Honorable Catherine Shaffer
Date of Hearing: August 24, 2001
Time: 11:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

GERALD L. RAY and KATHRYN B. RAY, husband and wife, Plaintiffs, v. KING COUNTY, a political subdivision, Defendant.	)	No. 00-2-14946-8 SEA **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

ARGUMENT

I.

THE HILCHKANUM DEED CONVEYS ONLY AN EASEMENT

Plaintiffs, Gerald and Kathryn Ray, provided the opinions of three experts in support of their Motion for Summary Judgment. Each expert is qualified and provided the factual basis of his conclusion. Albert Hebrank is a Professional Land Surveyor. Roger Hayden is the Senior Title Examiner for First American Title in Tacoma. Stephen Graddon is a title consultant and researcher. Each expert concluded that the intent of the parties to the Hilchkanum deed was to

convey a mere easement. Declaration of Albert Hebrank at ¶ 7; Declaration of Roger Hayden at ¶ 5; Declaration of Stephen J. Graddon at ¶ 11 – 27.

The County failed to respond to this testimony. Under CR 56, the County has not met its burden of producing evidence to defeat Plaintiff's motion for summary judgment.

The unrefuted expert opinion as to the intent of the parties is further supported by the language of the deed and the operation of established Washington law.

A. THE LANGUAGE OF THE DEED

The Court should compare the language of the deeds at issue in *Brown v. State*, 130 Wn.2d 430 (1996) with the language of the Hilchkanum deed. In *Brown*, the granting clause conveyed a **strip of land**. *Brown*, 130 Wn.2d at 434-35. In contrast, the Hilchkanum deed conveyed a **right of way**.

1. The Hilchkanum Granting Clause Limits the Estate Conveyed

King County's opposition asserts that use of the term "right of way" in the granting clause is irrelevant for limiting the estate conveyed. King County has badly misconstrued the cases.

First, King County cannot dispute the long line of cases holding that, *when used in the granting clause*, the term "right of way" invariably is a limitation of the conveyance to a mere easement. In *Morsbach v. Thurston County*, 152 Wash. 562 (1929), the Court established the rule as follows:

> [I]t is elementary that, in cases where the **granting clause** of a deed declares the purpose of a grant to be a **right of way** for a railroad, the deed passes an easement only, not a fee.

Morsbach, 152 Wash. at 565 *citing* 1 Thompson on Real Property, § 421 (emphasis added). *See also Swan v. O'Leary*, 37 Wn.2d 533, 537 (1950) (same); *Veach v. Culp,* 92 Wn.2d 570, 574 (1979); *Roeder Co. v. Burlington Northern, Inc*., 105 Wn.2d 567, 572 (1986).

In *Brown v. State,* the Washington Supreme Court cited these same cases, and others, and affirmed that the term "right of way," when used in the **granting clause,** is intended as a limitation on the estate conveyed and shows conclusively that the parties conveyed a mere easement. The *Brown* Court held:

> These cases are consistent with the majority of cases that hold the use of the term "right of way" **as a limitation** or to specify the purpose of the grant generally creates only an easement. **Conversely**, where there is no language in the deed relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, the deed will be construed to convey fee simple title.

Brown, 130 Wn.2d at 439-440 (emphasis added; citations omitted). King County ignores this clear affirmation in *Brown.*

Brown further underscores the rule by distinguishing use of the term "right of way" in the granting and habendum clauses from the deeds in *Brown* that used the term merely in the legal description.

> Unlike *Swan*, *Veach*, and *Roeder*, where "right of way" was used in the **granting** or habendum clauses **to qualify or limit the interest granted**, "right of way" in the deeds at issue here appears in either the legal description of the property conveyed or in the portion of the deeds describing Milwaukee's obligations with respect to the property. … Used in this manner, "right of way" merely describes a strip of land acquired for rail lines; it does not qualify or limit the interest conveyed in the granting or habendum clauses.

