RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 08, 2015, 3:12 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

COA NO. 336841

SUPREME COURT OF THE STATE
OF WASHINGTON

TAPIO INVESTMENT COMPANY I, a Washington limited liability company; MONARCH INVESTMENT; TAPIO OFFICE IV PARTNERSHIP; CLONINGER/EUCKER PARTNERSHIP; PAMELA M. CLONINGER, an individual, and CLONINGER & ASSOCIATES, L.L.C., a Washington limited liability company,

Plaintiffs/Appellants,
v.

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

Defendant/Respondent.

APPEALED FROM SPOKANE COUNTY
SUPERIOR COURT CAUSE NO. 11-2-04552-2

APPELLANTS' OPENING BRIEF

KEVIN W. ROBERTS, WSBA #29473
ROBERT A. DUNN, WSBA # 12089
DUNN BLACK & ROBERTS, P.S.
111 North Post, Suite 300
Spokane, WA 99201
(509) 455-8711
Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 4

1. The Trial Court Erred By Granting Defendant's CR 50 Motion to Dismiss. 4

2. The Trial Court Erred By Refusing to Admit Exhibit No. 35 Based On Authentication. 4

3. The Trial Court Erred By Denying Plaintiffs' Motion to Re-open To Authenticate Exhibit 35. 4

III. ISSUES PRESENTED 4

1. Did the Trial Court ignore the applicable law and the existence of the evidence upon which a reasonable jury could find WSDOT violated Plaintiffs' Constitutional right to be provided just compensation as a result of the taking or damaging of private property rights? 4

2. Does the Constitution protect citizens from having their private property rights of use, enjoyment and disposal damaged by actions taken by the government for a public purpose without the payment of just compensation? 5

3. Does interference by the government with property rights of use, enjoyment and disposal for a public purpose constitute a taking or damaging of private property rights? 5

4. Does the Constitution protect citizens from having their private property rights damaged as a result of the government engaging in conduct to manipulate property rights for a public project? 5

5. Does the Constitution protect citizens from having their private property rights damaged as a result of the government engaging in acquisitions in a

manner the government knows will create a blighted or depressed neighborhood affecting the rights of properties it delays acquiring? 5

6. Does the Constitution protect citizens from having their private property rights damaged as a result of the government engaging in acquisitions in a manner the government knows will prevent a neighborhood's character from changing to commercial uses which directly affects the rights of properties it delays acquiring? 5

7. Does activity that interferes with the right to use, enjoy and dispose of property as well as causing a substantial loss of value to the property, constitute a taking or damaging of the property under the Constitution? 5

8. Does the right to use and enjoy property include the ability to sell the property? 5

9. Does a damaging of private property rights occur if there is evidence that the ability to sell the property has been impacted by the government's conduct? 5

10. Under *Penn Central*, does a constitutional taking or damaging of property occur through government action even if the government action does not involve a "*permanent physical taking*" or a complete deprivation of "*all economically beneficial use*"? 6

11. Is the Constitution provision prohibiting the taking or damaging of property without payment of just compensation intended to protect all essential elements of ownership which make property valuable? 6

12. Does the entry of a Final Limited Access Order constitute a "*regulatory action*"? 6

13. Do the *Penn Central* elements establishing a compensable taking or damaging extend to government action beyond a written regulation or statute? 6

14. Can a Constitutional taking or damaging of private property rights occur even if the real property at issue has not been "*physically invaded*"? 6

15. Can the announcement of an intent to condemn combined with other activity by the government result in the taking or damaging of private property rights requiring the payment of just compensation under the Constitution? 6

16. Can undue delay in acquiring property or oppressive conduct by the government result in an unconstitutional taking or damaging of private property rights? 6

17. Should Plaintiffs' Exhibit 35 have been admitted where there was no objection to authenticity when it was identified in Plaintiffs' ER 904's? 6

IV. STATEMENT OF THE CASE 7

A. RELEVANT PROCEDURAL HISTORY 8

B. RELEVANT EVIDENCE PRESENTED AT TRIAL 9

1. TAPIO CENTER 11

2. THE NORTH-SOUTH FREEWAY 13

3. THE NORTH-SOUTH FREEWAY, WSDOT, AND THE TAPIO OFFICE CENTER 20

V. ARGUMENT 24

A. Standard of Review 26

B. A Constitutional Right To Just Compensation Exists For Any "Taking Or Damaging" of Private Property Rights. 29

C. Plaintiffs' Evidence Supported The Jury Being Able to Determine That A Taking or Damaging of Their Property Rights Occurred Under a *Penn Central* Analysis. 35

1. Tapio Presented Evidence of Economic Impact And Substantial Interference With Distinct Investment-Backed Expectations..... 36

2. Character Of Government Action 38

D. Evidence Was Presented Establishing A "De Facto" Taking Or Damaging Of Tapio's Property Rights. 41

E. Exhibit 35 Was Authentic And Should Have Been Admitted. 47

IV. CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Ackerman v. Port of Seattle, 55 Wn.2d 400, 409 (1960) 31, 37, 43

Berst v. Snohomish Cnty., 114 Wn. App. 245, 255-57 (2002) 40

Boitano v. Snohomish Cty, 11 Wn.2d 664, 672-77 (1941) 43

Clay County Realty Co., 254 S.W.3d 859 (2008) 46

Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55 (1963) 27

Dickgeiser v. State, 153 Wn.2d 530, 535-536 (2005) 29, 43

First English Evangical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 40

GES, Inc. v. Corbitt, 21 P.3d 11(2001) 46

Goodman v. Goodman, 128 Wn.2d 366, 371 (1995) 26, 27

Gregory v. City of San Juan Capistrano, 142 Cal.App.3d 72, 88–89, 191 Cal.Rptr. 47 (1983) 30

Guggenheim v. City of Goleta, 582 F.3d 996, 1018 (9th Cir. 2009) 36, 41

Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 11 (1976) 31, 32

Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 143 (1993) 27

Johnson v. City of Minneapolis, 667 N.W.2d 109, 115-116 (2003) 46

Klopping v. City of Whittier, 500 P.2d 1345 (1972) 46

Lange v. State, 86 Wn.2d 585, 590 (1976) ..... passim

Lincoln Loan Co. v. State, 545 P.2d 105, 107 (1976) 42

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) 35

Manufactured Hous. Communities of Washington, 142 Wn.2d at 368 30

Martin v. Port of Seattle, 64 Wn.2d 309 (1964) 43

Mega v. Whitworth College, 138 Wn. App. 661, 668 (2007) 27

Mekuria v. Washington Metropolitan Area Transit, 975 F. Supp. 1, 4 (Dist. of Col., 1997) 39, 40

Orion Corp. v. State, 109 Wn.2d 621 (1987) 44, 45

Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) ..... passim

Phillips v. King County, 136 Wn.2d 946, 957 (1998) 29

Pierce v. Northeast Lake Wash. Sewer Dist., 123 Wn.2d 550, 560 (1944) 31, 44

Presbytery of Seattle v. King County, 114 Wn.2d 320, 335-36 (1990) 36

Pruitt v. Douglas County, 116 Wn. App. 547, 559 (2003) 31

Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 98 (1994) 27

Rains v. Department of Fisheries, 89 Wn.2d 740, 745-47 (1978) 43

Reichs Ford Road Joint Venture v. State Roads Commission of the State Highway Administrative, 880 A.2d 307,319-20 (2005) 46

Showalter v. City of Cheney, 118 Wn. App. 543, 549 (2003) 30

Starker v. United States, 602 F.2d 1341, 1355 (9th Cir. 1979) 29

State v. Barsy, 941 P.2d 971, 976 (1997) 46

Tom v. State, 164 Wn. App. 609, 614 (2011) 31, 43

Union Elevator v. State, 96 Wn. App. 288 (1999) 42

Yancey v. United States, 915 F.2d 1534, 1539-41 (Fed.Cir.1990) 36

Other Authorities

BRESKIN, 10 WASH. PRAC. 450 28

U.S. Const. Amend. V 29
Washington State Const., Art. I, § 16 29

APPENDICES

APPENDIX A - Commissioner Monica Wasson's 12/19/12 Ruling

APPENDIX B - Order Denying Motion to Modify Commissioner's Ruling entered 3/16/13

I. INTRODUCTION

This case involves one of the most fundamental Constitutional rights that Washington Citizens have - the right to be paid Just Compensation when the government takes or damages their property. At the close of the Plaintiffs'[1] case, the Trial Court dismissed the Inverse Condemnation action. The Tapio Owners were unilaterally deprived of the opportunity to have the government's intentional acts weighed by a fact finder. The Trial Court's decision ignored the protections offered by the Constitution. The Court also ignored the evidence presented that established the Washington State Department of Transportation ("WSDOT") engaged in actions calculated to drive down the property value of land it needed to acquire and to create a blight to devalue property in the Tapio neighborhood. The evidence at trial confirmed WSDOT took actions that destroyed Tapio's private property rights, its property value and left the Tapio Office Center warehoused for WSDOT's project. Indeed, the evidence confirmed that WSDOT

[1] Tapio Owners.

knew the impact its actions would have on private property rights and the blighting of the Tapio neighborhood.

