NO. 311171

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

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

Appellant,

vs.

CITY OF RICHLAND,
a municipal corporation

Respondent.

RESPONDENT'S BRIEF

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II. LAWSUIT

In 2008, plaintiff 10 North Washington Avenue, LLC, (10 NWA) purchased, from the City of Richland, a 33-acre tract of land lying in Richland's Horn Rapids Industrial Park. Prior to and after the sale, 10 NWA's related company, Tri-City Railroad Company, LLC, (TCRY) utilized, pursuant to a Temporary Service Agreement, Richland-owned Horn Rapids Spur, a short line track running through the Horn Rapids Industrial Park. The spur ran to or near 10 NWA's land. Richland revoked the Temporary Service Agreement in January 2010, because TCRY refused to sign a permanent Track Use Agreement offered by Richland. TCRY refused to sign the Track Use Agreement because the agreement would require that TCRY surrender rights to use a distant junction as a switching yard. Other rail carriers signed the Track Use Agreement and released rights to use the switching yard.

10 NWA complains of Richland's revocation of the Temporary Service Agreement. 10 NWA sues Richland alleging: (1) violation of the 2008 sale agreement; (2) violations of the covenant of good faith extending from the agreement; (3) tortious interference with business expectancies; and (4) inverse condemnation. CP 6-9. The Superior Court granted Richland summary judgment dismissing all four claims. CP 615-7. 10 NWA appeals only the dismissal of the tortious interference and inverse condemnation causes of action.

The gist of 10 NWA's claim is that Richland revoked the Temporary Service Agreement with TCRY and attempted to gain a concession from TCRY to release rights to use Richland Junction in exchange for a permanent Track Use Agreement. Assuming Richland engaged in wrongful conduct, TCRY, not 10 NWA, is the injured party. But if Richland wronged TCRY, TCRY would have filed suit against Richland, since TCRY is owned by the same individuals as 10 NWA. The Peterson family, who owns both companies, may have recognized that Richland had the right to terminate the Temporary Service Agreement, so, with this suit, it tries an end run by forwarding 10 NWA as the plaintiff and asserting strained claims of tortious interference and taking.

III. STATEMENT OF FACTS

10 NWA is a Washington limited liability company, formed in

2006. CP 136. The Peterson family owns the limited liability company, with father Randolph Peterson owning forty percent, and children Tobie, Rydell, and Rhett each owning a respective twenty percent share. CP 136. Randolph Peterson manages the company. CP 139, 40. 10 NWA owns property and provides administrative services to other companies owned by the Peterson family. CP 137.

Randolph Peterson created TCRY in 1999. CP 130. Tobie Peterson, Rhett Peterson, and Rydell Peterson respectively own twenty percent of the company, Randolph Peterson owns thirty-six percent, and two unrelated gentlemen own the remaining four percent. CP 131, 2. TCRY conducts business in California and Washington as a shortline railroad. CP 132, 3. A shortline railroad is a small or mid-sized railroad that operates over a short distance and exists, in part, to interchange traffic with other larger railroads. See:

http://en.wikipedia.org/wiki/Shortline_railroad.

TCRY operates in Benton County, Washington, on tracks under long-term lease with the Port of Benton[1], on tracks owned by the United States Department of Energy, and on tracks owned by Union Pacific

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[1] The Port of Benton is an independent government entity whose purpose is to foster economic development, trade and tourism in Benton County by providing quality infrastructure and multi-modal transportation at a variety of sites. http://portofbenton.com/wordpress/.

Railroad. CP 134. The company owns about one dozen locomotives and one dozen rail cars. CP 135. TCRY has provided shortline services for two large railroads, designated as Class I railroads, Union Pacific and Burlington Northern Santa Fe. CP 157, 9.

In December 2001, the City of Richland and TCRY entered a Temporary Service Agreement, under which Richland granted TCRY a temporary right to use Richland's Horn Rapids Spur. CP 25-7, 142. The spur runs about one and one-half mile through the Horn Rapids Industrial Park. CP 176. The parties entered the agreement so TCRY could serve a titanium plant at the end of the Horn Rapids Spur. CP 143. Richland built the spur track so railroad service could reach the plant. CP 143.

