Dalle Wildlife and Fish Propagation Ponds.⁵

8. In conclusions of law at CP 451-452, the trial court determined *inter alia* that: (a) the Walches "...have physical access to their property over the Owens Road railroad crossing, and through the railroad corridor to their granted easement;" (b) "...the access may not be insurable because

⁴ See RP Vol. I, pp. 88-90 testimony from Cle Elum Planning Director, Matt Morton that while he had multiple meetings discussing access routes, Walch filed no land use applications with the City for his intended storage of several hundred tons of machinery on site.

⁵ RP Vol. I, pp. 78, 89-91.

of a lack of a permit from the railroad company, but no one has ever denied plaintiffs' or their predecessors' use of the railroad crossing and/or the railroad corridor to the granted easement to plaintiff's property in question; (c) "Until such access is in fact denied or withdrawn, the plaintiffs can make use and enjoyment of their property for those uses authorized by the City of Cle Elum within its Industrial zone;" and (d) "Plaintiffs have not established a reasonable necessity to condemn a private way of necessity because their property is not landlocked, and because they have no guarantee that a future use would include situating the RSE, Inc. manufacturing business on the property." (Emphasis added).

9. Before Walch sued the Folkmans and Clarks on all three easement claims, the following facts were established:

A. During development of the Clark and Folkman properties in 2008, Walch raised identical access arguments of prescriptive use and implied use in opposition to development of the Folkman and Clark properties to the City stating that the Owens Road crossing was "unsuitable for commercial lowboy traffic." RP Vol. I, pp. 102-108; Defendants' Trial Exhibits ("Def. Ex.") 31, 108, 109, 110, 111, and 112. Walches' claimed that the Dalle Ponds were protected environmentally sensitive "wildlife and fish propagation ponds." He demanded that the City condition the Clark's short plat approval to require westerly public

access to the Walch property to support his future RSE project. RP Vol. II, pp. 34-36; 31, 108, 109, 110, 111, and 112; CP 908-911; App. 2.

B. Walch did not appeal the Clark Short Plat or Swiftwater Site Plan approvals or seek judicial review under the Land Use Petition Act, RCW Chapter 36.70C (“LUPA”). RP Vol. II, pp. 99-109.

C. Folkman obtained a BNSF crossing permit for access to his commercial property. RP Vol. II, p. 85.

10. During trial on the merits Mr. Walch testified that: (1) other than personally “eye-balling” the suitability of access over Owens Road, he had hired no civil engineers or transportation engineers to examine route feasibility;⁶ (2) he personally had prepared no site plan for his development proposal;⁷ (3) he hired no civil engineering experts for an analysis to determine the cost of improving Owens Road for use of his low-boy equipment testifying that he considered any engineering analysis to be a “waste of time;”⁸ (4) he filed no application with BNSF for a

⁶ RP Vol. I, pp. 47-48; RP Vol. II, pp. 47-48.

⁷ RP Vol. I, p. 53.

⁸ RP Vol. I, pp. 47-48; RP Vol. II, pp. 47-48.

Q. Did you ever hire an engineer to do an analysis?

A. No, we just visited the site with our trucking people, like that testified, and we’ve got lots of experience trucking these loads and it looked to be a waste of time...”

crossing permit;⁹ (5) he filed no development or permit applications with City for either the requested 30 foot access road or his proprietary Rainer Skyline Excavator (“RSE”) facility;¹⁰ (6) he conducted no professional engineering or cost assessment of what installed improvements on the Folkman and Clark properties would have to be altered or removed as a result of his proposed 30 foot roadway;¹¹ and (7) he had no plans to “deal with anything” relating to hiring engineers and applying for City development approvals and permits until he first had legal access.¹²

11. Under applicable Cle Elum Industrial or “I” zoning regulations at CEMC Chapter 17.36, the Walch property is entitled to pursue development of sixteen (16) beneficial commercial land uses. App. 3.

12. Citing the City Planning Director’s testimony, Walch confirms in his Opening Brief at Page 7 that he submitted no application for any development plans, including its RSE manufacturing facility proposal. RP Vol. I, p. 89.

13. Walch admits at Page 7 that any application for the RSE proposal would require an adjudicative decision after filing a conditional use permit

⁹ RP Vol. I, p. 45.

¹⁰ RP Vol. I, p. 56.

¹¹ RP Vol. II, pp. 50-56; 142-143.

¹² RP Vol. II, p. 56.

application. RP Vol. I, pp. 90, 112. The application would require review and approval by the City Council under CEMC 17.36.030, CEMC Chapter 17.80, and CEMC 17.100.040C.3 as a Type III development proposal that Walch refused to file. App. 3.

14. Walch further admits at Pages 7-8 that any application for the RSE proposal would require City review of impacts to the Dalle Ponds under its critical areas code which Walch refused to file. RP Vol. I, pp. 91-97.¹³

III. SUMMARY OF ARGUMENT

Walches' appeal is premised on the unsupported notion that he need do nothing further to demonstrate "reasonable necessity" under RCW 8.24.010 other than to show that his RSE "super load lowboy" vehicles get stuck on the alternate BNSF railroad crossing at Owens Road. Walch asks this court to accept as "reasonable necessity" his plan to limit the Owens Road crossing to one (1) beneficial use when the City's zoning code for "Industrial" zoned land authorizes sixteen (16) beneficial land uses. Even if Walches' property is physically or "legally" landlocked (which it is not), Walch claims must be rejected where the trier of fact determined that his unspecified plan of future development that was not reasonably necessary,

¹³ Walch admits that the Dalle Ponds are Category Three Wetlands at Page 8; See also RP Vol. I, pp. 91-93 testimony of Cle Elum Planning Director that the Dalle Ponds are rated as Category Three Wetlands.

and which Brown v. McNally, 97 Wn.2d 360, 644 P.2d 1153 (1982) has rejected as being merely convenient or advantageous.

Walches' claims are tied entirely to his title insurance policy characterization of no "insurable access." CP 21, CP 172; App. 4. His property, like all other abutting parcels, is not physically landlocked. The claim of no "legal insurable access over the railroad right-of-way" is based upon Walches' own inactions in not securing available permission from BNSF over the Owens Road crossing or a northerly BNSF access. Even if his property were physically landlocked (which it is not), Ruvalcaba v. Kwang Ho Baeck, 159 Wn.App. 702, 709, 247 P.3d 1 (2011) holds that a condemnor's voluntary landlocking of his property is not dispositive of "reasonable necessity" under RCW 8.24.010.

"Instead, it constitutes one fact to be considered by the trier of fact with all other relevant facts to decide whether Ruvalcabas have made the showing of necessity required by the statute." (Emphasis added).

Walch and other adjoining property owners only access is over BNSF right-of-way. All owners are fully able to access their properties Owens Road and its crossing with BNSF within the City's Industrial zoning district. They continue to enjoy physical access and are able to make productive commercial use of their property with or without seeking permission from BNSF.

Walches' easement claims are jurisdictionally barred where he did not first exhaust his remedies and appeal such claims to the City Council or seek appellate review under LUPA in 2008. He filed his lawsuit years after the Clarks and Folkmans installed costly plat and site improvements and fully constructed buildings in the Swiftwater Business Park with active tenant uses.

IV. ARGUMENT

A. Applicable Standards of Review. Where a trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings of fact and conclusions of law. Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982) citing Holland v. Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978). Substantial evidence is evidence in sufficient quantum from a review of the trial court record to persuade a fair-minded person of the truth of the declared premise. Holland, supra at 390-91. Under this rule, an appellate court may not substitute its judgment for that of the trial court. Seattle-First Nat'l Bank v. Brommers, 89 Wn.2d 190, 199, 570 P.2d 1035 (1977).

The standard of review of an award of attorney fees awarded in this case is abuse of discretion. In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 265, 961 P.2d 343 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.

Allard v. First Interstate Bank of Wash., N.A., 112 Wn.2d 145, 148, 768 P.2d 998 (1989).

B. The Trial Court Did Not Commit Error Where Substantial Evidence Supports Findings that Walch Has Physical Access and Enjoyed Multiple Beneficial Land Uses Over the Alternative Owens Road Access and Crossing.

The trial court at CP 249 correctly cited and applied Washington law by assessing Walches' access claims in light of decisions in Brown v. McAnally, supra; Ruvalcaba v. Kwang Ho Baeck, supra at 709; Hellberg v. Coffin Sheep Company, 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965); Noble v. Safe Harbor Trust, 167 Wn.2d 11, 17-23, 216 P.3d 1007, 1011 (2009); and Kennedy v. Martin, 115 Wn.App. 866, 868, 63 P.3d 866 (2003). The Walch property is not "rendered useless" under RCW 8.24.010 by the trial court's refusal to grant a second westerly access road. Substantial evidence supported findings and conclusions that Walch had physical access to his property where, despite his unwillingness to secure permission from BNSF,¹⁴ he could still enjoy many beneficial uses allowed under the City's "Industrial" zoning district at CEMC Chapter 17.36. CP 250; CP 448. Indeed, the trial court found¹⁵ that other similarly situated

¹⁴ The trial court found that Walch and other Industrial-zoned property owners and businesses using the Owens Road railroad crossing for physical access to their property had not been issued permission by BNSF. CP 247-248.

¹⁵ RP Vol. II, pp. 66-70.

property owners such as Peninsula Trucking continued to use Owens Road and its crossing with the BNSF tracks for ongoing beneficial commercial uses without any BNSF crossing permits. CP 250.

Substantial evidence exists showing that tailored access at another westerly location across the Folkman and Clark properties was not “reasonably necessary” under Brown v. McAnally, supra at 367. Under the facts of this case, it is “merely convenient or advantageous” for Walches’ plan of development for an RSE manufacturing site. It is not “reasonably necessary” where Walch enjoys multiple permitted land uses under the City’s Industrial zoning district regulations at CEMC 17.36.020. CP 247-248; App. 3. The Brown court strictly construed the element of necessity that the trial court correctly applied under circumstances where Walch was interested only in one (1) future Industrial land use suitable for his 165 foot long super lowboys:

We have held, and continue to hold, that the statute which gives a landlocked owner a way of necessity over lands of a stranger is not favored in law and thus must be construed strictly. It must be borne in mind that RCW 8.24 authorizes a limited private condemnation proceeding in which the private property rights of one are taken for the benefit of another. The taking is limited to necessary ingress and egress only. It is not extended to those necessities that may be created by the contemplation of a future real estate subdivision development. There is, after all, a constitutional right to the protection of one's property that must not be lightly regarded or swept away merely to serve the convenience or advantage of a stranger to the property. Dreger v. Sullivan, supra, 46 Wash.2d 36,

38, 278 P.2d 647 (1955); State ex rel. Carlson v. Superior Court, 107 Wash. 228, 181 P. 689 (1919). Id at 370; (Emphasis added).

Here, the trial court correctly determined that Walch could not prove reasonable necessity, including the “absence of alternatives” where he enjoyed other alternative Industrial uses of his property even though the Owens Road crossing would not accommodate his 165 foot long super load lowboy trailers that were tied to his specific future development plan. CP 247-251; CP 446; CP 451. These findings are further supported by facts showing that Walches’ future real estate development was highly speculative and not even determined to be feasible where he refused to file any development applications for his RSE project;¹⁶ and where he claimed that the Dalle Ponds were protected critical areas.¹⁷ Even if Walches’ property was “legally” or “physically” landlocked (which it is not), Walch is precluded from any relief under Brown, supra at 370.

¹⁶ CP 248; and RP Vol. II, p. 56:

BY MR. MONTGOMERY:

Q Mr. Walch, are you actually able to deal with anything until you actually have legal access to your property?

A No, I don’t want to do anything until I have legal access.

MR. MONTGOMERY: No further questions, Your Honor.

¹⁷ CP 248.

Walches proffered arguments that “physical constraints” made it “impossible” to use the easterly Dalle Road access for a single vehicle type, namely RSE super-load lowboys, alone cannot necessitate an entitlement to another right-of-way across the Clark and Folkman properties under Brown supra, and RCW 8.24.010. Walch admitted during trial that he made no attempt to seek a professional engineering analysis of the Owens Road crossing that could have assessed the cost to install crossing or roadway improvements to support his claim that Owens crossing modifications “were prohibitive and not economically feasible.” See Beeson v. Phillips, 41 Wn.App. 183, 185, 702 P.2d 1244 (1984); and Ruvalcaba supra at 712 where economic feasibility of constructing a road is a factor to be weighed in determining reasonable necessity. Walch chose not to do this. He testified that he wasn’t “going there” and considered any such engineering analysis to be “a waste of time.” RP Vol. II, pp. 43-44, 47-48, 52-56. Accordingly, no evidence exists to demonstrate that constructing road or BNSF crossing improvements was prohibitive and economically infeasible under Beeson supra at 186-87.

Other than citing the rule that railroad right-of-way may not be condemned,¹⁸ Walch cites no authority for the proposition that the mere

¹⁸ State v. M.C. Ballard, 156 Wash. 530, 287 P. 287 (1930).

absence of a railroad crossing permit, which he refuses to obtain from BNSF, alone renders a property landlocked and useless where he enjoys continued open physical access. This is illogical where Walch would be required to obtain a westerly access permit from BNSF over the Folkman and Clark property. RP Vol. II, p. 85. Instead, Walch cites Brown, supra at 367-68 for the proposition that “...*a potential condemnor should not be prevented from condemning a private way of necessity merely because the condemnor may enjoy the permissive user of a ‘way.’*”¹⁹ This argument is nonsensical. Brown’s point is that any access route created by a permissive use does not by itself prevent a later private condemnation claim under RCW 8.24.010. Because the trial court found there was never any history of any use over the claimed westerly Dalle Road access route (CP 446; CP 988) or other access routes, this argument must fail.

C. Walches’ Cited Cases Do Not Apply.

Walch cites Jernigan v. McLamb, 192 N.C.App. 523, 665 S.E.2d 589 (2008) as determinative of “necessity,” where an owner has “no legally enforceable right-of-way to a public highway.”²⁰ The Plaintiff in Jernigan claimed he had implied rights of necessity where his parcel was

¹⁹ Walches’ Opening Brief, Page 14.

²⁰ In undisputed testimony before the trial court, City witnesses described Swiftwater Boulevard as a “private” road. RP Vol. I, p. 118, ll. 17-19.

“once held in a common ownership that was severed by a conveyance.” Id. at 592. In making this argument, Walch violates the stipulated order dismissing his easement claim²¹ through unity of title from a common grantor.²² Walches’ own expert’s declaration at CP 149 used to support dismissal of implied easement claims states that there was no evidence of a common grantor:

“...we did not discover in our search of records...that there is any unity of title between the Walch property and the properties owned by Folkman and the Clarks.”

The Court in Jernigan was also concerned that an existing permissive use could be revoked at any time that potentially prevented the plaintiff from deriving the financial benefit of farming his property. Id. Because of geography, Walch and all other landowners may only access their parcels over BNSF right-of-way or crossings. Walch is a similarly situated property owner. Condemnation under RCW 8.24 will not change the nature of BNSF easterly crossing where the trial court here found that:

“Peninsula Trucking also uses the same Owens Road to access its facilities to the south on Owens Road as do several private residences. None of these parties has been issued permits from Burlington Northern Santa Fe to cross the railroad right of way.” CP 247.

