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OCT 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30802-2-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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

Appellants,

vs.

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

Respondent.

BRIEF OF RESPONDENT CITY OF SPOKANE VALLEY

Kenneth W. Harper
WSBA #25578
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313
Attorneys for Respondent

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Both parties agree that an inverse condemnation suit must be based upon a valid claim of deprivation of a property right. Gibson argues that the existence of a property right hinges upon whether Gibson's property abuts Montgomery. In structuring the argument in this manner, Gibson concedes that the point of access between the apartments and Wilbur was unaffected by the City's revision of traffic at the roundabout.

Gibson's argument relies on the premise that the roundabout altered Gibson's access to and from Montgomery as an abutter. But Gibson's property continues to have access to and from Montgomery. Notwithstanding the roundabout, the property retains its full existing frontage along Montgomery. Access between the apartment complex and Montgomery continues to exist by way of Jackson. There is a small increase in travel time and distance (i.e., 18.5 seconds and 70 feet, respectively) by using Jackson to reach the apartments from Montgomery as compared to the former route along Montgomery to Wilbur.

The City's exercise of the police power to control traffic is legally distinct from a physical taking of an access right. Gibson continues to have access to the general street system. Gibson overplays the distinction between the rights of "abutters" and "non-abutters" under the case law.

Virtually all Washington cases¹ that address access questions in relation to “circuitry of route” or “inconvenience” deny compensation as a matter of law.

A decision that compensation could be awarded under the facts of this case would cause great uncertainty as to the extent of any such rule. Traffic regulations affecting distance or delay between two points could almost always imply a claim in inverse condemnation for any traffic improvement project. Design of traffic improvement projects would need to include contingencies for potentially remote and tenuous business diminution claims. Much existing Washington law would be overruled. Washington would join Louisiana as the only two states in the country allowing compensation under these circumstances.

This Court should affirm the trial court. Doing so results in a decision that fits neatly within existing precedent, both in Washington and elsewhere. This would not result in any unfairness to Gibson, because Gibson was compensated, in arms’ length negotiations, for the right-of-way actually acquired by Spokane County.

¹ The special case of *Union Elevator & Warehouse Co., Inc. v State*, 96 Wn. App. 288, 980 P.2d 779 (1999), is factually unlike anything here and is discussed below at section IV(D)(4).

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

A. Whether there is a protected property right associated with the turning motions of vehicles in an intersection when those turning motions are altered because of construction of a roundabout?

B. Whether a person has standing to bring an inverse condemnation lawsuit when that person is affected by a change in traffic regulations in the same way as other persons in the nearby vicinity?

C. Whether an inverse condemnation claim for deprivation of access exists for an owner who abuts a public road even when the owner had no direct access to the abutting road before a traffic improvement project is built and the owner's property continues to have access to the general public street system?

D. Whether it is necessary to apprise the trial court of an allegedly erroneous grant of summary judgment before voluntarily dismissing an action and seeking appellate review?

III. COUNTER-STATEMENT OF THE CASE

A. General background regarding the roundabout.

The Gibson apartment complex has its only point of open access to adjoining public streets at North Wilbur Road ("Wilbur"). CP 322. Access between Wilbur and the apartments was not altered by construction of the roundabout. CP 319-21.

Directions of travel on Wilbur were not altered by the roundabout. CP 122-26, 912. A driver on Wilbur can travel in a northbound direction. *Id.* A driver on Wilbur can travel southbound to the roundabout, and from that point may travel in any direction. *Id.* The roundabout changed a route that eastbound drivers can take to get to the apartments from East Montgomery Drive (“Montgomery”). CP 903. Drivers eastbound on Montgomery continue to have access, nevertheless, to the apartments. *Id.* A driver traveling eastbound on Montgomery may access Wilbur by means of East Jackson Avenue (“Jackson”). *Id.* The roundabout has no effect on drivers approaching the apartments from the east, along East Mansfield Avenue (“Mansfield”).

Accessing the apartments from eastbound Montgomery by means of Jackson requires an additional 18.5 seconds of travel time as compared to the travel time associated with the former route that existed before the roundabout was built. CP 904. The new route for eastbound drivers on Montgomery who wish to access the apartments is 70 feet longer in distance than the former route. *Id.*

No evidence in the record supports Gibson’s argument on appeal that the roundabout “impos[es] a detour of 1-1/4 miles.” Br. 4. Gibson’s citation to the clerk’s papers at CP 571 does not support this contention. No evidence in the record supports Gibson’s argument that there have

been a “high number of traffic tickets for illegal left turns, U-turns, and failure to obey traffic control devices....” Br. 5. The declaration of counsel purporting to establish this contention was stricken as incompetent summary judgment evidence. CP 806, 823-24. Gibson has not properly assigned error to the trial court’s evidentiary ruling.

Based on traffic count data, most drivers access the apartments from the east by means of North Pines Road (“Pines” which is also designated SR-27) to Mansfield to Wilbur. CP 904, 912. This is related to the proximity of the I-90 ramps to the east of the apartments at Pines. CP 122-26.

B. The roundabout was planned in relation to a large traffic improvement project.

After analysis and deliberation by state and local officials, the roundabout emerged as the preferred traffic control device for the Montgomery/Mansfield/Wilbur intersection. CP 901. The roundabout was duly selected as the best way to manage traffic at its location. CP 901. The roundabout was designed to enable the intersection to handle considerably more traffic than was formerly possible. *Id.* Future increases in traffic were imminently expected as a result of an overall traffic improvement project known as the Pines-Mansfield Corridor Congestion Relief Project (the “project”). *Id.* The project was intended to

address congestion in the vicinity of the intersections of Pines/west-bound ramps of I-90 and Pines/Montgomery and East Indiana Avenue (“Indiana”). CP 212. These intersections were formerly very closely spaced. *Id.* Prior to the project, queues from one intersection would spill back into the other intersection. *Id.* Over 16,000 vehicles per day used Pines. *Id.* The roundabout was described in a newspaper report in April 12, 2008, as being “about a half-mile from the nightmare intersection of Pines Road and Indiana Avenue, which is the focus of a complicated plan.” CP 241.

The project completely changed the flow of traffic in the Pines-Mansfield vicinity. CP 901. The project resulted in the elimination of eastbound travel on Montgomery through the intersection of Pines and Indiana. *Id.* This meant that all traffic that previously took the former route along Montgomery now had to stay on Mansfield, which was being improved, and go east on Mansfield to access the vicinity of Pines (and, by extension, the ramps for I-90). *Id.* With this revision, the proposed design effectively resulted in continuing Montgomery straight east and thereby merging it into Mansfield as one continuous new arterial street all the way to Pines. *Id.* Although Mansfield had previously been in existence, it was not sufficient for arterial-level traffic capacity until reconfigured and widened to three lanes for this project. *Id.* Mansfield is

now the main connection between Pines and points west, including the apartments. CP 904. The development of Montgomery-Mansfield as a new east-west arterial limited the intersection types suitable at the junction of Montgomery/Mansfield/Wilbur. CP 901-02.

The analysis of the City showed that the roundabout would be the best way to operate the intersection. CP 902. The roundabout design could not accommodate a left turn from eastbound Montgomery-Mansfield to Wilbur while maintaining a safe and well-functioning intersection. *Id.* The plan to transform Montgomery and Mansfield into an aligned arterial precluded stop signs or other traffic controls that would have been necessary to accommodate left turns from eastbound Montgomery onto Wilbur. *Id.* A traffic control device that would have allowed a left turn from eastbound Montgomery onto Wilbur would have failed to meet the City's designated level of service. CP 575. Within a few years, traffic volumes would be too high for such an intersection to function adequately. *Id.* A roundabout design that would have included a turn pocket to allow vehicles to queue for a left turn from eastbound Montgomery onto Wilbur would have blocked an exit from the roundabout and would have impeded overall traffic flow through the roundabout. CP 580.

Planning for the Pines-Mansfield Corridor Congestion Relief Project predated the City itself. In August 2002, when the project area was an unincorporated part of Spokane County, the Board of County Commissioners passed a resolution that endorsed a recommendation from the County Engineer for funding several road improvement projects. CP 140. The first project listed in the resolution was for a project known as “SR-27 & Mansfield Avenue” with project area limits from “Wilbur Road to SR-27.” *Id.* The BOCC unanimously approved the resolution. *Id.*

Following incorporation of the City on March 31, 2003, an interlocal agreement was signed between the City and Spokane County. CP 149-57. The agreement stated that one of its key purposes was to “contract with Spokane County, through the County Engineer” for the provision of “engineering services for quality street, traffic, and storm drainage improvements for its residents....” CP 149. Under the agreement, the parties listed capital projects for which Spokane County was required to perform services. CP 164. These services included engineering, project management, right-of-way appraisal and acquisition, and other similar matters. *Id.* For purposes of the agreement, the project was identified as the “Pines Road at Mansfield” project, with a cost estimate of over \$3 million. *Id.*

Project development activities took place over the course of several years. In October 2004, WSDOT completed a document titled “I-90/SR-27 Interchange North Ramp Realignment: Travel Demand Forecasts, Freeway Capacity Analysis, Signal Capacity Analysis, Air Quality Determination.” CP 180-86. The report was reviewed by the Federal Highway Administration, which, in a letter dated January 11, 2005, accepted the report’s conclusions. CP 188.

In June 2005, the City notified Spokane County that the County’s engineers were authorized to begin work on the project pursuant to the interlocal agreement and a related memorandum of understanding. CP 192-94.

