NO. 31117-1-III

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

10 NORTH WASHINGTON AVENUE, LLC, a Washington limited liability company,

Appellant,

vs.

CITY OF RICHLAND, a municipal corporation,

Respondent

BRIEF OF APPELLANT

MINNICK • HAYNER, P.S.

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I. PRELIMINARY STATEMENT

In a 2008 Real Estate Purchase and Sales Agreement, 10 North Washington Avenue, LLC (10 NWA) contracted to purchase a 33 acre tract of land from the City of Richland (City) located on the City's Horn Rapids Spur industrial track. 10 NWA intended to develop this land as a transloading and biofuels facility which required access by rail. As fully disclosed to the City, 10 NWA intended to utilize its sister company, Tri-City Railroad Company, LLC (TCRY) to provide rail service to this property. TCRY was able to access the facility over the Horn Rapids Spur under a Temporary Service Agreement (TSA) with the City in place since 2001.

The TSA contemplated being replaced by a permanent track use agreement, to be negotiated in good faith. In 2010, the City terminated the TSA. That action deprived 10 NWA of its rail service provider. The City was aware that because 10 NWA relied on TCRY for rail service to the property, termination of the TSA would place additional pressure on TCRY to relinquish TCRY's rights to a section of track at Center Parkway on the line leased by TCRY from the Port of Benton. The City sought to pressure TCRY to agree to that crossing as part of a new agreement which would allow TCRY to continue operations on Horn Rapids Spur and

service to the 10 NWA property. TCRY refused, and 10 NWA was deprived of rail service.

The termination of the temporary service agreement resulted in a loss of business for 10 NWA and diminished the value of its property. 10 NWA brought suit against the City asserting claims of Inverse Condemnation, Regulatory Taking, Breach of Contract Including Duty of Good Faith and Fair Dealing, and Tortious Interference with Contractual Relations. Damages were to be proven at trial. The city moved for summary judgment as to all grounds. The trial court granted the motion, and denied a subsequent motion for reconsideration.

This case comes before this Court on appeal from the proceedings below.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Respondent's summary judgment motion below as to Plaintiff's tortious interference claims because sufficient evidence in the record either conclusively established, or presented a genuine issue of material fact, as to all elements of the claim.
2. The trial court erred in granting Respondent's summary judgment motion below as to Plaintiff's inverse condemnation

claim because sufficient evidence in the record either conclusively established, or presented a genuine issue of material fact, as to all elements of the claim.

3. The trial court abused its discretion in denying Plaintiff's motion for reconsideration in light of the record before it.

III. STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting summary judgment as to Plaintiff's tortious interference claims where the evidence in the record raised at a minimum a genuine issue of material fact?

2. Whether the trial court erred in granting summary judgment as to Plaintiff's inverse condemnation claim where sufficient evidence was before it to defeat Respondent's summary judgment motion?

3. Whether the trial court abused its discretion in denying Plaintiff's motion for reconsideration?

IV. FACTUAL AND PROCEDURAL HISTORY

A. STATEMENT OF THE FACTS

10 North Washington Avenue, LLC (10 NWA) is a Washington company, formed in 2006. Clerk's Papers (CP) at 135-36. It is owned by the Peterson family, and provides administrative services to other companies owned by the Peterson family, including Tri-City Railroad Company (TCRY). CP at 136-37. TCRY is a "short line" railroad which operates in Benton County, Washington on track leased long-term from the Port of Benton. CP at 132-34. TCRY provides rail freight service to local companies through interchange of railcars with interstate railroads. CP 133-134.

In December, 2001, the City of Richland (City) and TCRY entered a Temporary Service Agreement (TSA), which granted TCRY the right to use the City's Horn Rapids Spur. CP at 26-27, 142. The Spur is a set of tracks that runs about one and one-half miles through the Horn Rapids Industrial Park. CP at 176. Under the TSA, the City permitted TCRY to operate over the Horn Rapids Spur to provide rail service to customers located on that track. CP at 26-27. TCRY was required to conduct an initial track inspection, report on its condition to the City, advise the City

of needed repairs and periodically inspect the track as required by the Federal Railroad Administration. CP at 26.

The TSA could be terminated by either party on 10 days written notice. CP at 26. However, in the TSA, the parties agreed to negotiate in good faith an industrial track agreement to replace the TSA. CP at 27.

