NO. 92856-8

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO
(46803-4-II)

THE CITY OF TACOMA,
a Washington Municipal Corporation,

Petitioner/Appellant,

vs.

TT PROPERTIES, LLC,
a Washington Limited Liability Company,

Respondent.

CITY OF TACOMA'S PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

Jeff H. Capell, WSBA No. 25207
Deputy City Attorney
City of Tacoma
747 Market Street, Room 1120
Tacoma, WA 98402
(253) 591-5638

Table of Contents

Table of Authorities

Washington Cases

Statutes

Constitutional Provisions

I. IDENTITY OF PETITIONER

The City of Tacoma, a Washington municipal corporation (the "City"), hereby petitions this Court for review of the Court of Appeals' decision identified immediately below in Section II.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of Division Two's published opinion in TT Properties, LLC v. the City of Tacoma (January 12, 2016)(2016 Wash. App. LEXIS 28, attached hereto as Appendix A), which reversed in part the Pierce County Superior Court's grant of summary judgment to the City.

III. ISSUES PRESENTED FOR REVIEW

A. In the absence of any facts that the City acted in a proprietary capacity in approving and permitting Sound Transit's plans for a commuter rail project, does the Court of Appeals' decision that the City could potentially be liable for an unconstitutional taking resulting from Sound Transit's[1] designed and constructed project conflict with this Court's holdings in Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998), and Halverson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999) and the Court of Appeals' decision in Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist., 175 Wn. App. 374, 305 P.3d 1108 (2013)?[2] (RAP 13.4(b)(1),(2) and (4))

---

[1] "Sound Transit" is the Central Puget Sound Regional Transit Authority, dba Sound Transit (and hereinafter referred to as "Sound Transit").

[2] Referred to hereafter as the JMRI case.

B. Did the Court of Appeals err in finding the City potentially liable for an unconstitutional inverse condemnation access taking that resulted from a Sound Transit designed and constructed project in the absence of any supporting facts that the Plaintiff did not have reasonable access remaining at the subject property and without making an initial takings determination as a matter of law in contravention of the numerous other cases discussed herein below from both this Court and the Court of Appeals that are controlling precedent in access takings as interpreted against the Washington State Constitution Art. 1, § 16, and the U.S. Constitution? (RAP 13.4(b)(1),(2) and (3))

IV. STATEMENT OF THE CASE

A. Introduction. This Petition raises the issue whether municipalities can regulate projects over which they have permitting authority without the specter of being made liable for the actions of the permittee through inverse condemnation. A city must be able to act in its sovereign role as regulator without becoming the financial guarantor for the projects it regulates and the permits it issues – particularly in a case such as this, where the City was acting to assist a regional, public transportation project of immense significance.

Three well-settled holdings in the areas of inverse condemnation generally, and access takings in particular, compel reversal of the Court of Appeals' published decision in this case. First, "[a] governmental entity does not become a surety for

every governmental enterprise involving an element of risk."[3] Second, "[n]ot all impairments of access to property are compensable."[4] Finally, "no compensation can be exacted [for an alleged access taking] where access is preserved over other streets or ways."[5] The Court of Appeals recognized (1) that "[i]t is undisputed that TTP retains ingress and egress access on Pacific Avenue and 27th Street,[6] (2) that Sound Transit and its contractors carried out the work that converted Delin Street to a slope,[7] and (3) that other than granting Sound Transit the right to use certain right-of-way areas, "[t]he City's involvement... consisted solely of approving and permitting Sound Transit's Plans."[8] Given these undisputed facts, the Court of Appeals erred in concluding that a portion of TTP's inverse condemnation claim should be remanded for trial.

B. Factual Background. TTP owns or formerly owned[9] parcels of real property at 2620 Pacific Avenue (the "2620 Property") and 223 East C Street (the "223 Property") in the City.[10] Historically, TTP had access to the 2620 Property from the front at Pacific Avenue and from the rear at both 27th Street and Delin Street.[11] Since 1952, TTP's access to Delin was

---

[3] Jackass Mt. Ranch, Inc., 175 Wn. App. at 389-390 *citing* Phillips, 136 Wn.2d at 965 *which cited* Bodin v. City of Stanwood, 130 Wn.2d 726, 740, 927 P.2d 240 (1996).
[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.
[7] COA Decision, pg. 3.
[8] Id.
[9] TTP sold the 2620 Property on or around June 19, 2013. CP pgs. 262-263.
[10] CP at 284-286.
[11] *See* TTP's maps at CP 183 and 188. *See* City maps and photos at CP 108-115, 127, and 133-134.

achieved across an easement retained over the property at 2610 Pacific Ave., which it sold to the City.[12] TTP contended that the Delin Street access point was used to exit the 2620 Property.[13]

In 2009, Sound Transit commenced work on its "D to M Track & Signal Project" in order to extend Sounder commuter rail service from Tacoma to Lakewood in furtherance of its mission "[t]o implement a high capacity transportation system,"[14] and "to address [inadequate] mobility needs of the area..."[15] The State Legislature has granted Sound Transit "[a]ll powers necessary" to carry out its mission, including the power to acquire property through eminent domain and to "[c]onstruct and maintain facilities in public rights-of-way without a franchise."[16]

The City, which had permitting authority over the portions of the D to M Project within the City's limits, entered into a regulatory Right-of-Use Agreement with Sound Transit (the "RUA") to govern how Sound Transit's use of the public right-of-way would be accomplished.[17] In its regulatory role, the City provided input on various safety and compliance issues with the D to M project,[18] and entered into the RUA as one part of that review and approval process.

---

[12] COA Decision, pg. 2.
[13] Id.; CP at 189.
[14] RCW 81.112.070; CP at 197.
[15] RCW 81.112.010.
[16] 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.
[17] COA Decision, pg. 3; the RUA is found in its entirety at CP 197-248.
[18] *See e.g.* CP at 246-248.