Brown, 130 Wn.2d at 441-42. Of course, the Hilchkanum deed utilizes "right of way" in the granting clause. Hilchkanum squarely fits within the rule of *Swan*, *Veach*, and *Roeder*, and is distinguished from the deeds in *Brown* which did not use the term "right of way" within the granting clause.

But this is not the only way the Hilchkanum deed limits the conveyance to the railroad. Hilchkanum did not grant a general right of way that could be used for any number of purposes. Rather, use of the right of way was specifically limited to "location, construction and operation" of the railroad. This term is not a general statement of purpose. Nor is it a statement of "probable use." Rather, this term provides what Hilchkanum was to receive in return for granting the right of way to the railroad. It was expressly stated to be the consideration for the grant. Accordingly, it is a critical term of the conveyance that defines and limits the allowed use of the right of way.

Under this provision, the railroad was not free to use the land in any way it wanted, as a fee owner would be allowed. For example, the railroad could not come onto the right of way and grow corn. Such a farming use is prohibited by the grant. Nor could the railroad use the right of way for building a wagon road. The right of way was conveyed for a specific use—the location, construction and operation of a railroad. With this express limitation on the right of use, the railroad could not have owned fee title and was not free to use the land as a fee owner.[1]

2. Hilchkanum Deed Language Departs from the Statutory Warranty Form

This state has long held that a deed in statutory warranty form is "deemed" a conveyance of fee simple. *Brown*, 130 Wn.2d at 437 n.5 (citing Laws of 1886, § 3, pp. 177-78). Of course, the deeds in *Brown* were in statutory warranty form. *Brown*, 130 Wn.2d at 433.
Unlike the *Brown* deeds, the Hilchkanum conveyance was **not** in the statutory warranty form. The County responds that being in statutory form is only one factor and that using the statutory

form merely creates the presumption of fee simple. King County's Response to Plaintiffs' Motion at 10:5. The County then asserts, *without any citation to authority* that "the inverse is not true."

Of course, common sense explains that if use of the statutory form is evidence of intent to convey fee, a deviation from that form is evidence of intent not to convey fee. The County's own witness, Neil DeGoojer, stated in deposition that the most common reason to not use a statutory warranty form would be because the parties do not want the warranties of title—*i.e*. they do not want the presumption of fee title. DeGoojer Depo. at 44:7-11 (Exhibit 1 to Groen Decl.).

The County also claims that it is ironic that Ray alleges that Hilchkanum was illiterate while also arguing that the form of the deed is evidence of **his** intent. First, the County does not dispute that Hilchkanum was illiterate. See Exhibits 6 and 7 to Graddon Decl. Second, the Hilchkanum deed was not drafted by Hilchkanum; it was drafted by the railroad. That fact is not disputed. *See* Graddon Decl. at 8:20-23 and 9:1-3 and exhibits thereto.

Obviously, Hilchkanum is not likely to have understood the differences between a statutory warranty deed and another deed. But Thomas Burke, the railroad's attorney, was required to understand those differences. Accordingly, it is not Hilchkanum's intent that is revealed by the choice of deed structure. It is the railroad's intent. By deciding not to use statutory warranty deed form, the railroad reveals that it never intended to secure fee title. *See* Graddon dec. at 5:16-23 and 6:1-10.

3. The Right to Cut Dangerous Trees Does Not Support an Intent to Convey Fee, But Rather an Easement

Contrary to the assertion by the County (King County's Response at 4:11-13), the provision related to cutting dangerous trees is consistent with grant of a mere easement. The dangerous tree provision grants permission to the railroad to cut down dangerous trees within 200 feet of the centerline of the tracks. Of course, **without** this provision the railroad would **not** have a right to cut down dangerous trees within 200 feet of the center line of the tracks. Herein lies the County's misconstruction of the deed. Obviously, if the railroad **already** owned the right of way **in fee**, it would not need separate permission to cut down dangerous trees within that right of way area.