The TSA was still in effect seven years later when, in May 2008, 10 NWA entered into the Agreement to purchase 33 acres of vacant land in the Horn Rapids Industrial Park from the City for $660,000. CP at 29-37. The Agreement expressly provided that the purpose of the land purchase was to enable 10 NWA to build a facility for transloading commodities between rail to truck and for biofuel production.[1] CP at 33.

In light of the intended uses of the property, as a condition precedent to the sale, the Agreement required 10 NWA to prepare a Rail Management Plan (RMP) identifying rail traffic requirements and measures to mitigate rail traffic's impact on vehicle and pedestrian traffic through the City. CP at 30. The Agreement expressly provided that if the plan was approved by the City, it would become binding upon 10 NWA as a covenant to the property. CP at 30.

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[1] Transloading is the process of transferring a shipment of freight from one mode of transportation to another; in this instance, from train to truck or truck to train.

In July, 2008, 10 NWA finalized its RMP as prepared by TCRY. CP at 49-59. The RMP contemplated that 10 NWA would construct additional track on its 33 acres in two phases. CP at 54. Specifically, it stated:

> Phase One:
>
> This includes building the new 500 foot rail siding and a new subsurface pit for commodities to drop into and then be removed by way of mechanical feeders. The effort will commence during the late summer and early fall of this year. The transload operator will then remove the product for stockpiling using their 12 acres of land within the overall 33-acres purchased by 10 NWA. They will employ mechanical feeders, equipment, and storage facilities. The operator will operate the business of handling and re-transport of the commodities.
>
> Phase Two:
>
> This includes the construction of a circle or loop track around the perimeter of the 33-acre property to add more efficiency to the railroad delivery as business dictates. This allows the Unit Trains to circle the Transload operation, in continuous motion, as the contents of each railcar is discharged in the subsurface pit.

CP at 54.

The RMP was accepted by the City on August 13, 2008, and became binding upon both 10 NWA and TCRY once the sale closed on August 15, 2008.[2] CP at 41. In its letter accepting the RMP, the City

[2] The RMP is binding upon TCRY by virtue of the fact that it is binding upon any railroad that agrees to do business with 10 NWA. To date, there exist no other RMPs for any other property in the Horn Rapids Industrial Park, and no other railroad has agreed to abide by the RMP. CP at 473.

stated that a "more detailed agreement" would need to be implemented in order to ensure that the track was maintained appropriately. CP at 41. Nothing was stated about any alternative reasons necessitating a permanent agreement. CP at 41.

Shortly thereafter, 10 NWA sold the 12 acre lot contemplated by Phase One of the RMP to Central Washington Corn Processors (Corn Processors). CP at 138-39, 151. 10 NWA then built railroad track improvements (including switches and a siding allowing access to the property from the Horn Rapids Spur), a railroad off-loading facility, a truck off-loading facility, and roads to the land. CP at 155. By putting this infrastructure in place, 10 NWA enabled delivery of commodities to the 10 NWA property and to Corn Processors, which constructed a grain processing facility on its land. CP at 156. These improvements were contemplated by the RMP accepted by City for the uses outlined in the Purchase and Sale Agreement. CP at 33.

10 NWA expended more than $5,739,423 in these improvements in anticipation of the business that would be generated while utilizing TCRY's carrier services on a daily basis. CP at 422, 425.

In August, 2009, 10 NWA signed a Letter of Intent with Gen-X Energy Group, Inc. (Gen-X) wherein the parties committed to joint development and construction of a biofuels production facility on the 10

NWA property and rail loop. CP at 421. The project required rail service, which was to be provided by TCRY. CP at 421. The City was expressly aware of this arrangement by the press announcement of the arrangement, which stated that Gen-X was to build on 10 NWA's land, and to receive railroad service provided by TCRY.[3] CP at 540-41.

In early 2011, City reached a permanent Track Use Agreement with the Burlington Northern Santa Fe (BNSF) and the Union Pacific Railroad (UP), which authorized those railroads to utilize the Horn Rapids Spur in exchange for giving up their rights to Richland Junction, near Columbia Center, where BNSF and UP interchanged railcars with TCRY. CP at 63. As a part of its efforts, City also informed TCRY that it was terminating its access to the Horn Rapids Spur under the TSA, and that in order to continue to use that spur TCRY must enter into a permanent Track Use Agreement. CP at 46. The Track Use Agreement required that TCRY relinquish its rights to Richland Junction and allow an at-grade crossing there in exchange for use of the Horn Rapids Spur. CP at 72. Importantly, the City understood that the termination of rail access placed additional pressure on 10 NWA because it depended on TCRY to provide

[3] At a minimum, the City became aware of the agreement when its agent Pete Rogalsky received, and responded to, a copy of the press release at his City of Richland email address. CP at 540-41.

carrier service, and because both companies were within the same family of Peterson Companies. CP at 537.