Preliminary design plans were prepared by Spokane County in November 2005. CP 169-78. The primary project designer was Spokane County Engineering Technician Kurt Farnsworth, and the lead design engineer of record was Spokane County Assistant County Engineer Chad Coles. CP 101; 131-2. An employee of the Washington State Department of Transportation with special expertise in roundabout design, Brian Walsh, provided assistance. CP 102, 108-09, 133, 306.

Mr. Walsh’s conceptual designs were evaluated by City and County engineers in several different iterations. CP 310-16. Traffic simulation models were performed on the designs by the City’s traffic

engineer, Inga Note. CP 317. The City made the final decision to accept the roundabout design in January 2006. CP 110.

During an open public meeting held on February 28, 2006, the City's engineers submitted an informational memorandum to City Council regarding the status of the project. CP 142-47. The memorandum stated that the Montgomery/Mansfield/Wilbur intersection would be affected by the project and further specifically stated that "a three-legged roundabout has been determined as the best option for this intersection...." CP 142. The memorandum referenced, and included, a separate memorandum written by Ms. Note that further explained the basis of the recommended roundabout design. CP 146-47.

Review of the project under the National Environmental Policy Act was completed in August 2006. CP 196. There was no appeal of the NEPA determination. The City requested Spokane County to commence right-of-way negotiations and acquisition efforts. CP 197.

In October 2006, the City took additional steps to increase public awareness of the project. An open house meeting occurred at the City's CenterPlace facility at Mirabeau Park on October 5, 2006. CP 211-14. Notice of the open house was publicly disseminated along with a summary of common questions and concerns regarding the project. *Id.* At the open house, representatives of the City and the County answered questions

about the project, including its construction schedule and expected right-of-way negotiation activities. *Id.* The public notice of the open house event provided a link to the City's website for "project updates and traffic alerts" and also listed a telephone number for the City's capital projects engineer. *Id.*

A "95% design review" process was finalized by November 2007. CP 219-22. A review process under the State Environmental Policy Act was completed in December 2007. CP 224. On December 14, 2007, a SEPA notice of determination of nonsignificance was issued. CP 225. This notice provided an appeal opportunity for the SEPA decision. *Id.* There was no SEPA appeal. In April 2008, the local media published a short article regarding the purpose of the project, which noted the expected benefits of the roundabout. CP 241-42.

The construction work was awarded to Inland Asphalt Company in June 2008, and a contract for construction was signed on July 14, 2008. CP 244-46. Final acceptance of construction occurred on December 16, 2009. CP 271.

C. Gibson's awareness of the road improvement project during the right-of-way acquisition process included awareness that the roundabout could affect Wilbur.

Jon Gibson is the principal owner of the apartments. Br. 3. Mr. Gibson has been in the real estate business for more than 35 years. CP 58.

He has a real estate broker's license. CP 59. Mr. Gibson is involved with various corporations and limited liability companies that own property throughout the West. CP 60, 62.

The interlocal agreement between the City and Spokane County contemplated that the County would perform right-of-way acquisition work for the City in support of the project. CP 152. Under the terms of the agreement, Spokane County was an independent contractor. CP 154. The City-County memorandum of understanding stated that "Spokane County will acquire all necessary right of way...." CP 193. The City did not assert any control over the manner or standards of performance by Spokane County during the right-of-way acquisition process. CP 155, 113.

None of the staff with the City was involved in the right-of-way acquisition process. CP 111-12, 117, 121. This work was done solely by Spokane County. CP 111. Staff with the City "held very firmly" to this division of work. CP 113.

Right-of-way from the apartment parcel was needed so that the roundabout could be built. CP 294. Spokane County initiated negotiations with Gibson for acquiring the right-of-way necessary. CP 190, 198. In February 2007, Spokane County's right-of-way supervisor, Sherman Johnson, contacted Mr. Gibson to formally notify him that the

project would require approximately 4,368 feet of additional right-of-way and a further 1,631 feet for a border easement. CP 273-74. Spokane County offered a total of \$33,300 in compensation. *Id.* After receiving Spokane County's offer, Mr. Gibson hired a lawyer. CP 80. Mr. Gibson consulted with appraisers "to better understand the process." *Id.*

Over the next several months, negotiations continued between Gibson and Spokane County. These parties exchanged views in August 2007 regarding an estimate for certain improvements (landscaping, fencing, irrigation lines) likely to be affected by the acquisition. CP 534-35. In October 2007, Gibson and Spokane County executed settlement documents including a right-of-way agreement, border easement, and a temporary construction easement. CP 276-99.

The right-of-way agreement stated that it was a "full, complete, and final payment and settlement for the title or interest conveyed or granted" and that it was a release of "further obligations or claims resulting from planning and construction of the proposed project." CP 279-80. According to Gibson's general manager, Scot Sutton, these documents were signed to "allow them to take that portion of the property to construct whatever they needed to construct." CP 45.

On appeal Gibson claims that he was never "contacted about the potential restriction of access to his commercial property." Br. 6.

Gibson's citation to the clerk's papers at CP 568 does not support this contention. To the contrary, as early as 2003, Gibson's general manager, Mr. Sutton, was aware that a change in traffic regulation near the apartments would result from the right-of-way acquisition for the project. CP 44. By 2005, a roundabout was identified as a potentially feasible way to regulate traffic at the intersection as part of the overall project. CP 301-04. Different conceptual layouts for a roundabout-controlled intersection were prepared. *Id.*

Mr. Gibson acknowledged that nobody from either Spokane County or the City made any affirmative representations that the roundabout would not impact traffic flow onto Wilbur. CP 69, 77. Gibson's general manager, Mr. Sutton, agreed that no government official concealed any information regarding the roundabout. CP 49.

Gibson retained a local Spokane-area property management firm, HSC Real Estate, Inc., (later known as HSC/Riverstone) to manage the apartments. CP 63. Frank Moore was the asset manager with HSC responsible for Montgomery Court Apartments. CP 88. As asset manager, Mr. Moore was responsible for gathering pertinent information regarding the right-of-way process and providing it to Mr. Sutton and Mr. Gibson. CP 50.

Mr. Moore attended the October 2006 open house at CenterPlace because he was aware that the project was “serious road construction in that area.” CP 89. At the open house, he learned that the project included a roundabout at the Montgomery/Mansfield/Wilbur intersection. CP 556. He viewed a proposal for the new roundabout. *Id.* He recognized that the proposal had the potential to affect traffic regulation at the intersection. *Id.* “Not once” at the open house did he ask any specific questions about the details of the roundabout. *Id.* He did not provide any input on the proposed roundabout design at the open house. CP 556. Mr. Moore received digital photographic renderings of proposed roundabout plans that he recognized could affect Wilbur, but he did not fully understand them and, in any event, he was not making any analysis of those proposals but was “purely trying to pass that information along” to Gibson as a conduit. CP 91, 93-94. Any analysis or conclusions Gibson may have made as a result of the information was outside of Mr. Moore’s responsibility. CP 95.

Even though he knew that the roundabout design proposals he was obtaining would have an effect on Wilbur, and even though he passed these along to Gibson as he received them, Mr. Moore never got any feedback from Gibson on the proposed roundabout designs. CP. 93-94, 558.

Mr. Gibson first recognized the alteration of traffic flow as a result of the roundabout while construction was already under way. He asked Mr. Sutton and Mr. Moore “why the hell this wasn’t brought to his attention.” CP 53-54.

Gibson terminated the property management contract with HSC sometime after July 2008 because Mr. Gibson determined that HSC “could not properly take care of details” and evinced “dishonesty” in certain matters. CP 51-52, 64. Mr. Sutton resigned as general manager of the Jon Gibson Company on or about July 30, 2008. CP 43.

No evidence in the record supports Gibson’s argument on appeal that the City reneged on a promise it made in writing to restore Gibson’s access. Br. 1, 10. Gibson’s only citations to the clerk’s papers in support of this claim (CP 507, 516) reference an email exchange between Mr. Gibson and Spokane County Engineer Chad Coles and a letter Mr. Gibson sent to Mr. Coles and Robert Brueggeman, another County engineer. CP 507-08, 515-17. In the referenced email, written by Mr. Gibson, he states that “*if* [he’s] properly covered the terms we’ll need to formalize this as an agreement. I know the entities will be interested in the actual cost for items.” CP 507. (emphasis added). No statement of any promise by the City is contained in the email. *Id.* Mr. Coles, the County engineer who responded to the email, did not make any promise on behalf of the City

relating to any undertaking or definable result because there was no agreement on any specific enforceable terms (e.g., cost of items, layout of alternative approach) stated in Mr. Gibson's email. *Id.*

D. Trial court proceedings.

Gibson sued the City in September 2010. CP 3. His main causes of action were inverse condemnation, misrepresentation, estoppel, and damages relating to construction of the roundabout. CP 8. In its answer the City alleged that Gibson had failed to join Spokane County and the construction contractor, Inland Asphalt Company. CP 13. Gibson filed an amended complaint in which he alleged causes of action for inverse condemnation, misrepresentation, equitable relief, and construction damages. CP 26-28. The City was the only defendant named in the amended complaint. CP 22. Gibson never sued Spokane County. CP 3, 22.

