

WHATCOM COUNTY COUNCIL AGENDA BILL

NO. AB2013-125

CLEARANCES	Initial	Date	Date Received in Council Office	Agenda Date	Assigned to:
Originator:	JPR	3/14/2013	RECEIVED MAR 19 2013 WHATCOM COUNTY COUNCIL	3/26/2013	Public Works Committee
Division Head:	JPR	3/14/2013			
Dept. Head:	ALL FOR F.A.	3/14/13			
Prosecutor:					
Purchasing/Budget:					
Executive:	<i>[Signature]</i>	3-18-13			

TITLE OF DOCUMENT:

Birch Bay Right-of-Way Presentation

ATTACHMENTS:

1. **Memo to County Executive and Council**
2. **Memo from Whatcom County Engineer**
3. **Right of Way Determination Report**
4. **Memo from County Prosecuting Attorney**
5. **Memo from County Senior Land Surveyor**

SEPA review required? () Yes () NO
 SEPA review completed? () Yes () NO

Should Clerk schedule a hearing? () Yes (X) NO
 Requested Date:

SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE: (If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)

Presentation on 60-foot wide Right-of-Way Corridor along Birch Bay Drive, County Road No. 46.

COMMITTEE ACTION:

COUNCIL ACTION:

Related County Contract #:

Related File Numbers:

Ordinance or Resolution Number:

Please Note: Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County's website at: www.co.whatcom.wa.us/council.

**WHATCOM COUNTY
PUBLIC WORKS DEPARTMENT**



Frank M. Abart
Director

Joseph P. Rutan, P.E.
County Engineer/Assistant Director
322 N. Commercial Street, Ste 301
Bellingham, WA 98225-4042
Phone: (360) 715-7450
Fax: (360) 715-7451

Memorandum

RECEIVED

MAR 14 2013

**JACK LOUWS
COUNTY EXECUTIVE**

To: The Honorable Jack Louws, County Executive, and
Honorable Members of the Whatcom County Council

Through: Frank M. Abart, Director

From: Joseph P. Rutan, P.E., County Engineer/Assistant Director *JPR*

Date: March 13, 2013

Re: Birch Bay Drive Right of Way

Requested Action:

Public Works requests that a County Council Public Works Committee work session be scheduled for an informational presentation on the 60-foot wide Right of Way (ROW) corridor along portions of Birch Bay Drive. This presentation is being made at the request of the County Executive.

Background and Purpose:

Project number 3, as shown on the 2013-2018 Six Year Transportation Program is "Birch Bay Drive and Pedestrian Facility". This project will remove the existing seawall and revetments protecting the roadway and will replace them with a soft shore beach profile. The project will also include the reconstruction of Birch Bay Drive to include enhanced pedestrian and bicycle facilities. This construction will occur within the existing ROW or within portions that will be acquired for the project. The County currently has at least a 60-foot wide ROW corridor throughout the entire length of the proposed project. The portion of the project west of the Willamette Meridian, which is the section line at Harborview Road, has been the subject of a few citizens' concerns in that they dispute our records of a 60-foot width ROW corridor.

This presentation is to provide the documents and information necessary to identify the public's established 60-foot wide ROW corridor. This is also intended to alert the abutting landowners of the existing conditions and provide them an opportunity to understand, question, or challenge the public's ownership of this ROW corridor.

Information:

See attachments

cc: File

**WHATCOM COUNTY
PUBLIC WORKS DEPARTMENT**



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RECEIVED

MAR 14 2013

**JACK LOUWS
COUNTY EXECUTIVE**

Memorandum

To: The Honorable Jack Louws, County Executive, and
Honorable Members of the Whatcom County Council

From: Joseph P. Rutan, P.E., County Engineer/Assistant Director *JPR*

Date: March 13, 2013

Re: Birch Bay Drive Right of Way

This memorandum is provided as documentation of the public Right of Way (ROW) for County Road No. 46, aka Birch Bay Drive, from Alderson Road northward and westerly to Birch Point Road.

Whatcom County currently has at least a 60-foot wide ROW corridor from Alderson Road to Birch Point Road. The record shows that there are two portions of this ROW that must be considered.

The portion of Birch Bay Drive north and west of the Willamette Meridan, Harborview Road, was originally established as County Road No. 22, in 1877. This original ROW was established as a 30-foot width corridor.

