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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

TT PROPERTIES, LLC,

Appellant,

v.

CITY OF TACOMA,

Respondent.

APPELLANT TT PROPERTIES, LLC'S OPENING BRIEF

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I. INTRODUCTION

This is an inverse condemnation damage action involving two separate properties in downtown Tacoma owned by appellant TT Properties, LLC ("TT Properties"), a family-owned entity consisting of members of the Turner family. One property is located at 2620 Pacific Avenue in Tacoma (sometimes referred to as the "Pacific Avenue Property"). The other property is at 223 E C Street in Tacoma (sometimes referred to as the "C Street Property").

The action was filed after the City of Tacoma, in participation with Sound Transit, completely eliminated all access to a public road, Delin Street, abutting the Pacific Avenue Property; and substantially impaired a public ally way access to the C Street Property by allowing Sound Tansit to construct an improvement encroaching on the ally way. The trial court dismissed the inverse condemnation action on summary judgment.

The trial court erred. With regard to the Pacific Avenue Property, the trial court failed to recognize that complete elimination of access to an abutting public road is a *per se* taking. The trial court instead incorrectly applied a circuitry of travel analysis that should only be applied when there is either a partial taking of or damage to access to an abutting road, or when the government action simply regulated

traffic flow so as to impact nonabutting property owners. With respect to the C Street property, the trial court improperly invaded the province of the jury when it determined, as a matter of law, that the impairment to the ally way was insubstantial.

This Court should reverse the trial court and remand the matter for a trial on the merits of these inverse condemnation claims.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Appellant TT Properties assigns error to the trial court's ruling on summary judgment that TT Properties does not have standing to assert an inverse condemnation claim because there was no compensable taking. The trial court's summary judgment order is at CP 267-68, which order was subsequently revised solely to set forth the pleadings relied up by the trial court and comply with RAP 9.12. (See 278-80.)

The issues presented on this appeal are as follows:

1. Was it error to hold, as a matter of law, that there is no compensable taking where appellant TT Properties owns property that abuts and accessed the public Delin Street and all access to Delin Street was destroyed?

2. Was it error to hold, as a matter of law, that there is no compensable taking where the degree of damage caused to a public right of way access is a question of fact for the jury?

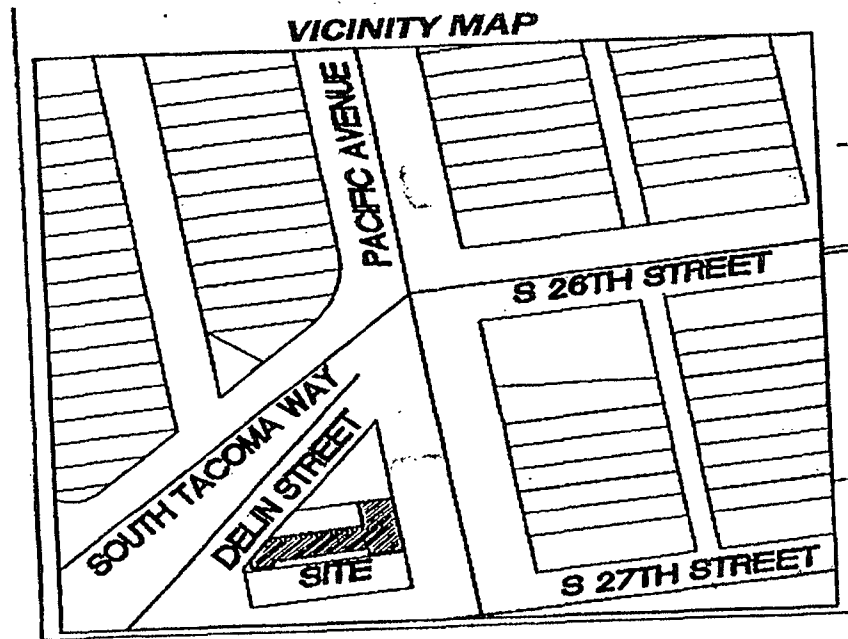
III. STATEMENT OF THE CASE

As noted earlier, the property that is the subject of this inverse condemnation is owned by TT Properties, which is a family-owned entity consisting of members of the Turner family. Both the Pacific Avenue Property and the C Street Property have been in the Turner family for approximately 60 years. (CP 187-88.)

