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No. 63747-9-1

COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION I

KIPP M. AND MARILYN V. DUNLAP,)
 Husband and wife)
)
)
)
 Appellants,)
)
 v.)
)
 CITY OF NOOKSACK,)
)
 Respondent)

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 STATE OF WASHINGTON
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BRIEF OF RESPONDENT
AND OPENING BRIEF ON CROSS APPEAL

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TABLE OF CONTENTS

I. INTRODUCTION.....6

II. ASSIGNMENT OF ERROR..... 8

III. ISSUES RELATED TO ASSIGNMENT OF ERROR AND CROSS APPEAL.....9

IV. STATEMENT OF THE CASE.....8

V. ARGUMENT.....14

 A) As to the plaintiffs’ 29 acre parcel, the findings of fact made by the Trial Court are supported by the evidence admitted at trial..... 14

 B) The Trial Court did not abuse its discretion when it granted the defendant’s motion in limine regarding damages to an un-built log home.....17

 C) The Plaintiffs’ never sought a trial on the issue of liability before a jury. Thus, after failing to do so, their argument to the Appellate Court that they should have had a jury determine this issue fails..... 19

 D) The record does not establish the City of Nooksack is liable for a taking of the Plaintiffs’ property due to storm water runoff.....21

E) The Trial Court was in error when it denied the defendant's Motion for Partial Summary Judgment.....33

F) Findings of Fact entered by the Trial Court do not justify the legal conclusion that the actions of the City of Nooksack resulted in a taking of the plaintiffs' quarter acre parcel27

VI. CONCLUSION.....31

TABLE OF AUTHORITIES

Cases

<u>Alpental Community Club Inc. v. Seattle Gymnastics Soc.</u> , 121 Wn. App. 491, 86 P. 3d. 784 (2004).....	29
<u>Fenimore v. Donald M. Drake Construction, Co.</u> , 87 Wn. 2d. 85, 91, 549 P. 2d. 483 (1976).	18
<u>Friends and Landowners Opposing Development v. Department of Ecology</u> , 38 Wn. App. 84, 684 P. 2d. 765 (1984).....	24
<u>Harvey v. Board of County Comm’rs</u> , 90 Wn. 2d. 473,584 P. 2d. 391 (1978).....	24
<u>Hewson Constr., Inc. v. Reintre Corp.</u> , Wn. 2d. 819, 685, P. 2d. 1062 (1984).....	24
<u>Orion Corporation v. State of Washington</u> , 109 Wn. 2d. 621-747 P. 1062 (1987) 23, 24, 25, 28	
<u>Penn Central Transt. Co. v. New York</u> , 438 U.S. 104 (1970).....	28
<u>Quinn v. Cherry Lane Auto Plaza, Inc.</u> , 2009 WL 4912707 (Wash. App. Div. 3)	15, 21, 30
<u>Samuels Furniture Inc., v. Washington State Department of Ecology</u> , 105 Wn. App. 278, 19 P. 2d. 474 (2001).....	25
<u>Seattle v. Kenmore</u> , 67 Wn. 2d. 923 (1966).....	20
<u>State v. Riley</u> , 121 Wn. 2d. 22, 31, 846 P. 2d. 1365 (1993)	20
<u>State v. Smith</u> , 32 Wn. App. 226, 228, 640 P.2d. 25 (1982).....	15
<u>Thorndike v. Hesperarian Orchards, Inc.</u> 54 Wn. 2d. 570, 572, 575, 343 P.2d. 1183 (1959)	15
<u>Tyler v. Grang Ins Ass’n</u> , 3 Wn. App. 167, 473 P. 2d. 193 (1970).....	24
<u>Van Vonno v. Hertz Corp.</u> , 120 Wn. 2d. 416, 427, 841 P. 2d. 1244 (1992).....	19
<u>Washington Legal Foundation v. Legal Foundation of Washington</u> , 271 F. 3d. 835, 862 (9 th Cir., 2001).....	17

Revised Code of Wahington

RCW 4.44.080.....	20
-------------------	----

RCW 4.44.090.....	20
RCW 90.58	5
RCW 90.58.060	22
RCW 90.58.060 et seq.	22
RCW 90.58.090	24, 25
RCW 90.58.180	23
Nooksack Municipal Code	
Chapter 16.04.....	22
Ordinance 598.....	12
Washington Pattern Jury Instruction	
WPI 150.06, 161.05, and 151.06	18
WPI 151.04	14
Rules on Appeal	
RAP 2.5(a).....	19
Washington Administrative Code	
WAC 173-16-040(5).....	23
WAC 173-27-190(1).....	22, 29
WAC 173-27-200(2).....	26
WAC 173-77-190(1).....	26
WAC 461-08-500.....	23

I. INTRODUCTION

The plaintiffs have filed a lawsuit against the City of Nooksack alleging the City of Nooksack, by and through its actions in vacating a portion of a public, unimproved right of way, and other actions involving the City's implementation and enforcement of its Shoreline Master Program pursuant to RCW 90.58 have taken portions of the plaintiffs' property for public use without paying just compensation.