TCRY refused the agreement because it felt that it could not unilaterally relinquish its rights to Richland Junction without breaching its contract with UP, and because it felt that City's efforts were beyond its authority. CP at 61-65. In its refusal, TCRY also informed City that it was under an obligation to provide services to 10 NWA, and that City's attempts to coerce it to give up its rights to Richland Junction were wrongful. CP at 62, 64. Nevertheless, the City terminated the TSA, thereby precluding TCRY from operating on the Spur, and depriving 10 NWA of the service carrier contemplated under the RMP accepted by the City. Because TCRY was unable to guarantee rail access, 10 NWA was also forced to break its agreement with Gen-X, thereby losing the benefit of that arrangement as well. CP at 421. As a result, the new Gen-X facility was constructed in Moses Lake. CP at 165.[4]

Despite a loss of access as an independent carrier, TCRY continues limited operations along the Horn Rapids Spur as an agent of UP. CP at 74. 10 NWA's facility still operates as well, but at a diminished capacity. CP at 181. Indeed, but for the City's termination of the TSA, 10 NWA

would utilize its transloader facility on a daily basis. CP at 181. Although 10 NWA is unable to calculate its exact damages, it has certainly incurred financial losses as a result of City's actions against TCRY. CP at 422.

B. PROCEDURAL BACKGROUND

10 NWA filed suit against City for Inverse Condemnation, Regulatory Taking, Breach of Contract Including Duty of Good Faith and Fair Dealing, and Tortious Interference with Contractual Relations. CP at 6-18. Damages were to be proven at trial. CP at 15-17. The City eventually moved for summary judgment, which was granted as to all claims. CP at 20-21, 615-17. 10 NWA sought reconsideration, and amended the record in so doing pursuant to CR 59. CP at 621-637.

Included in the amended portion of the record were: (1) Declaration of Brandon Johnson, counsel for 10 NWA, and attachment thereto; (2) Declaration of Paul Petit, general counsel for TCRY, and attachments thereto; and (3) Transcript of the Verbatim Report of

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[4] The Court may take judicial notice that the new facility was instead built in Moses Lake. http://www.genxeg.com/who-we-are/our-history/; CP at 165.

Proceedings.[5] CP at 641-854. The City opposed the motion, and requested that those documents submitted therewith be stricken. CP at 853-876. The trial court denied the motion for reconsideration and struck the documents. CP at 877-79. This appeal timely followed. CP at 880-87.

V. ARGUMENT

A. Standard of Review.

Summary judgment review is *de novo*, and this Court performs the same inquiry as the trial court. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; *see also* CR 56(c).

A material fact is one upon which the outcome of the litigation

[5] In particular, Mr. Petit's declaration and attachments were offered to show that in 2006 the City petitioned the Washington Utilities and Transportation Commission to grant an at-grade crossing at Center Parkway over tracks utilized by TCRY. CP at 757. The petition, opposed by TCRY, was denied because the crossing was deemed unsafe. CP at 767-769. Having failed to acquire the desired crossing by ordinary means, the City then embarked on the course of action that is the subject of this litigation. CP at 716.

depends, either in whole or in part. *Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487, *review denied*, ---P.3d--- (2012). "Summary judgment is not proper if reasonable minds could draw different conclusions from undisputed facts or if all of the facts necessary to determine the issues are not present." *Schwind v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 297-298, 914 P.2d 119, *review denied*, 130 Wn.2d 1003 (1996). Accordingly, summary judgment is only appropriate if a reasonable person could reach but one conclusion from all the evidence. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 663, *review denied*, 158 Wn.2d 1015 (2006).