²¹ CP 452.

²² RP Vol. I, pp. 2-3.

Walch testified that he had not taken any steps to obtain any crossing permit from BNSF for the Owens Road access route to his property. RP Vol. I, p. 16. The City testified that if BNSF attempted to close the Owens Road crossing, it would file an appeal. RP Vol. I, p. 136. Unlike the plaintiff in Jernigan, nothing prevents Walch from joining with the City and other Industrial zoned landowners to preserve access to their parcels should BNSF attempt to close the Owens Road railroad crossing.

Despite claims that he did not possess insurable legal access for the easterly Owens Road, Walch later testified that he had made an offer to buy property from BNSF for an access route located north of his property and east of the Clarks' property:

“A. After the City announced to me that there is nothing more that they could do or were will to do, I started the lawsuit and I made an attempt to make a purchase of the land from the Railroad by application so that I could leave another option open to get an easement.

Q. Do you recognize Exhibit 114 as the application to purchase railroad land...?

A. Yes I do.

Q. And they have not yet...denied or agreed, right? To sell you land?

A. Actually, we don't know. They quit calling us back.” RP Vol. II, pp. 38-40; (Emphasis added).

Nothing prevented Walch from making a similar offer to purchase a right-of-way or crossing permit for the easterly Owens Road railroad crossing from BNSF. Indeed, Walches' purchase and sale agreement of the Dalle property and his own title policy (initialed by Walch) made express provision for removing the "lack of a right of access to and from the land across a railroad right of way" if Walch obtained a "Private Roadway and Crossing Agreement" from BNSF (CP 21; CP 172; App. 4):



PRIVATE ACCESS TO SAID PREMISES is across a railroad right of way. This Company will require that the "Private Roadway and Crossing Agreement", and any assignment or modifications thereof which were issued by the railroad company, be submitted for examination. The coverage then afforded under any policies issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy(ies) will contain the following exception:

The lack of a right of access to and from the land across a railroad right of way.

ALTA OWNER'S POLICY

SCHEDULE B

Order Number: 16364

Policy No: O-9993-3374945

6. PRIVATE ACCESS TO SAID PREMISES is across a railroad right of way. This Company will require that the "Private Roadway and Crossing Agreement", and any assignment or modifications thereof which were issued by the railroad company, be submitted for examination. The coverage then afforded under any policies issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy(ies) will contain the following exception:

The lack of a right of access to and from the land across a railroad right of way.

All Walch had to do under ¶6 above was to purchase a crossing permit from BNSF to access easterly Dalle Road, and Stewart Title Company would have removed its "lack of access" exception. CP 172. Walch knowing refused his duty to act that was required under his title insurance policy for the easterly crossing. CP 172; RP Vol. II, pp. 43.

Walches' reason for not doing so was explained during trial:

Q. You never applied for a license to cross the Owens crossing from the Railroad Company have you?

A. Not going that direction, no.

Q. You haven't signed an easement from the Railroad Company going over the Owens Road crossing have you?

A. Not going that direction, no.

Q. Other than the, we'll call them the massive oversize lowboys that we saw in Exhibits 46 and 47 and in your power point presentation, other than lowboys, can other passenger vehicles make the crossing over the Owens railroad track?

A. Can passenger vehicles cross Owens railroad tracks? Yes they can.

Q. In fact the trucks going to Peninsula have no problem?

A. The trucks going into Peninsula's are a completely different type of truck. They're single axle trailers with, that are high off the ground. Vol. II, pp. 43-44.

When asked about making a formal application to BNSF to purchase an available 50 foot strip of railroad property between the north edge of the Patty Clark property and railroad right of way for another access route, Walch stated that he had talked to BNSF but made no such application.²³

²³ Q. And there's fifty feet between the north edge of the Clark LLC property and the Railroad, right?

A. That's what I understand.

Q. My question is, did you make an application, a formal application?

Walch later admitted that he tried to purchase BNSF land in October of 2006 as “another attempt to solve the issue” but did not know the status of negotiations. RP Vol. II, pp. 39-40. On Oct. 6, 2008 he told the City that BNSF “had offered to sell” him property “North, West and East” of the BNSF property purchased by the Clarks. Def. Ex. 103.

Walches’ title policy at ¶6 does not limit the location of a Private Roadway and Crossing Agreement to the Owens Road BNSF crossing. His pending BNSF application is tantamount to a finding of mootness where Walches’ claims made under RCW 8.24.010 are not ripe. Courts dismiss actions for want of subject matter jurisdiction to avoid a premature adjudication where BNSF is apparently still reviewing his application to purchase/access application. See Orwick v. Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984); Thun v. Bonney Lake, 164 Wn.App. 755, 761, 265 P.3d 207 (2011).²⁴

Walches’ conflicting testimony and credibility as a witness support the trial court’s findings by showing that Walch possessed multiple available access alternatives, and has physical access to his property, that do not support a necessity claim under RCW 8.24.010:

A. No, I talked to them on the phone about it. RP Vol. 2, p.45, ll. 21-22.

²⁴ RAP 2.5 allows a party to raise the following issues for the first time on appeal: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted and (3) manifest error affecting a constitutional right.

“Peninsula Trucking also uses the same Owens Road to access its facilities to the south of Owens Road as do several other private residences. None of these parties have been issued permits from Burlington Northern Santa Fe to cross the railroad right of way.” CP 247.

“1. The Plaintiffs have physical access to their property over Owens Road railroad crossing, and through the railroad corridor to their granted easement.

2. The access may not be insurable because of the lack of a permit from the railroad company, but no one has ever denied plaintiffs’ or their predecessors’ use of the railroad crossing/or the railroad corridor to the granted easement to the plaintiffs’ property in question.

3. Until such access is in fact denied or withdrawn, the plaintiffs can make use and enjoyment of their property for those uses authorized by the City of Cle Elum within its industrial zone.” CP 449.

Walch next argues that under Indiana Regional Recycling v. Belmont, 957 N.E.2d 1279 (Ind.Ct.App. 2011), he is not required to ask BNSF for crossing permission; and that he cannot compel BNSF to provide access where it is not condemnable under State v. M.C. Ballard, 156 Wash. 530, 287 P. 27 (1930). The court would not force a landlocked parcel owner to first seek an alternate crossing permit from a railroad and construct a costly crossing where he was entitled to an implied easement where an earlier subdivision left his parcel without any physical access. *Id.*, at 1284. Belmont, however, is another inapplicable case involving “unity of title” where an express easement was not reserved by the common grantor that

again is not present in this case by stipulation of the parties. CP 542, ¶7. Belmont is further distinguished where the landowner possessed no physical access unlike Walch who enjoys physical access to his property.

Walch finally relies on State ex rel. Mountain Timber Co. v. Cowlitz Superior Court, 77 Wash. 585, 137 P. 994 (1914) for the blanket notion that Walch himself need only “demonstrate a reasonable need for the easement for the use and enjoyment of his land.” Mountain Timber was limited to the constitutionality of Article 1, Section 16²⁵ of the Washington Constitution. Walches’ misapplication of this case would eliminate the role of courts in assessing “reasonable necessity” under RCW 8.24.010. Virtually, every decision of appellate courts in Washington leave the ultimate determination of “reasonable necessity” to the adjudicator of fact. These include: Hellberg, Kennedy, Wagle v. Williamson, 51 Wn.App. 312, 314, 754 P.2d 684 (1988), *appeal after remand*, P.2d 1373 (1991), Beeson, supra at 186-87, and Brown v. McAnally, supra at 370. Wagle, supra at 351 qualifies the general rule of

²⁵ 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... [AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

condemnor route selection by directing trial courts to determine reasonable necessity:

In Washington, the general rule is that the condemnor has a right to select the route which, according to his own views, is reasonably necessary for the full enjoyment of his land. However, the court is vested with the power to determine whether specific land proposed to be taken is necessary, in view of the general location, together with the burdens and benefits to the respective properties and then finally to determine the question of necessity for taking such specific land when there is evidence of bad faith, oppression or an abuse of power in the selection. State ex rel. Polson Logging Co. v. Superior Court, 11 Wash.2d 545, 562, 119 P.2d 694 (1941); State ex rel. Grays Harbor Logging Co. v. Superior Court, 82 Wash. 503, 505-06, 144 P. 722 (1914). The trial court, believing it had no other choice in the absence of a showing of bad faith, refused to interfere with Wagle's choice of Orchard Pass Route. However, we hold that the trial court, as a function of its power to determine necessity in the first instance over the particular strip of property selected by Wagle, should have considered the evidence presented by Williamson regarding the negative impact to her of the Orchard Pass Route along with the feasibility of the Whiskey Flats Route. The mere absence of bad faith does not satisfy the requirements that the selected route is reasonably necessary for the use and enjoyment of the condemnor's land locked property. (Emphasis added).

Both Folkman and Clark demonstrated that injurious impacts would occur to their properties²⁶ by the proposed route identified by Walch in Ex. 53²⁷ and that Walch had physical access at another easterly location. These facts that rebutted Walches' prima facie case of reasonable

²⁶ RP Vol. II, pp. 79-81; RP Vol. II, pp. 141-143;

²⁷ This trial exhibit is also attached to Walches' trial brief at CP 234.

necessity were incorporated into the trial court's decision memorandum and findings and conclusions. *Id.*, at 316-17; CP 248; CP 446; CP 448. This evidence showed that an alternate route for other beneficial commercial land uses was available to Walch and feasible over the Owens Road crossing where commercial vehicle and passenger vehicle traffic was a common occurrence. Wagle, *supra* at pp. 316-17; RP Vol. II, pp. 43-45.

The trial court's decision at CP 249 applied Beeson and Brown v. McAnally and the rule of strict construction to these facts:

“What constitutes a reasonable necessity is a factual determination.

As stated in *Beeson v. Phillips*, 41 Wn.App. 183 (1985):

‘The core of the public policy behind the statute’s grant of condemnatory authority lies in the admonition that the condemnor’s property must be so situated that it in order for him to obtain ‘its proper use and enjoyment,’ he must of necessity obtain the use of another’s property. In Washington, that necessity need not be absolute; it must, however, be reasonably necessary as opposed to merely convenient or advantageous.’

Beeson, *supra* at 186-87 quoting *Brown v. McAnally*, *supra*.” (Emphasis added).

In all of the facts elicited in pretrial motions and at trial in this complex case, the following notable facts confirmed that Walches’ speculative future development proposal could not support reasonable necessity under RCW 8.24.010: (1) Walch bought the property knowing

that he could not drive his RSE super load lowboys over the Owens crossing;²⁸ (2) Walches' title report showing "the lack of right of access"²⁹ could be cured by Walch obtaining a Private Roadway and Crossing Agreement" for the easterly Owens Road crossing³⁰ that Walch refused to make; (3) Walch refused to hire any engineering professionals to determine the feasibility of any access route;³¹ and (4) until Walch made land use applications with the City, there was no "guarantee" that Walches' speculative future development plans would be approved.³²

Applying the substantial evidence rule, these findings and conclusions confirm that the proposed westerly location across the Folkman and Clark properties sought to be condemned was not "reasonably necessary" for access under Brown v. McAnally, supra at 367; and that the Walch property was not "rendered useless" absent such access under Const. art. 1, § 16; RCW 8.24.010, State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County, 77 Wash. 585, 137 P. 994 (1914) and Hellberg v. Coffin Sheep Co., 66 Wn.2d 664, 404 P.2d 770 (1965). Viewing all of the

²⁸ RP Vol. I, p. 29.

²⁹ CP 172.

³⁰ CP 172.

³¹ RP Vol. I, pp. 47-48; RP Vol. II, pp. 47-48.

³² RP Vol. I, pp. 78, 89-91.

evidence together, Walches' self-inflicted access problems are nothing more than a staged pretense to invoke the private condemnation statute, RCW 8.24.010. Clearly, Walch would be obtaining a "convenience" and "advantage" for future development that Brown would not extend by the mere showing of "contemplated" "future development" that this court should reject. *Id.*

D. Walch Is Jurisdictionally Barred from Any Relief Under RCW 8.24.

Walch admitted in his Post Trial Memorandum (CP 238-CP 244) that as a neighboring property owner, he received "notice" and an "opportunity to comment" on: (1) the City of Cle Elum's review of Kerry Clark's Swiftwater Business Park Site Development Review Plan No. 2006-01; (2) environmental decision-making related to the site development review under the State Environmental Policy Act, RCW Ch. 43.21C ("SEPA"); and (3) Patricia Clark's Cle Elum short plat application No. 2007-004. CP 239; See Def.'s Exs. 31, 53, 54, 103, 109, 110, 111, 112, 113, 124, and 125. In 2008, Walch asked that the City condition approval of Clark's plat application to provide an access connection to his easterly abutting property because of inadequate access on Owens Road.

Walch acknowledged receiving notice of both "Type II" and his participation in both project decisions. Walch claimed in his comment letters that the Clark short plat application "...does not provide access to the

Dalle Wildlife and Fish propagation ponds to the East.” He asked that the City impose a plat approval condition for the “extension of public streets to the Dalle Wildlife and Fish propagation ponds to the East” and that Clark and Folkman construct an access road to the Walch property, stating that “...it must not be too narrow, or windy and must be sufficient for commercial low boy traffic.” See Def.’s Exs. 103, 109, and 110; CP 911; App. 2. The City of Cle Elum’s thereafter addressed these demands in a letter from the Cle Elum City Attorney dated Dec. 4, 2008 at Def. Ex. 111:

“...Mike and Marcia Walch are opposed to the proposed short plat because it does not ‘preserve and provide access to the adjoining real properties’ owned by the Walches.

Here, as in *Luxembourg*, the isolation and lack of road access to the Walches’ property satisfactory for commercial vehicles is a longstanding condition that is not the result of the Clark short plat. The October 6 letter acknowledges that other road access exists, across the BNSF tracks. October 6 letter (‘The alternative route for Mr. Walch to a public road, is over a railroad crossing that is unsuitable for commercial lowboy traffic...’). The fact that alternative access is not preferable for commercial traffic as access across the Clark property is not sufficient grounds for conditioning the short plat approval upon the provision of access to the Walch property, because the short plat is not the cause of the lack of a public road access to the Walches’ property

The Walches’ claim to a prescriptive easement is similarly distinct from ownership and division of land, which may be approved via approval of the short plat application. If the Walches believe that the law is otherwise, they can seek injunctive relief from the Kittitas County Superior Court. Alternatively, they may wish to consider purchasing an easement from the Clarks, or seek to condemn a private way of necessity pursuant to RCW 8.24.010.” (Emphasis added).

At trial, Walch initially testified that he only opposed “blacktopping” of Clark’s and Folkman’s property.³³ Walch later admitted upon cross-examination that he actively opposed the development of the Folkman and Clark properties in 2006. RP Vol. II, pp. 34-38. Walches’ knowledge of the City’s land-use codes is demonstrated in his repeated attempts during trial to use an initial conceptual Swiftwater Business Park Site Plan at Plaintiff’s Ex. 53 as his proposed 30.00 foot wide westerly access route. CP 215-217; CP 234. The Clark short plat and Swiftwater Site Plan land-use decisions establish precise requirements for the layout of streets, utilities, parking, stormwater facilities, and building setbacks for construction of office and manufacturing buildings, and outdoor storage for the Clark and Folkman properties. Walch claimed that his proposed westerly Dalle Road route would not interfere with the commercial businesses, utilities, and installed improvements on the Folkman and Clark properties. RP Vol. I, pp. 24-27, 51-52, 56-59, 61-62, 76-81, 92-93, 98, 125-126, 145-147.

