COA NO. 336841

IN THE 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, an 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.

BRIEF OF RESPONDENT

PAINE HAMBLEN, LLP
John C. Riseborough, WSBA #7740
William C. Schroeder, WSBA # 41986
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

I. INTRODUCTION

Under Washington law, an action may be brought for inverse condemnation when the government takes private property without instituting formal condemnation proceedings. A taking occurs if the physical right to use or enjoy the property is impaired, or a regulation is imposed that is so burdensome that it restricts use of the property. Because neither a physical nor a regulatory taking occurred, the trial court properly dismissed the Tapio Companies' (Tapio) case.

Tapio contends that a taking must have occurred because the State Department of Transportation's (WSDOT) conduct in acquiring other property for highway right-of-way decreased the value of Tapio's property. The Washington Supreme Court, like the United States Supreme Court, has held that impairment of the market value of real property incident to otherwise legitimate government action does not establish a taking. *E.g., Orion Corp. v. State*, 109 Wn.2d 621, 671-72, 747 P.2d 1062 (1987); *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984). There is no legal basis for Tapio's request that this Court depart from the established case law.

II. COUNTER-STATEMENT OF ISSUES

A. Whether An Independent Action For Inverse Condemnation Based Upon Lawful Precondemnation Activities Resulting Only in An Asserted But Unrecognized Loss of Market Value Exists in Washington?

B. Even If Such A Cause Action Were Recognized, Was Dismissal Proper When Tapio Failed To Offer Evidence At Trial Of Illegal Conduct, Or Of Undue Delay, Or Abusive Or Oppressive Conduct By WSDOT?

C. Whether The Court, Or A Jury, Determines If Property Has Been Taken By Inverse Condemnation?

D. Whether The Trial Court Abused Its Discretion By Not Admitting Into Evidence An Exhibit When Tapio Failed to Establish That The Exhibit Was Relevant?

E. Whether The Trial Court Abused Its Discretion By Denying Tapio's Motion To Reopen Its Case To Re-Offer An Exhibit After Resting And The Case Had Been Dismissed Under CR 50(A), When Judge Had Earlier Told Tapio Which Witness To Recall To Offer Exhibit?

III. COUNTER-STATEMENT OF THE CASE

A. Pre-Trial Procedural History.

1. Under the 2005 limited access design, the right of way of an existing street will eventually be shifted north, across the footprint of three commercial buildings owned by one of the Tapio Companies.

The Tapio Center is a three-acre office park situated along I-90 in Spokane, Washington. *See* Ex. D 225 – D 229. It consists of eleven parcels of property. *Id.* Management and ownership of the parcels which make up the Tapio Center are divided into a north portion and a south portion. The north Tapio properties are managed by owner Blake Cloninger ("Cloninger"). The south Tapio properties are managed by owner John Stejer ("Stejer"). Cloninger and Stejer were the only owners to testify at trial.

Under the 2005 limited access design, *see* Exhibit D-211, the three commercial buildings on the southern edge of the Tapio Center will be removed, in favor of a newly-constructed Second Avenue, accompanied by an overhead ramp for the collector-distributor. *See* Exhibits D-225 - D-229. There are no plans for removal of buildings or construction within the north Tapio properties. *Id.*

2. Commencement of suit and pretrial motions.

On November 2, 2011, Tapio (owners of the properties in both the north and south portions) commenced suit against WSDOT, alleging 'oppression, 'abuse', 'undue delay', and a 'failure or refusal to institute condemnation proceedings'. *See* CP 1-7.

Tapio moved for summary judgment as to liability, arguing that WSDOT had already taken the Tapio properties through: 1) WSDOT's public announcements concerning the North Spokane Corridor; 2) communications with property owners and tenants within the proposed North Spokane Corridor; 3) the acquisition of other properties near the Tapio Center; and 4) the removal of other structures. CP 16-18, 19-35, 36-61, 62-250.

WSDOT brought a CR 12(b)(6) motion, arguing that the remedy for the loss in market value alleged by Tapio is within formal condemnation

and they failed to state a claim since their only alleged damage was decrease in market value. CP 254-56, 257-79.

The parties responded and replied to the competing dispositive motions, as well as to motions concerning various evidentiary matters. CP 280-520. The trial court denied the dispositive motions. CP 530-35, 546-49. WSDOT sought discretionary review of the denial of its CR 12(b)(6) motion under RAP 2.4(b)(1), which was denied. No. 31159-7-III, December 19, 2012. CP 598-606.

After an additional 18 months of discovery and motions practice, WSDOT sought summary judgment on multiple grounds, arguing, *inter alia*, that Tapio lacked evidence sufficient to establish the elements of an inverse condemnation claim recognized under Washington law. CP 1070-1171. Tapio responded that their claim was legally viable, and that questions of fact existed as to liability and damages. CP 1479-1589.

After considering additional pleadings CP 1642-1876. and argument of counsel, the trial court denied the motion, ruling in a letter opinion, *inter alia*, that "inverse condemnation actions are not limited only to a taking resulting from physical or regulatory intrusion", and that "unwarranted delay coupled with abusive conduct by [a] governmental authority" could result in a taking. CP 2036-37.

B. Evidence Presented At Trial.

Tapio's case-in-chief consisted of eight (8) witnesses presented in the following order: Timothy P. Golden ("Golden"), real estate services manager for the eastern region of WSDOT, VRP 284; Larry R. Larson ("Larson"), project engineer for the NSC Project, VRP 550; Stejer, one of the owners, and manager of the south Tapio properties (VRP 586); R. Cajer Neely ("Neely"), a bank president, VRP 921; Jeff Johnson ("Johnson"), a real estate broker, VRP 935; Craig Soehren ("Soehren"), a real estate broker, VRP 973; Cloninger, one of the owners, and manager of the north Tapio properties, VRP 993; and D.M. 'Skip" Sherwood ("Sherwood"), a real estate appraiser, VRP 1088.

1. The NSC Project commenced in the late 1990s.

The construction of the NSC Project began in north Spokane, in the Wandermere area. *See* Exhibit D-223. It intersects SR 395 and US 2 in the north, and will run south through Spokane to intersect with I-90. *Id.*; VRP 288. The NSC Project runs generally in a north to south fashion, with the endpoint being the connection with I-90 in the south. VRP 289. Starting from the north, the NSC Project has constructed the major structures (bridges and interchanges), then connected them with the four-lane freeway. VRP 297-98. The interchange at Francis and Freya is currently being constructed. *Id.*

The environmental impact study for the project was conducted in the late 1990s, and occurred in two phases: one for the portion of the project running from Wandermere to the Spokane River; and a second for south of the Spokane River to I-90. VRP 295.

The area of the proposed I-90 interchange is three and one half miles long. VRP 523-24. All of the properties needed for right-of-way and construction along the 3.5 mile proposed I-90 interchange must be acquired before it can be completed. VRP 523-24. The Tapio Center sits on about 3 acres, and partially within the 3.5-mile proposed I-90 interchange portion of the NSC Project. VRP 523-24.

