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COURT OF APPEALS  
DIVISION II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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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

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**OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS  
GALVIS/MONCADA**

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## I. SUMMARY OF GALVIS/MONCADA ARGUMENT<sup>1</sup>

This case is not about "safe vehicle access" to State Route 7,<sup>2</sup> as the Washington State Department of Transportation ("WSDOT") suggests.<sup>3</sup> The references to "safety," "safety

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<sup>1</sup> Respondent/Cross-Appellants Galvis and Moncada embrace the facts and concepts in the Brief of Respondents/Cross-Appellants Masewicz filed herein.

<sup>2</sup> **There is no substantial evidence in the record that supports the premise of the Department of Transportation that the existing access to the Galvis/Moncada and Masewicz properties is dangerous.**

As a factual matter, the State's own **Exhibit 8** AR 300000588-675 and **Exhibit 18** AR 300000757 prove that the portion of the southbound lanes of SR 7 at MP 52.28, immediately in front of the Galvis/Moncada and Masewicz property, is nearly accident free. The proof offered by WSDOT establishes that there has been only one non-injury accident in the immediate vicinity of the subject properties in the past 10 years. **Exhibit 18** and **Exhibit 8**, Doc # **300000660**. By contrast, there were **238 accidents** that produced **150 injuries** at MP 52.36 (the SR 7 – 212<sup>th</sup> Street intersection) during the same time period (**Exhibit 8**, Doc#s **300000661** through **300000666**), and **114 accidents** that produced **70 injuries** at MP 52.20 (the 114<sup>th</sup> St. S. Intersection with SR 7). **A graphic summary of the accident and injury data presented for MP 52.10 through MP 52.39 (Exhibit 8, Middle of Doc # 30000654 through top of Doc # 300000667) is found in Appendix C, AR 300000501 attached hereto and incorporated by this reference herein.** This accident summary covers approximately the same area as **Exhibit 18**, the Collision Diagram entitled SR 7, MP 52.11 to MP 52.36. You will immediately notice that at Milepost 52.28, in front of the **Galvis-Moncada and Masewicz** properties, the chart shows 4 accidents and 6 injuries. **Three of the four accidents and all six of the injuries occurred in the northbound lanes, across the SR 7 median from the Galvis-Moncada and Masewicz properties.** (Doc # 300000070 to 71)

<sup>3</sup> The Washington State Department of Transportation (WSDOT) has broad discretion to design and construct Washington's highways to any standards it wishes to build. WSDOT could formally convert SR 7 to a limited access facility, making SR 7 as safe as any highway in the state if it chose to do so.

Unfortunately, that is not the issue here. The relevant factor in this action and all WSDOT projects is **money**. The level of improvement designed and constructed is fully dependent upon Project Cost. Planned but un-built state highway projects compete with each other on a priority grid. Until a WSDOT project has a sufficient priority to be constructed, they remain "on the shelf." The plans for SR 7 had been in existence and relegated to the "shelf" for at least 12 years before the "Nickel Gas Tax" was passed and provided funding for this project.

improvement," "safe vehicle access" and like phrases are euphemisms for "regulating", "police power," and "non-compensable"-- terms used by WSDOT to justify the States' failure to offer or pay Just Compensation to private property owners when the State takes or damages private property or property rights for a public use.<sup>4</sup>

Instead of "safe vehicle access," this case is about **money**. It is about money that these property owners and future property owners will lose if WSDOT can convince state appellate courts WSDOT is "regulating" abutting owner's access rights through an "administrative process," not unconstitutionally "taking or damaging" the abutting owner's access rights without paying just compensation required by the constitution.

The State is attempting to establish precedent authorizing WSDOT to acquire access rights from private property owners by "regulation" instead of acquiring access rights by paying for them. That is what the "access management" program is really about. The most disturbing fact about the State's "access

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<sup>4</sup> All highway improvements should promote highway safety, whether upon a limited access freeway or a two lane street. When private property and private property rights are taken or damaged for a public use, Article 1, § 16 of Washington's Constitution provides that the owner of those rights is entitled to a jury trial to determine just compensation.

management" program is that the greatest impacts are on small landowners, like Galvis/Moncada and Masewicz---small business owners that can least afford to incur costs and legal fees to protect their constitutional right to just compensation.<sup>5</sup>

To these abutting property owners, this case is about the "taking or damaging" of their access rights, and the destruction of the value of both their properties and their businesses. To stop the unconstitutional taking or damaging of their access rights, these abutting owners were forced to seek judicial enforcement of WSDOT's duty to follow the safeguards of Washington's Constitution, which require WSDOT to:

**(1) Recognize the taking and/or damaging of property and property rights for public use when they occur;**

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<sup>5</sup> Neither the Galvis/Moncada property nor the Masewicz property have reasonable alternative access to SR 7. This is important under RCW 47.50.010(3)(b), which provides:

"Every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. **The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property.**

Because of steep topography, the Galvis/Moncada and Masewicz properties both fall off sharply to the west. The commercial improvements on both businesses were constructed in the 1950s, when there was ample room to park in front of the businesses and insufficient traffic to make any difference. Today, if their access to SR 7 is destroyed by (State Plan 1) or substantially diminished by (State Plan 2) their businesses are destroyed and their buildings are rendered worthless. See Testimony of Ed Greer, MAI, (AR 300000108-109)

(2) **Ascertain the amount of just compensation** owed to abutting property owners before property or property rights are taken or damaged for public use **by jury trial** unless a trial by jury is waived by a property owner, and

(3) **Pay just compensation** to the abutting property owners **before any taking and/or damaging of the abutting owner's property and/or property rights occur**, unless possession and use of the property is acquired pursuant to RCW 8.04.090-094.

WSDOT should not seek to avoid these Constitutional obligations. Even in Chapter 47.50 RCW, the Highway Access Management Act ("HAMA"), the legislature specifically sought to protect Washington's citizens by including a specific reference to the **property owner's right to "full compensation" under the constitution.**<sup>6</sup>

These constitutional safeguards limit the power of a sovereign government. The actions of WSDOT on the SR 7, SR 507 to SR 512 Project illuminate the wisdom of our constitutional architects. WSDOT's SR 7 Project Plans for the Galvis/Moncada, and Masewicz properties establish a clear need for the

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<sup>6</sup> RCW 47.50.010(5) provides:

**"Nothing in this chapter shall affect the right to full compensation under section 16, Article 1 of the state Constitution."**

protections of Article 1, § 16 of Washington's Constitution.

Included as "property rights" under the Washington Constitution are the rights of "**access, light, view and air**" that are appurtenant to property abutting a street, road, or highway.

See, e.g. *Fry v. O'Leary*, 141 Wash. 465, 252 P.111 (1927),

where the court stated:

" . . . 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.**

*Fry v. O'Leary, supra*, 141 Wash. 465, at 470.

Washington direct and inverse condemnation cases recognize the impacts on commercial property owners abutting streets, roads and highways, and award just compensation for the taking and/or damaging of private property for a public use as the constitution requires. A person dealing with condemnation actions on a regular basis cannot read the facts of the **Galvis-Moncada** and **Masewicz** cases without thinking of the *McMoran v. State*, 55 Wn.2d 37, 345 P.2d 598 (1959), and *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977) cases.

The facts of the *McMoran* case are virtually identical

with the facts under the **first WSDOT highway plan**<sup>7</sup> presented in this case, and the facts of the **Keiffer** case are virtually identical with the facts under the **second WSDOT highway plan**.<sup>8</sup>

**A. Discussion of McMoran v. State**<sup>9</sup>

In **McMoran v. State**, in the before situation, the entire frontage of the subject property had unrestricted access. In the after situation, a concrete curb was constructed along the entire frontage of the subject property, **eliminating all direct access** to SR 2, the abutting state highway, although a new frontage road (constructed within the existing state right of way and defined by the installation of the curbing) connected to the state highway at a point 30 feet past the McMoran property line. Washington's Supreme Court held that McMoran suffered a compensable taking of direct access to the highway. Quoting from **State v. Calkins**, 50 Wn.2d 716, 314 P.2d 449, 450 (1957), the **McMoran** court stated:

'It is well established that the owner of land abutting upon a conventional highway has an easement of ingress and egress. This has been treated as a property right, attached to the land. The courts unanimously hold that such an owner is entitled to just compensation if this easement or property right is taken or damaged. \* \* \*'

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<sup>7</sup> WSDOT Exhibit 2 to Galvis/Moncada Administrative Hearing. Administrative Record (hereinafter "AR") 300000548.

<sup>8</sup> AR 300000019.

<sup>9</sup> 55 Wn.2d 37, 345 P.2d 598 (1959).

**McMoran v. State**, 55 Wn.2d 37,40, 345 P.2d 598, 599 (1959).

In **Galvis/Moncada** and **Masewicz**, the State's First Access Plan<sup>10</sup> proposed to eliminate all of the abutter's rights of direct access to SR 7 by removing asphalt used by the abutting businesses partly for head-in angle parking since the 100 foot State highway right of way was first paved, and installing a **sidewalk** and a **grass-lined ditch** across the entire frontage of the subject properties. Such a barrier would have damaged the subject properties more severely than the **McMoran** facts, because there is no frontage road providing local access to **Galvis/Moncada** and **Masewicz**, (nor is there any other reasonable alternative access).<sup>11</sup> Under the States First right of way plan,<sup>12</sup> neither Galvis/ Moncada nor Masewicz would have any parking in the after situation.<sup>13</sup>

## 2. Discussion of **Keiffer v. King County**,<sup>14</sup>

The facts of the **Keiffer v. King County** case, supra, are

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<sup>10</sup> AR 300000548

<sup>11</sup> Id.

<sup>12</sup> AR 300000548.

<sup>13</sup> Under the Pierce County Code, the Galvis/Moncada property required 1 parking space for each 200 square feet of building area. Since the Galvis/Moncada building contained about 2300 square feet, 12 parking spaces would be required. Testimony of Ed Greer, MAI, AR 300000105. There were 6 head-in angle parking stalls in front of the Galvis Moncada building in the before situation. Testimony of Sandra Galvis AR 300000078. Under the State's first plan, there would be zero parking spaces. AR 300000548. Under the State's second plan there would be two parking spaces in front of the Galvis building and three in front of the Masewicz building. AR 30000019.

<sup>14</sup> 89 Wn.2d 369, 572 P.2d 408 (1977).

virtually identical to the facts of WSDOT's Second or Amended Highway Plan for the Galvis/Mondada and Masewicz properties. In Keiffer, in the before situation, the owner had unrestricted access to the entire 280 feet of frontage on 98<sup>th</sup> Avenue, a two lane county road. Customers parked their cars in front of the *Keiffer* buildings, **partially on the undeveloped 98<sup>th</sup> Avenue right of way.**

In the after situation, the County installed a concrete curb on the right of way line of 98<sup>th</sup> Avenue. One curb cut was allowed near each end of the 280 foot frontage for the use of the Keiffer property, which contained a grocery store, meat market, restaurant - ice cream parlor, small office building and nursery. All of the commercial improvements located on the Keiffer property faced 98th Avenue, a two lane road in the before situation that was widened to 4 lanes within the existing right of way.

In Keiffer, the Supreme Court held that substantial evidence supported trial court findings **"(t)hat the practical effect of the curb with only two curb cuts is to virtually eliminate access to each of the aforementioned [business] structures";<sup>15</sup>** and that **"(t)he access provided after the completion of the curb and curb cuts ... denies reasonable access to each of the aforementioned**

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<sup>15</sup> 89 Wn.2d 369, 371.

**buildings and/or economic units,<sup>16</sup> and further denies reasonable access to the parking which is functionally necessary to utilize each of such structures for their highest and best use and/or the businesses being operated therein."<sup>17</sup>**

Accordingly, **Keiffer v. King County, supra**, upheld the trial court ruling that the impairment of physical access to the Keiffer's commercial property by King County's installation of curbing on the abutting road right-of-way line was sufficient to create liability for payment of Just Compensation.<sup>18</sup> **Keiffer** further held that substantial evidence, including evidence that **installation of curbing had decreased the possible parking capacity of the property from 18 vehicles to from two to five vehicles** supported the trial court's Order that a Jury be empanelled to determine Just Compensation.

As in **Keiffer**, in **Galvis/Moncada and Masewicz**, the access restrictions imposed upon the abutting owner's properties reduce available parking from approximately **18 parking places** existing in the before situation to **5 parking spaces** in the after

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<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> 89 Wn.2d 369, 374.

situation.<sup>19</sup>

Yet, significantly, neither McMoran nor Keiffer were cited by the State of Washington in its opening brief. It can't be because the State didn't know about them, because McMoran and Keiffer were cited and argued extensively by the abutting property owners before and during the Administrative Hearing, and during the appeal of the Administrative Hearing. The Keiffer case, in particular, was argued to and presumably relied upon by Judge Thompson in reversing the Department's administrative decision.

By way of contrast, the State cited Billington Builders Supply v. Yakima, 14 Wn. App. 674, 676-677, 544 P.2d 138 (1975) to show that the owner of property abutting a public way had no right to on-street parking. Although the 1975 Billington Builders Supply decision was cited by the 1977 Keiffer court, it was cited as support for the principle that the right of access does not include the right to maintenance of a particular pattern or flow of traffic. In other words, the seven person majority opinion of the Supreme Court in Keiffer did not find the Billington Builders Supply case controlling of the parking on the right of way issues in the Keiffer case. This was not an

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<sup>19</sup> AR 300000019.

issue that was overlooked by the majority opinion, because dissenting justices Dolliver and Rosselini specifically raised the compensability of parking partially on a public right of way issue in their dissent.<sup>20</sup>

In *Union Elevator & Warehouse Company v. State*, 96 Wn.App. 288, 980 P.2d 779 (1999), a case involving a non-abutting commercial property whose access was allegedly substantially impaired by the closure of a road connecting to a limited access highway, the Court of Appeals reversed a summary judgment in favor of the state and remanded the matter for trial, stating in part:

Union requested that when determining the issue of damages based on the amount of impairment of access, an instruction be given to the trier of fact declaring the issue of remaining access is to be determined on the basis of **reasonableness, adequacy and commercial practicability**. We find that proper.

*Union Elevator, supra*, 96 Wn.App. 288, 297-98.

The issue of the reasonableness, adequacy and commercial practicability of the remaining access to the Galvis/Moncada property was not addressed in the State's case in any manner. No real estate appraisers or other valuation experts were called by the State. No valuation evidence was offered by the State. No one

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<sup>20</sup> 89 Wn.2d 369, 375.

from the State addressed the viability of the Galvis/Moncada business with 0 or 2 parking spaces in the after condition.

The only evidence presented regarding the reasonableness, adequacy and commercial practicability of the parking under the State's proposed plan was the evidence of Mrs. Galvis, who was on-site at the property twelve hours each day, seven days a week, and Mr. Ed Greer, MAI real estate appraiser. Mrs. Galvis

The conclusions reached by the Administrative Law Judge ("ALJ") and affirmed by the WSDOT Design Engineer,<sup>21</sup> were diametrically opposed to those reached by retired superior court Judge Donald Thompson, who had broad experience in deciding condemnation issues as Pierce County Superior Court judge.

Judge Thompson stated in his initial ruling:

**In both of those cases [Masewicz and Galvis/Moncada] they have, at the present time, unlimited access to SR 7. The State now is proposing in each of the cases to limit the access to two points in each of the cases, which would have the affect of greatly reducing the parking available and have serious detrimental affect to the businesses being operated. A jury has to decide what that damage is and what the just compensation should be.**

11/25/2005 RP Page 84, Lines 12-20. (Emphasis added).

It is very telling that the experienced judge reversed both the

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<sup>21</sup> Both the ALJ and WSDOT's Design Engineer found that Galvis/Moncada and Masewicz had reasonable access to SR 7 in the after situation.

Initial Order of Administrative Law Judge and the Final Order of the Department of Transportation determining that the subject properties will have reasonable access under a plan that takes 13 of the 18 parking spaces from the two abutting business owners.

These stark differences in this case between the legal conclusions of the administrative law process versus the judicial process emphasizes the need for the protections of Article 1, § 16 of the Washington Constitution. Judge Thompson is correct that "Whether the property owner has reasonable access after the change in access from **unlimited access to SR 7 to two curb cuts** and the change in parking from **18 angle stalls to 5 parallel stalls**" is a question that must be decided by a jury.

The process used by the State of Washington ---trying to limit or acquire the property owner's access rights by administrative regulation without just compensation being paid is unconstitutional in the following respects:

First of all, the abutting property owners were forced by WSDOT to file legal proceedings (here, pursue an administrative hearing) to protect their constitutional rights to recover just compensation. This has not been permitted since adoption of the

constitution. The Fry v. O'Leary decision affirmed the rule.<sup>22</sup>

Second, WSDOT claimed that they would not pay any attorney fees or expert witness fees in the administrative hearing process, even though reasonable attorney fees and reasonable expert witness fees are payable under RCW 8.25.070 and .075 if a taking or damaging of private property or property right for a public use has occurred.

Third, when the owners contended that the state's proposed plan constituted a taking and/or damaging of the owner's property, the WSDOT response was that WSDOT's plans were not final— that if the administrative hearing officer said there was a taking, WSDOT had the right to change its plans to eliminate the taking.

Fourth, the administrative process is inherently disadvantageous to abutting property owners. WSDOT can initially take an extreme hardball approach as a part of its initial negotiation plan (e.g., in the Galvis/ Moncada and Masewicz cases **the first State Highway Plan eliminated all access to both properties** by removing asphalt parking stalls to build a sidewalk and a grass lined ditch). When WSDOT encountered resistance from the

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<sup>22</sup> 141 Wash. 465, 252 P.111 (1927),

property owners, **WSDOT can and did abandon its original plan before the administrative hearing, as it did in the Galvis-Moncada and Masewicz cases and take a more reasonable substitute plan to the Administrative Law Judge.**

**Fifth, the chilling effects of the administrative process are both predictable and confiscatory.**

On page 1, paragraph 2 of the State's Opening Brief, the State states:

"The project called for WSDOT to use the regulatory authority of Ch. 47.50 RCW, the Highway Access Management Act, to impose highway access standards on SR 7. **The project modified access to about 160 properties. Four owners sought administrative hearings to contest the proposed access modifications.**"

Despite the State's implication to the contrary, the lack of property owner challenges is not an endorsement of the highway access plans for SR 7. **Rather it is cold, hard evidence that the intimidation process used by WSDOT on SR 7 actually works.**

As used by WSDOT, the administrative process has characteristics of a mask and a gun. The process is designed to acquire property owner's access rights without paying for them. In

ordinary parlance that is stealing. If, as a result of the administrative process, the state recognizes that it is taking and or damaging property and/or property rights it can:

(1) **change its plan and force the owner through a hearing** (which it did in Galvis/Moncada and Masewicz); or it can

(2) **initiate condemnation proceedings**; or

(3) **drop its proposed access plan changes altogether with respect to the impacted properties.** Because of these changing parameters, the administrative hearing scheme is not only fundamentally wrong, it is prohibited by Article 1, § 16 of the Washington Constitution.

