

FILED FOR RECORD
SKAMANIA CO. WASH
BY *Skamania Co.*

JUN 21 11 53 AM '95

P. Lowry
AUDITOR

GARY M. OLSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

122592

FOR SKAMANIA COUNTY

DON KELLY, a single man,

Plaintiff,

No.

vs.

COMPLAINT FOR DECLARATORY
RELIEF, OR, IN THE
ALTERNATIVE, FOR A WAY OF
NECESSITY; AND FOR DAMAGES

COLUMBIA RIVER GORGE COMMISSION,
an administrative agency of the
State of Washington; SKAMANIA
COUNTY, WASHINGTON and its
DEPARTMENT OF PLANNING AND
COMMUNITY DEVELOPMENT; JAMES
SHEPARD and FAYE SHEPARD and the
marital community composed thereof,
RICHARD L. WILDING, a single man;
and WASHINGTON MUTUAL SAVINGS BANK,
a Washington banking corporation,

Defendants.

COMES NOW the Plaintiff and alleges as follows:

1. Parties and Status

1.1. Plaintiff is a single man residing in Skamania County, Washington and is the owner of the real property described in Exhibit "A" attached hereto and incorporated herein, hereafter referred to as "the Kelly property."

1.2. Defendant Columbia River Gorge Commission (herein "CRGC") is an administrative agency of the State of Washington.

Registered ☒
Indexed, Dir ☒
Indirect ☒
Filed ☐
Mailed ☐

KIPLINSKI & ASSOCIATES
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
40 Canada Avenue Suite 100 P.O. Box 510
Skamania, Washington 98648
Telephone (509) 427-0445
Fax (509) 427-7618

Complaint for Declaratory Relief, etc.
Page 1

1-5-8-501
502

1-5-8-500

1
2 1.3. Defendant Skamania County, Washington and its Department
3 of Planning and Community Development (herein "Planning
4 Department") are, respectively, a political subdivision of the
5 State of Washington and an administrative agency of Skamania
6 County, Washington.

7 1.4. Defendants James and Faye Shepard are husband and wife
8 forming a marital community under the laws of the State of
9 Washington. Defendants Shepard reside in Skamania County,
10 Washington and are the owners of certain real property adjacent to
11 the property of the Plaintiff, described in Exhibit "B" attached
12 hereto and incorporated herein, and hereafter referred to as "the
13 Shepard property."

14 1.5. Defendants Richard L. Wilding, a single man, and
15 Washington Mutual Savings Bank, a Washington banking corporation,
16 are parties having an interest of record in the real property owned
17 by Defendants James and Faye Shepard.

18 **2. FIRST CAUSE OF ACTION**
19 **Declaratory Relief and Negligence**
20 **CRGC**

21 As and for a cause of action against the Defendant CRGC,
22 Plaintiff alleges as follows:

23 2.1. The Kelly property and the Shepard property are portions
24 of the Clifford E. Blankenship Short Plat, which was approved by
25 Skamania County, Washington and recorded with the Auditor on
26 January 14, 1980. The Blankenship Short Plat reserves a 60 foot
27
28

1
2 easement over the west side of the Shepard property for ingress,
3 egress, road and utilities for the Kelly property. Both the
4 Plaintiff and the Defendants Shepard took title to their respective
5 properties subsequent and subject to the Blankenship Short Plat.

6 2.2. The Columbia River Gorge National Scenic Area Act
7 (hereafter referred to as "the Act") was adopted by the U.S.
8 Congress in 1986, subsequent to the recording of the Blankenship
9 Short Plat. The easement for the Kelly property therefore pre-
10 exists the Act and is "grandfathered" thereunder, and the CRGC
11 lacks jurisdiction to deny permits for development of the easement.