The plaintiffs own real property located within the City of Nooksack. The real property, in relevant part, includes parcel 2, a twenty-nine acre parcel. At the time the twenty-nine acre parcel was purchased by the Dunlaps, it fronted three platted rights of way. The second parcel, subject to the plaintiffs' lawsuit is parcel 3. This parcel is approximately one-quarter acre.

The plaintiffs have alleged two distinct inverse condemnation claims. The first is that the vacation of a portion of the unimproved right of way known as West Third Street has eliminated all direct and economical access to portions of parcel 2. The second claim is that by denying the plaintiffs' development permits for parcel 3, specifically, a shoreline variance for the construction of a fence within the 50 foot shoreline buffer and a second shoreline variance for the construction of a single family residence within the 50 foot shoreline buffer, the City deprived the plaintiffs of all reasonable use of parcel 3 such that it has no economic value.

Prior to the November 4, 2008 trial, the Court denied the defendant's motion on partial summary judgment regarding the plaintiffs' cause of action as to the quarter-acre parcel. The trial court held that the plaintiffs did not fail to join a necessary party by not including the State of Washington as a defendant.

Following the November 4, 2008 trial, the Court held the plaintiffs had not established the vacation of a portion of West Third Street resulted in a taking, but, did hold the denial of the development permits did result in the taking of parcel 3. The issue of damages was then heard by a jury on March 24, 2009.

The plaintiffs then timely filed their appeal in which they assign error to the findings of fact made by the Trial Court and the Trial Court's decisions regarding motions in limine. The plaintiffs, for the first time on appeal, assign error to the Court, as opposed to a jury hearing the liability portion of their case and the Court's failure to find a taking in regards to their allegation that the City diverted storm water onto their property.

The City of Nooksack, conversely, asks this Court to find that the findings of facts entered by the Trial Court, as to the 29 acre parcel are supported by the evidence and testimony admitted at trial, and that the Trial Court did not abuse its discretion as to the motions in limine. The City further asks this Court to disregard the issues raised by the plaintiffs which were not presented to the Trial Court; namely, the right to a jury on the issue of liability and storm water diversion. Finally, the

City, by way of its cross appeal, asks the Appellate Court to reverse the Trial Court's decision denying the City's motion on partial summary judgment and to reverse the Trial Court's decision that the denial of the development permits sought by the plaintiffs resulted in a taking of the quarter acre parcel.

II. ASSIGNMENT OF ERROR

- 1) The Trial Court was in error when it denied the defendant's Motion for Partial Summary Judgment.
- 2) The evidence presented at trial and the findings of fact entered by the Trial Court do not justify the legal conclusion that the actions of the City of Nooksack resulted in a taking of the plaintiffs' quarter acre parcel.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR AND CROSS APPEAL

- 1) As to the plaintiffs' 29 acre parcel are the findings of fact made by the Trial Court supported by the evidence admitted at trial?
- 2) Did the Trial Court abuse its discretion when it granted the defendant's Motion in Limine regarding damages to an un-built log home?
- 3) Was it error for the plaintiffs' case to be decided by judge as opposed to a jury?
- 4) Does the record establish the City of Nooksack is liable for a taking of the plaintiffs' property due to storm water runoff?
- 5) Should the Trial Court have granted the defendant's Motion for Partial Summary Judgment due to the plaintiffs' failure to join a necessary party?
- 6) Did the Trial Court commit error when it found there had been a taking of the defendant's quarter acre parcel due to the regulatory action of the City of Nooksack?

IV. STATEMENT OF THE CASE

The plaintiffs own real property located within the City of Nooksack and adjacent unincorporated Whatcom County. CP 216, Exhibit 2. This real property includes the plaintiffs' farm located on parcel 2, a 29 acre parcel which was zoned for agricultural use until December of 2005. Parcel 2 is essentially square. The eastern one-half of this parcel is located within the City of Nooksack; The western half is located in unincorporated Whatcom County. At the time the 29 acre parcel was purchased by the Dunlaps, it fronted three, platted right of way located within the City of Nooksack; West Third Street, West Lincoln Street, and West Grant Street. Of these three platted rights-of-way, West Third was, and remains unimproved and sub-standard. West Grant Street remains unimproved and only Lincoln Street is a platted right-of-way which has been improved to the City of Nooksack's Street Standards. RP pg. 363-366.

The second parcel subject to the plaintiffs' lawsuit is parcel 3. This parcel is approximately one quarter and is located entirely within the City of Nooksack.

The Nooksack slough bisects both parcels. In the case of the 29 acre parcel, the slough bisects the parcel at two locations. In the case of parcel 3, the quarter acre parcel, the slough runs diagonally through the middle of the property. CP 216, Exhibit 2. The Nooksack Slough, pursuant to the Washington State Shoreline Management Act and the Nooksack Shoreline Master Program has been designated as a Class

II Wetland and a water of the State of Washington. During much of the year the slough is filled with water.