**II. ASSIGNMENTS OF ERROR REGARDING THE GALVIS-MONCADA ADMINISTRATIVE HEARING AND THE SUMMARY JUDGMENT UPHOLDING THE CONSTITUTIONALITY OF CHAPTER 47.50 RCW.**<sup>23 24</sup>

A. **The Administrative Hearing Process Used in Galvis/Moncada and Masewicz is Unconstitutional. Under Washington Law Whether Or Not a Property Owner's Access Rights Are "Taken or Damaged for a Public Use," (i.e., "Unreasonably" or "Substantially" impaired ) is a Fact**

<sup>23</sup> See **Appendix A, Findings of Fact, Conclusions of Law and Initial Order [As Amended by WSDOT Design Engineer Harold Peterfeso.** Because of Time Constraints Appendix A is incorporated by reference in this Brief of Respondents Galvis/Moncada as though set forth in full.

<sup>24</sup> See **Appendix B. Brief of Appellants Galvis and Moncada** filed in Pierce County Superior Court Cause No. 04-2-06841-5 on October 17, 2005. Because of Time Constraints Respondents/Cross Appellants Galvis/Moncada incorporate the provisions of Appendix B into this Brief of Respondents Galvis/Moncada as though incorporated fully herein.

Question. *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977). Under Article I, Section 16 of the Washington Constitution Superior Court Judges Have Exclusive Jurisdiction to Determine Whether a Taking or Damaging Has Occurred.

- B. Administrative Law Judges Have No Jurisdiction to Hear Matters Relating to the Determination of Whether a Taking or Damaging of Private Property or Property Rights Has Occurred or Whether An Alleged Taking or Damaging Requires Just Compensation.
- C. Under Article I, § 16 of Washington's Constitution, The Letter From WSDOT Notifying Abutting Property Owners That Their Access Would Be Changed Unless The Property Owner Requested An Administrative Hearing Was Self-Executing and Unconstitutional In That The Letter Required Abutting Property Owners To Initiate Legal Proceedings To Protect Their Constitutional Rights. *Fry v. O'Leary*, 141 Wash. 465, 252 P.111 49 A.L.R. 1249 (1927).
- D. Under Article I, § 16 of Washington's Constitution, The Administrative Law Judge Did Not Have Jurisdiction To Decide the Factual Question Whether The Subject Properties Had Reasonable Access Under WSDOT's Proposed Highway Plan.
- E. Chapter 47.50 RCW is Designed To Deal With Road Approach Permits. WSDOT Does Not Have Authority Under Chapter 47.50 To Design Comprehensive Highway Construction Plans, or to Convert a Non-Limited Access Highway Into A De Facto Limited Access Facility Without Purchasing Access Rights From Abutting Property Owners.

### III. ISSUES RE ASSIGNMENTS OF ERROR

- A. Was The Administrative Hearing Process Used By WSDOT Unconstitutional under Article I, § 16 of the Washington Constitution?
- B. Do Superior Court Judges Have Exclusive Jurisdiction to Determine Whether Or Not a Property Owner's Access Rights Are Taken or Damaged?

- C. Was the Letter from WSDOT to the Abutting Property Owners Requiring The Owners To File An Administrative Appeal Within 30 Days or the State Plan Would Become Finalized Self-Executing and Unconstitutional? Fry v. O'Leary, 141 Wash. 465, 252 P.111 49 A.L.R. 1249 (1927).
- D. Do Administrative Law Judges Have Jurisdiction to Decide the Preliminary Factual Question Whether Or Not A Property Owner's Access Rights are "Unreasonably" or "Substantially" Impaired Sufficiently to Create a Jury Issue?
- E. Does RCW 47.52.080 Prevent WSDOT From Constructing A De Facto Limited Access Facility With More Stringent Restrictions Than a Modified Access Control Limited Access Facility Under Chapter 47.50 RCW Without Purchasing the Access Rights of Abutting Business Property Owners, As It Would Have To Do If WSDOT Proceeded Under Chapter 47.52 RCW?

#### IV. STATEMENT OF THE CASE

Sandra Galvis is a native of Columbia, South America.<sup>25</sup> Ms. Galvis moved to Venezuela in 1974 or 1975.<sup>26</sup> She came to the United States in 1995, two years after her son, Alexander Moncada.<sup>27</sup> Ms. Galvis worked at Latin American Store in Tacoma for nine years. After she was laid off from that store because of a lack of business, she and Alexander Moncada purchased the "Galvis/Moncada property", located at 11214-16 Pacific Avenue in

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<sup>25</sup> AR 300000074

<sup>26</sup> Id.

<sup>27</sup> Id.

Tacoma in April of 2002.<sup>28</sup> Ms. Galvis took her savings and some of Mr. Moncada's savings, and mortgaged her home to purchase the land and finance the business.<sup>29</sup> They cleaned and remodeled the building and installed some business improvements and started a business called "Le Popular Cash and Carry Mexican Grocery Store."<sup>30</sup> Mrs. Galvis works alone at Le Popular from 9 AM to 9 PM seven days a week.<sup>31</sup>

On or about September 22, 2002 WSDOT issued a letter to Galvis/ Moncada,<sup>32</sup> abutting owners of operating commercial property abutting SR 7, which enclosed a highway plan<sup>33</sup> showing that a grass-lined ditch and sidewalk would be constructed across the entire frontage of their businesses, eliminating all of the 6 head-in angle parking stalls that these owners were presently using and their predecessors had most probably used for at least fifty years, when the building was first constructed.<sup>34</sup> The letter stated that the enclosed plan would become final unless they filed for an Administrative Hearing within

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<sup>28</sup> AR 300000090.

<sup>29</sup> Id.

<sup>30</sup> AR 300000074-75

<sup>31</sup> AR 300000077.

<sup>32</sup> AR 300000549-550.

<sup>33</sup> AR 300000548

<sup>34</sup> Id.

30 days from the date the letter was sent to them.<sup>35</sup> Ms. Galvis requested an administrative hearing on 10/21/2003.<sup>36</sup>

Ms. Galvis testified in the administrative hearing that she had no knowledge of the State's proposed project when she purchased the property; and that she would not have made any investment if she had known [about the State's project].<sup>37</sup>

When shown Administrative Hearing Exhibit No. 3, and asked whether that was the letter she received from the Department of Transportation, Ms. Galvis said:

Yes. And I felt that day like this is the end of everything. All I had invested, and it wasn't just the money, it was the physical efforts I had invested. With no parking, . . . there is no business, so I felt like it was all coming to a halt.<sup>38</sup>

She further testified that in her opinion, based upon her knowledge and experience in running the business from 9 AM to 9 PM seven days a week during the past two years, **two parallel parking spaces in front of her building would not be adequate to serve a retail commercial business such as Le Popular.**<sup>39</sup>

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<sup>35</sup> AR 300000549-550.

<sup>36</sup> AR 300000875-880

<sup>37</sup> AR 300000076-77.

<sup>38</sup> AR 300000079.

<sup>39</sup> AR 300000081.

Ms. Galvis testified that she has been treated for depression since the State announced its proposed plan because she wonders what will happen next—Will she lose her car? Will she lose her house? Will she lose everything? Because everything is involved in this.<sup>40</sup>

In addition to filing for an administrative hearing, these abutting commercial property owners filed an inverse condemnation action in Pierce County Superior Court alleging an unconstitutional taking and/or damaging of their property and property rights, because the proposed WSDOT highway plan<sup>41</sup> eliminated all direct access to SR 7.<sup>42</sup> **McMoran v. State**, 55 Wn.2d 37, 345 P.2d 598 (1959). (State's installation of concrete curb prevented direct access to highway in front of abutting property causing compensable damage.)

As a result of negotiations between attorneys for the property owners and WSDOT, the Department of Transportation **abandoned its plan to take all access rights and eliminate all 18 head-in angle parking stalls** from Galvis/Moncada and Masewicz, and **substituted a plan with two curb-cuts** (one at each end of the

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<sup>40</sup> AR 300000080.

<sup>41</sup> The inverse condemnation action was filed on State Plan No. 1, known as .AR 300000548.

<sup>42</sup> Pierce County Superior Court Civil Case 04-2-06841-5.

combined properties) and **5 parallel parking stalls for both ownerships**. The substituted plan was the plan appealed by abutting property owners Galvis/Moncada and Masewicz in the Administrative Hearing.<sup>43</sup>

The substituted plan made the subject properties substantially identical to the facts of the Supreme Court decision in **Keiffer v King County**, 89 Wn.2d 369, 572 P.2d 408 (1977) (Holding that substantial evidence supported trial court findings "(t)hat the practical effect of the curb with only two curb cuts is to virtually eliminate access to each of the aforementioned business structures"; and that "(t)he access provided after the completion of the curb and curb cuts . . . denies reasonable access to each of the aforementioned buildings and/or economic units, and further denies reasonable access to the parking which is functionally necessary to utilize each of such structures for their highest and best use and/or the businesses being operated therein.")

Accordingly, **Keiffer v. King County, supra**, held that the owner of commercial property had been deprived of access to such property by King County's installation of curbing along the abutting road right-of-way to such an extent as to require

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<sup>43</sup> AR 30000019.

payment of just compensation. Keiffer further held that substantial evidence, including evidence that **installation of curbing had decreased possible parking capacity of the property from 18 vehicles to from two to five vehicles supported the trial court's order that a jury be empanelled to determine just compensation.**

These abutting property owners moved for an order to stay the administrative proceeding for lack of jurisdiction. Said motion was denied by Judge Ronald Culpepper.

At the WSDOT Administrative Hearing, the Honorable Selwyn Walters, Administrative Law Judge, (ALJ) determined that the state's substituted access plan (with 2 curb cuts and 5 parallel parking spaces for 5 businesses and 4 apartments provided "reasonable access" to the Galvis/Moncada and Masewicz Properties.

The State Design Engineer affirmed the decision of the Administrative Law Judge in a Final Order dated December 30, 2004.

The State moved for partial summary judgment that chapter 47.50 RCW, the access management statute is constitutional. The Honorable Lisa Worswick held that chapter 47.50 RCW is

constitutional.

These abutting property owners appealed the Final Orders of the Washington State Department of Transportation to Pierce County Superior Court. The Honorable Donald H. Thompson reversed the decisions of both the Director of The Department of Transportation and the Administrative Law Judge, holding that Galvis/Moncada and Masewicz each have unlimited access to SR 7 in the before situation, and that in the after situation, the State's proposal to limit the access of both properties to a total of two access points (one access point for each of the properties that both would share), would have the effect of greatly reducing the parking available and have serious detrimental effect to the businesses being operated thereon.

Judge Thompson further decided that a jury should be empanelled to decide what that damage is and what Just Compensation should be. See *Keiffer v King County*, 89 Wn.2d 369, 572 P.2d 408 (1977).

Judge Thompson also awarded reasonable attorney fees and costs to the abutting property owners under RCW 4.84.350 which provides for attorney fees and costs where an ALJ decision is reversed.

WSDOT Appealed Judge Thompson's Ruling  
Reversing the Final Order of the Department of Transportation that  
Affirmed the Initial Decision of the Administrative Law Judge.

The abutting property owners cross-appealed the Partial  
Summary Judgment Order entered by the Honorable Lisa  
Worswick that Chapter 47.50 RCW is constitutional under Article 1,  
§ 16 (Amendment 9) of the Washington State Constitution.

Respondents Galvis/Moncada Request the Relief  
Requested on pages 32-34 of Appendix B, the Brief of Appellants  
Galvis and Moncada.

## **V. LEGAL ARGUMENT**

- A. THIS CASE IS NOT ABOUT TRAFFIC SAFETY. THIS CASE IS ABOUT WSDOT'S ATTEMPT TO SUBSTANTIALLY RESTRICT AND IMPAIR ABUTTING PROPERTY OWNERS' ACCESS RIGHTS WITHOUT PAYING FOR THEM BY PERSUADING THE COURT THAT WSDOT'S TAKING OR DAMAGING OF ABUTTING PROPERTY OWNER ACCESS RIGHTS ARE NONCOMPENSABLE POLICE POWER ACTIONS RATHER THAN COMPENSABLE EMINENT DOMAIN ACTIONS.**

This case is not about traffic safety. As noted above,  
WSDOT's own Exhibits 8 and 18 clearly establish that there is no  
accident problem in front of the subject property.

This case is about WSDOT's **selective imposition and**

**enforcement** of access restrictions that constitute takings and/or damagings of private property for a public use under Article 1, § 16 (Amendment 9) of the Washington State Constitution. WSDOT's evidence of traffic safety was introduced to convince the ALJ and this Court that WSDOT can take appellants property rights without paying for them, contrary to established Washington law and the language of RCW 47.50.010(3)(b)(5),<sup>44</sup> the statute WSDOT relies upon as authority for its unconstitutional acts.<sup>45</sup> The fact that a highway project is developed under the police power of a condemnor does not mean that the condemnor can take or substantially impair abutting property owner's access rights without

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<sup>44</sup> **RCW 47.50.010 Findings -- Access.**

(3) It is the policy of the legislature that:

(b) Every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation, reasonable access can be provided to another public road which abuts the property.

(5) Nothing in this chapter shall affect the right to full compensation under section 16, Article I of the state Constitution.

<sup>45</sup> Notwithstanding the State's reliance upon the statutory language quoted above, the State asks the Court to read the last sentence of paragraph (3)(b) in a way that would eliminate its operative condition, to wit: "if . . . reasonable access can be provided to another public road which abuts the property." State's Consolidated Hearing Brief, pages 40-41. That is a legislative duty, not a judicial one. The language of the operative condition presents a real problem to the State in this case, because the Galvis-Moncada and Masewicz properties do not abut another public road that can provide reasonable access to those properties.

paying just compensation.<sup>46</sup> Presumably every highway project is implemented under the authority of the police power. Certainly actions filed under Chapter 47.52 RCW, the Limited Access Statute, invoke the police power,<sup>47</sup> but the taking or damaging of access rights from an abutting property owner, particularly one using its property for business purposes at the time the acquisition is made entitles such owner to payment of just compensation, police power or not.<sup>48</sup> Under **RCW 47.52.080** the statutory test is

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<sup>46</sup> In *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977) the Supreme Court addressed this issue head on, stating, at 89 Wn.2d 371:

The County argues that a municipal corporation does not take private property in violation of article 1, section 16 (amendment 9) of the Washington constitution when it regulates, but does not eliminate, access to abutting property. In support of this proposition it urges the County has the authority and responsibility to regulate and control traffic flow by virtue of its inherent police power and that a traffic regulation permitting direct access and providing for safe flow of traffic does not constitute a taking or damaging for which compensation must be paid. The fact that the police power of the state is exercised does not, however, grant the County unchallengeable authority to restrict access without compensation.

<sup>47</sup> **RCW 47.52.001 Declaration of policy.**

Unrestricted access to and from public highways has resulted in congestion and peril for the traveler. It has caused undue slowing of all traffic in many areas. The investment of the public in highway facilities has been impaired and highway facilities costing vast sums of money will have to be relocated and reconstructed. It is the declared policy of this state to limit access to the highway facilities of this state in the interest of highway safety and for the preservation of the investment of the public in such facilities. [1961 c 13 § 47.52.001. Prior: 1951 c 167 § 1.]

<sup>48</sup> **RCW 47.52.080 Abutter's right of access protected -- Compensation.**

**No existing public highway, road, or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access thereto as herein provided. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW 47.52.133, the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property in its existing**

“Whether WSDOT’s project has taken away from the owner of such business property adequate ingress to or egress from such property as business property in its existing condition.” *Id.* ***Union Elevator & Warehouse Company v. State***, 96 Wn.App. 288, 980 P.2d 779 (1999), a 1999 Division 3 Court of Appeals case has expanded this test, approving an instruction on remand to the effect that “the issue of remaining access is to be determined on the basis of reasonableness, adequacy, and commercial practicality”.<sup>49</sup>

Those stated tests were not considered by either ALJ Walters or by Mr. Peterfeso in preparing the WSDOT’s **Final Order**. There is nothing in the **Final Order** that states that the proposed access to the Galvis-Moncada and Masewicz properties is either **“adequate**

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**condition** at the time of the notice provided in RCW 47.52.133 as for the taking or damaging of property for public use. [1983 c 3 § 127; 1961 c 13 § 47.52.080. Prior: 1955 c 54 § 2; 1951 c 167 § 11; 1947 c 202 § 7; Rem. Supp. 1947 § 6402-66.] (Emphasis added).

<sup>49</sup> In ***Union Elevator & Warehouse Company v. State***, 96 Wn.App. 288, 980 P.2d 779 (1999) a grain elevator brought an inverse condemnation action against the State WSDOT alleging that the revision of a limited access highway that eliminated an at-grade intersection with a road the grain elevator was located on had destroyed all reasonable access to its non-abutting property. Reversing a summary judgment in favor of the State WSDOT, the Court of Appeals held that summary judgment was inappropriate because a reasonable person could find that even though access to the East Lind facility remains, that access has been so substantially impaired that Union has suffered damages different from that of the general public, and is, therefore, entitled to compensation. Because of the disputed issues of material fact, summary judgment was inappropriate. Reversing and remanding the case for trial, the Court also stated that “Union requested that when determining the issue of damages based upon the amount of impairment of access, an **instruction** be given to the trier of fact **declaring the issue of remaining access is to be determined on the basis of reasonableness, adequacy, and commercial practicality**. We find that proper.”

