NO. 90506-1

SUPREME COURT OF THE STATE OF WASHINGTON

TAPIO INVESTMENT COMPANY I, a Washington limited liability company; MONARCH INVESTMENT; TAPIO OFFICE IV PARTNERSHIP; CLONINGER/EUCKER PARTNERSHIP; PAMELA M. CLONINGER, and individual, and CLONINGER & ASSOCIATES, L.L.C., a Washington limited liability company,

Appellants,

v.

THE STATE OF WASHINGTON, by and through the Department of Transportation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court has consistently held that the Washington Constitution does not require compensation for all impacts to property caused by legal acts. A compensable taking occurs only if there is a physical invasion of private property or a regulation severely restricting its use.

Unable to show a physical or regulatory taking, Tapio essentially asks this Court to create a new cause of action for loss of market value based on "oppressive precondemnation conduct." Consistent with other states, this Court has specifically declined to create such a cause of action, and for good reason. *Orion Corp. v. State*, 109 Wn.2d 621, 671-72, 747 P.2d 1062 (1987). When there is precondemnation depreciation in market value, the trial court may provide a remedy during the formal condemnation action, after a taking has actually occurred.

The trial court properly dismissed Tapio's case under CR 50(a) for failure to present evidence to support its takings claim. There is no reason to remedy Tapio's lack of evidence by upending state law. If the State takes Tapio's property, Tapio will be entitled to seek just compensation.

II. COUNTERSTATEMENT OF THE ISSUE

If review were granted, the following issue would be presented:

> Should this Court depart from its prior decisions and create a new cause of action for inverse condemnation based on lawful precondemnation conduct that decreases

the marketability of property but does not interfere physically or regulate the use of the property?

III. COUNTERSTATEMENT OF THE CASE

This case arises in connection with the Washington State Department of Transportation's North Spokane Corridor Project, which is a partially completed limited access freeway that will link US 2 and SR 395 in the north with I-90 in Spokane. VRP 287, 288, 291. This is a major construction project. It requires acquisition of about 940 parcels of land and will take about 20 years to complete. VRP 310-11.

The project commenced in the late 1990s. VRP 293-97, 396-97. From the project's inception, the Department has gone to great lengths to communicate with potentially affected persons. Beginning in the late 1990s, the Department started holding open houses to share information with the public and solicit input on the project. VRP 291-92.

Following announcements about the project, the Department began to hear concerns from potentially affected persons. Among those were the Petitioners, collectively referred to as "Tapio," who are owners of the Tapio Center, an office park consisting of 11 parcels of property. CP 3-4; Exs. D225-D229. The Tapio Center is located partially within the proposed I-90 interchange portion of the project. VRP 523-24;

Exs. D225-D229, P97-P102. The Department convened a personal meeting to discuss Tapio's concerns. VRP 309-17, 321, 640-42; Ex. P2.

In the early 2000s, the Department began property acquisition and construction. The Department initially requested that the legislature fund the purchase of all properties needed for the project, but the request was denied. VRP 528. Instead, per biennium, the legislature provides the Department with a varying amount of funds for property acquisition. VRP 496-99. Funding for a particular biennium may be used to acquire properties anywhere along the project right-of-way. VRP 496-99, 507.

Construction started at the north end of the project, near Wandermere. VRP 288-89, 297, 397. As construction progressed, the Department continued to communicate regularly with potentially affected property owners, including Tapio, and it continued to conduct meetings and hold open houses. *E.g.*, VRP 391-92, 647-53; Exs. D203-D207, P9. The last portion of the project to be completed is the area of the I-90 interchange at the southern end of the project. VRP 288-89.

In December 2002, the Department sent notices to property owners and tenants along the proposed I-90 interchange inviting them to a meeting about the project. VRP 392-97; Exs. D208, P14. Following this notice, Tapio informed the Department that the notices were worrying its tenants, impacting leasing activity, and making it difficult to plan for

improvements and expenditures. VRP 398-99, 652-54; Ex. P17. Tapio asked the Department to acquire the Tapio Center, which is one of the most expensive properties to be acquired. VRP 312-13, 401; Ex. P17.

The Department promptly responded. VRP 402-03; Ex. D209. It explained that it was difficult to address the exact timing of the impact to the Tapio Center, the project's schedule was dependent on a steady funding stream the Department did not have, and the Department would not be purchasing the property for several years. Ex. D209. It recommended that Tapio maintain or enhance its property as it saw fit, and it assured Tapio that it would consider all improvements and maintenance made to the property when it appraised the property prior to purchase. Ex. D209.