A defendant in a civil action is entitled to summary judgment if he or she can demonstrate an absence or insufficiency of evidence to support an element that is essential to the plaintiff's claim. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 192 (1989). Where this occurs, there can be no genuine issues of material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* In demonstrating the presence or sufficiency of evidence to support each element of a claim, a plaintiff is not entitled to merely rely on the allegations in the pleadings but must set forth specific facts demonstrating the existence of a genuine

issue of material fact exists. *Id.* Nevertheless, the non-moving party is entitled to have all evidence considered in a light most favorable to its position. *Gerken v. Mut. Of Enumclaw Ins. Co.*, 74 Wn. App. 220, 224-25, 872 P.2d 1108, *review denied*, 125 Wn.2d 1005 (1994). As discussed below, the trial court erred because 10 NWA's tortious interference and inverse condemnation claims survive a properly applied summary judgment standard since sufficient evidence exists to create genuine issues of material facts as to the elements of each claim.

B. The trial court erred in granting summary judgment as to 10 NWA's tortious interference claim because 10 NWA has, at a minimum, established a genuine material issue of fact as to those elements which are not themselves readily established when viewing all evidence in a light most favorable to the non-moving party.

A party claiming tortious interference with a contractual relationship or business expectancy must establish five elements: (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that relationship; (3) an intentional interference that either induces or causes a breach or termination of the relationship or expectancy; (4) that the defendant interfered for an improper purpose or used improper means; and (5) resultant damage. *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006). Here, the record demonstrates that when taken

in a light most favorable to 10 NWA, elements 1, 2, and 5 are easily met, and that there exists at a minimum, a genuine issue of material fact as to elements 3 and 4. Accordingly, the trial court erred in granting summary judgment.

Valid Contractual Relationship or Business Expectancy

For purposes of tortious interference, a valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002), *review granted*, 148 Wn.2d 1021, *review withdrawn pursuant to settlement* (2003). Here, the record demonstrates that, for purposes of summary judgment, 10 NWA is able to show at least two such relationships.

It is manifest from the record that there existed between 10 NWA and TCRY a business relationship that was of pecuniary value, as 10 NWA relied upon TCRY to bring railcars including unit trains to its facilities located within the Horn Rapids Industrial Park. CP at 30, 49-59. Moreover, even a cursory glance illustrates the fact that 10 NWA's RMP was prepared with an exclusive focus on TCRY's services and actions as the rail carrier. CP at 49-59. Indeed, the plan specifically spells out how TCRY would attempt to mitigate the introduction of unit trains into North

Richland. CP at 59. This plan was accepted by the City. CP at 46. Moreover, at the point that TCRY's TSA was terminated by the City, in its response, TCRY made clear to the City that TCRY owed an obligation of service to TCRY's customers along the Spur, including 10 NWA. CP at 62, 64.

Taking all facts and inferences in a light most favorable to 10 NWA, there exists then, more than sufficient evidence to establish the existence of a business expectancy that 10 NWA would receive rail service from TCRY on the Horn Rapids Spur.

The record also demonstrates that there existed at the time of the interference a second business expectancy. Specifically, it shows that 10 NWA and Gen-X signed a letter of intent between to build a biofuel facility within 10 NWA's original 33-acre purchase, based on rail service by TCRY. CP at 421, 540-41. Indeed, the existence of such an agreement is referenced both by Mr. Peterson, and the City's internal email. CP at 421, 540-41. Accordingly, when taken in the light most favorable to 10 NWA, the record is easily sufficient to demonstrate the existence of a business expectancy for summary judgment purposes. To the extent the trial court concluded otherwise, it was in error.

Knowledge

The record is also sufficient to defeat summary judgment on this element because it illustrates that City had knowledge of both 10 NWA's business relationship with TCRY and its business expectancy with Gen-X.

The Purchase and Sale Agreement expressly stated that the primary use of the property was to create business expectancies that were to be serviced by rail – specifically, by TCRY, through the TSA that was in place at the time. CP at 33. The agreement was signed by agents of the City. CP at 37. Moreover, as a condition precedent to the sale, the City required 10 NWA to submit, and itself to accept, an RMP. CP at 30. The RMP was prepared by TCRY at 10 NWA's request. CP at 49-59. The City acknowledges that the purpose of the RMP was to bind both 10 NWA and TCRY. CP at 41. The City also acknowledges that its subsequent termination of TCRY's rail access to the Horn Rapids Spur placed additional pressure on the Peterson family because it also owned 10 NWA. CP at 537.

