COA NO. 336841

SUPREME COURT OF THE STATE
OF WASHINGTON

TAPIO INVESTMENT COMPANY I, a Washington limited liability company; MONARCH INVESTMENT; TAPIO OFFICE IV PARTNERSHIP; CLONINGER/EUCKER PARTNERSHIP; PAMELA M. CLONINGER, an individual, and CLONINGER & ASSOCIATES, L.L.C., a Washington limited liability company,

Plaintiffs/Appellants,

v.

THE STATE OF WASHINGTON, by and through the Department of Transportation,

Defendant/Respondent.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

WSDOT's brief underscores precisely why WSDOT's Motion for Directed Verdict should have been denied. In its brief, WSDOT attempts to spin disputed facts. Because there were numerous facts supporting a conclusion that there was a taking or damaging of property rights, Tapio's inverse condemnation should have been decided by the Jury. Tapio[1] presented evidence that WSDOT acquired properties located in phases of the North/South Freeway that it did not have construction funding for in order to manipulate the real estate market, create a blight and to depress land values. This destroyed Tapio's ability to sell and use their property, both protected property rights. WSDOT warehoused Tapio's property, leaving itself as the only purchaser while also depressing the value.

Despite knowing it lacked construction funding of this future phase of the North/South Freeway, WSDOT acquired the properties surrounding Tapio and informed Tapio's tenants and others that Tapio was being "*currently affected*" by the Project. During trial,

[1] "Tapio" is used to collectively refer to the owners of the Tapio Center, the Plaintiffs in this action.

the evidence established that WSDOT made the acquisitions to prevent the neighborhood from changing into a commercial zone which would have increased the value of the Tapio property. Tapio attempted to present evidence WSDOT had knowledge that acquiring property in phases not funded for construction would create a blight and depress the real estate market. "*So, in another 3 years we will have purchased more of the surrounding properties, creating an even more blighted or depressed commercial area along Market Street.*" **Ex. 35**. The evidence as a whole and the inferences from it supported Tapio's right to pursue just compensation for the taking or damaging of their property rights as required by the Washington State Constitution.

II. RESTATEMENT OF THE CASE

A. WSDOT's Conduct Started Prior To 2005.

WSDOT's actions that would culminate in a taking or damaging of Tapio's real property rights began before 2005. The slow erosion of Tapio's property rights first began in 1997 when WSDOT designed the North/South Freeway. The design and the plans for construction showed the freeway would be constructed on

nearly one-half of the Tapio Center property, that nearly all of the access would be taken from the remaining property and would require the destruction of five Tapio Center buildings. See e.g. **Exs. 73, 105, 106, 109** and **122**. See also VRP 562, ll. 24-25; VRP 563, ll. 1-3. Because the Tapio Center operates as one cohesive complex, the plans would impact the entire property. VRP 1006-1007.[2] The right of way plans were approved in 2002/2003 then obtained final approval in 2005 after an administrative hearing. VRP 559, ll. 8-23. No other right-of-way plans in the area of I-90 have been approved. Id.

B. Tapio's Suit And Pretrial Motions.

Tapio's claim is more than a "*decrease in market value.*" Tapio sought just compensation for the taking or damaging of its right to fully use, enjoy and dispose of the property caused by WSDOT's actions. See e.g. **Ex. 17, Ex. 50**, VRP 379, VRP 567-68, and VRP 1186, ll. 17-20. The evidence established that Tapio's property is warehoused with WSDOT as the only potential purchaser. Id. WSDOT's actions have created a cloud of blight that

[2] These facts combined with cross ownership implicated the larger parcel theory. See State v. Wandermere, 89 Wn. App. 369, 377 (1997). A fact WSDOT ignored.

caused a departure of tenants, decline in rentability, unmarketability, a decline in market value of the Tapio Center, and an inability to sell the property. This is about Tapio being subjected to more than a "*decrease in market value.*" Tapio is being deprived of the use, enjoyment and benefit of the property, as well as the opportunity to realize their investment by selling the development.

