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DIVISION II

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STATE OF WASHINGTON

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

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PACIFIC HIGHWAY PARK, LLC,

Appellant

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Respondent

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Appellant Pacific Highway Park submits this brief in reply to certain arguments raised by WSDOT in its Brief of Respondent of May 13, 2013.

## II. ARGUMENT IN REPLY

### II. A. INVERSE CONDEMNATION CLAIM DOES NOT “SUBSUME” TRESPASS AND RCW 4.24.630 CLAIMS

WSDOT argues that Pacific Highway Park’s trespass and RCW 4.24.630 claims are subsumed by its inverse condemnation claim.<sup>1</sup> And since, according to WSDOT, the inverse condemnation claim must be dismissed because it belongs to a prior owner, not Pacific Highway Park as a subsequent purchaser, Pacific Highway Park’s other claims must also be dismissed. In other words, according to WSDOT, a claim that does not belong to Pacific Highway Park subsumes claims that do. This is illogical.

In an encroachment case, our Supreme Court stated that

[w]hen [a] right ... is invaded, we think it of little moment what the theory of the injured party's cause of action may be. Whether it be brought on the theory of trespass, nuisance, negligence, or violation of rights guaranteed by Art. 1, § 16, of the Constitution, is not important. If, under the facts and circumstances of the particular case, the theory of the cause of action is adapted to the relief sought, it is sufficient.

*Kuhr v. City of Seattle*, 15 Wn.2d 501, 504, 131 P.2d 168 (1942).

In *Northern Pacific Ry. Co. v. Sunnyside Val. Irrig. Dist.*, 85 Wn.2d

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<sup>1</sup> Brief of Respondent (Br. Resp’t) at 27-29.

920, 924, 540 P.2d 1387 (1975), the railroad filed a constitutional takings claim against the district for damage to its roadbed by a flood from a ruptured canal. The railroad did not plead in tort. Affirming the dismissal of the constitutional takings claim because the flood was neither permanent nor recurring, the court observed

Plaintiff asserts that failure to proceed in tort does not necessarily result in denial of liability for a substantial invasion of private property. While this assertion is valid as an abstract proposition (See *Kuhr v. Seattle*, 15 Wn.2d 501, 131 P.2d 168 (1942)), plaintiff must still establish the elements of another theory, *e.g.*, nuisance or trespass. This plaintiff does not purport to do in this action.

Clearly, if Pacific Northern had pleaded trespass or nuisance, the Court would have weighed them in spite of dismissing the constitutional takings claim. Here, Pacific Highway Park has pleaded torts: trespass and RCW 4.24.630 wastage.<sup>2</sup> If the Court were inclined to dismiss the takings claim under the subsequent purchaser rule, the tort claims remain for consideration.<sup>3</sup>

While a taking must be chronic, not merely a temporary interference (see *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283, 783 P.2d 596 (1989)), this does not mean that a trespass cannot also be chronic, as

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<sup>2</sup> Clerk's Papers (CP) at 75-81.

<sup>3</sup> The recent decision in *Wolfe v. WSDOT*, 173 Wn. App. 302, 293 P.3d 1244 (2013), where the plaintiffs conceded that their continuing nuisance claim conflated with their inverse condemnation claim, is based on the particular facts of that case. Here, WSDOT itself appears to concede that *Wolfe* is not applicable to the case at bar as it cites *Wolfe* only for the subsequent purchaser rule, not in support of its subsumption argument. See Br. Resp't at 15-16 re. cites to *Wolfe*; see Br. Resp't at 27-29 re. subsumption argument.

WSDOT claims.<sup>4</sup> “To establish intentional trespass, a plaintiff must show (1) invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability the act would disturb the plaintiff’s possessory interest; and (4) actual and substantial damages.” *Crystal Lotus Enterprises, Ltd. v. City of Shoreline*, 167 Wn. App. 501, 506, 274 P.3d 1054 (2012). None of these elements forecloses a taking if what is trespassed upon is property that could have been taken by the exercise of eminent domain. The elements of inverse condemnation are “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Phillips v King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). It is not reasonably disputable that storage of stormwater gathered along a state highway is a public use or that WSDOT could have taken by eminent domain the land it needed to make its stormwater system work.

Trespasses are classified as permanent or continuing, the distinction turning on whether the trespass is reasonably abatable. *Fradkin v. Northshore Utility Dist.*, 96 Wn. App. 118, 125-26, 977 P.3d 1265 (1999).

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<sup>4</sup> Br. Resp’t at 29.

