No. 939063

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION III

Cause No. 336841-III

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.

APPELLANTS' PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

I. IDENTITY OF PETITIONER 1

II. DECISION TO BE REVIEWED 1

III. ISSUES PRESENTED FOR REVIEW 1

1. Whether the COA erred in failing to recognize an inverse condemnation claim for preacquisition conduct as an existing cause of action under Washington's Constitution and Washington Supreme Court decisions? 1

2. Whether the COA erred in not addressing Tapio's claim that damages are available under Washington law for government preacqusition conduct that is either abusive or unduly delayed? 1

3. Whether announcement of an intent to condemn, combined with other government preacquisition conduct can result in taking or damaging of private property rights requiring just compensation under Washington's Constitution? 1

4. Whether oppressive government conduct or undue delay in acquiring private property can result in an unconstitutional taking or damaging of private property rights? 1

5. Whether government conduct interfering with the right to use, enjoy and dispose of property, as well as causing a substantial loss of value to property, constitutes a compensable taking or damaging of property under Washington's Constitution? 1

6. Whether Washington's Constitution protects citizens from damage to private property rights of use, enjoyment and disposal due to government conduct or interference without just compensation first being paid? 1

7. Whether Washington's Constitution protects citizens from having private property rights damaged as a result of government acquisition of adjacent properties in a manner that knowingly blights or depresses property values of surrounding properties not yet acquired? 2

8. Whether actionable damaging of private property rights occurs due to government preacquisition conduct if there is evidence of a property owner's inability to sell resulting from such conduct? 2

9. Whether Washington's Constitution's prohibition against the taking or damaging of property without payment of just compensation is intended to protect all essential elements of ownership which make property valuable, including the right to sell? 2

10. Whether the Trial Court ignored both applicable law and evidence upon which a reasonable jury could have found DOT violated Tapio's right to just compensation due to the taking or damaging of private property? 2

IV. STATEMENT OF THE CASE 2

A. CASE OVERVIEW 2

B. TRIAL COURT EVIDENCE AND DECISION 7

C. COURT OF APPEALS DECISION 11

V. ARGUMENT 13

A. The Petition Involves A Significant Question Under Washington's Constitution. 13

B. Division III's Decision Conflicts With *Lange v. State.* 16

C. Substantial Public Interests Require This Court's Determination. 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224 (2008) 18, 19

Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 11 (1976).....14

Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972).....18

Lange v. State, 86 Wn.2d 585 (1976) 9, 16, 17, 18

Manufactured Housing Communities of Wash. v. State, 142 Wn.2d 347, 360 (2000) 14

Orion Corp. v. State, 109 Wn.2d 621 (1987) 17, 18

Pierce v. Northeast Lake Wash. Sewer Dist., 123 Wn.2d 550, 560 (1944) 14

Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 657 (1997).....14

Tapio Investment Company I, et al. v. State, Court of Appeals Division III No. 33684-1-III.....1

Union Elevator v. State, 96 Wn. App. 288 (1999).....15

Rules

RAP 13.4(b) 13

Other Authorities

Wash. Const, Art. I, Sec. 16.....13, 20

Appendices

Appendix A - 10/27/2016 Published Opinion - Tapio Investment Company I, et al. v. State, Court of Appeals Division III, Case No. 33684-1-III

Appendix B – Defts Exhibit No. 228 – Map

Appendix C – Commissioner Monica Wasson's 12/19/12 Ruling

Appendix D – Washington Constitution, Art. 1, Sec. 16

I. IDENTITY OF PETITIONER

Appellants Tapio Investment Company I, et al., (collectively "Tapio"), through their attorneys file this Petition for Review.

II. DECISION TO BE REVIEWED

Appellants Tapio seek discretionary review of the 10/27/2016 published decision, Tapio Investment Company I, et al. v. State, Court of Appeals ("COA") Division III No. 33684-1-III. See **Appendix A.**

III. ISSUES PRESENTED FOR REVIEW

1. Whether the COA erred in failing to recognize an inverse condemnation claim for preacquisition conduct as an existing cause of action under Washington's Constitution and Washington Supreme Court decisions?

2. Whether the COA erred in not addressing Tapio's claim that damages are available under Washington law for government preacqusition conduct that is either abusive or unduly delayed?

3. Whether announcement of an intent to condemn, combined with other government preacquisition conduct can result in taking or **damaging** of private property rights requiring just compensation under Washington's Constitution?

4. Whether oppressive government conduct or undue delay in acquiring private property can result in an unconstitutional taking or **damaging** of private property rights?

5. Whether government conduct interfering with the right to use, enjoy and dispose of property, as well as causing a substantial loss of value to property, constitutes a compensable taking or **damaging** of property under Washington's Constitution?

6. Whether Washington's Constitution protects citizens from damage to private property rights of use, enjoyment and disposal due to

government conduct or interference without just compensation first being paid?

7. Whether Washington's Constitution protects citizens from having private property rights **damaged** as a result of government acquisition of adjacent properties in a manner that knowingly blights or depresses property values of surrounding properties not yet acquired?

8. Whether actionable **damaging** of private property rights occurs due to government preacquisition conduct if there is evidence of a property owner's inability to sell resulting from such conduct?

9. Whether Washington's Constitution's prohibition against the taking or **damaging** of property without payment of just compensation is intended to protect all essential elements of ownership which make property valuable, including the right to sell?

10. Whether the Trial Court ignored both applicable law and evidence upon which a reasonable jury could have found DOT violated Tapio's right to just compensation due to the taking or **damaging** of private property?

IV. STATEMENT OF THE CASE

A. CASE OVERVIEW

Tapio Center is a business complex located adjacent to the Thor-Freya Interchange on Interstate 90 in Spokane. It consists of 9 office buildings and a full-service restaurant on 6.2 acres. Ex 102. Tapio was designed with buildings positioned along the perimeter of the site, allowing for a park-like setting with common parking in the protected interior to which there are presently 8 entrances. RP 1012; **Appendix B**.

Tapio's unique layout adds significant value to its property and business. It was assembled and designed to operate as one cohesive commercial development generating rental income for Tapio's investing owners. Ex 210; RP 623-26. Although management of the property is split, all of the common areas are managed jointly, share joint utility and water systems, and are subject to reciprocal parking agreements, allowing Tapio to operate as a cohesive complex. RP 1006-07.

The North/South Corridor ("NSC") whenever totally completed is planned to be a 10.5 mile long, high speed limited access freeway linking U.S. Highways 2 and 395 to Interstate 90 in Spokane. In 1997, the Washington State Department of Transportation ("DOT") began designing the NSC Project. E.g., Exs 73, 105, 106, 109, 122. Approved plans were completed. RP 559. Those final plans reflect complete removal of 3 Tapio buildings while 2 other buildings will be "*clipped*" by the completed NSC. Exs 73, 105, 106, 109, 122; RP 562. In turn, all southern access to Tapio is to be eliminated, with parking to the northern portion of Tapio substantially affected. RP 557.

Tapio is the largest commercial structure and the only office complex in the planned NSC route which DOT needs to acquire for its Project. RP 311-12. DOT's plans showing construction over nearly half of Tapio's property and nearly all access to be taken from the property, have been

depicted in design for the Project as far back as at least 1999. RP 562-63. The design and plans were finalized in approximately 2002, and as they relate to Tapio have not changed since. RP 559.

The ROW plans were approved in 2002/03, and the limited access plans, including construction over Tapio, were approved in 2005 after an administrative hearing. RP 559. Pursuant to DOT's plans, construction of the NSC was to proceed from U.S. Highway 395 north of Spokane toward I-90 to the south. Ex 223. Because Tapio is among the southern-most properties affected by the approved plans, DOT did not require acquisition of the property for many years after its approved plans. Exs 9, 18; RP 403-04.

From the time the NSC design was approved in the late 1990s, DOT's plans have been highly publicized. E.g., Exs 13-15, 37, 39, 73-75, 80, 82, 83, 105, 106, 109, 112, 121, 143, 202, 203, 205-208, 210, 221-224, 233; VRP 554. This included more than 100 DOT public meetings, open houses, community group presentations, neighborhood council presentations, and formal hearings. Id. DOT also directly contacted every property owner and tenant along the proposed NSC route, including Tapio's owners and tenants, and conducted numerous one-on-one meetings between DOT staff and interested citizens. Id.

In 1999, Tapio's Owners notified DOT that its mere announcement of the NSC Plans would destroy the Tapio Center by affecting Tapio's

ability to lease the property. Ex 1. In fact, following DOT's 1999 publication of plans, Tapio's vacancies increased to its highest level in 20 years. Exs 1 and 6. For the next several years, Tapio regularly notified DOT that continued publicity about its NSC route was worrying Tapio's tenants, hampering Tapio leasing activity, and making plans for improvements and long-term maintenance difficult. Exs 9, 17, 50; RP 648, 652-54, 678-79. By December 2002, DOT was fully aware its continued activities were creating an economic blight on Tapio. RP 390-99. At that time, **14 years before trial**, Tapio requested DOT to acquire its property or to commence condemnation to prevent further damage to its property rights. Ex. 17; RP 401. DOT refused to do so.