A. The Pacific Avenue Property.

In 1944 grandfather George Turner and his wife Helen purchased the Pacific Avenue Property, which at that time was part of an entire city block (block 7612) at the intersection of Pacific Avenue and 26th Street. (CP 188.)

The grandparents improved the south part of the property with a two story building containing approximately 5,000 square feet on each floor. The lower level was utilized as a service garage with five bays and an office area. The upper level contained five apartment units. The property was bordered by Pacific Avenue, Delin Street and S. 27th Street (see vicinity map below). (CP 188.)



While 27th Street provides some access for the apartments on the upper level of the building, the existing structure and the grade and topography of the site preclude access from 27th Street to the service garage on the lower level. (See photographs at CP 127, 124-25, 130, 137, 110-15. See *also* CP 155-56.) For the service garage, customers entered on Pacific Avenue and exited on Delin Street. (CP 188.)

In 1952 the grandparents sold the north portion of the property (2610 Pacific Avenue) to the City of Tacoma for use in connection with the construction of Highway 99. (CP 189.) But this triangle-shaped portion of property being sold to the City provided the means by which

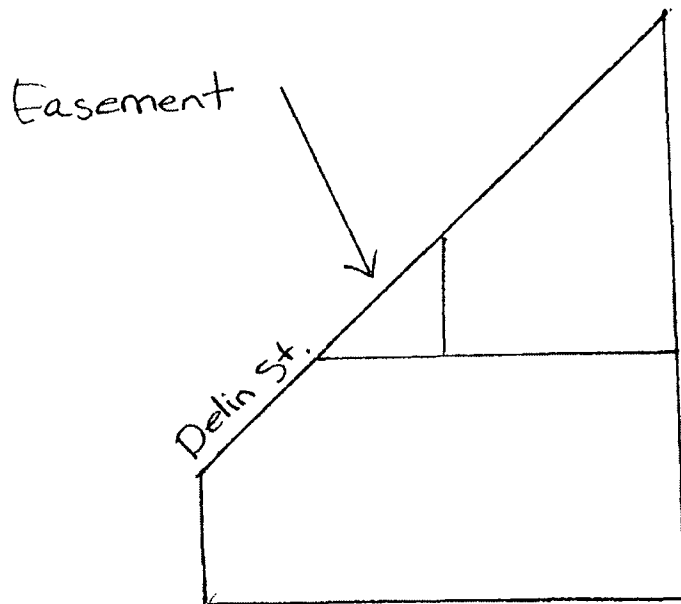
the service garage customers exited onto the abutting Delin Street. While it also abutted Delin Street, the grade difference and development on the Pacific Avenue property being retained by the Turner family hindered access to Delin Street. (See CP 155-56; see also CP 130.) Accordingly, to preserve access via Delin Street, an easement was reserved over the property sold to the City. (CP 189, 195.) Specifically, the deed conveyed the property to the City conditioned as follows:

EXCEPTING, easement for existing roadway over the property described as follows:

Commencing at the southeast corner of the north 5 feet of lot 2, Block 7612, The Tacoma Land Company's First Addition to the City of Tacoma, Washington Territory, thence on the south line of said North 5 feet West 62 feet to the true point of beginning for this description, thence continuing on said South line West 18.21 feet to the northerly line of said block, thence on said block line northeasterly 26.87 feet to a line parallel with and 62 feet West of the East line of said block, thence on said parallel line south 19.73 feet to the true point of beginning. (Underlining added.)

(CP 120, 195.) The easement was paved. For over 60 years trucks entering the Turner property would enter on Pacific Avenue and exit to Delin Street over the easement on City property. (CP 189. See also, photographs at CP 112-13.)

Below is a drawing that depicts the location of the easement with respect to the TT Properties' and the City's adjoining properties and Delin Street. On the page following this hand drawing is an aerial photograph of this same area taken in 2005 that depicts the access from Pacific Avenue and the exit over the easement to Delin Street. (Pacific Avenue is on the east / right and Delin Street is on the west /left.)