**ingress to or egress from such property as business property in its existing condition” or that “the issue of remaining access to the Galvis-Moncada and Masewicz properties was determined on the basis of reasonableness, adequacy, and commercial practicality”.** On the contrary, the only basis that was apparently considered by either ALJ Walters or Mr. Peterfeso was **“Does the proposed access plan constitute a safe entry and exit to and from the highway.”** In short, both ALJ Walters and Mr. Peterfeso gave the wrong answer because they answered the wrong question. They missed the ball completely, and yet the State is asking for deference for their opinions. Since these are legal issues, the administrative agency is not entitled to deference. Particularly since they have applied the wrong legal standard to reach the wrong result. *Keiffer, supra* and *Union Elevator, supra*.

Only Mr. Greer answered the right questions---**“Whether the subject property would have adequate access for business property in its present condition” and “Whether the remaining access to the Galvis-Moncada and Masewicz properties was reasonable and adequate, taking into consideration commercial practicality.”** Mr. Greer’s answer was that the

access proposed by the WSDOT was not reasonable or adequate for the existing businesses on the property. That the proposed plan would change the highest and best use of the property and render the buildings valueless. His conclusions apply to the Masewicz property as well, since they are the same as the issues applicable to the Galvis-Moncada property. The court should follow Mr. Greer's analysis, not that of Mr. Peterfeso.

Once the threshold issue that a compensable taking of access rights has been resolved by a superior court judge, the degree of impairment and the amount of compensation due the property owner is a question for the trier of fact. Keiffer v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977); Union Elevator, supra. Where, as here, the answer is that a compensable taking or damaging of Appellant's access rights has or will occur if the WSDOT plan is implemented, the amount of compensation for the WSDOT's taking must be ascertained by a jury.

**B. EVEN THE WSDOT FINALLY RECOGNIZED THAT ITS FIRST PROPOSED PLAN FOR THE GALVIS-MONCADA AND MASEWICZ PROPERTIES WOULD RESULT IN AN UNCONSTITUTIONAL TAKING OF THEIR ABUTTING ACCESS RIGHTS.**

The WSDOT initially sought to eliminate all direct access to the Galvis-Moncada and Masewicz properties. **State Consolidated**

**Hearing Brief**, at page 42. The WSDOT plan referenced in the letters to these abutting property owners would have removed the existing asphalt between the traveled lanes of SR 7 and the westerly property line of SR 7 and installed a barrier sidewalk and “grass lined ditch” or “swale” to prevent these abutting property owners and their customers from parking in front of their buildings, which they had done since the early 1950s, when the buildings were initially constructed.

After having an apparent revelation that the original WSDOT plan would have effected a taking or damaging of all of Galvis-Moncada and Masewicz access rights under **McMoran v. State**, 55 Wn.2d 37, 345 P.2d 598 (1959),<sup>50</sup> the WSDOT amended its plan

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<sup>50</sup> In **McMoran v. State**, the Department of Highways installed a concrete curb on the edge of the outside lane of the traveled portion of PSH No. 2, 35 feet from the outer edge of the highway right of way, upon which the McMoran property abutted, paralleling the entire frontage of the property. The 35 foot strip between the curb line and the McMoran property line was converted by the State into a frontage road, from which the McMorans could attain access to the mainline (of PSH No. 2) by an opening in the curb line, 30 feet past the termination of the McMoran property line. The owner sued in inverse condemnation for damages resulting from the taking of its right of direct ingress and egress to the highway upon which his property abutted. The trial court granted the State's motion for summary judgment, ruling that construction of the curb was a proper exercise of the State's police power and that there was no taking or damaging of the access rights of plaintiffs by said construction.

On appeal, the Supreme Court reversed, holding that:

In the instant case, the [owner] was deprived of his property right by the [State's] erection of the physical obstruction of a concrete curbing, without payment of compensation therefore. [The State] contends, however that [the owner] has not been denied direct access to the highway, since he has direct access to the right of way. There is no merit in such contention. [The owner] was entitled to direct access to the

before going to the Administrative Hearings on the Galvis-Moncada and Masewicz properties.<sup>51</sup>

**C. THE STATE'S REVISED ACCESS PLAN FOR THE GALVIS-MONCADA AND MASEWICZ PROPERTIES DOES NOT, AS A MATTER OF LAW, PROVIDE "ADEQUATE INGRESS TO,**

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thoroughfare where the traffic flows, as contemplated in the *Walker* case, *supra*. [*Walker v. State*, 48 Wn.2d 587, 295 P.2d 328, 330 (1956)].

<sup>51</sup> The State seems quite proud of the fact 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 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.

Neither my clients nor I share the State's view of the administrative hearing process. This candid statement by WSDOT counsel clearly shows 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 of his that have dropped out of the SR 7 fight because they couldn't afford the cost of preserving their legal rights.

**OR EGRESS FROM, SUCH PROPERTY AS BUSINESS PROPERTY IN ITS EXISTING CONDITION.”**

The revised access plan of the WSDOT that was taken to the administrative hearing seeks to apply very restrictive access control against the small Galvis-Moncada and Masewicz properties, notwithstanding the fact that the buildings are small and the number of daily vehicle trips to these properties are relatively insignificant as a percentage of the traffic using SR 7.

The first and most obvious deficiency in the State's Access Plan for the Galvis-Moncada and Masewicz properties is the absence of commercially practical parking. Before the State's proposed project, there was a total of 18 head-in angle parking stalls available for use by the owners and patrons of the businesses in the subject buildings. (6 in front of Galvis-Moncada and 12 in front of Masewicz. According to the State's proposed plan, only 2 parallel parking stalls will remain for Galvis-Moncada and only 3 parking stalls will remain for Masewicz. Mr. Greer, Appellant's appraisal expert indicated that this deficiency in parking would render the buildings useless and force them to be destroyed and removed to redevelop the subject properties.<sup>52</sup>

The State has reached the conclusion that these property

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<sup>52</sup> Testimony of Ed Greer, MAI, (AR 300000108-109)

owners cannot consider the effect on the parking currently in place in front of these business properties, and in any event, that these owners are not entitled to compensation for the loss of their parking, which has been in use for over 50 years.

With all due respect, the state's failure to properly analyze and acknowledge the holding of *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977), controlling Washington State Supreme Court authority on the parking issue is the reason their conclusion that the second parking plan for the subject property provides reasonable access is incorrect.

In *Keiffer*, the property owners owned commercial real estate abutting the east side of 98<sup>th</sup> Avenue Northeast, a two lane county road. A grocery store, meat market, restaurant-ice cream parlor, small office building and nursery were located on that property facing 98<sup>th</sup> Avenue. In 1973 and 1974 King County widened the two-lane county road to four lanes within the existing King County right of way and installed concrete curbing along the existing 280 foot right of way line, restricting access to two curb cuts approximately 32 feet long, located near each end of the frontage.

Before the improvements, the Keiffers had access to their

property at all points along their frontage and parking for approximately 18 cars was available on respondent's property in front of their buildings. Subsequent to the improvements, respondent's access was limited to the two curb cuts referenced above. The placement of the curbing and location of the curb cuts restricted the use of the strip of property in front of respondent's buildings to either a driveway or parking area with a usable capacity of from two to at most five cars.

The Keiffers sought damages from King County, claiming an impairment of access to their property occasioned by the installation of curbing along the adjacent road right of way was sufficiently substantial to amount to an unconstitutional taking or damaging of their property without just compensation. The Superior Court found a compensable taking of respondents' right of access had occurred and ordered the empanelment of a jury to determine just compensation.

**The trial court found that the curbing was installed for the purpose of reducing the traffic hazard posed by allowing vehicles to back out onto the roadway from respondents' property, and also that allowing any additional access would not be a good highway engineering practice. It found as well**

**“(t)hat the practical effect of the curb with only two curb cuts is to virtually eliminate access to each of the aforementioned structures” and that “(t)he access provided after the completion of the curb and curb cuts . . . denies reasonable access to each of the aforementioned buildings and/or economic units, and further denies reasonable access to the parking which is functionally necessary to utilize each of the structures for their highest and best use and/or the business being operated thereon.”**

On appeal, the Washington Supreme Court stated the issues as follows:

Two issues are presented on appeal: (1) under what circumstances may the restriction of access to private property, resulting from the construction of physical barriers located within the government right-of-way designed to regulate the flow of traffic into and out of such property, constitute a compensable taking; and (2) did the trial court err in treating the determination of degree of impairment as a question of fact. We find the Superior Court resolved these issues correctly and affirm its order.

**Keiffer, supra**, 89 Wn.2d at 370.

Affirming the trial court’s decision, the Supreme Court stated, in pertinent part:

**The County argues that a municipal corporation does not take private property in violation of**

**article 1, section 16 (amendment 9) of the Washington constitution when it regulates, but does not eliminate, access to abutting property.** In support of this proposition it urges the County has the authority and responsibility to regulate and control traffic flow by virtue of its inherent police power and that a traffic regulation permitting direct access and providing for safe flow of traffic does not constitute a taking or damaging for which compensation must be paid. **The fact that the police power of the state is exercised does not, however, grant the County unchallengeable authority to restrict access without compensation.**

**Keiffer, supra**, 89 Wn.2d at 371. (Emphasis added).

The Supreme Court further stated in the **Keiffer** case that:

Although appellant asserts that the curbing in question was installed for the purpose of regulating the flow of traffic on a public way, it is clear from the record that **the means of regulation adopted by the County has also resulted in a restriction of the respondents' access to and from 98th Avenue.**

II

**Where, as here, the court determines the right of access has been damaged, the degree of damage is the pivotal issue and second step in the determination of whether or not liability is present.** Appellant's assertion that compensation is allowed only where its action pursuant to the police power eliminates all direct access is not supported by our cases. **The cases relied upon by the appellant recognize compensation must be paid where all direct access is not eliminated, if substantial impairment of access is shown.**

**Keiffer, supra**, 89 Wn.2d at 373. (Emphasis added).

It is clear from a reading of the **Keiffer** case that the

Supreme Court held that the **loss of parking** suffered by the property owner as a result of the limitation of the landowners previously unrestricted access to two curb cuts, one at each end of the owner's property (a diminution from 18 parking stalls to 2 to 5 parking stalls) **was a compensable factor in that case**. The **Keiffer** case is still good law, and it has been cited in cases from other jurisdictions that are more direct about finding the loss of parking in the situation presented in this case to be legally compensable. For example, in **Three D Corporation v. Salt Lake City**, 752 P.2d 1321 (Utah App. 1988) the court considered a case with similar facts to both the **Keiffer** and the **Galvis-Moncada** and **Masewicz** cases. The property owners (Three D and Distributors Inc.) owned two buildings located on West 1300 South, a relatively broad two lane street in Salt Lake City. The street was not curbed where it abutted the owner's property, allowing customers to pull off 1300 South and park head-in directly in front of the two commercial buildings. Such parking had continued in this fashion for over 30 years. Such parking was apparently even contemplated when the City permitted Three-D and Distributors to build their facilities.

In 1983, the City formed a special improvement district to

install curbs and gutters and widen 1300 South. The City also planned to construct a sidewalk as part of the project and attempted to purchase a portion of appellant's property which fronted 1300 South for that purpose. Appellants refused to sell any portion of their frontage property for the sidewalk unless they were also compensated for any resulting loss of parking spaces. This condition was not acceptable to the City. As a result, the City extended the street surface only to the existing legal boundary of 1300 South and no portion of the roadway, curb or sidewalk was constructed upon property owned by appellants. However, solid curbs were constructed along nearly the entire length of appellant's property where before there was continuous and accessible frontage along the street. A curb cut, was made just east of Three D's building, and another was made near Distributor's building. As a result, Three-D lost 4 of its 6 former parking stalls. Distributors also has less than the 7 parking spaces it had before the curb was constructed.

Appellants claimed that although there was no physical taking of their property, they were damaged when their parking spaces were "taken" by the City's action. Further, they claimed that the value of both their properties and their businesses have been

decreased because of the loss of parking spaces.

The trial court denied compensation on the basis that despite the construction of the curb and the diminished parking spaces, appellants still enjoy reasonable access to their properties.

Reversing the trial court's denial of compensation, the Court of Appeals initially distilled three general principles out of existing case law and stated those principles as follows:

1) **Where governmental action, not amounting to a physical taking, effectively deprives a property owner of reasonable access (footnote omitted) to property, the owner is entitled to compensation, e.g., Hampton;**

2) **Where governmental action, not amounting to a physical taking, merely interferes with an owner's access to property, the owner is \*1326 *not* entitled to compensation so long as the owner still has reasonable access, e.g. Bailey;**

3) **Where governmental action, not amounting to a physical taking, substantially impairs a right appurtenant to an owner's property, or otherwise causes peculiar injury, and thereby results in substantial deprivation, the owner is entitled to compensation, e.g. Miya.**

*Three D Corporation v. Salt Lake City*, supra, 752 P.2d at 1325-26. (Emphasis added.)

The Court of Appeals then indicated the problem with the trial court's analysis was that it misses the gravamen of Appellant's complaint, which was not that their access, as such, had been substantially impaired, but rather that they had been deprived of

valuable parking spaces.

The Court of Appeals then stated:

“At the risk of oversimplifying, we believe the trial court erred in this way: While the court correctly concluded that this case was not one governed by the first principle described above, it mistakenly concluded that it was governed by the second principle when in fact it is a case properly analyzed under the third principle.<sup>53</sup> The City’s action did not constitute a physical taking. Indeed, it was apparently careful to avoid taking any of appellants’ property outright. See Note 1, *supra*. **However, there is little question but that the City’s action has substantially impaired appellants’ long-standing right to utilize their property for storefront parking and has caused them direct, peculiar injury. It appears their commercial property has been devalued as a result of the City’s action.**

... Accordingly, the judgment appealed from is reversed and the case is remanded for new trial or such other proceedings as might be appropriate in accordance with this opinion. . . .

**Three D Corporation v. Salt Lake City, supra**, 752 P.2d at 1326 (emphasis added).

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<sup>53</sup> (This is footnote 4 in the **Three D Corporation v. Salt Lake City** case, **supra**.) We note, however, that it is possible to reach the same result using "right of access" analysis. In **Keiffer v. King County**, 89 Wash.2d 369, 572 P.2d 408 (1977), for example, a county made improvements within its right-of-way, without physically taking or condemning any of plaintiffs property. Subsequent to the improvements, plaintiff’s parking was restricted from 18 spaces to some five spaces. The Washington Supreme Court found that the substantial interference with the property owner’s use of his parking spaces constituted a taking. **Id.** 572 P.2d at 411. The court reached this result by focusing on the impairment of what it referred to as the "right of access." **Id.** at 410. **We believe our analysis is preferable because it focuses on the real injury in cases like the instant one, namely the loss of parking spaces and the resulting impact on business and property value. (Emphasis added).**

In *Carpet Barn v. Department of Transportation*, 786 P.2d 770 (Utah App. 1990) the court also dealt with the loss of parking that accompanied a road widening by the Department of Transportation. In *Carpet Barn*, there was an inadvertent partial taking of the property by the Utah DOT, in that a retaining wall footing extended 6 inches onto the Carpet Barn ownership. The DOT retaining wall prevented parking in front of the Carpet Barn building, eliminating 15 to 20 parking spaces. The owners and their customers had utilized the unrestricted highway right of way to access parking in front of the Carpet Barn building between 1971 and the time of trial.

Following the *Three D case, supra*, the Utah Court stated:

**“ . . . In this case, the State’s construction of the wall extending along the legal right of way line deprived appellants of their long-standing right to utilize part of their property for store-front parking, thus entitling them to compensation for any decrease in value caused by the loss of parking spaces.**

**. . . Appellants are entitled to severance damages calculated as the difference in value of the property before and after severance, to include consideration of the lost parking spaces, as well as any decrease in market value because of limited access.**

*Carpet Barn v. Department of Transportation, supra*, 786 P.2d

at 774

**D. THESE PROPERTY OWNERS REQUEST ATTORNEY FEES AND COSTS ON APPEAL.**

The abutting property owners request attorney fees and costs on appeal as well as at the trial court level, predicated upon two statutory events. The first was **the abandonment of WSDOT's original proposed highway plan** that it would have effectuated a taking and/or damaging of the abutting owners property and property rights under ***McMoran v. State, supra***, giving rise to liability in inverse condemnation for attorney fees and expert witness fees under RCW 8.25.075.<sup>54</sup>

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<sup>54</sup> **RCW 8.25.075 Costs — Award to condemnee or plaintiff — Conditions.**

(1) A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

(a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or

**(b) The proceeding is abandoned by the condemnor.**

(2) In effecting a settlement of any claim or proceeding in which a claimant seeks an award from an acquiring agency for the payment of compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner, the attorney general or other attorney representing the acquiring agency may include in the settlement amount, when appropriate, costs incurred by the claimant, including reasonable attorney& fees and reasonable expert witness fees.

(3) A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.

(4) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to the provisions of subsection (4) of RCW 8.25.070\_as

The second statutory event qualifying the abutting property owners for reasonable attorney fees and costs under RCW 4.84.340,<sup>55</sup> RCW 4.84.350<sup>56</sup> and 4.84.360.<sup>57</sup> was the reversal of

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now or hereafter amended.[1977 ex.s. c 72 § 1; 1971 ex.s. c 240 § 21.]

<sup>55</sup> **4.84.340 Judicial review of agency action -- Definitions.**

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 4.84.340 through 4.84.360.

(1) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.

(2) "Agency action" means agency action as defined by chapter 34.05 RCW.

(3) "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of a study, analysis, engineering report, test, or project that is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees. Reasonable attorneys' fees shall be based on the prevailing market rates for the kind and quality of services furnished, except that (a) no expert witness shall be compensated at a rate in excess of the highest rates of compensation for expert witnesses paid by the state of Washington, and (b) attorneys' fees shall not be awarded in excess of one hundred fifty dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(4) "Judicial review" means a judicial review as defined by chapter 34.05 RCW.