By the end of 2003, DOT had started acquisition of several other properties in the direct vicinity of Tapio, even though actual freeway construction was still several miles north. RP 431-34, 470, 524-25. DOT purchased increasing numbers of residential homes in the immediate Tapio area from 2007 to 2011. Exs 138-143; RP 675-77. The majority of those DOT acquired properties surrounding Tapio were demolished and bulldozed under. RP 431, 435, 437-39, 462, 557, 676; Exs 10, 24, 27, 29, 32, 138-143. DOT's scheme of acquiring and destroying structures in the area surrounding Tapio caused the area to become increasingly visibly blighted and depressed. Exs 138-143.

As a result, Tapio sent another letter to DOT in March 2010, stating that its continued publicity of plans to acquire Tapio, coupled with DOT's campaign of acquiring and demolishing substantial numbers of surrounding properties was causing Tapio tenants to vacate, a decline in rentability and marketability, a significant decline in Tapio's market value, and an inability to sell Tapio's property. Ex 50; RP 678-79. In response, DOT still refused to acquire Tapio's property, instead informing it that DOT could not even provide a timeline for when actual construction of the NSC would begin in the Tapio area. Ex 220; RP 680-81.

Nevertheless, DOT systematically continued acquiring and demolishing approximately 300 parcels in the immediate vicinity of Tapio, essentially leaving it an island in the middle of DOT's demolition and construction zone. Exs 138-143; RP 453. DOT's actions resulted in Tapio's inability to find and keep tenants, or to find a purchaser other than DOT due to the blighted and depressed conditions DOT created in the area.

Thus, in November 2011, Tapio filed an inverse condemnation action claiming DOT's precondemnation conduct had reduced the market value of Tapio's property. CP 1-7. Tapio alleged that DOT's actions—including announcement of plans to build the NSC through the middle of the Tapio Center and DOT's widespread publication of its plans as early as 1999; the aggressive acquisition of properties immediately surrounding Tapio

admittedly to prevent commercial rezoning of the neighborhood and any consequential increase in property values; the purchase and demolition of properties near Tapio long before those phases of construction were to ever begin; and DOT's refusal to rent or acquire, much less provide any timeline whatsoever as to when Tapio would be acquired —was abusive conduct, causing undue delay, and the cause of substantial damage to Tapio's property rights. Id.

In 2012, DOT moved to dismiss Tapio's claims. CP 254-79. Superior Court Judge Leveque denied the motion for summary judgment finding genuine issues of material fact existed as to whether DOT engaged in "*abusive conduct*" or "*undue delay*" in taking or damaging Tapio's property rights. CP 546-49. DOT's Motion for Discretionary Review was also denied. **Appendix C**. The case was then reassigned, and DOT attempted to overturn its prior denied summary judgment motion. CP 1070-1133. That motion was heard on 5/16/2014, just two weeks prior to trial. On 5/29/2014, Judge Moreno denied DOT's motion, again confirming genuine issues of material fact existed. CP 2107-11.

B. TRIAL COURT EVIDENCE AND DECISION

Trial began on 6/2/2014. During trial, Tapio presented evidence confirming DOT had engaged in acquiring hundreds of properties surrounding Tapio outside the phases for which DOT had funding to

perform. RP 441-42, 444, 499, 506. DOT employees testified that the residential properties were acquired near Tapio long before they were needed for the NSC in order to prevent residential properties from being re-zoned to commercial zoning. RP 441-42, 444, 499, 506. DOT's intent in doing so was to preclude the neighborhood from being rezoned and an increase in property values including those of Tapio. Id. The net effect was DOT's manipulation of the real estate market near Tapio to depress market values, thus lowering DOT's future acquisition costs.

DOT's acquisition of the hundreds of properties surrounding Tapio not only had greatly decreased Tapio's property values, but also impacted Tapio's ability to rent or sell. RP 1120-21. Trial testimony supported that commercial brokers were not likely to bring potential tenants to Tapio in light of DOT's long-publicized NSC plans. RP 951, 983. Real estate experts confirmed that DOT's plans and acquisition activity near Tapio significantly affected Tapio's ability to ever sell its property. Id.

Notably, DOT confirmed at trial that despite its previous claims of lacking funding to acquire Tapio's property, its budget in 2007 would actually have accommodated Tapio's total acquisition. RP 506. However, instead of acquiring Tapio with funds specifically available for that purpose, DOT spent the next several years, intentionally buying and demolishing surrounding properties effectively blighting the area, including Tapio. RP

453, 506. By perpetrating its acquisition scheme, DOT effectively "*warehoused*" the Tapio Center leaving DOT ultimately as the only future Tapio buyer at a significantly discounted price. RP 897-915. Expert testimony supported that it was unlikely commercial banks would even provide loans to a potential purchaser of Tapio due to DOT's published construction plans and its obvious conduct of acquiring almost all the properties surrounding Tapio. RP 926-27, 933.

Consequently, Tapio presented sufficient evidence at trial allowing a jury to conclude that DOT's conduct as to Tapio was abusive and constituted undue delay, all of which deprived Tapio of the use, enjoyment, and benefit of their property, as well as the opportunity to sell the property and to realize on their investment.

At the close of Tapio's case, DOT moved to dismiss under CR 50. DOT had made the exact same arguments during its two prior summary judgment motions, rejected respectively by two different judges due to existing questions of material fact. CP 546-49, 2107-11. However, in reversal of its prior summary judgment ruling, the Trial Court inexplicably granted DOT's mid-trial motion stating:

> *[T]he Lange case . . . is what I heavily relied on in my ruling with regard to summary judgment and in analyzing what I've got before me and whether 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 deprecate the property, could result in a taking or damaging.

...

So applying all of this to the facts, the testimony that I've heard thus far is that . . .Tapio was identified early on in '99 as a property that was in the way of the highway and a piece of it was going to have to be taken. As early as 2000, 2001, the state started sending out notices...to the property owners, press releases. They started having open houses, and letters also went out to tenants of these properties, specifically Tapio. About 14 years has . . . gone by now, and from what I can tell from the testimony, most, if not all, of the homes surrounding Tapio have been purchased and most of them have been demolished. And that, it's alleged, caused the blight, the 'blight' term that we heard about.

...

[T]here is a lack of evidence, in my mind, sufficient to support a cause of action that, again, is not really on the books in the State of Washington but I think based upon due process and the constitution would be allowable if the plaintiff could prove that there was 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.

RP 1187-91.

In so ruling, the Trial Court did properly recognize a viable cause of action for precondemnation conduct under Washington law where the government engages in "*undue delay*" or "*abusive conduct.*" Additionally, the Trial Court correctly recognized material questions surrounding whether the State's behavior constituted oppressive conduct ("*I note that 14 years seems like a long time. But . . . I can't make that call; I can't say it's too*

long"; "what undue delay is to one person may not be to the other."). RP 1190, 1191. Yet, then proceeded nonetheless to erroneously grant DOT's motion to dismiss, thereby preventing the jury from determining the questions of fact concerning whether DOT's conduct and delays were abusive or unduly delayed. The Trial Court inexplicably interceded on issues clearly for the jury, thus committing reversible error.

C. COURT OF APPEALS DECISION

In April 2015, Tapio timely appealed the Trial Court's erroneous ruling taking the case from the jury. On 10/27/2016, Division III affirmed the Trial Court. **Appendix A.** However, in doing so, the COA simply ignored the controlling issue being appealed: "Was Tapio entitled to have a jury determine whether DOT's preacquisition behavior constituted abusive conduct or undue delay?" Instead, the COA stated:

> *On appeal, Tapio abandons any request that we recognize a new type of inverse condemnation claim for taking by oppressive preacquisition conduct—one theory that it advanced in the trial court. It contends, instead, that its evidence was sufficient to support its claim of inverse condemnation under existing law.*

Id. at 2. Unaccountably, this statement by Division III does not even closely reflect Tapio's position or arguments on appeal. Tapio's position has been consistent since filing its lawsuit. **Inverse condemnation claims for precondemnation activity are recognized under existing Washington**

law where government engages in abusive conduct or undue delay in a manner that damages private property rights.

Therefore, Tapio never requested Division III to recognize a "*new*" type of inverse condemnation claim since that cause of action already exists in Washington! In direct response to Division III's oral question whether Tapio was requesting a "*new*" cause of action, the Court was advised:

> *[T]his case was pled as an inverse condemnation claim. It was not pled as a 'separate abuse of the precondemnation conduct claim.' That term however, does apply and identif[ies] the cause of the significant precondemnation damage that the plaintiffs suffered as a direct result of the State's inverse condemnation acts which specifically targeted the plaintiff's property for taking, acts which are not permitted under our state constitution.*
>
> *So we're not asking this court this morning, to recognize this as a new cause of action, as some other states have done. That's because Washington law applicable to inverse condemnation, condemnation law in general, already supports the claim that we alleged in our Complaint.*

Id. at 11.