12 2.3. Skamania County Superior Court Cause No. 93-2-00106-3,
13 a prior action between Plaintiff and Defendants Shepard, confirmed
14 as between those parties the right of Plaintiff to use of the 60
15 foot easement over the west side of the Shepard property, as set
16 out in the Blankenship Short Plat.

17 2.4. In or about September of 1990 Plaintiff submitted his
18 application to the CRGC for development of the Kelly property as a
19 homesite. The attachments to Plaintiff's development application
20 included a copy of the Assessor's plat map showing his easement
21 over the Shepard property, providing access to the County road.

22 2.5. It was clear from the map and site plan submitted to the
23 CRGC that the Kelly property lacks frontage on the County road and
24 that access from the County road to the Kelly property must be over
25 adjacent properties. Further, no passable roads whatsoever
26
27
28

1
2 provided access to the Kelly property at the time the application
3 was processed.

4 2.6. CRGC Regulations, at 350-20-005, require that existing
5 and proposed roads and easements and rights of way be part of a
6 permit application. Plaintiff complied with that regulation by
7 attaching the plat map showing the 60' easement and by drawing in
8 on his site plan a BPA easement which existed of record but which
9 was not then a passable road upon the ground.

10 2.7. No deficiencies were noted in Plaintiff's application to
11 the CRGC, and his permit application was processed for approval.
12 The Director's Decision granting the permit was issued on November
13 13, 1990 and the appeal period ended on December 13, 1990.

14 2.8. Following notice of approval of his application,
15 Plaintiff went to the CRGC offices to pick up the permit. At that
16 time, employees and representatives of the CRGC affirmatively
17 represented to Plaintiff that his permit included access and that
18 he was fully covered to develop his property.

19 2.9. Plaintiff's site plan for development of his property
20 was oriented around accessing his property through the easement
21 route set out in the short plat. Since receiving his CRGC permit,
22 Plaintiff has undertaken sufficient development to maintain his
23 original permit in full force and effect. He has also incurred
24 substantial legal expenses in litigation with Defendants Shepard to
25 confirm the easement rights granted to him in the Blankenship Short
26
27
28

1
2 Plat. At all times he has relied on the sufficiency of the
3 original 1990 CRGC permit and the express representations made to
4 him by CRGC employees at the time of its issuance. Plaintiff has
5 performed all acts required to be performed by him to keep his
6 original permit in full force and effect.

7 2.10. On or about June 3, 1994, following the successful
8 conclusion of his lawsuit against Defendants Shepard for
9 confirmation of his short plat easement rights, Plaintiff obtained
10 a permit from the Engineering Department of Skamania County,
11 Washington for construction of his easement road. Prior to
12 submitting his application to the Engineering Department, Plaintiff
13 was again assured by employees of the CRGC that his original permit
14 was in effect and that he had approval from CRGC to construct his
15 road.

16 2.11. On or about June 20, 1994 CRGC informed Plaintiff that
17 his 1990 development permit did not include the right to develop
18 access to his property, and required Plaintiff to resubmit a
19 separate second application for development of his easement.

20 2.12. In requiring Plaintiff to file a separate second
21 application to develop his easement, CRGC has acted contrary to its
22 own rules and regulations and to the affirmative representations of
23 its employees and representatives. Plaintiff is entitled to a
24 declaratory judgment that the 1990 development permit included the
25 right to develop the easement set out in the short plat.
26
27
28

1
2
3 2.13. Plaintiff lacks a plain, speedy and adequate remedy at
4 law and is entitled to a writ of mandamus requiring the CRGC to
5 permit development of the easement pursuant to the permit which it
6 issued in 1990.

7 2.14. If Plaintiff fails to obtain declaratory relief as set
8 out in this cause of action, Plaintiff will have suffered damages
9 by reason of the negligence, misrepresentations and/or wrongful
10 issuance of the original permit by CRGC. The amount of such damage
11 will be set forth more fully at the time of trial.

