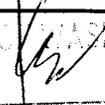


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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

SANDRA M. GALVIS, a divorced woman, and ALEXANDER MONCADA, a single man, d/b/a/ LA POPULAR CASH & CARRY MARKET, LLC; JAMES R. MASEWICZ and VIRGINIA F. MASEWICZ, husband and wife; and ASH RESOURCES, LLC.

Respondent/Cross-Appellants

v.

STATE OF WASHINGTON, DEPARTMENT OF
TRANSPORTATION,

Appellant/Cross-Respondent

REPLY BRIEF OF RESPONDENT'S CROSS-APPELLANTS GALVIS AND
MONCADA

ORIGINAL

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I. THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION (WSDOT) FOCUSED ITS BRIEFING ON THE ISSUE OF WHETHER OR NOT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINAL ORDER OF THE DEPARTMENT OF TRANSPORTATION IN THE ADMINISTRATIVE HEARING PROCESS THAT THEIR HIGHWAY PLAN PROVIDES REASONABLE ACCESS TO THE SUBJECT PROPERTIES.

In focusing its attention on the question of whether substantial evidence in the Administrative Hearing record supports the Final Order of the Department of Transportation, WSDOT has taken its eye off the ball. If the process utilized to reach a “Final Order” was constitutionally flawed, and it was, the “Final Order” of the WSDOT is meaningless, and properly set aside by Judge Thompson, because a taking and/or damaging of the Galvis/Moncada and Masewicz properties has occurred, giving rise to a valid claim for just compensation if WSDOT proceeds with its plans.

II. IN FOCUSING ON WHETHER OR NOT THE “FINAL ORDER” WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, WSDOT IGNORED THE CONTROLLING CONSTITUTIONAL AND JURISDICTIONAL ISSUES IN THIS CASE, VIZ., WHETHER AN ADMINISTRATIVE HEARING PROCESS (OR ANY OTHER PROCESS) THAT DOES NOT (1) REQUIRE A COURT OF RECORD TO INITIALLY DETERMINE WHETHER A TAKING AND/OR DAMAGING OF PROPERTY AND PROPERTY RIGHTS HAS OCCURRED; AND (2) PROVIDE FOR THE ASCERTAINMENT OF JUST COMPENSATION BY A JURY (UNLESS A JURY BE WAIVED); AND (3) REQUIRE PAYMENT OF JUST COMPENSATION TO THE ABUTTING OWNERS OR INTO COURT FOR THEIR BENEFIT BY THE CONDEMNOR; (4) BEFORE THE TAKING OR DAMAGING OF THE ABUTTING OWNER’S PROPERTY OCCURS, PASSES CONSTITUTIONAL

MUSTER UNDER ART. 1, § 16 OF THE WASHINGTON STATE CONSTITUTION.

From the outset, these abutting property owners of operating business property have challenged the jurisdiction of the Office of Administrative Hearings to determine whether or not the subject property would be taken or damaged for public use by the State's proposed highway plan for SR 7, SR 507 to SR 512.¹

These owners also challenged the constitutionality of Chapter 47.50 RCW, the "Access Management" statute as applied, as a regulatory taking, because WSDOT issued a letter on September 22, 2003² with a proposed highway access plan.³ The letter was issued under authority of WAC 468-51-150.⁴ It informed

¹ See, e.g., Galvis Administrative Record, pages 300000798, line 19 through page 300000800, line 22; and pages 300000802, line 4 through page 300000803, line 5 of the February 24, 2004 Verbatim Transcript of Proceedings of the telephonic pre-hearing conference before the Honorable Selwyn Walters, Administrative Law Judge.

² Letter from Troy Cowan, P.E., WSDOT Project Engineer, to Sandra M. Galvis, etal (sic), which was admitted as Exhibit 2 to the Galvis-Moncada Administrative Hearing, 300000549-550.

³ State Highway Plan attached to September 22, 2003 letter to Sandra M. Galvis Etal (sic) 300000551.

⁴ "WAC 468-51-150 Adjudicative Proceedings" provides:

WAC 468-51-150 Adjudicative proceedings.

