No. 92856-8

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 46803-4-II
(46803-4-II)

THE CITY OF TACOMA,
a Washington Municipal Corporation,

Petitioner/Appellant,
v.
TT PROPERTIES, LLC,
A Washington Limited Liability Company,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF CITY OF TACOMA'S PETITION FOR REVIEW

See 192 Wn.App. at 246-47, citing *Jackass Mt. Ranch, Inc. v. Columbia Basin Irrigation Dist.*, 175 Wn.App. 374, 389, 305 P.3d 1108 (2013)

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I. STATEMENT OF ISSUES

1) Whether a local government agency can be liable in inverse condemnation to an abutting owner for the act of granting a permit, even though there is no evidence that the agency had a proprietary interest in the project and no evidence of "direct participation" by the agency in the permitted project.

2) Did the appellate court err in finding a genuine issue of fact based on evidence of decreased value to land from harming one of three access points to property, where there was no evidence of substantial damage to the overall access to the property itself?

II. STATEMENT OF THE CASE

WSAMA adopts the statement of the case set forth in City of Tacoma's Petition for Review by the Washington State Supreme Court, at pp. 2-6. The facts relied upon by your amicus are the facts set forth in the court of appeals decision in *TT Properties v. City of Tacoma*, 192 Wn.App. 238, 366 P.3d 465 (Jan. 12, 2016), except as noted herein.

III. ARGUMENT

A. Absent a Proprietary Interest, a Local Government Agency Granting a Permit is Engaged in Governance, and Cannot By Definition Commit a Tortious Act Sounding in Inverse Condemnation.

This Court's decision in *Phillips v. King Cty.*, 136 Wn.2d 946, 968 P.2d 871 (1998), is quite clear that merely granting a permit does not give

rise to inverse condemnation liability, absent direct involvement by the agency in the project, and the proprietary nature of that involvement:

> The County and various amici argue that the Court of Appeals decision improperly equates King County's approval of private development with liability for a public project. We agree. *If all that the County had done was to approve private development, then one of the elements of an inverse condemnation claim, that the government has damaged the Phillips' property for a public purpose, would be missing.* There is no public aspect when the County's only action is to approve a private development under then existing regulations. *Furthermore, the effect of such automatic liability would have a completely unfair result.* If the county or city were liable for the negligence of a private developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties.

Phillips v. King Cty., supra, 136 Wn. 2d at 960-61, 968 P.2d 871, 878 (1998) (emphasis added). It appears from the decision below that the court of appeals understood that point perfectly. See 192 Wn.App. at 246-47, citing *Jackass Mt. Ranch, Inc. v. Columbia Basin Irrigation Dist.,* 175 Wn.App. 374, 389, 305 P.3d 1108 (2013)) ("the government needs active participation without which the alleged taking would not have occurred"). See also 192 Wn.App. at 253-254 ("a government entity's mere approval of development is insufficient to create takings liability").

But then the court below pointed out that this Court, in *Phillips, supra,* "held that there was a question of fact about whether the County

was liable as a direct participant in allowing a third party to use the County's land." 192 Wn.App. at 254, citing *Phillips*, 136 Wn.2d at 967. However, while this is a literally correct reading of *Phillips*, it misses the point.

The County in *Phillips* had both acted in a proprietary capacity and as a direct participant, as this Court points out in the following passage:

> 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 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, satisfies the public use element of an inverse condemnation cause of action. *King County's decision that the 236th Avenue N.E. 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.

Phillips v. King Cty., supra, 136 Wn.2d at 967-68, 968 P.2d at 881-82 (emphasis supplied). The italicized language from this passage is critical. King County was acting in combination with a private developer to manage its own proprietary land management for its own ends. Here, there is no such allegation. The court below simply overlooked these facts, and reached a conclusion that allowed it to find potential governmental liability without actually following this Court's teachings from *Phillips.*

The net result of the decision below will be to cause confusion in the lower courts. The question of fact found below, without evidence of direct participation or proprietary benefit to the permit-approving entity, will lead to two results. First, *Phillips* will be largely negated. *Phillips* worked hard to strike a sensible balance between tort-like liability for government agencies when a project of the agency (at least in significant part) caused harm to nearby owners, and that balance will be negated. The agency is potentially liable whenever a permit it grants *also* allows use of agency land. That is not *Phillips'* teaching or holding.

Second, "it is not a tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J. dissenting), cited in *Cummins v. Lewis County*, 156 Wn.2d 844, 863, 133 P.3d 458 (Chambers, J., concurring), and many other cases. If the agency is a *direct* participant

in a project in which it also has so permitting authority, and that participation provides a demonstrable benefit to the agency's citizens, then, according to *Phillips*, it is fair to make the agency share the burden. *See id.*, 136 Wn.2d at 967 ("If it is proven at trial that the County participated in creation of the problem, it may participate in the solution").