In the amended complaint, Gibson alleged that the City made a promise to construct a new access for the apartments at Montgomery. *See* First Amended Complaint at ¶¶ 11, 14. CP 23-24. Gibson also alleged that the City promised "to evaluate" modifications to the roundabout. *Id.* at ¶ 18. CP 25. As his second cause of action, Gibson stated a claim of misrepresentation related to the breach by the City of these alleged promises. *Id.* at ¶ 26. CP 27. In his third cause of action (a claim for

equitable relief) Gibson did not allege that the City had made any promise but instead sought an injunction to prevent the City from operating the roundabout in its intended manner. CP 27-28. There was no cause of action stated for promissory estoppel. CP 26-28.

In the summary judgment pleadings, Gibson pressed his misrepresentation claim and related it to promises allegedly made by the City. CP 601-02, 633-39.

Nowhere in the trial court briefing did Gibson argue that promissory estoppel was the basis of the injunction claim. CP 639-40.

The trial court considered summary judgment dismissal of the claims for inverse condemnation, misrepresentation, and equitable relief. CP 795. The trial court granted the City's motion to exclude certain incompetent evidence offered by Gibson. CP 806, 823-24. The trial court granted summary judgment to the City on the inverse condemnation and injunction claims, but denied dismissal of the misrepresentation claim. CP 796, 823. Gibson moved for reconsideration, in which Gibson acknowledged that the misrepresentation claim was the "single remaining issue...." CP 841. Nowhere in the motion for reconsideration pleadings did Gibson assert the existence of a promissory estoppel claim. CP 837-42. Gibson did not object to the order proposed by the City on the basis that it wrongfully dismissed a promissory estoppel claim. *Id.* After the

trial court denied the motion for reconsideration (CP 844-45), Gibson voluntarily dismissed all remaining claims. CP 846-49. Final judgment was entered in favor of the City on April 11, 2012. CP 852-55.

IV. ARGUMENT

A. **Standard of review.**

Review of a decision to grant summary judgment is de novo. *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). This Court may affirm summary judgment on any grounds supported by the record. *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

B. **Review of the roundabout and its effects on traffic circulation in the vicinity of the apartments.**

Gibson mischaracterizes the effect of the roundabout on access between the apartments and adjacent streets. Gibson blurs a key distinction in Washington law. This distinction separates access claims that relate to the ability of an owner to travel “on and off” the subject property (usually compensable) from access claims that relate to the ability to travel to and from the property to other points connected by the surrounding public street system (almost never compensable).

A few of Gibson’s wrong statements regarding the effect of the roundabout on Montgomery include the following: 1) Gibson argues that

the roundabout caused a “total removal of access from Montgomery.” Br. 15; 2) that in the post-roundabout status, “access is only from Mansfield.” Br. 17; 3) that “all access from Montgomery has been destroyed.” *Id.*; 4) “access to the apartments from Montgomery Drive has been eliminated.” *Id.*; 5) “here, [access] has been totally eliminated in the case of Montgomery.” Br. 20; and 6) “the City has also essentially closed the southern end of Wilbur.” Br. 23.

Gibson betrays an awareness that the case law does not support his claims. Otherwise, there would be little reason to exaggerate the effect of the roundabout on access to the apartments.

After construction of the roundabout each of the subject streets remained designated for two-way travel in the vicinity of the intersection. The apartment parcel continues to have unimpeded ingress and egress to Wilbur. A driver approaching the apartments from the east on Mansfield has an unimpeded right turn through the roundabout to northbound Wilbur. The majority of traffic approaches the apartments from the east. CP 901-02.

Drivers approaching the apartments from the west may make a left turn at the intersection of Montgomery and Jackson and then proceed eastbound along Jackson where it merges into the northerly point of Wilbur. CP 912. Drivers who do not wish to access the apartments may

travel from Montgomery through the roundabout to eastbound Mansfield and then to Pines.

All the traffic that formerly accessed the apartment complex from Montgomery to Wilbur, including tenants, service personnel, suppliers, etc., may still do so from Montgomery to Jackson to Wilbur. CP 904, 910, 912.

It is possible to compare the relative distance between the apartments' entrance on Wilbur and a point on Montgomery near the Montgomery/Jackson intersection. The formerly-available route traveled approximately 2,520 feet. The new route (using Jackson to connect Montgomery to the apartment parcel), travels a distance of approximately 2,590 feet, for a difference of 70 feet. CP 110, 904. The difference in real travel time is approximately 18.5 seconds. *Id.*

Gibson engages in hyperbole to claim that “[i]t is critically important to note that all traffic on Montgomery is now unable to access the driveway to the Apartments.” Br. 17. Gibson’s claim that access here has “been totally eliminated in the case of Montgomery” is also incorrect. Br. 20. It is not true that “[t]o those traveling eastbound on Montgomery, Wilbur is closed.” Br. 23.

The site plan for the apartment complex depicts an emergency point of ingress and egress between the apartment parcel and Montgomery

at the parcel's southwestern corner. CP 322. This point of access has never been opened for regular use, and the apartment parcel has never had any other direct point of access on Montgomery. The use of this access point for emergencies is unaffected by the roundabout. Whether Gibson may make use of the frontage along Montgomery for access depends upon the City's road approach design standards and has nothing to do with the existence of the roundabout.

C. For abutters and non-abutters alike, damages relating to lawful regulation of traffic are not compensable.

By statute, alteration of traffic flow is not a compensable deprivation of a property right even for abutters.

RCW 47.52.041. Closure of intersecting roads – Rights of abutters.

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.* (emphasis added).

In pleadings below, Gibson argued that the inverse condemnation claim is not “based upon circuitry of travel.” CP 624. Gibson claimed that the City's arguments to the contrary were an attempt “to mislead the court.” CP 623.

Here, Gibson barely acknowledges the existence of the above statute before moving into a discussion of *Union Elevator & Warehouse Co., Inc. v State*, 96 Wn. App. 288, 980 P.2d 779 (1999). Br. 27. Gibson's claims are impossible to reconcile with Gibson's pleadings. See First Amended Complaint at ¶¶ 21-24 ("Vehicle traffic that used to pass by the Complex, namely traffic traveling east on Montgomery, can no longer turn north onto Wilber [sic] to the Complex entrance.") CP 25-26. Gibson sued on an erroneous "circuitry of travel" theory.

Gibson gives this Court no reason to believe that this statute means anything other than what it says: no claim exists for closing streets even where the property is "abutting upon the closed streets" so long as "access still exists." RCW § 47.52.041.

Washington follows virtually all other states in disallowing compensation, as a matter of law, for regulation of access rights attributed to the exercise of the police power. See Sonja A. Soehnel, Annotation, *Abutting Owner's Right To Damages For Limitation of Access Caused By Traffic Regulation*, 15 ALR 5th 821 (1993). According to Professor Stoebuck, Washington has a more restricted view of this right [to an easement of access] than exists in some jurisdictions." 17 William B. Stoebuck & John W. Weaver, *Washington Practice, Real Estate: Property Law* § 9.11 (2012).

An exception exists for Louisiana, where courts have generally held that a limitation of access caused by a traffic regulation may be compensable. *See Soehnel, supra*, § 2.

Washington law distinguishes between compensable instances of impairment of access on and off an owner's property compared to noncompensable alterations in the flow of traffic adjacent to an owner's property. *See, e.g., Union Elevator & Warehouse Co., Inc. v State*, 96 Wn. App. 288, 295-96, 980 P.2d 779 (1999) (impairment that is merely an added inconvenience to all travelers cannot form the basis of compensation); *Keiffer v. King County*, 89 Wn.2d 369, 372-75, 572 P.2d 408 (1977) (distinguishing between restrictions of access and actions that affect a particular pattern or flow of traffic); *Hoskins v. City of Kirkland*, 7 Wn. App. 957, 960-63, 503 P.2d 1117 (1972) (abutting property owner could not obtain compensation where alternate mode of egress/ingress was less convenient); *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 365-66, 324 P.2d 1113 (1958) (closing of primary means of access noncompensable where it was the most direct and convenient access and depreciated value of property); *Walker v. State*, 48 Wn.2d 587, 590-91, 295 P.2d 328 (1956) (diversion of westbound traffic away from motel business by means of abutting physical obstruction preventing left turns authorized under the police power and

noncompensable); *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 308, 83 P. 316 (1906) (where width of street providing access is free and undisturbed and only real complaint is a change in course of travel, no compensation is due).

Commentators have echoed the position of Washington courts. *See, e.g.*, 11 E. McQuillin, *The Law of Municipal Corporations*, § 32.26.10, at 384 (2000) (“damage resulting from a diversion of traffic, because of a change of route, is not compensable”); 4A J. Sackman, *Nichols’ The Law of Eminent Domain*, § 14.15(4), at 14-340 (1990) (“The owner is not entitled to receive any compensation for diversion of traffic.”)

If Gibson’s factually incorrect claims regarding the roundabout are discarded, the applicable law requires the result reached by the trial court.

D. There is no property right in a specific route to reach a particular parcel of land.

To establish a governmental taking, a plaintiff must prove the existence of a property right. *Granite Beach Holdings, LLC v. State ex rel. Dep’t of Natural Res.*, 103 Wn. App. 186, 205, 11 P.3d 847 (2000).

There can be no inverse condemnation if no property right exists.

Showalter v. City of Cheney, 118 Wn. App. 543, 549, 76 P.3d 782 (2003)

(trial court reversed and judgment entered as a matter of law in favor of city in absence of property right).

Gibson argues that the modification to adjacent roads requires potential tenants to follow a new route to access the apartments. Br. 8. This is true for drivers who formerly would have followed Montgomery eastbound all the way to Wilbur in order to make a left turn onto Wilbur. But even motorists who approach the apartments from the west along eastbound Montgomery may now follow signage directing them to Wilbur by means of Jackson. CP 907-08.

