

NO. 84712-1-I

**COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON**

CITY OF EDMONDS,

Respondent,

v.

ASSOCIATION OF APARTMENT OWNERS OF THE
EDMONDS EBB TIDE,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case concerns the construction and interpretation of an easement granted to the City of Edmonds (“the City”) in 1983 to provide public access across a private beach owned by The Edmonds Ebb Tide Association of Apartment Owners (“Ebb Tide”). Since 1983, the public has utilized the ten-foot-wide easement to pass from one City-owned beach to the other by crossing Ebb Tide’s private beach, while the Ebb Tide continued its concurrent use to access its own beach and waterfront.

In 2017, the City filed the present suit for a declaratory judgment that the easement allows it to construct a roughly ten-foot-high and 154-foot-long elevated walkway across the entire width of Ebb Tide’s private beach, which among other detriments, cuts off Ebb Tide’s access to its beach. Early in the case, the trial court ruled the easement is ambiguous as to whether it allows such a walkway. After a four-day bench trial, the trial court ruled the easement grants the City that right.

Ebb Tide appeals the final judgment of the trial court granting a declaratory judgment that the City has sufficient property rights to construct the walkway, “the final design of which will be materially consistent with the Planned Improvements attached as Exhibit B to the Amended Complaint.” The trial court erred in granting declaratory relief in the absence of a justiciable controversy concerning a 30% complete conceptual design (i.e. the “Planned Improvements”) for which no building permits have issued, and also, ruling the parties to the easement intended an elevated walkway at the height of the City’s proposed walkway. Moreover, the decision allows the City to make exclusive use of the facially non-exclusive easement, and allows the City to permanently damage Ebb Tide’s access, views, and privacy. Accordingly, this Court should reverse the judgment and remand with directions to dismiss the City’s case.

II. ASSIGNMENT OF ERROR

Assignment of Error.

The trial court erred in entering the final judgment on October 31, 2022, granting the City declaratory relief.

Issues Pertaining to Assignment of Error.

1. Did the trial court improperly grant declaratory relief that was not ripe for adjudication? (Assignment of Error No. 1)
2. Did the trial court improperly find the parties in 1983 intended an elevated walkway at the height of the Planned Improvements? (Assignment of Error No. 1)
3. Did the trial court improperly rule the parties to the easement in 1983 intended the City's planned exclusive use of the easement area? (Assignment of Error No. 1)
4. Did the trial court improperly allow the City to take or damage Ebb Tide's access, views, and privacy without just compensation in violation of the Washington Constitution? (Assignment of Error No. 1)

III. STATEMENT OF THE CASE

A. Ebb Tide Has Direct Waterfront Access and Views.

The Ebb Tide building was constructed in 1965 as a five-story, twenty-unit apartment building located on the waterfront near downtown Edmonds, Washington. CP 601. At that time, the Ebb Tide was known as the Nelson Apartments and owned by the Nelson family. CP 601.

As confirmed by the trial testimony of Dr. Marv Nelson, the son of the original owners who still owns his family's original unit, the Ebb Tide has remained substantially the same since construction. RP 435. Each unit still looks directly onto Puget Sound, and there still is a common area beach-side patio for use by all residents, which sits above a bulkhead looking over the Ebb Tide's private sandy beach. See Ex. 125. Dr. Nelson also testified that he and other Ebb Tide owners have at all relevant times had direct access to the Ebb Tide's private beach by stepping over the Ebb Tide bulkhead from the patio. RP 423-24. Residents have been able to access the beach and

shoreline without leaving the Ebb Tide property, and likewise have been able to anchor sailboats offshore and row a dinghy directly to the Ebb Tide beach. RP 424-25.

The City has always controlled the beach on both sides, north and south, of the Ebb Tide beach. Ex. 20 at 12. The property immediately north of the Ebb Tide building has been used as a senior center. RP 426-27. The Edmonds-Kingston ferry terminal is approximately one-quarter mile north of the Ebb Tide beach. Ex. 14 at 1. The City marina and fishing pier are approximately the same distance to the south. CP 1562.

B. The City Examines Use of Ebb Tide's Beach in 1977.

There is no record indicating the City had interest in using the Ebb Tide beach prior to 1977. In approximately June 1977, when the Ebb Tide was still the "Nelson Apartments" and owned by the Nelson family, a City-commissioned study examined the feasibility of a walkway running a couple miles from the Edmonds-Kingston ferry terminal to the Union Oil beach south of the Edmonds marina, which thus included the

beach-side of the Ebb Tide. Ex. 6. The City’s structural engineers, Reid Middleton, Inc. (“Reid Middleton”), prepared a comprehensive report (“1977 Report”). Id.

The 1977 Report indicated the owners of the Nelson Apartments (pre-Ebb Tide) raised “strong objections to the proposed construction of a public walkway along the beach side of this patio, feeling that it will constitute an invasion of the beach and of the privacy of tenants on the patio.” Ex. 6 at 16. In the 1977 Report, Reid Middleton largely agreed with the Nelsons’ concerns, acknowledging that an elevated walkway “on posts to provide position above wintertime wave action, could be visually objectionable, could give an impression of invasion of privacy to the patio, and could constitute an unwelcome and inconvenient interference with access from the apartment house to the beach.” Id.

Based on the above concerns, the 1977 Report rejected the possibility of an elevated walkway on the beach. Id. Instead, Reid Middleton proposed “a paved walkway

constructed on the sand at beach level.” Id. It included a diagram of a proposed beach-level boardwalk, which “would not be unsightly nor afford any interference with access to the beach.” Id. at 16-19.

The 1977 Report divided the waterfront into discrete “stations” or sections. For example, the Nelson Apartments (Ebb Tide) section is identified as part of the “Main Walkway Increment Sta. 450 m. to 480 m.” Ex. 6 at 14-15, Appendix A at 2 (“Sta. 450 to 480 (Nelson Apartments)). In addition to the artist’s rendering of the beach level boardwalk on page 19 of the 1977 Report mentioned above, there is a cross section diagram of the proposed beach-level boardwalk in the appendix. Id., Appendix A at 4 (“Station 400 to 480”; “TYPICAL SECTION OF WALKWAY BELOW BULKHEAD”). This diagram appears to depict a five-inch-thick concrete walkway directly on the beach with no structural support below it. Id.

The 1977 Report recommended the “City should exercise its rights of eminent domain to secure the walkway right-or-way (sic) past the Nelson Apartments in accordance with the recommended concept (i.e., the boardwalk).” Id. at 16. In sum, in 1977, the City’s own engineers squarely rejected any possibility of building an elevated walkway on the Ebb Tide beach largely because it would materially impact the Ebb Tide’s views, privacy, and access to its beach and shoreline, and constitute a taking. Still, as confirmed by Dr. Nelson’s trial testimony, his parents, who were the then-owners of the Nelson Apartments, were opposed to even the proposed beach-level boardwalk. RP 444; see Ex. 6 at 16.

C. A Buyer Converts the Building to Condominiums.

In June 1983, six years after the 1977 Report, the Nelson Apartments were sold to Olympic Properties, Inc. (“Olympic”). CP 3726. Within months, Olympic converted the apartments to condominiums to be sold as individual units, and the building was renamed the Ebb Tide. Ex. 152, 153.

On October 20, 1983, Olympic recorded the Ebb Tide declaration to create the Ebb Tide Condominium, expressly ensuring each unit owner would have “reasonable access” to all “common areas.” CP 3743. The declaration defines “common areas” to broadly include “[a]ll other parts of the property and building necessary or convenient to their existence, maintenance, safety and use, which are not otherwise classified,” including the beach. CP 3738. Thus, before units were sold, Olympic created a means to assure “reasonable access” to the private beach, which is a common area.

D. Olympic Grants the Easement to the City.

On November 4, 1983, a couple weeks after recording the declaration creating the Ebb Tide condominium, Olympic signed an easement, prepared by the City, which provided:

...a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities, and necessary appurtenances, over, through, across, and upon the following described property [i.e. the Easement area].

Ex. 1. The easement did not identify any contemplated “public improvements, facilities, utilities, and necessary appurtenances,” nor confer exclusive rights to the City to allow it to exclude Ebb Tide from using the easement area. Id. After reciting the legal description of the easement area over the Ebb Tide beach, the easement provides:

The Grantee, its successors, agents, or assigns, shall construct, install, or erect no structures or improvements upon or within the above described easement right of way, whereby any portion thereof extends above a horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water).

Ex. 1. This second portion of the easement is a limitation on height, rather than a grant. Id.

The attorney who represented the City in negotiating the easement in 1983 was Scott Snyder of the Ogden Murphy Wallace law firm. Ex. 20.¹ Snyder is the only witness directly

¹ Due to privilege raised by the City, Snyder’s deposition was taken upon written questions. Id. at 1. His testimony was

involved in negotiating and drafting the easement who is still alive and able to testify. See generally CP 3659-3708.

Snyder testified the easement negotiations arose from trespass complaints by Ebb Tide owners and the City's desire to address that concern and obtain an easement linking the City-controlled beaches to the north and south of the Ebb Tide's beach. His testimony explains:

We were looking for ways to redirect that traffic out onto the tide flat, and this led to a discussion on how to do so; the City installing signage, looking for an easement or right of passage, and one of the primary elements in that discussion was what form that walkway or easement would take...

Ex. 20 at 11. Any walkway was supposed to be "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." Id. at 15-16.

presented at trial in the form of his deposition transcript per a motion in limine. Id.; CP 1649-50.

Snyder testified the Ebb Tide owners “wanted them [public pedestrians] away from the seawall so they could use their patio with reasonable privacy.” Id. at 13. This required any walkway be “at or below a level that would – as the Ebb Tide owners sip their evening beverage and looked out onto the Sound, they would be – their view would not be interrupted.” Id. at 14. Accordingly, Olympic was “willing to have a lower scale walkway in place as long as it didn’t interfere with their use of the common areas and views.” Id. at 17.

Olympic representatives also made it clear to Snyder that they did not want “a large fishing peer-like [sic] structure blocking their view.” Id. It is noteworthy that the nearby Edmonds fishing pier, was built around 1978 with a deck level varying from 16 to 21 feet. Ex. 39; CP 1764-1767.

Snyder testified that a survey firm, Lovell-Sauerland, “as the City’s agent and engineer,” drafted the easement under his direction. Ex. 20 at 6, 33-34. There was no plan for any specific improvements when the easement was negotiated and

the language regarding improvements was merely a “place holder” for the future. Id. at 15.

Since 1983, the easement area has remained as a beach. See Ex. 121, 125. To this day, Ebb Tide unit owners have direct, unobstructed views and access to Ebb Tide’s beach, while the public has legal access across Ebb Tide’s beach to either of the public beaches to the north and south. Id.

E. The City Proposes an Elevated Walkway in 1999.

The City took no action on any improved walkway in the easement until 1999, when the City Planning Board proposed an elevated walkway and the City Council preliminarily approved it. See Ex. 9, 10, 11, 12, & 13. The elevated walkway proposed in 1999 was substantially the same design as the elevated walkway proposed in this lawsuit. Ex. 36 at 2 (1999), compare with the same Ex. 36 at “Section D” (on third to last page) (present proposal).

The City again retained Reid Middleton, the same engineering firm that prepared the 1977 Report proposing a

beach-level boardwalk on Ebb Tide's beach. Ex. 42. Reid Middleton provided reports to the City Planning Board, along with presentations to the City. See Ex. 10, 11, 13. On September 16, 1999, a Reid Middleton presentation highlighted aspects of the "structural feasibility of an elevated walkway or bridge" over the ten-foot-wide easement area, concluding it would be "expensive" and be constructed above the 17-foot height limitation to "avoid the wave action during storms." Ex. 42 at 1.

The Reid Middleton 1999 memorandum report confirms that Ebb Tide owners "continue to be concerned about blocked views" and would "challenge any permitting efforts." Id. at 2. In fact, the Ebb Tide did raise a challenge, retaining an attorney Thomas Haensly, who on October 27, 1999, sent a letter to the City to confirm the opposition. Ex. 40.