In May 2008, 10 NWA entered into an Agreement for Purchase and Sale of Real Property with the City of Richland, under which 10 NWA purchased 33 acres of vacant land, in the Horn Rapids Industrial Park[2], from Richland for $660,000. CP 28-39. 10 NWA purchased the property for the purpose of transloading commodities. Paragraph 6.3.2 of Agreement for Purchase and Sale of Real Property, CP 33. Transloading

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[2] Richland's Horn Rapids Industrial Park contains 4,000 acres of commercial and industrial zoned property on Richland's north side. Primary businesses include nuclear and environmental remediation companies. The record includes a color map of the Industrial Park and the park's vicinity. CP 115. The map identifies the acres owned by 10 NWA as "10 N. Ave LLC." The Horn Rapids Spur runs east to west immediately south of 10 NWA's land. The spur joins with Port of Benton rail lines. Some of the facilities identified on the map are proposed rather than in existence now.

is the process of transferring a shipment of freight from one mode of transportation to another, such as from truck to rail. http://en.wikipedia.org/wiki/Transloading. As part of the agreement, 10 NWA agreed to prepare a Rail Management Plan identifying rail traffic requirements and measures to mitigate rail traffic's impact on vehicle and pedestrian traffic. Paragraph 3.2 of Agreement for Purchase and Sale of Real Property, CP 30.

In July 2008, 10 NWA finalized its Rail Management Plan. CP 49-59. The City of Richland approved the plan by an August 13, 2008, letter from Gary Ballew, Manager of the city's Office of Business and Economic Development. CP 48. The letter, in part, warned that Richland could cancel TCRY's Temporary Service Agreement at any time:

> To date there has been limited use of the Horn Rapids Rail Spur. Currently the only rail line agreement between the City of Richland and TCRY is a very brief letter [the 2001 Temporary Service Agreement], which can be cancelled by either party at any time. To ensure that the rail line is adequately maintained, there must be a more detailed agreement prior to the movement of loaded rail cars on the Horn Rapids Rail Spur. The City is still in discussions with the Port of Benton regarding leasing the Horn Rapids Rail Spur and the Port of Benton may be a party to the agreement.

Richland deeded the 33 acres to 10 North Washington on August 15, 2008. CP 43.

Immediately upon entering the 2008 agreement with Richland, 10 NWA sold 12 of the acres it purchased to Central Washington Corn Processors (Corn Processors). CP 138, 139, 151. The half-moon area sold to Corn Processors lies entirely inside 10 North Washington's property[3]. CP 138, 9. 10 NWA used its facilities in handling commodities of Corn Processors. CP 156. The Corn Processors also built facilities on its land. CP 184. The Corn Processors and 10 North Washington are now engaged in litigation over commitments to one another. CP 184.

After purchasing the Horn Rapids acreage, 10 NWA built a railroad off-loading facility, a truck off-loading facility, railroad track improvements, and roads to the land. CP 154, 5. 10 NWA built a track from the Horn Rapids Spur to serve the PermaFix Environmental facility on and off the edge of its land.[4] CP 179. PermaFix treats radioactive waste. CP 145. TCRY provides switching services to PermaFix through use of the Horn Rapids Spur and 10 NWA's loop track. CP 147.

Rail carriers used the Horn Rapids Spur under temporary agreements for several years, during which time Richland negotiated with carriers, such as Union Pacific Railroad, Burlington Northern Santa Fe,

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[3] The Corn Processors' land is not depicted in the map of Horn Rapids Industrial Park.

[4] The PermaFix land is depicted on the Horn Rapids Industrial Park map. CP 115.

and TCRY for a permanent Track Use Agreement. In late 2010, Richland reached a Track Use Agreement with BNSF and Union Pacific and offered the same agreement to TCRY. CP 46. Under the agreement, BNSF and Union Pacific may use the Horn Rapids Spur. The rail carriers also gave up rights to Richland Junction, near Columbia Center and miles from Horn Rapids, as a switching area between the large carriers and shortline carriers. Richland wishes to build an at-grade crossing at Richland Junction. CP 46. The city considers the crossing important in that it would open access to Tapteal Street and expand business in the commercial neighborhood near Columbia Center. CP 200.

TCRY refused to sign the Track Use Agreement because of the provision requiring carriers to waive rights to use of Richland Junction. Randolph Peterson described the provision as a "terrorist act of Richland." CP 166. He agrees, however, TCRY was already harmed when BNSF and Union Pacific gained rights to use the Horn Rapids Spur. CP 167. Peterson also agrees that TCRY's release of a leasehold right to use the Richland Junction would not have financial impact on the company. CP 168.

