NO. 46803-4-II

---

**COURT OF APPEALS FOR DIVISION TWO**
**STATE OF WASHINGTON**

---

TT PROPERTIES, LLC,

Appellant,

vs.

THE CITY OF TACOMA,
a Washington municipal corporation,

Respondent.

---

# RESPONDENT CITY OF TACOMA'S APPEAL BRIEF

---

Jeff H. Capell, WSBA No. 25207
Deputy City Attorney
City of Tacoma
747 Market Street, Room 1120
Tacoma, WA 98402
(253) 591-5638

# Table of Contents

# Table of Authorities

***Washington Cases***

***Statutes***



***Other Authorities***

## I. INTRODUCTION

"Not all impairments of access to property are compensable."[1] The takings alleged in this matter, are of the non-compensable variety, as the court below ruled as a matter of law, because "[t]he impairment of access is not substantial"[2]at either of the locations in question. As the Judge stated at the close of oral argument on the City of Tacoma's (the "City") motion for summary judgment, TT Properties, LLC ("TTP") still has access.[3]

TTP argues before this Court that ***any*** impairment of access from an abutting property is *per se* compensable.[4] TTP's argument relies on characterizing its main takings claim as a "[c]omplete elimination of access to an abutting public road."[5] As the City will show through numerous case holdings discussed below, this characterization, and limiting it the way TTP does, is an incorrect application of case law when viewed against the facts presented in this case that leads to an incorrect statement of the law regarding takings. To the contrary, the Superior Court was correct in holding that a non-substantial impairment of access is not compensable, regardless of whether the property abuts a public road, if access is preserved through other means.

In any event, the actions that TTP alleges worked a taking of its access were not City actions. At both locations, the actions

---

[1] Keiffer v. King County, 89 Wn.2d 369, 372, 572 P.2d 408 (1977).
[2] Id.
[3] Verbatim Transcript of Proceedings (hereinafter "RP"), pg. 18, lns. 17-24.
[4] TTP Opening Brief, beginning at pg. 1.
[5] Id.

complained of were taken by the Central Puget Sound Regional Transit Authority dba Sound Transit (and hereinafter referred to as "Sound Transit") as part of its D to M Project. The City's only role was regulatory, and the only benefit derived was public. As a result, even if this Court disagrees with the Superior Court on the issue of whether there is a compensable taking, the City was not the causal actor and cannot be held liable to TTP as a matter of law. For these reasons, the City submits that the dismissal below must be upheld.

## II. ISSUES PRESENTED

TTP has framed the issues as it sees them in its Opening Brief at pages 2 and 3. For its part, the City submits the issues for this Court's determination are as follows:

**A.** Was the Superior Court correct in finding, as a matter of law, that there is no compensable taking on the undisputed facts in this case?

**B.** If the Superior Court erred in finding no compensable taking, should the case against the City be dismissed in any event because the City was not the cause of either taking, and therefore TTP cannot make a *prima facie* case against the City?

Although the City's second issue was not decided by the Superior Court, it can still be the basis for the summary judgment dismissal being upheld. The State Supreme Court has stated that, "Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and

proof."[6] The City's second issue above is supported by the record, it is addressed within the pleadings and proof, and it was fully argued before the Superior Court.

## III. STATEMENT OF THE CASE

TTP has appealed the Pierce County Superior Court's summary judgment dismissal of TTP's inverse condemnation claims in which TTP alleged takings of access at two locations in the city of Tacoma—2620 Pacific Avenue (the "2620 Property") and 223 East C Street (the "223 Property"). The Superior Court dismissed TTP's action because it found, as a matter of law, that no compensable takings had occurred. In reaching this conclusion, the Superior Court did not reach the City's second argument—that even if a taking occurred, the City was not the causal actor. In its Opening Brief at pg. 11 and thereafter, TTP inexplicably, and incorrectly refers to this argument as the City's "first argument" and incorrectly states that "The trial court correctly rejected" it. Nowhere in the Verbatim Transcript of Proceedings is there any support for this contention. The City's primary argument has always been that there is no compensable taking supported by the undisputed facts of this case. When the Superior Court held that no compensable taking had occurred, there was no need to determine the causal actor for something to

---

[6] Plein v. Lackey, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) *citing* Ertman v. Olympia, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) (*a superior court decision will not be reversed where the reason given is erroneous if the judgment or order is correct*).

which no liability attaches.

Otherwise, the City has no disagreement with TTP's Statement of the Case except as specifically noted below.[7] The City does, however, offer the following points of distinction and clarification along with some facts that are part of the record, but that TTP did not reference.[8]

First, at several places in its Opening Brief, TTP references the subject properties as being "owned" by TTP.[9] Later, on page 8 of its Opening Brief, TTP states that it sold the 2620 Property while retaining claim rights. For purposes of clarification, TTP does not own the 2620 Property at present, and did not own it when it filed its claim. This fact, in itself, is of no real moment, but TTP's claim that it "[s]old the [2620] [P]roperty at a much reduced price"[10] does need addressing because it is an assertion unsupported by any evidence in the record, and upon which TTP appears to be attempting to create a material issue of fact regarding damages.

Records from the Pierce County Treasurer, submitted by the City, do show that the 2620 Property was sold in 2013 for $650,000 and at the time of hearing was assessed at a value of $528,000.[11] Based on those numbers, it would appear that TTP

---

[7] TTPs Statement of the Case can be found at pgs. 3-15 of its Opening Brief.
[8] In doing so, the City only offers its additional information to help clarify the context in which the issues on appeal come before this Court. Nothing offered in this section of the City's brief creates an issue on any material facts relevant to this appeal or to the already granted summary judgment.
[9] *See e.g.* TTP Opening Brief at pgs. 1 and 3.
[10] TTP Opening Brief at pg. 8
[11] CP pgs. 262-263.

did not do so badly. Beyond the City's submitted numbers, there is no support in the record for any monetary damages suffered by TTP as a result of Sound Transit closing Delin Street to vehicular traffic.[12]

Second, TTP strongly infers in its Statement of the Case that the 2012 Right of Use Agreement (the "RUA") between the City and Sound Transit somehow contained provisions by which the City required Sound Transit to close Delin Street to vehicle traffic and to place the utility bungalow behind the 223 Property. To the extent that TTP intended this inference, it is incorrect. The RUA was precipitated by Sound Transit's D to M Project.[13] The City's role in it was strictly regulatory. The RUA was intended to act as a coordinating regulatory umbrella that would allow Sound Transit to complete its public transportation project.

Nowhere in the RUA is there found a City requirement for Sound Transit to repurpose Delin Street or place the utility bungalow at its present location. The City approved those actions in its regulatory role in part through the RUA, but those actions were taken based on Sound Transit's design, and carried out by Sound Transit's contractor to facilitate Sound Transit's project.[14]

---

[12] TTP did submit the Declaration of Christopher Eldred (CP 184-186). Mr. Eldred offers nothing but unsupported assertions therein, and as such his Declaration should be given no weight. SentinelC3, Inc. v. Hunt, 181 Wn.2d 128, 331 P.3d 40 (2014)(*A bare assertion that a genuine issue of material fact exists is insufficient to defeat a motion for summary judgment.*). The best Mr. Eldred offers is "I have yet to arrive at a final opinion of damages for the two properties. However, based on what I have learned to-date, the impact on value is significant." CP pg. 185.

[13] *See* RUA recitals at CP pgs. 197-198. The recitals set forth the basis upon which the RUA was entered into.

[14] *See* Declaration of Mark Johnson, CP pg. 163.

There was no proprietary benefit to the City derived from the RUA.