In 2003, while construction was in Wandermere, the Department began receiving requests for early acquisition from residents near the I-90 interchange. VRP 433-34. Despite a limited budget, the Department was able to accommodate some hardship requests. VRP 433-34, 503-04, 509-10, 527. For example, it purchased one property because the owner needed money to care for a terminally ill parent. VRP at 509. It agreed to purchase residences in the East Central Neighborhood to allow families to relocate. VRP 571-72. And it purchased a commercial daycare, due to a personal hardship. VRP 510. The Department did not initiate condemnation proceedings for the properties it acquired near I-90. VRP 524-25.

In 2005, the final design for the I-90 interchange was approved. VRP 304, 559; Ex. D211. The 2005 design identified the proposed right-of-way footprint, which remained subject to modification. VRP 560, 579-80. Under this plan, three commercial buildings on the southern edge of the Tapio Center will be removed, two others will be clipped, and southern access to the property will be eliminated. *See* VRP 557, 562-63; Exs. D211, D225-D229. There are no plans for removal of buildings or construction within the northern Tapio properties. *See* Exs. D225-D229.

Over the next several years, the Department purchased additional properties near the I-90 interchange. VRP 506-07, 675-76. It decided whether to acquire each property on a case-by-case basis. VRP 509. In general, the Department prioritized residential properties because they were more cost effective than commercial properties, and it wanted to maximize the number of parcels it could acquire with its limited funds. VRP 472-73, 498-99, 503-04. The Department purchased commercial properties if it presented a good business opportunity. VRP 509. For safety reasons, the Department removed structures on some properties but continued to maintain the properties. VRP 429-30, 459-63, 504.

In March 2010, Tapio sent a letter to the Department expressing concerns about impacts on the Tapio Center. Ex. P50. The Department quickly responded. Ex. D220. It informed Tapio that its public

communication about the project was required by environmental regulations and that it did not need to acquire the Tapio Center for a number of years. Ex. D220. It offered to meet with Tapio or Tapio's tenants to answer questions. VRP 845; Ex. D220.

In November 2011, Tapio brought an inverse condemnation action seeking damages for loss of fair market value. CP 591-95. It alleged that the Department's actions, which included issuing press releases, holding public meetings, publishing reports and plans for the construction, acquiring property, and surveying and engaging in construction activities near the Tapio Center, damaged the value of Tapio's property. CP 587-88.

After the court denied dispositive motions, the case proceeded to a trial on a theory that the Department engaged in "oppressive preacquisition conduct." *See* CP 2036-37. At the time of trial, the Department had acquired about 300 parcels in the area of the I-90 interchange. VRP 453. It still needed to acquire about 50 residential properties and five commercial properties. VRP 465.

At trial, Tapio claimed that a taking occurred in October 2006. VRP 683. It presented evidence regarding the property's marketability. In general, Tapio's witnesses testified that the value of the Tapio Center had diminished; the Department's activities had affected Tapio's ability to obtain tenants, sign long-term leases, and attract purchasers; potential

purchasers would have difficulty obtaining certain types of financing; and some brokers would not bring potential buyers to the property. *E.g.*, VRP 685-90, 926-33, 951-60, 983, 1120-21.

Tapio's owners testified that they sought fair market value of the property but were not seeking damages for changes in occupancy or rental rates. VRP 683, 847-53. They conceded that there was no physical damage to the Tapio Center, the Department had not imposed a rule preventing them from running their operations, and they retained the right to sell the property. VRP 706-07, 868. Other witnesses confirmed that Tapio retained the right to sell and lease the property. VRP 960, 989-90, 1124. At the time of trial, the Tapio properties were still generating income and remaining profitable. VRP 687-88, 953, 1121, 1159-60.

Following Tapio's case-in-chief, the Department brought a CR 50(a) motion to dismiss. CP 2278-85; VRP 1172-85. The trial court granted the motion, concluding that no inverse condemnation taking or damage had been established because Tapio presented no evidence from which a jury could conclude: (1) that there was undue delay in the North Spokane Corridor Project; (2) that the Department's conduct was oppressive, abusive, or unlawful; or (3) that the Department had imposed any regulation that restricted Tapio's use of its properties. CP 2876.

Tapio sought direct review of the trial court's order. This Court denied direct review and transferred the case to the Court of Appeals. The Court of Appeals affirmed dismissal of Tapio's action. It noted that Tapio acknowledged that it was not asking the court to recognize a new cause of action for oppressive precondemnation conduct, but rather, it was claiming that the damages it seeks are available under existing condemnation law. *Tapio Inv. Co. I v. State*, No. 33684-1-III, slip op. at 11 n.3 (Oct. 27, 2016). This petition for review followed.