Tapio's right to have these facts weighed was reinforced throughout the case. Judge Leveque found that genuine issues of material fact existed and that Tapio had a right to trial. CP 254-279. WSDOT's attempt at discretionary review and to modify Commissioner Wasson's ruling finding that Washington law did not bar Tapio's claim also failed. See **Appendices A** and **B** to Appellants' Brief. Likewise, WSDOT's attempt to overturn Judge Leveque by renewing its Motion to Judge Moreno also failed. Judge Moreno found that the evidence presented issues of fact. CP 2107-2111.[3]

[3] Notably, even more evidence was presented at trial than in response to the summary judgment motions.

C. **Evidence At Trial.**

1. WSDOT's Actions Directed At Tapio.

By December, 2002, WSDOT was aware that even its early activities were impacting Tapio. VRP 398, ll. 22-25; 399, ll. 2-5. WSDOT sent a letter to the tenants of Tapio Center indicating their property was "*currently affected by the Project*," they would be displaced as a result of WSDOT's North/South Construction Project, and inviting them to one of many meetings that showed the Tapio Center was going to be used for construction. **Ex. 14**. More than 13 years ago, Tapio requested that WSDOT acquire its property or initiate condemnation proceedings to prevent its property rights from being taken. **Ex. 17**; VRP 401. After that time, construction activity and demolition occurred in the immediate area of Tapio for the North/South Freeway. VRP 557, ll. 19-22. WSDOT acquired the properties on each side and up to the Tapio Center. **Ex. 143**. Of the approximately 940 parcels of land that needed to be acquired, Tapio was unique. VRP 311. WSDOT did not think any of the other 940 parcels were an office complex like Tapio. VRP 311. The evidence was there was a delay of more than a decade in initiating

condemnation of Tapio. In light of when the other properties were acquired and the fact WSDOT had funds for acquisitions, a Jury could make the reasonable inference that more than a decade is an undue delay.

2. WSDOT's Scheme Included Making Acquisitions For Project Phases That Were Not Funded For Construction.

The North/South Freeway was planned and funded by "*phases*." See VRP 561. Despite not having funding for construction of future phases, WSDOT began acquiring properties in future phases. In 2007, this included real property in the immediate neighborhood of Tapio. **Ex. 138**. Tapio's tenants were advised WSDOT was going to require them to relocate. **Ex. 37**. WSDOT has acquired property for blocks on each side of Tapio. **Ex. 143**. This was done to prevent the Tapio neighborhood from becoming commercial. VRP 441. WSDOT's brief ignores the fact that it did not have construction funding for construction in the advanced phases of the North/South Freeway. As a result, it did not need to acquire any property at this time. It only did so to manipulate the

market to prevent price increases in the event it ever received construction funding for these phases.

WSDOT also engaged in extensive construction activities, including demolishing structures within the immediate neighborhood of Tapio Center for construction of the freeway. This construction activity, combined with freeway construction, acquisition of properties, and continued publication of the plans resulted in a blight on the Tapio property. **Ex. 50**. This blight damaged Tapio's ability to sell for fair market value, to lease at fair market value, and to realize their investment expectations. Infra.

There was testimony the re-zoning of these properties would have changed the neighborhood to a commercial area and increased the value of Tapio Center. There was also evidence that the demolition of the neighborhood destroyed Tapio's ability to sell or use its property. VRP 1120, 983, 951, and 927. Plaintiffs also offered a WSDOT email that showed WSDOT's knowledge.

> *We were figuring about 5 years before construction was slated for this area.* ***So, in another 3 years we will have purchased more of the surrounding properties, creating an even more blighted or depressed commercial area*** *along Market Street. We will also be 3 years closer to construction,* ***which***

> ***makes it an even riskier venture for any other potential tenant*** *if Ziegler is gone.*

Ex. 35 (emphasis added).

The evidence established that WSDOT's acquisitions and construction in the immediate neighborhood forced Tapio to carry the burden of funding the North/South Freeway pending its completion by creating a blighted and/or depressed area that would make properties like Tapio cheaper to acquire if WSDOT waited out the property owners. Accordingly, the evidence confirmed WSDOT deliberately executed its plan to damage private property rights.