Thereafter, "Sound Transit and its contractors carried out the work necessary for the D to M project...includ[ing] closing the portion of Delin Street" TTP used for a back exit.[19] During the project, Sound Transit representatives "[h]ad multiple conversations with Kenneth A. Turner, manager for TT Properties, LLC...regarding access and related issues."[20] "As a result of these conversations, Sound Transit's contractor widened and improved the Pacific Avenue access to 2620 Pacific Avenue."[21]

C. Procedural Background. TTP sued the City (but not Sound Transit) in Pierce County Superior Court on November 11, 2013 alleging a "Taking of Property" at 2620 Pacific Avenue (the "2620 Property") and 223 East C Street (the "223 Property"),[22] alleging (1) that Sound Transit's repurposing of the short section of Delin Street that ran near the 2620 Property from a traversable street to right-of-way slope had worked a taking of TTP's access, seeking damages of $365,000.00, and (2) that Sound Transit's placement of a utility bungalow behind the 223 Property that encroached one foot into an alleyway access path had also worked a taking of TTP's access, seeking additional damages of $70,000.00.[23]

On the City's motion, the Superior Court dismissed TTP's action on summary judgment, holding as a matter of law

---

[19] COA Decision pg. 3.
[20] CP at 163.
[21] Id.
[22] CP at 284-286.
[23] CP at 284-286 and 165-168.

that no compensable takings had occurred at either location because both locations still had reasonable access.[24] The Superior Court did not reach the City's second argument—that even if a taking occurred, the City was not the causal actor.

Division II affirmed and reversed it in part in a published decision. Division II affirmed the lower court's ruling that there was no compensable taking at the 223 Property because reasonable access remained, but reversed the same determination on the 2620 Property, holding that there existed "a genuine issue of material fact about whether access to the Pacific Avenue property...was substantially impaired.[25] Division II further held that "[t]here is a question of fact here about whether the City acted in a proprietary, rather than merely a regulatory, capacity,"[26] rejecting the City's argument that there was no factual support for the City being held liable as the causal actor under Phillips, Halverson, and JMRI.

The City now seeks review of Division II's remanded issues based on the errors set forth at Section III. above, and the authority and argument that follows.

V. ARGUMENT

A. Introduction. The City's role in Sound Transit's D to M Project was no more than the role it plays in any permit review and approval for a public project of this size. The RUA is

---

[24] Id.; *and* Verbatim Transcript of Proceedings ("RP") at 17-19.
[25] COA Decision, pg. 11.
[26] COA Decision, pg. 15.

a regulatory tool used to determine how two government agencies will cooperate in their governmental capacities regarding the public use of right-of-way. This Court has held this type of activity to be governmental and not proprietary.[27] There is no evidence that the City took proprietary action or reaped any special benefit beyond the public benefit of added public transportation within the City.

Moreover, the threshold issue of whether a taking has occurred is a constitutionally based question of law for the court to determine. Under both the state and federal Constitutions, the government cannot take access to a property without paying compensation, but the courts are clear that, "Not all impairments of access to property are compensable."[28] Division II did not make that determination in relation to the 2620 Property confusing the later question of degree of impairment with the long standing rule that if access remains over other ways and means, there is no taking. The resulting confusion has dire consequences for public transportation projects by taking away the possibility for swifter resolution of claims under the court rules and holdings of this Court, and confusing Washington

---

[27] "Governmental functions tend to involve activities ensuring compliance with state law; issuing permits; or performing activities for the public health, safety, and welfare." *See* Okeson v. City of Seattle, 150 Wn.2d 540, 551, 78 P.3d 1279 (2003) (*operating street lights*); Stiefel v. City of Kent, 132 Wn. App. 523, 529-530, 132 P.3d 1111 (2006) (*operating a fire department*); Taylor v. Stevens County, 111 Wn.2d 159, 164-65, 759 P.2d 447 (1988) (*issuing building permits and conducting building inspections*); Dorsch v. City of Tacoma, 92 Wn. App. 131, 136, 960 P.2d 489 (1998) (*issuing electrical permits*); Moore v. Wayman, 85 Wn. App. 710, 716, 934 P.2d 707 (1997) (*building code inspections*).

[28] Keiffer, 89 Wn.2d at 372.

State's Constitutional takings jurisprudence in the process.

B. The Takings Causation Issue Implicates Concerns of Substantial Public Interest That If Left Unaddressed Will Hinder Municipalities in their Crucial Regulatory Role and Create Unnecessary Barriers to Important Public Projects. (Rap 13.4(b)(1)(2)(3) and (4))

1. Municipalities are not to be Made Sureties for Third Party Projects in the Absence of Proprietary Participation. The Division II decision raises problematic, far-reaching concerns that directly affect Washington municipalities' ability to regulate activities for the public health, safety, and welfare. Proper regulation, without active proprietary participation, does not amount to causation.[29] If permitting a large scale public project such as Sound Transit's D to M implicates municipal liability for a constitutional taking, municipalities will be extremely hesitant to approve such projects without requiring indemnifications and other safeguards from the project applicant that are not now necessary.

Conversely, government agency project applicants will surely be reluctant to provide such safeguards. Division II's decision will create barriers to the completion of public projects and increase the costs of such projects to the public through delays and agency infighting. Division II's decision has implications not only for Sound Transit projects, but for any state agency that works in the public right-of-way or on locally owned public property. If allowing another governmental agency to use

[29] Halverson, 139 Wn.2d at 13.

local right-of-way for a public project creates potential liability for the municipality in the absence of proprietary action/benefit, municipalities will be reluctant to allow such use at all, leaving the project agency no recourse but to exercise eminent domain against the regulating agency. To the extent the municipality does not have the discretion to deny such projects, it becomes an unwilling "surety" for projects of other agencies. The facts of this case present the need for this Court's guidance on the issue of allowing right-of-way use by another government agency, and whether that alone creates a proprietary benefit. Without that clarification, Division II's decision stands in conflict with decisions of this Court and the Court of Appeals, resulting in adverse consequences that should not be the result of reviewing and approving permits.[30]