A review of Def.’s Exs. 103, 108, 109, 110, and 111 shows that Walch raised identical theories of implied easement, prescriptive use, and statutory necessity in opposition letters to the City that he now raises in his

³³ RP Vol. II, p. 22, ll. 2-22.

lawsuit. The City testified that it refused to deny or condition approval of the Clark/Folkman development projects to require any westerly access road to the Walch property that Walch sought in his opposition letters. Def. Ex. Exhibit 111; RP Vol. I, pp. 104-108.

Walches' westerly access claims that he now seeks under RCW 8.24.010 over the alleged "Dalle Road" extension would adversely impact installed utilities, improvements, and current land uses on the Folkman and Clark properties. City Planning Director Matt Morton testified that Walch did not appeal the final decisions or exhaust his available appellate remedies for either the Swiftwater Business Park Site Development Plan No. 2006-01 or Patricia Clark's short plat application No. 2007-004 under CEMC 17.100.130. RP Vol. I, pp. 104-106 citing CEMC 17.100.040; RP Vol. II, pp. 98. See City appeal procedures at CEMC 17.100.040C.2 and CEMC 17.100.130 for "Type II" and Type III discretionary and adjudicative decisions. App. 3. Under these circumstances, Walch was required to first exhaust his remedies where his access claims that he now litigates could have been considered in an appeal before the Cle Elum City Council. Ward v. Skagit County Commissioners, 86 Wn.App. 266, 270, 936 P.2d 42 (1997). CEMC 17.100.130.

Had administrative appeals with the City Council been rejected, Walch was required to thereafter file an appeal within 21 days of the City

Council's decisions approving the projects as required under LUPA. LUPA represents the exclusive means for reviewing final land use decisions. RCW 36.70C.030; RCW 36.70C.040; Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000). CEMC 17.100.130. Walch was free to thereafter join his prescriptive use, implied easement, and statutory easement by necessity claims along with a LUPA appeal that are allowed under RCW 36.70C.030. Having failed to exhaust his administrative remedies and file any LUPA appeal, Walch is jurisdictionally barred from collaterally attacking the final short plat and site plan decisions that in installed improvements (roads, utilities, constructed buildings, and outdoor storage uses) made to the Folkman and Clark properties. Habitat Watch v. Skagit County, 155 Wn.2d 397, 404-408, 120 P.3d 56 (2005).

The trial court found in reviewing Walches' prescriptive use claims that Walch later used the "same evidence" that he had presented earlier to the City Attorney in 2008 opposing Clark's plat. CP 988, note 5. Walch cannot now collaterally attack; or seek to alter final short plat and site plan decisions that authorized installed improvements (roads, utilities, constructed buildings, and outdoor storage uses) that now exist on the

Folkman and Clark properties.³⁴ See Habitat Watch supra at 404-408; and Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp., 115 Wn.App. 417, 421-423, 62 P.3d 912 (2003) (failure to appeal a shoreline permit estopped them from later challenging the permit where courts recognize a strong public policy supporting administrative finality in land use decisions); and Chelan County v. Nykreim, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002). Absent such appeals, this court possesses no jurisdiction to allow a collateral attack of the City's final short plat and site plan decisions through an implied easement claim brought under RCW 8.24 or Article I, Section 16 of the state Constitution.

E. Walch Misstates Cle Elum's Development Code Requirements.

Walch argues at Page 11 that the trial court's decision was based solely upon a finding that there is a "remote and speculative chance that the City of Cle Elum may not grant permits for Walch's intended use of the property." He claims that the trial court erred by not finding that development approvals were "ministerial in nature" that would be granted

³⁴Kerry Clark testified that the proposed south westerly access route would "wipe out three-quarters of that parking, and the...storm water retention area." RP Vol. II, p. 110.

Dr. Robert Folkman testified that Walches' proposed 30 foot roadway would not provide any possible benefit to his property and would reduce his net developable area from three acres to two acres. RP Vol. II, p. 80.

outright under the rationale of Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 954 P.2d 250 (1998).

These argument incorrectly state the Court's findings and conclusions, Walches' trial testimony, as well as, the City's development requirements. Walch testified that he did not want to do any studies or plans until he had legal access to their property. RP Vol. II, p. 56. The City confirmed in trial testimony from its Planning Director, Matt Morton, that Walch had filed no development applications with the City; and that there was "no guarantee" that Walches' intended use of his property would be approved by the City. RP Vol. I, pp. 78, 89-91.

"Q. Is there any guarantee, without having an actual land use application for any use...that the City can guarantee Mr. Walch would get his intended use of the property?

A. No.

The project permit application requirements for a conditional use permit are not what Mission Springs, supra at 960-61 describes as a non-discretionary ministerial "building permit" where the permit must issue as a matter of right once it complied with all zoning ordinances. The City's Planning Director, Mr. Morton, described Walches' future plans as requiring conditional use permit ("CUP") approval under CEMC Chapters 17.36 and 17.80; and CEMC 17.36.030-.040 due in part to their intensity,

compliance with performance standards, and intended use of critical areas, namely, the Dalle Ponds. RP Vol. I, pp. 90, 112-114.

A CUP is described under CEMC 17.100.030F and CEMC 17.100.040C.3 as a Type III project permit within the Industrial zone (CEMC 17.36.030) which must meet specific performance and design standards under CEMC 17.36.040-.050. Walches' project would require a public hearing and discretionary decision-making under CEMC 17.100.090 procedures with required findings of fact showing compliance with code approval sections, including a written justification approving, denying, or approving the project with conditions. App. 3. Under SEPA, the City could also require particular mitigation measures or actually deny Walches' future project that may cause unmitigated "probable significant, adverse environmental impacts." RCW 43.21C.031; RCW 43.21C.060; WAC 197-11-330 through WAC 197-11-390; WAC 197-11-660.

It follows that Walch is not entitled to issuance of City development permits as a matter of right where he has filed no applications with the City, and where the approvals he seeks are subject to a discretionary decision for consistency with the City's comprehensive plan and development regulations that could approve, deny, or approve his project with certain conditions as provided by RCW 36.70B.030(5). This court should not allow Walch to expand RCW 8.24.010 and misuse the

courts as an alternative land-use planning agency for speculative development proposals where Walch has consciously refused to apply for development approvals stating that he won't do anything regarding engineering feasibility "until I have legal access." RP Vol. II, p. 56.

F. The Trial Court Correctly Awarded Attorney Fees.

Walches' attempt to combine the trial court's award of attorney fees for the Folkman and Clark should be rejected. Whether under the exception to the segregation of fee rule in Boguch, *infra*, or the "action" provisions of RCW 8.24.030 under Beckman, *infra*, the Folkmans are entitled to their fees in defending Walches' integrated easement claims.

After separate motions and declarations were filed by Folkman and Clark,³⁵ the court in open hearing carefully and separately considered each party's attorney fee and cost claims.³⁶ The court applied the "American Rule" and *Lodestar* method in separately awarding fees to the Folkmans.³⁷ CP 439-444; CP 452-453.

³⁵ CP 252-266; CP 267-349; CP 350-363; CP 364-405; CP 436-438; CP 424-435; CP 445-454; CP 455-457; CP 458-460; CP 461-465; CP 466-469.

³⁶ See note 32 citations to record above and CP 450, note 2; CP 453 summarizes separate awards for Clarks at \$121,022.50, and Folkman at \$44,885.25.

³⁷ Leingang v. Pierce County Medical Bureau, 131 Wn.2d 133, 143, 930 P.2d 288 (1997); Bowers v. Transamerica Title Insurance Co., 100 Wn.2d 581, 675 P.2d 193 (1983).

Walch claims that his separate easement claims are “actually separate causes of action with separate requirements” that require segregation of attorney fees. Boguch v. Landover, 153 Wn.App. 595, 620-21, 224 P.3d 795 (2009) summarizes Washington law on segregation of attorney fees:

The general rule is that “[if] attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.” Mayer v. City of Seattle, 102 Wn.App. 66, 79-80, 10 P.3d 408 (2000). A trial court need not segregate time, however, “if it determines that the various claims in the litigation are ‘so related that no reasonable segregation of successful and unsuccessful claims can be made.’” Mayer, 102 Wn.App. at 80, 10 P.3d 408 [224 P.3d 808] (quoting Hume v. Am. Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994)). A “court is not required to artificially segregate time ... where the claims all relate to the same fact pattern, but allege different bases for recovery.” Ethridge v. Hwang, 105 Wn.App. 447, 461, 20 P.3d 958 (2001) (citing Blair v. Wash. State. Univ., 108 Wn.2d 558, 572, 740 P.2d 1379 (1987)). (Emphasis added).

The trial court did not abuse its discretion in determining that where Walches’ claims involved a “common core of facts and related legal theories” and that segregation of fees was not required. CP 452. The findings and conclusions fall within the segregation exception where

Walches' easement claims were alleged³⁸ and prosecuted from a common fact pattern which the court summarized in its memorandum decisions.³⁹

In this fact-driven inquiry of determining reasonable necessity,⁴⁰ Ruvalcaba, as cited by Walch, does not establish a fixed rule requiring attorney fees under RCW 8.24.030 to be segregated from other integrated easement claims. The Kitchins, who were seeking fees under RCW 8.24.030, owned an adjoining parcel. They were joined as parties by Ruvalcaba under the common grantor implied easement theory. *Id.*, at 713-14. The Ruvalcabas did not add the Kitchins as statutory condemnees with the "Day Group" of landowners for which a separate access route was sought under RCW 8.24.010. The court held that "mere joinder" of the Kitchins that involved entirely separate property and separate access route under an implied easement claim did not entitle them to fees under RCW 8.24.030:

Mere joinder of Ruvalcabas' claims against the Kitchins with the condemnation does not justify the fee award. Although our prior decision required the Ruvalcabas to resolve the reasonableness of access across the severed parcel, their claims for a common law implied easement and for private condemnation remain separate and distinct causes of action. A defendant joined in a lawsuit involving multiple causes of action may not recover fees simply

³⁸ CP 1-11.

³⁹ CP 439-443; CP 446; CP 987-994.

⁴⁰ Ruvalcaba, supra at 712.

because fees are statutorily authorized for a claim not asserted against that defendant. This is consistent with the general rule that when fees are recoverable for some, but not all, of a party's claims, a fee award must segregate the time expended on claims for which fees are authorized. The trial court erred in awarding fees. (Emphasis added).

These circumstances are not present in this case. Walches' complaint did not seek implied easement and prescriptive use claims against one defendant only. He alleged and prosecuted three claims of implied easement through unity of title, prescriptive easement, and easement by necessity equally against the Folkmans and Clarks over the same alleged routes of travel. See Walch complaint allegations at CP 1-11 and supporting exhibits at CP 56-63 where he affirmatively alleged a nexus of core facts common to all three easement theories at ¶¶ V through XI. CP 5-10. Access routes based upon these three theories in turn are illustrated in complaint exhibits H through K to support his prayer for relief for all three claims. CP 57-63.

Folkman and Clark were separately forced to defend implied easement and prescriptive use claims with common access routes before trial. These later routes were identified in the court's site visit conducted on May 4, 2011.⁴¹ Only after Folkman and Clark filed separate summary judgment motions, did Walch stipulate to dismissal of his implied

⁴¹ CP 249, note 8; RP Vol. I, pp. 1-2.

easement claims.⁴² CP 452. Trial courts may award fees even after a voluntary dismissal. Beckman v. Wilcox, 96 Wn.App. 355, 979 P.2d 890, 894 (1999). Walch focused his statutory easement by necessity claim to a single access route off Swiftwater Blvd. through the Folkman/Clark properties in a southeasterly direction in his trial brief. CP 249; CP 449, ¶16; CP 214-215; CP 244; RP Vol. I. However, even after the court's dismissal of Walches' prescriptive use claims, he continued to claim alternative routes through his closing argument. CP 213-231; CP 146-148.

In reviewing Walches' prescriptive use claim and access route, the trial court determined that "There is no evidence that a road ever existed along the alleged route identified by the plaintiffs in their complaint as an extension of Dalle Road leading from plaintiffs' property to Oakes Avenue." CP 988; App. 5; (Emphasis added). Yet, Walch continued to assert in his trial brief and in witness testimony that when he purchased his property in 2004 he "accessed" his property "over and across an existing private road" connection to "N. Oakes Avenue over the Clark and Folkman properties." CP 126; CP 137; CP 214-215; RP Vol. I, pps. 16-18, 29. Walches' witnesses testified that they had traveled to the Dalle Ponds over an existing southwesterly road in the 1960's and 70's. RP Vol. I,

⁴² CP 2-3; CP 512-517; CP 585-672; CP 673-675.

pps. 61-66. Walch claimed that this route would “benefit” the Folkman and Clark properties. CP 214-215; CP 244.

Walch used these facts to support his argument that even permissive use of roadway corridors that do not create vested rights, “...do not preclude the establishment of reasonable necessity” under RCW 8.24.010. CP 134. These arguments and facts, that the trial court found to be unsupported, were presented by plaintiff Walch and in numerous witness declarations and later testimony, including: Mike Walch, Al K. Lang, Steve Locati, Chuck Cruise, Royce Hatley, Jim Hawkins, Lester E. Hay, Paul & Rosemary Valentine, Floyd J. Rogalski, Ray Rogalski, and attorney Chris Montgomery. CP 995-1002; and CP 208-209.

Walch thereafter used the outcome of his implied easement and prescriptive use claims to meet his burden of showing that he possessed no “legal” right of access up to the time of trial. CP 223- 226. Walch himself argued the existence of a common nexus of core facts stating that he was required to show necessity by eliminating access by other legal means:

“Roberts v. Smith, 41 Wn.App. 861, 707 P.2d 143 (1985) (the condemnor's burden to prove reasonable necessity for ingress and egress includes the burden to disprove the existence of an implied easement of necessity where there is some credible evidence that such an easement exists). Plaintiffs Walch have met this burden by demonstrating to the Court that there has never been a common grantor which fact Clark and Folkman have stipulated is true.” CP 225.

Under these circumstances, it was not an abuse of discretion for the trial court to reasonably determine in awarding fees that: “Plaintiffs needed to demonstrate they had no other practical way of accessing their property,” and that all “...three theories in the plaintiffs’ causes of action were all interrelated and all arose from the same set of facts.” CP 443.

Folkman and Clark showed that they were forced to expend considerable attorney time in costly discovery, witness interviews, and briefing to respond to these linked claims involving the factual history of the use and title history of the parcels affected by Walches’ overlapping easement access route claims up to the day of trial. Through agreement of defense counsel, the Clarks largely responded to Walches’ prescriptive use claims. CP 364, ll. 23-24. However, both the Folkmans and Clarks independently examined and responded to Walches’ future plan of development, the purported history of access, and title insurance issues that the trial court ultimately rejected.