Gibson's brief is tied to the allegations of his underlying pleadings. Those allegations reflect a mistaken core premise. Gibson alleged as follows:

A significant percentage of residents at plaintiffs' Complex were prospective tenants who noticed the facility while driving by. Vehicle traffic that used to pass by the Complex, namely traffic traveling east on Montgomery, can no longer turn north onto Wilber [sic] to the Complex entrance. As a result of that restricted access, MCA and the Complex have suffered a substantial increase in vacancy with an associated loss of revenue, also requiring plaintiffs to incur additional marketing expenses. *See* First Amended Complaint at ¶ 21. CP 26.

Gibson's cause of action and his appeal arguments are invariably wrong because they proceed from the view that Gibson is entitled to compensation arising from alteration of traffic.

A brief synopsis of Washington cases extending back more than a century was provided above at section IV(C). Not a single one of these cases, or any other reported Washington case, concludes that alteration of traffic flow is equivalent to a compensable deprivation of property right. Although such a result might be possible in Louisiana, both the history of Washington case law and RCW § 47.52.041 bar such a claim here.

1. The determination of whether interference with access exists is a question of law for the court.

Gibson argues that he is entitled to compensation as an abutter without successfully establishing that the effect of the roundabout is actionable in the first place.

The first step in the analysis of whether compensation must be paid in a particular case is to determine whether a government action in question has actually interfered with the right of access. This analysis precedes, and is not dependent upon, classification of the owner's status as abutting or non-abutting. *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977) ("The first [step] is to determine if the government action in question has actually interfered with the right of access as that property interest has been defined by our law.")

A recent decision arising out of similar facts (i.e., city-installed roundabout) holds as a matter of law that an owner has no property

interest in the manner by which a city regulates the flow of public travel. *Kelly v. City of Port Townsend*, No. C10-5508RBL, 2011 WL 1868182, at *5 (W.D. Wash. May 16, 2011).

In *Kelly*, the plaintiffs sought compensation because a new roundabout altered the street from which plaintiffs' business was accessed. The access street became a cul-de-sac. *Id.* at *2. The building's design was based on the assumption that the customers would have direct access along the street affected by the roundabout. As a result of this loss of access, plaintiffs contended that the existing building design was unworkable and that they had lost business. *Id.*

The court ruled as a matter of law that plaintiffs had no claim. *Id.* at *5. It was within the authority of the city as it grew and expanded to determine that continuing to allow plaintiffs' historical access "was inconsistent with traffic flow and safety considerations in the [traffic] circle." *Id.* The roundabout did not landlock the plaintiffs' building. The court noted that it had been unable to find any case in which a municipality's revision of traffic was "deemed a taking simply because the most convenient path of travel was obstructed by municipal action." *Id.* This was true, according to the court, "despite the fact that the best option for egress and ingress has been cut off." *Id.*

There was conflicting evidence in *Kelly* as to whether the owner was an “abutter.” *Id.* at *4-5. This made no difference to the court’s conclusion. *Id.* at *5. Even an “abutting owner’s right of access...is subject to the public’s easement [to control and regulate streets].” *Id.*

The *Kelly* court cited an earlier federal decision reviewing Washington law on this issue. *Id.* at *3 (citing *Pande Cameron & Co. of Seattle, Inc. v. Cent. Puget Sound Reg’l Transit Auth.*, 610 F. Supp. 2d 1288 (W.D. Wash. 2009)).

The court in *Pande Cameron*, like the court in *Kelly*, granted summary judgment where plaintiffs could only show “inconvenience at having to travel a further distance to [their] business facility.” *Pande Cameron*, 610 F. Supp. 2d 1228, 1303 (quoting *Union Elevator & Warehouse v. State*, 96 Wn. App. 288, 296, 980 P.2d 779 (1999)). The *Pande Cameron* court noted other holdings to the same effect: “[c]ircuity of travel shall not be a compensable item of damage.” *Pande Cameron* at 1303 (citing *Walker v. State*, 48 Wn.2d 587, 590-91, 295 P.2d 328 (1956) (deprivation of the most “direct and convenient” access to property is insufficient to maintain an inverse condemnation action); *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 366, 324 P.2d 1113 (1958) (affirming trial court summary judgment dismissal

notwithstanding that street vacation imposed a new route that was less convenient and depreciated the value of owner's property).

2. Lack of standing is a legal bar to Gibson's claims because Gibson's claimed injury is no different in kind from that of others in the nearby vicinity.

Washington courts have dismissed these kinds of claims as a matter of law for lack of standing. *See, e.g., Hoskins v. City of Kirkland*, 7 Wn. App. 957, 503 P.2d 1117 (1972) (summary judgment dismissal proper where plaintiff had no standing to sue as damaged abutting property owner); *Mackie v. City of Seattle*, 19 Wn. App. 464, 468-70, 576 P.2d 414 (1978) (trial court reversed and action dismissed where plaintiff lacked standing for claim arising out of street closure).

These decisions are based on the inability of an owner to show an injury different in kind compared to the general public. Where a plaintiff's business and its customers still had access to the property, the court in *Mackie* found it irrelevant that access was deflected "a few blocks" because this did not raise the plaintiff's inconvenience "to the status of a special injury not suffered by the general public." *Mackie*, 19 Wn. App. at 469. Similarly, where a landowner retained an alternate mode of ingress or egress to the land in question, even if less convenient, the owner was held to have sustained damage "not different in kind even though different in degree from that suffered by others [and] has no legal

basis for complaint.” *Hoskins*, 7 Wn. App. at 960; *see also Ponischil*, 41 Wash. at 308 (impairment of access, to be compensable, must be different in kind from effect on the public at large who may be inconvenienced).

The Gibson apartment complex is not the only structure situated along Wilbur. Private residences, a mobile home park, and a different apartment complex, as well as other land uses, exist north of the Gibson apartments. These uses were all affected by the roundabout in the same manner. CP 73. According to Mr. Gibson’s testimony:

Q: Would the change in access dictated by the change in traffic regulation at Montgomery, Wilbur and Mansfield also have a similar effect to the apartment complex that’s located northeast of Montgomery Court Apartments?

A: What do you think?

Q: I’m asking you.

A: I would say so, yes, sir. CP 74.

The roundabout caused a change in traffic that would be common to all the tracts of land on Wilbur north of the apartment complex. CP 75.

No action exists when a person claims damages as a result of changes in traffic patterns that are different only in degree, and not in kind, relative to other property owners. *See Ponischil*, 41 Wash. at 308 (street vacated and closed as cul-de-sac did not result in special damages

where “the only real complaint is that by vacating of the street away from her lots the course of travel is changed”); *see also Hoskins*, 7 Wn. App. at 961-66 (plaintiffs failed to establish special damages “different in kind and not merely degree” from that sustained by the general public); *Mackie*, 19 Wn. App. at 469 (“the fact that access is deflected a few blocks” did not differ from inconvenience to the general public); *Capitol Hill Methodist Church*, 52 Wn.2d at 365-66 (where alternate route is available “although perhaps it is not quite so short a way nor as convenient, it is almost universally held that [plaintiff] does not suffer such a special injury as entitles him to damages.”)

The above-cited cases and the facts presented here differ significantly in that the former involved substantially *more* restrictive traffic control measures than the roundabout. In the earlier cases, the traffic restrictions included outright road closures (*Ponischil* and *Mackie*) and the vacating of public roadways (*Capitol Hill Methodist* and *Hoskins*).

Standing to raise a takings claim does not turn on the reasonableness or necessity of the traffic regulation. It depends on whether the impact of the regulation is shared by the general public or, instead, is borne by the plaintiff alone. *See Ponischil*, 41 Wash. at 308-09 (owner abutting street that was vacated had no claim).

Gibson argues that he suffered a particular plight because the apartments rely on drive-by traffic for rental income. But this is precisely what is prohibited by the “difference of degree and not of kind” rule. Gibson may be affected by the roundabout to a *degree* that is different from an individual who owns a space in the nearby mobile home park but Gibson has not been affected in a different *manner*.

A contrary rule would allow an inverse condemnation action to be brought by every person with access along Wilbur north of the roundabout. A trial would be necessary to determine the degree of damage for each such person. Meanwhile, other businesses near the roundabout have presumably benefitted from the increased efficiency in traffic flow between Pines and Montgomery. But none of these considerations are legally significant.

Gibson’s real claim is that Gibson is affected by the roundabout more than other persons along Wilbur. But no property owner has a right to a certain form of traffic regulation. Each person has a legally recognized right of access on and off property. The roundabout had literally no effect on any persons regarding this right.

3. No different result is required due to the fact that the apartments abut Montgomery.

The property's status abutting Montgomery does not render any damages different *in kind*. The apartment parcel has never had direct access to and from Montgomery in any event. The roundabout caused no change. There was no direct access before the roundabout was built. *See Kelly*, 2011 WL 1868182 at *4 (“Despite plaintiffs’ claim that they had ‘direct’ access to SR 20 prior to construction of the roundabout, access to the main road has always been indirect.”)

Gibson attempts to relate this case to *Fry v. O’Leary*, 141 Wash. 465, 252 P. 111 (1927). But Gibson is wrong to claim that *Fry* found “that an abutting property owner has a property interest to the full length of a street....” Br. 16.

Gibson argues that *Fry* supports a property right not just to ingress and egress, but also to be free from road alterations along the entire abutting way. The problem is that *Fry* says no such thing. Instead, the holding of *Fry* is that a property owner’s right of access extends “to the full *width* of the street....” *Fry*, 141 Wash. at 470 (emphasis added).

