No. 46803-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TT PROPERTIES, LLC,

Appellant,

v.

CITY OF TACOMA,

Respondent.

APPELLANT TT PROPERTIES, LLC'S REPLY BRIEF

GORDON THOMAS HONEYWELL LLP
Margaret Y. Archer, WSBA No. 21223
Warren J. Daheim, WSBA No. 03992
Attorneys for TT Properties, LLC

Suite 2100
1201 Pacific Avenue
Tacoma, WA 98401-1157
(253) 620-6500

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Cases

Statutes

Rules

Other Authority

I.
TT PROPERTIES IS ENTITLED TO COMPENSATION FOR THE COMPLETE ELIMINATION OF ITS DELIN STREET ACCESS AND THE SUBSTANTIAL ACCESS IMPAIRMENT FOR THE C STREET PROPERTY, THE AMOUNT OF WHICH MUST BE DETERMINED BY A JURY

The City of Tacoma has mischaracterized appellant TT Properties, LLC ("TT Properties") argument. TT Properties does not claim that "*any* impairment of access from an abutting property is *per se* compensable." See City's Brief at p. 1. TT Properties' argument is that government action that eliminates all access to a specific abutting public right-of-way is a *per se* taking – elimination of all access to an abutting public right-of-way damages, *per se*, the abutting property owner's right of access. *See Kieffer v. King County,* 89 Wn.2d 369, 372-73, 572 P.2d 408 (1977). The degree of damage, and the resulting amount of compensation owed as a result of that damage, is a question of fact to be determined after weighing the relevant evidence. *Id*, at 373-74. But there can be no debate that, when access to an abutting right-of-way is wholly eliminated, a private property right has been taken and compensation is required.

In this case, there is no dispute that all access to and from the 2620 Pacific Avenue property ("Pacific Avenue Property") to Delin Street has been wholly eliminated. The City misapplies case law governing instances in which public road closures impact properties

that do not abut the area of road closed, and argues that complete closure is irrelevant so long as the Pacific Avenue retains access from other public streets.[1] But the City fails to cite a single case in which a Washington court has held that government may, as a matter of law, wholly eliminate access to one abutting public right-of-way without compensation if the property also abuts other public roads. Of course, *Town of Selah v. Waldbauer*, 11 Wn. App. 749, 525 P.2d 262 (1974), leads to the opposite conclusion.

Significantly, the City's position fails to recognize and address the nature of the property right held by abutting property owners. The right is in the nature of an easement against the public right-of-way.

> 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. "This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself. *Fry v. O'Leary,* 141 Wash. 465, 469-70, 252 Pac. 111 (1927). TT Properties acknowledges that, as an abutting

[1] The specific cases the City highlights are addressed separately later in this Reply.

property owner, it is not necessarily entitled to access to Delin Street at all points along the abutting property boarder, but it 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.

17 William B. Stoebuck & John W. Weaver, Washington Practice Real Estate: Property Law § 9.11 p. 586.

If a property abuts more than one public right-of-way, those easement rights necessarily attach to each of the abutting public roads. *See, Town of Selah, supra.* No doubt, owners develop their abutting properties in reliance upon those easement rights. In this case, TT Properties developed its property such that its planned use, which necessarily involved access by truck traffic, could be maintained. While the permanent structures constructed on the Pacific Avenue Property rendered truck ingress and egress from Pacific Avenue impractical, the owners were nonetheless able to proceed with such development because truck access would remain viable if trucks may

enter from Pacific Avenue and exit to Delin Street. Continued access onto the abutting Delin Street was obviously critical to the Turner family. They used Delin Street as a truck exit for decades; and were careful to reserve an easement that preserved the Delin Street access even when they sold to adjoining parcel to the City of Tacoma. (CP 188-89, 195.)

The City is certainly free to argue to a jury that the impairment to access to Delin Street is mitigated by the remaining access to Pacific Avenue and this mitigation should limit the amount of just compensation.[2] But it was improper for the trial court to conclude, as a matter of law, that the complete elimination of the Delin Street access was not a taking without just compensation.