Lastly, on page 13 of its Opening Brief, TTP states that the City's basis for arguing no compensable taking is the assertion that TTP did not have lawful access to Delin Street from the 2620 Property. The City admits that early on in this matter it was somewhat confused as to the location of the easement and its function, but that was due in no small part to the fact that the easement references an "[e]xisting roadway over the property"[15] that was not readily apparent from the triangular shape of the easement area, and because TTP used the easement area for parking as often as it was used for access.[16] TTP used the easement area along with the remainder of the City owned property at 2610 Pacific Avenue (the "2610 Property") outside the easement area repeatedly for parking, overburdening the retained easement in the process and trespassing on the remainder of the 2610 Property.[17]

That said, TTP's ability to access Delin Street across the 2610 Property was never the basis for the City arguing that there is no compensable taking here. Rather, the fact that the 2620 Property still has two viable access points—one from Pacific Avenue, and one from 27th Street—has always been the City's

---

[15] CP pg. 120.
[16] *See* Aerial Photos at CP pgs. 110, 111, 113, 114, and 115. These photos corroborate the Declaration of Ronda J. Cornforth, CP pg. 153 that both the easement area and the remainder of the City's 2610 Property were parked on repeatedly.
[17] *See* Declaration of Ronda J. Cornforth, CP pg. 153.

basis for that argument just as it was the Superior Court's basis for its dismissal.[18]

## IV. ARGUMENT

TTP's argument rests on the contention that an abutting property owner has a *per se* right to compensation any time its access is interfered with regardless of whether "[a]ccess is preserved over other streets or ways."[19] TTP would have this Court consider the access point through the easement encumbering the 2610 Property in isolation and ignore the access to the 2620 Property from Pacific Avenue and from 27th Street. Takings analysis is not so limited.

TTP's analysis is apparently identical at the 223 Property, arguing that because the 223 Property abuts the City alleyway, any interference is a *per se* compensable taking. This approach is incorrect and has been since the Freeman case in 1912 as will be clarified below.

TTP then contends that summary judgment was incorrectly granted because the determination of substantiality of impairment is a question of fact. This too is not necessarily the case as will be discussed directly below.

### A. The Standard of Review on a Grant of Summary Judgment and the Appropriateness Thereof on the Facts in this Matter.

**1. Standard of Review.** When reviewing a trial court's

[18] RP pg. 18 ("They still have access...on two points.").
[19] Freeman v. City of Centralia, 67 Wash. 142, 145, 120 P. 886 (1912).

grant of a motion for summary judgment, the Court of Appeals engages in the same level of inquiry as that required of the trial court.[20] "A motion for summary judgment is proper where no genuine issue of material fact exists, or, in construing the evidence in favor of the nonmoving party, reasonable minds could reach but one result."[21]

**2. Summary Judgment was Appropriate Here under Controlling Case Law.** The present case meets both criteria for granting summary judgment, and the Superior Court was correct in doing so. The material facts at issue here are as follows:

> 1. During the course of Sound Transit's D to M Project, Sound Transit closed the section of Delin Street located to the North of the 2620 Property to vehicle traffic, but left direct access to the 2620 Property from 27th Street untouched with access from Pacific Avenue also remaining through a widened and improved curb cut;
> 2. The City reviewed and approved Sound Transit's D to M Project, including the actions complained of here; the City did not, however, perform any of the work, nor did it design the Project, or have any decision making authority over the Project other than as the local jurisdiction with regulatory authority; and
> 3. Toward the close of the D to M Project, Sound transit located a utility bungalow in the vicinity of 223 East C Street, primarily in railroad right-of-way, but encroaching into a City of Tacoma unimproved alley right-of-way a distance of approximately one (1) foot[22]; the City entered into a permit with Sound Transit dated September 14, 2010 that allowed the bungalow to be placed in the railroad right-of-way; the

---

[20] Ford v. Red Lion Inns, 67 Wn. App. 766, 769, 840 P.2d 198 (1992).
[21] Id., *citing* Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985).
[22] *See* CP 144-146, Declaration Leonard J. Webster, at pg. 2 and the Exhibit A survey drawing attached to the Declaration.

> City had no part in the decision making that led to the placement of the bungalow, nor does the City own, operate, or maintain it.

There is no dispute on these facts and they are the only facts material to the summary judgment on review in this appeal. The disagreement over whether the impairment of access was substantial is a difference of how the facts align with the law; it is not a disagreement in any actual material fact.

TTP cites Keiffer v. King County[23] for its argument that summary judgment was improper because determining substantial impairment is an issue of fact. TTP is correct that, according to the Keiffer Court, impairment is an issue of fact, but it can still be determined on summary judgment if, as stated above, in construing the evidence in favor of the nonmoving party, reasonable minds could reach but one result."[24] The State Supreme Court has also stated that:

> The determination of whether a given governmental interference with private property rights constitutes a "taking" or a "damaging" is a complex determination depending upon the unique facts of each given case. *This determination is a judicial question.* [Emphasis in the original.][25]

Summary judgment has been granted and upheld in similar circumstances in access takings cases for the same reasons the City advances here.[26] Determining whether

---

[23] 89 Wn.2d 369, 372, 572 P.2d 408 (1977).
[24] O.S.T. v. Regence BlueShield, 181 Wn.2d 692, 706, 335 P.3d 416 (2014)(*there is no genuine issue preventing summary judgment—reasonable minds could not differ when viewing the evidence in the light most favorable to the [non-moving party]*).
[25] Wandermere Corp. v. State, 79 Wn.2d 688, 695, 488 P.2d 1088 (1971).
[26] *See e.g.* Hoskins v. Kirkland, 7 Wn. App. 957, 503 P.2d 1117

reasonable minds could disagree happens against the backdrop of controlling case law. The City's position here has always been that controlling case law is clear that even when access is impaired at one point, "[n]o compensation can be exacted where access is preserved over other streets or ways."[27]

It is undisputed that the 2620 Property still has access from Pacific Avenue and from 27th Street, and the 223 Property still has access over the alleyway with only one foot of actual impairment[28] for a very short distance from Sound Transit's utility bungalow.[29] As such the issue of compensable impairment was proper for the Superior Court to decide on summary judgment. TTP has attempted to raise questions of fact in its submitted Declarations, but the Declarations contain nothing more than unsupported assertions.[30]

### B. There is no Compensable Taking in this Matter Because Reasonable Access is Preserved at Both Properties.

TTP's argument is that any time access to an abutting

---

(1972)(*summary judgment dismissal of access takings claim upheld where access was preserved over other streets*); Mackie v. Seattle, 19 Wn. App. 464, 576 P.2d 414 (1978); Galvis v. Dep't of Transp., 140 Wn. App. 693, 704-708, 167 P.3d 584 (2007) *rev. den.* 163 Wn.2d 1041, 187 P.3d 269 (2008)("*Keiffer does not require that a jury determine whether the degree of impairment is compensable*"); and London v. Seattle, 93 Wn.2d 657, 611 P.2d 781 (1980).

[27] Freeman, 67 Wash. at 145.

[28] The City calls it "actual impairment" because TTP had no right to have trucks "[s]wing wide" over railroad right-of-way (CP pg. 169), as the City will explain further below.

[29] *See* survey map at CP pg. 146.

[30] Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist., 175 Wn. App. 374, 305 P.3d 1108 (2013)
(*The nonmoving party may not rely on speculation or argumentative assertions to defeat summary judgment.*).

property is impaired, such impairment constitutes a *per se* compensable taking. This contention does not square with controlling case law and the facts of this case for a number of reasons. The first reason, at the 2620 Property, is that TTP is not, in fact, an abutting property owner to Delin Street at the point where access was lost.

