No. 326047

COURT OF APPEALS, DIVISION III,

OF THE STATE OF WASHINGTON

CITY OF WALLA WALLA and
COUNTY OF WALLA WALLA,

Respondents,

vs.

TERRY KNAPP,

Appellant.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

One need not be a student of John Locke to appreciate the sanctity of private property:

> Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 18 (1909).

The petition by the City of Walla Walla to condemn Terry Knapp's property is an error of the magnitude described in *City of Knoxville, supra.*

That Terry Knapp misbehaved or offended neighbors or government functionaries is not grounds for taking his property. Nuisances should be and may be corrected or abated. Miscreants should be and may be prosecuted. Condemnation is not an alternative to either abatement or prosecution.

Terry Knapp's property is not an urban renewal project. Indeed, Terry Knapp's own activity on his property shows that were any blight-like conditions to be found there, they are being remediated. As previously noted, his property is the subject of a building permit duly issued by the Walla Walla Joint Community Development Agency. (CP 1042, 1047) Therefore, it cannot be disputed that Mr. Knapp's property does not constitute (not "constituted") a threat to "the public

health, safety, or welfare." RCW 35.80A.010. Statutory criteria for condemnation as blight have not and cannot be met in this case. Therefore, the trial court should be reversed and the City's petition dismissed.

ARGUMENT IN REPLY

I. THE CITY MISAPPREHENDS THE NATURE OF THE TRIAL COURT PROCEEDINGS, AND, CONSEQUENTLY, FAILS TO RECOGNIZE THAT THE STANDARD OF REVIEW IN THIS CASE IS DE NOVO.

In resisting de novo review, the City fails to recognize the obvious nature of the proceedings in the trial court. The trial court record is composed exclusively of documentary evidence. When the record on review is as perceptible to the appellate court as it was to the trial court, de novo review is the standard:

> Because the trial court decided this case on the basis of affidavits, this court will review its decision de novo. *Amren v. City of Kalama*, 131 Wn. 2d 25, 32, 929 P.2d 389 (1997).
>
> ...
>
> Since they [findings of fact] were made from the same cold record of affidavits and depositions which has been filed here, and the court below did not have the opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony, we should reassess its factual findings as well as its legal conclusions de novo. *In re Estate of Nelson*, 85 Wn. 2d 602, 605, 537 P.2d 765 (1975).
>
> ...

> Where, as in this case, the record on both trial and appeal consists of affidavits and documents, and the trial court has neither seen nor heard testimony requiring it to assess the credibility or competency of witnesses, nor had to weigh the evidence or reconcile conflicting evidence in reaching a decision, the appellate court stands in the same position as did the trial court in reviewing the record. *Police Guild v. Liquor Control Bd.*, 112 Wn. 2d 30, 35-36, 769 P.2d 283 (1989) (footnote omitted).

There is no controlling authority to the contrary.

Cases cited by the City are not germane. Appellate review is limited with respect to factual findings where those findings are properly made. In *City of Blaine v. Feldstein*, 129 Wn. App. 73,77, 117 P.3d 1169 (2005) there was no factual dispute. In *Seattle v. Loutsis Investment*, 16 Wn. App. 158, 162, 554 P.2d 379 (1976), factual issues were resolved by the trial court after "a contested hearing in which testimony and evidence were presented." As those findings were supported by substantial evidence, they were upheld on appeal in accordance with the applicable standard. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn. 2d 570, 575, 343 P.2d 183 (1959), cited in *Loutsis*, 16 Wn. App. at 174. As Terry Knapp's case presented contested factual issues to the trial court, which then based its findings on documents alone, neither *Blaine*, *supra*, nor *Loutsis*, *supra*, is informative, much less dispositive.

The last case cited by the City in support of its position that the standard of review is not de novo, is *Util. Dist. v. For. Trade Zone Indus.*,

159 Wn. 2d 555, 151 P.3d 176 (2007). *Util. Dist.*, *supra*, recognized the well-established distinction in eminent domain doctrine between determinations of public use and determinations of public necessity. Concerning public necessity, the government need only show the taking is legislatively reasonable. A determination of public necessity is "conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud." *Util. Dist.*, 159 Wn. 2d at 575-576 citing *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn. 2d 612, 629, 121 P.3d 1166 (2005). As to public use, cases and the Washington Constitution, Art. 1 §16 require a judicial determination "without regard to any assertion that the use is public." *Util. Dist.*, 159 Wn. 2d at 573. Clearly, *Util. Dist.*, *supra*, gives no guidance where, as here, the question is of public use (not public necessity) and the record is composed only of documentary evidence.