IV. ARGUMENT

Tapio requests discretionary review under the criteria stated in RAP 13.4(b)(1), (3), and (4). Petition For Review (Pet.) at 13. Under these grounds for review, this Court will accept a petition only if the decision of the Court of Appeals is in conflict with a decision of this Court, a significant question of law under the state or federal constitution is involved, or the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (3), (4). This Court should not accept review under any of these grounds.

A. Washington Inverse Condemnation Law Is Well-Settled

Washington case law is well-settled. Legal acts that do not interfere physically or by regulating use of the property are not takings,

and the state constitution does not require compensation for all damage to property caused by legal acts.

This Court has expressly declined to recognize a cause of action for oppressive precondemnation conduct. When there is precondemnation depreciation in market value, the trial court may provide a remedy during the formal condemnation action. Therefore, there is no need to create a new cause of action.

1. Legal acts that do not interfere physically or by regulating use of the property are not takings

It is well-settled that legal acts are not takings under article I, section 16 of the Washington Constitution if they do not physically interfere or regulate use of the property. That section provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made[.]" Const. art. I, § 16. Inverse condemnation occurs when the government takes or damages property without the formal exercise of the power of eminent domain. *Dickgieser v. State*, 153 Wn.2d 530, 534-35, 105 P.3d 26 (2005). A plaintiff must show "(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 535.

Washington courts recognize two types of takings—physical and regulatory. *See, e.g.*, *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 238 P.3d 1129 (2010) (physical taking); *Mfd. Housing Cmtys. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000) (regulatory taking). A physical taking "'occurs when government encroaches upon or occupies private land for its own proposed use.'" *Berst v. Snohomish County*, 114 Wn. App. 245, 255, 57 P.3d 273 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)). A regulatory taking occurs when "'government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs.'" *Id.* at 255-56 (quoting *Palazzolo*, 533 U.S. at 617).

Washington courts do not recognize a taking in the absence of a physical invasion or a regulation severely restricting use. Lacking a claim of a physical or regulatory taking, Tapio essentially asks this Court to adopt a new cause of action for precondemnation conduct that decreases market value. Such a cause of action is inconsistent with Washington law.

2. The Washington Constitution does not require compensation for all damage to property caused by legal acts

It is well-settled that not all damage to property caused by legal acts, including depreciation in market value, amounts to a taking. On the contrary, this Court has repeatedly held that article I, section 16 does not

authorize compensation merely for depreciation in market value caused by a legal act. *Pierce v. Ne. Lake Washington Sewer & Water Dist.*, 123 Wn.2d 550, 562, 870 P.2d 305 (1994) ("[O]ur prior decisions do not lead to the conclusion that loss in market value . . . is of itself evidence of governmental interference with the use and enjoyment of property entitling them to compensation."); *Aubol v. City of Tacoma*, 167 Wash. 442, 446-47, 9 P.2d 780 (1932) (the constitution "does not authorize compensation to appellants for depreciation in the market value of their lands, as the diminution, if any, in value of the land was caused by a legal act").

These decisions are consistent with decisions from the United States Supreme Court. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984) ("impairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking" and "in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation" (footnote omitted)); *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) (A "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.").

This Court has also held that article I, section 16 does not require compensation for "mere infringement" of a property owner's "personal pleasure and enjoyment" of the property. *Pierce*, 123 Wn.2d at 564. Rather, damage for which compensation is to be made is damage to the property itself. *Pierce*, 123 Wn.2d at 563-64 (citing *People ex rel. Dep't of Pub. Works v. Symons*, 54 Cal. 2d 855, 859, 357 P.2d 451, 9 Cal. Rptr. 363 (1960)).

Here, the activities prior to condemnation were not only legal, they were necessary. The Department is *required* by law to be highly public and transparent when planning this type of project.[1] Moreover, this Court has recognized that project delays due to funding limitations are not actionable, even in the context of motorist injuries. *See Avellaneda v. State*, 167 Wn. App. 474, 489, 273 P.3d 477 (2012).