**1. The 2620 Property does not "Abut" Delin Street at the Location Access was Lost.** Washington courts have recognized that "[t]he right of access of an abutting property owner to a public street is an enforceable property right."[31] "Property abuts on a public street when there is no intervening land between it and the street.[32] "When property abuts, the lot line and street line are in common."[33] Under this definition, the 2620 Property abuts Pacific Avenue and 27th Street. It abuts Delin Street briefly, but not at the point where it had any access to Delin Street when Sound Transit repurposed Delin Street from a street to slope for S. Tacoma Way. At the only location where the 2620 Property actually abuts Delin Street, access is not possible due to a retaining wall that has been in place since at least 2001.[34] TTP's access to Delin Street was not as an abutting property owner, but as an easement holder over the City's 2610

---

[31] Davidson v. Kitsap County, 86 Wn. App. 673, 684, 937 P.2d 1309 (1997) *citing* Keiffer, 89 Wn.2d at 372.
[32] Davidson, 86 Wn. App. at 684, *citing* London, 93 Wn.2d at 661.
[33] Davidson, 86 Wn. App. at 684, *citing* keil v. City of Seattle, 149 Wash. 197, 201, 270 P. 431 (1928), *cert. denied*, 279 U.S. 825, 73 L. Ed. 978, 49 S. Ct. 482 (1929). *See also* 10A EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 30.55 (3d ed. rev. 1990).
[34] CP pgs. 112-113, 122-123, 130 and 133.

Property.[35] That notwithstanding, the ultimate issue is not whether TTP is an abutting property owner, but whether TTP's access was substantially impaired.[36]

**2. Under Applicable Case Law, TTP Overburdened its Access Rights to Delin.** There is no question that TTP's access to Delin Street from the 2620 Property only existed due to a retained easement for access. TTP overburdened the easement for years by using the entirety of the 2610 Property for access and by parking both in the easement area and over the remainder of the 2610 Property.[37] "The owner of an easement trespasses if he or she misuses, overburdens, or deviates from an existing easement."[38] TTP overburdened, misused and deviated from the access easement for years.[39] Damages for such a misuse and the trespass that results can include the cost of restoration and the loss of use.[40]

The City never authorized this expanded use, but neither did it seek damages against TTP for its misuse of the access easement. The City did, however, warn TTP of its misuse to the point that the City ultimately posted the 2610 Property for "no

---

[35] *See e.g.* Taft v. Washington Mut. Sav. Bank, 127 Wash. 503, 509, 221 P. 604 (1923), which states: "We conclude that the correct rule is that only those directly abutting on the portion of the street or alley vacated, or alleged to be obstructed, or those whose rights of access are substantially affected, have such a special interest as to enable them to maintain an action.

[36] Keiffer, 89 Wn.2d at 409-410.

[37] CP pgs. 111-115 and 153.

[38] Olympic Pipe Line Co. v. Thoeny, 124 Wn. App. 381, 393-394, 101 P.3d 430 (2004) *internal cites omitted.*

[39] CP pgs. 111-115 and 153.

[40] Thoeny, 124 Wn. App. at 393-394.

parking" in order to put an end to the trespassing.[41]

At the outset of this matter, it seemed that TTP was perhaps more upset about the loss of parking along Delin Street as well as the easement area. That said, because "[t]he elimination of on-street parking does not give rise to a takings claim,"[42] TTP has never mentioned the loss of parking specifically in its claim for damages. The City mentions this here only because it seems entirely inequitable to hold the City responsible for compensation for the loss of an access easement that TTP overburdened and misused for years. The foregoing notwithstanding, the ultimate issue remains whether TTP's access was substantially impaired.

**3. Even if One is an Abutting Property Owner, There is no Per Se Taking Rule for Access Impairments Unless the Subject Property is Landlocked.** TTP's error in applying the relevant case law lies in assuming that if any access point is eliminated for an abutting street, that access point is considered in complete isolation from any other access available to the subject property. That approach does not square with controlling case law. In all discussion in Washington cases regarding the issue of access takings and abutter's rights, there is an underlying assumption that stems from traditional platting patterns. That is, there is an assumption of square or rectangular lay-outs along straight streets in which properties face one street and obtain

---

[41] CP pg. 153.
[42] Galvis v. Dep't of Transp., 140 Wn. App. at 706-707.

their access to the public rights-of-way through that facing access alone. In such an alignment, a taking of access would leave the subject property landlocked (i.e. without any reasonable access). In such a scenario, the property would no longer have reasonable access and a compensable taking would, in almost all circumstances, have occurred. That is not the case here, however. The assumption that an abutting property owner loses all viable access when a street is vacated is not true here.[43] Where this assumption is not true, there is no reason to give higher scrutiny to an abutter's ability to question a taking.

The State Supreme Court's "[g]eneral rule...is that only abutting property owners, or those whose reasonable means of access has been obstructed, can question the [street] vacation by the proper authorities."[44] This rule holds true today, but this Court should note that the right derived from the rule is only to question the vacation, it is not a right to automatic compensation, even if the complaining property owner is an abutter.

As cited above, the City recognizes that in Washington law an abutting property owner has an enforceable right to access public streets.[45] However, that right is neither absolute nor is it unlimited. It is a right tempered by reasonableness even if it does

---

[43] The City would point out that Delin Street was not actually vacated here, Sound Transit repurposed it to right-of-way slope to accommodate its design needs at this location. Such a repurposing is allowable under applicable law. *See* Young v. Nichols, 152 Wash. 306, 278 P. 159 (1929)(*use of a street may be changed from its use as a highway to another public purpose, when it is determined that the change will better serve the public good*).

[44] Olsen v. Jacobs, 193 Wash. 506, 510, 76 P.2d 607 (1938).

[45] Davidson, 86 Wn. App. at 684.

require a higher level of scrutiny. There is a very long line of cases, both before and after Keiffer, that clearly stand for this proposition. The Keiffer court may have said it best, but it certainly was not the first.

One of the first was the Freeman case cited above.[46] The facts, both substantive and procedural, are exceptionally similar to those presented here. In Freeman, a cadre of appellants appealed "[a]n order sustaining a demurrer to a complaint" challenging the vacation of a city street which was to be turn[ed]...over to the railroad companies...to be used for railroad purposes.[47] The State Supreme Court surveyed other jurisdictions and aligned itself with "[t]he great majority of American courts" in holding that a property owner has to demonstrate a special or peculiar damage, "[d]ifferent in kind rather than in degree from that suffered by the general public" before compensation is due.[48]

As the City pointed out in oral argument before the Superior Court,[49] "The existence of the special and peculiar damage is,...more readily recognized *when the property abuts* upon the particular part of the street that is vacated,"[50] but that is

---

[46] Freeman v. Centralia, 67 Wash. 142, 120 P. 886 (1912).
[47] Id., at 142. It should be noted that the Court found nothing wrong with the purpose behind this vacation stating that the intended purposes of providing railroad transportation to the public were a valid reason to vacate. Id., at 146-148. The Freeman plaintiffs challenged the vacation as unlawful because it was without any public benefit. The Court disagreed stating that private interests are often necessarily intertwined with public interests and do not defeat the authority to vacate. Id., at 147.
[48] Id., at 143-144.
[49] RP pg. 15, lns. 8-23.
[50] Freeman, 67 Wash. at 143-144.

not the end of the compensability inquiry. The Freeman Court went on to hold all of the following:

> (a) Where a party owns a lot which abuts on that portion of the street vacated so that access to the lot is shut off, it is clear that the lot owner is directly injured, and may properly challenge the action;[51]
> (b) Where, however, the effect of closing the street or highway is to close the only passageway a property owner has from his property to the main public ways, such an owner may properly challenge the action by a suit in court, even though he be not an abutting property owner;[52] and
> (c) [t]he rule...is, that a recovery may be had if the vacation interferes with the *access* to the abutter's property in such manner that he is specially and peculiarly damaged. The injury must be physical in its character. But the rule is equally well settled that no compensation can be exacted where access is preserved over other streets or ways. In other words, an added inconvenience is not a damage or taking within the meaning of these terms as they are used in our state constitution.[53]

Neither of TTP's properties has been shut off from access to public streets under Freeman. Whether they abut or not, "[a]ccess is preserved [to both properties] over other streets or ways," and TTP's only harm is what the Freeman Court deemed "[a]n added inconvenience [that] is not a damage or taking within the meaning of these terms as they are used in our state constitution."[54]

---

[51] Id., at 144, *citing* Heller v. Atchison etc. R. Co., 28 Kan. 625, 628. Access to TTP's properties has not been shut off.
[52] Id., at 144, *citing* Smith v. Centralia, 55 Wash. 573, 104 Pac. 797. TTP's only "passageway" has not been closed here. TTP still has access to both properties.
[53] Id., at 145, emphasis in the original, internal cites omitted.
[54] Id.