(5) "Qualified party" means (a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141J(a)), may be a party regardless of the net worth of such organization or cooperative association. [1995 c 403 § 902.]

<sup>56</sup> **RCW 4.84.350 Judicial review of agency action —Award of fees and expenses.**

(1) **Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that**

three decisions of the Administrative Law Judge and the Final Order of the Department of Transportation. At the trial court level, Judge Thompson granted attorney fees under RCW 4.84.350, but limited the amount of fees for three separate administrative appeals to a single \$25,000 maximum fee set out in the Statute.

The abutting owners respectfully submit that there were **three separate appeals from 3 separate administrative hearings** ruled on by the Court, and that **the amount of fees for each separate administrative appeal should be \$25,000, or a total award of \$75,000.**

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circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars. Subsection (1) of this section shall not apply unless all parties challenging the agency action are qualified parties. If two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars. The court, in its discretion, may reduce the amount to be awarded pursuant to subsection (1) of this section, or deny any award, to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy.[1995 c 403 § 903.]

<sup>57</sup> **4.84.360 Judicial review of agency action -- Payment of fees and expenses -- Report to office of financial management.** Fees and other expenses awarded under RCW 4.84.340 and 4.84.350 shall be paid by the agency over which the party prevails from operating funds appropriated to the agency within sixty days. Agencies paying fees and other expenses pursuant to RCW 4.84.340 and 4.84.350 shall report all payments to the office of financial management within five days of paying the fees and other expenses. Fees and other expenses awarded by the court shall be subject to the provisions of chapter 39.76 RCW and shall be deemed payable on the date the court announces the award. [1995 c 403 § 904.]

## VI. CONCLUSION

The Final Order of the Washington State Department of Transportation is erroneous in several respects, properly warranting reversal of that decision. First of all, the substituted plan for accessing the **Galvis-Moncada** and **Masewicz** properties is virtually identical to the *Keiffer v. King County* case, which required compensation be paid for the substantial diminution in the property owner's unrestricted access to a county road that resulted in the loss of at least 13 storefront parking spaces. In *Keiffer*, after the county installed curbing on the existing right of way line, leaving only two 32-foot curb cuts to serve several commercial buildings on the property, the owner lost use of all but 2-5 of the 18 parking spaces in front of the buildings. In **Galvis-Moncada** and **Masewicz**, the state's plan also replaces unrestricted access to SR 7 with a concrete sidewalk with 2 curb cuts and reduces the total parking in front of the existing buildings from 18 spaces to 5.

The only difference between *Keiffer* and **Galvis/Moncada** and **Masewicz** is that in the present cases, **the State is not seeking to widen the existing 5-lane highway within the State's existing 100 foot right of way.** That difference does not affect the outcome of this case. The purpose of the WSDOT in this action is

to eliminate the 18 storefront parking stalls utilized by these businesses for safety reasons. The State has the unquestioned right to eliminate the **Galvis-Moncada** and **Masewicz** parking stalls **if and only if they pay the owners just compensation for the right to do so.** That is the essence of the holding in *Keiffer v. King County*, and it is equally applicable here.

The subject properties are developed for commercial purposes. Customers of their businesses have utilized a small portion of the State right of way for direct access to SR 7 and for access to head-in storefront parking since the buildings were constructed in the 1950s. **There is no evidence that the State has ever, prior to this administrative action, told any of the owners along SR 7 that they could not park their own or customer vehicles in front of their buildings, partly on the 100 foot highway right of way.** These owners fully expected they could continue to use this storefront parking when they purchased the property. If their government decided to take away the owner's right to park where others had parked for over 50 years, these owners should be confident that their Government would compensate them for their huge loss.

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). *Peterson v. Smith*, 6 Wash. 163, 32 P. 1050 (1893).

In *Duncan Township v. Satyr*, 106 Wash. 514, 180 P. 476 (1919), the court stated:

**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).

The owners of these properties are honest, law abiding

citizens and taxpayers. Ms. Galvis has mortgaged her future to purchase the subject property and provide herself with a job as the 12 hour per day, seven days per week owner-operator of the **Le Popular Mexican-American Cash and Carry Grocery store**. For the State Department of Transportation to place these property owners in financial jeopardy in an experimental program initiated under Chapter 47.50 RCW to acquire the access rights of an abutting property owner without paying for them is nothing short of outrageous. The case of **Armstrong v. United States**, 364 U.S. 40 (1960) provides:

**“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.**  
...<sup>58</sup>

A fair interpretation of the constitutional protections of Washington’s Article 1, Section 16 entitles these abutting property owners to just compensation here. Otherwise they will be unconstitutionally forced to contribute far more than their share to WSDOT’s SR 7 Project.

.We urge the court to affirm the Trial Court’s reversal of the

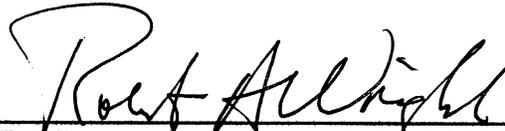
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<sup>58</sup> 364 U.S. 40 (1960). Pagination not available; quote appears in last full paragraph of majority opinion.

Final Order of the State Department of Transportation that dismissed the appeal of the instant actions, and to schedule the inverse condemnation actions for jury trial on the issue of just compensation. As noted above, in **Section V. D.** the property owners request an award of attorney fees and costs on appeal.

Dated this 6<sup>th</sup> day of October, 2006

**FAUBION, JOHNSON & REEDER, P.S.**

A handwritten signature in black ink, appearing to read "Robert A. Wright", written over a horizontal line.

By: Robert A. Wright WSB# # 4158  
ATTORNEYS FOR APPELLANTS  
GALVIS-MONCADA

# APPENDIX “A”

ANNOTATED  
FINAL ORDER

WSDOT-  
GALVIS/MONCADA  
ADMINISTRATIVE  
HEARING

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**BEFORE THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION**

In the matter of :

NO. OAH No. 2003-DOT-0021

**SANDRA M. GALVIS & ALEXANDER  
MONCADA,**

**FINAL ORDER**

**Appellants**

v.

**STATE OF WASHINGTON,  
DEPARTMENT OF  
TRANSPORTATION,**

**Respondent**

The reviewing officer, Harold Peterfeso, P.E., State Design Engineer for the Washington State Department of Transportation, having considered the record created by Administrative Law Judge Selwyn S.C. Walters, and also considering: (1) Appellants' Petition for Review of Findings of Fact, Conclusions of Law and Initial Order of Hearing Conducted on June 10 & 11, 2004 before ALJ Selwyn S.C. Walters, and (2) Respondent's Reply Brief,

**ORDERS AS FOLLOWS:**

1. The Findings of Fact, Conclusions of Law and Initial Order, dated September 24, 2004, in the above entitled matter is affirmed and is attached hereto and incorporated in its entirety by this reference, except for the amendments and corrections following:

**FINAL ORDER**

**ATTORNEY GENERAL OF WASHINGTON**  
Transportation & Public Construction Division  
905 Fifth Street, Building 3  
PO BOX 40113  
Olympia, WA 98504-0113  
(360) 733-6126 Facsimile: (360) 586-6847

1 effect of this Final Order. The filing of a petition for reconsideration is not a prerequisite for  
2 judicial review, and an order denying reconsideration is not subject to judicial review.

3 4. Pursuant to RCW 34.05.542, a petition for judicial review of this Final Order  
4 shall be filed with the court and served on the agency, the office of the attorney general, and  
5 all other parties of record within thirty (30) days after service of this Final Order.

6 DATED this 30<sup>TH</sup> day of December 2004.

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HAROLD PETERFESO, P.E., Reviewing Officer  
State Design Engineer  
Washington State Department of Transportation

MAILED  
AUG 9 2004  
OLYMPIA OAH

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of:

SANDRA M. GALVIS &  
ALEXANDER MONCADA

Appellants.

v.

STATE OF WASHINGTON,  
DEPARTMENT OF TRANSPORTATION,  
Respondent.

)  
) OAH Docket No. 2003-QOT-0021  
)  
) **FINDINGS OF FACT,**  
) **CONCLUSIONS OF LAW AND**  
) **INITIAL ORDER**  
) *AS AMENDED BY WSDOT*  
) *DESIGN ENGINEER*  
) *HAROLD PETERFUSO*  
)  
)

STATEMENT OF THE CASE

On September 22, 2003, the Washington State Department of Transportation (Department) served a notice on the Appellants, Sandra Galvis and Alexander Moncada. The notice informs the Appellants that a transportation safety improvement project along State Route (SR) 7, Pierce County, requires the Department to change direct vehicular access to SR 7 from their property.

The Appellants requested a hearing to challenge the Department's action on October 21, 2003.

The matter came before Administrative Law Judge Selwyn S. C. Walters for a full hearing on June 10 and 11, 2004, at the Office of the Attorney General, 1019 Pacific Avenue (The Washington Building), Tacoma, Washington. Assistant Attorney General, John Salmon, represented the Department of Transportation. Robert A. Wright, Esquire,

represented the Appellants. Karen Horn translated the proceeding into the English and Spanish Languages.<sup>1</sup>

Troy Cowan, a project engineer, and John Nisbet, a traffic engineer, both with the Department, presented testimony for the Department. The Appellants, Sandra Galvis and Alexander Moncada, and Edward O. Greer, a real estate appraiser, presented testimony for the Appellants. The undersigned admitted to the hearing record Department Exhibits 1a through 45 and Appellants Exhibits A through K.

The undersigned, having considered the evidence and the testimony, now enters the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. The Appellants, Sandra Galvis and Alexander Moncada, are the owners of a parcel of property located on the west side of State Route (SR) 7 at mile post 52.282, Pierce County, Washington. The size of the parcel is approximately 11, 246 square feet. The parcel extends 182.8 feet sloping steeply westward to 3<sup>rd</sup> Avenue and Lafayette Street. A building approximately 2,352 square feet constructed circa 1950 is located on the parcel. Over the past fifty-four years previous owners have used the building for business purposes and their customers have parked their vehicles in front of the building on the Owners' property and on the state's right-of-way.

2. The Appellants purchased the improved property on April 1, 2002, and operate *Le Popular Cash & Carry Market*, a retail business specializing in *latinoamericano* products and services. The business continues to grow and has seen an increase in it's

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<sup>1</sup> The Appellants may reach Ms. Horn for a translation of this decision at telephone number (360) 456-6901.

customer base. Because of the steep grade of the westward slope of the parcel customers and suppliers can only enter the business from SR 7. Customers, suppliers, and salespeople arrive at the business in a variety of vehicles including pick-up trucks, vans, delivery trucks, and cars. Customers and suppliers arriving in their motor vehicles encroach on the shoulder or right-of-way of SR 7 to park their vehicles on the Appellants' property and the state's right-of-way.

3. The property is configured so that vehicles may enter and leave *La Popular* along the entire frontage with SR 7. The property has approximately 61.52 feet of SR 7 frontage. ~~Marked on the Appellants' property and the state's right-of-way are parking spaces for six vehicles.~~ Before the Department's proposed SR 7 safety project, Appellants use six spaces for parking vehicles; however, the vehicles, when parked, are located both on Appellants' property and on the state-owned highway right of way. The property has no curbs, driveways, or other structures to define the particular access point to *La Popular*. The property just merges into the shoulder of the roadway and then into SR 7.

4. State Route 7 (also referred to as Pacific Avenue) is a class IV state highway carrying vehicular traffic north-south between the neighborhoods of Parkland and Spanaway, and the city of Tacoma. At the time SR 7 was built the area was primarily rural. It is now urbanized. The SR 7 roadway in front of the Appellants' property consists of two lanes of traffic on either side of the centerline a two-way left turn lane in the center. The pavement in front of the Appellants' property is flat and is 8.5 feet from the state's right-of-way. The state acquired the 20 feet right-of-way in 1928. Storm water is handled in underground pipes.

5. The state legislature created the Department of Transportation' in 1988 by consolidating the functions of the department of highways, the state highway commission, the director of highways, and other scattered agencies dealing with transportation. See, Laws of 1988 1977 c 167 §§ 11, Laws of 1977 ex.s. c 151 §§ 3.

6. Since at least 1998 the Department designed a project to improve safety along a five-mile segment of roadway on SR 7 between SR 507 (the Roy Y) and SR 512. The Department's proposal responded to concerns about safety. The name of the project is "SR 7 Safety Improvement Project." The Department intends to construct throughout the project limits driveways, sidewalks, drains, signal systems, bicycle lanes, and street lights. The Pierce County government and other local governments may also add landscaping and other complementary features to the project.

7. On September 22, 2003 the Department sent a notice and a draft design to Appellant, Sandra Galvis, and others, informing them of the SR 7 Improvement Project and the action the Department intended to take regarding access from their property to SR 7. The Department's letter provides in relevant part as follows:

Our research for this project has determined that the business on your property currently uses the state right-of-way for parking. Our construction of the proposed sidewalks, drainage ditches and other improvements will require the utilization of the existing state right-of-way. After we construct the proposed improvements as shown on the enclosed plans, you will no longer be able to use the state right-of-way for parking. For your information state law, RCW 47.32.120, generally prohibits the use of state highway right-of-way by business patrons or customers.

We have determined that it is not practicable or safe to provide direct vehicular access to State Route 7 from your property, because there would be no place vehicles leaving the highway to park. Should you make improvements or modifications to your property that would accommodate parking or otherwise enable safe vehicular access, your property may become eligible for a permit allowing a direct access to State Route 7.

.....

8. The Department classifies the five mile stretch of SR 7 a "high accident corridor". The Department defines 'high accident corridor' as a highway, one or more miles long, that has a higher accident rate and more severe accidents over a period of time (usually four years) in comparison to similar highways throughout the state. For example in 2002, the SR 7 five-mile corridor had 6.41 collisions per million vehicle miles, whereas the state average for similar highway sections was 2.56 collisions per million vehicles miles. Within high accident corridors the Department identifies "hazardous accident locations." Hazardous accident locations are less than one mile long (usually 1/10 of a mile) that have a higher than average rate of severe accidents during a two year period. Every biennium from 1993 through 2003 the Department has classified as a hazardous accident location a stretch of roadway within which the Appellants' property is located.

9. The Department intends to modify access and egress to Appellants' property along the highway pursuant to current highway access management laws, chapter 47.50 Revised Code of Washington (RCW), and chapters ~~368-54~~ 468-51 and 468-52 Washington Administrative Code (WAC).

10. The Department recorded approximately 400 accidents per year along the five mile long segment of SR 7 it intends to improve. The accidents are predominantly "angle" and "rear-end" accidents. "Angle" accidents involve a vehicle entering or exiting the highway dealing with access points. "Rear end" accidents are usually associated with congestion or access points.

11. The segment of SR 7 at issue in this case has random access or undefined access because it has full-frontage access to SR 7. There are no defined driveways or structures to limit vehicle access to certain points of entry or exit off of the highway. The

Department determined that such undefined or full-frontage access properties pose a traffic safety problem. Vehicle movement is unpredictable either entering or leaving the property when there is full-frontage access. Pedestrians are more at risk with undefined access and exit sites.

12. The Department identified a number of problems with the SR 7 segment that it believed contribute to the "hazardous accident" rating. The first problem includes the full-frontage access or undefined ingress and egress to the property and business. Secondly, the road has no sidewalks which is more dangerous for pedestrians.

13. In addressing the identified safety problem, the Department relied on well accepted published studies that support the view that reducing the number of access points along a highway reduces accidents by up to 40%. Similarly, the concept of defining access points by constructing driveways is a generally accepted means of improving highway safety and has long been a part of the Department's design standards.

14. Although the data shows in three years there was one accident directly in front of the Appellants' property (that is, at mile post 52.282), there were no injury accidents over a ten year period, and most of the accidents occurred in the north bound lanes, the Department designated the entire five-mile a "high accident corridor". The average daily traffic volume along the section of SR 7 encompassing the Appellants' property increased from 39,000 to 43,000 between the years 1997 through 1999.

15. Under the SR 7 improvement project the Department will install sidewalks, curbs, gutters, and concrete driveways. Regarding Appellants' access, the Department abandoned its proposed action described in its September 22, 2003 letter, and shown on a draft design plan attached to the letter. The Department proposes access to the subject

property outlined in a design plan attached to this decision and incorporated by reference as Attachment "A". Under this plan the Department plans to install an 11.8 foot cement concrete driveway and 26 foot wide approach and a 6 foot cement concrete sidewalk in front of Appellants' property. The Department will allow use of the state's right-of-way to ingress and egress the property. ~~This configuration eliminates all but two spaces for vehioular parking at the business.~~ After the Department's proposed safety project, Appellants will have two parking spaces, where vehicles, when parked, will be located only on appellant's property, and will not also require the use of or be located on state-owned highway right of way. Exhibits 41 and 42 represent computer generated turning templates offered by the Department to examine the impact of the improvements upon the property. The project does not unreasonably limit access by any vehicle using the Appellants' property.

16. The undersigned finds that a cement concrete driveway approach and cement concrete sidewalk will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route and the Appellants' property. Pedestrians will be safer along designated sidewalks.

17. Prior to the implementation of the Department's project improvements there were no defined driveways, sidewalks, or structures to limit vehicle access to certain points of entry or exit off the highway and Appellants' property. Such undefined, full-frontage access pose a traffic safety problem. Vehicle movement is unpredictable, and pedestrians are more at risk. The Appellants' property will have reasonable vehicle access after the implementation of the project's improvements. ~~Without a doubt, the Appellants will lose spaces they previously used for parking.~~ Appellants will no longer be able to use state-

owned highway right of way for business and tenant parking purposes. However, the Appellants' use of the state's right-of-way for parking was not permitted or otherwise authorized by the Department.

### CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the persons and subject matter of this case pursuant to chapter 34.05 RCW (the Administrative Procedure Act), and WAC 468-51-160.
2. The Washington State Department of Transportation regulates vehicular access and connections to or from the state highway system in order to protect the public health, safety, and welfare. RCW 47.50.030. The Washington State Legislature found that uncontrolled access to the state highway system is a significant contributing factor to the congestion and functional deterioration of the system. RCW 47.50.010 (1) (b). The development of an access management program will enhance the development of an effective transportation system and increase the traffic-carrying capacity of the state highway system and thereby reduce the incidences of traffic accidents, personal injury, and property damage or loss. RCW 47.50.010 (1) (c).
3. The public policy of the state announced by the Legislature at chapter 47.50 RCW (the Access Management law) provides the access rights of an owner of property abutting the state highway system are subordinate to the public's right and interest in a safe and efficient highway system; and that every owner of property which abuts a state highway has a right to reasonable access to that highway, unless such access has been acquired pursuant to chapter 47.52 RCW, but may not have the right of a particular means of access. The right of access to the state highway may be restricted if, pursuant to local regulation,

reasonable access can be provided to another public road which abuts the property. RCW 47.50.010(3). RCW 47.50.010(4) continues to emphasize that the purpose of the highway access management law is to provide a coordinated planning process for the permitting of access points on the state highway system to effectuate the findings and public policy announced by the Legislature. The Department issued rules to implement the provisions of chapter 47.50 RCW.

4. WAC 468-52-040 establishes an access control classification system consisting of five classes. The classes are arranged from the most restrictive, class one, to the least restrictive, class five. This access control classification system does not include highways that have been established as limited access highways in compliance with chapter 47.52 RCW. SR 7 is a class four highway for access management purposes. WAC 468-52-040(4).

5. The Department's rules related to the closure or alteration of existing access connections are set out at WAC 468-51-130 and provides:

Any unpermitted connections to the state highway system which were in existence and in active use consistent with the type of connection on July 1, 1990, shall not require the issuance of a permit and may continue to provide connection to the state highway system, unless the property owner had received written notification initiating connection closure from the department prior to July 1, 1990, or unless the department determines that the unpermitted connection does not meet minimum acceptable standards of highway safety and mobility based on accident and/or traffic data or accepted traffic engineering criteria, a copy of which must be provided to the property owner and/or permit holder and tenant upon written request. The department may require that a permit be obtained if a significant change occurs in the use, design, or traffic flow of the connection or of the state highway. If a permit is not obtained, the department may initiate action to close the unpermitted connection point in compliance with RCW 47.50.040. Any unpermitted connection opened subsequent to July 1, 1990, is subject to closure by the department . . . . .

6. Relatedly, at RCW 47.50.090(3) (d), access management standards shall

include, but not be limited to, connection location standards, safety factors, design and construction standards, desired levels of service, traffic control devices, and effective maintenance of the roads.

7. In this case, the number of customers who arrive by motor vehicle to patronize *La Popular* continue to grow. There are no defined driveways, sidewalks, or structures to limit customers' vehicle access to certain points of entry or exit off the highway and Appellants' property. Vehicle movement is unpredictable, and pedestrians are at risk. The Department properly designated the entire five-mile a "high accident corridor" and identified along the corridor "hazardous accident locations". The evidence shows the average daily traffic volume along the section of SR 7 encompassing the Appellants' property increased from 39,000 to 43,000 between the years 1997 through 1999, and the Department recorded approximately 400 accidents per year. The evidence shows the Appellants' property is located within that segment of SR 7 the Department has designated since 1993 as a hazardous accident location.

8. Accordingly, I conclude the increase traffic flow, the high rate of accidents, the absence of driveways and sidewalks, and the high accident corridor and hazardous accident location designation, are a significant change in the use, design, and traffic flow of SR 7 and the Appellants' property.

9. The state's established public policy is to protect the citizen's health, safety and welfare by regulating access to state highways. SR 7 has grown from a country road to a busy highway through an urbanized area. WAC 468-52-060 promotes highway uniformity and continuity and requires the undersigned to consider the five mile segment of SR 7 as one unit, not discreet and separate parts identified by a certain number of accidents.

Attaching a different characterization to every distance, whether a mile or less, based on the number of accidents in that discreet distance is unreasonable and unsafe, and is not supported by the access management law or the Department's rules. It is possible less accidents occurred on the roadway directly in front of the Appellants' property, or that more accidents happen at one place than another. However, the five mile segment should be planned and improved with uniformity because the evidence supports the Department's designation of the roadway as a high accident corridor, and a stretch of roadway within which the Appellants' property is located as a hazardous accident location. See, WAC 468-52-060.

10. The undersigned concludes that the Appellants' property will have reasonable access under the SR 7 Safety Improvement Project. The Department's proposed access to the subject property is outlined more fully in Attachment "A" attached to this decision and incorporated by reference. The Department will install an 11.8 foot cement concrete driveway and 26 foot wide approach and a 6 foot cement concrete sidewalk on SR 7 in front of Appellants' property. The Department will allow use of the state's right-of-way to ingress and egress the property. A cement concrete driveway approach and cement concrete sidewalk will improve highway safety and reduce accidents by utilizing defined access and egress along the SR 7 route and the Appellants' property. Pedestrians will be safer along designated sidewalks.

11. Under the plan that I conclude is reasonable, ~~the Appellants will lose spaces they previously used for parking. The fact that the Appellants lose spaces they used for parking, and do not have the particular access they believe necessary does not make the access unreasonable.~~ the fact that Appellants will no longer be able to use state-owned

highway right of way for parking purposes and the fact that Appellants do not have the particular access that they believe is necessary does not make Appellants' access unreasonable. Here the Appellants use the state's right-of-way for parking without authorization from the Department. Absent a lease, license, or permit from the Department an adjoining owner is not authorized to use the state's right-of-way. See, WAC 468-30-110, and generally, chapter 468-34 WAC. A property owner may not acquire an interest in state highway property by adverse possession. See, e.g., *State v. Scott*, 89 Wash 63, 76, 154 Pac. 165 (1916); *Mueller v. Seattle*, 167 Wash. 67, 75, 3 P.2d 994 (1932).

12. Further, the Appellants' right to have their desired access is subordinate to the public's right to a safe and efficient highway. The Appellants will not have to use any of their property or pay for any of the improvements. ~~The less of property where the Appellants' customers parked their vehicles was not the Appellants' property. Not being able to use that property for parking does not make the Appellants' access unreasonable. The Appellants parking spaces have been reduced from six to two. Part of the property upon which Appellants' customers parked their vehicles was not the Appellant's property, but instead, the property was state-owned highway right of way which will now be used for the SR 7 highway safety project. Not being able to use state-owned highway right of way for parking does not mke the Appellants' access unreasonable. The appellants will retain room that they previously had for two lawful parking spaces located on their property.~~ They believe this will adversely affect their business. The undersigned does not minimize the difficulty the reduced parking spaces may have on the Appellants' ability to attract customers, and the overall impact on their business. But growth and development have made the area unsafe for vehicular and pedestrian traffic. A cement concrete driveway

approach and cement concrete sidewalk will improve highway safety.

13. I conclude the Department's plan provides reasonable access for the Appellants' property and adds a safe and well planned road with a defined traffic flow for drivers and pedestrians, and is in the best interest of the public all around.

**ORDER**

**NOW THEREFORE** the proposed agency action installing an 11.8 foot cement concrete driveway approach and a 6 foot cement concrete sidewalk on SR 7 in front of Appellants' property, and allowing use of the state's right-of-way to ingress and egress the property, which plan is depicted in a design attached and incorporated in this decision as Attachment "A" is **HEREBY ORDERED AFFIRMED**. This appeal is **ORDERED DISMISSED**.

Dated at Olympia, Washington, on the date of mailing.

**WASHINGTON STATE OFFICE OF  
ADMINISTRATIVE HEARINGS**

By: /s/ Selwyn S.C. Walters  
Selwyn S.C. Walters  
Administrative Law Judge  
2420 Bristol Court SW  
PO Box 42489  
Olympia, Washington 98504-248.9

**NOTICE TO PARTIES**

This Initial Order may be appealed pursuant to the Administrative Procedures Act, chapter 34.05 RCW and WAC 468-10-520. If no appeal is served on the Washington State Access and Hearing Engineer, Transportation Building, PO Box 47329, Olympia, WA 98504-7329,

within 20 days of the date this Initial Order was mailed to you this Initial Order becomes final.

**Attachment**

Copies mailed to:

**Appellant:**

Sandra M. Galvis & Alexander Moncada  
11214 Pacific Ave S #1121  
Tacoma WA 98444  
Telephone (253) 377-0100 (cell)

**Appellant Representative:**

Robert A. Wright, Attorney at Law  
5920 100th St SW, Ste 25  
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**Assistant Attorney General:**

John Salmon, Assistant Attorney General  
Office of the Attorney General  
Transportation & Public Construction Division  
P0 Box 40113  
Olympia WA 98504-0113  
Telephone (360) 753-1622

**Interpreter:**

Karen Horn  
7627 Ostrich Dr SE  
Olympia WA 98513  
Telephone (360) 456-6901

cc: Barbara Cleveland, OAH

STATE OF WASHINGTON     )  
  )  
COUNTY OF THURSTON     )

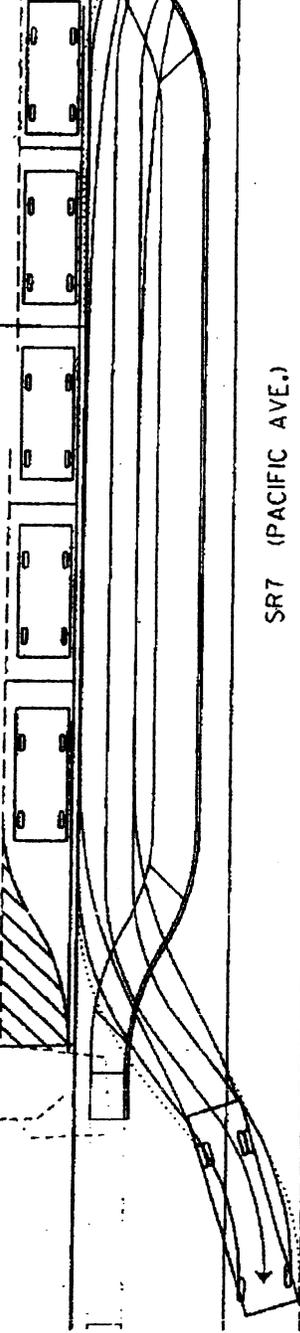
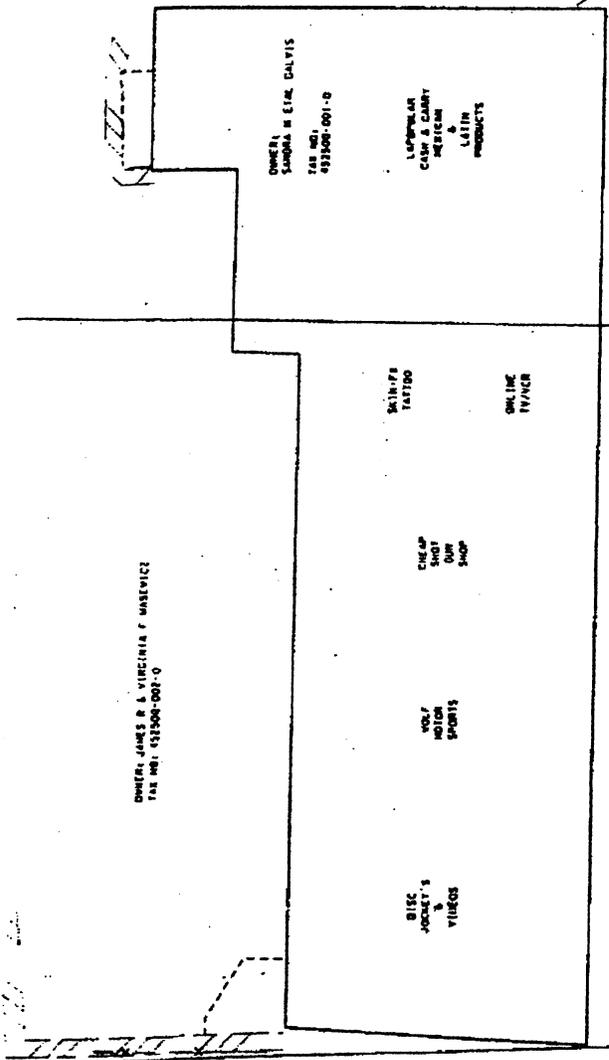
**I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent.**

**Dated at Olympia, Washington, this 9<sup>th</sup> day of August, 2004.**

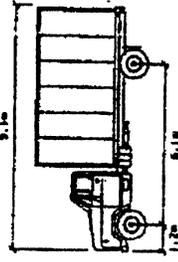
**/s/ Darlene Aumiller**  
**Representative, Office**  
**of Administrative Hearings**

T. 19 N., R. 3 E., W.M. SECTION 9

NO.	DATE	DESCRIPTION



SRT (PACIFIC AVE.)



LEGEND

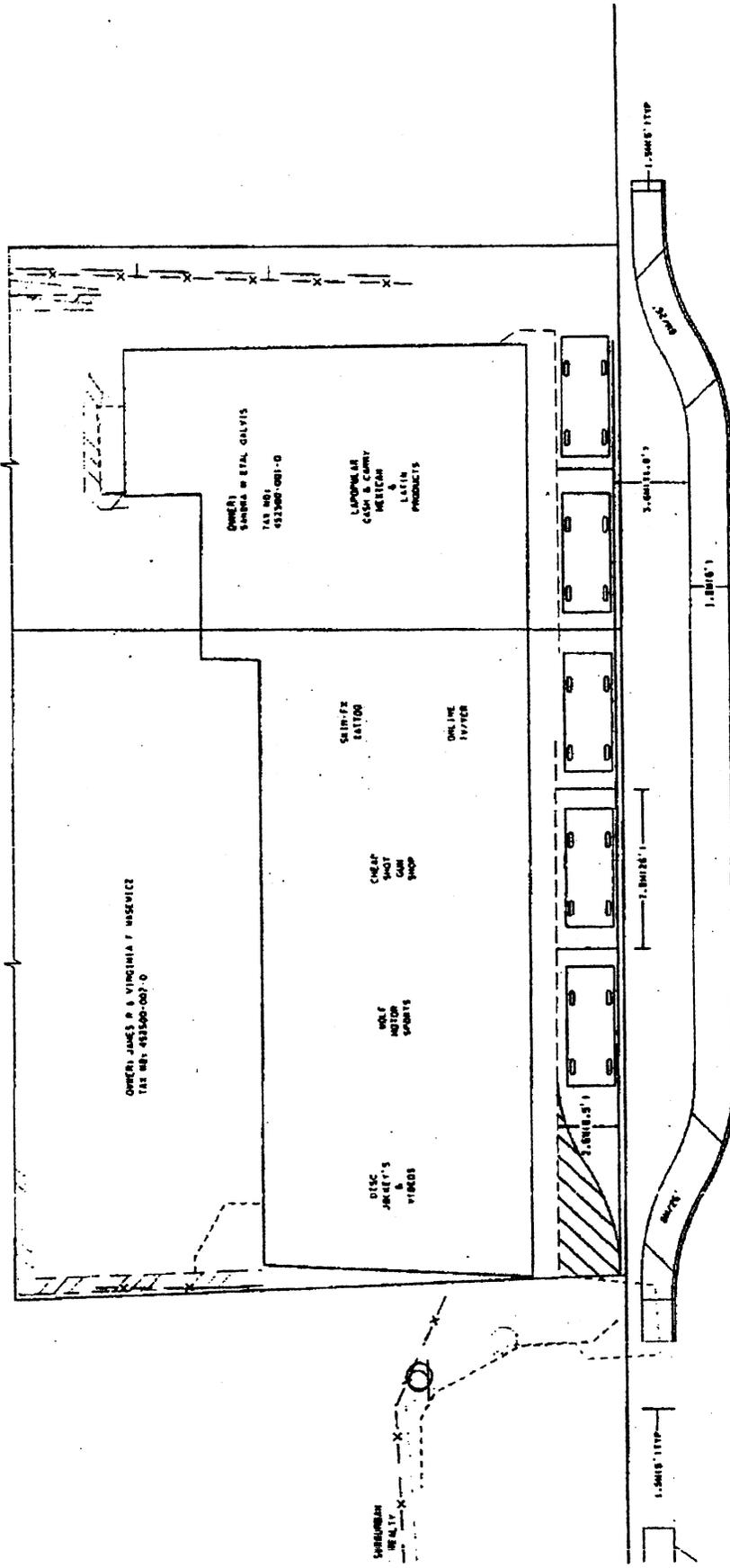
- FRONT WHEEL PATH
- REAR WHEEL PATH
- MINIMUM TURNING RADIUS USED = 11.57m

NO. 100 TO 100 - STAGE 2  
**EXHIBIT NO. B-2**  
 SUBMITTAL DRAWING PLAN  
 PROJECT NO. 0000000000  
 EXHIBIT TITLE: APPROVAL OF TRANSPORTATION  
 PLAN, TRUCKSTOP  
**NOT TO SCALE**



NO.	DATE	DESCRIPTION

T. 19 N., R. 3 E., W.M. SECTION 9



SR7 (PACIFIC AVE.)

LEGEND

- EXISTING SITE RIGHT OF WAY
- EXISTING CURB LINE
- PROPERTY BOUNDARY LINES
- SIDE OF LANE AND EDGE OF SHOULDER
- - - EXISTING FENCE
- ▭ CEMENT CONCRETE SIDEWALK
- ▭ CEMENT CONCRETE DRIVEWAY APPROACH
- - - EXISTING RIGHT OF WAY

SR7  
 DE 107 TO DE 109 - STAGE 2  
**EXHIBIT NO B-4**  
 METALLIC INTERLOCK PAVEMENT  
 ROAD CARRY  
 THROUGH STATE DEPARTMENT OF TRANSPORTATION  
 & HIGHWAYS

**NOT TO SCALE**

# APPENDIX “B”

OCTOBER 17, 2005  
BRIEF OF  
APPELLANTS  
GALVIS/MONCADA

RECEIVED

OCT 17 2005

ATTORNEY GENERAL'S OFFICE  
HONORABLE LISA WORSWICK



04-2-06841-5 23890474 BRAR 10-18-05

RECEIVED

OCT 17 2005

SINUIT & SINUIT INC P.S.  
ATTORNEYS AT LAW

IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

SANDRA GALVIS and ALEXANDER  
MONCADA,

NO. 04-2-06841-5

Appellants,

BRIEF OF APPELLANTS GALVIS &  
MONCADA

VS.