As Tapio explained, the Trial Court properly recognized a cause of action for oppressive precondemnation conduct that damages property rights; but it erroneously and improperly applied CR 50 to prevent the jury from determining factual issues as to whether DOT engaged in abusive conduct or undue delay. The COA compounded the Trial Court's error in refusing to address that argument. Instead the COA chose to inaccurately

classify the precondemnation damages claim as an asserted "*new*" cause of action, a decision directly contradicting existing Washington law.

Accordingly, Tapio respectfully requests this Court accept review confirming that (1) Washington's Constitution and existing case law already recognize causes of action for precondemnation taking or damaging where government engages in abusive conduct and undue delay, and that (2) questions of fact as to whether government has engaged in abusive precondemnation conduct or undue delay, are for the trier of fact.

V. ARGUMENT

Review should be accepted if there is (1) a significant question of law under Washington's State Constitution; or (2) if the Petition involves a substantial public interest that should be determined by this Court; or (3) if the decision is in conflict with a decision of this Court. RAP 13.4(b). Here, each of these factors exist and are satisfied.

A. The Petition Involves A Significant Question Under Washington's Constitution.

Washington's Constitution states "*[n]o private property shall be taken **or** **damaged** for public or private use without just compensation having first been made*". Wash. Const, art. I, sec. 16 (emphasis added). Notably, our Constitution provides additional protection not found in the takings clause of the U.S. Constitution. Our State's Constitution protects

citizens from their private property being "*taken **or damaged***" without being paid for such conduct. Therefore, our Constitution "*provide[s] Washington citizens with enhanced protections*" beyond those provided by the U.S. Constitution, namely as to the "*damaging*" of private property without first making just compensation. See Manufactured Housing Communities of Wash. v. State, 142 Wn.2d 347, 360 (2000).

Our courts have specifically recognized that property rights protected by our Constitution include the ability to use or sell the property. See e.g. Pierce v. Northeast Lake Wash. Sewer Dist., 123 Wn.2d 550, 560 (1944) citing Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 11 (1976). Where governmental taking **or damaging** occurs to private property "*[t]he amount of compensation necessary to satisfy the constitutional mandate is a matter for judicial determination. This should be determined by a jury 'unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.'*" Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 657 (1997) (internal citations omitted).

Therefore, significant constitutional questions exist in this case concerning when private property is considered "*damaged*" under our Constitution; and whether our citizen's property rights are protected from government precondemnation activity constituting abusive conduct and undue delay. Here, Division III erroneously concluded that since there "*had*

been no physical invasion of Tapio's land" (ignoring Union Elevator v. State, 96 Wn. App. 288 (1999)) and that "*the harm it complains of does not otherwise amount to a constitutional taking*", there is no allowable claim under Washington law. **Appendix A**, p. 2.

Tapio presented evidence that as early as 1999 DOT announced the NSC would effectively destroy Tapio's property. Supra. However, DOT went beyond merely "*announcing*" its plans, but began actually acquiring and demolishing hundreds of properties surrounding Tapio, long before that property was ever needed for the NSC Project. DOT's conduct of targeting these properties surrounding Tapio occurred despite any actual NSC freeway construction in the area. Supra. Tapio provided evidence that the considerable publicity of DOT's Project, coupled with DOT's orchestrated plan for prematurely acquiring and demolishing properties in the area surrounding Tapio, caused Tapio tenants to vacate, made its property unmarketable to new tenants, and made it unsaleable to potential purchasers. Supra.

As a result, during the ensuing 15 years from DOT's announcement that its Project would go through Tapio, until trial, Tapio made numerous requests for DOT to either provide specificity as to when Tapio would be acquired for its Project, or alternatively for DOT to acquire Tapio with the funding available for acquisition purposes. Supra. DOT refused to do

either. Instead, DOT continued its conduct adjacent to and surrounding Tapio creating a blighted and depressed market causing damage to Tapio's property values.

The perfect "*fact storm*" of this case now provides the ideal opportunity for this Court to confirm that Washington's citizens have constitutional protections from precondemnation government activity that damages private property rights. It was uncontroverted at trial that DOT's actions unequivocally damaged Tapio's ability to use and sell its property. Therefore, review should be accepted to definitively define that the express term "*damaged*" as used in Washington's Constitution, extends to government precondemnation activity; and that whether such government conduct and delay exists to require just compensation under our Constitution, is a question for the trier of fact.

B. Division III's Decision Conflicts With *Lange v. State.*

The COA decision here conflicts directly with a decision by Washington's Supreme Court. Division III altogether failed to address Tapio's claims of DOT's abusive conduct and undue delay, and whether those issues required factual determinations by the trier of fact. Instead, Division III erroneously regarded Tapio's damage claims caused by oppressive precondemnation conduct as a "*new cause of action*" and thus simply declined to address Tapio's issues. By viewing Tapio's argument of

oppressive preacquisition conduct as a "*type of inverse condemnation claim*" not yet recognized in Washington, the COA decision squarely conflicts with Lange v. State, 86 Wn.2d 585 (1976).

As the Trial Court stated, Lange recognized 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.*" RP 1187 (quoting Lange, 86 Wn.2d at 588). Although oppressive precondemnation conduct was previously recognized by this Court as a cause of action, no subsequent reported Washington decision has presented facts allowing clarification as to what government precondemnation activity constitutes conduct sufficient to allow compensation for private property damages.

Nevertheless, Division III ignored Lange with regard to Tapio's claims of precondemnation damages to its real property. Instead, the COA relied solely on Orion Corp. v. State, 109 Wn.2d 621 (1987) in determining a claim for oppressive precondemnation conduct was purportedly a "*new type of inverse condemnation claim.*" Although Orion did label a claim for oppressive precondemnation conduct a "*new cause of action*", a close reading of Orion indicates this Court was actually referring to the fact that

such a cause of action had not yet been applied to a set of facts in a Washington case, **but not that such a cause of action does not exist under Washington law**. This is supported by the fact that Lange, decided in 1976 before Orion, clearly recognizes a cause of action exists for oppressive preacquistion conduct, and has remained good law even after Orion. That is exactly what the Trial Court below concluded:

> *So going back to Orion. And again, the proposition in Orion is that there's no cause of action for oppressive preacquisition conduct and compare it with Lange. Now, Lange was a situation where ... the Plaintiffs filed an inverse condemnation action but then the State filed a condemnation action ... 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.*

RP 1189.

Tapio here presents the facts necessary for this Court to confirm that claims for oppressive precondemnation activity exist under Washington law, and to address the extent to which such claims apply, like other jurisdictions have. See e.g. Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972) ("*When the condemner [sic] acts unreasonably in issuing precondemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated.*"); see also Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224 (2008).

C. Substantial Public Interests Require This Court's Determination.

DOT admittedly engaged in an acquisition scheme for a public project by manipulating Spokane's real estate market, seeking intentionally to depress property values in order to acquire property at discounted prices.[1] If sanctioned, this type of government conduct will encourage unconstitutional damaging of private property rights, and will permit government to intentionally engage in condemnation conduct creating blighted and depressed neighborhoods affecting property values at the expense of private owners.

By addressing DOT's taking conduct and the laws surrounding it, this Court will ensure the constitutional rights of its citizens and protect future neighborhoods from being blighted in the name of public projects without just compensation first being made. See e.g., Buzz Stew, 124 Nev. at 229 ("*By allowing a cause of action for precondemnation damages, public agencies will be dissuaded from prematurely announcing their intent to*

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[1] *Q. [W]hat was the issue with respect to a potential zoning as it impacted the North-South Freeway, if there was one?*

A. Well, it would be a normal course of business. If the land was rezoned, then we would pay the current market value as related to that zone.

Q. So the concern was if it was residential property rezoned to business or commercial, the property values would go up and the state would have to pay more money?

A. Correct.

RP 441-442 (Direct examination of DOT's Real Estate Services Manager for the Eastern Division).

condemn private property."). Because the impact this type of intentional government precondemnation acquisition scheme is likely having on neighborhoods across the State purportedly as part of public works projects, this Court needs to clarify that government caused blighting and "*warehousing*" of property violates Wash. Const. Art. I, Sec. 16 and the protections provided our property owners.

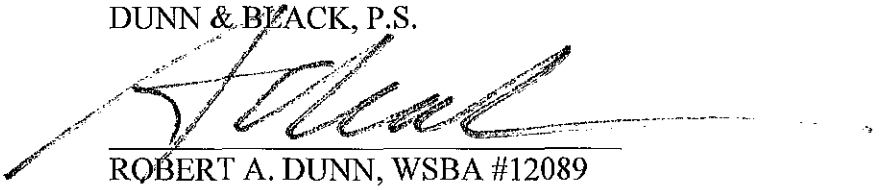
Lacking such a determination, Tapio will continue to suffer irreparable damage to its property that continues to lose tenants, decrease in value, and cannot be sold. Similar government precondemnation conduct in communities across the State to the direct damage of other Washington private property owners cannot be permitted. Thus, this Petition involves issues of substantial public interest that need to be resolved.