Without addressing these cases, nor pointing to any illegal conduct by the Department, Tapio contends that it is entitled to compensation for damage to its ability to use and sell its property for fair market value

[1] *See, e.g.*, RCW 47.52.133, .135, .137 (requiring public hearings, notice, administrative procedures, and formal plans for limited access facilities); RCW 47.01.290 (stating that "environmental review of transportation projects is a continuous process that should begin at the earliest stages of planning and continue through final project construction"); RCW 47.01.300 (requiring environmental review and public participation on transportation projects); WAC 468-12-055 (requiring SEPA process to be completed before Department commits to specific course of action); 23 U.S.C. § 128(a) (public process necessary for any federal aid project, including "hearings[] for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections"); 23 U.S.C. § 139(f)-(g) (general procedures, including public comment, on planning and alternatives).

because the Washington Constitution provides "additional protection." Pet. at 13-16. Tapio relies on the addition of the word "damaged" in article I, section 16. Pet. at 13-16. But this contention is not supported either by the law or by a fully developed legal argument.

Washington is one of 26 states whose constitutions contain the "damaging" language. William B. Stoebuck & John W. Weaver, 17 *Washington Practice: Real Estate* § 9.19 (2d ed. & Supp. May 2016 WL). The purpose of this language was to allow compensation in cases involveing losses of street access caused by changes of grade of existing streets, in which most courts had been unwilling to hold a taking had occurred. *Id.*

Over 40 years ago, this Court sought to distinguish a "taking" from a "damaging." *See, e.g.*, *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960); *Wandermere Corp. v. State*, 79 Wn.2d 688, 488 P.2d 1088 (1971). But in 1976, this Court eliminated any such distinction. *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976). Thus, Washington law does not support the assertion that the word "damaged" provides Washington citizens with "additional protection."

Tapio provides no authority to the contrary. It quotes *Manufactured Housing Communities*, 142 Wn.2d at 360, out of context to argue that the Washington Constitution provides "*enhanced protections*" as to "the '*damaging*' of private property[.]" Pet. at 14. But that decision

only stated that Washington courts provide greater protections against governmental takings "by literally defining what constitutes 'private use.'" *Mfd. Housing Cmtys.*, 142 Wn.2d at 359. It did not consider whether the word "damaged" in article I, section 16 provides greater protections. *See id.* at 357 n.8. Moreover, Tapio does not even suggest that an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), would support its assertion. Therefore, this Court should not consider this argument. *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 32-33, 940 P.2d 274 (1997) (declining to consider whether the use of "damaged" in article I, section 16 requires a different analysis based on the appellant's failure to brief *Gunwall*). The Department's lawful actions do not support a cause of action under the Washington Constitution.

3. This Court has expressly declined to recognize a new cause of action for oppressive precondemnation conduct

Lastly, it is well-settled that there is no cause of action for oppressive precondemnation conduct in Washington. This Court made that clear in *Orion Corp. v. State*, 109 Wn.2d 621, 671-72, 747 P.2d 1062 (1987). In that case, this Court expressly declined to recognize a cause of action for oppressive precondemnation conduct. *Id.* at 672. It observed that there was "no Washington case law to support [Orion's] claim that the government can unconstitutionally take private property by 'oppressive

preacquisition conduct'", and it expressly declined to recognize "this new cause of action." *Orion Corp.*, 109 Wn.2d at 671, 672.

In short, there is no question concerning when private property is considered "damaged" under article I, section 16 or whether Washington recognizes a claim for precondemnation conduct that decreases marketability. It is well-established that property is not taken absent a physical interference or regulation restricting use; that not all damage to private property caused by a legal act is compensable; and that Washington law does not recognize a cause of action for oppressive precondemnation activity.

There is no reason for this Court to depart from these well-established principles in this case. There is simply no support for Tapio's claim that existing law supports a cause of action for oppressive precondemnation conduct, and Tapio has expressly disavowed any endeavor to seek changes to the law. Moreover, the Department did not physically invade Tapio's property or restrict its use. Its conduct was lawful, appropriate, and necessary. The trial court properly dismissed this action.

B. The Court of Appeals' Decision Is Entirely Consistent With *Lange v. State*

Tapio asserts that this Court "clearly recognize[d] a cause of action exists for oppressive preacquisition conduct" in *Lange v. State*, 86 Wn.2d

585, 547 P.2d 282 (1976). Pet. at 18. Not so. This Court specifically rejected Tapio's reading of *Lange* when it decided *Orion Corp.* more than a decade later. This alone confirms that *Lange* does not support Tapio's argument.