12 3. SECOND CAUSE OF ACTION
13 Declaratory Relief
14 Skamania County/Planning Department

15 As and for a cause of action against Skamania County and its
16 Department of Planning and Community Development, Plaintiff alleges
17 as follows:

18 3.1. Plaintiff realleges paragraphs 1.1 through 2.12.

19 3.2. As of December 21, 1993, Skamania County and its
20 Department of Planning and Community Development ("Planning
21 Department") took over development reviews from the CRGC.

22 3.3. On June 20, 1994, the Planning Department advised Mr.
23 Kelly by letter that the building of a road along the easement
24 shown in the Blankenship Short Plat would require development
25 review by the Planning Department. The reason given by the
26 Planning Department for this requirement was that the CRGC had
27
28

1
2 advised that its prior approval of the Plaintiff's site plan did
3 not include development on adjacent properties.

4 3.4. On September 6, 1994, in a written opinion from the
5 Skamania County Prosecuting Attorney, Skamania County concurred
6 with the decision of the CRGC that its original permit did not
7 include access development rights and that the Plaintiff would have
8 to apply to the Planning Department for a separate second permit
9 for development of his easement.

10 3.5. On or about June 28, 1994, under protest, Plaintiff
11 filed an application with the Planning Department for issuance of
12 a permit to develop his short plat easement road.

13 3.6. By requiring Plaintiff to obtain a separate second
14 permit for development of his access road, Skamania County and its
15 Planning Department have acted contrary to the rules and
16 regulations of the CRGC and to the affirmative representations of
17 the employees and representatives of the CRGC, as set out
18 hereinabove. Plaintiff is entitled to a declaratory judgment that
19 the development permit issued by the CRGC in 1990 included the
20 right to develop the easement set out in the short plat, and
21 ordering Skamania County and its Planning Department to allow
22 Plaintiff to proceed with development of his easement without
23 obtaining a separate second permit.

24 3.7. Subsequent to Plaintiff's second permit application,
25 Defendants Shepard provided the Planning Department with a wetlands
26
27
28

1
2
3 determination report indicating, within the easement route, the
4 presence of vegetation and soils consistent with wetlands.
5 Plaintiff alleges on information and belief that such vegetation
6 and soils occur throughout the Belle Center Road area where the
7 Kelly and Shepard properties are situated, and are in fact present
8 along the Shepard's own driveway. The Belle Center Road area is
9 developed with many homesites and driveways, for which permits have
10 presumably been granted by CRGC and the Planning Department. The
11 wetlands report obtained by the Shepards is inconclusive as to the
12 actual presence of wetlands hydrology, and does not delineate any
13 alleged wetlands area.

14 3.8. No wetlands determination had been made by the Planning
15 Department personnel based on their ordinary and usual site
16 inspection procedures. However, the Planning Department has
17 determined that a wetland exists within the easement based on the
18 inconclusive report offered to it by the Defendants Shepard.
19 Further, the Planning Department has stated that, if the presence
20 of a delineated wetlands within the easement is not rebutted, a
21 permit cannot be granted. The Planning Department has further
22 stated that Plaintiff is required to incur the cost of rebutting
23 the wetlands contention, or, if the contention cannot be rebutted,
24 to incur the cost of delineating the wetlands area for the Planning
25 Department.

1
2 3.9. It would cost the Plaintiff many thousands of dollars to
3 hire consultants to rebut or delineate the presence of wetlands.
4 It is unreasonable to place such a financial burden on the
5 Plaintiff in view of the circumstances of this case. Plaintiff
6 believes that no wetlands exist within the easement route and
7 Plaintiff was, in fact, informally advised by a member of the staff
8 of the Planning Department who walked the easement route that there
9 were no wetlands. The Planning Department should not make a
10 determination that wetlands are present unless the Defendants
11 Shepard, at their own expense, produce a conclusive report
12 identifying the presence of wetlands and delineating the extent and
13 area of the wetlands so that the Planning Department can evaluate
14 the Plaintiff's permit application using its own staff and
15 criteria.

