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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

83771-6

Case No. 273709

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

UNION ELEVATOR & WAREHOUSE COMPANY, INC., a Washington corporation,

Appellant,

v.

STATE OF WASHINGTON, by and through the Washington State Department of Transportation,

Respondent.

APPEALED FROM ADAMS COUNTY SUPERIOR COURT
CAUSE NO. 06-2-00215-0

BRIEF OF APPELLANT UNION ELEVATOR & WAREHOUSE COMPANY, INC.

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I. INTRODUCTION

Nearly 13 years after Union Elevator & Warehouse Company, Inc. ("Union Elevator") informally requested assistance from the Washington State Department of Transportation ("WSDOT") and seven years after it formally requested relocation assistance (May 2001), WSDOT finally reimbursed Union Elevator the moving expenses it incurred. However, it only did so after years of litigation and when ordered to do so by this Court. See Union Elevator v. State, 144 Wn. App. 593 (May 15, 2008).[1] The Opinion included an award of Union Elevator's attorney fees and costs on appeal and remanded the matter to the Trial Court for proceedings consistent with the Opinion.

With the underlying issue resolved in its favor, Union Elevator moved the Trial Court for an award of interest on the money that was wrongfully withheld from it since May, 2001 and the attorney fees and costs it was forced to incur as a result of WSDOT's unjustified conduct. Notably, the issue of relocation assistance and the fees incurred flow directly from WSDOT's exercise of eminent domain. The Trial Court denied Union Elevator's motion for interest based on WSDOT's claim

[1] For clarity, this opinion will be referred to as Union Elevator II.

of sovereign immunity and limited the award of attorney fees to $25,000.

As explained below, the Trial Court's decision is inconsistent with the constitutional protections provided to Washington citizens when their property is taken or damaged and Washington law enacted to make citizens whole. Consequently, Union Elevator respectfully requests that the Trial Court's ruling be reversed and Union Elevator awarded the additional attorney fees incurred and interest on the funds which were not timely reimbursed.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred by denying Union Elevator interest on the relocation assistance funds that WSDOT wrongfully withheld for seven years.

2. The Trial Court erred by failing to award Union Elevator all of the reasonable attorney fees and costs it incurred as a result of WSDOT's wrongful conduct.

3. The Trial Court erred by failing to find that WSDOT acted in bad faith.

4. The Trial Court erred by entering Finding of Fact Number 9.

III. ISSUES PRESENTED

1. When a Washington citizen is denied reimbursements which result from the condemnation of private property is he/she entitled to interest?

2. Did the State waive sovereign immunity in eminent domain related proceedings?

3. Do the eminent domain statutes provide a basis to award attorney fees and costs in eminent domain related proceedings?

4. Did WSDOT act in bad faith when it intentionally failed to follow the statutory requirements for providing relocation assistance?

5. Did equity demand that Union Elevator be awarded the attorney fees and costs WSDOT forced it to incur?

IV. STATEMENT OF THE CASE

As the Court is aware, this case has a long history. Beginning in 1996, WSDOT ignored its obligations and forced Union Elevator to seek relief from the Courts and its fellow citizens. See Union Elevator v. State, 96 Wn. App. 288 (1999) and Union Elevator v. State, 144 Wn. App. 593 (May 15, 2008). Union Elevator's more than 20 year battle to enforce its constitutional rights and to be provided consistent treatment by the State began in 1996 when Union Elevator discovered that WSDOT planned to destroy its reasonable, adequate and commercially practicable access. At that time, Union Elevator requested that

WSDOT provide it compensation and/or assistance with the amounts it would incur for a replacement facility. CP 56. However, WSDOT took the unsupportable position that Union Elevator was not entitled to either compensation or relocation assistance. In 1998 Union Elevator expended $459,000 to construct a replacement facility. Union Elevator II, 144 Wn. App at 598. Union Elevator was then forced to seek just compensation and relocation assistance through the legal system. Below is an overview of the battle WSDOT forced Union Elevator to endure.

1. **July 2, 1996** – On the advice of its lawyers, WSDOT refused to provide Union Elevator with compensation for taking Union Elevator's property or to provide any assistance with relocation expenses. ("*I have heard that your hope was the DOT could help in the cost of your new facility*"). CP 56.[2]

2. **January 12, 2001** – Following a remand from this Court, an Adams County jury confirmed that WSDOT took Union Elevator's

[2] Specific citations to the administrative record are included within the briefing cited to in the Clerks Papers.

access to the East Lind Facility without paying just compensation. CP 56.

