IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FAME DEVELOPERS, LTD., and WILLIAM N. and PENELOPE A. HULETT, husband and wife, Appellants, v. CITY OF BAINBRIDGE ISLAND, a municipal corporation, Respondent.	No. 36801-3-II UNPUBLISHED OPINION

Armstrong, J. — William and Penelope Hulett, the sole shareholders of Fame Developers, Ltd., own two properties on Bainbridge Island. In 1997, severe landslides caused damage to a public road north of the Huletts' properties, impeding the sole access to their properties. The City of Bainbridge decided not to restore the road and the Huletts filed a takings claim in Kitsap County Superior Court. The trial court granted the City's motion for summary judgment. The Huletts appeal, arguing they have a right to access their property that precludes a dismissal of their takings claim. Because the Huletts have failed to produce evidence that would create an issue of material fact as to the City's claim that the Huletts have no right of access to the public road, we affirm.

FACTS

The Huletts own two separate properties on the eastern shore of Bainbridge Island, bounded by water in front and a steep cliff in back. Although their properties are accessible from the south, the access easement from this direction is privately owned and the Huletts have no rights in this easement. The only access to the Huletts' properties is from Gertie Johnson Road, a

public road which dead-ends at a cul-de-sac to the north of their properties. From this point of Gertie Johnson Road, where the Huletts and other homeowners park their cars, the Huletts must cross a 15-foot strip of land to reach their properties.

The area along the eastern shore of the island has experienced a number of landslides over the years. As a result, many of the homes in the neighborhood have been "red tagged" by the City of Bainbridge, which means they cannot be occupied unless the owner commissions an engineering consultant to conduct a detailed analysis and demonstrates that he or she has complied with the consultant's recommendations. On January 19, 1997, a landslide caused severe damage to a home in the Huletts' neighborhood. The City subsequently issued red tags for several nearby homes, including the house on the Huletts' southern property. On March 18, 1997, another series of landslides occurred, after which the City red tagged the house on the Huletts' northern property.

The March landslide also caused considerable damage to Gertie Johnson Road. The terminus of the road was covered with landslide debris, rendering it impossible for vehicles to turn around or park and difficult for pedestrians to access the properties to the south. Although the City investigated whether to reopen the road, even securing funds to do so, it ultimately decided not to repair the damage, claiming that the removal of debris might contribute to another slide.

The lack of access from Gertie Johnson Road has made it virtually impossible for the Huletts to modify their properties by constructing the large catchment wall required to lift the red tags from their houses. The Huletts maintain they are personally unable to access their properties, as well as unable to obtain access for construction vehicles necessary to build the wall to protect

their homes.[1]

The Huletts sued the City, alleging, inter alia, that the City had taken their property by failing to reopen Gertie Johnson Road. The City moved for summary judgment, arguing the Huletts had no legal right to access their property across the 15-foot strip of land between Gertie Johnson Road and their properties because the City owned the unopened tract of land.[2] The trial court granted the City's motion for summary judgment.

The Hullets moved for reconsideration, citing newly discovered evidence regarding the ownership of the 15-foot strip of land. The trial court denied the Huletts' motion. The Huletts then appealed the order granting summary judgment and the order denying the motion for reconsideration.

The Huletts also moved to supplement the record on appeal with the newly discovered evidence, which was conditionally denied.[3] The Huletts then moved to modify the ruling, which we granted, staying the appeal and remanding the matter to the trial court to consider the new evidence and decide whether the Huletts had raised an issue of material fact that would preclude summary judgment.

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[1] The owners of the access easement from the south obtained the City's approval to limit the use of the easement for construction purposes to property owners with pre-existing easement rights. The Huletts have no right of access even for construction of the catchment wall.

[2] The City presented an overhead photo with superimposed lines demarcating property and public right-of-way borders derived from the Kitsap County Assessor's data. From this map, the City identified the 15-foot strip of land as a public, unopened right-of-way.

[3] The commissioner's initial ruling stated that the appellants should bring a motion in the trial court to settle the record. If the trial court considered the new evidence, the commissioner would allow the appellants to file a supplemental designation of clerk's papers. If the trial court did not consider the evidence, the motion to supplement would be denied.

On January 16, 2009, the trial court dismissed the takings claim, finding that the 15-foot strip of land in question is an unopened public right-of-way; that because the land in question is public property, the Huletts had not established a right in the land by way of adverse possession or a prescriptive easement; and that the Huletts failed to raise an issue of material fact that would preclude summary judgment. The Huletts then notified us of their intent to proceed with their appeal.

