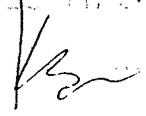


FILED
COURT OF APPEALS

NO. 34604-4-II

US DISTRICT COURT
NO. 34604-4-II

BY  COURT

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

SANDRA M. GALVIS, a divorced woman, and
ALEXANDER MONCADA, a single man, D/B/A LE POPULAR
CASH & CARRY MARKET, LLC; JAMES R. MASEWICZ and
VIRGINIA F. MASEWICZ, husband and wife;
and ASH RESOURCES, LLC,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION,

Appellant/Cross-Respondent.

APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF

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I. INTRODUCTION

This brief contains the Washington State Department of Transportation's ("State" or "WSDOT") reply on the issues raised in its appeal and its response on the issues raised by the cross-appeal. The State requests that this Court reverse that portion of Judge Thompson's order that vacated the final administrative orders and awarded attorneys' fees, and that this Court affirm Judge Worswick's summary judgment order finding RCW 47.50 constitutional and requiring the owners to exhaust administrative remedies.

Before turning to the legal analysis, the Court should disregard the owners' rhetoric insinuating agency malfeasance.¹ Both owners' briefs treat as self-evident that each proposed access connection modification constituted a substantial impairment of their access rights. But the factual record shows that WSDOT staff, the administrative law judge ("ALJ"), and the reviewing officer reached different conclusions. The record established that each modification would leave the owners with reasonable access and thus not result in a taking.

¹ In this brief, Respondents/Cross-Appellants are referred to collectively as the "owners" or "property owners." References to individual properties or briefs use the owner's name. Some confusion may be inevitable, however, because the Masewicz, Galvis and Moncada own adjoining properties and share an access design, but are represented by different attorneys and filed separate briefs. The Masewicz and Ash filed a joint brief.

The owners' allegations that WSDOT "knew" its proposed action constituted a taking or that it intended to "steal" property are similarly without support in the record. At all times, the agency indicated that it did not intend to take private property rights. Nor is there evidence to support the allegation that WSDOT maliciously forced property owners through a burdensome administrative process. The process, required by agency regulations and the Administrative Procedure Act ("APA"), provides an additional forum for the owners to be heard, and to prevent an inadvertent taking.² While the owners are entitled to show some error of fact or law, the rhetoric of counsel attacking the agency has no basis in the record. The record before this Court shows only that agency staff and an independent ALJ acted in good faith.

II. ISSUES PERTAINING TO CROSS-APPELLANTS' ASSIGNMENTS OF ERROR

The issues pertaining to the State's assignments of error are set out at page three of the Opening Brief of Appellant ("State's Opening Brief"). The following issues pertain to Sandra M. Galvis', Alexander Moncada's,

² WSDOT has a duty to file condemnation actions when it needs to take private property. RCW 8.26.180(8). Even then the constitution requires WSDOT to take only the property and property rights reasonably necessary for the project. *E.g., City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965). The SR 7 project was designed to be constructed using only existing WSDOT property rights. Index of Administrative Record ("AR") at 300000959 (Ash).

James R. Masewicz's, Virginia F. Masewicz's and Ash Resources, LLC's ("owners" or "property owners") assignments of error:³

1. Whether, on its face, RCW 47.50 takes the property right of highway access without just compensation?

2. Whether requiring the owners to exhaust available administrative remedies before instituting an inverse condemnation action violates article I, section 16?

3. Whether the owners have a compensable property right to use state highway right-of-way for parking?

4. Whether proposed access connection modifications, which improve highway safety and provide reasonable access to the highway, amount to a substantial impairment of the access right?

III. SUMMARY OF ARGUMENT

In the final orders, the WSDOT's reviewing officer found that:

1. State Route 7 ("SR 7") is a high accident highway corridor. Undefined highway access and the absence of sidewalks confused drivers and contributed to the safety problem.⁴

³ Galvis and Moncada exceeded the 50-page limitation of RAP 10.4, by appending a 34-page brief to their 50-page response brief. See Opening Brief of Respondents/Cross-Appellants Galvis/Moncada ("Brief of Galvis/Moncada"), p. 16, n.24. Further, owners Galvis and Moncada fail to assign error to any of WSDOT's findings. See Brief of Galvis/Moncada at 16-17. Any and all arguments and challenges to the reviewing officer's findings of fact and conclusions of law raised in the appended brief have been waived. *U.S. West Communications, Inc. v. Washington Utilities and Transp. Comm'n*, 134 Wn.2d 74, 949 P.2d 1337 (1997).

2. The existing access to each owners' property constituted a safety hazard.⁵

3. The proposed access connection modifications would correct the identified hazards and improve safety.⁶

4. The proposed access connection modifications would leave each owner with reasonable access to the highway considering all relevant factors, including the business operations on the properties.⁷

5. Although the owners will no longer be able to park on the highway right-of-way, the access connection modifications do not deprive them of any legal parking spaces.⁸

In their briefing, the owners failed to demonstrate the absence of substantial evidence in the record to support the reviewing officer's finding that their current access is part of the corridor-wide safety problem. The owners assert that their connections are safe because they have not yet caused a significant number of accidents immediately adjacent to their properties. But an argument based on this anecdotal

⁴ Administrative Record ("AR") at 300000007-8, amended at AR at 300000002 (Galvis Findings of Fact ("FOF") 4, 8); AR at 300000009-10 (Galvis FOF 10-13). Similar findings exist in the Masewicz and Ash final orders.

⁵ AR at 300000011, amended at AR 300000002 (Galvis FOF 17).

⁶ AR at 300000011 (Galvis FOF, p. 16). Similar findings exist in the Masewicz and Ash final orders.

⁷ AR at 300000011, amended at AR 300000002 (Galvis FOF 17); AR at 300000003, ¶2 (Galvis). Similar findings exist in the Masewicz and Ash final orders.

⁸ AR at 300000011, amended at AR 300000002 (Galvis FOF 17); AR at 300000016, amended at AR 300000003 (Galvis Conclusion of Law 12). Similar findings and conclusions of law exist in the Masewicz and Ash final orders.

evidence does not demonstrate a lack of substantial evidence. The included studies, testimony, diagrams, and pictures demonstrated safety problems at these properties and how those hazards contributed to a corridor-wide safety problem. Accordingly, the agency's findings of fact showing a need to address current access should be affirmed.

The owners also failed to show that their loss of the ability to park on the state right-of-way substantially impairs their right to highway access. Here, the historical use of the right-of-way for parking was unlawful, although at best the owners might say that they had a temporary revocable privilege. That unlawful use is irrelevant to the reasonable access determination. Therefore, substantial evidence showed that the modified access connections provide reasonable vehicular access to each property. Because the access connection modifications are a proper exercise of the State's police power and do not substantially impair the owners' right to highway access, the highway access control statute was applied constitutionally in these cases.

The remaining issues arise because the owners claim that RCW 47.50 is facially unconstitutional. However, the statute on its face does not authorize an uncompensated taking of property rights and the owners cannot meet the heavy burden of showing facial invalidity. Nor

can the statutory administrative remedies be ignored or not exhausted if inverse condemnation is claimed.

IV. STANDARD OF REVIEW PERTAINING TO STATE'S APPEAL

The owners misstate this Court's review role and urge the Court to apply the substantial evidence standard to superior court "findings."⁹ The standard of review applicable to the reviewing officer's findings of fact is whether substantial evidence exists in the record to support the finding. State's Opening Brief, pp. 17-19; RCW 34.05.570(3)(e); *Heidgerken v. Dep't of Natural Resources*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000). Indeed, oral comments and the written order show that Judge Thompson applied an incorrect standard of review—whether there was credible evidence to support the owners' arguments.¹⁰ At the February 26, 2006, hearing on the State's Motion for Reconsideration, Judge Thompson explained:

There is very *credible evidence* regarding the Ash and the -
- excuse me. Not the Ash but the other parcel.

