NO. 92856-8

**SUPREME COURT OF
THE STATE OF WASHINGTON**

THE CITY OF TACOMA,
a Washington Municipal Corporation,

Petitioner/Appellant,

vs.

TT PROPERTIES, LLC,
a Washington Limited Liability Company,

Respondent.

CITY OF TACOMA'S REPLY TO TT PROPERTIES, LLC'S RESPONSE IN THE CITY'S PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

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I. CITY OF TACOMA'S ARGUMENT IN REPLY TO TT PROPERTIES' RESPONSE

A. Introduction. Holding the City of Tacoma (the "City") potentially liable for an access taking on the facts of this case makes it extremely difficult for any municipality to perform its governmental regulatory function of permit review and approval in furtherance of public health, safety, and welfare for any project that involves public right-of-way. Through a regulatory Right of Use Agreement ("RUA"), the City and Sound Transit reached an accord as to how and where Sound Transit would use right-of-way dedicated to the City as part of the permitting process for Sound Transit's D to M Project (the "Project"). Sound Transit's legislatively mandated mission of providing public transportation[1] allows it to use local right-of-way even to the point of using eminent domain to acquire that right.[2] The City acted solely in its sovereign, regulatory capacity and without any proprietary benefit accruing from the RUA in permitting the Project. Under Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998) and its progeny[3] and the undisputed facts of this case, there is no causation against the City for inverse condemnation.

The question of causation need not even be reached if this Court corrects the error made by the Court of Appeals, Division Two regarding

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[1] *See* RCW 81.112.070; CP at 197.
[2] RCW 81.112.080, 100; RCW 35.58.030; Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 128 P.3d 588 (2006); CP at 197.
[3] Halverson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999); Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist., 175 Wn. App. 374, 305 P.3d 1108 (2013).

access takings. For over a century, this Court has held that "[n]ot all impairments of access to property are compensable,"[4] and that "no compensation can be exacted [for an alleged access taking] where access is preserved over other streets or ways."[5] Such is the case here with the real property at 2620 Pacific Avenue (the "2620 Property") still having its main, direct access from Pacific Avenue, as widened and improved by Sound Transit as part of its Project, and another direct access from 27th Street. Not only did Division Two err by ignoring binding precedent regarding these remaining access points, but it further erred by making an unsupported opinion/conclusory assertions its basis for finding an issue of material fact regarding substantial impairment.[6]

Government agencies such as the City and Sound Transit need to be able to rely on controlling precedent when they make decisions regarding right-of-way. That is, if an agency makes a decision regarding right-of-way that changes an access point for an abutting property owner, but still preserves access to that property over other streets or ways, the agency should have some certainty that it will not be liable for a taking. Division Two's decision does not follow controlling precedent in this regard, and lowers the bar to the point that any change to access whatsoever will require a trial. Without correction, Division Two's

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[4] Keiffer v. King County, 89 Wn.2d 369, 372, 572 P.2d 408 (1977).
[5] Freeman v. City of Centralia, 67 Wash. 142, 145, 120 P. 886 (1912).
[6] COA Decision, pg. 11; City's Petition, pgs. 16-19. All cites are to the version of the COA Decision submitted with the City's Petition.

decision hinders agency decisions regarding right-of-way significantly.

B. <u>This Court's holding in *Phillips* on Causation was not Followed by Division Two. That Failure Hinders Municipalities in Fulfilling Their Sovereign Regulatory Role in the Permitting Process and Must be Corrected</u>.

"To have a taking, some governmental activity must have been the direct or proximate cause of the landowner's loss."[7] It is undisputed that D to M was a Sound Transit Project conducted in furtherance of Sound Transit's mission to provide public transportation. It is undisputed that Sound Transit designed the Project. It is undisputed that Sound Transit's contractor performed the work that led to the repurposing of Delin Street right-of-way from a traversable side street to right-of-way slope to South Tacoma Way.[8] The City did not take any of these actions that allegedly "caused" TT Properties, LLC's ("TTP") loss. TTP's causation argument rests entirely on the existence of the RUA, and fails as a result.

In its Response, TTP asserts that "[t]he City's action through the Right of Use Agreement destroyed TT Properties' Delin Street access."[9] But TTP can point to no action the City took through the RUA, and more precisely, TTP can point to no action relevant to Delin Street other than agreeing to the use. That is not enough to hold the City potentially liable even if there is a compensable taking in this matter.

