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UNOPENED PUBLIC STREET EASEMENTS IN WASHINGTON: WHOSE RIGHT TO USE THAT LAND IS IT, ANYWAY?

Alfred E. Donohue

Abstract: This Comment argues that landowners whose property abuts unopened public street easements have a right to reasonable, non-interfering use of such easements until the city or county opens the street for its intended purpose. Unopened public street easements are dedicated streets that a city or county has not developed or used. Often, landowners use this land to store firewood, park boats, or garden. In 1995, the City of Seattle enacted Municipal Code section 15.02.100, which prohibits all use of unopened public street easements. Several Washington court decisions purportedly support the Seattle ordinance. These decisions suggest that abutting property owners have no legal right to use unopened streets absent permission from the city. However, other Washington court decisions have held that abutting property owners have a right to reasonable, non-interfering use of unopened streets. Under these decisions, this right of use continues until the city or county uses the street for its intended purpose. Other major Washington cities follow this rule. In 1999, the Washington Court of Appeals attempted to reconcile the conflicting decisions but was unable to resolve the issue satisfactorily. This Comment argues that courts and municipalities have misconstrued cases purporting to prohibit all use by the abutting landowner and that an abutting landowner may make reasonable non-interfering use of an unopened street easement.

*“The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle.”*¹

Throughout Washington, public easements burden a significant amount of land.² They give the city or county the right to construct a street at any time, but until the city or county actually does so, the land remains unused. For example, two Seattle neighborhoods, Magnolia and Queen Anne, have numerous unopened, unused, and unimproved public street easements.³ These easements total more than 21,000 linear feet in

1. *Sauer v. City of New York*, 206 U.S. 536, 548 (1907).

2. A right of way, or easement, is a right of use over the property of another. WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 435 (3d ed. 2000). A public right of way, or public easement, gives the general public an easement for passage on public streets and highways. See *Motoramp Garage Co. v. City of Tacoma*, 136 Wash. 589, 591, 241 P. 16, 17 (1925).

3. A public street easement is a dedication to a county or city of specific land for use as a street. See *State ex rel. York v. Bd. of County Comm'rs*, 28 Wash. 2d 891, 904, 184 P.2d 577, 585 (1947). A street is opened when the county or municipality uses the street for travel or transportation. See *Karb v. City of Bellingham*, 61 Wash. 2d 214, 217, 377 P.2d 984, 985-86 (1963).

these two neighborhoods alone.⁴ This amounts to more than 650,000 square feet of unopened public street easements, or nearly fifteen acres of land in two of Seattle's most expensive neighborhoods.⁵

This Comment examines who has the right to use these unopened public street easements until a street is built. Washington court decisions are not consistent regarding the use of unopened public street easements, and two contradictory views have developed.⁶ The first line of decisions treats unopened public street easements akin to private easements.⁷ The abutting landowner⁸ may use the area covered by an easement in any reasonable way that does not interfere with the easement holder's rights.⁹ However, the abutting landowner's use may neither interfere with the opening of the street by the city or county¹⁰ nor with the right of neighboring landowners to use the unopened street for access to their own property when necessary.¹¹ In contrast, the second line of decisions indicates that abutting landowners¹² have no right to use an unopened public street easement, other than for access, light, air, and view.¹³

Amidst this confusion, some cities have enacted ordinances that restrict use by abutting landowners. For example, Seattle and Bellevue both expressly prohibit the use of unopened public street easements

4. These figures are based on site surveys and examination of street maps by the author (Aug. 21–23, 2000) (maps available at Kroll Map Co.).

5. Based on site surveys and examination of street maps by the author, (Aug. 21–23, 2000), Magnolia and Queen Anne comprise less than ten percent of Seattle's total residential area. According to a Building Industry Association of Washington officer, there are substantial dedicated but unopened and unused streets statewide. Interview with Kenneth Donohue, past President, Building Industry Association of Washington, in Olympia, Wash. (Sept. 12, 2000).

6. *Compare* *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wash. 2d 555, 408 P.2d 1012 (1965), *with* *Nystrand v. O'Malley*, 60 Wash. 2d 792, 375 P.2d 863 (1962).

7. *See Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865; *Thompson v. Smith*, 59 Wash. 2d 397, 407–08, 367 P.2d 798, 803 (1962).

8. For the purposes of this Comment, an abutting landowner is the party that owns the land burdened by the easement.

9. *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865 (permitting planting of shrubs and trees, and extension of garage); *Thompson*, 59 Wash. 2d at 407–09, 367 P.2d at 803–04 (permitting concrete slab, parking cars, "or other appropriate use"); *Holm v. Montgomery*, 62 Wash. 398, 400, 113 P. 1115, 1116 (1911) (permitting irrigation ditch). However, building a garage, an addition to a house, or a cement retaining wall on the easement might be unreasonable. *See Thompson*, 59 Wash. 2d at 409, 367 P.2d at 804.

10. *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865.

11. *Id.*

12. *Kemp v. City of Seattle*, 149 Wash. 197, 201, 270 P. 431, 433 (1928) (explaining that property abuts street when there is no intervening land between it and street).

13. *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wash. 2d 555, 562, 408 P.2d 1012, 1016 (1965) (noting access, light, air, and view as street purposes).

without the city's permission.¹⁴ Other cities, such as Vancouver and Everett, allow reasonable use of unopened public street easements by an abutting landowner, provided the use does not interfere with the city's use and is not commercial.¹⁵

This Comment first explains unopened public street easements and their creation. Next, it examines the two conflicting lines of case law addressing the right of abutting owners to use these easements without first obtaining a permit. This Comment continues by examining various municipal ordinances, some of which, such as Seattle Municipal Code (SMC) section 15.02.100, prohibit any use of unopened easements. This Comment then argues that the legal premises for ordinances such as Seattle's are invalid because the "no use" cases do not apply to the reasonable use of an unopened public street easement. Further, constraining all reasonable use by abutting landowners excessively restricts the rights of landowners to use their property. Such exclusions run counter to public policy favoring the efficient use of land. This Comment concludes that Washington case law, properly read, mandates that abutting owners may make non-interfering use¹⁶ of unopened public street easements.

I. CREATION AND OWNERSHIP OF PUBLIC STREET EASEMENTS

This Part first discusses the creation, opening, and extinguishing of public street easements. Next, it explains who owns the land over which the public street easement runs. Finally, it details the specific rights of use that the general public, neighboring owners, and abutting landowners have in public street easements.

14. *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE § 15.02.100 (1998); BELLEVUE, WASH., CITY CODE § 14.30.080 (1998).

15. *See, e.g.*, VANCOUVER, WASH., MUNICIPAL CODE § 11.60.050 (1998); EVERETT, WASH., MUNICIPAL CODE §§ 13.30.040, 13.84.010 (1998).

16. For the purposes of this Comment, non-interfering use is any use of an unopened public street easement that will not prevent a city, county, or other party from later using the easement. *See, e.g.*, *Thompson v. Smith*, 59 Wash. 2d 397, 408, 367 P.2d 798, 803-04 (1962).

A. *Creating, Opening, and Extinguishing a Public Street Easement*

An easement is one person's¹⁷ right to make some limited use of land owned by another person.¹⁸ The dominant owner is the party who holds the easement, while the servient landowner is the person who owns the property burdened by the easement.¹⁹ The dominant owner's right to use the land exists whether or not the easement is improved and opened.²⁰ For example, when a landowner grants an easement for a driveway, that easement exists even though the driveway has not yet been built. Until the dominant owner constructs the driveway, the easement remains unopened and unimproved.²¹

When a landowner dedicates an easement to the public for use as a street, the landowner creates a public street easement.²² These dedications, known as statutory dedications, occur when a landowner grants the governmental body a deed or when a city or county approves a plat that marks the location of streets dedicated to public use.²³ A landowner may dedicate previously platted land for a street, provided the landowner follows the procedures set forth by the city or county.²⁴ This later

17. For the purposes of this Comment, a person is any owner of property, including an individual or corporation.

18. *City of Olympia v. Palzer*, 107 Wash. 2d 225, 229, 728 P.2d 135, 137 (1986). An easement holder, the dominant owner, is entitled to only limited use of the fee owner's, the servient owner's, property. *See State ex rel. Shorett v. Blue Ridge Club*, 22 Wash. 2d 487, 494, 156 P.2d 667, 671 (1945).

19. 17 WILLIAM B. STOEBCUK, *REAL ESTATE: PROPERTY LAW, in WASHINGTON PRACTICE*, 84 (1995).

20. An improved street is any street where the municipality or county has made improvements to provide for any primary use, such as grading or paving. *See Albee v. Town of Yarrow Point*, 74 Wash. 2d 453, 458-59, 445 P.2d 340, 344 (1968). An opened street is one where there is any primary or secondary use by a city or county; for example, laying a sidewalk opens a street, because transportation is a primary use. *See State ex rel. York v. Bd. of County Comm'rs*, 28 Wash. 2d 891, 904, 184 P.2d 577, 585 (1947). Likewise, a municipality laying gas, water, or power lines along an unimproved right of way opens it because the governmental agency has used the street easement for secondary uses. *See id.*

21. *Thompson*, 59 Wash. 2d at 407-08, 367 P.2d at 803.