WSDOT could have stopped at planning and announcing its plans and could have only acquired those parcels necessary for the phases of the project for which it had construction funding. It didn't. Instead, WSDOT made the decision to proceed with acquiring properties and to begin demolition in a way that left the Tapio Office Center as an island in the middle of the construction. This damaged the ability for Tapio to be leased long-term or sold - both protected property rights. Despite knowing the damages its actions were causing to the Tapio Owners' property rights, WSDOT steadfastly refused to either acquire the Tapio Office Center for the North-South Freeway or pay just compensation for the taking and damaging of the Tapio Owners' private property rights in furtherance of the North-South Freeway.

WSDOT acquired all of the properties surrounding the Tapio Office Center, leaving the Tapio Center on an island in the middle of demolition and construction. **Ex. 143.** At trial, WSDOT employees confirmed the acquisitions were made in order to prevent these

properties from being re-zoned to commercial zoning. This prevented the neighborhood from transitioning to a commercial corridor. This decreased property values, including the value of the Tapio Office Center. The evidence also confirmed that this action not only greatly decreased the value of the Tapio Office Center, but also impacted its ability to be rented and made it so the Tapio Office Center, an investment for several families, could not be sold. Plaintiffs also attempted to present further evidence that WSDOT had knowledge of the impact that its market manipulation, delaying condemnation and acquiring property ahead of the phases for which construction had been funded would have on the remaining parcels like the Tapio Office Center. See **Ex. 35**. The Trial Court wrongfully rejected Exhibit 34 based on authentication, despite the fact it was authenticated as a matter of law. ER 904.

The Tapio Owners presented evidence of conduct by WSDOT that has been recognized as meeting the elements of a Penn Central taking or damaging and which established the damages affecting the property rights associated with the right to use, enjoy, and disposal of property. Nonetheless, at the close of Tapio's case,

the Trial Court (Judge Moreno) erred by granting WSDOT's CR 50 Motion dismissing Tapio's Inverse Condemnation Claim. This despite the fact that a mere two weeks before trial Judge Moreno had denied WSDOT's Motion for Summary Judgment on the exact same arguments and the evidence presented at trial was consistent with what Tapio had presented to the Court in response to the Summary Judgment Motions. In granting the motion, Judge Moreno ignored the applicable legal standards and the evidence before the Jury. The dismissal should be reversed and decided by a Jury.

II. ASSIGNMENTS OF ERROR

1. The Trial Court Erred By Granting Defendant's CR 50 Motion to Dismiss.

2. The Trial Court Erred By Refusing to Admit Exhibit No. 35 Based On Authentication.

3. The Trial Court Erred By Denying Plaintiffs' Motion to Re-open To Authenticate Exhibit 35.

III. ISSUES PRESENTED

1. Did the Trial Court ignore the applicable law and the existence of the evidence upon which a reasonable jury could find WSDOT violated Plaintiffs' Constitutional right to be provided just compensation as a result of the taking or damaging of private property rights?

2. Does the Constitution protect citizens from having their private property rights of use, enjoyment and disposal damaged by actions taken by the government for a public purpose without the payment of just compensation?

3. Does interference by the government with property rights of use, enjoyment and disposal for a public purpose constitute a taking or damaging of private property rights?

4. Does the Constitution protect citizens from having their private property rights damaged as a result of the government engaging in conduct to manipulate property rights for a public project?

5. Does the Constitution protect citizens from having their private property rights damaged as a result of the government engaging in acquisitions in a manner the government knows will create a blighted or depressed neighborhood affecting the rights of properties it delays acquiring?

6. Does the Constitution protect citizens from having their private property rights damaged as a result of the government engaging in acquisitions in a manner the government knows will prevent a neighborhood's character from changing to commercial uses which directly affects the rights of properties it delays acquiring?

7. Does activity that interferes with the right to use, enjoy and dispose of property as well as causing a substantial loss of value to the property, constitute a taking or damaging of the property under the Constitution?

8. Does the right to use and enjoy property include the ability to sell the property?

9. Does a damaging of private property rights occur if there is evidence that the ability to sell the property has been impacted by the government's conduct?

10. Under Penn Central, does a constitutional taking or damaging of property occur through government action even if the government action does not involve a "*permanent physical taking*" or a complete deprivation of "*all economically beneficial use*"?

11. Is the Constitution provision prohibiting the taking or damaging of property without payment of just compensation intended to protect all essential elements of ownership which make property valuable?

12. Does the entry of a Final Limited Access Order constitute a "*regulatory action*"?

13. Do the Penn Central elements establishing a compensable taking or damaging extend to government action beyond a written regulation or statute?

14. Can a Constitutional taking or damaging of private property rights occur even if the real property at issue has not been "*physically invaded*"?

15. Can the announcement of an intent to condemn combined with other activity by the government result in the taking or damaging of private property rights requiring the payment of just compensation under the Constitution?

16. Can undue delay in acquiring property or oppressive conduct by the government result in an unconstitutional taking or damaging of private property rights?

17. Should Plaintiffs' Exhibit 35 have been admitted where there was no objection to authenticity when it was identified in Plaintiffs' ER 904's?

IV. STATEMENT OF THE CASE

This case is an extremely unique case. The Tapio Owners presented direct evidence that WSDOT was engaging in property acquisition for the North-South Freeway ahead of their construction phases in order to manipulate the real estate market in a way that damaged private property rights. The evidence confirmed that WSDOT purchased properties despite not having funding for construction of that phase in order to prevent the neighborhood from becoming commercial and increasing in value. The evidence also established that WSDOT knew the impact its actions were having on the Tapio Owners' property rights and that WSDOT has delayed acquiring Tapio Center despite being aware of the damage and having sufficient funds to acquire it. In addition, based on an improper authentication ruling, the Tapio Owners were deprived of providing further evidence of WSDOT's intent as it related to the consequences of purchasing properties surrounding unpurchased parcels and engaging in construction activities in those neighborhoods.

> *We were figuring about 5 years before construction was slated for this area.* ***So, in another 3 years we***

> ***will have purchased more of the surrounding properties, creating an even more blighted or depressed commercial area along Market Street.*** *We will also be 3 years closer to construction, which makes it an even riskier venture for any other potential tenant if Ziegler is gone.*

Ex. 35 (emphasis added). As set forth below, the evidence at trial established that the Tapio Owners' claim should have been presented to the Jury along with **Ex. 35.**

A. RELEVANT PROCEDURAL HISTORY

1. On November 2, 2011, Plaintiffs filed their Inverse Condemnation action and this matter was assigned to Judge Jerome J. Leveque. CP 1-7.

2. In 2012, WSDOT moved for Summary Judgment seeking to dismiss Plaintiffs' claims based on many of the same arguments WSDOT made to the Trial Court in 2014. CP 254-279. Judge Leveque denied the Motion for Summary Judgment finding that genuine issues of material fact existed. CP 546-549.

3. WSDOT's Motion for Discretionary Review was denied December 19, 2012. **Appendix A.**

4. WSDOT's Motion to Modify Commissioner's Ruling was Denied March 19, 2013. **Appendix B.**

5. The case was reassigned from Judge Leveque to Judge Moreno. WSDOT attempted to overturn Judge Leveque by renewing its Summary Judgment Motion. CP 1070-1133. The Motion was heard by Judge Moreno on May 16, 2014, a mere two weeks prior to trial. On May 29, 2014, Judge

Moreno denied the Motion and confirmed that genuine issues of material fact existed. CP 2107-2111.

6. Trial began June 2, 2014. On June 10, 2014, Plaintiffs rested their case which included the admission of 88 Plaintiff exhibits, 41 Defendant exhibits, and testimony by eight witnesses including two employees of WSDOT. During the trial, Plaintiffs produced substantial evidence from which a reasonable jury could determine that Plaintiffs' property rights had been taken or damaged.

