

FILED

MAR 11 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29530-3-III

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

GENE H. TOM and BARBARA TOM,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Toms brought an inverse condemnation action against the State of Washington. This is despite the fact that they do not have standing, are barred by the ten year prescriptive period, and cannot prove that a taking occurred. The result is that this appeal should be dismissed.

II. STATEMENT OF FACTS

A. Factual History

The Washington State Penitentiary has operated as a prison since 1886, three years before Washington's statehood. CP 42. Since its inception, the Penitentiary has operated a firing range on the grounds. *Id.* The current location of the firing range has remained the same since at least the 1950's. *Id.*

The Toms' property, four parcels in total, is located adjacent to the firing range. The Toms acquired Parcel A in 1962, Parcel B in 1982, Parcel C in 1984, and Parcel D in 1982. CP 47-71. None of the deeds contained language expressly granting the Toms any rights above and beyond ownership in fee simple. CP 58-71. In 2004, the Toms' property was rezoned from agricultural to residential.

B. Procedural History

The Toms filed an inverse condemnation action against the State of Washington on December 21, 2009. CP 1-11. They alleged that the

State of Washington, and more specifically, the Washington State Penitentiary, had taken their property under Art. 1, §16 by operating a nearby firing range. CP 4. The Toms claimed that the taking occurred in 2004 when the city of Walla Walla rezoned the property to permit residential development. *Id.*

The parties cross-motined for summary judgment. CP 17-20 and 33-80. The Toms motion was supported, in part, by a log of noise generated by the firing range during August and September of 2008. CP 91. This noise, they alleged, has left their property with no value for residential development. CP 28-29. As a result, the Toms calculated their damages as the difference between the land valued as agricultural and valued as residential. CP 90-91.

The trial court denied the Toms' motion and granted the State summary judgment. CP 103-105. In a letter opinion, the trial court noted that the diminution in value of the Toms' property occurred when the City of Walla Walla designated the area as "Urban Growth Area", and not as a result of the State's actions, which had occurred even before the Toms' ownership. CP 104. The trial court also found that because the Toms alleged that the taking occurred on the date the city ordinance was passed---June 29, 2004----their claim was beyond the ten year prescriptive period. CP 105.

The Toms now bring this appeal.

III. ISSUES PRESENTED

1. Whether the Toms were conveyed a right to pursue an inverse condemnation action before the State began operating its firing range.
2. Whether the Toms filed this inverse condemnation action beyond the ten year prescriptive period.
3. Whether the Toms failed to prove the required elements of inverse condemnation.

IV. ARGUMENT

A. Summary Judgment Standard

This Court reviews an order granting summary judgment *de novo*, “taking all facts and inferences in the light most favorable to the nonmoving party.” *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “The moving party has the burden of showing that there is no genuine issue as to any material fact.” *Indoor Billboard/Wn. Inc. v. Integra Telecom of Wash.*, 162 Wn.2d 59, 170 P.3d 10 (2007). Government entities, as the moving party, have the burden to demonstrate the absence of a genuine dispute as to any material fact with

all reasonable inferences resolved against them. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. Inverse Condemnation Actions, Generally

Recovery for the taking or damaging of land by the government is provided for in the Washington State Constitution, which states that “[n]o private property shall be taken or damaged for public use . . . without just compensation having been first made. . .” Article 1, §16, amendment 9. When a landowner believes that a governmental entity has violated this provision, the landowner may institute an inverse condemnation action. *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005); *Martin v. Port of Seattle*, 64 Wn.2d 309, 313-14, 391 P.2d 540 (1964). A plaintiff in an inverse condemnation action must prove that any taking is more than tortious interference. *Citoli v. City of Seattle*, 115 Wn. App. 459, 61 P.3d 1165, *review denied*, 149 Wn.2d 1033, 75 P.3d 968 (2002).

There are two forms of takings; the first, physical occupation, occurs when government encroaches upon or occupies private land for its own proposed use, and the second, regulatory takings, occurs when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273, *review denied* 150 Wn.2d 1015, 79 P.3d 445 (2002). A taking occurs at the time the

government invades or interferes with the use and enjoyment of a landowner's property. *See Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998).

C. The Toms Do Not Have Standing To Bring This Inverse Condemnation Action

Before this Court can consider the merits of the Toms' appeal, it must first determine whether the Toms have standing. *See DeWeese v. City of Port Townsend*, 39 Wn.App. 369, 693 P.2d 726 (1984). But the fact that the Toms hold title to the property at issue does not automatically give them standing to assert a cause of action in inverse condemnation. This is because "a grantee or purchaser cannot sue for a taking or injury occurring prior to his acquisition of title." *State v. Sherill*, 13 Wn.App. 250, 257, n.1, 534 P.2d 598, *review denied*, 86 Wn.2d 1002 (1975) (internal citations omitted).

Washington case law is in agreement that "when a property is taken or injured under the exercise of the power of eminent domain, the owner thereof at the time of the taking or injury is the proper person to initiate proceeding or sue therefore." *Hoover v. Pierce County*, 79 Wn.App. 427, 433, 903 P.2d 464 (1995). The rationale underlying this rule is that the right to "damages for an injury to property is a personal right belonging to the property owner, [and] the right does not pass to a

subsequent purchaser unless expressly conveyed.” *Hoover*, 79 Wn. App. at 434, citing *Gilliam v. City of Centralia*, 14 Wn.2d 523, 530, 128 P.2d 661 (1942) *overruled on other grounds*, *Ackerman v. Port of Seattle*, 329 P.2d 210, 52 Wn.2d 903 (1958).

