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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30802-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JON GIBSON and MARY LOIS GIBSON,
husband and wife, and WESLEY HILL and
JEANNE HILL, husband and wife, d/b/a
MONTGOMERY COURT APARTMENTS,

Appellants,

v.

CITY OF SPOKANE VALLEY, a municipal
corporation of the State of Washington,

Defendant.

BRIEF OF APPELLANTS

Philip A. Talmadge, WSBA #6973
Thomas M. Fitzpatrick, WSBA #8894
Sidney Tribe, WSBA #33160
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A. INTRODUCTION

This lawsuit is a prime example of a municipality's shoddy treatment of a business. The City of Spokane Valley (the "City") engaged in a taking of the property of the Gibsons and the Hills (collectively "Gibson")¹ through the construction of a roundabout. In late 2003, Gibson was approached to grant an easement on a small corner of the property occupied by Gibson's Montgomery Court Apartments ("the Apartments"). The City wanted to modify an intersection of three streets. The City never informed Gibson that the modification of the intersection would severely restrict access to the apartment complex, resulting in serious economic loss. Gibson granted the City an easement and gave up property rights (though *not* the right of access) to facilitate the City's plans.

When Gibson later discovered that the City planned to cut off access to the apartments, the City promised to provide a solution to the access issue if Gibson agreed not to delay the construction of the roundabout. Gibson agreed. The City then continued construction of its roundabout unfettered and reneged on a promise it made *in writing* to restore Gibson's access.

The trial court erred in dismissing Gibson's inverse condemnation and equitable actions against the City. The Apartments abutted both

Wilbur and Montgomery and lost access to Wilbur as a result of the City's actions. Even if Gibson were treated as a non-abutting property owner, under this Court's decisions, Gibson stated a claim against the City. Gibson also stated a claim in equity to enforce the City's promise to restore access, upon which they relied and the City reneged.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its Order on Motions for Summary Judgment and Motions to Strike dated February 29, 2012.

2. The trial court erred in entering its Judgment for Defendant on April 11, 2012.

(2) Issues Pertaining to Assignments of Error

1. Does a property owner present a genuine issue of material fact for trial on a claim for inverse condemnation when a city constructs a roundabout that eliminates access from an abutting street to the property? (Assignments of Error Numbers 1, 2)

2. Even considering the more relaxed standard applied to access for non-abutting property owners, does a property owner present a genuine issue of material fact for trial on a claim for inverse condemnation

¹ Where Gibson is referenced in the brief, the reference is to both the Hills and the Gibsons, unless the actions were specifically those of Jon Gibson himself.

when a city constructs a roundabout that substantially impairs access to the property? (Assignments of Error Numbers 1, 2)

3. Did Gibson produce sufficient evidence to merit a trial on his equitable estoppels claim?

C. STATEMENT OF THE CASE

Gibson owns the Apartments, a 120-unit commercial apartment building located at 2301 N. Wilbur Road, Spokane Valley, Washington, at the three-way intersection of East Montgomery Dr., North Wilbur Road and East Mansfield Street. CP 421. The Apartments have a single entrance which is located on North Wilbur Road. CP 522. The entrance was previously accessible from Montgomery via Wilbur, which both abut the property. CP 421; Appendix A.

In late 2003, Spokane County approached Gibson on the City's behalf seeking an easement on the property in order to modify the intersection. CP 488. The City did not indicate that that resulting intersection would restrict access to any of the three roads. *Id.* The proposed easement agreement made no reference to any street design, nor did it indicate or even imply that access to the Apartments would be restricted in any way. CP 276-78. In November 2007, Gibson reached an agreement with the City and executed the requested easement, permit, and right of way deed in exchange for \$69,000, so that the City could modify

the intersection. *Id.* The City did not compensate Gibson for loss of any access rights.

After obtaining Gibson's agreement, the City began construction on the intersection. CP 252. The resulting roundabout does not allow traffic arriving at the roundabout eastbound or northbound to enter Wilbur; only traffic traveling west on Mansfield before reaching the roundabout is able to legally enter Wilbur, which is the only way to enter the Apartments. CP 522; Appendix B.

The roundabout is located at the southeast corner of the Apartments. CP 522. Existing tenants and potential future tenants are expected to access the Apartments by turning north on Jackson, located approximately ½ mile west of the roundabout. CP 522, 571. If a driver travelling eastbound on Montgomery reaches the roundabout, the only legal access to the Apartments requires backtracking ½ mile to turn on Jackson, travel northeast another ½ mile to reach Wilbur then turn south for another ¼ mile, imposing a detour of 1-1/4 miles. CP 571.

Roundabouts typically provide access to all four streets, and there is no engineering reason that the traditional design could not have been used in this location. CP 568. The County engineers originally provided the City with a design that gave access to Wilbur as well as the other three streets, but the City decided access "wasn't an essential thing to this

project.” CP 570. If the roundabout had been located slightly further north and east of its present location the full access to the Apartments would have been retained. CP 568. However, the City was also concerned about the cost and inconvenience *to other property owners* of acquiring additional rights of way with that option. CP 567.