Despite the expiration of the Temporary Service Agreement and TCRY's refusal to sign the Track Use Agreement, TCRY continues to run trains on the city-owned Horn Rapids Spur. CP 148. The company

operates on the track as an agent of Union Pacific Railroad. CP 74, 148. TCRY has numerous written agreements with Union Pacific Railroad covering various commodities and which garner TCRY revenue. CP 157, 158, 180, 181. Because of use of the Horn Rapids Spur as agent of another, 10 NWA's pit facility and loop track continue to be used, despite termination of TCRY's Temporary Service Agreement. CP 174. 10 NWA also agrees that it could build its own spur track and avoid use of the Horn Rapids Spur in order to reach its pit facility and loop track. CP 182.

Because of Richland's agreements with Union Pacific and BNSF, Richland Junction is no longer used to switch cars between the Class I carriers and shortline railroads such as TCRY. CP 169. Instead cars are switched in downtown Kennewick. CP 169. TCRY now moves the cars a further distance, but TCRY can not identify its additional costs. CP 169, 70.

Randolph Peterson testified that TCRY would perform more services on the Horn Rapids Spur beyond services performed as the agent of Union Pacific, if Richland had not ended the Temporary Service Agreement. CP 149. Nevertheless, 10 NWA's counsel objected to the question of whether additional services would be provided on the ground of speculation. CP 149. In depositions, TCRY representatives could not

identify the amount of income lost by reason of termination of the Temporary Service Agreement. TCRY 173, 177. Nor could 10 NWA identify any lost income to it. CP 173, 178. Rydell Peterson testified that an expert would be needed to calculate the amount of the loss and no expert was working on this task. CP 178.

TCRY formerly had carrier agreements with Burlington Northern Santa Fe (BNSF), but the agreements ended in 2009, before Richland revoked TCRY's Temporary Service Agreement along Horn Rapids Spur. CP 159, 192, 193, 194. BNSF decided to make direct deliveries to shippers along the Port of Benton rail facilities, rather than using the shortline services of TCRY. CP 159, 192, 193, 194. BNSF's conduct led to litigation, in federal court, between TCRY and BNSF. CP 161, 192, 193, 194. United States District Court Judge Ed Shea ruled that BNSF had the right to run trains on its own across the Port of Benton line. CP 116-28, 194. The loss of Burlington Northern's business led to a significant downturn in 10 NWA's and TCRY's commerce. CP 189-92. Before BNSF's running of trains directly on the Port of Benton line, BNSF handed off the railroad cars to TCRY at Richland Junction. CP 194.

Randolph Peterson opines that the value today of 10 NWA's remaining 21 acres is that it is a liability rather than an asset, because of Richland's conduct. CP 151, 2. Peterson, however, concedes he has no

expertise in real estate values. CP 152. 10 NWA has not hired anyone to appraise the land for this litigation. CP 152, 3. 10 NWA has no interest in selling the land. CP 152. 10 NWA has a large remainder of the 33 acres left for other projects. CP 165.

Randolph Peterson believes Richland staff members Pete Rogalsky, Gary Ballew, and Bill King wish to harm 10 North Washington, based upon an e-mail in which King allegedly made disparaging remarks about Randolph Peterson and his family. CP 163, 4. Peterson is not aware of other disparaging remarks. CP 164. 10 NWA's government liaison David Samples, who met and worked with Richland staff, testified that Gary Ballew and Pete Rogalsky were cooperative and did not wish to harm 10 NWA. CP 188, 191.

On March 28, 2011, Richland sent to 10 NWA interrogatories and requests for production. CP 76-101. Interrogatory 27 asked 10 NWA to list all business expectancies with which Richland interfered and the income received from each expectancy. CP 87. Interrogatory 28 sought identification of Richland's improper purpose when interfering with 10 NWA's business expectancies and contracts. CP 87. Interrogatories 32 and 33 sought the current fair market value of 10 NWA's land and the value of the property if Richland had not allegedly violated duties owed 10 NWA, while interrogatory 36 asked for the decrease in the value of the

property caused by Richland's actions. CP 89, 90. Interrogatory 43 asked 10 NWA to disclose the revenue it expected from its property. CP 91. The requests for production of documents sought financial records of 10 NWA, including tax returns, financial statements, financing papers, expense records, pro formas, property appraisals, customer contracts, and income statements. CP 95-101. By the time, Richland filed its summary judgment motion, 10 NWA had not answered any interrogatories nor produced any documents. CP 22, 23.