(See drawing of easement per legal description at CP 183, 178, 181.)



(CP 113.)

Turner Towing Company occupied the lower floor of the Pacific Avenue Property from the late 1940's until 1986 when the towing business was sold. (CP 189.) The Turner family continued to own the property and leased the lower floor to various automotive related businesses, the last of which was Premier Transmission. (*Id.*) In approximately September 2009, Premier Transmission moved out. All of the various automotive related businesses used the Delin Street exit on a regular basis. (*Id.*)

In 2009, Sound Transit commenced its D to M Street Track and Signal Project (the "Project"). (CP 189.) In 2010 TT Properties signed a

temporary construction easement to Sound Transit which allowed Project contractors access to a portion of TT Properties' property for on-site grading work. No mention was made that Delin Street, or TT Properties' access to Delin Street, would be destroyed. (CP 189-90.)

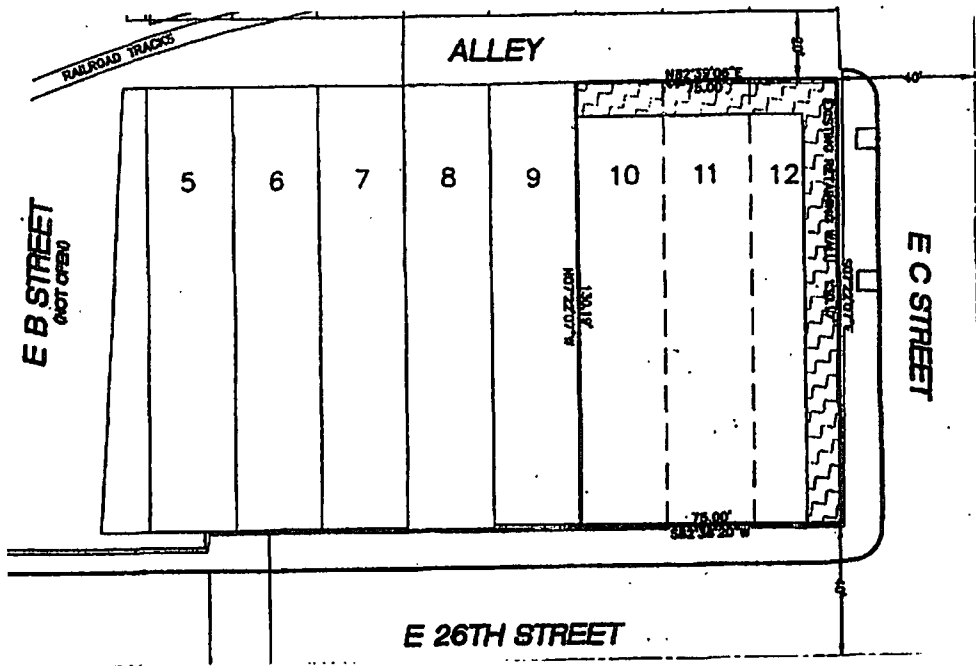
In 2011, as part of the Project, Delin Street as it abutted TT Properties' property, and TT Properties' easement access to Delin Street, were destroyed. (CP 190.) Delin Street's grade was changed such that it was converted from a traversable street to a right-of-way slope area. (CP 154, 250, n. 3.) At the time TT Properties did not know who physically destroyed Delin Street or its easement. TT Properties subsequently learned the access was destroyed by contractors hired by Sound Transit. (CP 190.) However, Sound Transit only so acted after it entered into a Right-of- Use Agreement with the City allowing Sound Transit to destroy Delin Street and TT Properties' access to Delin Street. (CP 189, 197-248.) The Right of Use Agreement provided that "it is in the best interests of the public that the City authorize such use of the public rights of way." (CP 197.)

The destruction of Delin Street and TT Properties' access to Delin Street has had a significant negative impact on the value of the Pacific Avenue Property. (CP 184-85.) In 2013, TT Properties sold the property at a much reduced price retaining claims against Sound

Transit and the City for the destruction of Plaintiff's access to Delin Street. (CP 190.)