Based on Ebb Tide's opposition and impracticality of the proposed walkway within the easement's height limitation, the City terminated its 1999 plan. Ex. 13 at 16. The

abandonment appeared to end plans of an elevated walkway. Indeed, as mentioned above, Reid Middleton confirmed the Ebb Tide's belief at the time that the walkway was impractical to build within the 17-foot height limitation. Ex. 42; see also, CP 1874-77 (includes p. 3 missing from Ex. 42). However, any reliance on the City's termination of its 1999 walkway plan was misplaced.

F. The City Proposes the Current Walkway Plan in 2016.

Seventeen years later, in 2016, the City again proposed an elevated walkway uncannily similar to the walkway proposed in 1999.² Ex. 19, 21. The present design will appear similar to the nearby Edmonds fishing pier, with several (presently seven but the final design is not yet determined) large steel foundation pier/piling structures of thirty inch diameter, rising from the sand to support a similarly large

² Since 1999, almost all witnesses with direct knowledge of the 1983 easement negotiations have passed away, are in a memory care unit, or have no ability to recall the events. See CP 3659-3708.

cement horizontal walkway ten feet wide (the full width of the easement) and running across the entire 154 foot width of the Ebb Tide beach. Compare Ex. 1, 19, 21.

As proposed, the walkway will extend over the entire easement area, eliminating the legal public access to cross the Ebb Tide beach itself. Ex. 21 at 9-10. That access will be rerouted off the beach and over the walkway, approximately 10 feet west of the Ebb Tide bulkhead and patio. Id. Thus, instead of the original intent to provide legal access across Ebb Tide's beach, the City now intends to use the easement as a continuation of its "waterfront promenade," with no beach-level public access between the public beaches. Id.; Ex. 3.

The proposed walkway structure will create a solid wall-like appearance viewed from the patio and practical barrier to Ebb Tide's access to the beach. Ex. 19, 21. The walkway deck where people walk will be a couple feet higher than the Ebb Tide patio floor, meaning Ebb Tide owners sitting on their patio will no longer see the waterfront, but only the walkway wall

with people walking several feet higher and looking down on them. Ex. 21 at 12. Likewise, all first-floor condominium units, which are all at the same level as the patio, will have views of the walkway wall, while walkway users will have views looking down into those units. Id. at 12-14.

The City's current conceptual design does not include railings to prevent people from falling or jumping off the walkway, as the railings would make the walkway too high to comply with the height limitation of the easement. RP 253, 286. Instead, the City proposes that on either side of the four-foot-wide walkway surface, it will install a one-foot-high curb, which will be three feet wide. Ex. 19. There will be no railings on the edges of the elevated curbs, which will be seven to ten feet above the sand. Ex. 19.

The only risk safety expert who has examined the proposed walkway unequivocally maintains that an elevated walkway, as proposed without a railing, will create a significant risk of injury to anyone who crosses it. CP 3327-3346. For this

reason, that expert opines without reservation that this walkway must have railings to comply with the International Building Code (“IBC”) (which has been adopted by the City). See CP 3327-3346. The City building official still has not determined whether the proposed walkway will require railings but testified to having significant concerns with no railings. CP 1114, 1117, 1119, 1122-1123, 1126.

It is undisputed the proposed elevated walkway will eliminate Ebb Tide owners’ historical and currently existing direct access to the beach and force them to take a long, winding route around either end of the walkway and over City owned property just to access their own beach. Ex. 19, 21, and 138a at 14. The alternate route deprives Ebb Tide of any use of the easement area. Id.

G. The Trial Court Decision and Final Judgment.

The City filed suit against Ebb Tide in 2017 seeking declaratory relief to establish the easement provides it sufficient property rights to construct its proposed elevated walkway. CP

3865-3877. Pretrial motions practice resulted in rulings that the easement is ambiguous as to what the parties intended, but they did intend some sort of “improved walkway.” CP 3050; CP 1576-77. Ebb Tide pretrial motions for summary judgment arguing the easement does not expressly provide for below ground structures (i.e., the planned support pilings), does not provide the right to construction activity outside the easement area, and the City’s request for declaratory relief is not ripe for adjudication, were all denied. CP 218-220. The issues were raised again in Ebb Tide’s trial brief. CP 114-16.

After a four-day bench trial, while acknowledging the proposed elevated walkway “would impact a portion of the Ebb Tide’s upper beach property and access to the water,” the Honorable Millie M. Judge concluded in her letter decision that “[t]he parties are presumed to know the impact of the rights they granted in the easement.” CP 75. Thus, the trial court concluded that Olympic and Ebb Tide intended to grant an exclusive easement across its entire private beach, cutting off its

own access, as well as the resulting negative impacts on views and privacy.

The City then moved for entry of judgment on the letter decision, requesting the trial court expand the declaratory relief pleaded in the amended complaint to allow, not only the specified “Planned Improvements,”³ but also any final design “materially consistent with the Planned Improvements.” CP 64-67; 69-71. Ebb Tide objected that the vaguely worded final judgment will only result in more litigation and is an improper advisory ruling. CP 45-53. The trial court entered the judgment exactly as requested by the City. CP 7-9. This appeal followed. CP 1.

IV. SUMMARY OF ARGUMENT

Since 1983, the public has crossed Ebb Tide’s private beach over an unimproved ten-foot-wide easement. Ebb Tide

³ The “Planned Improvements” are the conceptual design for the elevated walkway attached as Exhibit B to the City’s amended complaint and admitted at trial as Ex. 19.

has enjoyed concurrent use of the easement area without impact on its access, views, or privacy, which the City attorney who negotiated the easement testified were all material concerns raised by the grantor during the parties' negotiations in 1983. For decades, the City respected those concerns.

As a threshold issue before reaching the merits, the City's case is premature and does not present a justiciable controversy for declaratory relief. Whether couched in terms of "ripeness" or an "advisory opinion," the issue is the same: the City's current design is only 30% complete, and the City maintains that it does not yet know whether, in accordance with the IBC, it will require the addition of railings, which would exceed the height limitation, or whether the City will need a construction easement for work outside the easement area. Thus, the City cannot say the eventual design will fit within the "box" of the easement, or whether it has "sufficient real property rights to construct a walkway within the easement area," or whether that walkway will be "materially consistent"

with the currently proposed elevated walkway. Because it is improper for courts to grant declaratory relief without a justiciable controversy, this Court should reverse and remand with directions to dismiss the City's case.

Regarding the merits, the intent of the parties as shown from the unambiguous language of the easement and, as to the ambiguous language, from the testimony of Snyder, Dr. Nelson, and the surrounding facts and circumstances admitted at trial, was for an improved beach-level walkway. The 1977 Report proposed the beach-level boardwalk, but the owners of the Nelson Apartments opposed it. The sale to Olympic allowed for a compromise, with the beach-level boardwalk proposed in 1977 being moved away from the patio to protect Ebb Tide's access, privacy, and views, but still provide "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." As the City's own expert, Jeff Parsons, testified, unsupported beach-level walkways were common in the Puget Sound area

before and after the easement was created.

Fundamentally, the easement allowed the City the right to construct something like the beach-level boardwalk proposed in the 1977 Report, but without having to incur the cost of a condemnation action to secure the real property rights as recommended by that 1977 Report. Entirely consistent with this intent for a more modest beach-level walkway, the easement language – drafted by the City – omits any grant for installation of improvements or structures, below, beneath, or under the easement area. This grant language is essential to the installation of the proposed elevated walkway’s multiple thirty-inch diameter support pilings up to fifty feet below the Ebb Tide beach. The easement, as drafted by the City, did not include such language. Nor does it include language allowing the City to perform construction outside the easement area, which will be required to construct the current proposed walkway. The City’s proposal exceeds the grant, meaning the City does not have “sufficient real property rights” to construct

its proposed elevated walkway in the easement area.

In addition, the City omitted any language granting itself exclusive use of the easement area. The easement is, on its face, non-exclusive. That means Ebb Tide has the right to use the easement area as it always has so long as it does not interfere with the City's reasonable use. The City's own experts admitted at trial that a significantly lower improved walkway, which Ebb Tide owners could easily cross over, would have essentially the same utility as the currently proposed elevated walkway, which will be a barrier between Ebb Tide and its beach. Thus, such an improved walkway does not require the City's proposed exclusive use.

Because the easement is non-exclusive, allowing the proposed elevated walkway also effects an unconstitutional taking of Ebb Tide's access to its beach. The damage to Ebb Tide's access, as well as its views and privacy, violates the Washington Constitution, art. 1, § 6.

For any of the above reasons: the City’s case is not ripe for declaratory relief, the proposal being beyond the scope of the grant, lack of exclusivity, and unconstitutional taking, this Court should reverse and remand with directions to dismiss the City’s case.

V. ARGUMENT

A. Standard of Review.

This Court’s review of the decision and judgment from a bench trial is “limited to determining whether the trial court’s factual findings are supported by substantial evidence and whether those findings support the trial court’s conclusions of law.” Yorkston v. Whatcom County, 11 Wn. App. 2d 815, 831, 461 P.3d 392 (2020), rev. denied, 195 Wn.2d 1020, 464 P.3d 202 (2020) (citing Standing Rock Homeowners Ass’n v. Misich, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001)). “Substantial evidence” is the “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” Id. (quoting Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d

873, 879, 73 P.3d 369 (2003)) The evidence and all reasonable inferences must be viewed in the light most favorable to the prevailing party. Id., citing Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 572, 343 P.2d 183 (1959)). Questions of law are reviewed de novo. Sunnyside Valley, 149 Wn.2d at 880.

B. The Trial Court Erred in Granting Declaratory Relief in the Absence of a Justiciable Controversy.

As a threshold issue, the trial court erred in granting the City’s declaratory relief in the absence of a justiciable controversy. Coppernoll v. Reed, 155 Wn.2d 290, 300, 119 P.3d 318 (2005) (“Justiciability is a threshold inquiry and must be answered in the affirmative before a court may address the merits.”). “The justiciability of a claim is a question of law we

review de novo.” Am. Traffic Solutions, Inc. v. City of Bellingham, 163 Wn. App. 427, 432, 260 P.3d 245 (2011) (citing Coppernoll, 155 Wn.2d at 299-301).

The City’s only claim for relief is under the Uniform Declaratory Judgments Act, Chapter 7.24 RCW. CP 18-19. In pertinent part, the Act provides: “A person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder. RCW 7.24.020.

However, as our Supreme Court has advised, there must be a “justiciable controversy,” meaning:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

To-Ro Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting Diversified Industries Development Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). “Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement.” Id. Here, as further explained herein, the City fails to satisfy the elements.

The preliminary status of the elevated walkway design was highlighted by the City in opposition to summary judgment shortly before trial, when the Ebb Tide sought to establish there is no dispute that the construction process will require use of Ebb Tide property outside the easement area. The City responded:

The City currently has a conceptual design for a proposed elevated walkway in the easement area. It does not have a finalized design, construction plan, construction budget, or building permit. Those steps come later in the process of constructing capital improvement projects. The determination of exactly how to construct a walkway in the easement area may not be made for

several years, depending on the City Council's funding priorities.

CP 1598. The proposed "conceptual design" is only 30% complete and currently omits features, such as safety railings, which appear required by the International Building Code (IBC), and which may be required later, but would violate the easement's 17.00 MLLW height limitation. CP 1438 (30% complete), 1120, 3327-3346 (safety railings); RP 234 (walkway with railings would be 25 MLLW).

Ebb Tide maintained the City's case is not ripe until the final parameters of the proposed elevated walkway are known, i.e., whether the elevated walkway will have railings or not. CP 118-19. In the alternative, Ebb Tide planned to provide expert testimony that safety railings are required by the IBC, which is Washington law, and, therefore, the proposed elevated walkway in its final form will be above the easement's height limitation. CP 307-319; CP 3327-46; see WAC 51-50 et seq. However, the City moved in limine to exclude any mention of the IBC at

trial as “irrelevant.” CP 1432-37. The trial court granted the motion. RP 21-43; CP 223-25.