If abatable the trespass is continuing, if not it is permanent.<sup>5</sup>

Based on a remarkably expansive reading of this Court's opinion in *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012), WSDOT contends that it cannot be ordered to abate the trespass Pacific Highway Park complains of because such would require the expenditure of moneys only available by appropriation of the legislature.<sup>6</sup> While *Avellaneda* does discuss the separation of powers as a rationale for granting WSDOT discretionary immunity for its methods of prioritizing highway improvements, no mention is made by the court of Const. art. VIII, § 4, cited by WSDOT in its footnote, as foreclosing the State from paying for any damages it does in implementing its projects. In fact, the *Avellaneda* court at 481, citing *Taggart v. State*, 118 Wn.2d 195, 214–15, 822 P.2d 243 (1992), clearly distinguishes discretionary decisions, entitled to immunity, from operational decisions. “While the decision whether to include a project on the priority array is entitled to discretionary immunity, negligent implementation of that decision may

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<sup>5</sup> Br. Resp't at 29, n.30, quotes one word, “permanent,” of Pacific Highway Park's response to WSDOT's Interrogatory 16. “Do you contend that the taking of your property was temporary or permanent in nature? Please identify all facts that support your contention.” Answer: “Permanent, in that flooding and resultant saturation is frequent, reoccurring, and continuing.” Given this choice of “permanent” or “temporary,” Pacific Highway Park's answer is “permanent” in the sense of recurring and continuing. Pacific Highway Park has never alleged that the trespass is “non-chronic” or “insubstantial,” as WSDOT implies. Br. Resp't at 32.

<sup>6</sup> Br. Resp't at 29, n.31.

still be the basis for tort liability.” *Avellaneda*, 167 Wn. App. at 487. Pacific Highway Park has not sued WSDOT because it decided to widen SR 99. It sued because WSDOT decided to dump its stormwater on Pacific Highway Park’s property, a choice that saved WSDOT the cost of replacing the 24 inch pipe under SR 99.

WSDOT relies on *Crystal Lotus Enterprises Ltd. v. City of Shoreline*, 167 Wn. App. 501, 274 P.3d 1054 (2012), where plaintiff sued for continuing trespass and unlawful taking because a city stormwater system, built sometime before 1962, discharges stormwater on to a *neighboring lot not owned by the plaintiff* but whose water was alleged to seep on to Crystal Lotus’s lots. Alleged, because as the court notes

Crystal Lotus presented no evidence of actual or substantial damages occurring in the past three years: no expert testimony about diminution of property value, no government property tax assessments, no photos or descriptions of physical deterioration. Rather, Crystal Lotus merely asserts the property is currently “unusable and unmarketable.” Such bare assertions do not suffice to defend a motion for summary judgment. [*Id.* at 506; internal citation omitted.]

Contrary to *Crystal Lotus*, Pacific Highway Park has presented evidence here of substantial damage to its interests within the statutory period.

If the trial court were to find that for whatever reason WSDOT’s trespass is not reasonably abatable, then the trespass would be

permanent. Permanent trespasses are subject to the discovery rule, as argued in Pacific Highway Park's opening brief.<sup>7</sup>

## **II.B. THE COMMON ENEMY DOCTRINE DEFENSE IS NOT AVAILABLE TO WSDOT**

Interposing a common enemy defense,<sup>8</sup> WSDOT cites *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010) for the standard formulation of the common enemy doctrine, i.e., “[i]f one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is [damage without remedy].” This is the standard formulation of the bare doctrine, but beyond that, *Fitzpatrick*, a case about dikes on a river floodplain, has little to guide the resolution of the case at bar.

WSDOT further cites *Wilber Dev. Corp v. Les Rowland Constr. Inc.*, 83 Wn.2d 871, 874-875, 523 P.2d 186 (1974)<sup>9</sup> for oft-repeated qualifiers to the doctrine:

while municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done,

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<sup>7</sup> Brief of Appellant (Br. Appellant) at 20-22.

<sup>8</sup> Br. Resp't at 29-32.

<sup>9</sup> *Wilber* was overruled on one point by *Phillips v. King County*, 136 Wn.2d 946, 961-62, 968 P.2d 871 (1998): “To the extent the *Wilber* case can be read to hold that approval of development alone is sufficient to give rise to liability on the part of a municipality, we overrule it.” That is not an issue in this case and *Wilber* remains good law for the purposes Pacific Highway Park cites it.

they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made ....

Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof. At the same time, it is the rule that the flow of surface water along *natural drains* may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another. [Emphasis added; internal citations omitted.]