ANALYSIS

I. Standard of Review

The Huletts assert that we should review the summary judgment order de novo. The City contends a de novo review of the proceedings is inappropriate given that the trial court entered findings of fact. According to the City, the remand proceedings were more akin to a reconsideration of the original dismissal and the proper standard of review is therefore abuse of discretion. We agree with the Huletts that our review is de novo.

Our remand order did not require the trial court to find the facts as it would in a bench trial. Rather, we directed the trial court to assess all evidence regarding ownership of the disputed 15-foot strip of land to determine if an issue of material fact existed as to ownership of the land. Both parties submitted additional briefing and the court entertained argument; considering "the arguments of counsel and the records and files herein," the trial court determined the Huletts had failed to raise an issue of material fact that precluded summary judgment. Clerk's Papers (CP) at 799. Accordingly, we review the trial court's final decision that no issue of material fact existed de novo. *Hisle v. Todd Pac. Shipyards Corp*., 151 Wn.2d 853, 860, 93 P.3d

108 (2004).

In reviewing an order granting summary judgment, we view all facts and reasonable inferences in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Where a trial court grants summary judgment and then denies a motion for reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review. *Tanner Elec. Co-op v. Puget Sound Power & Light Co*., 128 Wn.2d 656, 675 n.6, 911 P.2d 1301 (1996).

Once the moving party sustains its initial burden of showing there are no genuine issues of material fact, the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party's contentions and disclose issues of material fact. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Seven Gables*, 106 Wn.2d at 13. The trial court may grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

II. Right of Access

The central issue is whether the Huletts had the right to access their property by crossing the 15-foot strip of land at the end of Gertie Johnson Road. It is undisputed that "the right of access of an abutting property owner to a public right-of-way is a property right which if taken or

damaged for a public use requires compensation under . . . the Washington State Constitution." *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977). The Hullets argue that summary judgment prevented them from demonstrating a property interest in the 15-foot strip of land that would have established their abutter's rights.

The City argues that because the Huletts' properties do not abut Gertie Johnson Road, their takings claim necessarily fails. According to the City, the 15-foot strip of land between the Huletts' properties and Gertie Johnson Road is a right-of-way the City owned, but never opened, by the City. Because this intervening strip of land is an unopened public right-of-way, the City claims the Huletts have no legal right to access their property via Gertie Johnson Road.[4] The City maintains its ownership of this strip of land precludes the Huletts from succeeding on their takings claim as a matter of law.

According to the Huletts, three pieces of evidence contradict the City's assertion that it owns the 15-foot strip of land: (1) an order establishing the land as a county road from 1894, but vacated by law in 1899;[5] (2) the Plat of Manitou Park from 1908, which the Huletts claim failed to dedicate the 15-foot strip of land to the county; and (3) subsequent vacation proceedings where a county commissioner declared that part of the same strip farther up the slope was private

[4] The City relies on the following authority for this proposition: 10A McQuillin, Municipal Corporations, § 30.56.10 (indicating the general rule that proprietary rights of an abutter do not begin until the street is opened for use as such); *Voss v. City of Middleton*, 470 N.W.2d 625, 635 (Wis. 1991) ("a property owner has no right of access where a street does not exist but would abut his land if it did exist"). Moreover, under the Bainbridge Island Municipal Code (BIMC), an unopened right-of-way may not be privately improved or used for access purposes without both an access permit and a right-of-way approach permit, neither of which the Huletts possess. BIMC 12.32.030. The Huletts do not contest any of this in their opposition to summary judgment.

[5] The City does not dispute this fact.

property. Without the dedication or other proof that the City owns the land in question, the Huletts argue they would have acquired access rights through adverse possession. The Huletts argue this evidence, at the very least, gives rise to a disputed issue of material fact that precludes summary judgment.

A. Plat of Manitou Park ["Plat"]

The Huletts' neighborhood was created by the Plat of Manitou Park (Plat) in 1908. The Plat dedicates to the public "all the streets, roads, and avenues" shown therein. CP at 733. The Plat shows the land in question as an unlabeled strip of land running along the northern edge of the platted properties. The Huletts argue that because the strip was not labeled as a "street[], road[], or avenue[]," the owners did not dedicate it to the public. Br. of Appellant at 27. The Huletts further argue (1) that specifically named roads and avenues show the intent of the Plat's owners to dedicate elsewhere on the Plat and (2) that the 15-foot strip covers a steep cliff and is therefore unsuited for use as a street, road, or avenue. The City counters that although unlabeled, the 15-foot strip was marked and accordingly dedicated.