Nevertheless, the fact remains the City has not determined whether the proposed elevated walkway, the existing conceptual design of which already is within inches of the maximum height limitation of 17.00 MLLW, will require safety rails. CP 1114, 1117, 1119, 1122-23, 1126. If required, safety rails will add approximately another 42 inches to the height of the walkway, well above the easement’s height limitation. CP 1120; RP 234.

The effort by the City and trial court to narrow the issues for trial further highlights the problem. Specifically, the resulting declaratory judgment is an impermissible advisory ruling regarding a future conceptual design the City admits may require safety rails and almost certainly will require it to secure additional real property rights from Ebb Tide to construct the proposed elevated walkway. It is well-settled in Washington that courts may not issue advisory opinions. Walker v. Munro,

124 Wn.2d 402, 879 P.2d 920 (1994) (“We choose instead to adhere to the longstanding rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions.”); Bloome v. Haverly, 154 Wn. App. 129, 141-42, 225 P.3d 330 (2010) (holding, inter alia, absence of firm building plans precluded declaratory relief regarding compliance with view covenant).

The conceptual, versus final, nature of the City’s elevated walkway design became significantly more evident in the aforementioned summary judgment motion heard shortly before trial. Ebb Tide sought to dismiss the City’s claim because the City lacked “sufficient property rights to construct the Planned Improvements within the easement area” due to needing use of an area outside the Easement area for construction. CP 3878. The issue appeared cognizable as the City admitted in discovery answers that it would have to condemn a temporary construction easement for an undetermined additional portion

of the Ebb Tide beach for an as yet undetermined period of time to facilitate construction activities, including the pile-driving of at least seven steel pilings to a depth of up to fifty feet. CP 109, 191; see Ex. 138a. at 2-4.

In response to summary judgment, the City demurred that it did not actually know whether a construction easement would be needed because the design is only thirty percent complete and the “means and methods” of construction are determined later. CP 1438, 1598; RP 12-15. The trial court denied the Ebb Tide’s motion as “unripe.” RP 21. However, if the issue was unripe, the City’s request for declaratory relief based on a merely “conceptual” design was then clearly unripe as well, and this case should be dismissed.

Despite the trial court’s (and the City’s) efforts to narrow the issue at trial to simply whether the 30% complete “conceptual” proposed elevated walkway fit with the spatial box of the easement, that – simply – does not resolve the issues between the parties. In fact, the final judgment that the City has

the property rights to construct anything “materially consistent with the Planned Improvements” raises more questions than answers. CP 3-4. After all, what would be “materially consistent,” and would that include railings necessary to comply with the IBC? The term “materially” is obviously ambiguous under the circumstances and clearly means something different to Ebb Tide than to the City. It is for this reason that courts cannot render advisory rulings based on conceptual and incomplete designs. See, e.g., Bloome v. Haverly, 154 Wn. App. 129, 141-42, 225 P.3d 330 (2010) (holding, inter alia, absence of firm building plans precluded declaratory relief regarding compliance with view covenant).

Because a declaratory judgment based on a merely 30% complete conceptual design for which no permits have been obtained does not present a justiciable controversy, this Court should reverse and remand with directions to dismiss the City’s case.

C. The Trial Court Erred in Disregarding Both Intrinsic and Extrinsic Evidence of Intent.

1. Easements are construed and interpreted like contracts.

Easements are conveyed by deed, and deeds are interpreted like contracts. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). The interpretation of an easement is a mixed question of law and fact. See Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). The original parties' intent is a question of fact and the legal consequence of that intent is a question of law. Id.

The intent of the original parties to an easement is determined from the deed as a whole. Zobrist v. Culp, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not be considered. City of Seattle v. Nazarenius, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). "Generally, the question of whether a written instrument is ambiguous is a question of law for the court." McGary v. Westlake Investors, 99 Wn.2d 280, 661 P.2d 971

(1983) (citing Ladum v. Utility Cartage, Inc., 68 Wn.2d 109, 411 P.2d 868 (1966)). Ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole. Id., citing Green River Vly. Found., Inc. v. Foster, 78 Wn.2d 245, 249, 473 P.2d 844 (1970). The Washington Supreme Court has accepted the definition of “ambiguous” as “[c]apable of being understood in either of two or more possible senses.” Ladum, 68 Wn.2d at 116 (quoting Webster's New International Dictionary (2d ed.)).

If ambiguity exists in an easement, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties’ prior conduct or admissions. Nazarenius, 60 Wn.2d at 665. “The easement's scope is determined by looking to the intentions of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has

been used and occupied.” Nw. Properties Brokers Network, Inc. v. Early Dawn Ests. Homeowner's Ass’n, 173 Wn. App. 778, 789–90, 295 P.3d 314 (2013).

It is well-established that a servient estate should not be “subjected to a greater burden than that originally contemplated by the easement grant.” See Rupert v. Gunter, 31 Wn. App. 27, 31, 640 P.2d 36 (1982); Green v. Lupo, 32 Wn. App. 318, 324, 647 P.2d 51 (1982). When an easement does not state that it is exclusive as against use by the grantor, by law, it is nonexclusive. Johnson v. Lake Cushman Maint. Co., 5 Wn.App.2d 765, 784-85, 425 P.3d 560 (2018).

2. The easement is ambiguous, requiring extrinsic evidence of the parties’ intent.

In September 2018, Ebb Tide moved for summary judgment that the easement is invalid because the grantor, Olympic, did not have legal authority to grant it and, even if valid, the scope of the easement is ambiguous, and because it was drafted by the City, the easement should be construed

against the City, as the drafter. See CP 3842-51. Among other ambiguities, Ebb Tide pointed out the City of Edmonds Datum⁴ cited in the easement for the maximum allowed elevation did not exist in 1983 and the easement did not identify any “improvements” or “structures” contemplated by the easement. CP 3843-46. Thus, the easement was both vague and ambiguous as to its intent regarding any improvements in the easement area and the height limitation, for which there was no commonly understood baseline measurement. See id.

The lack of an actual “City of Edmonds Datum” as referenced in the easement is troubling. Though it did not exist, it appears that the City’s surveyors, Lovell-Sauerland, calculated their own, and only a skilled surveyor who was able to retrieve and review the field notes of Lovell-Sauerland could re-calculate it many years later. See id.; see also CP 2235-36.

⁴ A Datum is defined as a surface of zero elevation by United States Geodesic Survey from which other measurements may be made. CP 3799-3800; see also, CP 3006-10.

However, there is no evidence of record that either the City or Olympic/Ebb Tide understood or even discussed Lovell-Sauerland's calculation of the "City of Edmonds Datum." In short, there is no evidence that the parties to the easement in 1983 knew what "17.00 as referred to City of Edmonds Datum (Mean Lower Low Water)" meant in relation to the elevation of the Ebb Tide. Thus, the City introduced an ambiguity regarding the height limitation in the easement it drafted.

On November 5, 2018, the Honorable Joseph P. Wilson denied Ebb Tide's motion for summary judgment of invalidity, ruling the easement is valid and enforceable, but granted Ebb Tide's motion as to the easement's ambiguity, ruling:

[T]he Easement is ambiguous as to whether it provides the City of Edmonds a right to construct an elevated walkway on the Easement area including but not limited to the Planned Improvements described in the Complaint. Extrinsic evidence is therefore admissible to construe the ambiguous Easement.

CP 3051.

On July 26, 2019, after further discovery and on a later motion for summary judgment by the City, Judge Janice E. Ellis entered an order that the City's contracted surveyors "intended the height limitation in the easement to be calculated as 1.84 feet above the finished first floor elevation of the Ebb Tide." CP 2235-36. While the court ruled the height limitation itself could be determined through extrinsic evidence, it remains unclear how that specific height was chosen by the surveyors, or how anyone reading the easement without assistance of the extrinsic evidence would know the actual height limitation. There is no evidence of record regarding whether any of the parties to the easement had any knowledge or understanding of what 17.00 "City of Edmonds Datum" represented in relation to the height of the Ebb Tide patio or first floor units.

On December 17, 2019, another trial court judge, Judge Richard T. Okrent, entered an order granting the City's unopposed third motion for partial summary judgment that:

[T]he phrase “public improvements, facilities, utilities and necessary appurtenances” contained in the Access Easement allows for the construction of an improved walkway in the easement area.

CP 1576-77. Significantly, the order does not say “elevated walkway,” but “improved walkway,” which would include the roughly beach-level boardwalk contemplated by the City in 1977 before the easement was entered. Ex. 6.

Thus, it remained an issue for trial whether the parties to the ambiguous easement intended in 1983 to allow the roughly ten-foot-high by ten-foot-wide by 154-foot-long elevated walkway proposed by the City as its “Planned Improvements,” with the obviously negative impacts it would impose on Ebb Tide’s privacy, views, and access to its private beach.

3. The extrinsic evidence at trial shows the parties intended a beach-level walkway.

Snyder testified that a survey firm, Lovell-Sauerland, “as the City’s agent and engineer,” drafted the easement under his direction. Ex. 20 at 6, 33-34. Snyder testified there was no plan for any specific improvements in the easement area at the

time the easement was negotiated and the language regarding improvements was simply a “place holder” for the future. Id. at 15. Any walkway was supposed to be “some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway.” Id. at 15-16. Snyder was obviously suggesting the walkway was to be on the beach itself, i.e., “the tide flat,” and not elevated. Id.

Snyder’s testimony of a beach-level walkway is entirely consistent with other testimony at trial. Under cross-examination, one of the City’s experts, Jeff Parsons, testified that beach-level walkways were quite common on Washington’s private beaches in the 1970s and ‘80s when the easement was negotiated and drafted. RP 340.

Conversely, the only extrinsic evidence offered by the City to support intent for an elevated walkway at or before the time when the easement was entered was the 1977 Report showing an elevated walkway on posts in the Edmonds marina,

but not in front of the Ebb Tide. See Ex. 6. There was no actual evidence presented of any intent whatsoever for an elevated walkway on Ebb Tide's beach when the easement was executed.

4. The unambiguous easement language does not allow for the City's proposed elevated walkway.

The parties' intention of a beach-level walkway is consistent with the intrinsic evidence, i.e., the language of the easement itself, which expressly provides only the "right to construct and maintain public improvements, facilities, utilities, and necessary appurtenances, over, through, across and upon" the easement area. Ex. 1 at 1. There is no specific right granted to construct or maintain anything under, below or beneath Ebb Tide's beach. Id.

The omission of language allowing construction or installation of structures below the easement area is dispositive, as Washington Supreme Court precedent precludes interpreting and expanding this language to allow for construction or

installation of structures underground, below the easement area.

See, e.g., Coleman v. Everett, 194 Wash. 47, 76 P.2d 1007

(1938). In Coleman, the Supreme Court was presented with language that was the reverse of the language at issue in this case, with the controlling express phrase “along and under.” As the Court described the issue:

Considered in its context, the phrase would seem hardly susceptible to construction. But respondents urge that *along* alone may mean *upon or above*. That may well be. It is, however, used in conjunction with under, which limits, rather than augments, its meaning. So, in its context, along must have been intended by the parties to carry merely its ordinary meaning of “lengthwise,” or “in a line with the length.” Webster's New International Dictionary. It seems clear to us that the only right acquired by the city under the deeds was to lay a pipe line lengthwise of the strips of land described and under the surface. Any other construction would leave the word *under* meaningless.

Id. at 49-50 (italics original).

For support, Coleman cited with approval to a Pennsylvania Supreme Court case deciding the exact issue before this Court: whether “over and through” can be properly

construed to include “under, below or beneath.” Id. at 50

(citing Commonwealth ex rel. Bell Tel. Co. v. Warwick, 185

Pa. 623, 40 Atl. 93 (1898)). The Warwick court stated:

The grant however of authority to run and maintain wires “over and through” the streets, did not include permission to lay them under, below or beneath. Over and through are equivalent to across and along, not only by the natural meaning of the words in this connection, but by the practical construction given to them at the time by the acts of the parties. The claims of the relator in this respect are too broad and cannot be sustained.

Warwick, 185 Pa. at 637 (quoted in Coleman, 194 Wash. at 50).

Here, the easement was drafted under the direction of the City’s attorney, Scott Snyder. Ex. 20 at 5-6. If the City then wanted and intended to construct an elevated walkway with support pilings installed underground or at least have a “placeholder” for such a structure, it should have provided access both “over” and “under” the easement area. See, e.g., Murphy v. Hendrickson, 8 Wn. App. 150, 156, 437 P.3d 736 (2019) (easement stating: “An easement for ingress, egress and utilities over, across and under a strip of land...” (underlining

added); Rainier View Court HOA v. Zenker, 157 Wn. App. 710, 716, 238 P.3d 1217 (2010) (easement stating: “We hereby convey an easement for ingress, egress and utilities over, under, and across the private roads as shown hereon”) (underlining added). The easement in this case explicitly says: “over, through, across and upon,” not “under,” not “below,” and not “beneath.” Ex. 1 at 1. Thus, the holding in Coleman is dispositive of the City’s ability to construct its proposed elevated walkway with – currently – seven 30-inch diameter pilings extending up to fifty feet below Ebb Tide’s beach. Ex. 19; Ex. 138a. at 2-3 (Supp. Answer to Rog. 10). By its terms, the easement clearly does not grant that right.

While perhaps arguably not a standard beach walkway construction practice today, the evidence at trial showed that at the time the easement was created, improved beach-level walkways without subsurface supporting structure were common. See RP 340-341. It is thus reasonable to conclude that the City, being responsible for drafting the easement,

included all terms necessary for the intended use and no subsurface support was deemed necessary for that intended use, i.e., a beach-level walkway.

Similarly, the City's plans ignore that the ten-foot-wide elevated walkway will occupy the entire width of the easement area leaving none of the easement area to provide access for equipment during the lengthy construction period, nor maintenance after construction. While admitting it will need use of an area on Ebb Tide's beach outside the easement area for construction, the City merely states it will need a "temporary construction easement" on an as-yet undetermined area of the remaining Ebb Tide beach for an as-yet undetermined period of construction, causing as-yet undetermined damage to the existing natural beach, likely in violation of state and federal environmental laws. Ex. 138A. at 2-4 (Supp. Answer to Rog. 10). The easement clearly does not provide the City the right to take those actions. Ex. 1 at 1.

The trial court erred in granting the City's requested declaratory relief that "the City has sufficient real property rights to construct the Planned Improvements within the easement area" because, as a matter of law, the City cannot construct the proposed elevated walkway based only on its existing real property rights, i.e., only the currently existing easement. The easement has no language granting the City the right to install substantial support pilings below the easement area and the City admits it needs a temporary construction easement outside the current easement to construct its proposed elevated walkway. Ex. 1 at 1; Ex. 138a. at 2-4.

D. The Trial Court Erred in Granting the Declaratory Relief Because the Planned Improvements Create an Exclusive Use of a Non-Exclusive Easement.

1. The Easement is non-exclusive.

Ebb Tide maintained throughout the litigation and trial that the City's Proposed Improvements will render the City's use of the easement area exclusive, contrary to the parties'

intent reflected in the language of the easement itself and extrinsic evidence. Nevertheless, the trial court concluded:

By placing the easement approximately 10 feet away from the Ebb Tide's sea wall, the parties had to know that a constructed public pathway of up to 17 feet in height would impact a portion of the Ebb Tide's upper beach property and access to the water. The parties are presumed to know the impact of the rights they granted in the easement.

CP 74. In effect, the trial court found the parties mutually agreed that the subject easement would be exclusive to the City.

See id. The trial court erred.

Washington recognizes two types of easements: exclusive and nonexclusive. Johnson v. Lake Cushman Maint. Co., 5 Wn.App.2d 765, 425 P.3d 560 (2018). Easements are generally nonexclusive unless the easement includes clear and unambiguous language of exclusivity. Id., citing Latham v. Garner, 105 Idaho 854, 857, 673 P.2d 1048 (1983). The owner of a servient estate typically has the continuing right to use their land burdened by an easement as follows:

The fundamental distinction between the rights embodied in easements and profits and the right of possession is that the latter gives the owner the legal right to exclude all persons from all parts of the land, whereas the holder of an easement or profit may only prevent other persons from interfering with its limited purposes.

17 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE, REAL ESTATE: PROPERTY LAW § 2.1 at 80-81 (1995); see also, RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9 cmt. c (2000) (“The person who holds the land burdened by a servitude is entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement or profit.”). Thus, unless an easement is exclusive, the owner of the servient estate may use his property as he chooses, so long as his use does not unreasonably interfere with the dominant estate’s enjoyment of the easement. Id.; see also, Hayward v. Mason, 54 Wash. 649, 652, 104 P. 139 (1909); Cole v. Lavery, 112 Wn. App. 180, 184, 49 P.3d 924 (2002).

While Washington recognizes exclusive easements, they are generally disfavored because exclusivity “strips the servient estate owner of the right to use his land.” Latham v. Garner, 105 Idaho 854, 673 P.2d 1048, 1050 (1983) (citing Hoffman v. Capitol Cablevision System, Inc., 52 A.D.2d 313, 383 N.Y.S.2d 674, 676 (1976)). For example, our Supreme Court has held that an easement for ingress and egress without any exclusivity language is “simply an easement, and nothing more” and does not convey exclusive rights. Hayward v. Mason, 54 Wash. 649, 651, 104 P. 139 (1909). Moreover, courts cannot imply exclusivity into an easement where none expressly exists. See Johnson, 5 Wn.App.2d at 783-784.

Here, the easement does not contain the word “exclusive” and is therefore facially non-exclusive. Ex. 1. Thus, Ebb Tide has the right to use the easement area “in any manner which does not materially impair or unreasonably interfere with the use of the way [i.e. the easement area].” Hayward, 54 Wash. at 652. As the dominant estate, the City may not take any action

that eliminates all Ebb Tide's uses of the easement except for those available to the general public because, in doing so, the City would be using the non-exclusive easement in an exclusive manner. That is, the City would be excluding all uses except for those which the City chooses to allow. Id.

2. The City unlawfully seeks to use the non-exclusive easement in an exclusive manner.

The City admits the elevated walkway will effectively eliminate Ebb Tide's use of the easement area to access the shoreline from the Ebb Tide patio or, conversely, to access the Ebb Tide patio from the beach, as has been usual and customary throughout Ebb Tide's existence. Ex. 138a. at 4 (Answer to Rog. 14); Ex. 21 at 9-10. For example, Dr. Nelson, the only Ebb Tide unit owner the trial court allowed to testify because only he had "relevant" knowledge, testified that Ebb Tide residents regularly accessed the beach from the patio and he and other boaters would pull up to the Ebb Tide beach to visit. RP

424-25; see CP 223-25.⁵

Notably, diagrams provided by the City confirm the elevated walkway will block Ebb Tide's direct access to the beach and force owners to take a circuitous route over the City's neighboring property. See Ex. 21 at 9-10 (showing, respectively, Ebb Tide's beach access currently, and future Ebb Tide circulation). The City confirmed this fact in answer to interrogatories:

The upper beach area will no longer be used to access the waterfront, or "lower beach" area. Instead (Ebb Tide) residents will be able to access the waterfront in one of two ways the City recommends, as indicated in Supplemental Response No. 14a: through the south gate off of the Ebb Tide patio and down the south steps, or through a north gate off of the Ebb Tide patio.

Ex. 138a at 5 (Answer to Rog. 12); Ex. 21 at 10. Thus, as the City admits, the proposed elevated walkway will cut off Ebb

⁵ The trial court granted the City's motion in limine to prevent all other current Ebb Tide owners from testifying since they had no personal, and thus no relevant, knowledge of events giving rise to the 1983 easement. CP 223-225.

Tide's direct access to its beach. In short, the proposed elevated walkway is an improper attempt to use a non-exclusive easement in an exclusive manner.

Ebb Tide previously raised the exclusivity argument on summary judgment. Judge Kurtz initially granted the motion, but then reconsidered the order, concluding there remained issues of fact. CP 2751-2752 and CP 2579-2580. For its reconsideration motion and at trial, the City argued a California case, City of Pasadena v. California-Michigan Land & Water Co., 17 Cal.2d 576, 110 P.2d 983 (1941), essentially provides that the easement's legal description, along with the height restriction, draws a box which the City may completely occupy should it deem fit to do so. CP 2891-2892. The City misreads City of Pasadena. In fact, the City's "box theory" was raised by the dissent in City of Pasadena, but the majority opinion rejected it. Compare, 110 P.2d at 985-86 (majority), with 110 P.2d at 990-91 (dissent). The majority in City of Pasadena instead held that an easement "must be construed to permit a

due and reasonable enjoyment of both [the servient and dominant estates'] interests so long as that is possible,” which is also consistent with Washington law. Id. at 987.

Thus, even under City of Pasadena, the City was required to show at trial that the City’s “due and reasonable enjoyment” of the easement is impossible unless it builds the proposed elevated walkway and thereby deprive Ebb Tide of its “due and reasonable enjoyment” of the easement. Littlefair v. Schulze, 169 Wn. App. 659, 665, 278 P.3d 218 (2012) (“A servient estate owner may use his property in any reasonable manner that does not interfere with the original purpose of the easement.”) (citing Thompson v. Smith, 59 Wn.2d 397, 407, 367 P.2d 798 (1962)). Otherwise, the existing concurrent use of land must continue “[u]ntil a point of unreconcilable conflict is reached.” Pasadena, 110 P.2d at 987.

The City did not argue at trial, nor did it provide any evidence, that “a point of unreconcilable conflict” exists between its desire for a walkway over the easement area and

Ebb Tide's access, views, and privacy. Indeed, the public, i.e., the City, and Ebb Tide have both had "due and reasonable enjoyment" of the easement as intended for almost forty years. Even if the "Planned Improvements" could otherwise be allowed by the easement, there is no evidence of record that they are necessary to the City's "due and reasonable enjoyment" of the easement.

The evidence at trial established that the parties likely intended some future "improved walkway" at beach level. As already discussed, Snyder testified that he intended "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." Ex. 20 at 15-16.

The City's geomorphology expert, Jeff Parsons, testified regarding beach-level boardwalks:

This is – this was a very popular thing when it – when this was proposed in the '70s, '80's, and even into the '90s.

RP 340. In context, Dr. Parsons testified that those beach-level

boardwalks were generally built without subsurface support structures and because of the lack of support, they did not last. See generally, RP 340. Thus, at the time the easement at issue was created in 1983, beach-level boardwalks were common, but they typically were not very durable. Id.

Later, also under cross-examination, Dr. Parsons testified that during the roughly six-month warmer late spring, summer, and early fall beach season – roughly six months – the easement area might never be wet during the day. RP 349-50.

Dr. Parsons then testified referring to Ex. 19 (i.e. the diagram of the proposed elevated walkway) and discussed sand levels in the easement area and whether a lower walkway would often be wet, confirming that an improved walkway at 13 feet MLLW, roughly four feet lower than the City's proposed elevated walkway, likely would be dry those same six months of the year. RP 353. Thus, the testimony of Dr. Parsons established that a walkway at 13.00 MLLW (approximately four feet lower than the Planned Improvements), would be

practical as a dry walkway over the tide flats. Likewise, the Ebb Tide established by cross-examination of the City's marine structural engineer, Willie Ahn, that a lower-level walkway is structurally feasible, though it may need to be made stronger for the periods when it is exposed to severe weather. RP 373-74.