On January 22, 2002, the City Council of the City of Nooksack denied the plaintiffs' request to improve a portion of West Third Street to access their 29 acre parcel. The plaintiffs' request was to utilize West Third Street in connection with their farming operation. RP pg. 345. The plaintiffs did not request to improve West Third for the purposes of building a residence. RP pg. 345. A copy of the Council minutes denying the plaintiffs' request was admitted at trial. CP 216, Exhibit 29. The plaintiffs did not appeal the City's actions nor did they submit any authority to the City or the Trial Court, that they were entitled or otherwise had the right to improve an unimproved public right-of-way.

On April 15, 2002, the City Council of the City of Nooksack vacated the portion of West Third Street which the plaintiffs sought to improve and which abutted their property. A copy of the April 15, 2002 Council Minutes was admitted at trial. CP 216, Exhibit 30. The plaintiffs did not appeal the partial street vacation.

On March 18, 2002, the plaintiffs applied for a Shoreline Substantial Development Permit to implement improvements to their farm. The Permit Application was following a Washington State Department of Ecology Site Visit of the plaintiffs' farm wherein concerns were raised about water quality violations. RP pg. 315-316. The plaintiffs began working with the Natural Resource Conservation Service to develop a farm plan to address the concerns raised by the

Department of Ecology. RP pg. 315-316. The Dunlap's farm plan was designed to move animals away from the slough while still providing access for equipment and animals to the fields on the south side of the slough. RP pg. 316. The March 18, 2002 Application indicated that the then current use of the property was "agricultural" and the proposed future use of the property was "agricultural". The site plan attached to the plaintiffs' application describes the proposed project as 1) placing a berm on the south side of the barn to control manure and 2) relocating the existing culvert off the southwest corner of the barn to a new location, due east, just off the south east corner of the new berm. RP pg. 317-321

After submitting their permit application, the Dunlaps' installed a wire fence on parcel 3, south of the slough. On September 5, 2002, the City of Nooksack sent the plaintiffs' notice that construction of the fence within the 50' Shoreline Buffer was in violation of City Code provisions. The letter further required the Dunlaps to remove the newly installed fence or apply for the proper permit within 15 days. On September 11, 2002, the Dunlaps re-submitted their Shoreline Permit Applications to include application for a shoreline variance for development within the 50 foot buffer, a Flood Plain develop permit and a grading permit. RP pg. 316.

On October 21, 2002, the City of Nooksack issued a decision regarding the plaintiffs' Application. The decision, in part, held that the fence was inconsistent with the Variance Permit criteria. The decision however, approved the relocation of a slough crossing. RP pg. 321. On December 1, 2002, the Washington State Department of Ecology

concluded in the denial of the Variance and the approval of the crossing. RP pg. 322.

The Dunlaps appealed the decision of the Nooksack City Council and the Washington State Department of Ecology to the Shorelines Hearings Board. A hearing was held on April 11, 2003. In its May, 26, 2003 written opinion, the Washington State Shoreline Hearings Board affirmed the denial of the variance by the City of Nooksack and the Department of Ecology for the installation of the fence within the 50 foot buffer on parcel 3. A copy of the findings of facts, conclusion of law, and order issued by the Hearings Board was admitted at trial. CP 216, Exhibit 48. The Dunlaps appealed the decision of the Shoreline Hearings Board to the Whatcom County Superior Court. The Court affirmed the decision of the Hearings Board. RP pg. 330-331.

On February 18, 2003, the plaintiffs submitted an application for a Shoreline Development Exemption and a Shoreline Variance Application for the construction of a house on parcel 3, the quarter acre parcel. RP pg. 332. On December 1, 2003, following a public hearing, the City Council denied the plaintiffs' application for a Shoreline Variance. A copy of the report of decision denying the application was admitted at trial. CP 216, Exhibit 5. The Washington State Department of Ecology concurred with the decision of the City of Nooksack that the Shoreline Management Variance Criteria had not been met.

The plaintiffs appealed the decision of the City of Nooksack and the Washington State Department of Ecology denying them a variance

to the Whatcom County Superior Court pursuant to the Land Use Petition Act as set forth in RCW 36.70C. The plaintiffs' appeal was dismissed on procedural grounds.

On August 8, 2005, the plaintiffs applied to the City of Nooksack for a change of zoning. This was to change the zoning classification of their 29 acre parcel from agricultural to residential. On December 19, 2005, the City Council of the City of Nooksack adopted Ordinance 598 whereby the City of Nooksack Comprehensive Plan and current and future zoning map were amended changing the zoning classification of the Nooksack portion of the 29 acre parcel from agricultural to residential.

Following the change in zoning classification, the plaintiffs have employed the services of John W. Matzinger, P.E. Mr. Matzinger is a civil engineer. Mr. Matzinger designed a preliminary land development plan for the residential development of the Dunlap's 29 acre parcel. The land plan allows for the full residential development of the 29 acre parcel given the access the plaintiffs had at the time of trial. RP pg. 354-360, CP 215A.