Gibson’s representative contacted the City during the planning process, but was told repeatedly the various plans for the intersection were not final, and that changes were being made. CP 500. Although the final plans were submitted to various government agencies, they were not provided to Gibson. CP 568-69. After complaints by the fire department about the lack of access to Wilbur, emergency vehicle access to Wilbur was cut into the design. CP 551, 569. However, general traffic is not permitted to use the emergency access route. CP 569. Records from the Spokane County Sheriff’s office show a high number of traffic tickets for illegal left turns, U-turns, and failure to obey traffic control devices at the intersection since the roundabout was installed. CP 422-78.

The City rejected the option of using a more traditional “cross” style intersection even though the roundabout would create confusion and exceed the project budget by \$240,000. CP 567. Operating a traditional intersection, which would not have impeded access to the apartments,

costs no more or less than operating the roundabout which does impede access. CP 576.

The City admitted that it made no effort whatsoever to ameliorate the confusion for drivers who could no longer access Wilbur from Montgomery. CP 578. City Engineer Inga Note testified that the engineers were well aware that people who live in the neighborhood cannot access their homes from the south or the east. CP 577-79. She also testified that drivers are supposed to learn by trial and error how to access their homes by finding alternate routes, or somehow just “know” that they are expected to use Jackson. *Id.* If drivers become stuck trying to access Wilbur they were expected to turn around in someone’s private driveway because the roundabout was designed to require traffic to eliminate access to Wilbur from Montgomery.² *Id.* Even having a map is insufficient to assist drivers. When Gibson’s engineering expert, Hank Borden first visited the area, he attempted to use a GPS device to find his way to the Apartments, but became lost. CP 423.

During the City’s process of selecting a design for the intersection, Gibson was not contacted about the potential restriction of access to his commercial property. CP 568. When he entered into the 2007 agreement

² After complaints, the City belatedly posted a sign to try to ameliorate the confusion. CP 578.

with the City, Gibson was unaware that the planned revisions would eliminate access from Montgomery to the Apartments. CP 489, 515.

In July 2008, Gibson realized that the planned roundabout would prevent vehicles traveling east on Montgomery (an abutting street) and vehicles traveling northbound on Montgomery from using Wilbur to access the Apartments. CP 504-05, 515-17, 522. When Gibson discovered that the roundabout prohibited the Apartments' tenants from accessing the sole apartment complex entrance on Wilbur, he was understandably irate. *Id.* He immediately sent the City a letter revoking the authorization to record the easement, and returned the \$69,000 payment. *Id.* He believed that the City had misrepresented the scope of the project and its impact, thereby misrepresenting the value of the easement he had granted them. *Id.*

In July 2008, Gibson met with City representatives in attempts to resolve the access issue as the City did not want its construction schedule impacted. CP 491. To avoid any potential delay, the City made promises to Gibson that, in return for his not delaying the construction of the roundabout, the City would:

- (1) Pay the costs of constructing a new access point to the property on Montgomery, subsequent to Gibson obtaining estimates for such a construction;

- (2) Find a satisfactory resolution to the access issue in good faith and assured Gibson that money was not an issue; and
- (3) Draft a written agreement memorializing its commitment to arranging and paying for a solution to the limited access problem, while Gibson obtained estimates.

CP 507, 516.

Relying on the City's representations, Gibson expended substantial time and money to get the estimates and halted his efforts to stop construction. CP 491. Gibson spent approximately \$4,500 obtaining cost estimates. CP 492. The estimates to construct a new entrance on Montgomery totaled \$168,000. CP 513. When the City received the estimates, it *renege*d on its previous agreement. CP 510. It offered to pay him \$1,500, an amount that failed to compensate Gibson for even the cost of obtaining estimates let alone the cost of restoring access. CP 492, 516.

The lack of access has caused Gibson harm. The majority of potential renters that become tenants at the Apartments learn of apartment availability by driving by the complex on the main road, Montgomery. CP 420-21. Their inability to access the entrance has caused a severe reduction in rentals, and increased costs of advertising. CP 421, 492. Unless the potential tenants intuitively realize that access is ½ mile to the west, the only options are (a) perform an illegal U-turn at the end of the concrete traffic island in Mansfield, or (b) turn north on Wilbur by

illegally driving the wrong way in the southbound lane, or (c) drive through the emergency vehicle access, guarded by traffic pylons. CP 522. The denial of access to Wilbur results in many potential tenants simply driving to Gibson's more easily accessible competitors. CP 421.

A commercial appraisal report by Bruce Jolicoeur, MAI, concluded that after considering the impact of the impaired access and increased marketing costs required to minimize the harm caused by making the Wilbur entrance inaccessible, the property value has been reduced by \$1,325,000. CP 542-43. As of the date of Jon Gibson's deposition (April 19, 2011) the lost rental income resulting from destroying the access to the Apartments totaled \$156,275.11. CP 494.

Gibson commenced the present action for inverse condemnation, misrepresentation, and injunctive relief in the Spokane County Superior Court on August 30, 2010. CP 1-9. The case was assigned to the Honorable Jerome Leveque. Gibson moved for partial summary judgment on the inverse condemnation claim, CP 618-20, and the City cross-moved for summary judgment. CP 35-36. The trial court granted the City's motion as to the inverse condemnation claim and denied Gibson's motion on February 29, 2012. CP 820-24. Thereafter, Gibson dismissed his remaining claims under CR 41. CP 846-47. The trial court entered a

Judgment for Defendant on April 11, 2012. CP 852-54. This timely appeal ensued. CP 850.