22. *Loose v. Locke*, 25 Wash. 2d 599, 604, 171 P.2d 849, 852 (1946).

23. *See Karb v. City of Bellingham*, 61 Wash. 2d 214, 217, 377 P.2d 984, 985-86 (1963). A plat map is a representation outlining streets and property lines. *See WASH. REV. CODE* § 58.17.020 (2000); *see also Neighbors & Friends of Viretta Park v. Miller*, 87 Wash. App. 361, 366, 940 P.2d 286, 289 (1997).

24. *See WASH. REV. CODE* § 58.17.215. *See also generally id.* §§ 58.08.050, 58.17.033.

dedication of a public street need not be accepted by any public authority to have statutory effect.²⁵

A county or municipality opens a public street easement when it uses the street for any legal purpose.²⁶ This use may be either primary or secondary.²⁷ Primary uses relate to travel over the street, while secondary uses are incident to travel and commerce, such as utility lines and street railways.²⁸ For example, if a city constructs a sidewalk or gravel road, the street easement is opened for its primary use.²⁹ In contrast, if the city lays a sewer line or runs utility lines along the street easement, the street is open for a secondary use.³⁰ Until a city or county uses the street easement in any or all of these manners, it remains unopened and exists only on paper.

Nevertheless, a public street easement exists even if it remains unopened, unused, or unimproved.³¹ Some street easements are not opened because they lie on steep slopes that make improvement impractical.³² Others are not opened because adequate access to abutting properties exists, making development of streets unnecessary and financially wasteful.³³ Further, if a street easement continues through a ravine, creek, or other physical impediment, the improved street may end at the impediment while the unimproved easement or “paper street” continues.³⁴

25. *Loose*, 25 Wash. 2d at 604, 171 P.2d at 852. In addition to statutory dedication, “common law dedications” are unrecorded public street easements created by implication or estoppel. See *McConiga v. Riches*, 40 Wash. App. 532, 537, 700 P.2d 331, 336 (1985). In this Comment, for uniformity, all references to easements assume a statutory grant is the basis for the dedication.

26. *Motoramp Garage Co. v. City of Tacoma*, 136 Wash. 589, 591–92, 241 P. 16, 17 (1925) (listing permissible and impermissible uses).

27. *See State ex rel. York v. Bd. of County Comm’rs*, 28 Wash. 2d 891, 898, 184 P.2d 577, 582 (1947).

28. *Id.*

29. *See id.*

30. *See id.*

31. *See Erickson Bushling, Inc. v. Manke Lumber Co.*, 77 Wash. App. 495, 499, 891 P.2d 750, 752 (1995).

32. *See Finch v. Matthews*, 74 Wash. 2d 161, 164, 443 P.2d 833, 836 (1968).

33. *See Nystrand v. O’Malley*, 60 Wash. 2d 792, 793, 375 P.2d 863, 864 (1962).

34. *See Finch*, 74 Wash. 2d at 164, 443 P.2d at 836 (explaining that unopened street ran through ravine and was unimprovable).

A municipality or county may lose a public street easement only by relinquishing the easement.³⁵ Mere non-use will not extinguish a public or private easement.³⁶ Equitable estoppel arises when a party's prior conduct is inconsistent with a claim the party later asserts.³⁷ For example, if a city is aware an individual is building a house on an unopened street easement and does nothing, a court may equitably estop the city from requiring the house's removal.³⁸ Washington courts do not favor extinguishment of a public easement by equitable estoppel, although cases exist in which courts have applied the doctrine.³⁹

B. *Ownership of Land Underlying Public Easements*

In Washington, a landowner generally holds fee simple title⁴⁰ to the center of the street abutting⁴¹ the landowner's property.⁴² This fee simple title is subject to the dedicated street easement, which gives a city or county the right to use the street easement.⁴³ This easement gives the city or county superior rights of use, but title to the land remains in the hands of the abutting landowner.⁴⁴ The chain of fee title runs back to the party who originally dedicated the street.⁴⁵ If the easement is eliminated by

35. Adverse possession cannot run against a public easement. *Erickson Bushling*, 77 Wash. App. at 497, 891 P.2d at 752 (citing WASH. REV. CODE § 7.28.090 (1994), preventing adverse possession against municipalities, counties, or state).

36. *McAdam v. Benson Logging & Lumbering Co.*, 57 Wash. 407, 409, 107 P. 187, 187 (1910).

37. Equitable estoppel occurs when a party makes admissions or acts inconsistent with a later claim, and an injury to another party relying on that admission or act would occur if that later inconsistent claim were allowed. *Lybbert v. Grant County*, 141 Wash. 2d 29, 35, 1 P.3d 1124, 1128 (2000).

38. See P.H. Vartanian, Annotation, *Applicability of Doctrine of Estoppel Against Government and Its Governmental Agencies*, 1 A.L.R.2d 338, 340-41 (1948).

39. *Finch*, 74 Wash. 2d at 171, 443 P.2d at 839-40; *City of Seattle v. P.B. Inv. Co.*, 11 Wash. App. 653, 663, 524 P.2d 419, 426 (1974).

40. In Washington, a conveyance of property without qualification conveys to the transferee fee simple title. See WASH. REV. CODE § 64.04.060 (2000); see also *STOEBUCK*, *supra* note 19, at 4-5.

41. *Kemp v. City of Seattle*, 149 Wash. 197, 201, 270 P. 431, 433 (1928) (explaining that property abuts street when there is no intervening land between it and street).

42. *Burmeister v. Howard*, 1 Wash. Terr. 207, 211 (1867) ("[W]hen 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."). Washington courts have followed this rule without exception. *E.g.*, *Rainier Ave. Corp. v. City of Seattle*, 80 Wash. 2d 362, 366, 494 P.2d 996, 998 (1972); *Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wash. 2d 222, 226, 422 P.2d 799, 802 (1967).

43. 11 EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS* 3 (1991) (explaining that underlying owners must yield to municipality or county).

44. See *supra* note 18 and accompanying text.

45. See *Rainier Ave.*, 80 Wash. 2d at 366, 494 P.2d at 998.

vacation,⁴⁶ the exclusive right to use the property vests in the abutting landowners.⁴⁷ Moreover, unless the original dedicator reserves the fee in the street, the fee runs with the abutting property when the owner subsequently sells the property.⁴⁸

However, several exceptions to this general rule exist.⁴⁹ For example, a city may own the fee to a street.⁵⁰ Another exception may arise when a street borders two separate plats dedicated by two parties.⁵¹ In this instance, one of the original dedicators may have originally conveyed the entire street easement, thus retaining the fee to the entire street.⁵²

C. *Rights of Use in Open Public Street Easements*

Washington courts have traditionally classified rights to use open public street easements in three categories. First, the general public has the right to use open public streets regardless of where these members of the public live.⁵³ This right extends to all reasonable travel and communication of persons and movement of property over the public street easement.⁵⁴ This right is granted through public dedication and manifests itself when the city or county opens the street.⁵⁵ Thus, until the city or county opens the public street easement, the public has no right to use the easement.⁵⁶ However, once the street is opened, the public has the full right to use the street.⁵⁷

46. "Vacation" is defined as the elimination of the easement from the underlying land by ordinance or judicial decree. See WASH. REV. CODE § 35.79.010 (2000).

47. *Id.* § 35.79.040; *Puget Sound Alumni*, 70 Wash. 2d at 226, 422 P.2d at 802.

48. *Bradley v. Spokane & Inland Empire R.R.*, 79 Wash. 455, 458, 140 P. 688, 689 (1914).

49. This Comment assumes that the general principle of fee simple ownership applies.

50. For example, Seattle has owned fee simple title to Lake Washington Boulevard since 1913. See *Martin v. City of Seattle*, 111 Wash. 2d 727, 730, 765 P.2d 257, 258 (1988).

51. See *Rowe v. James*, 71 Wash. 267, 271, 128 P. 539, 541 (1912) (holding that deed carries title to farthest side of highway if easement is located wholly on grantor's land).

52. *Id.*

53. *Yarrow First Assocs. v. Town of Clyde Hill*, 66 Wash. 2d 371, 375–76, 403 P.2d 49, 53 (1965).

54. 11 MCQUILLIN, *supra* note 43, at 3 (citing *Yarrow First Assocs.*, 66 Wash. 2d 371, 403 P.2d 49).

55. See 10A EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS 371 (3d ed. 1949); see also *Moore v. City of Lawrence*, 654 P.2d 445, 453 (Kan. 1982).

56. See *Erickson Bushling Inc. v. Manke Lumber Co.*, 77 Wash. App. 495, 499, 891 P.2d 750, 752–53 (1995).

57. 11 MCQUILLIN, *supra* note 43, at 3.