Additionally, following the change in zoning classification, the Dunlaps have been trying to sell their 29 acre parcel. The Dunlap's marketing promoted the 29 acre parcel as suitable for real estate development. At trial, the plaintiffs' realtor testified to the effect that her description of the Dunlap's 29 acre parcel in the Multiple Listing Services did not set forth any concerns regarding access and that the property was suitable for development. RP pg. 103. Further, the

Dunlaps have continued to use all 29 acres of their property as a dairy farm. PR pg. 307.

Rollin Harper, the planner for the City of Nooksack, also testified at trial. Mr. Harper testified that even through the plaintiffs had been denied development permits for the quarter acre parcel, they still had reasonable use of that parcel and that even with the vacation of West Third Street the plaintiffs had access to all of their 29 acre parcel. RP pg. 366-369.

Prior to the November 4, 2008 trial, the City of Nooksack retained the services of Donald Gustafson to appraise the plaintiffs' 29 acre parcel. Mr. Gustafson subsequently testified that the vacation of West Third Street did not impact the monetary value of the 29 acre parcel and that suitable access is available to the plaintiffs from the existing, platted, rights-of-way. RP pg. 504-512, 519, CP 216, Exhibit 61.

IV. ARGUMENT

A) As to the plaintiffs' 29 acre parcel, the findings of fact made by the Trial Court are supported by the evidence admitted at trial.

The plaintiffs are asking the Appellate Court to disregard the findings made by the Trial Court and essentially enter new findings based not exclusively on the record made at trial, but in part, based on

pleadings submitted to the Trial Court prior to the commencement of trial. Specifically at pages 9 -14 in their opening brief, the plaintiffs are asking the Appellate Court to make a factual determination that the plaintiffs regularly used West Third Street to get to their 29 acre parcel before the April 15, 2002 partial street vacation, and that the vacation subsequently resulted in their access being eliminated or substantially impaired. This argument contradicts the Trial Court's explicit finding that before the vacation, the previous use of the vacated portion of West Third Street was intermittent at best, and that the plaintiffs currently have access to all of their 29 acre parcel via other means. CP 305.

Access to the plaintiffs' 29 acre parcel, whether it be prior to the partial street vacation or after, is a factual determination. (see WPI 151.04 access in the context of an eminent domain claim) It is very well settled law that the function of the Appellate Court is to review the action of the Trial Court. . Appellate Courts do not weigh evidence, find facts, or substitute their opinion for those of the trier of fact. Id. Instead, they must defer to the factual findings made by the trier of fact. Id., citing Thorndike v. Hesperarian Orchards, Inc. 54 Wn. 2d. 570, 572, 575, 343 P.2d. 1183 (1959). "Judgment as to the credibility of witnesses and the weight of the evidence is the exclusive function of the [Trial Court]" Id., citing State v. Smith, 32 Wn. App. 226, 228, 640 P.2d. 25 (1982).

It is one thing for an Appellate Court to review whether sufficient evidence supports a Trial Court's factual determination. That is, in essence, a legal determination based upon factual findings made by

the Trial Court. Id. In contrast, where a Trial Court finds that evidence is insufficient to say that something occurred, an Appellate Court is simply not permitted to re-weigh the evidence and come to a contrary finding. Id. It invades the province of the Trial Court for an Appellate Court to find compelling that which the Trial Court found unpersuasive. Id. Yet, that is what appellant wants this Court to do. There was conflicting evidence in this case regarding whether the appellants had access to their 29 acre parcel following the partial vacation of a portion of West Third Street. The Trial Judge weighed that conflicting evidence and chose which of it to believe. In this regard, as set forth above, the Court found use of West Third Street to get to the 29 acre parcel prior to the street vacation was intermittent at best and other access currently remains for the plaintiffs. That is the end of the story. Id.

Further, even if the Appellate Court was to reconsider the findings made by the Trial Court, there is substantial evidence to support them. Specifically, as to the issue of access to the 29 acre parcel, the Court heard the testimony of appraiser James Berg who was first called by plaintiff and, who during cross examination, testified that the highest and best use of the plaintiffs' 29 acre parcel was residential development and that if developed, the plaintiffs' would have access to all of the parcel without the use of West Third Street. RP pg. 45, 50. The Court also heard the testimony of realtor Barbara Meleng who, during cross examination, acknowledged that she was marketing the plaintiffs' 29 acre parcel with the following description, "beautiful view property with residential potential. Approximately 15 acres within Nooksack's City Limits. Sandy loam soil and has recently been zoned residential with the possibility of cluster zoning. Also, 15