Here, there is no dispute that D to M was a public project. There is no dispute that Sound Transit is legislatively empowered to use public right-of-way to accomplish its legislatively mandated mission.[31] There is no allegation that the City acted improperly in any way in the execution of its regulatory role over the D to M Project. There is only the *existence* of the RUA and the fact that the City allowed Sound Transit to use public right-of-way for a public transportation project. There is no also supported allegation that the City benefitted in a proprietary capacity. Division II's only stated support for the existence of an

[30] Phillips, 136 Wn.2d at 965; Halverson, 139 Wn.2d 1 at 8; Jackass Mt. Ranch, Inc., 175 Wn. App. at 389-390.
[31] CP at 197 *citing* RCW 81.112.100 *and* RCW 35.58.030.

issue of material fact regarding causation seems to be the court's overbroad reading of the 6th recital of the RUA, which reads:

> "WHEREAS, it is in the best interests [sic] ***of the public*** that the City authorize such use of the Public Right-of-Way in support of Sounder Commuter Rail service through the issuance of a Right-of-Use Agreement for the purposes stated herein..."[32] [Emphasis added]

Division II erred when it stated that the RUA "[w]ould be in the best interest of the City and the public"[33] using that overbroad reading of the RUA's 6th recital to imply some proprietary benefit to the City in the absence of any support for that allegation. There is no special benefit to the City from this public project.

In both Halverson, and JMRI, the plaintiffs' takings claims against the government were dismissed on summary judgment because the causation element of the taking could not be substantiated as a matter of law. In both cases the government defendants had greater active participation than the City had here.[34] The Phillips Court set forth the elements of inverse condemnation as follows:

> A party alleging inverse condemnation must establish the following elements: (1) a 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.[35]

---

[32] CP at 197.
[33] COA Decision, pg. 15.
[34] In both cases, the County and the District had taken on certain maintenance obligations and had actively worked on the dikes and the wasteway.
[35] Phillips, 136 Wn.2d at 957, *additional cites omitted.*

The Court continued by saying that "To have a taking, some governmental activity must have been the direct or proximate cause of the landowner's loss."[36] Here, the City's only action was to enter into the RUA, and thereby allow Sound Transit to repurpose Delin Street to right-of-way slope.

2. Factual Support Similar to What Led to Remand in Phillips is Absent Here. In Phillips, King County allowed a private developer to place stormwater spreaders in County right-of-way, diverting water away from the private development and away from County property onto the property of the landowner alleging inverse condemnation. The County allowed a private, non-right-of-way use that generated private benefit to the developer. There was also substantial evidence of how the County reaped a private benefit from its approval of the Stormwater design and use of County property. The Phillips Court pointed out that:

> The record indicates that the water was collected from the development into the retention pond and was piped by culvert under or across the County right-of-way so that instead of flooding County property, it poured out of the spreaders onto the Phillips' property.[37]

Directing flood waters away from County property created an actual private benefit—protecting County property from flooding—pointing toward the potential liability of the County. Here, there is only the RUA recital finding Sound Transit's

---

[36] Id., at 966.
[37] Phillips, 136 Wn.2d at 967.

project to be in the public interest. Private benefit to the City necessary to find a proprietary action is absent.

The Phillips record also contained testimony from an expert hydrologist regarding the channeling of water and evidence that showed water levels before and after installation of the spreaders.[38] This together with evidence that the County's approval had worked an actual physical invasion of the Phillips' property in contravention of Washington laws regarding the artificial channeling of stormwater[39] were enough to create a material issue of fact. The remanded issue in Phillips had ample factual support. That is not the case here.

Here, there is nothing in the record that approaches the level of evidence present in Phillips. The RUA's statement of public interest alone is not evidence of active, proprietary participation or benefit. The Phillips Court remanded because of the numerous facts that could be construed in the Phillips' favor. Here, there are no such facts, only unsupported opinions and conclusory assertions. The Phillips Court concluded that because of its actions, "[t]he County ***may*** share in any potential liability, along with the developer, for damage to the Phillips' property [emphasis added]. In this case, TTP assumes that liability should rest entirely with the City based only on a statement of public interest in a recital of a regulatory right-of-way use agreement.

---

[38] Phillips, 136 Wn.2d at 967-968.

[39] The importance the Court placed on this aspect of the case is clear from its statement that "As discussed above, a long line of Washington cases holds that a municipality may not collect surface water by an artificial channel, or in large quantities, and pour it, in a body, on the land of a private person, to his or her injury." Id.

3. The Absence of any Facts Supporting a Proprietary Action or Benefit here, Makes Summary Judgment Dismissal the Correct Decision. "A public entity acts in a proprietary rather than a governmental capacity when it engages in businesslike activities that are normally performed by private enterprise."[40] Entering into an agreement as a regulatory tool is not a proprietary action. Private enterprise has no part in owning and controlling the use of public right-of-way, whether through an agreement or not. Municipalities regularly enter into development agreements like the RUA as a regulatory permitting tool.[41] If the mere existence of such an Agreement creates potential municipal liability for the permitted project, municipalities will no longer be able to use such agreements effectively, nor will they be able to regulate projects effectively.

"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."[42] Here, TTP presented no facts showing that the City, as opposed to the general public, benefited in any way from allowing Sound Transit's use of the right-of-way. "There is no question that land held for a street or highway is a public purpose."[43] The subject property is still right-of-way. The City facilitated the project in

[40] Stiefel v. City of Kent, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006).
[41] *See e.g.* RCW 36.70B.170 where development agreements are authorized as a land use regulatory tool.
[42] Okeson v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003).
[43] Kiely v. Graves, 173 Wn.2d 926, 937, 271 P.3d 226 (2012).

furtherance of public transportation. Railroad uses have been determined to be for the public benefit in the access takings context even when the operator was a private entity.[44] The record here is without support for any special benefit to the City as a corporate entity. The record only supports a public benefit.