Thus, the City's own expert witnesses testified at trial that the City's proposed elevated walkway at or just below the height limitation of 17.00 MLLW is not the only feasible and practical option for an improved walkway over the beach. Rather, a much lower and less obtrusive walkway through the easement remains both feasible and practical, which further underscores the City's failure to establish that it cannot have "due and reasonable enjoyment" of the easement without cutting off Ebb Tide's direct access to its beach or severely impacting Ebb Tide's privacy and views.

In sum, the City failed to establish at trial that depriving Ebb Tide of direct access to its beach is necessary to the City's "due and reasonable enjoyment" of the easement when it has

used the easement for almost forty years with no improvements and a much lower improved walkway is both feasible and practical. Therefore, the trial court erred in granting the City's declaratory relief, which would create an exclusive use of a non-exclusive easement.

E. The Trial Court Erred in Granting the City Declaratory Relief Because It Effects an Unconstitutional Taking Without Just Compensation.

In seeking to convert a non-exclusive easement to the City's exclusive use, the City sought, and the trial court effected, an improper taking without just compensation in violation of the Washington Constitution. Specifically, the exclusive easement will deny Ebb Tide access to the waterfront side of the Ebb Tide beach, while also creating an unusable "sandbox" to the area between the exclusive easement and the Ebb Tide patio. The Washington Constitution, art. 1, § 16, provides in pertinent part: "No private property shall be taken or damaged for public or private use without just compensation having been first made." It is the addition of "or damaged" in

the Washington and other state constitutions that provides broader protection to private parties than the U.S. Constitution. Brown v. Seattle, 5 Wash. 35, 38-41, 31 P. 313 (1892) (discussing greater protection offered by Washington constitution).

It is well-settled in Washington that a right of access is a protected property right. Id. at 37-45 (City's threatened denial of access to alley due to planned street grading justified injunctive relief to property owner); Seattle Transfer Co. v. Seattle, 27 Wash. 520, 526, 68 P. 90 (1902) ("From the nature of the elevated roadway or structure as described in the complaint, such damages to appellants are apparent and are such as entitle them to compensation; and, under the constitution (§ 16, art. 1), appellants are entitled to such compensation before the injury is done."); McMoran v. State, 55 Wn.2d 37, 345 P.2d 598 (1959). Here, the City's proposed elevated walkway would deprive Ebb Tide of access, not to another property, but to much of its own property – its private

beach and tidelands – and would render the portion Ebb Tide could access, the so-called “upper beach,” entirely useless. This is not seriously disputed by the City, which admitted as much in answers to discovery and other materials.

The City’s proposed elevated walkway, taking up the whole of the easement area, blocks off Ebb Tide’s “upper beach” area from the water. See Ex. 138A. at 4 (“The upper beach area will no longer be used to access the waterfront, or “lower beach” area.”). Effectively, the “upper beach” would no longer be a beach, as a beach requires a shoreline. Rather, it would be nothing more or less than a giant sandbox with Ebb Tide’s bulkhead on the east and the City’s elevated public walkway on the west. Thus, Ebb Tide would suffer a taking of its beach and property damage in violation of the state constitution by the taking of its use of the “upper beach” area. Id. This is “damage to property” violative of article 1, § 16 of the Washington Constitution. See Martin v. Port of Seattle, 64 Wn.2d 309, 318, 391 P.2d 540 (1964) (holding that no actual

incursion into the space at issue is “necessary to maintain an action under the ‘taking or damaging’ provisions of the state constitution.”).

In Martin, 196 homeowners sued the Port of Seattle for inverse condemnation, alleging an unconstitutional “taking or damaging” of their property without just compensation caused by low altitude flights of jet aircraft at SeaTac Airport. As the Court framed the issue, “[t]he plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the near-by flights which interfere with the use and enjoyment of their land.” Id. at 316. While the City may argue here that it will not intrude into the “upper beach” area (other than during construction), the Martin court observed that “the problem of balancing the interests involved, public and private, seems much the same whether a physical trespass is or is not involved.” Id. at 317. In Martin, the issue was noise alone. Here, there are issues of noise, loss of privacy, and loss of use, i.e., access to the water, which the City

does not and cannot dispute.

While the City's proposed elevated walkway takes the utility of the "upper beach" from Ebb Tide, that walkway also takes away Ebb Tide's access to the lower beach and waterfront. In effect, Ebb Tide would no longer be a "waterfront" condominium because to access the waterfront, the residents would have to leave the Ebb Tide property, cross City property, and enter the beach area via public stairs to the north and/or south along with the rest of the general public. Ex.

138A. at 4; Ex. 21 at 9-10. The City admits this, stating:

The upper beach area will no longer be used to access the waterfront, or "lower beach" area. Instead [Ebb Tide] residents will be able to access the waterfront one of two ways the City recommends, as indicated in Supplemental Response No. 14a: through a gate off of the Ebb Tide patio and down the south steps, or through a north gate off of the Ebb Tide patio.

Ex. 138A. at 4. The City further admits the south gate option is offered only because the City was unable to obtain permits to do something else it had planned. Id.

The City's disregard for Ebb Tide's rights aside, the fact remains that the City's proposed elevated walkway would eliminate, i.e. take, Ebb Tide's access to its own beach. See Seattle Transfer Co., 27 Wash. at 526 ("From the nature of the elevated roadway or structure as described in the complaint, such damages to appellants are apparent and are such as entitle them to compensation; and, under the constitution (§ 16, art. 1), appellants are entitled to such compensation before the injury is done."). In Seattle Transfer, the taking was the adjoining property owner's right of access to a public street, which was raised by the city several feet above the adjoining property at issue, making it impossible to access the street from the adjoining property. See id.; see, e.g., Brown, 5 Wash. at 38-45 (deprivation of right to access plaintiff's property through alley warranted injunction against city's planned street grading as unconstitutional).

Because it is admitted by the City and cannot otherwise be disputed that the proposed elevated walkway would take, or

at least damage, Ebb Tide's access to its waterfront and its private tidelands, i.e. the "lower beach," for this additional reason, this Court should rule that construction of the proposed elevated walkway would violate the Washington constitution, art. 1, § 16, reverse the judgment, and remand with direction to dismiss the City's case.

VI. CONCLUSION

After five years of litigation, the trial court issued a declaratory judgment in the absence of a justiciable controversy that will only result in further litigation over construction and maintenance access to the easement area and what appurtenances may be attached to the Planned Improvements and still result in a final product that is "materially similar" the Planned Improvements. For this reason alone, this Court should reverse with directions to dismiss the City's case.

Furthermore, on the merits, the trial court entered a final judgment that improperly allows the City to act outside the scope of the easement grant, that renders a non-exclusive

easement exclusive to the City, and improperly effects a taking of Ebb Tide's access to its own beach. Accordingly, for any one or all these reasons, this Court should reverse the judgment of the trial court and remand with directions to dismiss the City's case. Costs on appeal should be awarded to Ebb Tide.

The undersigned certifies that the present brief has 10,915 words in compliance with RAP 18.17(c)(2).

Respectfully submitted on April 14, 2023,

/s/Stephan D. Wakefield
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Steven A. Stolle, WSBA #30807
John T. Yip, WSBA #46597
First Avenue Law Group, PLLC
321 First Avenue West
Seattle, WA 98119-4103
(206) 447-1900

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

APPENDIX

Access Easement	A-001
Planned Improvements, as attached to the Amended Complaint.....	A-003
Letter Ruling.....	A-005
Final Judgment and Order.....	A-010
Order Granting Ebb Tide’s Motion for Summary Judgment as to Ambiguity filed on November 6, 2018.....	A-013
Order Granting City’s Motion for Partial Summary Judgment as to Height Limitation, filed on July 26, 2019.....	A-016
Order Granting City’s Third Motion for Partial Summary Judgment as to Intent for an Improved Walkway, filed on December 17, 2019.....	A-018

3311070085

1983 NOV -7 AM 9:42

DEAN J. JONES, JR.
SNOHOMISH COUNTY, WA

Dean J. Jones, Jr.

250 5TH Ave. North
EDMONDS, WA 98020

400

RECORDED

NOV 7 1983

Dean J. Jones, Jr.

ACCESS EASEMENT

THIS INDENTURE, made this 4th day of Nov., 1983, by and between Olympic Properties Inc., a Washington corporation, and assigns, hereinafter called the "Grantor", and the City of Edmonds, a municipal corporation of the State of Washington, hereinafter called the "Grantee."

WITNESSETH:

That the said Grantor for and in consideration of one dollar to Grantor in hand paid by said Grantee, mutual benefits accruing and other valuable, legal consideration, receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said Grantee a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities and necessary appurtenances, over, through, across and upon the following described property, situate in Snohomish County, Washington, more particularly described as follows:

Commencing at a point on the Westerly margin of right-of-way of Burlington Northern Railroad 50.00 feet Northerly from the South line of Government Lot 2, Section 23, Township 27 North, Range 3 East W.M., as measured along said westerly margin; thence North 41°00'00" East along the Westerly margin of said right-of-way, a distance of 100.00 feet; thence North 49°00'00" West, perpendicular with said right-of-way margin, a distance of 149.61 feet to the Government meander line of the waters of Puget Sound; thence North 51°19'24" East, along said meander line, a distance of 6.91 feet to the Easterlymost corner of Parcel A, as described on Sheet 1 of the Plat of Ebb Tide, a condominium, as recorded in Volume 44 of Plats, on pages 175 through 181 inclusive, records of Snohomish County, Washington; thence North 38°37'00" West, along the Northeasterly line of said Parcel A, a distance of 60.00 feet to the True Point of Beginning; thence continuing North 38°37'00" West a distance of 10.00 feet; thence South 47°52'11" West, a distance of 99.60 feet to a point on the Southwesterly line of said Parcel A; thence South 38°37'00" East, along said Southwesterly line of said Parcel A, a distance of 10.00 feet; thence North 47°52'11" East, a distance of 99.60 feet to the True Point of Beginning.

Situated in Snohomish County, Washington.

The Grantee, its successors, agents, or assigns, shall construct, install, or erect no structures or improvements upon or within the above described easement right of way, whereby any portion thereof extends above a horizontal plane having an elevation of 17.00 as referred to City of Edmonds Datum (Mean Lower Low Water).

This Agreement shall be an appurtenant easement running with the land and shall be binding on the Grantor, its successors and assigns forever for the benefit of the

VIR. 1815 PAGE 2611

3311070085

Grantee as owner of real property located immediately adjacent to the north and south of the subject property.

OLYMPIC PROPERTIES, INC.

BY James R. Braun
James R. Braun, President

and BY Warren J. Murphy
Warren J. Murphy, Vice President

STATE OF WASHINGTON)

COUNTY OF)

On this 4th day of November, 1983, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Warren Murphy and James R. Braun, to me known to be the Vice President and President of Olympic Properties, Inc., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and an oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal hereto affixed the day and year first above written.