(1) Application. Any person who has standing to challenge the denial of a permit application in compliance with WAC 468-51-080; a permit with conditions in compliance with WAC 468-51-080; a notice of permit modification, revocation, or closure of permitted connection in compliance with WAC 468-51-120; or notice of closure of an unpermitted connection in compliance with WAC 468-51-130 may apply for an adjudicative proceeding on the matter in compliance with chapter 34.05 RCW, rules adopted thereunder, and department rules within thirty days of the date the initial determination of the department is sent by certified mail.

the property owners that if they did not file a request for an “adjudicative proceeding” (an administrative hearing) under Chapter 34.05 RCW, by October 22, 2003, i.e., 30 days of the mailing of the letter transmitting the state’s proposed highway plan, which the owners contend took all of their access rights under *McMoran v. State*, 55 Wn.2d 37, 345 P.2d 598 (1959), “**the enclosed access configuration will become final and will be included in the upcoming construction project.**”⁵ The highway plan attached to the letter depicted the construction of a **concrete sidewalk** and a **grass lined ditch** across and beyond the entire frontage of the

(2) Conduct. Thereafter, and within the times set forth by chapter 34.05 RCW, rules adopted thereunder, and department rules, the department shall convene an adjudicative proceeding. The proceeding shall be conducted in compliance with chapter 34.05 RCW, rules adopted thereunder, and department rules.

(3) Failure to apply. **Failure to apply for an adjudicative proceeding within the times set forth in subsection (1) of this section shall result in the adoption of the department's initial determination as its final determination.**

(4) Failure to participate. Failure to attend or otherwise participate in an adjudicative proceeding may result in a finding of default.

(5) Reasonableness of access. **The department in its regulation of connections in compliance with chapter 47.50 RCW and these regulations shall allow reasonable access. If the department's final order denies reasonable access, the appellant shall be entitled to just compensation in compliance with RCW 47.50.010(5).** Access which is not reasonable is not compensable.

[Statutory Authority: Chapter 47.50 RCW. 99-06-034 (Order 187), § 468-51-150, filed 2/25/99, effective 3/28/99. Statutory Authority: RCW 47.01.101 and chapter 47.50 RCW. 92-14-044, § 468-51-150, filed 6/24/92, effective 7/25/92.]

The writer of this brief has examined both **Chapter 47.50 RCW** and **RCW 47.01.101** and cannot find express statutory authority for **WAC 468-51-150 Adjudicative proceedings** in either.

⁵ September 22, 2003 Troy Cowan letter to Sandra Galvis et al (sic), *supra*, note 2.

Galvis-Moncada and Masewicz properties where asphalt pavement then existed. The effect of WSDOT's Proposed Highway Access Plan was to eliminate all vehicular access to the subject properties. In addition, the plan eliminated all 18 head-in angle parking stalls in front of the Galvis-Moncada and Masewicz business properties that provided customer parking. This proposal was an abrupt change for the subject business properties. The existing parking, which was located partly on the owner's property and partly upon the existing 100 foot wide SR 7 right of way, had been allowed continuously for approximately 50 years, without any known governmental complaint or request that such parking be discontinued. The change was precipitated by passage of the "nickel/gallon gas tax." The "nickel tax" prompted WSDOT to construct a marginal project that had been "on the shelf" over twelve years because it didn't rank high enough on WSDOT's priority array, and build it "on the cheap," i.e., without paying for access rights taken or damaged by the project.⁶ The insidious part

⁶ See, e.g., Galvis Administrative Record 300000804, line 11 to page 300000805, line 10.

RCW 47.32.120 Business places along highway provides:

Except as provided in RCW 47.04.270, it is unlawful for any person to erect a structure or establishment or maintain a business, the nature of which requires the use by patrons or customers of property adjoining the structure or establishment unless the structure or establishment is located at a distance from the right of way of any state highway so that none of the right of way thereof is required for the use of the patrons or customers of the establishment. Any such structure erected or business maintained that makes use of or tends to invite patrons to use the right of way or any portion thereof of any state highway by occupying it while a patron is a public nuisance, and the department may fence the right of way of the state highway to prevent such unauthorized use thereof. [2006 c 324 § 2; 1984 c

of the WSDOT's process is that it was **self-executing**. The letter provided that **unless the property owner actively challenged the WSDOT plan by applying for an adjudicative proceeding within 30 days of the mailing of the WSDOT letter and highway plan, the plan would become final and would be built as a part of WSDOT's upcoming construction project.**

In *Fry v. O'Leary*, 141 Wash. 465, 252 P. 111 (Jan. 4, 1927) the Supreme Court held that the passage of an ordinance vacating a portion of a street across from an abutting owner's property was **self-executing**, because nothing remained to be done, except for the passage of time until the street was vacated. In setting aside the vacation, the court stated:

“ . . . one who is an abutting property owner upon a street or alley, any portion or the whole of which is sought to be vacated, has a special right and a vested interest in the right to use the whole of the street for ingress and egress, light, view, and air, and, if any damages are suffered by such an owner, compensation is recoverable therefor. It follows therefore, that if appellants' light, air, view, or access is materially diminished, as alleged in the complaint, they are entitled to have the same passed upon by a jury regularly impaneled to determine the amount thereof. *Ridgway v. City of Osceola*, 139 Iowa, 590, 117 N. W. 974.

7 § 183; 1961 c 13 § 47.32.120. Prior: 1937 c 53 § 79; RRS § 6400-79.]