3. WSDOT's Acquisitions Have Not Been "Voluntary."

Remarkably, WSDOT claims "*all of the acquisitions have been voluntary and not under threat of condemnation.*" That simply is not true. Like Tapio, dba Petroleum Distributors was forced to file an inverse condemnation action to seek just compensation when WSDOT refused to initiate condemnation proceedings. See VRP 501, ll. 1-6. Although not relevant at trial, WSDOT knows there have been several other inverse condemnation proceedings initiated or threatened as a result of WSDOT creating condemnation blight

and warehousing properties.[4] Also, there is nothing "*voluntary*" about citizens selling their property to WSDOT for a public project that has begun and with the knowledge that WSDOT has the power to condemn property required for the Project.

4. WSDOT Manipulated The Real Estate Market And Stopped Development To Prevent The Tapio Area From Increasing In Value.

"*Advance acquisition*" is in reality WSDOT's decision to acquire properties in phases of the North/South Freeway which were planned but for which WSDOT did not have construction funding. The evidence was that this "*advance acquisition*" scheme was to stop the neighborhood from changing in character and increasing in value. VRP 572, ll. 22-25; 573, ll. 1-7. WSDOT had knowledge its "*advance acquisition*" combined delay in condemning some properties created blighted and depressed neighborhoods. **Ex. 35.**[5]

5. Tapio Experienced A Loss Of Rights Beyond "Loss Of Market Value."

Whether Tapio generated revenue of any type goes to the issues of just compensation and not whether a taking occurred. It

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[4] For example, Dave Moore v. State and the Community Colleges of Spokane. See VRP 986-987. Notably, unlike Tapio, WSDOT settled the Moore and dba Petroleum inverse condemnations. All three are examples of other properties WSDOT warehoused.

[5] **Ex. 35** was offered but not admitted.

does not change the evidence that Tapio lost rights like the ability to sell its property or use it as intended. Supra.

III. ARGUMENT

A. Standard Of Review.

"*In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion.*" Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 98 (1994). Furthermore, "*[i]f any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury.*" Mega v. Whitworth College, 138 Wn. App. 661, 668 (2007). WSDOT's arguments ignore this standard of review and ask the Court to weigh the evidence. Evidence was presented establishing that a taking or damaging of property rights occurred, and Tapio should not have been deprived of their right to have their constitutional protections decided by trial.

B. Evidence Supported Finding A Taking Or Damaging Of Tapio's Private Property Rights Occurred.

WSDOT asks that the broad constitutional protections provided citizens be read in a narrow fashion that is contrary to the Constitution and our jurisprudence. The requirement of just

compensation is not limited to "*when the government directly appropriates property or issues a regulation....*" To apply such a narrow standard would ignore the fact that property rights include more than just the dirt. Instead, property rights consist of a bundle of individual sticks that can be appropriated or damaged without WSDOT driving a bulldozer onto the land. The government can and should be held accountable for actions it takes that result in the taking or damaging of private property rights so citizens are not forced to carry the burden of a public project that should be spread across those who benefit. Here, WSDOT's actions took or damaged Tapio's ability to sell its property, to use the property for long-term leases, and resulted in a substantial loss of value. See VRP 1120-21; 927; 933; 951; 983; and 1120-1121. Tapio has been subjected to a unique damage to its property rights for public benefit.

C. The Penn Central Analysis Applies To Government Conduct And Does Not Require A Formal "Regulation."

WSDOT has not and cannot point to any legal precedent holding that a Penn Central[6] taking only occurs if there is a formal "*regulation*." Instead, the Penn Central analysis implements the

[6] Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

constitutional protections by analyzing whether conduct by the government rises to the level of a taking or damaging of private property rights. WSDOT fails to offer any meaningful response to the fact that numerous other courts have recognized that it is the government action, no matter what form it takes, that is to be analyzed and that may not always involve formal "*regulatory or legislative action.*" See Mekuria v. Washington Metropolitan Area Transit, 975 F. Supp. 1, 4 (Dist. Of Colo., 1997).[7] It is illogical to claim constitutional protections only apply if the government passes a formal "regulation." Tapio presented evidence that WSDOT took specific actions, like purchasing in areas where it did not have construction funding to warehouse properties, prevent development and to decrease prices. The evidence also established that because of that conduct, Tapio was unable to sell its property and freely use it. These factual disputes and the inferences from them should have been decided by the finder of fact. Berst, 114 Wn. App. at 255-27.