acres zoned agricultural would be potential for one home. Gorgeous views” RP Pg. 75. Ms. Meleng also testified that the plaintiffs received an offer for the 29 acre parcel which was rejected because they felt they could get more money for it. RP pg. 87. She further testified none of the plaintiffs’ concerns regarding access made it into her description of the property in the Multiple Listing Service. RP pg. 103. Engineer, John Matzinger testified he had created a preliminary land development plan which allows for access to all of the 29 acre parcel without utilizing the vacated portion of West Third Street. CP 7-63. On behalf of the City of Nooksack, Planner Rollin Harper testified during his direct examination that Mr. Matzinger’s plan to develop the plaintiffs’ property was viable. RP pg. 354-360. Mr. Harper also testified that the vacated portion of West Third Street was undeveloped and that following the street vacation, the Dunlaps still had access to the entire 29 acre Parcel. RP pg. 362-366. Appraiser Donald Gustafson testified, during his direct examination, that the vacated portion of West Third Street is substandard and that the 29 acre parcel could not be developed from that particular right-of-way, RP pg. 504-505, and that the vacation of West Third Street did not affect access to the plaintiffs’ 29 acre parcel. RP pg. 505-509. Additionally, Mr. Gustafson testified that the vacation had no affect on the value of the plaintiffs’ property. RP pg. 513-519. As such, the evidence and testimony admitted at trial supports the Trial Court’s findings of fact.

B) The Trial Court did not abuse its discretion when it granted the defendant’s motion in limine regarding damages to an un-built log home.

Prior to trial, the defendant, in its first motions in limine, asked the Trial Court to exclude all evidence concerning the cost of logs to build a log home on the plaintiffs' 29 acre parcel. CP 198. The motion was based on the cost of logs for an un-built home being damages which were not compensable in a takings action. See Washington Legal Foundation v. Legal Foundation of Washington, 271 F. 3d. 835, 8/62 (9th Cir., 2001). The Trial Court granted the defendant's motion. CP 306.

The granting or denial of a motion in limine is within the discretion of the Trial Court, subject only to review for abuse. Fenimore v. Donald M. Drake Construction, Co., 87 Wn. 2d. 85, 91, 549 P. 2d. 483 (1976). The motion should be granted if (1) it describes the evidence objected to with sufficient specificity to enable the Trial Court to determine that is clearly inadmissible (2) the evidence is so prejudicial that the movant should be spared the necessity of calling attention to it by objecting when it is offered: (3) is given a memorandum of authorities showing that the evidence is inadmissible. Id. at 91.

In the instant case, the Trial Court did not abuse its discretion when it granted the defendant's motion in limine. Damage to personal property is not a compensable loss in a takings or eminent domain claim. (see WPI 150.06, 161.05, and 151.06). Further, it is unclear as to how plaintiffs' logs were damaged when a portion of West Third Street was vacated or how the vacation prohibited the plaintiffs from covering, moving or otherwise protecting their logs from harm. Finally, damage to logs has no relevance as to whether the vacation of a

portion of West Third Street resulted in an actionable taking. As such, it is requested that the Appellate Court find the Trial Court did not abuse its discretion when it granted the defendant's motion in limine.

C) The Plaintiffs' never sought a trial on the issue of liability before a jury. Thus, after failing to do so, their argument to the Appellate Court that they should have had a jury determine this issue fails.

In the instant case, the plaintiffs sought a bifurcated trial in which the issue of liability, whether there had been a taking, was tried before the bench in regards to both of the plaintiffs' parcels of real property. The Trial Court held a taking had occurred to the plaintiffs' quarter acre parcel but found a taking did not occur in regards to the plaintiffs' 29 acre parcel. As a result, the issue of damages was tried before a jury as to only the quarter acre parcel.

While the plaintiffs claim it was error for the Trial Court to bifurcate the trial they have not identified any part of the record which reveals that they ever requested a jury to hear the issue of liability and that their request was denied by the Trial Court. The reason why they have not been forthcoming with identifying this portion of the record is that it was the plaintiffs themselves who chose to try the liability portion of their case before the bench. The issue of whether Washington State Law allows for a jury to determine liability in a takings claim was never heard by the Trial Court because the plaintiffs chose to bifurcate their claim and try the issue of liability to the bench. Having so decided to try

their case to the bench, the plaintiffs can not now argue it was error for the liability component of their case to not be determined by a jury.

Arguments not raised in the Trial Court generally will not be considered on appeal. Van Vonno v. Hertz Corp., 120 Wn. 2d. 416, 427, 841 P. 2d. 1244 (1992). Moreover, although RAP 2.5(a) permits a party to raise for the first time on appeal a “manifest error affecting a Constitutional right”. RAP 2.5(a) does not mandate appellate review of a newly raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not “manifest”. State v. Riley, 121 Wn. 2d. 22, 31, 846 P. 2d. 1365 (1993). In the instant case, there is no record of the plaintiffs seeking to have a jury trial on the issue of liability. As such, there is no way the Appellate Court can decide if the plaintiffs chose to try their case to the bench or a request for a jury trial was denied. Because the plaintiffs failed to make a record on this issue and because they waived any argument they were entitled to a jury trial by choosing to try their case before the bench, the Appellate Court can not grant the relief requested by the plaintiffs.