The dedicator's intention controls the plat's meaning; we ascertain such intent from all the marks and lines appearing on the plat. *Deaver v. Walla Walla County*, 30 Wn. App. 97, 99, 633 P.2d 90 (1981) (quoting *Minton v. Smith*, 102 Okl. 79, 227 Pac. 75 (1924)). A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning. *Selby v. Knudson*, 77 Wn. App. 189, 194-95, 890 P.2d 514 (1995). Only when the plat is ambiguous may we use parole evidence, such as actual use of the land in question, to determine the dedicator's intention. *Knudson*, 77 Wn. App. at 194. The mere

absence of words designating a particular strip on the plat as a street does not necessarily mean the dedicator failed to express intent to dedicate such a strip as a street. *Mueller v. City of Seattle*, 167 Wash. 67, 71, 8 P. 994 (1932).

Here, the evidence from the face of the Plat shows that the owners intended to dedicate the 15-foot strip of land to the public. First, solid lines do not close off the strip of land at issue; instead, it intersects a named street to the south. *See Olson Land Co. v. City of Seattle*, 76 Wash. 142, 146-47, 136 P. 118 (1913) (if unimproved tract of land had not been intended as part of dedication, there would have been a solid line between it and the street); *Mueller*, 167 Wash. at 72-73 (where a long narrow strip was open at each intersection with plat's named streets, dedicators intended the unnamed strip to be a street); *C.f. Frye v. King County*, 151 Wash. 179, 185-86, 275 P. 547 (1929) (where street ends were enclosed by lines marked on plat, dedicators did not intend extension of street beyond those lines). Second, the parallel lines demarcating the 15-foot strip are similar in width and thickness to the adjacent street, further showing an intent to dedicate the strip in addition to the named streets. *See Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 375, 940 P.2d 286 (1997) (an unnamed right-of-way was intended as a street because the lines designating the right-of-way were continuous parallel black lines the same thickness and quality of the lines showing the named city streets). Thus, although unnamed, the clear lines and markings express the property owners' intent to dedicate the 15-foot strip of land to the public. *See Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989) (a question of fact may be determined as a matter of law when reasonable minds could reach but one conclusion from the evidence presented). And the Huletts point to nothing on the

face of the Plat that would create an issue of material fact as to this intent.

B. Subsequent Vacation Proceedings

The Huletts also argue that vacation proceedings in which a county commissioner commented that a section of the 15-foot strip of land farther up the slope was private property give rise to a genuine issue of material fact as to whether the land in question is also private property.

Even if the Plat does not unequivocally establish the City's ownership, the minutes from the vacation proceedings are insufficient to raise a genuine issue of fact. The Huletts did not establish the source for the commissioner's comment that the land was private property. Something in the record before the commissioner caused him to comment that the property was private, but the Huletts have produced nothing that establishes what that information was. In the absence of such evidence, the commissioner's off-hand comment is simply his opinion as to ownership of the land. And the Huletts have given us nothing to show that the commissioner is qualified to give an opinion as to ownership of the land or that the commissioner is even available as a witness. Moreover, the commissioner's comment was contradicted by the City's ultimate action of vacating a county road, attaching conditions to the vacated property, and retaining an easement "within, over, and across" the property. CP at 635-36. In addition, the vacated land is a unique, unused section of land, located 60 feet below the surface of the road itself. Although it is undisputed that both sections of land are extensions of Valley Road—part of the same "15-foot strip of land"—it appears that the section at issue in the vacation proceedings was not shown on the Plat. CP at 123, 132, 635. Thus, the vacated section of the land was not part of the

dedication in which the land at issue was given to the public. Given that the two tracts of land represent different sections of the same right-of-way, the commissioner's comments, even if admissible, do not rebut the evidence establishing the City's ownership of the disputed land.

We conclude that the Huletts have not presented sufficient evidence to create an issue of material fact as to the City's ownership of the 15-foot strip of land. Accordingly, the Huletts have not shown that they have a viable claim to access over the City's unopened right-of-way under BIMC 12.32.030. Because the land in question is public property, the Huletts cannot show a right in the land by adverse possession or prescriptive easement. *Commercial Waterway Dist. No. 1 v. Permanente Cement Co.*, 61 Wn.2d 509, 512, 379 P.2d 178 (1963) (title by adverse possession cannot be acquired to property held by the state or municipality).