In its brief, 10 NWA writes that termination of the Horn Rapids Spur temporary access agreement forced 10 NWA "to break its agreement with Gen-X." The record does not show any breaking of an agreement or contract. 10 NWA has produced no agreement with Gen-X. In his affidavit, Randolph Peterson referred to a letter of intent and the discontinuation of a "commitment" with Gen-X. CP 421. Richland moved to strike the reference to the letter of intent, since the letter was not attached to the declaration. CP 545, 6.

After the Superior Court granted Richland's summary judgment motion, 10 NWA filed a motion for reconsideration that included three affidavits. CP 641-56; CP 715-851. 10 NWA did not explain in its motion why it did not include the facts stated in the affidavits in earlier affidavits.

IV. ARGUMENT

A. AS A MATTER OF LAW RICHLAND DID NOT TORTIOUSLY INTERFERE WITH ANY BUSINESS EXPECTANCY.

The tort of interference with a business expectancy prohibits wrongful interference of a valid contractual expectancy by third parties. *Johnson v. Yousoofian*, 84 Wn.App. 755, 763, 930 P.2d 921 (1997). The prima facie elements are: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that the interferor interfered for an improper purpose or used improper means; and (5) resultant damage. *Johnson v. Yousoofian*, 84 Wn.App. 755, 763, 930 P.2d 921 (1997). In response to Richland's summary judgment motion, 10 NWA failed to show facts supporting elements 1, 3, 4, and 5.

1. NO VALID BUSINESS EXPECTANCY.

The first element of tortious interference with business expectancy is a valid business expectancy. On appeal, 10 NWA contends Richland interfered with two business expectancies, a relationship with TCRY and a letter of intent with Gen-X. Before the Superior Court, 10 NWA argued that the two business expectancies, with which Richland interfered, were a

contract with Central Washington Corn Processors and the letter of intent with Gen-X. 10 NWA did not contend that Richland interfered with a relationship with TCRY. CP 412, 3. Therefore, this reviewing court should not entertain a claim based upon any alleged relationship with TCRY. An appellate court generally will not address claims not addressed by the trial court. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002); *Outsource Services Management, v. Nooksack Business Corp.*, __ Wn.App. __, 292 P.3d 147, ___ (2013).

10 NWA's claim based upon a purported letter of intent with Gen-X cannot be considered a valid business expectancy for at least two reasons. First, 10 NWA did not produce a copy of a letter of intent. Second, a letter of intent would be terminable at will and a terminable at will agreement cannot form the basis for a claim of tortious interference.

In his declaration opposing the summary judgment motion, Randolph Peterson referred to a letter of intent with Gen-X Energy Group. CP 421. He failed to attach a copy of the letter, however. Nor was any letter produced in discovery. Richland moved the court for an order striking the declaration on the ground of the best evidence rule, ER 1002, which requires production of the writing to prove its contents. CP 545, 6. Also, CR 56(e) demands that the declarant attach sworn copies of papers mentioned in the affidavit. CP 546. The Superior Court denied the

motion to strike, CP 616, perhaps because striking the declaration would not have made a difference in the outcome. Nevertheless, this court may affirm the summary judgment order on a basis other than used by the trial court. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). This court may affirm summary judgment on any grounds supported by the record. *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn.App. 449, 453, 266 P.3d 881 (2011).

If the contract, upon which the plaintiff bases his claim of a business expectancy, is terminable at will, Washington courts have held that the element of the tort is not satisfied. See *Woody v. Stapp,* 146 Wn.App. 16, 189 P.3d 807 (2008); *Raymond v. Pacific Chemical*, 98 Wn.App. 739, 992 P.2d 517 (1999), reversed on other grounds, *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 20 P.3d 921 (2001). A letter of intent must be considered terminable at will, since a letter of intent is non-binding. *Farm Crop Energy, Inc. v. Old Nat. Bank of Washington*, 38 Wn.App. 50, 59, 685 P.2d 1097 (1984); *Van Leer v. Deutsche Bank Securities, Inc.*, 479 Fed.Appx. 475, 480 (4th Cir.2012); *Minelli Const. Co., Inc. v. Volmar Const., Inc.*, 82 A.D.3d 720, 721, 2, 917 N.Y.S.2d 687 (2011); *Midtown Realty, Inc. v. Hussain*, 712 So.2d 1249 (Fla.App.1998). In *Farm Crop Energy, Inc. v. Old Nat. Bank of Washington*, the court ruled that the trial court could have instructed the jury that a letter of intent

was not binding, although its failure to so instruct was not prejudicial error.