3. **May 21, 2001** – Union Elevator submitted its formal claim for relocation assistance based on the jury's confirmation that its property rights had been taken. CP 57.

4. **June 13, 2001** – The Attorney General's Office directed WSDOT to ignore its obligation and to deny Union Elevator's relocation claim without providing any specific basis for the determination. WAC 468-100-207(7). WSDOT's attorneys incorrectly argued that Union Elevator was not displaced and was not entitled to relocation assistance. Id.

5. **January 17, 2003** – Judge McCarthy granted Union Elevator's Motion for Summary Judgment and entered a decision confirming that Union Elevator had been displaced and was entitled to relocation assistance. Once again, it was confirmed that the conclusions of WSDOT and its attorneys were wrong. Id.

6. **May 16, 2003** – Before seeing the equipment, the replacement site, or speaking with Union Elevator, WSDOT's staff

continued to ignore its obligations and drafted "*Claim #1 – Review*" based only on conversations with WSDOT's attorneys. Id.

7. **April 29, 2004** – After being forced to finally consider Union Elevator's claim, WSDOT's staff denied 82% of the claim without any factual basis. Out of Union Elevator's claim of $336,934.41, WSDOT only agreed to provide assistance of $62,200. Union Elevator appealed and WSDOT again denied the appeal. CP 58.

8. **July 21, 2005** – Union Elevator was forced to incur the expense of an adjudicative hearing and judicial review in order to obtain the relocation assistance required by law. Notably, WSDOT was represented by the Attorney General's Office throughout this process. Id.

9. **August 10, 2005** – After the Adjudicative hearing went against it, WSDOT petitioned the head of the agency for review of Judge McCarthy's Proposed Decision and Order. Id.

10. WSDOT failed to timely review the Proposed Decision and Order.[3] More than a year after the Proposed Decision was issued,

[3] Indeed, from the start WSDOT ignored its statutory obligation to provide assistance in an expeditious manner. Thus, it has been more than a decade since Union Elevator was displaced.

WSDOT finally issued an arbitrary and self-serving Final Order. CP 31-49.

11. When that Order was reviewed, this Court confirmed that WSDOT's Final Order was improper and that its conduct was not substantially justified. The opinion also confirmed that Union Elevator was entitled to the final $235,000 in relocation assistance it had requested and an award of its attorney fees on appeal. Union Elevator II, 144 Wn. App. at 607-608.

Based on this Court's Opinion, WSDOT's conduct and Washington Law, Union Elevator moved the Trial Court for an award of the attorney fees and costs it incurred throughout the process and interest on the reimbursements that were wrongfully withheld from it for seven years. From the time that Union Elevator began its formal request for relocation assistance (2001) through July 6, 2008 Union Elevator incurred attorney fees totaling $118,025 as a result of WSDOT's refusal to provide the reimbursement required by law. CP 321; CP 334-360. In addition, although Union Elevator paid for the relocation in 1998, WSDOT's refusal to provide the reimbursement deprived Union Elevator of the use of $235,000 from the date the claim

was made (May 21, 2001) until the reimbursement was made as ordered by this Court (July 10, 2008). Interest at 12% on these funds totals $201,416.82. As explained below, Union Elevator's request for interest should have been granted and Union Elevator's attorney fee award should not have been limited to $25,000. CP 407-411.

V. ARGUMENT

A. Union Elevator Is Entitled To Interest On The Eminent Domain Relocation Assistance WSDOT Wrongfully Withheld.

The issue before the Court is not one that has been directly addressed by any Washington case. Namely, whether the government may claim sovereign immunity to avoid paying a citizen who has his/her private property taken by eminent domain interest on relocation assistance reimbursements wrongfully withheld. Indeed, WSDOT's position that sovereign immunity applies ignores the constitution and the specialized area of law at issue in this case. When the power of eminent domain is used, the founders from our State provided a self-executing constitutional right for citizens to pursue a cause of action against the State. WASH. STATE CONST. Art. I, § 16. Our legislature later expanded the damages recoverable to include reimbursement of

moving expenses. RCW 8.26 et seq. As a result, the State's sovereign immunity for eminent domain claims was waived.