As to this last point, a reasonable fact finder could easily conclude that this awareness could only have come about by a knowledge of the business relationship between the two entitles – a relationship upon which 10 NWA was dependent. Accordingly, when viewed in a light most favorable to 10 NWA, the record is sufficient, at a minimum, to raise a

genuine issue of material fact as to whether the city had knowledge of the relationship between 10 NWA and TCRY.

As to 10 NWA's business expectancy with Gen-X, the record demonstrates that the City's agent, Pete Rogalsky, received a copy of the press release at his City of Richland email address. CP at 540-41. It is readily apparent that he read the email, because he replied to it positively. CP at 540-41. Accordingly, when viewed in a light most favorable to 10 NWA, the record is also sufficient to demonstrate City's knowledge of its business expectancy regarding Gen-X for purposes of summary judgment.

Intentional Interference

Tortious interference is intentional "if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action. *Newton Ins. Agency & Brokerage, Inc., 114 Wn. App. at 158.* Here, as discussed above, the City was aware of both 10 NWA's business relationship with TCRY to provide rail access to its Horn Rapids property and its agreement with Gen-X. In discovery, the City admitted that it was aware that terminating the TSA would place additional pressure on TCRY because of the fact that the Peterson family owned both the railroad and 10 NWA. CP at 537. Moreover, the City received a letter from TCRY protesting the termination and advising that it

would affect TCRY's obligations to 10 NWA. CP at 62, 64. Accordingly, when viewed in a light most favorable to 10 NWA, the record is more than sufficient to permit a reasonable fact finder to infer the intentional nature of the City's interference with both 10 NWA's business relationship with TCRY and its business expectancy with Gen-X because it knew that the interference with one or both was either certain or substantially certain to occur. *Newton Ins. Agency & Brokerage, Inc.*, 114 Wn. App. at 158. This Court should therefore find sufficient evidence in the record precludes summary judgment as to this element.

Improper Purpose or Means

In order to be improper, interference must be wrongful in some way other than the mere interference itself. *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 510, 278 P.3d 197, *review denied*, --- P.3d--- (2012). Thus, the interference may violate a statute, regulation, recognized rule of common law, or an established standard of trade or profession. *Id.* An improper motive has also been held to satisfy this element. *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 606, 564 P.2d 1137 (1977). Here, sufficient evidence existed in the record to preclude summary judgment on this point by demonstrating that the interference was wrongful in three separate ways; (1) the interference was

wrongfully motivated, and conducted in bad faith; (2) the bad-faith interference led to bad-faith negotiations in violation of the 2001 TSA; and (3) The City's requirement that TCRY relinquish its rights to Richland Junction was arbitrary and capricious, and therefore wrongful. Each is sufficient to defeat summary judgment as to this element.

In *Cherberg*, a lessor refused to make repairs necessary to permit the lessee to continue to operate its business despite the fact that the lessee's disclosure that failure to repair would cause them substantial harm. *Id.* at 598. The lessor subsequently terminated the lease, and informed the lessee that it intended to post the building as unsafe, but never did so. *Id.* at 598-99. The lessee eventually moved back in and continued business after receiving the necessary repairs. *Id.* at 599. The lessees brought suit for various causes of action, including tortious interference with business expectancy. Evidence adduced at trial showed that the lessor had intended to regain control of the premises as soon as possible so that the property could be put to a more profitable use. *Id.* at 599. The trial court denied a directed verdict for defendants as to the tortious interference claim, and the jury found for the plaintiff. *Id.* at 599-600. On appeal, the Court of Appeals reversed and remanded for a directed verdict in the defendant's favor regarding the tortious interference claim. *Id.*

However, on review, our Supreme Court held that a jury could infer from the facts present in the record that the lessor had refused to make the repairs in an attempt to cause the lessee to vacate the premises so that the lessor could put the premises to a different, more profitable use. *Id.* at 606. The court went on to note that the facts of the case permitted an inference of a bad-faith motive, thereby precluding a directed verdict as to the element of improper purpose or means for tortious interference purposes. *Id.* Stated another way, the *Cherberg* court found the evidence permitted a fact-finder to conclude that the lessor's pressure tactic to induce the lessee to relinquish its rights was wrongful for purposes of tortious interference.