In order "to defeat a motion for summary judgment, a party must present more than '[u]ltimate facts' or conclusory statements."[45] TTP only alleged the existence of the RUA and the use of public right-of-way as the causal link to holding the City liable for Sound Transit's actions. Neither the existence of the RUA, or that the RUA allowed Sound Transit to use public right-of-way is in dispute. Transportation use of the right-of-way does not confer a private benefit to the regulating City and this Court should so hold as a matter of law.

Allowing summary judgment to be defeated without factual support allows anyone in or around a project area to pursue the permitting agency as a surety for the project in violation of the principles set forth in Phillips, Halverson and JMRI. That is not a result the Phillips Court intended. There must be actual facts in dispute and support for the dispute.

The Court of Appeals took the language in the 6th recital and presumed some proprietary benefit to the City without any facts in support such as were present in Phillips and therefore

---

[44] Freeman, 67 Wash. at 148-149.

[45] SentinelC3, Inc. v. Hunt, 181 Wn.2d 128, 140-141, 331 P.3d 40 (2014)*citing* Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

erred. There is no issue of material fact supported in the record that could make the City liable as the causal actor in inverse condemnation under Phillip, Halverson and JMRI.

C. The COA Approach to the Issue of "Substantial Impairment" is in Conflict with Access Takings Case Law and is Inconsistent with its Own Ruling on the 223 Property.

1. The Existence of a Taking is a Threshold Question of Law for the Court. The threshold question in an access taking is not whether the property has decreased in value, as alleged without support here, it is whether a taking has occurred at all. This question is determined by assessing whether the property still has reasonable access. Put more precisely, if the property still has access over other street and ways, *there is no taking*, and the valuation question never comes into play. This is the holding of access takings cases in Washington for over a century.[46] Division II did not follow this well-settled rule in its opinion. Instead, Division II bit on an unsupported assertion of diminution in value effectively skipping its required threshold determination.

---

[46] Freeman, 67 Wash. at 145. ("*the 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.*"); 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.*").

TTP's assertion that it sold the 2620 Property at a loss is both unsupported and beside the point. Whether there is a taking at all is a question of law and was appropriately decided on summary judgment in the Superior Court.[47] Division II erred in bypassing this question of law and skipping ahead to a potential question of fact, unsupported though it was.[48] Because the initial existence of a taking is a determination of law for the court, it has been decided as such on summary judgment in numerous cases.[49]

TTP's argument that a taking has occurred at the 2620 Property relies entirely on the loss of Delin Street. It is undisputed that access is still available to and from Pacific Avenue and 27th. Division II erred in finding an issue of material fact regarding the 2620 Property because it was the court's duty to determine the existence of a taking as a matter of law. Division II recognized that the 2620 Property still has access at Pacific and 27th. Following the rule first stated by the State

---

[47] 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 v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977)(*the court determines the existence of a taking; a jury determines the degree thereafter*).

[48] Interestingly, Div. II cited the same cases the City does here in upholding the SJ dismissal of the claim at the 223 Property. Doing so was correct, but the same rule and analysis should have been applied to the 2620 Property as well. The 2620 Property actually has better remaining access than the 223 Property.

[49] *See e.g.* 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.*); Hoskins v. Kirkland, 7 Wn. App. 957, 503 P.2d 1117 (1972)(*summary judgment dismissal of access takings claim upheld where access was preserved over other streets*); Mackie v. Seattle, 19 Wn. App. 464, 576 P.2d 414 (1978); Galvis v. Dep't of Transp., 140 Wn. App. 693, 704-708, 167 P.3d 584 (2007) *rev. den.* 163 Wn.2d 1041, 187 P.3d 269 (2008)(*property owners have no right to submit to a jury the preliminary question of whether a taking of property has occurred*); and London v. Seattle, 93 Wn.2d 657, 611 P.2d 781 (1980).

Supreme Court in Freeman, the Court of Appeals should have upheld the summary judgment dismissal below just as it did for the 223 Property.

2. Under Controlling Case Law, Substantial Impairment is not a Value Based Determination. Division II pointed to two items from the record as creating an "issue of material fact regarding whether the removal of Delin Street substantially impaired TTP's access" at the 2620 Property.[50] First, is TTP's assertion that it exited the property on Delin Street on a regular basis.[51] It is undisputed that TTP used Delin as an exit point, and therefore nothing relevant to this fact that requires determination outside of summary judgment.

Second, is TTP's statement that the 2620 Property was sold in 2013 "at a much reduced price."[52] The claim of financial loss at the sale of the 2620 Property in 2013 is an unsupported assertion or opinion insufficient to defeat summary judgment. TTP presented the Declaration of MAI appraiser Christopher Eldred on this point, but Mr. Eldred was only able to offer that he had not arrived at a final opinion. He claimed the "impact on value" of the alleged takings was "significant," but made this incomplete "supposition or opinion" without any supporting facts.[53] There are no comparative sales offered, no actual numbers discussed, only conclusory statements and unsupported

---

[50] COA Decision, pg. 11, *citing* CP at 190.
[51] Id.
[52] Id.
[53] Id., SentinelC3, Inc., 181 Wn.2d at 140-141 (*value determination ruled inadmissible and insufficient to defeat summary judgment without actual supporting evidence*).

opinions.

As stated above, this unsupported assertion regarding a diminution in value misses the point. This assertion coupled with the undisputed fact that TTP exited to Delin merely creates an argument that TTP is damaged because its preferred traffic pattern into and out of the 2620 Property is no longer available. Even if true, the facts do not support a taking because "the constitutional right of access does not include the right to maintenance of a particular pattern or flow of traffic."[54] That is TTP's only complaint here—that it can no longer exit to Delin. This loss of a preferred pattern does not create a taking under controlling case law when access is preserved through "alternative modes," "even if less convenient,"[55] as is the case here.

CR 56 requires that "an affidavit opposing summary judgment must (1) be made on the affiant's personal knowledge, (2) be supported by facts admissible in evidence, and (3) show that the affiant is competent to testify to the matters therein."[56] The missing element here, and for the issue of causation above is that there are no supporting facts for either "issue of material fact"—only unsupported opinions and bare assertions. CR 56 and controlling case law require "support[] by facts admissible in

---

[54] Keiffer, 89 Wn.2d at 373; Capitol Hill Methodist Church, 52 Wn.2d at 365-366; Mackie, 19 Wn. App. at 469-470.