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[7] Phillips, 136 Wn.2d at 966.
[8] COA Decision, pg. 15.
[9] TTP Response, pg. 7.

Division Two acknowledged the Phillips rules,[10] and then failed to follow them. Division Two erroneously held that the City might be liable because the City might have been a direct participant in these actions by allowing use of the right-of-way.[11] Even were that true, under Phillips, there must be supported facts that show a proprietary benefit to the permitting municipality in addition to allowing right-of-way use in order to withstand summary judgment under Phillips.[12]

In Phillips, the county not only allowed a private development to use county right-of-way for placement of private stormwater improvements, it also benefited by those improvements diverting stormwater away from county owned property "so that instead of flooding county property, it poured out of the spreaders onto the Phillips' property."[13] That is where the question of proprietary benefit came in to reverse the previously granted summary judgment in Phillips. There was evidence that the county benefited proprietarily. Here, the City did not.

The City did allow the repurposing of Delin Street, but not to any proprietary end. Unlike the developer's private use in Phillips and the resulting private benefit to the county, the City merely allowed Sound Transit to use Delin, in accordance with its design, to accomplish construction of a ***public*** transportation project.

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[10] COA Decision, pg 14 (*municipality not liable for design when its action is only to approve and permit*).
[11] COA Decision, pg 15.
[12] Phillips, 136 Wn.2d at 967-968.
[13] Id.

It is true that, in the RUA recitals, the City declared the Project to be in the ***best interest of the public***.[14] That is only true, however, in the exact, sovereign sense of the words used, that a public transportation project benefits the citizens of the City. There is no proprietary tie-in to be found in a misquoted recital. "The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity."[15] A public transportation project is just that—for the public. There is no allegation of any special benefit or profit inuring to the City here, only what Division Two characterizes as a question of fact about whether the City directly participated somehow in the Project because of the existence of the RUA. That is not the Phillips standard. There must be a proprietary benefit as well.

TTP, in its Response, quotes from other recitals of the RUA as evidence of the City's participation.[16] Any alleged participation notwithstanding, none of those recitals show any kind of a special benefit or profit to the municipal corporation of the City that results from allowing the repurposing of Delin Street for a public purpose. In Phillips, the county's alleged benefit, for which there was a variety of

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[14] CP 197; Division Two erroneously paraphrased this recital as the City acknowledging that the RUA "[w]ould be in the best interest of the City and the public." COA Decision, pg 15.
[15] Okeson v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003).
[16] TTP Response, pgs. 17-18.

evidence including expert reports, resulted directly from the right-of-way use in question. Here, the best TTP can do is to point to conditions in the RUA that have nothing to do with Delin Street or with any proprietary benefit. There is no evidence to show that these provisions are anything other than part of the regulatory framework for Sound Transit's Project.

Even TTP's reference, raised for the first time in its Response to the City's Petition for Review, to various requirements in the RUA[17] makes no connection to any proprietary benefit to the City. These provisions were either regulatory in nature (requiring a City Project Manager for regulatory oversight) or were nothing more than boilerplate provisions common to a regulatory agreement.

The bottom line here is that the facts, even when viewed in a light most favorable to TTP, present far too tenuous a link to create causal liability on the City for the loss of TTP's back exit on Delin Street as a result of Sound Transit's design and construction. That tenuousness is what creates the huge dilemma for municipalities. If the use of regulatory agreements on larger projects creates an inference of direct participation in a project, and then without any evidence of a proprietary benefit, as required by Phillips and it progeny, a city may be liable for what happens as part of the permitted project, cities will no longer be able to use regulatory agreements, and will be loath to approve

[17] *See* TTP Response, pg. 18 *referencing* CP 208-209, 220-221, and 226.

projects where there is any risk of being sucked into liability. The alternative is that cities will approve such projects, but will limit their involvement to the point that sovereign responsibilities regarding public health, safety, and welfare will be disregarded in order to be shielded against liability or will have to require indemnification as part of project review. The added risk that Division Two's error unavoidably hinders cities in performing their regulatory role for the betterment of the public. That sort of obstacle to carrying out sovereign duties does not appear to be what this Court intended in Phillips. Division Two's errors of ignoring the proprietary benefit requirement of Phillips and its progeny should be corrected through reversal and reinstatement of the trial court's summary judgment dismissal on this alternative ground.[18]

C. Division Two's Failure to Follow Controlling Takings Precedent from This Court and Even Its Own Prior Decisions Must be Corrected for Government Agencies to Have Any Certainty in Their Management of the Public Right-of-Way.