Based upon the fact there are no reported cases of State attempts to use RCW 47.32.120 to eliminate parking on state rights of way since its enactment in 1937, it is extremely likely that but for the State's SR 7 project, customer parking on the westerly 10 to 15 feet of the 100 foot SR 7 right of way in front of the Galvis and Masewicz businesses would have continued unchallenged as it had for the prior 50 years.

Respondents contend that the vested interest of an abutting property owner in a street extends only to the middle of the street, and that therefore appellants are not abutting property owners as to the 13 feet vacated, which is across the street. But this position is untenable. . . . **An abutting property owner's vested interest is to the full width of the street in front of his land, and he is entitled to use the whole thereof for egress and ingress, light, air, and view, and for any substantial or material diminution of any of these rights he is entitled to recover in damages.**

However, the complaint in this case alleges that the city council vacated a portion of the street without the same being done for a public use, but that it was vacated for a private use. **The council may not vacate a portion of a street in which an abutting property owner has a vested right without the vacation is for the public use, and then only upon the payment of the damages sustained. . . .**

Nor can the city, by the passage of an ordinance of vacation, damage the property of an abutting owner without first having ascertained and paid the amount of the damage. Section 16, art. 1, of the Constitution, as often construed by us, requires this to be done. **To permit the passage of such an ordinance without first ascertaining the damage and paying therefor is to compel the property owner to bring an action to recover his damages. The burden may not be so placed. State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 P. 385.**

A vacation ordinance stands on a different footing as far as a property owner is concerned than those ordinances which provide that some action shall be taken thereafter which damages one's property. **The vacation ordinance carries its own execution. When the ordinance becomes effective by the**

lapse of time provided by law, the property abutting the portion vacated has been damaged. Nothing remains to be done.

Fry v. O'Leary, 141 Wash. 465, 469-474 (Emphasis added).

In the present case, as in **Fry v. O'Leary, supra**, WSDOT's letter and the plan sheets mailed to the abutting property owners were **self-executing**. The WSDOT letter did not provide a process whereby a jury ascertained and the public agency paid damages suffered by the property owners in advance of the taking, as Art. 1, § 16 requires. Instead, the WSDOT letter and highway construction plan forced the property owners to bring an action to recover their damages. As **Fry v. O'Leary** states, the burden may not so be placed on the property owner. WSDOT has a duty to bring the owners into a court of record by an appropriate original process to have a jury ascertain the damages to be paid for the taking and/or damaging of the owner's property and property rights.

As will be further documented in **Section III, infra**,

It has become the settled law of this state, since the adoption of our Constitution, that a statute which purports to provide for the determination of the question of damages resulting from the exercise of the power of eminent domain, other than by a judicial proceeding in a court of record, wherein the owners of property are brought into court by an appropriate original process, is unconstitutional. Section 16, art. 1, Constitution; Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050; Askam v. King County, 9 Wash. 1, 36 Pac. 1097; Snohomish County v. Hayward, 11 Wash. 429, 39 Pac. 652; Seanor v. Board of County

Commissioners, 13 Wash. 48, 42 Pac. 552; **Adams County v. Dobschiag**, 19 Wash. 356, 53 Pac. 339.

Duncan Township v. Satyr, 106 Wash. 514, 521, 180 P. 476, 478 (1919). (Emphasis added).

When the property owner's objections to the WSDOT's proposed plan were ignored, on April 9, 2004 the owners filed a Complaint⁷ in Pierce County Superior Court under Cause No. 04-2-06841-5 for a declaratory judgment that the proposed WSDOT project would result in a taking and/or damaging of the owner's property and property rights; for injunctive relief; for a stay of the Galvis-Moncada and Masewicz administrative proceedings; for reasonable attorney fees and for other relief.

A letter was written to ALJ Selwyn Walters and John F. Salmon III, Assistant Attorney General representing WSDOT, indicating the owner's belief that WSDOT was acting in excess of its constitutional and statutory authority in attempting to resolve the inverse condemnation issues by administrative hearing, and requesting that the administrative hearings in the Galvis-Moncada and Masewicz matters be stayed pending resolution of constitutional challenges to the administrative hearing process.⁸ ALJ Walters responded to the April 12, 2004 letter the same date, indicating that he would not stay the administrative proceedings.⁹

⁷ Galvis Administrative Record 30000514-537.

⁸ April 12, 2004 Letter from Robert A. Wright to ALJ Selwyn Walters and John F. Salmon, III, Galvis Administrative Record 30000510-11.

⁹ April 12, 2004 Letter from ALJ Selwyn Walters to John F. Salmon, III and Robert A. Wright

At that time, the Galvis-Moncada administrative hearing¹⁰ was scheduled for May 13, 2004 and the Masewicz administrative hearing¹¹ was scheduled for June 24, 2004.