[55] Hoskins, 7 Wn. App. 960-61; Freeman, 67 Wash. at 145 ("an added inconvenience is not a damage or taking within the meaning of these terms as they are used in our state constitution.").

[56] SentinelC3, Inc., 181 Wn.2d at 140-141 *citing* Civil Rule (CR) 56(e), *and* Bernal v. Am. Honda Motor Co., 87 Wn.2d 406, 412, 553 P.2d 107 (1976).

evidence" to defeat summary judgment. Taking that requirement out of the equation makes summary judgment meaningless in the inverse condemnation context, allowing any claimant to move on to a trial in the absence of any issue of material fact and even in the absence of a compensable taking altogether if an unsupported claim of diminution in value is allowed to cloud the real issue of whether access remains.

In any event, the question for the court on summary judgment is not financial loss.[57] The question of law is whether the property still has reasonable access. The test for whether it has reasonable access—whether access is preserved over other streets or ways[58]—is met here, and the 2620 Property claim was appropriately dismissed on summary judgment below.

V. CONCLUSION

As stated above, "Not all impairments of access to property are compensable."[59] To again quote this Court in Freeman:

> "the rule [in access takings] 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."[60]

The 2620 Property still has access from two City streets. It may

---

[57] In refutation of TTP's unsupported assertion of selling at a loss, the City submitted records from the Pierce County Treasurer showing that the 2620 Property was sold in 2013 for $650,000, $122,000 more than what the property was assessed at ($528,000) at the time of the summary judgment hearing. CP 262-263.
[58] Freeman, 67 Wash. at 145.
[59] Keiffer, 89 Wn.2d at 372.
[60] Freeman, 67 Wash. at 145.

have lost its preferred rear exit, but that does not amount to a taking, as a matter of law, under controlling case law. Moreover, even if there were a compensable taking here, the City of Tacoma's part in the D to M project:

> "falls short of the active, proprietary participation--participation *without which the alleged taking or damaging would not have occurred*--which is required under *Phillips* before liability can attach in this inverse condemnation action."[61] [Emphasis in the original]

The RUA and the cursory acknowledgment of public benefit in its recital is not the kind of "active proprietary participation"[62] necessary to hold the City liable for the actions of Sound Transit. This Court should address the public project regulatory aspect of this case to hold that regulatory agreements, in the absence of proprietary participation or special benefit do not create liability for the regulator in inverse condemnation. Likewise, this Court should hold that allowing another public agency to use local right-of-way for a public purpose, again in the absence of proprietary participation or special benefit, does not create liability for the regulator in inverse condemnation.

DATED this 10th day of February, 2016, at Tacoma, Washington.

ELIZABETH A. PAULI, City Attorney

By: _____
JEFFREY CAPELL, WSBA #25207
Deputy City Attorney
of Attorneys for City Tacoma

---

[61] Halverson, 139 Wn.2d 1 at 13.
[62] JMRI, 175 Wn. App. at 389 *citing* Halverson, 139 Wn.2d at 13.

APPENDIX A

TT Props. v. City Of Tacoma, 2016 Wash. App. LEXIS 28

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TT PROPERTIES, a Washington Limited Liability Company, Appellant, v. CITY OF TACOMA, a Municipal Corporation, Respondent.	No. 46803-4-II PUBLISHED OPINION

WORSWICK, J. — TT Properties (TTP) appeals a summary judgment dismissal of its takings claim against the City of Tacoma involving two parcels of real property. It argues that the superior court erred by granting summary judgment because there are genuine issues of material fact about whether the City's actions constituted a per se or otherwise compensable taking. The City argues that even if there were a compensable taking, the City was not the liable actor. We affirm in part and reverse in part, holding that a material issue of fact exists regarding one parcel of property. We remand to the superior court for further proceedings consistent with this opinion.

FACTS

A. *The Properties*

TTP is a Washington corporation owned and operated by the Turner family. TTP owned two properties at issue in this case: 2620 Pacific Avenue (the Pacific Avenue property), and 223 East C Street (the C Street property). Both properties have belonged to the Turner family and its business entities for several decades.[1]

Before 1952, the Pacific Avenue property covered what is now two lots on a triangular block surrounded by Pacific Avenue to the east, 27th Avenue to the south, and former Delin Street on a diagonal to the north and west. In 1952, the Turner family sold roughly half of the property to the City of Tacoma and retained the southern part of the property (what is now 2620 Pacific Avenue, or the Pacific Avenue property). The northern portion which the City bought, 2610 Pacific Avenue, abutted Delin Street to the north and west. The Pacific Avenue property retained by the Turners lacked direct access to Delin Street because of the property's grade and a retaining wall. But the Turners retained an express easement over the property they sold to the City, allowing the Turners to cross the City's property to reach Delin Street. TTP's businesses used Delin Street to exit the property "on a regular basis." Clerk's Papers (CP) at 189.

The C Street property abuts a city-owned alleyway that is 20 feet wide. The Turners used the alleyway as an entrance to the C Street property.[2] Specifically, trucks and long-haul vehicles

[1] TTP sold the Pacific Avenue property in 2013, after the alleged taking.

[2] The alleyway was not the only entrance to the C Street property; the property also appears to abut East 26th Street to the south.

used to use the alleyway to enter the property, but needed to "swing wide" over a city-owned railroad right-of-way beyond the alleyway to enter. CP at 191.