Hoover is both instructive and factually analogous. *Hoover*, 79 Wn. App. 427. In *Hoover*, Pierce County constructed a road in 1925 adjacent to what would much later become the Hoovers’ property. *Id.* at 428. In 1972, the County added a culvert to allow draining water to flow under the roadway. *Id.* In 1988, the Hoovers purchased two lots abutting the roadway. *Id.* And in 1990 and 1991, the Hoovers property flooded. *Id.* They promptly filed an inverse condemnation action against the county. *Id.*

The court in *Hoover* found for the County, and in doing so, distinguished the facts from SeaTac Airport-related inverse condemnation cases, including the cases cited by the Toms. *Id.*; *see, e.g., Highline School Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). The *Hoover* court distinguished *Highline* by explaining that a cause of action can only accrue where the “intensity of the interference had increased over time”, not simply because the plaintiffs were located next to an airport. *Hoover*, at 435. In doing so, the court required that, in such situations, an initial judgment of damages must have been made before

further damages could be compensable as a taking. *Id.*; *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980).

The substantive facts in the current case mirror those in *Hoover*. First, like the county in *Hoover*, the State began using the current firing range in the 1950's. And, like the Hoovers, the Toms came into possession of their property decades after the range's inception. Second, there is no proof that any noise or interference has increased over time. Even if it had, *Highline* and *Petersen* require a judgment for the preliminary damages, in order, presumably, to calculate the difference between the levels of interference. There has been no such judgment here. Nor has there been evidence to show the level of noise before the alleged taking, whether determined to be in 1950 or 1994. Finally, nothing in the Toms' deeds expressly states that the former owners' right to sue for inverse condemnation was preserved. The result is that the Toms do not have standing.

D. Even if the Toms Did Have Standing, They Are Barred By The Ten Year Prescriptive Period

Inverse condemnation actions seeking recovery for interference with use and enjoyment of property are governed by the ten-year prescriptive period. RCW 4.16.020; *Lambier v. City of Kennewick*, 56 Wn.App. 275, 285, 783 P.2d 596 (1989). A cause of action accrues when

a party has the right to seek relief from the courts. *First Maryland Leasecorp v. Rothstein*, 72 Wn.App. 278, 282, 864 P.2d 17 (1993) (cause of action for fraud accrues when damage occurs because of fraudulent acts); *see also Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975) (statute of limitations triggered when negligence causes actual damage).

Here, any inverse condemnation claims the Toms may have had began to accrue when they acquired title to the property, most recently in 1984. CP 47-79. At that time, the State was continuing to operate the firing range. Consequently, after 1994, any inverse condemnation claim made by the Toms, absent those alledging an increase in noise, are no longer be actionable.

E. Moreover, The Toms Cannot Prove The Elements Of Inverse Condemnation

Even if the Toms had standing and were not beyond the statute of limitations, they cannot prove the most important element of inverse condemnation: that a taking occurred. To prove inverse condemnation, a plaintiff must show: (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings¹.

¹ For purposes of argument, the State agrees that elements (2), (3), and (5) have been met, even though the Toms presented no evidence to support these elements.

Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 613, 238 P.3d 1129 (2010).

1. The Toms Have Not Shown Proximate Cause Between The Firing Range And The Damage Alleged

In an inverse condemnation action, the burden is on the landowners to show proximate cause between governmental activity and the landowners' loss. *Id.*; *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999). Put another way, governmental conduct that is not the cause of damage to a plaintiff cannot constitute a taking for purposes of inverse condemnation. *See Petersen*, 94 Wn.2d 479 (only market loss that is applicable to a decline in market value was one *caused by* governmental interference).

Here, the cause of the alleged diminution of value in the Toms' property rests with the city of Walla Walla by zoning the property for the higher and best use of "urban growth area". Without this change in zoning, there would be no damage to the Toms' agricultural land. Consequently, it is not the firing range which is the impetus for the diminution in value (if any), but rather the city's unfortunate zoning decision. Accordingly, there is no proximate cause between the firing range and the injury alleged.

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2. The Toms Have Not Shown Substantial Impairment

The Toms have also not shown that there has been substantial impairment to their property as a result of the firing range. If the court determines that the government action in this case has actually interfered with a cognizable property interest, the court must next determine whether this impairment was substantial. *Pande Cameron and Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority*, 610 F.Supp.2d 1288 (W.D.Wa. 2009).

The only evidence that the Toms provided in support of substantial impairment is a noise measurement from a two month period in 2008. *See* CP 1-11 and 90-91. And even this noise, the Toms admit, is varied in its “intensity and intermittence.” CP 91. Consequently, the Court has no basis upon which to find substantial impairment.

V. CONCLUSION

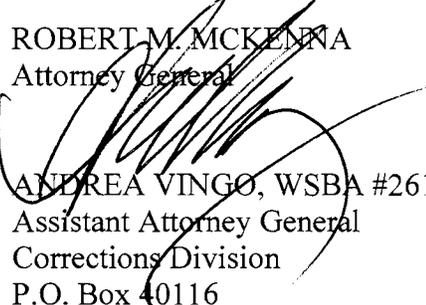
The Toms do not have standing to bring this inverse condemnation action. Nor did they bring this action within the ten year prescriptive period. Even so, an inverse condemnation action cannot be premised upon a change in the Toms’ use of the land, rather it must be premised on a change in the State’s actions, which the Toms have not proven. They also have not provided proof of substantial impairment

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as required by case law. As such, the State respectfully asks that this Court affirm the trial court's finding of summary judgment in its favor.

RESPECTFULLY SUBMITTED this 9th day of March, 2011.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing **BRIEF OF RESPONDENT** on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

TO:

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

EXECUTED this 9th day of March, 2011 at Olympia, WA.



DAWN WALKER
Legal Assistant