In *Fry*, a portion of the street adjacent to the lot of Mr. and Mrs. Fry was vacated so that a garage placed in the street could be permitted. *Id.* at 466-67. This left Mr. and Mrs. Fry with half the street width they

had formerly benefitted from, with a commensurate loss of light, air, and view. *Id.* at 470. The court also noted that if compensation were not allowed under these facts, then a state or municipality might be allowed to “cut the street down to a width of ten or fifteen feet....” *Id.* at 472.

Gibson misuses *Fry*. Gibson claims that *Fry* is similar to this case because, according to Gibson, in both cases direct access between the thoroughfare and the property never existed. Br. 17. This is not true. In *Fry*, Mr. and Mrs. Fry indeed had direct access to the affected road (Garfield Ave.); the unique aspect of *Fry* was that the garage, and the vacated portion of Garfield, was on the side of the road opposite the Fry residence. *Id.* at 466. When the width of Garfield was reduced directly in front of the Fry residence, the Frys were entitled to compensation. Gibson has *never* had direct access to Montgomery. And Wilbur itself has not been altered.

Professor Stoebeck correctly describes *Fry* as holding that vacation of a half street in front of an owner’s parcel is compensable because of the “rule that an easement of access extend[s] to the full width of the street.” 17 William B. Stoebeck & John W. Weaver, *Washington Practice Real Estate: Property Law* § 9.11 (2011). Here, the roundabout did not cause the vacating of one-half of the width of Wilbur. It also did not cause a

private improvement to be placed in the public right-of-way adjacent to the apartment complex's point of access to Wilbur.

Gibson also relies on *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977), for Gibson's formulation of the "abutting property owner rule." Br. 18-20. Gibson argues that "*Kieffer* [sic] lends direct support to Gibson's claims here as an abutting property owner." Br. 20. According to Gibson, because the apartments are "now completely inaccessible from Montgomery," and because access to the apartment parcel "has been totally eliminated in the case of Montgomery," *Keiffer* requires that compensation be paid. Br. 20.

Gibson is persistently incorrect regarding deprivation of access from Montgomery. Gibson is also wrong in reading *Keiffer* to support compensation for alterations of access.

Keiffer does not hold that an abutter's property interests are materially different from the property interests of a non-abutter in cases where there is no effect on access other than as a result of traffic regulation devices. *See Keiffer*, 89 Wn.2d at 372-73.

In *Keiffer*, the court determined that the right of access had been damaged because an "existing two-lane road was widened to four lanes and curbs were erected on the edge of the improved road...." *Id.* at 370. The court noted that this directly interfered with the right of access

because “[b]efore the improvements, respondents had access to their property at all points along their frontage....” *Id.* After the improvements, “respondents’ access was limited to two curb cuts approximately 32 feet long located near each end of the frontage. The placement of the curbing and location of these cuts restricted the use of the strip of property....” *Id.* at 371. Because the new curbing “actually interfered” with the right of access, the question of substantial impairment of access went to the issue of damages, and not liability. *Id.* at 372-73.

The degree of impairment was a question of fact. *Id.* at 374. But this conclusion followed the initial question, as a matter of law, of whether the right of access had been affected at all. *Id.* at 373 (“Where, as here, the court determines the right of access has been damaged, the degree of damages is the pivotal issue....”)

In the present case, the roundabout did not alter anything regarding the point of access between the apartments and Wilbur. Gibson’s case fails the first test of the *Keiffer* analysis. The second step (the degree of damage) is never reached.

The two-step analysis of *Keiffer* (first, determination as a matter of law on question of liability, second question of fact as to damages) was neatly summarized in *Pande Cameron*:

Relying on *Keiffer*, Plaintiffs seem to assert that all right of access takings claims must go to a trier of fact. However, *Keiffer* set forth a two-step inquiry. The first step is to determine if the government action in question has actually interfered with the right of access as that property interest has been defined by Washington law. *Keiffer*, 89 Wash.2d at 372, 572 P.2d 408. This is a question of law that may be resolved at summary judgment. *Pande Cameron*, 610 F. Supp. 2d at 1304 n. 2.

Further insight can be gained by reviewing two cases approvingly cited by *Keiffer*. See *Keiffer*, 89 Wn.2d at 374 (citing *People ex rel. Dep't of Public Works v. Ayon*, 54 Cal. 2d 217, 352 P.2d 519 (1960), cert. denied, 364 U.S. 827, and *Phoenix v. Wade*, 5 Ariz. App. 505, 428 P.2d 450 (1967)).

In *Ayon*, the California Supreme Court considered a fact pattern similar to the present. The court held that even substantial damage to property attributable to the rerouting or diversion of traffic is not compensable. *Ayon*, 54 Cal. 2d at 223. The court described the resulting loss of business or loss of value as “simply a risk the property owner assumes when he lives in modern society under modern traffic conditions.” *Id.* at 223.

In *Ayon*, a road improvement project had the effect of requiring drivers to travel a more circuitous route to reach a supermarket. *Id.* at 221.

A new connecting street was built between an existing street directly abutting the supermarket parcel and a separate nearby arterial. *Id.* at 221-22. Traffic that could formerly access the supermarket parcel in both directions was restricted to access only in a southbound direction from the new connector street and, separately, by means of entirely different streets terminating in an alley access point on the west side of the parcel. *Id.* at 221. As a result, customers who formerly traveled north on the main arterial abutting the supermarket were no longer able to do so, but access was retained for vehicles traveling in a southbound direction along the new connector and via the alley access point. *Id.* at 223.

Because “direct access to through traffic in one direction still exists[,]” the court affirmed the trial court’s decision that no damages could be recovered. *Id.* at 225. It was of no significance to the outcome that the supermarket parcel abutted the improved street.²

Keiffer also approvingly cited a decision from Arizona in which the corner of an abutter’s property was “rounded off, and a triangular piece approximately 10 feet across was taken for road purposes.” *Phoenix*

² The court noted with interest that the property owner had accepted \$1,500.00 as full compensation for the property actually acquired as part of the road improvement project. *Id.* at 226. This may be compared with the present case, in which Gibson accepted \$69,000 as “full, complete, and final payment and settlement for the title or interest conveyed” and agreed that said amount “constitutes the entire consideration for the grant of said Right of Way and shall relieve the Department of further obligations or claims resulting from planning and construction of the proposed project.” CP 279-80.

v. *Wade*, 5 Ariz. App. 505, 507, 428 P.2d 450 (1967). The *Wade* court observed that “[i]n the proper exercise of its police power in the regulation of a traffic, a city, state or county may do to an abutting property owner many things which are noncompensable....” *Id.* at 508.

The *Wade* court rejected the argument that “the landowner has a right of access to his land at all points in the boundary between it and the highway.” *Id.* at 509. In reaching this ruling, the court also held that “[t]he determination of whether such material impairment has been established must be reached as a matter of law.” *Id.*

The property owner’s status as an abutter was not legally sufficient to justify compensation. *Id.* at 507. This was true even though the project prohibited parking adjacent to the owner’s property, prevented traffic from making a left turn into the property, and required that vehicles back out onto the street in order to exit the property. *Id.* at 507. Testimony regarding the effect of these changes was allowed at trial. *Id.* at 509-10. Because this testimony supported an improper measure of damages, the trial court was reversed. *Id.* at 510.

Gibson’s “abutter” argument depends on premises that are unsustainable. Gibson cannot prevail by claiming a right to preserve the former turning motion. He also cannot prevail under the more subtle premise that he has “lost” something as an abutter to Montgomery because

his parcel has never had direct access on and off Montgomery. He has never had an entitlement to access at all points along the boundary between his land and Montgomery.

4. *Union Elevator* does not support Gibson's claims.

In *Union Elevator*, this Court held that plaintiffs must show “more than mere inconvenience at having to travel a further distance to [their] business facility.” *Union Elevator & Warehouse Co., Inc. v. State*, 96 Wn. App. 288, 296, 980 P.2d 779 (1999). Because of the highway reconfiguration in *Union Elevator*, plaintiffs’ isolated rural property was reachable only at the end of a long and tortuous cul-de-sac. *Union Elevator*, 96 Wn. App. at 291.

The roundabout has not limited Gibson to access at the end of a cul-de-sac. Access to the apartments does not require negotiating steep grades, blind turns, and active mainline railroad tracks. *Id.* at 291. The urban nature of the area surrounding the apartments is unlike the remote access limitations of *Union Elevator*. The Court noted that *Union Elevator* was a “fact-driven” case and the chief fact cited was that “the East Lind facility is the only business affected by the road closure.” *Id.* at 295. This fact is not true as regards Gibson’s apartments.

Moreover, the result in *Union Elevator* also turned, in part, on the terms of RCW § 47.52.080. *Id.* at 294-95. This statute, which provided

compensation in cases arising out of creation of a limited access highway, has no applicability here.

5. No other cases support Gibson's claims.

To bolster the argument based on *Union Elevator*, Gibson refers to two Massachusetts cases that have never been cited in a reported Washington decision. Br. 28. In *Malone v. Commonwealth*, 378 Mass. 74, 84, 389 N.E.2d 975 (1979), a trial court decision was reversed and judgment granted to the Commonwealth. Compensation was awarded in error where the road relocation did not landlock the plaintiffs' property and vehicular access to the public highway system was preserved. The court noted that "the loss of value was not compensable" and that "numerous jurisdictions would join us in reaching the result portended here." *Malone*, 378 Mass. at 81.