B. *The Project*

In 2009, the Central Puget Sound Regional Transit Authority, doing business as Sound Transit, began a project known as the "D to M Street Track & Signal Project." CP at 29. The project was designed to add 1.4 miles of new tracks on a City right-of-way to help connect its Sounder commuter rail service from the Tacoma Dome station to a new station in Lakewood. The City passed a "Right-of-Use Agreement" (RUA) laying out its plans regarding the D to M Street project. CP at 197. In relevant part, the RUA contemplated that Sound Transit would need to use some city rights-of-way, including Delin Street. The City noted that "it is in the best interests of the public that the City authorize such use of the Public Rights-of-Way in support of Sounder Commuter Rail service." CP at 197. Other than granting Sound Transit the right to use various rights-of-way, the City's involvement in the D to M Street project consisted solely of approving and permitting Sound Transit's plans.

Sound Transit and its contractors carried out the necessary work for the D to M Street project. This included closing the portion of Delin Street that previously abutted 2620 and 2610 Pacific Avenue—in other words, the portion of Delin Street that the Pacific Avenue property accessed via its easement. Sound Transit converted this portion of the former Delin Street to a grassy slope. The Pacific Avenue property remains accessible from Pacific Avenue and 27th Street.

Pursuant to a city permit, Sound Transit also placed a "utility bungalow" on the city right-of-way abutting the alley near the C Street property. CP at 151. The bungalow encroached

about one foot into the alleyway, leaving 18.97 to 19.19 feet of the 20-foot-wide alleyway unobstructed. The remaining space in the alleyway here was more than the 16 foot minimum width required by the City for an alleyway. Nevertheless, the bungalow made it impossible for trucks to "swing wide" across the right-of-way to enter the alleyway and reach the C Street property.

C. *Takings Claim*

TTP sued the City for unconstitutionally taking its property at 2620 Pacific Avenue and C Street. It alleged that the City accomplished these takings in conjunction with Sound Transit. TTP alleged that the removal of Delin Street damaged TTP because it was an abutting property owner. It also alleged that the utility bungalow's encroachment into the alleyway damaged its property. TTP declared that the C Street property's value was reduced because trucks could no longer "swing wide" to enter the alley.

The City moved for a summary judgment dismissal of all of TTP's claims. It argued that TTP could not obtain relief because (1) TTP had not demonstrated a takings claim, and therefore lacked standing, and, alternatively, (2) the City was not the actor that caused any taking.

In response, TTP asserted that the removal of Delin Street "has had a significant negative impact on the value" of the Pacific Avenue property and that the property was sold in 2013 "at a much reduced price." CP at 190. It also provided a declaration from a real estate appraiser, who said that his ongoing investigation of damages revealed that the "impact on value [at both properties] is significant." CP at 185.

TTP also argued that the City "participated with Sound Transit in permanently closing Delin Street," and "participated with Sound Transit in constructing a substantial encroachment

on the public [alleyway] abutting Plaintiff's C Street property." CP at 171. TTP alleged that these were more than merely regulatory actions because they were "proprietary actions respecting a government's management of its public lands." CP at 171. It alleged that the "extensive Right of Use Agreement with Sound Transit" made the City into a "direct participant by allowing its land to be used by Sound Transit." CP at 173.

The superior court orally granted the City's summary judgment motion on the grounds that TTP "still [has] access, and the City can go ahead and vacate a street if they want; but [TTP still has] access on two points" at the Pacific Avenue property. Verbatim Report of Proceedings at 18. In its written order, the superior court clarified that it granted the City's motion for summary judgment on the basis that "there is no compensable taking and therefore plaintiff has no standing against the City of Tacoma." CP at 274. TTP appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's summary judgment ruling de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the litigation's outcome depends in whole or in part. *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We consider "all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Atherton*, 115 Wn.2d at 516. Summary judgment should be granted only if the nonmoving party fails to show that a genuine issue as to a

material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986).

II. TAKINGS CLAIM

TTP argues that material facts exist regarding whether the City, together with Sound Transit, took its property without just compensation at the Pacific Avenue and C Street sites. We agree with respect to the Pacific Avenue property, and we disagree with respect to the C Street property.

A. *Takings Background*

"The federal and Washington state constitutions provide that private property may not be taken for public use without just compensation." *Sparks v. Douglas County*, 127 Wn.2d 901, 907, 904 P.2d 738 (1995). Where the government physically appropriates private property, a "per se" taking has occurred which requires compensation. *Sparks*, 127 Wn.2d at 907; *Guimont v. Clarke*, 121 Wn.2d 586, 603, 854 P.2d 1 (1993). Where the government appropriates property in fact, but with no formal exercise of the power of eminent domain, the law may recognize a taking through inverse condemnation. *Dickgieser v. State*, 153 Wn.2d 530, 534-535, 105 P.3d 26 (2005). To establish inverse condemnation, a plaintiff must show "(1) a 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*, 153 Wn.2d at 535.

The plaintiff in a takings case must show that a governmental activity directly or proximately caused the plaintiff's loss. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist.*, 175 Wn. App. 374, 389, 305 P.3d 1108 (2013). "The government needs active proprietary participation, meaning 'participation without which the alleged taking or damaging would not

have occurred.'" *Jackass Mt. Ranch*, 175 Wn. App. at 389 (quoting *Halverson v. Skagit County*, 139 Wn.2d 1, 13, 983 P.2d 643 (1999)).

B. *Takings Analysis*

1. *Pacific Avenue Property: No Per Se Taking*

TTP argues that the City completely destroyed its access to Delin Street and thereby took its Pacific Avenue property per se.[3] We disagree. This question turns on whether, as a matter of law, a property owner has a per se compensable interest in accessing a *particular* street. We hold that so long as reasonable access remains to other public streets, the closure of one street a property abuts is not per se a taking. Instead, a property owner has a right to reasonable access to his property, which access must be substantially impaired for there to be a taking.

As stated above, to establish a taking, the claimant must prove a property right. *Granite Beach Holdings, LLC v. Dep't of Nat. Res.*, 103 Wn. App. 186, 205, 11 P.3d 847 (2000). "The right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation under article I, section 16 of the Washington State Constitution." *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977). Similarly, the owner of a private easement abutting a public highway has a property right subject to a takings analysis. *Williams Place, LLC v. State ex rel. Dep't of Transp.*, 187 Wn. App. 67, 87, 348 P.3d 797, *review denied*, 184 Wn.2d 1005 (2015).