But the very things that *Wilber* held may not be done are exactly what WSDOT has done here. Its 36" pipe gathers water from some 330 acres, much outside the natural drainage basin in which the Pacific Highway Park property is located,<sup>10</sup> contrary to WSDOT's claim,<sup>11</sup> and casts it upon Pacific Highway Park's property in a "manner and volume as to cause substantial damage."<sup>12</sup> Citing *Wilber*, *inter alia*, *Hedlund v. White*, 67 Wn. App. 409, 416, 836 P.2d 250 (1992), explains what it means to discharge water in quantities greater than, or in a manner different from, the natural flow of such surface waters. "A landowner may discharge surface water onto adjoining land through a *natural watercourse or natural drainway*, but not through a culvert or drain artificially constructed and located apart

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<sup>10</sup> CP at 255, Declaration of Norman L. Olson (Olson Decl.) at ¶ 5; CP at 281, Declaration of Steven F. Neugebauer (Neugebauer Decl.) at ¶ 7 ("[T]he WSDOT system brings stormwater to the Pacific Highway Park property that originates from outside of the natural drainage basin that contains the Pacific Highway Park property.")

<sup>11</sup> Br. Resp't at 31.

<sup>12</sup> Regarding damages to the property, see CP at 258-59 ¶ 16, and 270, Olson Decl. and Ex. D thereto; CP at 376-497, Declaration of Frederick Strickland (Strickland Decl.).

from a natural watercourse or natural drainway.” (Internal citations and quotation omitted; emphasis added.)

As succinctly stated in *Feeley v. ER Butterworth & Sons*, 42 Wn.2d 837, 842, 259 P.2d 393 (1953), while one has

a right to discharge surface waters by natural means – even though they were discharged on to the lands of another – he had no right to convey them .... by an artificial means, a concealed drain pipe. *Whiteside v. Benton County*, 114 Wash. 463, 195 Pac. 519 [1921]; *D'Ambrosia v. Acme Packing & Provision Co.*, 179 Wash. 405, 37 P. (2d) 887 [1934].

The roadside ditch which WSDOT replaced with the 36” buried pipe was never a natural water course or drainway. It was a ditch dug along the highway and maintained by WSDOT.<sup>13</sup> The *natural* drainage is to the east, not to the south as the 36” pipe runs.<sup>14</sup> Even if some water from this ditch may have entered the Pacific Highway Park property prior to 2001, it certainly did not do so by the two pipes now connecting the WSDOT system and the property (i.e., a different method) or in the amounts it now does (i.e., different amount).<sup>15</sup>

In fact, the replaced ditch did itself flood stormwater on to adjoining properties. As explained in the Olson declaration,<sup>16</sup> the ditch was actually

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<sup>13</sup> *Buxel v. King County*, 60 Wn.2d 404, 408, 374 P.2d 250 (1962): “When a question is raised as to the existence of a natural watercourse, that question must be determined by the trier of fact. *Tierney v. Yakima County* (1925), 136 Wash. 481, 239 P. 248.”

<sup>14</sup> CP at 281 ¶ 7, Neugebauer Decl.

<sup>15</sup> CP at 255-56 ¶ 8, 257-58 ¶ 15, and 259-60 ¶ 17, Olson Decl.

<sup>16</sup> CP at 257, ¶ 15.

a series of segments connected by 24" culverts at driveways. At high flows the culverts could not convey all the water in the ditch and flooding of adjoining properties occurred. This was particularly pronounced at what WSDOT identified as a wetland to the north of the Pacific Highway Park property. Before it was replaced with the 36" pipe, WSDOT's stormwater system could only function by flooding waters on to *several* adjoining properties.

Once these other "safety valves" (the properties to the north of Pacific Highway Park's, to which flood waters from the roadside ditch had easy access) were cutoff by installation of the 36" pipe, any stormwater that cannot pass through the 24" culvert under SR 99 floods on to the Pacific Highway Park property. And this stormwater reaches the catch basin adjacent to the Pacific Highway Park property more rapidly, i.e., at greater concentration, due to the greater hydraulic efficiency of a pipe as compared to a ditch. And with a ditch in bare earth, which also overtopped and flooded out on to other adjoining properties, much of the stormwater could infiltrate. Now, all the water gathered into the 36" pipe is carried to the bottleneck adjacent to the Pacific Highway Park property. Therefore, the amount of water reaching Pacific Highway Park's property is greater in quantity and it arrives in a different manner from the natural flow.