Subsequently, the Galvis-Moncada Administrative Hearing was continued until June 10 and 11, 2004. On or about May 19, 2004, WSDOT changed its plan for access to the Galvis-Moncada and Masewicz properties by eliminating the grass lined ditch and allowing two curb-cuts in the sidewalk to be constructed, one at the north end of the Galvis-Moncada property and the other at the south end of the Masewicz property.¹² The net result of the proposed change left the Galvis-Moncada property with two parallel parking spaces in front of their building instead of six angle parking spaces, and the Masewicz property received three parallel parking spaces in place of 12 angle parking spaces. At the Galvis administrative hearing, Ms. Galvis and her expert appraisal witness both testified that two parking spaces for 2300 square feet of retail commercial was totally inadequate,¹³ since the Pierce County code parking requirements for retail commercial space require 1 parking space for each 200 square feet of floor area. Mr. Greer, MAI appraiser indicated that the diminution in access and parking would

¹⁰ OAH Docket Number 2003-DOT-021 Galvis-Moncada.

¹¹ OAH Docket Number 2003-DOT-022 Masewicz.

¹² Galvis Administrative Record 300000547 Letter from John F. Salmon, III to ALJ Selwyn Walters, and 300000414-416, plan sheets showing two road approaches and a total of 5 parallel parking spaces in front of Galvis-Moncada and Masewicz businesses.

¹³ Galvis Administrative Record 30000081

change the highest and best use of the Galvis building, requiring that it be torn down and the property redeveloped for a different highest and best use.¹⁴

The facts of the combined Galvis-Moncada and Masewicz cases are remarkably similar to the facts of *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977) [holding that the installation of curbing (with a 32' road approach at each end of the business property) on the right of way line of an existing county road right of way in conjunction with the widening of a county road from two lanes to four lanes presented a jury issue as to whether or not a taking and/or damaging of the abutting owner's property rights entitled the owner to recover compensation for the loss of all but two to five of 18 parking spaces].

These owners also raised the issues of both an additional economic burden¹⁵ and an unconstitutional legal burden¹⁶ placed

¹⁴ Galvis Administrative Record 300000108-109.

¹⁵ See, e.g., Galvis Administrative Record 300000806, lines 6-23, discussing the fact that abutting owners must hire lawyers to represent them in the administrative proceedings, and that WSDOT was taking the position that no attorney fees are payable under RCW 8.25.070 or .075. In addition, if the abutter is successful in proving a taking or damaging of his or her property in the administrative hearing, WSDOT can change its plan to avoid the taking. Indeed, the State acknowledged that they have forced these appellants through an inverse condemnation action and a total of three administrative hearings without having a final highway plan. The State's Consolidated Hearing Brief states, in pertinent part:

... **“One of the purposes of the administrative process provided in WAC 468-51 is to avoid taking property. If the administrative ruling is that the proposed modification to an access point would result in an unreasonable access, WSDOT can then alter its plans to make the access reasonable – a much more desirable result than going**

upon abutting property owners by the WSDOT administrative hearing process. Under WAC 468-51-150, Adjudicative

forward with a project and then litigating with abutting property owners who are claiming an inverse condemnation.

This is exactly what happened in this case. The WSDOT initially came up with a proposal that would eliminate all direct access to SR 7 from Petitioner's property. However, after examining the likelihood that this would be considered an unreasonable restriction of access, WSDOT modified its plans and proposed the revised plan that was considered during the administrative hearing. Therefore, unlike a condemnation action, the administrative process provided for under WAC 468-51 is to facilitate modifications to project proposals. Because the administrative process below is not part of a condemnation action, the award of fees under RCW 8.25.075 is inappropriate. **State Consolidated Brief**, page 42, lines 1-13.

After experiencing it first hand, neither my clients nor I share the State's positive view of the administrative hearing process. This candid statement by WSDOT counsel acknowledges that **WSDOT is misusing the administrative process for two wrongful purposes: (1) To avoid payment of just compensation for the taking and or damaging of abutting owner's access rights, even when they acknowledge a taking or damaging exists; and (2) To eliminate property owner opposition to a proposed project by forcing abutting property owners to fight a war of financial attrition where highway plans change like shifting sands underfoot.** The war of financial attrition is effective. My clients cannot outspend an entity that has the power to tax. Mr. Sinnitt has previously spoken in court of clients that have dropped out of the SR 7 fight because they couldn't afford the cost of preserving their legal rights.