This was subsequently re-established and overlapped in 1884 as County Road No. 46 from Alderson Road northward and westerly to Birch Point Road.

This established a lawful county road and public highway which, by territorial statute, established a 60-foot wide corridor unless otherwise petitioned for. This is reflected by the February 1884 legal public notice in the publication of record at the time, The Whatcom Reveille. This ROW was mapped and declared by the County Engineer in 1916. It was subsequently reconstructed and monumented as lateral Highway 2 in 1930. These monuments were subsequently recovered and re-established in 1974 and 2012. Whatcom County has continually and openly operated, maintained, reconstructed, and provided public utility installation throughout the width and length of this 60-foot ROW corridor since 1884. Moreover, all records of surveys and legal subdivisions on file with the County Engineer's office identify a 60-foot ROW as established by County Road No. 46.

In 1984 Whatcom County commissioned local Professional Land Surveyor Larry Steele and Associates, Inc. to prepare a ROW determination report. This was done in order to provide a neutral third party review of the ROW record. This is attached along with a memorandum from Whatcom County Prosecuting Attorney, Dan Gibson, addressing the legal issue raised in the report. Also attached, is a review and analysis of the records on file with the County Engineer's Office, by Ty Whitcomb P.L.S., County Senior Land Surveyor.

cc: File



LARRY STEELE & ASSOCIATES, INC.

ENGINEERS

RIGHT-OF-WAY DETERMINATION REPORT
FOR
BIRCH BAY DRIVE
(WHATCOM COUNTY ROAD NOS. 22 & 46)

Prepared By

Lawrence W. Steele, P.L.S.
805 Dupont Street
Bellingham, Washington

Submitted To

Jim Kresge, Project Engineer
Bureau of Engineering
Whatcom County, Washington

October 1, 1984

DESCRIPTION

The portion of the road in question commences at the intersection of Alderson Road and Birch Bay Drive in the Northwest Quarter of Section 31, Township 40 North, Range 1 East; thence continues Northwesterly along the bay through Sections 31 & 30, Township 40 North, Range 1 East and Sections 25 & 24, Township 40 North, Range 1 West, to its intersection with Shintaffer Road in the Southwest Quarter of said Section 24.

HISTORY

A portion of the Right-of-Way in question is covered by County Road No. 22, and all of the R/W in question is covered by County Road No. 46.

Listed below is the sequential history of each road with the Appropriate Commissions Proceedings and Road Record Book noted.

County Road No. 22

<u>DATE</u>	<u>ITEM</u>	<u>COMM. PROC.</u>	<u>ROAD RECORD BOOK</u>
Oct. 2, 1877	Notice of Petition		2/43
Nov. 6, 1877	Petition Filed		2/44
Nov. 7, 1877	Petition Presented	3/153	
Nov. 7, 1877	Viewers Appointed		2/44
Feb. 7, 1878	Viewers Report Filed		2/45
Feb. 7, 1878	Hearing Continued	3/169	
May 9, 1878	" "		
Aug. 6, 1878	Order of Establishment	3/219	2/45

County Road. No. 46

<u>DATE</u>	<u>ITEM</u>	<u>COMM. PROC.</u>	<u>ROAD RECORD BOOK</u>
Feb. 14, 1876	Petition for Private Rd.		1/135
Feb. 14, 1876	Viewers Report for Private Rd.		1/134
Aug. 8, 1883	Ordered Surveyed	4/101	
Feb. 6, 1884	Surveyors Report, Field Notes		2/242-245
Feb. 6, 1884	Order of Establishment	4/142	

For County Road No. 22 the width is set out at 30 feet, both in the Road Record Book and the Commissions Proceedings.

However, for County Road No. 46, nowhere in the Road Record Book or the Commissions Proceedings is a R/W width mentioned. There were several laws in effect at the time of the Order of Establishment on February 6, 1884 that seem to pertain directly to this situation. There are:

- 1) Sec. 8, Act of Jan. 11, 1859 (Territorial Law) - "County roads shall be 60 feet in width unless the county commissioners shall, upon prayer of the petitioners for same, determine a less number of feet in point of width."
- 2) Sec. 2979, Chapter CCXXIX, Acts of 1881 - "All county roads shall be sixty feet in width unless the county commissioners shall, upon the prayer of the petitioners for the same, determine on a less number of feet in width."
- 3) Sec. 2980, Chapter CCXXIX, Acts of 1881 - "When the place of beginning or true course of any public road shall become uncertain by reason of the removal of any marked tree or monument by which such road is designated, or from any other cause, the county commissioners of the proper county may appoint two disinterested freeholders of the county to review and if they deem it necessary to straighten such road; and the re-viewers shall cause the said road to be correctly surveyed and marked throughout, as in case of a new road, and shall make a return of the survey and plat of such road to the county commissioners of the proper county; the commissioners shall cause the same, if approved, to be recorded as in other cases; and from thenceforth such road surveyed as aforesaid shall be considered as a public highway."
- 4) Sec. 3119, Acts of 1881
- 5) Chapter CCXXXVI, Acts of 1881

Sixty feet of R/W appears to be correct since the laws clearly stated 60 feet unless explicitly stated otherwise.

The Commissioners Proceedings for County Road No. 46 statement, "no objections having been made in writing or otherwise to the legalization of said Road", coincides with the laws which allowed for objections and claims for damages, etc.

From the record there was no survey made for County Road No. 22, although one had been called for by the Commissioners. The petitioners apparently prevailed after two continuances, and the Order of Establishment given without a Surveyors Report or Field Notes.

OBSERVATIONS

From the record again, a portion of County Road No. 46 appears to overlay a portion of County Road No. 22. The general descriptions given for the roads indicate this. Specifically, the overlay is from the intersection of Birch Bay Drive and County Road No. 8 on the Willamette Meridian Northwesterly to the

Southeast Quarter of Section 23, Township 40 North, Range 1 West. Our concern for this report ends at the intersection of Birch Bay Drive and Shintaffer Road in the Southwest Quarter of Section 24, Township 40 North, Range 1 West.

From the record the portion of Birch Bay Drive R/W within Sections 30 & 31 (from its intersection with Alderson in the Northwest Quarter of Section 31 to the Willamette Meridian) I believe to be 60 feet in width.

The overlayment area presents a question and the need for a legal opinion. The question is: did County Road No. 46 and its 60 foot of width supercede the County Road No. 22 and its 30 feet of width? As a licensed Land Surveyor, I am not in a position to answer a question of law; however, the implication for 60 feet is there.

I believe I can back up that implication with the following data from the County Engineering records, in which it is believed, assumed and noted that a 60 foot width of R/W is correct.

- 1) 1916 map and Field Notes of the overlayment area.
 - a) map in road packet titled, "Map Showing Resurvey of Part of County Roads No. 22-46."
 - b) Field Book 188, page 27-33.
- 2) 1921 Field Notes of overlayment area.
 - a) Field Book 224, page 33.
- 3) 1930 map of Lateral Highway No. 2, including overlay area.
 - a) plan and profile.

Also in support of 60 feet of R/W through this stretch of road are the following:

- 1) E. C. Lyle, well known Civil Engineer & Land Surveyor in the 1920's and 1930's wrote descriptions and drew a map for tracts in Section 25, Township 40 North, Range 1 West. While the legal descriptions only state "Less Road", the map clearly shows a 60 foot R/W width. This section is part of the overlay area.
- 2) The plat of Cottonwood Beach Park, in Section 24, Township 40 North, Range 1 West, shows the County Road (Birch Bay Drive) to be 60 feet in width. No additional R/W was shown as dedicated in order to achieve this width - 60 feet was believed to be there. The date of the recording of this plat is May 9, 1922.
- 3) The plat of Cottonwood Beach, again in Section 24, Township 40 North, Range 1 West, was recorded September 9, 1925. This plat shows Birch Bay Drive as 60 feet within the plat boundaries. Outside of its boundaries it appears to show 40 feet (by scaling), not 30 feet or 60 feet.
- 4) The map of Morgan Cottonwood Beach Plat is adjacent to and surrounds Cottonwood Beach. It was filed for record May 29, 1939. This plat clearly shows 60 feet of R/W adjacent to the platted area, as well as either side of the intersecting plat boundaries.

Private surveying records, and Record of Survey & Short Plat filings for the area in question since the 1950's indicate a general acceptance, by the surveying community, of the County's belief in the 60 foot R/W width.