In *Harkoff v. Whatcom County*, 40 Wn.2d 147, 151, 241 P.2d 932

(1952), a case involving property damage and a taking by flooding caused by a highway ditch, the court stated that

[w]hen the [county] constructed and subsequently made improvements to its road system, it necessarily changed the course of the natural drainage of surface water. It had the right to construct and at times enlarge roadside drainage ditches to protect the roads and to put needed culverts under them. In so doing, however, it was its duty to construct them of sufficient capacity to carry the drainage waters impounded thereby and in such a manner as not to overflow onto the property of others.

This language is quoted with approval by *Colella v. King County*, 72 Wn.2d 386, 393, 433 P.2d 154 (1967). Certainly, the State owes no less a duty to its citizens than a county does and a buried pipe that replaces a roadside ditch is not materially different in this respect than a roadside ditch.

In its Statement of the Case, WSDOT cites Pacific Highway Park's expert Neugebauer for the proposition, in WSDOT's words, "that the land purchased by [Pacific Highway Park] in 2006 has always been the low point in the drainage basin west of SR 99."<sup>17</sup> But what Neugebauer actually wrote was "[a]ll storm water that comes from *the watershed on the [8.61 acre] subject property* and *all diverted storm water from offsite sources* will be collected in the storm water basin area."<sup>18</sup> Neugebauer was writing about what is occurring *on* the subject property, not in the entire

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<sup>17</sup> Br. Resp't at 4, citing CP 138.

<sup>18</sup> CP at 138.

“drainage basin.” In discussing the connection between the Pacific Highway Park property and the WSDOT system, engineer Olson notes that “hydraulic pressure forces backflow (*up gradient*) through the 24 inch and 18 inch pipe *from the* [WSDOT] *catch basin* and on to the Pacific Highway Park property....”<sup>19</sup> (Emphasis in original.) This is not the kind of alteration protected from liability by the common enemy doctrine.

Thus, WSDOT cannot avail itself of the safe harbor afforded by the common enemy doctrine even if its actions were exercised with due care, which they were not. *Currens v. Sleek*, 138 Wn.2d 858, 865, 983 P.2d 626 (1999), articulates the “due care” exception to the common enemy doctrine:

We...unambiguously hold that under our common enemy jurisprudence, landowners who alter the flow of surface water on their property must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others.

When evaluating liability under the doctrine – even *when* the doctrine is controlling – the court must determine “whether the method employed by the landowner minimized any unnecessary impacts upon adjacent land.” *Id.* at 866. The landowner undertaking improvements “must limit the harm caused by changes in the flow of surface water to that which is reasonably necessary.” *Id.* at 867.

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<sup>19</sup> CP at 256, ¶ 9.

Summary judgment is inappropriate where issues of material fact exist as to whether the landowner doing the improvements “acted in good faith and with such care as to avoid unnecessary damage to the [adjacent] property.” *Id.* at 868. Here, Pacific Highway Park can prove through WSDOT’s own documents that it did not exercise due care or good faith. Instead of exercising due care, late in the project WSDOT took a shortcut.

In preparation for its road widening project in 2001, WSDOT prepared a Hydraulic Report.<sup>20</sup> This report, authored by engineer Fred Tharp of WSDOT, calculates the amount of stormwater that will need to be accommodated, both that already present and that which will be added by the increase in impervious area. However, all of this analysis pertains to replacing the roadside ditch with a 24" pipe, not the 36" pipe that was actually installed. As Brad Lindgren, WSDOT hydraulic engineer testified:

59: 24 BY MR. DANYSH:

25 Q And what was proposed and what's analyzed in this

60: 1 plan is a 24-inch pipe system but what was built, as

2 we see in the as-built, you know, in Exhibit 9 is

3 basically 36 inches, right?

4 A That's correct, but I can't remember what the percent

5 of flow was in the 24-inch.<sup>21</sup>

The reason for the change is revealed in the tables of the report that

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<sup>20</sup> CP at 217 ¶ 6 and 241, Declaration of Paul J. Hirsch (Hirsch Decl.)

<sup>21</sup> CP at 247-48, Hirsch Decl.

show catch basins being overtopped by the 25-year storm when the 24" roadside pipe is used.<sup>22</sup> But with no analysis of the change, WSDOT upsized the roadside pipe to 36" – a larger, more efficient conveyance that gets the water to the catch basin adjacent to the Pacific Highway Park property more quickly and in greater amounts than either the ditch or the designed 24" pipe. But that is where the upsized pipe ended. The pipe from the catch basin which carries the stormwater under SR 99 was left at 24". Hence the bottleneck and hence the need to install two pipes connecting the catch basin to the Pacific Highway Park property so at storm flows backflow would occur and the water that could not make it under the highway could be stored on Pacific Highway Park's property cost free – as far as WSDOT was concerned.