Second, neighboring landowners⁵⁸ have special rights arising out of property ownership.⁵⁹ Whether the street easement is open or unopened, neighboring owner rights include access, air, light, and view.⁶⁰ Even if a street abutting their property is unopened, closed, or vacated, neighboring owners may maintain a private easement to access their property, known as “easement implied from plat.”⁶¹ However, a neighboring owner may only use an unopened public street easement if that use is necessary for access to and from the owner’s property.⁶²

Third, the abutting landowner’s rights to use the street easement abutting their properties are greater still than neighboring landowners are.⁶³ An abutting landowner generally holds title to the portion of the public street easement underlying the landowner’s property.⁶⁴ Courts have recognized that abutting landowners have a special right to use the opened street abutting their properties.⁶⁵ In *Fry v. O’Leary*,⁶⁶ the court recognized that “the rights which an abutting owner of abutting property possesses in a street are different in kind from that possessed by [the general public].”⁶⁷ However, the degree and nature of an abutting landowner’s use is less clear when the street is unopened.⁶⁸

58. For the purposes of this Comment, a neighboring owner is one whose property does not abut the particular street or portion of street an abutting owner holds title to, but rather is in the general vicinity of the property. The neighboring owner owns property in the same plat or subdivision and has special rights to all streets in that area. STOEBOCK, *supra* note 19, at 95.

59. 10A MCQUILLIN, *supra* note 55, at 355 (citing *Shaw v. City of Yakima*, 183 Wash. 200, 48 P.2d 630 (1935)).

60. *Id.*; see also *Denman v. City of Tacoma*, 148 Wash. 314, 320, 268 P. 1043, 1045 (1928).

61. *Denman*, 148 Wash. at 320, 268 P. at 1045; see also 10A MCQUILLIN, *supra* note 55, at 355.

62. See *Nystrand v. O’Malley*, 60 Wash. 2d 792, 795, 375 P.2d 863, 865 (1962) (concluding that use of unopened street not necessary for neighbor’s access).

63. *Humphrey v. Krutz*, 77 Wash. 152, 155, 137 P. 806, 807 (1913) (holding that abutting owner has both public rights in common with everyone and private rights arising from ownership of contiguous property).

64. See *supra* notes 42–52 and accompanying text.

65. *James v. Burchett*, 15 Wash. 2d 119, 123, 129 P.2d 790, 792 (1942) (stating that owners of lots bordering streets or ways have right to make reasonable use of street for convenience of their lots, not inconsistent with public’s right to use entire street); 10A MCQUILLIN, *supra* note 55, at 355.

66. 141 Wash. 465, 252 P. 111 (1927).

67. *Id.* at 471, 252 P. at 113 (quoting *Smith v. Centralia*, 55 Wash. 573, 104 P. 797 (1909)).

68. The general rule for opened private easements is that a servient landowner may make any use of the area covered by the easement that does not interfere with the dominant owner’s use. *Long v. Leonard*, 191 Wash. 284, 295–96, 71 P.2d 1, 6 (1937); STOEBOCK, *supra* note 19, at 113.

II. USE OF UNOPENED PUBLIC STREET EASEMENTS

Although Washington courts have consistently construed the rights of abutting landowners with respect to open public street easements, two distinct lines of cases address the right of abutting owners with respect to unopened public street easements. In the first line of cases, exemplified by *Nystrand v. O'Malley*,⁶⁹ courts focus on whether the use by the abutting landowner interferes with the city's easement and whether the city has opened the easement.⁷⁰ If neither condition is satisfied, courts allow abutting landowners "reasonable use" of the land over which the easement runs, provided the use does not interfere with access of other landowners.⁷¹ The second line of cases, based on *Baxter-Wyckoff Co. v. City of Seattle*,⁷² suggests that, although abutting landowners hold underlying title to the street, until the city vacates its street easement, abutting landowners have no exclusive right of use.⁷³ Some municipalities have used these cases to justify legislation strictly regulating all uses of unopened public street easements.⁷⁴ Others follow a reasonable-use standard as applied by the *Nystrand* and *Thompson v. Smith*⁷⁵ courts.⁷⁶

A. Cases Permitting an Abutting Landowner's Reasonable Use of an Unopened Public Street Easement

The *Nystrand* line of decisions treats unopened public street easements similarly to private easements, permitting abutting landowners reasonable use of the land.⁷⁷ This right of reasonable use is subject to the city or county opening the easement⁷⁸ and neighboring landowner's right

69. 60 Wash. 2d 792, 375 P.2d 863 (1962).

70. *Id.* at 795, 375 P.2d at 865.

71. *See* *Thompson v. Smith*, 59 Wash. 2d 397, 407-08, 367 P.2d 798, 804-05 (1962).

72. 67 Wash. 2d 555, 408 P.2d 1012 (1965).

73. *Id.* at 560-61, 408 P.2d at 1015-16.

74. *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE §§ 15.02.046, .048, .100 (1998) (prohibiting any use of unopened streets by any party without permission).

75. 59 Wash. 2d 397, 407-08, 367 P.2d 798, 804-05 (1962).

76. *See, e.g.*, EVERETT, WASH., MUNICIPAL CODE §13.30.040 (1998) (allowing non-interfering use of unopened street easements).

77. *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865. The rule for unopened private easements is similar to opened private easements in that the servient landowner is entitled to any use that does not interfere with the dominant owner's use. *Compare* *Thompson*, 59 Wash. 2d at 407-08, 367 P.2d at 803 (unopened private easement), *with* *Long v. Leonard*, 191 Wash. 284, 296, 71 P.2d 1, 6 (1937) (opened private easement).

78. *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865.

to use the unopened street for access.⁷⁹ However, if the municipality does not open the street and neighboring owners do not need it for access, these cases consistently hold that the abutting landowner may use the land in any manner consistent with what an owner burdened by a private easement might do with the land.⁸⁰

1. Nystrand v. O'Malley

In *Nystrand v. O'Malley*, the Washington Supreme Court held an abutting landowner may use the portion of an unopened street easement to which he or she holds fee title in any manner not inconsistent with the easement.⁸¹ The *Nystrand* court employed a two-part analysis. First, the court asked whether the use by the abutting owner was consistent with the public's right to the easement.⁸² Second, the court examined whether the use challenged interfered with other abutting property owners' access.⁸³ The court held that if both questions were answered negatively, then the abutting landowner could make use of the portion of the easement overlying his or her land.⁸⁴

In *Nystrand*, a twelve-foot-wide unopened public street easement ran directly in front of the Nystrand property.⁸⁵ The Nystrands held the underlying fee.⁸⁶ Running parallel and abutting this right of way was a second easement owned by Northern Pacific Railroad.⁸⁷ A street that provided access to the Nystrand and O'Malley properties lay on the railroad easement.⁸⁸ Both the Nystrands' and O'Malleys' driveways ran across the twelve-foot unopened street easement to the street located on the railroad easement.⁸⁹ The Nystrands extended a garage onto the unopened street, planted trees and hedges, and constructed a bulkhead.⁹⁰

79. *Id.*

80. *Thompson*, 59 Wash. 2d at 407–08, 367 P.2d at 803.

81. *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865.

82. *Id.*

83. *Id.*

84. *Id.* At least one unpublished Washington appellate decision makes reference to a "*Nystrand* test." *Sandpiper Condo. Owners Ass'n v. Gaylard*, No. 41746-1-1, 1999 Wash. App. LEXIS 383, at *5 (Mar. 1, 1999).

85. *Nystrand*, 60 Wash. 2d at 793, 375 P.2d at 863–64.

86. *Id.*

87. *Id.* at 793, 375 P.2d at 864.

88. *Id.*

89. *Id.*

90. *Id.* at 795, 375 P.2d at 865.

To improve access, the O'Malleys bulldozed an alternate route to their house.⁹¹ This alternate route crossed the public street easement over the Nystrand fee, and required removal of the bulkhead, trees, and hedge.⁹² When the Nystrands refused to remove the obstructions, the O'Malleys bulldozed them.⁹³ The Nystrands brought suit.⁹⁴

The court rejected the O'Malleys' argument that the Nystrands wrongfully encroached upon the public street easement.⁹⁵ Because the Nystrands owned the fee to the land underlying the easement where they placed the bulkhead, trees, and hedges, the court determined that they could use the land to which they held fee until their use interfered with the city's use of the street easement.⁹⁶ First, the court reasoned that the Nystrands' use of the abutting unopened street was not inconsistent with the public easement because the city had not asserted its right to open the easement.⁹⁷ Second, it found the Nystrands' use was not improper because the unopened easement was not necessary for reasonable ingress and egress to the O'Malleys' property.⁹⁸ Accordingly, the court held the Nystrands' use was proper.⁹⁹

2. *Additional Cases Supporting an Abutting Owner's Reasonable Use of an Unopened Street Easement*

Many other Washington courts have applied a reasonable-use standard. For example, the Washington Supreme Court applied the standard in *Thompson v. Smith*, decided the same year as *Nystrand*. In *Thompson*, Smith, the abutting landowner, constructed a concrete slab over an unused portion of a private street easement.¹⁰⁰ Thompson, a neighboring owner, sued to enjoin the use, claiming it interfered with the easement.¹⁰¹ The court concluded that, until Smith's use interfered with Thompson's use of the easement, Smith did not need to remove the

91. *Id.* at 793, 375 P.2d at 864.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 795, 375 P.2d at 865.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. 59 Wash. 2d 397, 403, 367 P.2d 798, 801(1962).