Beginning as early as 1912, this Court has held in access takings cases that:

> "[t]he rule is equally well settled that no compensation can be exacted where access is preserved over other streets or ways. In other words, an added inconvenience is not a damage or taking within the meaning of these terms as they are used in our state constitution." [19]

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[18] Plein v. Lackey, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003)("*Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof.*") *citing* Ertman v. Olympia, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) (*a superior court decision will not be reversed where the reason given is erroneous if the judgment or order is correct*).

[19] Freeman v. City of Centralia, 67 Wash. 142, 145, 120 P. 886 (1912).

This rule is clearly stated and is clear in its application. Division Two failed to apply it. TTP argues that the Freeman rule only applies to properties that do not abut the street in question. That is not the law.[20] Applying Freeman and the many cases citing it to the 2620 Property dictates that there is no compensable taking here as the trial court ruled. Numerous cases since Freeman support the trial court's dismissal.[21] In all these cases, by any reasonable assessment, the plaintiffs remaining access was less than what remains at the 2620 Property after completion of Sound Transit's Project. The 2620 Property still has direct access from two different abutting streets.

At its essence, TTP's complaint is that traffic cannot now flow through the 2620 Property, entering on Pacific Ave. and exiting on Delin Street. This is exactly the type of case this Court has held is not a compensable taking.[22] This Court has expressly held that "[t]he right of

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[20] Freeman and it progeny deal with issues particular to abutting properties. The only time an abutting property owner has any heightened rights is when she becomes landlocked as a result of a street closure. Such is not the case here.

[21] Hoskins v. Kirkland, 7 Wn. App. 957, 960-961 503 P.2d 1117 (1972) ("*If, however, the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged. He has no legal right to prevent the vacation because no legal right of his has been invaded.*"); Mackie v. Seattle, 19 Wn. App. 464, 469-470, 576 P.2d 414 (1978) ("*The plaintiff and his customers still have access to the property. The fact that access is deflected a few blocks and will be inconvenient due to the closure of South Southern Street in the next block does not raise such inconvenience to the status of a special injury not suffered by the general public. The plaintiff does not have standing to challenge the Board of Public Works' action.*"); Capitol Hill Methodist Church v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958)(*no taking on summary judgment where plaintiff retains excellent access to the system of streets remaining.*); Galvis v. Dep't of Transp., 140 Wn. App. 693, 167 P.3d 584 (2007)(*no taking even though WSDOT reduced unfettered access along abutting street to two curb cuts*).

[22] Keiffer v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977) *citing* Walker v. State,

access does not include the right to maintenance of a particular pattern or flow of traffic."[23] TTP's desired flow of traffic through the 2620 Property and out to Delin Street is the entire basis for its claim of monetary damage—a monetary claim that is wholly lacking in any factual support.[24]

The trial court recognized that the application of this Court's holdings in Freeman, Walker, Capitol Hill, and Keiffer as well as the multiple Court of Appeals cases following them[25] dictate dismissal of TTP's claim because there is no compensable taking at the 2620 Property.

Whether a taking exists at all is a threshold determination for the court.[26] Division Two correctly made this determination for the 223 Property,[27] but inconsistently failed to do so for the 2620 Property, instead erroneously finding an issue of material fact regarding whether TTP was damaged in contravention of controlling case law.[28] In regard to the 223 Property, Division Two correctly held that TTP failed to show

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48 Wn.2d 587, 295 P.2d 328 (1956).

[23] Capitol Hill Methodist Church, 52 Wn.2d at 365; Keiffer, 89 Wn.2d at 372-373.

[24] TTP's claim of monetary damage is based entirely on the unsupported, conclusory assertion of Christopher Eldred, CP pg. 185; SentinelC3, Inc. v. Hunt, 181 Wn.2d 128, 140-141, 331 P.3d 40 (2014)("*to defeat a motion for summary judgment, a party must present more than '[u]ltimate facts' or conclusory statements.*") *citing* Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988)

[25] *See e.g.* Hoskins, Mackie and Galvis *supra.*

[26] Wandermere Corp. v. State, 79 Wn.2d 688, 695, 488 P.2d 1088 (1971)(*the determination of the existence of a taking is a judicial question);* Keiffer, 89 Wn.2d at 372-373; Galvis, 140 Wn. App. At 705 *as cited by Division Two in upholding the dismissal of TTP's claim at the 223 Property,* COA Decision, pg. 13().