In its Statement of the Case, WSDOT misrepresents the written testimony of Olson to claim that even before its 2001 construction "the normal flow of water out of the western basin could exceed the capacity of the west-to-east cross culvert."<sup>23</sup> However, the testimony cited is clearly referring to the WSDOT 2001 calculations pertaining to the installation of

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<sup>22</sup> The official WSDOT Hydraulic Manual in use during the time of this project specified the 25-year storm as the design storm (CP at 258, ¶ 16). The overtopping of catch basins when the 24" pipe is used is discussed in the Olson Decl. at ¶ 15 (CP at 257-58.)

<sup>23</sup> Br. Resp't at 5 and n. 2.

the proposed 24" pipe, not the pre-2001 situation.<sup>24</sup>

As for WSDOT's objection to the discussion by Olson of the effects of filling the northern, offsite wetland and the post-2001 connection of an inlet pipe there to the WSDOT system (see Br. Appellant at 29-32)<sup>25</sup>, this one paragraph *is* a hypothetical and clearly indicated as such.

There is sufficient evidence of bad faith and lack of care by WSDOT to present the question to the finder of fact for determination.

### **II.C. WSDOT SHOULD NOT BE REWARDED FOR HIDING ITS MALFEASANCE SO WELL THAT NO ONE SAW IT**

WSDOT asserts that the discovery rule "does not sanction a claimant putting their head in the sand in order to avoid the effect of time limitations."<sup>26</sup> But this truism is not pertinent here. As argued in Pacific Highway Park's opening brief,<sup>27</sup> two experts in water issues, a wetland specialist and hydrogeologist, independently studied the property and did not recognize WSDOT's engineered backflow. It took an engineer tasked with site design to appreciate, via mathematical calculations, what others

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<sup>24</sup> WSDOT also misrepresents Olson's testimony at CP 533 (*see* Br. Resp't at 21). Olson's response of "I can't say" was in answer to a *contrafactual* asking what would happen *if* the 24" pipe had been installed. This immediately followed the question and response at CP 533, ll. 2-6: "Q: Is it your opinion that the same amount of water would reach the subject property, regardless of how the SR 99 stormwater system was conveyed. And it's mainly a matter of how quickly it would reach the subject property? A: No."

<sup>25</sup> Br. Resp't at 22 n.24, citing Olson Decl. at ll. 11-25, i.e., ¶ 17 (CP at 259).

<sup>26</sup> Br. Resp't at 24.

<sup>27</sup> *See, e.g.*, Br. Appellant at 24-26.

saw but did not understand, i.e., WSDOT's clever way to store stormwater when its 24" culvert under SR 99 is overtaxed.<sup>28</sup>

WSDOT states that Pacific Highway Park "could have further investigated and acquired all the information now relied upon to assert their claims....", including the "2001 WSDOT hydrology report."<sup>29</sup> But for the discovery rule to apply, a plaintiff need only exercise reasonable diligence (*see, e.g., Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006)), not, for example, go to the extraordinary length of obtaining a hydrology report from WSDOT when everyone who inspects the property observes that stormwater drains off the property but does not apprehend the fact that during storms water can backup the same pipes on to the property. To adopt WSDOT's reading of the discovery rule is to make it a nullity.

"Whether the plaintiff has exercised due diligence under the discovery rule is a question of fact, which is the defendant's burden to prove. *Mayer* [*v. Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000)] (defendant has burden of proving a statute of limitation defense)."

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<sup>28</sup> WSDOT asserts that because expert Olson "concedes" that drainage is sometimes from the property into the WSDOT system, this "does not support PHP's claim." Br. Resp't at 19. WSDOT misstates the allegation: At higher flows WSDOT stormwater backs up on to the property, at lower flows it drains back into the WSDOT system. This is why Pacific Highway Park characterizes the taking as "storage" and "detention." See Br. Appellant at 1-2.

<sup>29</sup> Br. Resp't at 23.

*Wallace*, 134 Wn. App. at 13. *See also Haslund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976). While WSDOT rejects this burden,<sup>30</sup> Pacific Highway Park has put forward credible evidence to support the rule's application.