101. *Id.*

concrete slab¹⁰² because such use by the abutting landowner was permitted.¹⁰³ The court reasoned that such reasonable use must not interfere with the dominant party's actual use of the easement.¹⁰⁴

Although *Thompson* involved a private easement, in dictum the court extended the abutting owner's right of reasonable use, consistent with *Nystrand*, to public easements.¹⁰⁵ Furthermore, the court noted that when possible, contemporaneous use by the underlying landowner not inconsistent with the city or county's use was actually desirable.¹⁰⁶ The *Thompson* court explained that although the city or county has the right to use its easement for any use consistent with a public right of way, until such use, the servient landowner has a right of reasonable use.¹⁰⁷ As examples of consistent use, the court discussed two California cases.¹⁰⁸ These cases found that neither the rights of a city possessing an easement nor the abutting landowner's rights are absolute; instead, both the individual property owner and the municipality's rights should be interpreted to permit reasonable enjoyment by both parties as long as mutual enjoyment is possible.¹⁰⁹ While the city's use of its easement is superior to the rights of an abutting landowner, the *Thompson* court reasoned that if the abutting landowner's use can coincide with the city's use, then the private use is permissible.¹¹⁰ Therefore, until a city asserts its rights by occupying and using the easement in some manner, non-interfering use by the abutting landowner would be consistent with the city's rights, provided that use does not encroach on the easement by requiring substantial expense or effort for removal.¹¹¹

In addition, cases preceding *Nystrand* and *Thompson* support a right of reasonable use by the abutting landowner, so long as the use does not affect the rights of the city or county holding that easement. For example,

102. *Id.* at 407, 367 P.2d at 803.

103. *Id.* at 408-09, 367 P.2d at 804.

104. *Id.* at 407-08, 367 P.2d at 803.

105. *Id.* at 408-09, 367 P.2d at 803-04.

106. *Id.*

107. *Id.* at 407-08, 367 P.2d at 803.

108. The court cited two California cases applying "reasonable use" to public easements: *City of Pasadena v. California-Michigan Land & Water Co.*, 110 P.2d 983, 987 (Cal. 1941) and *Colegrove Water Co. v. City of Hollywood*, 90 P. 1053, 1055 (Cal. 1907). *Thompson*, 59 Wash. 2d at 408-09, 367 P.2d at 803-04.

109. *Thompson*, 59 Wash. 2d at 408-09, 367 P.2d at 803-04 (quoting *Pasadena*, 110 P. 2d at 987; *Colegrove*, 90 P. at 1055).

110. *Id.*

111. *Id.* at 409, 367 P.2d at 804.

in *Holm v. Montgomery*,¹¹² a neighboring landowner interfered with a ditch in the unopened portion of the public street easement.¹¹³ The abutting landowner sued to enjoin the use.¹¹⁴ The court, in ruling for the abutting landowner, held that the owner of abutting property was allowed to use land within the highway so long as the use did not interfere with its use as a highway.¹¹⁵ Because the use for ditches and drains was outside the traveled portion, his use was proper.¹¹⁶ Hence, the respondent's interference with the abutting owner's use constituted a trespass. The Washington Supreme Court subsequently applied this standard of consistent use in *Lanham v. Forney*,¹¹⁷ where the abutting landowner had installed a pipe under an opened street.¹¹⁸ The city sued to enjoin the use.¹¹⁹ The Washington Supreme Court cited to *Holm* and *Colegrove* to support the proposition that unless the use by an abutting landowner interfered with the public's actual use of the street, it was permissible.¹²⁰

Recent Washington cases have reaffirmed the reasonable-use standard. For example, in *Meresse v. Stelma*,¹²¹ the Washington Court of Appeals found that until a private easement holder used property for the purpose reserved by the easement, the servient landowner could use the land in any manner not interfering with the easement's proper enjoyment.¹²² Consistent with *Thompson*, the court held that this use is qualified; thus, any use considered permanent¹²³ or requiring substantial cost to remove is not permissible.¹²⁴

Similarly, in *Sandpiper Condominium Ass'n v. Gaylard*,¹²⁵ a recent unpublished decision, the Washington Court of Appeals analyzed an

112. 62 Wash. 398, 113 P. 1115 (1911).

113. *Id.* at 399, 113 P. at 1116.

114. *Id.*

115. *Id.* at 400, 113 P. at 1116.

116. *Id.*

117. 196 Wash. 62, 81 P.2d 777 (1938).

118. *Id.* at 65–66, 81 P.2d at 779.

119. *Id.* at 65, 81 P.2d at 778.

120. *Id.*

121. 100 Wash. App. 857, 999 P.2d 1267 (2000).

122. *Id.* at 867–68, 999 P.2d at 1274.

123. For the purpose of this Comment, "permanent uses" are those that might lead to equitable estoppel. See *supra* notes 35–39 and accompanying text.

124. *Thompson v. Smith*, 59 Wash. 2d 397, 409, 367 P.2d 798, 804 (1962).

125. *Sandpiper Condo. Owners Ass'n v. Gaylard*, No. 41746-1-I, 1999 Wash. App. LEXIS 383 (Mar. 1, 1999).

abutting landowner's use of an unopened public street easement.¹²⁶ In *Sandpiper*, a landowner shared an unopened street end with a large condominium.¹²⁷ The condominium began to use the entire unopened street easement for additional parking.¹²⁸ The other landowner then constructed a fence extending to the centerline of the easement to eliminate the condominium's use of the portion of the street easement overlying their land.¹²⁹ Using a two-part "*Nystrand* test," the court concluded that until a municipality opens a public street easement, the abutting landowner has a right to reasonable use.¹³⁰ However, this right of use is qualified by the other abutting landowners' need to access their own property.¹³¹ In applying this test, the court concluded that the fence did not interfere with the city's use of the easement because the city had not asserted its right to open the easement and that the abutting landowner's fence did not interfere with the condominium's need for reasonable access.¹³²

B. Cases Prohibiting an Abutting Landowner's Use of an Unopened Public Street Easement Without Approval

Despite the historical application of the reasonable-use standard, a distinct line of cases suggests an abutting landowner has no right to use any public street easement other than for access, light, air, and view.¹³³ These cases focus on a municipality's right to regulate any use of public street easements.¹³⁴ Although a municipality or county may permit use by the abutting landowner, it may also prohibit all uses.¹³⁵ Accordingly, even though a city or county has not opened a public street easement,

126. *Id.* at *2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at *5. The abutting owner's need for access qualifies this right, along with the city's assertion of the easement. *Id.*

131. *Id.* at *5-6.

132. *Id.*

133. *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wash. 2d 555, 561, 408 P.2d 1012, 1016 (1965) ("The *lack of right* of the abutting owner to use the street in front of his property does not depend on his interference with an actual or proposed public use of the street. The abutting owner simply has no legal right to make this kind of use of the dedicated public street.").

134. *Id.*

135. See *Snohomish County Pub. Util. Dist. No. 1 v. Broadview Television Co.*, 91 Wash. 2d 3, 10-11, 586 P.2d 851, 856 (1978); *Baxter-Wyckoff*, 67 Wash. 2d at 561, 408 P.2d at 1016.

these cases suggest it still may control and dictate any use of the land over which the easement runs.¹³⁶

I. Baxter-Wyckoff Co. v. City of Seattle

In *Baxter-Wyckoff Co. v. City of Seattle*,¹³⁷ Seattle lumber mills challenged the city's authority to charge fees for its continued permanent use of an unopened public street easement.¹³⁸ The mills leased the property on both sides of the street and claimed the right to use the street.¹³⁹ The street was dedicated in 1897 but never opened.¹⁴⁰ Before 1955, Baxter-Wyckoff and Nettleton had built several structures.¹⁴¹ In 1955, Seattle enacted an ordinance imposing fees for exclusive private commercial use of unopened public street easements.¹⁴² In 1958, Baxter-Wyckoff and Nettleton refused to pay any further fees and sued the city to enjoin the collection of any fees.¹⁴³ They argued that because fee title to an unopened street easement lies with the abutting landowner, the city of Seattle could not charge fees that amounted to rent.¹⁴⁴

The Washington Supreme Court did not refer to *Nystrand* or the *Nystrand* analysis, but only considered whether Baxter-Wyckoff and Nettleton's "*Permanent Encroachments Are Inconsistent with the Public's Easement for Travel in Southwest Florida Street.*"¹⁴⁵ The City of Seattle argued that because streets were dedicated primarily for public travel, secondary and subordinate uses were allowed only when they did not interfere with public travel.¹⁴⁶ The court concluded: "The basic rule applicable to this case is that there is no inherent right in a private individual to conduct private business in the public streets."¹⁴⁷ The court reasoned that neither individuals nor municipalities may permanently encroach on a street without a permit for private use.¹⁴⁸ The court held

136. *Baxter-Wyckoff*, 67 Wash. 2d at 561, 408 P.2d at 1016.

