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No. 73335-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a  
KAY BURDINE, husband and wife; and FREDERICK A.  
KASEBURG, a single man,

Appellants,

v.

KING COUNTY, a political Subdivision of the State of Washington,

Defendant,

and

CITY OF SEATTLE, a municipal corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE MONICA BENTON

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COURT OF APPEALS  
DIVISION I  
SEATTLE, WASHINGTON



REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The City stayed the order quieting title for 21 months until its unsuccessful appeal was mandated, authorizing the public to use Holmquist's and Kaseburg's property as a public beach, while depriving the Owners of their right to exclusive use and possession. In arguing that Kaseburg and Holmquist suffered no harm because they could continue using the property along with the general public, the City ignores the fundamental attribute of ownership – the right to exclude others. These Owners proved the fact of damage and offered uncontradicted evidence as to the amount. Any factual issues regarding the amount of damages should be determined by the trier of fact.

## II. REPLY ARGUMENT

**A. The Owners are entitled to recover damages for loss of use because the City's stay deprived them of exclusive use and possession of their real property.**

The City's contention that Holmquist and Kaseburg suffered no compensable harm is without merit. The City concedes that, as a result of its stay of the trial court's judgment quieting title pending appeal, the City allowed the public to continue using these owners' property as a public beach. (Resp. Br. 3-4) The City concedes that RAP 8.1 provides a remedy to a successful respondent who is

deprived of the use and ownership of property pending appeal. (Resp. Br. 4-5, 11) And the City concedes that successful respondents under *Norco Construction, Inc. v. King County*, 106 Wn.2d 290, 721 P.2d 511 (1986) are entitled to claim “damages resulting from the delay in enforcement” of their judgment quieting title. 106 Wn.2d at 296. (Resp. Br. 10)

The City instead advances the mistaken notion that because Holmquist and Kaseburg could use the beach along with other members of the public, they failed to suffer any “actual damages” or “compensable losses.” (Resp. Br. 5, 9) The City’s argument ignores that “the right to exclude others” is “one of the most essential sticks in the bundle of property rights . . .” *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979).

“The very essence of the nature of property is the right to its exclusive use.” *Ohwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 286, 173 P.2d 652 (1946). *Accord, Guimont v. Clarke*, 121 Wn.2d 586, 594, 854 P.2d 1 (1993) (“fundamental attributes of ownership include the right to possess, exclude others from or dispose of property.”), *cert. denied*, 510 U.S. 1176 (1995). Courts assess damages for minimal interference with an owner’s right of exclusive use and possession. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

422, 102 S. Ct. 3164, 3168-69, 73 L. Ed. 2d 868 (1982) (owner entitled to compensation for television company's installation of "cable slightly less than one-half inch in diameter and of approximately 30 feet in length" above roof of apartment building).

Respecting the paramount right to exclude others, Washington courts compensate the loss of exclusive possession under a variety of legal theories. *See, e.g., Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 692-93, 709 P.2d 782 (1985) (trespass claim for airborne pollution that "invaded the plaintiff's interest in the exclusive possession of his property"), *answer to certified question conformed to* 635 F.Supp. 1154 (W.D. Wash. 1986); *Highline Sch. Distr. No. 401, King County v. Port of Seattle*, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976) (inverse condemnation based on noise pollution); *Kuhr v. City of Seattle*, 15 Wn.2d 501, 504, 131 P.2d 168 (1942) (where encroachment interferes with owner's "right to exclusive use and enjoyment . . . we think it of little moment what the theory of the injured party's cause of action may be").

The City advances a number of arguments that ignore this established law, but they all rest on the proposition that only loss of total, not exclusive, use is compensable. According to the City, it could collectivize a privately owned home without just compensation

under the theory that the owners maintained the right to occupy it in common with their comrades. That is not now, and has never been, the law.

None of the cases cited by the City support the notion that a local government can deprive a property owner of the exclusive use and possession of real property without compensation under the theory that the owner could still use the property as a member of the general public. In *Ames v Ames*, 184 Wn. App. 826, 340 P.3d 232 (2014), *rev. denied*, 352 P.3d 187 (2015) (Resp. Br. 10), the trial court had ordered a \$10,000 bond to supersede an order granting a party the right to harvest timber. Division Three affirmed the trial court's order forfeiting \$8,230 of that bond because the prevailing party lost out on a logging contract for the timber based on the supersedeas order. Relying on *Norco*, the Court held that "a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement." 184 Wn. App. at 855, ¶70.

In *Interstate Production Credit Ass'n v. MacHugh*, 90 Wn. App. 650, 953 P.2d 812, *rev. denied*, 136 Wn.2d 1021 (1998) (Resp. Br. 10), the Court held that the appellant had never stayed enforcement of a trial court's order staying foreclosure of its

mortgage on the respondents' real property. Thus the respondents never lost the exclusive right to use their land: "[T]here was nothing to prevent them from farming the land or leasing it." 90 Wn. App. at 657.

By contrast, here, Holmquist and Kaseburg could not exercise any rights of ownership pending appeal. Not only could they not "subdivide, sell, rent, [or] develop" (Resp. Br. 11), they could not even keep out the public. They were deprived of their essential property right to exclude others. They established a compensable loss.