2. NO INTENT TO INTERFERE.

The third element of the tort of interference with a business expectancy has two discrete components: (1) an intent to interfere with plaintiff's business expectancy; and (2) a termination of the business expectancy. Under the undisputed facts 10 NWA fails to satisfy each component of the third element of tortious interference.

Proof of the tort of interference requires a showing of an intent to interfere with the private business relation. *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots, West Coast and Pac. Region Inland Division, Branch 6*, 92 Wn.2d 762, 768, 600 P.2d 1282 (1979). Conduct is generally not improper if it was merely a consequence of actions taken for a purpose other than to interfere with a contract. 44B Am.Jur.2d *Interference* §17 (2013). *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 244 (Iowa.2006). Richland hopes the best for 10 NWA, since it is one of the city's taxpayers. Other than a misreading of an e-mail, 10 NWA presented no testimony that Richland intended to interfere in any of 10 NWA' business relationships. 10 NWA's one agent, who had the most contact with Richland, testified that Richland representatives held no ill will towards 10 NWA.

3. NO TERMINATION OF A BUSINESS RELATIONSHIP.

A tort occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another. 44B Am.Jur.2d *Interference* §1 (2013). A necessary element of the tort of interference is a showing that the defendant played an active and substantial part in causing the loss to plaintiff. 44B Am.Jur.2d *Interference* §17 (2013). One who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby. *Houser v. City of Redmond*, 16 Wn.App. 743, 745, 559 P.2d 577 (1977).

The undisputed facts show that Richland's revocation of the Temporary Service Agreement did not end TCRY's business with 10 NWA. TCRY still conducts business with 10 NWA and still uses the Horn Rapids Spur and 10 NWA's pit facility and loop track. CP 74, 148, 157, 158, 174, 180, 181. 10 NWA also agrees that it could build its own spur track and thereby afford TCRY additional access to 10 NWA's pit facility and loop track. CP 182.

10 NWA argues that Gen-X relocated its proposed project to Moses Lake, but it provides no testimony from Gen-X representatives as

to the reason for the relocation. The facts show that TCRY continued to have access to 10 NWA's rail facilities anyway and even could gain additional access such that the lack of rail service for Gen-X could not reasonably be a cause of any relocation to Moses Lake.

4. NO IMPROPER PURPOSE NOR MEANS.

10 NWA's tortious interference fails as a matter of law for a fourth reason. 10 NWA cannot satisfy element four of the tort- that Richland engaged in an improper purpose or acted with an improper means.

Interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession. *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn.App. 502, 510, 278 P.3d 197 (2012). When interfering in a business relationship, the defendant generally persuades through bribery, unfounded litigation, defamation, misrepresentations, or threats to a third party to end a business relationship with the plaintiff. 44B Am.Jur.2d *Interference* §17 (2013). As a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be "lawful" and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190, 818 N.E.2d 1100

(2004). This is not the case here. 10 NWA cites no statute, regulation, rule of common law, or established standard of trade violated by Richland. 10 NWA principally relies upon *Cherberg v. Peoples National Bank of Washington*, 88 Wn.2d 595, 564 P.2d 1137 (1977). Cherberg's landlord refused to repair damaged outside walls within a reasonable time after notification from the city that the building was structurally unsound. The landlord's refusal to act constituted a breach of the implied covenant of quiet enjoyment and resulted in actionable constructive eviction. Even absent the mandate from the city, the landlord was under the duty to repair the outside wall since it expressly retained control over such portions of the premises under the lease. Evidence showed that the landlord refused to timely make the repairs because it wished tenant Cherberg to abandon his lease, so that the property could be put to a more profitable use. The court ruled that the willful refusal to make repairs, when the landlord held a duty to do so, could give rise to an action in tort for intentional interference with the tenant's business expectancies with third parties. Unlike Cherberg's landlord, Richland did not wilfully breach any provision of an agreement with 10 NWA. Richland has not attempted to drive 10 NWA from its property.

10 NWA complains that Richland demanded, in the permanent Track Use Agreement, that TCRY give up rights to use Richland Junction.

Richland and TCRY entered a Temporary Service Agreement, in 2001, that permitted the latter to operate on the spur for a period of thirty (30) days. The agreement explicitly provided that, after the 30-day period, the agreement could be terminated by either party on ten days' written notice. In 2010, both Union Pacific and BNSF signed the new Track Use Agreement covering the Horn Rapids Spur. Richland offered the same Track Use Agreement to TCRY and remains willing to enter the agreement with TCRY. TCRY even continues to use the Horn Rapids Spur as the agent of Union Pacific.