WSDOT argues for the application of the subsequent purchaser rule against Pacific Highway Park's inverse condemnation claim. This is a court made rule that, in the appropriate circumstance, cuts off a landowner's right to compensation for the taking or damaging of private property for public use, a right guaranteed by Washington Const. art. I, § 16. The rule is based on the *presumption* that the subsequent purchaser paid a price commensurate with the damaged state of the property. Courts applying the rule emphasize this presumption. *See, e.g., Crystal Lotus*, 167 Wn. App. at 505 ("the price of property is *deemed* to reflect its condition at the time of the sale"). However, here we are dealing with vacant land sold by absentee owners, an out-of-state trust.<sup>31</sup> While Pacific Highway Park knew there were concerns with drainage – as can be suspected on any western Washington property at the foot of a hill – there was not the slightest reason for anyone to presume that stormwater from the manmade drainage system below the property is being forced

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<sup>30</sup> Br. Resp't at 25, n.27.

<sup>31</sup> CP at 111, Ex. B of Wendel Decl.

up on to the property by design. “No damages should be allowed any appellant *found* to have acquired his property for a price commensurate with its diminished value.” *City of Walla Walla v. Conkey*, 6 Wn. App. 6, 17, 492 P.2d 589 (1971). Emphasis added. There is no evidence in the record to suggest that Pacific Highway Park bought the property at any kind of discount.

In fact, there is no evidence, in the record or otherwise, that anyone but WSDOT knew of the odd circumstances on this parcel. Just as courts traditionally set the bar higher for adverse possession of vacant land, this is a case in which the subsequent purchaser rule can properly be relaxed.

WSDOT argues that it is significant that “[t]he claimed latency is not a condition of the property itself....but an alleged *cause* of the apparent condition.”<sup>32</sup> Claiming, implausibly, that the “condition” is “readily apparent,” even though the property is vacant and overgrown –and the intrusion intermittent – WSDOT suggests suit could have been brought *before* a cause and a trespasser were identified. However, as argued in Pacific Highway Park’s opening brief, “the cause of action accrues and the limitation period begins to run when the plaintiff discovers all the essential elements of the cause of action, *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992), and who the responsible party is.

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<sup>32</sup> Br. Resp’t at 14.

*Orear v. Int'l Paint Co.*, 59 Wn. App. 249, 257, 796 P.2d 759 (1990).<sup>33</sup>

WSDOT offers no contravening authority.

Pacific Highway Park's case is distinguishable from this Court's recent decision in *Wolfe v. WSDOT*, 173 Wn. App. 302, 293 P.3d 1244 (2013). In *Wolfe* the damage and the cause were well known to both the previous owner and the plaintiffs. The erosion putatively caused by the alignment of the bridge piers was patent, not latent. *Id.* at 304.

WSDOT argues that it has not caused damage to the property.<sup>34</sup> But its flooding of the property, at a minimum, it has rendered the approved development plans impossible to accomplish<sup>35</sup> which has devalued the property.<sup>36</sup> "In summary judgment proceedings .... the evidence must at least support a reasonable inference that the damage alleged to constitute inverse condemnation would not have occurred but for the government conduct in issue." *Gaines v. Pierce County*, 66 Wn. App. 715, 726, 834 P.2d 631 (1992).

#### **II.D. THE PRESENCE OR ABSENCE OF WETLANDS ON THE PROPERTY GOES ONLY TO THE EXTENT OF DAMAGES**

WSDOT argues that "the administrative finding of wetlands forecloses Pacific Highway Park's conflicting claims against WSDOT for detention

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<sup>33</sup> Br. Appellant at 21.

<sup>34</sup> See, e.g., Br. Resp't at 18.

<sup>35</sup> CP at 258-29, ¶ 16, Olson Decl.

<sup>36</sup> CP at 376-497, Strickland Decl.

facilities.”<sup>37</sup> However, the viability of Pacific Highway Park’s case does not depend on the resolution of whether a jurisdictional wetland is present on the property or not. Two points make this plain: 1. The calculations of engineer Olson show that the WSDOT-caused flooding goes well beyond the boundary and buffer of the wetland Pacific Highway Park stipulated to for permitting purposes;<sup>38</sup> and 2. If there is a wetland, it is Pacific Highway Park’s wetland, not WSDOT’s; a “wetland” Pacific Highway Park has promised to remediate and enhance in return for a Conditional Use Permit.<sup>39</sup> A wetland is not waste land suitable for spoilage.