A. TT Properties Is An Abutting Property Owner With Respect To Delin Street.

The City first attempts to argue that TT Properties' Pacific Street Property did not abut Delin Street. There can be no dispute that there is no intervening land between the Pacific Avenue Property and Delin Street. TT Properties has never disputed that, absent significant alteration, the grade and improvements prevented direct access from

---

[2] Recall that 27th Street only provides access to the second story residential units. The topography of and development of the Pacific Avenue Property precludes access to the automotive business on the ground floor. (See photographs at CP 127, 124-25, 130, 110-15; see *also* CP 155-56.)

the Pacific Avenue property onto the abutting Delin Street. But nonetheless, the Pacific Avenue Property abuts Delin Street. However, it is upon the express easement that TT Properties relies to establish its rights and interests in Delin Street as an abutting property owner.

The City does not and cannot dispute that our courts recognize 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). Thus, 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.*

The City does not even address *Kodama* in its attempt to challenge TT Properties' status as an abutting property owner, though later, at page 25 of its brief, the City does admit that *Kodama* "does speak somewhat to TTP's status as an abutter." Instead, the City asserts that TT Properties overburdened its access easement crossing the City's adjoining property to Delin Street because it would also use the easement area for parking.

Of course, TT Properties denies the City's allegation that the easement was ever overburdened. (See CP 189, ¶¶ 7, 8, 11.) Regardless, the claim is a red herring. If the easement was

overburdened, then such overburdening may have, at one time, given rise to a claim for injunctive relief to limit future use to that expressly allowed by the written easement; or, perhaps, a claim for damages based on trespass.[3] See *Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 393-94, 101 P.3d 430 (2004). But overburdening would not result in loss of those easement rights expressly authorized by the written easement. Regardless of any claimed overburdening, the Pacific Avenue Property remains the beneficiary of the access rights authorized in the written easement and, through the easement, retains the status of an owner of property abutting Delin Street. Government cannot take those easement rights without just compensation.

B. None Of The Cases The City Cites Refutes The Established Legal Principle That Elimination Of Access To An Abutting Public Way Is A Per Se Taking.

The City correctly recites that it is the general rule that "only abutting property owners, or those whose reasonable means of access has been obstructed can question the [street] vacation by proper authorities." (City's Brief at p. 14, *quoting Olsen v. Jacobs*, 193 Wash. 506, 76 P.2d 607-09 (1938).) However, the City misapplies this rule to inappropriately limit an abutting property owner's right to compensation when an abutting public road is closed.

---

[3] Such claims would need to be proven at trial and would necessarily be required to survive viable defenses, such as equitable estoppel and laches.

The City highlights six cases and argues that government is free, as a matter of law and without any compensation, to wholly eliminate access to an abutting public street, so long as some other public access is maintained. These highlight cases are each addressed below in the order they were discussed in the City's brief. These cases address a wholly different situation – one in which the complaining party's property does not abut the segment of the street vacated. The cases do not support the City's argument, but confirm that abutting property owners do have unique rights that cannot be taken without compensation.

- *Freeman v. City of Centralia*, 67 Wash. 142, 120 Pac. 886 (1912).

In *Freeman,* the suing parties owned property abutting three streets (Magnolia, Pine and Frontier Street) that were being partially vacated. However, their properties did not abut those portions of the streets that were being vacated. Rather, the vacated portions were within the route the suing property owners regularly used to travel from their homes to the business part of the City of Centralia. *Id.* at 142-43. The property owners sought to enjoin the vacation or recover compensation for their lost use of the public streets:

> It is contended that appellants have a right to use of the streets upon which their property abuts for its entire length, and are entitled to compensation

> as abutting property owners, if any part of the street is vacated.

Id. at 143.

Thus the question presented to the *Freeman* court was whether abutting property owners are entitled to just compensation if their properties do not actually abut that portion of the street being vacated. The *Freeman* court concluded:

> [A] property owner does not come within the rule of compensation, unless his property abuts upon or touches that part of the street which is actually vacated, ***or*** a special or peculiar damage is made to appear, or to state the proposition in its elementary form, unless the injury differs in kind, rather than in degree, from that suffered by the general public. (Emphasis added.)

Id. at 143. Proof of "special" or "peculiar damage" is only required if the complaining party's property does not abut that portion of the street being vacated.

Thereafter, the *Freeman* court went on to discuss what will constitute a "special or peculiar damage" when the plaintiff's property does not abut the portion of public street being vacated. *Id.* at 143-44. The *Freeman* court rejected the rule adopted by some courts that "only property abutting upon the portion of the street closed is specially damaged by the vacations, and that only such abutter can recover damages or compensation for the taking of property." *Id.* at 144.