These facts are also why WSDOT's public policy argument about "*announcing plans*" is inapplicable. This case is about what

[7] See also First English Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); and Berst v. Snohomish County, 114 Wn. App. 245, 255-57 (2002) ("government actions").

WSDOT did in addition to announcing and publishing its plans. It is about the totality of WSDOT's conduct, the purpose behind its conduct (to manipulate the real estate market) and the effect of its conduct on Tapio. WSDOT did far more than merely publishing and announcing plans.

D. Washington Law Protects Its Citizens From Government Conduct That Results In A Taking Or Damaging Of Private Property Rights.

This case is not simply a planning or "*pre-condemnation*" case. Unlike Orion[8], WSDOT had not only announced an intent to condemn, but had actually informed the property owners their property was "*currently affected by the Project.*" On top of that, WSDOT acquired nearly all of the surrounding neighborhood in order to manipulate the real estate market. Supra. Finally, evidence was offered that WSDOT recognized that purchasing properties in phases for which it did not have construction funding and leaving other properties on an island would create a blighted and depressed area preventing use. **Ex. 35**. WSDOT engaged in conduct it knew would depress land values and uses while refusing to acquire Tapio. See Klopping v. City of Whittier, 500 P.2d 1345 (1972).

[8] Orion Corp. v. State, 109 Wn.2d 621 (1987).

A jury could have determined WSDOT's actions were an abuse of its power, oppressive and there was undue delay in condemning Tapio. The evidence included WSDOT told tenants Tapio was "*currently affected*," yet refused to condemn the property; it acquired properties to depress land values by preventing the neighborhood from transitioning into a commercial corridor; evidence that WSDOT had ample budget to condemn Tapio; it acquired in a phase lacking construction funding knowing that purchasing "surrounding properties" creates blighted and depressed areas; and delaying acquisition of Tapio for more than 8 years after beginning acquisitions of the surrounding properties.

Importantly, as to "*undue delay*," WSDOT consistently referred to whether there was undue delay in the construction of the freeway. However, one of the factors is whether there was undue delay in the condemnation of Tapio, not the construction. The evidence of the years of delay combined with WSDOT's other acquisitions and the impact caused by the delay all would support a finder of fact concluding there was undue delay by WSDOT in condemning Tapio. The facts of this case fall squarely into the type

of conduct that Lange[9] and Orion recognized would arise to the level of a physical taking.

E. Whether "Lawful" Or Not, Citizens Are Entitled To Just Compensation If Their Property Is Taken Or Damaged.

WSDOT makes the overly broad claim that if its activities are "lawful," it does not have to pay just compensation for taking or damaging private property rights. However, that position is illogical, and the cases cited do not have such a broad holding. First, public projects are lawful endeavors. However, that does not relieve WSDOT of the obligation to pay just compensation for the taking or damaging of private property.

Second, this case is very different from those cited by WSDOT. In those cases, the plaintiffs' property was not actually identified as being taken for part of the project at issue. In contrast, here, WSDOT has specifically identified Tapio as necessary for the Project, and WSDOT's actions are in furtherance of the Project and intended to impact Tapio's property rights by manipulating the market to create blight. Thus, WSDOT's argument is without merit,

[9] Lange v. State, 86 Wn.2d 585 (1976).

the cases cited don't apply, and their holdings are not as broad as suggested.