VI. CONCLUSION

Appellants Tapio et al., respectfully request the Supreme Court accept review of their Petition.

DATED this 28th day of November, 2016.

DUNN & BLACK, P.S.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of November, 2016, I caused to be served a true and correct copy of the foregoing document to the following:

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FILED
OCTOBER 27, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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, LLC, a Washington limited liability company,	)	No. 33684-1-III
Appellants,	)	PUBLISHED OPINION
v.	)	
THE STATE OF WASHINGTON, by and through the Department of Transportation,	)	
Respondent.	)	

SIDDOWAY, J. — Tapio Investment Company I and its affiliates[1] (collectively "Tapio") filed an inverse condemnation lawsuit against the State of Washington

[1] Monarch Investment, Tapio Office IV Partnership, Cloninger/Eucker Partnership, Pamela M. Cloninger, and Cloninger Associates, LLC.

APPENDIX A

Department of Transportation for an alleged taking of Tapio's office park during construction of a major freeway project in Spokane. The approved route for the freeway includes a portion of the office park, which is situated partially within a planned interchange. Construction of the interchange will be one of the last steps in the decades-long construction process. The Department will not need Tapio's property for many years.

The case proceeded to a jury trial on Tapio's theory that while the Department had not physically or legally interfered with use of its property, Department publicity about the freeway project and its acquisition of nearby properties hampered Tapio's leasing activity and diminished the market value of the office park to an extent that had, by 2006, already effected a constitutional taking. At the close of Tapio's case the trial court granted the Department's CR 50 motion, ruling that Tapio's evidence was insufficient as a matter of law to support a claim for relief.

On appeal, Tapio abandons any request that we recognize a new type of inverse condemnation claim for taking by oppressive preacquisition conduct—one theory that it advanced in the trial court. It contends, instead, that its evidence was sufficient to support its claim of inverse condemnation under existing law. Because there has been no physical invasion of Tapio's land, no regulation restricting Tapio's use of its property, and the harm it complains of does not otherwise amount to a constitutional taking, we affirm.

FACTS AND PROCEDURAL BACKGROUND

What is commonly referred to in Spokane as the future North-South Freeway is a partially completed, 10.5 mile long, high-speed limited access freeway that will link U.S. Highways 2 and 395 with Interstate 90 in the city of Spokane. The approved route traverses a great deal of developed property, requiring that approximately 940 parcels of land be acquired. Among them is the Tapio Center, which is situated partially within a planned interchange at Interstate 90.

Tapio Center is a three-acre office park located near the Thor-Freya interchange on Interstate 90. Nine office buildings and one restaurant are positioned on the perimeter of the site in what one owner has described as a "circle the wagons" format, with a park-like setting in the protected interior. Report of Proceedings (RP) at 1012. Common parking is included in the landscaped center, to which there are presently eight entrances. The north portion of Tapio Center includes five buildings managed by their majority owner, the Cloninger family. The five buildings in the south portion are primarily owned by Dixon/Stejer family interests and are managed by John Stejer.

The freeway project's right-of-way plans call for complete removal of three buildings in the south portion of Tapio Center. Two others will be "clipped." RP at 562. Southern access to the office park will be eliminated and access and parking to the northern portion will be affected.

Construction of the freeway project is proceeding from U.S. Highway 395 on the north toward Interstate 90 on the south. Since Tapio Center is among the southern-most properties touched by the approved route, the Department will not need to acquire, physically affect, or regulate use of Tapio's property for many years.

The Department's initial budget request to fund the purchase of all properties needed for the freeway project was denied by the legislature. Instead, the legislature began providing partial acquisition funding of approximately $16 million each biennium. Funding for a particular biennium is not appropriated or tied to particular locations and may be used by the Department to acquire properties anywhere along the project right-of-way.

The Department's communication about the freeway project with affected persons has been extensive. Following initial environmental approval of the freeway project in the late 1990s, the Department had, by the time of the trial below, held over 100 public meetings to impart information and gather public input. It had communicated with every identifiable affected property owner, and continued to communicate with them as construction progressed toward their area.

Before commencing this inverse condemnation action in 2011, Tapio's owners had complained for years that publicity about the freeway project was worrying their tenants, hampering leasing activity, and making it difficult to plan for improvements and long-term maintenance expenditures. Concerns first expressed in writing in 1999 were

renewed in writing several times, and in additional meetings and conversations with Department representatives. The Cloninger family patriarch, Glen Cloninger, asked in 1999 that the Department make an early purchase of the properties in which his family was invested. In 2002, Mr. Stejer wrote to Timothy Golden, the Department's real estate manager for the North-South Freeway, asking that the Department "go ahead and initiate the necessary proceedings," to acquire the needed Tapio property in order to prevent further economic damage. RP at 401; Ex. 17.

In written responses to Tapio's correspondence, Department representatives explained that its public communication about the project was required by federal and state environmental regulations; that construction would not affect Tapio's property anytime soon and it did not expect to acquire Tapio's property for years; that when property was condemned, it would be valued as if there was never any freeway project; and that the Department's recommendation was that all property owners "maintain or enhance their properties as they see fit," because the Department "will consider all improvements and maintenance made to the property during the appraisal prior to purchase." RP at 819; Ex. 18.

By the end of 2003, the Department had acquired several properties in the area of Interstate 90, even though construction was still several miles north in the Wandermere area. The acquisitions included a vacant tavern and a daycare that were purchased due to owner medical and hardship reasons, as well as two church buildings. The Department

occasionally purchased residences in response to requests from homeowners that it purchase their homes, and East Central Neighborhood community leaders eventually lobbied for a verbal commitment from the Department to acquire residences when funding became available so families could relocate.

The Department's biennial acquisition budgets could have accommodated a purchase of the Tapio Center had the Department thought that was the best use of the funds available. As Mr. Golden would testify at trial, the Department's business practice is to look at all residential and commercial purchase requests and identify the best use of the available budget to maximize the number of parcels purchased. In the Interstate 90 area, it placed a priority on purchasing residential properties because acquiring single-family dwellings with yards was more cost effective and provided more total right-of-way for the amount expended than would acquiring commercial properties. For a time, the Department was also acquiring and removing structures along Interstate 90 to accommodate a plan to install noise walls. The plan was later dropped because of engineering uncertainties and funding issues. Commercial properties were purchased on a case-by-case basis if price, location, or surrounding circumstances presented a good business reason for deviating from the priority on residential purchases.

The Department purchased increasing numbers of residential properties in the Interstate 90 area from 2007 to 2011. By the time of trial in 2014, it had acquired about 300 parcels in the area, on both sides of the interstate and up and down blocks east and

west of Tapio Center. On many of the properties, structures were demolished and the land bulldozed for safety and maintenance reasons and to avoid problems with theft and transients. The Department spends about $100,000 annually for mowing and general maintenance of the lots that have been cleared.

In March 2010, Mr. Stejer sent another letter to Department officials, again complaining of publicity about the freeway plan and acquisition, and about the Department's demolition of neighboring properties. In a response that discussed legal requirements for notice and public participation and the funding and property acquisition demands of a large highway project, Regional Administrator Keith Metcalf informed Mr. Stejer that the Department did not anticipate construction would directly affect Tapio's property for at least 10 years.

Tapio filed its inverse condemnation action against the Department in November 2011. It contends that a taking of Tapio's property occurred in the fall of 2006 when the Department consciously started negotiating for the purchase of homes in the Interstate 90 area. After the denial of several dispositive motions, the case proceeded to trial in June 2014.

Tapio called eight witnesses, including four experts. Dewitt Sherwood, a licensed real estate appraiser, testified to his opinion that as a result of Department publicity and property acquisitions, the value of the Tapio Center had been diminished by 80 to 90

percent, with resulting damages of $8,510,000. His opinion assumed a taking in October 2006, the date given him by Tapio's attorneys.

Craig Soehren, a commercial real estate broker, testified that commercial brokers would be unlikely to bring potential tenants to Tapio in light of the published freeway plan and that he would not bring potential buyers to the property. He admitted he had no knowledge that the Department did anything different in pursuit of the North-South Freeway construction than it had done in other major projects, and agreed that Tapio still had the right to sell its property. He admitted that the Department's demolition of nearby homes had improved the look of the neighborhood.

Jeff Johnson, also a real estate broker, testified to his opinion that the Department's plans and acquisition activity in the vicinity of Tapio Center had affected its ability to obtain tenants, thereby affecting Tapio's ability to sell the office park. He acknowledged that Tapio remained legally able to sell or lease the property.

Cajer Neely, a commercial banker, testified that in light of the freeway plans and property acquisitions in the Interstate 90 area, it was unlikely a commercial bank would provide a loan to a potential purchaser of Tapio Center if it was secured only by the office park property.