The Folkmans’ defense included the examination and assessment of the use and development of all affected parcels that Walch integrated into his claims of prior or permissive use routes, including the westerly Dalle Road access route. The Folkmans incurred over 110.55 hours in the defense of Walches’ RCW 8.24.010 statutory necessity claims together with 46.80 hours in attorney fees for defending Walches’ unity of title

implied easement claim and 7.40 hours for related to Walches' prescriptive use claims. Had Walch merely alleged that he could not acquire an implied easement through unity of title or prescriptive use, the Folkmans (and Clarks) could have avoided these fees in defending these baseless claims that Walch linked to perfecting his RCW 8.24.010 claim. CP 368, ll. 3-4; CP 365.

The Folkmans and Clarks are entitled to their reasonable fees under RCW 8.24.030 in defending these linked claims that were dependent upon a common nexus of core facts that Walch aggressively continued to assert throughout these proceedings. CP 350-363. Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 540, 151 P.3d 976 (2007) weighed "equitable factors" in awarding fees in easement by necessity claim, noting that: "...the court's focus should be to determine who was responsible for the litigation, and which party was responsible for the resulting costs of litigating the claimed alternative feasible access routes." (Emphasis added). Trial courts also have discretion to determine what amount, if any, condemnees receive in attorney fees to "balance the equities." Noble v. Safe Harbor Trust supra at 11.

Beckman v. Wilcox, supra at 897, citing Shields v. Garrison, 91 Wn.App. 381, 388, 967 P.2d 1266 (1998), holds that an attorney fee award

under RCW 8.24.030⁴³“is a matter of discretion with the trial court that will not be disturbed absent a clear showing of an abuse of that discretion.” The court correctly noted that the use of the term “any action” “...indicates that the Legislature intended broad application of RCW 8.24.030” and that even “abandoned claims,” such as Walches’ dismissed implied easement claims and alternate condemnation routes, could not escape this obligation. *Id.*, at 896; Beckman, *supra* at 894. The trial court’s conclusions at CP 494 that Walches’ three easement claims were “all interrelated and arose from a common core of facts and related legal theories” are supported by these record facts and findings. CP 446 incorporating the May 24, 2011 Memorandum Decision; CP 247-249; CP 440-441; CP 443; and CP 453, ¶10.

Consistent with these case law decisions, Folkman outlined numerous equitable “factors” for awarding attorney fees in his attorney memorandum that are supported by trial exhibits at CP 350-359.⁴⁴

⁴³ RCW 8.24.030 provides in part: “In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys’ fees and expert witness costs may be allowed by the court to reimburse the condemnee.” (Emphasis added).

⁴⁴ These factors include: (1) all Walch claims were dismissed; (2) Walch could not meet his burden of proof; (3) Walch sued Folkman making no effort to contact him; (4) Walch created his own problems by not appealing City land-use decisions for the Folkman and Clark properties; (5) Walch waited until after Folkman and Clark built out their properties to file this lawsuit; (6) Walch made no attempt to jointly develop his property with Folkman and Clark; (7) Walch tried to leverage access concessions

Attorney Williamson's Declaration provided detailed documentation of work performed in worksheets, separated attorney time for each of Walches' three easement claims, and explained his fee rate of \$265.00 per hour⁴⁵ as required under Bowers supra at 597; and Scott Fetzer v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993) as cited in Beckman v. Wilcox 96 Wn.App. 355, 979 P.2d 890, 895-97 (1999). CP 364-404. The trial court denied Folkman's costs but awarded \$43,885.25 based upon its findings and conclusions that all of Walches' claims were interrelated and arose from the same set of facts. CP 443; CP 458-459; CP 466-469.

The trial court's determination that Folkman's fees were reasonable in hourly amount and scope of work at CP 440-443 should not be disturbed on appeal where the trial court following hearing by the parties did not abuse its discretion under Beckman supra at 895.

from Folkman and Clark during earlier project reviews by the City; (8) Walch never filed development applications with the City to see if his access routes and RSE project were even feasible; (9) Folkman and Clark incurred substantial investigative fees and costs to ferret out and explain these circumstances; (10) highly technical local permitting procedures and requirements had to be explained; (11) Walches' claims and future development plans were tied to a single piece of specialized "lowboy" equipment; (12) Walch abandoned two plausible access routes immediately before trial that Folkman and Clark still had to defend up to the time of trial; (13) Walch tried to use easement by necessity claims as a substitute for land-use applications with the City; (18) Walch withdrew its implied easement by common grantor claims only after Folkman and Clark filed motions to dismiss this claim.

⁴⁵ Respondent Folkman's fees were separated into the following categories: (1) implied easement [46.80 hrs] at \$12,402.00; (2) prescriptive use claims [7.40 hrs] at \$1,987.50; and (3) RCW Chapter 8.24 claims [110.55 hrs] at \$29,295.75. CP 364-404.

G. The Folkmans Are Entitled to Fees at Trial and on Appeal.

Walch has misrepresented the trial court's fee award. In affirming the trial court's award, Respondent Folkmans seek additional attorney fees and costs in defending this appeal pursuant to RAP 18.1. See Beckman supra at 897. Legal fees awarded to the Folkmans⁴⁶ were not combined with the Clarks for a determination of reasonableness for a total award.⁴⁷ The Folkmans' fees were not submitted to the trial court in such fashion and should be rejected. The trial court denied Folkmans' costs as unsupported while it separately awarded the Clarks their costs. CP 453.

As noted above, all three easement claims advanced by Walch were interrelated and arose from the same set of facts that were inherently part of Walches' burden of proof for easement by necessity claims under RCW 8.24.010 that Walch claimed separately against each party defendant. Walch was represented by two attorneys throughout these proceedings. The Folkmans defense focused on Walches' implied easement and RCW 8.24.010 claims in an agreement with the Clarks' attorney to limit duplication of effort. CP 364. The Folkmans' fee segregation was provided to the trial court only for purposes of an

⁴⁶ CP 467.

⁴⁷ CP 449-453.

alternate theory of attorney fee recovery under CR 11 and RCW 4.84.185. This segregation did not limit the Folkmans' entitlement to all fees under RCW 8.24.030. CP 350-363; CP 450.

Walch used the absence of an implied easement through unity of title as a predicate theory to support his condemnation claim. CP 441. See Walches' Opposing Memorandum at CP 134, ll. 3-24, where Walch connects the absence of legal access to his inability to prove his right to an implied or prescriptive easement to support his RCW 8.24.010 claim to a route over a Dalle Road. Walch continued to argue and present evidence that this route "was previously in existence, and has been in existence for many years" (CP 137) as "bare flat land" despite the trial court's earlier finding that there was no such evidence. CP 988.

Only after Folkman and Clark filed motions for summary judgment, incurring substantial legal fees, did Walch determine from his own title expert that is implied easement through unity of title were unsupported. CP 149. Until the stipulated order of dismissal was entered on Jan. 14, 2011 (CP 542, ¶7; RP Vol. I, p. 3.), the Folkmans were presented with no choice other than to defend against Walches' baseless implied easement claim and incur \$12,402.00 in fees. CP 365. The Folkmans' awarded fees also included \$29,295.75 in fees successfully defending Walches' RCW 8.24.010 claims showing that Walch could not

meet the reasonable necessity test of Brown v. McAnally, supra. CP 365. Whether under the Noble v. Safe Harbor Trust “balance the equities;” or Chuong Van Pham “equitable factors” criteria, the party “responsible” for resulting costs of litigation for access routes was Walch. That he continued prosecution of all three easement was his trial strategy, not the Folkmans or Clarks.

Walch alone is “responsible” for his costly and risky litigation strategy in presenting two baseless implied and prescriptive easement claims. Nothing prevented Walch from affirmatively pleading that he could not otherwise obtain legal access for his lowboy trailers over his preferred route through either theory. He refused this judicial economy thereby increasing the costs of litigation to the Folkmans and Clarks. Until Walch filed his trial brief on May 9, 2011, only one (1) day before trial,⁴⁸ Walch continued to claim two additional westerly access route alternatives that he knew or should have known were not feasible. As noted in Noble v. Safe Harbor, 167 Wn.2d 11, 23, 216 P.3d 1007 (2009):

Where a condemnee argues that a more feasible alternative route exists, it is still incumbent upon the condemnor to demonstrate the selected route is more equitable, and the court must then weigh the benefits and burdens of each alternative route to arrive at an equitable solution. *Id.* at 870, 169 P.3d 45 (citing Sorenson v. Czinger, 70 Wn.App. 270, 276 n. 2, 852 P.2d 1124 (1993)). But

⁴⁸ CP 213-231.

where the court later determines the alternative route proposed by the condemnee was clearly unfeasible and implausible, the judge has discretion under the statute to award attorney fees. While the burden remains on the condemnor to address all alternative routes raised by the original condemnee, vesting discretion in the trial court to later award fees helps ensure that uncredible alternatives are not presented in an effort to increase the costs of litigation. (Emphasis added).

The trial court “who watched this case unfold and who was in the best position to determine which hours should be included in the [attorney fee] calculation” to “balance the equities”⁴⁹ commented on Walches’ trial tactics. Judge Cooper noted that Walch had “foisted” all three claims upon Folkman and Clark that they were forced to defend at considerable cost to both parties.⁵⁰ CP 443; CP 350-CP 404; CP 252-349. The trial court did not abuse its discretion under Schmidt v. Cornerstone, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990) in not segregating fees.

V. CONCLUSION

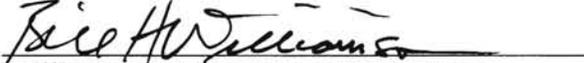
Walches’ appeal should be denied. The court should affirm the trial court’s award of Folkman’s and Clark’s attorney fees, and award the Folkmans continuing fees and costs in defense of Walches’ appeal.

⁴⁹ Noble v. Safe Harbor Family Preservation Trust, 141 Wn.App. 168, 175-76, 169 P.3d 45 (2007).

⁵⁰ Walch admitted that he filed his lawsuit without ever having contacted the Folkmans, making no attempt to acquire an easement over the Folkman property for his proposed westerly Dalle Road route. RP Vol. II, p. 33.

RESPECTFULLY SUBMITTED this 6th day of July 2012.

WILLIAMSON LAW OFFICE


William H. Williamson, WSBA 4304
Attorney for Respondent Folkmans

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 6th, 2012 I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of Respondent Folkmans' Opening Brief addressed to:

The Court of Appeals
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DATED this 6th day of July 2012, at Seattle, Washington.


Bill H. Williamson
Attorney for Respondent Folkmans

VII. APPENDIX

1. Trial Court's Memorandum Decision – May 24, 2011 (CP 246-251)
2. Oct. 6, 2008 Opposition Letter from Walch to City of Cle Elum (Def. Ex. 103).
3. Cle Elum Municipal Code provisions.
4. Excerpts of Walches' Title Insurance Policy (CP 21; CP 172).
5. Trial Court's Memorandum Decision – Feb. 2, 2011.

APPENDIX 1

WALCH V. CLARK – NO. 10-2-00353-6

FILED

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KITTITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

MIKE WALCH and MARCIA WALCH,)
husband and wife,)

Plaintiffs,)

vs.)

KERRY A. CLARK and PATRICIA)
L. CLARK, husband and wife,)
W. L. CLARK FAMILY, LLC, a)
Washington limited liability company,)
ROBERT C. FOLKMAN, et ux.,)

Defendants.)

No. 10-2-00353-6

MEMORANDUM DECISION

INTRODUCTION

Trial of the above captioned matter took place before this court on May 10 and 11, 2011. The plaintiffs were represented by attorneys Chris A. Montgomery and Richard T. Cole. The defendants Clark and Clark, LLC were represented by attorney Doug Nicholson and the defendants Folkman were represented by attorney Bill Williamson. The court heard the testimony of plaintiff Mike Walch, Super Load driving expert Royce Hatley, Cle Elum City Administrator Matt Morton, City of Cle Elum Public Works Director Jim Leonard, Joe Kretschman, Robert Folkman, Kerry Clark, and Ken Marson. The court also received into evidence Exhibits 1 through 18, 20 through 40, 42

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through 55, 57 through 59, 101 through 114 and 116 through 120. At the conclusion of the plaintiffs' case both Mr. Nicholson and Mr. Williamson made motions to dismiss on behalf of their clients. The court took their arguments under advisement, reserved ruling thereon and required that the defendants put on their cases.¹ At the conclusion of the trial the court heard the closing arguments of the parties and renewed motions by the defendants to dismiss the claims. The court thereafter took the matter under advisement to review all of the exhibits and consider the arguments as well as the testimony of the witnesses. The court has finished that process now and herebelow issues its memorandum decision.

DISCUSSION

1. Facts. The plaintiffs purchased real property situated in Cle Elum Washington in May, 2004². Access to plaintiffs' property is outlined in the real estate contract and is by way of an existing easement over the Dalle property to the east of the plaintiffs' property, east over and across a Burlington Northern Santa Fe Railroad corridor and then north over and across the Burlington Northern Santa Fe Railroad crossings crossing to Owens Road. The City of Cle Elum owns the public right of way of Owens Road from North First Street in the City of Cle Elum to the north edge of the Burlington Northern Santa Fe right of way. The City of Cle Elum also has a private agreement with the Owens family to use Owens Road south of the Burlington Northern Santa Fe railroad crossing to the City of Cle Elum sewage treatment plant. Peninsula Trucking also uses the same Owens Road to access its facilities to the south on Owens Road as do several private residences. None of these parties has been issued permits from Burlington Northern Santa Fe to cross the railroad right of way.

The plaintiffs own Rainier Skyline Excavators, Inc. (RSE) and intend to locate that business on their Cle Elum property. RSE designs and manufactures the world's largest portable hydraulic track drive skyline excavators, buckets, teeth and accessory

¹ See CR 41(b)(3).

² See Exhibit I.

equipment.³ The Walches intend to use their Cle Elum property to demonstrate their portable skyline excavator in conjunction with the Dalle pond on their property and either manufacture or assemble several components of the skyline excavator on their property. Many components of the portable skyline excavator are transported by long and extra long lowboy trailers, called super loads. These super loads can be up to 165 feet in length and carry several hundred thousand pounds.

The defendants own property to the west of the Walch property situated in the Swiftwater Business Park⁴. The Clarks and the Folkmans have spent the last five years developing the Swiftwater Business Park, improving the building now housing Marson & Marson Lumber, developing and housing a glass company and constructing a two story office building which houses the Kubota Tractor dealership and other tenants. Clark, LLC has spent time and money to short plat its property immediately north of Clarks, which it purchased from Burlington Northern Santa Fe.

The property of all parties is presently zoned by the City of Cle Elum industrial as defined by Chapter 17.36 of the Cle Elum Municipal Code⁵. According to Matt Morton, Cle Elum city administrator, no land use applications have ever been submitted by the plaintiffs for the intended use by their company RSE on the property they now own. Moreover, while the intended uses by the plaintiffs of their property may be permitted outright in the industrial zone if they are developed and used in the manner that complies with the performance standards and aesthetics objectives of Chapter 17.36 of Cle Elum city code, Mr. Morton also pointed out that there is no guarantee of granting any application until it was submitted and reviewed and reconciled with the City of Cle Elum Critical Areas Ordinance,⁶ especially because of the Dalle ponds situated on the Walch property, which Walch has described as the Dalle wildlife and fish propagation ponds.⁷

The Walches seek a 30 foot easement by necessity, claiming their property is "landlocked" because they have no legal right to cross the railroad right of way over

³ See Exhibit 40.