By granting permission to cut trees, both within the right of way, and also extending up to a distance of 200 feet from the center line of the tracks, this provision is clear evidence that the parties intended the railroad to only own the right of way as an easement. Any other construction is not consistent with the terms of the grant.

It is worth further noting that the railroad is only authorized to cut down the trees. The railroad is not authorized to remove the trees from the property or otherwise put the trees to use. That is because the timber remains the property of Hilchkanum as the fee owner.

Related to this issue, the Hilchkanum deed omits any reserved right to Hilchkanum to cross over the right of way. Obviously, Hilchkanum would need to cross through the right of way to go from one side of his property to another. **If** the parties intended to convey fee title,

Hilchkanum could not cross through the right of way without trespassing. Of course, as a mere easement, there is no need for Hilchkanum to have retained a right to cross. This omission of a right to cross is yet further evidence that the parties intended the right of way to be a mere easement. *Brown*, 130 Wn.2d at 442 n.9.

B. CIRCUMSTANCES SURROUNDING THE DEED

1. Common Understanding of "Right of Way"

As pointed out in Plaintiffs' Motion for Summary Judgment, Black's Law Dictionary,1891, defines "right of way as the "right of passage … through the estate of another." The definition is further clarified as follows:

> "Right of way," in its strict meaning, is the right of passage over another man's ground; and in its legal and **generally accepted meaning**, in reference to a railway, **it is a mere easement** in the lands of others, obtained by lawful condemnation to public use or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way.

Id. (emphasis added).

The rule is well settled that "[w]ords should be given their ordinary meaning." *Corbray v. Stevenson*, 98 Wn.2d 410, 415 (1982); *Harris v. Ski Park Farms*, 62 Wn.App. 371, 375 (1991) (words of a deed "are to be given their ordinary meaning"); *McKillop v. Crown Zellerbach*, 46 Wn.App. 870, 873 (1987) (same). The County does not deny this rule of construction.

Instead, the County asserts, without any logic or other basis, that Black's Law Dictionary does not "establish the 'generally accepted meaning' merely because it presumes to have the authority to do so." King County's Response at 8:8-10. While casting dispersions at Black's Law Dictionary, the County offers no competing authority stating what the County believes the generally accepted meaning of the term right of way was in 1887.

Of course, in determining the ordinary meaning of words, the courts regularly refer to dictionary definitions. As stated by Chief Justice Durham, "We usually divine the ordinary meaning of words by resort to dictionary definitions." *Mains Farm Homeowners Association v. Worthington*, 121 Wn.2d 810, 829 (1993) (Durham, C.J. dissenting). See e.g. *Corbray*, 98 Wn.2d at 415 (utilizing Black's Law Dictionary to provide ordinary meaning of term); *Lakes at Mercer Island Homeowners' Association v. Witrak*, 61 Wn.App. 177, 182 (1991) (utilizing Webster's Third International Dictionary); *Mueller v. Rupp*, 52 Wn.App. 445, 451 (1998) (utilizing Black's Law Dictionary to define term "real property").

In short, the **generally accepted meaning** of the term right of way, means a right of passage, or mere easement. *See also* Webster's New Collegiate Dictionary, 1977 (defining right of way as "legal right of passage over another person's ground"). The uncontested rule is to interpret deeds according to their ordinary, common, generally accepted meaning. Accordingly,

the term as used in the Hilchkanum deed must be construed as meaning mere right of passage or easement.

King County argues that, because Hilchkanum was illiterate, "he cannot be expected to have read either the legal decisions or Black's Law Dictionary." Response at 8:11. Of course, that is true. But that is the very reason the common understanding of the term must be used. At best, Hilchkanum would know the common, ordinary usage of the term. Hilchkanum would not need to read Black's to know the ordinary meaning of the term. Of course, there is no evidence that he understood the specialized, unusual meaning the County advocates. Again, the railroad—the party who drafted the deed—can be expected to know the significance of the words chosen in the deed.