One observation as to title and use of the R/W. The book put out by the Municipal Research and Services Center of Washington titled "Surveys, Subdivision and Platting, and Boundaries", Report No. 4, May 1977, on page 141 in the last paragraph states, "When an easement is taken as a public highway, the soil and freehold remain in the owner of the land encumbered only with the right of passage in the public; and upon a discontinuance of the highway, the soil and freehold revert to the owner." Additionally, in Chapter XI, Compilation of Selected Laws of the State of Washington Relating to Surveys, Subdivision and Platting and Boundaries, at page 234 in the second paragraph, it states, "The public control of streets and highways in this state does not amount to an ownership of the fee under this section and RCW 58.08.015, supra," Paragraph three on that same page states, in part, "The owner of property abutting on a street may use the street area, to which he holds the fee, in any manner not inconsistent with the easement in the public for street purposes." From these it appears that the County's control is in the form of an easement and that the property owner can use the R/W as long as the public use for street is not thwarted.

CONCLUSION

I believe that the portion of Birch Bay Drive R/W within Sections 30 and 31 (from its intersection with Alderson Road in the Northwest Quarter of Section 31 to the Willamette Meridian) is 60 feet in width.

I believe that a legal opinion is necessary for the remaining portion of the R/W stretch in question (from the Willamette Meridian to the intersection with Shintaffer Road). Did County Road No. 46 and its 60 foot wide width automatically supercede the stated width of 30 feet for County Road No. 22?

It appears to me that the intent of the 1884 Survey and Order of Establishment was to redo County Road No. 22 R/W overlapped by the establishment of County Road No. 46. (See Commissioners Proceedings, Volume 4, p. 101, paragraph 1, "be surveyed. . . . and platted and report returned." See also Commissioners Proceedings, Volume 4, p. 142, paragraph 2, "resurvey of portions of travelled road ordered that the Plat & Field Notes . . . be recorded and accepted.") Based on this, the R/W would be 60 feet in width.