[27] COA Decision, pg. 13; for which summary judgment dismissal was upheld by Division Two and for which TTP does not seek review. TTP Response, pg. 8 fn 3.

[28] COA Decision, pg. 11-12.

it had a property right that had been damaged because it still had access. Citing Keiffer and Galvis, Division Two correctly held, in regard to the 223 Property, that a jury need not decide damages or whether the degree of impairment is compensable.[29] Why then, was that same process not engaged for the 2620 Property where more access remains than for the 223 Property?

The following excerpt from this Court's decision in Keiffer is particularly instructive as to how Division Two erred. This Court outlined the process for assessing an access taking claim as follows:

> The issue of whether compensation must be paid in a particular case is best resolved through a two-step process. The first is to determine if the government action in question has actually interfered with the right of access as that property interest has been defined by our law. Here distinctions are made between the restriction of access and related but distinguishable actions which simply regulate the volume or flow of traffic on a public way. Those actions taken pursuant to the police power for the purpose of regulating the flow of traffic on the public way itself are generally not compensable. Underlying the decisions in these types of cases is the principle that the right of access does not include the right to maintenance of a particular pattern or flow of traffic.[30]

As stated above, "The [court's] first [duty] is to determine if the government action in question has actually interfered with the right of access *as that property interest has been defined by our law.*"[31] The trial court followed this requirement, and Division Two did also for the 223

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[29] COA Decision, pg. 13.
[30] Keiffer, 89 Wn.2d at 372-373.
[31] Id.

Property, but failed to do so for the 2620 Property, instead incorrectly focusing on TTP's unsupported assertion of monetary damage.[32] Even if there were credible evidence of monetary damage, such evidence has no bearing on the judicial determination of whether there is a taking at all. Such evidence would address degree under the Keiffer test, not the existence of a taking at the outset.

Put simply, Division Two erred when it allowed an unsupported conclusory assertion relevant (even if supported) only to the second part of the Keiffer test to create an issue in the first part of the test—whether there even is a compensable taking.

An access property interest is not an unlimited right.[33] As stated above, "[t]he right of access does not include the right to maintenance of a particular pattern or flow of traffic."[34] For there to be a compensable taking, "[i]t must appear that the complaining parties suffered a special damage different in kind and not merely in degree from that sustained by the general public."[35] "The fact that the lot owner may be inconvenienced or that he may have to go a more roundabout way to reach certain points, it is generally held, does not bring him an injury different in kind from the general public, but in degree only."[36]

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[32] COA Decision, pgs. 11-12.
[33] Galvis, 140 Wn. App. at 702.
[34] Id.
[35] Capitol Hill Methodist Church, 52 Wn.2d at 365.
[36] Id.; Mackie, 19 Wn. App. at 469-470 ("*The plaintiff and his customers still have access to the property. The fact that access is deflected a few blocks and will be inconvenient due to the closure of South Southern Street in the next block does not*

Anyone travelling to the 2620 Property can still access the property directly from Pacific Avenue and directly from 27th Street. The loss of Delin Street may create an inconvenience in how traffic may have otherwise flowed through the 2620 Property, but that inconvenience does not and cannot rise to the level of a compensable taking under controlling decisions of this Court.[37]

Division Two failed to make the first step determination of whether a taking actually exists at the 2620 Property "*[a]s that property interest has been defined by our law.*"[38] The trial court correctly identified that the 2620 Property still has direct access at two locations and correctly applied the holdings in Freeman, Capitol Hill Methodist Church, Hoskins, Mackie and Galvis to dismiss TTP's claims.[39] Division Two erred in not making that same application. It cannot be ignored here that "[t]he landowner [TTP] still retains an alternate mode of egress from or ingress to his land"[40]—two alternative modes, in fact. Where that is the case, "even if less convenient, generally speaking he [the landowner] is not deemed specially damaged. He has no legal right to prevent the vacation because no legal right of his has been invaded."[41]

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raise such inconvenience to the status of a special injury not suffered by the general public.").