Controlling case law submitted above and in Mr. Knapp's opening brief in this case amply support de novo review. Cases cited by the City are not to the contrary. Moreover, *Util. Dist.*, 159 Wn. 2d at 566, stands for the proposition that questions of statutory meaning are reviewed de novo. As this case turns on the meaning of RCW 35.80A.010, review should be de novo on that ground alone.

II. THE CITY MISCONSTRUES THE GRAVAMEN OF TERRY KNAPP'S APPEAL WHICH IS NOT MERELY TECHNICAL AND PROCEDURAL.

At the outset of its argument, the City asserts:

> Mr. Knapp complains that the Superior Court did not hold a hearing with live witnesses, and his principal argument on appeal is that the court therefore did not conduct an authentic judicial inquiry to determine public use. He argues that the matter should be remanded for further proceedings. (Brief of Respondent City of Walla Walla, at 7.)

Actually, Mr. Knapp noted that "no trial was held, no witnesses testified and no conflicting evidence was weighed or reconciled." (Brief of Appellant at 1-2.) This observation established de novo as the standard of review. But Mr. Knapp's principal argument is that the record, undeveloped as it is, shows that condemnation must be denied. Only in the alternative is a remand for further proceedings suggested. Thus:

> While Terry Knapp has shown that condemnation of his property should not be allowed, the lightest touch by this Court should result in remand for further proceedings. Clearly, the trial court failed to resolve contested questions of fact. (Brief of Appellant at 15.)

As articulated in Mr. Knapp's opening brief, the evidence does not support condemnation, the trial court should be reversed, the petition for condemnation should be dismissed and Mr. Knapp should be awarded his costs, expenses and attorney fees. Only alternatively does Mr. Knapp suggest that further proceedings should be had on remand.

Contrary to the City's implication, Terry Knapp does not challenge the validity of the governing statute, RCW 35.80A.010. Rather, his challenge involves the application of that statute. Mr. Knapp's challenge reveals that the City has failed to pass the test for condemnation under that statute. The statute is not under attack. The City's position is under attack for failing to fulfill the statutory requirements for condemnation.

III. THE CITY MISCONCEPTUALIZES THIS CASE AS AN URBAN RENEWAL MATTER, AND, THUS, RELIES ON AUTHORITY THAT IS TOTALLY INAPPOSITE.

This case is not an urban renewal condemnation with all the diminished constitutional protections of private property that urban renewal takings entail, as noted by Professor Stoebuck, 17 *Wash. Prac. Real Estate* §9.28 (2d ed. 2004). Therefore, case law concerned with urban renewal is inapposite. These cases, cited by the City, can play no part in the analysis required here:

> *Seattle v. Loutsis Investment,* 16 Wn. App. 158, 554 P.2d 379 (1976), review denied 88 Wn. 2d 1016 (1977);
> *Miller v. Tacoma*, 61 Wn. 2d 374, 378 P.2d 464 (1963);
> *Berman v. Parker*, 348 U.S. 26 (1954);
> *Apostle v. Seattle*, 70 Wn. 2d 59, 422 P.2d 289 (1966);
> *Apostle v. Seattle*, 77 Wn. 2d 59, 459 P.2d 792 (1969); and
> *Edwards v. City Council of Seattle*, 3 Wn. App. 665, 479 P.2d 120 (1970), *review denied* 78 Wn. 2d 996 (1971).

This case is not controlled by the Community Renewal Law, RCW 35.81 (formerly, Urban Renewal Law) which lacks the specific, stringent criteria for condemnation found in the controlling statute, RCW 35.80A.010. Nothing like the criteria of RCW 35.80A.010 is found in RCW 35.81.080 governing urban renewal condemnations.

Assuming, *arguendo*, that the City attempts to justify taking Mr. Knapp's property under RCW 35.81, its action is contrary to that law's purpose. RCW 35.81.005 requires that "to the extent feasible salvable blighted areas should be rehabilitated through voluntary action and the regulatory process." Mr. Knapp's permitted construction on his property is in accord with the purpose of the community renewal law. (CP 1042, 1047)

IV. CASE LAW ON WHICH THE CITY RELIES, OUTSIDE THE REALM OF URBAN RENEWAL, REINFORCES THE PROPER CONCLUSION HERE, THAT CONDEMNATION OF TERRY KNAPP'S PROPERTY UNDER RCW 35.80A.010 MUST BE DENIED.