FILED  
IN COUNTY CLERK'S OFFICE

THE WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION,

A.M. OCT 17 2005 P.M.

Respondent.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, COUNTY CLERK  
BY \_\_\_\_\_ DEPUTY

Comes now Sandra Galvis and Alexander Moncada, Appellants, appearing by and through their attorney, Robert A. Wright of Faubion, Johnson & Reeder, P.S., to file this brief in support of their petition for this court to review and reverse the FINAL ORDER of the WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, acting by and through Harold Peterfeso, P.E., State Design Engineer who served as Reviewing Officer of the Findings of Fact, Conclusions of Law and Initial Order of Administrative Law Judge Selwyn S.C. Walters.

I. ISSUES INVOLVING JURISDICTION AND PROCESS

A. The State Department of Transportation Abandoned its Original Access Plan for the Subject Property and Proceeded to the Administrative Hearing with a Substitute Access Plan.

Appellants challenge the Washington State Department of Transportation's (WSDOT's) utilization of a process whereby the first access plan served upon these Appellants (a plan to install a six foot sidewalk and grass-lined barrier ditch across the entire frontage of the subject property, eliminating all 62.5 feet of direct access to the

BRIEF OF APPELLANTS GALVIS AND  
MONCADA— 1

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ORIGINAL

1 subject property)<sup>1</sup> was abandoned by WSDOT approximately two weeks before the  
 2 Administrative Hearing, and the Administrative Hearing proceeded upon a Substitute  
 3 Access Plan which took all but 26.5 feet of direct access, provided a 26.5 foot road  
 4 approach and an un-needed second concrete sidewalk in front of the subject building.  
 5 The Substitute Plan eliminated 6 angle parking spaces used by the Appellants and their  
 6 predecessors for over 50 years, and replaced the six angle parking stalls with two  
 7 parallel parking stalls proposed to be located on the Appellants property.

8 These Appellants seek **reasonable attorney fees and reasonable expert**  
 9 **witness fees** for the partial abandonment by the State Department of Transportation in  
 10 both the Administrative Hearing (under RCW 4.84.340 through RCW 4.84.360) and the  
 11 inverse condemnation proceeding (under RCW 8.25.075).

12 **B. Since These Appellants Own Property Used for Business Purposes that**  
 13 **Abutted An Existing Highway, They Are Entitled To Just Compensation For the**  
 14 **Taking and/or Damaging Of Their Access Rights Under RCW 47.52.080.**

15 These Appellants challenge the actions of the WSDOT in proceeding to take  
 16 and/or damage their rights of access to SR 7 under Chapter 47.50 RCW, the "Access  
 17 Management" statute instead of proceeding to purchase the petitioner's access rights  
 18 under Chapter 47.52 RCW, the "Limited Access" statute. Appellants own property that  
 19 abuts SR 7, an existing highway for which the State of Washington has never  
 20 purchased any "access rights" from abutting property owners, as is permitted and  
 21 encouraged by Chapter 47.52 RCW.

22 Under RCW 47.52.080, the Petitioner's rights of access to its business property  
 23 are specifically protected by statute.

24 RCW 47.52.080 provides:

25 <sup>1</sup> The State's first plan, if implemented, would affect a clear and unequivocal taking of all of the Appellants  
 26 access rights under the case of McMoran v. State, 55 Wn.2d 37, 345 P.2d 508 (1959). The state might  
 27 as well have proposed to construct a 10-foot high wall in front of the subject property. The economic  
 28 effect of the plan would be the same. The State's originally proposed plan is described in the inverse  
 condemnation complaint filed by these Appellants and others in Sandra M. Galvis, et al v. State of  
Washington Department of Transportation, Pierce County Superior Court No. 04 2 08841 5).

1 **RCW 47.52.080 Abutter's right of access protected – Compensation.**  
 2 No existing public highway, road, or street shall be constructed as a  
 3 limited access facility except upon the waiver, purchase, or condemnation  
 4 of the abutting owner's right of access thereto as herein provided. In  
 5 cases involving existing highways, if the abutting property is used  
 6 for business at the time the notice is given as provided in RCW  
 7 47.52.133, the owner of such property shall be entitled to  
 8 compensation for the loss of adequate ingress to or egress from  
 9 such property as business property in its existing condition at the  
 10 time of the notice provided in RCW 47.52.133 as for the taking or  
 11 damaging of property for public use.

12 [1983 c 3 § 127; 1961 c 13 § 47.52.080. Prior: 1955 c 54 § 2; 1951 c 167 § 11; 1947 c  
 13 202 § 7; Rem. Supp. 1947 § 6402-66.]

14 (Emphasis added.)

15 As will be shown in the next section of this Brief, the only method available for  
 16 the State to acquire access rights from these Appellants is to either purchase or  
 17 condemn those access rights under Chapter 47.52. WSDOT cannot restrict access  
 18 to the subject property from SR 7 because WSDOT cannot provide "reasonable  
 19 access" to "another road which abuts the property". RCW 47.50.010(3) (b).

20 **C. WSDOT Does Not Have Authority to Restrict Access Between SR 7 and**  
 21 **the Subject Property under RCW 47.50.010 (3) (b), Because No Other Road Abuts**  
 22 **and Provides Reasonable Access To the Subject Property.**

23 WSDOT does not have statutory authority to restrict access between SR 7  
 24 and the subject properties (Galvis-Moncada and Masewicz) under Chapter 47.50  
 25 RCW because the State cannot provide reasonable access to another road which  
 26 abuts the properties.

27 RCW 47.50.010 provides in pertinent part:

28 ...

(3) It is the policy of the legislature that:

(a) The access rights of an owner of property abutting the state  
 highway system are subordinate to the public's right and interest in a safe  
 and efficient highway system; and

(b) Every owner of property which abuts a state highway has a  
right to reasonable access to that highway, unless such access has  
been acquired pursuant to chapter 47.52 RCW, but may not have the  
right of a particular means of access. The right of access to the state

1 highway may be restricted if, pursuant to local regulation, reasonable  
 2 access can be provided to another public road which abuts the  
 3 property.

4 (4) The legislature declares that it is the purpose of this chapter to  
 5 provide a coordinated planning process for the permitting of access points  
 6 on the state highway system to effectuate the findings and policies under  
 7 this section.

8 (5) Nothing in this chapter shall affect the right to full  
 9 compensation under section 16, Article I of the state Constitution.

10 (Emphasis added)

11 Read together, RCW 47.50.010 (3)(b) and RCW 47.50.010(5) compel the  
 12 conclusion that where reasonable access cannot be provided to the subject  
 13 property from another road that abuts the subject property, the only way that  
 14 WSDOT can restrict access to the subject property is to purchase or condemn  
 15 the Petitioner's access rights under Chapter 47.52 RCW.

16 WAC 468-51-030 (1), the State (WSDOT) regulation in support of RCW  
 17 47.50.010(3)(b) also prohibits the restriction of an abutting property owner's access to a  
 18 state highway where reasonable access cannot be provided to another public road  
 19 which abuts the property. WAC 468-51-030 provides:

20 **WAC 468-51-030 General provisions.**

21 (1) When connection permits required. Every owner of property  
 22 which abuts a state highway, or has a legal easement to the state  
 23 highway, where limited access rights have not been acquired has a  
 24 right to reasonable access, but may not have the right to a particular  
 25 means of access, to the state highway system. The right of access to  
 26 the state highway may be restricted if, in compliance with local  
 27 regulation, reasonable access to the state highway can be provided  
 28 by way of another public road which abuts the property. These public  
 roads shall be of sufficient width and strength to reasonably handle the  
 traffic type and volumes that would be accessing that road. All new  
 connections including alterations and improvements to existing  
 connections to state highways shall require a connection permit. Such  
 permits, if allowed, shall be issued only after written development approval  
 where such approval is required, unless other interagency coordination  
 procedures are in effect. However, the department can provide a letter of  
 intent to issue a connection permit if that is a requirement of the agency  
 that is responsible for development approval. The alteration or closure of

1 any existing access connection caused by changes to the character,  
 2 intensity of development, or use of the property served by the connection  
 3 or the construction of any new access connection shall not begin before a  
 4 connection permit is obtained from the department. Use of a new  
 5 connection at the location specified in the permit is not authorized until the  
 6 permit holder constructs or modifies the connection in accordance with the  
 7 permit requirements. If a property owner or permit holder who has a valid  
 8 connection permit wishes to change the character, use, or intensity of the  
 9 property or development served by the connection, the department must  
 10 be contacted to determine whether a new connection permit would be  
 11 required.

12 (Emphasis added).

13 Under both RCW 47.50.010(3) (b) and WAC 468-51-030(1) an abutting owner's  
 14 right of access to the State highway may be restricted only if reasonable access can  
 15 be provided to another public road which abuts the property. The converse is also  
 16 true. The abutting owner's access *cannot* be restricted where reasonable access  
 17 cannot be provided to another public road unless that abutter's access rights are  
 18 purchased or condemned under Chapter 47.52 RCW.

19 This language of RCW 47.50.010(3) (b) is not ambiguous and subject to  
 20 interpretation. The clear and unequivocal meaning of the quoted section is that unless  
 21 "reasonable access" can be provided to another public road that abuts the property, the  
 22 Department has no authority to restrict access to the state highway. That is precisely  
 23 the case before this court. The importance of this statutory safeguard is underscored by  
 24 WSDOT's Administrative Ruling affirming the decision of the Administrative Law Judge  
 25 that ignored these provisions to the detriment of the Appellants.

26 **D. The WSDOT is Improperly Attempting to Convert SR 7, a Local Access**  
 27 **Highway Into a De Facto Limited Access Facility Under the Cloak of RCW 47.50,**  
 28 **the "Controlled Access" Statute.**

29 The five mile highway section of SR 7 between SR 507 and SR 512 that the  
 30 State has proposed as a "controlled access" highway contains more severe access  
 31 restrictions than a "modified access control" limited access highway under chapter  
 32 47.52 RCW. The WSDOT is "backdooring" the conversion of SR 7 into a low grade  
 33 freeway because it seeks to save money in its budget by stealing the access rights of

1 abutting property owners through the regulatory process. WSDOT's attempt is improper  
 2 on three counts. First, there is no authority in Chapter 47.50 for the state to use  
 3 that statute to make project level changes to convert a non-limited access facility  
 4 into a "de facto Limited Access facility. Chapter 47.50 is essentially a road  
 5 approach statute. This is made clear by RCW 47.50.010(4) which provides:

6 (4) The legislature declares that it is the purpose of this chapter to  
 7 provide a coordinated planning process for the permitting of access points  
 8 on the state highway system to effectuate the findings and policies under  
 this section.

9 The proper function of the chapter 47.50 RCW, the Controlled Access statute, is  
 10 to provide a land use mechanism to adjust the access rights of a development when the  
 11 highest and best use of the land is expanded or otherwise changed. Chapter 47.50  
 12 RCW is not intended or designed to handle the conversion of a 5-mile section of an  
 13 existing highway on a project level basis. Secondly, the attempt to make an  
 14 unauthorized conversion from non-access controlled to de facto limited access  
 15 circumvents Chapter 47.52 RCW, the Limited Access statute, and the due process  
 16 and equal protection safeguards the Limited Access statute provides to abutting  
 17 property owners. Thirdly, WSDOT is attempting to circumvent its constitutional  
 18 obligation to pay Just Compensation for the abutting owner's access rights to SR  
 19 7. The case law under the constitutional provision regarding Just compensation for  
 20 property rights taken from abutting property owners is well-established in Washington.  
 21 Where a property owner's access rights are substantially impaired, the government has  
 22 an obligation to compensate the owner for the diminution in the value of their property.

23  
 24 **E. The Appellants Established at the Administrative Hearing Through**  
 25 **Mr. Greer's Expert Testimony That the Access Plan Devised by WSDOT for**  
 26 **Petitioner's Property is Not Suitable For Retail Commercial Purposes.**  
 27 **Appellants Further Established That the State's Proposed Plan Will Change the**  
 28 **Highest and Best Use of the Subject Property, Destroying the Value of**  
**Appellants' Building and Constructively Evicting their Business.**

BRIEF OF APPELLANTS GALVIS AND  
 MONCADA— 6

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1 In the Administrative Hearing on the Galvis/Moncada property, the State did not  
 2 present any testimony concerning the valuation of the subject property. WSDOT  
 3 ignored the value of the Petitioner's property for retail commercial purposes on both a  
 4 before-situation and an after-situation basis. Why? Because they knew the answer  
 5 would be unfavorable to their position. Retail businesses need customers. Customers  
 6 travel to Petitioner's business by car. Eliminating 4 of 6 existing parking spaces from a  
 7 2400 square foot retail business<sup>2</sup> has a devastating impact on the value of the property.  
 8 The proposed WSDOT solution, providing 2 marked parallel parking spaces on  
 9 Petitioner's property in front of Petitioner's building to be shared with 3 other spaces by  
 10 5 additional businesses in the abutting building to the south simply won't work. In this  
 11 situation, the State has a duty to either solve the problem (which it did not) or pay  
 12 damages for the diminution in the value of the property occasioned by the taking of  
 13 Petitioner's access rights as Washington's constitution requires. Forcing the Appellants  
 14 out of business by suddenly disallowing parking partly on State Right of Way (after over  
 15 50 years of permitting it) is not an acceptable solution. The Washington Supreme Court  
 16 in Keiffer v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977) required compensation  
 17 for a taking and/or damaging of access rights in a virtually identical factual situation to  
 18 that presented here.

19 The only expert testimony on the record regarding the suitability of the access for  
 20 commercial purposes was that of Ed Greer, the MAI real estate appraiser called by the  
 21 Appellants.<sup>3</sup> Mr. Greer indicated that the taking of the access rights from the subject  
 22 property would render the building on the Galvis-Moncada property worthless under the  
 23 State's plan where no access remains (Exhibit 2) (300000108); and under Exhibits 40-

24  
 25  
 26 <sup>2</sup> Mr. Greer testified that for retail enterprises the current Pierce County Code Section 18A.35.040 (J) (19)  
 27 requires one parking space for every 200 square feet of floor area for a retail store. (RP 300000105)  
 Under this regulation Le Popular Cash & Carry Mexican Grocery should have a total of 12 parking  
 spaces.

28 <sup>3</sup> Mr. Greer's testimony is found at (RP 300000101-121).

1 42, where only two parking spaces would remain. (30000108-09). Mr. Greer indicated  
 2 that his preliminary opinion of the value of the Galvis property as improved in the before  
 3 situation is \$140,000; but that in the after situation, the building is a negative asset,  
 4 because it would cost approximately \$25,000 to tear it down. Accordingly, Mr. Greer  
 5 estimated the value of the real property in the after situation to be approximately  
 6 \$70,000, less the \$25,000 to \$30,000 demolition cost or \$45,000. The difference  
 7 between the before and after values is \$95,000. (\$100,000 if the cost of demolition is  
 8 \$30,000.) Mr. Greer indicated that the value of the subject building would go from  
 9 positive to negative, and because of the steeply sloping topography of the site, there is  
 10 not sufficient depth for development under today's standards without substantial fill and  
 11 retainage. (RP 300000109-110).

12 **F. WSDOT Argued, and the Hearing Examiner and the Agency Found**  
 13 **That The Elimination of Petitioner's Access Rights Was Necessary For Safety**  
 14 **Reasons, Thereby Enabling WSDOT to Avoid the Payment of Just Compensation.**  
 15 **This was Error. WSDOT'S Proof Does Not Support the Stated Conclusion.**

16 **(1) There Was Only One Non-Injury Accident In Front of the Subject**  
 17 **Property in the 10 Years Covered by The State's Accident Study.**

18 **(2) Regulatory Actions Taken Under the Police Power Can Effectuate**  
 19 **Eminent Domain Takings Which Require That Just Compensation Be Paid.**

20 WSDOT went to the Administrative Hearing with a One-Track Agenda. It was  
 21 trying to sell a police power regulatory action to eliminate the need to pay just  
 22 compensation for its Eminent Domain taking or damaging of the Petitioner's access  
 23 rights. While it is true that the overall 5-mile segment of SR 7 has a high accident rate,  
 24 that high accident rate is not present in the southbound lanes of SR 7 in the immediate  
 25 vicinity of the subject property, where WSDOT's accident records show that there was  
 26 only one accident (a non-injury accident) in front of the subject property during  
 27 the past 10 years. See WSDOT Exhibit 18.<sup>4</sup> When you consider that the subject

28 <sup>4</sup> See also, Exhibit 8 (RP 300000660) showing that 1<sup>st</sup> 6-injury accident involving 4 cars occurred in  
 northbound lanes (subject property abuts southbound lanes). These facts are confirmed by a stipulation  
 BRIEF OF APPELLANTS GALVIS AND FAUBION, JOHNSON & REEDER, P.S.  
 MONCADA— 8 5920 100<sup>th</sup> STREET SW, SUITE 25  
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1 property had the same unrestricted access and the same head-in angle parking that  
 2 the State claims is so dangerous for over 50 years, the WSDOT's claims that "this is a  
 3 safety improvement project," as applied to the subject property are arbitrary and  
 4 capricious. There has been no change in the highest and best use of the subject  
 5 property that would justify an access change. It is also extremely unlikely that either of  
 6 the state's proposed plans for the subject property would reduce the occurrence of  
 7 accidents in front of the subject property during the next ten years to less than one.

8 The notion argued by the WSDOT is that the enactment of a "regulatory  
 9 measure", an exercise of the police power, cannot be a taking of property. This  
 10 argument is just plain wrong.

11 Professor William B. Stoebuck has unequivocally rejected the argument that an  
 12 exercise of the police power cannot be a taking of property by stating that:

13 "This doctrine is unjustified both theoretically and as a practical tool  
 14 for dispute settlement. It sets up a false dichotomy between the police  
 15 and eminent-domain powers. The doctrine is invoked, not only in a few of  
 16 the access-denial cases that we presently discuss, but also, and  
 17 sometimes more frequently, in other classes of cases which will be  
 18 considered later, such as those involving traffic regulations. And the  
 19 dichotomy is often advanced in varying degrees of warmth by legal  
 20 writers. (Footnote in original omitted) So the objection is not that the  
 21 police-power doctrine lacks support, but simply that it is wrong.