D. SUMMARY OF ARGUMENT

The right of property owners encompasses more than mere possession, it includes a right of free and convenient access to abutting public thoroughfares. Although a municipality has a right to maintain and improve roads, it may not remove, restrict, or damage access to property without paying the owner just compensation.

The City here severely damaged Gibson's property right of ingress and egress with its ill-considered roundabout. Access from the abutting Montgomery to the Apartments has been completely eliminated. Access from the abutting Wilbur to the Apartments has been seriously restricted, resulting in a de facto partial closure of Wilbur at its southern end.

Although the law evaluates the claims of abutting and non-abutting landowners differently, that distinction is immaterial here. Regardless of whether Gibson's property is considered abutting or non-abutting, genuine issues of material fact remain here regarding the severity of the access restrictions imposed by the City, and the particularity of the harm to Gibson. Gibson also adduced sufficient evidence to survive summary judgment on his promissory estoppels claim. The City promised in writing to pay for a new access point on Montgomery. After Gibson

expended funds and took other actions in reliance on that promise, the City reneged.

Summary judgment should be reversed, and this case should be remanded for trial.

E. ARGUMENT³

(1) Washington Law on Inverse Condemnation

Both the federal and state constitutions place limitations on a government's power to take private property by eminent domain. However, the Washington Constitution provides greater limitations than its federal counterpart in that it provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made ...” Wash. Const. art. I, § 16.

Our Supreme Court has interpreted this provision to allow a landowner to bring an inverse condemnation action to recover the value of property which has been appropriated in fact, but with no formal exercise of condemnation power. *See, e.g., Highline Sch. Dist. No. 401, King County v. Port of Seattle*, 87 Wn.2d 6, 8 n.1, 548 P.2d 1085, 1087 (1976).

³ This Court is well aware of the standard of review on summary judgment. Trial court decisions on summary judgment are reviewed de novo. *Dowler v. Clover Park School Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Under CR 56(c), a party is not entitled to summary judgment unless there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. All facts and inferences from those facts are read in a light most favorable to Gibson as the non-moving party. *Id.*

This Court has identified the elements of an inverse condemnation action to be: (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. At issue in this case are elements (1) and (2), and (4) whether a taking or damaging of private property without just compensation has occurred. *Fitzpatrick v. Okanogan County*, 143 Wn. App. 288, 301-02, 177 P.3d 716, review granted, 164 Wn.2d 1008 (2008). The remaining elements are not at issue in this case.

“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of [its] use, enjoyment and disposal. Anything that destroys any of these elements of property, to that extent destroys the property itself” and constitutes a compensable taking or damaging of property. *Wandermere Corp. v. State*, 79 Wn.2d 688, 694-95, 488 P.2d 1088 (1971). An unconstitutional taking has occurred when government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value. *Martin v. Port of Seattle*, 64 Wn.2d 309, 320, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989 (1965). Owners of property have an interest in the ownership, possession and the unrestricted right of use, enjoyment and disposal of their property. To establish a governmental taking, the claimant need only

prove that such an interest has been taken or damaged by governmental action without just compensation.

An owner of property “abutting upon a public thoroughfare has a right to *free and convenient access* thereto.” *McMoran v. State*, 55 Wn.2d 37, 40, 345 P.2d 598, 599 (1959) (emphasis added). Access to property from a street is one of the rights of ownership, and a property owner has a “special right and a vested interest in the right to use the whole of the street for ingress and egress.” *Fry v. O’Leary*, 141 Wash. 465, 469-70, 252 Pac. 111 (1927). “This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself.” *Id.* It is well-established that “[t]he right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation.” *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

Under Washington law a partial denial of access to an abutting street results in a compensable taking when the access restriction is sufficiently severe. Stoebuck, 17 *Washington Practice: Real Estate Property Law*, Ch. 9.11 (2d ed.) (“Stoebuck”). “A partial denial of access onto the abutting street may, if severe enough, also cause a taking. This arises from the scope of the judicially created easement of access, which is generally defined as a right of ‘reasonable access.’” *Id.*

Our Supreme Court has held that there is a compensable taking when one-half of an abutting street is vacated, *even if the vacated portion is not the portion on which the property owner has direct access.* *Fry*, 141 Wash. at 471. Reducing the number of access portals to abutting property is also a taking, requiring compensation when it results in a “substantial impairment” of access, or an “unreasonable encroachment.” *Keiffer*, 89 Wn.2d at 374; *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 328 P.2d 873 (1958). The question of whether impairment is “substantial” is a question for the trier of fact, not the judge. *Keiffer*, 89 Wn.2d at 374.

An abutting owner's easement of access includes within its scope the right merely to enter or exit the way immediately abutting the land and also the right travel to and from the property on a “general system of public ways.” *Stoebuck* at 589.