7. Despite recognizing that there was substantial evidence that because of WSDOT's actions "*a willing buyer could not get financing*" and evidence that "*no one will purchase*" Plaintiffs' property, the Trial Court granted WSDOT's Motion to Dismiss. VRP 1186, ll. 17-20. However, based on comments during the ruling, it was clear that Judge Moreno failed to consider or recall substantial and important evidence that was presented supporting Plaintiffs' claims. VRP 1192, ll. 19-25; 1193, ll. 1-7. Notably, this was the exact opposite of the ruling the Trial Court made a mere two weeks prior when it denied WSDOT's renewed Motion for Summary Judgment on the same issues. CP 2107-2111. In granting the Motion, the Trial Court ignored the applicable legal standards and the evidence confirming that there had been taking or damaging of Plaintiffs' property rights. An Order granting the CR 50 Motion to Dismiss was entered on June 20, 2014. CP 2774-2788.

B. RELEVANT EVIDENCE PRESENTED AT TRIAL

At trial, Tapio not only presented the same evidence that had been presented in response to WSDOT's prior Summary Judgment Motions, but also additional evidence of WSDOT's acquisition scheme. Trial included direct evidence that WSDOT damaged

Tapio Owners' private property rights including the ability to sell the Tapio Office Center. WSDOT employees testified that the properties surrounding Tapio were acquired to manipulate the real estate market by preventing properties from being re-zoned. Infra. There was testimony the re-zoning of these properties would have changed the neighborhood to a commercial area and increased the value of Tapio Center. There was also evidence that the demolition of the neighborhood destroyed the value of the Tapio Center. Furthermore, Plaintiffs also attempted to introduce a WSDOT email that showed WSDOT knew the consequences of purchasing properties surrounding unpurchased parcels and engaging in construction activities in those neighborhoods.

> *We were figuring about 5 years before construction was slated for this area.* ***So, in another 3 years we will have purchased more of the surrounding properties, creating an even more blighted or depressed commercial area along Market Street.*** *We will also be 3 years closer to construction, which makes it an even riskier venture for any other potential tenant if Ziegler is gone.*

Ex. 35 (emphasis added).

The evidence established that WSDOT's acquisitions and construction in the immediate neighborhood forced Tapio to carry

the burden of funding the North-South Freeway pending its completion by creating a blighted and/or depressed area that would make properties cheaper to acquire if WSDOT waited out the property owners. Accordingly, the evidence confirmed WSDOT decided to deliberately execute its plan to damage private property rights for a public purpose.

1. **TAPIO CENTER**

The Tapio Office Center is located at the intersection of Interstate-90 and the Freya/Thor Interchange and is a development that consists of nine office buildings and a full-service restaurant on 6.2 acres. See **Ex. 102**. The development was designed and operates as one center with the buildings positioned along the perimeter of the site to allow for a park-like setting on the interior with a large parking lot providing substantially more parking than required. Each building was designed and built to provide complimenting amenities for the success of the entire project. The design takes into consideration reciprocal parking, multiple access points, an on-site deli/coffee house, and a full service restaurant. Because of the way the improvements were constructed, the use of

the center as an operating development has a unique, close and interdependent relationship with the property. See **Ex. 210**.

Tapio Center is a unique commercial property whose improvements add significant value to the property and the business. Tapio Center was constructed to operate as one cohesive commercial development to generate rental income. See **Ex. 210**; VRP 623-626. The property was strategically assembled, designed and built by architect Glen Cloninger beginning in the '70's. VRP 996-97; 1000. The location and lay-out was picked because of the access and to create a park-like commercial office complex. VRP 1001.

Tapio is owned by several families – the Dixon Family[2]; the Wilharm family[3]; the Bouten Family[4]; the Eucker Family; and the Cloninger Family[5]. VRP 621; 634. Although the management of the office center is split, all of the common areas are managed jointly, share a joint utility and water systems and are subject to

---

[2] Consisting of Hal Dixon, Grant Dixon and Jan Dixon along with their adult children - Darren Dixon, David Dixon, John Stejer, Shelly Stejer, Cassandra Dixon and Darcy Dixon.

[3] Jim Wilharm's family.

[4] Frank Bouten's family.

[5] Glen Cloninger's family.

reciprocal parking agreements, all of which allows the Tapio Center to operate as one cohesive complex in the marketplace. VRP 1006-1007.

The approved plans for the North-South Freeway shows WSDOT eliminating all of the southern access off of the Tapio project. VRP 557, ll. 13-18. The approved plans show three buildings in the Tapio Center being taken and two other buildings being *"clipped"* by the construction project. VRP 562, ll. 6-17. This destruction of five buildings in the Tapio Center has been depicted in WSDOT's plans as far back as at least 1999. VRP 562, ll. 24-25; VRP 563, ll. 1-3.

2. THE NORTH-SOUTH FREEWAY

In 1997, WSDOT began designing the North-South Freeway project. The design and the plans for construction showed that the freeway would be constructed on nearly half of the Tapio Center property and that nearly all of the access would be taken from the remaining property. See e.g. **Ex. 73, 105; 106; 109 and 122**. The design and plans were finalized in approximately 2002, and as they relate to the Tapio Center, have not changed in any substantive

manner since. VRP 559. The right of way plans were approved in 2002/2003. VRP 559, ll. 8-10. The limited access plans, including the construction on Tapio Center, was finally approved in 2005 after an administrative hearing. VRP 559, ll. 16-18. Since that time, there have been no other approved right-of-way plans in the area of I-90 other than the one approved in 2005. VRP 559, ll. 19-23.

From the time the North-South Freeway design was approved in the late 90's, the plans have been highly publicized. VRP 554. See also **Exs. 13-15, 37, 39, 73, 74, 75, 80, 82, 83, 105, 106, 109, 112, 121, 143, 202, 203, 205, 206, 207, 208, 210, 221, 222, 223, 224, and 233.** This has included more than 100 public meetings, open houses, community group presentations, neighborhood counsel presentations, and formal hearings. Id. WSDOT also directly contacted every property owner and tenant along the proposed route and there were numerous one-on-one meetings with WSDOT staff and interested citizens. Id.

In 1999, the Owners of Tapio Center provided notice to WSDOT that the mere announcement of plans including the Tapio Center had started to impact their ability to lease the property in

1999. **Ex. 1.** By December, 2002, WSDOT was aware that its continued activities were creating an economic blight on the Tapio property. VRP 398, ll. 22-25; 399, ll. 2-5. Tapio requested at that time, more than 13 years ago, that WSDOT acquire its property or initiate condemnation proceedings to prevent further damage to its property rights from occurring. **Ex. 17**; VRP 401.

For properties acquired for the North-South Freeway project in the area of Tapio, WSDOT would contract out the demolition of the property. VRP 431, ll. 7-13; VRP 435. At trial, evidence of the demolition for construction of properties surrounding Tapio was presented to the jury. See VRP 437-439; **Exs. 10, 24, 27, 29, and 32**. This construction activity, demolition, occurred in the area of Tapio for the North-South Freeway. VRP 557, ll. 19-22. In fact, WSDOT has acquired the properties on each side and up to the Tapio Center. See **Ex. 143**. WSDOT spends approximately $100,000 per year for mowing and weed control in the lots that have been razed. VRP 558, ll. 9-12.

During trial, evidence was presented confirming that WSDOT was acquiring properties outside of the phases for which they had

funding to perform construction in order to manipulate the real estate market for the area surrounding Tapio and depress market values.

> *Q. All right. And if there were –if there were these discussions going on, what was the –what was the issue with respect to a potential zoning as it impacted the North-South Freeway, if there was one?*
>
> *A. Well, it would be a normal course of business. If the land was rezoned, then we would pay the current market value as related to that zone.*
>
> *Q.* ***So the concern was if it was residential property rezoned to business or commercial, the property values would go up and the state would have to pay more money?***
>
> *A.* ***Correct.***

VRP 441, ll. 18-25; VRP 442, ll. 1-3 (emphasis added). See also VRP 444 and 499. WSDOT was acquiring property surrounding Tapio because it was *"where we [WSDOT] need to go."*

> *...decide what –you know where the freeway should be built next, what – what should be the next steps. And then we would provide to Tim, or to Real Estate Services, an area that this is where we need to go. And then he would use the right-of-way maps to go begin purchasing property in that area.*

VRP 568, ll. 3-11. As it related to the I-90 area, WSDOT elected to treat Tapio different than other citizens and place a higher burden on them. This despite knowing their action was having an impact on

Tapio Center's property rights. This included entering into a *"commitment"* with the East Central neighborhood leadership to purchase the residential properties that WSDOT did not want to end up re-zoned commercial. VRP 572, ll. 22-25; 573, ll. 1-7.

At the time of trial, WSDOT had acquired about 300 parcels in the Tapio area. VRP 453, ll. 17-22. The majority of these properties have been *"demoed"*. VRP 462, ll. 17-22. At the time of trial, for actual construction of the freeway itself in the Tapio area, there were only 47-50 houses remaining to be acquired and 5 commercial properties, including Tapio. VRP 465; VRP 468-69. As of February 27, 2012, WSDOT had acquired 551 out of the 880 total parcels of residential, commercial and industrial property needed to construct the North-South Freeway. VRP 555, ll. 19-24.