If there is a property right, the first step in the analysis of whether compensation must be paid in a particular case is to determine whether the government action in question has actually

[3] TTP argues that a per se taking occurred only at the Pacific Avenue property, not at the C Street property.

interfered with the right of access to the property. *Keiffer*, 89 Wn.2d at 372. If the right of access has been impaired, the second step in the analysis is the degree of damage; this is a question of fact. *Keiffer*, 89 Wn.2d at 373-74.

To satisfy the first step, a party must show that his or her right of access to the property was either eliminated or substantially impaired. *Keiffer*, 89 Wn.2d at 373. That is, the party must show that his or her reasonable means of access to the property was obstructed. *Union Elevator & Warehouse Co. v. Dep't of Transp.*, 96 Wn. App. 288, 296, 980 P.2d 779 (1999).

> [A] landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury. 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.

Hoskins v. City of Kirkland, 7 Wn. App. 957, 960-61, 503 P.2d 1117 (1972) (citations omitted). Thus, a landowner is not entitled to compensation in the case of the vacation of a street where access is preserved over other streets or ways; an added inconvenience is not a damage or a taking. *Freeman v. City of Centralia*, 67 Wash. 142, 145, 120 P. 886 (1912); *see also* RCW 47.52.041 (preventing takings liability for the "closing of such streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways. Circuity of travel shall not be a compensable item of damage."). Where there is no taking, the landowner has no standing to sue. *Hoskins*, 7 Wn. App. at 961.

Here, TTP abutted Delin Street due to its easement over the City's property.[4] *See Williams Place*, 187 Wn. App. at 87. But more than merely abutting a street is required to create takings liability when the street is closed. TTP argues that the closure of *any* street or street segment a property owner directly abuts is a per se taking. This is not the law. "[O]wners of property abutting on a street or alley have no vested right in such street or alley except to the extent that their access may not be unreasonably restricted or substantially affected." *Taft v. Wash. Mut. Sav. Bank*, 127 Wash. 503, 509-10, 221 P. 604 (1923). Without a denial of access to the property, even abutting owners do not have a property right in a *particular* street. *See Keiffer*, 89 Wn.2d at 372-73. The right of an abutting property owner is the right of access *to the property*, not access to the particular street. *See Keiffer*, 89 Wn.2d at 372 ("Not all impairments of access to property are compensable."); *Hoskins*, 7 Wn. App. at 960-61.

TTP cites *Town of Selah v. Waldbauer* for the proposition that removing access to a property from a particular street is categorically a per se taking. Br. of Appellant at 21 (citing 11 Wn. App. 749, 756, 525 P.2d 262 (1974)). But *Waldbauer* is not a takings case. In that case, a town petitioned to rezone an area such that the owner of a corner lot would no longer have access to one of the two streets it abutted. 11 Wn. App. at 750-51. Division Three of this court held that while eminent domain *may* have been an appropriate way to remove the corner lot owner's access to a particular road, rezoning was not a permissible way to accomplish that goal. 11 Wn.

[4] The City argues that TTP overburdened this easement by using it for parking rather than for access, and by using more of the 2610 Pacific Avenue property than the easement allowed. It argues that "loss of use" can be a consequence of such "misuse" and "trespass." Br. of Resp't at 12 (citing *Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 394, 101 P.3d 430 (2004)). But whether the City may have had a trespass claim against TTP says nothing about whether TTP had a valid easement.

App. at 756. Thus, *Waldbauer* does not address whether the closure of a particular street constitutes the taking of a property owner who abuts other streets.

Finally, TTP argues that it is inappropriate to consider an abutting owner's access to other roads when a particular abutting street has been removed. TTP points to *Washington Pattern Jury Instruction* 151.04, which instructs that there is no taking if a property owner must simply use a more circuitous route, but which instructs courts not to use the instruction "when the issue is access from or to an existing abutting roadway."[5] Br. of Appellant at 23 (citing 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 151.04, at 112 (2012) (WPI). TTP argues that this instruction demonstrates that considering the accessibility of other roads is inappropriate in the case of an abutting owner. But WPI 151.01, which addresses abutting property owners' rights to roadways, reads in relevant part:

> The right of access means that an owner is entitled to reasonable ingress and egress to the property. However, an owner is not necessarily entitled to access at all points along the boundary between the property and the existing public way.
>
> Unless such rights of access are substantially impaired, such owner has suffered no compensable damage in regard to these rights.

6A WPI 151.01, at 107. Thus, the pattern instructions contemplate a substantial impairment analysis even for abutting property access.

TTP does not establish a per se taking at the Pacific Avenue property merely by showing that its easement abutted Delin Street; it must show that the impairment of its access *to its property* was substantial. Accordingly, we turn to examining whether TTP raised a material

[5] We address TTP's argument, notwithstanding that pattern jury instructions are not binding legal authority.

issue of fact that its access to its Pacific Avenue property, as well as its C Street property, was substantially impaired.

2. *Substantial Impairment Analysis*

TTP argues that even if there was no per se taking, there was substantial impairment to its right of access to the Pacific Avenue property, and therefore a compensable taking through inverse condemnation. It also argues that its uses of the C Street property were substantially impaired. We hold that there is a genuine issue of material fact about whether access to the Pacific Avenue property, but not the C Street property, was substantially impaired.