This case is analogous to *Cherberg*. Here, as in *Cherberg*, the City terminated the TSA with TCRY in an admitted attempt to leverage the railroad to surrender its rights to Richland Junction – rights that were in no way related to the Horn Rapids Spur, and were not implicated in the

original TSA, nor contemplated by the City's 2008 letter.[6] CP at 26-27, 46. Crucially, the City terminated the TSA between it and TCRY *prior* to conducting negotiations for a track use agreement wherein it made TCRY's continued access contingent upon it relinquishing rights to Richland Junction. CP at 46. From this evidence alone a fact finder could conclude that the City's subsequent negotiations for a Track Use Agreement were conducted in bad faith, thereby satisfying the wrongfulness requirement.

This inference is further bolstered by the fact that the City was aware that the termination of the TSA placed pressure on 10 NWA as well as TCRY, and that the railroad access was required for 10 NWA to utilize the property for the purposes for which it had been purchased and its improvements constructed. CP at 537.

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[6] It may be argued that if the City admitted its intents to TCRY in its termination letter that it was not proceeding in bad faith at all, but rather in open fashion. However, transparency is no defense to bad faith. Here, the City terminated TCRY's rights in the same breath that it acknowledged its motive for doing so – to force it to give up its rights to Richland Junction. CP at 46. However the mere fact that the Petersons were intentionally placed in an inferior bargaining position *prior* to negotiations for a Track Use Agreement is readily demonstrative of the wrongfulness of the City's actions, even if the City readily admits to it. Accordingly the City's admission is meaningless for purposes of absolving it of bad faith.

Thus, when taken together in the light most favorable to 10 NWA, sufficient evidence exists in the record from which a fact finder could infer a bad faith motive in the termination of the TSA in an effort to pressure TCRY to relinquish its rights to Richland Junction in order to continue operations on the Horn Rapids Spur. *Cherberg*, 88 Wn.2d at 606. To the extent the trial court determined otherwise, its decision was error.[7]

Assuming, *arguendo*, that a fact-finder could conclude that the City failed to negotiate the Track Use Agreement in good faith, that bad-faith also violated the TSA established in 2001, thereby satisfying the improper means element of this claim for summary judgment purposes. The record demonstrates that the 2001 TSA was intended by the parties to be replaced by a permanent Track Use Agreement. CP at 27. The record further demonstrates that the TSA required its permanent replacement be negotiated in good faith. CP at 27. Here, sufficient evidence exists to

[7] In its Brief Opposing Plaintiff's Motion for Reconsideration below, the City argued that 10 NWA has no standing to complain about the wrongful nature of its negotiations with TCRY. CP at 865. In advance of its reappearance, it should be pointed out that this argument simply misses the point. To clarify, "Standing" is a party's right to make a legal claim or seek judicial enforcement of a duty or right. Here, 10 NWA does not assert any claim for, or seek redress on behalf of TCRY. Rather, 10 NWA is pointing to demonstrable wrongfulness in support of its own claims – something which does not require TCRY's standing to do.

permit a fact-finder to conclude that the termination of the TSA prior to negotiation for a permanent Track Use Agreement violates the good faith requirement of the 2001 TSA because the City admittedly terminated the agreement so as to use track access as a lever to gain rights to an unrelated crossing. CP at 46.[8]

Finally, a municipality's arbitrary and capricious actions are considered evidence of tortious interference with a business expectancy. *Pleas v. City of Seattle*, 112 Wn.2d 794, 805, 774 P.2d 1158 (1989). A municipality's action is arbitrary and capricious if it is "willful and unreasonable action, without consideration and regard for facts or circumstances." *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

As previously discussed, at the time of the termination, City was aware of 10 NWA's relationship with, and reliance upon, TCRY to fulfill its other business relationships and expectancies. CP at 29-37. Moreover, the City was also aware of 10 NWA's agreement with Gen-X. CP at 540-41. Nevertheless, the City terminated TCRY's agreement *prior* to

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[8] That the same facts could also be read to be separately motivated by the City's evolving needs is merely indicative of the fact that a genuine issue of material fact exists.

negotiating for a Track Use Agreement in good faith as required by the existing TSA. CP at 27.

Consequently, the record suggests that the City's position was essentially "if you want to continue to eat, you know what we want." Such action, insofar as it involved Richland Junction, was arbitrary and capricious since it demonstrated a callous disregard for the circumstances of 10 NWA's business contracts and expectancies – a situation to which the City had given its blessing through the Purchase and Sale Agreement, the TSA, and the accepted RMP. *Landmark Dev., Inc.*, 138 Wn.2d at 573. Moreover, the circumstances involving 10 NWA and TCRY were unique because neither BNSF nor UP owned a customer located on the Spur – accordingly the City's request for junction rights was not nearly as burdensome on either of these interstate railroads.