Tapio also called two Department employees, Mr. Golden and Larry Larson (a project engineer on the North-South Freeway project) questioning them about the history

of the project, Tapio's communications with the Department, and the Department's property acquisitions in the Interstate 90 area.

Mr. Stejer and Blake Cloninger testified to the damages each was requesting on behalf of their owners' interests—collectively, $13.8 million—based on what each considered a total taking of Tapio Center in 2006. Mr. Stejer conceded the Department had imposed no rule that kept them from running their operations and that they retained the right to sell the property.

At the time of trial, an estimated 47 to 50 residential properties and 5 commercial properties (in addition to Tapio Center) remained to be acquired for the proposed Interstate 90 interchange.

At the close of Tapio's case, the Department moved to dismiss under CR 50(a). After hearing argument from the parties, the court granted the motion, finding that Tapio's theory of unwarranted delay or oppressive preacquisition conduct—a theory the court had allowed to proceed, but that has not yet been recognized by any reported Washington decision[2]—had not been demonstrated by its evidence.

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[2] In *Orion Corp. v. State*, 109 Wn.2d 621, 671-72, 747 P.2d 1062 (1987), our Supreme Court declined to recognize a distinct inverse condemnation claim for a taking by oppressive preacquisition conduct. The court explained:

> 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 . . .'" *Jones v. People ex rel. Dep't of Transp.*, 22 Cal. 3d

In attempting to persuade the court to change its ruling, Tapio's lawyer reminded it of Tapio's proposed but as-yet unadmitted exhibit 35—a partial e-mail chain among Department employees that used the word "blight" in describing a concern about a property disposition outside of the Interstate 90 area. Tapio had tried to offer the partial e-mail through Mr. Stejer, but the court sustained an objection and ruled that its relevance would have to be demonstrated by someone like Mr. Golden, who had personal knowledge of its subject matter.

Tapio moved to reopen its case to recall Mr. Golden for the purpose of offering the exhibit. The court denied the motion on the basis that Tapio had rested its case.

Tapio sought direct review by the Washington Supreme Court of the judgment dismissing its complaint with prejudice. The Supreme Court transferred the appeal to us.

ANALYSIS

At oral argument of the appeal, Tapio's lawyer began by stating Tapio was not asking us to recognize a new cause of action for oppressive precondemnation conduct, as the courts of some states have done. He stated Tapio's contention that the property rights

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144, 151, 583 P.2d 165, 148 Cal. Rptr. 640 (1978) (quoting *Klopping v. Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972)). . . .

> At this time, we do not choose to recognize this new cause of action.

The *Orion* court further commented that even if it had recognized the cause of action, the evidence in the case before it did not support it.

it asserts and the damages it seeks to recover are available under Washington's existing condemnation law.[3]

We review a trial court's decision on a CR 50(a) motion for judgment as a matter of law using the same standard as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). A motion for judgment as a matter of law admits the truth of the opponent's evidence and all reasonable inferences that can be drawn from it. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 98, 882 P.2d 703 (1994). "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).[4]

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[3] The following argument appears at Washington Court of Appeals oral argument, *Tapio Investment Company I, et al v. State*, No. 33684-1-III (June 10, 2016) at 40 sec. through 1 min., 28 sec. (on file with the court):

> [T]his case was pled as an inverse condemnation claim. It was not pled as a separate abuse of the precondemnation conduct claim. That term however, does apply and identify the cause of the significant precondemnation damage that the plaintiffs suffered as a direct result of the state's inverse condemnation acts which specifically targeted the plaintiff's property for taking, acts which are not permitted under our state constitution.
>
> So we're not asking this court this morning to recognize this as a new cause of action, as some other states have done. That's because Washington law applicable to inverse condemnation, condemnation law in general, already supports the claim that we alleged in our complaint.

[4] Tapio emphasizes the trial court's pretrial denials of the Department's CR 12(b)(6) and summary judgment motions and this court's denial of discretionary review of the CR 12(b)(6) ruling as illustrating the presence of factual issues requiring a jury

I. Takings law: an overview

The takings clause of the Fifth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. "The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use," and decisions by the United States Supreme Court establish that "even a minimal 'permanent physical occupation of real property' requires compensation under the Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)).

In 1922, the United States Supreme Court recognized "there will be instances 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." *Palazzolo*, 533 U.S. at 617 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)). "In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a

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trial. And the Department contends that the trial court should have granted its motion to bifurcate and should have decided the issue of whether there was a taking first. The Department did not seek discretionary review of the denial of its motion to bifurcate.

The only decision whose correctness is presented by the appeal, and the only one that we need to address, is the trial court's decision to grant the CR 50(a) motion.

taking.'" *Id.* (quoting *Mahon*, 260 U.S. at 415). When a regulation restricts an owner's use of its property but advances a legitimate state interest, courts balance the public interest against the economic impact on the landowner using three factors identified in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978): (1) the regulation's economic impact on the property, (2) the extent of the regulation's interference with investment-backed expectations, and (3) the character of the government action. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 333, 335-36, 787 P.2d 907 (1990) (footnote omitted).

Article I, section 16 of the Washington Constitution states that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made." At oral argument, Tapio contended that this broader language, speaking of "damage," means that neither a physical intrusion nor a regulatory taking is required to trigger a right to compensation under the Washington Constitution.[5] Asked to

[5] The following argument appears at Washington Court of Appeals oral argument, *Tapio Investment Company I, et al v. State*, No. 33684-1-III (June 10, 2016) at 1 min., 28 sec. through 2 min., 7 sec. (on file with the court):

> Our state constitution is rather unique. It's different than the federal constitution under the Fifth Amendment. "No private property shall be taken *or damaged*"—and those are the operative words that are applicable to this case and the decision that I believe we're asking you to make—"for public or private use without just compensation." . . . So our state constitution recognizes that you don't have to have a physical intrusion or a regulatory taking in order to trigger compensation.

identify any Washington decision that has held that no physical intrusion or regulatory taking need be shown, however, counsel was unable to identify one.[6]

Professor Stoebuck has expressed the view that our state constitution—like 25 other state constitutions, beginning with that of Illinois—allowed compensation for damaging as well as taking private property "to allow compensation in certain cases, especially certain loss-of-street-access cases, in which most courts had been unwilling to hold a taking had occurred." WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN WASHINGTON § 1.9, at 9 (1980) (citing, inter alia, *Brown v. Seattle*, 5 Wash. 35, 31 P. 313, 32 P. 214 (1892)). Tracing the erratic history of judicial construction of the "or damaging" language in article I, section 16, he concluded, as of the time he was writing, that any distinction between damaging and taking had been abolished. *Id.* at 10. Tapio does not address this history nor any of the *Gunwall*[7] factors in suggesting that we rely on an independent analysis of Washington's takings provision to find that no physical invasion or regulation is required for a taking. We decline to do so and rely instead on

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[6] He cited four cases when questioned, but three involved an alleged physical invasion and one concluded that in the absence of a physical invasion, there was no taking. *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998) (physical invasion: surface water runoff onto plaintiff's property); *Showalter v. City of Cheney*, 118 Wn. App. 543, 549, 76 P.3d 782 (2003) (physical invasion—removal of a canopy); *Pierce v. Ne. Lake Wash. Sewer Dist.*, 123 Wn.2d 550, 559, 870 P.2d 305 (1994) (action was properly dismissed because there was no physical invasion and, lacking an easement, property owner had no property "right to a view"); *Martin v. Port of Seattle*, 64 Wn.2d 309, 391 P.2d 540 (1964) (physical invasion—noise from low flying aircraft).

[7] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

existing case law. *Cf. Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993) (refusing to address the plaintiffs' contentions that the Washington Constitution provides greater protection from government takings of property where they did not brief the *Gunwall* factors).

A property owner may bring an inverse condemnation claim to "'recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain.'" *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (quoting *Dickgieser v. State*, 153 Wn.2d 530, 534-35, 105 P.3d 26 (2005)). To maintain an action for inverse condemnation, 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." *Dickgieser*, 153 Wn.2d at 535.

A cause of action for inverse condemnation accrues when the landowner sustains any measurable loss of market value as a result of interference, physical or regulatory, with the use and enjoyment of its property. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). But a loss of market value alone—even a loss of value attributable to government action—is not itself evidence that the government has interfered in a way that amounts to a constitutional taking. *Pierce v. Ne. Lake Wash. Sewer Dist.*, 123 Wn.2d 550, 562, 870 P.2d 305 (1994).