LARRY STEELE & ASSOCIATES

LAND-SURVEYORS

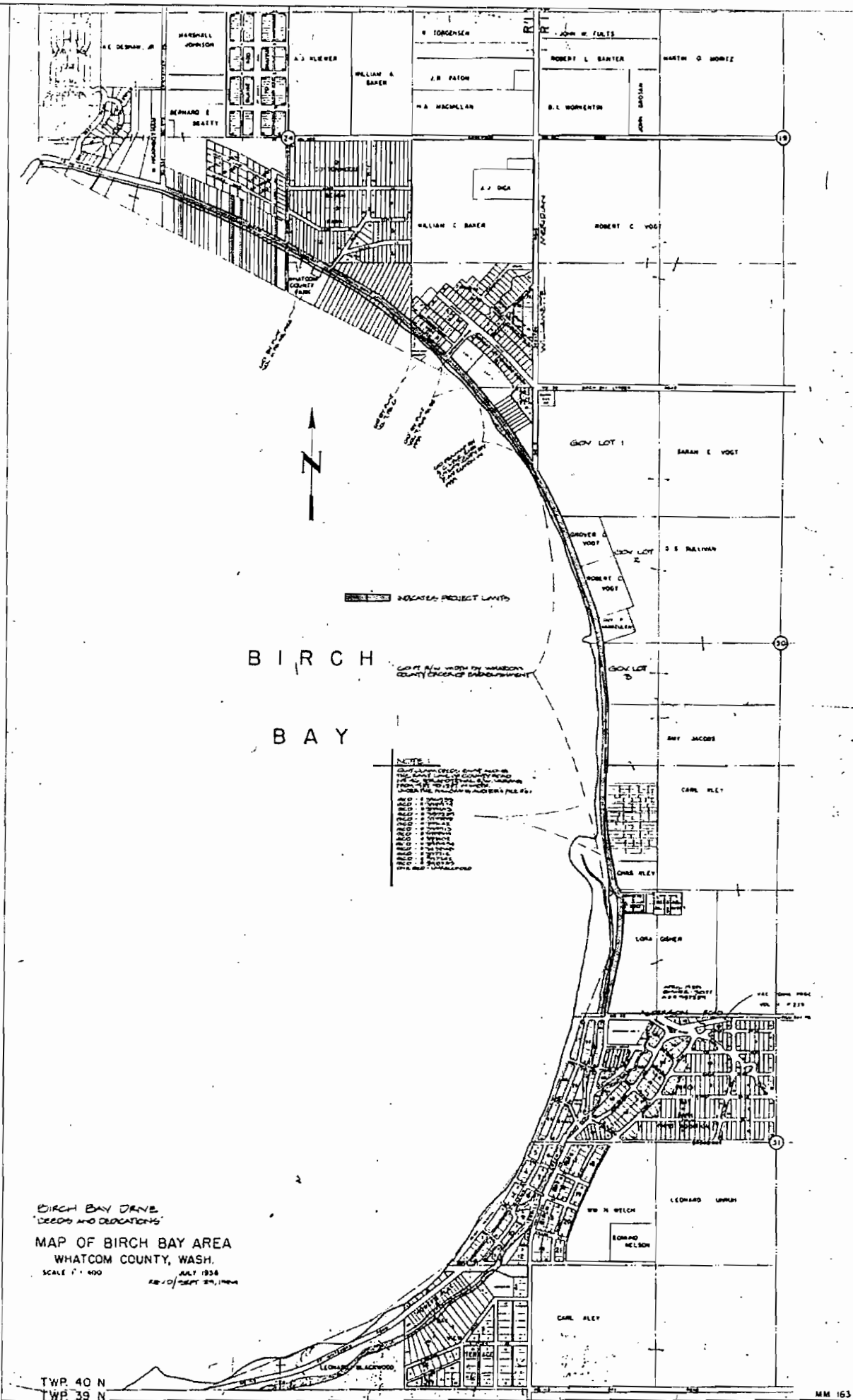
805 Dupont Street
BELLINGHAM, WA 98225

678-9350

Signed:

Lawrence W. Steele
Lawrence W. Steele, P.L.S. NO. 13138





BIRCH BAY

COPY FILE WITH THE WASHINGTON COUNTY OFFICE OF ENCUMBRANCE

- NOTES:
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BIRCH BAY DRIVE
 'DEEDS AND ENCUMBRANCES'
 MAP OF BIRCH BAY AREA
 WHATCOM COUNTY, WASH.
 SCALE 1" = 400' JULY 1958
 RE-10/SEPT 24, 1964

MM 163

TWP. 40 N
 TWP. 39 N

MM 163

MEMORANDUM

TO: Joe Rutan, County Engineer

FROM: Daniel Gibson, Asst. Chief Civil Deputy Prosecuting Attorney

DATE: February 21, 2013

Re: Status of Birch Bay Drive Right-of-Way

Joe, you requested that I examine the records and provide my legal opinion on the legal status of Birch Bay Drive, in light of claims by some adjacent property owners that the road right-of-way is only thirty (30) feet wide in the pertinent area. I have examined the entirety of the materials provided to me and can confirm that the opinion offered by licensed surveyor Larry Steele a number of years ago, when he compiled and examined the relevant information, is indeed correct. At the location in issue, the right-of-way for Birch Bay Drive is sixty feet in width.

Based upon the establishment of County Road No. 46 in conjunction with state law on the width of public roads when no width is specified, and with subsequent surveys that were filed, it is clear to me that County Road No. 46 with a width of 60 feet superseded County Road No. 22 and its width of 30 feet where they overlapped. I leave unanswered the question whether there remains, in any area where they did not entirely overlap, additional right-of-way beyond the 60 feet of right-of-way width for County Road No. 46. In other words, the road right-of-way is at least 60 feet in width to account for County Road No. 46 as both established and as continuously occupied for decades, and possibly more to account for County Road No. 22 if and where it does not entirely coincide with No. 46. I understand that it is not our intent in the present context, however, to assert a claim beyond the 60 feet of width for No. 46.

**WHATCOM COUNTY
PUBLIC WORKS DEPARTMENT**

Frank M. Abart
Director



Joseph P. Rutan, P.E.
County Engineer/Assistant Director
322 N. Commercial Street, Ste 301
Bellingham, WA 98225-4042
Phone: (360) 715-7450
Fax: (360) 715-7451

Memorandum

To: Joseph P. Rutan, P. E., County Engineer/Assistant Director

From: Ty Whitcomb, PLS

Date: March 13, 2013

Re: Right of Way for Birch Bay Drive

The Larry Steele report commissioned by the County in 1984 was in response to concern by the Landowners about the right of way for the construction of the existing Birch Bay Berm. It comprehensively covers the record related to the establishment of County Roads 22 and 46. Mr. Steele was the representative for some of the concerned Landowners. The County thought we would completely eliminate any question of an appearance of fairness or prejudice with his selection as the consultant. Let me emphasize, the argument of whether it is 60' or 30' wide only applies to the establishment of the portion lying northwest of Harborview. County Road 46 which runs from Alderson north only overlaps County Road 22 west of the Willamette Meridian, which is the section line at Harborview. There is no evidence to support anything but a 60 foot corridor from Alderson to Harborview.