As of the trial, WSDOT had conducted approximately 100 open house meetings to inform members of the community of the project and its progress. VRP 292-93.

2. Tapio sent a letter to WSDOT in December 2002 and received a prompt response.

In December 2002, WSDOT sent notices to property owners and tenants along the proposed I-90 interchange, informing them of the access design hearing to be held in the spring of 2003. VRP 396-97.

Stejer wrote to WSDOT on December 12, 2002, complaining of the notices sent to tenants. VRP 398-99. Stejer wrote that "[i]If there are no

realistic and immediate plans to acquire our property, we intend to move forward with significant expansion and improvement[.]" VRP 402.

WSDOT responded to Stejer's letter, explaining:

> To address the exact timing of the impact to your property is difficult. The schedule of this project is dependent on a steady funding stream of which we do not have at this time. Under our current funding climate as we know it today, we will not be purchasing property in your area for several years.

VRP 403.

WSDOT also explained that the notices to property owners and tenants concern "[t]he series of meetings that we are holding, which includes the Tapio Center, [and] are aimed at preparing folks for the upcoming design access hearing tentatively scheduled for Spring, 2003." VRP 404.

Addressing the portion of the Stejer letter concerning Tapio's plans to expand, the letter explained that:

> WSDOT recommends that property owners maintain or enhance their properties as ... they see fit [because] WSDOT will consider all improvements and maintenance made to the property during the appraisal prior to purchase.

VRP 819.

3. WSDOT continued to acquire properties for the entire project, including along the I-90 corridor.

The first budget request to the Legislature for the NSC Project sought funding for the acquisition of all the necessary properties for the right-of-way. VRP 527-28. The Legislature declined to fund the entire project at that time. VRP 528.

Rather, per biennium, the Legislature provides WSDOT with a varying amount of funds for acquisition of properties for the NSC Project right-of-way. VRP 496-99. The funds appropriated for property acquisition are not tied to particular locations along the proposed NSC corridor; instead, these funds are used to acquire properties along the entire right-of-way. VRP 496-99, 516. The determination of whether to acquire each property in the vicinity of I-90 was made on a case-by-case basis.[1] VRP 509. One of the considerations WSDOT used in determining which properties to acquire was the amount of property acquired relative to the cost. VRP 498-99. Acquiring single-family dwellings with yards was more cost effective, and provided more total right-of-way for the amount expended. VRP 498-99, 503. So, if WSDOT had the funding to acquire either 30 residential properties or one commercial property, it

[1] WSDOT acquired the properties in the vicinity of I-90 through "advance right-of-way acquisition" or "early acquisition" and not under eminent domain or the threat of eminent domain. *See* RCW 47.12.242; 23 C.F.R. § 710.501(a).

would acquire the 30 residential properties. VRP 506. When WSDOT was considering acquiring a property for the right-of-way, potential future zoning changes were usually not a consideration, as the fair market value was paid. VRP 573-74.

Once property was acquired, the project office determined whether the property could be rented until demolition was necessary, or whether the property should be removed because it was unsafe. VRP 429-30, 459-60. Once a structure on a property was removed, WSDOT property management performed vegetation control, mowing, trash collection, and general maintenance. VRP 462-63.

4. WSDOT acquired residential and commercial properties along the I-90 corridor because of specific hardship requests, a residential neighborhood group's request, and value.

In 2003, WSDOT started receiving requests for early acquisition from residents of homes in the projected right-of-way near I-90. *See* VRP 433. For discretionary reasons, such as a medical necessity on the part of the resident, WSDOT would acquire a house. VRP 433, 503-04, 526-28. Also, the East Central Neighborhood community leaders asked WSDOT to consider advance acquisition of residences near I-90 so families could relocate. *See* VRP 571-72. WSDOT's project engineer made a

commitment to the East Central Neighborhood community to acquire residences there, if and when funding became available. *See* VRP 571-72.

WSDOT acquired and removed a vacant tavern building on Sprague Avenue, a few blocks north of I-90, in 2002. VRP 470-71. WSDOT acquired that building because the owner's father was dying, and the owner wished to travel to the Midwest to care for him. VRP 509. Another commercial entity, a daycare, was acquired due to a claimed economic hardship. VRP 510.

WSDOT acquired two church buildings near I-90; though WSDOT did not consider churches to be commercial entities. VRP 509-10.

> Q. [Was there] a policy or a protocol that decided it was going to be residential versus commercial first.
> A. The real estate... section of this project has never been fully funded. And our business decision was to try to be responsive to the citizens as they would bring issues forward, and so that in trying to maximize our parcels, how many parcels we can use with the limited funding we have, the decision was made to move forward in this area to purchase residential, and then followed with commercial properties.

VRP 472-73.

> A. ...[T]he conversations were in tune with "Is this a good business decision?" And so if we were to pick up, for example, the daycare center for prices that were reasonably close to residential, then... that's how it was made. It's not like the... fact that we were going down to purchase residential was meant to tie our hands to make good business decisions. And so if we could pick up... a church

> for some price or whatever that they did, that was something we did.

VRP 576.

5. WSDOT removed some properties along the I-90 corridor for construction of a wall; the remainder were removed either for safety, or cost effectiveness.

Part of the purpose of acquiring and removing some structures along I-90 in the early 2000s was to install a wall to separate I-90 from the nearby neighborhood. VRP 569-71. In 2005, the plan was to install the wall before the construction of the I-90 interchange. *Id.* However, because of engineering and funding changes, the wall was not built. *Id.*; *see also* VRP 843.

In the case of many of the residential properties near I-90, it was both safer (in terms of transient, fire, and theft issues) to remove the structures, as well as more cost-effective than not removing them. VRP 503-04.

6. The I-90 corridor properties have been acquired through advance acquisition.

WSDOT has not initiated any condemnation proceedings for the properties it has acquired near I-90. VRP 524-25. All of the acquisitions have been voluntary and not under the threat of condemnation; each of the residences which has been acquired and removed represents an owner who elected to accept WSDOT's acquisition offer. *See Id.* Fair market value

for these advance acquisitions is determined as if there were no NSC Project, and / or that the property is outside the project area. VRP 525.

7. The properties nearest the Tapio Center were owned by some of the Tapio owners, and were sold to WSDOT after the announcement of the NSC Project.

The residential properties directly across the street from the Tapio Center were sold to WSDOT by one of the Tapio company owners, Glen Cloninger. VRP 439, 521-22. One of the properties had an uninhabitable derelict house on it which required removal. VRP 439, 522-23. The other parcel was an empty lot, and the Tapio Center had stored its trash dumpster there until WSDOT acquired the lot. VRP 522-23. A total of six parcels immediately adjacent to the Tapio Center were sold for $641,000 to WSDOT by some of the Tapio owners; one of them had been acquired after the announcement of the NSC Project, in 2001, for $37,000. VRP 1073-75. Some of the Tapio owners also purchased another parcel in the path of the NSC Project and down the street from the Tapio Center, for $29,000, and then sold it to WSDOT two years later for $90,000. VRP 1077.