MR. SINNITT: Masavage? [sic]

THE COURT: Yes. That there are businesses being operated, five of them, and four residential parcels, and with the reduction down to the two accesses there will be a result of only three parking spots, and that's not reasonable.

...

⁹ Brief of Respondents/Cross-Appellants Masewicz and Ash ("Brief of Masewicz/Ash"), p. 20; Brief of Galvis/Moncada, p. 13 (encouraging this Court to examine Judge Thompson's findings).

¹⁰ Clerk's Papers ("CP") at 25.

It doesn't comply with the County code. It's going to put these businesses out of business. You can't do that without compensation.

And so far as the Ash property is concerned, *there is credible evidence*, convincing evidence again that the proposal would be unreasonable. . . .

Verbatim Record of Proceedings ("VRP") (February 24, 2006) (emphasis added) at pp. 31-32.

This reasoning fails to apply the substantial evidence standard to the opinion testimony and documentary evidence supporting the reviewing officer's findings. The owners now urge this Court to repeat the mistake. Thus, instead of discussing the substantial evidence cited in the State's Opening Brief, the owners point to a handful of statements that arguably conflict with the reviewing officer's findings of fact. This is merely an attempt to retry the adjudication. The existence of arguably contradictory evidence alone does not demonstrate the lack of substantial evidence. Here, the owners fall far short of explaining why a fair-minded person could not be convinced of the truth of the reviewing officer's findings. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, *cert. denied*, 518 U.S. 1006 (1996).

V. ARGUMENT

A. The Reviewing Officer's Findings of Fact are Supported by Substantial Evidence in the Record

The only two findings discussed in the owners' briefs are those that address the issues of safety and reasonableness of access. Because the owners have not effectively preserved error with regard to any other findings, they are considered verities on appeal. *Skelly v. Criminal Justice Training Comm'n*, ___ Wn.2d ___, 143 P.3d 871, 873 (2006). Judge Thompson affirmed WSDOT's finding that the unrestricted and poorly controlled access points at the owners' properties are part of a corridor-wide safety problem. Because substantial evidence supports this finding, this Court should similarly affirm it.

However, Judge Thompson erred by reversing WSDOT's finding that the proposed modifications to the owners' access to SR 7 would leave them with reasonable access. Because substantial evidence in the record supports this finding, this Court should affirm it as well, thus reversing the superior court.

1. The uncontrolled and poorly defined access to the owners' properties is hazardous

All owners argue that because accidents have not occurred at an unusually high rate immediately adjacent to their property, their

uncontrolled access does not present a safety problem.¹¹ As explained in the State's Opening Brief, the WSDOT traffic engineer testified that uncontrolled access poses a safety problem throughout the corridor.¹² He and the project engineer explained the reasons that uncontrolled access causes accidents. There is a high accident rate throughout the corridor, although the number of accidents at any one particular location is not statistically significant. Uncontrolled access may cause accidents upstream of the property by causing hesitation and indecision as drivers attempt to discern where they can enter onto the property and where they should expect vehicles to exit off the property.¹³

The problem on the Ash property is different. Their two access points are undefined and too close. *See* WAC 468-52-040. Located just north of 188th, the Ash property is on a class III highway.¹⁴ The Ash property does not conform with WAC 468-52-040(3)(b)(ii) because it has over two access points on a contiguous parcel and the distance between the two points is less than three hundred feet.¹⁵ Consolidating those two

¹¹ *See* Brief of Galvis/Moncada at p.1, n.2; Brief of Masewicz/Ash at pp. 18-19.

¹² A high accident corridor is a one-half (1/2) mile stretch of highway which has a greater than state-wide average accident rate. A high accident location is a one-tenth (1/10) mile stretch of highway with a greater than state-wide average accident rate. AR at 300000307-08 (Galvis); AR at 300001701-03 (Masewicz).

¹³ *See* State's Opening Brief, pp. 21-27.

¹⁴ AR at 300000953 (Ash).

¹⁵ AR at 300000954-55 (Ash).

points into a single, wider access connection improves highway safety according to WSDOT engineers.¹⁶

The WSDOT should not be required to wait until someone is injured or killed adjacent to these properties before it can act to remedy a known design deficiency. The reviewing officer's findings of fact with regard to the safety hazard in all three WSDOT's final orders are supported by substantial evidence and should be affirmed.

2. Substantial evidence in the Galvis/Moncada and Masewicz records supports the findings of reasonable access

The key issue regarding the reasonable access determination for the Galvis/Moncada and Masewicz's properties is whether the owners' past use of the right-of-way for parking was unlawful, and whether it reflects a property right or a mere revocable privilege. Judge Thompson's mistaken conclusion on this point contributed to his erroneous reversal of the agency's findings.

a. The Galvis/Moncada and Masewicz properties currently make illegal use of the state right-of-way

The reviewing officer found that under the current parking configuration, cars utilized a portion of the State's right-of-way for

¹⁶ AR at 300000988 (Ash).

parking.¹⁷ Cars are forced to use the state right-of-way because the sloping topography limited building sites.¹⁸ As a result, the buildings are too close to the right-of-way. The distance from the edge of the sidewalk in front of the building to the right-of-way line is between eight to nine feet.¹⁹ All automobiles are longer than eight feet.²⁰ The parking configuration is depicted in the pictures attached as Appendix 2 to the State's Opening Brief. The WSDOT project engineer testified that cars parked in front of the building protrude into the right-of-way.²¹ None of the owners disagreed with this testimony. *See generally* Opening Brief of Respondents/Cross-Appellants Galvis/Moncada (“Brief of Galvis/Moncada”) and Brief of Respondents/Cross-Appellants Masewicz and Ash (“Brief of Masewicz/Ash”). Before the superior court, the owners conceded that they were parking on the right-of-way.²² Substantial evidence therefore supports the reviewing officer's right-of-way parking findings. In any event, the owners did not assign error to these findings. They should be treated as verities on appeal. *Skelly*, 143 P.3d at 873.

¹⁷ AR at 300000002 (Galvis); AR at 300001522 (Masewicz).

¹⁸ AR at 300001681 (Masewicz).

¹⁹ AR at 300000244 (Galvis).

²⁰ *Id.*

²¹ AR at 300000246 (Galvis).

²² *See* Brief of Galvis/Moncada, App. B, pp. 10-12 (excerpted pages attached as Appendix A). Judge Thompson correctly rejected this argument. CP at 6.

b. Parking in the right-of-way is a revocable privilege, not a property right

In Washington, use of public right-of-way for parking is no more than a revocable privilege. *State v. Williams*, 64 Wn.2d 842, 394 P.2d 693 (1964); *see also Billington Builders Supply, Inc. v. City of Yakima*, 14 Wn. App. 674, 676-677, 544 P.2d 138 (1975) (owner of property abutting a public way had no right to on-street parking). In *Williams*, a condemnation case, the State permitted property owners to use a portion of the right-of-way for loading trucks. As here, the state project eliminated the right-of-way parking.²³ The property was appraised for the condemnation action and the property owner's appraiser assigned a parking value to the "lost" right-of-way. The State objected to this evidence. *Id.* at 843-44.

Upholding the State's objection, the *Williams*' court held that the use of the right-of-way for loading and unloading was a privilege, not a right:

Traffic regulations, including parking while loading and unloading, are police power regulations and are not a part of an abutting property owner's vested right of ingress and egress.

Id. at 844.

²³ Unlike the situation in *Williams*, all the improvements for the SR 7 project will be built on existing state right-of-way. WSDOT does not need to acquire land.

In our case, the facts provide even greater reason to hold that the past use of the right-of-way was a privilege. Unlike the *Williams'* property owners, neither Galvis/Moncada nor the Masewiczses have ever had permission to use the right-of-way for parking. Businesses may not use highway right-of-way for parking:

It is unlawful for any person to erect a structure or establishment or maintain a business, the nature of which requires the use by patrons or customers of property adjoining the structure or establishment unless the structure or establishment is located at a distance from the right of way of any state highway so that none of the right of way thereof is required for the use of the patrons or customers of the establishment. Any such structure erected or business maintained that makes use of or tends to invite patrons to use the right of way or any portion thereof of any state highway by occupying it while a patron is a public nuisance, and the department may fence the right of way of the state highway to prevent such unauthorized use thereof.