[37] Freeman, 67 Wash. at 145; Capitol Hill Methodist Church, 52 Wn.2d at 365-367; Hoskins, 7 Wn. App. at 960-961.

[38] Id.

[39] RP at 18-19.

[40] Hoskins, 7 Wn. App. at 960-961; *see also* Freeman, 67 Wash. at 145.

[41] Id.

Even viewing all facts in this matter in a light most favorable to TTP, nothing changes in regard to the Pacific Ave. and 27th Street access. Under the law, there is no taking here. No legal right has been invaded. While access to the 2620 Property is less than what it was, and is perhaps a bit more inconvenient as a result, "[n]o compensation can be exacted [because] access is preserved over other streets or ways."[42]

Agencies such as Sound Transit and the City have to make decisions regarding right-of-way on a regular basis. Many times, such as here, those decisions are made due to safety considerations[43] "[t]aken pursuant to the police power for the purpose of regulating the flow of traffic on the public way."[44] Prior to Division Two's decision in this matter, agencies had a clearer path to follow in making those decisions. Following Freeman, Capitol Hill Methodist Church, Hoskins, Mackie and Galvis, an agency could look at a proposed right-of-way project, see how the project would affect neighboring access and make a determination based on whether a given property still had access over other ways or means. After Division Two's decision in this matter any possibility of making that determination is gone if a property with direct access to two adjacent streets can be considered to possibly have a claim for taking and damages. The City, Sound Transit, WSDOT, and other agencies of this state need the certainty of Freeman, Capitol Hill

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[42] Id.
[43] CP at 158, ¶ 6.
[44] Keiffer, 89 Wn.2d at 372.

Methodist Church, Hoskins, Mackie and Galvis to be free from the uncertainty that Division Two's ruling creates.

V. CONCLUSION

There is no question that the City of Tacoma permitted Sound Transit to repurpose right-of-way next to the 2620 Property through the regulatory review process culminating in the Right of Use Agreement. That notwithstanding, Sound Transit designed and conducted all work relevant thereto, and[45] Sound Transit alone had contact with TTP's principals.[46] Nonetheless, TTP believes the City should be responsible for its alleged taking.

This Court has held that, in inverse condemnation cases, the "'[D]etermination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent."[47] Nothing of "logic, common sense, justice, policy, and precedent" dictate that the City of Tacoma should be liable for an access taking here. According to Phillips, regardless of any direct participation by the regulator, there must also be evidence of proprietary benefit in order for the permitting agency to "[s]hare in any potential liability."[48] TTP believes that liability is entirely the City's. Such should not be the case under controlling precedent. Division Two's ruling should be reversed and the trial court's dismissal reinstated.

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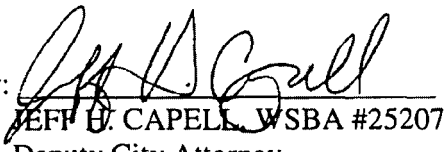
[45] CP at 163, ¶ 5-7.
[46] Id., at 163, ¶ 8-9.
[47] Halverson, 139 Wn.2d at 8; Jackass Mt. Ranch, Inc., 175 Wn. App. at 390.
[48] 136 Wn.2d at 969.

The Phillips analysis does not even need to be engaged if this Court corrects Division Two's failure to follow controlling precedent in access takings. Division Two acknowledged that in order "[t]o establish a taking, the claimant must prove a property right."[49] TTP has not done so in light of the holdings of Freeman, Capitol Hill Methodist Church, Hoskins, Mackie and Division Two's own decision in Galvis. As the trial court noted, the 2620 Property still has direct access at two locations.[50] TTP's complaint is only for an added inconvenience, not for a substantial taking according to controlling case law. The trial court's dismissal on summary judgment should be reinstated.

DATED this 11th day of April, 2016, at Tacoma, Washington.

ELIZABETH A. PAULI, City Attorney

By: 
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[49] COA Decision pg. 7 *citing* Granite Beach Holdings, LLC v. Dep't of Nat. Res., 103 Wn. App. 186, 205, 11 P.3d 847 (2000).
[50] RP at 18-19.

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Dear Clerk:

Attached is the Petitioner/Appellant City of Tacoma's Reply Brief in its Petition for Review in the following matter:

Case Name: TT Properties, LLC v. City of Tacoma
Case Number: SC No. 92856-8 (COA No: 46803-4-II)

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