Approximately 11 years later, the State Supreme Court followed its holding in Freeman, but added that,

> The further rule, deducible from our own cases and the authorities generally, is that owners of property abutting on a street or alley have no vested right in such street or alley except to the extent that their access may not be unreasonably restricted or substantially affected.[55]

In other words, there is no *per se* compensation even for an abutting property when that property's access has not been "unreasonably restricted or substantially affected." With its main access (Pacific Ave.) and another secondary access (27th Street) still available to the 2620 Property, TTP's has not been "unreasonably restricted or substantially affected."[56] The 223 Property's access, likewise, has not been "unreasonably restricted or substantially affected" by Sound Transit's one foot encroachment into the alleyway.[57]

Later in 1958, the State Supreme Court carried the holdings in Freeman and Taft forward in Capitol Hill Methodist Church v. Seattle.[58] Again, the Court requires "*that the complaining parties suffer[ ] a special damage different in kind*

---

[55] Taft, 127 Wash. at 509-510 (1923).
[56] TTP seems to argue that the 27th Street address shouldn't count because the top floor of the building at the 2620 Property has been converted to apartments and the 27th Street access only connects to this part of the property. There is no support for this argument. TTP's usage decisions regarding its property do not allow it to somehow create damages where none otherwise exist. The 2620 Property has access off of 27th Street and that fact must be considered when determining whether the property still has reasonable access.
[57] *See* CP pgs. 138-143. The alleyway still provides ample width for two large vehicles side-by-side.
[58] 52 Wn.2d 359, 324 P.2d 1113 (1958).

*and not merely in degree from that sustained by the general public,*" in order to be compensated.[59] Citing Freeman, the State Supreme Court went on to state:

> There can be no question but what, under our decisions, the power of vacation of streets and alleys or portions thereof belongs to the municipal authorities,[60] and the exercise of that power is a political function which, *in the absence of collusion, fraud, or the interference with a vested right, will not be reviewed by the court*; and that one who suffers damages similar to those sustained by the public generally will not be heard to complain.

Under Taft, there is no vested right in access to a closed street unless the overall access to the property is "unreasonably restricted or substantially affected."[61] The Capitol Hill Methodist Church, Court went on to note that "the church... retains excellent access to the system of streets remaining,"[62] on the way to upholding the summary judgment dismissal of the church's claim even though the street being vacated was arguably the church's most direct, convenient, and even principal access to its property,[63] and even though the church would be inconvenienced by traffic having to travel an additional block east to reach the church. The Court deemed this inconvenience to be "[t]oo slight

---

[59] Id., at 365.
[60] Sound Transit has this same authority, even though Sound Transit actually repurposed Delin Street rather than vacating it. The City did not vacate Delin Street either. *See* Declaration of Kurtis D. Kingsolver, CP pg. 151 ¶ 9.
[61] 127 Wash. at 509-510 (1923).
[62] 52 Wn.2d at 367.
[63] Id., at 364 and 366. Here, TTP cannot claim that Delin Street was its most direct or principal access, only that it is now inconvenienced by not having its backdoor exit still available.

a consideration to be controlling in this case."[64]

The Court also relied heavily on 11 McQuillin on Municipal Corporations (3d ed.) 146, § 30.194 in reaching its conclusion. One passage cited by the Court is particularly instructive here, which reads:

> The fact that the lot owner may be inconvenienced or that he may have to go a more roundabout way to reach certain points, it is generally held, does not bring him an injury different in kind from the general public, but in degree only. 'If means of ingress and egress are not cut off or lessened in the block *of the abutting owner*, but only rendered less convenient because of being less direct to other points in the city, and made so by the vacation of the street in another block, such consequence is damnum absque injuria.' [Emphasis is the Court's in the original][65]

The Hoskins case follows it predecessors in all respects.[66] Again, a street vacation was involved. The Hoskins and others challenged the City of Kirkland's vacation because they alleged it interfered with their access. The Hoskins court found that:

> (a) a city may vacate a public street within its jurisdiction if the vacation is for a public use;
> (b) A public use may exist even if some private benefit may result; and
> (c) The power to vacate a public street exists notwithstanding some inconvenience will follow to others who are thereby deprived of street access they would otherwise have had.[67]

The Hoskins court couched its analysis in terms of

---

[64] Id., at 366, *citing* Mottman v. Olympia, 45 Wash. 361, 88 Pac. 579 (1907).
[65] Id., at 366-367.
[66] Hoskins v. Kirkland, 7 Wn. App. 957, 503 P.2d 1117 (1972).
[67] Id.

standing.[68] It recognized the rule that one must be either an abutter or otherwise have a claim of "special injury" in order to even "complain of illegality,"[69] but it also concluded that, in order to maintain their action, the Hoskins had to show "[t]heir right of access must be 'destroyed or substantially affected,' or, to put it another way, their reasonable means of access must be obstructed..."[70]

In looking at how the facts of the case lined up with the rules, the Hoskins court noted that:

> Plaintiffs' property is not landlocked by the street vacation. Plaintiffs still retain the same alternative access to their property over 124th Avenue N.E., and on N.E. 60th Street on which the northerly end of their property abuts, that they had when they built their private residence across from the entranceway into N.E. 57th Street. It is true that access from their private residence to N.E. 60th Street is now less convenient.[71]

The Court then found that this (a) inconvenience was not enough to sustain the Hoskin's claim being "*damnum absque injuria*", and therefore (b) the Hoskins plaintiffs' had no standing to sue because they had no legally cognizable injury.[72] Because TTP has only been inconvenienced, still having access at both locations, its claim too is without a legally cognizable injury, and

---

[68] Id., at 960-964.
[69] Id., at 961.
[70] Id. *citing* Capitol Hill Methodist Church, 52 Wn.2d at 366.
[71] Id., at 962-963.
[72] Id., at 961-963 (*A denial of standing to sue means that the damages of which he complains are damnum absque injuria because no protectible interest or cause of action belonging to him has been violated. ) internal cites omitted.*

was therefore properly dismissed below.

As already referenced above, the Keiffer case added to the well-developed body of law regarding access takings by stating that "Not all impairments of access to property are compensable."[73] There, the State Supreme Court went on to state that "Compensation is properly denied in those cases where an exercise of the police power does not directly affect access or the impairment of access is not substantial."[74] The Keiffer court also recognized that "Underlying the decisions in these types of cases is the principle that the right of access does not include the right to maintenance of a particular pattern or flow of traffic."[75]

This underlying principle defeats TTP's primary contention at both locations. At the 2620 Property, TTP alleges damage because vehicles can now no longer enter the property from Pacific Ave. and then flow straight through to exit on Delin. Similarly, at the 223 Property, TTP's complaint is that now because of Sound Transit's bungalow, trucks can no longer "swing wide" (onto railroad right-of-way) to enter the property. At both locations, reasonable access still exists. Only the preferred pattern or flow has been altered.