8. A hearing on the proposed design was held in 2003, and the final design was adopted in 2005.

Pertinent to the proposed I-90 interchange and the area near the Tapio Center, an access and design hearing was conducted in 2003 and the final design for the I-90 interchange was approved in 2005. VRP 304; Ex. D-

211. Some of the Tapio owners appeared and offered comment at the public hearing. Ex. P-21. The 2005 design established the footprint of the right-of-way, though it remains subject to modification.[2] VRP 580. After the adoption of the 2005 design, WSDOT has continued to make announcements and notify the public about the NSC Project. VRP 390. Tapio did not appeal the adoption of the 2005 design. *See* CP 2020.

9. More than 50 properties in the vicinity of the Tapio Center have not been acquired.

At the time of trial, there were about 47 to 50 residential properties left to acquire for the proposed I-90 interchange. VRP 465. There were also about 5 commercial properties left to acquire, which included the gas station adjacent to the Tapio Center, the gas station across I-90 from the Tapio Center, a nearby hair salon, a strip of Fred Meyer's parking lot, and a warehouse near Sprague Avenue. VRP 465, 468-69, 471-72. WSDOT has not yet sought to acquire any of the Tapio properties. VRP 322.

10. Tapio contended WSDOT took the entire value of the Tapio Center in October 2006.

Stejer contended the NSC Project had "stripped us of our fair market value." VRP 683-84, 688, 712-14. He claimed that the fair market value

---

[2] Although a design modification is pending which will limit the impact of the proposed I-90 interchange to a single building on the southwest corner of the Tapio Center, the trial court disallowed introduction into evidence of the pending design modification itself. VRP 581-82; Ex. D-229.

of the south Tapio properties was $7.5 million in October 2006, and $0.00 thereafter. VRP 688-90. Cloninger, manager of the north Tapio properties, opined that in October 2006, the north Tapio properties were worth about $6.5 million dollars. VRP 1059.

11. The Tapio properties generate income and remain profitable for their owners.

In 2012, the most recent data available before trial, the south Tapio properties generated $416,000 in income which passed through to the owners. VRP 1159-60. The north Tapio properties generated $260,000 in income that year. *Id.*

12. No evidence was presented at trial to substantiate the claim that "WSDOT intentionally manipulated the market"

Tapio argued to the trial court, as to this Court, that they presented evidence during their case-in-chief that WSDOT intentionally manipulated the real estate market. *See* VRP 1178. In their briefing to this Court, they identify the following locations in the record: VRP 441-42, 444, 449, 506, and Ex. P-35.

VRP 441-42 and 444 are parts of the testimony of Golden explaining how WSDOT evaluated the impact that potential rezoning would have on the fair market value amounts WSDOT pays when acquiring property. WSDOT is an owner of adjacent real property in the form of I-90 and its right-of-way, and an agency acquiring land for the NSC Project right-of-

way. Its evaluation of the impact of potential rezoning in the vicinity of the planned I-90 interchange is best described as WSDOT acting as a prudent steward of limited public resources, which is not even close to being market manipulation as alleged by Tapio. VRP 449 is colloquy among counsel and the trial court, and is not evidence. VRP 506 concerns the criteria WSDOT considers in using its limited funding to acquire property for the NSC Project right-of-way. None of this testimony supported Tapio's claim of "market manipulation" at trial, nor does it substantiate the arguments they have presented to this Court.

13. Tapio claimed only a loss of market value and admitted making no claim concerning occupancy rates or rents

One of Tapio's experts testified that the "market rents at Tapio have been competitive with other peripheral office buildings of the same quality." VRP 942. Tapio's managers testified they were not making a claim as to a change in occupancy rate, or that the Tapio properties had fewer tenants than they would have but for the NSC Project. VRP 848, 850.

Tapio did not present evidence of any tenant for whom the NSC Project was a factor in deciding either to not lease or to relocate. VRP 793. The only examples given at trial by Tapio were tenants who expressed concern about the NSC Project who remained tenants. VRP

822. Tapio's managers also testified they are not making a claim as to lower rental rates; in fact, each of their rental contracts contains a rent escalation clause. VRP 851, 853.

In their brief to this Court, Tapio claims "countless lost tenants", citing VRP 379, VRP 567-68, and Exhibit P-50. These citations do not support Tapio's claims. VRP 379 is colloquy among counsel and the trial court. The testimony in VRP 567-68 concerns notifications mailed to owners and tenants along the NSC Project corridor and does not discuss the occupancy rates at the Tapio properties. Exhibit P-50 is a March 17, 2010, letter from south Tapio manager Stejer to WSDOT alleging lost tenants, lower rents, and lower occupancy, though Stejer testified at trial to the contrary. *See* VRP 793, 822, 848, 850-51, 853.

14. Tapio presented no evidence of 'undue delay'.

The only witnesses called during Tapio's case-in-chief to describe the NSC Project and its progress were WSDOT employees Golden and Larson. Tapio's lay witnesses were asked about delay, but admitted that it was only from their perspective, and that they had no evidence of delay, undue or otherwise, from a project, budgetary, or engineering standpoint. VRP 711-12, 834, 836-37. Tapio's real estate broker testified that in his experience, what WSDOT has done in furtherance of the NSC Project is

no different from what they do in other public works projects. VRP 989-90.

The Tapio owners testified they did not request that WSDOT buy the Tapio properties in 2002, 2006, or 2012. VRP 715, 817. The Tapio managers testified that they had never requested WSDOT to alter the planned footprint of Second Avenue so as to not necessitate the removal of the southernmost three buildings. VRP 797.

15. Tapio did not claim physical damage, loss of access, or restriction upon use of their properties.

The Tapio owners testified they are not claiming any physical damage to the property, any loss of access to the property, or that any rule or restriction imposed on their property has impeded their operations. VRP 706-07; 1079-80.

16. Tapio did not claim WSDOT misinformed them or the public.

Tapio was not claiming that it was wrong for WSDOT to hold public meetings, nor that WSDOT misinformed the public. VRP 705; 1078-79. They likewise were not claiming that WSDOT put false information in any of the reports it published, nor that they should have refrained from publishing the construction plans or have kept the plans secret. VRP 1079.

17. Tapio has not attempted to market or sell the properties.

The Tapio properties were never listed for sale. VRP 865. Tapio never listed, marketed the properties, or attempted to sell them because an undisclosed advisor told them "somebody wouldn't take fair market value." VRP 865-66. Tapio's expert did not segregate what portion of the asserted but unrecognized loss of market value of the Tapio properties was caused by the effects of the economy, their location, their lack of ADA compliance, and the age of the buildings, as opposed to the NSC Project.[3] VRP 962.