WSDOT claims that a wetland cannot be a stormwater detention facility, so if the area on Pacific Highway Park’s property is a “wetland,” it cannot be a detention facility for WSDOT’s stormwater.<sup>40</sup> But the allegation is that wetland or not, WSDOT is *using* that portion of Pacific Highway Park’s property as a detention facility. WSDOT quotes Pacific Highway Park’s expert Neugebauer as saying that the portion of the property in question “cannot be both a stormwater detention facility and a wetland.”<sup>41</sup> But Neugebauer is referring to the common wetland regulation

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<sup>37</sup> Br. Resp’t at 34 (capitalization omitted).

<sup>38</sup> CP at 270; Ex. D of Olson Decl. *Pacific Highway Park Flood Stage Boundary*.

<sup>39</sup> CP at 148-65, Ex. H of Wendel Decl.

<sup>40</sup> Br. Resp’t at 34.

<sup>41</sup> *Id.*

where manmade detention facilities are not to be classified as wetlands.<sup>42</sup> His words cannot reasonably be interpreted to mean that a jurisdictional wetland could not be *used* as a detention facility.

In order to determine the extent of development possible on the property given Pierce County's contention that two critical-area wetlands exist on the property,<sup>43</sup> Pacific Highway Park filed its LUPA petition challenging the Hearing Examiner's finding of two wetlands<sup>44</sup> and then entered into negotiations with Pierce County. These negotiations resulted in an agreement that *stipulated* two wetlands exist on the property and what their buffers would be.<sup>45</sup> The agreement states on page one that "Pacific Highway Park *contends* there are no jurisdictional wetlands or other critical areas on its property...." Solely in the interest of exploring development possibilities, Pacific Highway Park prepared and attached to this agreement a Preliminary Site Plan showing the extent of the wetlands and their buffers. This site plan, marked as "For Settlement Purposes Only," is the site plan that was before the Hearing Examiner when the

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<sup>42</sup> See, e.g., RCW 36.70A.30(21). "Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities ..."

<sup>43</sup> Only the easternmost "wetland" is at issue in this case.

<sup>44</sup> The Hearing Examiner's final decision found that Pacific Highway Park had failed to show that Pierce County's wetland determination was clearly erroneous – that decision that has since been vacated and therefore is a nullity; those findings and conclusions have no force (*Sutton v. Hirvoven*, 113 Wn.2d 1, 9-10, 775 P.3d 448 (1989)).

<sup>45</sup> CP at 225-31, Ex. C of Hirsch Decl.

April 25, 2011 conditional use permit (CUP) and wetland variance were approved.<sup>46</sup> As the agreement makes clear, Pacific Highway Park and Pierce County went jointly to the hearing for approval of the already agreed to CUP and variance. This second proceeding was not a contested hearing.

In order for collateral estoppel to apply, there are required: “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine *must not* work an injustice on the party against whom the doctrine is to be applied.” *Reninger v. Dep’t of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998). Emphasis added.

The presence or absence of critical-area wetlands on the property was not an “issue” before the Hearing Examiner at the CUP hearing. The role of the Examiner was to determine if, given the presence of these “wetlands,” could a CUP and a variance from the code-required buffers be granted so the development might go forward. The Supreme Court stated in *Haslund*, 86 Wn.2d at 622-623: “The doctrine of collateral estoppel precludes parties from relitigating an issue which has been actually and

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<sup>46</sup> CP at 231, copy of the settlement site plan

necessarily *contested and determined* in a prior action between the same parties.” Emphasis added.

To allow WSDOT’s claim of collateral estoppel would work an injustice as Pacific Highway Park went to the CUP/variance hearing to explore its development options. “Where a land owner has not sought a variance or waiver from a land use restriction, a taking claim is not ripe.” *Saddle Mt. Minerals v. Joshi*, 152 Wn.2d 242, 252, 95 P.3d 1236 (2004). As part of its settlement with Pierce County, the original decision of the Hearing Examiner was vacated<sup>47</sup> and the taking claim against the county was dismissed without prejudice.

Finally, Washington courts typically require mutuality: the party asserting collateral estoppel must have been a party to the earlier proceeding. “Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). This is required to prevent “inconvenience, and even harassment, of parties” by relitigation of the same issues. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). But WSDOT was not a party before the Hearing Examiner and thus will experience no undue inconvenience or harassment if required to litigate this issue.

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<sup>47</sup> CP at 146-47, Ex. G of Wendel Decl.