B. The C Street Property.

The C Street property has also been in the Turner family for approximately 60 years. (CP 190.) A drawing of the Property is set forth below:



(CP 191.)

A City owned alley way abuts the North side of Plaintiff's C Street property. The alley way serves as an entrance to Plaintiff's property on the north. (CP 191.)

In 2012, under the Right of Use Agreement, the City allowed Sound Transit to construct what the City calls a utility bungalow on a portion of the alley way. (CP 191.) Although the bungalow only intrudes a little over one foot into the alley way, it rests for the most part on other City owned and unoccupied property. (*Id.*)

For over 60 years trucks entering the C Street property would swing wide over the area now occupied by the utility bungalow to enter Plaintiff's property. (CP 191.) The presence of the bungalow makes it difficult to impossible for trucks to enter over C Street Property. (*Id.*) The inability for long haul vehicles to enter/exit over C Street property has had a significant negative impact on the value of TT Properties' C Street property. (CP 192, 185.)

C. The City's Summary Judgment Motion.

TT Properties filed suit against the City of Tacoma in November 2013, asserting that the City's action through the Right of Use Agreement served to destroy TT Properties' Delin Street access to the Pacific Avenue Property and substantially impair its ally access to the C Street Property without compensation as required by Washington's

Constitution.¹ In August 2014, the City moved to dismiss TT Properties' inverse condemnation claim. (CP 1-21.)

The City asserted two grounds for dismissal. First, the City claimed, as a matter of law, that it cannot be held liable because it only approved Sound Transit's plans and permits and, thus, the City was not the government entity that took TT Properties' access rights – the City claimed it did not cause the damage to TT Properties private property rights. Second, the City claimed it cannot be held liable because there was no compensable taking because, accordingly to the City, TT Properties lost nothing of value. (CP 2.)

The trial court correctly rejected the first argument pursuant to *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871, 876 (1998).² Contrary to its assertion on summary judgment (CP 2-4), the City of Tacoma did more than simply approve Sound Transit's plans. The City

¹ TT Properties' Complaint was not included in the original designation of Clerk's Papers, but has been added by a supplemental designation filed simultaneously with this opening brief. It is anticipated that the Complaint will be at CP 284.

² The proposed Order Granting City of Tacoma's Motion for Summary Judgment provided a form for the trial court to select among options as for the basis for granting the motion. The proposed Order provided the following:

It is hereby ORDERED, ADJUDGED and DECREED that the City of Tacoma's motion is granted on the following basis/bases:

- the Court finds that, based upon applicable case law, there is no compensable taking and therefore plaintiff has not standing against the City of Tacoma; and/or
- the Court finds that, based upon the case law, the City of Tacoma was not the causal actor in any event alleged by plaintiff to constitute a taking.

(CP 268.) Only the first box was checked as the basis for the trial court's ruling. (*id.*)

entered into an extensive Right of Use Agreement with Sound Transit allowing Sound Transit to permanently use public rights-of-way (including Delin Street and C Street) for a transportation project. (CP 197.) The City acted as a direct participant by allowing its land to be used by Sound Transit. This was not a mere regulatory act by the City. It was “a proprietary action respecting a government’s management of its public land.” The City found that “it is in the best interests of the public that the City authorize such use.” (CP 197.) The City’s action and finding “satisfied the public use element of an inverse condemnation action.” See *Phillips supra*, 136 Wn.2d at 957.³

³ In *Phillips* a property owner abutting a county right of way used as a drainage basin for stormwater sought damages from the County and a subdivision developer for flooding of his property. The court held that:

- The County was not liable for its approval of the private land development.
- The County was not liable for its agreement to accept ownership of the drainage system for maintenance purposes.
- The County was liable for allowing a part of a private drainage system to be constructed on public land.

The *Phillips* Court explained its ruling:

Drainage System Constructed on Public Land

It is undisputed that King County provided the land on which the spreaders were placed. Whether the County owned the property in fee or whether it allowed Lozier to build the drainage system in the county’s right-of-way is irrelevant. The record shows that the County allowed Lozier to build drain pipes across its 236th Avenue N.E. right-of-way and to install the spreader system on the far east side of the right-of-way, within several feet of the Phillips’ property.