The City's efforts to relocate the rail interchange operation away from Richland Junction violated no law nor obligation to any party. Under 49 U.S.C. §10742, "connecting carriers are required to interchange traffic with each other. Usually they do so on the basis of mutual agreement. This is an operational matter that carriers should be able to settle themselves." *Norfolk Southern Railway Company -- Petition for Declaratory Order -- Interchange with Reading Blue Mountain & Northern Railroad Company*, Docket No. 42078 (STB[5] served April 29, 2003) at 4 [2003 WL 1963547]. As a result, "the determination of an interchange point for the required through movement is, in the first instance, 'a matter of mutual consultation and agreement' between the two

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[5] Surface Transportation Board

carriers." *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 2 S.T.B. 235, 243 (1997) (quoting *New York, C. & St. L. R. Co. v. New York Cent. R. Co.*, 317 I.C.C. 344, 346 (1961)).

Richland had the right to terminate the Temporary Service Agreement. Otherwise, TCRY, controlled by the same owners as 10 NWA, would have sued Richland for wrongful termination. Richland need not even prove that it was legally correct to revoke the Temporary Service Agreement, as long as the city had a reasonable basis for believing its action was lawful. A party is not guilty of tortious interference if it acts pursuant to its own lawful economic interests. *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wn.App. 1, 11, 776 P.2d 721 (1989). Exercising one's legal interests in good faith is not improper interference. *Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, 169 Wn.App. 111, 132, 279 P.3d 487 (2012). A defendant who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference. *Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, 169 Wn.App. 111, 132, 279 P.3d 487 (2012).

In *Tacoma Auto Mall, Inc. v. Nissan North America, Inc.*, a car manufacturer refused to consent to a dealer's request to transfer a dealer franchise to a third party. The dealer agreement allowed the manufacturer

the right to refuse. The Court of Appeals therefore summarily dismissed the dealer's claim of tortious interference with its agreement to sell the franchise.

Richland need not disclose its reason for demanding the end to the use of Richland Junction as an railroad interchange, but the city has done so anyway. Richland wants a grade crossing at Richland Junction, in order to facilitate traffic and further economic expansion in the neighborhood. Richland wishes to "spur" commercial development and to raise the city's tax base. The court should encourage these goals of Richland. Furthering economic growth is a legitimate public purpose. *Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*, 159 Wn.2d 555, 151 P.3d 176 (2007); *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500, 530 (2004); aff'd 545 U.S. 469 (2005); *General Bldg. Contractors, L.L.C. v. Board of Shawnee County Com'rs, Shawnee County*, 275 Kan. 525, 66 P.3d 873, 880 (2003); and *Dannheiser v. City of Henderson*, 4 S.W.3d 542, 546, 7 (1999). 10 NWA cites no law to the end that these goals are improper purposes. Therefore, 10 NWA has not provided evidence of Richland employing an improper means. See *Johnson v. Yousoofian*, 84 Wn.App. 755, 763, 930 P.2d 921 (1997).

10 NWA argues that Richland acted "arbitrary and capricious," but this argument was not advanced at the trial court level. See CP 411-3. An

appellate court generally will not address claims not addressed by the trial court. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002); *Outsource Services Management, LLC v. Nooksack Business Corp.*, __ Wn.App. __, 292 P.3d 147, ___ (2013). A city's action is "arbitrary," if it is "willful and unreasonable action, without consideration and regard for facts and circumstances." *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Steps taken to further economic development are not unreasonable. 10 NWA cites no law to the contrary. If Richland's actions were arbitrary and capricious, TCRY should be the one to sue Richland.

For the first time on appeal, 10 NWA suggests that Richland violated the Temporary Service Agreement with TCRY by failing to negotiate in good faith a new agreement. The final paragraph in the Temporary Service Agreement includes this language. Once again, an appellate court generally will not address claims not addressed by the trial court. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002). Anyway, 10 NWA failed to present, in its opposition to the summary judgment motion, facts concerning negotiations. Richland and TCRY negotiated over a period of years. Richland eventually offered TCRY the same terms the city offered others using the Horn Rapids Spur. If Richland violated the provision of the Temporary Service Agreement,

TCRY could have sued Richland.