Moreover, even if *Orion Corp.* had not provided clear guidance, *Lange* would still fail to support Tapio's assertion of a cause of action for oppressive precondemnation conduct. In *Lange*, this Court established only that diminution in value and marketability of property is compensable, if at all, in the formal condemnation proceeding. *Lange*, 86 Wn.2d at 586, 595-96. It did not establish that precondemnation activity gives rise to a separate cause of action, and it certainly authorized no action on the facts Tapio presents. This Court, and other courts, have recognized the boundaries of *Lange*'s holding. *See State v. McDonald*, 98 Wn.2d 521, 532, 656 P.2d 1043 (1983) ("*Lange* merely modifies the time of valuation in certain cases where that is necessary to achieve a just compensation" but it "does not allow a landowner to claim, under the guise of compensation, profits allegedly lost as a result of precondemnation activities of the State."); *Joseph M. Jackovich Revocable Trust v. State*, 54 P.3d 294, 302 (Alaska 2002) (*Lange* is "properly regarded as [an] early valuation eminent domain case[]; [it does] not establish the appropriate standard for reviewing the state's

precondemnation conduct where condemnation proceedings are either abandoned or never initiated.").

Although *Lange* references inverse condemnation based on precondemnation activities, it does not create such a cause of action. *See Lange*, 86 Wn.2d at 587-88. Rather, in dictum, the Court distinguished the extra-jurisdictional cases cited by the appellants and noted that there was no evidence of unreasonable or intentional delay in the case at issue. *Id.*

Furthermore, *Lange* is distinguishable from the present case. In *Lange*, the undisputed evidence demonstrated that the plaintiff could not sell or develop the property at issue due to RCW 47.28.026(1), which allows the Department to foreclose improvements to prospectively condemned property under certain circumstances and time frames. *Lange*, 86 Wn.2d at 594. As a result, the property had no income potential. *Id.* Here, in contrast, there were no restrictions on Tapio's property and the highway planning was legally deemed tentative. In addition, Tapio continued to derive income and benefit from the property.

In short, this Court has made it abundantly clear that there is no cause of action for oppressive precondemnation conduct in Washington. The decision of the Court of Appeals is entirely consistent with *Lange* and with *Orion Corp.* It is Tapio's argument—not the decision of the Court of Appeals—that is inconsistent with Washington law.

C. There Is No Issue of Substantial Public Interest

Lastly, Tapio claims review is warranted to address an issue of substantial public interest. Pet. at 19-20. Specifically, Tapio asserts that this type of government precondemnation conduct is occurring across the state and permits the government to impact property values by intentionally creating blighted neighborhoods. Pet. at 20. Tapio's speculative argument fails for several reasons.

For one, Washington law already accommodates precondemnation activities. As this Court made clear in *Lange*, the sole remedy for a precondemnation decrease in market value, if any, is in a formal condemnation proceeding. *Lange*, 86 Wn.2d at 591. Accordingly, this case does not present an issue of substantial public interest where Washington property owners' interests are protected by the remedies afforded in formal condemnation actions.

Second, as other states have recognized, Tapio's new legal theory would severely impede public works projects. Other courts have recognized this. For example, the Texas Supreme Court found that "sound public policy" supports the conclusion that economic damage to a property owner "generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property." *Westgate Ltd. v. State*, 843 S.W.2d 448, 453 (Tex. 1992). It reasoned:

> Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future. Such a rule would encourage the government to maintain the secrecy of proposed projects as long as possible, hindering public debate and increasing waste and inefficiency. *See Loitz*, 61 Ill. 2d at 96, 329 N.E.2d at 211 ("[I]mposition of liability for precondemnation activities would tend to inhibit free and open discussion of proposed public improvements . . . ."). After announcing a project, the government would be under pressure to acquire the needed property as quickly as possible to avoid or minimize liability. This likewise would limit public input, and forestall any meaningful review of the project's environmental consequences. The government also would be reluctant to publicly suggest alternative locations, for fear that it might incur inverse condemnation liability to multiple landowners arising out of a single proposed project. Failing to consider available alternatives is not only inefficient, but is at odds with proper environmental review.

Westgate Ltd., 843 S.W.2d at 453 (alterations in original); *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed 322 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

These concerns are particularly applicable to transportation planning where, as noted above, the Department is required by law to plan projects very publicly. Each study the State undertakes, each alternative plan it publishes for public input, and each modification considered to

mitigate environmental harm, may change the perceived value of property in the area. If the taxpayers are required to compensate every owner when their property value fluctuates during the planning phase, there will never be sufficient funding to construct highways or improve safety.

V. CONCLUSION

The Court of Appeals properly applied well-settled inverse condemnation law to affirm dismissal of this action. Nothing in the decision raises a significant constitutional question, conflicts with prior case law, or presents an issue of substantial public interest. Accordingly, this Court should deny Tapio's petition for review.

RESPECTFULLY SUBMITTED this 27th day of January 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Answer To Petition For Review to be served via electronic mail on the following:

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