22 Implicit in the police-power – eminent-domain dichotomy seems to  
 23 be the notion that the two powers are mutually exclusive – that if the police  
 24 power is exercised, there can be no taking and so no exercise of the  
 25 eminent-domain power. That is the basic mistake. To the extent that  
 26 there is utility in categorizing powers of government, we have to say the  
 27 eminent-domain power is one way among many by which government  
 28 may achieve whatever objects it is permitted to achieve. Eminent domain  
 subsists alongside the other powers and usually, if not always, is  
 conjoined with one or more of the others in the achieving. None of the  
 powers are ends but are only means to ends. (Footnote omitted) Thus  
 there is no inconsistency in two or more of them being used to accomplish

by the State on the record at RP 30000070-71. There are no other accidents shown on Exhibit 8 at MP 52.28.

BRIEF OF APPELLANTS GALVIS AND  
 MONCADA— 9

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1       some purpose. Why can we not say to a governmental agency, "Yes, you  
 2       certainly may exercise your police power, your road-building power, or  
 3       what have you, but if in doing so you effect a taking of property, why then,  
 4       you have also exercised your power of eminent domain, and your must  
 5       pay compensation."? We do not thereby destroy the police power or the  
 6       power of eminent domain; we only invoke the constitutional corollary of  
 7       compensation."

8       William B. Stoebuck, Nontrespassory Takings in Eminent Domain, Michie Company,  
 9       1977, pages 30-31. (Emphasis added).

10       The instant case is a prime example of a situation where the police power and  
 11       the power of eminent domain have both been invoked to accomplish a public  
 12       improvement. Appellants do not question the State's power to acquire all or a portion of  
 13       the Petitioner's access rights, so long as just compensation is paid. However, it is clear  
 14       that RCW 47.50.010 (3)(b) and RCW 47.50.010(5) compel the conclusion that where  
 15       reasonable access cannot be provided to the subject property from another road that  
 16       abuts the subject property, the only way that WSDOT can restrict access to the subject  
 17       property is to purchase or condemn the Petitioner's access rights under Chapter 47.52  
 18       RCW.

19       There is no argument by the State that there is another road that abuts the  
 20       subject property that could be utilized to provide reasonable access to the retail  
 21       commercial building.

22       There is no argument that the head-in angle parking has been in existence  
 23       for over 50 years, which parking has been partially upon state right of way. Mr.  
 24       Salmon said as much in his opening statement. (RP 300000216). The battle about the  
 25       head-in angle parking centers around the State's claim that said parking is illegal under  
 26       RCW 47.32.120<sup>5</sup> (which Appellants strongly contest) and the Appellant's claims that (1)

27       <sup>5</sup> RCW 47.32.120 Business places along highway.

28       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

1 The existing head-in angle parking in front of the subject property is consistent with  
 2 parking allowed under RCW 46.61.570(2),<sup>6</sup> because there are not now, nor have there

3  
 4 patrons to use the right of way or any portion thereof of any state highway by occupying it while a patron  
 5 is a public nuisance, and the department may fence the right of way of the state highway to prevent such  
 6 unauthorized use thereof.

[1984 c 7 § 183; 1961 c 13 § 47.32.120. Prior: 1937 c 53 § 79; RRS § 6400-79.]

NOTES: Severability – 1984 c 7: See note following RCW 47.01.141.

<sup>6</sup> RCW 46.61.570. Stopping, standing, or parking prohibited in specified places— Reserving  
 7 portion of highway prohibited

8 (1) Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions  
 9 of a police officer or official traffic control device, no person shall:

10 (a) Stop, stand, or park a vehicle:

11 (i) On the roadway side of any vehicle stopped or parked at the edge or curb of a street;

12 (ii) On a sidewalk or street planting strip;

13 (iii) Within an intersection;

14 (iv) On a crosswalk;

15 (v) Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately  
 16 opposite the ends of a safety zone, unless official signs or markings indicate a different no-parking area  
 17 opposite the ends of a safety zone;

18 (vi) Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would  
 19 obstruct traffic;

20 (vii) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;

21 (viii) On any railroad tracks;

22 (ix) In the area between roadways of a divided highway including crossovers; or

23 (x) At any place where official signs prohibit stopping.

24 (b) Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a  
 25 passenger or passengers:

26 (i) In front of a public or private driveway or within five feet of the end of the curb radius leading thereto;

27 (ii) Within fifteen feet of a fire hydrant;

28 (iii) Within twenty feet of a crosswalk;

29 (iv) Within thirty feet upon the approach to any flashing signal, stop sign, yield sign, or traffic control signal  
 30 located at the side of a roadway;

31 (v) Within twenty feet of the driveway entrance to any fire station and on the side of a street opposite the  
 32 entrance to any fire station within seventy-five feet of said entrance when properly signposted; or

33 (vi) At any place where official signs prohibit standing.

34 (c) Park a vehicle, whether occupied or not, except temporarily for the purpose of and while actually  
 35 engaged in loading or unloading property or passengers:

36 (i) Within fifty feet of the nearest rail of a railroad crossing; or

37 (ii) At any place where official signs prohibit parking.

38 (2) Parking or standing shall be permitted in the manner provided by law at all other places except a time  
 39 limit may be imposed or parking restricted at other places but such limitation and restriction shall be by  
 40 city ordinance or county resolution or order of the secretary of transportation upon highways under their  
 41 respective jurisdictions.

42 (3) No person shall move a vehicle not lawfully under his or her control into any such prohibited area or  
 43 away from a curb such a distance as is unlawful.

44 (4) It shall be unlawful for any person to reserve or attempt to reserve any portion of a highway for the purpose of  
 45 stopping, standing, or parking to the exclusion of any other like person, nor shall any person be granted such right.

BRIEF OF APPELLANTS GALVIS AND  
 MONCADA— 11

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1 ever been signs posted in the SR 7 Right of Way prohibiting the parking beyond the fog  
 2 line in the vicinity of the subject property; RCW 35A.46.010,<sup>7</sup> and RCW 46.61.575.<sup>8</sup> (2)  
 3 That WSDOT has never made any effort to enforce RCW 47.32.110, the highway  
 4 obstruction statute, against the subject property or in any reported case; and (3) That  
 5 WSDOT is estopped from claiming that parking by Appellants and their customers  
 6 partially on a portion of the State's SR 7 right of way that has not been needed or used  
 7 for highway purposes since it was acquired in 1928 is illegal.

8 Regarding equitable estoppel, although there are no cases on point in  
 9 Washington, there is a New Jersey case<sup>9</sup> that involved an access management statute  
 10 that held that the state was equitably estopped from denying that the owner of property  
 11 abutting a state highway had a grandfathered right to utilize the right of way in front of  
 12 his property for maneuvering vehicles to facilitate their parking just off the state highway  
 13 right of way. The court stated, in pertinent part:

14 We reiterate what we observed earlier. The taking itself effected the loss  
 15 of the fifteen parking spaces here. The "lot access and use" were

17 <sup>7</sup> See also, RCW 35A.46.010 State law applicable

18 The provisions of Title 46 of the Revised Code of Washington relating to regulation of motor vehicles shall  
 19 be applicable to code cities, its officers and employees to the same extent as such provisions grant  
 20 powers and impose duties upon cities of any class, their officers and agents, including without limitation  
 the following: (1) Authority to provide for angle parking on certain city streets designated as forming a  
route of a primary state highway as authorized in RCW 46.61.575; . . . .

21 <sup>8</sup> RCW 46.61.575. Additional parking regulations, which provides, in pertinent part:

22 (3) Local authorities may by ordinance or resolution permit angle parking on any roadway, except that  
 23 angle parking shall not be permitted on any federal-aid or state highway unless the secretary of  
transportation has determined by order that the roadway is of sufficient width to permit angle parking  
without interfering with the free movement of traffic.

24 SR 7 in the vicinity of the subject property is a 5-lane state highway with a 100 foot wide right of way  
 25 width that is paved across its full width. Assuming that the lanes have a maximum width of 12 feet each,  
 26 the traveled lanes take up no more than 60 feet of the 100 foot right of way leaving 40 feet (20 feet on  
 27 each side of the roadway) that are unused for highway purposes. This excess highway right of way has  
 traditionally been utilized by customers of the many highway oriented businesses for maneuvering and  
 parking.

28 <sup>9</sup> City of Linden v. Benedict Motel Corp. 370 N.J. Super. 372, 851 A.2d 652 (Feb. 11, 2004). The

1 grandfathered under N.J.A.C. 16:47-1.1 as they existed on July 1, 1976.  
 2 A plain reading of this regulation allows continuation not only of the access  
 3 to the lot, but the use of the lot. Judge Beglin properly found that the  
 4 parking spaces were grandfathered under the Access Code.

5 \*393 [7] [8] The City next<sup>10</sup> argues that equitable estoppel does not apply,  
 6 as the City never approved the parking spaces and therefore, defendants  
 7 had nothing upon which they could, in good faith, rely; the City could not  
 8 have approved the parking spaces as they constituted an unlawful use,  
 9 precluding the application of equitable estoppel; and that defendants failed  
 10 to satisfy the elements of equitable estoppel. We reject these arguments.

11 [9] [10] [11] Though sparingly applied against municipalities,  
 12 "[e]quitable estoppel may be invoked against a municipality 'where  
 13 interests of justice, morality and common fairness clearly dictate that  
 14 course.'" *Middletown Township Policemen's Benevolent Ass'n. v.*  
 15 *Township of Middletown*, 162 N.J. 361, 367, 744 A.2d 649, 652 (2000)  
 16 (citing *Gruber v. Mayor of Raritan*, 39 N.J. 1, 13, 186 A.2d 489, 495  
 17 (1962)). See also *Hill v. Bd. of Adjustment*, 122 N.J. Super. 156, 162, 299  
 18 A.2d 737, 740 (App.Div.1972); *Township of Fairfield v. Likanchuk's, Inc.*,  
 19 274 N.J. Super. 320, 331, 644 A.2d 120, 125-26 (App.Div.1994). When a  
 20 municipal corporation "irregularly," but in good faith, uses a legislatively  
 21 granted power, the conduct is ultra vires in the secondary sense, see  
 22 *Middletown Township Policemen's Benevolent Ass'n.*, supra, 162 N.J. at  
 23 368, 744 A.2d at 652, and equitable estoppel may apply where a party in  
 24 good faith properly relied upon such authority. See *Hill*, supra, 122  
 25 N.J. Super. at 162, 299 A.2d at 740 (citing *Summer Cottagers' Ass'n of*  
 26 *Cape May v. City of Cape May*, 19 N.J. 493, 117 A.2d 585 (1955)). "The  
 27 essential principle of the policy of estoppel ... is that one may, by voluntary  
 28 conduct, be precluded from taking a course of action that would work  
 29 injustice and wrong to one who with good reason and in good faith has  
 30 relied upon such conduct." *Summer Cottagers' Ass'n*, supra, 19 N.J. at  
 31 503-504, 117 A.2d at 590; see also *Fraternal Order of Police v. Bd. of*  
 32 *Trs.*, 340 N.J. Super. 473, 484, 774 A.2d 680, 687-88 (App.Div.2001).

33 [12] Estoppel may apply even when a permit is not validly issued.  
 34 See *Hill*, supra, 122 N.J. Super. at 163, 299 A.2d at 740-41. In *Hill*, we  
 35 applied estoppel, where "a building inspector, in good faith, but with  
 36 mistaken judgment, issue[d] a permit in violation of a zoning ordinance,"

37 <sup>10</sup> We decline to consider the City's independent argument that the City had no authority to grant approval  
 38 for use of the parking spaces requiring use of the State's right of way. The argument was not raised  
 39 below and we will not consider it on appeal. R. 1:7-2; R. 2:10-2; *Nieder v. Royal Indemnity Ins. Co.*, 62  
 40 N.J. 229, 234, 300 A.2d 142, 145 (1973).

1 upon which defendants relied in good faith. *Id.* at 160, 165, 299 A.2d at  
2 739.

3 **[13] Here, Judge Beglin found as a matter of law that the City**  
4 **approved the 15 parking spaces when it approved the motel**  
5 **expansion.** The City again complains that no such approval could have  
6 been given, *see fn. 3, supra*, at 393, 851 A.2d at 664, and any approval  
7 would have been void, as use of the parking spaces requires use of the  
8 State-owned right-of-way. An act that is "ultra vires in the primary sense"  
9 is conduct "utterly beyond the jurisdiction of a municipal corporation." "  
10 *Middletown Township Policemen's Benevolent Ass'n., supra*, 162 N.J. at  
11 368, 744 A.2d at 652 (citing *Summer Cottagers' Ass'n., supra*, 19 N.J. at  
12 504, 117 A.2d at 590). Such an act is void, precluding \*\*665 the  
13 application of estoppel. *Ibid.* This is the focal point of the City's argument.

14 **We view the City's position as a means of avoiding payment of just**  
15 **compensation for the taking. Cf. Riggs v. Township of Long Beach, 109**  
16 **N.J. 601, 538 A.2d 808 (1988) (finding the Township's effort to justify the**  
17 **zoning ordinance by "link[ing] the reduction of lots to the designation of**  
18 **open space in the master plan [a]s nothing more than a red herring to**  
19 **divert attention from the true purpose of the ordinance," mainly, "to acquire**  
20 **the property for open space without paying a fair price"). The fifteen**  
21 **disputed spaces fronted defendants' property on a major highway for**  
22 **approximately thirty years, without any action by the City. The City**  
23 **was equitably estopped from arguing that no approval was given for**  
24 **these parking spaces.**

25 In the Galvis-Moncada case, customers of Appellant's business and their  
26 predecessor's businesses utilized the 8-9 foot strip owned by Appellants in front of their  
27 business for head-in angle parking together with a portion of the State right of way that  
28 was not being used for highway purposes. This occurred for well over 50 years. No  
signs were posted prohibiting angle parking partially on State right of way; no tickets  
were issued to customers or owners of the business; and Appellants had no notice of  
either the pendency of the state's project or the extent of the State right of way. Like  
those before them, Appellants continue to utilize the angle parking spaces to this date,  
as those spaces have been utilized for the past 55 years. As in *Benedict Motel,*  
*supra*, where the City was held to be estopped from claiming Plaintiff's parking spaces  
were illegal, here, WSDOT must be estopped from claiming that Appellant's parking

spaces are illegal. As in *Benedict Motel, supra*, WSDOT's position alleging illegal parking partially on State right of way is simply a means to avoid payment of just compensation for the taking of access from Appellants.

## II. COUNTERSTATEMENT OF FACTS

Appellants Sandra Galvis and her son, Alexander Moncada are Spanish speaking immigrants from South America. Mr. Moncada immigrated to the United States from Venezuela in 1993 (RP 300000091). Ms. Galvis, who was born in Columbia, spent 23 years in Venezuela, and immigrated to the United States in 1995. (RP 300000074). Ms. Galvis worked 9 years in a Latin American store on Pacific Avenue, which laid her off because business was slow and the owners wanted to sell the property. (Id.)

After Ms. Galvis was laid off, she and her son Alex Moncada utilized their savings and borrowed \$80,000 to purchase an *existing business property* at 11214-16 Pacific Avenue South, Tacoma, Washington 98847 *that abuts SR 7* (RP 300000073 and 300000075-76). They paid \$115,000 for the property on April 1, 2002 (RP 300000091), and spent close to \$40,000 (and many hours of labor) to remodel the building (RP 300000091). When Ms. Galvis purchased the property to establish the

They opened the *Le Popular Cash & Carry Mexican Grocery*, a new Latin American specialty store, to provide Ms. Galvis with a livelihood. (RP 300000095). The location of the business is dependent upon customers arriving by automobile. (RP 300000093). The property has 6 marked head-in angle parking stalls in front of the store building. (RP 300000093). The Appellants did not know that portions of those parking stalls encroached upon state highway right of way when they purchased the property. (RP 300000093). They purchased the property understanding that they could utilize the area in front of their building for business parking purposes, just as it had been used by prior owners for the last 54 years. (RP 300000094) Since

1 purchasing the property, Ms. Galvis has worked at *Le Popular* for twelve hours a day,  
2 seven days a week. (RP 300000073).

3 Since Ms. Galvis found out the State intended to limit access to the Galvis  
4 property and eliminate all but two parking stalls for her business she has worried  
5 constantly about losing every thing that she had saved and put into the business,  
6 including her home, which she has mortgaged to establish the business and her car,  
7 which is also pledged as collateral. Ms. Galvis is on anti-depressants because of these  
8 worries. (RP 300000082)

9 On September 23, 2003 the Washington State Department of Transportation  
10 (WSDOT) served notice on the Appellants, Sandra Galvis and Alexander Moncada, that  
11 WSDOT's proposed "safety improvement project" on SR 7 required WSDOT to change  
12 direct vehicular access to SR 7 from their property. Exhibit 3.<sup>11</sup> (RP 300000549)  
13 Although a "change" in "direct vehicular access" sounds innocuous; the Department's  
14 proposed plan proposed to eliminate all direct access to, from and between SR 7 and  
15 the abutting business property without first ascertaining and paying just compensation,  
16 in violation of Article 1, Section 16 (Amendment 9)<sup>12</sup> of the Washington State  
17 Constitution.

18 Exhibit 2, (RP 300000548) the WSDOT plan, proposed to leave both the "Le  
19 Popular Cash and Carry Mexican & Latin Products" and the neighboring Masewicz  
20

21 <sup>11</sup> All references to Exhibits refer to the June 10-11, 2004 Administrative Hearing Exhibits, unless otherwise  
22 stated.

23 <sup>12</sup> **ARTICLE 1, SECTION 16 EMINENT DOMAIN.** Private property shall not be taken for private  
24 use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands  
25 of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or  
26 damaged for public or private use without just compensation having been first made, or paid into  
27 court for the owner, and no right-of-way shall be appropriated to the use of any corporation other  
28 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. [AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

1 property to the south without any physical vehicular access to SR 7, and without any  
2 on-site parking for its customers.