¹⁶ **The State's utilization of the administrative process as a test track to avoid paying for these owner's property and property rights is repugnant to Article 1, Section 16 of the Washington Constitution.** Where the taking of property for public use is self-executing, requiring the abutting property owner to take an affirmative act to obtain just compensation, the government action is unconstitutional under Article 1, § 16 of the Washington Constitution. *Fry v. O'Leary*, 141 Wash. 465, 252 P.111 (1927) where the court stated:

"Nor can the city, by the passage of an ordinance of vacation, damage the property of an abutting owner without first having ascertained and paid the amount of the damage. Section 16, art. 1, of the Constitution, as often construed by us, requires this to be done. **To permit the passage of such an ordinance without first ascertaining the damage and paying therefor is to compel the property owner to bring an action to recover his damages. The burden may not be so placed.** *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 P. 385."

See also, *Peterson v. Smith*, 6 Wash. 163, 32 P. 1050 (1893) discussed *infra* in Section III.

Proceedings, if WSDOT is allowed to completely eliminate an abutting property owner's right of access by sending a letter telling him or her that their access will be "changed" if the owner doesn't file a request for an administrative hearing within 30 days of receipt of the letter and an attached map, the protections of Article 1, § 16 of the Washington State Constitution are rendered meaningless. As will be seen below, Washington case authority developed in the 1890s and early 1900s precludes such a result.

III. A BRIGHT LINE RULE HAS EVOLVED UNDER ART. 1, § 16 HOLDING THAT A STATUTE WHICH PURPORTS TO PROVIDE FOR THE DETERMINATION OF THE QUESTION OF DAMAGES RESULTING FROM THE EXERCISE OF THE POWER OF EMINENT DOMAIN, OTHER THAN BY A JUDICIAL PROCEEDING IN A COURT OF RECORD, WHEREIN THE OWNERS OF PROPERTY ARE BROUGHT INTO COURT BY AN APPROPRIATE ORIGINAL PROCESS, IS UNCONSTITUTIONAL. Duncan Township v. Satyr, 106 Wash. 514, 521, 180 P. 476, 478 (1919).

The Washington Constitutional rule stated above originated in the California decision in Weber v. Board of Supervisors of Santa Clara County, 59 Cal. 265 (1881) 8 P.C.L.J. 493, 1881 WL 1846 (Cal.) In Weber, supra, the Special Road Law of March 18th 1874 provided a method of ascertaining damages to owner's property by the examination and report of Road Viewers.

The property owners challenged the validity of the 1874 statutory method on grounds that the enactment of a new constitutional provision, Section 14 of Article I of the California

Constitution, was in conflict with the 1874 statute and by all necessary operation repealed the same. The new California Constitutional provision read as follows:

"Private property shall not be taken or damaged for public use without just compensation having been made to, or paid into Court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in a court of record, as shall be prescribed by law."

The California Supreme Court held that the Board of Supervisors of Santa Clara County no longer had the power to condemn land for road purposes under the 1874 statute. The court stated:

This question was passed upon by the Court below, and was answered in the negative. We think the question was correctly answered by the Superior Court. **The constitutional provision is prohibitory in its nature and is self-executing; it is in direct conflict with the Act of March 18th, 1874, and by necessary operation repeals the same. The Constitution contemplates and provides for a proceeding *in Court* in all cases where private property is sought to be taken for public use, and it prohibits any other proceeding to that end.**

The owner of the property is entitled to a jury trial for the purpose of ascertaining the amount of damages which he *267 will sustain by the appropriation of his property to public use, and the method provided by section 10 of the Act of 1874,

of ascertaining the damages by the examination and report of Road Viewers, has been abrogated by section 14 of article i of the Constitution.

Weber v. Board of Supervisors of Santa Clara County, 59 Cal. 265, at 266-67.

In **Peterson v. Smith**, 6 Wash 163, 32 P. 1050 (1893), the Washington Supreme Court was presented with the question whether Laws of 1890, c. 19, requiring damages to landowners from the opening of a county road be assessed by three disinterested freeholders appointed by the board of county commissioners is in conflict with Const. art. 1, § 16, which prohibits the taking of private property for a right of way until full compensation be first made in money, or ascertained and paid “into court” for the owner, “which compensation shall be ascertained by a jury.”

The Washington court stated, in pertinent part:

Under the constitutional guaranty, the owner of the land appropriated in this case by the county could not be compelled to present a claim for damages. He can remain quiet, and be assured that, before his property is condemned, the county must ascertain his damage, and either pay it to him, or pay it into court for his benefit; and the amount of his damages must be ascertained in a court, in a proceeding instituted for that purpose, and in which the defendant can appear and make his showing, if he so desire. There is, in our judgment, no authority under the constitution for submitting the question of damages to the road viewers, to be arbitrarily passed upon by them. This question has been passed upon by the supreme court of California in **Weber v. Board, 59 Cal. 265, under substantially the same statutes and the same constitutional provisions,**

and it was there held that the constitutional provision was in conflict with the statutory provision, and therefore abrogated it; the constitutional provision having been adopted after the enactment of the statute. We think that decision was right, and therefore follow it. As this view of the constitutional question involved will result in the final determination of the case, it is not necessary to pass upon the alleged informalities of the proceedings. The judgment of the lower court will be reversed, and the case remanded, with instructions to dismiss the action, with costs to appellant.