WSDOT argues against mutuality here, citing four cases where “offensive collateral estoppel” – use by a stranger to an earlier decision – was allowed.<sup>48</sup> Each of these cases is distinguishable. *Fahlen v. Mounsey*, 46 Wn. App. 45, 50, 728 P.2d 1097 (1986) concerns whether a *criminal* conviction, later overturned in a habeas corpus proceeding, can be used in a civil trial. It cannot. *Medrano v. Schwendeman*, 66 Wn. App. 607, 612, 836 P.2d 833 (1992) addressed the issue of whether a party previously *convicted* of vehicular assault can claim in a later civil action that his driving was blameless. The court found that “the doctrine of offensive collateral estoppel is applicable where defendants in civil cases have been previously convicted of criminal charges after trial.” In *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001) the court found that conviction for a traffic infraction could not be used to preclude relitigation of the issue. “Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice.” *Id.* at 315. Finally, *City of Seattle, Executive Services Dept. v. Visio Corp.*, 108 Wn. App. 566, 31 P.3d 740 (2001) is a tax enforcement case where a hearing examiner allowed a taxpayer to use collateral estoppel based on a previous decision finding a similar company did not owe a particular B&O tax as precedent. *Visio Corp.* has nothing to guide the Court here.

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<sup>48</sup> Br. Resp’t at 37 n.46

WSDOT argues, further, that the stipulated existence of wetlands on the property is the “law of the case” since the dismissal of the LUPA petition was approved by the superior court.<sup>49</sup> While the LUPA petition against Pierce County was consolidated in one filing with inverse condemnation claims against the county and WSDOT, the stipulated order on the Initial Hearing of the LUPA petition explicitly excludes WSDOT from the LUPA petition. “Washington State Department of Transportation is not a party to the LUPA petition and, thus, does not need to participate in the proceedings on the LUPA petition.”<sup>50</sup> In fact, WSDOT was not required to, nor did it, answer the complaint until the LUPA petition was resolved.<sup>51</sup> This stipulated order was signed by AAG S. Alexander Liu, representing WSDOT.<sup>52</sup>

In advancing its law of the case argument, WSDOT cites only *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005), an opinion that is limited to “appellate holding[s] enunciating a principle of law” and jury instructions not objected to. *Roberson* certainly does not address the procedural facts here. Indeed, the full text of the portion quoted by WSDOT is “once there is an appellate holding enunciating a principle of

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<sup>49</sup> Br. Resp’t at 37.

<sup>50</sup> Supplemental CP \_\_; Order on Initial Hearing, April 4, 2010, p. 2, ¶ 2.

<sup>51</sup> Supplemental CP \_\_; p. 3, ¶ 5.

<sup>52</sup> Supplemental CP \_\_; counterpart p. 3.

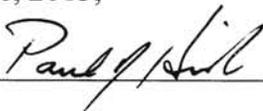
law, that holding will be followed in subsequent stages of the same litigation.” *Id.* WSDOT omits the opening clause.<sup>53</sup>

WSDOT finally argues that Pacific Highway Park should be subject to judicial estoppel for adopting inconsistent positions with WSDOT and the County, agreeing to dismissal of the County but not WSDOT.<sup>54</sup> But Pacific Highway Park’s principle and consistent allegation against WSDOT is that it is unlawfully putting its stormwater on the SR 99 parcel. Regardless if a wetland exists or not, this is still RCW 4.24.630 wastage, trespass and a taking. Since the flooding goes well beyond the boundaries of the stipulated “wetland” and interferes with Pacific Highway Park’s designed drainage works, the presence or absence of a wetland goes only to the *amount* of damage WSDOT is doing.

### III. CONCLUSION

For the reasons stated here and in the Brief of Appellant, dated March 29, 2013, Pacific Highway Park, LLC requests that this Court REVERSE the trial court’s grant of summary judgment to WSDOT.

Respectfully submitted this 12<sup>th</sup> day of June, 2013,



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Paul J. Hirsch, WSBA #33955  
Attorney for Appellant

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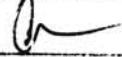
<sup>53</sup> Br. Resp’t at 37.

<sup>54</sup> Br. Resp’t at 37-8.

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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### CERTIFICATE OF SERVICE

I certify that a copy of this document was properly addressed and mailed, postage prepaid, to the following individual on the date indicated below.

D. Thomas Wendel, AAG  
*Attorney for Washington State Department of Transportation*  
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Additionally, I certify that a copy of this document was emailed to D. Thomas Wendel, AAG, at [TomW@atg.wa.gov](mailto:TomW@atg.wa.gov), on the date indicated below.

At: Manchester, Washington  
Date: June 12, 2013



Paul J. Hirsch