Restricting access to the point that property is essentially cut off from the abutting street is a compensable taking. *McMoran*, 55 Wn.2d at 40. Although our Supreme Court has held in that when a street is closed at one end, the owner of property located at the other end lost no access and suffered no damage, *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 308, 83 Pac. 316 (1906), if closing one end of the street “gives poor access, there is a compensable taking.” *Stoebuck* at 588.

In applying these general principles to inverse condemnation Washington law draws a distinction between abutting and non-abutting property owners. In the case of the former, a deprivation of an abutting property owner's right to access the property by government action is a per se taking, and the only issue for trial is the amount of damages. *See McMoran*, 55 Wn.2d at 41. In the latter case, the property owner must prove to the trier of fact that the impairment of access is substantial, and damages may then be assessed." *Keiffer*, 89 Wn.2d at 374.

Here, regardless of whether this Court applies the abutting or non-abutting landowner standard, summary judgment for the City should be reversed. The total removal of access from Montgomery, an abutting street, is a per se taking and the trier of fact must determine damages. In the alternative, Gibson has raised a genuine issue of material fact regarding the severity of the restrictions to access to warrant a trial on the substantial impairment of access imposed by the City.

(2) Gibson Is an Abutting Property Owner Who Has Lost All Access from Montgomery to His Property, a Per Se Taking Has Occurred

A landowner abutting a street to which access has been removed or restricted demonstrates a per se taking that is compensable. The *Fry* court articulated the breadth of an abutting property owner's right of access as follows:

We think it is also clear under the uniform weight of authority that one who is an abutting property owner upon a street or alley, any portion or the whole of which is sought to be vacated, has a special right and a vested interest in the right to use the *whole of the street for ingress and egress*, light, view, and air, and, if any damages are suffered by such an owner, compensation is recoverable thereof.

Fry, 141 Wash. at 470. (emphasis added). *See also, Walker v. State*, 48 Wn.2d 587, 589-90, 295 P.2d 328 (1956) (“The abutting property owner is entitled to just compensation if this right [ingress and egress] is taken or damaged.”).

The *Fry* court went on to find that an abutting property owner has a property interest to the full length of a street, which is different from the right of the general public, and that to close or partially close an *abutting street* affects his rights of ingress and egress to and from the property. *Id.* at 471 (emphasis added). The court concluded that the plaintiffs were entitled to compensation under Washington’s Constitution because the city, by ordinance, vacated a portion of a street to which the plaintiffs once had access, even though plaintiffs did not directly border the portion vacated and direct access to the property was still available. *Id.* at 473.

Gibson’s entire property abuts Montgomery and Wilbur; he is an abutting landowner. “Property abuts a street when there is no intervening land between it and the street.” *London v. City of Seattle*, 93 Wn.2d 657, 661, 611 P.2d 781 (1980). Montgomery and Wilbur directly abut

Gibson's property as there is no intervening land between it and those streets. CP 522.

As in *Fry*, *direct* access from the thoroughfare (Montgomery, in this case) to the property never existed. But the substantially impaired access is compensable because plaintiffs are abutting property owners of the modified streets: Montgomery and Wilbur. CP 522. As such, Gibson has suffered harm different in kind than that of the general public from the elimination of access from Montgomery (an abutting street) to their property; access is only available from Mansfield. *Id.* All access from Montgomery has been destroyed, which has imposed a substantial impact on the income from the commercial property. Likewise, access from Wilbur has been severely impaired, resulting in a de facto partial closure of Wilbur.

Gibson is entitled to *per se* compensation as access to the apartments from Montgomery Drive has been eliminated, and access from Wilbur has been impaired. The roundabout destroyed previously existing access to the property by vehicles traveling on Montgomery. The roundabout also partially removed previously existing access to Wilbur, which may no longer be accessed by vehicles traveling on Montgomery.⁴

⁴ It is critically important to note that all traffic on Montgomery is now unable to access the driveway to the Apartments. Only vehicles traveling eastbound on Mansfield have access to Wilbur Street where the driveway is located. All drivers using

Fry is only one of several decisions outlining the contours of the abutting property owner rule. In *Dockstader v. City of Centralia*, 3 Wn.2d 325, 100 P.2d 377 (1940), Centralia consented to the construction of a viaduct by a railroad in front of Dockstader's property, which raised the road in front of his property by 12 feet. *Id.* at 327. The viaduct, "cut off all access from Windsor street, unless one went around the end of the viaduct; that there was only a lane, twelve to fifteen feet wide, between the viaduct and the store..." *Id.* at 331. Dockstader was allowed at trial to show that the viaduct's restriction of access substantially diminished the value of his property for business purposes. *Id.* The Supreme Court affirmed the judgment for Dockstader. *Id.* at 333.

Similarly in *McMoran*, the State constructed a curb along the outside edge of a state highway paralleling the entire frontage of the plaintiff's property. 55 Wn.2d at 38. The department of highways then constructed a frontage road between the plaintiff's property and the curb line. While the property bordered the highway and previously had direct access thereto, the plaintiff now only had access to the highway through an opening in the curb line 30 feet past the termination of his property line. *Id.* The Supreme Court found the State liable for violating the

Montgomery must discover through trial and error that the only way to access the driveway is to take a 1 ¼ mile "detour" that requires traveling east to travel northwest on Jackson, then turn south on Wilbur.

plaintiff's right of ingress and egress to the public highway and remanded only the issues of damages. The court denied the State's argument that access was still permissible through an alternative route and noted:

In the instant case, the appellant was deprived of this property right by the respondent's erection of the physical obstruction of a concrete curbing, without payment of compensation therefore[sic]. Respondent contends, however, that the appellant has not been denied access to the highway, since he has direct access to the right of way. There is no merit in such contention. The appellant was entitled to direct access to the thoroughfare where the traffic flows ...