Gibson's reference to *Stop & Shop Companies, Inc. v. Fisher*, 387 Mass. 889, 444 N.E.2d 368 (1983) is meaningless since *Stop & Shop* is a peculiar public nuisance case arising out of a tugboat accident. The case says nothing about access relating to government road improvements.

Gibson's remaining authority is not persuasive. Gibson's reference to *London v. Seattle*, 93 Wn.2d 657, 611 P.2d 781 (1980) is of little value because *London* is not an inverse condemnation case. In *London*, the court reviewed the validity of a local ordinance vacating a

street. *London*, 93 Wn.2d at 658. It is true that the *London* court also mentioned concepts regarding compensation, but did so in a manner consistent with the City's arguments here. Thus: "...an abutter suffering damage peculiar to himself because of a street vacation is entitled to recover compensation." *Id.* at 663. The *London* court did not actually address whether the owner was entitled to damages at all ("if any"), but only held that the owner was not entitled to injunctive relief. *Id.* at 664-65.

Here, there has been no street vacation and Gibson cannot show damage of a different kind than that of other property owners along Wilbur.

Other cases cited by Gibson involve traffic regulations that impact existing, direct access *on and off* (rather than *to and from*) the property in question.

In *Dockstader v. City of Centralia*, 3 Wn.2d 325, 327, 100 P.2d 337 (1940), a city construction project raised the level of the street in front of the plaintiff's business by 12 feet, which "blocked and cut off for all practical purposes access [to the property]...." In *E. G. McMoran v. State*, 55 Wn.2d 37, 345 P.2d 598 (1959), the state installed a concrete curb along the entire frontage of the plaintiff's property, thereby entirely precluding access from the property to the abutting thoroughfare. The

only available point of access to the abutting road was an opening in the curb located 30 feet beyond the termination of the plaintiff's property. *E.G. McMoran*, 55 Wn.2d at 38.

Gibson cites *State v. Kodama*, 4 Wn. App. 676, 483 P.2d 857 (1971). But this case fits the same pattern. In *Kodama*, the property owners' 12-unit apartment building was accessed solely by means of a paved easement road. *Id.* at 676. A limited access highway was designed to be built in a manner that would cut off the easement road. *Id.* The court found that the state, with its proposed new highway, appropriated the formerly-existing easement road. *Id.* at 679. The appropriation of the easement was a compensable taking of a property interest. *Id.*

Here, there is no easement affected by the roundabout. By contrast, in *Kodama*, the easement was an actual property interest taken.

These cases bear no factual similarity to the present.

E. No promissory estoppel claim existed in this case but, if one did, Gibson voluntarily dismissed it.

Gibson argues that his claim for equitable relief against the City in the form of promissory estoppel should have survived summary judgment. Br. 29. In support of promissory estoppel, Gibson cites well-known authority such as *Restatement (Second) of Contracts* § 90 (1981) and

Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 616 P.2d 644 (1980).

1. Gibson never raised a promissory estoppel claim.

No promissory estoppel theory was ever stated in Gibson's complaint. *See* First Amended Complaint. CP 22-29. Gibson never asserted a promissory estoppel theory at summary judgment at any stage. No such argument was raised: 1) in Gibson's pleadings in response to the City's motion for summary judgment (CP 621-41); 2) in Gibson's own summary judgment pleadings (CP 592-613); or 3) in Gibson's motion for reconsideration following the trial court's summary judgment ruling. CP 807-16. The authority Gibson cites here was not cited to the trial court.

The City sought summary judgment on Gibson's claims for inverse condemnation, misrepresentation, and equitable relief. CP 325-27. Gibson responded to the City's motion and sought summary judgment against the City on the inverse condemnation claim and with respect to certain construction-related damages. CP 592-613. At summary judgment, Gibson's claim for injunctive relief sought an order compelling the City to modify the roundabout. CP 639-40.

In a memorandum opinion, the trial court considered the issues of inverse condemnation, misrepresentation, and equitable relief. CP 795. The claim for inverse condemnation (Gibson's first cause of action) failed

as a matter of law. CP 27, 796. The claim for equitable relief (third cause of action) failed as well. The court reasoned that if the inverse condemnation was not actionable then there was no basis to grant an injunction to compel the City to modify the roundabout. CP 27-28, 796.

The misrepresentation claim (second cause of action) was denied because questions of fact were unresolved. CP 796. The claim for construction-related damages (fourth cause of action) was not addressed. CP 795-96.

After summary judgment, two claims were preserved (misrepresentation and construction damages) and two were dismissed (inverse condemnation and equitable relief to enjoin the operation of the roundabout). CP 823-24. There was no objection to the City's proposed order to this effect. *Id.*

2. After summary judgment, Gibson dismissed all remaining claims in this action.

There was no stipulation to dismissal. Gibson sought dismissal unilaterally under CR 41(a)(1)(B). CP 846. This rule operates to dismiss an entire action and not fewer than all claims then existing. *See Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1392 (9th Cir. 1988) (no unilateral dismissal of single claims in multi-claim lawsuit).

A key problem with Gibson's present argument is that it misperceives the disposition of his (latent) promissory estoppel claim. It was not dismissed by the trial court on summary judgment. It was voluntarily dismissed by Gibson himself.

For Gibson to now argue that the trial court failed to evaluate the elements of a claim for promissory estoppel requires application of the "invited error" doctrine. *See State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (error of "whatever kind" committed at a party's invitation may not be complained of by that party on appeal). The doctrine of implied error applies when a party takes affirmative and voluntary action that induces the error the party later challenges on appeal. 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice, Handbook on Civil Procedure* § 88.4 (2012).

The trial court record shows that Gibson was perfectly well aware that the only claims affected by the summary judgment related to inverse condemnation and an injunction to alter the roundabout. Whatever remained of Gibson's case, particularly including the misrepresentation claim, was voluntarily dismissed *after* Gibson took full opportunity of his chance to ask for reconsideration. CP 807-16. Nowhere did Gibson assert "promissory estoppel."

Gibson's voluntary dismissal of all remaining claims is impossible to reconcile with his arguments on appeal. The gravamen of his promissory estoppel argument relates to the alleged conduct of the City regarding negotiations for a new point of access to the apartments on Montgomery. Br. 32-33. Identical allegations were leveled at the City as part of Gibson's misrepresentation claim, which Gibson knowingly and voluntarily abandoned. *See* First Amended Complaint at ¶ 26. CP 27.

The trial court's disposition of claims on summary judgment did not encompass any un-pleaded and inchoate promissory estoppel theory because no such claim existed. Even if it did, Gibson's awareness of his own claims and his voluntary dismissal of the entire action extinguished what was left of the case.

Gibson's voluntary dismissal ended both the misrepresentation claim and the claim for damages due to construction activities. If Gibson ever had a claim to promissory estoppel, that claim was surrendered as well. Gibson's claimed error is not attributable to the actions of the trial court.

The idea of a latent, wrongfully dismissed promissory estoppel claim should also be rejected for ordinary reasons of waiver. A party will be deemed to have waived an asserted error if the party ignored an opportunity to assert the issue before the trial court. *Erickson v. Robert F.*

Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 192, 883 P.2d 313 (1994). This rule is directly applicable here. Gibson claims on appeal that the trial court wrongfully dismissed the promissory estoppel claim, but Gibson argued nothing about promissory estoppel in the summary judgment briefing. See *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483-84, 78 P.3d 1274 (2003) (issue not considered on appeal where appellant failed to brief issue in opposing summary judgment).

Gibson did nothing to raise this issue or seek correction of the trial court's summary judgment order when Gibson argued various grounds for reconsideration. See, e.g., *Delaney v. Canning*, 84 Wn. App. 498, 509, 929 P.2d 475 (1997) (failure to seek correction of claimed erroneous order constituted waiver); *State ex rel. D.R.M.*, 109 Wn. App. 182, 202-03, 34 P.3d 887 (2001) (where record did not indicate that party attempted to pursue claim below, dismissal not properly before appellate court).

Because of Gibson's silence on this point below, Gibson also cannot now argue that further assertion before the trial court of the allegedly erroneous dismissal of the promissory estoppel claim was a useless act. See *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99, 933 P.2d 1036 (1997). Most simply, an issue expressly abandoned by a party at the trial level will not be addressed on appeal. *Hollenback v. Shriners Hospitals for Children*, 149 Wn. App. 810, 822, 206 P.3d 337

(2009) (issue waived by being abandoned in summary judgment proceedings).

F. Gibson has no automatic entitlement to attorney fees.

Although somewhat unclear, Gibson appears to argue that an award of attorney is proper should this Court remand for trial. Br. 33-34.

However, this conclusion is not warranted under the sole authority Gibson cites, RCW § 8.25.075(3). That statute makes an award of fees dependent on the offer history of the parties at a point thirty days prior to trial. In the event of remand, the statute will have whatever force is warranted by then-existing circumstances. On this issue, no ruling is appropriate for this Court at this time.

V. CONCLUSION

For the foregoing reasons the trial court's entry of summary judgment and final judgment in favor of the City should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of October, 2012.

Menke Jackson & Beyer, LLP

By:



Kenneth W. Harper, WSBA # 25578

Attorneys for Respondent
City of Spokane Valley

Appendix A

(color images, as filed with the
trial court, of selected Clerk's Papers)

What's Happening on Pines Road & Mansfield Avenue?