16 3.10. Plaintiff lacks a plain, speedy and adequate remedy at
17 law. Plaintiff is entitled to a writ of mandamus ordering the
18 Planning Department to permit development of his easement based on
19 the 1990 permit issued by the CRGC, without further permits or
20 restrictions.

21 3.11. Plaintiff is entitled to a declaratory judgment
22 ordering the Planning Department to abide by its own ordinary
23 procedures for making wetlands determinations, or, in the
24 alternative, ordering the Planning Department to require the
25 Defendants Shepard to incur the cost of obtaining a conclusive
26
27
28

1
2
3 report identifying the presence of wetlands and delineating the
4 same, for the use of the Planning Department staff.

5
6 4. THIRD CAUSE OF ACTION
Way of Necessity

7 James and Faye Shepard, Richard L. Wilding
8 and Washington Mutual Savings Bank

9 In the alternative, and as and for a cause of action against
10 Defendants James and Faye Shepard, Richard L. Wilding and
11 Washington Mutual Savings Bank, Plaintiff alleges as follows:

12 4.1. Plaintiff realleges all of the foregoing paragraphs.

13 4.2. If Plaintiff does not prevail on his claims for
14 declaratory relief set out hereinabove, and if Plaintiff is unable
15 to obtain a permit to develop his short plat easement because of
16 wetlands, Plaintiff's property will be without legal access and be
17 landlocked.

18 4.3. By reason of the foregoing, Plaintiff would then be
19 entitled to an easement by necessity along, through, or over some
20 portion of Defendant's land to the County road, for the proper use
21 and enjoyment of Plaintiff's land. The exact route of such
22 easement is unknown to Plaintiff at this time.

23 4.4. Taking of the way of necessity should be without
24 compensation to the Defendants Shepard, since they took their
25 property subject to the easement in favor of the Kelly property set
26 forth in the Blankenship Short Plat.

1
2 4.5. Defendants Shepard should not be awarded any costs or
3 attorney fees in connection with establishing a way of necessity,
4 in view of the circumstances of this case.

5 5. FOURTH CAUSE OF ACTION
6 "Taking" Under Initiative 164
7 CRGC/Skamania County/Planning Department

8 As and for a cause of action against CRGC, Skamania County and
9 its Department of Planning and Community Development, Plaintiff
10 alleges as follows:

11 5.1 Plaintiff realleges all of the preceding paragraphs
12 except paragraphs 4.1 through 4.5.

13 5.2 All or some of the actions of Defendants CRGC, Skamania
14 County and its Department of Planning and Community Development may
15 constitute a "taking" under Initiative 164, and Plaintiff reserves
16 the right to amend this complaint to allege a taking under
17 Initiative 164 after its effective date, and damages therefor.

18 6. Prayer for Relief

19 WHEREFORE, Plaintiff prays judgment as follows:

20 6.1. For declaratory relief, determining that the Plaintiff
21 has a vested right to develop the easement route set out in the
22 Blankenship Short Plat, which Short Plat preceded the enactment of
23 the Columbia River Gorge National Scenic Area Act;

24 6.2. For declaratory relief, determining that the permit
25 first obtained by Plaintiff from the CRGC in 1990 includes the
26 vested right to develop the easement route set out in the
27
28

Blankenship Short Plat, and that no further permits are required from the CRGC in order for Plaintiff to develop his easement route.

6.3. For declaratory relief, ordering that the original permit obtained by Plaintiff from the CRGC, which includes the right to develop the easement route over the Shepard property, remains in full force and effect, and that no further permits are required from Skamania County or its Planning Department in order for Plaintiff to develop the easement route set out in the Blankenship Short Plat.