Id. at 40.

Similarly in *Kieffer*, owners of commercial property sought damages after the County built curbing alongside their property, within the County's right of way, which reduced access to their property to only two curb cuts. Ironically, the County in *Kieffer*, like the City here, argued that it had merely "regulated traffic" and that such action could not constitute a taking as a matter of law. 89 Wn.2d at 371. But the *Kieffer* court rejected that proposition, noting that police power does not "grant the County unchallengeable authority to restrict access without compensation." *Id.* The Court then concluded that it was "clear from the record that the means of regulation adopted by the County has also resulted in a restriction of the respondents' access to and from 98th Avenue [the abutting thoroughfare]." The Court left the issue of degree of impairment to the trier of fact and

noted that there was enough evidence on the record to find the County liable. *Id.* at 374.

Kieffer lends direct support to Gibson's claims here as an abutting property owner. As in *Kieffer*, the City is exercising its police power when it built the roundabout to control traffic regulation. Building roads is, admittedly, a proper exercise of the municipal police power. The City, however, also impacted Gibson's access to the Apartments from an abutting street. That impact is compensable under *Kieffer*:

Appellant's assertion that compensation is allowed only where its action pursuant to the police power eliminates all direct access is not supported by our cases. The cases relied upon by the appellant recognize compensation must be paid where all direct access is not eliminated, if substantial impairment of access is shown.

Id. at 372.

While *Kieffer* involved access to property from an abutting street that was merely impaired, here it has been totally eliminated in the case of Montgomery, and severely impaired in the case of Wilbur. Gibson's property is now completely inaccessible from Montgomery where previously that was the primary source access for both residents and potential tenants. It is immaterial that the ingress-egress driveway is on Wilbur, as direct access from the abutting street onto the property is not necessary for compensation. *Fry*, 141 Wash. at 473. Access to Wilbur

has also been impaired, Wilbur has been closed to all but those travelling westbound on Mansfield who have the foresight to exit before they actually reach the intersection of Mansfield and Wilbur. Gibson's access from both streets has been eliminated or severely impaired, entitling him to compensation.

The City offered confusing arguments below. First, the City contended that Gibson was not an abutting property owner, arguing that cases involving non-abutting property owners supported dismissal of Gibson's claim. CP 342. The City suggested that because Gibson's property directly accesses Wilbur and not Montgomery, then it cannot be considered an abutting street. CP 343.

The proposition that only interference with direct access from an abutting street to property is actionable has been unequivocally repudiated by our Supreme Court in *Fry* and *London*. In *Fry*, a city ordinance vacated the portion of a street directly across from appellant's property. The portion vacated did not touch appellant's property nor did it provide direct access to it. The Court found that there is a vested right to the whole street which abuts one's property; if this property right is damaged, the only question remaining is to determine the amount of compensation. 89 Wn.2d at 473. In *Fry*, the respondents attempted to argue that because direct access remained and only non-direct access was limited, appellants

were not entitled to compensation. *Id.* at 472. The *Fry* court rejected respondent's arguments and found that compensation is required whenever a property owner suffers damage as a result of even the partial closure of an abutting street. *Id.* The fact that direct access was still available was not relevant. *Id.*

Similarly in *London*, the Court again dealt with a property owner's impairment of non-direct access to his property from an abutting street. In *London*, the City of Seattle vacated the northern portion of 17th Avenue but did not vacate the southerly portion which provided direct access to plaintiffs' property. 93 Wn.2d at 661. Thus, direct access to the property remained. Despite the existence of direct access, the Court still found that compensation was required. The Court reasoned that because the plaintiff was a "presumptive abutter," the only issue left for determination was that of damages. *Id.* at 651-65.

Fry and *London* make clear not only that abutting property owners are entitled to *per se* damages when there is an inference of access, but also that impairment of direct access from an abutting street is not necessary for compensation.

The trial court, however, disregarded Montgomery as an abutting street, and incorrectly concluded that access to Wilbur was unrestricted by the roundabout: "Defendants point out the access plaintiffs enjoyed and

continues [sic] to have is access from Wilbur, that is the abutting street and that access remains unrestricted.” CP 806.

This analysis is incorrect on two counts. First, Wilbur was not the only abutting street at issue. *Montgomery is also abutting*. Second, access to Wilbur was not “unrestricted.” Access to Wilbur from the south was effectively closed except to those driving westbound on Mansfield.

Regardless of whether the relevant abutting street is considered to be Montgomery or Wilbur, summary judgment for the City is inappropriate. A per se taking has occurred of an abutting property owner’s right of access. The roundabout has essentially closed access to the Apartments from Montgomery. The City has taken his property right of access to his property from the abutting street of Montgomery without compensation. The City has also essentially closed the southern end of Wilbur, another abutting street, from the roundabout. The only tenants and prospective tenants that may access the southern end of Wilbur are those who exit Mansfield before reaching the roundabout. To those travelling eastbound on Montgomery, Wilbur is closed. Summary judgment should be reversed.