The Petition and Establishment process for the creation of County Roads was originally drafted by the Territorial Legislature incorporated into RCW and was the common way to establish road right of way in early Washington. It did not commonly involve deeds and unless upon prey of the petitioners for a different width, all lawful county roads were 60 feet wide. County Road 22 requested or in the specified manner, granted the County 30 feet **above high water**. The subsequent overlying Establishment, over this portion of County Road 22, by County Road 46, did not specify a width and it has been well established in law that this means the right of way is 60' wide. It has been argued that since the original petitioners only granted or preyed for 30 that the overlying establishment did not have the proper foundation by new petition to establish more than 30. Please note that C. Donovan, for the County, published notice in the Whatcom Reveille, to the specific landowners that in February of 1884 that the County was establishing County Road 46 as a Lawful County road and Public highway, based on use for ten years and they were surveying and platting it and to file any claims or objections. Based on this, it would appear that the resultant 60 foot Lawful County Road was not dependent on the original Petition.

The real question at hand is, over the last 130 years, has the County been clear enough in their notice of position and intent related to the width of this right of way, to have provided sufficient opportunity

Name
Date
Page 2

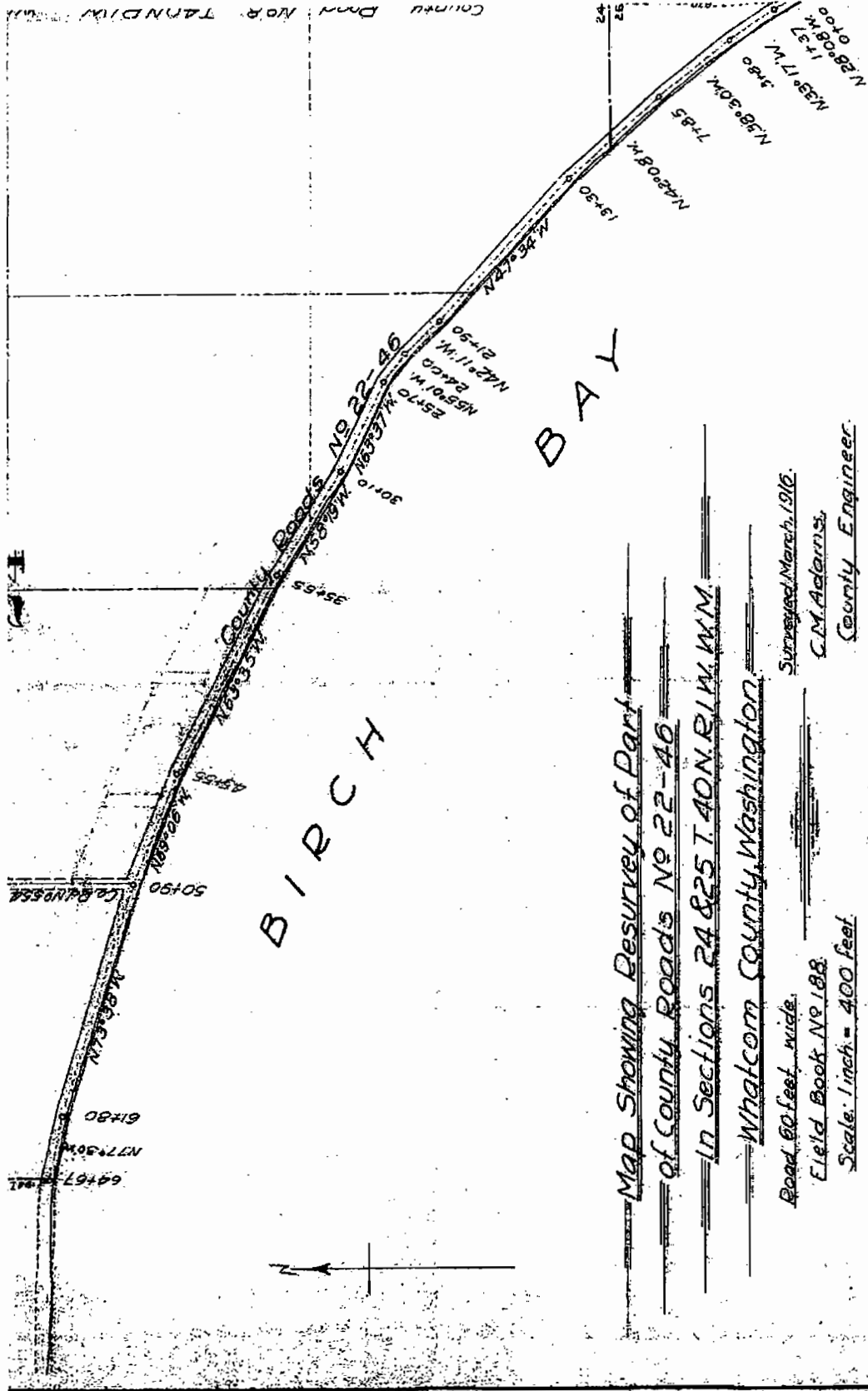
to object, seek damages or sue for resolution? The 1916 map of County Engineer, C.M. Adams declares the subject portion to be 60 feet. Our present 60 foot wide alignment and a majority of the improvements were built, mapped and monumented as Lateral Highway No. 2, in 1930, with extensive Public involvement and notice. We have recovered all but two of the original monuments from this reconstruction and are using them for our right of way. These same monuments were re-surveyed and used for the original installation in the 70's and all subsequent installations, of Birch Bay water and Sewer. Based on this it would appear sufficient notice of intent has been provided.