III. Special Damages

According to the Huletts, their special damages claim survives summary judgment regardless of who owns the 15-foot strip of land. They argue they have sustained a special injury by being denied access to their property that is compensable under Washington case law.[6] The Huletts maintain that any dispute as to the extent of their impaired access is a factual issue that precludes summary judgment. The City responds that the Huletts cannot claim special damages because (1) their properties do not abut *any* public right-of-way and (2) the area remains physically passable.[7]

[6] The Hullets do, however, admit the facts presented in this case have never been addressed by a Washington court where, as here, the property owners accessed their properties from an open public right-of-way; across an allegedly unopened right-of-way; without objection by the municipality; and there is no other access to the properties in question.

[7] The City emphasizes that while the Huletts retain physical access to their properties, this does not equate to legal access.

A property owner does not come within the rule of compensation unless his property abuts the public right-of-way, or he suffers special or peculiar damages different from the general public. *State v. Kemp*, 149 Wash. 197, 199, 270 P. 431 (1928); *Hoskins v. Kirkland*, 7 Wn. App. 957, 960, 503 P.2d 1117 (1972). To maintain this type of action, a nonabutting landowner's *right of access* must be destroyed or substantially eliminated. *Hoskins*, 7 Wn. App. at 961 (quoting *Capitol Hill Methodist Church v. Seattle*, 52 Wn.2d 359, 366, 324 P.2d 1113 (1958)) (emphasis added). Accordingly, a threshold issue is whether the Huletts can claim special damages without having established a cognizable right of access to their property.

To establish a governmental taking, the claimant must prove a property right. *Granite Beach Holdings, LLC v. Dep't of Natural Res.*, 103 Wn. App. 186, 205, 11 P.3d 847 (2000); *see also Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 707, 167 P.3d 584 (2007) (because the privilege to park on a public right-of-way was not a compensable property right, it is not part of the "reasonable access" constitutionally guaranteed); *State v. Calkins*, 50 Wn.2d 716, 719-20, 314 P.2d 449 (1957) ("since the property owner has no easement, i.e., no right of access to the highway itself, it follows that an allowance of damages for the loss of such a nonexistent easement or right of access is unrealistic, unjustified in fact, and improper"). In *Granite Beach*, the appellants contested the State's refusal to grant an easement providing access to a parcel of land surrounded entirely by state trust lands. *Granite Beach*, 103 Wn. App. at 194-95. The court rejected the appellants' inverse condemnation claim because the appellants never obtained the right to cross the adjoining land by agreement or other means; thus, the property right the appellants claimed was injured did not exist. *Granite Beach*, 103 Wn. App. at 206-07. The

Huletts' argument that they have an unconditional right to access their landlocked properties even if the City owns the 15-foot strip is untenable under *Granite Beach*.[8]

Cases involving special damages as a result of a street vacation are also premised on the denial of a vested property right. *See Kemp*, 149 Wash. at 199-200 (nonabutting property owner had no right to complain of loss of view because he had no vested right, in contrast to an abutting property owner who is entitled to egress and ingress, light, air, and view and is entitled to damages for any material diminution of these rights); *Taft v. Wash. Mut. Sav. Bank*, 127 Wash. 503, 510, 221 P. 604 (1923) (owners who did not abut on the vacated alley, and whose access was not destroyed or substantially affected, had no vested rights that were substantially affected); *Hoskins*, 7 Wn. App. at 960-61 (where an alternate mode of ingress and egress still remains, a property owner has no legal right to prevent the vacation because no legal right of access has been invaded). Under this principle, even access to one's property must be a vested property right that is impinged on as a result of the street vacation to warrant compensation. *See* 11 McQuillin, Municipal Corporations, § 30.192 (cases where damages for a street vacation are available may be divided into two categories: (1) those where one claiming damages owns property abutting directly on the part of the street vacated; and (2) those where the claimant owns property abutting on the *same street* but not on the part of the street vacated, or owns nonabutting property *on another street*) (emphasis added).

[8] The parties disagree as to the central holding of *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wn.2d 371, 403 P.2d 49 (1965) (remanding to trial court to enjoin the city from vacating the street at issue). The Huletts claim that because the street vacation renders them landlocked, similar to the property owners in *Yarrow*, they are entitled to special damages. But the *Yarrow* court was primarily concerned with the fact that the city council was closing the street to deny access to nonresidents from neighboring towns. *Yarrow*, 66 Wn.2d at 377.

The Hullets' claim for special damages fails because they had no legal right to access their property across the City's 15-foot strip of land.[9] Accordingly, they do not have the right to receive compensation from the City where they did not have a pre-existing right of access.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.

[9] The Huletts may be able to bring an action to condemn a private way of necessity under RCW 8.24.010. *See* Wash. Const. art. I, § 16 (a private person may exercise eminent domain power to condemn private ways of necessity).