- (3) Even Applying the Non-Abutting Property Owner Standard Explained by this Court in Union Elevator, Summary Judgment Was Inappropriate on These Facts

Generally, non-abutting property owners whose access is altered by government action cannot recover for a taking. *Mackie v. City of Seattle*, 19 Wn. App. 464, 576 P.2d 414 (1978) (plaintiff was non-abutting property owner of a closed street); *Hoskins v. City of Kirkland*, 7 Wn. App. 957, 503 P.2d 1117 (1972) (plaintiffs were non-abutting property owners of the vacated street).

However, this Court has recently held that summary judgment on a claim similar to Gibson's is inappropriate when there is evidence that the new route imposed by the condemnation impairs access to the extent that the property owner's business is impaired. *Union Elevator & Warehouse Co. v. State*, 96 Wn. App. 288, 297, 980 P.2d 779 (1999). A non-abutting owner's property is taken by government action, and is compensable, if the owner experiences damages to access in a fashion that exceeds what might be experienced by the general public. *Id.*

In *Union Elevator*, this Court considered whether a non-abutting property owner's claim for inverse condemnation was correctly dismissed by the trial court when reasonable evidence existed that access was substantially impaired. This Court noted that while non-abutting property owners rarely are compensated for access issues, the owners were entitled to compensation if access was unreasonably obstructed and their damage was different from that suffered by the general public. The Court

considered affidavits of two customers of Union Elevator describing the difficult means now required to access the plaintiff's property due to the State's actions and found that summary judgment in the State's favor was improper:

a reasonable person could find that even though access to the [Plaintiff's property] remains, that access has been so substantially impaired that Union has suffered damages different from that of the general public.

Id. at 297. This question of impact beyond that experienced by the general public is necessarily a question of fact. *Id.* at 296.

The trial court here improperly resolved this same kind of factual dispute, rather than allowing the factfinder to exercise its constitutional function:

The placement and resulting rerouting caused by the roundabout, although curious and unfortunate, does not create a circumstance that as a matter of law leaves plaintiffs with a remedy. I believe as a matter of law, there [sic] claim for inverse condemnation fails, therefore, defendant's motion is GRANTED.

CP 806. The trial court thus ruled as a matter of law that the damage to Gibson's access rights was not "sufficiently severe" to be remediable.

Under this Court's decision in *Union Elevator*, this issue presents a question of fact, not law, and summary judgment is inappropriate. There is a remedy for Gibson's claim if the restriction of access is sufficiently

severe. There are questions of fact regarding the severity of access restrictions that must be resolved by a jury.

The City relied below primarily on *Kelly v. City of Port Townsend*, 2011 WL 1868182 (W.D. Wash. 2011). In *Kelly*, a roundabout limited access to SR 20, which the plaintiff's property did not abut and the plaintiff's property line never touched. *Id.* at *4. The federal district court specifically noted that the plaintiffs "*could not, consistent with the public's right of way on 5th Street and Thomas Street, construct a driveway or other access path that would connect their lot directly to SR 20*" because SR 20 was non-abutting. *Id.* In short, the plaintiff in *Kelly* did not have an infringement of his right of access to an abutting street.

Here, unlike *Kelly*, access from an abutting street to property has been impaired. This was a notable fact missing from *Kelly*. *Id.* at *4 (fact that driveway to SR 20 could not be built from plaintiff's property was further evidence rights of an abutting property owner were not implicated). Also, the total impairment of access from Montgomery severely restricts access from Wilbur, which is also an abutting street with direct access. Regardless of whether the abutting street is considered to be Montgomery or Wilbur, *Kelly* is simply inapposite.

Finally, the City argued below that this was a “circuitry of route” case, citing RCW 47.52.041. CP 338.⁵ The City averred that the closing of Montgomery access and impairment of Wilbur access was merely a change in route, rather than a diminishment of access, and suggested that there should be no remedy. *Id.*

However, if the circuitry of route imposed is severe enough, it is not a bar to a claim. *Union Elevator*, 96 Wn. App. at 297; *State v. Kodama*, 4 Wn. App. 676, 483 P.2d 857 (1971). In *Kodama*, the State sought to take land for a limited access highway. The respondents owned a 12-unit apartment building which was accessible by means of an easement road which the planned limited access highway would close while providing an alternative route. 4 Wn. App. at 677. The State attempted to argue that respondents were not entitled to compensation because they were not abutting property owners, but merely holders of an easement that provided access to a non-abutting right of way. *Id.* at 679. Since the State had provided an alternate means of access, the State contended that the property owner’s only grievance was that of circuitry of route. *Id.* at 679. The *Kodama* court rejected the State’s arguments, noting that an easement

⁵ RCW 47.52.041 states: “No person, firm or corporation, private or municipal, shall have any claim against the state, city or county by reason of the closing of such streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways. Circuitry of travel shall not be a compensable item of damage.”

of access from a non-abutting property to a street was still a valuable property right for which compensation must be paid. *Id.*

Other jurisdictions have long recognized that when a route becomes difficult to navigate, as in this case, the circuity of travel doctrine cannot apply.