Craig Soehren, real estate broker called by Tapio, testified that he would not show commercial clients seeking long term leases the Tapio Center, or recommend it to a prospective purchaser, if that purchaser was seeking to increase cash flow. VRP 981-84. Soehren also testified that the removal of the houses in the blocks near the Tapio Center improved the look of the area. VRP 991.

[3] Johnson testified that it would be difficult to hold tenants and difficult to find a real estate investor to purchase the Tapio properties. VRP 950-51. Johnson did not consult specific information as to the vacancy rate at the Tapio Center, and acknowledged that his opinion as to holding tenants was hypothetical. VRP 955-56.

18. Tapio did not present evidence they either sought, or were unable to receive refinancing.

The Tapio owners have not sought to refinance the Tapio properties, nor have they attempted to use the Tapio properties as collateral for a loan. VRP 854-55, 861. Tapio do not state a dollar figure in damages for their 'inability to refinance' claim, and they do not claim that this impacted the fair market value of the Tapio properties.[4] VRP 861-62.

C. Tapio Rested Their Case Without Offering Competent Testimony Sufficient To Admit Ex. P-35.

Prior to trial, WSDOT moved to exclude or limit consideration of Ex. P-35, which is an email exchange between several WSDOT employees, dated between September 27, 2006, and October 9, 2006. CP 2026-28, 2116-17, 2167-68. The author of the portion of the email chain in question, Richard Birr, died 14 months before the June 2014 trial. VRP 457; CP 2026-28.

WSDOT argued the email was not relevant, in that it describes different property several miles from Tapio Center; was written five years prior to Tapio filing suit; and that the clipped version of the email presented by Tapio was incomplete and out of context, and should not be

[4] Neely testified the only type of loan which would present trouble for the Tapio Companies to obtain is a nonrecourse loan, though other types of loans would be available. VRP 931. Neely was not asked to evaluate a loan application, nor did he check the Tapio Companies' income, finances, vacancy rate, market position, or rent rolls. VRP 928-29.

admitted without proper foundation as to relevance. VRP 904-05; CP 2026-28, 2116-17, 2167-68.

The trial court reserved ruling until such time as admission of the exhibit was sought, which Tapio first attempted during the re-direct examination of the third witness in their case-in-chief, south Tapio manager Stejer. VRP 897-901. After hearing oral argument as to the pending motion in limine concerning that exhibit, VRP 900-12, the trial court ruled:

> ... I can't read this, and it's not obvious to me that the state's doing it. I just don't know. There's too many things that -- too many unknowns for me to have any clue as to really what this says. You could tell me, I'm sure, what you each think it says. But I look at this and it's not really apparent to me that it proves anything, at least at this point.
> ...
> I'm really reluctant to -- to allow this in without some sort of an explanation. I think it's pretty extrinsic. I'm wondering -- you know, probably a DOT representative would be the person to ask these questions of. I'm going to give you some leeway with asking him about this situation, but I don't think he's the appropriate person to be testifying to all this. I think somebody in the know -- if you're going to make that allegation, somebody from the DOT. My understanding was Mr. Golden was part of this email... chain. So if it's going to come in at all, it would have to come in through one of those people.

VRP 905, 909-10.

Tapio sought to lay a foundation for Stejer to offer his opinions about Ex. P-35. VRP 913-14. The trial court properly sustained objections to

this. Counsel then shifted focus, asking Stejer the basis for his selection of October 2006 as the date of taking. Stejer responded "the state has made a conscious decision to acquire property in and around Tapio and they [knew]... that their acquisition would create blight[.]" VRP 914-15. This opinion was not made in response to a question about Ex. P-35. No basis or foundation for this opinion was elicited, nor were further questions regarding Ex. P-35 asked. *Id.* Significantly, Tapio did not simultaneously seek admission of Ex. P-35 into evidence. *Id.* Tapio then completed their re-direct of Stejer. Only after additional re-cross examination by WSDOT did Tapio ask the trial court to admit Ex. P-35, with no pending question, and prior to the jury submitting its questions for the witness. VRP 918. Sustaining WSDOT's objection, the trial court stated it was "not going to admit [Ex. P-35] at this time." VRP 918.

There was no further discussion of Ex. P-35 prior to Tapio resting their case. *See* VRP 918, 1171, 919-1170.

D. The Trial Court Properly Granted WSDOT's Dismissal Motion After Tapio Rested Their Case.

After Tapio rested, WSDOT moved to dismiss and filed a Memorandum of Authority in Support of Motion to Dismiss. VRP 1172; CP 2278-85. The trial court heard oral argument of counsel, then took the

matter under consideration. VRP 1172-83. During oral argument, the trial court asked counsel for Tapio the following:

> THE COURT:... quite frankly, I'm not quite clear on what you're asking for... And I saw the figures, I saw the millions. So Tapio gets to keep their property -- they get a check, they get to keep their property, and then eventually when the property is actually formally condemned, what happens?
> MR. ROBERTS: Well, and -- and that's exactly what the damages would be, Judge, is for -- for this period of time that the conduct has caused damage to the -- the property, the fair market value that can either be all of the property, a total take. If the jury finds that's a total take, DOT gets the keys... If the jury finds that it's something else... that's the just compensation for taking the ability to sell this property, my clients would get a check... And so when it comes time for the bulldozers to come in, they get to put on evidence that "Listen, we paid $7 million for the one stick; we get to get your other sticks for the remaining 200,000." And so that's the way it would work practically.

VRP 1180-83.

After consideration until the following day, the next morning the trial court ruled, in pertinent part:

> The defendants are correct: The *Orion* case suggests and plainly says that there's no cause of action for oppressive preacquisition conduct in the State of Washington... But the *Lange* case... is what I relied on heavily in my ruling with regard to summary judgment and in analyzing what I've got before me and whether or not there's enough evidence that's been presented by the plaintiff to justify moving on with this case. So in *Lange,* the court held that "...unwarranted delay coupled with affirmative action by the condemning authority resulting in a decrease in property value and actual encouragement of neighborhood deterioration," or blight, "or other abusive conduct," such

> as intentional delay on the part of the state so as to depreciate the property, could result in a taking or damaging.
>
> ...
>
> [T]he proposition in *Orion* is that there's no cause of action for oppressive preacquisition conduct and compare it with *Lange*... And that case, if you put that together with *Orion*, seems to me to allow a separate cause of action for precondemnation activity by the state but there has to be proof of abusive conduct before that happens... I didn't hear any testimony from anybody that the state was behaving in an abusive manner or in any way, shape, or form different than they perform in other types of situations... I was looking for testimony that would form the basis for a finding of undue delay, oppressive conduct basically that would allow the plaintiffs to bring this cause of action and to basically force a condemnation. I'm also aware of the fact that when the state does file a condemnation proceeding, the plaintiffs are going to be allowed to argue that fair market value -- fair market value and the decrease in it should be determined not at the date of the condemnation but at sometime prior to that... [T]here is a lack of evidence, in my mind, sufficient to support a cause of action... based upon... undue delay, oppressive behavior, or some kind of intentional conduct by the state. I can't find that in... any of the testimony, so I am going to grant the defendant's motion to dismiss.