Without that participation, without the proprietary benefit to Tacoma's citizens, however, Tacoma becomes an insurer, and non-liability for governance, in theory and in practice, will be lost. *Peterson v. King County*, 41 Wn.2d 907, 912-913, 252 P.2d 797 (1953); *Struthers v. City of Seattle*, 161 Wn.App. 1010, 2011 WL 1485597 (Div. 1, 2011) ("As *Peterson* makes clear, the City is not an insurer against all flood damage").

Accordingly, this Court is respectfully requested to accept review and reverse.

B. Where the Court Recognizes that there is Alternative Access to the Property, and the Only Evidence is Damage to Value, and Not to Access Itself, There Cannot Be a Genuine Fact Issue Regarding a Taking.

1. Takings law on this subject is clear.

The law on this subject, the question whether a claim may sound in inverse condemnation where the condemnee retains multiple access points, is clear. It is not new.

To establish a "takings" based on a denial of right of access, Plaintiffs must establish that their right of access was eliminated or

substantially impaired. *See Keiffer v. King County,* 89 Wn.2d 369, 373, 572 P.2d 408 (1977). Plaintiffs must show "more than mere inconvenience at having to travel a further distance to [their] business facility." *Union Elevator & Warehouse v. State,* 96 Wn.App. 288, 296, 980 P.2d 779 (1999).

Indeed, "[c]ircuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right." *Walker v. State,* 48 Wn.2d 587, 590–91, 295 P.2d 328 (1956); *see also* R.C.W. § 47.52.041 (regarding road closures, "[c]ircuity of travel shall not be a compensable item of damage."). If a property owner is deprived of his or her most "direct and convenient" access to his or her property, that is insufficient to maintain an inverse condemnation action. *See Capitol Hill Methodist Church v. Seattle,* 52 Wn.2d 359, 366, 324 P.2d 1113 (1958) ("[t]he fact that the lot owner may be inconvenienced or that he may have to go a more roundabout way to reach certain points" does not result in a compensable injury).

Moreover, "[t]hose actions taken pursuant to the police power for the purpose of regulating the flow of traffic on the public way itself are generally not compensable." *Keiffer,* 89 Wn.2d at 372, 572 P.2d 408. In addition, the property owner must demonstrate that he or she has suffered

special damage different in kind and not merely in degree from that sustained by the general public. *Capitol Hill Methodist Church,* 52 Wn.2d at 365, 324 P.2d 1113.

In *Mackie v. City of Seattle,* 19 Wn.App. 464, 576 P.2d 414 (1978), the plaintiff complained that because of a permanent street closure, he and his customers were required to drive several additional blocks to reach his business. The plaintiff received numerous complaints from customers unable to locate his business. However, the court of appeals held that the plaintiff was not entitled to damages, as "*[t]he plaintiff and his customers still have access to the property.* The fact that access is deflected a few blocks and will be inconvenient due to the closure ... does not raise such inconvenience to the status of a special injury not suffered by the general public." *Mackie,* 19 Wn.App. at 469 (emphasis supplied).

The court below did not misstate the law. The court misapplied it, however, in a manner certain to cause confusion in future cases.

2. Misapplication of the law regarding the Pacific Avenue property.

The "Pacific Avenue property," also referred to in the materials below as "the 2620 Property" because of its address at 2620 Pacific, had three access points, and still has two of them, undisturbed. One such access point was from Pacific Avenue, and one from 27th Street. RP p. 18

("They still have access on two points"). The third access point was from Delin Street. The court of appeals recognized this fact. See 192 Wn.App. at 251 ("It is undisputed that TT retains ingress and egress on Pacific Avenue and 27th Street").

TT Properties complained that it lost its third access point, across an easement to Delin Road. However, the rule of law, which the court below recognized, *id.* at 249, is that "the right of an abutting owner is the right of access *to the property*, not access to the particular street" (emphasis in original). Yet the court below held that, if one of three access points is destroyed, leaving the other two access points unimpaired, there may be takings liability if the loss of that one access point might substantially impact the overall *value* of the property.

Your amicus believes the court of appeals did an excellent job of outlining the applicable authorities and setting forth the rule of law. Where the court below fell short, however, is in its reliance upon declarations submitted by TT Properties that stated that the *value* of the property was impacted by Tacoma's actions. See 192 Wn.App. at 251. The focus of the court's inquiry, in determining whether there is a jury question, is whether the property's *access*, not its *value,* has been substantially impaired. As this Court stated in *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977):

> The cases relied upon by the appellant recognize compensation must be paid where all direct access is not eliminated, if *substantial impairment of access* is shown.