Because the City's actions were arbitrary and capricious in relation to 10 NWA, they were wrongful, thereby satisfying this element of tortious interference. Here, the City terminated the TSA between it and TCRY, despite the fact that the agreement, though temporary in nature, had existed for nearly nine years uninterrupted. The stated purpose for the termination was to "establish a safe and fair operating environment on which multiple railroads may serve client businesses." CP at 46. However, the City went on to state that it "also intends to use this [track

use] agreement to create a clear path to its goal of completing Center Parkway." CP at 46.

In sum, sufficient evidence was present in the record from which a reasonable fact finder could conclude in multiple ways that the City's actions against TCRY were wrongful for purposes of tortious interference with 10 NWA's interests. To the extent the trial court determined otherwise, it erred.

Damages

Finally, 10 NWA must be able to demonstrate resulting damage. *Pacific Northwest Shooting Park Ass'n*, 158 Wn.2d at 351. Here, the record supports a finding that several types of damages are present. First, reasonable fact-finder could easily conclude from the above-discussed facts that 10 NWA has sustained damages as a result of the City's actions, because it currently enjoys a lower volume of traffic at its transloading facility than it would otherwise see. CP at 45. Moreover, a reasonable fact-finder could also conclude that the loss of the business expectancy with Gen-X is worthy of compensation. The precise amount of damages is a question for a trier of fact.

Second, in addition to the general damages described above, 10 NWA has also suffered lost value to its property because of the City's

tortious interference. Although 10 NWA is unable to state a precise damage amount, Washington generally permits plaintiffs to recover damages calculated under a lost asset theory, or a parallel means of arriving at a price an investor would pay for an asset. *Columbia Park Golf Course Inc., v. City of Kennewick*, 160 Wn. App. 66, 88-89, 248 P.3d 1067 (2011).

Here, Mr. Peterson has declared that 10 NWA's Horn Rapids Spur project, with all components, including rail access, was an asset worth between sixteen and twenty million dollars. CP at 422. This figure was arrived at utilizing the RMP agreed to by the City to determine the number of rail cars, the track or pit fee, and a reasonable cap rate of 8%. CP at 49-59, 422. This method of calculation is acceptable, since it permits the City to subject this damage measure to measurement, cross examination, and countervailing evidence at trial. *Columbia Park Golf Course Inc.*, 160 Wn. App. at 89. A reasonable fact finder could easily conclude from this information that 10 NWA suffered significant damage as a result of the City's tort. As previously stated, the existence of damages, as well as a precise amount, is a question for a trier of fact, to be proven at trial.

Third, the record also supports expenditure damages in the over five million dollars that 10 NWA invested in building facilities in the Horn Rapids Industrial Park. CP at 422, 425. Mr. Peterson testified that the

company would never have invested the money had it known that the City would terminate the TSA in an attempt to force TCRY to relinquish its rights to a crossing of track leased by TCRY. CP at 422, 425. Taking these facts in a light most favorable to 10 NWA, a reasonable fact-finder could conclude that damages occurred, and the trial court erred in concluding otherwise to the extent that it did. This court should therefore reverse and remand for trial on the issue of tortious interference.

In sum, the record, when taken in the light most favorable to 10 NWA, demonstrate that the trial court erred in granting summary judgment as to the tortious interference claim. That error merits reversal.

C. The trial court erred in granting summary judgment as to 10 NWA's inverse condemnation claim because there exist genuine issues of material fact which are based upon specific facts contained within the record.

The Washington State Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." WASH. CONST. art. I, § 16. An inverse condemnation claim is an action that alleges a governmental taking or damaging, and seeks to recover the value of the property that the government appropriated without a formal exercise of its eminent domain powers. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). Thus, a party alleging that an inverse condemnation has

occurred is required to establish (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal condemnation proceedings. *Id.* at 606. As discussed below, 10 NWA has more than established a prima facie case that each element is met with regard to the appropriation by Richland of track and siding installed in the Horn Rapids Spur.