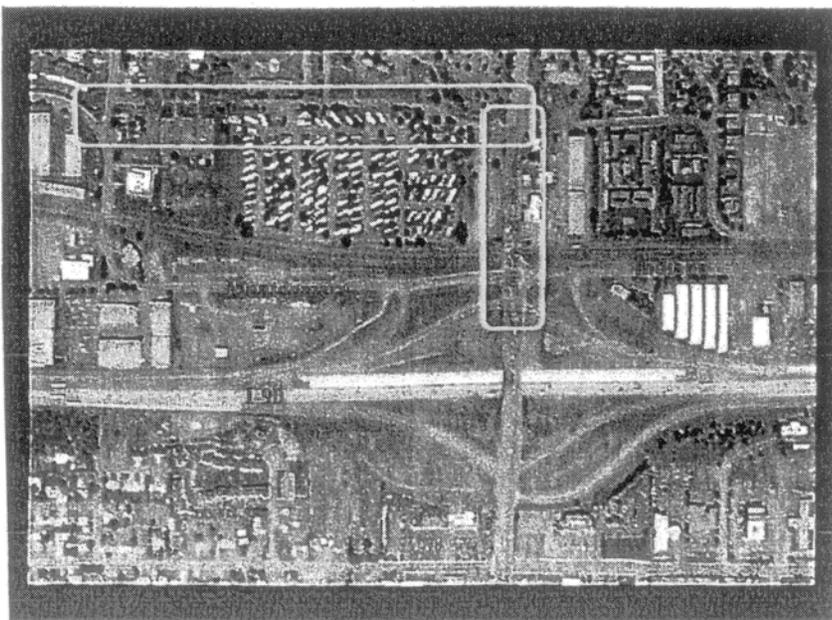
This project will widen Mansfield to a three-lane section (two travel lanes and a center left-turn lane) with bike lanes and sidewalks on both sides. Storm sewer pipes and drainage swales to accommodate the runoff from the road surface will be installed. Curb, gutter, sidewalks and bike lanes will also be constructed. Traffic signals will be constructed at the intersections of Indiana and Pines and Mansfield and Pines. A roundabout will be installed at the Mansfield/Wilbur/Montgomery intersection. West-bound I-90 on and off-ramps will be realigned. Pines Road will be widened between Indiana Avenue and Mansfield Avenue.



**CITIZENS ARE INVITED TO
ATTEND AN OPEN HOUSE
SCHEDULED FOR:**

**4:00 p.m. to 7:00 p.m.
Thursday, October 5, 2006**

**Small Dining Room at
CenterPlace
2426 North Discovery**



The public is encouraged to stop by for a look at preliminary plans and ask questions.

No formal presentation will be provided.

Google maps

To see all the details that are visible on the screen, use the "Print" link next to the map.



Montgomery County Apts - www.archstoneapartments.com - Move in with a 30-day Guarantee. Lease Online at a

Report a problem

Google maps

To see all the details that are visible on the screen, use the "Print" link next to the map.

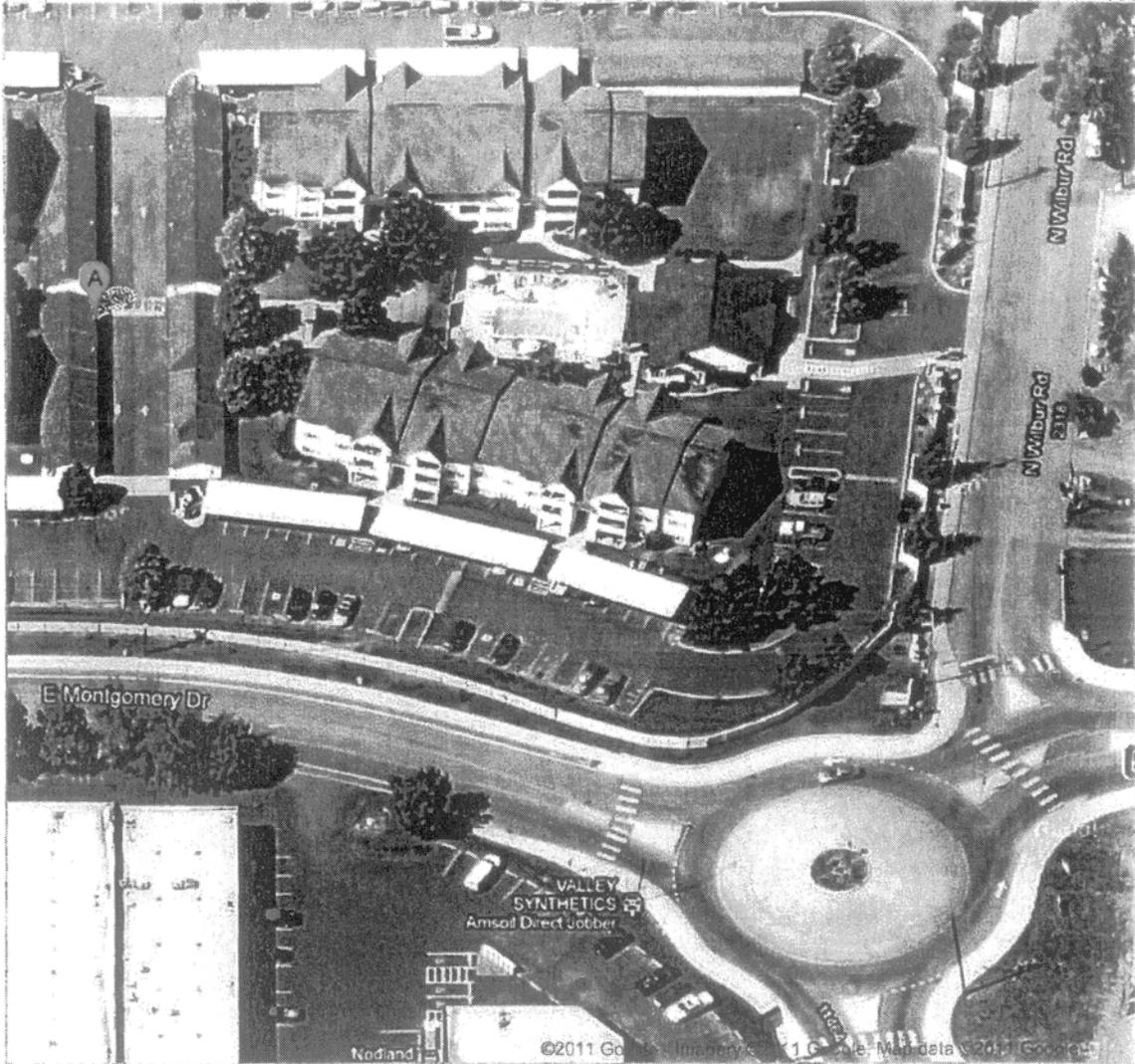


Montgomery County Apts - www.archstoneapartments.com - Move in with a 30-day Guarantee. Lease OnlineAd a

Report a problem

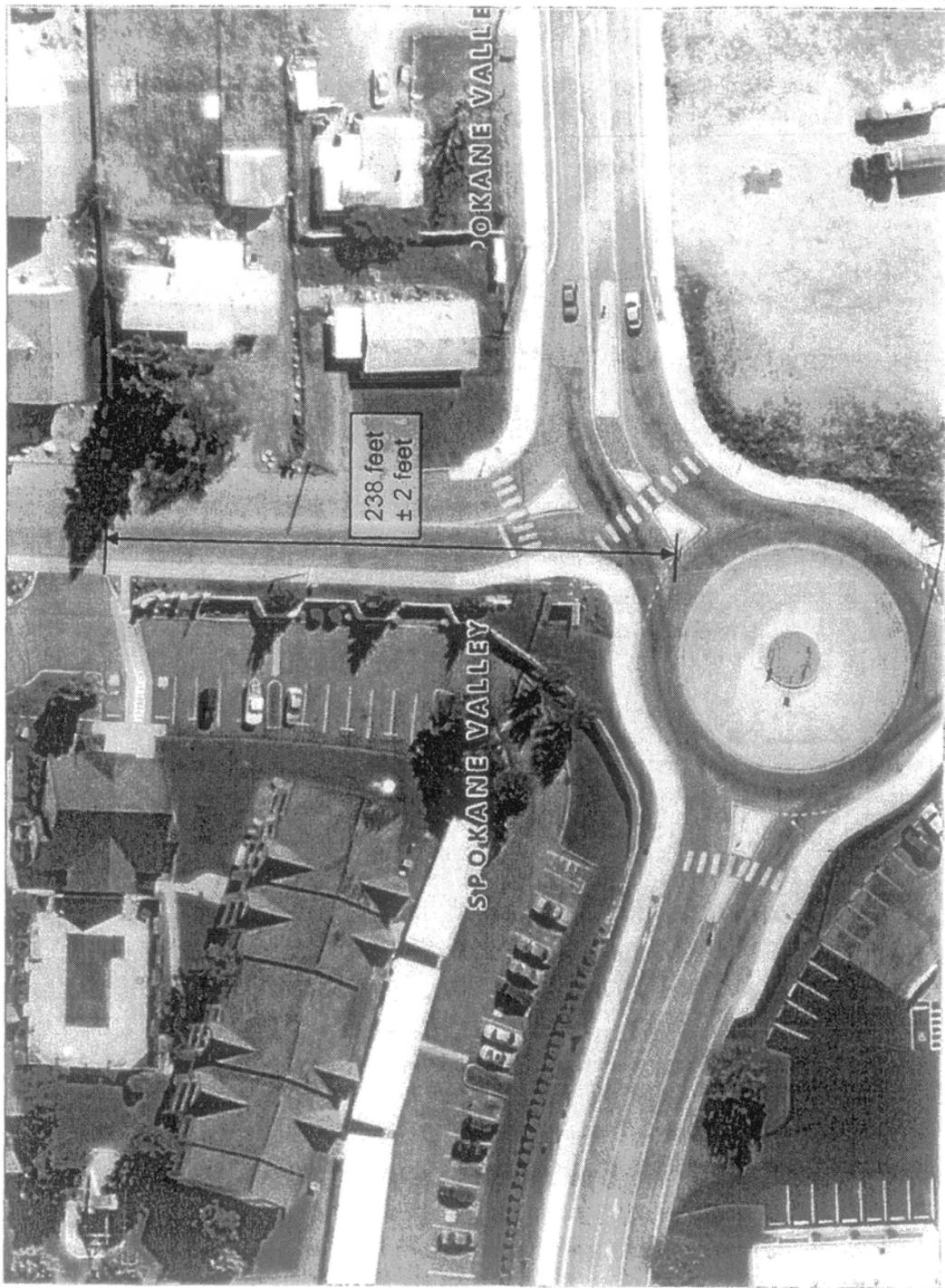
Google maps

To see all the details that are visible on the screen, use the "Print" link next to the map.