The court in Mackie v. Seattle[76] followed the already long line of reasoning outlined here in a case that, like this one, involved the closing of a street to traffic without actually

---

[73] 89 Wn.2d at 372.
[74] Id.
[75] Id. at 372-373.
[76] 19 Wn. App. 464, 576 P.2d 414 (1978).

vacating it. In Mackie, the plaintiff brought suit for injunction and damages against the City of Seattle for closing direct access along South Southern Street to his 524 Southern Street business with barriers on Southern Street approximately one block away, and with additional barriers at S. Elmgrove St. and S. Rose St. forcing access to come from three blocks away to reach Mackie's location.[77]

There, even though Mackie alleged that he had received numerous complaints from customers that they could not find his location, and that he actually had to go out and meet customers and guide them in,[78] the court concluded that "The plaintiff and his customers still have access to the property" and that the plaintiff did not have standing to challenge the closure as a result.[79] The inconvenience Mackie was subjected to is of far greater magnitude than anything TTP complains of here. Patrons of the 2620 Property are not diverted from the property at all, they just can't exit out the back anymore. Patrons to the 223 Property enter the same way they always have, they just can no longer trespass onto railroad right-of-way to do so.

Finally, in a more recent access takings case, this same Division of the Court of Appeals found no compensable taking in a scenario where the State eliminated the plaintiffs' "on street" parking (that had encroached onto SR7 right-of-way) as well as

---

[77] 19 Wn. App. at 465-467. *See* map from the original at pg. 466 attached as Exhibit A.
[78] Id., at 467.
[79] Id.

modified plaintiffs' unfettered access from SR7 where "No curbs or structures define the access point to the building, and vehicles enter and leave the property along the entire SR 7 frontage."[80] In Galvis, all plaintiff properties abutted SR7. All plaintiff properties had their access from SR7. As part of the State's project, it installed sidewalks and driveway approaches to the plaintiff's properties, limiting their access points and eliminating their on-street parking.[81]

In addressing whether the plaintiffs' access rights had been "'[t]ransferred...to the DOT without compensation," the court engaged in a very thorough analysis of controlling case law including many of the cases TTP cites as authority, distinguishing them in the process.[82] Similar to TTP's claim that any taking of an abutting access point is *per se* compensable, the Galvis plaintiffs argued that even though the DOT project left them with access to their properties, they should be compensated because they were left with less access than they previously enjoyed.

The court found otherwise stating "None of the cases the [plaintiffs] cite support their claim that abutting property owners have unlimited access rights."[83] Citing to Keiffer,[84] the court acknowledged that "[n]ot all impairments of access to property

---

[80] Galvis, 140 Wn. App. at 699.
[81] Id., at 699-701.
[82] Including McMoran v. State, 55 Wn.2d 37, 345 P.2d 598 (1959); Fry v. O'Leary, 141 Wash. 465, 252 P. 111 (1927)
[83] Galvis, 140 Wn. App. at 703.
[84] 89 Wn.2d at 372.

are compensable," and concluded, in conformance with all the cases cited herein, that "Compensation is properly denied in those cases where an exercise of the police power does not directly affect access or the impairment of access is not substantial."[85]

The court then stated that neither Keiffer, nor any other case the plaintiffs cited "support[ed] their argument that *any* impairment of access constitutes a taking."[86] Ultimately, the lower ruling that the plaintiffs still retained reasonable access was upheld.

**4. TTP's Cited Authorities do not Stand for the Existence of a Per Se Taking Rule for Access Impairments.** The City has already referenced that in Galvis the Court of Appeals found McMoran and Fry and many of the facts in Keiffer uncompelling, even for abutting property owners, when reasonable access is still preserved. Nothing in TTP's other authorities states otherwise.

TTP cites Wandermere and Martin v. Port of Seattle[87] for the proposition that anything that destroys an element of a property right is a taking. While this broad statement is generally true, it does not square with the specific application of takings law to access issues, more specifically, the State Supreme Court's statement in Capitol Hill Methodist Church that "[i]t is is

---

[85] Id.
[86] Id., emphasis in the original.
[87] *See* pg. 16 TTP Opening Brief. The case cites are respectively 79 Wn.2d at 694-695 and 64 Wn.2d 309, 320, 391 P.2d 540 (1964) *cert. den.* 379 U.S. 989 (1965). It should be noted that Martin is not an access takings case.

almost universally held that [an access takings plaintiff] does not suffer such a special injury as entitles him to damages..." when access is still preserved over more "roundabout ways" and "notwithstanding the new route is less convenient or the diversion of travel depreciates the value of his property."[88] This is so because Washington courts have held that when a property owner's access impairment does not create the requisite special damages, in other words, where "[t]he damage sustained is *damnum absque injuria*," or reasonable access remains, the "[r]efusal to compensate him for his injury is not a taking of property without compensation in violation of *U.S. Const. amend. 14* and Const. art. 1, § 16 (amendment 9)."[89]

Kodama is not controlling here either. Kodama offers only very brief discussion regarding access takings concluding that there is "no distinction between an easement of access from abutting property to a roadway and a private easement which provides access via a corridor from the owner's property to the road."[90] While this may speak somewhat to TTP's status as an abutter, it says nothing about whether any taking of access is *per se* compensable.

TTP also contends that whether a property ends up landlocked (i.e. with no reasonable access) has no bearing on the

---

[88] 52 Wn.2d 365-366 *citing* 11 McQuillin on Municipal Corporations (3d ed.) 146, § 30.194.
[89] Hoskins, 7 Wn. App. at 960 *citing* State v. Wineberg, 74 Wn.2d 372, 444 P.2d 787 (1968); Capitol Hill Methodist Church v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958); State v. Kodama, 4 Wn. App. 676, 483 P.2d 857 (1971); *and* 11 E. McQuillan, supra §§ 30.192, 30.194.
[90] 4 Wn. App. at 679.

issue of a compensable taking.[91] The vast majority of cases say otherwise.[92] This returns to the City's argument above that when an abutter's access is taken, the default assumption is that the property is then landlocked. Where that is not the case, such as in Galvis, if the access that remains is reasonable, there is no compensable taking.

In a similar vein, TTP attempts to limit applicability of the "'[c]ircuity of travel' or 'regulation of traffic flow' cases" to non-abutting properties or where "[t]here is only a partial taking of access to an abutting road."[93] A review of the cases will show that they do not make this limitation. This is where TTP's unsupported assertion that impairment of one access point to a given property must be considered in complete isolation from any remaining access points rears its head. There is no support for this approach in the controlling case law.

Even so, at the 2620 Property and at the 223 Property, all that has happened is just such a "[p]artial taking of access to an abutting road." The 2620 Property still has access at two distinct locations, making the impairment only partial. The 223 Property's access has suffered an impairment of approximately four square feet making it also only a "[p]artial taking of access

---

[91] TTP Opening Brief, pg. 20.

[92] *See e.g.* Hoskins, 7 Wn. App. at 961 (*In Washington, at least in the absence of overriding public benefit, a landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury.*) The reverse implication, made explicit at least in Galvis if nowhere else, is that where property is not landlocked, or otherwise substantially impaired, there is no special injury.

[93] TTP Opening Brief, pg. 20.

to an abutting road" to which the "'[c]ircuity of travel' or 'regulation of traffic flow' cases" would apply even if TTP's limiting analysis were correct.

TTP also cites to Selah v. Waldbauer[94] as support for its right to compensation. This case dealt with the Town of Selah's attempt to terminate "[t]he the entire access onto this property from Hillcrest Drive" through a zoning ordinance. Given that the case was the Town's appeal of the denial of its injunction "to prohibit vehicle ingress or egress, directly or indirectly" to/from the property and that the court was more concerned with the related zoning ordinance being an inappropriate avenue through which to exercise the police power of eminent domain, the case was on a very different footing than the present case.[95] There is nothing in the case that requires compensation *per se* to an abutting property owner.

**5. In the Absence of a Per Se Requirement to Compensate TTP, or a Total Taking of Access, Controlling Case Law Looks at the Reasonableness of the Remaining Access.** The questions of substantial impairment of access and the reasonableness of remaining access are opposing sides of the same coin. In other words, if, as in the numerous cases cited by the City herein, a plaintiff is due no compensation because she still has reasonable access to her property, that determination is

[94] 11 Wn. App. 749, 525 P.2d 262 (1974).

