No. 92856-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF TACOMA,

Petitioner,

v.

TT PROPERTIES, LLC,

Respondent.

TT PROPERTIES, LLC'S RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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

Secondary Sources

I. INTRODUCTION

With regard to both issues presented in the City of Tacoma's Petition for Supreme Court Review, the Amicus praises Division II's recitation of the law, but argues that Division II incorrectly applied the law to the specific facts in this case. The Amicus brief demonstrates that the challenged decision does not change the established law, but is fact specific. Division II did not create new precedent, but simply applied well-established law to the facts of this case. As such, the Amicus argument fails to demonstrate that acceptance of review is appropriate under the standards set forth in RAP 13.4(b), or that this case presents significant or novel issues that warrant Supreme Court resolution.

II. ARGUMENT

A. The Amicus Curiae's Argument Regarding Liability Of The City, As An Owner Of Property Upon Which Sound Transit's Project Was Built, Is Premised On An Incorrect Assumption.

The Amicus acknowledges that Division II correctly articulates the law as presented in *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). The Amicus argues only that Division II incorrectly applied the law to the facts of this case. But the Amicus' argument is premised on a false assumption.

The Amicus assumes that the City of Tacoma's only role in the Sound Transit project was as a permitting authority. (*See* Amicus Brief at

p. 1, Issue 1.) Without even referencing the Sound Transit – City of Tacoma Right-Of-Use Agreement (CP 197-248) which was central to Division II's decision (Opinion at p. 15), the Amicus assumes there is no evidence in the record of direct participation or proprietary benefit to the City. The Amicus' assumption is incorrect.

Division II's decision regarding potential City liability was not based upon or even related to project approval stemming from the City's permitting authority. To the contrary, Division II expressly acknowledged that approval pursuant to permitting authority cannot create takings liability. (Opinion at p. 14.)

Contrary to the Amicus' incorrect assumption, City liability arises in this case because, through the Right-of-Use Agreement, it expressly authorized Sound Transit to permanently use City right-of-way (including Delin Street and C Street) for Sound Transit's project that Sound Transit could not otherwise use. The City made this agreement because it deemed the benefits of the agreement "in the best interests of the public"[1] and because it derived benefits from authorizing use of its right-of-way, including beneficial placement of utilities[2] and participation in design

[1] CP 197.

[2] CP 208-09.

review and project management outside of permit review.[3]

Like in *Phillips*, the City's action was taken in its proprietary capacity as the owner and manager of the right-of-way and, like in *Phillips*, the City benefited from authorizing use of its property. But the City's action and agreement also substantially impaired appellant TT Properties, LLC's easement right to access Delin Street without compensation to TT Properties. The City's action "satisfied the public use element of an inverse condemnation action."[4] Division II correctly concluded that the City's authorization to use public right-of-way through the Right-Of-Use Agreement, at the very least, presented "a question of fact ... about whether the City acted in a proprietary, rather than mere regulatory capacity."[5]

Division II's decision does not make municipalities the insurer of projects they approve through their permitting authority, nor does it make governing a tort. The decision simply recognizes that a municipality may not circumvent the condemnation laws through a right-of-way use agreement that, while beneficial to the City, substantially impairs an adjoining property owner's access rights without compensation. Likewise, a city cannot avoid liability for its own action simply because another

[3] CP 208, 210, 226.

[4] *See Phillips supra*, 136 Wn.2d at 967.

[5] Opinion at p. 15.

entity ultimately performed the construction work on the city right-of-way. *State v. Williams*, 12 Wn.2d 1, 15, 120 P.2d 496 (1941).

The Amicus simply ignores the facts relied upon by Division II to conclude that TT Properties was entitled to present its case to a jury. Because it completely failed to address these facts, the Amicus' analysis is incorrect and provides no support for the City's request for Supreme Court review.

B. Division II Properly Concluded That There Is A Question Of Fact As To Weather The Complete Destruction Of TT Properties' Delin Street Access Was A Substantial Impairment Of TT Properties' Access.

Once again, the Amicus has no disagreement with Division II's statement of the applicable law. In fact, the Amicus states that Division II "did an excellent job of outlining applicable authorities and setting forth the rule of law." (Amicus Brief at p. 8.) The Amicus complains that Division II did not correctly apply the law to the specific facts of this case.

The Amicus again misapprehends the facts. Though the property abuts both 27th Street and Pacific Avenue, because of the topography and existing development on the property, the service garage cannot be accessed from 27th Street. (*See* photographs at CP 127, 124-25, 130, 137, 110-15.) The only remaining access to the service garage is from Pacific Avenue. Prior to the Sound Transit project and the total elimination of the

Delin Street access, large trucks would enter from Pacific and exit through Delin, since there is limited room for such trucks to enter from Pacific, turn around and then also exit to Pacific Avenue. (CP 188-189.) Elimination of the Delin Street access thus grossly impaired truck access. This substantial impairment of access, in turn, decreased the value of the property. (CP 188-89, 188-84.) The 27th Street access does not diminish the impact of the loss of the Delin street access.

The Amicus effectively asserts that, despite total elimination of access to an abutting right-of-way, no property owner may have a takings claim if the property owner retains some access to another abutting right-of-way. The Amicus asserts that, regardless of the circumstances, if a property owner abuts two public right-of-ways, the municipality can always completely eliminate access to one of the right-of-ways, if access remains on the other right-of-way.