Despite refusing to either acquire Tapio or pay for the damages caused to the Owners' property rights, at the time of trial WSDOT had recently continued to acquire properties in the area of Tapio for the I-90 Corridor phase of the North-South Freeway. VRP 495, ll. 7-11. The commercial acquisitions made in the vicinity of Tapio included dba Petroleum Distributors. VRP 500, ll. 23-25.

Notably, dba Petroleum Distributors was only acquired as a result of it being forced to bring an inverse condemnation like Tapio. VRP 501, ll. 1-6.

During Trial, it was revealed that WSDOT's claim they did not have funding to purchase properties in the I-90 corridor was not accurate either. Indeed, at the time of trial WSDOT testified that it had "*a little less*" than $8,000,000 for that very purpose. VRP 495, ll. 12-19 and VRP 497. In fact, WSDOT testified that it had $16,000,000 every two years ($8,000,000 per year) that was available to purchase properties in the I-90/Tapio area. VRP 495-496; 497, ll. 1. Despite claiming to Tapio that it lacked funding, WSDOT confirmed at trial that in 2007 the budget would have accommodated the total acquisition needed for Tapio. VRP 506, ll. 11-16. However, WSDOT elected to manipulate the real estate market by preventing the Tapio area from becoming zoned for significant commercial use and depressing the neighborhood by purchasing 70-80 houses per year. VRP 506, ll. 17-25. As explained at trial, if WSDOT had not manipulated the Market, Tapio would have enjoyed a positive impact as a result of the

neighborhood changing into a commercial corridor. See VRP 1100, 11. 9-21. WSDOT did not condemn or acquire Tapio despite the fact it consistently had acquisition funding for the I-90/Tapio area. VRP 513, ll. 11-18; 514, ll. 1-5.

In 2009, WSDOT continued to receive communications from third-parties, tenants and prospective tenants of Tapio showing concern with regard to the impact to property relative to the North-South Freeway project. VRP 508, ll. 12-16. In other words, they continued to receive notice not only from Tapio but from others in the real estate market confirming the issues WSDOT's actions were creating for Tapio. Id. Nonetheless, WSDOT engaged in undue delay in implementing condemnation proceedings and providing just compensation. **Ex. 50.** WSDOT's actions have resulted in a cloud of condemnation and blight that have caused a departure of tenants, declines in rentability, unmarketability, a decline in market value of the Tapio Center, and an inability to sell the property. Id. Consequently, the Tapio Owners are being deprived of the use, enjoyment and benefit of the property, as well as the opportunity to realize their investment by selling the development.

3. THE NORTH-SOUTH FREEWAY, WSDOT, AND THE TAPIO OFFICE CENTER

1997 - WSDOT approved The Final Environmental Impact Statement for the North-South Freeway. **See Ex. 39.**

1999 – Tapio Center informed WSDOT that following publication of WSDOT's plans that Tapio Office Center's vacancies had increased to the highest level in 20 years. **Exs 1 and 6.** Up until WSDOT started making announcements of their plans to take a portion of Tapio Center, the vacancies had held consistently around 5%. **Ex. 6.** By 1999, Tapio Center was experiencing vacancies in excess of 20%, even when the market was only experiencing single digit vacancies. **Ex. 6.** WSDOT informed Tapio it would have to pursue an Inverse Condemnation to recover the damages that had begun. **Ex. 8.**

2002 – WSDOT sent a letter to the tenants of Tapio Center indicating their property was *"currently affected by the Project"*, they would be displaced as a result of WSDOT's North-South Construction Project, and inviting them to one of many meetings that showed the Tapio Center was going to be used for construction. **Ex. 14.** On December 12, 2002, WSDOT was informed of the impacts

these letters had and the continuing blight WSDOT's plans and actions were having on Tapio Office Center. **Ex. 17.**

2003 – The Final Limited Access Hearing was conducted. See **Ex. 210.** At the hearing, WSDOT specifically identified the Tapio Center property as property that would be acquired for the North-South Freeway. **Ex. 210.** WSDOT continued to publicize and show design plans with the Tapio Center property being taken for the North-South Freeway.

2005 – Following a limited access hearing in 2003, the final design of the North-South Freeway was passed and approved. VRP 304, 305. Relative to its impact on Tapio, that final project plan was never changed since it was passed. VRP 305, ll. 17-23.

The approved footprint of the North-South Freeway contained approximately 940 parcels of land that needed to be acquired. VRP 311. WSDOT's representative Tim Golden testified that Tapio was unique among these parcels and that he did not think any of the other 940 parcels were an office complex like Tapio. VRP 311. He also testified that Tapio was one of the more expensive properties that needed to be acquired. VRP 312-313.

Between 2005 and 2008, Tapio Office Center continued to suffer negative impacts from the North-South Freeway plans and WSDOT's publicity surrounding it. Tapio Center had tenants move out of Tapio Office Center because of the North-South Freeway, and countless prospective tenants declined to lease space because of the same concern. VRP 379. WSDOT's actions also directly impacted lease rates, terms, and Tapio Center's ability to secure lease extensions and renewals. Id. See also **Ex. 50**.

WSDOT's project also moved well beyond mere planning. Construction of a significant portion of the Project has been completed. Beginning in approximately 2007, WSDOT began acquiring real property in the immediate neighborhood of the Tapio Center. **Ex. 138**. At the same time, the City of Spokane contacted Tapio's tenants and advised them that WSDOT was going to require them to relocate. **Ex. 37.** WSDOT has now acquired property up and down the blocks to the east and west of Tapio Center. **Ex. 143.** WSDOT not only acquired these properties, but it also engaged in extensive construction activities, including demolishing structures within the immediate neighborhood of Tapio Center for construction

of the Freeway. Supra. This construction activity, combined with Freeway construction, acquisition of properties, and continued publication of the plans has resulted in a blight on the Tapio property. **Ex. 50.** This blight has damaged Tapio Owners' property rights including the ability to sell for fair market value, to lease at fair market value, and to realize their investment expectations. Infra.

In order to recoup leasehold improvements, long term leases in excess of five to ten years are required in order to amortize the improvements and to receive an adequate return on the capital invested. Because of the North-South Freeway, tenants are either reluctant to or have refused to sign long term leases at Tapio Center. VRP 568-567. In addition, because WSDOT has indicated relocation would be necessary, several existing tenants demanded short term leases. Id.

The evidence at trial was that the cumulative effect of WSDOT's conduct was to make the Tapio Center unsellable and unmarketable. WSDOT's regular announcements of its plans to connect the North-South Freeway at the Thor/Freya interchange, its publications of its plans to construct the freeway over half of the

property and take nearly all of the access to the remainder, its acquisition of nearly all of the property in the area needed for construction of the freeway, and the construction activities it is engaging in within the immediate neighborhood make this property one that cannot be sold for fair market value. Not only do Tapio Center's Owners have to disclose WSDOT's plans to potential buyers, but WSDOT is constantly making public the design and identifying the properties on which the freeway will be constructed. As a result, potential purchasers are unwilling and unable to make an investment by purchasing the property. With no buyers and no commercial financing available for Tapio Center, WSDOT has warehoused the property and is preventing the Owners from enjoying all of the rights of ownership including the right to market, lease and sell the property.

V. ARGUMENT

In granting WSDOT's CR 50 Motion to Dismiss, the Court ignored the substantial evidence presented that directly supported the legal authority confirming the Constitutional protections afforded property owners extend well beyond a *"physical"* entry onto real

property. Both the Washington State and U.S. Constitutions protect private citizens' private property rights. As a result, landowners are entitled to just compensation in any situation where the government's actions result in a taking or damaging of the property rights of use, enjoyment and disposal (right to sell) for public use. The Court wrongfully ignored the evidence a jury could have considered to find that a taking and/or damaging of property rights occurred under our Constitution. This included evidence supporting the Penn Central analysis which insures that the property rights of private citizens are fully protected as required by the Constitution. The Court's ruling also ignored the evidence supporting a taking under Washington case law establishing that the Constitution protects landowners from having their right to use and dispose of property damaged regardless of whether or not the government has physically "*touched*" the real property at issue.

As a result, the denials of WSDOT's prior motions seeking judgment as a matter of law were correct and in light of the actual evidence at trial, WSDOT's CR 50 Motion to Dismiss should have been denied. The jury should have been allowed to weigh the facts

to determine if taking or damaging of property rights occurred and whether WSDOT violated its constitutional obligation to pay just compensation for taking or damaging Tapio's property rights.