The County acted as a direct participant in allowing its land, or land over which it had control, to be used by the developer. Rather than acting only to approve plans, the County here used its own property for the specific placement of drainage devices allegedly intended to drain water onto the Phillips’ property. It is alleged that the County voluntarily allowed its property to be used as a conduit for storm

The trial court accepted, however, the City's second asserted basis for summary judgment and held, as a matter of law, that TT Properties does not have standing to assert an inverse condemnation claim because there was no compensable taking. (CP 268.) It is this ruling that is challenged on appeal.

Notably, with respect to the Delin Street access, the City's claim that there was no compensable loss of access was founded upon the following assertion:

Plaintiff [TT Properties] never had direct access to its 2620 Property off of Delin Street without having to cross the City owned property at 2610 except as the same can be had from the 27th Street at the back of Plaintiff's property. Any lawful access (i.e. not by traversing across City owned property) to the 2620 Property off of Delin Street was prevented by a difference in grade and a retaining wall that has been present at the 2620 Property since at least

water from private development. The record indicates that the water was collected from the development into the retention pond and was piped by culvert under or across the county right-of-way so that instead of flooding county property, it poured out of the spreaders onto the Phillips' property. This alleged conduct, of allowing the use of public land to convey the subdivision's storm water to the edge of, and then upon, the Phillips' property, satisfied the public use element of an inverse condemnation cause of action. King County's decision that the 236th Avenue NE right-of-way should be used for the construction of drainage fixtures was a proprietary action respecting a government's management of its public land. By channeling the water to the edge of its right-of-way, the County acted to protect its interest in public land. As in the *Wilber* case, the County's action here was not simply approval and permitting – it was actual involvement in the drainage project. If it is proven at trial that the County participated in creation of the problem, it may participate in the solution.

136 Wn.2d at 967.

2001 before the D to M Project began. Prior to the closure of Delin Street, Plaintiff did, however, use the adjacent City property for both parking and access to the 2620 Property. This use of the City's property was not permissive, nor was it otherwise lawful. Plaintiff has never had direct access to the 2620 Property off of Delin Street.

(CP 6. See also CP 11 ("Plaintiff had no direct access to the 2620 Property from Delin Street because of a pre-existing difference in grade and retaining wall barring access. The only access Plaintiff lost as a result of Sound Transit's D to M Project work as an access point only viable by crossing the property of another.").)

Of course, this assertion was incorrect.⁴ TT Properties did, in fact, have an express easement that authorized it to cross the City's property and access to the abutting Delin Street. However, through the Right of Use Agreement the City acted to completely destroy and eliminate that access, and as result, all access to Delin Street.

In its reply, after TT Properties completed its briefing and submitted its declarations, the City shifted its emphasis away from its

⁴ While the City attached a copy of the Deed to its motion (see CP 120), it made no mention of the easement in its motion. Rather, all communications to the trial court were that TT Properties and its customers used the City's process to access Delin Street without permission or authorization from the City (see CP 6, 11-12). (See also Declaration of Ronda Cornforth at CP 153-54 ("The City never affirmatively authorized such access or use.)

In its reply, the City stated: "No attempt was made to conceal this, but the City found the easement to be irrelevant." (CP 250, n. 3.) TT Properties does not accuse the City of concealment, though the City's claims in its opening motion lead one to believe the City was unaware that the deed contained an access easement over the existing road.

claim that TT Properties had no, and therefore lost no right of access to Delin Street. The City instead focused attention to the fact that TT Properties retained access to its Pacific Avenue Property via Pacific Avenue and 27th Street. It appears that the trial court concluded that this remaining access, as a matter of law, fully negated TT Properties inverse condemnation claim based upon the complete loss of access to Delin Street.

Such a conclusion, however, is contrary to the law. As an abutting property owner, TT Properties loss of access to Delin Street is a *per se* compensable loss, even if it has some access from wholly different public streets. At the very least, the trial court invaded the province of the jury when it concluded, as a matter of law, that the damage to the Delin Street access to the Pacific Property and the ally way access to the C Street Property was not a substantial impairment.