Division II adopted no such bright line. Instead, consistent with the established law in this State as articulated in *Kieffer v. King County*[6] and *Union Elevator & Warehouse, Inc. v. State,*[7] Division II appropriately recognized that each case must be evaluated in context; and the question to be addressed is whether the government has impaired access and whether

---

[6] 89 Wn.2d 369, 374, 572 P.2d 408 (1977).

[7] 96 Wn. App. 288, 289-90, 980 P.2d 779 (1999).

the impairment was substantial. Division II also appropriately recognized that the degree of damage to access -- whether the impairment is "substantial" – is a question of fact to be decided by the trier of fact. It is in this context that Division II properly analyzed TT Properties inverse condemnation claim. Opinion at p. 11. Like in *Kieffer* and *Union Elevator,* the TT Properties' access was impaired, though not eliminated. Unlike in *Kieffer* and *Union Elevator,* access to one abutting right-of-way was completely eliminated. Like in *Kieffer* and *Union Elevator*, Division II in this case held that whether the access impairment was substantial is a question of fact to be decided by a jury.

The Amicus argues that the City did no more than regulate traffic flow and the impact to TT Properties is no more than "circuity of travel," which does not give rise to a takings claim. The City did not, however, regulate traffic flow. It authorized another agency to utilize the right-of-way for another purpose and that authorized use completely destroyed TT Properties' access to the abutting Delin Street.

Moreover, none of the cases upon which the Amicus relies addressed total elimination of access to an abutting right-of-way. These cases do not suggest any improper analysis by Division II in this case.

The Amicus first cites *Walker v. State,* 48 Wn.2d 587, 295 P.2d 328 (1956). In *Walker*, the state sought to install a concrete, centerline

curb on a portion of Highway No. 2. The curb would divide the highway and was being installed to regulate traffic flow such that left turns could no longer be taken from the highway. The plaintiff owned a motel abutting Highway 2. The curb did not eliminate access from the highway. The motel could still be directly accessed by eastbound travelers on Highway 2. Westbound travelers could access the motel through a newly constructed limited access facility. Westbound travelers were re-routed, but access to the motel from Highway 2 was retained. *Id.* at 589-90.

The *Walker* court concluded that the one-way traffic regulation was inconvenient, but did not give rise to a taking. The court also held that "a concrete curb erected on the center line of a four-lane highway is a physical obstruction that prevents left turns into oncoming traffic. It is a traffic control devise, within the purview of our statutes, authorized by police power." *Id.* at 591. "Damages resulting from the exercise of the police powers are noncompensable." *Id.*

The Amicus next cites *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958). In *Capitol Hill,* 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 stated the applicable rule:

> 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. (Emphasis added.)

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.

Finally, the Amicus cites *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.

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. These cases do not detract from the holdings in *Kieffer, supra,* and *Union Elevator*, which establish that whether access has been substantially impaired is a fact question to be determined in the context of the circumstances presented.

In this case, TT Properties has suffered total elimination of its access to Delin Street and the loss of that access detrimentally impacts truck access. The damage is unique to the Pacific Avenue Property and not like that experienced by the general public traversing the streets. Division II appropriately concluded that the trier of fact should hear and evaluate the evidence to determine if the access to the property was substantially impaired.

III. CONCLUSION

Division II's decision was consistent with the law established by this Court. No issues are presented that require resolution by this Court and review should be denied.

Dated this 27th day of May, 2016.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Margaret Y. Archer, WSBA No. 21224
Attorneys for TT Properties, LLC

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 27th day of May, 2016, I did serve via email and U.S. Postal Service, a true and correct copy of Appellant TT Properties, LLC's Response to Brief of Amicus Curiae 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

Milton G. Rowland
Foster Pepper PLLC
618 W. Riverside
Suite 300
Spokane, WA 99201
rowlm@foster.com

CHRIS SCHEALL

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, May 27, 2016 5:00 PM
To: 'Scheall, Chris'
Cc: jcapell@ci.tacoma.wa.us; rowlm@foster.com; Archer, Margaret; Blakeney, Lisa
Subject: RE: City of Tacoma v. TT Properties, LLC - Case No. 92856-8

Rec'd 5/27/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Scheall, Chris [mailto:cscheall@gth-law.com]
Sent: Friday, May 27, 2016 4:50 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: jcapell@ci.tacoma.wa.us; rowlm@foster.com; Archer, Margaret <marcher@gth-law.com>; Blakeney, Lisa <lblakeney@gth-law.com>
Subject: City of Tacoma v. TT Properties, LLC - Case No. 92856-8

Attached for filing by Margaret Y. Archer, WSBA No. 21224, in the case of *City of Tacoma v. TT Properties, LLC*, Case No. 92856-8, is **TT Properties, LLC's Response to Brief of Amicus Curiae Washington State Association of Municipal Attorneys**.

Christine L. Scheall
Legal Assistant for Margaret Y. Archer

GORDON THOMAS HONEYWELL

1201 Pacific Avenue, Suite 2100
Tacoma, Washington 98402
T 253 620 6500
F 253 620 6565
http://www.gth-law.com