A. Standard of Review

A trial court's ruling on a CR 50 Motion for judgment as a matter of law is reviewed de novo with the same standard to be applied as the trial court. Goodman v. Goodman, 128 Wn.2d 366, 371 (1995).

> *If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.*

CR 50(a)(1).

Judgment as a matter of law may only be granted if there is *"no competent evidence or reasonable inference sustaining the*

jury's verdict for the nonmoving party." Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 143 (1993). The court must consider whether the evidence, accepted as true, and all inferences viewed in the light most favorable to the nonmoving party, support the verdict.

> *We have oft repeated the rule that a challenge to the sufficiency of the evidence, or a motion for nonsuit, dismissal, directed verdict, new trial, or judgment notwithstanding the verdict, admits the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent. No element of discretion is involved. Such motions can be granted only when the court can say, as a matter of law, there is no substantial evidence to support the opponent's claim.*

Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55 (1963); see also Goodman, 128 Wn.2d at 371. *"In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion."* Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 98 (1994). Furthermore, *"[i]f any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury."* Mega v. Whitworth College, 138 Wn. App. 661, 668 (2007).

The moving party must satisfy a heavy burden to prevail on a CR 50 motion. As stated in BRESKIN, 10 WASH. PRAC. 450:

> *Because judgment as a matter of law intrudes upon the rightful province of the jury, it is highly disfavored and judgment may be entered only when no jury could decide in that party's favor. (citation omitted). The court may not weigh the evidence, resolve conflicting evidence, or determine the credibility of the witnesses, when ruling on the motion.*

In this case, the Court failed to accept the evidence presented as true, failed to consider the reasonable inferences from the evidence, failed to properly apply the evidence to existing law and supplanted the province of the jury. Indeed, a review of the record confirms that in making the ruling the Trial Court had forgotten that certain evidence had even been presented and that the ruling was directly contrary to prior rulings by herself and Judge Leveque. These were rulings in which both Judges had previously found the same evidence created genuine issues of material facts to be decided by a jury at trial. Despite the fact that even more evidence was presented at trial than contained in the summary judgment responses, the Judge committed err by dismissing the case before the Jury could weigh the facts and make a decision.

B. A Constitutional Right To Just Compensation Exists For Any "Taking Or Damaging" of Private Property Rights.

"*No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.*" Washington State Const., Art. I, § 16. See also U.S. Const. Amend. V. An *"inverse condemnation"* occurs when the government takes or damages property without the formal exercise of the power of eminent domain. Dickgeiser v. State, 153 Wn.2d 530, 535-536 (2005). To establish an inverse condemnation there need only be evidence of: (1) a taking or damaging (2) of private property (3) for public use (4) by a governmental entity that has not instituted formal proceedings. Id. at 536, citing Phillips v. King County, 136 Wn.2d 946, 957 (1998). Nothing in the Washington State Constitution limits a taking or damaging to *"physical"* or *"regulatory"* takings. Instead, the Constitution protects citizens from any *"taking or damaging"* of private property. Indeed, it has long been recognized that like a "*bundle of sticks*" real property is comprised of various rights. See e.g. Starker v. United States, 602 F.2d 1341, 1355 (9th Cir. 1979). The Constitutional protections extend to each of the sticks in the

bundle. Indeed, Washington law has specifically recognized that the protected property rights include the ability to use or sell the property. Thus, when there is evidence that those rights have been damaged, a factual question necessarily exists with regard to whether or not the conduct at issue rises to the level of taking or damaging those rights. Infra. Here, the Judge recognized but then ignored the importance of evidence that was presented establishing that because of WSDOT's actions buyers could not get financing and no one would buy Tapio. VRP 1186, ll. 1720.

"Any governmental activity that invades or interferes with the right to use and enjoy property is a taking." Showalter v. City of Cheney, 118 Wn. App. 543, 549 (2003). One of the basic property rights included in the right to use and enjoy property is the ability to sell it. See Manufactured Hous. Communities of Washington, 142 Wn.2d at 368 quoting Gregory v. City of San Juan Capistrano, 142 Cal.App.3d 72, 88–89, 191 Cal.Rptr. 47 (1983) (*"The ability to sell and transfer property is a fundamental aspect of property ownership."*). Thus, it is well established that property rights, and the bundle of sticks, include and extend well beyond the mere right

of exclusive possession. Washington recognizes that property rights include the right to use the land, including the right to dispose of it. See e.g. Pierce v. Northeast Lake Wash. Sewer Dist., 123 Wn.2d 550, 560 (1944) citing Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 11 (1976). As explained by the Pierce Court:

> ***Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.***

Pierce, 123 Wn.2d at 560-61 citing Ackerman v. Port of Seattle, 55 Wn.2d 400, 409 (1960)(emphasis added).

As a result, any Government conduct which interferes with the use and enjoyment of property, including anything that interferes with the right of disposal that causes a loss of value without the formal exercise of eminent domain, gives rise to an inverse condemnation action. See Tom v. State, 164 Wn. App. 609, 614 (2011) citing Pruitt v. Douglas County, 116 Wn. App. 547, 559 (2003)(emphasis added)(*"A taking occurs when the government*

invades or interferes with the use and enjoyment of a person's property, ***causing the property to lose value.***"). The Highline court confirmed this stating "***an inverse condemnation action for interference with the use and enjoyment of property accrues when the landowner sustains any measurable loss of market value...***" Highline, 87 Wn.2d at 15 (emphasis added).

Here, the Trial Court ignored the evidence presented to the jury that confirmed WSDOT's actions resulted in: 1) the inability for Tapio to sell its property; 2) the inability for Tapio to fully use its property for long- term leases; and 3) the substantial loss of value as a direct result of WSDOT's actions. Indeed, there was expert testimony to that effect.

Dewitt Sherwood, an experienced and licensed real estate appraiser, testified that based on his own experience and through his research including speaking with other real estate professionals, it was his opinion that as a result of WSDOT's conduct the property's value was diminished by 80-90 percent. VRP 1120. This resulted in total damages to the property rights of $8,510,000. VRP 1120, ll. 17-25; 1121, ll. 1-6. In other words, the decreased value as a result

of the impacts by WSDOT on Tapio's ability to sell its property, to use its property for long-term tenants and the loss of value as a result of WSDOT's plans combined with its construction and actions in the neighborhood was $8,510,000.

Craig Soehren, an experienced commercial real estate broker that buys and sells office centers as well as leasing them, offered testimony confirming that WSDOT's actions were directly impacting these property rights. He testified that commercial brokers would be unlikely to bring potential tenants to Tapio because of the WSDOT's actions. VRP 983, ll. 1-8. He also testified that, as a commercial broker, because of WSDOT's actions he also would not bring potential purchasers to the Tapio for a potential sale. VRP 983, ll. 9-25.

Jeff Johnson, an experienced real estate broker that specializes in office buildings, testified that it was his opinion that WSDOT's plans combined with its actions, such as construction and acquisition in the neighborhood, has a direct impact on who Tapio would be able to obtain as tenants, and that this directly impacted *"the owner's ability to sell."* VRP 951, ll. 1-16.

Finally, Cajer Neely, a commercial banker with 35 years in commercial real estate lending experience, testified that because of WSDOT's actions, it would be extremely difficult for a potential purchaser to obtain financing. VRP 926, ll. 11-25. He testified that the *"plans for the North-South Freeway"* combined with the *"amount of acquisition"* near the Tapio Center made it *"unlikely"* a commercial bank would provide a loan to a potential purchaser for Tapio Center. VRP 927, ll. 14-22. See also VRP 933, ll. 3-9.

The Trial Court failed to consider the evidence presented and did not accept it as true or provide Tapio with all reasonable inferences from it. When taken as a whole, the evidence would have provided the jury a basis for finding that Tapio's rights to use, sell and/or the substantial value of their property had been damaged for a public project in violation of the Washington State Constitution. This was recognized by both Judge Leveque and Judge Moreno when they denied the state's prior motions for judgment as a matter of law and found that at the very least genuine issues of material fact existed with regard to whether a taking or damaging of property rights occurred under the Washington State and U.S. Constitution.

This is true pursuant to both the Penn Central analysis and any other taking analysis. Therefore, the jury should have been allowed to hear and decide this case rather than it being dismissed.

C. Plaintiffs' Evidence Supported The Jury Being Able to Determine That A Taking or Damaging of Their Property Rights Occurred Under a *Penn Central* Analysis.