RCW 47.32.120.

The sidewalks and drainage swales, which are part of the SR 7 project will function as the fencing authorized by RCW 47.32.120. Although WSDOT has not historically enforced RCW 47.32.120 in this area, it never granted permission to use the right-of-way for private parking.²⁴

²⁴ The owners cannot obtain a prescriptive right to use state right-of-way. RCW 7.28.090.

Owners Masewicz and Ash argue in response that by eliminating this past use of the right-of-way, the access modification would cause their businesses to be out of compliance with Pierce County code.²⁵ This argument is legally irrelevant and unsupported by the record. No county staff testified at the adjudicative hearing. There is no evidence that the county would not grant a variance or that it would take any enforcement action. However, this alleged hardship is caused by the owners (or their predecessor's) noncompliance with Pierce County parking codes and should not be borne by WSDOT when it addresses public safety. Here, the proposed modifications will have no effect on the legal parking spots on the Galvis/Moncada and Masewicz's properties and the claim of noncompliance with the Pierce County parking code requirements is a red herring.

c. The properties will have reasonable ingress and egress considering their current uses.

Once the right-of-way parking is removed from the reasonable access analysis, the real issue is simply whether substantial evidence exists to support the reviewing officer's finding that the modification left the Galvis/Moncada and Masewicz's properties with reasonable ingress and egress. Property owner James Masewicz essentially conceded this point,

²⁵ Brief of Masewicz/Ash, p. 19.

admitting that his concern is about parking, not access.²⁶ Galvis and Moncada assert that the access modifications will leave them without a commercially practicable property, but their argument is based upon the erroneous claim that they would be losing legal parking spots.²⁷ Accordingly, the owners have offered nothing to show a lack of substantial evidence to support the finding that they each have reasonable access.

Further, substantial evidence of adequate ingress and egress exists in the record in the form of diagrams and testimony. *See* State's Opening Brief, pp. 31-39 for discussion and citations. Delivery trucks and customer cars can enter and leave the property and there is no change in the legal, on-site parking.

Galvis and Moncada assert that "the issue of reasonableness, adequacy and commercial practicability of the remaining access . . . was not addressed in the State's case in any manner" because the State did not call a real estate valuation expert.²⁸ This assertion is incorrect. There was substantial testimony about the businesses operating on the property and

²⁶ AR at 300001725 (Masewicz).

²⁷ Brief of Galvis/Moncada, p. 20 (Ms. Galvis' testimony that two spots would be inadequate for her business necessarily presumes that she currently has the right to more than two spots); *Id.* at 33 (the expert opinion of value of appraiser Ed Greer is based upon the assumption that they would be losing four legal parking spots).

²⁸ Brief of Galvis/Moncada, p. 11.

the types of vehicles servicing those businesses.²⁹ Based on this evidence, the reviewing officer made several findings about the business-related access requirements and therefore considered commercial practicability.³⁰ The two points will provide ingress and space for customers, tenants and supply trucks to ingress and egress.

The State is sympathetic to the situation of some of the owners, but that is not a basis for ignoring the State's property interest. The State purchased the right-of-way in 1928.³¹ The Masewicz purchased their property in 1994.³² Galvis and Moncada purchased the adjoining parcel in 2002.³³ These owners have no permit or other authorization to use the highway right-of-way for parking. Put simply, they purchased buildings that were built too close to the right-of-way, with two legal spots in front of the Galvis building and three in front of the Masewicz building.³⁴ Such business decisions, although unfortunate, should not prevent exercise of

²⁹ E.g., AR at 300000077 (Galvis) (Mrs. Galvis testifies that her customers consist of "working construction or cooks for restaurant (inaudible), and Latin Americans in general, but many Americans who are married to (inaudible), teachers or -- working people"); AR at 300000255-256 (Galvis) (Troy Cowan testimony regarding the ability of cars and supply trucks to access the property at all times).

³⁰ AR at 300000007, amended at AR 300000002 (Galvis FOF 2, 3).

³¹ AR at 300001673 (Masewicz).

³² Brief of Masewicz/Ash, p. 2.

³³ Brief of Galvis/Moncada, pp. 18-19.

³⁴ Without citations to the record, owners Galvis and Moncada assert that when these buildings were originally constructed "there was ample room to park in front of the businesses and insufficient traffic to make any difference." Brief of Galvis/Moncada, p. 3, n.5. The State is unaware of any evidence in the record supporting these allegations. As explained above, the record does show that the State has owned the right-of-way in its current alignment since 1928. No evidence in the record suggests that the buildings existed at this time.

the State's property interests and its police power to improve highway safety. The reviewing officer's finding that the proposed access modifications leave owners Galvis/Moncada and the Masewicz with reasonable access should be affirmed.

d. Access revision cases are fact specific and the *Keiffer* case is distinguishable

The owners misrepresent that *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977) stands for the proposition that business owners have a right to right-of-way parking. *Keiffer* does not so hold and does not aid the owners.

As explained below, the *Keiffer* majority endorsed a two-part factual analysis in access regulation cases.³⁵ While all the facts from the trial court record are not stated in the *Keiffer* majority opinion, the holding is not based on an analysis that presumes the property owners were using the right-of-way for parking:

The existing two-lane road was widened to four lanes and curbs were erected on the edge of the improved road, all within the county's right-of-way. Before the improvements, respondents had access to their property at all points along their frontage and *parking for approximately 18 cars was available on respondents' property in front of their buildings.* Subsequent to the improvements, respondents' access was limited to two curb cuts approximately 32 feet long located near each end of the frontage.

³⁵ *Infra* at pp. 24-25.

Keiffer, 89 Wn.2d at 371 (emphasis added). The emphasized words recognize that the parking was “on respondent’s property.”

The owners here would rewrite the majority opinion because a comment in the dissent suggests that the owners were using the right-of-way for parking:

For many years, plaintiff used the public right-of-way in front of his premises as an extension of an adjunct to the parking area for his customers . . . Plaintiff has not suffered a loss of access, he has suffered the loss of public property for use as his private parking lot.

Keiffer, 89 Wn.2d at 375; Brief of Masewicz/Ash, p. 10. Nothing in the majority opinion suggests that it relied on this characterization of the record, or that it was making any holding based on such a fact. This Court should therefore reject the revision of *Keiffer* offered by the owners.

Moreover, the interpretation of *Keiffer* advanced by the owners should be rejected as inconsistent with RCW 47.32.120 and cases holding that any private use of the right-of-way is a revocable privilege. *Williams*, 64 Wn.2d at 844; *Billington*, 14 Wn. App. at 676-77; *Showalter v. City of Cheney*, 118 Wn. App. 543, 550, 76 P.3d 782 (2003) (no right to compensation for city-mandated removal of awning that had been allowed by license to rest on public sidewalk); *Central Puget Sound Regional*

Transit Authority v. Heirs and Devisees of Eastey, ____ Wn.2d ____, 144 P.3d 322 (2006).

Read fairly, *Keiffer* stands for the proposition that what amounts to reasonable access is to be determined by the trier of fact on a case-by-case basis. The *Keiffer* court held that substantial evidence in the record supported the trial court's finding that the property's access would be substantially impaired by the installation of the sidewalk along its frontage.

Similarly, the reviewing officer considered the competing evidence in this case and entered a formal finding that the construction of a sidewalk with two curb cuts *would* provide reasonable access. On appellate review, a court must review the fact finder's record and determine whether substantial evidence supports the finding. *Keiffer* thus offers no precedent for whether there is reasonable access at the properties in this case.

Neither do the two Utah appellate court cases cited by Galvis and Moncada provide useful guidance. In *Three D Corp. v Salt Lake City*, 752 P.2d 1321 (Utah App. 1988), all parking was located entirely on the owners' property; the court did not address whether partial use of the right-of-way for parking was a property right. *Three D Corp.*, 752 P.2d at 1322-23. *Carpet Barn v. State By and Through Dep't of Transp.*, 786 P.2d

770, 772 (Utah App. 1990), is distinguishable because there the state's retaining wall encroached on the property by six inches, whereas in our case, all improvements will occur solely within the right-of-way. *Carpet Barn*, 786 P.2d at 772. Additionally, in *Carpet Barn*, the cars used the right-of-way only to maneuver on and off of the property. By contrast, vehicles of customers, tenants and suppliers for the Galvis, Moncada and Masewicz properties actually park partially on the right-of-way. Numerous states share Washington's rule that parking on the right-of-way is a revocable privilege. *Snyder v. State*, 92 Idaho 175, 438 P.2d 920 (1968) (loss of right to encroach on the right-of-way via perpendicular parking alignment not compensable); *State Comm'r of Transp. v. Faps Realty Corp.*, 197 N.J. Super. Ct. App. Div. 44, 484 A.2d 35 (1984) (loss of maneuvering room on right-of-way for parking due to berm construction noncompensable); *Paul's Lobster, Inc. v. Massachusetts*, 53 Mass. App. Ct. 227, 758 N.E.2d 145 (2001) (loss of ability of large trucks to park perpendicular to road for loading purposes as they had previously done for many years due to road reconfiguration was noncompensable).

3. Substantial evidence in the Ash record supports the findings of reasonable access

A simple examination of the record reveals why the WSDOT finding regarding reasonable access in the Ash final order should be affirmed. On the Ash property, WSDOT proposed to combine the two, 25-foot wide access connections into a single, 50-foot wide connection. WSDOT's original plan called for a 40-foot wide driveway but, after hearing the owners' concerns, WSDOT engineer, Troy Cowan, agreed to enlarge the design.³⁶

The reviewing officer found that the 50-foot wide connection was sufficient to serve the business on the property. Expert opinion testimony supports the conclusion that large trucks could easily use the new connection.³⁷

Ash fails to explain why the evidence discussed in the State's Opening Brief does not amount to substantial evidence. Rather, Ash states that according to their expert, Christopher Brown, the tractor-trailer rigs which access the property need a 60-foot turning radius and that a 50-foot wide access point would increase accidents.³⁸ They do not explain the basis for this conclusion or why the opposite conclusion of WSDOT's two testifying engineers should not be believed.

³⁶ AR at 300000950 (Ash).

³⁷ AR at 300000957 (Ash);

³⁸ Brief of Masewicz/Ash, pp. 4, 19.

Indeed, Christopher Brown's opinion on the reasonableness of the 50-foot access point defies common sense. He testified that a 75-foot long dump truck with tractor-trailer would take up to 30 feet of the access point when entering the property.³⁹ The current access connections are but 25 feet wide. Under Mr. Brown's analysis, such trucks could not now enter the Ash property.⁴⁰ In any event, when asked whether a 50-foot driveway would alleviate his concerns about this problem, Mr. Brown answered that it would.⁴¹ In light of the fact that WSDOT altered its design plan to 50 feet before the ALJ issued his ruling, the concerns expressed by Mr. Brown regarding turning radii have been addressed.

Even without this modification to the plans, conflicting testimony of a single expert does not establish that a reasonable person could not have been convinced otherwise. Because Ash fails to show that WSDOT's expert testimony does not amount to substantial evidence, the reviewing officer's finding that the Ash property will retain reasonable access should be affirmed.

B. State Response to Owners' Constitutional Arguments

As shown above, the reviewing officer's public safety and reasonable access findings are supported by substantial evidence. The

³⁹ AR at 300001065 (Ash).

⁴⁰ *Id.*

⁴¹ AR at 300001080 (Ash).

next questions are therefore the constitutional issues raised by the property owners. If this Court affirms the finding that the properties retain reasonable access under the proposed design, that defeats the as-applied constitutional argument that the design takes reasonable access. The owners filed two briefs and make different facial constitutional arguments to avoid the adjudication of their reasonable access. Masewicz and Ash argue that any government action that leaves a property owner with less than full access along the entire highway frontage constitutes an unconstitutional taking. The Galvis owners apparently share this position, but their main argument attacks the WSDOT administrative hearing. They contend that a property owner may allege inverse condemnation with no need to exhaust this administrative remedy that defines the access available.

The owners' arguments are not consistent with Washington law. The legislature has directed WSDOT to hold administrative hearings that accurately implement the common law property right of reasonable access, consistent with judicial determinations defining that property right.

1. Standard of review

The Masewiczes and Ash argue that Judge Worswick erred when she ruled that RCW 47.50 was facially constitutional.⁴² That alleged error pertains to a partial summary judgment order and review is de novo. *Washington Fed'n of State Employees v. State*, 127 Wn.2d 544, 551, 901 P.2d 1028 (1995).

Statutes are presumed to be constitutional. *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998). The party challenging a statute must prove that it is unconstitutional beyond a reasonable doubt. *E.g., State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995). The beyond a reasonable doubt standard is met when “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled on other grounds, Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

This high burden for a facial challenge to a statute is necessary because the judiciary must allow the legislature to function as a co-equal branch of government. Courts assume that the legislature considered the constitutionality of its enactments and defer to legislative evaluations of the need for a statute. Courts are therefore hesitant to strike a duly enacted

⁴² Brief of Masewicz/Ash, p. 1.

statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution. *See State v. Smith*, 111 Wn.2d 1, 17-18, 759 P.2d 372 (1988) (Utter, J., dissenting).

2. On its face, RCW 47.50 does not authorize WSDOT to take property rights without just compensation

Masewicz and Ash assert that the statute transfers private property rights to the government without requiring payment of just compensation. Drawing an imperfect analogy to the right of first refusal at issue in *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 369, 13 P.3d 183 (2000), they argue that the permit requirement in RCW 47.50.040 unconstitutionally transfers their “right” to highway access along the full property frontage to the government by allowing reasonable restrictions.⁴³ As shown below, the argument is based on a flawed premise, ignores the statutory language, and relies upon misstatements of the record.⁴⁴

⁴³ *See* Brief of Masewicz/Ash, pp. 7, 13.

⁴⁴ The Masewiczes assert that the State conceded its action would substantially impair access. Brief of Masewicz/Ash, p. 15. In reality, the State only commented that the proposed design in front of the Galvis/Moncada and Masewicz properties would reduce the current amount of the right-of-way which they could use for maneuvering on and off of SR 7. State’s Opening Brief at 7.

a. The highway access right has always been subject to reasonable regulation to protect public safety

The flawed premise that underlies the facial challenge is the assumption that an owner of property abutting a state highway has a right to unfettered, unrestricted or unregulated⁴⁵ access along the entire highway frontage.⁴⁶ The access right has always been subject to reasonable government regulation necessary to protect safe highway operation. The owners' claims that RCW 47.50 is facially unconstitutional cannot be based on the mere fact that it leads to some restrictions on access to public highways.

There is no question that the owner of property abutting upon a public street has a right to use the street for ingress and egress. *Deaconess Hospital v. Washington State Highway Comm'n*, 66 Wn.2d 378, 403 P.2d 54 (1965), citing *Fry v. O'Leary*, 141 Wash. 465, 252 P. 111 (1927); see also State's Opening Brief, p. 11. However, the Supreme Court also has described the access right as subject to regulation pursuant to the police power. *Keiffer v. King County*, 89 Wn.2d at 372. Consistent with these principles, permissible access regulations include restrictions that fall short of substantial impairment as in *Keiffer* and include restrictions that leave the property with reasonable access. *State v. Wineberg*, 74 Wn.2d

⁴⁵ See Brief of Masewicz/Ash, p. 12.

⁴⁶ See Brief of Masewicz/Ash, p. 13.

372, 378, 444 P.2d 787 (1968); *Kahin v. City of Seattle*, 64 Wn.2d 872, 875, 395 P.2d 79 (1964) (“Appellant has suffered a compensable claim under Art. 1, § 16 . . . of the Constitution only when the use of the police power in limiting the access has become unreasonable.”).

Keiffer explicitly rejects the very argument being raised here that any access restriction constitutes a compensable taking:

Not all impairments of access to property are compensable. Compensation is properly denied in those cases where an exercise of the police power *does not directly affect access or the impairment of access is not substantial*.

Keiffer, 89 Wn.2d. at 372 (emphasis added). This confirms that there is no facial flaw in RCW 47.50 because government may regulate highway access without taking a property interest provided that it does so correctly—that is without substantially impairing the ability of vehicles to move between the highway and the property. *Keiffer* disproves the Masewicz and Ash assertion that governmental regulation of any access is a taking *per se*.

Instead, *Keiffer* confirms that each access case turns on its facts. *Id.* at 372-73. The first factual issue is “whether the government action in question has actually interfered with the right of access as that property interest has been defined by law.” *Id.* at 372. If the regulation or restriction interferes with the right of access, the second factual issue is

whether the impairment is substantial, thus requiring compensation. *Id.* at 374. If as Masewicz and Ash assert, any new curbing along the property frontage constitutes a substantial impairment of access, the *Keiffer* opinion and its holdings about these factual questions must be overruled. Under their argument, *Keiffer* should have substituted the two part inquiry with a simple rule of law that government may never install or require any curbing without first paying just compensation.⁴⁷

Similarly, *McMoran v. State*, 55 Wn.2d 37, 345 P.2d 598 (1959) does not support the owners' contention that any access regulation is a taking *per se*. *McMoran* held that an abutting property owner must be compensated when *all* direct access to the highway is blocked and the owner is forced to use a frontage road. *McMoran*, 55 Wn.2d at 40; *see also Kahin*, 64 Wn.2d at 876 (noting that *McMoran* stands for the proposition that a total deprivation of access is compensable). That does not apply to the instant case, where each property retained direct highway via curb cuts for access and where there was no diversion to a frontage or intermediate access road. The facts here are distinguishable from *McMoran* and the plain language in that case contradicts the owners'

⁴⁷ Had the *Keiffer* court adopted such a rule, Washington streets and highways would look very different today. Our now ubiquitous curbs, gutters and sidewalks would likely have never appeared.

argument that *any* modification of unfettered direct highway access is a taking.

Likewise, *Brown v. City of Seattle*, 5 Wash. 35, 31 P. 313 (1892), a case cited by all owners, does not support the contention that any restriction in the access constitutes a taking *per se*. In *Brown*, the city sought to lower elevation (or grade) of the adjoining street by 14 to 17 feet, making it physically impossible to access the property from the street. *Brown*, 5 Wash. at 313-14. Again, that is distinguishable from our case. Nothing in *Brown* suggests that the government may not limit access by defined driveways. In sum, no Washington case law suggests that property owners have the right to access a public highway at any point they wish without concern for public safety.

b. RCW 47.50 implements the common law property right of access

In RCW 47.50.010(3)(b), the legislature has codified and described the access right in language similar to that used by the Supreme Court in *Wineberg*, 74 Wn.2d at 378, and *Kahin*, 64 Wn.2d at 875:

(b) Every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can

be provided to another public road which abuts the property. . . .

The Masewicz and Ash ignore the substance of the statute to argue that the statute “transfers” private property rights. They cite a portion of the policy statement in RCW 47.50.010(3)(1) explaining that private access rights should be subordinate to the public’s right to a safe and efficient highway.⁴⁸ The owners ignore the later statements that explicitly affirm the right of reasonable access, RCW 47.50.010(3)(b), and confirm that the statute does not affect that right. RCW 47.50.010(5);⁴⁹ *see Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 844, 64 P.3d 15 (2003) (holding that statutes should be read as a whole and the various provisions considered in light of each other).

Additionally, the owners’ selective reading of the findings and policy statements in RCW 47.50.010 do not reflect the operative parts of this statute. Nothing in the operative language authorized WSDOT to take existing access rights without compensation and the legislature took care to preserve the status quo. For example, the legislature applied the permit

⁴⁸ Brief of Masewicz/Ash, pp. 12-13.

⁴⁹ Similarly, WSDOT regulations recognized its constitutional obligation to respect the access property right. WAC 468-51-150(5) states:

(5) Reasonableness of access. The department in its regulation of connections in compliance with chapter 47.50 RCW and these regulations shall allow reasonable access. If the department's final order denies reasonable access, the appellant shall be entitled to just compensation in compliance with RCW 47.50.010(5). . . .

requirement only to new construction. RCW 47.50.040(1). It allowed existing, unpermitted access connections to remain, provided that the connections meet minimum acceptable standards of highway safety. RCW 47.50.080(1). It even authorized WSDOT to issue non-conforming access connection permits if a property would otherwise be deprived of highway access. RCW 47.50.080(3). In light of the substance of the law, there is no merit to the owners' analysis that rights are being transferred.

The Masewiczes and Ash, however, also argue that "property owners are statutorily forced to pay for permits for what they had previously held outright."⁵⁰ The statute requires only that the WSDOT establish a fee schedule for permit applications. RCW 47.50.050. WSDOT does not charge fees where the modification is initiated by a WSDOT construction project. WAC 468-51-140(4). The record shows that WSDOT did not charge a fee for the permits it issued in this case.⁵¹

On its face, RCW 47.50 allows for regulation of highway access up to the point that such regulation would interfere with a property owner's common law right. The owners' argument fails because abutting property owners do not have (nor have they ever had) a right to an unsafe access connection or to unrestricted access across the entire frontage. Once the nature of the property right is correctly understood, it is evident

⁵⁰ See Brief of Masewicz/Ash, p. 13.

⁵¹ AR at 300001515 (Ash).

that RCW 47.50 does not on its face take or damage a private property right and does not violate article I, section 16.

The owners cannot meet the heavy burden of showing invalidity, where there is no set of circumstances exist in which RCW 47.50 can be applied without violating article I, section 16. Instead, the statutes can be applied to fairly implement the property rights by protecting reasonable access while controlling access to streets and highways using curbing, driveways and other such improvements. The numerous cases examining these ubiquitous features show that they can be used without substantially impairing the property right.

3. WSDOT's administrative process to contest proposed access connection modifications is consistent with article I, section 16

The remaining constitutional argument claims that because there is a right to bring inverse condemnation actions for the taking of property, there can be no administrative process to determine reasonable access to a highway. The first four Galvis/Moncada "assignments of error" attack the WSDOT's administrative process on this basis.⁵² Essentially, Galvis argues that once a property owner alleges that a proposed design will result in a taking of the property interest in access, the agency cannot

⁵² See Brief of Galvis/Moncada, pp. 16-17.

institute the statutory process that determines reasonable access. Such an outcome is not required by article I, section 16.

a. The constitutional text does not prohibit an administrative process

Article I, section 16 imposes several substantive and procedural restrictions on the inherent sovereign power of eminent domain. *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 410, 128 P.3d 588 (2006). It generally prohibits the taking of private property for other than public uses. It bars any taking until just compensation is paid. It empowers the judiciary to determine whether a proposed governmental use is really a public use. And the language “compensation shall be ascertained by a jury,” guarantees a jury determination only of the amount of compensation owed once it has been determined that a taking has occurred. *See Peterson v. Smith*, 6 Wash. 163, 32 P. 1050 (1893).

Nowhere does article I, section 16 prohibit using an administrative process to determine reasonable access to property along streets and highways. Nor does any case suggest that constitutional challenges are the exclusive tool for resolving disputes over the scope of a property right that is affected by proposed modifications to highway access. The process selected by the legislature reflects a valid exercise of legislative power to deal with this unique aspect of property.

In *Keiffer*, the court concluded that the question of whether an access modification amounts to substantial impairment of the access right was a question of fact. *Keiffer*, 89 Wn.2d at 374. The *Keiffer* court affirmed a procedure in which the trial court judge decided the taking issue. *Keiffer*, 89 Wn.2d at 410; *see also Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 102 P.3d 173 (2004) (the determination as to whether a regulation is so restrictive that it amounts to a taking is for the court, not the jury). *Keiffer* admittedly does not squarely address the procedure adopted in RCW 47.50, but its analysis of this property right demonstrates that it can be fairly determined by an administrative adjudication.

The administrative process employed by WSDOT determines facts that are material to highway access property rights. Those findings are reviewed under the APA judicial review standards. The adjudication and judicial review ensures that the facts found are consistent with the statutory directive to preserve reasonable access.

That there is a constitutional right to seek inverse condemnation when property is taken does not make the inverse condemnation lawsuit an exclusive means for determining the scope of the property interest in reasonable access to a highway. For good reasons, Washington has implemented that property interest using the administrative process. Having adopted that administrative process, a property owner must

exhaust that administrative remedy. A court, of course, retains final say to determine if RCW 47.50 accurately implements the access property interest—and as shown above, the statute is consistent with case law defining reasonable access. But once it is shown that a highway access connection preserves such reasonable access, then an inverse condemnation based solely on the taking of reasonable access must fail. There is no constitutional need to relitigate the property interest in reasonable access.

b. The legislature may properly require owners to exhaust administrative remedies to determine reasonable access

That property owners need to seek relief first through the administrative process provided in WAC 468-51 prior to filing an inverse condemnation action is consistent with Washington’s exhaustion of administrative remedies doctrine. The WSDOT applied its regulations (WAC 468-51) under the authority granted by RCW 47.50 and the APA. In RCW 47.50.030(2), the legislature directed the agency to:

[a]dopt administrative procedures pursuant to chapter 34.05 RCW which establish state highway access standards and rules for its issuance and *modification of access permits, closing of unpermitted connections, revocation of permits and waiver provisions in accordance with this chapter.*

(Emphasis added). The APA authorizes state agencies to commence adjudicative proceedings “at any time” regarding matters within the scope

of the agency's jurisdiction. RCW 34.05.413(1). WSDOT's rules implement this legal authority and offer those affected by access connection modifications the right to an adjudicative hearing. WAC 468-51-150. Consistent with the APA, an ALJ presides at the hearing and makes an initial order, which can be reviewed by a delegee of the WSDOT Secretary. The reviewing officer issues the agency's final order, which is then subject to judicial review under RCW 34.05.570.

Galvis/Moncada rely entirely upon cases addressing the property right of highway access. They fail to recognize that administrative agencies acting pursuant to the APA during the exhaustion of remedies may often decide contested facts that bear upon property rights. Under the APA, findings of fact are reviewed under the substantial evidence standard. RCW 34.05.570(3)(e).

When, as here, an administrative remedy is available, our Supreme Court has repeatedly held that one must exhaust that remedy before instituting an inverse condemnation action. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 768 P.2d 462 (1989); *see also Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990).⁵³ There is "a strong bias in favor of the exhaustion doctrine." *Estate of Friedman*,

⁵³ Various statutes also require exhaustion. RCW 36.70C.060(2)(d) (requiring exhaustion of remedies prior to judicial review under the Land Use Petition Act); RCW 90.58 (requiring exhaustion of administrative remedies before determining judicial review of Shorelines Hearings Board final decision). *See also* RCW 34.05.534.

112 Wn.2d at 78. In seeking to establish an excuse to the exhaustion requirement, a landowner in an inverse condemnation case has a substantial burden because a final government decision as to the permitted land use is necessary before the court can assess the takings claim. *Id.* at 79-80.

In *Estate of Friedman*, the court recounted the rationale underlying the exhaustion requirement. First, it ensures against premature interruption of the administrative process. Second, it allows the agency to develop the necessary factual background on which to base a decision. Third, it allows the agency to exercise its institutional expertise. Fourth, the exhaustion requirement provides a more efficient process and allows the agency to correct its own mistakes. And fifth, it ensures that people do not ignore administrative procedures in a rush to the court room. *Estate of Friedman*, 112 Wn.2d at 78. According to the *Estate of Friedman* court, “[e]ach of these policy underpinnings to the exhaustion doctrine is significant in and of itself, and, together, they mandate observance of the exhaustion requirement absent compelling ground for excuse.” *Id.* Exhaustion of administrative remedies is not precluded by the contemplation of a later claim for inverse condemnation, it is harmonious with that right.

The policies underlying the exhaustion doctrine support its application in highway access. Perhaps most importantly, WSDOT is the institution best positioned to evaluate complicated highway safety data and driveway design issues such as vehicle turning radii and clearances. The legislature acknowledged the special expertise held by the WSDOT, when it directed the agency to adopt rules to implement highway classification and design standards.⁵⁴ RCW 47.50.090. Because courts recognize that they are ill-equipped to design or engineer highway projects, they have historically deferred to WSDOT's judgment on such matters. *See Deaconess*, 66 Wn.2d at 404; *see also Miller*, 156 Wn.2d at 421-22.

The administrative process provides an adjudicative forum on the record for the property owners to express their concerns with the agency's initial proposals. Here, the agency modified the permits to accommodate concerns. If, as Galvis/Moncada assert, the initial proposals were erroneous, the administrative process allowed the agency to efficiently correct the mistake. Although owners Galvis and Moncada characterize these design changes as "abandonment" of the original plan and as "extreme hardball," those mischaracterizations are without merit.⁵⁵ Agency adjustments during an administrative process are expected and

⁵⁴ The owners have not challenged the WSDOT's regulations.

⁵⁵ Brief of Galvis/Moncada, pp. 14-15.

should be encouraged. In contrast, the alternative process envisioned by Galvis and Moncada would have the superior courts hearing lawsuits over every quibble over access, which is not necessarily more accurate or fair.

Galvis and Moncada provide no reason why their arguments about the highway access right cannot be raised on judicial review as they have done by making arguments about unfettered access or rights to park in the right of way. As shown above, the owners' various arguments reflect errors of law concerning their access rights. But the essential point is that judicial review has ensured that a court can review the administrative decision to ensure that there is an accurate application of reasonable access law.⁵⁶

c. The self-executing nature of article I, section 16 does not create an exception to the exhaustion requirement

The Masewicz and Ash argue that because article I, section 16 has been described as “self-executing,” property owners cannot be compelled to participate in a preliminary administrative process.⁵⁷ They offer no principles by which their proposed rule could be limited to highway access cases. Their argument misunderstands the term “self-

⁵⁶ As noted above, Judge Thompson erred by misapplying the law. His legal error was that he evaluated how the proposed access control affected the owners' interests in parking on the right of way or subjective impacts on the owners that went beyond preserving reasonable access from the private property to the highway. *Supra* at 7-8.

⁵⁷ Brief of Masewicz/Ash, p. 8.

executing.” The self-executing nature of article I, section 16 does not require a departure from the exhaustion doctrine or preclude the legislature from using an administrative process to determine the property right of reasonable access.

A self-executing constitutional provision means that it is enforceable against the state without a waiver of sovereign immunity. In *Deaconess Hospital v. State*, 10 Wn. App. 475, 479, review denied, 518 P.2d 216 (1974), Division III held that article I, section 16 was self-executing because one could sue to enforce the protections of the article without legislative authorization. That reason and others led the *Deaconess* court to hold that a statute establishing venue over actions against the state, which was enacted pursuant to the legislature’s article 2, section 26 power, did not apply to inverse condemnation actions. *Deaconess*, 10 Wn. App. at 479. The court found that the venue requirement would have amounted to an impermissible legislative restriction on the right protected by article I, section 16. *Id.* Noting that the Supreme Court had applied statutes of limitation to inverse condemnation actions, the *Deaconess* court acknowledged that not “every legislative condition placed upon the exercise of rights granted under the a [sic] self-executing constitution provision is unconstitutional.” *Id.* at 479.

The notion that the self-executing character of article I, section 16 excuses the exhaustion requirement before filing an inverse condemnation action is impossible to reconcile with exhaustion cases such as *Estate of Friedman* and *Presbytery of Seattle*. Both of those cases involved real property rights, administrative processes and inverse condemnation claims. Both of those decisions provide a far better analogy to the procedural situation in this case. This Court should apply the Supreme Court precedent rather than a strained interpretation of dicta from a court of appeals case that was not even considering the issue that is before this court.

The Supreme Court has not recognized an inverse condemnation exception to the exhaustion doctrine. Galvis and Moncada have identified no good reason for this Court to do so now.

4. If the court decides that the agency's order should be vacated, the remedy is a remand to the agency

Galvis and Moncada also argue that if the proposed design would substantially impair their access right then a jury should be empanelled to determine just compensation as an immediate remedy.⁵⁸ As an initial matter, no owner assigned error to Judge Thompson's remand order and thus they failed to preserve this alleged error. This Court should not

⁵⁸ Brief of Galvis/Moncada, pp. 4, 30.

entertain their argument that they have a right to an immediate just compensation trial.

Moreover, the argument is without merit. Mere notice of a proposed agency construction project does not constitute a taking. *Orion Corp. v. State*, 109 Wn.2d 621, 670-71, 747 P.2d 1062 (1987); *State v. McDonald*, 98 Wn.2d 521, 531-32, 656 P.2d 1043 (1983); *Lange v. State*, 86 Wn.2d 585, 588, 547 P.2d 282 (1976). It makes little sense to have taxpayers buy an interest in property based on an unimplemented proposed design.

As of today, the WSDOT has yet to construct the project adjacent to the owners' properties. There is no physical or regulatory restriction yet in effect. Thus, even if a final judgment in this case finds that the proposed modification would substantially impair access, no compensation is due at this time. As Judge Thompson recognized, the correct remedy is an agency remand.⁵⁹ *See also Dunn v. City of Redmond*, 303 Or. 201, 205, 735 P.2d 609 (1987) (“When the government has sought to regulate private property but not to take it, the owner cannot force a sale by having a court decide that the regulation is tantamount to taking the property for public use. The policy choice is for the government to make”).

⁵⁹ CP at 25.

5. RCW 47.52 does not forbid access regulation

The owners' contention that RCW 47.52 forbids access regulation reflects a fundamental misunderstanding of the two statutes.⁶⁰ RCW 47.50 authorizes WSDOT to regulate access connections provided that each property owner retains reasonable access. RCW 47.50.010(3)(b). RCW 47.52 authorizes the WSDOT to condemn access rights for designated "limited access" highways. RCW 47.52.050. The statute includes several planning and notice requirements that apply in certain situations. RCW 47.52.131-139. If the Washington State Transportation Commission had designated SR 7 as a limited access highway, WSDOT could have used the authority in RCW 47.52 to acquire access rights. But SR 7 is not a limited access highway. It is a controlled access highway. *See* RCW 47.50.010(2). RCW 47.52 does not apply to controlled access highways, such as SR 7. *See also Deaconess*, 66 Wn.2d at 378 ("[u]nless the abutting owner will lose or suffer substantial loss of ingress or egress to an existing street, he is not entitled to the notice prescribed in RCW 47.52.072").

⁶⁰ *See* Brief of Masewicz/Ash. p. 9, n.4. Galvis and Moncada make this assertion in assignment of error "E," but fail to support the assertion with any argument. Brief of Galvis/Moncada, p. 17.

C. Owners are not Entitled to Attorneys' Fees

Should this Court affirm WSDOT's final orders, it should reverse the trial court's award of fees and refuse the property owners' requests for fees on appeal. However, if this Court reverses the agency's final orders, no more than \$25,000 is available to all owners. Under RCW 4.84.350, qualified parties (sole owners with net worth not exceeding \$1 million or a corporation/organization with net worth not exceeding \$5 million) may obtain attorneys' fees when they obtain a reversal of an administrative order through judicial review. *Id.* The courts have concluded that the legislative intent is that fees are only recoverable for the work done to prepare for judicial review, and not for the work associated with the underlying administrative hearing:

Under our statute, fees are available to a qualified party that prevails in a *judicial review* of an administrative action. The statute is silent as to fees incurred at the administrative level. The clear implication is that our legislature did not intend to make fees incurred at the administrative level available under the act.

(Emphasis added.)

Alpine Lakes Protection Society v. Washington State Dep't of Natural Resources, 102 Wn. App. 1, 19, 979 P.2d 929 (1999). Further, "[i]f two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars." RCW 4.84.350(2).

The superior court correctly concluded that the \$25,000 is the entire sum available to all owners in this action under RCW 4.84.350. At the February 24, 2006 superior court hearing, Judge Thompson awarded fees of \$4,477.97 to the Masewiczses and \$5,534.98 to Ash.⁶¹ Subsequently, at the April 17, 2006 superior court hearing, Judge Thompson awarded owners Galvis and Moncada \$14,987.50.⁶² The sum total of these three amounts is \$25,000.

The fact that three separate adjudicative hearings were held for the property owners at the administrative level does not justify a departure from the explicit \$25,000 statutory ceiling on fees for joined parties under RCW 4.84.350. They consolidated their administrative challenges into a single case for judicial review. The statute is clear on its face—when two or more qualified parties join in an action, all eligible fees are capped at \$25,000.

Further, the owners cannot recover additional fees for costs associated with this appeal because they have already been awarded the maximum amount allowed under RCW 4.84.350. They can only recover fees for appellate work if “applicable law” grants them a right to so

⁶¹ CP at 6-7, 10.

⁶² Evidence in the record is lacking regarding the Galvis/Moncada fee award amount. Owners Galvis/Moncada did not obtain a written order from the court awarding their fees. Neither did they designate the verbatim record of proceedings from the April 17, 2006 hearing. However, they concede that the total award of fees for all three parties was \$25,000, pursuant to RCW 4.84.350. Brief of Galvis/Moncada, p. 45.

recover. RAP 18.1. Because the applicable law, RCW 4.84.350, caps the recoverable amount for all qualified parties seeking judicial review at \$25,000, no additional fees can be awarded for work associated with this appeal.

VI. CONCLUSION

Substantial evidence in the record supports WSDOT's findings of fact and they should be affirmed. The agency's final orders include findings that the currently uncontrolled access alignments at the owners' properties are symptomatic of the access throughout the corridor which is causing an alarming high number of accidents. To address this problem, WSDOT has proposed access modifications which, while restricting their current access alignment, continues to provide the properties with reasonable ingress and egress. While the owners point to arguably conflicting evidence in the record, they fail to show that substantial evidence is absent. Perhaps most lethal to the Galvis/Moncada and Masewicz challenges to the reasonableness finding of fact is their fundamental misunderstanding regarding the revocable privilege to use the right-of-way for private parking. Because the loss of this privilege is non-compensable, it is irrelevant to the reasonable access analysis.

Neither do the owners' present meritorious constitutional challenges to RCW 47.50. The claim of the Masewiczes and Ash that

abutting property owners' property rights include a right to unrestricted, unfettered access to the highway finds no support in Washington law. RCW 47.50 merely implements well-established common law that access right may be restricted without compensation if it leaves the property with reasonable access. Galvis' and Moncada's argument that article I, section 16 precludes the scope of the access right from being implemented by an administrative agency finds no support in common law and clashes with Washington's well-recognized exhaustion of remedies doctrine.

For these reasons, the State respectfully requests that the Court affirm the superior court's conclusion that RCW 47.50 is constitutional. The State further requests that the Court reverse the portion of the superior court's order that vacated the agency's final orders and awarded attorneys' fees.

RESPECTFULLY SUBMITTED this 20th day of November, 2006.

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APPENDIX A

1 some purpose. Why can we not say to a governmental agency, "Yes, you
 2 certainly may exercise your police power, your road-building power, or
 3 what have you, but if in doing so you effect a taking of property, why then,
 4 you have also exercised your power of eminent domain, and you must
 5 pay compensation."? We do not thereby destroy the police power or the
 6 power of eminent domain; we only invoke the constitutional corollary of
 7 compensation."