We do not deal here in absolutes. As indicated, loss of access need not be complete to justify an award; indeed, in any case there will remain some way to reach private property. Circuity of access may be rendered extreme to the point of counting as a substantial impairment of access. [citation omitted]. Thus the problem in each case consists of assessing a variety of factors, including most notably the existence, availability, and feasibility of routes, all in connection with the uses to which the property has been (or may be) put, to determine whether the claimant or his patrons, previously in a reasonable relation to a road system reaching the property, have now been left without such a relation. [citation omitted].

Malone v. Commonwealth, 389 N.E.2d 975, 979 (Mass. 1979). *See also*, *Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368 (Mass. 1983) (store stated claim for nuisance against barge and tugboat owners whose collision with drawbridge impaired access to store).

Here, there is a fact question as to whether Gibson experienced an impact greater than the general public, even if Gibson were a non-abutting property owner. John Evans, the City's appraiser who assessed the value of Gibson's agreement with the City, testified that the appraisal he was asked to review did not contain any indication that traffic flow would be

changed. CP 585. He was never told there was a potential issue involving restricted access. *Id.* Evans also testified that he has never seen a roundabout that does not allow access to all streets. *Id.* If he had been told there would be an impact on access to the Montgomery Court Apartments it would have changed his assignment, and such impacts should have been addressed in the underlying report by Spokane County employee Jerry Williams. CP 587. In short, he was not made aware of the restriction on accessing Wilbur, and if he had been told of the traffic changes he would have incorporated analysis of those changes into his appraisal. CP 588.

Given the impairment of access to Wilbur and the closure of Montgomery -- even if he is considered a non-abutting property owner -- Gibson was entitled to a trial on whether the loss of access was substantial enough to constitute a taking. The trial court erred in granting summary judgment to the City.

(4) Gibson Produced Sufficient Evidence to Support His Claim of Promissory Estoppel Regarding the City's Promise to Pay to Restore His Access

Gibson brought a claim for equitable relief against the City in the form of promissory estoppel. CP 27. Gibson argued that the City should be estopped from reneging on its unequivocal promise to Gibson to pay for a new access point on Montgomery. *Id.*

The trial court also entered summary judgment in the City's favor on Gibson's equitable claim. CP 806. The court claimed that the claim in equity was contingent upon Gibson proving his inverse condemnation claim, and because the court ruled against him on that claim, equitable relief was unavailable. *Id.*

The doctrine of promissory estoppel allows a court to enforce a promise "which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance.... The remedy granted for breach may be limited as justice requires." *Restatement (Second) of Contracts* § 90 (1981). The purpose of this doctrine has been articulated by our Supreme Court:

The purpose of promissory estoppel is "to make a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable.

Klinke v. Famous Fried Recipe Chicken, Inc., 94 Wn.2d 255, 261 n.4, 616 P.2d 644 (1980) (quoting *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal.3d 665, 672-73, 517 P.2d 1157, 111 Cal.Rptr. 693 (1974)).

The purpose of equity is to prevent injustice when legal remedies are inadequate. *Lundberg ex rel. Orient Found. v. Coleman*, 115 Wn.

App. 172, 180, 60 P.3d 595, 600 (2002), *review denied*, 150 Wn.2d 1010 (2003). *See also*, *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997) (“[E]quitable doctrines grew naturally out of the humane desire to relieve under special circumstances from the harshness of strict legal rules.” (quoting *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 513, 30 P.2d 239 (1934)); *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 925, 185 P.2d 113 (1947) (“The decision was rested on broad equitable principles, upon the theory that the legislature has always been well advised of the uses and purposes of equity to afford relief, under special circumstances, from the harshness of strict legal rules....”).

Because equitable remedies are meant to be considered if legal remedies are inadequate, the trial court plainly erred when it concluded that Gibson’s claim in equity was dependent upon success with his claim in law. According to ancient legal principles, equity may be employed to remedy an injustice *when the law fails*.

Instead, the trial court should have evaluated the elements of a claim for promissory estoppel to determine if Gibson propounded sufficient evidence to survive summary judgment. In order to state a claim for promissory estoppel, a plaintiff must provide evidence of: (1) A promise which (2) the promisor should reasonably expect to cause the

promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290, 300-01 (1967).

Here, the elements are met. The City's promise to pay for the cost of building a driveway on Montgomery to restore access is unequivocal and was made in writing. CP 507. It is undisputed that Gibson relied on this promise to his detriment and changed his position, both by foregoing his legal right to challenge the roundabout before construction occurred, and by expending time and money to obtain estimates of that project *at the City's request*. CP 491, 507, 515-17. Gibson's reliance was justifiable, given that the City's promise was unequivocal and in writing, and that he was acting at the City's express instruction. CP 507.

Finally, enforcement of the City's promise would remedy an injustice. The City's actions toward Gibson throughout the process of planning and building the roundabout were at least callous and negligent, and at most deliberate and reprehensible. The City knew that its project would seriously alter access to Gibson's property for existing and prospective tenants, and did not inform them of the change in advance. CP 568. When Gibson discovered the problem and sought to resolve it,

the City misled them and made false promises in order to stop them from exercising his rights. The City even instructed Gibson to get estimates, and then failed to reimburse them even for that cost, let alone for the cost of building the access it had promised.