King County points out that the term "right of way" means more than an easement, citing *Joy v. City of St. Louis*, 138 U.S. 1, (1891). *See* Response at 8:1-4. But *Joy* does **not** in any way support the County's position. Rather, *Joy* further confirms that conveyance of a "right of way" invariably means conveyance of an easement.

At issue in *Joy* was interpretation of a "tripartite agreement" whereby park commissioners agreed to allow a single railroad right of way through a public park. Under the agreement, the railroads were granted a "right of way." The agreement repeatedly utilized the term "right of way." *Joy*, 138 U.S. at 7-9. Significantly, the Court acknowledged that the right of way held by the railroads was an **easement**. *See id*. at 38 ("tripartite agreement created an easement"); *id*. at 39 ("agreement created the easement"); *id*. at 51 ("easement was granted"). Contrary to King County's assertion, *Joy* underscores that a **right of way** grant—as under the tripartite agreement—is typically and commonly understood as a grant of an easement.

King County also cites *Keener v. Union Pacific Railway Co*., 31 F. 126 (Cir. Colo, 1887). Response at 8:5. As with *Joy*, this case strongly supports the common understanding that right of way means easement.

In *Keener*, a railroad in 1868 took possession of a right of way pursuant to a condemnation proceeding it had instituted. However, the proceeding was invalid because the railroad failed to notify the owner of the proceedings. *Keener*, 31 F. at 127. Accordingly, the railroad argued the alternative position that it became the legal owner by possessing the property for five consecutive years, and citing a state statute. The Court responded:

> But it is urged [by the property owner] that the statute only applies where legal title is taken to land,--where a fee is claimed; and that it does not apply to the case of an **easement**,--a **right of way**.

Id. at 128 (emphasis added). This quote is particularly revealing because it distinguishes fee title from easements. In doing so, the Court expressly equates easement with right of way. The case treats the terms as synonyms. *See also id*. ("railroad company was seeking to take no more than it needed, and that was the easement,--the use").

While both *Joy* and *Keener* support Ray's position, yet further support from the same time period is provided in *East Alabama Railway Co. v. Doe ex dem. Visscher*, 114 U.S. 340 (1885). In that case, the interest obtained by the railroad

> was described in the deeds as 'the **right of way** over which to pass … and particularly for the purpose of running, erecting, and establishing thereon a railroad …'

114 U.S. at 349 (emphasis added). The deed was construed as conveying mere easement.

> The right granted was merely a **right of way** for a railroad. … What it acquired was **merely an easement** in the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor.

Id. at 350 (emphasis added).

In short, as argued by Ray, the common understanding and usage of the term "right of way" meant easement. The County provides no evidence or applicable legal authority to conclude otherwise.

2. If Hilchkanum Conveyed Fee Title, He Would Jeopardize His Entire Homestead Claim

When Hilchkanum conveyed the right of way, he had not yet received a patent to his homestead claim. Accordingly, under the applicable federal law, Hilchkanum was able to only grant a railroad right of way easement. *South Perry Townsite v. Reed*, 28 Pub. Lands Dec. 561, 562 (1899); *Lawson v. Reynolds*, 28 Pub. Lands Dec. 155, 159-60 (1899). *See also* Ray's Opposition to County's Motion for Summary Judgment at 13-16.

At best, the County attempts to distinguish Congressional intent regarding the Act of 1875 and the 1873 amendment of section 2288 which authorized unpatented homesteaders to convey a railroad right of way. However, *South Perry Townsite* ends any uncertainty regarding the meaning section 2288. That case, along with *Lawson v. Reynolds*, are conclusive in establishing that an unpatented homesteader could convey an easement to the railroad, but could not convey fee title. Accordingly, under the homestead laws, it would be incredible to suppose that Hilchkanum would intend to convey fee title to the railroad and thereby risk losing his homestead claim. The County has no countervailing evidence.