Additionally, the City of Nooksack does not concede that if the plaintiffs had demanded a jury to hear the issue of liability, that this demand would need to be met. Whether there has been a taking of the plaintiffs' property due to the actions of the City of Nooksack is a question of law and fact as contemplated by RCW 4.44.080. Thus the determination of this issue is proper only before the Court. The measure of damages is, conversely, a question of fact as contemplated by RCW 4.44.090. See also Seattle v. Kenmore, 67 Wn.

2d. 923 (1966). As such, the plaintiffs' pursuit of a bifurcated trial was appropriate and supported by the law.

D) The record does not establish the City of Nooksack is liable for a taking of the Plaintiffs' property due to storm water runoff.

The plaintiffs argue in their opening brief that there is enough information in the record to establish that the City of Nooksack is liable for a taking of their property due to storm water runoff. This argument fails for a number of reasons. First, the record does not establish this occurred. During his cross examination by the plaintiff, planner Rollin Harper testified he was "not indicating that the City has put storm water on the Dunlap's land". RP pg. 602. Mr. Dunlap, during his rebuttal testimony, stated "I have no idea how much of that water is coming from the City of Nooksack, but I do know that just from the laws of gravity that water seeks its own level so that the storm water is coming into my property and its seeking its own level, and that's the only flow of that slough is just the up and down movement of the level of water". RP pg. 621. This is the extent of the testimony and evidence which was introduced at trial regarding this issue and, taken as a whole, does not support any Court finding the plaintiffs have suffered a taking due to the invasion of residential storm water.

Second, the plaintiffs never made a claim for damages due to storm water runoff as part of their lawsuit. CP 1 and 139. This claim appears to be something the plaintiffs thought of and then chose to

pursue during the pendency of the trial. As such, the defendant has not had any opportunity to respond to this claim.

Finally, the Trial Court did not find there was the presence of storm water runoff and that the plaintiffs suffered any damages as a result. As set forth above, the Appellate Court must defer to the factual findings made by the Trial Court. Trial Court.

E) The Trial Court was in error when it denied the defendant's Motion for Partial Summary Judgment.

On August 15, 2008, the Trial Court heard the defendant's Motion for Partial Summary Judgment. The motion was supported by the defendant's Memorandum of Authorities and the Affidavit of Defendant's Counsel in Support of its Motion for Partial Summary Judgment. CP 167, 168, and 169. The Trial Court denied the defendant's Motion for Partial Summary Judgment. Summary Judgment RP pg. 14, CP 308.

The defendant's Motion for Partial Summary Judgment was based on the City of Nooksack, by adopting and implementing a Shoreline Master Programs consistent with the policies enumerated in the Shoreline Management Act of 1971 acted under the direction and control of the State of Washington and thus is immune from this part of the plaintiffs' takings claim.

With respect to the alleged taking of the quarter acre parcel, the regulation enacted by the defendant the plaintiffs find offensive is the

City of Nooksack's Shoreline Master Program as set forth in Chapter 16.04 of the Nooksack Municipal Code. The primary responsibility for implementing the policies enumerated in the Shoreline Management Act rest with local governments, such as the City of Nooksack, who adopt Shoreline Master Programs consistent with the State's requirements as mandated by RCW 90.58.060 et seq. The City's Shoreline Master Program has been approved by the Department of Ecology as being consistent with the requirements as set forth in RCW 90.58.060.

In the case of the fence constructed on the quarter acre parcel, the plaintiffs applied for a variance granting them relief from the prohibition of development within 50 feet of a Category II wetland. CP 169. The plaintiffs applied for a similar variance in regards to their proposal to build a single family home. CP 169. Both applications were processed pursuant the Shoreline Management program. In both instances, comment letters were received by the City from the Department of Ecology. In both instances, a report of decision was issued by the City which was not binding until it was approved by the Department of Ecology. WAC 173-27-190(1). In both instances, an appeal of the City's decision would be to the Shoreline Hearings Board pursuant to RCW 90.58.180. In both instances, the Washington State Department of Ecology would be a necessary party to the appeal. The Shoreline Hearings Board, pursuant to WAC 461-08-500 would consider the appeal on a de novo standard and scope of review. In this regard, the Shoreline Hearings Board would hear testimony and render a decision independent of that made by the City of Nooksack Council.

The issue of whether a local government, which had adopted a Shoreline Master Program, was liable for an alleged takings claim has been addressed by the Washington State Supreme Court in Orion Corporation v. State of Washington, 109 Wn. 2d. 621-747 P. 1062 (1987). In *Orion*, the Washington State Supreme Court held that the State of Washington, rather than Skagit County, was liable for any taking of tideland owner's property by excessive regulation where the county acted under the direction and control of the State in developing a Shoreline Master Program pursuant to RCW 90.58.180. Here, the Supreme Court further held that in developing the Skagit County Shoreline Master Program, the County acted under direction and control of the State. *Id.* at 643. State regulation required the County to give preferences to certain uses. *Id.* citing WAC 173-16-040(5). In *Orion* there was not an allegation that the Skagit County Shoreline Master Program requirements for issuing a conditional use program differed in any substantial way from WAC guidelines, *Id.* at 643. Moreover, the Skagit County Shoreline Master Program became effective only when adopted by the State Department of Ecology, *Id.* at 643, citing RCW 90.58.090. Upon adoption, the Skagit County Shoreline Master Program became State Regulation, *Id.* at 644, citing Harvey v. Board of County Comm'rs, 90 Wn. 2d. 473,584 P. 2d. 391 (1978); Friends and Landowners Opposing Development v. Department of Ecology, 38 Wn. App. 84, 684 P. 2d. 765 (1984). Because the County acted at the issuance of and, in some material degree, under the direction and control of the State, an agency relationship developed between the parties. *Id.* 644. See also Hewson Constr., Inc. v. Reintre Corp., Wn. 2d. 819, 685, P. 2d. 1062 (1984). As the principal acting within its authority, the State must take full