Upholding any argument for an original 30 foot corridor above high water would have to take into account our occupation and maintenance, for the sufficient statutory period, to have already perfected the right of Way, by operation of law, over all the present improved area . The addition of the thirty feet above high water from County Road 22 would result in the Public owning the beach and with the said improved area, probably more than 60 feet with an adverse effect on the adjoining. Even though this might be advantageous to the County in some respects, it is not a fair or correct position. It is only being addressed in response to arguments being made from Landowners.

County Right of Way is a Boundary between adjoining's, just like any other in Washington State. This boundary is a legal relationship between the parties based on history, evidence, mutual recognition and the actions of the parties. The County's position is well documented and has been of record with the Auditor and in the County Engineer's office of record that the Birch Bay Drive right of way was established 60 feet in width. We have operated the corridor and constructed facilities within it based on this position.

Ty Whitcomb, PLS

SyW
CORDED 1-25-13



Map Showing Resurvey of Part
of County Roads No 22-46
in Sections 24 & 25 T. 40N. R. 1W. W.M.
Whatcom County, Washington.
Road 60 feet wide.
Field Book No 188.
Scale: 1 inch = 400 feet.
Surveyed March, 1910.
C.M. Adams,
County Engineer.

Simahmeo Township

...proof vault and five (5) ...
...of the lower story of the Co...
...ing at Whatcom, according to the
...ans and specifications on file at the
...of said Auditor in Whatcom; the
...board reserving the right to reject any
...and all bids.

C. DONOVAN,

County Auditor of Whatcom Co., W.

NOTICE.

Notice is hereby given to H. Shields, J. Aitkin, T. Murphy, H. Roessell, Eunice Stevens, D. Rogers, George Windust, Abram Green, L. Martinson, G. McHeffy, J. Gisher, C. Vogt, H. Henspeter, and B. H. Bruns, residents on those portions of the county road used and traveled as such for 10 years, from the Ferndale Ferry to Semiahmoo, and that portion of the county road used and traveled as such for 10 years, from the quarter post of Secs. 31 and 32, Tp 3^{N.}, R 1 east; thence to and around Birch Bay, to the house of B. H. Bruns, in the County of Whatcom, has been resurveyed and platted, and the Board of County Commissioners of Whatcom County, W. T., will at its February term, A. D. 1884, hear and determine whether the roads herein described and included in said survey shall be ordained lawful county roads and public highways, and objections thereto or claims for damages must be filed in the Auditor's office on or before the first day of said February term, 1884, or the roads herein above described will be declared county roads and public highways.