Washington precedent confirms that a taking or damaging of private property occurs even if the government action does not involve a *"permanent physical invasion"* or a complete deprivation of *"all economically beneficial use"* of property which has been referred to as a *"per se" or "de facto"* taking. In such cases, the Penn Central balancing test determines whether an unconstitutional taking and/or damaging occurred requiring just compensation. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

The Penn Central test considers three factors: (1) the economic impact on the property; (2) the extent of the interference with distinct investment-backed expectations; and (3) the character of the government action. Lingle, 544 U.S. at 538-39; Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978); Presbytery of Seattle v. King County, 114 Wn.2d 320, 335-36

(1990) (recognizing the applicability of the Penn Central test in Washington). Tapio presented evidence supporting each.

1. Tapio Presented Evidence of Economic Impact And Substantial Interference With Distinct Investment-Backed Expectations.

An economic impact sufficient to find a Penn Central taking requires only that a property owner *"demonstrate a loss of value that may be less than 100%, but high enough to have gone too far."* Guggenheim v. City of Goleta, 582 F.3d 996, 1018 (9th Cir. 2009). There is no *"automatic numerical barrier preventing compensation, as a matter of law, in cases involving a smaller percentage diminution in value."* Yancey v. United States, 915 F.2d 1534, 1539-41 (Fed.Cir.1990). The takings clause *"was intended to protect all the essential elements of ownership which make property valuable."* Lange v. State, 86 Wn.2d 585, 590 (1976). Here, Tapio presented evidence that the loss of value was 80-90%. VRP 1120.

Washington courts have *"repeatedly recognized that 'property,' as used in the constitutional phrase, encompasses many rights: Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and*

disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself." Lange, 86 Wn.2d at 590 quoting Ackerman v. Port of Seattle, 55 Wn.2d 400, 409 (1960).

Here, Tapio presented substantial evidence that WSDOT's actions completely destroyed their fundamental right to sell Tapio Center for fair market value and drastically limited its use. Supra. In other words, the *"right of use, enjoyment and disposal"*. The evidence is that, the warehousing and blight caused by WSDOT's actions also prevented the Tapio Owners from renting the property to tenants (a result WSDOT recognized would happen) or to sell the property for fair market value. Supra.

Plaintiffs also have the right to make a *"reasonable return"* on this investment in the property that is protected. See Penn Central Transportation Co., 438 U.S. at 136. The evidence was Plaintiffs invested in and improved the property adding significant value to it. Plaintiffs did so with the reasonable and distinct expectation that they would be able to sell the property to realize a reasonable return on the investment. Plaintiffs' ability to do so has been permanently damaged by WSDOT's conduct in this case.

Supra. This is a severe economic burden on the Owners and a significant interference with their investment-backed expectations. Thus, there was evidence that would have supported the finding of a Penn Central taking requiring just compensation.

2. Character Of Government Action

WSDOT claimed the Penn Central analysis should not be applied to its actions because WSDOT *"didn't pass a regulation."* In ruling on the Motion to Dismiss, the Trial Court apparently refused to analyze the evidence in terms of the Penn Central analysis. This ignores the fact that evidence was presented that the damage Tapio suffered does in fact flow from regulatory conduct. **Ex. 210.** After a lengthy administrative process, including a *"Design and Access Hearing"*, a Findings and Order was entered creating a Final Limited Access Order in 2005. Supra. The Limited Access Order established through the administrative process is based upon the final design plans which establish limit access. This included the design relating to Tapio. It is the implementation of this Final Limited Access Order that has resulted in the damages to Tapio. For example, the acquisition and construction in the immediate

neighborhood as provided for by those plans. WSDOT went beyond *"planning"* when it adopted through the regulatory process the Final Limited Access plan and began acting in accordance with it. Thus, WSDOT's claim that no *"regulation"* is involved is not factually accurate and the Court should have analyzed the evidence in light of the Penn Central analysis.

Numerous other jurisdictions have confirmed that the *"focus of the inquiry"* in analyzing whether a Penn Central taking has occurred is on the government's action itself. The government does not get a free pass on taking or damaging private property simply by not passing an actual *"regulation"* or *"legislation"*. For example, the Mekuria v. Washington Metropolitan Area Transit, 975 F. Supp. 1, 4 (Dist. of Col., 1997) Court explained:

> *The simple answer to this argument is that Penn Central cannot be read so narrowly. For example, the [Penn Central]* ***Court explicitly refers to the possibility of compensable takings occurring as a result of a government's 'public action' or 'public program', neither of which necessarily require regulatory or legislative action.***

Id. (emphasis added).

Likewise, First English Evangical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), indicated it is *"government action,"* that constitutes a taking. *"Moreover, it makes no sense to limit Penn Central to apply merely to statutes and regulations, such as land use regulations, when there are a myriad of ways in which government action can seriously impact individual land owners' use of their property."* Mekuria, 975 F. Supp. at 4. The Penn Central analysis considers the actions of the government and insures that private property rights are provided the protections required by the Constitution. See e.g. Berst v. Snohomish Cnty., 114 Wn. App. 245, 255-57 (2002) (stating that *"regulatory takings"* are implicated *"when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs."* Also noting that *"[c]ases involving claims of inverse condemnation can seldom be dismissed on the pleadings because the Supreme Court itself has admitted its inability 'to develop' any 'set formula' for determining when compensation should be paid, resorting instead to 'essentially ad hoc, factual inquiries' to resolve this difficult question."* (internal citations omitted).

Here, the evidence confirmed that WSDOT's cumulative actions were intended to, and have, damaged Tapio's right to use, enjoy and dispose of their property. The evidence confirms that WSDOT's conduct *"places a high burden on a few private property owners that should more fairly be apportioned more broadly among the tax base."* Guggenheim v. City of Goleta, 582 F.3d 996, 1028 (9th Cir. 2009). WSDOT imposed a unique burden on the Tapio Owners. WSDOT acquired nearly all of the property on the blocks to the east, west and south of Tapio Center for its project and actually began construction by demolishing the improvements on those properties. Supra. See also **Ex. 143.** Yet, WSDOT refused to provide Tapio Center just compensation, and instead has taken, damaged, blighted and warehoused the property. Thus, the financial burden being imposed on the Tapio Owners should more fairly be imposed on the State.

D. Evidence Was Presented Establishing A "De Facto" Taking Or Damaging Of Tapio's Property Rights.

Not only did Plaintiffs present evidence supporting a Penn Central taking, but because of WSDOT's intentional conduct, the facts of this case also rise to the level of a *"de facto"* taking or

damaging of several of Tapio's Property rights from its bundle of sticks. A *"de facto"* taking or damaging can occur even without a property owner actually being dispossessed or the property completely destroyed. See Lincoln Loan Co. v. State, 545 P.2d 105, 107 (1976). WSDOT incorrectly claimed that a taking cannot occur unless it actually touches the property. That claim is unsupported by Washington case law. Instead, the analysis is whether there are property interests that are either taken or damaged. This is because *"Article 1, Section 16 was intended to protect all the essential elements of ownership which make property valuable."* Lange, 86 Wn.2d at 590.

For example, Union Elevator v. State, 96 Wn. App. 288 (1999) did not involve a physical invasion of Union Elevator's property. There, WSDOT claimed that it had not taken or damaged the access to Union Elevator's grain elevator because Union Elevator's property did not abut WSDOT's project. In other words, it did not *"physically invade"* or encroach on Union Elevator's property. Union Elevator v. State, 96 Wn. App. 288 (1999). Like the case at bar, WSDOT's actions revolved around construction and

other actions relating to other property. The Court of Appeals decided that even though there was no physical invasion, whether or not the property interest (access) had been taken or damaged was a question for the jury. Id. Ultimately, a jury found that WSDOT had taken and/or damaged the plaintiff's right of access. Id. There are numerous cases confirming that a taking may occur based on activities on adjacent land. See e.g. Dickgeiser v. State, 153 Wn.2d 530, (2005); Ackerman, 55 Wn.2d at 413; Rains v. Department of Fisheries, 89 Wn.2d 740, 745-47 (1978); Martin v. Port of Seattle, 64 Wn.2d 309 (1964); and Boitano v. Snohomish Cty, 11 Wn.2d 664, 672-77 (1941).

Hence, the critical issue was whether there was evidence that Tapio had a property right taken or damaged by WSDOT for public use. The right to use and dispose of property is one such valuable property right. Supra. Plaintiffs presented evidence that WSDOT's intentional actions relating to and in constructing the North-South Freeway resulted in a restriction and damage to Plaintiffs' right to use, enjoy and dispose of their property. Washington law recognizes that this kind of impairment constitutes a taking. See Tom, 164 Wn.

App. at 614 (*"A taking occurs when the government invades or interferes with the use and enjoyment of a person's property, causing the property to lose value."*).