Instead, the *Freeman* court adopted an exception to this rule. Property owners whose property does not abut the vacated portion of the street may still recover compensation, but only if the vacation interferes with access to the property in such a manner that the property is specially and peculiarly damaged. If the nonabutting property owner's access is preserved over other streets – if the damages sustained are only inconvenience like that experienced of the general public – then he is not entitled to compensation. *Id.* at 145.

The *Freeman* court did not diminish or contradict the right of compensation owed to a party owning property that abuts the portion of the public road vacated. If access to an abutting public road way is eliminated, this government action remains a per se taking. *Id.* at 144 (noting that that "[t]he existence of the special and peculiar damage is, however, more readily recognized *when the property abut*s upon the particular part of the street vacated." (Italics in original)). Rather, the *Freeman* court defined the right of recovery by property owners who do not own property abutting the street portion vacated. Those property owners do not hold the same easement right that abutting owners hold. To be compensated, no abutting property owners must demonstrate that they were specially and peculiarly damaged.

The *Freeman* court ultimately concluded:

> It will be borne in mind that this court has held that, unless the property of the owner actually abuts upon the vacation portion of this street, or suffers a special injury, he has no private right.

Id. at 148 (emphasis added).

- *Taft v. Washington Mutual Savings Bank*, 127 Wash. 503, 221 Pac. 604 (1923).

Taft, like *Freeman*, addressed the rights of owners whose property did not abut the actual portion of public right of way being vacated. Access to the property owned by the suing plaintiffs was "not cut off or interfered with." *Id.* at 509. Nonetheless, the property owners sought to enjoin enforcement of an ordinance that approved a privately initiated street vacation. The court was asked to determine

> The right of the owner of a neighboring lot, not immediately abutting or touching the space vacated, to enjoin the city from putting the vacating ordinance into operation, or abutting owner from building across the vacated portion, as affecting the right of light and air.

Id. at 506.

The *Taft* court's ruling was in accord with *Freeman*

> [W]e conclude that the correct rule is that only those directly abutting on the portion of the street or alley vacated, or alleged to be obstructed, or those whose rights of access are substantially affected, have such a special interest to maintain such an action. ... Owners who do not abut, such as respondents here, and whose access is not

> destroyed or substantially affected, have no vested rights which are substantially affected.

Id. at 509-08.

- *Capitol Hill Methodist Church of Seattle v. City of Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958).*

In *Capitol Hill,* the court addressed a fact pattern quite similar to that in *Taft.* There, Group Health privately petitioned for an ordinance vacating those portions of John Street abutting Group Health's property. The Capital Hill Church's property fronted John Street, but no portion of their frontage or their access to John Street was vacated. Instead, after the vacation, the Capital Hill Church visitors could no longer continue west after exiting onto John Street, but at the intersection were deflected to Denny Street. *Id.* at 361, 365. The Capital Hill Church did not lose its access to John Street, but was inconvenienced because it lost its most direct and convenient route to and from the property. *Id.* at 365. The Church sought to enjoin enforcement of the vacation ordinance or to be compensated.

The *Capitol Hill* court repeated the rule stated as stated in *Olsen v. Jacobs, supra,* 193 Wash. at 510:

> The general rule supported by this court is that only abutting property owners, *or* those whose reasonable means of access has been obstructed, can question the vacation by the proper authorities. (Italics in original).

The *Capitol Hill* court, citing McQuillin on Municipal Corporations, emphasized the different status of a claimant whose property abuts a street, but not that portion being vacated:

> On the other hand, if the street directly in front of one's property is not vacated but the portion vacated is in another block, so that he may use an intersecting cross street, although perhaps it is not quite so short a way nor as convenient, it is almost universally held that that he does not suffer such a special injury as entitles him to damages.

Id. at 365, *quoting* 11 McQuillin on Municipal Corporations, 3d Ed., 146, § 30.194.

Analyzing the case before it, the *Capitol Hill* court noted

> It must be borne in mind that the appellants in this case are not abutting owners of property on the portion of the street vacated by the city of Seattle. To maintain this action, their right of access must be 'destroyed or substantially affected,' or, to put it another way, their reasonable access must be obstructed, and they must suffer special damage *different in kind and not in degree*, from that sustained by the general public. This they have failed to show by their pleadings and affidavits. (Italics in original.)

Id. at 366. Because the Capitol Hill Church was not an abutting property owner and, as a non-abutting property owner, because the Church could not demonstrate special damage not experience by other travelers of John road, the summary judgment dismissal of their case was affirmed.