1. The Legislature Provided An Express And/Or Implied Waiver Of Sovereign Immunity For Eminent Domain Proceedings.

In Washington, "*[p]rejudgment interest is favored in the law based on the premise that he who retains money he should pay to another should be charged interest on it.*" Universal/Land Constr. Co. v. Spokane, 49 Wn. App. 634, 641, 745 P.2d 53 (1987). While the right to prejudgment interest is well established in Washington, the interest at issue here goes beyond mere "prejudgment" interest. Instead, at issue are relocation assistance statutes that expanded the constitutional protections provided to landowners in Washington.

It has long been recognized that the legislative intent behind Washington's eminent domain statutes is to make whole citizens who have their property taken by the Government. State v. Lange, 86 Wn.2d 585, 589, 547 P.2d 282 (1979). ("[A] *condemnee is entitled to be put in the same position monetarily as he would have occupied had his property not been taken*"). To accomplish this, the legislature placed statutes in the eminent domain chapter requiring relocation

assistance for citizens who have their property taken by the government. RCW 8.26 et seq. The purpose of the Act is to "*establish a uniform policy of fair and equitable treatment of persons displaced...and to minimize the hardship of displacement on such persons.*" RCW 8.26.010(1)(a); Union Elevator II, 144 Wn. App. at 602. The relocation assistance statutes provide additional damages to citizens who have their property taken by eminent domain. This includes the right to be reimbursed for certain moving expenses. See RCW 8.26 et seq.

As this Court pointed out, it has been recognized that "*Congress indicated a willingness to depart from traditional methods of evaluating property because such methods result in inequitable treatment for many people displaced by public action.*" Union Elevator II, 144 Wn. App. at 607. In order to further these goals, the Legislature waived the State's sovereign immunity by specifically including relocation assistance as part of Washington's Eminent Domain Law. See RCW 8.04 et seq. - RCW 8.28 et seq. A review of the relocation assistance statutes within the Eminent Domain chapter confirms that the Legislature provided for either an express or implied waiver of sovereign immunity relating to

all damages a condemnee is entitled to recover relating to the taking of his/her private property. See e.g. RCW 8.28.040; and In Re Anacortes, 81 Wn.2d 166, 169 (1972)(Condemning authority is liable for interest once it takes possession). Thus, in this case Union Elevator should be awarded interest so it does not "*bear the burden of the state's highway project.*" Union Elevator II, 114 Wn. App. at 607.

2. Sovereign immunity does not bar the award of interest as part of the reimbursement.

Furthermore, in Sintra v. Seattle, 131 Wn.2d 640 (1997) the Supreme Court explained that sovereign immunity does not protect the government from the award of interest in eminent domain cases.

> *The City correctly points out that municipalities are generally immune from prejudgment interest. See Fosbre v. State, 76 Wn.2d 255, 456 P.2d 335 (1969). Here, however, the interest awarded is not prejudgment interest.* ***The interest awarded is part of the damages and is required as part of the just compensation. Therefore, we dispense with the City's immunity argument.***

Id. at 657 (emphasis added). Similarly, in this case interest is an extension of the damages WSDOT caused by taking Union Elevator's property. The Legislature specifically added moving expenses as a category of eminent domain damages in order to make citizens who

have their property taken whole. RCW 8.26.010. Although it provided for these amounts to be pursued through an administrative process, they are nonetheless an additional element of damages recoverable as the result of an eminent domain action. See e.g. Union Elevator II, 144 Wn. App. at 607("*..such methods result in inequitable treatment for many people displaced by public action*"). Consequently, the relocation assistance statutes provide for these damages to be determined based on the property owners being reimbursed for actual moving expenses. See RCW 8.26.035. Thus, the damages at issue are more like the compensation for loss of the use of property than mere "*prejudgment*" interest. See Sintra, 131 Wn.2d at 656.

Here, WSDOT withheld reimbursement from Union Elevator for seven years for expenses Union Elevator paid to move to its replacement facility. Thus, Union Elevator was deprived of the use of its funds for seven years. CP 322. These were funds that Union Elevator could have put to a beneficial use during that time. Sintra, 131 Wn.2d at 656 ("*We assume a person who received the money value of his or her property as of the date of the taking has a beneficial use available for these funds.*"). As a result, the interest at issue is "*not an*

award of prejudgment interest on a liquidated sum in the traditional sense, but is a measure of the rate of return on the property's owner's money had there been no delay in payment." Id. Therefore, it should be awarded in this case.

B. Union Elevator Is Entitled To Recover All Of The Attorney Fees It Incurred As A Result Of WSDOT's Wrongful Conduct.

Limiting its ruling on the Washington Equal Access to Justice Act, the Trial Court limited the Award of attorney fees and costs to $25,000. RCW 4.84.340 (Note)(1995)(Findings). However, it ignored the other basis upon which Union Elevator was entitled to an award of the attorney fees WSDOT forced it to incur over the last seven years.

1. As A Condemnee Union Elevator Is Entitled To An Award Of The Attorney Fees.

This dispute arises directly from WSDOT's taking of Union Elevator's private property rights. In other words, it is because of the condemnation proceeding. From March, 2001 through July 6, 2008 Union elevator incurred $118,025 in attorney fees as a result of WSDOT's refusal to provide it the reimbursement required by Washington law. CP 360. Nonetheless, the Trial Court limited the

award of attorney fees to $25,000 because it incorrectly found the only basis for an award of attorney fees was the Washington Equal Access to Justice Act. However, this ruling ignored the eminent domain statutes that provide for an award of attorney fees to a condemnee.

In Washington, attorney fees and costs may be awarded if authorized by contract, statute, or a recognized ground in equity. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004). The legal basis for an award is reviewed de novo. Schlener v. Allstate Insurance Co., 121 Wn. App. 384, 388, 88 P.3d 993 (2004). Under Washington law, condemnees are entitled to an award of attorney fees and costs incurred as a result of proceedings related to the condemnation of private property. See RCW 8.25.075; RCW 8.25.070; and WAC 468-100-105.

> ***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 to such plaintiff costs including reasonable attorney fees and reasonable expert fees****, but only if the judgment awarded to the plaintiff as a result of trial exceeds by 10 percent or more the highest written offer or settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.*

RCW 8.25.075(3)(emphasis added).

In this case, it is undisputed that this provision was triggered by the underlying inverse condemnation action. As a result, the Superior Court had authority to award Union Elevator attorney fees and costs it incurred pursuing the additional damages it was entitled to receive as a result of the taking. See RCW 8.26 et seq. That included the reimbursements required by the relocation assistance statutes. RCW 8.26.035. Nothing in RCW 8.25.075 limits the attorney fees awarded to those incurred in the inverse condemnation proceeding. Supra. Instead, the statute provides a trigger authorizing the Superior to award attorney fees.

A review of the applicable regulations confirm that these attorney fee statutes should be applied to a condemnee's litigation to obtain relocation assistance as well. For example, based on the authority of RCW 8.26 et seq. WSDOT adopted a regulation that provides for the award of attorney fees "*incurred because of a condemnation proceeding*..." WAC 468-100-104. Certainly, fees incurred to obtain relocation reimbursement caused by the taking of private property are incurred "*because of a condemnation proceeding*".

In addition, under the Relocation assistance statutory headings, RCW 8.26.210 refers to RCW 8.25.070 and RCW 8.25.075 to address the issue of attorney fees.[4]

WSDOT forced Union Elevator to bring an inverse condemnation action to receive payment for property which the State took. The jury confirmed that Union Elevator had its access taken. Nonetheless, when Union Elevator made its claim for relocation assistance the State argued that Union Elevator had not been displaced because it continued to claim it had not taken property. As a result, Union Elevator was forced to seek review of WSDOT's denial. Union Elevator prevailed with regard to the relocation assistance that resulted because of the condemnation proceeding. Therefore, pursuant to the above statutes and statutory scheme, Union Elevator is entitled to an award of the attorney fees and costs WSDOT forced it to incur to obtain its entitlement. Therefore, the Trial Court should have awarded Union Elevator all of the attorney fees and costs it incurred.

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[4] While not binding, this confirms the reasonableness of the interpretation of the Eminent Domain Chapters as a whole.

2. Equity Requires Union Elevator Be Awarded All Of The Fees WSDOT Forced It To Incur.

> *[I]t is within our inherent powers to award attorney fees on equitable grounds.* Public Util. Dist. No. 1 v. Kottsick, *86 Wn.2d 388, 389, 545 P.2d 1 (1976). We are at liberty to set the boundaries of the exercise of that power.* Weiss v. Bruno, *83 Wn.2d 911, 914, 523 P.2d 915 (1974).* ***We have already recognized that bad faith litigation can warrant the equitable award of attorney fees.*** Hsu Ying Li v. Tang, *87 Wn.2d 796, 798, 557 P.2d 342 (1976);* Kottsick, *86 Wn.2d at 390, 545 P.2d 1.*

Matter of Pearsal-Stipek, 136 Wn.2d 255 267 fn.6, 961 P.2d 343 (1998).

In this case, the Trial Court ignored the fact that WSDOT conducted itself in bad faith throughout this dispute. Indeed, a review of WSDOT's actions confirms that it acted in bad faith and that Finding of Fact No. 9 is not supported by substantial evidence.

1. The Trial entered a Finding that WSDOT "*has not shown that its actions were substantially justified*". CP 408.

2. WSDOT refused to follow its own regulations and at the direction of its lawyers denied Union Elevator's claim without providing any specific basis for the denial. CP 57; WAC 468-100-207(7).

3. WSDOT took the unsupportable position that Union Elevator was not displaced. CP 57.

4. Before it even viewed the equipment at issue, based on conversations with the attorney general who tried the

inverse condemnation case, WSDOT drafted a "claim review" denying the bulk of the claim. CP 57.

5. Despite regulations requiring it to expeditiously determine relocation assistance claims, when Judge McCarthy rendered her proposed decision on July 21, 2005, WSDOT did not enter a Final Order until August 24, 2006. More than a year later! CP 31.

A review of the history of this case and the conduct of WSDOT confirms that it acted in bad faith. As a result, the Trial Court's finding otherwise is not supported by the facts and equity demands that Union Elevator be awarded all of the attorney fees and costs it was forced to incur so that it does not bear a greater burden for WSDOT's project than other citizens.

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1, RCW 8.25.070, RCW 8.25.075, and equity; Union Elevator respectfully requests an Award of the reasonable attorney fees and costs incurred on Appeal.

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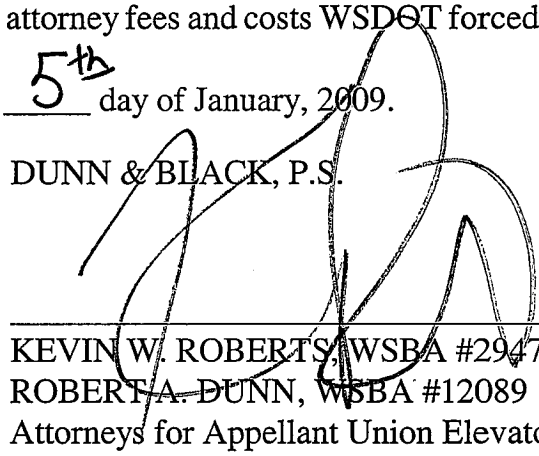
VII. CONCLUSION

Based on the extensive record of this matter and Washington law, Union Elevator respectfully requests that it be awarded interest and all of the reasonable attorney fees and costs WSDOT forced it to incur.

DATED this 5th day of January, 2009.

DUNN & BLACK, P.S.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of January, 2009, I caused to be served a true and correct copy of the foregoing document to the following:

- [x] HAND DELIVERY
- [ ] U.S. MAIL
- [ ] OVERNIGHT MAIL
- [ ] FAX TRANSMISSION
- [ ] EMAIL

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RCW 8.26.010

Purposes and scope.

(1) The purposes of this chapter are:

(a) To establish a uniform policy for the fair and equitable treatment of persons displaced as a direct result of public works programs of the state and local governments in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons;

(b) To encourage and expedite the acquisition of real property for public works programs by agreements with owners, to reduce litigation and relieve congestion in the courts, to assure consistent treatment for owners affected by state and local programs, and to promote public confidence in state and local land acquisition practices.

(2) Notwithstanding the provisions and limitations of this chapter requiring a local public agency to comply with the provisions of this chapter, the governing body of any local public agency may elect not to comply with the provisions of RCW 8.26.035 through 8.26.115 in connection with a program or project not receiving federal financial assistance. Any person who has the authority to acquire property by eminent domain under state law may elect not to comply with RCW 8.26.180 through 8.26.200 in connection with a program or project not receiving federal financial assistance.

(3) Any determination by the head of a state agency or local public agency administering a program or project as to payments under this chapter is subject to review pursuant to chapter 34.05 RCW; otherwise, no provision of this chapter may be construed to give any person a cause of action in any court.

(4) Nothing in this chapter may be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately before March 16, 1988.

[1988 c 90 § 1; 1971 ex.s. c 240 § 1.]

Notes:

Section captions -- 1988 c 90: "Section captions and part divisions in this act do not constitute any part of the law." [1988 c 90 § 19.]

RCW 8.28.040

Interest on verdict fixed — Suspension during pendency of appeal.

Whenever in any eminent domain proceeding, heretofore or hereafter instituted for the taking or damaging of private property, a verdict shall have been returned by the jury, or by the court if the case be tried without a jury, fixing the amount to be paid as compensation for the property so to be taken or damaged, such verdict shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020 from the date of its entry to the date of payment thereof: PROVIDED, That the running of such interest shall be suspended, and such interest shall not accrue, for any period of time during which the entry of final judgment in such proceeding shall have been delayed solely by the pendency of an appeal taken in such proceeding.

[1984 c 129 § 2; 1943 c 28 § 1; Rem. Supp. 1943 § 936-4.]

RCW 8.26.035

Payment for moving and related expenses.

(1) Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the displacing agency shall provide for the payment to the displaced person of:

(a) Actual reasonable expenses in moving himself or herself, or his or her family, business, farm operation, or other personal property;

(b) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate the property, in accordance with criteria established by the lead agency;

(c) Actual reasonable expenses in searching for a replacement business or farm; and

(d) Actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, in accordance with criteria established by the lead agency, but not to exceed fifty thousand dollars.

(2) A displaced person eligible for payments under subsection (1) of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection (1) of this section may receive an expense and dislocation allowance determined according to a schedule established by the lead agency.

(3) A displaced person eligible for payments under subsection (1) of this section who is displaced from the person's place of business or farm operation and who is eligible under criteria established by the lead agency may elect to accept the payment authorized by this subsection in lieu of the payment authorized by subsection (1) of this section. The payment shall consist of a fixed payment in an amount to be determined according to criteria established by the lead agency, except that the payment shall be not less than one thousand dollars nor more than twenty thousand dollars. A person whose sole business at the displacement dwelling is the rental of that property to others does not qualify for a payment under this subsection.

[2003 c 357 § 1; 1988 c 90 § 3.]

Notes:

Section captions -- 1988 c 90: See note following RCW 8.26.010.

RCW 4.84.340

Judicial review of agency action — Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 4.84.340 through 4.84.360.

(1) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.

(2) "Agency action" means agency action as defined by chapter 34.05 RCW.

(3) "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of a study, analysis, engineering report, test, or project that is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees. Reasonable attorneys' fees shall be based on the prevailing market rates for the kind and quality of services furnished, except that (a) no expert witness shall be compensated at a rate in excess of the highest rates of compensation for expert witnesses paid by the state of Washington, and (b) attorneys' fees shall not be awarded in excess of one hundred fifty dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(4) "Judicial review" means a judicial review as defined by chapter 34.05 RCW.

(5) "Qualified party" means (a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141J(a)), may be a party regardless of the net worth of such organization or cooperative association.

[1995 c 403 § 902.]

Notes:

Findings -- 1995 c 403: "The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights." [1995 c 403 § 901.]

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

RCW 8.25.075

Costs — Award to condemnee or plaintiff — Conditions.

(1) A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

(a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or

(b) The proceeding is abandoned by the condemnor.

(2) In effecting a settlement of any claim or proceeding in which a claimant seeks an award from an acquiring agency for the payment of compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner, the attorney general or other attorney representing the acquiring agency may include in the settlement amount, when appropriate, costs incurred by the claimant, including reasonable attorneys' fees and reasonable expert witness fees.

(3) 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 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.

(4) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to the provisions of subsection (4) of RCW 8.25.070 as now or hereafter amended.

[1977 ex.s. c 72 § 1; 1971 ex.s. c 240 § 21.]

Notes:

Severability -- 1971 ex.s. c 240: See RCW 8.26.900.

RCW 8.25.070

Award of attorney's fees and witness fees to condemnee — Conditions to award.

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.

[1984 c 129 § 1; 1971 ex.s. c 39 § 3; 1967 ex.s. c 137 § 3.]

Notes:

Court appointed experts: **Rules of court:** ER 706.