Commissioner Wasson, in her 2012 ruling denying discretionary review of the denial of WSDOT's Motion to Dismiss noted that Pierce v. Northeast Lake Wash. Sewer Dist., 123 Wn.2d 550 (1944), Orion Corp. v. State, 109 Wn.2d 621 (1987) and Lange v. State, 86 Wn.2d 585 (1976) did not apply to the facts being considered in this case. **Appendix A.** The Commissioner also noted that *"[u]pon review of the above cases, this Court is unable to discern a hard and fast rule that would apply so as to disallow Tapio's inverse condemnation action."* Id.

Furthermore, Orion Corp. v. State does not bar Tapio's inverse condemnation action. While the Orion Court noted that it did not *"at this time"* choose to recognize a *"new"* cause of action arising out of precondemnation activities at that time, the evidence at trial was that WSDOT went well beyond mere planning or *"pre-condemnation actions"*. See Orion, 109 Wn.2d at 672. The Orion Court explained that it was the facts of that case that didn't rise to the

level of such a taking because *"there ha[d] been no announcement of intent to condemn and no condemnation proceedings ha[d] been instituted."* Id. The Orion Court further noted that *"[a]s to other examples of oppressive conduct, the trial court correctly concluded that 'the undisputed facts demonstrate ... no abusive preacquisition activity on the part of the defendants which would amount to an unconstitutional taking of [Orion's] property.'"* Id. Notably, the Orion Court remanded for the trial court to determine whether a regulatory taking (i.e. Penn Central) had occurred finding questions of material fact as to *"each component of the regulatory takings test."* Id., at 669-70. The evidence confirmed that WSDOT intentionally engaged in abusive conduct and deliberately took actions over the course of several years in order to blight and warehouse the Tapio Center property for its use in the North-South Freeway project.

Notably, numerous jurisdictions have recognized that a *"condemnation blight"* can result in a *"defacto"* taking or damaging of real property in violation of State and Federal Constitutional rights. See e.g. Clay County Realty Co., 254 S.W.3d 859

(2008)(*"[T]his court holds that actions for condemnation blight are inverse condemnation claims that property owners may advance..."*); Reichs Ford Road Joint Venture v. State Roads Commission of the State Highway Administrative, 880 A.2d 307,319-20 (2005); and Johnson v. City of Minneapolis, 667 N.W.2d 109, 115-116 (2003)(finding the city's activities constituted a taking under the state's constitution). This is especially true where damage is caused by extraordinary delay and/or oppressive conduct. See State v. Barsy, 941 P.2d 971, 976 (1997)(recognizing a right to recover damages caused by extraordinary delay or oppressive conduct by the condemnor), overruled on other grounds by GES, Inc. v. Corbitt, 21 P.3d 11(2001); and Klopping v. City of Whittier, 500 P.2d 1345 (1972). As the Klopping Court explained:

> ***[I]t would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographic area prior to making its decision to take a particular parcel located in that area.***

Id. (emphasis added). As conceded by WSDOT, the Lange Court recognized that the protective language of the Washington Constitution would likewise protect Washington landowners from

this type of intentional conduct by the Government. As explained above, WSDOT recognized it was engaging in this activity. Indeed, despite informing Tapio and its tenants in 2002 that its property rights were *"currently being affected"*, WSDOT continues to refuse to provide just compensation. There can be no better evidence of undue delay in instituting condemnation proceedings.

"We were figuring about 5 years before construction was slated for this area. ***So, in another 3 years we will have purchased more of the surrounding properties, creating an even more blighted or depressed commercial area....*** *"* **Ex. 35** (emphasis added). The plain language of the Washington Constitution protects Washington Landowners from this type of intentional damaging of property rights by WSDOT.

E. Exhibit 35 Was Authentic And Should Have Been Admitted.

Exhibit 35 was a WSDOT email that confirmed WSDOT knew that acquiring properties in a phase that was not funded for construction and leaving other properties isolated ("*purchase more surrounding properties*") that WSDOT would create "*an even more blighted or depressed*" neighborhood. **Ex. 35**. This evidence was

directly relevant to whether WSDOT engaged in undue delay in acquiring Tapio and was evidence of WSDOT's knowledge that its actions would damage private property rights. The Tapio Owners identified **Ex. 35** thirty (30) days prior to trial pursuant to ER 904. CP 1378. Prior to Trial, WSDOT expressly stated that it was not objecting to the *"authenticity"* of any of the documents, including Exhibit 35. CP 2094. As it relates to Exhibit 35, WSDOT's only objections that it preserved were, *"relevance"*, *"unfair prejudice"* and *"requires relevancy foundation"*. CP 2098.

At trial, Tapio provided testimony that laid the foundation for the document and its relevance, this included not only the fact the Exhibit was directly relevant to establishing for the jury that WSDOT was aware of the impacts that its warehousing and advance acquisition scheme would have on remaining properties, but also to establish the date of the take and to establish that *was* not the true reason for WSDOT refusing to acquire all properties in an area at the same time. Instead, WSDOT was intentionally creating blighted neighborhoods. See VRP 897-915. This was also the document through which Tapio learned the State was intentionally

warehousing properties to drive down the price for them to acquire the property later. VRP 903, ll. 1-7.

After argument, the Court refused to admit the Exhibit stating *"So if it's going to come in at all, it would have to come in through one of those people [WSDOT]."* VRP 910, ll. 24-25. It appears the basis of refusing to admit the document was authentication. However, not only did WSDOT never object to authentication, but the document had also been authenticated through ER 904. Furthermore, the document was directly relevant to the issues of the case and the testimony of Mr. Stejer. See e.g. VRP 914-915. The Trial Court erred as a matter of law by failing to apply ER 904 and refusing to admit the document based on authentication. See also VRP 1194-1195. Accordingly, that decision should be reversed and **Ex. 35** admitted.

The Trial Court further committed err when it denied Tapio's Motion to re-open its case to call WSDOT's representative to authenticate the document. VRP 1197. This was err in light of the fact that the Exhibit further supported Tapio's case. VRP 1194.

IV. CONCLUSION

The U.S. and Washington Constitutions protect the property rights that WSDOT has damaged. The Tapio Owners have presented admissible evidence establishing that their property rights were damaged and the government's conduct should have been weighed by a Jury.

Based upon the foregoing, Appellants respectfully request that this Court reverse the dismissal and remand the case for trial.

DATED this 8th day of April, 2015.

DUNN BLACK & ROBERTS, P.S.

KEVIN W. ROBERTS, WSBA #29473
ROBERT A. DUNN, WSBA #12089
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of April, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

☒	HAND DELIVERY	Frank Hruban
☐	U.S. MAIL	Attorney General's Office
☐	OVERNIGHT MAIL	Washington
☐	FAX TRANSMISSION	1116 W Riverside Ave
☐	EMAIL	Spokane, WA 99201-1106

☒	HAND DELIVERY	John C. Riseborough
☐	U.S. MAIL	Richard Kuhling
☐	OVERNIGHT MAIL	William C. Schroeder
☐	FAX TRANSMISSION	Paine Hamblen
☐	EMAIL	717 W. Sprague, Fl. 12
		Spokane, WA 99201

KEVIN W. ROBERTS

Tapio.
12/20 Chron
Tickl
FILED
RECEIVED
DEC 19 2012
DUNN & BLACK

The Court of Appeals
of the
State of Washington
Division III

DEC 19 2012
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

TAPIO INVESTMENT COMPANY, et al. Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION Petitioner.	)	No. 31159-7-III COMMISSIONER'S RULING

The State of Washington, Department of Transportation, (State) seeks discretionary review of the Spokane County Superior Court's August 30, 2012 Order Denying Defendant's Motion to Dismiss the plaintiffs' complaint for inverse condemnation. Plaintiffs are Tapio Investment Company, et al., (Tapio). The State

contends that (1) Washington does not recognize Tapio's theory of inverse condemnation, (2) acts that do not physically invade property are not takings, (3) no regulatory taking has occurred absent a regulation that restricts use of the property, and (4) Tapio's action violates public policy because it attempts to dictate the course and progress of a public highway.

The State also moves to strike the following from Tapio's response to its motion for discretionary review: (a) A brief filed in a different superior court matter; (b) references to other superior court cases which the superior court either struck or declined to consider; and (c) references to the legal conclusions of a fact witness that the superior court struck.

Pursuant to RCW 8.25.075 and RAP 18.1, Tapio requests this Court award it reasonable attorney fees and costs that it incurred in responding to the motion for discretionary review.