IV. ARGUMENT

Washington's Constitution provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made . . . which compensation shall be ascertained by a jury." Wash. Const. Art. I § 16. "Property in a thing consists not merely of its ownership and possession, but in the unrestricted right of [its] use, enjoyment and disposal. Anything that

destroys any of these elements of property, to that extent, destroys the property itself” and constitutes a compensable taking or damaging of property.” *Wandermere Corp. v. State*, 79 Wn.2d 688, 694-95, 488 P.2d 1088 (1971). A compensable taking has occurred when government conduct interferes with the use and enjoyment of private property, with subsequent decline in market value. *Martin v. Port of Seattle*, 64 Wn.2d 309, 320, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

The term "inverse condemnation" is used to describe an action alleging a governmental "taking" or "damaging" that is brought to recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain. *Phillips v. King County*, *supra*, 136 Wn.2d at 957. 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. *Id.* at 959.

The question presented on this appeal is whether TT Properties presented an inverse condemnation claim that satisfies the first element – that its private property right was taken or damaged.

A. Because TT Property Was An Abutting Property Owner, The Complete Destruction Of TT Properties' Delin Street Access Was A Per Se Taking. The Trial Court Erred When It Dismissed TT Properties' Inverse Condemnation Claim.

1. Owners of property abutting a public street have an absolute private property right to ingress and egress to the abutting public street.

Except for highways established as limited access highways,⁵ public streets are designed not only to move the traveling public, but also to give abutting land owners access to the system of the public ways. Thus, an owner of property "abutting upon a public thoroughfare has a right to free and convenience access thereto." *McMoran v. State*, 55 Wn.2d 37, 40, 345 P.2d 598 (1959).

This is quite separate from the public's right to traverse the public way. It is an easement appurtenant to the abutter's land, an easement in which the dominant tenement is the land and the servient tenement is the public way, whether the public owns the way in fee or itself only has an easement in it.

17 William B. Stoebuck & John W. Weaver, Washington Practice Real Estate: Property Law § 9.11 (2012) at p. 586. A property owner has a

⁵ A "limited access facility" is statutorily defined as "a highway or street especially designed or designated for through traffic, and over, from, or to which owners or occupants of abutting land, or other persons, have no right or easement, or only a limited right or easement of access, light, air, or view by reason of the fact that their property abuts upon such limited access facility, or for any other reason to accomplish the purpose of a limited access facility. Such highways or streets may be parkways, from which vehicles forming part of an urban public transportation system, trucks, buses, or other commercial vehicles may be excluded; or they may be freeways open to use by all customary forms of street and highway traffic, including vehicles forming a part of an urban public transportation system." RCW 47.52.010.

“special right and a vested interest in the right to use the whole of the street for ingress and egress.” *Fry v. O’Leary*, 141 Wash. 465, 469-70, 252 Pac. 111 (1927).

This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself.

Id.

Special protection is thus given to owners of property which abut a public road. “The right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation.” *Kieffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977). The abutting property owner is not necessarily entitled to access at all points along the abutting property boarder, but the owner is nonetheless entitled to some access.

If an owner who abuts on a land-service way is totally blocked from access to it, there is no doubt that he is entitled to eminent domain compensation. He had an easement, a species of property, and it has been completely destroyed. In more technical terms, his land has lost an easement appurtenant, and the public way has been relieved of the burden of easement upon it. There has in effect been a forced transfer, just as if the owner had given a deed release to the government entity. The most obvious way in which this might occur is for the city, county, or state to block access at all points on the land with a physical barrier, such as a fence, wall, or impassible curbing.

17 William B. Stoebuck & John W. Weaver, Washington Practice Real Estate: Property Law § 9.11 p. 586. See also, *McMoran v. State*, 55 Wn.2d 37, 345 P.2d 598 (1959) (holding state blocking of access by curbing was taking even though the state built a new frontage road between the owner's land and the curbing).

2. TT Properties' property abutted Delin Street and a taking occurred when all access to the abutting Delin Street was destroyed.