6.4. For a writ or writs of mandamus, ordering the CRGC and the Planning Department to permit Plaintiff to develop his original easement route over the Shepard property under the 1990 permit issued by the CRGC, without further permits or restrictions;

6.5. In the alternative, for a money judgment against the CRGC for negligence and wrongful issuance of a permit, according to proof at trial.

6.6. In the alternative, ordering the Planning Department to require the Defendants Shepard to incur the cost of obtaining a conclusive report identifying the presence of wetlands and delineating the same, for the use of the Planning Department staff.

6.7. In the alternative, for condemnation of a private way of necessity over the lands of Defendants Shepard, said condemnation

1
2 to be without compensation to said Defendants and without award of
3 costs or attorney fees.

4 6.8. For Plaintiff's damages for the "taking" of his property
5 pursuant to Initiative 164, according to proof at the time of
6 trial.

7 6.9. For Plaintiff's costs herein and reasonable attorney
8 fees.

9 6.10. For such other and further relief as the court may deem
10 proper.

11 DATED this 5th day of June, 1995.

12 KIELPINSKI & ASSOCIATES, P.C.

13
14 By: 
15 JAN C. KIELPINSKI of
16 Attorneys for Plaintiff
17 WSB #3716
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

OREGON
STATE OF ~~WASHINGTON~~)
County of Multnomah)

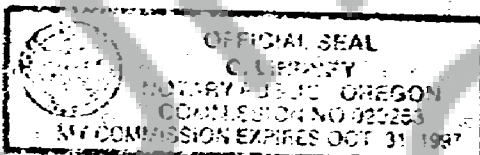
SS

I, DON KELLY, being first duly sworn on oath, depose and state:

I am the Plaintiff herein. I have read the foregoing COMPLAINT FOR DECLARATORY RELIEF, OR, IN THE ALTERNATIVE, FOR A WAY OF NECESSITY; AND FOR DAMAGES, know the contents thereof and believe them to be true and correct.

Don Kelly
DON KELLY

SIGNED AND SWORN to before me this 9th day of June, 1995 by Don Kelly.



Name C. LINDSEY
NOTARY PUBLIC in and for the State
of Washington, OREGON

Commission expires: OCT 31, 1997

EXHIBIT "A"

The Kelly property:

The East half of the West half of the Northwest quarter of the Northwest quarter and the West half of the East half of the Northwest quarter of the Northwest quarter, all in Section 8, Township 1 North, Range 5 East Willamette Meridian, EXCEPT the North 528 feet thereof, TOGETHER WITH an easement over the West 60 feet of the North 528 feet, exception above, and the East half of the West half of the Southwest quarter of the Southwest quarter of Section 5, Township 1 North, Range 5 East Willamette Meridian lying Southerly of the County road known and designated as Belle-Center Road.

Subject to: Transmission line easement as recorded under Auditor's file No. book 29, Page 4, Skamania County Deed records, Access road easement as recorded under Auditor's File No. 32162, Book 29, Page 308, Skamania County Deed records, Right of Way easement as recorded under Auditor's File No. 33377, Book 30, Page 111, Skamania County Deed records.

EXHIBIT "B"

The Shepard property:

Parcel I

A Tract of land in the Southwest Quarter of the Southwest Quarter of Section 5 and in the Northwest Quarter of the Northwest Quarter of Section 8, all in Township 1 North, Range 5 East of the Willamette Meridian, in the County of Skamania, State of Washington, described as follows:

Lot 1 of the Blankenship Short Plat, Recorded in Book 2 of Short Plats, Page 148, Skamania County Records.

Parcel II

A Tract of land in the Northwest Quarter of the Northwest Quarter of Section 8, Township 1 North, Range 5 East of the Willamette Meridian, in the County of Skamania, State of Washington, described as follows:

Lot 2 of the Blankenship Short Plat recorded in Book 2 of Short Plats, Page 148, Skamania County Records.