3. The Thomas Burke Deed

The County responds to Burke's deed, as anticipated, by relying on the additional language in the habendum clause of Burke's deed. But the County fails to come to grips with the fact that a habendum clause merely explains or clarifies, and may not contradict or alter, what is granted by the granting clause. Black's Law Dictionary, 4th Edition, 1951 at 838.

King County argues that Burke's habendum clause is sufficient to distinguish Burke's intent from Hilchkanum's intent. But that distinction cannot pass scrutiny. Remember, the habendum clause cannot alter the interest conveyed by the granting clause, it merely defines or

sets forth that interest. Because Burke and the railroad (of which he was an officer) agreed to the habendum with the reversion language, this can only mean that Burke and the railroad agreed that the **intent of the granting clause** was to convey a mere easement. That was the ready conclusion of the Washington Supreme Court. *Pacific Iron Works v. Bryant Lumber*, 60 Wash. 502, 505 (1910). Of course, the operative language of the granting clause is identical to the Hilchkanum deed and must carry the same intent.

The fact that Hilchkanum's deed used a standard habendum clause without express words of reversion is not detrimental Plaintiffs' case. In *Morsbach*, a similar standard habendum clause was utilized. *Morsbach*, 152 Wash. at 565. Nevertheless, the Court concluded that the use of the term right of way in the granting clause meant that a mere easement was intended to be conveyed. The use of the general and broad habendum clause did not alter that intent. The same must be true with respect to Hilchkanum's deed.

To conclude this point, attention is directed to *Veach v. Culp*, 92 Wn.2d 562 (1979). The deed there also utilized a standard habendum clause. *Id*. at 573. Significantly, the Court rejected the railroad's argument that use of the standard habendum clause language meant that the parties intended to convey fee title. *Id*. at 573-74.

> In *Veach v. Culp*, the court construed a deed which granted a right of way and used the **standard habendum language**, but without the additional language conditioning use of the property on its continued use as a railroad right of way. The successor railroad argued that the absence of such limiting language showed a fee was conveyed. The *Veach* court disagreed, holding that the language of the deed which described conveyance of a right of way indicated an easement had been conveyed.

King County v. Squire Investment Co., 59 Wn.App. 888, 894 (1990) (emphasis added).

C. SUBSEQUENT CONDUCT OF THE PARTIES

The subsequent conduct of the parties also confirms that only a right of way easement was granted. The County suggests that subsequent deeds provided that the conveyances were "less" a certain number of acres for right of way and that this indicates the right of way was conveyed in fee to the railroad.

Plaintiffs dispute that the subsequent deeds constitute evidence of a contrary intent. Albert Hebrank has reviewed these subsequent deeds and has rendered an expert opinion regarding the intent of the parties. Second Declaration of Hebrank.

> These references to the approximate acreage of the right of way have no bearing on Hilchkanum's intent to convey an easement. By including an estimate of the acreage, the grantor Hilchkanum is merely providing notice to the grantee of the approximate size of

> the area that is subject to the right of way. This does not alter the intent that the right of way is but an easement.

Second Hebrank dec. at 4:4-8. Moreover, by excepting out of the conveyances a "right of way" Hebrank explains that proper inference of intent is that Hilchkanum conveyed a mere easement.

> In my opinion and experience, these subsequent deeds by Bill Hilchkanum do not show that in 1887, Hilchkanum intended to convey fee title to the railroad. Rather, in these subsequent deeds, the consistent reference to Hilchkanum's prior 1887 conveyance being a grant of a "right of way" is evidence to me that Hilchkanum only intended to convey an easement. At that time, the term "right of way" was used synonymously with the term easement. In these subsequent deeds, if Hilchkanum intended to show a belief that he had previously conveyed fee title to the railroad, the subsequent deeds would have not used the term "right of way" but would have simply indicated that the land itself was previously conveyed to the railroad. By not using such general language, and instead describing what was conveyed to the railroad as being a "right of way" and "for right of way purposes" indicates to me that Hilchkanum understood the 1887 conveyance to be limited or qualified as a right of way in the usual sense of an easement.