C. DONOVAN,
County Auditor.

COPIED FROM

VOL. 2 PG. 242

W C ROAD RECORD

Sy W 1-25-13

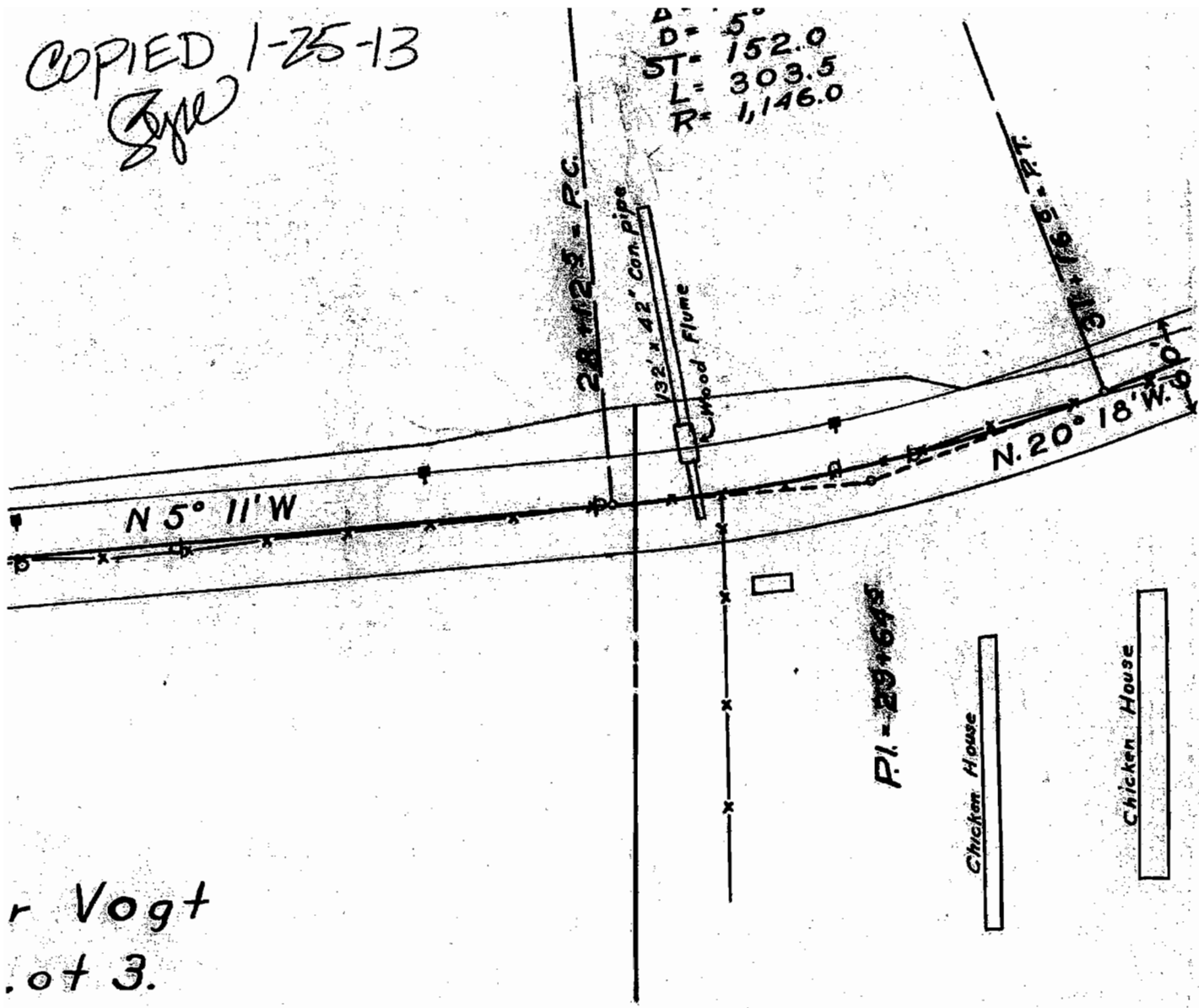
Book 1

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" 15

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(Signature)

$\Delta = 5^\circ$
 $ST = 152.0$
 $L = 303.5$
 $R = 1,146.0$



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lot 3.

COUNTY OF WHATCOM
OFFICE OF COUNTY ENGINEER
BELLINGHAM, WASHINGTON

MAP AND PROFILE LATERAL HIGHWAY N° 2 BIRCH BAY ROAD.

1 of 4 Sheets

WHATCOM COUNTY WASHINGTON

April 1930

Carl McCoy
Supervising Engineer