KIPLINSKI & ASSOCIATES
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
40 Cascade Avenue, Suite 110 • P.O. Box 510
Severson, Washington 98648
Telephone: (509) 427-5665
Fax: (509) 427-7618

JAN C. KIELPINSKI
MICHAEL J. WYNNE

KIELPINSKI & ASSOCIATES
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS AT LAW
OFFICE ADDRESS: 40 CASCADE AVENUE - SUITE 110
MAILING ADDRESS: P.O. BOX 510
STEVENSON, WA 98648

Legal Assistant:
ANITA R. SMITH

TELEPHONE: (509) 427-5665
FAX: (509) 427-7618

June 19, 1995

Ms. Marilyn Breckel
Skamania County Risk Manager
P.O. Box 790
Stevenson WA 98648

Re: Claim of Don Kelly
Our File No. 4834

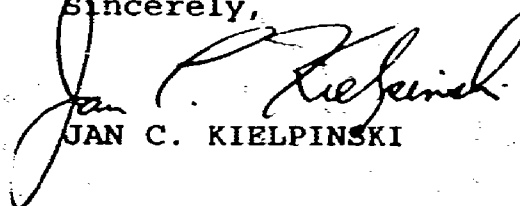
Dear Marilyn:

I am enclosing for the information of the County Commissioners a copy of a verified complaint which has been prepared for filing, naming Skamania County and its Department of Planning and Community Development among the defendants.

Our purpose in sending this complaint is to present our claim as required by RCW 4.96.

Mr. Kelly's residence for the six months prior to presentation of this claim has been 2241 Belle Center Rd., Washougal, Washington 98671.

Sincerely,


JAN C. KIELPINSKI

JCK:as

Encl.

cc: Don Kelly

SKAMANIA COUNTY AUDITOR
GARY M. OLSON

27860

Date: 06/25/1995 11:53

Type: FILED DOCUMENTS

Receipt#: 43198

Amount: \$.00

Input by: PL

Funds paid: NO CHARGE

From: SKAMANIA COUNTY

Memo: COMPLAINT FOR RELIEF OR WAY OF NECESSITY; AND DAMAGES

Auditor file#: 122592

Return to: SKAMANIA COUNTY

Grantor:	Grantee:	Parcel:
COLUMBIA RIVER GORGE COMMISS 27861	KELLY, DON	01-05-08-0-0-0500-00
COLUMBIA RIVER GORGE COMMISS 27862	KELLY, DON	01-05-08-0-0-0501-00
COLUMBIA RIVER GORGE COMMISS 27863	KELLY, DON	01-05-08-0-0-0502-00
SKAMANIA COUNTY PLANNING DEPT 27864	KELLY, DON	01-05-08-0-0-0502-00
SKAMANIA COUNTY PLANNING DEPT 27865	KELLY, DON	01-05-08-0-0-0501-00
SKAMANIA COUNTY PLANNING DEPT 27866	KELLY, DON	01-05-08-0-0-0500-00
SHEPARD, JAMES ETUX ETAL 27867	KELLY, DON	01-05-08-0-0-0500-00
SHEPARD, JAMES ETUX ETAL 27868	KELLY, DON	01-05-08-0-0-0501-00
SHEPARD, JAMES ETUX ETAL 27869	KELLY, DON	01-05-08-0-0-0502-00
WILDING, RICHARD L ETAL 27870	KELLY, DON	01-05-08-0-0-0502-00
WILDING, RICHARD L ETAL 27871	KELLY, DON	01-05-08-0-0-0501-00
WILDING, RICHARD L ETAL 27872	KELLY, DON	01-05-08-0-0-0500-00
WASHINGTON MUTUAL SAVINGS BK 27873	KELLY, DON	01-05-08-0-0-0500-00
WASHINGTON MUTUAL SAVINGS BK 27874	KELLY, DON	01-05-08-0-0-0501-00
WASHINGTON MUTUAL SAVINGS BK 27875	KELLY, DON	01-05-08-0-0-0502-00