RCW 8.26.210

Award of costs, attorney's fees, witness fees — Conditions.

See RCW 8.25.070, 8.25.075.

WAC 468-100-207 Agency filings affecting this section

General requirements — Claims for relocation payments.

(1) **Documentation:** Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as, bills, certified prices, appraisals, or other evidence of such expenses. Payment for a low cost or uncomplicated move may be made without documentation of actual costs when payment is limited to the amount of the lowest acceptable bid or estimate obtained by the agency. A displaced person must be provided reasonable assistance necessary to complete and file any required claim for payment.

(2) **Expeditious payments:** The agency shall review claims in an expeditious manner. The claimant shall be promptly notified as to any additional documentation that is required to support the claim. Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim.

(3) **Advance payments:** If a person demonstrates the need for an advance relocation payment in order to avoid or reduce a hardship, the agency shall issue the payment, subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished.

(4) **Time for filing:**

(a) All claims for a relocation payment shall be filed with the agency within eighteen months after:

(i) For tenants, the date of displacement;

(ii) For owners, the date of displacement or the date of the final payment for the acquisition of the real property, whichever is later.

(b) This time period shall be waived by the agency for good cause.

(5) **Notice of denial of claim:** If the agency disapproves all or part of a payment claimed or refuses to consider the claim on its merits because of untimely filing or other grounds, it shall promptly notify the claimant in writing of its determination, the basis for its determination, and the procedures for appealing that determination.

(6) **No waiver of relocation assistance:** A displacing agency shall not propose or request that a displaced person waive his or her rights or entitlements to relocation assistance and benefits provided by the Uniform Act and this regulation.

(7) **Expenditure of payments:** Payments, provided pursuant to this part, shall not be considered to constitute federal financial assistance. Accordingly, this part does not apply to the expenditure of such payments by, or for, a displaced person.

[Statutory Authority: Chapter 8.26 RCW. 06-02-068, § 468-100-207, filed 1/3/06, effective 2/3/06; 89-17-048 (Order 121), § 468-100-207, filed 8/14/89, effective 9/14/89.]

WAC 468-100-105 No agency filings affecting this section since 2003

Certain litigation expenses.

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, and expert witness fees, which the owner actually incurred because of a condemnation proceeding; pursuant to RCW 8.25.020 and 8.25.075.

[Statutory Authority: Chapter 8.26 RCW. 89-17-048 (Order 121), § 468-100-105, filed 8/14/89, effective 9/14/89.]

WAC 468-100-104 Agency filings affecting this section

Acquisition of tenant-owned improvements.

(1) **Acquisition of improvements:** When acquiring any interest in real property, the agency shall offer to acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property to be acquired or which the agency determines will be adversely affected by the use to which such real property will be put. This shall include any improvement of a tenant-owner who has the right or obligation to remove the improvement at the expiration of the lease term.

(2) **Improvements considered to be real property:** Any building, structure, or other improvement, which would be considered to be real property if owned by the owner of the real property on which it is located, shall be considered to be real property for purposes of WAC 468-100-101 through468-100-106 .

(3) **Appraisal and establishment of just compensation for tenant-owned realty improvements:** Just compensation for a tenant-owned realty improvement is the amount which the improvement contributes to the fair market value of the whole property or its salvage value, whichever is greater. (Salvage value is defined in WAC 468-100-002(23).)

(4) **Special conditions:** No payment shall be made to a tenant-owner to acquire any real property improvement or relocate any tenant-owned real estate fixture unless:

(a) The owner of the real property on which the improvement is located disclaims all interest in the tenant's realty improvement or fixture; and

(b) The tenant-owner, in consideration for the acquisition payment, assigns, transfers, and releases to the agency all of the tenant-owner's right, title, and interest in the realty improvement; and

(c) The payment does not result in the duplication of any compensation otherwise authorized by law.

(5) **Alternative compensation:** Nothing in WAC 468-100-101 through 468-100-106 shall be construed to deprive the tenant-owner of any right to reject payment under WAC 468-100-101 through 468-100-106 and to obtain payment for such property interests in accordance with other applicable law.

[Statutory Authority: Chapter 8.26 RCW. 06-02-068, § 468-100-104, filed 1/3/06, effective 2/3/06; 89-17-048 (Order 121), § 468-100-104, filed 8/14/89, effective 9/14/89.]