137. 67 Wash. 2d 555, 408 P.2d 1012 (1965).

138. *Id.* at 557, 408 P.2d at 1014.

139. *Id.* at 556-57, 408 P.2d at 1013-14.

140. *Id.* at 556, 408 P.2d at 1013.

141. *Id.* at 557, 408 P.2d at 1013.

142. *Id.* at 557, 408 P.2d at 1014.

143. *Id.*

144. *Id.*

145. *Id.* at 559, 408 P.2d at 1015 (emphasis added).

146. *Id.*

147. *Id.* at 560, 408 P.2d at 1015.

148. *Id.* at 561, 408 P.2d at 1016.

the city could impose any terms and conditions it chose because the permanent use of a street was a mere privilege, not a right.¹⁴⁹ To support this conclusion, the court cited several cases allowing regulation of private use of public streets.¹⁵⁰ These cases all concerned private individuals conducting business on opened streets, not unopened ones.

In dictum, the court also discussed the rights of abutting property owners. It limited these rights to access, light, air, water, and certain temporary or nonexclusive uses of the street easement.¹⁵¹ It further indicated an abutting property owner has no right to use the street abutting its property exclusively, regardless of whether the use interferes with any actual or proposed public use of the street.¹⁵² Although the actual holding of the case solely addressed an abutting landowner's lack of right to construct permanent commercial structures on street easements and a city's right to regulate this extraordinary use in any manner it chooses,¹⁵³ subsequent cases have expanded the *Baxter-Wyckoff* decision beyond this holding.¹⁵⁴

2. *The Expansion of Baxter-Wyckoff To Prohibit Any Use of Unopened Public Street Easements by Abutting Owners*

Subsequent cases have relied on *Baxter-Wyckoff* for the proposition that a city may regulate any use of a city street, and that any regulation is

149. *Id.* at 562, 408 P.2d at 1017.

150. *Id.* at 560, 408 P.2d at 1015–16 (citing *McGlothern v. City of Seattle*, 116 Wash. 331, 335, 199 P. 457, 458 (1921) (holding that regulating jitney buses on public streets permitted); *State v. City of Spokane*, 109 Wash. 360, 364–65, 186 P. 864, 866 (1920) (holding that regulating jitney buses by ordinance not precluded by state code); *Hadfield v. Lundin*, 98 Wash. 657, 662–63, 168 P. 516, 517–18 (1917) (holding that regulating taxicabs on public streets permitted); *Allen v. City of Bellingham*, 95 Wash. 12, 35, 163 P. 18, 26 (1917) (holding that regulating jitney busses permitted)).

151. *Baxter-Wyckoff*, 67 Wash. 2d at 562, 408 P.2d at 1016–17.

152. *Id.* at 561, 408 P.2d at 1016.

153. *Id.* at 561–62, 408 P.2d at 1016–17.

154. *Snohomish County Pub. Util. Dist. No. 1 v. Broadview Television Co.*, 91 Wash. 2d 3, 586 P.2d 851 (1978); *City of Seattle v. Samis Land Co.*, 55 Wash. App. 554, 779 P.2d 277 (1989). Part of the confusion surrounding subsequent applications of *Baxter-Wyckoff* might arise from its first headnote, which states “abutting property owners [do not] have any inherent right to have the exclusive private use of, or to maintain permanent structures on, any area dedicated as a public street.” *Baxter-Wyckoff*, 67 Wash. 2d at 555. This headnote implies that the case overruled *Nystrand* by prohibiting all private use of unopened streets. However, *Baxter-Wyckoff* does not address this issue and discusses only permanent use. See *infra* notes 186–87 and accompanying text (discussing confusion surrounding “so use” language in *Baxter-Wyckoff*).

“entirely within the discretion of the city council.”¹⁵⁵ Under these cases, whether the street is opened or unopened does not affect the city’s regulatory authority.¹⁵⁶ In addition, these cases do not distinguish whether the use regulated is permanent or non-permanent, commercial or non-commercial.¹⁵⁷ Instead, such cases cite to *Baxter-Wyckoff* for the general proposition that a municipality or governmental agency may regulate any use of any opened or unopened street.

For example, in *Snohomish County Public Utility District No. 1 v. Broadview Television Co.*,¹⁵⁸ the Washington Supreme Court reaffirmed its holding in *Baxter-Wyckoff*.¹⁵⁹ It noted “there is no inherent right in a private individual to conduct private business in the public streets.”¹⁶⁰ The court called the right to use a street “a mere privilege, which the city could grant or withhold,” and focused on the absolute right of the state and cities to control streets.¹⁶¹ Although *Broadview* concerned private use of public utility poles, rather than an unopened street easement, the Washington Supreme Court found the factual differences between *Baxter-Wyckoff* and *Broadview* immaterial and instead focused on the government’s authority to regulate use.¹⁶² By extending *Baxter-Wyckoff* to the use of public utility poles, the court focused on the general right to regulate public streets, rather than the type of use regulated.¹⁶³

In *City of Seattle v. Samis Land Co.*,¹⁶⁴ the Washington Court of Appeals held that the city could regulate any commercial use of an

155. *Bd. of Regents of the Univ. of Wash. v. City of Seattle*, 108 Wash. 2d 545, 556, 741 P.2d 11, 17 (1987) (citing *Baxter-Wyckoff*, 67 Wash. 2d at 562, 408 P.2d at 1016); *Broadview Television*, 91 Wash. 2d at 11, 586 P.2d at 856.

156. Most cases citing *Baxter-Wyckoff* involved opened streets. *E.g.*, *Bd. of Regents*, 108 Wash. 2d at 555, 741 P.2d at 17; *Broadview Television*, 91 Wash. 2d at 11, 586 P.2d at 856. *But see* *Sandpiper Condo. Owners Ass’n v. Gaylard*, No. 41746-1-I, 1999 Wash. App. LEXIS 383, at *3 (Mar. 1, 1999) (unopened street).

157. *Samis*, 55 Wash. App. at 557, 779 P.2d at 278–79 (involving permanent structure); *City of Seattle v. P.B. Inv. Co.*, 11 Wash. App. 653, 524 P.2d 419 (1974) (same). *But see* *Sandpiper*, 1999 Wash. App. LEXIS 383, at *3 (involving non-permanent structures).

158. 91 Wash. 2d 3, 586 P.2d 851 (1978).

159. *Id.* at 10, 586 P.2d at 856.

160. *Id.*

161. *Id.* at 10–11, 586 P.2d at 856 (“The state, and the city as an arm of the state, has absolute control of the streets in the interest of the general public. No private individual . . . has a right to the use of the streets . . . without the consent of the state.”) (quoting *Hadfield v. Lundin*, 98 Wash. 657, 660, 168 P. 516, 517 (1917)).

162. *Id.* (tracing authority to *Hadfield v. Lundin*, 98 Wash. 657, 660, 168 P. 516, 517 (1917)).

163. *Id.*

164. 55 Wash. App. 554, 779 P.2d 277 (1989).

opened street easement by an abutting landowner.¹⁶⁵ Samis, a property-development company, owned several buildings that extended out underneath opened public street easements.¹⁶⁶ The city, relying on its authority to regulate such uses, imposed a fee for this permanent use, which Samis refused to pay.¹⁶⁷ Samis argued that as the underlying fee holder to the street, the city should not charge Samis for de minimis, non-interfering use of the easement.¹⁶⁸ Citing *Baxter-Wyckoff*, the court held the city had the authority to regulate and charge fees for any type of use.¹⁶⁹ The court further held that an underlying landowner's use need not interfere with the public's use because the city could regulate any use.¹⁷⁰ The City of Seattle and other municipalities have construed this holding to justify land use ordinances restricting any use of unopened public street easements by the underlying fee owner.¹⁷¹

C. *Municipal Ordinances Regulating Abutting Landowner's Use of Unopened Public Street Easements Embody the Conflict Between the Nystrand Rule and the Expansion of the Baxter-Wyckoff Doctrine*

Using *Baxter-Wyckoff* and *Samis* as support, some cities have enacted ordinances that restrict any use of an unopened public street easement by abutting landowners. The cities of Seattle and Bellevue, among others, prohibit any use of unopened streets without permission.¹⁷² For example, SMC section 15.02.100, enacted in 1995, prohibits activities on unopened public street easements without a permit.¹⁷³ The prohibited activities include erecting fencing, storing material, planting trees or

165. *Id.* at 557, 779 P.2d at 278-79.

166. *Id.* at 556, 779 P.2d at 278.

167. *Id.* at 555-56, 779 P.2d at 278.

168. *Id.* at 557, 779 P.2d at 278.

169. *Id.* at 559-60, 779 P.2d at 280.

170. *Id.* at 560, 779 P.2d at 280. *Baxter-Wyckoff's* headnotes might have caused this interpretation. See *supra* note 154.

171. See SEATTLE, WASH., MUNICIPAL CODE, ch. 15.02 (1998) (citing *Samis* for proposition that Seattle has authority to charge fees for permission to occupy portion of public street for private use). This general provision provides the authority for chapter 15.02, which includes SEATTLE, WASH., MUNICIPAL CODE section 15.02.100 (barring "use" of unopened street without permit, as defined by section 15.02.046).