[95] Unless, of course, this Court finds TTP's argument that the Delin Street impairment has to be considered in complete isolation from other access available at the 2620 Property, a proposition for which the City finds no support in controlling case law.

the same as determining that her access was not substantially impaired.

According to the State Supreme Court in Keiffer, a compensable taking only exists"[i]f the government action in question has actually interfered with the right of access as that property interest has been defined by our law."[96] As already referenced herein, the law defines that interest as follows through the following principles:

> (a) agency action cannot landlock a property (take all reasonable access;[97]
> (b) the right to access is not unlimited, however;[98]
> (c) preferred traffic patterns or flows are not protected;[99]
> (d) added inconvenience where access remains is not a taking;[100] and
> (e) where reasonable access still remains, there is no taking.[101]

So how do TTP's claims line up against the applicable rules? Neither property is landlocked, meaning neither property has been cut-off entirely from the public streets. The 2620 Property still has its main access on Pacific Avenue (as widened and improved by Sound Transit during the D to M Project[102]) and

---

[96] 89 Wn.2d 369, 372.
[97] Freeman, 67 Wash. at 144-147; Capitol Hill Methodist Church, 52 Wn.2d at 365-366; Hoskins, 7 Wn. App. at 960; McMoran, 55 Wn.2d at 40-41; and Mackie, 19 Wn. App. at 468-470.
[98] Hoskins, 7 Wn. App. at 960; Keiffer, 89 Wn.2d at 372; and Galvis, 140 Wn. App. at 703.
[99] Keiffer, 89 Wn.2d at 372-373; Mackie, 19 Wn. App. at 468-469; Capitol Hill Methodist Church, 52 Wn.2d at 365-366.
[100] Freeman, 67 Wash. at 145; Capitol Hill Methodist Church, 52 Wn.2d at 365-366; Hoskins, 7 Wn. App. at 963; and Mackie, 19 Wn. App. at 469.
[101] Freeman, 67 Wash. at 144-146; Capitol Hill Methodist Church, 52 Wn.2d at 365-368; Hoskins, 7 Wn. App. at 961-963; and Mackie, 19 Wn. App. at 469.
[102] *See* Declaration of Mark Johnson, at pg. 2., ¶9, CP pg. 163.

its access from 27th Street. The 223 Property still has access over 19 feet of the 20 feet of alleyway width it previously had which is wider than most alleyways in Tacoma.[103] TTP and its patrons cannot claim a right of access over the adjacent railroad right-of-way. Railroad right-of-way is not open for public vehicular travel, but rather is exclusively for railroad use.[104]

The case holding cited herein that hold that the right of access is not unlimited directly refute TTP's contention that an abutter is entitled to compensation *per se*. An abutter falls under the same rules as other plaintiffs for purposes of takings analysis if she still has access to the public streets.

At the core, TTP's claim, at both locations is that TTP and its patrons no longer enjoy their preferred traffic pattern or flow into and out of their properties. This places TTP squarely in the same category as the complainants in Freeman, Capitol Hill Methodist Church, Hoskins, Mackie and Galvis. TTP is no more inconvenienced than members of the public generally. TTP still has access at both locations, and therefore is not specially damaged and not entitled to compensation. Reasonable access remains.

---

[103] CP pg. 155.

[104] *See* Hanson Indus. v. County of Spokane, 114 Wn. App. 523, 528, 58 P.3d 910 ( 2002) *rev. den.*, 149 Wn.2d 1028 (2003); *and see also* Midland Valley R. Co. v. Jarvis, 29 F.2d 539 (1928).

**C. Even if the Court Finds a Compensable Taking, the City of Tacoma was not the Causal Actor and Therefore Cannot be Liable for the Taking.**

Sound Transit is a statutorily created and authorized[105] regional transit authority operating in King, Pierce and Snohomish counties. The State Legislature authorized Regional Transit Authorities in order to empower a single agency with the ability to carry out regional public transportation improvement goals in a more direct and effective manner than multijurisdictional efforts had previously been.[106]

Sound Transit's mission is "[t]o implement a high capacity transportation system and to develop revenues for system support."[107] In order to do so, Sound Transit is granted broad powers, including the power to acquire real property and to exercise the same power of eminent domain granted to cities.[108]

As pointed out before the Superior Court, all the actions alleged in Plaintiff's complaint upon which Plaintiff bases its takings claim were carried out by Sound Transit as part of Sound Transit's D to M Project.[109] Every action that was taken relevant to the closing of Delin Street to vehicular traffic and the placement of the utility bungalow in the vicinity of the 223 Property was taken based on a Sound Transit decision and by

---

[105] Under RCW Chapter 81.112.
[106] RCW 81.112.010.
[107] RCW 81.112.070.
[108] RCW 81.112.080; *See also* Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 128 P.3d 588 (2006).
[109] *See* Declaration of Mark Johnson, CP pgs. 162-164; *see also* Declaration of Kurtis D. Kingsolver, CP pgs. 149-151; Declaration of Chris E. Larson, CP pgs. 157-159; and Declaration or Ronda J. Cornforth, CP pgs. 154-155.

Sound Transit or its contractors.

Sound Transit's design firm, ABHL, Inc. in association with Parsons Brinckerhoff, designed the configuration at South Tacoma Way and Pacific Avenue that led to the closing of Delin Street to vehicular traffic.[110] Sound Transit's Board chose the design and configuration.[111] Sound Transit's contractor, MidMountain Contractors, Inc., implemented the design and configuration by constructing it.[112] During project performance, Sound Transit employees had multiple conversations with TTP's principal, Kenneth Turner, regarding any access issues at the 2620 Property.[113] Ultimately, as a result of those discussions, Sound Transit's contractor widened and improved Plaintiff's access from Pacific Avenue as part of the work Sound Transit was having performed in and around the area.[114]

TTP faults the City for not informing it that Delin Street would be closed.[115] The City was not privy to any conversations between Sound Transit and TTP because this was not a City project. Sound Transit did give public notice of its intentions at least though publication.[116]

---

[110] *See* Sound Transit D to M Street Track & Signal Project Concept Plan Development Document Volume 1: Urban Design Analysis, at cover page (CP pg. 24), and at CP pgs. 28, 34, 40, 44, 46 and 47; *see also* Declaration of Mark Johnson, at pg. 2, CP pg. 163.
[111] Id.; *see also* the Sound Transit Motions and related documents at CP pgs.50-61, 63-64, 67, 73, 75, 77-78 (showing published, public notice of Sound Transit's project intentions), 82, 85, and 87-89.
[112] Id.
[113] Declaration of Mark Johnson, at pg. 2, CP pg. 163.
[114] Id.
[115] TTP Opening Brief, at pg. 8.
[116] CP pgs. 77-90.

Similarly, Sound Transit was entirely responsible for the decision-making and placement of the utility bungalow behind the 223 Property. Sound Transit owns the bungalow and operates and maintains it.[117] The City's only involvement in the placement of the bungalow was to field Sound Transit's request to place it in its present location and to grant permission, through a permit, for it to be there.[118]

As a result, from the initial filing of this claim, the City has been thoroughly confused as to why TTP would take aim only against the City and leave Sound Transit entirely out of its sights. TTP's counsel before the Superior Court seemed to indicate that the only reason was that Delin is a City street and "[t]he City said we (Sound Transit) could do it."[119] TTP then points to Phillips v. King County[120] as the authority for holding the City liable for Sound Transit's actions.[121]

The City agrees completely that Phillips and its progeny are on point in determining the City's second issue stated above. Phillips does not, however, lead to TTP's conclusion that the City is liable for Sound Transit's action in its D to M Project.

**1. The Facts and Holding in Phillips Dictate that the City of Tacoma is not Liable for Actions Taken in Sound**

---

[117] *See* Declaration of Mark Johnson, at pg. 3, CP pg. 164. *See also* Declaration of Kurtis D. Kingsolver, at pg. 3, CP pg. 151; Declaration of Ronda J. Cornforth, at pg. 4, CP pg. 155; and Declaration of Chris E. Larson, at pg. 3., CP pg. 159.