⁴ See Exhibits 2 through 8.

⁵ See Exhibit 106.

⁶ See Exhibit 107.

⁷ See Exhibit 109.

Owens Road and the super load lowboys needed to transport their equipment cannot traverse the railroad crossing over Owens Road or make an immediate right turn down the railroad corridor.⁸ At trial the plaintiffs claimed that the easement by necessity they sought should be off of Swiftwater Boulevard through the Folkman/Clark properties in a south easterly direction along the southern edges of the defendants' properties immediately inside the DOT right of way fence to meet the plaintiffs' property at the southwest corner thereof.⁹

2. Law. The private condemnation statute, RCW 8.24.010 et seq. under which this action is brought by the plaintiffs "is not favored in law and thus must be construed strictly." *Brown v. McAnally*, 97 Wn.2d 360, 370 (1992). In a condemnation proceeding for a private way of necessity the condemnor, here Walch, has the burden of proving the reasonable necessity for a private way of necessity including the absence of alternatives. *Noble v. Safe Harbor Trust*, 167 Wn.2d 11, 17; *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 234 (1919). The need for a private way of necessity need not be absolute; instead the way must be reasonably necessary under the facts of the case, as distinguished from being merely convenient or advantageous. *Brown, supra*; *Ruvalcada v. Kwang Ho Baek*, 159 Wn.App. 702, 709 (2011).

The policy on which the doctrine of easement by necessity is based is that a landlocked land may not be rendered useless in perpetuity, that the "landlocked" landowner is entitled to the beneficial uses of the land. The landlocked owner is, therefore, given the right to condemn a private way of necessity to allow ingress and egress to the land to enjoy its beneficial use. *Hellberg v. Coffin Sheep Company*, 66 Wn.2d 664, 666-667 (1965); *Kennedy v. Martin*, 115 Wn.App. 866, 868 (2003).

What constitutes a reasonable necessity is a factual determination. As stated in *Beeson v. Phillips*, 41 Wn.App. 183 (1985):

"The core of the public policy behind the statute's grant of condemnatory authority lies in the admonition that the condemnor's property must be so situated that in order for him to obtain 'its proper use and enjoyment', he must of

⁸ Two separate problems: one, not being able to cross the railroad crossing because of the low center of the super load lowboys creating risk of high centering on the railroad tracks and, secondly, the 165 foot load making a right turn within 30 feet of the crossing on to the railroad corridor passage. On May 4, 2011 the court, with each of the attorneys, took a view of the property at both the west and east ends, walked the property, drove on the property and witnesses a demonstration of a smaller lowboy high centering on the railroad tracks in question.

⁹ See Exhibit 53.

necessity obtain use of another's property. In Washington, that necessity need not be absolute; it must, however, be reasonably necessary as opposed to merely convenient or advantageous."

Beeson, supra at 186-187 quoting *Brown v. McAnally, supra*.

3. Decision. Plaintiffs contend their property is landlocked because they cannot access their property for their intended purpose; that is to place their RSE, Inc. business thereon. More specifically, plaintiffs contend they cannot access their property for that intended use because they do not have legal, insurable access over the railroad right of way either at the crossing or along the railroad corridor to their granted easement through the Dalle property. And, as a practical matter, they cannot pull their super load lowboys over the railroad tracks and make the right turn because the lowboys would get high centered, and even if the lowboys could cross the tracks, they could not (because of their length) make the hard right 90 degree turn immediately after the railroad tracks on to the railroad corridor to access the granted easement. The defendants counter the plaintiffs' argument by contending the plaintiffs' proposed use of the property is purely speculative at this point; that the Walches have never made application for development of the property for the intended use and that there is no guarantee from the City of Cle Elum that Walches would be permitted to even situate their RSE business on their property, given the complexities of the industrial zone and Critical Areas Ordinances of the City of Cle Elum. In other words, there is no guarantee that the plaintiffs' intended use of their property would be a proper use and enjoyment of the property.

The plaintiffs have access to the property over the railroad crossing through the railroad corridor to their granted easement. The access may not be insurable because of the lack of permits from the railroad but no one has ever denied the plaintiffs or their predecessors' use of the railroad crossing and/or corridor to the granted easement and hence to the plaintiffs' property in question. Until such access is in fact denied or withdrawn the plaintiffs may utilize their property for uses authorized by the industrial zone of the City of Cle Elum and for which they can make use and enjoyment of their property. Taking by necessity is not extended to those necessities that may be created

by the contemplation of a future real estate subdivision development. *Brown, supra* at 370.

The court finds the plaintiffs have not established a reasonable necessity for a private way of necessity because their property is not landlocked and because they have no guarantee that a future use of their property would include situating the RSE, Inc. manufacturing business on the property.

Based on the foregoing, the court concludes the defendants are entitled to a judgment of dismissal¹⁰.

CONCLUSION

Based on foregoing, please prepare findings of fact, conclusions of law and a judgment of dismissal. Please also be prepared at presentation of those documents to argue on the award of attorney's fees pursuant to RCW 8.24.030.

DATED: May 24, 2011


JUDGE

¹⁰ Pursuant to CR 41(b)(3) the court declined to rule on the defendants' motions at the end of the plaintiffs' case. The court declined to render any judgment until after the close of all of the evidence and will base its decision upon the completed case. Moreover, because the court is ruling on the merits of the case the court chooses not to rule on the defendant Folkman's motion to dismiss on jurisdictional grounds based on the alleged failure of the plaintiffs to properly pursue its administrative remedies and remedies under the Land Use Petition Act (LUPA).

APPENDIX 2

WALCH V. CLARK – NO. 10-2-00353-6

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October 6, 2008

FAXED TO (509) 674-4097

Matthew Morton
City Planning Department
City of Cle Elum
119 W. First Street
Cle Elum, Washington 98922

Re: Clark Short Plat No. SP 2007-004

Dear Mr. Morton:

Thank you for answering my Public Records Request. I have reviewed Ms. Clark's most recent response letter and found it interesting that she cites no legal authority or other supporting documentation for her position that the traditional access to the BNSF and Walch properties was anywhere other than right through the proposed Short Plat No. SP 2007-004.

The subject site for the proposed subdivision is assessed under Tax Parcel No. 044-0003 and is approximately 5.05 acres, with an Application for subdivision to nine (9) parcels, of approximately .56 acres each. The hereinabove described Tax Parcel No. 044-0003 was a portion of real property owned by the Burlington Northern Railway Company and Santa Fe Railway Company which was conveyed to the Clarks.

The real property being subdivided is the real property that was deeded to the current owner of record from the Burlington Northern Railway Company and Santa Fe Railway Company, as Grantors; and William L. Clark and Patricia Lane Clark, husband and wife, as Grantees, recorded under Kittitas County Auditor's Recording No. 200412020030. *Said Quitclaim Deed included a reservation unto the Burlington Northern Railway Company and the Santa Fe Railway Company, their licensees, permittees and other third parties, in and to all existing driveways, roads, utilities, fiber optic lines, tracks, wires and easements of any kind whatsoever on the property and whether or not of public record.* Furthermore, the Burlington Northern Railway Company (BNSF) still owns real property lying North, West and East of the hereinabove described Tax Parcel No. 044-0003 which it has offered to sell to the Walches. The hereinabove described reservation extends beyond the boundaries of said Tax Parcel, and provides access to and from real property lying to the West, East and Southerly of the hereinabove described Tax Parcel No. 044-0003 owned by Burlington Northern Railway Company and the Walches.

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Such lands as BNSF sold to Clarks and which BNSF seeks to sell to the Walches are subject to the law of the State of Washington pertaining to prescriptive easements by adverse possession. See Northern Pacific Railway Company v. The City of Spokane, 45 Wash. 299, 88 P. 135 (1907). The Walches and BNSF have an easement implied from prior use. The principal behind the creation of easements implied from prior use is that the conveyance of a dominant estate should be accompanied by the advantages and burdens that were appurtenant to the estate prior to separation of the title. Roe v. Walsh, 76 Wash, 148, 135 P. 1031 (1913). Conveyance of an estate should be accompanied by everything necessary to its reasonable enjoyment, or at least those things that the grantor, during the time it was in his or her possession, used for his or her benefit. Bushy v. Weldon, 30 Wn.2d 266, 191 P.2d 302 (1948). The BNSF Quitclaim Deed Reservation recited above clearly preserves and acknowledges this doctrine in Washington State Law in favor of its own property that it seeks to sell to the Walches, and the real property of the Walches.

It is well established that such an easement may be acquired by clear proof that the land was used for ten (10) years in a manner open, notorious, continuous, and adverse to the owner. Adams v. Skagit County, 18 Wn. App. 146, 150 (1977), review denied, 92 Wn.2d 1007 (1978); see also Dunbar v. Heinrich, 95 Wn.2d 20, 22, 622 P.2d 812 (1980). It is the objective acts of the claimant, rather than subjective intent, that determines the hostility or adversity element, and open and notorious use need only be the character that a true owner would assert in view of the property's nature and location. Chaplin v. Sanders, 100 Wn.2d 853, 676 P.2d 431 (1984).

A claimant establishes a prescriptive easement upon proof of: (1) use adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for the entire prescriptive period; and (3) knowledge of such use at a time when the owner was able to assert and enforce his or her rights. Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 694, 709 P.2d 782 (1985); Crescent Harbor Water Co. v. Lyseng, 51 Wn. App. 337, 753 P.2d 555 (1988). Claimants may tack the adverse use of property by their predecessors in interest. Where there is privity between the successive occupants holding continuously and adversely to the true title holder, the successive periods of use may be tacked to each other to compute the ten (10) year limitation period. Roy v. Cunningham, 46 Wn. App. 409, 731 P.2d 526, 529 (1986).

The historical use of the existing roadway described in the Quitclaim Deed recorded under Kittitas County Recording No. 200412020030 dates back prior to June of 1979. I have previously provided copies of three (3) aerial photographs taken of the Walchs' real property and a portion of the real property subject to the Application for Short Plat under Short Plat No. SP 2007-004 showing the location of the existing roadway. It appears to be along the North line of the proposed Short Plat lots. I have had an opportunity to sit down with local resident Ron A. Dalle, whose family's homestead is just East of the Walch property. Mr. Dalle's history predates Interstate 90 through Cle Elum. He reviewed the aerial photographs and was able to relate to me with great specificity his and his family's use of the road shown in the aerial photographs as going through the proposed Short Plat of the Clarks.

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Mr. Ron A. Dalle was born and raised in Cle Elum on the Dalle homestead which is still there today. He lived on the family homestead until he was fifteen (15) years old, then moved into town proper. His family continues to this date to own the original homestead. The Dalle family grew hay and alfalfa until the freeway came to town. The farming equipment was brought into the Dalle property over and across the road shown on the aerial photographs as going through the proposed Short Plat of Clark.

The ponds that exist on the Dalle and Walch properties were actually created from the excavation that occurred during the construction of Interstate 90. From the early 1960's until 1988 Mr. Dalle was in the excavation business and used the road shown on the aerial photographs through the proposed Clark Short Plat extensively to bring his construction equipment to and from the Dalle property. The road was graded three (3) to four (4) time per year, and more if necessary due to high traffic volumes of construction equipment. The road was always well defined until the recent reconfiguration of the property by the Clark family. Mr. Dalle may be reached at (509) 899-2375, or 504 Columbia Avenue, P.O. Box 186, Cle Elum, Washington 98922 if you would like to independently verify any of this information. The Walch property is a portion of the original Dalle ownership.

The Walches and their predecessors the Dalle family utilized the roadway from their properties through the BNSF and real properties subject to the Application for Short Plat under short Plat No. SP 2007-004 to Oak Street since at least the early 1960's. The alternative route for Mr. Walch to a public road, is over a railroad crossing that is unsuitable for commercial lowboy traffic, due to the danger of becoming high centered on said railroad crossing.

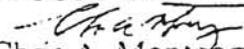
Any new roadway that may be developed should also be bound by the terms set forth in said Quitclaim Deed, and extend to property owners beyond the boundaries of the hereinabove described Tax Parcel No. 044-0003 and continue to provide access to the real properties lying to the East, West and Southerly of said Tax Parcel.

Based upon the map provided with the Application for Short Plat under Clark Short Plat No. SP 2007-004, it appears that the proposed access would terminate short of the Easterly boundary of the real property being subdivided. This is unacceptable and contrary to the access reservation and legal authority quoted above! Apparently, the proposed access is over the 60' easement on the West, then along a 25' easement to be granted by the Clarks to the Easternmost Short Plat Lot. The Walches do not have an objection to the relocation of their access road, but it must not be too narrow, or windy and must be sufficient for commercial lowboy traffic. If the re-routing goes off the former Burlington Northern Railway Company property, then a separate easement must be provided by the Clarks.

Absent a roadway that would preserve and provide access to the adjoining real properties, my clients, Mr. and Mrs. Walch oppose the Short Plat No. 2007-004, as the current application is of record.

Very truly yours,

MONTGOMERY LAW FIRM


By: Chris A. Montgomery

CAM/cm/#5713
cc: Mike and Marcia Walch

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APPENDIX 3

WALCH V. CLARK – NO. 10-2-00353-6

17.34.090 Lot coverage.

The lot area covered by structures shall not exceed forty percent of the lot area.
(Ord. 1163 § 1 (part), 2001)

17.34.100 Landscaping and screening.

A. Loading docks, service bays and associated maneuvering areas shall be located outside the public right-of-way and shall be landscaped as necessary to screen said loading areas from any adjacent public right-of-way.

B. A minimum fifteen foot landscaped strip shall be provided adjacent to all street rights-of-way.

C. A minimum twenty-five foot fenced landscape strip shall be provided adjacent to any residentially zoned property.

D. Off-street parking areas shall be located to the side or in the rear of buildings and shall be screened from adjacent public rights-of-way and adjacent residential areas by sight-obscuring landscaping or a fence. Landscaping requirements within the parking area are described in Section 17.64.040.

E. All required yards, parking areas, storage areas, operations yards, and other open uses on the site shall be maintained in a neat and orderly manner appropriate for the district at all times.
(Ord. 1163 § 1 (part), 2001)

17.34.110 Design guidelines.

(To be developed)

Chapter 17.36

I INDUSTRIAL DISTRICT

Sections:

17.36.010 Purpose and intent.

17.36.020 Permitted uses.

17.36.030 Conditional uses.

17.36.040 Performance standards.

17.36.050 Design standards.

17.36.010 Purpose and intent.

This district is intended to accommodate a broad range of industrial activities and to protect such uses and districts from encroachment by conflicting land uses.
(Ord. 1163 § 1 (part), 2001)

17.36.020 Permitted uses.

The following uses and their customary accessory uses are permitted outright in the industrial district

when they are developed and used in a manner that complies with the performance standards and aesthetic objectives of this chapter:

- A. Manufacturing, rebuilding and/or repairing nonmetal or mineral products;
- B. Warehouse establishment;
- C. Wholesale establishment;
- D. Accessory retail uses, where products manufactured on site are sold to the general public;
- E. Office buildings related to permitted uses conducted on the same premises or within the industrial district;
- F. Food and dry goods processing, packaging and distribution operations;
- G. Welding and metal fabrication shops;
- H. Vehicle and machinery repair and storage;
- I. Transportation terminals;
- J. Contractor's offices, shops and storage yards;
- K. Scientific research, testing, developmental and experimental laboratories;
- L. Public utility and governmental structures and/or uses;
- M. Agricultural use of the land;
- N. Veterinary clinic within the enclosed structure;
- O. Wireless communication facilities;
- P. Retail sales involving equipment or vehicles normally stored or displayed outside and used for manufacturing, farming or construction.