- *Hoskins v. City of Kirkland*, 7 Wn. App. 957, 502 P.2d 1117 (1972).

In *Hoskins*, the City of Kirkland, at the request of a certain residential development, vacated the portion of N.E. 57th Street abutting the development. It was "undisputed that plaintiffs [had] not sustained special damages as abutting property owners because their property [did] not abut on N.E. 57th." *Id.* at 961 (emphasis added). Plaintiffs' only right to use N.E. 57th was via a trail permit from King County. But that permit was automatically canceled when the City of Kirkland annexed the area. *Id.* at 961-62. After the vacation, the vacated N.E. 57th Street area was deeded to the City of Kirkland, which, in turn, proffered to plaintiffs a revocable easement for access. Plaintiffs, however, declined the proffered easement. *Id.* at 959, 962.

The court held that the King County permit was, "at best a mere revocable license." *Id.* at 962. Because plaintiffs held no abutting property owner rights, and because they presented no evidence that plaintiffs "sustained special damages 'different in kind and not merely degree, from that sustained by the general public,' the court concluded that plaintiffs were without standing to assert a cause of action. *Id.* at 962.

- *Mackie v. City of Seattle*, 19 Wn, App. 464, 576 P.2d 414 (1978).

In *Mackie*, the court addressed the City of Seattle's decision to

close a public street, South Southern Street, to through traffic. "Closure was accomplished by installing a guard rail in the center of the street, which preserved vehicle access to all the abutting houses as cars entering the street from either end could drive its full length up to the barrier." *Id.* at 466-67. The effect of the closure was to prevent traffic from proceeding from 8th Avenue South, an arterial, westerly to and across 7th Avenue South. *Id.* at 467.

Plaintiff Mackie's property abutted South Southern Street, but there was no closure along this portion of the street. Mackie thus retained full use of the abutting segment of South Southern Street for ingress and egress to his property. The closure implemented one block over did, however, affect Mackie's route after entering Southern Street. Mackie could no longer travel directly on Southern Street across 7th Avenue to access 8th Avenue, but instead was required to turn north onto and travel along 7th Avenue to Kenyon Street, where he could then turn and travel east to access 8th Avenue. *Id.* at 466-67.

The *Mackie* court reaffirmed and articulated clearly that the right of recovery for property owners of abutting property owners is different than that for non-abutting property owners:

> (1) A property owner must abut directly upon the portion of the roadway being vacated in order to be awarded compensable damages per se; (2) where the closure and the owner's property are separated

> by an intersecting street, compensation usually will be denied; and (3) where the closure occurs within the same block but not directly in front of the property, the owner must show physical impairment of his access different in kind from that of the general public (i.e., if the impairment is merely an inconvenience that is common to all travelers it cannot form the basis for payment of compensation).

Id. at 469, *quoting, State v. Wienberg,* 74 Wn.2d 372, 375, 444 P.2d, 787 (1968). The court noted that mere circuity of travel once one enters onto the public road does not constitute "special damage" and will not give rise to an inverse condemnation cause of action for compensation. *Id.* The court thus concluded

> Here, the plaintiff's property does not abut the segment of South Southern Street that was closed, and is separated from the closed segment by an intersecting street.

Id.

All the above cases address only the showing of special damage or impairment required for party's who own property that does not abut the portion of public right-of-way that is vacated. This requirement to demonstrate special damages or substantial impairment is not applied to abutting property owners. Consistent with this interpretation, the Washington Pattern Instructions direct that the instruction on "circuity

of travel" and substantial impairment," WPI 151.04,[4] should not be given when the issue presented the jury involves access from or to an existing abutting road way. See Notes on Use to WPI 151.04 (Access, Light, View, and Air – Abutting Roadway), 6A Washington Practice, Washington Pattern Jury Instructions (2012) at p. 112. There certainly is no authority to apply this heightened burden to circumstances where access to an abutting public road is completely eliminated.

- *Galvis v. Dept. of Transportation*, 140 Wn.2d 693, 167 P.3d 584 (2007).

Finally, the City highlights *Galvis*. Unlike the cases above, the *Galvis* court did address the rights of property owners whose direct access to a public highway was impacted by government action. However, the government action only resulted in a partial impairment of the abutting access, not complete elimination.