5. NO DAMAGES.

An essential element of a claim of tortious interference is damages. 44B Am.Jur.2d *Interference* §14 (2013). An action cannot be maintained for interference with a contract for breach of which only nominal damages could be recovered. *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092 (11th Cir.1994), applying Florida law.

Demanding that TCRY forgo rights at Richland Junction has not resulted in any damages. TCRY does not use Richland Junction anymore, so its signing of a Track Use Agreement, under which it released rights to use the junction, could cause no harm. CP 169. TCRY interchanged cars with Burlington Northern and Union Pacific at Richland Junction, but BNSF ended its relationship with TCRY before Richland asked TCRY to sign the Track Use Agreement. BNSF no longer wanted to conduct business with TCRY. Union Pacific and TCRY have agreed to interchange rail traffic at another location. BNSF and Union Pacific released rights to use Richland Junction.

In depositions, 10 NWA' agents could not answer questions as to what, if any, damages it sustained due to conduct of Richland. 10 NWA also failed to respond to interrogatories asking for information on damages and requests for production seeking financial records supporting a claim

for damages. When Richland raised the failure to comply with discovery requests in support of its summary judgment motion, 10 NWA argued that Richland had not filed a motion to compel and thus 10 NWA need not have responded to the discovery requests. Nevertheless, a party need not file a motion to compel for the duty to respond to discovery requests to arise. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 588, 220 P.3d 191 (2009). A party has an obligation to produce the documents by the discovery requests themselves. *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 588, 220 P.3d 191 (2009).

B. AS A MATTER OF LAW RICHLAND DID "TAKE" PROPERTY OF 10 NORTH WASHINGTON IN VIOLATION OF THE CONSTITUTION.

1. NO TAKING OF PROPERTY.

Washington Const., Art. 1, § 16, requires just compensation for the property owner when a government entity takes or damages private property for a public use. When a property owner contends its property is taken and the government did not commence a formal condemnation proceeding, the owner may seek damages in an inverse condemnation suit. *Granite Beach Holdings, LLC v. State Department of Natural Resources*, 103 Wn.App. 186, 205, 11 P.3d 847 (2000). The elements required to establish inverse condemnation are: (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 proceedings. *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005). 10 NWA cannot satisfy at least one element - a taking or damaging of property rights for a public use.

There are two forms of takings. The first, physical occupation, "occurs when government encroaches upon or occupies private land for its own proposed use." *Berst v. Snohomish County*, 114 Wn.App. 245, 255, 57 P.3d 273 (2002). The second, regulatory takings, occurs when "government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Berst v. Snohomish County*, 114 Wn.App. 245, 255, 6, 57 P.3d 273 (2002). Richland has not physically occupied or encroached on any of 10 NWA's land. Nor has Richland adopted any regulation that limits the use of 10 NWA's land. Therefore, there is no taking or damaging.

Richland revoked a temporary use agreement that allowed TCRY to use a spur track. No decision supports a conclusion that terminating a revokable agreement works a taking. Nor does 10 NWA forward a case supporting its implied argument that a landowner has a property right in access to the land by rail.

The right to cross adjoining land is not a property right that is incident to the ownership of the land to be developed, unless the right is obtained by agreement. *Granite Beach Holdings, LLC v. State Department of Natural Resources*, 103 Wn.App. 186, 206 (2000). There can be no inverse condemnation if no property right exists. *Granite Beach Holdings, LLC v. State Department of Natural Resources*, 103 Wn.App. 186, 205 (2000). In *Granite Beach Holdings*, a property owner sued in inverse condemnation because the Department of Natural Resources would not allow use of its logging road for the owner to gain access to his land. The claim was dismissed because the owner had no property right to access across the road.

Richland's conduct has not even blocked rail access to 10 NWA's land. Richland has not removed the Horn Rapids Spur. The spur still affords railways, such as Union Pacific and BNSF, egress to the land. 10 NWA has no property right to insist that one of its sister companies have rail access. Nevertheless, TCRY still has access to 10 NWA's land since TCRY can use the Horn Rapids Spur as an agent of Union Pacific Railroad.

In an analogous situation involving vehicle access to land, a landowner may sue to gain access across a neighbor's property, but only if the landowner does not otherwise have reasonable access. The term used

for this access is a "private way of necessity." RCW 8.24.010. A defense to such an action is the existence of a feasible alternative for access. *Kennedy v. Martin*, 115 Wn.App. 866, 870, 63 P.3d 866 (2003). 10 NWA concedes that it has another route on which it could build its own spur. CP 182.