F. The Trial Court Was Not Acting As A Fact Finder.

Strangely, WSDOT argues an issue which is not before the Court. WSDOT attempted to bifurcate the trial and requested that the Trial Court rule that the issue of taking was to be decided by the Court. The Trial Court denied the Motion. WSDOT did not appeal that ruling or assign error to it. As set forth in the pleadings to the Trial Court, WSDOT's claim that an inverse condemnation is to be decided by a bench trial and not to a jury is incorrect.[10] However, the issue is not before the Court and is immaterial. Because the issue on appeal is a directed verdict, the Trial Court's ruling is reviewed de novo and Tapio is entitled to have its evidence accepted as true along with all reasonable inferences. Supra. The Trial Court did not enter any findings of fact and deprived Tapio of the opportunity to complete the trial. Accordingly, since Tapio presented evidence supporting its claims, there is no basis to

[10] The cases cited by WSDOT are distinguishable and fail to offer any analysis of whether a right to a Jury exists.

"*affirm*" the Trial Court's decision since it did not act as a fact finder.

G. Exhibit 35, Which WSDOT Now Admits Was Authenticated, Was Relevant.

In its response, WSDOT does not dispute that **Ex. 35** was properly authenticated and claims instead it was "*not relevant.*" The threshold for relevance is extremely low under ER 401. City of Kennewick v. Day, 142 Wn.2d 1, 8 (2000). Relevant evidence is any evidence that has "*any tendency to make the existence of any fact that is of consequence... more or less probable than it would be without the evidence.*" ER 401 (emphasis added).

> *'Minimal logical relevancy is all that is required.' 5 K. Tegland, Wash.Prac. § 83 at 170 (2d ed. 1982). In State v. Wilson, 38 Wn.2d 593, 231 P.2d 288, 300, cert. denied, 342 U.S. 855, 72 S.Ct. 81, 96 L.Ed. 644 (1951), the court stated the connection between evidence and relevant issues need not be a 'necessary' connection but only 'reasonable and not latent or conjectural.'*

State v. Bebb, 44 Wn. App. 803, 814 (1986), aff'd, 108 Wn.2d 515 (1987).

Here, **Ex. 35** is a WSDOT document that established WSDOT was aware that acquiring properties in phases for which

WSDOT did not have construction funding and leaving other properties in that phase unacquired would cause a blighted or depressed neighborhood. **Ex. 35**. As explained by the Court in its incorrect oral ruling, included in the issues to be decided in the case was whether or not WSDOT engaged in undue delay in acquiring Tapio, whether or not WSDOT engaged in conduct intended to depress or blight neighborhoods or took actions intended to depreciate property. VRP 1185-91. **Ex. 35** established that prior to acquiring the properties surrounding Tapio, in a phase of the North/South Freeway, while refusing to condemn Tapio, that WSDOT had done the same thing in an earlier phase of the North/South Freeway Project. **Ex. 35** provided evidence that WSDOT knew that buying properties and leaving others in phases of the North/South Freeway would create a blighted and depressed neighborhood. Notably, **Ex. 35** was in the timeframe that Tapio sought to establish as a take date and also constituted evidence that WSDOT had knowledge that the blight Tapio was suffering and telling WSDOT was occurring as a warehoused property was real. **Ex. 35**. Despite having the knowledge that the same conduct in a

prior unfunded construction phase of the North/South Freeway was resulting in a blighted and depressed neighborhood, WSDOT continued to delay acquiring Tapio. Consequently, **Ex. 35** was relevant to establishing that WSDOT unduly delayed condemning the property while blighting the neighborhood and creating a situation where Tapio could not sell or fully use its property. In addition, **Ex. 35** was directly relevant to the take date. Therefore, the Trial Court's refusal to admit the evidence was in error.

IV. CONCLUSION

Based on the substantial evidence presented, Tapio respectfully requests the Trial Court's directed verdict dismissal be reversed along with the Trial Court's refusal to admit **Ex. 35** and this case be remanded for trial.

DATED this 22nd day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of July, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

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Attached for filing is Appellants' Reply Brief.
Tapio Investment Company I, et al. v. State of Washington, Case No. 90506-1

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