There, the suing property owners all had direct access to State Highway Route 7 ("SR 7"). In order to improve highway safety, the State limited the property owners' access points to the highway, but did not eliminate direct access. The plaintiffs could no longer access

---

[4] WPI 151.04 provides:

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

SR 7 from any point in which their property abutted the highway as they could before the State improvement. But the abutting property owners were allowed continued direct access through defined points of access from their respective properties. *Id.* at 698-700.

Galvis involved application of chapter 47.50 RCW governing highway access management of public highways. The statute recognizes at RCW 47.50.010 that abutting property owners have access rights to public highways. The statute allows the State to limit access to protect health, safety and welfare of those that travel on the highway, but precludes the State from eliminating all access to abutting property owners. *Id.* The *Galvis* case was presented to the court in the procedural context of an administrative appeal that followed an administrative law judge's factual finding, made with the benefit of testimony and evidence from all interested parties, that reasonable access to SR 7 had not been denied. *Id.* at 700-1.

The primary focus of the appealing plaintiffs' challenge to the administrative law judge's determination was their claim that the State's action eliminating their prior use of the public right-of-way for parking was a taking without compensation. But the *Galvis* court held that private property owners do not have a right to park in the public right-of-way. As a result, no property rights were taken by the

government action eliminating the parking and the property owners were not entitled to compensation for the loss of parking. *Id.* at 707.

One property owner (Ash), who previously had SR 7 access via two 25-foot approaches, protested the State's action to consolidate the approaches into a single 50-foot approach. After considering and accepting as credible evidence that the turning radius on the new approach was sufficient to allow a 68-foot semi-truck to access the property, the administrative law judge found that the property owner would maintain "reasonable access to and from SR 7 through a single 50-foot road approach (driveway) after implementation of the SR 7 Safety Improvement Project." *Id.* at 711-12 Giving appropriate deference to the administrative law judge determinations as the fact finder on this issue, the court held that his factual determination was supported by the substantial evidence in the record. *Id.*

The *Galvis* decision supports TT Properties. *Galvis* confirms that government cannot eliminate <u>all</u> of an abutting landowner's access to a public right-of-way – in this case, eliminate all access to Delin Street. *Galvis* also confirms that, if an abutting landowner's access to a public right-of-way is only partially eliminated, whether reasonable access remains is a factual question to be decided by a trier of fact. *Id.* at 705-

06.[5]

Again, this is case in which TT Properties' access to the abutting Delin Street – its easement right of access via Delin Street – was completely eliminated. It was not a partial impairment of the Delin Street access – it was a total impairment. Even if, due to the separate Pacific Street access, the Delin Street impairment is viewed as a case of partial impairment to access, the degree of impairment remains a question of fact. The degree of damage to access – whether the impairment is "substantial" – is a question of fact to be decided by the trier of fact. *Kieffer, supra,* 89 Wn.2d at 374.

In *Kieffer,* the plaintiff's access was impaired, though not eliminated, when curbing was installed on the abutting roadway. Plaintiff's access was limited to two curb cuts approximately 32 feet long near each end of the frontage. 89 Wn.2d at 371. Notably, the trial court evaluated substantial impairment in the context of the existing improvements on plaintiff's abutting property. Though access was not eliminated, the trial court noted that the practical effect of the curb

---

[5] While the court held that the States statutory delegation of this factual determination regarding reasonable access to the administrative law judge did not contravene the Constitution. It also nonetheless concluded that the determination is a factual question to be decided by the designated fact finder. *Id.* at 705, The *Galvis* court did hold that, if following a evidentiary hearing it is determined that reasonable access is not maintained, the Washington Constitution does mandate that the amount of compensation to be paid for loss of reasonable access be determined by a jury. *Id.*

with only two curb cuts was to "virtually eliminate access" to certain buildings on plaintiff's property. *Id.* at 371. The trial court continued

> The access provided after the completion of the curb and curb cuts . . . denies reasonable access to each of the aforementioned buildings and/or economic units, and further denies reasonable access to the parking which is functionally necessary to utilize each of such structures for their highest and best use and/or the businesses being operated therein.

Id.

Similar factual questions are presented here. Without Delin, truck access to this already improved property is eliminated, if not substantially impaired. (See CP 188-90.) Even if this court considers the remaining Pacific Street access to determine if elimination of the Delin Street access resulted in substantial impairment – or if the Pacific Avenue Property was left with reasonable access, ultimately, the degree of impairment or whether the remaining access is reasonable remains a question of fact. Similar impairment to truck access has resulted 223 E C Street Property ("C Street Property") with the City-authorized encroachment of the abutting ally way. (See CP 190-92.)