Peterson v. Smith, 6 Wash. 163, 164-65; 32 P. 1050, 1050-51.

Similarly, in **Askam v. King County**, 9 Wash. 1, 36 P. 1097 (May 21, 1894), the sole issue question presented on appeal was the constitutionality of Hill's Code, tit. 21, c. 1, which provided for the drainage of swamps, but made no provision for compensation for property taken or damaged. The court was asked to sustain the constitutionality of the statute under both eminent domain and the police power. With respect to the right of eminent domain, the court stated that **Peterson v. Smith**, supra, applies with full force to this law, and the rule there announced compelled the Court hold that the law cannot be sustained under principles of eminent domain. The court stated:

Under the provisions of such law, there is no pretense of an attempt to have the damages incident to the taking of private property assessed and compensated for in the first instance; and if the property owner does not appear, and himself take the initiative, the law provides that his property may be taken without there having been an assessment of damages, or the

payment of any compensation whatever. **To give effect to a law of this kind would be to substantially overthrow the provision of our constitution, which provides, in section 16 of article I, that no private property shall be taken or damaged without just compensation having *3 been first made, or paid into court for the owner.** It is true that if the owner comes into court, and files his claim for damages, the law provides machinery for having it ascertained and paid; but if, for any reason, he does not so appear and file his claim, the property is to be taken without this provision of the constitution having been in any manner complied with. If the law had provided for even an ex parte assessment of damages, and that such assessment should be filed, and, unless objected to, confirmed, it might be possible to sustain it on the ground that such assessment of damages, and its filing, in a proceeding to which the property owner had been made a party by proper notice, was in the nature of a proffer to him of just compensation, and if he did not appear, and object thereto, such failure on his part might be taken to be a waiver of the right to have his damages **1098 assessed by a jury. **Courts are always reluctant to declare an act of the legislature invalid for any reason, but their duty is clear, when there is an irreconcilable conflict between an act of the legislature and the constitution, to see that the provisions of the constitution, and not those of the act, are given force.**

Askam v. King County, 9 Wash. 1, at pages 2-3.

In **Snohomish County v. Hayward**, 11 Wash. 429, 39 P. 652 (1895), the court followed **Peterson v. Smith, supra**, and **Askam v. King County, supra**, holding that a provision of the public dikes and dams statute is unconstitutional, for the reason that it violates Art. 1, § 16 of the Washington Constitution in that it

authorizes the board of county commissioners to appoint three viewers to “view out and locate the proposed dikes and dams, etc. The court stated that:

[In *Peterson v. Smith*] “We there held that under this constitutional guaranty the owner of the land could not be compelled to present the claim for damages, but that he could remain quiet, and be assured of his constitutional right to receive his damages before his property was appropriated; that before it was condemned the county must ascertain his damages, and either pay it to him or pay it into court for his benefit, and that the amount of his damages must be ascertained in court in a proceeding instituted for that purpose, and in which the defendant could appear and make his showing, if he so desire; that there was no authority under the constitution for submitting the question of damages to the road viewers, to be arbitrarily passed upon by them, following the doctrine laid down by the supreme court of California in *Weber v. Board of Supervisors*, 59 Cal. 265, under substantially the same statutes and same constitutional provisions.

The law in question here is subject to the same objections that were discussed in the case above mentioned. . . .

Snohomish County v. Hayward, 11 Wash. 429, 431.

In *State ex rel Smith v. Superior Court of King County, Boyd J. Tallman, Judge*, 26 Wash. 278, 66 P.385 (Oct. 14, 1901) the property owner sought an injunction to prevent the Seattle Electric Company from building a trestle and elevated railway in Forth Avenue South in front of the owner’s property, alleging that the trestle and elevated railway cut off the access to his property

and interfered with his light and air; said trestle being about to be constructed at a height of 25 feet at one end and 15 feet at the other, above the grade of the street, and occupying 25 feet in the middle of said street; the street being 60 feet wide. A restraining order was issued by the King County Superior Court and Judge Tallman, prohibiting the company from building said railway and trestle in said street in front of the owner's property until further order of the court, and setting a hearing for September 17, 1901 for the defendant to show cause why an injunction pendente lite should not issue, **Provided that the temporary injunction shall cease to be operative if Defendant filed a bond with the court in the amount of \$30,000. . . . Defendant excepted to the proviso and asked the Supreme Court for a writ of review. The temporary writ was ordered, and the superior court answered and a final hearing was had in the supreme court on October 4, 1901.**

On the merits of the taking issue, the court quoted from Lewis on Eminent Domain, (2d ed.) § 56, as follows:

"If property, then, consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, **that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto,**

taken, and he is entitled to compensation."