8 William B. Stoebuck, Nontrespasory Takings in Eminent Domain, Michie Company,
 9 1977, pages 30-31. (Emphasis added).

10 The instant case is a prime example of a situation where the police power and
 11 the power of eminent domain have both been invoked to accomplish a public
 12 improvement. Appellants do not question the State's power to acquire all or a portion of
 13 the Petitioner's access rights, so long as just compensation is paid. However, it is clear
 14 that RCW 47.50.010 (3)(b) and RCW 47.50.010(5) compel the conclusion that where
 15 reasonable access cannot be provided to the subject property from another road that
 16 abuts the subject property, the only way that WSDOT can restrict access to the subject
 17 property is to purchase or condemn the Petitioner's access rights under Chapter 47.52
 18 RCW.

19 There is no argument by the State that there is another road that abuts the
 20 subject property that could be utilized to provide reasonable access to the retail
 21 commercial building.

22 There is no argument that the head-in angle parking has been in existence
 23 for over 50 years, which parking has been partially upon state right of way. Mr.
 24 Salmon said as much in his opening statement. (RP 300000216). The battle about the
 25 head-in angle parking centers around the State's claim that said parking is illegal under
 26 RCW 47.32.120⁵ (which Appellants strongly contest) and the Appellant's claims that (1)

27 ⁵ RCW 47.32.120 Business places along highway.

28 It is unlawful for any person to erect a structure or establishment or maintain a business, the nature of
 which requires the use by patrons or customers of property adjoining the structure or establishment
 unless the structure or establishment is located at a distance from the right of way of any state highway
 so that none of the right of way thereof is required for the use of the patrons or customers of the
 establishment. Any such structure erected or business maintained that makes use of or tends to invite

1 The existing head-in angle parking in front of the subject property is consistent with
 2 parking allowed under RCW 46.61.570(2),⁶ because there are not now, nor have there

3
 4 patrons to use the right of way or any portion thereof of any state highway by occupying it while a patron
 5 is a public nuisance, and the department may fence the right of way of the state highway to prevent such
 6 unauthorized use thereof.

[1984 c 7 § 183; 1961 c 13 § 47.32.120, Prior: 1937 c 53 § 79; RRS § 6400-79.]

NOTES: Severability — 1984 c 7: See note following RCW 47.01.141.

7 ⁶ RCW 46.61.570. Stopping, standing, or parking prohibited in specified places— Reserving
 8 portion of highway prohibited

(1) Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions
 9 of a police officer or official traffic control device, no person shall:

(a) Stop, stand, or park a vehicle:

(i) On the roadway side of any vehicle stopped or parked at the edge or curb of a street;

(ii) On a sidewalk or street planting strip;

(iii) Within an intersection;

(iv) On a crosswalk;

(v) Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately
 12 opposite the ends of a safety zone, unless official signs or markings indicate a different no-parking area
 13 opposite the ends of a safety zone;

(vi) Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would
 14 obstruct traffic;

(vii) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;

(viii) On any railroad tracks;

(ix) In the area between roadways of a divided highway including crossovers; or

(x) At any place where official signs prohibit stopping.

(b) Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a
 17 passenger or passengers:

(i) In front of a public or private driveway or within five feet of the end of the curb radius leading thereto;

(ii) Within fifteen feet of a fire hydrant;

(iii) Within twenty feet of a crosswalk;

(iv) Within thirty feet upon the approach to any flashing signal, stop sign, yield sign, or traffic control signal
 20 located at the side of a roadway;

(v) Within twenty feet of the driveway entrance to any fire station and on the side of a street opposite the
 21 entrance to any fire station within seventy-five feet of said entrance when properly signposted; or

(vi) At any place where official signs prohibit standing.

(c) Park a vehicle, whether occupied or not, except temporarily for the purpose of and while actually
 22 engaged in loading or unloading property or passengers:

(i) Within fifty feet of the nearest rail of a railroad crossing; or

(ii) At any place where official signs prohibit parking.

(2) Parking or standing shall be permitted in the manner provided by law at all other places except a time
 25 limit may be imposed or parking restricted at other places but such limitation and restriction shall be by
 26 city ordinance or county resolution or order of the secretary of transportation upon highways under their
 27 respective jurisdictions.

(3) No person shall move a vehicle not lawfully under his or her control into any such prohibited area or
 28 away from a curb such a distance as is unlawful.

(4) It shall be unlawful for any person to reserve or attempt to reserve any portion of a highway for the purpose of
 29 stopping, standing, or parking to the exclusion of any other like person, nor shall any person be granted such right.

BRIEF OF APPELLANTS GALVIS AND
 MONCADA — 11

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1 ever been signs posted in the SR 7 Right of Way prohibiting the parking beyond the fog
 2 line in the vicinity of the subject property; RCW 35A.46.010,⁷ and RCW 46.61.575,⁸ (2)
 3 That WSDOT has never made any effort to enforce RCW 47.32.110, the highway
 4 obstruction statute, against the subject property or in any reported case; and (3) That
 5 WSDOT is estopped from claiming that parking by Appellants and their customers
 6 partially on a portion of the State's SR 7 right of way that has not been needed or used
 7 for highway purposes since it was acquired in 1928 is illegal.

8 Regarding equitable estoppel, although there are no cases on point in
 9 Washington, there is a New Jersey case⁹ that involved an access management statute
 10 that held that the state was equitably estopped from denying that the owner of property
 11 abutting a state highway had a grandfathered right to utilize the right of way in front of
 12 his property for maneuvering vehicles to facilitate their parking just off the state highway
 13 right of way. The court stated, in pertinent part:

14 We reiterate what we observed earlier. The taking itself effected the loss
 15 of the fifteen parking spaces here. The "lot access and use" were

16
 17 ⁷ See also, RCW 35A.46.010 State law applicable

18 The provisions of Title 46 of the Revised Code of Washington relating to regulation of motor vehicles shall
 19 be applicable to code cities, its officers and employees to the same extent as such provisions grant
 20 powers and impose duties upon cities of any class, their officers and agents, including without limitation
 the following: (1) Authority to provide for angle parking on certain city streets designated as forming a
route of a primary state highway as authorized in RCW 46.61.575; . . .

21 ⁸ RCW 46.61.575. Additional parking regulations, which provides, in pertinent part:

22 (3) Local authorities may by ordinance or resolution permit angle parking on any roadway, except that
 23 angle parking shall not be permitted on any federal-aid or state highway unless the secretary of
transportation has determined by order that the roadway is of sufficient width to permit angle parking
without interfering with the free movement of traffic.

24 SR 7 in the vicinity of the subject property is a 5-lane state highway with a 100 foot wide right of way
 25 width that is paved across its full width. Assuming that the lanes have a maximum width of 12 feet each,
 26 the traveled lanes take up no more than 60 feet of the 100 foot right of way leaving 40 feet (20 feet on
 27 each side of the roadway) that are unused for highway purposes. This excess highway right of way has
 traditionally been utilized by customers of the many highway oriented businesses for maneuvering and
 parking.

28 ⁹ City of Linden v. Benedict Motel Corp, 370 N.J. Super. 372, 851 A.2d 652 (Feb. 11, 2004). The
 BRIEF OF APPELLANTS GALVIS AND
 MONCADA— 12

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NO. 34604-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SANDRA M. GALVIS, a divorced woman, and ALEXANDER MONCADA, a single man, d/b/a LE POPULAR CASH & CARRY MARKET, LLC; JAMES R. MASEWICZ and VIRGINIA F. MASEWICZ, husband and wife; and ASH RESOURCES, LLC,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF
TRANSPORTATION,

Appellant/Cross-Respondent.

DECLARATION OF
SERVICE

TIFFANY R. GILBERTSON states and declares as follows:

I am a citizen of the United States of America, over 18 years of age, and am competent to testify to the matters set forth herein. On November 20, 2006, I sent for service a copy of the Appellant/Cross-Respondent's Reply Brief, Appendix A, and this Declaration of Service via same day ABC Legal Messenger to the following:

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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 20th day of November, 2006, at Tumwater, WA.



TIFFANY R. GILBERTSON, Legal Assistant