VRP 1185-91.

E. The Trial Court Denied Tapio's Motion To Re-Open Their Case After The Trial Court Granted Dismissal.

In objecting to the trial court's ruling, Tapio acknowledged that Ex. P-35 was not in evidence. VRP 1194. After objecting to the trial court's ruling, Tapio moved to re-open their case in order to re-call witnesses and attempt to further discuss Ex. P-35. VRP 1197-1200. The trial court

denied the motion, noting that Tapio had "due, ample time to do that and didn't when you called the witness[.]" VRP 1198.

Tapio also argued that additional evidence supporting their case might come in during WSDOT's case-in-chief. VRP 1199-1200. The trial court rejected this as well, noting that Tapio were not entitled to consideration of the defense's case on a motion to dismiss. VRP 1200.

The trial court approved the order proposed by WSDOT, which was drawn from a suggested form contained in Washington Practice. VRP 1207; CP 2767-73, 2774-88. The trial court entered Judgment on June 20, 2014 and this appeal timely followed. CP 2801-19.

IV. ARGUMENT

A. Standard Of Review.

The Court reviews a trial court's CR 50 ruling *de novo*, engaging in the same inquiry as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Judgment as a matter of law is proper only when, viewing the evidence in the light most favorable to the nonmoving party, substantial evidence cannot support a verdict for the nonmoving party. *Id.* at 491, 493.

B. Tapio's Case Was Properly Dismissed Because There Was No Physical or Regulatory Taking of Their Property.

Tapio alleges that WSDOT engaged in an inverse taking of its property. An inverse taking occurs when property is "appropriated in fact,

but with no formal exercise of the power of eminent domain." *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). The test for inverse condemnation requires proof of four elements: "(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.* The claimant has the burden to prove each element. *Keene Valley Ventures v. Richland*, 174 Wn. App. 219, 225, 298 P.3d 121 (2013), *review denied*, 178 Wn.2d 1020 (2013).

Tapio failed to prove the first element, because WSDOT did not take or damage their property. Inverse condemnation is not a hazy concept that requires the taxpayers to pay every property owner indirectly impacted by the government. Rather, compensation is due when the government directly appropriates property or issues a regulation resulting in a taking. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 929, 296 P.3d 860 (2013); *Manufactured Housing Comm. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000) (mobile home park regulations); *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 238 P.3d 1129 (2010) (physical invasion by water). Tapio did not establish either form of taking. There is no evidence of a physical taking and there is no regulation affecting Tapio's property.

1. There was no physical taking of Tapio's property.

Tapios' witnesses confirmed that there was no physical damage or loss of access to its property. VRP 706-07, 1079-80. The property identified by the 2005 limited access design for possible future acquisition will not be affected unless WSDOT purchases or condemns the property.

Planning a highway project is a major endeavor that takes years of surveying, environmental studies, proposed plans, public input, and state and federal political negotiation to obtain funding. WSDOT's actions do not "restrict or restrain in any manner the improvement, development, or other use" of property within with the proposed highway, until WSDOT records a final plan with the county auditor. RCW 47.28.026(2). Because WSDOT had not recorded a plan, Tapio's use or sale its property was not restricted. *Id.*

2. Tapio's ability to use the property by selling it was not impaired.

Although Tapio's right to sell was unimpaired, Tapio contends that use of the property was impaired because knowledge of WSDOT's preliminary plans caused the market value to drop. VRP 865-66. Tapio contends that any measurable loss of market value entitles them to compensation. Br. at 32. But the United States Supreme Court has held that impairment of the market value of real property incident to otherwise legitimate government action does not establish a taking. *Kirby Forest*

Industries v. United States, 467 U.S. 1, 15, 104 S.Ct. 2187, 81 L. Ed. 2d 1 (1984). In *Kirby Forest*, the owner's land was identified for acquisition by the National Park Service. Seven years later, Congress passed a statute directing the Secretary of the Interior to acquire the landowner's tract for a national preserve. *Id.* at 7. The government commenced a condemnation action, filed a notice of *lis pendens*, and publicized the condemnation proceeding. In rejecting the owner's takings claim, the Supreme Court held that "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 under the Fifth Amendment." *Id.* at 15. The Court cautioned that although it is certainly possible that publishing intent to condemn the land reduced the sale price, this did not obstruct the owner's ability to sell or develop the property.

Contrary to Tapio's argument, loss of value alone is not recognized as a taking in Washington, either. In making this allegation, Tapio selectively quotes *Highline School District v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1967). Br. at 32. In *Highline,* the Court addressed the loss of the schools' ability to use and enjoy its property after an invasion of new jet airplane noise, and an increase of annual air operations overhead to more than 100,000 flights. This doubled the classroom and instructional time

lost because of aircraft noise. *Id.* at 8. Given the incursion on the ability to use and enjoy the property, the Court held that an inverse condemnation claim could be brought. Unlike the Highline School District, Tapio did not lose its ability to use or enjoy its property. There is simply no support for Tapio's contention that a loss in market value alone is an interference with property use.

3. Government use of adjacent land did not encroach on Tapio's use of its property.

Tapio relies on a number of cases in which the physical invasion involved a taking of some aspect of physical ownership and control. *Union Elevator & Warehouse v. State*, 96 Wn. App. 288, 980 P.2d 779 (1999) concerned a physical taking of access to a property. *Dickgeiser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005) concerned logging of land adjacent to private property, which caused winter and spring floodwaters to damage homes, septic systems, and drinking water. *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960) concerned noise interference caused by increased airplane overflights near an airport. These cases illustrate that a taking may occur based on activity on adjacent land—but only if it results in a physical impairment of the property as issue. Because Tapio's property, access, and use were not impaired, these cases are not applicable.

4. Since there is no regulation at issue, there cannot be a regulatory taking.

Unable to show evidence of a physical taking, Tapio contends its property was impaired by a regulation. Yet Tapio's witnesses also conceded at trial that there was no regulation, rule, or restriction imposed on their property that impeded their operations. VRP 706-07, 1079-80.

Tapio argues that the 2005 limited access design was an implied 'regulation.' This is incorrect. As stated above, Washington law affirmatively provides that until a final plan is recorded with the county auditor, property rights remain unrestricted. RCW 47.28.026(2). After a plan is recorded, owners of property along the proposed right-of-way are restricted from erecting new structures or engaging in substantial improvements. *See* VRP 819-20. The possibility that WSDOT may take such action in the future is not sufficient to support a regulatory takings claim.