(Ord. 1191, § 1, 2003; Ord. 1163 § 1 (part), 2001)

17.36.030 Conditional uses.

Because of considerations of odor, dust, smoke, noise, fumes, vibration or hazard, the following uses shall not be permitted in the industrial district unless a conditional use permit authorizing such use has been granted by the city council. The following purposes and uses of buildings shall be allowed only upon approval of a conditional use permit in accordance with the provisions of Chapter 17.80:

- A. Chemical manufacture, storage and/or packaging;

- B. Asphalt manufacture, mixing or refining;
 - C. Automobile dismantling, wrecking or junkyards;
 - D. Cement, lime, gypsum or plaster of paris manufacture;
 - E. Drop forge industries;
 - F. Reduction or disposal of garbage, offal or similar refuse;
 - G. Rubber reclaiming;
 - H. Feed yards, livestock sales yards or slaughterhouses;
 - I. Smelting, reduction or refining of metallic ores;
 - J. Tanneries;
 - K. Wineries;
 - L. Manufacturing of industrial or household adhesives, glues, cements or component parts thereof, from vegetable, animal or synthetic plastic materials;
 - M. Waste (refuse) recycling and processing.
- (Ord. 1163 § 1 (part), 2001)

17.36.040 Performance standards.

All permitted, conditional and accessory uses in the industrial zone shall comply with the following performance standards:

- A. All uses shall be subject to strict compliance with Washington state standards for noise, odor, air quality, smoke and hazardous materials.
- B. No person shall operate or cause to be operated any source of sound in such a manner as to create a sound level that exceeds sixty dBA in any residential district. Specifically exempted from this requirement are emergency signaling devices, operating motor vehicles and lawnmowers, railroads, or aircraft.
- C. Continuous frequent or repetitive vibrations that can be detected by a person of normal sensitivities at the property line shall not be produced. Vibrations from temporary construction activities, motor vehicles and vibrations occurring on an infrequent basis lasting less than five minutes are exempt.
- D. Continuous, frequent or repetitive odors that exceed centimeter No. zero may not be produced.

Odors lasting less than thirty minutes per day are exempt. The odor threshold is the point at which an odor may just be detected. The centimeter reading is based on the number of clear air dilutions required to reduce the odorous air to the threshold level. Centimeter No. zero is one to two dilutions of clear air.

- E. All lighting shall be arranged so as not to produce glare on public roadways and/or neighboring non-industrial properties. Welding, acetylene torch or other similar processes shall be performed inside an enclosed structure.
- F. All vehicle travelways, parking spaces and storage areas shall be paved with Portland cement concrete, asphalt cement pavement to eliminate dust as a result of wind or usage. Open areas shall be landscaped and/or maintained to minimize dust. Sites with its only access from an unpaved city street may provide alternative dust control measures in place of the required pavement.
- G. All uses shall be subject to the collection and suitable disposal of on-site generated water runoff. A building permit and a drainage plan shall be submitted to the planning director for approval. The collection system shall be installed and functional prior to the issuance of a final building permit.
- H. All open storage shall be enclosed by a six-foot-high security fence and/or an attractive hedge six feet in height so as to provide a fully site obscuring buffer when adjacent to public roads, and rights-of-way and any non-industrial district.

(Ord. 1163 § 1 (part), 2001)

17.36.050 Design standards.

A. The following setbacks from property lines and screening standards shall apply to all development in the industrial district:

- 1. Building, parking spaces and storage areas shall be located no closer than ten feet from property lines.
- 2. Building, parking spaces and storage areas abutting a residential zoning district shall be located no closer than twenty feet from property lines.

B. The minimum lot size for new lots is twenty thousand square feet.

C. No building hereafter erected or structurally altered within or moved into the district shall exceed three stories or thirty-six feet in height.

D. A minimum of ten percent of the site shall be landscaped.

(Ord. 1163 § 1 (part), 2001)

Chapter 17.45

- G. Roofs shall be designed such that snow from the roof will not be deposited on adjacent public or private properties.
(Ord. 1163 § 1 (part), 2001)

Chapter 17.80

CONDITIONAL USE PERMITS

Sections:

- 17.80.010 Purpose.**
- 17.80.020 Applicability.**
- 17.80.030 Procedure.**
- 17.80.040 Submittal requirements.**
- 17.80.050 Criteria for granting conditional use permits.**
- 17.80.060 Special conditions.**
- 17.80.070 Revocation of a conditional use permit.**
- 17.80.080 Change, enlargement or alterations.**
- 17.80.090 Permit approvals–Validity.**

17.80.010 Purpose.

The purpose of this chapter is to provide procedures and criteria for conditional uses which, because of their unusual size, special requirements, potential safety hazards, and/or other potential detrimental effects on surrounding properties, are allowed in a specific zone at a specific location only after review by the city to determine if the use is compatible with other uses in the same vicinity and zone. The granting of a conditional use permit may include the imposition of specific development and performance standards beyond that required in the underlying zoning to assure compatibility. The conditional use process is not intended to allow for uses that are not specifically listed in the zoning ordinance to be permitted.

(Ord. 1163 § 1 (part), 2001)

17.80.020 Applicability.

The provisions of this chapter shall apply to all uses that are listed as conditional in this title.

(Ord. 1163 § 1 (part), 2001)

17.80.030 Procedure.

Conditional use permits shall be considered a Type III process pursuant to CEMC 17.100.

(Ord. 1163 § 1 (part), 2001)

17.80.040 Submittal requirements.

All applications for conditional use permits shall contain the following information:

1. A completed application form signed by the owner(s) of the property subject to the application. If the applicant is not the property owner, a signed instrument authorizing the application is required.

2. A legal description of the subject property supplied by the Kittitas County, a title company or surveyor licensed in the state of Washington, and a current county assessors map(s) showing the property (ies) subject to the application.
3. A current assessors map quarter section map identifying the properties within three hundred feet of the subject site and the names and mailing addresses of all property owners of record.
4. The application fees specified by CEMC 16.48.
5. A site plan prepared according to CEMC I 7. 76 (site plan review section) that includes the proposal and its relationship to uses within three hundred feet of the subject property.
6. A written statement including:
 - a. A detailed description of the proposed use.
 - b. A description of how the proposal meets the approval criteria in 17.80.050.
 - c. An analysis of how the proposal is consistent with the City of Cle Elum comprehensive plan.
 - d. A detailed description of any mitigation measures proposed by the applicant to meet the approval criteria.
7. Other information that the city planner deems reasonably necessary to review to the application.

(Ord. 1163 § 1 (part), 2001)

17.80.050 Criteria for granting conditional use permits.

A conditional use permit shall be granted only after the city has reviewed the proposed use and determined that it complies with the standards and criteria set forth in this subsection. A conditional use permit shall be granted only if the applicant demonstrates that:

1. The proposed use will be designed and operated in a manner which is compatible with the character, appearance, and operation of existing or proposed development in the vicinity of the subject property; and
2. The hours and manner of operation of the proposed use are not inconsistent with adjacent or nearby uses; and
3. The proposed use is compatible with the physical characteristics of the subject property and neighboring properties; and
4. The location, nature and intensity of outdoor lighting is such that it is consistent with the surrounding neighborhood and does not cast light or glare on adjoining properties; and

5. The proposed use is such i/wit pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood; and
6. The proposed use is capable of being served by public facilities and services, and will not adversely the level of service to surrounding areas; and
7. The proposed use is not detrimental to the public health, safety, or welfare; and
8. The proposed use is consistent with the goals and policies of the comprehensive plan; and
9. The subject site can accommodate the proposed use considering the size, shape, topography and drainage.

(Ord. 1163 § 1 (part), 2001)

17.80.060 Special conditions.

Special conditions may be imposed on the proposed conditional use to ensure that the proposed use will meet the above standards and criteria. Guarantees and evidence regarding compliance with such conditions may be required.

(Ord. 1163 § 1 (part), 2001)

17.80.070 Revocation of a conditional use permit.

The city may revoke a conditional use permit if, after a public hearing before the planning commission, the planning commission finds that the conditional use is not being operated as specified, or that the use is violating conditions set forth in the conditional use permit. Revocation is not the only remedy to addressing non-compliance with conditional use permit requirements. Enforcement proceedings may occur under the provisions of this title.

(Ord. 1163 § 1 (part), 2001)

17.80.080 Change, enlargement or alterations.

Any change, enlargement, or alteration to an approved conditional use shall require the submittal and review of a new conditional use application. A one-time enlargement of a conditional use not to exceed a ten percent increase in size, number of visitors or increase in traffic may be permitted through the design review process. The transfer or change in owner or operator of the CUP shall require the submittal of a Type I application.

(Ord. 1163 § 1 (part), 2001)

17.80.090 Permit approvals--Validity.

Permit approvals shall generally be valid for the time specified in CEMC 17.100. Certain uses may be approved for specific lengths of time where the use requires review to determine its appropriateness or conditions of approval.

(Ord. 1163 § 1 (part), 2001)

- D. The abutter agrees in writing to indemnify and save the city harmless from all claims, suits and liabilities arising in any way out of such use of the sidewalks and/or parking strips;
- E. No permit shall be approved for more than seven days in any one year period. The abutter keeps in full force and effect and leaves on deposit with the city clerk at all times while the city permit is in effect a liability insurance policy as described. The policy shall be in a reputable insurance company acceptable to the city. It shall provide not less than twenty-five thousand dollars per person and fifty thousand dollars per occurrence personal injury coverage, and not less than one thousand dollars per occurrence property damage coverage, and shall specifically under its terms afford such liability protection to the city as well as the abutter.

(Ord. 1163 § 1 (part), 2001)

Chapter 17.100

PROJECT PERMIT PROCEDURES

Sections:

- 17.100.010 Purpose.**
- 17.100.020 Applicability.**
- 17.100.030 Definitions.**
- 17.100.040 Application types and classification.**
- 17.100.050 Pre-application review.**
- 17.100.060 Determination of completeness.**
- 17.100.070 Type I review and decision procedure.**
- 17.100.080 Type II review and decision procedure.**
- 17.100.090 Type III review and decision procedure.**
- 17.100.100 Type IV review and decision procedure.**
- 17.100.110 Public notice for Type II, III and IV applications.**
- 17.100.120 Decision timelines.**
- 17.100.130 Appeals.**
- 17.100.140 Development approval timeline.**

17.100.010 Purpose.

This chapter establishes procedures for the processing of project permit applications in the City of Cle Elum consistent with Chapter 36.70B of the Revised Code of Washington.

(Ord. 1139 § 1 (part), 2001)

17.100.020 Applicability.

All project permit applications shall be subject to the provisions of this chapter unless specifically exempted herein, including but not limited to building permits, land divisions, binding site plans, site plans, master planned developments, conditional uses, shoreline substantial development permits, critical area permits, and site specific rezones. Certain project permit applications may be exempt from specific procedures identified in this chapter. This chapter generally applies to permit activities under the following chapters of the City of Cle Elum Municipal Code:

Title 12--Streets, sidewalks, and public places.

Title 15--Buildings and construction.

Title 16--Subdivisions.

Title 17--Zoning.

Title 18--Critical areas development.

(Ord. 1139 § 1 (part), 2001)

17.100.030 Definitions.

Unless explicitly stated otherwise, the following terms or phrases, as used in this chapter, shall have the meanings designated by this section.

- A. "Closed record appeal" means an administrative appeal on the record to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.
- B. "Closed record hearing" means a public hearing on the record by a local government body or officer, including the legislative body, following an open record hearing on a project permit application, when the project permit decision is on the record with no or limited new evidence or information allowed to be submitted to support the decision.
- C. "Days" shall refer to calendar days.
- D. "Open record hearing" means a hearing, conducted by a single hearing body or officer authorized by the city to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures prescribed by the city in this chapter. An open record hearing may be held prior to a decision on a project permit application to be known as an open record predecision hearing. An open record hearing may be held on an appeal, to be known as an open record appeal hearing, if no open record predecision hearing has been held on the project permit.
- E. "Party of record" shall mean any person, agency or organization who have submitted written comments on an application, made oral comments on an application during a public hearing or who has requested in writing to be a party of record. In all cases the property owner and applicant shall be considered parties of record. In those cases where there is no public notice of the application any interested party is considered a party of record.
- F. "Project permit" shall mean any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendments of a comprehensive plan, subarea plans, or development regulations.

(Ord. 1139 § 1 (part), 2001)

17.100.040 Application types and classification.

A. Project permit applications shall be subject to a Type I, Type II, Type III or Type IV process as set forth by this chapter.

B. Where the city must approve more than one (1) permit application for a project, all applications may be considered at one time. Where different permit applications required for a development are subject to different procedure types, all applications will be subject to the procedure type that requires the greatest level of public notice and involvement.

C. The city planner shall classify all applications as a specific type. The act of classifying an application shall be a Type I process which shall be appealable at the same time and in the same manner as for the project permit application being considered. The following guidelines shall be used when establishing the procedure type for a permit:

1. Type I--This administrative process is used for applications where there are clear and objective standards involving little or no discretion in technical issues and that are exempt from SEPA review. The decision making authority for Type I permits shall be the city planner or designee. For decisions under Title 12, the decision making authority is the public works director or designee. Examples include building permits, boundary line adjustments, floodplain permits, and critical areas review (when not associated with a development permit).
2. Type II--This administrative process is used for applications where a limited amount of professional discretion is used for objective and subjective standards involving non-technical issues. The applications may be of general public interest although no public hearing is held. If a Type I application is subject to SEPA it shall be considered a Type II application for processing. The decision-making authority for Type II permits is the city planner or designee. For decisions under Title 12, the decision making authority is the public works director or designee. Examples include short plat and site plan reviews.
3. Type III--This hearing quasi-judicial process is used for applications that require a substantial amount of discretion on non-technical issues and where there is likely to be broad public interest. A public hearing is required. The decision making authority for Type III applications shall be the planning commission. Examples include conditional use permits, appeals of Type I and Type II decisions and certain variances.
4. Type IV--This quasi-judicial process is used for applications that require a substantial amount of discretion on non-technical issues and where there is likely to be broad public interest. This process requires at least one open record public hearing before the planning commission and one closed record public hearing before the city council. The final decision making authority for Type IV actions shall be the city council with the planning commission acting as a recommending body in an advisory capacity. Examples include subdivisions, site specific rezones and master planned development approvals.

Table 17.100-1, Application Procedure

Application Type	Type I	Type II	Type III	Type IV
Notice of Application	No	Yes	Yes	Yes
Open Record Public Hearing	No	Only if appointed	Yes, before decision body	Yes, before recommending body
Recommending Body	N/A	N/A	Staff	Planning commission
Decision Body	Staff	Staff	Planning commission or hearing examiner	City council
City Appeal	Yes	Yes	Yes	No
Appeal Body	City council	City council	City council	N/A

(Ord. 1139 § 1 (part), 2001)

17.100.050 Pre-application review.

A pre-application review is an opportunity for a potential applicant to meet with city staff to provide an understanding of the city's development requirements for a specific application.