State ex rel Superior Court, *supra*, 26 Wash. 278, 287.

The court then discussed and followed **Brown v. Seattle**, 5 Wash. 35, 31 P.313, 18 L.R.A. 161 (1892) where it was held that, under the constitutional provision (§ 16, art. 1) that no private property shall be taken or damaged for public or private use without just compensation having first been made, **damages are recoverable by the owner of the land abutting upon a street for any permanent injury inflicted upon such abutting land by any material change of grade or obstruction to the abutter's access**, where the damages thus inflicted exceed the benefits.

The Supreme Court then turned to **Peterson v. Smith**, 6 Wash. 163, 32 P.1050, stating:

In **Peterson v. Smith**, 6 Wash. 163 (32 P. 1050), it was held that under § 16, art. 1, of the constitution, private lands could not be appropriated by a county for road purposes unless the amount of damages was ascertained in court in a proceeding instituted for that purpose; and a statutory law invading this right was pronounced unconstitutional. It was said that under the constitutional guaranty the owner of the land appropriated could not be compelled to present a claim for damages, but that he could remain quiet and be sure that before his property was condemned the county must ascertain his damages, and either pay it to him or pay it into court for his benefit, and that the amount of his damages must be ascertained in a court in a proceeding instituted for that purpose, and in which the defendant could appear and make his showing if he so desired. **This has been the uniform holding of this court on this constitutional provision whenever it has arisen. It is a plain, specific right guaranteed by the constitution to**

the citizen, and must be respected. In this case the court below has denied the relator this right, and has substituted one which, in its opinion, is adequate.

It is finally insisted by the respondent that the remedy by appeal is adequate, for the reason that the court would have a right, upon the final determination of the questions involved, to order the structure removed if it were ascertained that it was a damage to the relator. **But this would be at least a very radical action on the part of the court, which would involve the destruction of property, and it is doubtful if a court would go so far as to order the destruction of property if it could be ascertained that the party complaining could be compensated by damages or in any other way. In any event, the damage, in a degree, would have been sustained by the erection and maintenance of the structure for even a limited time; and the party damaged would be delayed, at the very least, in receiving that which is guaranteed to him by the constitution in advance of the appropriation of or interference with his rights.**

State ex rel Superior Court, supra, 26 Wash. 278, 290-291.

Finally, concluding that the trial court erred in attaching the proviso to its judgment **that the injunction should cease to be operative upon the execution of the bond ordered by the court, the Supreme Court remanded the case with instructions to maintain the injunction in force until the final determination of the controversy.**

IV. THE WSDOT HAS ARGUED THAT THE STATE'S SR 7, SR 507 TO SR 512 PROJECT IS AN EXERCISE OF THE POLICE POWER, NOT AN EXERCISE OF EMINENT DOMAIN. WSDOT COULD NOT BE MORE WRONG. THE NET EFFECT OF THE WSDOT ACTION IN RESTRICTING ACCESS RIGHTS TO SR 7 IS TO ACQUIRE ON BEHALF OF THE STATE ACCESS RIGHTS BELONGING TO PRIVATE INDIVIDUALS WITHOUT

**PAYING FOR THEM, NOT TO ERADICATE MATTERS
PERTAINING TO HEALTH, SAFETY, MORALS AND THE
GENERAL WELFARE.**

The recent case of *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (June 25, 2002) is illustrative of an action under the police power as opposed to the power of eminent domain.

In *Eggleston v. Pierce County*, supra, the Supreme Court held the destruction of a mother's home that was raided during the arrest of her drug-dealing son for the purpose of obtaining evidence was a proper exercise of the police power. The Supreme Court stated, at pages 767-768:

The power and the obligation of eminent domain plays a critical role in constitutional governance, and courts are obligated to carefully monitor its exercise. The State is vested with the power to take real property for public use, but must compensate the owner appropriately. CONST. art. I, § 16. Similarly, "[p]olice power is inherent in the state by virtue of its granted sovereignty." *Mfr'd Hous.*, 142 Wn.2d at 354. The State is vested with the power to regulate for the health, safety, morals, and general welfare, and the burdens imposed incidental to such regulations are not takings unless the burdens manifest in certain, enumerated ways. **See *Guimont v. Clarke***, 121 Wn.2d 586, 854 P.2d 1 (1993) (articulating analytical framework for evaluating substantive due process, per se and regulatory takings claims); ***Conger v. Pierce County***, 116 Wash. 27, 36, 198 P. 377 (1921); ***Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency***, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (articulating requirements for federal regulatory takings); **cf. *Mugler v. Kansas***, 123 U.S. 623, 668-69, 8 S. Ct. 273, 31 L. Ed. 205 (1887) (giving historical view).