responsibility if a taking occurred. *Id.* at 644. See also Tyler v. Grang Ins Ass'n, 3 Wn. App. 167, 473 P. 2d. 193 (1970). As a result, the Washington State Supreme Court reversed the decision of the Trial Court and dismissed Skagit County from the pending action alleging a takings claim.

The facts in the instant case are analogous to those presented in *Orion*. In the instant case, a landowner is alleging inverse condemnation by excess regulation. In the instant case, as in *Orion*, the regulation in question is a local government's Shoreline Master Program. Similar to Skagit County, the City of Nooksack was required to adopt a Shoreline Master Program pursuant to RCW 90.58.090. Similar to Skagit County, the City of Nooksack's Master Program only became effective when approved by the Washington State Department of Ecology. In every instance where the plaintiffs complain of excessive regulation, their remedy has been to pursue an appeal through the Shoreline Hearings Board. The Shoreline Hearings Board will hear their appeal and apply a de novo standard of review, thus rendering a decision wholly independent of the decision rendered by the City of Nooksack. As such, if the plaintiffs believe they are entitled to compensation due to excessive regulation, their claim must name the State of Washington, not the City of Nooksack. Because the City of Nooksack was only adopting and implementing regulation as required by the State of Washington, all claims alleged by the plaintiff seeking damages due to the classification of portions of their property as a Category II wetland and the denial of development permits as a result must name the State of Washington as a defendant.

The Court denied the defendant's Motion for Partial Summary Judgment holding that where "the regulations themselves do not constitute the taking, but it is the application of those regulations", there are a different set of circumstances than those set forth in *Orion*. Summary Judgment RP pg.14. The Trial Court also referred to the Division I of the Court of Appeals decision in Samuels Furniture Inc., v. Washington State Department of Ecology, 105 Wn. App. 278, 19 P. 2d. 474 (2001) as overruling *Orion* in regards to the issue of agency when a local government adopts and enforces a Shoreline Master Program pursuant to RCW 90.58.090.

In *Samuels*, the City of Ferndale was claiming an agency relationship to justify binding the Washington State Department of Ecology to the City's decision the proposed development was outside of Shoreline jurisdiction. Id. at 287. The Court of Appeals held the City's jurisdictional decision was in no way directed or controlled by the Department of Ecology. Id. In fact, the City's decision was in effect an indication of its belief that the Department did not need to be involved in the permit process for the project at all. Id. The Appellate Court further held that because there is nothing in the Shoreline Management Act implying the existence of an agency relationship between the Department and local government, and because the City's decision was not controlled by the Department, the Trial Court was in error when it held the Department of Ecology was bound by the City's decision. Id. at 288.

The circumstances in the instant case are, however, different. First, *Samuels* was not a takings case but a case regarding whether

the local government could bind the Department of Ecology in its decision to not apply Shoreline regulations. The answer from the Appellate Court is that the local government could not and thus, could not act outside of the direction from the Department of Ecology. Second, unlike in *Samuels*, the City of Nooksack was effectively controlled by the Department in that any decision it made regarding the plaintiffs' request for a Shoreline Regulation Variance would ultimately be approved by the Department. WAC 173-27-200(2). While the Department will not overturn a local decision denying a development permit, the Department's mandate grants the department the authority to overturn a local decision granting a Shoreline Development Permit. WAC 173-77-190(1). Thus, the final say whether a Shoreline Development Permit is issued lies with the Department of Ecology. Further, the local government's decision in this regard only becomes effective upon approval of the Department of Ecology. WAC 173-27-200(2). Furthermore, and as set for above, the recourse for the applicant is to appeal the denial of the permit to the Shoreline Hearings Board at which time a de novo standard is applied. Finally, in the instant case, the findings of a taking was in part based on a decision made by the Shoreline Hearings Board to the extent that the findings made by the Board following the plaintiffs' appeal was that the plaintiffs could not keep the fence on their quarter acre parcel. This underscores the extent to which state action kept the plaintiffs from developing their property and underscores the necessity for the plaintiffs to have the state named as a party.

Because the Department of Ecology or the Shoreline Hearings Board ultimately determines whether the plaintiffs will get the

development permit they applied for, it was error for the Trial Court to deny the defendant's Motion for Partial Summary Judgment.