Even in cases in which there is a regulation, compensation is not afforded every time a regulation has an incidental impact on property values. Regulatory inverse condemnation occurs only when government imposes a regulation that is so restrictive that it rises to the level of a taking. *See, e.g., Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) (land use regulation). The plaintiff must prove that the regulation

"destroys or derogates a fundamental attribute of ownership: the rights to possess exclusively, to exclude others, and to dispose of property." *Robinson*, 119 Wn.2d at 49-50. In other words, a regulatory taking can occur if a regulation "goes too far." *See Phillips,* 136 Wn.2d at 964-65. A bare allegation of financial impact is insufficient to support a claim. Since Tapio is unable to show even a regulation, it has no basis for its case.

5. Federal courts have also rejected the notion that compensation must be awarded for every impact on property values.

In asking the Court to expand the law and find inverse condemnation in the absence of a physical or regulatory taking, Tapio incorrectly argues that federal and state cases support the contention that any impact on property value requires that the taxpayers provide just compensation. In reality, this concept has been widely rejected.

For example, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 107, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Supreme Court held that a municipal law restricting development of historic landmarks financially harmed the owner of Grand Central Terminal, and but did not result in a regulatory inverse condemnation. *Id.* at 107. The regulation prevented Penn Central, the terminal's owner, from entering a long-term lease with a company that planned to build an office building above the terminal. *Id.* at 116. Under the 1968 lease agreement, Penn

Central would have received $1 million annually during construction, and at least $3 million a year for the next 50 years. *Id.* at 116.

In denying Penn Central's takings claim, the Court rejected the notion that a taking must have occurred simply because the value of terminal was significantly diminished. *Id.* at 130. "'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.'" *Id.* at 124 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322 (1922)). This is point is particularly applicable to highway planning. Each study the State undertakes, each alternative plan it publishes for public input, each modification considered to mitigate environmental harm, may change the perceived value of property in the area. If the taxpayers must compensate every property owner whose value fluctuates during the planning phase, there would never be sufficient funding to construct the highway and provide just compensation for property owners whose property actually is taken.

Penn Central also demonstrates that even when there is a regulation at issue, just showing economic loss is insufficient to constitute a taking. Here, however, Tapio cannot even cite a government regulation. Lacking a regulatory restriction upon the use of property, the regulatory takings

analysis ends at the first element: there is no regulation which is "vulnerable to a taking challenge[.]" *Robinson*, 119 Wn.2d at 49-51.

Tapio cites a series of cases, each distinguishable. *Guggenheim v. City of Goleta*, 582 F.3d 996, 999 (9th Cir. 2009) (mobile home rent control ordinance). *Yancey v. United States*, 915 F.2d 1534, 1536 (Fed.Cir.1990) (USDA poultry quarantine); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 532, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (regulation limiting rents); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 325-26, 787 P.2d 907 (1990) (ordinance which prohibiting construction); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 306-07, 107 S.Ct. 2378 (1987) (flood protection ordinance); *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (2002) (Forest Practices Act land use moratorium); *Martin v. Seattle*, 46 Wn. App. 1, 728 P.2d 1091 (1986) (boathouse construction regulation). The issue in each case was whether the regulation was so restrictive that it rose to the level of a taking. None of these cases provided compensation in the absence of a regulation, during a time the government was contemplating possible future regulation or action.

From Oregon, Tapio cites *Lincoln Loan v. State Hwy. Comm.*, 274 Or. 49, 545 P.2d 105 (1976), which no longer appears to be good law in that state. *See Dep't of Trans. v. Hewett Prof. Group*, 321 Or. 118, 133-34, 895

P.2d 755 (1995). *Clay County Realty Co. v. Gladstone*, 254 S.W.3d 859 (Mo.banc 2008) concerned the interpretation and interplay of Missouri statutes, and is not relevant here. *Reichs Ford v. State Roads*, 388 Md. 500, 880 A.2d 307 (2005) turned on the interpretation of a Maryland statute, and contradicts Washington law as embodied in *Orion. State Dep't Transp. v. Barsy*, 113 Nev. 712, 941 P.2d 971 (1997) *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001), was a formal condemnation case. Finally, *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003), by its own terms, is limited to its unique facts.

Tapio's reliance on *Mekuria v. Washington Metropolitan Area Transit*, 975 F.Supp. 1, 2-3 (D.D.C. 1997), is equally without merit. The case does not support Tapio's claim that a taking may be found in the absence of a regulation. In *Mekuria,* the court considered the impact of a transit district's decision to block off all vehicular and pedestrian access to a business for several years, in order to build a new metro station. Despite being a physical takings case, *Mekuria* applied regulatory takings case law. *Id.* In 2002, the United States Supreme Court overruled *Mekuria*, and all other like cases, expressly holding that courts are not to apply regulatory takings case law to a physical takings claim, and vice versa. *Tahoe-Sierra Pres. Council v. Tahoe Reg. Pl. Ag.*, 535 U.S. 302, 323-24,

122 S. Ct. 1465 (2002). The Court noted that most land use regulations tend to impact property values, often in unanticipated ways. "Threating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Id.* at 323-24.

The Supreme Court's reasoning strongly counsels against Tapio's request that regulatory takings law be grossly expanded to require government compensation before regulation or physical restriction is imposed on property. 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.[5] 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. 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

[5] See *Westgate Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992).

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.

The necessary review time between public announcement and acquisition of property for a particular project will depend on many factors unique to the project, including the projected cost, the number of feasible alternatives, the potential environmental impact, and the extent of federal involvement. Competing interests must be considered: on the one hand, the interest of the landowner in not having the cloud of condemnation hanging over his property, and on the other, the need for thorough public debate, environmental review, and consideration of project alternatives. If the government were subject to liability for 'unreasonable' delay, however, its consideration of these competing interests would be skewed. Officials would be pressured to expedite property acquisition to avoid immediate liability to a particular landowner, regardless of the long-term social costs. Public policy dictates that the government be free to make this type of planning decision in the public interest, without threat of civil liability to a particular landowner. In the absence of clear constitutional or statutory authority, this Court should decline to recognize a liability rule that would so skew governmental decision-making.

C. Washington Does Not Recognize a "Pre-Condemnation Activity" Theory of Inverse Condemnation.

Washington does not recognize a "pre-condemnation" cause of action based on action the government takes before it condemns property. The Supreme Court rejected such a theory in *Lange v. State*, 86 Wn.2d 585, 547 P.2d 282 (1976) and *Orion Corp. v. State*, 109 Wn.2d at 671-72. *See* VRP 1186.