Even assuming that Gibson did not present enough evidence to warrant a trial on the inverse condemnation claim, Gibson presented more than enough evidence of a claim for promissory estoppel to survive summary judgment. In fact, since the evidence on this claim is largely undisputed, summary judgment in Gibson's favor is warranted. This Court should reverse the trial court's order of summary judgment in favor of the City on Gibson's equitable claim.

(5) Gibson Is Entitled to Attorney Fees and Costs at Trial and On Appeal Should He Prevail on Remand

RAP 18.1 provides for attorney fees to be awarded to a prevailing party on appeal in any action where a contract, statute, or the common law allows for recovery of fees.

RCW 8.25.075(3)⁶ provides a mandatory award of fees to a plaintiff who prevails in an inverse condemnation action. *Brazil v. City of Auburn*, 93 Wn.2d 484, 497, 610 P.2d 909, 916 (1980).

⁶ RCW 8.25.075(3) states: "A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner shall award or allow

Because Gibson's claims were dismissed on summary judgment, his right to fees is not yet final. If this Court orders entry of summary judgment for Gibson, it should award him fees at trial and on appeal. Should this Court remand for trial, Gibson requests that this Court state that fees at trial and on appeal are awardable by the trial court under RCW 8.25.075(3).

F. CONCLUSION

Gibson once had access to the Apartments from Montgomery, an abutting thoroughfare. They also had full access from the south end of Wilbur, another abutting street and the only street with direct access to the public rights of way. As a consequence of the City's construction of the roundabout, however, Gibson's reasonable access from Montgomery is eliminated, and from Wilbur is severely restricted. Although Gibson has been partially compensated for an easement across a small portion of the southeast corner of the property, they have not been compensated for the loss of access, which is an independent and fully compensable property right. Gibson is entitled to just compensation for this taking.

to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial."

Gibson has *per se* rights to damages from inverse condemnation as abutting property owners because the entire south boundary of the Apartments property abuts Montgomery Street. At a minimum, even if Gibson was not an abutting property owner, they were entitled to prove that the access has been substantially impaired in a fashion greater than the general public.

This Court should reverse the trial court's judgment with directions to grant summary judgment to Gibson or, alternatively, to allow a trial on any non-abutting property owner claim. Costs on appeal, including reasonable attorney fees, should be awarded to Gibson.

DATED this 22d day of August, 2012.

Respectfully submitted,



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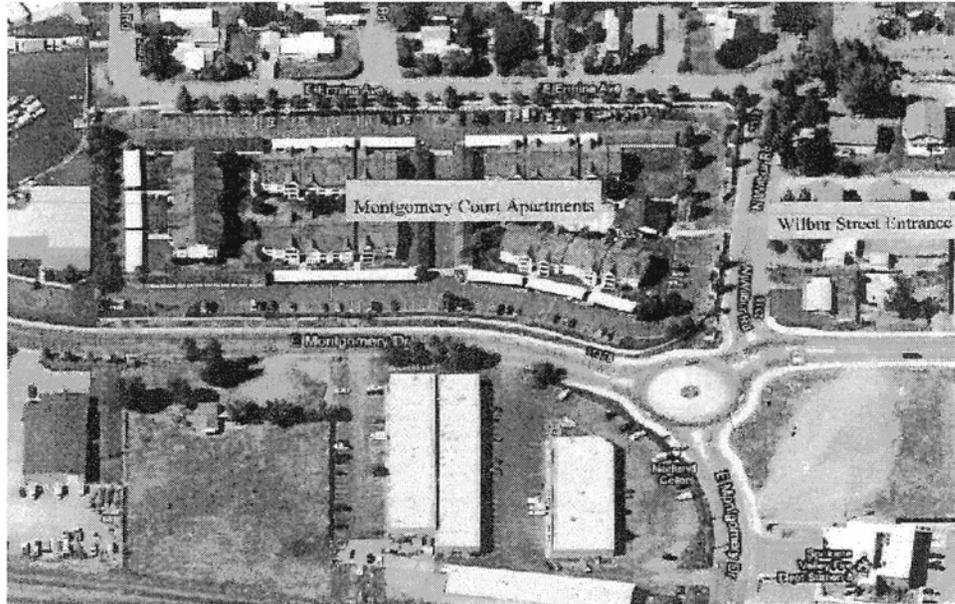
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APPENDIX A

Map of shown to Gibson before construction (CP 299)

APPENDIX B



Roundabout as constructed (CP 549)



Close up of roundabout (CP 551)

DECLARATION OF SERVICE

On this day said forth below, I emailed a courtesy copy and deposited in the U.S. mail for service a true and accurate copy of the Brief of Appellants in Court of Appeals Cause No. 30802-2-III to the following parties:

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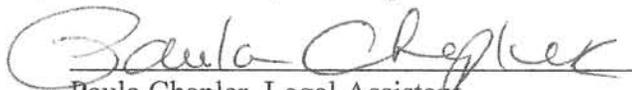
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 22, 2012, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick