NO. 316815-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WILLIAMS PLACE, LLC, a Washington limited liability company,

Appellant,

v.

THE STATE OF WASHINGTON, by and through the Department of Transportation,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Williams Place, LLC claims inverse condemnation resulting from the removal of a temporary bridge within the highway right-of-way at the direction of the Washington State Department of Transportation (WSDOT). Williams Place asserts that it and its predecessors have used a route which included a bridge-crossing site at the location of this temporary bridge to access State Route (SR) 270 at milepost 6.9 for several decades, even though Williams Place's property does not abut SR 270 at that milepost. The facts underlying this assertion, however, do not establish that Williams Place owns a property right to access the highway at milepost 6.9. Williams Place has failed to produce evidence sufficient to support the existence of such a right, an essential element of its lawsuit. Specifically, Williams Place has presented no evidence that it had title to the former railroad between the Williams Place property and the highway right-of-way. Similarly, Williams Place has not presented evidence establishing that it had an easement, prescriptive or otherwise, to cross the former railroad or neighboring parcel. Moreover, Williams Place failed to present any evidence that its use of this particular route to reach the right-of-way was anything more than permissive. Because Williams Place did not have a property right to access the state highway at milepost 6.9, its inverse condemnation claim based on removal of the bridge necessarily

fails. Accordingly, this Court should affirm the trial court's summary judgment dismissal of Williams Place's claim.

II. RESTATEMENT OF ISSUES

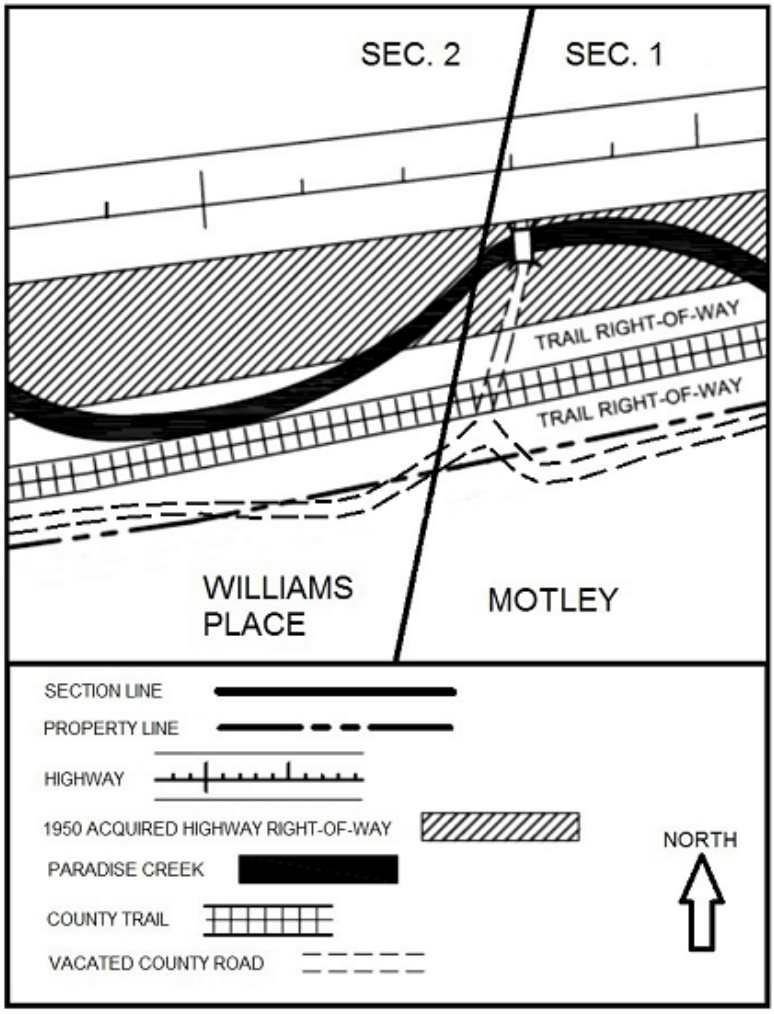
Whether Williams Place had a property right to access SR 270 at milepost 6.9 via the adjacent bridge where the facts indicate that Williams Place's property did not abut the state highway and that Williams Place lacked an easement or other property right to cross the county recreation trail to reach SR 270 at milepost 6.9.

III. STATEMENT OF THE CASE

The illustration[1] below displays the relative locations of the former temporary bridge, section line, creek, vacated county road, highway, additional highway right-of-way acquired in 1950, county recreation trail and right-of-way, and property of Williams Place and Motley. The section line between Sections 2 and 1 is a critical reference point because it separates the Williams Place and Motley parcels. The fact that the section line is not perpendicular to the highway, county trail, or vacated county road is important when examining alleged routes used by Williams Place and its predecessors to reach the milepost 6.9 access point in order to

[1] This illustration was prepared as part of this Brief of Respondent for the purpose of illustrating the relative locations of significant features. Although this illustration is not to scale and not part of the record, it is based on CP 111, 113, 114, 115, 117, 172, 242, and 786. This illustration shows the east-west segment of the vacated road adjacent to the Williams Place property as depicted in Williams Place's images in CP 786-88.

properly understand the relative locations of the bridge and railroad/trail crossing site with respect to the section line.



The undisputed facts in the record indicate that the former county road known as Garrison Road ran generally east to west, south of Paradise Creek, which flows east to west from Moscow, Idaho, toward Pullman, Washington. The record does not indicate where Garrison Road began or ended. Garrison Road included a short spur that ran north from the main

Garrison Road to a point across Paradise Creek. CP 115, 117, 242. This case centers on the use of the short spur.

IV. SEQUENCE OF EVENTS AND PROCEDURAL HISTORY

The following material facts are undisputed.

A. Federal Land Patents.

In 1881 and 1882, the federal government conveyed by patent the land that is presently owned by Williams Place and Motley, respectively. All land conveyed by the United States to Motley's 1882 predecessor was in Section 1 and all the land conveyed by the United States to Williams Place's 1881 predecessor was in Section 2. CP 689, 692-694. Williams Place's predecessors are described in the record as are many of Motley's.[2] With respect to the Williams Place and Motley property at issue in this case, the record gives no indication that this property had unity of ownership or a common grantor other than the United States.

B. Garrison Road Development.

An east-west road generally south of Paradise Creek named Garrison Road was developed in 1882 as a county road. CP 113, 143.

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[2] Williams Place's predecessors include Pinnell, Halpin, Brosa, Williams, and Jorstad. Motley's predecessors include Collins, Emerson, and Aitley. CP 96-97, 104-109, 245, 332, 689, and 692-694.

C. Railroad Right-Of-Way Conveyances.

Williams Place's predecessor conveyed right-of-way to the railroad in 1886. CP 687. Motley's predecessor conveyed right-of-way to the railroad in 1885. CP 690. With the exception of the dates, parties, and property descriptions, the contents of the documents conveying these railroad rights-of-way are the same. CP 687-88, 690-91.

D. Development of an East-West Road North of Paradise Creek.

Whitman County constructed a county road north of Paradise Creek referred to as Secondary Road Project No. 11 as a relocated replacement for Garrison Road. Williams Place's predecessor gave Whitman County land for Secondary Road Project No. 11 and waived any claim for damages caused by the location of that road. CP 96. This county road was completed sometime prior to the vacation of Garrison Road in 1935. CP 102-03, 143. This road would later become Primary State Highway No. 3, which would later become SR 270. CP 143. The present highway, SR 270 is generally along the same alignment as Secondary Road Project No. 11.[3]

E. Vacation of the Garrison Road.

Whitman County vacated Garrison Road in 1935. CP 102-03. The Whitman County Board of Commissioners order vacating the road

[3] Compare aerial photograph in CP 171 with aerial photograph in CP 172, which also appears to show the east-west route of former Garrison Road.

included findings that the Garrison Road had been "thrown into disuse by reason of the establishment and construction of Secondary Road Project No. 11 and . . . [was] not being used by vehicular traffic." CP 102.

F. Expansion of the Highway Right-Of-Way.

In 1950, WSDOT's predecessor acquired additional right-of-way from the predecessors of Williams Place and Motley. CP 105-110. Before the State acquired this additional right-of-way, the Williams Place and Motley properties were each directly adjacent to SR 270's southern edge, though only the Motley property directly abutted SR 270 at the location at issue, milepost 6.9. CP 111, 115, 242.

G. Conveyance of the Railroad For Use as a Recreation Trail.

In 1997, the railroad executed a donative quit claim deed in favor of Whitman County to use the railroad as a recreation trail. CP 702-04, 695-701.

H. Non-Use of Bridge.

Sometime prior to 2001, the existing bridge on the spur road from the former Garrison Road connecting the Motley property to SR 270 at milepost 6.9 fell into disrepair and was no longer used because it could not be crossed. CP 49, 223-24, 226-29.[4] In 2001, the existing "bridge"

[4] Williams Place disputes that there have been periods during which the bridge was not traversable. CP 248-252. Whether or not there were periods when the bridge

consisted only of two cement abutments somewhat connected by a few logs. CP 227, 229. Based on the photograph in CP 229, it was unlikely that anyone, including Williams Place crossed the bridge as it existed in this 2001 photograph.

When Williams Place did not access its property south of SR 270 using the Motley temporary bridge at milepost 6.9, Williams place used permissive access approximately three quarters of a mile west of milepost 6.9 belonging to its neighbor, Thonney. CP 193-96, 228, 357-58. The Williams Place member who farms Williams Place's property claims to access the Williams Place property via the Thonney property pursuant to a farm lease arrangement. CP 250.

I. Motley Temporary Bridge.

In 2001, Motley applied to WSDOT for and received a temporary access connection permit for access to SR 270 at milepost 6.9 (where the former Garrison Road spur connects to SR 270) and a separate permit to construct a temporary bridge in the State-owned right-of-way. CP 49-59. Also in 2001, Motley applied for and received an easement to cross the county recreation trail (formerly the railroad right-of-way), without which it could not build or use the temporary bridge and temporary highway access connection. CP 227, 319-21. Motley built the temporary bridge;

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was not passable is not a fact material to Williams Place's claim that it held the access right essential to this case.

Williams Place did not help pay for the installation or maintenance of the bridge. CP 227 ¶8.

J. WSDOT Coordination Prior to Removal of Temporary Bridge.

At a 2006 public meeting regarding the WSDOT project to widen SR 270 from two to five lanes, WSDOT's project engineer discussed Williams Place's access with one of Williams Place's representatives. WSDOT's project engineer also spoke with one of Williams Place's managing members by phone on more than one occasion regarding the SR 270 project and Williams Place's access. CP 49. Months prior to the removal of the Motley temporary bridge, the WSDOT Regional Administrator wrote one letter to Williams Place and two letters to Williams Place's attorney informing them of WSDOT's understanding and position with respect to Williams Place's use of the highway access at milepost 6.9. CP 236-41.

In writing, WSDOT told Williams Place, among other things, that 1) the 2001 highway design had changed from limited access to managed access and, therefore, there was no longer a need for a new frontage road; 2) Williams Place had never applied for an access connection to SR 270 from the Williams Place property and, therefore, WSDOT had not refused to give Williams Place an access connection; 3) WSDOT had been unable to locate any records establishing a temporary access connection permit,

an easement, or other property right authorizing Williams Place to travel from its property to the temporary access connection at milepost 6.9; 4) WSDOT was willing to grant Williams Place an access permit at a location where its property abutted or held an easement connecting to SR 270; 5) WSDOT did not agree that Williams Place already held an access property right or permit; and 6) the 1970 access permit from Northwest Paving[5] was incomplete and void because that permittee did not obtain the railroad's permission to cross the railway at milepost 6.9. CP 236-41.

K. Initiation of This Case.

Motley removed the temporary bridge on September 5, 2007, pursuant to WSDOT's instruction. CP 228. Williams Place filed this inverse condemnation lawsuit on September 10, 2007. CP 1.

L. State and Federal Quiet Title Actions Against County and Railroad.

In 2009, Williams Place filed quiet title actions against Whitman County and the Railroad in Spokane County Superior Court and the U.S. District Court for the Eastern District of Washington. CP 609-16, 620-30.

[5] In 1970, Motley's predecessor operated Northwest Paving from the present Motley parcel and applied to WSDOT for a permit to construct a bridge in the SR 270 right-of-way and a highway access connection permit at milepost 6.9. In its application, Northwest Paving refers to the abutters to the west, which would have been the Williams Place property. CP 128, CP 145. The Northwest Paving access and bridge permits were never in effect because they became void due to the applicant's failure to obtain the necessary railroad crossing permits. CP 246-47. Thus, the fact that Motley's predecessor applied for an access permit with the intent to share it with Williams Place in 1970 does not establish that Williams Place had a right to access SR 270 at milepost 6.9.

The title that Williams Place was trying to establish would have made it an abutter to SR 270, a fact crucial to its claim that it owns the right it alleges WSDOT took through inverse condemnation. The state court quiet title action was dismissed with prejudice in 2012. CP 617-19. The federal court quiet title action was dismissed without prejudice in 2011. CP 637.

M. New Easement for Separated Grade Crossing of the County Recreation Trail at Milepost 6.7.

Whitman County executed a non-grade (over or under the recreation trail) crossing easement allowing Williams Place to cross the recreation trail at milepost 6.7 in 2012. CP 674-78, 800-05; CP 858 ¶9. *See also* CP 859 ¶17 (containing comments of Williams Place following County's execution of the easement). The fact that Williams Place had to obtain this easement is additional undisputed evidence that Williams Place is not otherwise an abutter to SR 270 at milepost 6.7 or 6.9. In addition, because Williams Place now has an easement allowing it to reach SR 270 at milepost 6.7, WSDOT would be willing to consider granting it an access permit at that location, obviously very near the milepost 6.9 access that is at issue in this case. CP 676.

N. Procedural History.

WSDOT concurs with the procedural history described by Williams Place. Appellants Br. at 13-14.

V. SUMMARY OF ARGUMENT

Williams Place's appeal should be denied and the trial court's summary judgment affirmed because Williams Place produced no evidence supporting its claim that it had an existing property right or interest to access SR 270 at milepost 6.9. Even when the proffered evidence is viewed most favorably to Williams Place, applying Williams Place's various legal theories to those facts does not establish that it abuts SR 270 at milepost 6.9 – or even a genuine factual dispute that it might. Because the undisputed evidence demonstrates Williams Place does not abut SR 270 at milepost 6.9 and Williams Place cannot establish title to, or an easement to cross, land that does abut SR 270 at milepost 6.9, Williams Place cannot establish that it had a property right to access SR 270 at that location. Without that right Williams Place cannot establish that WSDOT took that right; and summary judgment was appropriate.

VI. ARGUMENT

A. The Court of Appeals Should Affirm Summary Judgment Because There Are No Genuine Issues of Material Fact.

On appeal of summary judgment, the standard of review is de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). The appellate court makes the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the

nonmoving party. *Id.* A court must grant (or affirm) summary judgment when there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. CR 56(c). The purpose behind the summary judgment motion is "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists." *Zobrist v. Culp,* 18 Wn. App. 622, 637, 570 P.2d 147 (1977).

Summary judgment is subject to a burden-shifting pattern. *Ranger Ins. Co. v. Pierce Cnty.,* 164 Wn.2d 545, 552, 192 P.3d 886 (2008). When the defendant is the moving party, it bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Once the moving party meets its initial burden, the burden shifts to the nonmoving party who cannot merely "rely on the allegations made in its pleadings." *Young,* 112 Wn.2d at 225; *see* CR 56(e). To defeat a summary judgment motion, the nonmoving party must set forth "specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Ranger*, 164 Wn.2d at 552. Summary judgment must be granted when the nonmoving party fails to meet its burden of "establish[ing] the existence of an element essential to that party's case, and on which that party will bear the burden

of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Pacific Northwest Shooting Park Ass'n v. City of Sequim,* 158 Wn.2d at 342, 351, 144 P.3d 276 (2006). In such a case, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

WSDOT moved for summary judgment on the grounds that Williams Place lacked evidence to make out a *prima facie* case of inverse condemnation because Williams Place cannot establish that it held a property right that WSDOT took or damaged by removing the Motley temporary bridge in the right-of-way at a location which the Motley property abutted the state highway by virtue of Motley's easement to cross the county recreation trail. "There can be no inverse condemnation if no property right exists." *Granite Beach Holdings, LLC v. Dep't of Natural Res.,* 103 Wn. App. 186, 205, 11 P.3d 847 (2000).

The elements of an inverse condemnation claim are: (1) taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings. *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005). As plaintiff, Williams Place must prove *all* of these

elements. Williams Place cannot establish that WSDOT took its right to access SR 270 at milepost 6.9 because Williams Place cannot establish that it owned that right. Williams Place's failure to produce evidence establishing that it had that right means that no other disputed fact is material because Williams Place's failure to prove this essential element renders all other facts immaterial.

B. Williams Place is Not an Abutter and, Therefore, Has No Property Right or Interest.

Williams Place failed to establish that it held a property right entitling it to access the highway at milepost 6.9. Owners of property abutting a public highway have a right to reasonable access to that highway, although not necessarily the right to a particular means of access. RCW 47.50.010(3)(b). The right of access of an abutting property owner to a public right-of-way is a property right. *Keiffer v. King Cnty.*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977). An abutting owner is entitled to just compensation under Article I, Section 16 of the Washington State Constitution if the right of access is taken or damaged for a public use. *Id.*; RCW 47.50.010(5). For purposes of determining an abutting landowner's right of access to a public highway, the term "access" is to be given its ordinary meaning of "[a]n opportunity or ability to enter, approach, [or] pass to and from." *Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 709, 167 P.3d

584 (2007) (*citing Black's Law Dictionary* 14 (8th ed. 1999)). "Property is said to abut upon a street or highway when there is no intervening land between it and such street or highway." *Kemp v. City of Seattle*, 149 Wash. 197, 201, 270 P. 431 (1928); *Davidson v. Kitsap Cnty.*, 86 Wn. App. 673, 684-85, 937 P.2d 1309 (1977). "When property abuts, the lot line and street line are in common." *Kemp*, 149 Wash. at 201.

Here, Williams Place failed to establish that its land abuts SR 270 or its right-of-way at the location of the alleged taking.[6] Undisputed facts show that the county recreation trail (formerly the railroad right-of-way) separates Williams Place's property and the state highway right-of-way. Before the State acquired additional highway right-of-way in 1950, the bridge was on the Motley property. Thus, anyone on the Williams Place property had to cross both the Motley property and the railroad to reach the milepost 6.9 connection to SR 270. After 1950, Williams Place's route to the milepost 6.9 access point required traveling on and across the railroad/recreation trail and the railroad/recreation trail right-of-way.[7]

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[6] As testified to by WSDOT's development services manager in his declaration, WSDOT provided Williams Place a letter which explained that WSDOT was amenable to granting an access permit to Williams Place at a location where it is an abutter. CP 232 ¶5; CP 236-37. Williams Place has not applied for an access permit. CP 676.

[7] "To reach the temporary access connection installed by Motley in 2001 from the Williams Place parcel, you need to drive along Chipman Trail property owned by Whitman County due east before reaching the temporary access connection located in [the] WSDOT right-of-way." CP 228 ¶9.

Because Williams Place cannot establish that its property abuts SR 270 at the location of the alleged taking, it cannot prevail on its inverse condemnation claim on this theory.

Not only has Williams Place failed to establish that it is an abutting landowner, but it also failed to establish that it had an easement on land that does abut SR 270 at the location of the alleged taking. A person who owns non-abutting property may still have a right to access a state highway if he or she has an easement to travel across the land of another which abuts the state highway right-of-way. "Every owner of property which abuts a state highway, or has a legal easement to the state highway . . . has a right to reasonable access, but may not have the right to a particular means of access, to the state highway system." WAC 468-51-030(1). But Williams Place has not produced evidence creating even a factual dispute that it held an easement, prescriptive or otherwise, or other property right to cross the intervening land to reach the milepost 6.9 access that it claims WSDOT condemned.[8]

1. Williams Place Failed To Establish Title or an Easement to County Recreation Trail.

In order to establish that it had a property right to cross the

[8] Similarly, as explained below at pages 33-34, Williams Place has not produced evidence that it is entitled to access at the location of the alleged taking under the right of reasonable access described in *Union Elevator & Warehouse Co., Inc. v. Dept. of Transp*., 96 Wn. App. ¶288, 980 P.2d 779 (1999).

intervening land to reach the access point at issue, Williams Place must establish a property right to cross the county trail and right-of-way. Williams Place argues that it has an easement to cross the county trail and right-of-way because it claims that the railroad right-of-way was an easement that reverted to Williams Place under state law when the railroad abandoned the easement. Williams Place's argument fails in the first instance because it relies on state law, when federal law controls this issue. Second, Williams Place's argument fails as a factual matter because it has twice been rebuffed in attempts to establish ownership of the land in court. Third, even if Williams Place's claim was not preempted by federal law, and even if Williams Place had not lost its quiet title actions, ownership of this land would not establish that it abuts the location of the alleged taking.

Williams Place's argument that it has produced evidence that ownership of the abutting railroad land reverted to Williams Place under state railroad abandonment law fails because federal law preempts state law. Williams Place argues that the railroad right-of-way was an easement and, therefore, the fee interest in the railroad reverted to Williams Place under state law when the railroad abandoned the easement. Williams Place is wrong on its state-law analysis,[9] but more fundamentally, a state

[9] Because, based on the facts of this case, federal law preempts state railroad abandonment law, WSDOT's explanation of why the law and facts here do not support a conclusion under state law that the fee interest in the railroad right-of-way reverted is not

property law analysis is irrelevant to this situation. In this case, federal law preempts state railroad abandonment law because Whitman County acquired its interest in the railroad land through a deed executed pursuant to a Surface Transportation Board (STB) order authorized by the federal Trails Act, 16 U.S.C. § 1247. *See Good v. Skagit Cnty.*, 104 Wn. App. 670, 675-76, 17 P.3d 1216 (2001).

This Court has described the preemption of state law claims involving STB orders implementing the federal Trails Act by explaining that:

> In this case, [the] County acquired the disputed property under the Trails Act. The Act specifically provides that interim trail use under the Act "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). By deeming interim trail use to be a discontinuance rather than abandonment, Congress effectively prevented property interests from reverting under state law. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990). During the interim trail use, the STB retains jurisdiction over the line. *Preseault*, 494 U.S. at 5-6 n. 3, 110 S.Ct. 914. So long as the STB retains jurisdiction, state law, including that governing creation and extinguishment of easements, is **preempted**. *See Hayfield N. R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633-34, 104 S.Ct. 2610, 2617-18, 81 L.Ed.2d 527 (1984) (Absent a determination of abandonment [by the STB], the rail property will remain within the STB's jurisdiction); *Trustees of the Diocese of Vermont v. State*, 145 Vt. 510, 496 A.2d 151 (1985).

Good v. Skagit Cnty., 104 Wn. App. 670, 675-76, 17 P.3d 1216 (2001)

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discussed in this response, but can be found at CP 648-50 (analyzing the terms of the railroad right-of-way conveyances at CP 687, 690).

(internal footnote omitted and emphasis supplied).

Williams Place failed in two efforts to quiet title to the former railroad right-of-way. CP 617-19, 637. It does not own that land. By continuing to argue on appeal that it does, Williams Place appears to be asking this Court to disregard the federal preemption of state law, this Court's prior case law, and the two separate court dismissals preventing title from reverting to Williams Place.

Even if federal preemption somehow did not apply and Williams Place owned the railroad right-of-way adjacent to its land, Williams Place still would not hold a right to access SR 270 at milepost 6.9, the only location at which it claims WSDOT took its access. If Williams Place owned the former railroad next to its property, then Motley, its neighbor to the east, would also own the railroad next to the Motley property.[10] The same fee ownership result would occur if Williams Place were to successfully challenge the STB Order. Williams Place still could not access the former bridge site without first crossing a Motley-owned portion of the former railroad. In sum, even if the railroad fee interest on the Williams Place property reverted to Williams Place's ownership, Williams Place would not hold a property right to access SR 270 at milepost 6.9 via the bridge at issue because its route to the bridge would

[10] The railroad right-of-way instruments are the same for the Motley and Williams Place. CP 687, 690.

still require it to cross the intervening property of a third party.

2. County Road Vacation Does Not Establish an Easement.

Williams Place argues that it retained a private easement along the route of the former Garrison Road, which after its 1935 vacation was no longer a public road. CP 102-03, 143. Williams Place asserts that because a segment of a vacated road once ran across a portion of Williams Place's property, it has a right to travel on other segments of the former Garrison Road that are not on its property to reach the bridge and SR 270 at milepost 6.9. This argument, however, is not supported by law.

To support this theory, Williams Place relies in error on *Howell v. King County*, 16 Wn.2d 557, 134 P.2d 80 (1943) and *Curtis v. Zuck*, 65 Wn. App. 377, 829 P.2d 187 (1992). Appellant Br. at 21. These cases are inapt because those cases were specifically limited to application of a specific statute not relevant here. *Howell* and *Zuck* involved street vacations occurring by operation of the "nonuser" statute[11] which applies after a platted street remains unopened for five years after the order or authority for opening it. Here, however, vacation did not occur by operation of the "nonuser" statute. Garrison Road had been opened for

[11] RCW 36.87.090. "[T]he non-user statute 'vacates' any county road not opened for public use within five years of the order or authority for opening it." *Leonard v. Pierce Cnty.*, 116 Wn. App. 60, 64-65, 65 P.3d 28 (2003).

public use and actually used. Then, after fully considering a petition for vacation, Whitman County ordered the vacation of Garrison Road because it had fallen into disuse after it had been replaced by Secondary Road Project No. 11.[12] CP 102. There is absolutely no evidence that the Garrison Road vacation resulted from the statutory mechanism central to *Howell v. King County* and *Curtis v. Zuck*. The Washington Supreme Court has explained that the line of "nonuser" statute cases (including *Howell v. King County*) "simply hold that parties who purchase property from a common grantor, in reference to a recorded plat, acquire a private easement for the purpose of access over the streets and alleys abutting their property, and/or over the streets and alleys that are reasonably necessary for ingress and egress to their property." *Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 368-69, 324 P.2d 1113 (1958).[13] Thus, *Howell v. King County* and other cases involving the "nonuser" statute do not apply here because in this case: 1) there is no common grantor; 2) the purchase did not refer to a recorded plat; and 3) a

[12] The order vacating Garrison Road also indicates that "no objection [was] made to vacating said road." CP 102.

[13] The court further explained that the rule in *Howell v. King County* could not be applied to the facts before it involving a failed attempt to enjoin the vacation of a city street by appellants, because the appellants were not abutting owners and the vacated street was not necessary for reasonable access to their property. *Capitol Hill Methodist Church*, 52 Wn.2d at 369. In the instant case, Williams Place's predecessor did not attempt to enjoin the vacation of former county road. CP 102-03; note 12, *supra*.

platted road did not remain unopened for five years after the order or authority for opening it.

Williams Place also cites to *Walker v. State*, 48 Wn.2d 587, 295 P.2d 328 (1956), to support its theory that it has a private easement to use the route of the county road vacated in 1935. *Walker v. State* is also not applicable because it involved neither a vacation of a road nor an alleged easement.[14]

In the instant case, Garrison Road was not vacated in 1935 by operation of the "nonuser" statute. Whitman County vacated the former Garrison Road because it had replaced it by building Secondary Road Project No. 11 in 1934 north of Paradise Creek. CP 143. The 1935 Whitman County Board of Commissioner's Order vacating the Garrison Road did not include any reservation of additional rights to the individual abutting owners. Title to a county road reverts to the abutting property owners upon its vacation. *Leonard v. Pierce Cnty.*, 116 Wn. App. 60, 64, 65 P.3d 28 (2003).

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[14] In *Walker v. State*, the court held that circuity of route resulting from the installation of a center-line concrete curb in front of an abutting property on SR 2 was not a taking or damaging of the property right of access. *Walker v. State*, 48 Wn.2d 587, 591, 295 P.2d 328 (1956).

3. Williams Place is Not Entitled to Compensation as a Subsequent Purchaser and Due to Foreseeable Damage.

Williams Place also argues that its property south of SR 270 was somehow landlocked after removal of the temporary bridge. WSDOT's actions, however, did not create that condition. Instead, if the property is landlocked, the acts and omissions of Williams Place and its predecessors are the cause. At those locations where it abuts SR 270 or where it has an easement to reach SR 270, Williams Place and its predecessors have been free at all times to develop access to and from Williams Place's property south of SR 270.

Additionally, the record indicates that Williams Place enjoys permissive access through the property of its neighbor to the west which is not unlike the permissive access Williams Place used prior to the removal of the temporary bridge. CP 193-96, 228, 250, 357-58. As stated by Williams Place's predecessor and founder, Sig Jorstad, in his deposition testimony regarding Williams Place's permissive use of its westerly neighbor's property to access the Williams Place property south of SR 270, "[t]he first [Thonney] was Walt, but he's passed away. Since that time, the son, Larry [Thonney], has run it and we've always gotten along fine with him. He's let us cross their property." CP 357. See also CP 250

(explaining the use of a farm lease arrangement to access Williams Place's property via the neighboring Thonney property to the west).

Since 1935, there have been at least four different owners of the Williams Place property. CP 104. The subsequent purchaser doctrine bars Williams Place from prevailing in an inverse condemnation case for injuries resulting from government takings that occurred prior to Williams Place's ownership.

> A property owner may bring an inverse condemnation claim alleging an unlawful governmental "taking" or "damaging," and may seek to recover the diminished value of the property. But a property owner generally may sue only for a taking that occurs during his or her ownership because the price of property is deemed to reflect its condition at the time of the sale, including any injury because of government interference.

Crystal Lotus Enter. Ltd. v. City of Shoreline, 167 Wn. App. 501, 505, 274 P.3d 1054 (2012) (footnotes omitted). "Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed." *Hoover v. Pierce Cnty.*, 79 Wn. App. 427, 433-34, 903 P.2d 464 (1995). This principle, known as the subsequent purchaser doctrine, bars Williams Place from seeking compensation for loss of access based on the County's 1933 acquisition of the right-of-way that bisected the Williams Place property or based on WSDOT's 1950 acquisition of a

different portion of Williams Place's property. Only the person owning the property in 1933 or 1950 could have sued for such compensation, if any.

In addition to Williams Place, as a subsequent purchaser, being barred from seeking compensation for any takings before it owned the property, *both* Williams Place *and* its predecessor are presumed to have been compensated for all damages caused by those prior takings. *Dickson v. City of Pullman*, 11 Wn. App. 813, 817-18, 525 P.2d 838 (1974). Under *Dickson*, Williams Place is estopped from claiming damages for any injury allegedly arising from the 1933 and 1950 right-of-way acquisitions at a later date. *Id*. When Williams Place's predecessors agreed to vacating Garrison Road, the building of the replacement road, and the conveying of additional highway right-of-way, it was foreseeable that access might become difficult. "[W]hen the right-of-way was sold by plaintiffs' predecessors-in-interest it must be presumed that they realized that eventually there would be at best difficult access to the property sold." *Id*. at 817. The *Dickson* court explained that:

> As to foreseeable damage, the rule is the same whether the property is taken for the public use through condemnation proceedings or is obtained for public purpose by deed or consent. Where private property is taken by condemnation, it is assumed the owner has received in that proceeding compensation for all reasonably foreseeable damage to his property resulting from the taking and public use. Where

> the owner of land has consented to the taking by giving a deed, he may not subsequently recover any damage he might have recovered had the public use been taken through condemnation proceedings. In either event, **it is assumed the owner was compensated for all reasonably foreseeable injury in the first instance and he is estopped to claim damages for such injury at a later date**.

Dickson v. City of Pullman, 11 Wn. App. 813, 817, 525 P.2d 838 (1974) (quotations omitted; emphasis supplied).[15]

In 1933, Williams Place's predecessor consented to the location and establishment of the Secondary Road Project No. 11 and gave the County an 80-foot-wide right-of-way across its property at a location north of Paradise Creek for that replacement road in a waiver of right-of-way instrument.[16] CP 96. In that instrument, Williams Place's predecessor "waive[d] all claims for damages of whatever kind which may be occasioned to said land or premises, or **any portion thereof**, or to the undersigned [owner] by the **location**, establishment, opening and use of said [replacement] road . . . ."[17] (emphasis supplied). CP 96. The words

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[15] *Dickson v. City of Pullman* involved the application of the original-grade doctrine. Although the facts in *Dickson* may be unique, the proposition for which it is relied upon in this response brief is not.

[16] The 1933 Right of Way Consent at CP 96 and the 1933 map at CP 242 demonstrate that Williams Place's predecessor owned land on both the north and south sides of what is now SR 270. Consequently, statements about being landlocked due to WSDOT's 2007 actions are illusory.

[17] This 1933 waiver of any damages caused by the location of the replacement road (now SR 270) demonstrates the absurdity of Williams Place's claim that WSDOT landlocked it in 2007 by removing a temporary bridge on the former route of a road Williams Place's predecessor itself agreed to replace and move in 1933. When examined

"any portion thereof" include the Williams Place property south of SR 270 at issue in this case.

If Williams Place's predecessor in interest had a claim against the County in 1933 or WSDOT in 1950 arising out of one of those acquisitions, that predecessor would have been deemed to have been compensated during that acquisition under *Dickson,* 11 Wn. App at 818. Similarly, under *Crystal Lotus Enter. Ltd. v. City of Shoreline*, the purchase price paid by Williams Place for its property would have been deemed to reflect the property's condition at the time of the sale, including any injury caused by the State's 1950 acquisition of additional highway right-of-way. *Crystal Lotus,* 167 Wn. App. at 505.

If Williams Place lost a property right to access SR 270 at milepost 6.9 via the bridge at issue, it did so in 1933 when its predecessor waived damages resulting from the location of the replacement road, in 1935 when Garrison Road was vacated,[18] or in 1950 when the State acquired the

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under the subsequent purchaser doctrine, any "taking" of the access right now claimed by Williams Place was waived by its predecessor in 1933.

[18] Vacation of a public street can result in a compensable loss for abutting property owners. *See Fry v. O'Leary*, 141 Wash. 465, 469-70, 252 P. 111 (1927); *London v. City of Seattle*, 93 Wn.2d 657, 661-63, 611 P.2d 781 (1980). The property owner's loss is complete on the date that the vacation order becomes effective. *London*, 93 Wn.2d. at 664. Thus, even though Williams Place's predecessor in 1935 may have had a claim arising out of the road vacation against the county, that claim does not survive the subsequent conveyance of the property.

property south of the then-existing SR 270.[19] Williams Place is either prohibited from seeking compensation for that purported loss because it acquired the property after the "taking" or is estopped because its predecessor was fully compensated. Either way, as a matter of law, Williams Place cannot establish an inverse condemnation, so summary judgment was appropriate.

4. Williams Place Has No Implied Easement or Easement by Necessity or Prescription

Despite Williams Place's arguments regarding various easement theories in support of its inverse condemnation claim, these theories are unsupported by the facts and the law.

a. Williams Place Cannot Establish an Implied Easement.

In its opening brief, Williams Place claimed that it has an implied easement. Appellant Br. at 22-23. An easement can be implied based upon prior use and is based on the parties' intent, which is shown by the facts and circumstances surrounding the conveyance. *Roberts v. Smith,* 41 Wn. App. 861, 864, 707 P.2d 143 (1985) (citing *Evich v. Kovacevich,* 33 Wn.2d 151, 204 P.2d 839 (1949)). Intent to create an easement may be

[19] In 1950, the Williams Place property was owned by Williams (no relation to Williams Place other than honorific farm/property identification) who conveyed additional highway right-of-way to WSDOT's predecessor in 1950 by deed. CP 107-08. In 2005, Williams Place acquired title from its predecessor Jorstad, whose deed was recorded in 1961. CP 104. Williams Place believes that Jorstad purchased the property in 1954 or the mid 1950s from Williams. CP 104, CP 86-87, Appellant Br. at 3.

implied from prior use where there is: "(1) a unity of title and subsequent termination of two parcels of property; (2) apparent and continuous use of a quasi easement for the benefit of one parcel to the detriment to the other during the unity of title; and (3) a reasonable degree of necessity for the existence of the easement after severance. Unity of title and subsequent separation is an absolute requirement." *Landberg v. Carlson,* 108 Wn. App. 749, 757, 33 P.3d 406 (2001) (citing *Hellberg v. Coffin Sheep Co.,* 66 Wn.2d 664, 668, 404 P.2d 770 (1965) (internal quotations omitted)).

Williams Place cannot satisfy the first element requiring unity of title through a common parcel. Williams Place's implied easement theory relies on *Roe v. Walsh*, 76 Wash. 148, 135 P. 1031 (1913), which is factually dissimilar to the present case. In *Roe v. Walsh*, the parcels in question were originally owned by a common grantor. But in this case, it is undisputed that Williams Place's predecessors did not share unity of title or a common grantor with the Motley property. From 1935, when the County vacated Garrison Road, until 1950, the bridge was located on the Motley property. Both Williams Place's and Motley's 1880s predecessors in interest received their property from the United States in 1881 and 1882, respectively. CP 689, 692-94. The "common original ownership by the USA should not be considered unity of title when analyzing whether an implied easement exists." *Granite Beach Holdings, LLC v. Dep't. Nat.*

Res., 103 Wn. App. 186, 196, 11 P.3d 847 (2000). Doing so "would make the mandatory element that a party establish common ownership at the date of severance meaningless - because all ownership of land in the western states can be so traced." *Id*.

Williams Place also argues that the fee interest in the vacated Garrison Road is itself somehow the common parcel that was divided. According to this argument, Garrison Road was formerly owned by the county, which Williams Place considers to be the grantor, and, when the county vacated the road, the entire length of the road reverted to the owners. There is no authority for this novel argument. Under this argument, the effect of the county vacating the road was to maintain the road as a means of access to the Williams Place property as well as a semi-private highway for all those owners abutting the former Garrison Road.

This theory is contrary to law because the fee interests in a former county road revert to the abutting property owners upon vacation of a county road. *See Leonard,* 116 Wn. App. at 64 ("On vacation of a road, title reverts to the abutting property owners."). Thus, Williams Place now owns the portion of Garrison Road abutting the Williams Place property, and Motley owns the portion of Garrison Road abutting the Motley property.

The Williams Place parcel and Motley parcel were never owned by a common grantor. It is, therefore, not possible for Williams Place to have an implied easement to access the former Garrison Road Bridge site. Without that easement, Williams Place is not an abutter and cannot present evidence that it owned the access right it now claims WSDOT condemned.

b. Williams Place Cannot Establish an Easement by Necessity.

Contrary to its assertion otherwise, Williams Place cannot have an easement by necessity. Williams Place cites to *Dawson v. Greenfield*, 118 Wash. 454, 203 P. 948 (1922), which holds that an implied easement by necessity can be found where a common property owner sells a portion of the property that, without an easement, would be landlocked. *See also Hellberg v. Coffin Sheep Co*., 66 Wn.2d 664, 667, 404 P.2d 770 (1965). Intent to create an easement is implied from necessity where (1) a grantor conveys part of a common parcel, (2) retains part of the parcel, and (3) after severance, it is necessary to pass over the grantor's land to reach a public street or road. *Visser v. Craig*, 139 Wn. App. 152, 158–59, 159 P.3d 453 (2007). The facts here cannot support the elements necessary to establish an easement by necessity because there is no common grantor. Consequently, none of the three required elements of easement by necessity can be satisfied.

c. Williams Place Cannot Establish a Prescriptive Easement.

Williams Place suggests that the facts support a prescriptive easement. Appellant Br. at 24-27. In order to perfect an easement by prescription, Williams Place would have to produce evidence demonstrating, among other things, that its use was adverse or hostile to the owner. *See Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 84, 123 P.2d 771 (1942). The burden of proving a prescriptive right rests upon the one who is to be benefited by the establishment of such right. *Id*. Williams Place has presented no evidence that its use of the bridge or former Garrison Road route was adverse to Motley or Motley's predecessors, the railroad, or the county. Without production of such evidence, Williams Place fails to meet its burden and its use of the former Garrison Road route and bridge must be presumed to be nothing more than permissive. Interestingly, Williams Place suggests that it may have perfected a prescriptive easement against the railroad. Appellant Br. at 24. But this argument is unsupportable because state and federal courts already ruled otherwise when they dismissed Williams Place's 2009 quiet title actions against the railroad and county. CP 617-19, 637.

d. Williams Place Receives No Right of Access under *Union Elevator*.

Williams Place asserts that WSDOT has destroyed its reasonable, adequate, and commercially practicable access to SR 270. Appellant Br. at 16-20.[20] Williams Place cites to *Union Elevator & Warehouse Co., Inc. v. Dept. of Transp*., 96 Wn. App. 288, 296, 980 P.2d 779 (1999) to support this position. Appellant Br. at 19.

The Court should decline to follow Williams Place's suggestion that *Union Elevator* would support a finding that Williams Place, as a non-abutting landowner, had a state highway access right at milepost 6.9. *Union Elevator* is distinguishable for two reasons. First, *Union Elevator* involved a limited access[21] (four lane full access control) facility and this case involves only a managed access highway.[22] The issues resolved by *Union Elevator* involved statutes unique to limited access facilities including RCW 47.52.041 and .080, which are not applicable in this case which involves a managed access facility.

Thus, unlike the more limited options available to the *Union Elevator* plaintiff, Williams Place can apply for access at a location where

[20] Within this section of its opening brief, Williams Place argues that WSDOT did not present evidence disputing that Williams Place had access to its property via the former temporary bridge site for 125 years. Appellant Br. at 18. This is not accurate. The record establishes that there were periods in which this former, temporary bridge site was not used by anyone. CP 48-49, 224, 227, 229, 386. And sometime prior to 2001, the "bridge" was not useable. CP 227 ¶4-5; CP 229.

[21] Limited access facilities are provided for in RCW 47.52.

[22] Managed access facilities are addressed in RCW 47.50.

Williams Place is an abutting owner.[23] *See* RCW 47.50.010; WAC 468-51-030. Consequently, removal of the temporary bridge at milepost 6.9 does not prevent reasonable access by Williams Place to its property. Second, *Union Elevator* involved the loss of access to a State highway from an existing public county road. *Union Elevator,* 96 Wn. App. at 294. The *Union Elevator* plaintiff's facility abutted the Lind-Kahlotus County Road, a public road which had been connected to the state highway prior to WSDOT's highway construction project. *Union Elevator,* 96 Wn. App. at 292, 294. But the portion of the Williams Place property at issue in this case (south of SR 270) does not abut a public road. Garrison Road has not been a public road since its vacation in 1935 and, therefore, the Williams Place property owners have not used a public road to reach SR 270 since 1935. Unlike the *Union Elevator* plaintiff, Williams Place did not have access to a state highway via a public road at the time of the alleged taking. Thus, there is no logical basis to apply the unique holding in *Union Elevator* to the dissimilar facts here.

[23] WSDOT will consider an application from Williams Place for an access permit at a location where it abuts the highway. CP 676. For example, WSDOT Eastern Region Administrator informed Williams Place by letter that WSDOT was amenable to issuing an access connection permit from SR 270 to Williams Place's property, provided that the connection met regulatory requirements. CP 236-37. This letter included an enclosed blank access connection permit form for use by Williams Place. CP 237. As of November, 2012, Williams Place had not applied for an access connection permit, even though the County gave Williams Place an easement to cross the county recreation trail at SR 270 milepost 6.7 in 2012. CP 674-78, 800-05.

C. The Facts Do Not Establish Equitable Estoppel.

Williams Place's conclusion that WSDOT is equitably estopped from asserting that Williams Place did not have a right of access at milepost 6.9 is based on an incorrect understanding of the facts and law. The doctrine of equitable estoppel against a government agency has been described by the Supreme Court as follows.

> The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Robinson v. Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, cert. denied, --- U.S. ----, 113 S.Ct. 676, 121 L.Ed.2d 598 (1992). Equitable estoppel is based on the principle that: a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975).
>
> Equitable estoppel against the government is not favored. *See Finch v. Matthews*, 74 Wn.2d 161, 169, 443 P.2d 833 (1968). Consequently, when a party asserts the doctrine against the government, two additional requirements must be met: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel. *Shafer v. State*, 83 Wn.2d 618, 622, 521 P.2d 736 (1974); *Finch*, 74 Wn.2d at 175, 443 P.2d 833. Courts should be most reluctant to find the government equitably estopped when public revenues are involved. *Harbor Air Serv., Inc. v. Board of Tax Appeals*, 88 Wn.2d 359, 367, 560 P.2d 1145 (1977).
>
> A party asserting equitable estoppel against either the government or a private party must prove each

> element of estoppel with clear, cogent and convincing evidence. *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wn. App. 758, 760-61, 695 P.2d 996 (1985) (equitable estoppel asserted against government) . . . .

Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743-44, 863 P.2d 535 (1993) (footnote omitted).

Williams Place contends that WSDOT has been equitably estopped based upon the following government admissions, statements, or acts: 1) a 1970 permit application by Northwest Paving Inc. which never resulted in an access permit because the applicant failed to obtain the necessary railroad crossing permits;[24] 2) an observation in a WSDOT appraisal regarding farm access without an explanation of the basis for the appraiser's observation concerning a portion the Williams Place property that was not the focus of the appraisal because it was unaffected by the acquisition that the appraisal concerned. CP 139, 140. 3) internal WSDOT communication in which an employee described his opinion that Williams Place's asserted access right did not exist; and 4) former WSDOT plans for a limited access highway which would have included a frontage road that Williams Place could have used had it been built. None

[24] Williams Place is attempting to support its equitable estoppel argument with a 1970 highway access permit and bridge permit application that was not completed because the applicant, a business operating on the present Motley land, failed to obtain approval from the railroad to cross at the location central to the instant case. This is a situation not dissimilar to Williams Place's. This permit application is at CP 371-84, 127-37. This permit was conditioned on the applicant obtaining railroad crossing permits. Because the applicant was unable to satisfy this condition, the access and bridge permits became void. CP 246-47.

of these government actions are inconsistent with WSDOT's position that Williams Place did not have a right of access at milepost 6.9.

As to the second element of equitable estoppel, there is no evidence that Williams Place acted in reliance on any of these government actions. Furthermore, any reliance on the frontage road plan was unreasonable, as the limited access plans include a warning in capital letters that "ALL PLANS ARE SUBJECT TO CHANGE . . . " CP 260-61.

Additionally, Williams Place cannot establish clear and convincing evidence to support its equitable estoppel theory. None of the four documents described above which Williams Place relies on to support its equitable estoppel argument were addressed to Williams Place or specifically concerned the issue presented here. In the only written communication from WSDOT to Williams Place concerning the issue presented here, WSDOT specifically said that it did not believe that Williams Place had a right of access. These letters were from WSDOT's regional administrator and were addressed to Williams Place and its attorney. CP 236-37, 240-41. WSDOT's position in this litigation is consistent with its position in these letters. Thus, when the totality of the evidence concerning WSDOT's actions prior to the removal of the temporary bridge is weighed, the letters directly to Williams Place from the highest-ranking WSDOT employee in the region far outweigh the

other alleged acts. Thus, Williams Place has not satisfied its initial burden to produce evidence sufficient to meet the clear, cogent, and convincing evidence standard. Finally, "[w]here both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie." *Guillen v. Pierce Cnty.*, 127 Wn. App. 278, 290, 110 P.3d 1184 (2005) (quoting *Lybbert v. Grant Cnty.*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)).

D. Williams Place's Standing Issue Misunderstands WSDOT's Role.

Williams Place complains that WSDOT lacks standing to assert claims belonging to the County and/or other third parties with respect to Williams Place's lack of an easement to cross intervening property belonging to these third parties. This argument fails to understand RCW 47.50, the Washington Highway Access Management Act (HAMA), which establishes a framework for the governmental regulation of access points to state highways. *Galvis v. Dept. of Transp.*, 140 Wn. App. 693, 167 P.3d 584 (2007). Under HAMA, owners or occupiers of land abutting a state highway have a right of access to or from such highway only at such points and in such manner as may be determined by WSDOT. RCW 47.50.020(1). In performing its responsibilities under HAMA, WSDOT must evaluate whether owners of property are state highway abutters, or have legal easements, to the state highway. *Id.*; WAC 468-51-030. In short, Williams

Place's "lack of standing" argument mistakes standing with WSDOT's performance of its statutory duties.

In addition, as the plaintiff in an inverse condemnation case, Williams Place bears the burden of producing evidence that it owns the property right it claims WSDOT took – the right to access SR 270 at milepost 6.9. WSDOT's summary judgment motion demonstrated that Williams Place lacked evidence that it held that right. Because Williams Place is a non-abutting owner, the missing evidence necessarily included the apparent lack of any easement across the intervening lands. WSDOT is not asserting the claims of third parties; it is merely demonstrating that Williams Place cannot produce evidence to prove a necessary element of its claim.

Under HAMA, no connection to a state highway may be constructed or altered without first obtaining an access permit. RCW 47.50.040(1). Williams Place has not applied for an access permit at milepost 6.9. As discussed above, WSDOT has, however, indicated its willingness to approve a permit for reasonable access elsewhere, including in the vicinity of milepost 6.7, where Williams Place has recently obtained an easement for a separated grade crossing of the county recreation trail.

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E. Williams Place Has No Grandfathered Access under the Highway Access Management Act.

Williams Place may argue as it did in Whitman County Superior Court that it has grandfathered access as a result of having used the milepost 6.9 access on July 1, 1990. CP 458-61. Under this flawed theory regarding HAMA's grandfathered access provision, the use of any access connection that existed on July 1, 1990, by any person would be grandfathered even if such access would have required crossing the property of one or more neighboring landowners without the necessary easements in order to reach the state highway access connection point. To make this argument, Williams Place will likely focus on the absence of a reference to an "abutting land owner" in RCW 47.50.080. According to this argument, the grandfathering provision in RCW 47.50.080 applies to any person who used an access connection on July 1, 1990, regardless of that person's relationship to the land that abuts the highway or the route that person must take to get to the highway access point.

This unsound statutory construction concerning the relationship between RCW 47.50.010 and RCW 47.50.080 leads to an absurd result; namely, that if a person lacking a legal right to cross the property of another to reach a highway access connection did so actively on July 1, 1990, that person's right to access has been nevertheless grandfathered

under state law. The court must "avoid constructions that yield unlikely, absurd or strained consequences." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). *See also State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010) ("Such an interpretation could lead to absurd results, which we are bound to avoid when we can do so without doing violence to the words of the statute."). "'[D]eparture from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.'" *State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (*quoting* 2A N. Singer, Statutory Construction § 45.12 (4th ed. 1984)).

Any contention that RCW 47.50.080 does not require an abutting ownership interest (directly or by legal easement), fails to acknowledge the statements of the Legislature's policy in HAMA.

RCW 47.50.010(3) provides:

> (3) It is the policy of the legislature that:
>
> (a) The access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a safe and efficient highway system; and
>
> (b) **Every owner of property which abuts a state highway has a right to reasonable access** to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the

> right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property.

RCW 47.50.010(3) (emphasis supplied). Similarly, the general provisions in WAC 468-51-030 provide in pertinent part that "[e]very **owner of property which abuts a state highway, or has a legal easement to the state highway** . . . has a right to reasonable access, but may not have the right to a particular means of access, to the state highway system." WAC 468-51-030(1) (emphasis supplied). Furthermore, "[i]t is also the responsibility of the applicant to acquire any property rights necessary to provide continuity from the applicant's property to the state highway right of way **if the applicant's property does not abut the right of way** . . ." WAC 468-51-030(2) (emphasis supplied).

Thus, RCW 47.50.080, concerning the grandfathering of connections that were active and existing on July 1, 1990, only applies to the connections of abutting property owners. The HAMA grandfathering provision in RCW 47.50.080 is an exception to the general terms of HAMA. Under the rules of statutory construction, such "exceptions to the general terms of the statute to which they are appended and as such, generally, should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions." *State v.*

Wright, 84 Wn.2d 645, 652, 529 P.2d 453 (1974), quoted with approval in *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 327, 931 P.2d 885 (1997).

RCW 47.50.010 and RCW 47.50.080 are in the same chapter and pertain to the same subject matter and, therefore, under the rules of statutory construction these statutes must be construed together.[25] Moreover, RCW 47.98.020 applies here and requires that the provisions of Title 47 RCW be construed in *pari materia* with provisions of Title 47 RCW, Title 46 RCW, and with other laws relating to highways. RCW 47.98.020.[26]

F. Statutory Attorney Fees.

The State also respectfully requests statutory attorney fees and

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[25] The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. Such statutes must be construed together. In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes. . . . Courts also consider the sequence of all statutes relating to the same subject matter.

Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001)(internal quotations and citations omitted).

[26] RCW 47.98.020 provides:

> The provisions of this title shall be construed in pari materia even though as a matter of prior legislative history they were not originally enacted in the same statute. The provisions of this title shall also be construed in pari materia with the provisions of Title 46 RCW, and with other laws relating to highways, roads, streets, bridges, ferries and vehicles. This section shall not operate retroactively.

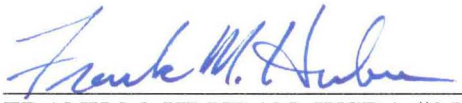
costs on review if it prevails. See RCW 4.84.080; RAP 18.1.

VII. CONCLUSION

Williams Place cannot make out a *prima facie* case of inverse condemnation because it lacks evidence necessary to establish that it owned the access property right it claims WSDOT took. In sum, Williams Place has provided no evidence of deed, title, or easement necessary to establish that it abutted SR 270 at milepost 6.9 or otherwise held a right to access SR 270 at that location. The State respectfully requests that this Court affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 22nd day of November, 2013.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify that I caused to be served on all parties, or their counsel of record, a true and correct copy of the Response Brief by Hand Delivery to the following addresses:

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

DATED this 22nd day of November, 2013, at Spokane, Washington.

Margo Loree

Margo Loree
Legal Assistant

RCW 47.50.010
Findings — Access.

(1) The legislature finds that:

(a) Regulation of access to the state highway system is necessary in order to protect the public health, safety, and welfare, to preserve the functional integrity of the state highway system, and to promote the safe and efficient movement of people and goods within the state;

(b) The development of an access management program, in accordance with this chapter, which coordinates land use planning decisions by local governments and investments in the state highway system, will serve to control the proliferation of connections and other access approaches to and from the state highway system. Without such a program, the health, safety, and welfare of the residents of this state are at risk, due to the fact that uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system; and

(c) The development of an access management program in accordance with this chapter will enhance the development of an effective transportation system and increase the traffic-carrying capacity of the state highway system and thereby reduce the incidences of traffic accidents, personal injury, and property damage or loss; mitigate environmental degradation; promote sound economic growth and the growth management goals of the state; reduce highway maintenance costs and the necessity for costly traffic operations measures; lengthen the effective life of transportation facilities in the state, thus preserving the public investment in such facilities; and shorten response time for emergency vehicles.

(2) In furtherance of these findings, all state highways are hereby declared to be controlled access facilities as defined in RCW 47.50.020, except those highways that are defined as limited access facilities in chapter 47.52 RCW.

(3) It is the policy of the legislature that:

(a) The access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a safe and efficient highway system; and

(b) Every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property.

(4) The legislature declares that it is the purpose of this chapter to provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the findings and policies under this section.

(5) Nothing in this chapter shall affect the right to full compensation under section 16, Article I of the state Constitution.

[1991 c 202 § 1.]

Notes:

Captions not law -- 1991 c 202: "Section captions and part headings as used in this act do not constitute any part of the law." [1991 c 202 § 22.]

APPENDIX A

Effective date -- 1991 c 202: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1991." [1991 c 202 § 24.]

Severability -- 1991 c 202: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1991 c 202 § 25.]

RCW 47.50.020
Definitions — Access.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Controlled access facility" means a transportation facility to which access is regulated by the governmental entity having jurisdiction over the facility. Owners or occupants of abutting lands and other persons have a right of access to or from such facility at such points only and in such manner as may be determined by the governmental entity.

(2) "Connection" means approaches, driveways, turnouts, or other means of providing for the right of access to or from controlled access facilities on the state highway system.

(3) "Permitting authority" means the department for connections in unincorporated areas or a city or town within incorporated areas which are authorized to regulate access to state highways pursuant to chapter 47.24 RCW.

[1991 c 202 § 2.]

Notes:

Captions not law -- Effective date -- Severability -- 1991 c 202: See notes following RCW 47.50.010.

RCW 47.50.040
Access permits.

(1) No connection to a state highway shall be constructed or altered without obtaining an access permit in accordance with this chapter in advance of such action. A permitting authority has the authority to deny access to the state highway system at the location specified in the permit until the permittee constructs or alters the connection in accordance with the permit requirements.

(2) The cost of construction or alteration of a connection shall be borne by the permittee, except for alterations which are not required by law or administrative rule, but are made at the request of and for the convenience of the permitting authority. The permittee, however, shall bear the cost of alteration of any connection which is required by the permitting authority due to increased or altered traffic flows generated by changes in the permittee's facilities or nature of business conducted at the location specified in the permit.

(3) Except as otherwise provided in this chapter, an unpermitted connection is subject to closure by the appropriate permitting authority which shall have the right to install barriers across or remove the connection. When the permitting authority determines that a connection is unpermitted and subject to closure, it shall provide reasonable notice of its impending action to the owner of property served by the connection. The permitting authority's procedures for providing notice and preventing the operation of unpermitted connections shall be adopted by rule.

[1991 c 202 § 4.]

Notes:

Captions not law -- Effective date -- Severability -- 1991 c 202: See notes following RCW 47.50.010.

RCW 47.50.080
Permit removal.

(1) Unpermitted connections to the state highway system in existence on July 1, 1990, shall not require the issuance of a permit and may continue to provide access to the state highway system, unless the permitting authority determines that such a connection does not meet minimum acceptable standards of highway safety. However, a permitting authority may require that a permit be obtained for such a connection if a significant change occurs in the use, design, or traffic flow of the connection or of the state highway to which it provides access. If a permit is not obtained, the connection may be closed pursuant to RCW 47.50.040.

(2) Access permits granted prior to adoption of the permitting authorities' standards shall remain valid until modified or revoked. Access connections to state highways identified on plats and subdivisions approved prior to July 1, 1991, shall be deemed to be permitted pursuant to chapter 202, Laws of 1991. The permitting authority may, after written notification, under rules adopted in accordance with RCW 47.50.030, modify or revoke an access permit granted prior to adoption of the standards by requiring relocation, alteration, or closure of the connection if a significant change occurs in the use, design, or traffic flow of the connection.

(3) The permitting authority may issue a nonconforming access permit after finding that to deny an access permit would leave the property without a reasonable means of access to the public roads of this state. Every nonconforming access permit shall specify limits on the maximum vehicular use of the connection and shall be conditioned on the availability of future alternative means of access for which access permits can be obtained.

[1991 c 202 § 8.]

Notes:

Captions not law -- Effective date -- Severability -- 1991 c 202: See notes following RCW 47.50.010.

WAC 468-51-030
General provisions.

(1) When connection permits required. Every owner of property which abuts a state highway, or has a legal easement to the state highway, where limited access rights have not been acquired has a right to reasonable access, but may not have the right to a particular means of access, to the state highway system. The right of access to the state highway may be restricted if, in compliance with local regulation, reasonable access to the state highway can be provided by way of another public road which abuts the property. These public roads shall be of sufficient width and strength to reasonably handle the traffic type and volumes that would be accessing that road. All new connections including alterations and improvements to existing connections to state highways shall require a connection permit. Such permits, if allowed, shall be issued only after written development approval where such approval is required, unless other interagency coordination procedures are in effect. However, the department can provide a letter of intent to issue a connection permit if that is a requirement of the agency that is responsible for development approval. The alteration or closure of any existing access connection caused by changes to the character, intensity of development, or use of the property served by the connection or the construction of any new access connection shall not begin before a connection permit is obtained from the department. Use of a new connection at the location specified in the permit is not authorized until the permit holder constructs or modifies the connection in accordance with the permit requirements. If a property owner or permit holder who has a valid connection permit wishes to change the character, use, or intensity of the property or development served by the connection, the department must be contacted to determine whether a new connection permit would be required.

(2) Responsibility for other approvals. Connection permits authorize construction improvements to be built by the permit holder on department right of way. It is the responsibility of the applicant or permit holder to obtain any other local permits or other agency approvals that may be required, including satisfaction of all environmental regulations. It is also the responsibility of the applicant to acquire any property rights necessary to provide continuity from the applicant's property to the state highway right of way if the applicant's property does not abut the right of way, except where the connection replaces an existing access as a result of department relocation activity.

(3) Early consultation. In order to expedite the overall permit review process, the applicant is strongly encouraged to consult with the department prior to and during the local government subdivision, rezoning, site plan, or any other applicable predevelopment review process for which a connection permit will be required. The purpose of the consultation shall be to determine the permit category and to obtain a conceptual review of the development site plan and proposed access connections to the state highway system with respect to department connection location, quantity, spacing, and design standards. Such consultation will assist the developer in minimizing problems and delays during the permit application process and could eliminate the need for costly changes to site plans when unpermittable connection proposals are identified early in the planning phase. The conceptual review process is further detailed in WAC 468-51-050.

(4) Cost of construction.

(a) Permit holder. The cost of construction or modification of a connection shall be the responsibility of the permit holder, including the cost of modification of any connection required as a result of changes in property site use in accordance with WAC 468-51-110. However, the permit holder is not responsible for alterations made at the request of the department that are not required by law or administrative rule.

(b) Department. Existing permitted connections impacted by the department's work program and which, in the consideration of the department, necessitate modification, relocation, or replacement in order to meet current department connection location, quantity, spacing, and design standards, shall be modified, relocated, or replaced in kind by the department at no cost to the permit holder. The cost of further enhancements or modification to the altered, relocated, or replaced connections requested by the permit holder shall be the responsibility of the permit holder.

(5) Notification. The department shall notify affected property owners, permit holders, business owners and/or emergency services, in writing, where appropriate, whenever the department's work program requires the modification, relocation, or replacement of their access connections. In addition to

written notification, the department shall facilitate, where appropriate, a public process which may include, but is not limited to, public notices, meetings or hearings, and/or individual meetings. The department shall provide the interested parties with the standards and principles of access management.

(6) Department responsibility. The department has the responsibility to issue permits and authority to approve, disapprove, and revoke such permits, and to close connections, with cause.

[Statutory Authority: Chapter 47.50 RCW. WSR 99-06-034 (Order 187), § 468-51-030, filed 2/25/99, effective 3/28/99. Statutory Authority: RCW 47.01.101 and chapter 47.50 RCW. WSR 92-14-044, § 468 -51-030, filed 6/24/92, effective 7/25/92.]