FACTS

Tapio asserts inverse condemnation in the following context: Tapio's properties, which include the Tapio Office Center, are located near the Freya interchange on I-90 in Spokane. The 1997 design for the North Spokane Freeway showed the State planned to construct the freeway over half of the Tapio properties. In the fifteen years that has passed since then, the State has acquired "nearly all" of the property surrounding Tapio

and has engaged in construction activities such as demolishing buildings in Tapio's neighborhood. The State's actions have allegedly caused Tapio's tenants to depart, and a shortage of new tenants, a decline in rent, and, generally, a decline in market value. The State counters that the Legislature has not approved funding for the portion of the freeway project where Tapio is located. Such funding may be three or four years off, and a potential remains that the project will not immediately receive funding or will be relocated.

MOTION TO STRIKE

This Court has reviewed the State's arguments with regard to Tapio's references in its response to another superior court matter, as well as in its appendix. The cited references and the appendix are stricken.

The superior court struck the declaration of John Stejer, Tapio's president, insofar as he rendered an opinion in the nature of a legal conclusion. This Court has reviewed the references to Mr. Stejer's declaration at pages 2-8 of Tapio's response, and rules that Tapio has cited the declaration for its factual statements and that the specific phrases identified at page 5 of the State's motion to strike are either in the nature of argument by counsel based upon Mr. Stejer's statements of fact or, to the extent they are included in the cited declaration, are obviously argument. It therefore denies the State's motion to strike in this regard.

MOTION FOR DISCRETIONARY REVIEW

This Court may grant discretionary review if the movant establishes that the superior court committed obvious or probable error that renders further proceedings useless or substantially alters the status quo or the freedom of a party to act. *See* RAP 2.3(b)(1) and (2).

"Inverse condemnation is an action to 'recover the value of property which has been appropriated *in fact*, but with no formal exercise of the condemnation power.'" (Emphasis added.) *Pierce*, 123 Wn.2d at 556, quoting *Marin v. Port of Seattle*, 64 Wn.2d 309, 310, n.1, 391 P.2d 540 (1964). The State contends that it is well-settled in Washington that courts do not recognize a cause of action in the circumstances here. The State cites *Pierce v. Sewer & Water Dist.*, 123 Wn.2d 550, 870 P.2d 305 (1994); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1990); and *Lange v. State*, 86 Wn.2d 585, 547 P.2d 282 (1976).

Orion appears to best support the State's position. In that 1987 case, a tideland owner sued the State for inverse condemnation by excessive regulation. The State appealed a summary judgment in favor of the owner. The supreme court stated at 671 that "Orion cites no Washington case law to support its claim that the government can unconstitutionally take private property by 'oppressive pre-acquisition conduct.'" The court further stated at 672 that "*[a]t this time*, we do not choose to recognize this new

cause of action." (Emphasis added.) The court in *Orion* at 671 observed that "[a]pparently, California has recognized a cause of action for inverse condemnation when a decrease in market value resulted from 'unreasonably delaying eminent domain action,'" quoting *Kloppinger v. Whittier*, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal Rptr. 1 (1972).

Pierce and *Lange* involved situations other than pre-acquisition conduct. In *Pierce*, 123 Wn.2d 550, the supreme court in 1994 used language in *dicta* that recognizes the possibility that diminution of market value in certain circumstances may support an argument that a taking has occurred. There, the homeowners sued a municipal corporation water and sewer district after the district constructed a water tank on adjacent property that allegedly diminished their property value by $30,000 because it obstructed their view.

The *Pierce* court held at 558-59 that the homeowners' view was not a property right, and, since the district had acted lawfully and only upon its own property, there was no appropriation of the owners' property. The court acknowledged that "[o]wnership of property not only includes the right to exclusive possession, but also includes 'the right to use the land.' . . . [and that *owners*] *could have a property interest in the market value of their property* which would entitle them to compensation under the Washington Constitution." (Emphasis added.) *Id.* at 560, quoting *Highline School Dist. 401 v. Port*

of Seattle, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976). But it also stated that the Constitution does not "authorize compensation merely for a depreciation in market value when *caused by a legal act,*'" such as the construction of the water tank. (Emphasis added.). *Id.* at 562, quoting *Aubol v. Tacoma*, 167 Wash. 442, 446, 9 P.2d 780 (1932).

In *Lange v. State*, 86 Wn.2d 589, 547 P.2d 282 (1976), the property owners had sued for inverse condemnation, but the State subsequently initiated a condemnation action. The trial court dismissed the inverse condemnation action and awarded the owners the value of the property *at the time of trial.* The owners appealed. The supreme court specifically held that the general rule that the court is to value the property as of the trial date, gives way when that result is inequitable. The court stated at 595, "[f]or the time of valuation to be advanced, marketability must be substantially impaired and the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose."

Upon review of the above cases, this Court is unable to discern a hard and fast rule that would apply so as to disallow Tapio's inverse condemnation action. And, to the extent that the superior court's decision here reflects a consideration of facts that may materially distinguish it from the facts present in *Orion*, this Court cannot say that the

decision was obvious or probable error.

But even if the superior court's decision was obvious or probable error, the State still has to show that the superior court's decision renders further proceedings useless or substantially alters its freedom to act. Here, a denial of discretionary review means that Tapio's action will go to trial, at which Tapio may or may not prevail. If Tapio prevails, the State can raise the same arguments as here, on appeal. And, the facts are likely to be better developed in a trial than they are on a motion for summary judgment, should a court on appeal want to explore whether the pre-acquisition conduct that occurred here resulted in a taking, as in the California case cited in *Orion*. *See Kloppinger, supra.*, 500 P.2d 1345.

Finally, this Court's ruling makes it unnecessary to address the parties' remaining arguments. This Court observes, however, that public policy, which the State raises as an argument against recognition of Tapio's cause of action, is an issue only if such recognition serves as precedent for holding that any and all pre-acquisition conduct amounts to a taking. Tapio's position is that the pre-acquisition conduct in this case is so extreme that the result is a taking, even if an actual, physical invasion of the property has not yet occurred. Accordingly,

IT IS ORDERED, the State's motion for discretionary review is denied. The State's motion to strike is granted in part and denied in part. At this time, discretionary

review having been denied, Tapio need not file an amended response without the complained of references, as set forth at page 3 of this ruling. Tapio's request for reasonable attorney fees is referred to the superior court for determination under RCW 8.25.075. *See* RAP 18.1(i).

December 19, 2012

Monica Wasson
Commissioner

Tapio

RECEIVED
MAR 19 2013
DUNN & BLACK

FILED
MAR 19 2013
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

TAPIO INVESTMENT COMPANY, et al.,	)	
	)	No. 31159-7-III
Respondents,	)	
	)	
v.	)	
	)	ORDER DENYING
STATE OF WASHINGTON,	)	MOTION TO MODIFY
DEPARTMENT OF TRANSPORTATION,	)	COMMISSIONER'S RULING
	)	
Petitioner.		

Having considered petitioner's motion to modify the commissioner's ruling of December 19, 2012, respondent's answer to the motion, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Sweeney, Kulik, Siddoway

DATED: March 19, 2013

FOR THE COURT:

KEVIN M. KORSMO
Chief Judge

APPENDIX B

OFFICE RECEPTIONIST, CLERK

To: Maureen Obrien
Cc: Kevin Roberts; Bob Dunn; John Riseborough (JCR@PaineHamblen.com); will.schroeder@painehamblen.com; richard.kuhling@painehamblen.com; FrankH@ATG.WA.GOV
Subject: RE: Tapio Investment Company, et al. v. State of Washington, Supreme Court Case No. 90506-1

Received 4-8-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maureen Obrien [mailto:mobrien@dunnandblack.com]
Sent: Wednesday, April 08, 2015 3:01 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kevin Roberts; Bob Dunn; John Riseborough (JCR@PaineHamblen.com); will.schroeder@painehamblen.com; richard.kuhling@painehamblen.com; FrankH@ATG.WA.GOV
Subject: Tapio Investment Company, et al. v. State of Washington, Supreme Court Case No. 90506-1

Good afternoon,

Attached for filing in the matter of Tapio Investment Company, et al. v. State of Washington, Supreme Court Case No. 90506-1, please find the following:

1. **Appellants' Opening Brief**

This pleading is being filed by Kevin W. Roberts, 509-455-8711, WSBA No. 29473, email address: kroberts@dunnandblack.com.

Thank you.

Maureen

DB&R
Maureen Cox-O'Brien | Dunn Black & Roberts, P.S.
111 N Post, Suite 300 | Spokane, WA 99201
Tel: (509) 455-8711 | Fax: (509) 455-8734
Email: mobrien@dunnandblack.com
Website: www.DunnandBlack.com

Disclaimer: This message may contain confidential communications protected by the attorney client privilege. If you received this message in error, please delete it and notify the sender.