There is no dispute in this case that TT Properties' Pacific Avenue Property abuts Delin Street. That there was a prior grade interference with the immediately adjoining roadway and that TT Properties' access to Delin Street was by way of an easement over the City's adjoining property does not change or reduce TT Properties' status as an abutting property owner. A private easement is a property right that is compensable if taken or damaged. *State v. Kodama*, 4 Wn. App. 676, 679, 483 P.2d 857 (1971). Washington courts "see no distinction between and easement of access from abutting property to a roadway and a private easement which provides access via a corridor from the owner's property to the road." *Id.*

Before the trial court, the City relied heavily upon the line of cases providing that government action that only regulates traffic flow and causes a more circuitous route is not a compensable taking unless

access is eliminated or substantially impaired. See, *Kieffer, supra*; *Walker v. State*, 48 Wn.2d 587, 591, 295 P.2d 328 (1956). The City pointed to the remaining access from Pacific Avenue and claimed these cases applied here to bar TT Properties' inverse condemnation claim because the Pacific Avenue was not landlocked. (See CP 12, 252, 255.) These cases have no application here, however, because the government action wholly destroyed access to an abutting public road way. Thus, there is a *per se* taking.

The "circuitry of travel," or "regulation of traffic flow" cases apply where there is only a partial taking of access to an abutting road or where the government action taken affects only the access of nonabutting property owners (e.g. closure of an intersection). See *Kieffer, supra*, (addressing partial closure of abutting owner's access); *Mackie v. Seattle*, 19 Wn. App. 464, 576 P.2d 414 (1978) (addressing closure of access for nonabutting property owner and noting "a property owner must directly abut upon the portion of roadway being vacated in order to be awarded compensable damages *per se*"). For a property owner to recover in such case "their reasonable means of access must be obstructed, and they must suffer a special damage, Different in Kind and no merely degree, fro, that sustained by the general public." *State v. Kodama, supra*, 4 Wn. App. at 678, *quoting*

Capitol Hill Methodist Church v. Seattle, 52 Wn.2d 359, 366, 324 P.2d 1113 (1958). See also *Kieffer, supra*, 89 Wn.2d at 372-73; *Walker, supra*, 48 Wn.2d at 591.

These cases stand for the proposition that, when less than all direct access to a public road way is taken, the inverse condemnation plaintiff must demonstrate substantial impairment of his access. *Id.* These cases do not, however, negate the law that complete deprivation of access to an abutting public road is *per se* compensable. Here TT Properties' Pacific Avenue Property abuts Delin and had direct access to Delin via the easement across the City's adjoining property. The City's action did not simply regulate the flow of traffic on Delin Street once it was accessed; its action completely destroyed and eliminated all access from the Pacific Avenue Property to Delin Street.

That TT Properties continues to have access from Pacific Avenue, a wholly different public roadway, does not transform the analysis to a partial taking analysis. The taking occurs here because, regardless of access to other public roads, all access to Delin Street was terminated. *Town of Selah v. Waldbauer*, 11 Wn. App. 749, 525 P.2d 262 (1974).

In *Waldbauer*, the property owner's property had direct access to two public roads – it was connected through a driveway to Hillcrest

Drive, yet also had access to Crusher Canyon Road. *Id.* at 751, 756. The Town of Selah adopted an ordinance prohibiting continued access from Waldbauer's property to Hill Crest Drive if certain development was pursued; in such case, only access to Canyon Crusher Road was allowed. The Town asserted that its action was within its police powers to condition projects and to regulate the flow of traffic. *Id.* at 755-56.

The trial court, however, held that Waldbauer's right of access to Hillcrest Drive was a "valuable property right" that could not be taken through a zoning ordinance without compensation through eminent domain proceedings. *Id.* at 756. The court of appeals agreed:

The owner of property abutting upon a public thoroughfare has a right to free and convenient access thereto. This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself.

On numerous occasions, this court has held that the abutting property owner is entitled to just compensation if this right is taken or damaged.

* * *

The driveway to this property has been in existence for over 20 years. By ordinance No. 476 of the Town of Selah, it is contemplated that the entire access onto this property from Hillcrest Drive will be terminated. This may be done by different action, i.e. eminent domain; it cannot be done by rezoning legislation.

Id.