Legal acts that do not interfere, physically or by regulating use of private property, are not takings, and neither the Washington nor federal constitutions have been held to require compensation for depreciation in market value caused by such legal acts. *Id.* at 562 & n.55 (citing *Aubol v. Tacoma*, 167 Wash. 442, 446, 9 P.2d 780 (1932)); *Danforth v. United States*, 308 U.S. 271, 286, 60 S. Ct. 231, 84 L. Ed. 240 (1939) ("The mere enactment of legislation which authorizes condemnation of property cannot be a taking."); *Andrus v. Allard*, 444 U.S. 51, 66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) ("[A] reduction in the value of property is not necessarily equated with a taking" and "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim."); *Kirby v. Forest Indus., Inc. v. United States*, 467 U.S. 1, 15, 104 S. Ct. 2187, 81 L. Ed. 2d 1 (1984) ("[I]mpairment of the market value of real property incident to otherwise legitimate governmental action ordinarily does not result in a taking.").

II. Tapio presented no substantial evidence of a taking

At issue is whether, by the close of Tapio's case, there was substantial evidence or reasonable inference that would sustain a verdict that the Department had committed a taking of Tapio's property under the federal or state constitution, thereby requiring payment of compensation.

Messrs. Stejer and Cloninger conceded no governmental rule had been imposed on Tapio that had impeded its operations or otherwise prevented it from improving or

maintaining the property. Tapio's experts and Mr. Stejer acknowledged that Tapio still had the legal right to lease or sell the property. Tapio nonetheless argues that it did suffer damage from "regulatory conduct" in the form of a limited access order entered in 2005 and, alternatively, that neither physical invasion nor regulation is required for a taking.

A. The 2005 Final Limited Access Order does not regulate Tapio's use of its property

Tapio contends that a Final Limited Access Order entered by the Department in 2005 (and the public notice and planning processes leading up to that order) is tantamount to an administrative regulation, justifying a regulatory takings analysis under the *Penn Central* factors. If entitled to *Penn Central* balancing, it claims to have demonstrated economic impact, interference, and a character of government action entitling it to relief.

The final limited access design for the freeway project was approved by the Department in 2005. Approval resulted in findings and an order related to the proposed right of way and access control plans.[8] But the undisputed evidence was that the plan had not yet been filed with the Spokane County Auditor. As a matter of state law, it had not yet restricted property owners in any way. Because of "the uncertainties of federal aid and the state level of funding of proposed construction or improvement of state

[8] The parties generally refer to this as the 2005 Limited Access Order. Although referred to by trial witnesses and in various exhibits, the document itself is not included in the record.

highways," the Department's plans for highway improvements "shall be deemed tentative until filed with the county auditor as authorized in RCW 47.28.025 or until the department commences action to condemn or otherwise acquire the right-of-way for the highway improvements." RCW 47.28.026(2). Unless and until the Department causes a plan of a proposed new highway or limited access facility to be recorded with the county auditor, nothing contained in highway construction provisions dealing with building and improvement prohibitions (RCW 47.28.025 or 47.28.026) "may be deemed to restrict or restrain in any manner the improvement, development, or other use by owners or occupiers of lands, buildings, or improvements within the limits of any proposed new or limited access highway or any proposed relocated or widened highway." *Id.*

As a matter of law, the Final Limited Access Order did not regulate Tapio's use of its property.

B. "Government action" falling short of regulation does not trigger application of *Penn Central* balancing

Tapio nonetheless argues that

> [i]t is the implementation of this Final Limited Access Order that has resulted in the damages to Tapio. For example, the acquisition and construction in the immediate neighborhood [i]s provided for by those plans. [The Department] went beyond *"planning"* when it adopted through the regulatory process the Final Limited Access plan and began acting in accordance with it.

Br. of Appellant at 38-39.

Tapio represents that "[n]umerous other jurisdictions" have affirmed that the focus of the inquiry in analyzing whether a *Penn Central* taking has occurred is not on regulation but on the "government's action itself," but it identifies only one decision—*Mekuria v. Washington Metropolitan Area Transit*, 975 F. Supp. 1 (D.D.C. 1997)—that suggests that *Penn Central* should be read broadly as applying to any government action, not just regulatory or legislative action. Br. of Appellant at 39-41.

In *Mekuria*, business owners in a Washington D.C. neighborhood brought an inverse condemnation suit against the local transit authority for the alleged taking of their property in constructing a rail station. According to the complaint, obstructions from the project cut off street access to the businesses and greatly hindered pedestrian access, resulting in loss of delivery services and customers. Two of the businesses closed and the others suffered revenue decreases of 70 to 90 percent. The construction caused physical damage to the properties including cracked walls, ceilings and floors, and flooding from sewer water flowing from the construction site. The construction also hindered police patrol, resulting in robberies and vandalism. *Mekuria*, 975 F. Supp. at 2-3. The plaintiffs alleged the transit authority's actions deprived them of reasonable access, denied them all viable economically beneficial or productive use of the properties, and thereby interfered with their investment-backed expectations. *Id.* at 3.

The transit authority argued that *Penn Central* did not apply because there was no regulatory or legislative governmental action. The court disagreed:

> The simple answer to this argument is that *Penn Central* can not be read so narrowly. For example, the Court explicitly refers to the possibility of compensable takings occurring as a result of a government's "public action" or "public program", neither of which necessarily require regulatory or legislative action. *See Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659. Similarly, *First English* [*Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 306-07, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)] refers to "government action" which may constitute a taking. *See First English*, 482 U.S. at 314, 107 S. Ct. at 2385. Moreover, it makes no sense to limit *Penn Central* to apply merely to statutes and regulations, such as land use regulations, when there are myriad ways in which government action can seriously impact individual owners' use of their property.

Id. at 6.

The district court's analysis is flawed and unpersuasive. Both *Penn Central* and *First English* involved takings challenges to actual government regulations: *Penn Central* to a municipal law restricting development of historic landmarks, *see Penn Central*, 438 U.S. at 116, and *First English* to a flood protection ordinance, *First English*, 482 U.S. at 306-07. Between them, the cases speak of "public action," "public programs," or "government action," but each of those terms encompass regulation and actions taken pursuant to regulation, leaving no reason to believe that the Court was, in dicta, speaking of something other than regulation. Neither *Penn Central* nor *First English* discusses at all whether a *Penn Central* regulatory takings analysis applies to cases not involving a regulation, let alone holds that the analysis would apply in such a case.

Mekuria is a legal anomaly in its willingness to entertain a *Penn Central* regulatory taking claim where there was no regulation. The businesses harmed by the

transit authority's construction in *Mekuria* failed to plead a physical taking, which is what they had actually suffered. Because of that shortcoming in the pleading, the district court concluded that to find a taking, it had to find a regulatory taking. *Mekuria*, 975 F. Supp. at 5. Perhaps the court's analysis is problematic because it was results-oriented.

Following *Mekuria*, the United States Supreme Court has overruled the district court's approach, holding that a "longstanding distinction between acquisitions of property for public use . . . and regulations prohibiting private uses . . . makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (footnote omitted). The Supreme Court also observed that in determining whether government action affecting property is an unconstitutional deprivation of ownership rights, "a court must interpret the word 'taken[,]'" and identified only two senses in which property is "taken":

> When the government *condemns or physically appropriates* the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because *a law or regulation imposes restrictions* so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.

Id. at 322, n.17 (emphasis added).

Any number of businesses in the vicinity of the North-South Freeway project may have suffered reduced property value and lost income due to governmental acquisition and construction "actions" over the last 13 years that have not physically touched their property or legally restricted its use. It is well settled that such harm is not compensable in an inverse condemnation proceeding.[9] And just because a portion of Tapio's property is expected to be taken in the future does not make it different from its neighbors in this

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[9] Other Washington decisions cited in Tapio's briefing as supporting recovery are not helpful because they either involve an actual invasion and impairment of use or access or were held not to be takings. *See Dickgieser v. State*, 153 Wn.2d at 533 (logging activities on adjacent land caused flooding that damaged private property); *Union Elevator & Warehouse Co. v. State*, 96 Wn. App. 288, 980 P.2d 799 (1999) (question of fact whether State's activities physically hindered access to plaintiff's adjacent property); *Rains v. Dep't of Fisheries*, 89 Wn.2d 740, 575 P.2d 1057 (1978) (State's denial of permit to rechannel creek bed that later overflowed and damaged plaintiff's property was not a taking); *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960), *overruled on other grounds by Highline Sch. Dist.*, 87 Wn.2d 6 (1976) (noise interference caused by increased airplane overflights near airport); *Boitano v. Snohomish County*, 11 Wn.2d 664, 672-77, 120 P.2d 1490 (1941) (county's excavation activities resulted in water damage to plaintiff's neighboring property); *Tom v. State*, 164 Wn. App. 609, 614, 267 P.3d 361 (2011) (no taking attributable to noise from a neighboring prison firing range that pre-existed plaintiff's property ownership); *Pruitt v. Douglas County*, 116 Wn. App. 547, 559-60, 66 P.3d 1111 (2003) (inverse condemnation claim arose when county channeled water that flooded and destroyed market value of adjacent landowners' properties); *Highline Sch. Dist.*, 87 Wn.2d at 8, 15-16 (inverse condemnation claim arose when changes in airport operations led to marked increase in aircraft noise interference with adjacent land, including school classrooms, which would result in measurable diminution of property value, the extent of which presented a factual issue); *Lincoln Loan Co. v. State*, 274 Or. 49, 51, 545 P.2d 105, 107 (1976) (complaint alleged that the dismantling of dwellings in the surrounding properties created noise, dust and confusion) and *cf. Hall v. State*, 355 Or. 503, 516, 326 P.3d 1165 (2014) ("[N]othing in *Lincoln Loan* suggests that, in the absence of a physical occupation or invasion of a property right, a government action that causes only a reduction in the value of property qualifies as a taking.").