2. NO DAMAGES TO PROPERTY.

A landowner can generally testify to the value of his property. Nevertheless, 10 NWA failed to answer discovery requests concerning the value of its property and any damages sustained by Richland's conduct. So the court should not entertain any testimony of damages, an essential element to recovery in inverse condemnation.

Randolph Peterson claims in a declaration that the 10 NWA land is now valueless. An owner of land may often testify to the value of his land. Nevertheless, Peterson readily admitted he had no expertise in real estate values, so the court may not accept his opinion. A controlling decision is *Port of Seattle v. Equitable Capital Group*, 127 Wn.2d 202, 898 P.2d 275 (1995). The Evergreen State high court affirmed a trial court's decision to strike the testimony of the owner as to the value of property, since the owner identified no theory or technique upon which he formulated his opinion. Although a landowner has the right to testify concerning the fair market value of his property, this right is not absolute. 127 Wn.2d at 279.

In *State v. Larson*, 54 Wn.2d 86, 338 P.2d 135 (1959), the court also struck the testimony of the landowner.

In *K&R Partnership v. City of Whitefish*, 344 Mont. 336, 189 P.3d 593 (2008), the reviewing court held that the trial court abused its discretion when permitting the landowner to testify to property values in an inverse condemnation suit. The owner gave no rational basis of his opinion of value. While an owner may testify to property damage, when an owner's opinion is based on improper elements or foundation, his opinion loses its probative value. In *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780, 783 (Mo.App.1992), the appeals court reversed an award of damage to property because of the landowner's testimony of loss lacked probative value.

C. THE SUPERIOR COURT CORRECTLY DENIED 10 NWA'S MOTION FOR RECONSIDERATION.

10 NWA's motion for reconsideration added nothing substantive to the lawsuit such as to change the outcome of the suit. Nevertheless, the court was free to ignore the motion anyway.

Despite filing three new declarations in support of its motion, 10 NWA failed to ask for reconsideration of the summary judgment ruling on the ground of newly discovered evidence. Newly discovered evidence is a basis for a motion for reconsideration. CR 59(a)(4). But of course the

evidence must be newly discovered.

CR 59(c) sets out the timetable for the nonmoving party to file its opposing memoranda, affidavits, and other documentation. Under this rule, a nonmoving party is not permitted to file responding documents any later than 11 calendar days before the hearing. *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 498, 183 P.3d 283 (2008). If the adverse party states in an affidavit that he or she is unable to present facts essential to its opposition, the court may, among other things, "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." CR 56(f). 10 NWA never sought a continuance of the earlier summary judgment hearing in order to procure the declarations later filed.

Granting of reconsideration on the ground of newly discovered evidence requires that evidence is such as will probably change the result of the case, that it has been discovered since trial, that it could not have been discovered before trial by exercise of due diligence, that it is material to an issue, and that it is not merely cumulative or impeaching. *Praytor v. King County*, 69 Wn.2d 637, 639, 419 P.2d 797 (1966); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn.App. 73, 88, 60 P.3d 1245 (2003). In *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 498, 183 P.3d 283 (2008), the superior court and court of appeals scorned a declaration filed in support of a

motion for reconsideration of a summary judgment order, since the facts in the declaration were available to the moving party at the time of the summary judgment hearing.

V. CONCLUSIONS

The Superior Court correctly granted the City of Richland summary judgment dismissing all claims of 10 NWA. The undisputed facts, as a matter of law, do not support either a claim for tortious interference or for inverse condemnation for numerous reasons. The Superior Court also correctly denied 10 NWA's motion for reconsideration. Richland requests that this reviewing court affirm the trial court's rulings.

DATED this 12TH day of February, 2013.

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Attorneys for Appellee City of Richland

GEORGE FEARING #12970

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF BENTON)

The undersigned, being first duly sworn on oath, deposes and says:

That on February 12, 2013, affiant deposited in the mails of the United States a properly stamped and addressed envelope directed to:

Brandon L. Johnson
Minnick Hayner
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249 W. Alder Street
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Walla Walla, WA 99362

containing a true and correct copy of respondent's brief, and this affidavit of mailing.

Kristi Flyg
KRISTI L. FLYG

SUBSCRIBED AND SWORN TO before me this 12th day of February, 2013.

Karen L. Gothel
Notary Public in and for the state of Washington, residing at Kennewick
Karen L. Gothel
NAME OF NOTARY PUBLIC (TYPE OR PRINT)
My commission expires: 11/6/2015