172. See SEATTLE, WASH., MUNICIPAL CODE § 15.02.100; BELLEVUE, WASH., CITY CODE § 14.30.070 (1998).

173. See SEATTLE, WASH., MUNICIPAL CODE § 15.02.100 (regulating all "use" of "public places").

shrubs, or disturbing the surface without a permit.¹⁷⁴ This ordinance explicitly relies on *Samis*, which authorizes municipal regulation.¹⁷⁵ While this ordinance appears consistent with the holdings in the *Baxter-Wyckoff* line of cases, it conflicts with the Washington court decisions that allow abutting landowners to make reasonable non-interfering use of unopened street easements.¹⁷⁶

Other cities, such as Vancouver and Everett, do not restrict all use of unopened public street easements; instead, they are consistent with the *Nystrand* reasonable-use model.¹⁷⁷ Vancouver regulates only “improvements” in areas “legally open to the public use,” such as streets, sidewalks, roadways, and alleys.¹⁷⁸ Everett’s ordinance does not restrict any use of unopened public street easements for parking, landscaping, or single-family uses that “will not interfere with the public convenience or the health, safety or welfare of the general public.”¹⁷⁹

III. WASHINGTON CASE LAW DOES NOT PROHIBIT REASONABLE, NON-PERMANENT USES OF UNOPENED PUBLIC STREET EASEMENTS BY ABUTTING LANDOWNERS

On their facts, *Baxter-Wyckoff* and *Samis* both address permanent use of public streets. Neither case actually supports regulating non-interfering reasonable uses of an unopened public street easement by abutting landowners. This Comment argues that language in the *Baxter-Wyckoff* decision centers on permanent use and that the *Samis* court misapplied this language, creating confusion about the rights of abutting landowners. Seattle’s use of *Samis* to support its regulation of all uses of unopened public street easements exemplifies this confusion. Furthermore, because the *Nystrand* line of reasonable-use cases remains good law and unequivocally speaks to non-interfering uses of unopened public

174. See *id.* § 15.02.048 (defining “public place” in section 15.02.046 as street or right of way, whether opened and improved or not).

175. See *id.* ch. 15.02.

176. See *supra* notes 77–132 and accompanying text.

177. See VANCOUVER, WASH., MUNICIPAL CODE §§ 11.60.010, .050 (1998); EVERETT, WASH., MUNICIPAL CODE § 13.30.040 (1998).

178. See VANCOUVER, WASH., MUNICIPAL CODE §§ 11.60.010 (defining public street), .050 (setting forth activities on rights of way that require permit).

179. EVERETT, WASH., MUNICIPAL CODE § 13.30.040(A)(2) (requiring permits but not fees for use of right of way by abutting owners), § 13.84.010 (defining right of way to not include unopened and unimproved street easements).

street easements, a reasonable-use model should apply. Properly limited to their facts, neither *Baxter-Wyckoff* nor *Samis* conflicts with this standard. Additionally, although case law clearly suggests that a city may comprehensively regulate opened street easements, case law does not support prohibiting abutting owners from non-interfering use of unopened public street easements. Thus, municipalities such as Seattle should not prohibit or limit non-interfering reasonable use of unopened street easements by abutting landowners, and instead should encourage the efficient use of urban land.

A. Ordinances Such as SMC Section 15.02.100 Should Not Rely on Samis To Restrict Use by Abutting Owners

Washington case law does not support SMC section 15.02.100 because the Seattle ordinance regulates all use of unopened public street easements by abutting landowners regardless of the nature of that use.¹⁸⁰ *Samis*, the case purportedly providing explicit support for the Seattle ordinance, only addresses the regulation of permanent use of opened streets.¹⁸¹ Likewise, *Baxter-Wyckoff* does not support a city prohibiting all uses of an unopened public street easement because *Baxter-Wyckoff* dealt with permanent commercial use of an unopened public street easement.

1. Samis Provides No Authority for SMC Section 15.02.100 Because the Samis Court Erroneously Interpreted the Washington State Supreme Court's Holding in Baxter-Wyckoff

Decisions relying on *Baxter-Wyckoff* mistakenly conflate the permanent and non-interfering use of public street easements.¹⁸² Furthermore, *Samis* concerned permanent use of opened streets and did not address unopened street easements. The *Samis* court determined only that a Washington statute allowed cities to regulate permanent encroachments under sidewalks.¹⁸³ Because sidewalks are opened public street easements, *Samis* does not hold that a city may regulate any use of

180. See SEATTLE, WASH., MUNICIPAL CODE § 15.02.046 (defining "public place"), .048 (defining "use").

181. See *supra* notes 164–69 and accompanying text.

182. See *supra* notes 137–69 and accompanying text.

183. See, e.g., *City of Seattle v. Samis Land Co.*, 55 Wash. App. 554, 556–67, 779 P.2d 277, 278 (1989).

an unopened public street easement. The court's analysis centered on whether Samis's use of the public street easement needed to interfere with the public's use of the easement for the city to regulate the use.¹⁸⁴ Citing to *Baxter-Wyckoff*, the court concluded that there did not need to be interference with the public's use to allow municipal regulation.¹⁸⁵

However, the *Samis* court misinterpreted dictum from *Baxter-Wyckoff*.¹⁸⁶ The *Samis* court quoted *Baxter-Wyckoff* for the proposition that "the lack of right of the abutting owner to so use the street . . . does not depend on his interference with an actual or proposed public use of the street."¹⁸⁷ The court emphasized the language "lack of right" instead of the words "so use" in the quoted passage. This emphasis is important because "so use" in *Baxter-Wyckoff* specifically referred to the permanent use of the street.¹⁸⁸ By taking this dictum out of context, *Samis* employed the proposition of no use incorrectly. This misinterpretation dramatically changes the *Baxter-Wyckoff* holding from prohibiting permanent commercial use of easements to prohibiting any use of easements. Moreover, *Baxter-Wyckoff* and other decisions simply do not support prohibiting abutting owners from making reasonable non-permanent use of an unopened public street easement.¹⁸⁹ By incorrectly applying *Baxter-Wyckoff* and expanding its holding to all uses of street easements, the *Samis* court grossly misinterpreted *Baxter-Wyckoff*. To the extent that cities such as Seattle use *Samis* as a foundation for ordinances restricting use of unopened public street easements by abutting landowners, their validity is specious.

184. *Id.* at 561, 779 P.2d at 281.

185. *Id.*

186. *Id.* at 559–60, 779 P.2d at 279–80 (citing *Baxter-Wyckoff v. City of Seattle*, 67 Wash. 2d 555, 561, 408 P.2d 1012, 1016 (1965)).

187. *Samis*, 55 Wash. App. at 559–60, 779 P.2d at 280 (quoting *Baxter-Wyckoff v. City of Seattle*, 67 Wash. 2d 555, 561, 408 P.2d 1012, 1016 (1965)).

188. *Baxter-Wyckoff v. City of Seattle*, 67 Wash. 2d 555, 561, 408 P.2d 1012, 1016 (1965). "The rule applies particularly to exclusive private use of the street and the construction and maintenance of permanent structures." *Id.*

189. For the purposes of this Comment, a "non-permanent" use is a long term use by an abutting owner that cannot lead to equitable estoppel.

2. *Baxter-Wyckoff Addresses Only the Regulation of Permanent Uses of Unopened Public Street Easements, Not Reasonable Non-Permanent Uses by Abutting Landowners*

Baxter-Wyckoff did not address an abutting landowner's non-interfering and non-permanent use of an unopened street easement; instead, it centered on the permanent use of an unopened street easement.¹⁹⁰ The court expressly stated that the only issue it was considering was whether "Respondent's [Baxter-Wyckoff and Nettleton's] *Permanent Encroachments Are Inconsistent with the Public's Easement for Travel in Southwest Florida Street.*"¹⁹¹ The court concluded "there is no inherent right in a private individual to conduct *private business* in the public streets."¹⁹² It also emphasized that permitting the construction of permanent buildings in the street "is so unusual, and beyond the ordinary authority and power of a municipality" that enabling state legislation is needed for the city to permit such use.¹⁹³

Baxter-Wyckoff was unique because it involved an abutting owner's permanent use of a public street easement, a use that could have led to equitable estoppel.¹⁹⁴ In *Baxter-Wyckoff*, the mills constructed numerous permanent buildings and structures in the unopened street.¹⁹⁵ It was likely the concern of the court that by not allowing the city to regulate this extremely unusual use, the city might be estopped from later opening the easement.¹⁹⁶ Because equitable estoppel may extinguish an easement, cities may restrict permanent use on unopened streets.¹⁹⁷ While the permanent use of an unopened easement can affect the city's rights, an

190. *Id.* (holding that use of street by abutting owners for permanent structures is so unusual that it may be regulated regardless whether it interferes with public).

191. *Id.* at 559, 408 P.2d at 1015 (emphasis added).