F. The Findings of Fact entered by the Trial Court do not justify the legal conclusion that the actions of the City of Nooksack resulted in a taking of the plaintiffs' quarter acre parcel.

1. The Trial Court did not enter Findings or Conclusions of Law on what were the plaintiffs' reasonable investment-backed expectations regarding the quarter acre parcel.

The takings clause analysis set forth in the United States Supreme Court decision of Penn Central Transp. Co. v. New York, 438 U.S. 104 (1970) involved a number of factors including the economic effect on the land owner, the extent to which the regulation interferes with reasonable investment-backed expectations and the character of the Government action. In *Orion*, the Washington State Supreme Court held that when the takings challenge concerns the application of the regulatory régime to a specific piece of property, the Court looks to the challenged regulations economic impact and the extent of its interference with reasonable, investment-backed expectations. *Id.* at 656. The Court further held that the extent of the economic deprivation depends upon two factors: (1) the economic impact caused by the denial of any profitable use and (2) the extent to which the denial of profitable use interfered with reasonable investment-backed expectations. *Id.* at 664.

In the instant case, the plaintiffs' quarter acre property was described at trial as being marginal and difficult to develop due to the natural features of the property. RP pg. 338. A slough runs diagonally through the property and there is water in the slough year around. RP pg. 339. A F.E.M.A. designated hundred-year flood plain runs through the property. RP pg. 339. At the time the plaintiffs purchased the quarter acre parcel there was a one hundred foot wetland buffer in effect. RP pg. 362. This buffer covered all of the quarter parcel RP pg. 362. Because of the buffer, the plaintiffs could not develop the quarter acre parcel at the time it was purchased. Given these limitations, the plaintiffs should have had limited investment-backed expectations for the property. This is particularly true given the natural features of the property whereby the center of the property is covered with water much of, if not all of the time. Because the Trial Court did not address this issue in its conclusions of law, it is requested this Court overturn the Trial Court's Order and remand this matter for further proceedings.

2. Findings of Fact 50 is a Conclusion of Law and as such, it is not justified by the other Findings of Fact on the evidence admitted at trial.

Finding of fact 50, sets forth that plaintiffs' fundamental attributes of property ownership have been significantly impact and there is a total and devastating economic impact to the quarter acre parcel. This finding is a conclusion of law and, as such, the Appellate Court should review it de novo. Alpental Community Club Inc. v. Seattle Gymnastics Soc., 121 Wn. App. 491, 86 P. 3d. 784

(2004)(overturned on other grounds). Further, the testimony and evidence admitted at trial do not support such a legal conclusion.

In his direct testimony, Nooksack City Planner, Rollin Harper indicated that while the plaintiffs' application for a variance for the plaintiffs' proposed home on their quarter acre parcel was pending, the City of Nooksack received a comment letter from Susan Meyer of the Department of Ecology. RP pg. 335. The correspondence from Ms. Meyer set forth proposed mitigation for the proposal to be consistent with the Shoreline Management Act and what the Department of Ecology wanted to see for compliance. RP pg. 336. The plaintiffs did not amend their application to incorporate any of the proposed mitigation. RP pg. 337. It is significant that the correspondence did not recommend denial of the variance but with the proposed mitigation could be approved. RP pg. 338. Given that, as set forth above, the Department of Ecology is the final arbiter when issuing Shoreline Permits. WAC 173-27-190(1), the fact that the Department was recommending approval, with the right mitigation, contradicts the Trial Court's Conclusion of Law that there was a total economic impact to the plaintiffs' quarter parcel.

Further, if the Appellate Court is to consider Findings of Fact 50 as a Finding of Fact then it is not supported by substantial evidence admitted at trial. This argument is different than the one made by the plaintiffs in which they ask the Appellate Court to substitute its judgment for that of the Trial Court to make findings on matters in which the Trial Court held the Evidence was insufficient. See Quinn v. Cherry Lane Auto Plaza, Inc., 2009 WL 4912707 (Wash. App. Div. 3).

Also, given the Trial Court's finding that the plaintiffs could build a very small house on their quarter acre parcel the Trial Court's Conclusion of Law that there was a total and devastating economic impact to the property and thus a taking was not justified.

V. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Appellate Court uphold the Trial Court in regards to its determination that the plaintiffs did not establish the partial street vacation of West Third Street resulted in a taking of their 29 acre parcel. It is further respectfully requested that the Appellate Court overturn the Trial Court's decision that the regulatory enforcement by the City of Nooksack resulted in a taking of the plaintiffs' quarter acre parcel. This is because the Trial Court was in error when it denied the defendant's Motion for Partial Summary Judgment and the evidence and findings made by the Trial Court do not support the legal conclusion that the plaintiffs suffered a taking of their quarter acre parcel.

DATED this _____ day of ^{Feb} ~~January~~, 2010.

Respectfully submitted,

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V. CONCLUSION

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DATED this 26th day of February, 2010.

Respectfully submitted,



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