Property owners abutting a public road do not have unlimited access rights. *Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 703, 167 P.3d 584 (2007). Compensation is properly denied in those cases where the impairment of access is not substantial. *Keiffer*, 89 Wn.2d at 372. Moreover, summary judgment can be an appropriate avenue for disposing of takings claims based on a lack of substantial impairment. *See Hoskins*, 7 Wn. App. at 964-65.

i. *Pacific Avenue*

Here, it is undisputed that TTP retains ingress and egress access on Pacific Avenue and 27th Street. Nevertheless, there is a genuine issue of material fact regarding whether the removal of Delin Street substantially impaired TTP's access to its Pacific Avenue property. TTP provided declarations showing that the removal of Delin Street "has had a significant negative impact on the value" of the Pacific Avenue property, and that the property was sold in 2013 "at a much reduced price." CP at 190. TTP's businesses used Delin Street to exit the property "on a regular basis." CP at 189. These facts, taken in the light most favorable to TTP, suggest that the

removal of Delin Street substantially impaired TTP's access to the Pacific Avenue property. Accordingly, summary judgment dismissal of this claim is inappropriate.

ii. *C Street Property*

TTP argues that the utility bungalow built near the C Street property "substantially limited the potential uses" of that property, and that there was a question of fact for the jury about the degree of damage. Br. of Appellant at 25. We disagree.

TTP relies on *Fry v. O'Leary*, 141 Wash. 465, 252 P. 111 (1927), for the proposition that it had a property right in the pre-bungalow width of the alley. *Fry* involved a city ordinance vacating 13 feet of the width of the road that provided access to the plaintiffs' property. 141 Wash. at 466-67. In that case, our Supreme Court reasoned that an abutting property owner is entitled to recover in damages "for any *substantial or material* diminution" of the right of access, air, light, and other benefits from the width of the street. *Fry*, 141 Wash. at 470 (emphasis added).

TTP also cites *Young v. Nichols*, 152 Wash. 306, 278 P. 159 (1929). But *Young*, like *Fry*, holds that property owners have an action for damages if a government vacates "a *substantial* part of the street." *Young*, 152 Wash. at 308 (emphasis added). Here, the utility bungalow encroaches just over one foot into a 20-foot-wide alleyway, and TTP fails to show how *this encroachment* (rather than the placement of the bungalow beyond the alleyway in the City's right-of-way) substantially or materially diminished its right of access to the C Street property.

TTP fails to raise a genuine issue of material fact about the substantial impairment of its access to the C Street property. The facts show that the encroachment is minimal—just over a foot—and that the remaining width of the alley is more than the City's minimum required alley

width. While TTP has a right to access its property, it does not show that it had a property right to "swing wide" over the City's property *beyond* the alley to enter the alley. Therefore, TTP has failed to show that the encroachment of the bungalow into the alleyway substantially impaired its access to the property.

Thus, TTP's argument that a jury must determine the amount of damage is unavailing. "*Keiffer* does not require that a jury determine whether the degree of impairment is compensable." *Galvis*, 140 Wn. App. at 705. In this case, TTP fails to raise a genuine issue of material fact to defeat summary judgment on the question whether there was a compensable taking. A jury need not decide damages. The superior court properly granted summary judgment on this issue.

C. *Question of Fact about Taking by City*

The City argues that, even if there was a compensable taking, the City was not the liable actor. We disagree because there is a question of material fact about whether the City participated in the taking by allowing Sound Transit to use its rights-of-way.

Both parties cite *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998) to support their arguments about whether the City is liable. In *Phillips*, landowners sued King County for a taking after a neighboring developer obtained the County's approval to construct drainage facilities. 136 Wn.2d at 950-51, 954. The drainage facilities, which included a "sheet flow spreader" built on a King County right-of-way, caused water to flood the plaintiff landowners' property. 136 Wn.2d at 951-54. Our Supreme Court granted review of a summary judgment in the County's favor. 136 Wn.2d at 954-55.

Our Supreme Court held that, as a matter of law, a government entity's mere approval of development is insufficient to create takings liability. 136 Wn.2d at 962 ("[C]ounty action in regulating development and enforcing drainage restrictions should not give rise to liability against the county for the negligence of a developer."). The court expressly "reject[ed] the contention that a municipality will be liable for a developer's design which causes damages to neighbors when the county's only actions are in approval and permitting." 136 Wn.2d at 963.

But our Supreme Court held that there was a question of fact about whether the County was liable for acting as a direct participant in allowing a third party to use the County's land. 136 Wn.2d at 969. The County had permitted the developer to install water-spreading devices on a right-of-way owned by the County. 136 Wn.2d at 967. The court allowed the plaintiffs to pursue the County on a theory that the water spreaders caused flooding. 136 Wn.2d at 969. "By making public property available for the building of the drainage facilities, the County may share in any potential liability, along with the developer, for damage to the Phillips' property caused by the dispersal of water from the spreaders." *Phillips*, 136 Wn.2d at 969.

Thus, *Phillips* holds that a governmental entity is liable only for acts attributable to it, which do not include permitting and approval activities or assuming ownership of a system the design of which is subject to a takings challenge. *Halverson*, 139 Wn.2d at 8-9 (citing *Phillips*, 136 Wn.2d at 965-66). But one act that may create government liability is allowing a third party to use public land. *Phillips*, 136 Wn.2d at 969. When this occurs, there is a question of fact about whether the government, "*as a property owner*, should be responsible for a 'proprietary action' respecting the County's management of its public land." *Halverson*, 139 Wn.2d at 9 (quoting *Phillips*, 136 Wn.2d at 967).

Here, although it is undisputed that Sound Transit and its contractors did all of the work that TTP challenges, there is at least a question of fact about whether the City acted as a direct participant in these actions by allowing Sound Transit to use its rights-of-way. *See Phillips*, 136 Wn.2d at 969. The RUA contemplates that Sound Transit would use City rights-of-way, including Delin Street, to accomplish the D to M project. The RUA granted Sound Transit the right to use these rights-of-way because this use would be in the best interests of the City and the public. Thus, there is a question of fact here about whether the City acted in a proprietary, rather than merely a regulatory, capacity.

In summary, we reverse the summary judgment dismissal of TTP's takings claim regarding the Pacific Avenue property because there is a genuine issue of material fact about whether TTP's access to that property was substantially impaired and whether the City acted in a proprietary or regulatory capacity. We affirm the summary judgment dismissal of TTP's takings claim at the C Street property because no taking occurred regarding that property. We remand to the superior court for further proceedings consistent with this opinion.

Worswick, J.

We concur:

Bjorgen, A.C.J.

Sutton, L.