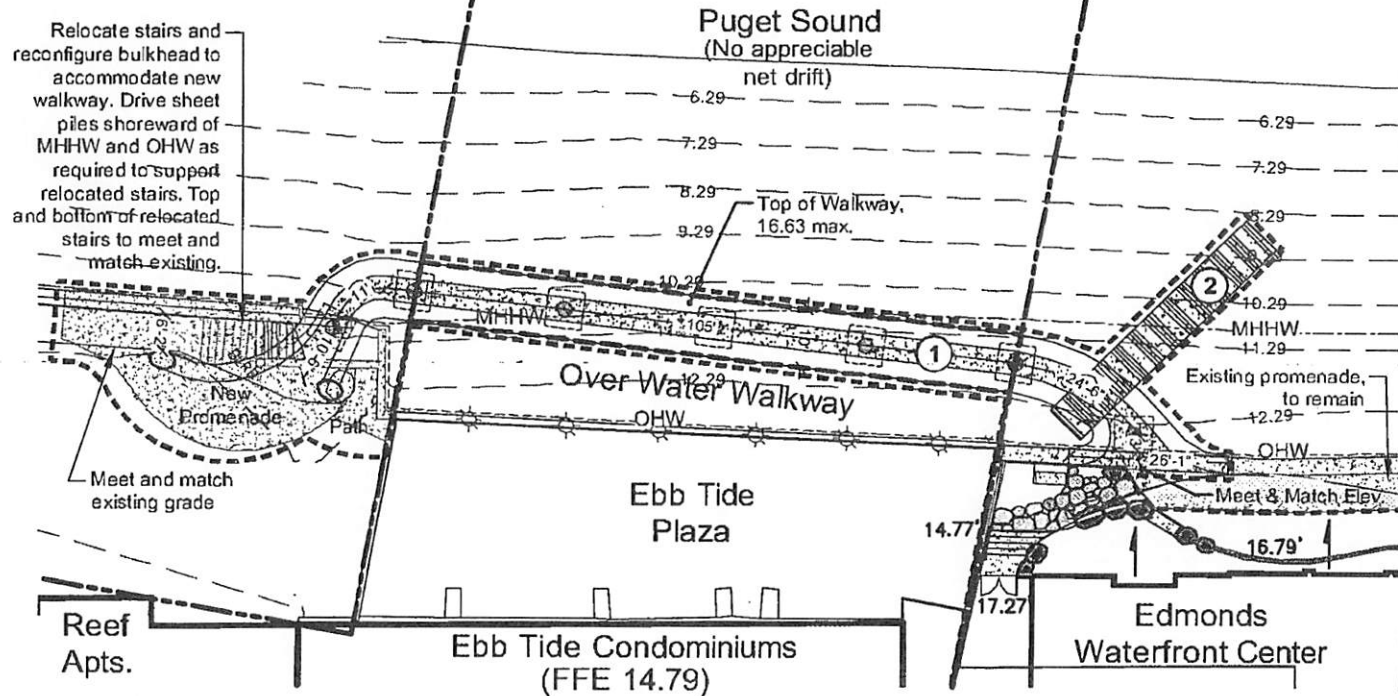
Margaret H. Edwards
NOTARY PUBLIC in and for the
State of Washington, residing at
Edmonds

8817070085

- 2 -

VOL. 1815 PAGE 2612

Relocate stairs and reconfigure bulkhead to accommodate new walkway. Drive sheet piles shoreward of MHHW and OHW as required to support relocated stairs. Top and bottom of relocated stairs to meet and match existing.



Note: Refer to the *Critical Areas Report and Mitigation Plan* (Hererra, 2017b) for more details about impact areas for this project.

LEGEND

- Parcel Lines
- Project Limits
- 13.0' Proposed Spot Elevation
- 2% TYP Proposed Direction of Slope
- Concrete Foundation
- Beach Nourishment
- Steel Pilings
- MHHW Mean Higher High Water
- OHW Ordinary High Water

IMPACT AREAS

	Total	Waterward MHHW	Landward MHHW
① Steel Driven Piles	35 SF/63 CY	10 SF/18 CY	25 SF/45 CY
② Remove Concrete Foundation	317 SF/117 CY	157 SF/58 CY	160 SF/59 CY

APPLICANT: City of Edmonds Parks, Recreation, and Cultural Services Department

PROJECT: Edmonds Waterfront Redevelopment Project

US ARMY CORPS OF ENGINEERS REFERENCE NO:

0 15' 30'
Scale: 1" = 30'-0"



Community Design Center
402 15th Avenue East
Seattle, Washington 98112
206.329.8300
206.329.5494 fax

WATERBODY: Puget Sound
CITY: Edmonds
COUNTY: Snohomish
STATE: Washington
SECTION: SE 1/4 of Section 23
TOWNSHIP: 27 N
RANGE: 3E, WM

LATITUDE: 47°48'42.13"N
LONGITUDE: 122°23'6.49"W
ADDRESS: 220 Railroad Ave
Edmonds, WA 98020-4133

TITLE:
GRADING AND DRAINAGE PLAN
SOUTH

DATE:
08.29.2017

REVISION DATE:
07.02.2019

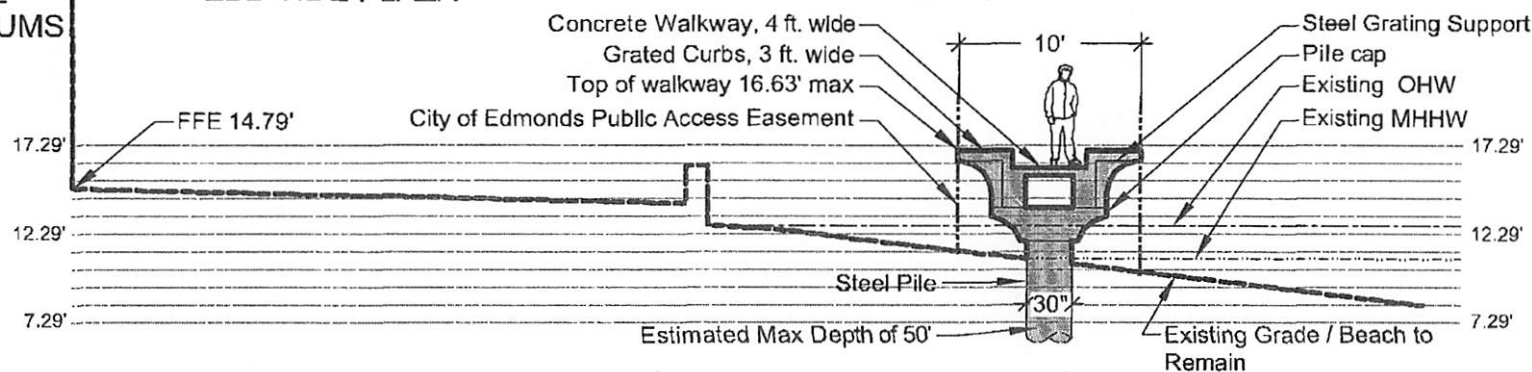
SHEET:
08 OF 14

Vertical Datum: MLLW
Horizontal Datum: NAVD83/91
To convert from MLLW to NAVD88 subtract 2.29ft.

EBB TIDE
CONDOMINIUMS

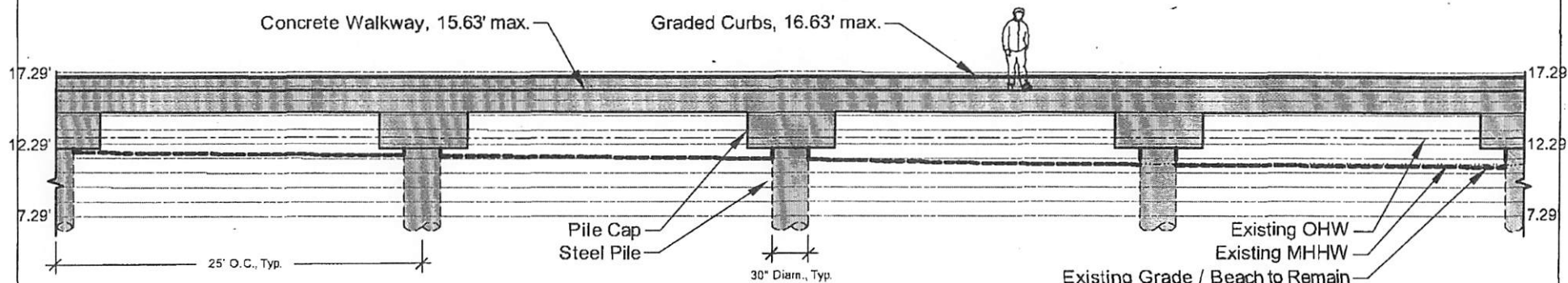
EBB TIDE PLAZA

OVER WATER WALKWAY



E SECTION E-e
05 Scale: 1" = 10'-0"

OVER WATER WALKWAY



F SECTION F-f
05 Scale: 1" = 10'-0"

APPLICANT: City of Edmonds Parks,
Recreation, and Cultural
Services Department

PROJECT: Edmonds Waterfront
Redevelopment Project

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LONGITUDE:
122°23'6.48"W
ADDRESS:
220 Railroad Ave
Edmonds, WA
98020-4133

TITLE:
SECTIONS 03

DATE:
08.29.2017
REVISION DATE:
07.02.2019
SHEET:
12 OF 14

Vertical Datum: MLLW
Horizontal Datum: NAVD83/91
To convert from MLLW to NAVD88
subtract 2.29ft.

Superior Court of the State of Washington
for Snohomish County

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SUPERIOR COURT ADMINISTRATOR
ANDREW G. SOMERS

17-2-09476-31
LTR 292
Letter
13372449



October 14, 2022

To All Parties of Record

Re: *City of Edmonds v. Association of Apartment Owners of the Edmonds Ebb Tide*
Snohomish County Superior Court Cause No. 17-2-09476-31

HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WA

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FILED

This matter came before the Court pursuant to the City of Edmonds' (hereinafter "City") action seeking a Declaratory Judgment clarifying the real property rights associated with the easement granted to it by the predecessor-in-interest of the Association of Apartment Owners of the Edmonds Ebb Tide (hereinafter "Ebb Tide"). Specifically, the City seeks a declaration that the easement authorizes it to construct an elevated walkway similar to the Conceptual Plan attached to its Complaint. For the reasons set forth herein, the Court grants the City's request for a Declaratory Judgment and confirms that the easement rights held by the City are sufficient to allow it to construct an elevated walkway similar to the Conceptual Plan design.

In construing an easement, the court is required to carry out the intention of the parties. *Beebe v. Swerda*, 58 Wn. App. 375, 379-380 (1990). The intent of the original parties to an easement is determined from the deed as a whole. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880 (2003). The Court's primary objective is to effectuate the intent of the parties who created it. *Wilson & Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 306 (2011). It is also the goal of the court to interpret an easement so as to carry out the purpose for which the easement was created. *Restatement Third of Property: Servitudes*, Section 4.1(1) (2000). Where an easement is ambiguous, extrinsic evidence may be used to illuminate the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657 (1990). Extrinsic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in absence of fraud, accident or mistake. *Id.* at 669. Extrinsic evidence is admissible to prove omitted but not inconsistent terms, if the contract is ambiguous or not fully integrated. *Id.* at 662. The Court is allowed to consider the surrounding circumstances leading to execution of the agreement, including the subject matter of the contract as well as the subsequent conduct of the parties, not

ORIGINAL

for contradicting what is in the agreement, but for the purpose of determining the parties' intent. Id. at 666-667. This is known as the "context rule."

There are limits, however, to this type of evidence. It may not be admitted for the purpose of importing into a writing an intention not expressed therein. Id. at 669. This includes evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; evidence that would show an intention independent of the instrument; or evidence that would vary, contradict or modify the written word. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695 (1999).

The easement in question is located on a strip of land running across the 100-foot wide western frontage of the Ebb Tide's condominium real property situated on the Edmonds waterfront on Puget Sound. The easement is approximately 10-feet wide and is the last unbuilt portion of a public walkway the City has been working to construct along the waterfront since 1977.

The property known as the Ebb Tide was originally purchased by the Nelson family in 1963. They built a twenty-unit apartment building on the site in 1965 known as the "Nelson Apartments." The family maintained and operated the apartments until it was sold in the Spring of 1983 to Olympic Properties. Prior to the sale, the Nelsons had encountered problems with trespassers who would frequently walk along the patio area, on the seawall protecting the patio from the sandy beach, and across their beach.

The Nelsons were aware of the City's desire to construct a waterfront promenade that would extend from Brackett's landing and the ferry terminal to the north, all the way along Puget Sound to the southern edge of the City. The Nelsons understood that the City's plans included a walkway in front of their apartment building and objected to it. The *1977 Feasibility Study for Public Access to the Waterfront* prepared by the City's consultant, Reid, Middleton and Associates Inc., described the Nelson's opposition to the walkway. It stated:

The owners of the apartment building express strong objection to the proposed construction of a public walkway along the beach side of this patio, feeling that it will constitute an invasion of the beach and of the privacy of the tenants on the patio.