The City's related argument that the Owners "had to demonstrate that they intended to rent their properties during the pendency of appeal," to recover damages (Resp Br. 14) or that only "a depreciation in the value of the property, lost profits, and additional expenses . . ." (Resp. Br. 9-10, quoting *Norco*, 106 Wn.2d at 293), fails to acknowledge the plain language of RAP 8.1.

RAP 8.1 makes clear that for purposes of setting the bond to secure recoverable damages due to a stay of enforcement of an order affecting real property, the presumptive measure of damages is for "loss of use," with the "burden of proving that the amount of loss would be more" placed upon "the party claiming that the reasonable value of the use of the property is inadequate to secure the loss . . ."

RAP 8.1(c)(2) The prevailing respondent in *Norco* met that burden of proof, recovering “more” than mere loss of use damages in the form of consequential damages for its lost profits as a result of the delay in developing its real property. The fact that such additional damages are authorized under RAP 8.1, does not negate in any respect the ability of a successful respondent to recover loss of use damages as the presumptive measure for the loss of the right to exclusively possess and use real property.

To support its assertion that *only* the type of consequential damages available to *Norco* are recoverable here, the City argues that the Owners could not establish that they suffered any “liability . . . as a result of an accident occurring on the property . . . or damage to the property as a result of the inability to fence it off” – hypothetical losses posited by the Owners in the trial court in litigating the terms of the City’s stay without bond. (Resp Br. 9, citing CP 53-68) At that time, the Owners recognized that the City had the right to stay enforcement of the quiet title order without bond under RAP 8.1(f), but argued that the City should not be able to obtain affirmative relief by intervening in the County’s quiet title action, and then maintaining a sign announcing its intention to develop a public park on the waterfront property that it never owned. (See CP 92-93 (“By

superseding without bond, the City may not obtain affirmative relief . . . by claiming the right of a landowner to announce development of a park and to invite entry upon the subject property. The City was *never* in title to the property at issue here.”). The Owners never conceded that the City would not be liable for preventing the Owners from taking exclusive possession by superseding without a bond under RAP 8.1(f).

Holmquist and Kaseburg established that they were damaged by the City’s stay. They are entitled to delay damages under RAP 8.1 for the loss of their exclusive use and enjoyment of real property.

**B. The Owners are entitled to at least the presumptive amount of damages – reasonable rental value of the property while the City’s stay was in effect.**

Having established the *fact* of damages, the City’s argument that the *amount* of damages is uncertain fails. The City’s argument ignores the established principle that only “the *fact* of damage” must be proved with “reasonable certainty.” *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (emphasis in original) (discussed in App. Br. at 18).

Moreover, the Owners established not only the *fact* of damage, but also presented un rebutted evidence on the *amount* of their damages. Their damages here are not incapable of

measurement, as the City asserts. The City ignores the fact that RAP 8.1(c)(2), by its terms authorizes the recovery of delay damages for “loss of use.” “Loss of use” equates to rental value. *Barci v. Intalco Aluminum Corp.*, 11 Wn. App. 342, 352, 522 P.2d 1159, *rev. denied*, 84 Wn.2d 1012 (1974). The City’s argument that “reasonable rental value” is only available if an owner “cannot quantify the amount of damages,” (Resp. Br. 14) ignores that reasonable rental value in fact quantifies the Owners’ delay damages under RAP 8.1(c)(2).

Holmquist and Kaseburg provided sufficient evidence of rental value “independent of their larger parcels” (Resp. Br. 13) based upon the rent the City itself charges for street end right of ways in Ordinance 123611. (CP 122-25, 204-20) And even if the City is correct that the street end could only be valued as part of the adjacent parcels, Holmquist and Kaseburg also testified to the fair market value of the 60 foot waterfront lot based upon their adjacent lots, providing an additional basis to determine rental value. (CP 239, 243) “An owner may testify to the value of his property and the weight to be given to it is left to the trier of fact.” *Worthington v. Worthington*, 73 Wn.2d 759, 763, 440 P.2d 478 (1968).

Holmquist and Kaseburg provided un rebutted evidence of their delay damages. (App. Br. 13-14) They also presented

unrebutted evidence that establishes additional damages due to the public's use of the adjoining property during the pendency of the City's appeal. (App. Br. 17-18; CP 157-59, 222-23)

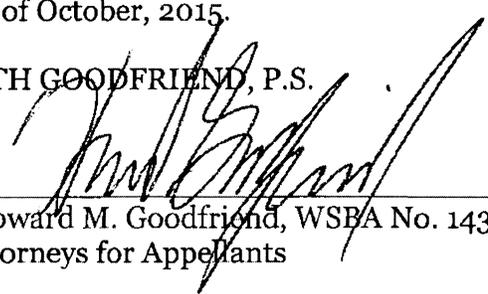
Holmquist and Kaseburg are entitled, at a minimum, to the rental value of their property for the loss of its exclusive use during the pendency of the City's unsuccessful appeal. Any fact questions regarding additional damages that they suffered due to the public's use of their property as a public beach during the pendency of appeal should be resolved by the trier of fact.

### III. CONCLUSION

The Court should remand with instructions to award Holmquist and Kaseburg their delay damages pursuant to RAP 8.1(c)(2).

Dated this 14<sup>th</sup> day of October, 2015.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 15, 2015, I arranged for service of the foregoing Reply Brief of Appellants to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 15<sup>th</sup> day of October,  
2015.

  
\_\_\_\_\_  
Tara D. Friesen