respect. *See Campbell v. United States*, 266 U.S. 368, 45 S. Ct. 115, 69 L. Ed. 328 (1924) (landowner was entitled to be compensated for a taking of 1.81 acres of his property but not for the diminution of the value of his remaining property attributable to government's acquisition of neighboring property and construction of large industrial plant); *Cent. Puget Sound Reg'l Transit Auth. v. Heirs & Devisees of Eastey*, 135 Wn. App. 446, 458, 144 P.3d 322 (2006) (damage to Eastey property caused by a pocket track on nearby land does not flow from the taking of a narrow strip of Eastey land, but from Transit's legal use of other land, and the damage to Eastey was no different than the damage (if any) to the rest of the neighborhood).[10]

This settled takings law also advances public interests, as recognized in a Texas decision cited by the Department:

> 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. . . . 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

[10] It is well settled that when property is condemned for a project such as this, fair compensation for the property that is actually condemned and acquired by the State should disregard depreciation that is attributable to the project for which the eminent domain proceeding is instituted. *Lange v. State*, 86 Wn.2d 585, 591, 547 P.2d 282 (1976). That is the basis for the Department's repeated assurances to Tapio that when its property is ultimately condemned, it will be valued as if the freeway project had never occurred.

> 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. . . .
>
> . . . .
>
> . . . 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. . . . If the government were subject to liability for "unreasonable" delay . . . 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.

Westgate, Ltd. v. State, 843 S.W.2d 448, 453-54 (Tex. 1992) (citations omitted); *see* Br. of Resp. at 34-35.

The Department's "actions" have not triggered application of *Penn Central* balancing.

III. The trial court did not err in refusing to admit exhibit 35 or in denying Tapio's motion to reopen its case

Given the basis on which we affirm the trial court, its refusal to admit exhibit 35 initially, or by allowing Tapio to reopen its case, does not appear to matter. Because this was not addressed when Tapio abandoned its "taking by oppressive preacquisition conduct" claim at oral argument, however, we address the assignment of error.

Tapio offered exhibit 35 during Mr. Stejer's re-direct testimony. The exhibit contained one day's worth of an e-mail exchange among Department employees in

September and October of 2006. The subject matter was whether the Department, as landlord, should have reduced the rent of a commercial building on Market Street in order to have continued occupancy until project construction reached that area. Tapio contends that a passage in the e-mail demonstrates Department officials knew that acquiring and demolishing properties in a phase not funded for construction would leave the properties that were not acquired in a more blighted and depressed neighborhood.[11] It argues that such knowledge was relevant to its claims.

The Department objected and argued that the e-mail was not relevant because it described a different decision than it faced in deciding whether to acquire the Tapio Center: it involved a different property several miles north, was written five years before Tapio filed suit, and the one-day excerpt from the exchange was incomplete, out of context, and should not be admitted without proper foundation as to relevance.

The trial court sustained the objection, ruling it was not yet apparent that exhibit 35 proved anything and that Mr. Stejer was not the appropriate person to testify about its contents. The court said if the exhibit was to come in at all, it would have to be through

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[11] The allegedly relevant passage states:

> We were figuring about 5 years before construction was slated for this area. So, in another 3 years we will have purchased more of the surrounding properties, creating an even more blighted or depressed commercial area along Market Street. We will also be 3 years closer to construction, which makes it an even riskier venture for any other potential tenant if [our lessee] is gone.

Ex. 35.

someone like Mr. Golden, who was a party to the e-mail exchange. When testimony resumed, Tapio's lawyer elicited Mr. Stejer's testimony that he had selected October 2006 as the taking date because the Department was "under the full knowledge that when they skip ahead and acquire property out of sequence from where they are actually doing construction . . . that their acquisition would create blight, and . . . that blight would reduce rents, increase vacancies, and ultimately affect the fair market value." RP at 914-15. It offered the exhibit again following that testimony, and the court again sustained the Department's objection. Tapio did not attempt to offer the exhibit through any other witness before resting its case.

A trial court's decision to exclude evidence will be reversed only where it has abused its discretion. *Kappleman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Id.*

On appeal, Tapio treats the trial court as sustaining an objection to a lack of authentication, which it contends was error because exhibit 35 had been authenticated through notice in accordance with ER 904. But authenticity was not at issue. The trial court declined to admit the exhibit because, as argued by the Department, Tapio did not

establish that Mr. Stejer had personal knowledge of the e-mail's contents sufficient to establish its relevance.

The proponent of evidence has the burden to establish necessary foundation for the evidence to be relevant and admissible. *See State v. Smith*, 87 Wn. App. 345, 348, 941 P.2d 725, 726 (1997). The general rule is "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [he] has personal knowledge of the matter." ER 602.

The trial court did not abuse its discretion in denying admission through Mr. Stejer. He might or might not have been right about what amounted to his speculation that the e-mail reflected knowledge that applied to Tapio's situation. The court reasonably required Tapio to call a witness who could provide context, so that an informed decision could be made as to whether the e-mail exchange reflected knowledge that *was* relevant.

Tapio's final assignment of error is that the trial court erred by denying its motion to reopen, in order to call Mr. Golden and reoffer exhibit 35. 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). The court denied the motion because Tapio had been told what the court would require as a reasonable basis for admitting the exhibit and did not

re-call Mr. Golden for that purpose despite having the opportunity to do so. That is not an abuse of discretion.

Affirmed.

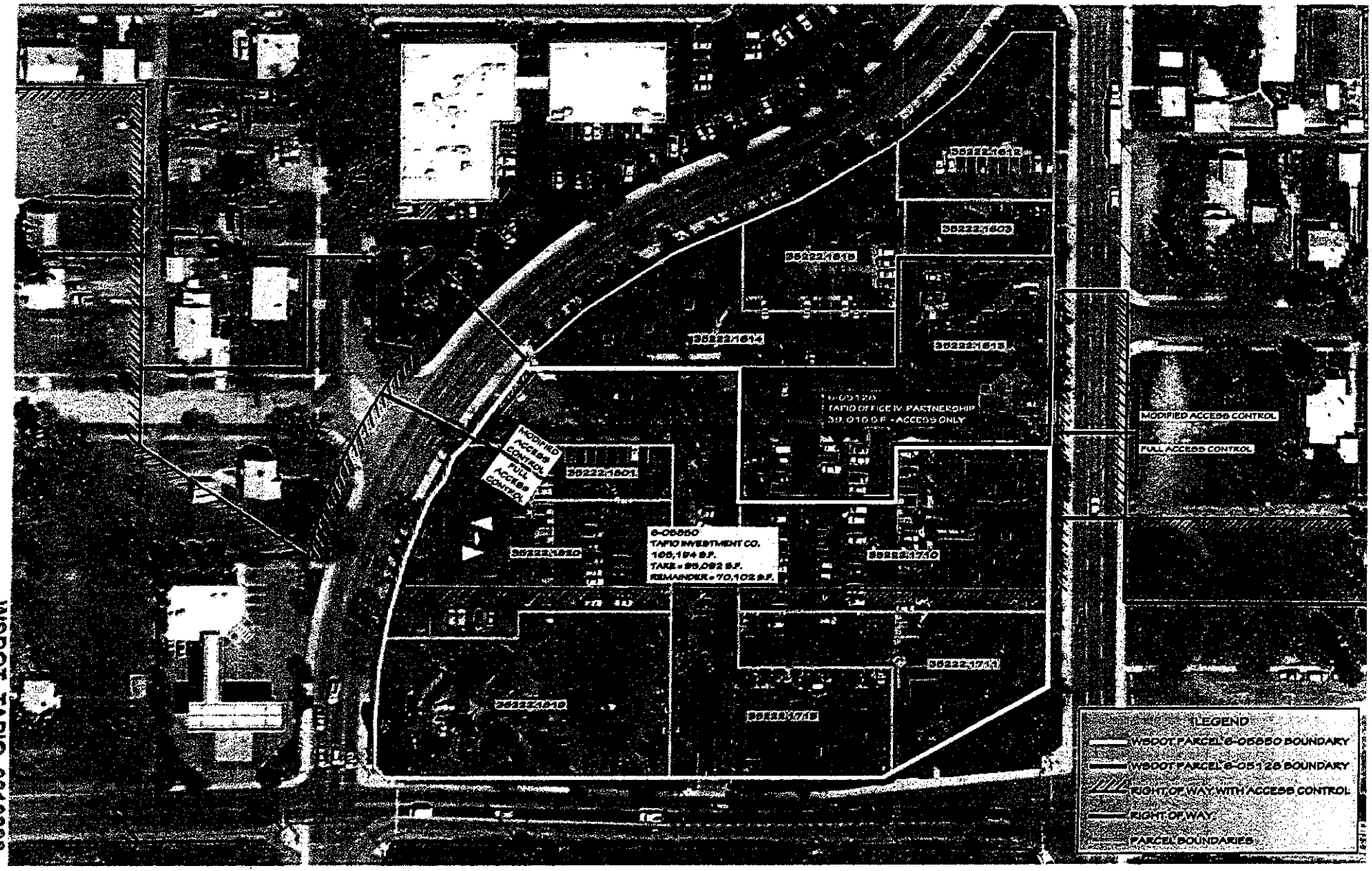
Siddoway, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