Their expressed concern is shared to some extent, and it is agreed that a walkway constructed next to the patio on posts to provide position above wintertime wave action, could be visually objectionable, could give an impression of invasion of privacy to the patio, and could constitute an unwelcome and inconvenient interference with access from the apartment house to the beach. However, a paved walkway constructed on the sand at beach level would not be unsightly nor afford any interference with access to the beach. Furthermore this walkway constitutes the only obstacle to the development of a waterfront walkway of tremendous public value with continuity from the Senior Center all the way to the Union Oil Company Beach. . . . [This] is of such great importance that the City should exercise its rights of eminent domain to secure the walkway right-of-way past the Nelson Apartments in accordance with the recommended concept.

(Exhibit 6 at page 16). Dr. Marvin Nelson, the original owner's son, testified that his parents were not in favor of a boardwalk on posts or a beach-level boardwalk and were not considering it. For its part, the City did not exercise its right of eminent domain over the Nelson Apartments beachfront property and focused on other projects instead.

Six years later in 1983, the Nelsons sold the apartment to a corporation known as Olympic Properties, Inc. After its purchase, Olympic Properties converted the apartments to condominium uses and sold the apartment units to various individuals. The building became commonly known as the "Ebb Tide." After that time, although they retained ownership in a single unit in the building, the Nelsons were not involved in negotiating the easement. Unlike the prior owners, Olympic Properties, Inc. was prepared to enter into a negotiation with the City to resolve the trespassing complaints and create a public walkway connection for the City.

W. Scott Snyder was a junior associate attorney representing the City of Edmonds in 1983 regarding the easement issue, and the Ebb Tide's complaints regarding trespassing on their beachfront patio. He is the only living or competent witness who was involved in the negotiation and drafting of the easement language. Mr. Snyder testified that the trespassing complaints led to a series of discussions with Ebb Tide about how to resolve the problem, given the City's desire to complete its public walkway link to its park on the other side of the Ebb Tide property.

He testified, "We were looking for ways to redirect traffic out onto the tide flat, and this led to a discussion of how to do so; the City installing signage, looking for an easement or right of passage, and one of the primary elements in that discussion was what form that walkway or easement would take. . . ." (Exhibit 20 at p. 12) He stated that the Ebb Tide owners "wanted the public away from their seawall so that they could use their patio with reasonable privacy." (Exhibit 20 at p. 13) He stated that there was no design or engineering discussed for the walkway at that time, because there was no funding for the project. *Id.* According to Mr. Snyder, the 17-foot height restriction came about from a casual conversation:

The calculation of the datum points was based on a couple of the Ebb Tide board members and I standing on their lawn with a beer and looking out towards the sunset one night trying to figure out an appropriate height would be—could be for some sort of modest walkway, and Lovell-Sauerland came up with the datum point."

(Exhibit 20 at p. 34). He was told that the Ebb Tide and Olympic Properties did not want a large structure along the scale of the fishing pier. Their discussions led to an easement that would be a placeholder for future construction of a walkway at or below a level that would not interrupt their views as they stood on the patio. This is how they arrived at the height limit. *Id.* at p. 14.

On November 4, 1983, Olympic Properties granted the City an access easement as follows: "...a right-of-way easement for public access, use and enjoyment, together with the right to construct and maintain public improvements, facilities, utilities and necessary appurtenances, over, through, across and upon the following described property, situated in Snohomish County, Washington . . ." (Exhibit 1) The legal description granted the City a 10-foot wide easement roughly 10 feet seaward of the bulkhead, spanning the 100-foot frontage of the Ebb Tide

property. It limited the height of the easement to no more than 17 feet (1.84 feet above the finished floor elevation of the Ebb Tide). There were no other restrictions or reservations of rights in the easement.

Mr. Snyder testified that the easement was drafted by the City's consultant but the idea was his. He stated that should funding become available, the City wanted "some sort of firm footing for seniors, moms with baby buggies, and other people to cross the tide flat and also to have a designated pathway." (Exhibit 20 at p.15). Mr. Snyder drafted the language imposing the height restriction into the easement. He communicated with both the Ebb Tide Homeowners Association and Olympic Properties about the height restriction language. At the time, Olympic Properties still owned a majority of the units in the Ebb Tide building and had the votes to grant the easement. (*Id.* at p. 17).

The City now proposes to construct an elevated walkway across its easement below the height limit of 17 feet as shown in the Conceptual Design attached to its Complaint. (Exhibit 19) The walkway will be placed on pilings to anchor it from the forces of the tide, currents, wave and wind. The pilings are necessary to maintain the stability of the walkway within the easement area. The proposed design would connect the last portion of the public beachfront walkway.

According to the City's expert, John Barker, the completed public improvements made to the north and south of the Ebb Tide property demonstrate the City's knowledge and desire to maintain its pedestrian walkway up and out of the tidal zone where it would be inundated daily by tides and subject to damage and erosion. The proposed design is consistent with the parties' intent that the public walkway would connect the City's walkway system, but also swing out away from the Ebb Tide patio giving them more privacy and designating where the public could walk to prevent trespassing. The proposed Conceptual Design is significantly lower than the fishing pier structure, as desired by the Ebb Tide owners.

By placing the easement approximately 10 feet away from the Ebb Tide's sea wall, the parties had to know that a constructed public pathway of up to 17 feet in height would impact a portion of the Ebb Tide's upper beach property and access to the water. The parties are presumed to know the impact of the rights they granted in the easement.

The Ebb Tide argues that the parties only intended to construct a beach-level boardwalk or some sort of walkway that would have no impact on its views, beach access or patio privacy. However, the easement contains no such restriction and to read the easement in this way contradicts its express terms that granted the City "the right to construct and maintain public improvements, facilities, utilities and necessary appurtenances," subject to the 17-foot height limit. (Exhibit 1) Additionally, their argument contradicts the evidence presented by Scott Snyder, the fact that this easement was mutually negotiated, and the fact that the parties used the Ebb Tide's first floor level as the height measurement beyond which they could not construct. In order to find in favor of the Ebb Tide, the Court would have to import several new terms that would further restrict the City's use of its easement. The law simply doesn't allow it. *Hollis v. Garwall, Inc.*, *supra*.

No evidence was presented that either the City or Olympic Properties was dissatisfied with the terms of the easement granted in 1983. Dissatisfaction by current property owners of the Ebb Tide is not a legal basis to undermine the rights previously granted to the City by their predecessor.

Based on all of the evidence presented, and determining the easement as a whole, the Court concludes that the City's design is consistent with the easement in all respects. The design does not impact the Ebb Tide's views or beach access beyond what was contemplated by the parties at the time the easement was drafted. The 17-foot height limit is not exceeded.

The City of Edmonds is granted a declaratory judgment in its favor. This letter constitutes the Court's Findings of Fact, Conclusions of Law and Decision herein. As the prevailing party, the City shall immediately draft a proposed Final Judgment and Order to be circulated to the Ebb Tide's attorneys for its review. If an agreed order is not achieved within five (5) days after receipt, the parties shall note a hearing for presentation of the Final Judgment and Order.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Judge', with a large, stylized initial 'M'.

The Honorable Millie M. Judge
Judge of the Snohomish County Superior Court

17-2-09476-31
JD 300
Judgment
13372825

FILED

2022 OCT 31 PM 4:31 The Honorable Millie M. Judge

HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington
Municipal Corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE
ASSOCIATION OF APARTMENT
OWNERS, a Washington Nonprofit
Corporation,

Defendant.

No.: 17-2-09476-31

~~[PROPOSED]~~ FINAL JUDGMENT AND
ORDER

JUDGMENT

This matter came before the Court upon Plaintiff City of Edmonds' (hereinafter "City")
Complaint for Declaratory Judgment with regard to the Access Easement granted to it by
Defendant Edmonds Ebb Tide Association of Apartment Owners' (hereinafter "Ebb Tide")
predecessor-in-interest. The City brought a declaratory judgment action to establish that it has
sufficient property rights to construct a walkway within the easement area, the final design of
which will be materially consistent with the Planned Improvements as attached in the Exhibit
B to the City's Amended Complaint.

LIGHTHOUSE LAW GROUP PLLC

[PROPOSED] FINAL JUDGMENT AND
ORDER - 1

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Tel. 206-273-7400 • Fax 206-273-7401

1 The Court conducted a four-day bench trial on this matter between October 10 and
2 October 13, 2022. The Court received evidence in the form of exhibits, deposition transcripts,
3 and witness testimony. After viewing the property and its vicinity, and after carefully
4 reviewing all of the evidence, testimony, and arguments presented by the parties' counsel, the
5 Court filed its written decision on October 14, 2022, which contained the Court's findings of
6 fact, conclusions of law, and decision.

7 In accordance with its written decision, the Court grants the City's request for a
8 Declaratory Judgment and confirms that the City has sufficient property rights to construct a
9 walkway within the easement area, the final design of which will be materially consistent with
10 the Planned Improvements as attached as Exhibit B to the Amended Complaint.
11

12
13 ORDER

14 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- 15 1. Pursuant to RCW 7.24.020 and 7.24.030, the City of Edmonds is granted a
16 declaratory judgment in its favor.
17
18 2. The City has sufficient real property rights to construct a walkway within the
19 easement area, the final design of which will materially consistent with the Planned
20 Improvements as attached as Exhibit B to the Amended Complaint.
21
22 3. Pursuant to RCW 7.24.100, the City of Edmonds, as the prevailing party, is
23 entitled to such award of costs as may seem equitable and just, to be determined through a
24 forthcoming cost bill.
25
26

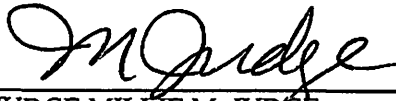
[PROPOSED] FINAL JUDGMENT AND
ORDER - 2

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1 IT IS SO ORDERED.

2
3 DATED this 31st day of October 2022

4
5 
6 JUDGE MILLIE M. JUDGE

7
8 Presented by:

9 LIGHTHOUSE LAW GROUP PLLC

10 

11 Jeff Taraday, WSBA No. 28182

12 Beth Ford, WSBA No. 44208

13 Attorneys for Plaintiff City of Edmonds

14
15 Approved as to form; notice of presentation waived:

16 FIRST AVENUE LAW GROUP PLLC

17
18 Stephan D. Wakefield, WSBA No. 22762

19 John T. Yip, WSBA No. 46597

20 Steven Stolle, WSBA No. 30807

21 Attorneys for Defendant Ebb Tide

22
23
24
25
26 LIGHTHOUSE LAW GROUP PLLC

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[PROPOSED] FINAL JUDGMENT AND
ORDER - 3

FILED

2018 NOV -6 PM 4: 06

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

The Honorable Joseph P. Wilson
Judge's Civil Motions
Hearing Date: October 9, 2018
Hearing Time: 9:00 a.m.
With Oral Argument

17-2-09476-31
CR08J 95
Order Granting Summary Judgment
4180090



THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington municipal
corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE ASSOCIATION
OF APARTMENT OWNERS, a Washington
nonprofit corporation,

Defendant.

Case No. 17-2-09476-31

ORDER GRANTING DEFENDANT EBB
TIDE'S MOTION FOR SUMMARY
JUDGMENT IN PART AND DENYING
PLAINTIFF CITY OF EDMONDS'S
MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the undersigned Judge of the Snohomish County
Superior Court upon Defendant's Motion for Summary Judgment and Plaintiff's Revised Motion
for Summary Judgment, and the Court having reviewed the following pleadings (all documents
include their exhibits, if any):

1. Defendant's Motion for Summary Judgment
2. Declaration of Stephan D. Wakefield.
3. Declaration of John T. Yip.
4. Declaration of Leigh Bennett.
5. Declaration of Rita Speiser.
6. Declaration of Todd Parker.
7. Declaration of Theresa Swan.
8. Declaration of Esther Drouin.
9. Declaration of Virginia Douglas.
10. Declaration of Carmen Holt.
11. Declaration of Molly Smith.
12. Declaration of Larry Hoppe.
13. Declaration of James Braun.