In *Lange*, the plaintiff had acquired fifteen undeveloped parcels for development. *Lange* at 586. After establishing mutual easements for sewer, water, and access, and surveying and graded for streets, he learned that the State Highway Department was proposing to run a new highway across his property. *Id.* The Department confirmed to the plaintiff that the proposed highway would affect his property, and that right-of-way acquisitions were not scheduled to begin until the following year. *Id.* The Department held public hearings, advising that the plaintiff's property would be acquired, but that delays were occurring. *Id.* at 587. Ultimately, the plaintiff commenced an inverse condemnation suit, alleging that "the cumulative effect of the actions of the State in surveying, issuing press releases, acquiring nearby property, and implementing its plans for the highway amounted to 'condemnation blight' and a 'taking' ...." *Id.* at 587-88. A year later, the Department initiated condemnation proceedings. *Id.*

The Supreme Court affirmed dismissal of the inverse condemnation claim and held that the remedy for an alleged pre-condemnation decrease in market value is found in the formal condemnation proceeding. *Id.* at 595.

Although some states have recognized a "pre-condemnation activity" theory of inverse condemnation, the Washington Supreme Court has expressly declined to recognize such a theory as a stand-alone cause of action, separate from formal condemnation. *Orion Corp. v. State*, 109 Wn.2d at 671-72.[6] In *Orion*, the plaintiff argued that its property suffered "diminution in market value result[ing] from unreasonably delaying [the] eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation." *Id.* at 671. The Court held that this theory of inverse condemnation is not viable as a separate cause of action in Washington:

> Apparently, California has recognized a cause of action for inverse condemnation when a diminution in market value resulted from unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation[.] At this time, we do not choose to recognize this new cause of action.

---

[6] *See also State v. McDonald*, 98 Wn.2d 521, 532, 656 P.2d 1043 (1983) (Washington law "does not allow a landowner to claim, under the guise of compensation, profits allegedly lost as a result of precondemnation activities of the State.").

Id. at 671-72 (*citing Klopping v. City of Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal.Rptr. 1 (1972)). The Court affirmed dismissal of the plaintiff's "oppressive pre-acquisition conduct" inverse condemnation theory on summary judgment. *Id.*[7] Here, as in *Lange* and *Orion*, the only remedy for Tapio's alleged precondemnation diminution in market value is within formal condemnation. This, alone, warrants the dismissal of Tapio's claim.

1. Even if there were a cause of action for pre-condemnation activity, there is no evidence of oppression, abuse, or undue delay.

Even if Washington were to recognize a cause of action for pre-condemnation action, dismissal of Tapio's case was appropriate. As the trial court noted, there was not "any testimony from anybody that the state was behaving in an abusive manner or in any way, shape, or form different than they perform in other types of situations." VRP 1189-90. There was no testimony "that they created blight intentionally." VRP 1189-90. The testimony "indicat[ed] that the budget drove all of their decisions and that

[7] Although the *Orion* court characterized *Klopping* as recognizing a precondemnation "cause of action", under California law, "inverse condemnation damages for precondemnation conduct must be claimed in a pending eminent domain action[.]" *City of Ripon v. Sweetin*, 100 Cal.App.4th 887, 897-98 (2002). "In short, a claim for precondemnation damages...is not akin to a court-created private right of action enabling property owners to collect damages whenever a public entity acts 'unreasonably.'" *City of Los Angeles v. Superior Court*, 194 Cal.App.4th 210, 226, 124 Cal.Rptr.3d 499 (2011) (internal citations omitted).

basically because of the budget constraints, they worked with what they got." VRP 1190.

Tapio had no evidence or witnesses concerning "undue delay." VRP 711-12, 834, 836-37. Tapio is not claiming there has been any physical damage to the property, any loss of access to the property, or any regulation, rule, or restriction imposed on their property supporting a remedy. VRP 706-07; 1079-80. There was not "testimony that would form the basis for a finding of undue delay [or] oppressive conduct[.]" VRP 1190-91.

2. Lawful Activity On Government Owned Property Is Not A Taking By Inverse Condemnation.

"[The Washington State] constitution does not authorize compensation merely for depreciation in market value when caused by a legal act." *Reg'l v. Heirs*, 135 Wn. App. 446, 458-59, 144 P.3d 322 (2006). "[T]he premise that a measurable loss in market value constitutes interference with a landowner's use and enjoyment of property would be applicable in this case only if the decline in market value was caused by unlawful governmental interference." *Pierce v. Sewer & Water Dist.*, 123 Wn.2d 550, 561, 870 P.2d 305 (1994).[8]

[8] Tapio cites three cases for the proposition that market value loss alone is compensable, absent a physical or regulatory taking. *Showalter v. City of Cheney*, 118 Wn. App. 543, 551, 76 P.3d 782 (2003) turned on the issue of whether a license to put a canopy on a

In *Pierce*, a Water & Sewer District acquired a parcel of property adjacent to some homes and constructed a 4.3 million gallon water storage tank. *Id.* at 554. Owners of the nearby residential properties sued, alleging inverse condemnation on the theory that the construction of the tank had caused a $30,000.00 loss in value to the owners' properties. *Id.* The District was granted summary judgment, which was affirmed. *Id.* at 555. The *Pierce* court explained that a view from a property is not a compensable property right for the purposes of a takings analysis, as the "right to an unobstructed view does not exist, absent an agreement, statute or governmentally imposed condition affirmatively creating that right." *Id.* at 559.

Concerning the issue of property value, the *Pierce* court agreed that the property owners had suffered a measurable loss in market value after the tank was constructed. *Id.* at 561.

> [O]ur prior decisions do not lead to the conclusion that loss in market value of Petitioners' property is of itself evidence of governmental interference with the use and enjoyment of property entitling them to compensation. If property, or a substantial portion of that property, is destroyed by the government for a public purpose, the landowner would

---

public sidewalk was a property right; the court affirmed summary dismissal of an inverse condemnation claim. *Tom v. State*, 164 Wn. App. 609, 267 P.3d 361 (2011) found no taking where the plaintiffs lived next door to a firing range that pre-existed their ownership of the property. *Pruitt v. Douglas County*, 116 Wn. App. 547, 550-51, 66 P.3d 1111 (2003) concerned a suit for damages due to flooding caused by water channeled onto private property due to nearby road and ditch improvements.

> unquestionably be entitled to compensation under Const. art. 1, § 16 (amend. 9). That section, however, does not authorize compensation merely for a depreciation in market value of property when caused by a legal act.

Id. at 562 (footnotes omitted). "This court has not allowed compensation based merely upon proximity of a building or structure." *Id.* at 563 (*citing Aubol v. Tacoma*, 167 Wn. 442, 446, 9 P.2d 780 (1932)).[9]

At trial here, Tapio presented testimony complaining of various acts undertaken by WSDOT in furtherance of the NSC Project, though they admitted that they did not contend those acts were illegal, or question WSDOT's authority to perform them.

Lawful activity on government owned property is not a taking by inverse condemnation. Since there is simply no evidence of any inappropriate conduct by WSDOT, dismissal of Tapio's claim would be proper even if there were a cause of action for pre-condemnation activity.