The Washington Pattern Jury Instructions to be conferred in eminent domain cases confirms the analysis applied in *Waldbauer*. The pattern instruction for circumstances in which circuitry of travel to and from property is presented is at WPI 151.04. This instruction provides:

No compensation is allowable because a more circuitous route must be taken in going to or leaving from the remaining property as a result of (name the agency's) project, unless access is eliminated or substantially impaired.

The "NOTE ON USE" for this instruction expressly instructs:

Do not use this instruction when the issue is access from or to an existing abutting road way. See WPI 151.01 (Access, Light, View, and Air - Abutting Roadway). (Emphasis added.)

6A Washington Practice, Washington Pattern Jury Instructions (2012) at p. 112.

The trial court in this case should have reached the same conclusion as that in *Waldbauer*. Here, the City participated with Sound Transit in permanently closing Delin Street which abutted Plaintiff's Pacific Avenue property. In the process Plaintiff's easement was destroyed. By eliminating access to Delin Street the potential uses of Plaintiff's property were permanently and substantially limited.

Regardless of continued access to other public streets, TT Properties lost a valuable property right without compensation when its

access to Delin Street was terminated. Such action is contrary to Washington's Constitution and TT Properties had a viable inverse condemnation claim.

Finally, even if the substantial impairment test of a partial taking applied, the trial court erred in dismissing TT Properties' inverse condemnation claim on summary judgment. The degree of damage to access – whether the impairment is "substantial" – is a question of fact to be decided by the trier of fact. See *Kieffer*, 89 Wn.2d at 374; *Union Elevator & Warehouse, Inc. v. State*, 96 Wash. App. 288, 289-90, 980 P.2d 779 (1999). The trial court erred when it failed to recognize that complete termination of access to a particular abutting public street is a *per se* taking. At the very least, the degree of damage to the TT Property that resulted from the complete loss of an exist, rendering access by large vehicles and trucks infeasible, is a question of fact that should be decided by a jury.

B. The City's Authorized Encroachment On TT Properties Ally Access To The C Street Property Substantially Damaged The Access And Resulted In A Compensable Loss.

With regard to the C Street Property, the City participated with Sound Transit in constructing a bungalow that encroaches on the public alley way abutting Plaintiff's C Street property. While the encroachment may have a relatively small measurement, it

nonetheless substantially limited the potential uses of Plaintiff's C Street property. The encroachment of the bungalow onto the ally way makes it difficult to impossible for the long trucks that previously accessed TT Properties' C Street Property to continue that access and, thus, negatively impacted the value of that property. (CP 191.)

A substantial encroachment upon, or vacation of, a public way is actionable. *Young v. Nichols*, 152 Wash. 306, 278 Pac. 159 (1929) (building encroached upon vacated portion of road); See also, *Fry v. O'Leary, supra*, 141 Wash. 465 (holding compensable taking occurred when only half of an abutting roadway was vacated).

The trial court improperly removed the factual question of the degree of damage caused by the bungalow encroachment when it dismissed this inverse condemnation on summary judgment.

V. CONCLUSION

A taking or damaging occurs if the government in furtherance of a public project eliminates or substantially impairs a property owner's access rights. *Kieffer, supra*. The City of Tacoma, in participation with Sound Transit, completely eliminated TT Properties Delin Street access to the Pacific Avenue Property and substantially impaired the public ally way access to the C Street Property.

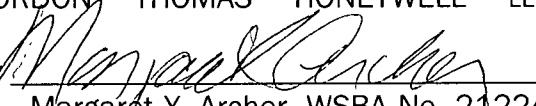
This Court should reverse the trial court's order granting summary judgment and remand the matter for a trial on the merits

Dated this 23rd day of February, 2015.

Respectfully submitted,

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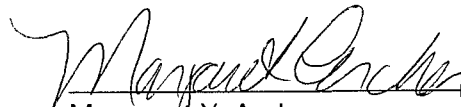
TT PROPERTIES, LLC,
Respondent,
vs.
CITY OF TACOMA
Appellant.

NO. 46803-4

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 23rd day of February, 2015, I did serve via email and U.S. Postal Service, a true and correct copy of Appellant TT Properties, LLC's Opening Brief by addressing for delivery to the following:

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