192. *Id.* at 560, 408 P.2d at 1015 (emphasis added).

193. *Id.* at 561, 408 P.2d at 1016.

194. See *supra* notes 37–39 and accompanying text (discussing equitable estoppel).

195. *Baxter-Wyckoff*, 67 Wash. 2d at 566–57, 408 P.2d at 1013–14.

196. The issue of equitable estoppel arose in two decisions shortly after the *Baxter-Wyckoff* decision. See *Finch v. Matthews*, 74 Wash. 2d 161, 171, 443 P.2d 833, 839–40 (1968); *City of Seattle v. P.B. Inv. Co.*, 11 Wash. App. 653, 663, 524 P.2d 419, 426 (1974).

197. See *Town of W. Seattle v. W. Seattle Land & Improvement Co.*, 38 Wash. 359, 364, 80 P. 549, 550–51 (1905). The concern of equitable estoppel is implicit rather than explicit in *Baxter-Wyckoff*. *Baxter-Wyckoff*, 67 Wash. App. at 560–62, 408 P.2d at 1015–17. Throughout its discussion, the *Baxter-Wyckoff* court talked about the unique nature of the use at issue, and implied that equitable estoppel was a concern. *Id.* At one point, the court cited *West Seattle Land*, 38 Wash. at 364, 80 P. at 550–51, a leading Washington case on equitable estoppel and adverse possession, concerning permanent structures. *Baxter-Wyckoff*, 67 Wash. App. at 561, 408 P.2d 1016.

abutting owner's non-interfering "reasonable use" does not pose the same threat of equitable estoppel.¹⁹⁸

Additionally, the language used by the court restricting an abutting owner's rights is confusing. The court stated that the "recognized text authorities" limit an abutting owner's rights to temporary or non-exclusive use of unopened street easements.¹⁹⁹ The *Baxter-Wyckoff* court's use of the language "temporary and non-exclusive" is distinct from "reasonable" or "non-interfering" use.²⁰⁰ The meaning intended by the court is very specific and includes such temporally limited uses as parking a car on an unopened street easement and unloading it, or playing catch on the unimproved street easement.²⁰¹ The court's use of "temporary or nonexclusive" is distinct from "non-interfering" uses, which would include the construction of a fence or horseshoe pit, for example. Moreover, because the court did not distinguish "temporary and non-exclusive" uses from "non-interfering" uses in its discussion, a mistaken belief might arise that they are the same, when they are not.

More importantly, the recognized authorities cited by the *Baxter-Wyckoff* court did not clearly support the court's dictum limiting an abutting owner's right to use unopened street easements. McQuillin, the treatise cited extensively as support for this proposition, relies on rules allowing regulation of opened streets, not unopened ones.²⁰² This omission resulted in a conflation by the Washington Supreme Court of opened and unopened streets that is troubling. In fact, Antieau, cited by the court as support along with McQuillin, does at times distinguish between opened and unopened streets. It is in its discussion of an abutting owner's rights to an *opened* street that the Antieau treatise restricts use to temporary obstructions of streets, and access, light, air,

198. *Thompson v. Smith*, 59 Wash. 2d 397, 407–08, 367 P.2d 798, 803 (1962).

199. *Baxter-Wyckoff*, 67 Wash. 2d at 562, 408 P.2d at 1016–17 (citing EUGENE A. MCQUILLIN, MUNICIPAL CORPORATIONS 647–56 (3d ed. 1949), and CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW 606, 622 (1955)).

200. *Id.* at 562, 408 P.2d at 1016–17.

201. *See, e.g.*, *Gabrielsen v. City of Seattle*, 150 Wash. 157, 168–69, 272 P. 723, 727 (1928) (recognizing deposit of building materials, machinery, and equipment on street, necessary for construction of abutting building as temporary); *see also* 10A MCQUILLIN, *supra* note 55, at 356 (listing temporary uses).

202. 10A MCQUILLIN, *supra* note 55, at 356–57. The court's use of McQuillin is inappropriate because the quoted portion focuses on the right to use opened streets and streets in general. *Id.* McQuillin's discussion of abutting owner's rights focuses on use of the street and sidewalk (discussing awnings, signs, steps, and other encroachments found on opened streets). In addition, the *Baxter-Wyckoff* court ignores non-permanent use in its brief discussion. *Baxter-Wyckoff*, 67 Wash. 2d at 561, 408 P.2d at 1016–17.

and view.²⁰³ However, Antieau also discusses reasonable use, stating that, “when an abutter owns the fee he can use the property in the street in any way not interfering with the public easement.”²⁰⁴ Antieau’s discussion contradicts the *Baxter-Wyckoff* court’s assertion that abutting owner’s rights are limited to access, light, air, water, view, and temporary uses.²⁰⁵ Further, the most recent edition of *Antieau on Local Government Law* reaffirms the right of an abutting owner to use a street area so long as it does not interfere with the public’s use.²⁰⁶ Prior and subsequent cases allowing abutting owners to make non-interfering reasonable use of unopened public street easements expose the vulnerability of the *Baxter-Wyckoff* court’s dictum.²⁰⁷ Yet, this dictum has led some municipalities to believe that abutting landowners have no right to use unopened streets for any purpose in any circumstances.²⁰⁸ However, on close analysis, neither the holding, underlying purpose, nor dictum of *Baxter-Wyckoff* suggests a city may prohibit an abutting owner’s reasonable non-interfering use of an unopened public street easement.

B. Reasonable Nonpermanent Use of an Unopened Public Street Easement by Abutting Owners Is Consistent with Prior Case Law

By requiring abutting landowners to seek permission to use unopened easements in any manner, SMC section 15.02.100 ignores *Nystrand* and other Washington case law allowing abutting landowners to use the unopened street as long as it does not interfere with the city’s use.²⁰⁹ The

203. CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW 50–53 (Student ed. 1956).

204. *Id.* at 52.

205. *Baxter-Wyckoff*, 67 Wash. 2d at 562, 408 P.2d at 1016–17.

206. 2 SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW 30–82 (2d ed. 2000).

207. *See supra* Part II.A.

208. *See, e.g.*, SEATTLE, WASH., MUNICIPAL CODE § 15.02.100 (1998); BELLEVUE, WASH., CITY CODE § 14.30.080 (1998).

209. *See supra* Part II.A. The legislature may delegate the authority to regulate streets to cities through enabling legislation. *See State ex rel. York v. Bd. of County Comm’rs*, 28 Wash. 2d 891, 898, 184 P.2d 577, 582 (1947); *see also* 10A MCQUILLIN, *supra* note 55, at 301–02. As an enabling statute, WASH. REV. CODE section 35.22.280(7) (2000) comes closest to providing a basis for SMC section 15.02.100. However, the language of that statute focuses on the rights of cities to “lay out [and] establish . . . streets . . . and to regulate the use thereof,” not on regulating unopened streets. WASH. REV. CODE § 35.22.280(7). The statute does not authorize regulation before laying out or establishing a street, and courts have never interpreted it to apply to non-permanent use in unopened streets. Therefore, if the sole authority for SMC section 15.02.100 is *Samis*, there may be no legal basis for section 15.02.100. The courts have not addressed whether Washington Revised Code

Nystrand line of cases remains good law and holds that abutting landowners may make reasonable use of an unopened public street easement in any manner not inconsistent with public street easements or neighboring owner's access.²¹⁰ In *Nystrand*, the court stated that the O'Malleys' use of the unopened street, in extending their garage onto the unopened easement, planting trees and a hedge, and constructing a bulkhead, "was not inconsistent with the public's easement since the right to open the street for the public's use had not been asserted by the city."²¹¹ Thus, the use by the abutting landowner did not interfere with the city's use of the easement, satisfying the first part of the *Nystrand* test. Furthermore, the landowner's use of the unopened public street easement did not interfere with the neighboring owners' access, satisfying the second part of the test.²¹² By satisfying both prongs of the test, the O'Malleys' use was permitted.²¹³

The foundation of this reasonable-use principle is *Colegrove Water Co. v. City of Hollywood*,²¹⁴ consistently cited by the Washington Supreme Court to support the proposition that abutting landowners may reasonably use unopened public street easements, so long as the use does not interfere with the public's full enjoyment of the easement.²¹⁵ In *Colegrove*, the California Supreme Court held that as long as the use by an abutting landowner of the street did not interfere with the public's rights, it was permissible.²¹⁶ This holding was endorsed by the Washington Supreme Court in 1911, when it adopted this rule and decided that an abutting landowner could construct a ditch in the unopened portion of the abutting public street.²¹⁷ Likewise, in *Lanham v. Forney*²¹⁸ the court permitted reasonable use by abutting landowners, where the abutting

section 35.22.280(7) may in fact provide support for regulation of all uses of unopened public street easements. This issue is beyond the scope of this Comment.

210. See *supra* notes 81–99 and accompanying text.

211. *Nystrand v. O'Malley*, 60 Wash. 2d 792, 795, 375 P.2d 863, 865 (1962).

212. *Id.*

213. *Id.*

214. 90 P. 1053 (Cal. 1907).