D. Whether A Taking By Inverse Condemnation Has Occurred Is A Question Of Law For The Court To Decide.

Tapio argues the trial court's ruling that they failed to establish that an inverse condemnation taking had occurred should be reversed, because a jury should decide whether the property was unconstitutionally taken. This

---

[9] "[T]he constitutional guaranty that no private property shall be taken or damaged without just compensation having first been paid, 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, which is in law *damnum absque injuria*." *Aubol*, 167 Wn. at 446.

request is contrary to Washington law. The court determines the constitutional question of whether a taking has occurred; if so, a jury determines the question of compensation. *See Wandermere Corp. v. State*, 79 Wn.2d 688, 695, 488 P.2d 1088 (1971); *Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 705, 167 P.3d 584 (2007), *review denied*, 163 Wn.2d 1041 (2008).

> The determination of whether a given governmental interference with private property rights constitutes a 'taking' or a 'damaging' is a complex determination depending upon the unique facts of each given case. *This determination is a judicial question.*

Wandermere, 79 Wn.2d at 695 (emphasis in original).

Similarly, the question of whether a regulatory inverse condemnation taking has occurred is one of law for the court. *Robinson v. Seattle*, 119 Wn.2d 34, 49-51, 830 P.2d 318 (1992); *Galvis*, 140 Wn. App. at 705. *Galvis* explains that while article I, section 16 of the Washington Constitution guarantees a jury trial to assess the amount of damages in an inverse condemnation case, Washington case law does not "suggest that property owners have a right to submit to a jury the preliminary question of whether a taking of property has occurred." *Id.* at 705. Only after the court has determined that a taking has occurred is compensation mandated. *See Robinson* at 51.

There was substantial development of the issue of whether the judge,

and not the jury, decides whether a taking has occurred. WSDOT presented a separate pretrial motion to bifurcate the trial. CP 2169-76. The court entertained oral argument though declined to bifurcate, believing it was not mandatory in inverse condemnation cases. VRP 59-60, 215-18. Thus, the trial court's ultimate decision with respect to Tapio's failure to present evidence that a taking had occurred operates to establish an alternative basis upon which this Court may affirm the trial court. A dispositive ruling may be affirmed on any grounds supported by the record even if the trial court did not consider those grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

E. The Trial Court Properly Declined to Admit Ex. P-35 Through A Witness Who Lacked Sufficient Knowledge Regarding The Exhibit.

"A trial court's decision to exclude evidence will be reversed only where it has abused its discretion." *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009) (*citing State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007)). "An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons." *Id.* (*citing State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007)).

ER 402[10] authorizes a trial court to exclude evidence if relevance is not established, and ER 403[11] authorizes the exclusion even of relevant evidence if the admission would be unduly prejudicial. Here, the trial court clearly ruled that Ex. P-35 as offered was of little or no relevance, and would cause undue confusion had it been admitted. It did not abuse its discretion in refusing admission of Ex. P-35.

Tapio could not establish that the email was relevant through Stejer because it pertained to different property several miles from the Tapio properties, was written five years prior to Tapio filing suit, was incomplete, and was out of context. Thus, Ex. P-35 was properly excluded due to the lack of an adequate foundation to establish that the exhibit was relevant. VRP 904-05; CP 2026-28, 2116-17, 2167-68.

Here, Tapio witness Stejer lacked a sufficient understanding of the subject matter, contents, and context of Ex. P-35 to establish that the exhibit was relevant. In sum, Tapio presented no testimony from a witness with sufficient knowledge to lay a proper foundation for introduction of this exhibit.

---

[10] ER 402 provides: "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

[11] ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

F. The Trial Court Properly Denied Tapio's Motion To Re-Open The Case After Tapio Rested And The Claim Was Dismissed.

"Reopening a cause for additional evidence rests within the discretion of the court[.]" *Tsubota v. Gunkel*, 58 Wn.2d 586, 591, 364 P.2d 549 (1961). As explained by the trial court, Tapio had "ample time" to present their evidence and witnesses, and had called the proper witness to testify to Ex. P-35, but elected to not have him do so. VRP 1198–1199. Then, Tapio elected to rest their case without further seeking introduction of Ex. P-35. *See Id.* The trial court did not err in declining to allow Tapio to re-open its case after it had been dismissed.

V. CONCLUSION

Having convinced the trial court that a cause of action for lawful pre-condemnation activity might exist in Washington as provided for by dicta in *Lange* and *Orion*, Plaintiff's nevertheless failed to prove the elements defined by the Trial court as essential to their cause of action.

In denying summary judgment, the trial court concluded that a cause of action for inverse condemnation through pre-condemnation activity would lie if there was proof of undue delay coupled with abusive or oppressive conduct by WSDOT. Tapio failed to prove either theory at trial and the trial court appropriately dismissed their action.

The trial court's decision should be upheld because a) there is no cause of action for taking by lawful pre-condemnation activity in

Washington; b) the plaintiffs failed to prove actionable conduct by WSDOT in any event; and c) whether a taking has occurred for purposes of inverse condemnation is a question determined by the court, not a jury.

RESPECTFULLY SUBMITTED this 8th day of June, 2015.

PAINE HAMBLEN LLP

By: _____

John C. Riseborough, WSBA #7740
William C. Schroeder, WSBA # 41986
717 W. Sprague Avenue, Suite 1200
Spokane, WA 99201-3505
(509) 455-6000
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2015, I caused to be served a true and correct copy of the foregoing document, by the method indicated below and addressed to the following:

Kevin W. Roberts Robert A. Dunn 111 North Post, Suite 300 Spokane, WA 99201-0705	X _____ _____ _____ X	DELIVERED U.S. MAIL OVERNIGHT MAIL TELECOPY E-MAIL

William C. Schroeder

OFFICE RECEPTIONIST, CLERK

To: Theresa Henry
Cc: Kevin W. Roberts (kroberts@dunnandblack.com); Bob Dunn; John Riseborough; William C. Schroeder; Cindy Bryan; Richard Kuhling; Hruban, Frank (ATG); Maureen Obrien
Subject: RE: Tapio v. State of Washington, Supreme Court Case no: 90506-1

Received 6-8-2015

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.

-----Original Message-----
From: Theresa Henry [mailto:Theresa.Henry@painehamblen.com]
Sent: Monday, June 08, 2015 3:24 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kevin W. Roberts (kroberts@dunnandblack.com); Bob Dunn; John Riseborough; William C. Schroeder; Cindy Bryan; Richard Kuhling; Hruban, Frank (ATG); Maureen Obrien
Subject: Tapio v. State of Washington, Supreme Court Case no: 90506-1

Good afternoon. Attached for filing in re: Tapio v. State of Washington, Case no: 90506-1 is the following:

- Brief of Respondent

John C. Riseborough is filing this pleading; WSBA #7740, 509-455-6000, john.riseborough@painehamblen.com

Sincerely,

Theresa J. Henry
Paine Hamblen LLP
Assistant to John C. Riseborough
direct: (509) 455-5182
fax: (509) 838-0007