- A. Applications subject to a Type II, III or IV process are required to conduct a pre-application meeting with staff prior to submitting an application, unless waived in writing by the city planner. Applications subject to a Type I process may choose to conduct a pre-application meeting, but one is not required.
- B. To initiate a pre-application an applicant shall submit a completed form provided by the city for the purpose along with all the information identified by the form and the required fee.
- C. Upon receipt of a completed form the city planner shall schedule a date and time to conduct a pre-application meeting with the applicant. The city planner may limit the days and times when a pre-application meeting may be scheduled.
- D. Within seven days of the pre-application meeting the city planner shall issue a summary of the pre-application review that includes the following information:
 - 1. Summary of the application;
 - 2. Identify the relevant approval criteria, development standards and other relevant laws and policies;
 - 3. Evaluate information supplied by the applicant and identify any changes that may be necessary to comply with the approval criteria and development standards;
 - 4. Applicable application fees;
 - 5. Public facilities and improvements necessary to serve the development;
 - 6. Current utility connection charges; and

7. Physical development limitations.
(Ord. 1139 § 1 (part), 2001)

17.100.060 Determination of completeness.

A. Within twenty-eight days of receiving an application the city shall provide a determination of whether the application is complete for processing. If a determination is not made within the required twenty-eight days, the application shall be automatically deemed complete. If a determination is made that the application is incomplete the city shall clearly identify the necessary materials and set a reasonable time period in which the applicant has to submit the additional items. Following the submittal of additional items, the city shall notify the applicant within fourteen days whether the application is complete. If the submitted materials do not address the incompleteness the city may either request the additional information in the same manner as the first attempt or deny the application pursuant to subsection D.

B. An application is complete if it contains the items identified in the specific section related to the action and at a minimum the following materials:

1. A completed application form signed by the owner(s) of the property subject to the application. If the applicant is not the property owner, a signed instrument authorizing the application is required.
2. A legal description of the subject property supplied by the Kittitas County, a title company or surveyor licensed in the state of Washington, and a current county assessors map(s) showing the property(ies) subject to the application
3. For applications subject to a Type II, III or IV process, a current assessors map identifying the properties within three hundred feet of the subject site along with the names and addresses of the property owners.
4. The application fees specified by CEMC 16.48.
5. All information required by other sections of the code.

C. A determination on the completeness of an application shall be based on the presence of the required materials and shall not be based on differences of opinion as to the quality or accuracy of the submitted materials.

D. If an application is not fully complete within the time frames specified in subsection A, the city shall reject the application and return the submitted materials to the applicant along with ninety percent of required fees.

E. A determination of completeness does not prevent the city from requiring additional information or studies that are necessary to fully review the project permit.
(Ord. 1139 § 1 (part), 2001)

17.100.070 Type I review and decision procedure.

The review authority shall approve, approve with reasonable conditions or deny the application pursuant to the timeliness of Section 17.100.120. A written notice of decision shall be mailed or otherwise transmitted to the applicant.
(Ord. 1139 § 1 (part), 2001)

17.100.080 Type II review and decision procedure.

A. Within fourteen days of the date of determination of completeness under Section 17.100.060, the city shall issue a notice of application consistent with the provisions of Section 17.100.100.

B. Following the comment period provided for in the notice of application, the city shall mail to the applicant copies of any comments received. The review authority shall consider any comments received along with responses by the applicant to those comments in reviewing the project permits. The applicant shall have 7 days to respond to the comments submitted.

C. A decision shall be issued subject to the time limitations of Section 17.100.120, and shall contain:

1. A list of the applicable criteria and standards against which the project was measured.
2. Statement of the facts that were found to show compliance with the applicable approval sections.
3. The justification and reason for the decision.
4. The decisions to approve, approve with conditions or deny the application.

D. Within seven days of the decision date, the review authority shall issue a notice of decision to the applicant, applicant's representative (if any), property owner, parties of record and the county assessor. The notice shall include a statement of any SEPA determination made, any appeal rights and where the complete record may be reviewed.
(Ord. 1139 § 1 (part), 2001)

17.100.090 Type III review and decision procedure.

A. Within fourteen days of the date of determination of completeness under Section 17.100.060 the city shall issue a notice of application consistent with the provisions of Section 17.100.100. The notice shall be issued at least 15 days prior to the date of the public hearing. The notice may contain the date, time and location of the public hearing if scheduled at the time of the issuance of notice.

B. If a notice of public hearing is not included in the notice of application, at least 15 days prior to the public hearing date, a notice of public hearing shall be issued by the city consistent with the requirements of Section 17.100.110. The public hearing should be scheduled to allow enough time for a decision to be issued within the time limitations of Section 17.100.120.

C. At least fourteen days prior to the public hearing, the city planner shall issue a staff report

describing the project, its consistency with city standards and a recommendation to approve, approve with conditions or deny the application. The staff report shall be sent to the applicant and applicant's representative and made available to the public for review.

D. Public hearings shall be conducted in accordance with the rules of procedure adopted by the review authority and the Open Public Meeting Act, RCW 42.30 as amended and the following:

1. At the start of the public hearing the review authority shall:
 - a. State that testimony will be accepted only if it is applicable to the matter being reviewed and the development and approval standards.
 - b. State that the review authority must be unbiased in its review and whether the review authority has had any ex parte contact or has any personal and business interest in the application and provide any party the opportunity to challenge the statement.
 - c. State whether the review authority has visited the site.
 - d. State that any party that wishes to receive a copy of the decision may do so by identifying their name and address to the review authority.
 - e. Explain the conduct expected at the hearing.
2. At the ending of the public hearing the review authority shall announce one of the following actions:
 - a. That the hearing is continued to a date, time and place certain or, if not known, that a notice consistent with the initial notice will be issued; or
 - b. The hearing is closed but the public record will be held open to a time and date certain. The review authority shall also identify a location where written comments are to be submitted and any specific limitations there may be to the type of information that can be submitted; or
 - c. That the hearing and public record are closed to additional submissions and that the application is taken under advisement and a written decision will be issued; or
 - d. That the application is either denied, approved or approved with conditions, a summary of the decision basis and that a written decision will be issued.

E. Within twenty-one calendar days of the close of the public hearing or record, the review authority shall issue a written decision which includes at a minimum:

1. A list of the applicable criteria and standards against which the project was measured.
2. Statement of the facts that were found to show compliance with the applicable approval sections.

3. A statement of the decision along with justification and reason for the decision.
4. If the decision is to approve the application, any conditions of approval necessary to ensure compliance with applicable criteria.

F. Within seven days of receiving the decision the city planner shall mail the decision to the applicant, applicant's representative, if any; property owner, parties of record and the county assessor. The notice shall include a statement of any SEPA determination made, any appeal rights and where the complete record may be reviewed.

(Ord. 1139 § 1 (part), 2001)

17.100.100 Type IV Procedure

A. The review and decision procedure for a Type IV application shall be the same as the process outlined in Section 17.100.090 for a Type III decision with the exception that the process shall result in a recommendation that will be considered by the city council at a closed record hearing.

B. Within seven days of receiving the recommendation from the recommending body the city planner shall forward the recommendation to the city council and mail the recommendation to the applicant, applicant's representative, if any, property owner and parties of record. The recommendation shall include notice of the closed record hearing of the city council.

C. The city council shall consider the recommendation of the review authority at the next available regularly scheduled city council meeting or at a special meeting scheduled to consider the recommendation.

D. The city council shall review the recommendation at a closed record hearing and shall either:

1. Adopt the recommendation as written.
2. Modify the recommendation and make a decision on the project permit application.
3. Remand the project permit application for the reconsideration of a specific aspect of the project.

(Ord. 1139 § 1 (part), 2001)

17.100.110 Public notice for Type II, III and IV applications.

A. A notice of application shall be issued for all Type II, III and IV applications consistent with this section. Notice of application is not required for Type 1 applications.

B. The notice of application shall contain the following information:

1. The date of application, the date of notice of completion of the application and the date of the notice.
2. The name of the applicant and the name, address and phone number of the contact person.

3. The name and telephone number of a contact person with the city.
4. The location and description of the proposed project and a list of local permits included in the application.
5. The identification of any existing environmental documents that include the proposed project.
6. The location and times where the complete application can be viewed.
7. A statement of the fourteen day public comment period, the right of any person too comment on the application, receive notice of and participate in any hearings, request a copy of the decision, and any appeal rights.
8. If known, the date, time, place and type of public hearing if applicable and scheduled.
9. A statement of the list of development regulations, if known, which will be used to review the application.
10. A statement of the application type.
11. Any other appropriate information determined to be appropriate by the city.

C. The notice of application shall be distributed to the following:

1. The applicant and applicant's representative.
2. Owners of property within three hundred feet of the subject site. The records of the Kittitas county assessors office or licensed title company shall be used to determine the owners of record of the subject properties. Failure of any one party to receive notices is not grounds for a denial of an application provided a good faith effort was made to accurately distribute notice. A sworn certificate of mailing completed by the person conducting the mailing shall be evidence of the notice being mailed.
3. Agencies with jurisdiction.

D. Notice of application shall be published in the newspaper of general circulation. The notice shall include a brief project description, location, the date, time and place of the public hearing (if applicable), where and when comments must be submitted by and where additional information can be obtained.

E. Notice of the application shall be posted in a conspicuous location on the property subject to the application. The notice shall include a brief project description, location, the date, time and place of the public hearing (if applicable), where and when comments must be submitted by and where additional information can be obtained. A sworn certificate of posting shall be completed by the person conducting the posting and submitted as evidence of the posting.

F. If a hearing is required and not scheduled at the time the notice of application is issued a separate notice of public hearing shall be issued at least 14 days prior to the public hearing.
(Ord. 1139 § 1 (part), 2001)

17.100.120 Decision timelines.

As a goal, the city shall strive to process and issue a decision on all project permit applications within one hundred twenty calendar days of the date the application was determined to be complete under Section 17.100.060. The failure of the city to meet the one hundred twenty day goal shall not result in any penalties or obligations to the city, provided the city was diligent in attempts to process the application in a timely fashion. If the one hundred twenty day time period cannot be met by the city, the city shall notify the applicant in writing of the delay, stating the reasons why a decision can not be rendered in the required time period. In determining the number of days that have passed since the determination of completeness, the following time periods shall not be counted:

- A. The time during which the applicant has been requested by the city to provide additional information or make changes to submitted materials.
- B. The time period during which an environmental impact statement is being prepared. EISs shall be completed within one year of the date of the determination of significance, at which time the application shall become null and void.
- C. An applicant may agree in writing to extend the time in which the review has to make a decision.
(Ord. 1139 § 1 (part), 2001)

17.100.130 Appeals.

A. A final decision on a Type I, II or III decision may be appealed by a party of record. No appeals to the city are permitted for Type IV decisions. Further appeals may be authorized to Superior Court or other hearing body as provided by Chapter 36.70C Revised Code of Washington. Appeals to the city must be filed within fourteen days of the date of issuance of the decision. Appeals shall be in writing and shall contain, at a minimum, the following information:

1. The case number assigned by the city and the name of the application.
2. The name and signature of the party or parties filing the appeal including an address and phone number of a contact person.
3. The specific aspects of the decision which are the subject of the appeal, the legal basis of the appeal based on adopted standards and policies, and the evidence relied on to prove the error.
4. The appeal fee pursuant to CEMC 16.48.

B. Appeals of Type I and II decisions shall be heard by city council in a de novo hearing. Notice of the appeal and the hearing shall be mailed to the parties of record and to the parties entitled to notice of the decision on the application being appealed. Staff shall prepare a report on the points of the appeal, a hearing

shall be conducted and a written decision made on the appeal. The decision shall be noticed as if it was a Type III decision.

C. The city council shall consider appeals of Type III decisions. Decisions shall be based on the record established for the Type III hearing including all submitted written materials, oral arguments, the decision being appealed and the argument on the appeal by the parties.

1. The city council shall consider the appeal at a closed record public hearing. The city council shall issue a written decision to affirm, reverse, modify or remand the original decision based on the appeal and record of the original decision.
2. A notice decision of the city council shall be mailed to parties entitled to receiving notice under CEMC 17.100.090.F [notice of decision on type III actions].

(Ord. 1153 § 1, 2001; Ord. 1139 § 1 (part), 2001)

17.100.140 Development approval timeline.

A. Permit approvals shall be valid for the time periods identified in this section unless a project specific development agreement authorized by RCW 36.70B.170 provides for an alternate approval period. Within the time period the applicant shall either complete the development or have applied for the necessary construction permits to complete the development. The time period shall be measured from the date of the final decision, excluding any time period during which the application was under appeal. All decisions shall include a statement of the time limit and a date upon which the application terminates. No extensions are permitted unless indicated below.

B. Approval time periods:

1. Preliminary subdivisions--Five years.
2. Site plan reviews--Two years.
3. Conditional use permits--One year with one one hundred eighty day extension.
4. Building permits--One hundred eighty days with one one hundred eighty day extension.
5. Zoning reviews--One year.
6. Variances--One year with one one hundred eighty day extension.
7. Additional permit types--One year.

C. Permitted extensions may only be approved if the applicant can show that circumstances beyond the control of the applicant have prevented action from being taken.
(Ord. 1139 § 1 (part), 2001)

BUILDING AND USE PERMITS

Sections:

17.110.010 Application.

17.110.020 Flats or maps required.

17.110.010 Application.

All applications for building or use permits, for use of premises, for erection of structures, or for additions to structures, shall be submitted to the city official in charge of issuing building permits and inspection of buildings (referred to as the building inspector in this title). With the exception of buildings and uses in existence at time of adoption of the ordinance codified in this title, no building shall be erected or altered or added to or moved, and no industrial, residential, commercial or public use shall be made of any premises within the city, unless a permit therefor is first obtained under the provisions of this title.

(Ord. 1163 § 1 (part), 2001)

17.110.020 Plats or maps required.

All applications for erection, alteration, addition or moving of any building or structure shall contain plats or maps, drawn to scale, showing the actual dimensions of the lot to be used, and the size and location of existing buildings and improvements thereon, and of the building or structures to be built, altered, enlarged, or moved thereon.

(Ord. 1163 § 1 (part), 2001)

Chapter 17.115

ADDITIONS OR ANNEXATIONS TO CITY

Sections:

17.115.010 Use districts.

17.115.010 Use districts.

Any area added or annexed to the city shall automatically be zoned in accordance with the city comprehensive plan in effect at the time of such annexation or adopted concurrently with the annexation.

(Ord. 1163 § 1 (part), 2001)

Chapter 17.120

AMENDMENTS AND RECLASSIFICATIONS

Sections:

17.120.010 Authorized.

17.120.020 Application procedure and hearing notice.

17.120.030 Standards and criteria for granting a reclassification.

17.120.010 Authorized.

APPENDIX 4

WALCH V. CLARK – NO. 10-2-00353-6



EXHIBIT B

FUTURE FACILITY CHARGES. If any, including but not limited to hook-up, or connection charges and telecomm charges for water or sewer facilities of Cle Elum as disclosed by instrument recorded under recording number 589831.