[118] Id.; *see also* Permit No. 195, CP pgs. 91-106.

[119] RP pgs. 14-15

[120] 136 Wn.2d 946, 968 P.2d 871 (1998).

[121] *See* RP pgs. 13-15 (*everybody knew this was Sound Transit's project, but Phillips makes the City liable*).

**Transit's Project Because the City's only Role was Regulatory.** In Phillips, the State Supreme Court ruled that "A claim for inverse condemnation exists where the alleged damage or taking was caused by a governmental entity's affirmative act of constructing a public project to achieve a public purpose."[122] The Phillips Court also held that a government taking of private property does not occur absent some governmental activity that is a direct or proximate cause of the property owner's loss.[123] In other words "governmental conduct that is not a cause of damage to plaintiff cannot constitute a 'taking' for purposes of inverse condemnation."[124] The Phillips Court also held that mere regulatory approval of a private development, without more, cannot be the basis for liability against the approving agency.[125] The City recognizes that Sound Transit's D to M Project is not necessarily a private project, but the City's relationship to Sound Transit, for purposes of the Phillips holding is the same as regulator to private developer even though the D to M Project is a public project with a public purpose. The question, then, is whether the City participated in Sound Transit's D to M Project to a level that makes the City liable for Sound Transit's actions.

TTP has conceded that the D to M Project was Sound Transit's.[126] TTP's argument for City liability relies on TTP's

---

[122] 136 Wn.2d at 962, *quoting* Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 530, 871 P.2d 601 (1994).
[123] 136 Wn.2d at 966, *internal cites omitted.*
[124] Id. *citing* Gaines v. Pierce County, 66 Wn. App. 715, 726, 834 P.2d 631 (1992).
[125] Id. at 960-963.
[126] RP pg. 14.

contentions that the RUA conferred some private, proprietary benefit on the City and that the City thereby participated beyond its regulatory role invoking liability. This is not the case. All City actions were taken as the regulatory authority with approval jurisdiction within the limits of the City of Tacoma. The RUA was simply the regulatory vehicle by which the City allowed use of certain City property so that Sound Transit could carry out its project and even a cursory reading of the RUA bears that out.[127]

TTP claims that that the City approvals were a "proprietary action respecting a government's management of its public lands,"[128] and that the City somehow gained a proprietary benefit from the RUA and the D to M Project. TTP errs in this assessment. The main purpose of the RUA was to set the parameters for the City to conduct the necessary regulatory review and then provided the necessary regulatory approval for the D to M Project. In the process, the City reached agreement with Sound Transit for how overlapping right-of-way issues would be handled. This agreement worked no proprietary benefit to the City on par with the private benefit King County obtained in Phillips.

In Phillips, the Court did not even reach a firm conclusion that the County was liable for a taking, only that the County "[m]ay be liable in inverse condemnation if the plaintiff can prove liability under existing law regarding dispersal of surface

[127] The RUA is found at CP pgs. 197-244. It is an involved document, but nowhere therein did the City dictate terms to Sound Transit.
[128] CP pg. 173.

waters and consequent damages."[129] Liability was ultimately left for determination on remand.

As pointed out before the Superior Court, there are a number of distinctions that make the reasons for remand and the rulings behind that determination in Phillips inapplicable here. First, in Phillips, King County not only approved the drainage system in question, but did so in furtherance of private development and its own proprietary interest in protecting property it held that was not being used for the public.[130] Sound Transit is its own government actor, and Sound Transit took the actions at issue here. In other words, in Phillips, King County approved a private entity's use of publicly owned lands for economic gain to the benefit of both the developer and the County. There is no element of that in this case. The City merely permitted a conversion of ROW from street to slope in furtherance of a public project by a state agency. The same is true of the placement of the bungalow.

Secondly, King County's actions resulted in an actual physical invasion of the Phillips' property by water that would be, in all likelihood, not exempted by the common enemy doctrine because of the artificial channeling involved. King County reaped a windfall by allowing the developer to install

---

[129] 136 Wn.2d at 969.

[130] The City's only benefit here was to clarify right-of-way issues. "There is no question that land held for a street or highway is a public purpose." Kiely v. Graves, 173 Wn.2d 926, 937, 271 P.3d 226 (2012). The City's only benefit from the RUA was a public benefit that the City sought to protect in its sovereign role.

spreaders on County property that channeled potentially damaging water away from the County property and onto the Phillips' property.

There is nothing in what the City did in approving Sound Transit's design or permitting the bungalow that resulted in a physical invasion and damaging of Plaintiff's properties at either location. The City took no action in protection of its own property as was the case in Phillips. Rather the City simply allowed use of its property for a public project of immense significance to state goals regarding public transportation and emissions reduction. There is no additional act here beyond the mere approval and permitting that Phillips states is not enough to support an inverse condemnation claim.

The Right of Use Agreement does nothing to alter the above analysis. The only reason the City had standing to enter into, and the leverage to require Sound Transit to enter into it, was entirely due to the fact that the City is the entity with police-power regulatory authority over the D to M Project area. To that point, the City's role was the same as King County's role in approving the drainage system, but the City did not gain any private benefit in the process. It gave up the use of some of its property right in allowing the closing of Delin Street, and as a side interest, clarified and somewhat protected the public use of other right-of-way areas.

Nothing in that scenario makes the City's approval and permitting into proprietary actions. The State Supreme Court has

stated that:

> The principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the corporate entity.[131]

As stated above, land being held for a street or highway is a public purpose.[132] Nothing the City did in relation to approval of Sound Transit's design and construction, or in permitting the bungalow was "[f]or the specific benefit or profit" of the municipal corporation of the City of Tacoma. Plaintiff's analysis of and reliance on Phillips in this regard is misplaced.

**2. Halverson and Jackass Mt. Ranch, Inc. ("JMRI") Provide Additional Authority Showing that the City is not the Causal Actor Here.**

Halverson v. Skagit County[133], and Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist.,[134] are much more factually similar to the present case. In Halverson, Skagit County was sued for inverse condemnation for damages the Plaintiff alleged from flooding along the Skagit River floodplain as a result of the local independent diking district's levees that the County had reviewed and approved.[135] Halverson alleged that Skagit County was either solely or jointly and severally liable for

---

[131] Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 165 Wn.2d 679, 687, 202 P.3d 924 (2009), *citing* Okeson v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003); *and* Hagerman v. City of Seattle, 189 Wash. 694, 701, 66 P.2d 1152 (1937).
[132] Kiely, 173 Wn.2d at 937.
[133] 139 Wn.2d 1, 983 P.2d 643 (1999).
[134] 175 Wn. App. 374, 305 P.3d 1108 (2013).
[135] 139 Wn.2d at 7-8.

damages caused by levees.[136]

Citing to Phillips, the State Supreme Court reiterated that mere approval of a separate entity's plan was not enough to create liability.[137] Halverson argued that Skagit County should be liable because it acted "[e]ither alone or in concert with others" to cause damage to plaintiffs' property.[138] The State Supreme Court rejected Plaintiffs' "acting in concert" theory calling it "[e]ntirely inapplicable to this inverse condemnation action."[139] The Court found that the County's role in reviewing and approving the levees was insufficient to create any causal liability because it did not design, construct, own or operate them. As a result, the Court held that Plaintiffs had failed to state a valid legal theory for imposing liability against the County and remanded for dismissal.[140]

The JMRI case built upon both Phillips and Halverson to find no liability in an inverse condemnation claim against the local irrigation district for damages to plaintiff's orchard that were incurred when an irrigation wasteway failed. Again, the finding of no causal liability, and therefore no taking, was based on the fact that the irrigation district did not design or construct the wasteway even though the district had even taken over its ownership and operation.[141] Citing Halverson,[142] the JMRI Court