ORDER GRANTING DEFENDANT EBB TIDE'S MOTION FOR
SUMMARY JUDGMENT AND DENYING PLAINTIFF CITY OF
EDMONDS'S MOTION FOR SUMMARY JUDGMENT - 1 -

HECKER WAKEFIELD & FEILBERG, P.S.
321 FIRST AVENUE WEST
SEATTLE, WASHINGTON 98119
PHONE (206) 447-1900 FAX (206) 447-9075

14. Plaintiff's Revised Motion for Summary Judgment.
15. Declaration of Suzanne Lieberman.
16. Declaration of Beth Ford.
17. Response to Plaintiff's Revised Motion for Summary Judgment.
18. Supplemental Declaration of Stephan D. Wakefield.
19. Declaration of Jeffrey Bentley.
20. Declaration of Will Martin.
21. Declaration of James Selleck.
22. Plaintiff's Response to Defendant's Motion for Summary Judgment.
23. Declaration of Beth Ford (filed with Plaintiff's Response).
24. Defendant's Reply.
25. Plaintiff's Reply.
26. Records and files herein.

* Pursuant to the Order Granting Motion to Strike entered herewith, the court struck and did not consider the Declaration of Philip Abenroth, Declaration of Carrie Hite, or the Third Declaration of Beth Ford, all of which were filed with the Plaintiff's Reply.

Having heard the arguments of the parties and being otherwise duly informed under the premises, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. Defendant's Motion for Summary Judgment is GRANTED and DENIED in part. Pursuant to CR 56(d), the court hereby enters the following express findings as facts that appear without substantial controversy:

- a. On or around November 4, 1983, the Defendant's predecessor, Olympic Properties, Inc, granted a valid Access Easement to the City of Edmonds (hereinafter the "Easement").
- b. The Easement is ambiguous as to whether it provides the City of Edmonds a right to construct an elevated walkway in the Easement Area, including but not limited to the Planned Improvements described in the Complaint.
- c. Extrinsic evidence must be considered and is relevant to determine the party's intent to allow the City to construct a walkway in the Easement Area, including but not limited to the Planned Improvements in the Complaint.

ORDER GRANTING DEFENDANT EBB TIDE'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF CITY OF EDMONDS'S MOTION FOR SUMMARY JUDGMENT - 2 -

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1 Based on the foregoing findings and the parties' pleadings and oral argument, and finding no just
2 reason for delay on entering summary judgment on the issue of the Easement's validity or
3 ambiguity, the Court hereby concludes that the Easement is a valid conveyance of an express
4 easement. Further, the Easement is ambiguous regarding whether the Plaintiff may construct an
5 elevated walkway on the Easement area including but not limited to the Planned Improvements
6 described in the Complaint. Extrinsic evidence is therefore admissible to construe the
7 ambiguous Easement.
8

9 2. Plaintiff's Revised Motion for Summary Judgment is DENIED.

10 3. This Order does not prevent the parties from filing motions for summary judgment, at
11 their discretion, regarding issues other than the Easement's validity or ambiguity, which are
12 already fully adjudicated above.
13

14 DONE IN OPEN COURT this 5 day of November, 2018.

15
16 
The Honorable Joseph P. Wilson

17 **PRESENTED BY:**
18 HECKER WAKEFIELD & FEILBERG, P.S.

19 /s/ Stephan Wakefield
Stephan D. Wakefield, WSBA #22762
20 John T. Yip, WSBA #46597
21 Attorneys for Defendant Ebb Tide

22 **APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:**
23 LIGHHOUSE LAW GROUP PLLC

24 Jeffrey Taraday, WSBA #28182
Beth Ford, WSBA #44208
25 Attorneys for Plaintiff City of Edmonds
26

ORDER GRANTING DEFENDANT EBB TIDE'S MOTION FOR
SUMMARY JUDGMENT AND DENYING PLAINTIFF CITY OF
EDMONDS'S MOTION FOR SUMMARY JUDGMENT - 3 -

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FILED

2019 JUL 26 AM 10:38

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

17-2-09476-31
ORGPSJ 184
Order Granting Partial Summary Judgment
6188899



Hearing Date: July 26, 2019
Hearing Time: 9:00am
The Honorable Janice E. Ellis
Department 12

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington
Municipal Corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE
ASSOCIATION OF APARTMENT
OWNERS, a Washington Nonprofit
Corporation,

Defendant.

No.: 17-2-09476-31

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S PARTIAL MOTION FOR
SUMMARY JUDGMENT

THIS MATTER came before the Court on the Plaintiff City of Edmonds's Revised Motion for Partial Summary Judgment. Having come on for hearing before the above-captioned Court, and the Court having reviewed the following:

1. Plaintiff City of Edmonds's Revised Motion for Partial Summary Judgment; and
2. Declaration of Phillip Abenroth, PLS, in Support of the City's Revised Motion for Partial Summary Judgment, with attached exhibits; and
3. Declaration of Beth Ford in Support of the City's Revised Motion for Partial Summary Judgment, with attached exhibits; and ^[L]~~SEP~~
4. Defendant's opposition to the City's Revised Motion for Partial Summary Judgment, ~~if any, and~~ ^[L]~~SEP~~
5. Plaintiff's Reply on its Revised Motion for Partial Summary Judgment, ~~if any.~~ ^[L]~~SEP~~
6. Declaration of Carl Sorensen, and
7. Declaration of John T. Yip

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S REVISED MOTION FOR
PARTIAL SUMMARY JUDGMENT - 1

LIGHTHOUSE LAW GROUP PLLC

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1
2 HAVING heard the arguments of the parties and being otherwise duly informed under the
3 premises, it is hereby **ORDERED, ADJUDGED AND DECREED** that Plaintiff City of
4 Edmonds' Revised Motion for Partial Summary Judgment is **GRANTED**.

5
6 Pursuant to CR 56(d), the court hereby enters the following express findings as facts that appear
7 without substantial controversy:

- 8 *surveyors who drafted*
9 a. The ~~parties to~~ Access Easement intended for the height limitation of the
10 Access Easement to be calculated as 1.84 feet above the finished first floor
11 elevation of the Ebb Tide Condominium.

12 Based upon these uncontroverted facts, the court concludes that the height limitation of the
13 Access Easement is calculated as 1.84 feet above the finished first floor elevation of the Ebb
14 Tide Condominium.

15
16 DONE IN OPEN COURT this 26th day of July, 2019

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18 
19 JUDGE JANICE E. ELLIS

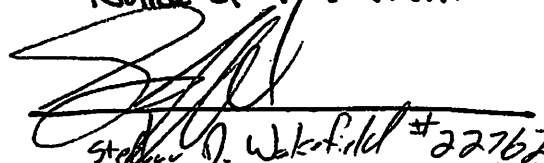
20
21 Respectfully submitted:

22 LIGHTHOUSE LAW GROUP PLLC

23 

24 Jeff Taraday, WSBA #28182
25 Beth Ford, WSBA #44208
26 Attorneys for Plaintiff City of Edmonds

*Approved as to form;
Notice of presentation waived*


Stephen D. Wakefield #22762
Attorney For Ebb Tide

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S REVISED MOTION FOR
PARTIAL SUMMARY JUDGMENT - 2

LIGHTHOUSE LAW GROUP PLLC

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FILED

Hearing Date: December 17, 2019
Hearing Time: 9:30am
The Honorable Richard T. Okrent
Department 2

2019 DEC 17 AM 10:31

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

17-2-09476-31
ORGPBJ 196
Order Granting Partial Summary Judgment
7276148



IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

CITY OF EDMONDS, a Washington
Municipal Corporation,

Plaintiff,

v.

THE EDMONDS EBB TIDE
ASSOCIATION OF APARTMENT
OWNERS, a Washington Nonprofit
Corporation,

Defendant.

No.: 17-2-09476-31

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF CITY OF EDMONDS' THIRD
MOTION FOR PARTIAL SUMMARY
JUDGMENT

THIS MATTER came before the Court on the Plaintiff City of Edmonds's Third Motion for Partial Summary Judgment. Having come on for hearing before the above-captioned Court, and the Court having reviewed the following:

1. Plaintiff City of Edmonds's Third Motion for Partial Summary Judgment; and
2. Declaration of Beth Ford in Support of the City's Third Motion for Partial Summary Judgment, with attached exhibits; and ^[1]_{SEP}
3. Defendant's opposition to the City's Third Motion for Partial Summary Judgment, if any; and ^[1]_{SEP}
4. Plaintiff's Reply on its Third Motion for Partial Summary Judgment, if any. ^[1]_{SEP}

~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S THIRD MOTION FOR
PARTIAL SUMMARY JUDGMENT - 1

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1 HAVING heard the arguments of the parties and being otherwise duly informed under the
2 premises, it is hereby **ORDERED, ADJUDGED AND DECREED** that Plaintiff City of
3 Edmonds' Third Motion for Partial Summary Judgment is **GRANTED**.

4
5 Pursuant to CR 56(d), the Court hereby enters the following express findings as facts that
6 appear without substantial controversy:

- 7 a. There is no genuine issue of material fact that the plain language of the Access
8 Easement ("public improvements, facilities, utilities and necessary
9 appurtenances") allows for construction of an improved walkway.
10
11 b. There is no genuine issue of material fact that the extrinsic evidence of the
12 circumstances surrounding the drafting of the Access Easement demonstrates
13 that construction of an improved walkway was contemplated by the parties.
14

15 Based upon these uncontroverted facts, the Court concludes that the phrase "public
16 improvements, facilities, utilities and necessary appurtenances" contained in the Access
17 Easement allows for the construction of an improved walkway in the easement area
18

19
20
21 DONE IN OPEN COURT this 17 day of June, 2019

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23 
24 JUDGE JANICE B. ELLIS

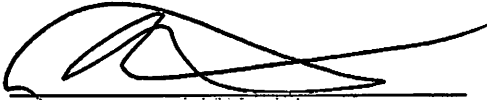
25
26 [PROPOSED] ORDER GRANTING
PLAINTIFF'S THIRD MOTION FOR
PARTIAL SUMMARY JUDGMENT - 2

LIGHTHOUSE LAW GROUP PLLC

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1
2
3 Respectfully submitted:

4 LIGHTHOUSE LAW GROUP PLLC

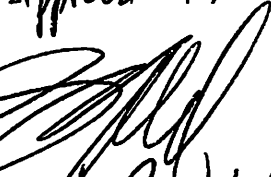
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6 Jeff Taraday, WSBA #28182

7 Beth Ford, WSBA #44208

8 Attorneys for Plaintiff City of Edmonds

9 *Approved As To Form*

10 

11
12 *Stephen P. Wetzel, WSBA #22762*
13 *Attorney For Defd*
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[PROPOSED] ORDER GRANTING
PLAINTIFF'S THIRD MOTION FOR
PARTIAL SUMMARY JUDGMENT - 3

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FIRST AVENUE LAW GROUP PLLC

April 14, 2023 - 1:38 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 84712-1
Appellate Court Case Title: City of Edmonds, Respondent v. The Edmonds Ebb Tide Assoc., Appellant
Superior Court Case Number: 17-2-09476-3

The following documents have been uploaded:

- 847121_Briefs_20230414133645D1305791_3015.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Final Brief.pdf

A copy of the uploaded files will be sent to:

- beth@lighthouselawgroup.com
- jeff@lighthouselawgroup.com
- johny@firstavenuelaw.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- sastolle@yahoo.com
- sstolle@stollelawgroup.com

Comments:

Brief of Appellant

Sender Name: Stephan Wakefield - Email: shellit@firstavenuelaw.com

Filing on Behalf of: Stephan Douglas Wakefield - Email: stephanw@firstavenuelaw.com (Alternate Email: shellit@heckerwakefield.com)

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