Keiffer v. King Cty., supra, 89 Wn.2d at 373, 572 P.2d 408, 410 (1977) (emphasis supplied). In all cases of which your amicus is aware, the crucial question (called the second step in *Keiffer* and cited appropriately in the decision below) is whether *access* is severely impaired, not whether the owner alleges that his property has experienced a decline in value.[1]

Perhaps the best example of the difference is found in *Union Elevator & Warehouse Company, Inc. v. Washington State Department of Transportation*, 96 Wn.App. 288, 980 P.2d 779 (1999). In *Union Elevator*, the State built a limited access highway, and in doing so, eliminated condemnee's direct (and easy) access to the property, leaving access dependent upon right angles and slopes, making access so difficult that trucks could no longer be used to access the silos on the property. While there was, no doubt, an allegation that the value of the property was diminished as a result, the principal issue (whether there was a taking at

[1] It can be noted in the present case that, while TT Properties complains of a diminution in value, this claim is not borne out by the record. According to the record, TT Properties sold the property, after the grade change was made affecting the one access point noted, for an amount well in excess of assessed value. CP 262-263. This is discussed in Respondent City of Tacoma's Appeal Brief, at p. 4.

all) depended, as here, on the question whether *access* was substantially impaired, not whether value was impaired. The court stated:

> In order to maintain an inverse condemnation action, Union must show more than mere inconvenience at having to travel a further distance to its business facility. It must show *its right of access was either eliminated or substantially impaired.* In other words, its reasonable means of access must be obstructed. This determination is a factual issue for the trier of fact at trial. *Keiffer,* 89 Wash.2d at 374, 572 P.2d 408.

Union Elevator & Warehouse Co. v. State ex rel. Dep't of Transp., 96 Wn.App. at 296 (citations largely omitted). This is not a question of money; it is a question of physical access, as the *Union Elevator* court pointed out. See *id.* at 296-97, describing two affidavits regarding access and its access difficulties, subsequent to the State's actions.

The *only* evidence relied upon by the court below to determine whether the *Keiffer* second step was met, so as to create a jury issue, is set forth at 192 Wn.App. at p. 251—a declaration regarding "negative impact on *value*" and a sale "at a much reduced *price*." (Emphasis supplied.) That is *not* the *Keiffer* second step issue. There was no evidence of record before the court of a *Union Elevator*-like destruction of practical access to the property. This is not evidence sufficient to raise a genuine issue of

material fact.[2]

Nothing in the cases suggests that an exercise of the police power, which leaves the abutting owner access to his or her property that is not substantially impaired, but which affects the value of the property, creates a cause of action against the permit-granting agency for inverse condemnation. Rather, the case law is clear, that the *access itself* must be damaged so significantly that mere "inconvenience at having to travel a further distance" or "circuitry of travel" is insufficient to establish a compensable taking. TT Properties did not show this. It did not, therefore, create a genuine issue of material fact.

Because the court below, conflating impaired value with impaired access, did not rely on evidence of substantial harm to access, two of the three access points remaining unfettered, and indeed, at least apparently, improved, but instead relied on statements in the record regarding value alone, there was no genuine issue of fact, and the court below erred by reversing and remanding.

WSAMA believes that anyone adjacent to a public project, at any time, could make a bald assertion of damage to value, and if the courts do not focus on the real issue, substantial damage to access itself, local

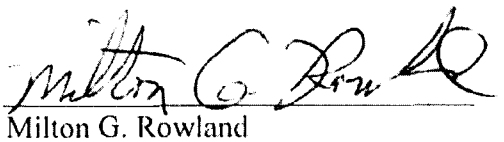
[2] As the Court is undoubtedly more than aware, a material fact is one on which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

governments are likely to face more unjustified claims, and the taxpayers will bear the trouble and expense of a trial, where—as here—summary disposition of the case is appropriate.

IV. CONCLUSION

Amicus Washington State Association of Municipal Attorneys respectfully requests this Court to accept review, and reverse for the reasons stated, and remand with directions to dismiss the case.

RESPECTFULLY SUBMITTED this 18th day of April, 2016.



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THE CITY OF TACOMA,
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CERTIFICATE OF SERVICE

I, April Engh, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on April 18, 2016, I emailed to The Supreme Court for the State of Washington at supreme@courts.wa.gov the following documents for filing:

1. Brief of Amicus Curiae Washington State Association of Municipal Attorneys in Support of City of Tacoma's Petition for Review; and

2. Certificate of Service.

Additionally, I certify and declare that on the 18th day of April, 2016, I delivered a true and correct copy of the foregoing documents to the following persons ***via U.S. Mail, postage prepaid:***

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SIGNED at Spokane, Washington, this 18th day of April, 2016.

April Engh, Legal Assistant

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Attached for filing is Brief of Amicus Curiae Washington State Association of Municipal Attorneys in Support of City of Tacoma's Petition for Review and the accompanying Certificate of Service in the above referenced case.

Thank you, April.

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