The trial court erred when it held, as a matter of law, that TT Properties did not, as a matter of law, experience a compensable loss

when its Delin Street access was eliminated and its ally access to the C Street Property was impaired.

II.
THE CITY OF TACOMA IS LIABLE FOR THE TAKING AS AN ACTING PARTICIPANT IN THE SOUND TRANSIT PRJECT

The City next argues that it cannot be held liable for the impairment the Pacific Avenue and C Street Properties accesses, because it did not participate in the Sound Transit project. The City claims it did not cause the damage to TT Properties' accesses. The City cites *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998) for the proposition that mere approval of an entity's development plan is not enough to create liability. *Phillips* does not support the City's argument.

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.
- Nonetheless, there was a material question of fact existed as to whether the County cause, and was thus

liable for the flooding because the County allowed a part of a private drainage system to be constructed on public land.

The *Phillips* Court explained (at p. 967):

> 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 water from private development. The record indicates that the water was collected form 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,[6] 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.

The *Phillips* supports City liability in this case.

The City of Tacoma did not act as a mere regulator reviewing permit applications; it did more than simply approve Sound Transit's plans. The City entered into an extensive Right of Use Agreement with Sound Transit authorizing Sound Transit to permanently use public rights-of-way (including Delin Street and C Street) for Sound Transit's Project that Sound Transit could not otherwise use. The City enabled construction of the project where and as desired by Sound Transit. (CP 197-248.) Sound Transit could not have completed its project in a manner that interfered with the Delin Street access to the Pacific Street Property and the ally way access to the C Street Property without the City's authorization and consent.

The nature and purpose of the Right of Use Agreement is noted in the Ordinance through which it was approved:

> WHEREAS, in order to extend its commuter rail services to the City of Lakewood, Sound Transit will

---

[6] *Wilbur Development Corp. v. Les Rowland Construction, Inc.*, 83 Wn.2d 871, 523 P.2d 186 (1974).

> need to use portions of the City's Public-Rights-Of-Way, in addition to its own real property and the rail corridor, to construct commuter rail track and facilities to connect track over which it currently possesses operating rights to operate Sound Commuter Rail Trains, and
>
> WHEREAS, such Public Rights of Way are generally depicted in the attached Exhibit A and may include portions of ... South C Street, ...Delin Street ... all located within the City of Tacoma, and
>
> WHEREAS, it is in the best interests of the public that the City authorize such use of the Public-Rights-Of-Way in support of the Sounder Commuter Rail service through the issuance of a Right-of-Use Agreement for the purposes stated herein, and
>
> * * *
>
> WHEREAS, Sound Transit has agreed to enter into such Right-of-Use Agreement and the City is willing to issue such Right-of-Use Agreement to Sound Transit, conditioned on acceptance by Sound Transit of terms and conditions hereof and execution of a reciprocal Master Utility License Agreement ("MULA") that allows City Utilities to cross and occupy Sound Transit's rail corridor and a development agreement is authorized by RCW 36.70B. 170-210.

(CP 197-98.)

Far beyond a mere regulator reviewing permit applications, the City, in return for use of the public rights-of-way, was allowed to participate in the project management (CP 210), obtain indemnity and insurance benefits (CP 220-21), receive certain benefits with regard to placement of utilities (CP 208-09) and, finally, enabled Sound Transit

to construct its project in a manner that was desired by and benefited the City.

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, but 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 967.

III. CONCLUSION

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

Dated this 27rd day of April, 2015.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____

Margaret Y. Archer, WSBA No. 21224
Warren J. Daheim, WSBA No. 03992
Attorneys for TT Properties, LLC

COURT OF APPEALS, DIVISION II
OF STATE OF WASHINGTON

TT PROPERTIES, LLC, Respondent, vs. CITY OF TACOMA Appellant.	NO. 46803-4 CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 27th day of April, 2015, I did serve via email and U.S. Postal Service, a true and correct copy of Appellant TT Properties, LLC's Reply Brief by addressing for delivery to the following:

Jeff Capell
Deputy City Attorney
Tacoma City Attorney's Office
747 Market Street, Room 1120
Tacoma, WA 98402-3767
jcapell@ci.tacoma.wa.us

Frances Ostruske
Gordon Thomas Honeywell LLP
PO Box 1157
Tacoma, WA 98401-1157
(253)620-6500