APPENDIX B



WSDOT_TAPIO_0010288

SPOKANE COUNTY NO. 11-2-02470-3

Tapio vs. State of Washington

DEFTS EXHIBIT NO. 228

Tapio
Resp Cross
Dec

The Court of Appeals
of the
State of Washington
Division III

TAPIO INVESTMENT COMPANY, et al. Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION Petitioner.	)	No. 31159-7-III COMMISSIONER'S RULING

The State of Washington, Department of Transportation, (State) seeks discretionary review of the Spokane County Superior Court's August 30, 2012 Order Denying Defendant's Motion to Dismiss the plaintiffs' complaint for inverse condemnation. Plaintiffs are Tapio Investment Company, et al., (Tapio). The State

APPENDIX C

contends that (1) Washington does not recognize Tapio's theory of inverse condemnation, (2) acts that do not physically invade property are not takings, (3) no regulatory taking has occurred absent a regulation that restricts use of the property, and (4) Tapio's action violates public policy because it attempts to dictate the course and progress of a public highway.

The State also moves to strike the following from Tapio's response to its motion for discretionary review: (a) A brief filed in a different superior court matter; (b) references to other superior court cases which the superior court either struck or declined to consider; and (c) references to the legal conclusions of a fact witness that the superior court struck.

Pursuant to RCW 8.25.075 and RAP 18.1, Tapio requests this Court award it reasonable attorney fees and costs that it incurred in responding to the motion for discretionary review.

FACTS

Tapio asserts inverse condemnation in the following context: Tapio's properties, which include the Tapio Office Center, are located near the Freya interchange on I-90 in Spokane. The 1997 design for the North Spokane Freeway showed the State planned to construct the freeway over half of the Tapio properties. In the fifteen years that has passed since then, the State has acquired "nearly all" of the property surrounding Tapio

and has engaged in construction activities such as demolishing buildings in Tapio's neighborhood. The State's actions have allegedly caused Tapio's tenants to depart, and a shortage of new tenants, a decline in rent, and, generally, a decline in market value. The State counters that the Legislature has not approved funding for the portion of the freeway project where Tapio is located. Such funding may be three or four years off, and a potential remains that the project will not immediately receive funding or will be relocated.

MOTION TO STRIKE

This Court has reviewed the State's arguments with regard to Tapio's references in its response to another superior court matter, as well as in its appendix. The cited references and the appendix are stricken.

The superior court struck the declaration of John Stejer, Tapio's president, insofar as he rendered an opinion in the nature of a legal conclusion. This Court has reviewed the references to Mr. Stejer's declaration at pages 2-8 of Tapio's response, and rules that Tapio has cited the declaration for its factual statements and that the specific phrases identified at page 5 of the State's motion to strike are either in the nature of argument by counsel based upon Mr. Stejer's statements of fact or, to the extent they are included in the cited declaration, are obviously argument. It therefore denies the State's motion to strike in this regard.

MOTION FOR DISCRETIONARY REVIEW

This Court may grant discretionary review if the movant establishes that the superior court committed obvious or probable error that renders further proceedings useless or substantially alters the status quo or the freedom of a party to act. *See* RAP 2.3(b)(1) and (2).

"Inverse condemnation is an action to 'recover the value of property which has been appropriated *in fact*, but with no formal exercise of the condemnation power.'" (Emphasis added.) *Pierce*, 123 Wn.2d at 556, quoting *Marin v. Port of Seattle*, 64 Wn.2d 309, 310, n.1, 391 P.2d 540 (1964). The State contends that it is well-settled in Washington that courts do not recognize a cause of action in the circumstances here. The State cites *Pierce v. Sewer & Water Dist.*, 123 Wn.2d 550, 870 P.2d 305 (1994); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1990); and *Lange v. State*, 86 Wn.2d 585, 547 P.2d 282 (1976).

Orion appears to best support the State's position. In that 1987 case, a tideland owner sued the State for inverse condemnation by excessive regulation. The State appealed a summary judgment in favor of the owner. The supreme court stated at 671 that "Orion cites no Washington case law to support its claim that the government can unconstitutionally take private property by 'oppressive pre-acquisition conduct.'" The court further stated at 672 that "*[a]t this time*, we do not choose to recognize this new

cause of action." (Emphasis added.) The court in *Orion* at 671 observed that "[a]pparently, California has recognized a cause of action for inverse condemnation when a decrease in market value resulted from 'unreasonably delaying eminent domain action,'" quoting *Kloppinger v. Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal Rptr. 1 (1972).

Pierce and *Lange* involved situations other than pre-acquisition conduct. In *Pierce*, 123 Wn.2d 550, the supreme court in 1994 used language in *dicta* that recognizes the possibility that diminution of market value in certain circumstances may support an argument that a taking has occurred. There, the homeowners sued a municipal corporation water and sewer district after the district constructed a water tank on adjacent property that allegedly diminished their property value by $30,000 because it obstructed their view.

The *Pierce* court held at 558-59 that the homeowners' view was not a property right, and, since the district had acted lawfully and only upon its own property, there was no appropriation of the owners' property. The court acknowledged that "[o]wnership of property not only includes the right to exclusive possession, but also includes 'the right to use the land.' . . . [and that *owners*] *could have a property interest in the market value of their property* which would entitle them to compensation under the Washington Constitution." (Emphasis added.) *Id.* at 560, quoting *Highline School Dist. 401 v. Port*

of Seattle, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976). But it also stated that the Constitution does not "authorize compensation merely for a depreciation in market value when *caused by a legal act,*'" such as the construction of the water tank. (Emphasis added.). *Id.* at 562, quoting *Aubol v. Tacoma*, 167 Wash. 442, 446, 9 P.2d 780 (1932).

In *Lange v. State*, 86 Wn.2d 589, 547 P.2d 282 (1976), the property owners had sued for inverse condemnation, but the State subsequently initiated a condemnation action. The trial court dismissed the inverse condemnation action and awarded the owners the value of the property *at the time of trial.* The owners appealed. The supreme court specifically held that the general rule that the court is to value the property as of the trial date, gives way when that result is inequitable. The court stated at 595, "[f]or the time of valuation to be advanced, marketability must be substantially impaired and the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose."

Upon review of the above cases, this Court is unable to discern a hard and fast rule that would apply so as to disallow Tapio's inverse condemnation action. And, to the extent that the superior court's decision here reflects a consideration of facts that may materially distinguish it from the facts present in *Orion*, this Court cannot say that the

decision was obvious or probable error.

But even if the superior court's decision was obvious or probable error, the State still has to show that the superior court's decision renders further proceedings useless or substantially alters its freedom to act. Here, a denial of discretionary review means that Tapio's action will go to trial, at which Tapio may or may not prevail. If Tapio prevails, the State can raise the same arguments as here, on appeal. And, the facts are likely to be better developed in a trial than they are on a motion for summary judgment, should a court on appeal want to explore whether the pre-acquisition conduct that occurred here resulted in a taking, as in the California case cited in *Orion*. *See Kloppinger, supra.*, 500 P.2d 1345.

Finally, this Court's ruling makes it unnecessary to address the parties' remaining arguments. This Court observes, however, that public policy, which the State raises as an argument against recognition of Tapio's cause of action, is an issue only if such recognition serves as precedent for holding that any and all pre-acquisition conduct amounts to a taking. Tapio's position is that the pre-acquisition conduct in this case is so extreme that the result is a taking, even if an actual, physical invasion of the property has not yet occurred. Accordingly,

IT IS ORDERED, the State's motion for discretionary review is denied. The State's motion to strike is granted in part and denied in part. At this time, discretionary

review having been denied, Tapio need not file an amended response without the complained of references, as set forth at page 3 of this ruling. Tapio's request for reasonable attorney fees is referred to the superior court for determination under RCW 8.25.075. *See* RAP 18.1(i).

December 19, 2012

Monica Wasson
Commissioner

WASH. CONST., ART. 1, SEC. 16 - EMINENT DOMAIN.

"*...No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.*"

APPENDIX D