THE TAXES AS CURRENTLY ASSESSED include other property. The Kittitas County taxing authorities may not recognize a segregation created by the proposed transaction unless a parcel segregation is approved by said County and submitted to the Kittitas

PRIVATE ACCESS TO SAID PREMISES is across a railroad right of way. This Company will require that the "Private Roadway and Crossing Agreement", and any assignment or modifications thereof which were issued by the railroad company, be submitted for examination. The coverages then afforded under any policies issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy(ies) will contain the following exception:

The lack of a right of access to and from the land across a railroad right of way.

COVENANT AGAINST BLASTING AND/OR DISCHARGE OF EXPLOSIVES as contained in instrument granting easement on adjacent property:

Recorded: July 9, 1957
Recording no.: 264889

CONDEMNATION IN KITTITAS COUNTY SUPERIOR COURT by the State of Washington of the rights of access to state highway and of light, view and air as disclosed by L.L. Penders:

Recorded: October 20, 1964
Recording no.: 315313
Decree entered: October 20, 1964
Cause no.: 16091
Affects: A portion of said premises and other property.

RESERVATIONS, EASEMENTS AND CONDITIONS thereof contained in Real Estate

Contract:
Recorded: December 13, 1965
Recording no.: 328442
As Follows: As part of this agreement purchaser is granted by sellers a non-exclusive easement in perpetuity for the right of way along the present existing roadway 25 feet in width extending across tracts 1, 2, 3, 4, Third Addition to the City of Cle Elum, in Kittitas County, Washington and then across Northern Pacific Railroad land (so long as the railroad shall allow) for ingress and egress to and from the properties herein sold to purchaser. By deed dated April 15, 1960 recorded in Volume 105 of Deeds at page 89, records of Kittitas County, from sellers to Richard Owens Sr. and Wife, sellers reserved an easement across Tracts 5, 6, and 7 of that portion of Third Addition to Cle Elum in Kittitas County, Washington, which lies south of the Northern Pacific Railway Company right of way, for purpose of ingress and egress, provided this easement is to be exercised only if the existing roads leading to the sellers lands are for reasons beyond control of sellers and Owens, vacated or closed in the future. Sellers agree that if the existing roadway through the Northern Pacific Railroad Company land is so vacated or closed in the future, purchasers shall have joint use of this reserved easement, with sellers, across said Tracts 5, 6 and 7 of that portion of Third Addition to the City of Cle Elum which lies south of the said railroad company right of way. Purchaser shall use neither easement until road across N.P. lands is vacated or closed.

REFERENCE IS ALSO MADE TO RESERVATIONS, EASEMENTS AND CONDITIONS contained in Warranty Deed:

Recorded: December 20, 1965
Recording no.: 345126

Refer to record for full particulars.

000021

SCHEDULE B

Order Number: 16364

Policy No: O-9993-3374945

4. GENERAL TAXES. The first half becomes delinquent after April 30th. The second half becomes delinquent after October 31st.

Year:	2004
Amount billed:	\$1,054.56
Amount paid:	\$527.28
Amount due:	\$527.28
Levy code:	043
Tax account no.:	20-15-35010-0001
Assessed value of land:	\$60,600.00
Assessed value of improvement:	\$49,310.00

Includes other property.

5. THE TAXES AS CURRENTLY ASSESSED include other property. The Kittitas County taxing authorities may not recognize a segregation created by the proposed transaction unless a parcel segregation is approved by said County and submitted to the Kittitas County Assessor's office.

6. PRIVATE ACCESS TO SAID PREMISES is across a railroad right of way. This Company will require that the "Private Roadway and Crossing Agreement", and any assignment or modifications thereof which were issued by the railroad company, be submitted for examination. The coverage then afforded under any policies issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy(ies) will contain the following exception:

The lack of a right of access to and from the land across a railroad right of way.

7. COVENANT AGAINST BLASTING AND/OR DISCHARGE OF EXPLOSIVES as contained in instrument granting easement on adjacent property:

Recorded:	July 9, 1957
Recording no.:	264899

8. CONDEMNATION IN KITTITAS COUNTY SUPERIOR COURT by the State of Washington of the rights of access to state highway and of light, view and air as disclosed by Lis Pendens.

Recorded:	October 20, 1964
Recording no.:	316313
Decree entered:	October 20, 1964
Cause no.:	16091
Affects:	A portion of said premises and other property.

APPENDIX 5

WALCH V. CLARK – NO. 10-2-00353-6

took the matter under advisement to review the extensive pleadings and to consider the arguments. The court has now had the opportunity to completely read and study all of the submissions and herebelow issues its memorandum decision.

DISCUSSION

1. Law of Summary Judgment. The purpose of a summary judgment is to avoid a useless trial. However, a trial is required and summary judgment must be denied whenever there are genuine issues of material fact. CR 56(c); Jacobsen v. State, 89 Wn.2d 104 (1977). Material facts are those facts upon which the outcome of litigation depends, either in whole or in part. Harris v. Ski Park Farms, 120 Wn.2d 727, 729 (1993). In a summary judgment the burden is always on the moving party regardless of where the burden would lie in the trial of the matter. Peninsula Truck Lines, Inc. v. Tooker, 63 Wn.2d 724 (1961). In ruling on a motion for summary judgment the court must consider all of the evidence and all reasonable inferences from the evidence in favor of the non-moving party. CR 56(c); Ohler v. Tacoma General Hospital, 92 Wn.2d 507 (1979). Summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds can reach but one conclusion on that issue based on the evidence construed in a light most favorable to the non-moving party. White v. State, 131 Wn.2d 1, 9 (1997); Weatherbee v. Gustafson, 64 Wn.App. 128 (1992).

Although the moving party bears the initial burden of showing the absence of an issue of material fact, once this initial showing is met, the burden shifts to the non-moving party, who must set forth specific, admissible facts showing that there is a genuine issue of material fact for trial. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225-226 (1989). The moving party can satisfy its initial burden in either of two ways: (1) it can set forth its version of the facts, and allege there is no genuine issue as to those facts; or (2) it can simply point out to the court that no evidence exists to support the non-moving party's case. Howell v. Blood Bank, 117 Wn.2d 619, 624 (1991); Guile v. Ballard Community Hospital, 70 Wn.App. 18, 21 (1993).

2. Undisputed Facts. The plaintiffs acquired a title to their real property from the Estate of Reno J. Dalle pursuant to Real Estate Contract dated May 12, 2004 and recorded in Kittitas County on June 21, 2004. The Dalle family had owned what is now the plaintiffs' property for over 80 years prior to 2004. The defendants' properties are located to the west of the plaintiffs' property, lying between the plaintiffs' property and the westernmost Cle Elum exit off of Interstate 90 (Exit 84 onto Oakes Avenue). According to Dalle family members, the Dalle family never accessed their property from the west over either the alleged "Dalle Road Extension" or BNSF corridor road. Historically, the Dalle family members indicate they accessed their property from the east, over Owens and Dalle Roads. There is no evidence a road ever existed along the alleged route identified by the plaintiffs in their complaint as an extension of Dalle Road leading from the plaintiffs' property to Oakes Avenue.³

With respect to the claim for a prescriptive easement parallel to the BNSF corridor, the parties agree any road existing in the BNSF corridor is not condemnable and that any claim by plaintiffs within the corridor⁴ is not subject to prescriptive easement.⁵ Now, in written and oral argument in opposition to the defendants' motion plaintiffs claim a second road existed parallel to and south of the BNSF corridor road alleged in their complaint which traverses through property owned by the Clark Family LLC. The Clark Family LLC purchased its property⁶ separately from the railroad in 2004.

The Grangers were the predecessors in interest to the Folkmans and Clarks and owned those parcels from 1986 when they purchased them from Plum Creek Timber Company with Thomas A. McKnight and Jamie L. McKnight. Those parties partitioned the property. McKnights owned the westerly 4.05 acres and the Grangers became sole owners of the remainder of the property to the east. McKnights sold their 4.05 acre

³ During both the written and oral arguments the plaintiffs shifted their prescriptive easement claim to the alleged Dalle Road Extension to a road coming off what is now Swiftwater Boulevard, traversing diagonally from northwest to southeast through the Clark property, to the southwest corner of the plaintiffs' property.

⁴ Within 100 feet of the center line of the railroad track.

⁵ The evidence submitted in plaintiffs' complaint to support the prescriptive easement on the northern boundary of the defendants' properties is within the railroad right-of-way corridor. Moreover, the aerial photographic evidence submitted by plaintiffs' attorney to the City of Cle Elum in October 2008 used that same evidence to support a claim for prescriptive easement.

⁶ Situated to the north of the Folkman/Clark properties and south of the BNSF corridor.

parcel to Folkmans in 2002 and Grangers sold their portion of the property to the Clarks and Roger Overbeck in 2002. When the Grangers and McKnights purchased the property in 1986 there were no roads over the property and according to the Grangers the property was so uneven and covered with trees and debris one could not drive on it even from the west off of Oakes Avenue or from anywhere. They accessed the property by foot from the north across the railroad tracks. Grangers obtained a permit across the railroad right-of-way from Oakes Avenue to the property and leveled and cleared the property so they could access it from the west off Oakes Avenue. Their access never extended across their properties to the property owned by Reno Dalle (now the plaintiffs' property). Moreover, within Grangers' knowledge no one else ever used their properties to access the Dalle property.

When McKnights and Grangers purchased the properties now owned by the defendants a barbed wire fence ran the entire length of the property between the Dalle property and what is now the Clark property and no effort was ever made either by way of the alleged "Dalle Road Extension" or by the BNSF corridor road to access the Dalle property to the east.

3. Claims. The plaintiffs claim historic access to their property was from the west across either a road they alleged existed parallel to but outside the BNSF corridor or diagonally from what is now Swiftwater Boulevard southeasterly to the southwest corner of their property. In support of their claim Mr. Walch submitted an affidavit averring he accessed the Dalle property from the west on at least three occasions when viewing the property for the purpose of potentially purchasing it. Each time he accessed through the southwest corner cable gate. One time Bob Ballard, the realtor who showed him the property, had a key to the cable gate and another time he (Walch) picked up the key from Reno Dalle. On a third visit Bob Ballard was already present and had unlocked the gate and they proceeded through the cable gate at the southwest corner. Still, on other occasions Walch attempted to access the property with Lester Hay at the southwest corner of the property but was unable to lock the cable gate and so never went on the property at that time. On another time Lester Hay himself visited the property and accessed the southwest corner of the property after getting a key from Bob Ballard. On that occasion Mr. Hay met with Rudolph Kleinschmidt, an occupant of

the building on the Clark property, who pointed to a gate at the northwest corner of the Walch property as an access point.

Bob Ballard submitted an affidavit that there was a road extending from the southwest corner of the Dalle property out across the property to the west which connected with Oakes Avenue and that Dalle had erected a barbed wire fence and cable gate to keep people from accessing his property from the west. Ballard also indicated that prior to the construction of Interstate 90 the City of Cle Elum city dump was situated where the overpass and exit off of Interstate 90 are now situated in the vicinity of Oakes Avenue.

Ray and Floyd Rogalski grew up in Cle Elum and recall in the 1960s a road extending from Oakes Avenue east to and beyond Owens alley railroad crossing running parallel to the railroad tracks and that people would use the road to access the Dalle ponds for fishing until Reno Dalle put up a fence and gates on the roads that accessed his property to keep fishermen out and that Reno Dalle and others used the road or roads.

Finally, Al K. Lang through the viewing of aerial photographs contends he can ascertain roads all through what is now the Folkman/Clark properties to the southwest corner of the Walch property as well as roads leading from the Walch property to its northwest corner and connecting with a road running westerly to Oakes Avenue parallel to the railroad corridor through that which is now owned by Clark LLC south of the railroad corridor.⁷

4. Decision. In analyzing a claim for prescriptive easement one starts with a presumption that the use of another's property is permissive. *810 Properties v. Jump*,

⁷ Defendants' motion to strike a portion of Walch's second declaration is granted. With respect to lines 13 to 15 on page 4 Walch has no firsthand knowledge that because of the width of the canopy it would have to have been brought in from the southwest corner of the property. With respect to lines 11 to 12 and 14 to 15 on page 5 of the Walch declaration Walch has no firsthand knowledge and merely states some conclusions with respect to the use of the road by predecessors. Moreover, any conversations Mr. Walch had with Reno Dalle are inadmissible pursuant to the Deadman's Statute. See RCW 5.60.030; see ER 601. Mr. Walch's statements on lines 20, page 5 through line 4, page 6 and lines 21 through 24 on page 6, are likewise inadmissible, barred by the Deadman's Statute, RCW 5.60.030.

The statement made by Al K. Lang on page 2, line 4 through page 3, line 3 should be stricken because it is not relevant and/or is immaterial to the prescriptive easement claim. Finally, the court strikes any conclusions Mr. Lang draws on page 5, lines 1 to 25 as to the purposes of any roads he purportedly observes on the series of photographs and aerials as he has no firsthand knowledge regarding use of any of the purported roads.

141 Wn.App. 688 (2007); *Kunkel v. Fisher*, 106 Wn.App. 599, 602 (2001). Prescriptive rights are not favored. *810 Properties, supra*; *Roediger v. Cullen*, 26 Wn.2d 690, 706 (1946). The person claiming a prescriptive easement or right must prove: 1) use adverse to the owner of the servient land; 2) use that is open, notorious, continuous and uninterrupted for 10 years; and 3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights. *810 Properties, supra*; *Mood v. Banchemo*, 67 Wn.2d 835, 841 (1966).

The plaintiffs have failed to come forward with any evidence creating a genuine issue of material fact regarding any of the elements for the prescriptive easement claims. They have completely failed to establish that they, or their predecessors in interest (the Dalle family), have ever used the alleged prescriptive routes for a continuous and uninterrupted 10 year period. Likewise, the plaintiffs have failed to set forth specific facts to overcome the presumption of permissive use of any of the alleged routes. The land over which the plaintiffs claim of a prescriptive right was vacant, open and unimproved until at least the Grangers and McKnights purchased the alleged servient properties in 1986. There is no evidence prior to 1986 of any adverse use whatsoever of the servient properties to access properties to the east. The only evidence is that of Al Lang interpreting aerial photographs indicating there may have been roads across the servient properties. Even if people used those alleged roads, there is no evidence that the Dalles, or anyone else, used them as access to the Dalle properties.

The presumption of permissive use over the alleged servient properties owned by Plum Creek, later McKnight and Granger, and now by Folkman and Clarks, can only be overcome by evidence of facts or circumstances showing that the use was indeed adverse and not permissive. *State ex. rel. Shorett v. Blue R. Club*, 22 Wn. 2d 487, 493-95 (1945). Recreational use of vacant land is defined by statute as permissive; it cannot support any claim of adverse possession. RCW 4.24.210(1), (4). Here, there is no evidence anybody used the road described in the complaint as the "Dalle Road Extension" and the only evidence that anybody used the new alleged prescriptive easement southwest from Swiftwater Boulevard to the southwest corner of the plaintiffs' property are the three times Walch indicates he used it from 1999 to the time he

CONCLUSION

Based on foregoing, the defendants' motion for summary judgment of dismissal of the plaintiffs' claims of prescriptive easement over either the alleged "Dalle Road Extension" or the BNSF corridor should be granted. Please prepare the appropriate orders and note them for presentation or present them by agreement.

DATED: February 2, 2011


JUDGE