215. See *supra* notes 107–20 and accompanying text; see also *State v. Bd. of County Comm'rs*, 28 Wash. 2d 891, 902, 184 P.2d 577, 584 (1947); *City of Raymond v. Willapa Power Co.*, 102 Wash. 278, 281, 172 P. 1176, 1177 (1918) (citing *Colegrove*, 90 P. at 1055).

216. *Colegrove*, 90 P. at 1055.

217. *Holm v. Montgomery*, 62 Wash. 398, 399, 113 P. 1115, 1116 (1911).

218. 196 Wash. 62, 81 P.2d 777 (1938).

landowner had installed a pipe under what later became an opened street, and two city officials sued to enjoin its use.²¹⁹

Since the Washington Supreme Court adopted *Colegrove*, it has consistently allowed abutting owners to make use of the land subject to the public easement where such use is not inconsistent with that easement.²²⁰ These cases are consistent with *Nystrand*'s approach of allowing reasonable use by abutting landowners. For example, the court in *Thompson v. Smith*²²¹ permitted reasonable use by the abutting landowner until that use interfered with the opening of the street easement.²²² The Washington Court of Appeals recently followed *Thompson*'s rule of reasonable use in *Meresse v. Stelma*,²²³ where it determined that an abutting landowner could reasonably use a private street while unopened.²²⁴ Thus, Washington still adheres to the reasonable-use standard for unopened and unimproved public street easements.

C. *Cities May Not Prohibit the Non-Permanent Reasonable Use of Unopened Public Street Easements*

Washington cases have repeatedly held that public easements do not convey complete control over the property dedicated. In fact, Antieau, one of the treatises cited by the *Baxter-Wyckoff* court, states that fee owners may use their fee so long as their use does not interfere with the municipality's use.²²⁵ If the municipality is not using the easement, reasonable use by an abutting owner cannot interfere with the city's rights to the easement. Additionally, a long line of Washington decisions supports limiting the scope of public street easements by restricting the rights of the public easement holder to uses connected with transportation and commerce.²²⁶ This limitation arises because an easement dedication grants only limited rights to use the land, not fee ownership.

219. *Id.* at 66, 81 P. 2d. at 779.

220. *See, e.g., Bd. of County Comm'rs*, 28 Wash. 2d at 902, 184 P.2d at 584 (listing cases permitting non-interfering use of easement); *see also* *Thompson v. Smith*, 59 Wash. 2d 397, 407-08, 367 P.2d 798, 803 (1962).

221. 59 Wash. 2d 397, 367 P.2d 798 (1962).

222. *Id.* at 407-08, 367 P.2d at 803.

223. 100 Wash. App. 857, 999 P.2d 1267 (2000).

224. *Id.* at 867-68, 999 P.2d at 1274.

225. 2 STEVENSON, *supra* note 206, at 30-82 (quoting *Nystrand v. O'Malley*, 60 Wash. 2d 792, 375 P.2d 863 (1962) in its text to support this proposition).

226. *E.g., State ex rel. York v. Bd. of County Comm'rs*, 28 Wash. 2d 891, 902, 184 P.2d, 577, 584 (1947); *Motoramp Garage Co. v. City of Tacoma*, 136 Wash. 589, 591, 241 P. 16 (1925).

Generally, Washington courts have not held that municipalities and counties have anything more than an easement of use in public streets.²²⁷ The only right a municipality or county acquires from the easement is the right to use the land for a public street.²²⁸ *Nystrand* and *Thompson* support this proposition that a public street easement does not convey unlimited control over the property dedicated.²²⁹ If the public has not asserted the easement by opening it, then reasonable use by an abutting landowner is consistent with the public's present and future rights to use the easement.²³⁰

Consider under *Thompson* a situation in which a private easement holder, who had yet to assert the easement by opening it, put up a sign stating: "The fee holder may not use this land except for access without my permission." A court would conclude that this attempt to prevent an abutting landowner's reasonable use was improper because the easement holder had not begun to use the easement.²³¹ Likewise, following *Nystrand*, to exercise direct control over the easement, the city or county must assert its rights by opening the easement.²³² Merely placing a sign at the beginning of the easement, or regulating the easement by enacting a statute, does not open it. The hypothetical situation above would also apply to public easements because the easement conveys to a city or county the right to *open* a street. To hold otherwise, prohibiting reasonable non-interfering uses by abutting landowners, would essentially equate dedication of an easement with conveyance of fee title ownership.

Therefore, it is contradictory to allow municipalities and counties to act as owners by effectively precluding abutting landowners from making any non-interfering use of the land over which the easement runs.²³³ Additionally, these regulations effectively preclude landowners

227. See, e.g., *Bd. of County Comm'rs*, 28 Wash. 2d at 898, 184 P.2d at 582 ("[N]ormally, the interest acquired by the public is but an easement."); *Erickson Bushling Inc. v. Manke Lumber Co.*, 77 Wash. App. 495, 498, 891 P.2d 750, 752 (1995) ("[W]hen land is dedicated to the public for a street or road, the public acquires only an easement.").

228. *Finch v. Matthews*, 74 Wash. 2d 161, 168, 443 P.2d 833, 838 (1968) (holding that only right acquired by municipality was easement for passage and use for street purposes).

229. *Nystrand v. O'Malley*, 60 Wash. 2d 792, 795, 375 P.2d 863, 865 (1962); *Thompson v. Smith*, 59 Wash. 2d 397, 407-08, 367 P.2d 798, 803 (1962).

230. See *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865.

231. See *supra* notes 100-07 and accompanying text.

232. See *Nystrand*, 60 Wash. 2d at 795, 375 P.2d at 865.

233. *Rowe v. James*, 71 Wash. 267, 270, 128 P. 539, 540-41 (1912) ("We have uniformly held that a city acquires only an easement in a street in consequence of a dedication.").

from challenging the city because the cost to litigate these rights is prohibitive. In this manner, municipal regulations that prohibit use by abutting owners remain unchallenged.

D. Public Policy Favors Permitting Abutting Landowners' Non-Permanent Reasonable Use of Unopened Public Street Easements

Restricting abutting landowners' reasonable non-interfering use of unopened public street easements prevents the efficient use of land. Municipalities regulate opened streets primarily to ensure public safety.²³⁴ Municipalities may seek to regulate unopened public street easements for similar reasons. However, cities are not liable for injuries on unimproved (and unopened) public street easements.²³⁵ Therefore, the need to regulate these unopened streets is minimal. If the city or county has not asserted the easement by opening it, the public is not using the street and the need to protect the public through regulation diminishes.²³⁶

Municipal restrictions that prohibit non-interfering reasonable use by abutting landowners furthers waste. When an abutting landowner uses an unopened street easement to store firewood, establish a dog run, or simply to extend a backyard, the fee owner enjoys this previously unused land. Restricting this reasonable use by the abutting landowner serves no benefit, except to increase revenue for municipalities.²³⁷

Furthermore, many unopened street easements were dedicated in the 1920s and 1930s and lie over terrain where it is impossible to build a street. Abutting landowners should be able to make non-interfering reasonable use of this marginal land until the city or county needs it. Such use leads to an efficient utilization of resources. Consequently, abutting landowners should have rights of reasonable non-interfering use to the unopened public street easements abutting their property.

234. 10A MCQUILLIN, *supra* note 55, at 332.

235. *Barton v. King County*, 18 Wash. 2d 573, 575, 139 P.2d 1019, 1020 (1943) (holding that "municipality is not liable for injuries sustained outside the improved portion of the street or highway").

236. *Id.*; see also 10A MCQUILLIN, *supra* note 55, at 332.

237. However, regulating non-interfering land use as a revenue source is suspect. See *Baxter-Wyckoff v. City of Seattle*, 67 Wash. 2d 555, 564-67, 408 P.2d 1012, 1018-19 (1965) (Hunter, J., dissenting) (focusing on whether fees relate to cost of administration, or instead are revenue raising).

CONCLUSION

Reasonable, non-interfering use of unopened public street easements by abutting landowners should be exempt from prohibitions on use and fees by municipalities. Neither *Baxter-Wyckoff* nor *Samis* addresses reasonable non-interfering use of an unopened street easement. If courts and lawmakers properly confine *Baxter-Wyckoff* and *Samis* to their facts and holdings, these cases do not actually conflict with the *Nystrand* line of decisions. Accordingly, ordinances such as Seattle Municipal Code section 15.02.100 should not rely on *Samis* to support restricting abutting landowners' reasonable non-interfering use of unopened public street easements because *Samis* applies to neither unopened street easements nor non-interfering use of these easements. Further, the *Nystrand* line, which explicitly addresses abutting landowner's use of unopened public street easements, does not support such restrictions; instead, these cases permit reasonable non-interfering use. If the use by the abutting landowner does not interfere with the city's potential use of the easement, or neighboring owners' rights of access, then the use is reasonable. Finally, as land in Seattle neighborhoods such as Queen Anne and Magnolia becomes both more valuable and exceptionally scarce, the desire and need to use this land will increase. Thus, abutting landowners should have the right to reasonable non-interfering use of unopened public street easements.