Police power and the power of eminent domain are essential and distinct powers of government. *Mfr'd Hous.*, 142 Wn.2d at 354; *State ex rel. Long v. Superior Court*, 80 Wash. 417, 419, 141 P. 906 (1914); see generally William B. Stoebuck, A General Theory of Eminent Domain, 47 WASH. L. REV. 553, 553-63 (1972). Courts have long looked behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent domain.¹⁷ See, e.g., *Conger*, 116 Wash. 27. But clearly, not every government action that takes, damages, or destroys property is a taking. **"Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public."** *Conger*, 116 Wash. at 36 (emphasis added). **The gathering and preserving of evidence is a police power function, necessary for the safety and general welfare of society.** Cf. *Conger*, 116 Wash. at 36.

Our constitution provides:

Eminent Domain. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into

¹⁷ We recognize "police power" has been used elastically and imprecisely since adoption of our constitution in 1889. See, e.g., Hugh D. Spitzer, Municipal Police Power in Washington State, 75 WASH. L. REV. 495 (2000). **Therefore, for the purpose of our taking analysis the term must be understood in the more limited sense as it was then, not necessarily now.** Moreover, we also recognize even a legitimate exercise of police power, as those terms were understood in 1889, may also result in a compensable taking where the regulation goes "too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, **which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.** Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. (Emphasis added)

CONST. art. I, § 16.

The words of the constitution are interpreted as they would have been commonly understood at the time the constitution was ratified. ***State v. Brunn***, 22 Wn.2d 120, 139, 154 P.2d 826 (1945) (stating it is standard practice, when construing the meaning of a constitutional provision, to inquire: **What was the accepted meaning of the words used at the time the provision was adopted?** Usually, that meaning must be sought from extrinsic sources, and, when the language to be construed is a legal phrase or term, the meaning is sought in the former or current decisions of the courts.)

Utilizing this standard, it is clear from early case law quoted in Section III of this Reply Brief that **the authors of our constitution intended that determinations of whether or not**

private property was taken or damaged for public use would be made by a court of record, not by an administrative tribunal, because administrative tribunals did not exist in 1889.

In the instant case, Art. 1, § 16 requires that “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,” . . . which compensation shall be ascertained by a jury, unless a jury be waived

V. CONCLUSION

The use of an administrative law judge in place of a court of record and a jury trial is the same under Art. 1, § 16 as appointing Road Viewers under Weber v. Board of Supervisors, supra or appointing freeholders under Peterson v. Smith, supra, or viewers under Snohomish County v. Hayward, supra. As noted above, early in the history our state, a bright line rule evolved under Art. 1, § 16 of the Washington Constitution holding that a statute which purports to provide for the determination of the question of damages resulting from the exercise of the power of eminent domain, other than by a judicial proceeding in a court of record, wherein the owners of property are brought into court by an appropriate original process, is unconstitutional. Duncan Township v. Satyr,¹⁰⁶ Wash. 514, 521, 180 P. 476, 478 (1919).

That rule must be enforced in this proceeding to sustain Judge Thompson's ruling that the Galvis-Moncada, Masewicz and Ash cases must be set for trial if WSDOT elects to proceed with its highway plans for the subject properties.

Since WSDOT has abandoned its initial plan for all three of these owners, in an attempt to avoid a ruling that each of the initial plans caused a compensable taking, these owners must be awarded reasonable attorney fees under RCW 8.25.075.

These owners must also be awarded fees under RCW 4. for reversing the Final Orders of the WSDOT through the administrative hearing process.

RESPECTFULLY SUBMITTED this 20th day of December, 2006.

FAUBION, JOHNSON & REEDER, P.S.



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and this DECLARATION OF SERVICE to be hand delivered by ABC Legal Services to counsel of records as follows:

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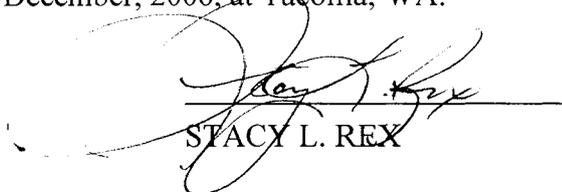
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I also personally served and filed the original and one true and correct copy of the REPLY BRIEF OF RESPONDENT'S CROSS-APPELLANTS GALVIS AND MONCADA attached thereto and this Declaration of Service on:

Division II of the Court of Appeals
950 Broadway, Room 300
Tacoma, WA 98402

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

Dated this 20th day of December, 2006, at Tacoma, WA.


STACY L. REX