As an initial matter, it is undisputed that City has not compensated 10 NWA for any property. It is likewise undisputed that the City is a governmental entity that has not instituted formal condemnation proceedings against 10 NWA's property, which is private in nature. Accordingly, the narrow question before this court is simply whether there was sufficient evidence contained within the record to create genuine issues of material fact as to whether a taking occurred, and whether the taking was for public use.[9]

A taking occurs when: (1) the government invades or interferes with the use or enjoyment of property, and (2) the market value declines as a result. *Gaines v. Pierce County*, 66 Wn. App. 715, 725, 834 P.2d 631 (1992), *review denied*, 120 Wn.2d 1021 (1993). A taking does not occur

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[9] The question of whether a taking has occurred is one of fact. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 18 n.9, 829 P.2d 765 (1992).

unless the governmental invasion causes damage which is permanent, recurring, or chronic and unreasonable. *Id.* Here, as discussed above, the record plainly shows that City interfered with 10 NWA's use of its property by terminating TCRY's rail access under the TSA.[10] Moreover, the termination is permanent. CP at 46.

The record is also sufficient to permit a fact-finder to conclude that 10 NWA's property has declined in value as a result of the City's interference. The 33 acre property was purchased from City for $660,000 in anticipation of the fact that, for 10 NWA, the property's highest and best use was for the purposes of constructing a transloading facility and also developing a biofuel facility, both of which were to be served by TCRY's rail service. CP at 26-37, 49-59. Mr. Peterson's testimony states that 10 NWA now considers the Horn Rapids Property to be a liability rather than an asset due to the City's interference because the company can no longer rely upon TCRY's rail access to create the originally anticipated volume. CP at 151-152. The existence of the accompanying loss of value is given credence by the fact that Gen-X did not follow through with its original intent to build biofuel facilities within the 10

[10] Notably, the interference required of an inverse condemnation claim does not require wrongfulness, unlike tortious interference. *See id.*; *Pacific Northwest Shooting Park Ass'n*, 158 Wn.2d at 351.

NWA property once rail access could not be guaranteed. CP at 421. Accordingly, there exists in the record then, sufficient evidence for a reasonable fact finder to conclude that a diminution in value has occurred since the property can no longer be used for its anticipated purpose; the amount of that diminution is a question for a jury.

A taking is for public use "when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof." RCW 8.08.020. Here, presuming that a taking is established, the subsequent question before this court is whether it was for the public use. This is easily established by the record, as the City has admitted on numerous occasions that it wished to pressure TCRY into relinquishing its rights to Richland Junction in order for the City to complete its Center Parkway project for what it considered the public good. *E.g.*, CP at 46. Accordingly, it is readily apparent that, viewed in a light most favorable to 10 NWA, the taking performed by the City was for the public use. To the extent the trial court concluded otherwise, it was in error.

In sum, there existed in the record sufficient evidence to demonstrate each element of inverse condemnation that could seriously have been questioned by the trial court. To the extent that the court

concluded no valid claim existed, it erred and this Court should reverse and remand for further proceedings.

D. The trial court abused its discretion in denying the motion for reconsideration because the initial record before it was sufficient to defeat summary judgment, and because the supplemented record was even more so.

This Court reviews a trial court's denial of a motion for reconsideration for an abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). A court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is manifestly unreasonable if the court applies the appropriate legal standard, but adopts a view that no reasonable person would take and the decision is outside the acceptable range of choice. *Id.* A decision is based upon untenable grounds or made for untenable reasons if it rests of facts unsupported in the record or was reached by applying the wrong legal standard. *Id.*

Here, the trial court abused its discretion in denying 10 NWA's motion for reconsideration in light of the record which, as discussed above, defeats summary judgment on the tortious interference and inverse condemnation claims. Because application of the appropriate legal standard permits 10 NWA's tortious interference and inverse

condemnation claims to survive, no reasonable person would have denied the motion and it was consequently outside the acceptable range of choices. Accordingly, the trial court's denial was manifestly unreasonable and should be reversed.

VI. CONCLUSION

When viewing the facts contained within the record in a light most favorable to 10 NWA, it is manifest that there exists more than sufficient evidence to defeat summary judgment as to the tortious interference and inverse condemnation claims. The trial court plainly erred in granting summary judgment as to both. Given that the court erred in granting summary judgment on these claims, it abused its discretion in denying the motion for reconsideration as well. Accordingly, this Court should reverse and remand for further proceedings.

DATED this 11th day of January 2013.

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