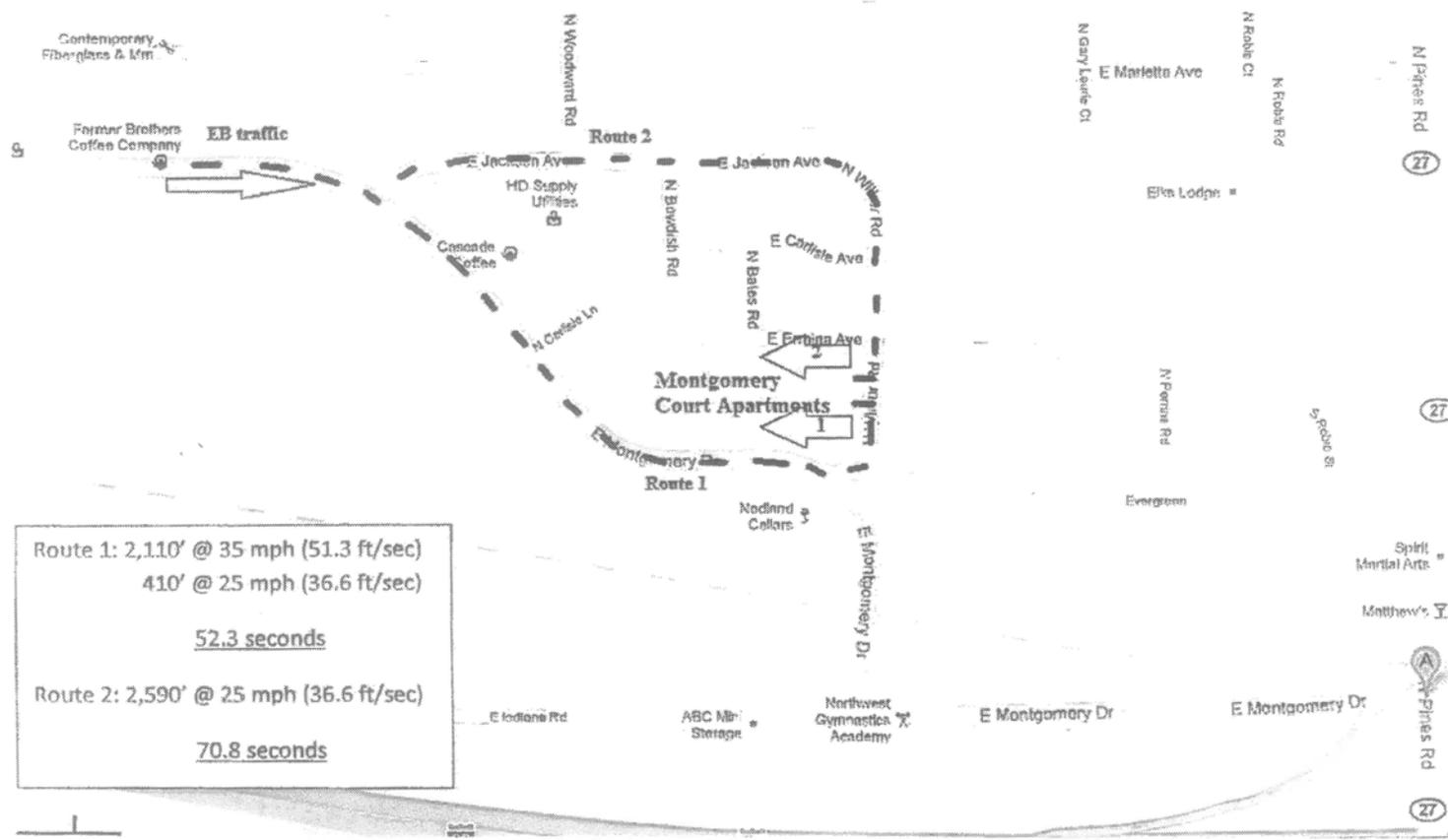


Montgomery apartment - www.apartmentguide.com - Search for Apartments Near you Directions, Maps, and Google

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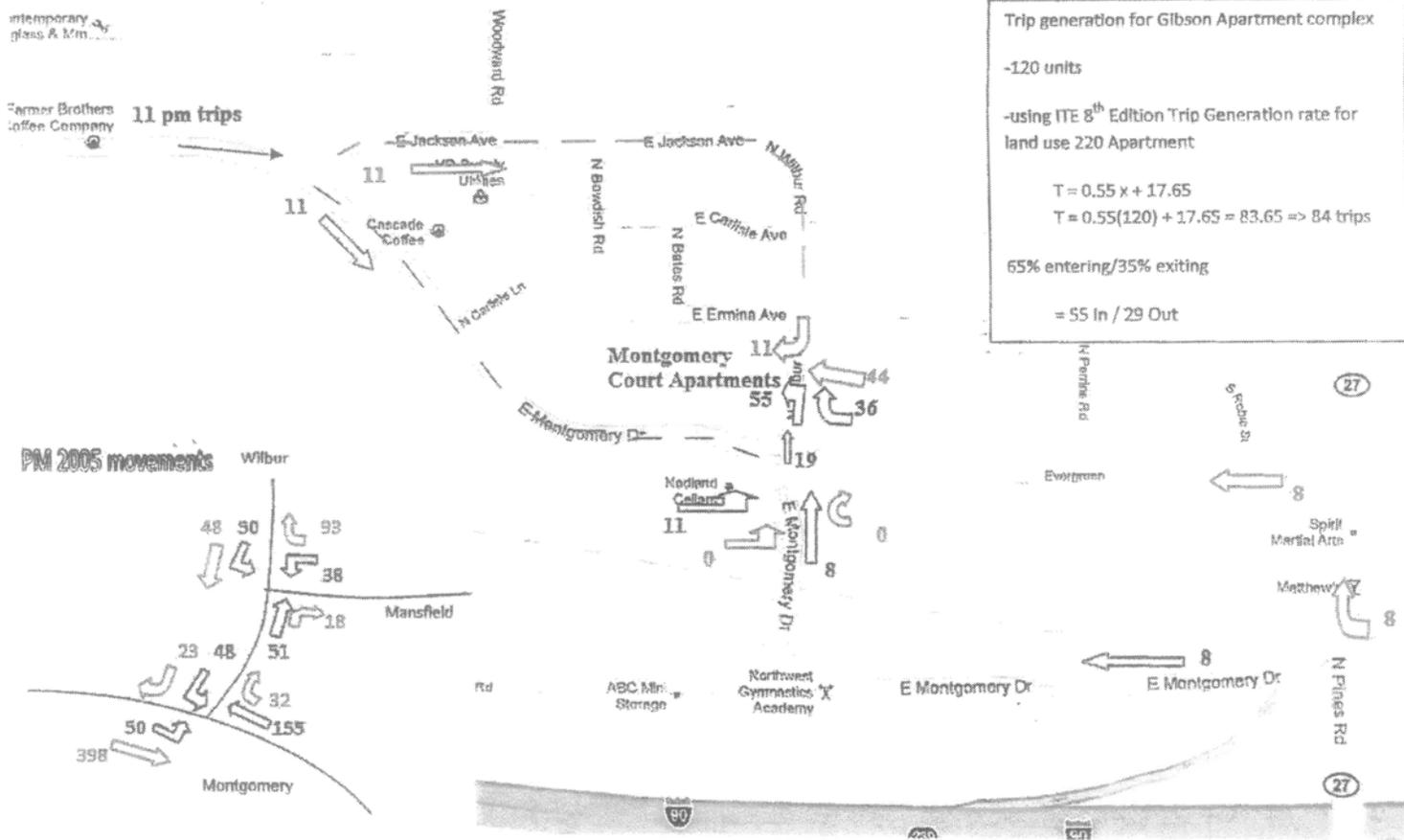


Difference in travel time



Note: This assumes left turn delay is about the same for each route, either turning from Montgomery to Jackson or from Montgomery to Wilbur.

Gibson Apartment Trips that switch to Route 2 or to Mansfield



Apartment complex generates 55 In/29 out during pm peak hour. Assumes that prior to installation of the roundabout all inbound apartment traffic passed through the intersection of Mansfield/Wilbur.

← = New design
 ⇐ = Old configuration