---

[136] Id.
[137] Id. at 10-12.
[138] Id.
[139] Id. at 13.
[140] Id.
[141] 175 Wn. App. at 17-19.
[142] 139 Wn.2d at 13.

stated that "The government needs active proprietary participation, meaning 'participation without which the alleged taking or damaging would not have occurred.'" The JMRI Court then expounded further on causal liability in the inverse condemnation setting with all of the following:

> (a) Legal causation rests on policy considerations as to how far a party's responsibility for the consequences of its actions should extend;
> (b) Determination of legal liability will be dependent on mixed considerations of logic, common sense, justice, policy, and precedent; and
> (c) A governmental entity does not become a surety for every governmental enterprise involving an element of risk.[143]

Again, the City did not design or construct any of the elements alleged to have worked a taking of TTP's access at either location. The City does not own, operate or maintain the utility bungalow. The City has not yet even taken over maintenance of the slope area that was formerly Delin Street.[144] As a result, the City should not be found liable for inverse condemnation, even if a taking is found to exist, because the City took no affirmative or proprietary act that brings it into the liability equation. TTP contends that the City vacated Delin because it was a City street. That is not accurate. Sound Transit closed it under its State granted authority pursuant to its design and repurposed it as slope. All the City did was approve.

---

[143] 175 Wn. App. at 17, *internal cites omitted.*
[144] CP pg. 151.

## V. CONCLUSION

In its Opening Brief at page 15, TTP begins its argument by stating the rule from the Washington Constitution art. 1, § 16 that "no private property shall be taken or damaged without just compensation having first been made..." Not all impairments of access are violations of Washington Constitution art. 1, § 16, however. TTP's argument is then that TTP is an abutting property owner, and since it abuts, it is entitled to compensation *per se*. That position is not supported by Washington law either.

The Hoskins Court perhaps stated the rule most clearly with the following:

> In Washington, at least in the absence of overriding public benefit, a landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury. If, however, the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged. He has no legal right to prevent the vacation because no legal right of his has been invaded.[145]

TTP is not landlocked at either location. TTP still has access to the public streets at both locations. Like the plaintiffs in Galvis who abutted SR7, that access has been reduced, but it has arguably been reduced less than the plaintiff's in a number of cases cited herein (Mackie is perhaps the most glaring example) where compensation was denied. TTP's added inconvenience is not a compensable taking, and as such the Superior Court's dismissal based on the fact that TTP still has access[146] should be

[145] 7 Wn. App. 960-961.
[146] RP at pg. 18, ln. 17.

upheld.

Alternatively, if the Court disagrees with the Superior Court on the existence of a taking, the Court should find that the City was not the causal actor in the actions alleged and leave TTP to pursue its recourse against the real actor—Sound Transit.

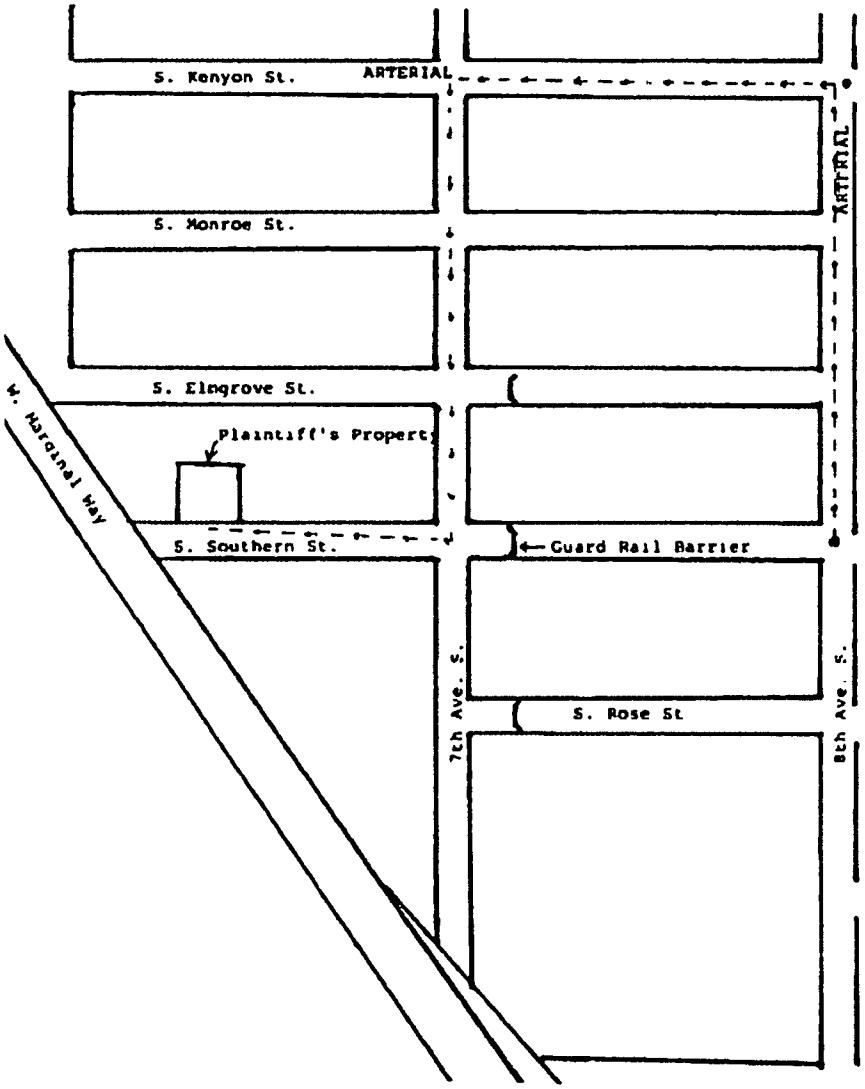
DATED this 25th day of March, 2015, at Tacoma, Washington.

ELIZABETH A. PAULI, City Attorney

By: _____
JEFF H. CAPELL, WSBA #25207
Deputy City Attorney
of Attorneys for City Tacoma

EXHIBIT A to RESPONDENT'S BRIEF





NO. 46803-4-II

---

**COURT OF APPEALS FOR DIVISION TWO**
**STATE OF WASHINGTON**

---

TT PROPERTIES, LLC,

Appellant,

vs.

THE CITY OF TACOMA,
a Washington municipal corporation,

Respondent.

---

**CERTIFICATE OF SERVICE RESPONDENT**
**CITY OF TACOMA'S APPEAL BRIEF**

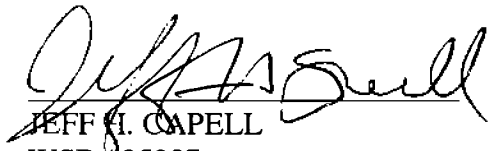
---

Jeff H. Capell, WSBA No. 25207
Deputy City Attorney
City of Tacoma
747 Market Street, Room 1120
Tacoma, WA 98402
(253) 591-5638

THIS IS TO CERTIFY that on this 25th day of March, 2015, I did serve via email and U.S. Postal Service, a true and correct copy of Respondent City of Tacoma's Appeal Brief, by addressing for delivery to the following:

Gordon Thomas Honeywell LLP
Attn: Margaret Y. Archer
P.O. Box 1157
Tacoma, WA 98401

ELIZABETH A. PAULI, City Attorney



JEFF H. CAPELL
WSB #25207
Deputy City Attorney
Attorneys for Respondent

# TACOMA CITY ATTORNEY

## March 25, 2015 - 1:32 PM

**Transmittal Letter**

Document Uploaded: 4-468034-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 46803-4

**Is this a Personal Restraint Petition?** Yes ■ No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

No Comments were entered.

Sender Name: Jeff H Capell - Email: jcapell@ci.tacoma.wa.us

A copy of this document has been emailed to the following addresses:

tkroplnicki@ci.tacoma.wa.us