Second Hebrank Decl. at 3:5-16.

A subsequent deed not referenced by the County is an 1890 deed from Hilchkanum to Curley. Second Hebrank Decl. at Exhibit D. Hebranks explains the relevance as follows:

> By this deed, Hilchkanum conveyed **all** of Lot 2 without any exception for the right of way. This conveyance further indicates that Hilchkanum did not think he had conveyed fee title to the railroad by his 1887 conveyance of a right of way. If Hilchkanum had intended in 1887 to convey fee title to the railroad, this subsequent deed conveying "all of Lot two" would have required a provision excluding the fee to the land allegedly conveyed to the railroad. By not including such an exception, this subsequent deed indicates that Hilchkanum understood that he still retained the fee title to all of Lot 2. This is consistent with the 1887 conveyance of a "right of way" which was normally understood as conveying an easement.

Second Hebrank Decl. at 3: 17-23 and 4:1-2.

In short, the subsequent deeds do not establish that Hilchkanum intended to convey fee title. Rather, the deeds evidence an intent to convey a right of way easement.[2]

II.

THE DEEDED RIGHT OF WAY HAS BEEN ABANDONED

Where a deed provides a survey call that specifically defines the location of an easement, the language of the deed controls. *Aladdin Petroleum Corporation v. Gold Crown Properties, Inc.*, 221 Kan. 579, 561 P.2d 818, 822 (1977) (express terms of the grant control). The County responds that this is one case from Kansas. Of course, *Aladdin* is the leading case stating the general rule. *See also Andersen v. Edwards*, 625 P.2d 282, 286 (Alaska, 1981) (following *Aladdin*); *Lindhorst v. Wright*, 616 P.2d 450, 453 (Okla. 1980) (same); *Consolidated Amusement Co. Ltd. V. Waikiki Business Plaza*, Inc., 719 P.2d 1119, 1123 (Haw. 1986) (same).

The County relies on *DD&L, Inc. v. Burgess*, 51 Wn.App. 329 (1988). Ray agrees with the general rule that a monument will control over courses and distances if they are inconsistent. *Mathews v. Parker*, 163 Wash. 10, 14 (1931). However, that rule has no applicability to the Hilchkanum deed. The Court is invited to read closely the language describing the location of the right of way. This is not a case where a preexisting monument and a distance call are in conflict. Nothing in the deed suggests that the railroad had any right to select an alternative location outside of the area described by the survey call. To allow a realignment of the right of way would ignore the clear intent of the parties in defining where the tracks were to be located.

The easement described in the survey call of the deed was abandoned long ago. At most, the railroad acquired a prescriptive easement approximately ten feet wide—the width actually used by the railroad. Declaration of Ray.

For the foregoing reasons, Plaintiffs respectfully request that summary judgment be granted in their favor.

DATED this 20th day of August, 2001.

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[1] The County also cites *King County v. Hansen*, 34 Wn.2d 430 (1949) for the proposition that a conveyance of land is made conditional only by express terms. Of course, the Hilchkanum deed is not a conveyance of land; it is a conveyance of a right of way. Moreover, the Hilchkanum deed has express terms limiting the deed to a mere easement pursuant to the precedents established in *Brown*, *Morsbach*, *Roeder*, *Veach*, and *Swan*. *King County v. Hansen* is not to the contrary.

[2] King County places substantial reliance on *King County v. Rasmussen*, 143 F.Supp. 1225 (2001). That decision should not distract this Court from conducting its own thorough review of the arguments and authorities raised in this case. Unfortunately, the *Rasmussen* case was plagued with overlength briefs, inadmissible evidence, and unauthorized memoranda. Id. at 1227-28. Altogether 18 pages of Rasmussen's briefing was stricken by Judge Rothstein and not considered. *Id*. at 1227. More importantly, significant arguments, evidence and analysis is before

this Court that were not presented to Judge Rothstein. Finally, it is your undersigned's understanding that *Rasmussen* has been appealed.