While the City appears to conflate condemnation of specific property pursuant to RCW 35.80A.010 with an urban renewal project, it does cite other eminent domain authorities that do not concern urban renewal. Nevertheless, those cases provide no support to the City's position here.

Although the City cites several cases involving eminent domain, these do not concern questions of blight:

> *City of Blaine v. Feldstein*, 129 Wn. App. 73, 117 P.3d 1169 (2005);
> *Util. Dist. v. For. Trade Zone Indus.*, 159 Wn. 2d 555, 151 P.3d 176 (2007);
> *Bellevue School Dist. v. Lee*, 70 Wn. 2d 947, 425 P.2d 902 (1967);
> *Hallauer v. Spectrum Props.*, 143 Wn. 2d 126, 18 P.3d 540 (2001);
> *Anderson v. Superior Court*, 119 Wash. 406, 205 P. 1051 (1922);
> *Reg'l Transit Auth. v. Miller*, 156 Wn. 2d 403, 128 P.3d 588 (2006);
> *Steilacoom v. Thompson*, 69 Wn. 2d 705, 419 P.2d 989 (1966);
> *Des Moines v. Hemenway*, 73 Wn. 2d 130, 437 P.2d 171 (1968);
> *Tacoma v. Welcker*, 65 Wn. 2d 677, 399 P.2d 330 (1965);
> *State v. Lauman*, 5 Wn. App. 670, 490 P.2d 450 (1971);
> *PUD v. Kottsick*, 86 Wn. 2d 388, 545 P.2d 1 (1976); and
> *State ex rel. Lange v. Superior Court*, 61 Wn. 2d 153, 377 P.2d 425 (1963).

These cases have no connection to the statute (RCW 35.80A.010) controlling condemnation of Terry Knapp's property.

The dead weight of these cases is compounded by the absence of serious, disputed questions of public use, as opposed to public necessity. The issue of public use requires full judicial inquiry "without regard to any legislative assertion that the use is public." *Washington Constitution Art. 1 §16.* In contrast, the issue of public necessity, accorded the least

penetrating judicial inquiry, is "conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud." *Util. Dist.*, 159 Wn. 2d at 575-76, *citing HTK Management v. Seattle Popular Monorail Authority*, 155 Wn 2d 612, 629. These cases cited by the City are concerned with public necessity, and, therefore, do not bear on the issue here which is public use: *Hallauer*, 143 Wn. 2d 126, 131; *Des Moines*, 73 Wn. 2d 130, 133; *State ex rel. Lange*, 61 Wn. 2d 153, 154; *Reg'l Transit Auth.*, 156 Wn. 2d 403, 411; *State v. Lauman*, 5 Wn. App. 670, 674-75. Other citations by the City that are listed above have to do with questions of notice, water rights, future pollution prevention and attorney fees. None has to do with condemning an individual citizen's property as a blight on the surrounding neighborhood.

No case cited by the City is based on RCW 35.80A.010. Therefore, the City utterly fails to show that the specific, stringent statutory criteria have been fulfilled. The City's contention that the property in question has not been lawfully occupied for a period of one year or more fails on logic and fact. There is no proof of unlawful occupation. There is ample evidence supporting the inference that the property was lawfully unoccupied.

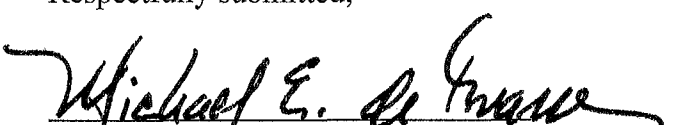
Neither metric nor measure has been proposed by the City that might indicate whether Mr. Knapp's property, in fact, constitutes a threat to public health, safety or welfare. The evidence of record does not prove a threat to public health, safety or welfare. Moreover, as shown by the Declaration of Terry Knapp (CP 1041-47), his property does not threaten public health, safety or welfare. A catalog of neighborhood grievances and City code violations against a property owner is no proof that the property constitutes a threat to public health, safety or welfare. Assuming that Mr. Knapp's past behavior may be contemned does not mean that his property may be condemned.

CONCLUSION

On the basis of the foregoing argument together with that previously submitted, the trial court order of public use and necessity should be reversed and the petition for condemnation by the City of Walla Walla should be dismissed. Terry Knapp should be awarded his costs, including reasonable attorney fees.

Dated this 28th day of November, 2014.

Respectfully submitted,



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