

63943-9

63943-9

CASE NO. 63943-9-1

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

ROBERT B. STRUTHERS AND VITEZSLAVA OTRUBOVA

Appellant,

v.

CITY OF SEATTLE

Respondents.

BRIEF OF APPELLANT

Robert B. Struthers, pro se
10514 Riviera Place NE
Seattle, WA 98125

RECEIVED
COURT OF APPEALS
DIVISION I
NOV 12 2008
11:12:08

TABLE OF CONTENTS

I. INTRODUCTION.....1

 A. Did the trial court err in granting in part a motion for summary judgment striking the claim of inverse condemnation?...1

 B. Did the trial court err in granting attorney Karen A. Willie’s motion for leave to withdraw?1

II. ASSIGNMENTS OF ERROR1

III. STATEMENT OF THE CASE1

 A. Factual Background.....1

 B. Procedural Background4

IV. SUMMARY OF ARGUMENT7

V. ARGUMENT9

 A. The Claim of Inverse Condemnation.....9

 B. Withdrawal of Karen Willie, with no Continuance Allowed 24

VI. CONCLUSION26

TABLE OF AUTHORITIES

Table of Cases

<i>Ackerman v. Port of Seattle</i> , 55 Wn.2d 400, 348 P.2d 664 (1960)	15
<i>B&W Construction v. Lacey</i> , 19 Wn. App. 220, 577 P.2d 583 (1978).....	19
<i>Balandzich v. Demeroto</i> , 10 Wash. App. 718, 719-720, 519 .2d 994 (1974);	24
<i>Boitano v. Snohomish County</i> , 11 Wn.2d 664, 120 P.2d 490 (1941).	14
<i>Casassa v. Seattle</i> , 75 Wash. 367, 134 P. 1080 (1913)	13
<i>Conger v. Pierce County</i> , 116 Wash. 27, 198 Pac. 377 (1921).....	10
<i>Deep Water Brewing, LLC v. Fairway Resources, LTD</i> , 27014-9-III, 27024-6-III.....	19
<i>DiBlasi v. Seattle</i> , 136 Wn.2d 865, 969 P.2d 10 (1998);.....	17
<i>Dickgieser v. State</i> , 153 Wn.2d 530, 105 P.3d 26 (2005).	17
<i>Hamm v. Seattle</i> , 143 Wash. 700, 255 Pac. 655	15
<i>Highline School District 401 v. Port of Seattle</i> , 87 Wn.2d 6, 548 P.2d 1085 (1976);	15
<i>Jogunson v. Seattle</i> , 80 Wash. 126; 141 P. 334 (1914)	9
<i>Jorgunson v. Seattle</i> , 80 Wash. 126; 141 P. 334 (1914).....	9
<i>Kincaid v. Seattle</i> , 74 Wash. 617, 620, 135 P. 820 (1913)	12
<i>Lambier v. Kennewick</i> , 56 Wn.App. 275, 783 P.2d 596 (1989)	20
<i>Martin v. Port of Seattle</i> , 64 Wn.2d 309, 341 P.2d 540 (1964).....	15
<i>Nabisco, Inc. v. Warner-Lambert Co.</i> , 220 F.3d 43, 45 (2d Cir. 2000)	7
<i>Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District</i> , 85 Wn. 2d 920, 540 P.2d 1387 (1975).....	18
<i>Olson v. King County</i> , 71 Wn.2d 279, 284, 428 P.2d 562 (1967):.....	9
<i>Peterson v. Port of Seattle</i> , 94 Wn.2d 479, 618 P.3d 67 (1980).	15
<i>Phillips v. King County</i> , 136 Wn.2d 946, 968 P.2d 871 (1998);.....	17
<i>Seal v. Naches-Selah Irrigation District</i> , 51 Wn. App. 1, 751 P.2d 873 (1988).....	20
<i>Ulery v. Kitsap Cy.</i> , 188 Wash. 519, 523, 63 P.2d 352 (1936)).	21
<i>United States v. Causby</i> , 328 U.S. 256, 90 L.Ed. 1206, 61 S.Ct. 1062 (1946).....	16
<i>United States v. Cress</i> , 243 U.S. 316, 328, 61 L.Ed 746, 37 S.Ct. 380 (1916);	16
<i>Wilber Development v. Rowland Construction</i> , 83 Wn.2d 871, 523 P.2d 186 (1974);	17
<i>Willapa Trading Co, Inc. v. Muscanto, Inc.</i> 45 Wash. App. 779, 785,727 P.2d 687 (1986).	24
<i>Wong Kee Jun v. Seattle</i> , 143 Wash. 479, 255 P. 645 (1927)	9
Constitutional Provisions	
Const. Article 1, §16.....	10

Regulations and Rules

Civil Rule 1.....7
Civil Rule 71(c)(4).....25
King County Local Rule 40(e)(2).....24
Rules of Professional Conduct 1.6(a).....6

Other Authorities

Uniform Standards of Professional Appraisal Practice19

I. INTRODUCTION

A. Did the trial court err in granting in part a motion for summary judgment striking the claim of inverse condemnation?

B. Did the trial court err in granting attorney Karen A. Willie's motion for leave to withdraw?

II. ASSIGNMENTS OF ERROR

Appelants Robert B. Struthers and Vitezslava Otrubova believe that the issues pertaining to the assignments of error may best be stated as:

1. Whether inverse condemnation claims are properly dismissed where the damage was not contemplated by nor necessarily incident to a government project.
2. Whether an attorney's motion for leave to withdraw can properly be granted three weeks before trial while prohibiting further continuance.

III. STATEMENT OF THE CASE

A. Factual Background

Plaintiffs Vitezslava Otrubova and Robert Struthers own a home on Riviera Place NE on the western shore of Lake Washington. The home was purchased by Ms. Otrubova in 1992 and was remodeled in 1998. Riviera Place NE is separated from Thornton Creek by the Sand Point Ridge and is over 3,000 feet from the creek. The Thornton Creek watershed, which drains an area of 7,322 acres, is the largest watershed in the City of Seattle. The north fork of this creek flows southeast from the City of Shoreline through northern Seattle. The creek drains into Lake Washington at Matthews Beach. Several tributaries drain much of north Seattle before converging at the south fork of Thornton Creek. The

confluence of the north and south forks is adjacent to 35th Avenue NE, between NE 105th and 110th Street. Thornton Creek suffers from high and 'flashy' flows during rainstorms. The area between the confluence and Matthews Beach downstream was designated as a flood-prone area in October 2009 by Seattle Public Utilities.

When creek levels exceed 38 feet above sea level, a diversion structure downstream from the convergence takes storm water directly from Thornton Creek to Lake Washington through a 72" pipe, which connects to a 90" pipe. The 90" concrete pipe, or Sand Point Tunnel, was constructed in 1953 as part of the Lake City Sewage Treatment Plant. This pipe was designed to convey treated effluent from the plant to the lake. Sand Point Tunnel terminates at Riviera Place NE, where a concrete outlet control structure connects the 90" pipe to three smaller concrete pipes (36", 42" and 48" in diameter). (CP 357). The smaller pipes allow flow to continue under Riviera Place NE. The control structure was built with two concrete weirs of differing heights, which prioritized the sequence of flow to each downstream pipe. The 30" pipe is lowest and the first to carry flow until surcharged. The 42" pipe was the next to carry flows, and when it was surcharged, the 48" pipe would carry remaining flows. The 48" pipe is closest to the Otrubova-Struthers property. All three concrete pipes were coupled to corrugated metal pipes at the shore of Lake Washington. The corrugated metal pipes conveyed flows offshore into the lake (CP 3221-3222).

Further downstream on Thornton Creek, the City of Seattle built the Meadowbrook Diversion Pond to protect the lower mile of the creek from flooding and erosion. This series of ponds on a nine-acre site was designed to remove sediment and reduce peak flows in the creek. During

heavy rains, storm water flows from the creek through the ponds, then back to the creek through a control weir. When the level of the ponds reaches a certain height, excess water flows over a weir, into a hole on the top the 72" concrete pipe, then on to the 90" pipe. The 90" pipe acts as the stem of a large funnel, which is the Thornton Creek watershed.

The Meadowbrook Diversion Pond became operational in March 1998. In October 1998, a ten-foot by ten-foot sinkhole appeared in the front yard at 10515 Exeter Avenue, one block due west of the concrete control structure at Riviera Place NE. In response to this event, Seattle Public Utilities contractors removed the concrete weirs within the control structure. As a result, the 30", 42" and 48" concrete pipes now had equal priority in receiving flows from the Sand Point Tunnel.

The 30" corrugated metal pipe was broken at the western shore of Lake Washington (CP3222). This break was visible from shore when the lake was calm. During storm events, geysers of water bubbled from the break, and from holes that had formed in all three corrugated metal pipes.

Vitezslava Otrubova reported the broken pipes to Seattle Public Utilities as early as winter, 1997. A large storm event on October 21, 2003 resulted in large geysers of water emitting from the concrete structure at the lakeshore where the concrete and corrugated metal pipes are coupled. Sinkholes appeared a few days later in the City's property and the Otrubova-Struthers yard. The homeowners retained the services of a geotechnical firm to study the damage. In their report, HWA Geosciences stated that damage to the residence and yard was caused by leaks in the storm water pipes. Ms. Otrubova and Mr. Struthers filed a claim for damages in November 2004, which was denied by the City. No attempt to repair the damage was apparent from the City, despite several inquiries

from Ms. Otrubova, until June 2005, when Kathy Minsch of Seattle Public Utilities identified Lilin Li as project manager of the Meadowbrook Outfall Rehabilitation Project, C353206. On January 31, 2006, Lilin Li responded to an electronic mail from Bruce Struthers and provided a copy of Project Development Plan #2 (CP 3220-3235).

The Meadowbrook Outfall Rehabilitation Project entered its first construction phase in June 2007, with the goal of replacing two of the corrugated metal pipes in Lake Washington with ductile iron pipes. The 30" pipeline was abandoned and plugged at the concrete control structure. The project was projected to cost \$2.5M, but costs overruns drove the final project cost to over \$3.3M. Videotaping of the concrete pipes during construction showed that there were breaks in the 48" concrete pipe, approximately six feet from the northeast corner of the Otrubova-Struthers residence. The first winter storm on December 3, 2007 demonstrated that the replacement ductile iron pipes still leaked. The contractor returned to the site and made some repairs late summer 2008. The first severe storm on October 17, 2009, produced a familiar pattern of same geysers and bubbling from the replaced outfall pipes.

B. Procedural Background

On June 7, 2007, Ms. Otrubova and Mr. Struthers sued the City of Seattle, alleging that defendants were liable for damage to the plaintiffs' property and diminution in the fair market value of this property (CP 1-12). On August 9, 2007 the complaint was amended to include claims of spoliation of evidence and request an injunction against continuing trespass and continuing nuisance (CP 13-24). Discover master Terrence

Carroll was appointed on August 21, 2007 (CP 190) in response to an August 15, 2007 motion concerning preservation of evidence (CP 131-138). On March 7, 2008, Judge Steven González issued an order dismissing the claim for inverse condemnation (CP 413). Plaintiffs requested a revision reinstating inverse condemnation (CP 922-927) on October 16, 2008. Judge González denied the revision with no explanation on October 20, 2008. (CP 977).

Deadlines in the case were continued twice by stipulation of the parties' attorneys. The first stipulation was to extend discovery cutoff and delay filing of jury instructions, trial briefs, proposed jury instructions and proposed voir dire (CP 985-987). Trial date of December 15, 2008 was preserved. A second continuance, postponing trial to June 1, 2009 (CP 1618-1622), was granted to accommodate the illness of plaintiffs' attorney Karen A. Willie, and the schedules of the parties' attorneys and Judge González. Ms. Otrubova and Mr. Struthers were not consulted before these stipulations were entered and ordered. Ms. Willie had requested another continuance on October 16, 2008 (CP 926-932), citing discovery issues. Judge González denied this request (CP 994-995).

On April 27, 2009 attorney Karen A. Willie filed a motion for leave to withdraw from representation of the plaintiffs (CP 1642-1650). Lacking familiarity with the law, Mr. Struthers sent an email to Judge González and his clerk stating his opposition to this withdrawal. The electronic mail received an automated response, stating that Judge

González was out of the office and would not return until May 4th, 2009. In response to this motion, the City of Seattle did not oppose withdrawal, but was adamant that no further continuance be allowed (CP 1642-1650, CP 1668). Opposing Counsel David Bruce clearly described the situation:

Counsel's proposed withdrawal shortly before a long-scheduled jury trial places the Court, the plaintiffs and the City between a rock and a hard place.

On April 28, 2009 Attorney Willie wrote in a declaration (CP 1673-1675) that:

I have had confidential discussions with counsel for the City concerning the reasons for my law firm's withdrawal in this matter. I do not believe it would be appropriate to place those reasons before Judge González, who is the trial judge for the June 1st trial.

Before she wrote this declaration, Ms. Willie did not inform her clients of her intention to speak with opposing counsel, nor did she solicit their consent. To date, she has not shared the contents with her of this confidential discussion with opposing counsel, in violation of the Washington State Rules of Professional Conduct 1.6(a). On April 30th, Karen Willie left for a two-week vacation in Spain. She did not wait for a response to her motion for leave to withdraw from Judge González.

On May 8, 2009 Judge Steven González signed an order granting the motion for withdrawal and imposing the condition that trial not be continued (CP 1680-1681). Mr. Struthers received a copy of this order two hours before the deadline for submission of a joint statement of evidence and motions *in limine*. He had to spend the remainder of his workday to address these deadlines. The next day, Ms. Otrubova and Mr. Struthers picked up a case file that occupied thirty banker's boxes of paper and

digital media. With no time to retain substitute counsel, and no possibility of a continuance, Ms. Otrubova and Mr. Struthers were left to represent themselves, three weeks before trial. The timing and manner of Ms. Willie's withdrawal could not be accomplished without material adverse effect on the interests of her clients, in direct violation of Washington State RPC 1.16(b)(1). No competent attorney would agree to substitute for Ms. Willie with only three weeks to prepare for trial. A substitution would necessarily incur substantial fees to allow counsel to become familiar with the complex subject matter of this case. Ms. Willie's motion to withdraw, under the conditions stipulated by the City of Seattle, was extremely prejudicial to her clients. Washington State Civil Rule 1 states:

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the *just, speedy, and inexpensive* determination of every action.

Under the restrictions of Civil Rule 1, the only option available to Judge González was to deny Karen Willie's motion to withdraw. The court erred by allowing Ms. Willie to abandon her clients.

IV. SUMMARY OF ARGUMENT

Summary judgment is appropriate when there are no genuine issues of material fact and when, viewing the evidence in a light most favorable to the non-moving party, no reasonable trier of fact could disagree as to the outcome of the case. See *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000). In 1998, the City of Seattle engineers decided to redeploy an abandoned sewer line at the site of the decommissioned Lake City Sewage Treatment Plant. The Meadowbrook Detention Pond was built to divert storm water from Thornton Creek to

reduce sedimentation, erosion and flooding downstream. Seattle Public Utilities engineers were made aware of structural problems with outfall pipes directly north of the Otrubova-Struthers residence, but did not address these problems until 2007.

The elements set out in *Phillips v. King County* to establish inverse condemnation are:

(1) a taking or damaging (2) of private property (3) for public use (4) without compensation being paid (5) by a government agency that has not instituted formal proceedings.

The City of Seattle is the governmental agency that, through its diversion of Thornton Creek for the benefit of homeowners downstream of Meadowbrook Pond, instituted a taking in the diminution in value of Otrubova-Struthers residence. The City of Seattle has denied all past claims for damages. The City has not instituted formal proceedings to condemn the affected residence. The Meadowbrook Outfall cannot be eliminated or restricted without damaging residences downstream of the diversion structure on Thornton Creek and Meadowbrook Pond by increasing flooding during two-year storm events. Projects to mitigate flashy flows, or divert storm water from Thornton Creek by another route, have been proposed and not been approved. Capital project funding has been directed to resolve problems in other areas, such as to meet compliance orders from the Environmental Protection Agency requiring replacement of combined sewage overflows. The continuing trespass of storm water upon the Otrubova-Struthers property cannot be abated by a City strapped for funds, under a federal mandate to address other priorities. The takings by the City of Seattle are permanent and the claim of inverse condemnation should be restored.

V. ARGUMENT

A. The Claim of Inverse Condemnation

The City has argued that the damage on the Plaintiffs' property must be a "necessary incident" of and be "contemplated" by the City's Meadowbrook Outfall Rehabilitation Project (CP 202). In support of this position, the City relies on the following phrase from *Olson v. King County*, 71 Wn.2d 279, 284, 428 P.2d 562 (1967):

Every trespass upon, or tortious damaging of real property does not become a constitutional taking or damaging simply because the trespasser or tort-feasor is the state or one of its subdivisions, such as a county or a city.

Seemingly, this phrasing has its genesis in the overruled case of *Jorgunson v. Seattle*, which states:

In each of these three cases, the taking or damaging was an indispensable and intentional part of the improvement, necessarily anticipated by the plan, and intended in the performance, of the work.

See Jorgunson v. Seattle, 80 Wash. 126; 141 P. 334 (1914), *overruling sub rosa Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927). Although the *Olson* court recites the oft-used "not every tort is a taking" phrase, in making its decision, the court applies the proper inverse condemnation claim analysis as announced in *Wong Kee Jun*—which is "any permanent invasion of private property, must be held to come within the constitutional inhibition." *See Won Kee Jun* at 505.

The following section provides a chronological overview of inverse condemnation cases and the analysis employed by Washington Courts in evaluating these claims. This overview establishes that, even under the outdated inverse condemnation analysis proffered by the City, the facts still establish an inverse condemnation of the plaintiffs' property,

as the City knew that excess storm water from Thornton Creek would cause damages downstream, the City proceeded with the Meadowbrook Diversion Pond Project, and the predicted damages came to fruition.

1. **Conger v. Pierce County—1921 Supreme Court.**

In *Conger v. Pierce County*, 116 Wash. 27, 198 Pac. 377 (1921), adjoining counties straightened and deepened the Puyallup River so it would not overflow its banks and damage bridges and roads. *See Conger*, at 29. The work eliminated a bend in the river and acted to “throw the current of the stream against the river bank at the point of plaintiff’s location.” *See Conger* at 30. As a result of the change in the river, plaintiff’s buildings lost their foundations and floated out into Commencement Bay. However, Conger sued only for the damage done by erosion on his lands. *Id.*

In its takings analysis, the *Conger* Court cited to cases that hold a private riparian owner cannot so change a stream that it floods or erodes the property of someone else. *See Conger* at 33.¹ The Court then noted that Washington’s constitution added the element that property cannot be taken or “damaged” for the public use without compensation first being made. *See Conger* at 34 (*citing* Const. Article 1, §16). The Court next discussed the police power doctrine and whether it was applicable to the

¹ *Judson v. Tidewater Lumber Co.*, 51 Wash. 164, 98 P. 377 (1908); *Johnson v. Irvine Lumber Co.*, 75 Wash. 539, 135 P. 217 (1913); *Valley Ry. Co. v. Franz*, 43 Ohio St. 623, 4 N.E. 88 (1885); *Crawford v. Rambo*, 44 Ohio St. 279, 7 N.E. 429 (1886); *Freeland v. Pennsylvania R. Co.*, 197 Pa. 529, 47 A. 745, 80 Am. St. 850, 58 L.R.A. 206 (1901); *Gerrish v. Clough*, 36 N.H. 519 (1858); *Bowers v. Mississippi & R.R. Boom Co.*, 78 Minn. 398, 81 N.W. 208, 79 Am. St. 395 (1899); *Morton v. Oregon Short Line Ry. Co.*, 48 Ore. 444, 87 P. 151, 120 Am. St. Rep. 827, 7 L.R.A. (N.S.) 344 (1906), and note; *Town of Jefferson v. Hicks*, 23 Okla. 684, 102 P. 79, 24 L.R.A. (N.S.) 214 (1909), and note.

case making payment unnecessary. *See Conger* at 35-37. Finally, an analysis was made of the county's activities and the Court stated:

The counties were protecting themselves and their roads and bridges. May they do this in such a way as to injure private property without becoming liable therefore? Certainly not.

See *Conger* at 41.

The municipalities argued the damage was not a direct result of the improvements but "indirect," or consequential damages, for which there can be no liability. See *Conger* at 42. The Court found an inverse condemnation stating:

The alleged erosion of its land and thereby the destruction of its property would be the direct result of the act of the respondents in straightening the channels of the river and thereby changing the currents of the stream. *There was testimony to show that respondents' engineers must of necessity have known that the improvements which they were making would cause the appellant's property to be eroded and probably wash away.*

See Conger at 42 (emphasis added).

In this case, the evidence before the Court showed that the City diverted natural flows from Thornton Creek to the Meadowbrook Outfall (CP 357). Erosion of the bulkhead straddling the City's and plaintiffs' property line, and sinkholes in the City and plaintiffs yard, resulted from these diverted flows, and subsequently, from excavation work performed during the Meadowbrook Rehabilitation Project (CP 354-393, CP 398-412, CP 431-439, CP 495-496).

Under the jurisprudence of 1921, the evidence before the Court establishes that the City is liable for inverse condemnation of the Otrubova-Struthers property.

2. *Wong Kee Jun v. Seattle—1927 Supreme Court.*

Six years after *Conger*, in a sweeping opinion by Judge Tollman, the question is asked whether “property has been taken and damaged in contravention of constitutional rights, or whether the city’s acts were of a tortious nature only. . . .” See *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 Pac. 645 (1927). The case involved landsliding caused by the City of Seattle’s grading of streets. Judge Tollman reviewed 29 cases with 19 of them being against the City of Seattle.² He noted that there is “a condition of confusion” in this area of law and he hoped to give “a rule by which litigants and trial courts may in the future determine into which class a given case may fall.” See *Wong Kee Jun* at 480-481. Liability is the same with or without negligence because the State “goes not as a trespasser, inspired by selfish or unlawful motive, but as one taking *without malice or intent to do wrong* and presumptively for the public good. It cannot put on the cloak of a tort[feasor].” See *Wong Kee Jun* at 485-486 (*quoting Kincaid v. Seattle*, 74 Wash. 617, 620, 135 P. 820 (1913) (emphasis

² *Peterson v. Smith*, 6 Wash. 163, 32 P. 1050 (1893); *Askam v. King County*, 9 Wash. 1, 36 P. 1097 (1894); *Snohomish County v. Hayward*, 11 Wash. 429, 39 P. 652 (1895); *Seanor v. Board of County Comm'rs*, 13 Wash. 48, 42 P. 552 (1895); *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 P. 385 (1901); *Postel v. Seattle*, 41 Wash. 432, 83 P. 1025 (1906); *Scurry v. Seattle*, 8 Wash. 278, 36 P. 145 (1894); *Born v. Spokane*, 27 Wash. 719, 68 P. 386 (1902); *Ehrhardt v. Seattle*, 40 Wash. 221, 82 P. 296 (1905); *Farnandis v. Great Northern Ry. Co.*, 41 Wash. 486, 84 P. 18 (1906); *Smith v. Spokane*, 54 Wash. 276, 102 P. 1036 (1909); *Hummel v. Peterson*, 69 Wash. 143, 124 P. 400 (1912); *Donofrio v. Seattle*, 72 Wash. 178, 129 P. 1094 (1913); *Kincaid v. Seattle*, 74 Wash. 617, 134 P. 504, 135 P. 820 (1913); *Provident Trust Co. v. Spokane*, 75 Wash. 217, 134 P. 927 (1913); *Casassa v. Seattle*, 75 Wash. 367, 134 P. 1080 (1913); *Jorguson v. Seattle*, 80 Wash. 126, 141 P. 334 (1914); *Johanson v. Seattle*, 80 Wash. 527, 141 P. 1032 (1914); *Marks v. Seattle*, 88 Wash. 61, 152 P. 706 (1915); *Hollenback v. Seattle*, 88 Wash. 322, 153 P. 18 (1915); *Egbers v. Seattle*, 90 Wash. 172, 155 P. 751 (1916); *Jacobs v. Seattle*, 93 Wash. 171, 160 P. 299 (1916); *Willett v. Seattle*, 96 Wash. 632, 165 P. 876 (1917); *Aylmore v. Seattle*, 100 Wash. 515, 171 P. 659 (1918); *Jacobs v. Seattle*, 100 Wash. 524, 171 P. 662 (1918); *Great Northern Ry. Co. v. State*, 102 Wash. 348 (1918); *Neely v. Seattle*, 109 Wash. 266, 186 P. 880 (1920); *Pratt v. Seattle*, 111 Wash. 104, 189 P. 565 (1920); *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921); *Knapp v. Siegley*, 120 Wash. 478, 208 P. 13 (1922); *Island Lime Co. v. Seattle*, 122 Wash. 632, 211 P. 285 (1922); *Davis v. Seattle*, 134 Wash. 1, 235 P. 4, 44 A. L. R. 1490 (1925); *Hamm v. Seattle*, 140 Wash. 427, 249 P. 778 (1926).

added). The City's criticism that the words "intentional," "deliberate" or "willful" are not employed to describe an inverse condemnation is therefore misplaced.

The inquiry for a court is no longer to revolve around an analysis of the municipality's actions or inactions:

[T]he courts must look only to the taking, and not to the manner in which the taking was consummated. A mere temporary interference with a private property right in the progress of work, especially such as might have been avoided by due care, would probably be tortious only. Improper blasting, causing debris to be cast upon adjacent property, would seem to be tortious and not a taking or damaging under the constitution; but the removal of lateral support causing slides or any permanent invasion of private property, must be held to come within the constitutional inhibition.

See Wong Kee Jun at 505.

The courts, henceforth, are to judge whether the facts before it present a "temporary interference" or a "permanent invasion."

In this case, the City admits that the damages at the Otrubova Struthers' property will remain permanent because of their continued assertions that the \$3.3 million spent on the Meadowbrook Outfall Rehabilitation Project constitutes a fix. The City of Seattle **must** continue to divert water from Thornton Creek to the Meadowbrook Outfall to alleviate flooding around and down stream from Meadowbrook Pond.

The plaintiffs have submitted an appraiser's opinion concerning diminution of value of the plaintiffs' residence caused by the Meadowbrook Outfall (CP 1030-1056). The facts presented irrefutably establish a constitutional taking under *Wong Kee Jun*. Finally, it is important to note that *Wong Kee Jun* directly overruled *Postel v. Seattle* and limited *Casassa v. Seattle*, 75 Wash. 367, 134 P. 1080 (1913), and

Jorgunson v. Seattle, 80 Wash. 126, 141 P. 334 (1914), to the extent that they were not in harmony with the opinion. See *Wong Kee Jun* at 505.

Jorgunson involved the same landslide as in *Casassa*, which was caused by Seattle's grading activities. See *Jorgunson* at 127. The landsliding was deemed only tortious because the "constitution was never intended to apply to consequential or resultant damages not anticipated in, nor a part of, the plan of public work." See *Jorgunson* at 131. This reasoning is supplanted by the rule set out in *Wong Kee Jun*. However, municipalities continued to advance that reasoning to the courts. See *Boitano v. Snohomish County*, 11 Wn.2d 664, 120 P.2d 490 (1941).

3. **Boitano v. Snohomish County—1941 Supreme Court.**

In *Boitano v. Snohomish County*, 11 Wn.2d 664 (1941), the county had a gravel pit from which it took materials to build roads. In excavating the pit, it uncovered a large spring. See *Boitano* at 665-666. The county directed the flow to a channel it dug underneath a highway to the plaintiff's land covering about two and a half acres of it. *Id.* Because the plaintiff had not filed a tort claim, the trial court dismissed the case.

The Supreme Court first analyzed, as required by *Wong Kee Jun*, the nature of the invasion. In constructing the channel to convey the water it was "effecting a direct and permanent invasion of appellant's premises and inflicting upon them a lasting damage of substantial proportions." See *Boitano* at 671. It noted that the County's "principal contention" is that the damages are "consequential or resultant damages" because the flooding was not "an indispensable and *intentional* part of any improvement project which necessarily anticipated such flooding or contemplated that it should be done." See *Boitano* at 673 (emphasis added). The court points out this contention is based on *Jorgunson v.*

Seattle. Id. It states: “Just how far the *Jorgunson* case is still authoritative is a debatable question. In *Hamm v. Seattle*, 143 Wash. 700, 255 Pac. 655, this court referred to the *Wong Kee Jun* case, *supra*, as one ‘where we have adopted a rule different from that enunciated in *Jorgunson v. Seattle.*’” *See Boitano* at 675.

The *Boitano* court then quotes the *Wong Kee Jun* case at length and states: “The opinion in the *Wong Kee Jun* case concludes with a statement to the effect that the *Casassa* and *Jorgunson* cases are overruled in so far as they are out of harmony with the rules announced in the overruling opinion.” *See Boitano* at 676. The Court finds the property has been inversely condemned stating that if it even “assumed the *Jorgunson* case still had an authoritative force” this case was a “perfect illustrator of the rule of the *Wong Kee Jun* case” because the “taking or damaging is in consequence of a permanent invasion of private property.” *See Boitano* at 677. Again, the evidence in this case establishes that the damage to the Struthers’ property is irrefutably permanent.

4. **The Airport Cases—1960 Supreme Court:**

The Airport cases were decided by the Supreme Court due to the location of the SeaTac airport and the eventual development of prop planes into ones with jet propulsion. *See Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960); *Martin v. Port of Seattle*, 64 Wn.2d 309, 341 P.2d 540 (1964) *cert. denied* 379 U.S. 989, 13 L.Ed.2d 610, 85 S.Ct. 701 (1965); *Highline School District 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976); *Peterson v. Port of Seattle*, 94 Wn.2d 479, 618 P.3d 67 (1980). In *Ackerman*, the Supreme Court addressed, *inter alia*, whether a taking had occurred on vacant land impacted by increased airport takeoffs and landings, and if the Port, which owned no planes,

could be liable. *See Ackerman* at 403-406. As to the vacant land, the court stated: “The actual monetary damage to the developed land may well be greater than to vacant land. “But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether there is a taking.” *See Ackerman* at 405 citing *United States v. Cress*, 243 U.S. 316, 328, 61 L.Ed. 746, 37 S.Ct. 380 (1916); *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206, 61 S.Ct. 1062 (1946). The court then held that indeed, there could be a taking where the Port, which operated none of the planes at issue, is the municipal entity responsible for maintaining an approach to the airport. It was held liable because it had the power of eminent domain, and “failed to provide such an approach through the powers of eminent domain and instead took the airspace over plaintiffs’ properties for the approach.” *See Ackerman* at 412-13.³

Likewise, in this case, the City failed to utilize its powers of eminent domain with respect to the Plaintiffs’ property. Therefore, the City has inversely condemned the property.

5. *Olson v. King County—1967 Supreme Court.*

The City relies on *Olson v. King County*, 71 Wn.2d 279, 428 P.2d 562 (1967), as supportive of its position that only tort law applies in this case (CP 202). The facts and analysis in the case belie this position. In *Olson*, three homes had a one time flooding event in 1962 because an ancient cross-culvert was placed at the top of a 35-foot fill embankment without any splash block or armoring to protect the fill. *See Olson* at 281. The *Olson* Court specifically refers to the cases previously analyzed:

³ It is notable that the *Ackerman* Court cites to *Conger*, a water law case, to support its holding.

Concededly the distinction between a constitutional taking and a damages and tortious conduct by the state or one of its subdivisions is not always clear. But subsequent to the comprehensive analysis of our cases by Judge Tollman in *Wong Kee Jun* supplemented by Judge Steinert's scholarly discussion in *Boitano v. Snohomish Cty.*, we have adhered fairly closely to the principles enunciated in those cases.

See Olson at 284. (citations omitted).

The Court goes on to say: "The present case falls into the category referred to in *Wong Kee Jun, supra*, as a 'mere temporary interference with a private property right'" *See Olson* at 285. The *Olson* case does not support the City's position given the permanent nature of the damages to the Plaintiffs' property.

6. **Wilber v. Rowland—1974 Supreme Court.**

Absent from the City's analysis is any reference to the Supreme Court's inverse condemnation law in the context of water law. Municipalities did not fare well in these cases. *See Wilber Development v. Rowland Construction*, 83 Wn.2d 871, 523 P.2d 186 (1974); *DiBlasi v. Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998); *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998); *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005).

In *Wilber*, the Town of Steilacoom maintained the flow of water in a stream so a wetlands on the plaintiff's property remained at a certain level and held the storm flows from surrounding newly platted lands. The plaintiff contended his property was being used as a holding basin by the surrounding private plats. *See Wilber* at 873. A real estate appraiser, via affidavit, testified that the market value of the land had been "adversely affected." *See Wilber* at 874. The Supreme Court reversed the dismissal of the homeowner's inverse condemnation claim finding that if the water

was being “delivered more swiftly and in large amounts” liability would attach. *See Wilber* at 876. However, the landowner would have to show a certain level of damage. Using the same analysis from *Wong Kee Jun* the court stated: “Whether it is regarded as a trespass, temporary in nature, or an appropriation of easements across plaintiff’s lands” would be determinative of whether a taking had occurred. No inquiry was made as to “intent” or whether the use of private property was “incident to” a public purpose because no public project was built or created. Again, the proper analysis is temporary versus permanent and in this case, the damages are permanent.

7. ***Northern Pacific Railway Co. v. Sunnyside Valley—1975***
Supreme Court.

The City’s reliance on *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 85 Wn. 2d 920, 540 P.2d 1387 (1975), is misguided because the facts of that case do not in any way mirror those before this Court. In *Northern Pac.*, the defendant’s irrigation canal broke and washed out the roadbed of the railroad. The stipulated facts revealed that the embankment was replaced and the tracks were repaired. *See Northern Pac.* at 924. The court stated that the plaintiff railroad cited cases that “almost uniformly involve permanent or recurring damage.” *Id.* After citing to *Wong Kee Jun v. Seattle*, *Boitano v. Snohomish County* and *Olson v. King County*, the court stated: “Temporary interference with a private property right, which is not continuous nor likely to be reoccurring, does not constitute condemnation without compensation.” *Id.* The railroad’s damages were temporary and fixed by the time of trial. The damages at the Plaintiffs’ property are permanent and excess storm water will be diverted from Thornton Creek with every big storm.

8. **B & W Construction v. Lacey—1978 Division Two.**

The holding in *B&W Construction v. Lacey*, 19 Wn. App. 220, 577 P.2d 583 (1978), does not support the City of Seattle’s position either. The City of Lacey was found by a jury to have inversely condemned commercial property by sending surface water flows to it. See *B&W Construction* at 22. The City of Lacey argued that the damages were not substantial enough to support the inverse condemnation claim. The appeals court upheld the claim stating:

The plaintiff need not prove “substantial injury” he need only show a “measurable or provable” declining in market value. *Highline School Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 13, 548 P.2d 1085 (1976); accord, *Martin v. Port of Seattle*, 64 Wn.2d 309, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989, 13 L. Ed. 2d 610, 85 S. Ct. 701 (1965).

See *B&W Construction* at 223.

John Boucher was the expert appraiser in *B&W Construction* and his testimony was upheld. In this case, Richard Hagar and Graham Albertini have produced a report on the diminution of value of the Otrubova-Struthers residence (CP 1030-1056), based upon the appraisal of Michael Dilio (CP 653-656). This complies with Standard 4 in the *Uniform Standards of Professional Appraisal Practice* (USPAP) and was used to support the September 10, 2009 published opinion⁴ (pages 47-52) of the Washington State Court of Appeals in *Deep Water Brewing, LLC v. Fairway Resources, LTD*, 27014-9-III, 27024-6-III.

B&W Construction supports a finding of inverse condemnation of the properties and does not support the City’s position. Similar to the *Lambier* case, the court in *B&W Construction* also discusses the Supreme

⁴ *Deep Water Brewing, LLC v. Fairway Resources, Ltd*, 27014-9-III, 27024-6-III published opinion, (September 10, 2009).

Court's analysis of takings law in the cases involving the SeaTac airport. *See B&W Construction* at 223 (citing to *Martin v. Port of Seattle*, 64 Wn.2d 309 (1964)).

9. ***Seal v. Naches-Selah*—1988 Court of Appeals, Division Three.**

In *Seal v. Naches-Selah Irrigation District*, 51 Wn. App. 1, 751 P.2d 873 (1988), the plaintiffs alleged seepage from an irrigation ditch damaged their cherry orchard. The jury found the Seals 95% contributorily negligent. *See Seal* at 2. The trial court refused to give inverse condemnation instructions and Division Three upheld that decision. *See Seal* at 9-10 (citing *Jorgunson v. Seattle, supra*; *Songstad v. Metropolitan Seattle, supra*; and *Olson v. King County, supra*.) The court noted that the “damage here was obviously not contemplated by the plan of construction, as the orchard was planted several years after the canal was built.” *See Seal* at 10.

The facts of *Seal* are not at all similar to the facts of this case. The Otrubova-Struthers residence was in place before the Meadowbrook Outfall Rehabilitation Project. The City knew of the flooding, sinkholes and damage to the Plaintiffs' residence. However, more importantly, Division Three disavowed its own reasoning in *Seal* one year later in *Lambier v. Kennewick*, 56 Wn.App. 275, 783 P.2d 596 (1989).⁵

10. ***Lambier v. Kennewick*—1989 Court of Appeals, Division Three.**

In *Lambier*, the City built a road with a curve that automobiles had difficulty negotiating. By the time of trial, 11 vehicles had landed on the Lambiers' front lawn, their homeowner's insurance had been cancelled and their home was “not salable at any price.” *See Lambier* at 278.

⁵ One of the concurring judges from the *Seals* decision, Judge Green, was still on the panel.

Kennewick pointed out that the Lambiers' damages were "neither contemplated by the plan of work nor a necessary incident to the building or maintenance of the road" citing to *Seal*. See *Lambier* at 279. Division Three stated its earlier decision in *Seal* was based on *Songstad* and that both cases relied on *Jorgunson v. Seattle* which had been overruled by *Wong Kee Jun*. Division Three clearly stated that "the Supreme Court abandoned the *Jorgunson* rule in *Wong Kee Jun*." See *Lambier* at 281. The City relies on a case that Division Three admits is flawed and which relied upon an overruled case.

The *Lambier* case stands for the proposition that: "The unintended results of a governmental act may constitute a 'taking.'" See *Lambier* at 281-82. This case is ignored by the City of Seattle. The relevant Supreme Court cases on takings law that are cited in *Lambier* are also ignored. See *Lambier* at 281-82 (citing *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976); *Martin v. Port of Seattle*, *supra*; see also *Ulery v. Kitsap Cy.*, 188 Wash. 519, 523, 63 P.2d 352 (1936)).

11. DiBlasi v. Seattle and Phillips v. King County—1998 Supreme Court.

In December 1998, the Court decided *DiBlasi v. Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998) and *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). In *DiBlasi*, a city street was channeling water such that a set down or slump opened up in the street and radiated onto private property. The City was notified about its street flows but refused to do anything. In the next large storm, a landslide developed taking out a portion of the yard up to the edge of the house. See *DiBlasi* at 870. The City argued the developer who graded the street and filled a small ravine should be liable—i.e., there was no public project. The Supreme Court

did not accept the argument and held that if the street concentrated the flows, then an action for inverse condemnation would lie. *See DiBlasi* at 880. Absent is any discussion of whether the City intended the flows to reach DiBlasi. Because DiBlasi had fixed the property, the City argued the damages were not “permanent” under takings law. This stance emphasizes that at that time, the City was aware of the proper inquiry for an inverse condemnation case based on water law.

Phillips involved a private developer who was vested under old drainage laws that allowed him to build a severely undersized retention detention pond for a large housing development. His engineers warned him that the pond needed to be enlarged “three or four fold” but that would cause the loss of several buildable lots. *See Phillips* at 952. The developer did not upsize the pond so there were more flows to deal with. The County was unaware of the engineer’s warning letter to the developer. *Id.* Because of the additional flows, the developer’s engineers designed a flow spreader and the County allowed it to be built on its right of way. Eventually, the County took over maintenance of the pond.

The Court of Appeals decision found the County liable for permitting the development, taking over the pond’s maintenance involving itself in a private project. The decision meant the protections of the Public Duty Doctrine were abrogated. *See Phillips*, 87 Wn.App. 468, 943 P. 306 (1997). Municipalities in the state were alarmed. As is apparent in the decision, the municipalities argued that the County should not be liable for the developer’s “design defect.” *See Phillips* at 966. To have a taking, one needed “government activity.” *Id.* The County had no choice but to allow the smaller pond and the facts were irrefutable that the flow spreaders were not a public project but a private one. The Supreme Court

found that the County's conduct in donating its right of way "satisfies the public element of an inverse condemnation cause of action," and it stated that: "If it is proven at trial that the County participated in creation of the problem, it may participate in the solution." See *Phillips* at 967-968.

There was no governmental project in *Phillips*; so there could be no inquiry into "intent" or whether the project was "incident to" or "contemplated by" the County's engineers. The only part the County's engineers had in the project was to permit it under the old regulations. The City ignores this case but it is the controlling authority, along with *Dickgieser v. State, infra*.

12. Dickgieser v. State—2005 Supreme Court.

In *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005), the Department of Resources logged and allowed others to log its land above the Dickgiesers' property. Prior to the logging, the Dickgiesers warned the department that the logging would cause a stream to flood and damage their property. See *Dickgieser* at 533. The first winter after the logging, the stream overflowed damaging three houses, a septic system and the water supply. Experts testified that there would be repeated, permanent and chronic flooding. *Id.* The Supreme Court analyzed whether logging was a "public use" requiring compensation under the takings clause.

The department made the same arguments the City now makes and similarly relied on *Olson v. King County*:

[T]he Department argues that every trespass or tortious damaging of real property does not become a constitutional taking or damaging merely because the government is involved. Rather, a taking occurs only if the state's interference with another's property is a "necessary incident" to the public use of the State's land.

See *Dickgieser* at 541.

The court deemed the argument “not persuasive” and it relied upon the Boitano and Phillips cases in reinstating the inverse condemnation claim. See *Dickgieser* at 538-43.

As *Dickgieser* demonstrates, despite the repeated arguments of municipalities, the Washington Supreme Court has continually rejected the argument that an inverse condemnation claim requires an element of intentionality or that the alleged damage is “necessarily incident” to the government’s actions or project.

Based on evidence and argument, there is no other reasonable conclusion but that the claim of inverse condemnation should survive.

B. Withdrawal of Karen Willie

A relevant section of King County Local Rule 40(e)(2) states:

If a motion to change the trial date is made after the Final Date to Change Trial Date, as established by the Case Schedule, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice. A motion to strike or change a trial date may be granted subject to such conditions as justice requires.

Case law sets forth the following criteria for the Court to consider in deciding whether to grant a trial continuance:

In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation; including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and other matters that have a material bearing upon the exercise of discretion vested in the court.

See *Balandzich v. Demeroto*, 10 Wash. App. 718, 719-720, 519 .2d 994 (1974); *Willapa Trading Co, Inc. v. Muscanto, Inc.* 45 Wash. App. 779, 785,727 P.2d 687 (1986).

The extraordinary circumstance in this case was the abandonment of the plaintiffs by their attorney three weeks before trial. No qualified attorney could adequately represent the plaintiffs, after discovery cutoff, without a continuance. Even the withdrawing Ms. Willie, an attorney experienced in water law, noted in October 16, 2008 (CP 930):

Plaintiffs' attorneys are having great difficulty in preparing for trial.

This sentiment was echoed throughout Ms. Willie's declarations, and reflects the difficulty experienced by her small law firm in responding to a "paper storm" generated by the City of Seattle. The trial was delayed by six months to accommodate Ms. Willie's health in December 2008. She recuperated within two weeks and was able to represent Ms. Otrubova and Mr. Struthers before Judge McBroom in Superior Court cause 08-2-17862-5 on January 5, 2009.

Karen Willie was given the time she requested to prepare for trial. It was within the discretion of the judge to grant a continuance, to allow plaintiffs time to retain substitute counsel, and to allow substitute counsel to become familiar with the case. This course of action would impose a severe financial burden on the plaintiffs. The City proposed several alternatives to Judge González (CP 1668-1672), including a requirement that the withdrawing attorney compensate the City for a delay.

If a timely written objection is served, Civil Rule 71(c)(4) permits withdrawal by an attorney only by order of the court. The City of Seattle did object, to the possibility of a resulting continuance. Mr. Struthers offered a timely objection to the withdrawal, but used a method of communication that Judge González considered inappropriate. The Court Clerk was required to share the email objecting to withdrawal with Ms.

Willie and the City's attorneys. No attorney came forward to advise Mr. Struthers on the proper method to serve his objection.

The result of Judge González's decision was that Bruce Struthers and Vitezslava Otrubova represented themselves pro se in a three-week jury trial. Having no training in the law, the plaintiffs did not prevail over a seasoned team of City's attorneys who had worked continuously for two years on this case.

VI. CONCLUSION

The claim of inverse condemnation against the City of Seattle should stand. The court also erred in granting the plaintiffs' attorney's motion for leave to withdraw, while prohibiting a continuance of trial. Robert B. Struthers and Vitezslava Otrubova respectfully request that:

- i) the inverse condemnation claim be restored,
- ii) summary judgment on inverse condemnation be awarded to Bruce Struthers and Vitezslava Otrubova,
- iii) compensation for damages resulting from diminution of value be awarded to the appellants, and
- iv) attorney and expert fees be awarded to the appellants.

If this Court does not agree, the appellants respectfully request that this case be remanded back to trial.

DATED this 22nd day of November, 2009.

By: 
Robert B. Struthers, pro se