3 Implementing the plan shown on Exhibit 2 would require the state's  
4 contractor to remove a 16-foot wide strip of flat asphalt paving that has been used  
5 (with an 8.5-foot wide asphalt strip owned by Appellants) for angle parking since  
6 Petitioner's building was constructed in the early 1950's. The 16 foot strip of asphalt  
7 would be replaced by a 10-foot wide grass lined ditch and 6-foot wide sidewalk that  
8 would extend the full length of the Galvis-Moncada and Masewicz property. The new  
9 ditch and sidewalk would physically block vehicular access to the Galvis-Moncada and  
10 Masewicz retail commercial buildings that abut SR 7.

11 The proposed 6-foot sidewalk and 10-foot grass lined ditch depicted on  
12 Exhibit 2 are far more damaging to petitioner's abutting business property than the six-  
13 inch concrete curb found to cause a compensable taking of the property owners  
14 access rights in McMoran v. State, 55 Wn.2d 37, 345 P.2d 598 (1959). In the  
15 McMoran case, the Washington State Supreme Court held that the States' installation  
16 of the curbing constituted a compensable taking and/or damaging of the abutting  
17 property owner's access rights. The ruling of the McMoran case is applicable to current  
18 actions of the Department. If the SR 7 Highway Plan shown in Exhibit 2 was  
19 implemented, these Appellants would clearly be entitled to Just Compensation for the  
20 taking of its access rights and the damage to its established business on an existing  
21 highway under RCW 47.52.080 and under McMoran v. State, supra.

22 The economic effect of WSDOT's Exhibit 2 highway plan, which eliminated all  
23 access to from and between SR 7 and the subject property, including all 6 angle-parking  
24 stalls located in front of the Le Popular Mexican-Latino Product store, was devastating.  
25 Taking all access and all parking from a small existing storefront business abutting SR 7  
26 would destroy both petitioner's business and the value of petitioner's real property.

1 Mr. Edward O. Greer, a MAI real estate appraiser called by the Appellants was  
2 the only expert valuation witness called by the parties. He was the only expert witness  
3 qualified to express an opinion with regard to whether or not the ingress and egress to,  
4 from, and between SR 7 and the Galvis-Moncada property was "adequate for  
5 business property." That is the standard under the McMoran case and RCW  
6 47.52.080 quoted above. Mr. Greer testified about the highway plan shown on Exhibit  
7 2, which eliminated all access and all six parking stalls; and the highway plan shown  
8 on Exhibits 40-42, which eliminated four of the existing six angle parking stalls. Mr.  
9 Greer concluded in both instances that the Galvis-Moncada property was severely  
10 damaged if either plan were implemented. Mr. Greer indicated that if either the  
11 Exhibit 2 or the Exhibit 40 plans were implemented, the highest and best use of the  
12 retail commercial building on the property would be changed from a viable business  
13 building to a misplaced improvement. Under either plan, the building will no longer be  
14 usable by its owners for business purposes because the property does not have  
15 adequate ingress and egress to SR 7 for business purposes. It would not have any  
16 parking under the Exhibit 2 plan, and it would not have adequate parking under the  
17 Exhibit 40 plan.

18 Mr. Greer testified that under the Pierce County Code, one (1) parking space is  
19 required for every 200 feet of retail floor area. The Galvis building contains 2352 square  
20 feet of retail space. Exhibit J. Mr. Greer testified that if the Galvis-Moncada building  
21 were built today, it would require 12 parking spaces under the Pierce County Code  
22 instead of the 6 parking spaces that it was currently using.

23 Mr. Greer concluded that if either the Exhibit 2 plan or the Exhibit 40 plan were  
24 implemented, the Galvis-Moncada building would have to be torn down to redevelop the  
25 land, and that redevelopment would be extremely costly and difficult because of the  
26 severe slope of the property to the west. Similarly, Mr. Greer indicated that the state's  
27 proposed elimination of direct access to and from SR 7, would cause the value of the

1 property to be substantially diminished. As *Exhibit 40* shows, for the Galvis property  
 2 and the adjacent Masewicz property to the south, a total of five (5) parking stalls are  
 3 proposed for six businesses, to replace eighteen (18) existing parking spaces (six  
 4 parking spaces in front of the Galvis property and 12 parking spaces in front of the  
 5 Masewicz property).

6 If *Exhibit 40-42* is adopted by WSDOT, these property owners are clearly  
 7 entitled to payment of Just Compensation for the taking and/or damaging of their  
 8 property and/or property rights under the case of *Keiffer v. King County*, 89 Wn.2d  
 9 369, 572 P.2d 408 (1977). In a remarkably similar fact pattern, the Supreme Court held  
 10 the Keiffers were entitled to damages where King County widened a county road within  
 11 the county's existing right of way from 2 to 4 lanes; installed a concrete curb on the right  
 12 of way line (providing two curb cuts) and reduced the number of available parking stalls  
 13 from 18 to a possible 2 to 5 stalls. The seven member majority of the Washington  
 14 Supreme Court held that the taking of Keiffer's access rights was compensable,  
 15 notwithstanding a dissenting opinion signed by two justices which concluded that all that  
 16 the Keiffer's had lost was the ability to park cars partly in the County right-of-way.

17 At the Galvis administrative hearing, the State's counsel argued that the dissent  
 18 in *Keiffer v. King County* stated the correct position, but the majority opinion is still  
 19 binding precedent within the State of Washington that cannot be ignored by inferior  
 20 tribunals. The *McMoran* case and the *Keiffer* case were both ignored by the  
 21 Honorable Selwyn S.C. Walters, Administrative Law Judge, resulting in the entry of  
 22 an invalid initial decision. The WSDOT Reviewing Officer, State Design Engineer  
 23 Harold Peterfeso also ignored the *McMoran* and *Keiffer* cases, resulting in an  
 24 invalid Final Decision.

### 25 III. ASSIGNMENTS OF ERROR

#### 26 A. Assignments of Error to Findings of Fact

27 Appellants assign error to the following Findings of Fact:

28 BRIEF OF APPELLANTS GALVIS AND  
 MONCADA— 19

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**Finding of Fact No. 2:**

2. The Appellants purchased the improved property on April 1, 2002, and operate *Le Popular Cash & Carry Market*, a retail business specializing in *latinoamericano* products and services. The business continues to grow and has seen an increase in its customer base. Because of the steep grade of the westward slope of the parcel customers and suppliers can only enter the business from SR 7. Customers, suppliers, and salespeople arrive at the business in a variety of vehicles including pick-up trucks, vans, delivery trucks, and cars. Customers and suppliers arriving in their motor vehicles encroach on the shoulder or right-of-way of SR 7 to park their vehicles on the Appellants' property and the state's right-of-way.

Error is assigned to the last sentence of Finding of Fact No. 2. The sentence is misleading because the "shoulder" or right of way is at least 20 feet wide before you reach the 8 ½ feet owned by Appellants. There is a considerable amount of room (nearly 30 feet) to maneuver automobiles without encroaching onto the traveled lanes of SR 7, a fact that is documented by the occurrence of only one accident in the past 10 years on the southbound side of SR 7 in the vicinity of Appellant's property.

**Finding of Fact No. 3:**

3. The property is configured so that vehicles may enter and leave *La Popular* along the entire frontage with SR 7. The property has approximately 61.52 feet of SR 7 frontage. ~~Marked on the Appellants' property and the state's right-of-way are parking spaces for six vehicles.~~ Before the Department's proposed SR 7 safety project, Appellants use six spaces for parking vehicles; however, the vehicles, when parked, are located both on Appellants' property and on the state-owned highway right of way. The property has no curbs, driveways, or other structures to define the particular access point to *La Popular*. The property just merges into the shoulder of the roadway and then into SR 7. (Finding of Fact #3 as Amended by Peterfeso)

Finding of Fact No. 3 should state: Appellants have unrestricted access along their entire 61.52 foot SR 7 frontage. The State of Washington has not acquired any rights of access, light, view or air from Appellant's property. Appellants utilize six marked head-in angle parking stalls on their property that partially encroach on state

1 right of way. Those parking stalls have been in use for well over 50 years.  
 2 Appellants had no knowledge of the proposed WSDOT plan when they purchased  
 3 the property and remodeled it for use as a retail market carrying *Latino Americano*  
 4 products. The public hearings on the instant project were conducted long before  
 5 Appellants purchased their property. The project has been shelved for at least 12  
 6 years because the project did not have a high enough priority to receive funding.

7  
 8 **Finding of Fact No. 4:**

9       4. State Route 7 (also referred to as Pacific Avenue) is a class IV  
 10 state highway carrying vehicular traffic north-south between the  
 11 neighborhoods of Parkland and Spanaway, and the city of Tacoma. At the  
 12 time SR 7 was built the area was primarily rural. It is now urbanized. The  
 13 SR 7 roadway in front of the Appellants' property consists of two lanes of  
 14 traffic on either side of the centerline a two-way left turn lane in the center.  
 The pavement in front of the Appellants' property is flat and is 8.5 feet  
 15 from the state's right-of-way. The state acquired the 20 feet right-of-way in  
 16 1928. Storm water is handled in underground pipes. (Finding of Fact #4  
 as Amended by Peterfeso)

17       Finding of Fact No. 4 omits the very important fact that the overall width of the  
 18 SR 7 right of way is 100 feet. The significance of the width of the street is the amount of  
 19 excess right of way that is owned by the WSDOT that has not ever been utilized for  
 20 highway purposes. Assuming the roadway section is comprised of 5 12-foot lanes, only  
 21 60 of the paved 100 feet right of way is actually utilized for highway purposes, the  
 22 adjoining businesses utilize the remaining 40 feet of the state right of way for parking  
 23 and other purposes. The state's original plan proposed that the existing pavement be  
 24 ripped out and a 10 foot wide grass lined ditch and a six foot sidewalk be installed in its  
 place.

25 **Finding of Fact No. 7:**

26       7. On September 22, 2003 the Department sent a notice and a  
 27 draft design to Appellant, Sandra Galvis, and others, informing them of the  
 28 SR 7 Improvement Project and the action the Department intended to take  
 regarding access from their property to SR 7. The Department's letter

1 provides in relevant part as follows:

2 Our research for this project has determined that the  
3 business on your property currently uses the state right-of-  
4 way for parking. Our construction of the proposed  
5 sidewalks, drainage ditches and other improvements will  
6 require the utilization of the existing state right-of-way. After  
7 we construct the proposed improvements as shown on the  
8 enclosed plans, you will no longer be able to use the state  
9 right-of-way for parking. For your information state law, RCW  
10 47.32.120, generally prohibits the use of state highway right-  
11 of-way by business patrons or customers.

12 We have determined that it is not practicable or safe to  
13 provide direct vehicular access to State Route 7 from your  
14 property, because there would be no place vehicles leaving  
15 the highway to park. Should you make improvements or  
16 modifications to your property that would accommodate  
17 parking or otherwise enable safe vehicular access, your  
18 property may become eligible for a permit allowing a direct  
19 access to State Route 7.

20 Error is assigned to the last sentence of the second paragraph in Finding of Fact  
21 No 7, which is the erroneous legal conclusion that RCW 47.32.120, which has never  
22 been cited by an appellate court for the purpose it is cited in the letter, "generally  
23 prohibits the use of state highway right of way by business patrons or customers." The  
24 Rules of the Road statute, RCW 46.61.560 through .575 provide otherwise.  
25 Specifically, RCW 46.61.570(2) provides:

26 (2) Parking or standing shall be permitted in the manner provided by law  
27 at all other places except a time limit may be imposed or parking restricted  
28 at other places but such limitation and restriction shall be by city ordinance  
or county resolution or order of the secretary of transportation upon  
highways under their respective jurisdictions.

29 **Finding of Fact No. 15:**

30 15. Under the SR 7 improvement project the Department will  
31 install sidewalks, curbs, gutters, and concrete driveways. Regarding  
32 [Appellants] access, the Department abandoned its proposed action  
33 described in its September 22, 2003 letter, and shown on a draft design

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1 plan attached to the letter. The Department proposes access to the  
 2 subject property outlined in a design plan attached to this decision and  
 3 incorporated by reference as Attachment "A". Under this plan the  
 4 Department plans to install an 11.8 foot cement concrete driveway and 26  
 5 foot wide approach and a 6 foot cement concrete sidewalk in front of  
 6 Appellants' property. The Department will allow use of the state's right-of-  
 7 way to ingress and egress the property. ~~This configuration eliminates all~~  
 8 ~~but two spaces for vehicular parking at the business.~~ After the  
 9 Department's proposed safety project, Appellants will have two parking  
 10 spaces, where vehicles, when parked, will be located only on appellant's  
 11 property, and will not also require the use of or be located on state-owned  
 12 highway right of way. Exhibits 41 and 42 represent computer generated  
 13 turning templates offered by the Department to examine the impact of the  
 14 improvements upon the property. The project does not unreasonably limit  
 15 access by any vehicle using the Appellants' property. (Finding of Fact #15  
 16 as amended by Peterfeso)

17 Appellants challenge the last sentence of Finding of Fact No. 15, namely, the  
 18 erroneous legal conclusion that the project does not unreasonably limit access by any  
 19 vehicle using the Appellants' property. The Finding of Fact totally ignores the fact that  
 20 the property is no longer suitable for business purposes, and the fair market value of the  
 21 property is diminished by the approximate sum of \$95,000 to \$100,000 according to Mr.  
 22 Edward O. Greer, MAI, Appellant's real estate appraiser.

23 **Finding of Fact No. 17:**

24 17. Prior to the implementation of the Department's project  
 25 improvements there were no defined driveways, sidewalks, or structures  
 26 to limit vehicle access to certain points of entry or exit off the highway and  
 27 Appellants' property. Such undefined, full-frontage access pose a traffic  
 28 safety problem. Vehicle movement is unpredictable, and pedestrians are  
 more at risk. The Appellants' property will have reasonable vehicle  
 access after the implementation of the project's improvements. ~~Without a~~  
~~doubt, the Appellants will lose spaces they previously used for parking.~~  
Appellants will no longer be able to use state-owned highway right of way  
for business and tenant parking purposes. However, the Appellants' use of  
 the state's right-of-way for parking was not permitted or otherwise  
 authorized by the Department. (Finding of Fact #17 as Amended by  
 Peterfeso)

Finding of Fact No. 17 is challenged on the bases that (1) the accident history of

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1 the subject property specifically refutes the allegation that the lack of defined entrance  
 2 points to the subject property poses "a traffic safety problem." There was only one  
 3 accident in front of the subject property, (which is adjacent to the southbound lanes of  
 4 SR 7) in the last ten years, according to WSDOT accident records. One accident in 10  
 5 years is almost utopian in view of the accidents that occur on the balance of the project,  
 6 particularly at the county road intersections. A prime example is the intersection  
 7 between 112<sup>th</sup> and SR 7, which is a half block north of the subject property. (2) The  
 8 erroneous conclusion of law that the property will have reasonable access after  
 9 implementation of project improvements. As Mr. Greer testified, the building on the  
 10 subject property will be worthless if there are only 2 parking spaces available, and the  
 11 property will experience a diminution in value of \$95,000 to \$100,000.

12  
 13 **B. Assignments of Error to Conclusions of Law**

14 **Appellants assign error to the following conclusions of law:**

15 **Conclusion of Law No. 1:**

16 1. The undersigned has jurisdiction over the persons and  
 17 subject matter of this case pursuant to chapter 34.05 RCW (the  
 18 Administrative Procedure Act), and WAC 468-51-160.

19 Appellants maintain that exclusive jurisdiction over the persons and subject  
 20 matter of an alleged unconstitutional taking is vested in the Superior Court of  
 21 Washington under the Washington State Constitution, predicated upon cases cited  
 22 earlier in the original petition on file herein and the complaint in inverse condemnation  
 23 on file herein.

24 **Conclusion of Law No. 3**

25 3. The public policy of the state announced by the Legislature  
 26 at chapter 47.50 RCW (the Access Management law) provides the access  
 27 rights of an owner of property abutting the state highway system are  
 28 subordinate to the public's right and interest in a safe and efficient  
 highway system; and that every owner of property which abuts a state  
 highway has a right to reasonable access to that highway, unless such

1 access has been acquired pursuant to chapter 47.52 RCW, but may not  
2 have the right of a particular means of access. The right of access to the  
3 state highway may be restricted if, pursuant to local regulation, reasonable  
4 access can be provided to another public road which abuts the property.  
5 RCW 47.50.010(3). RCW 47.50.010(4) continues to emphasize that the  
6 purpose of the highway access management law is to provide a  
7 coordinated planning process for the permitting of access points on the  
8 state highway system to effectuate the findings and public policy  
9 announced by the Legislature. The Department issued rules to implement  
10 the provisions of chapter 47.50 RCW.

11 Appellants content that the following statutory provision is a limitation on the  
12 WSDOT's power to restrict the access to their retail commercial business:

13 The right of access to the state highway may be restricted if, pursuant to  
14 local regulation, reasonable access can be provided to another public road  
15 which abuts the property. RCW 47.50.010(3).

16 Appellants contend that the condition precedent of the statute, (i.e., the ability to  
17 provide reasonable access to another public road which abuts the property) cannot be  
18 satisfied because of the steep and rough topography westerly of SR 7. Accordingly,  
19 under the clear and unambiguous language of the statute, the State does not have the  
20 right to restrict Appellant's access to SR 7.

21 **Conclusion of Law No. 5**

22 5. The Department's rules related to the closure or alteration of  
23 existing access connections are set out at WAC 468-51-130 and provides:

24 Any unpermitted connections to the state highway  
25 system which were in existence and in active use consistent  
26 with the type of connection on July 1, 1990, shall not require  
27 the issuance of a permit and may continue to provide  
28 connection to the state highway system, unless the property  
owner had received written notification initiating connection  
closure from the department prior to July 1, 1990, or unless  
the department determines that the unpermitted connection  
does not meet minimum acceptable standards of highway  
safety and mobility based on accident and/or traffic data or  
accepted traffic engineering criteria, a copy of which must be  
provided to the property owner and/or permit holder and  
tenant upon written request. The department may require  
that a permit be obtained if a significant change occurs in the

1 use, design, or traffic flow of the connection or of the state  
2 highway. If a permit is not obtained, the department may  
3 initiate action to close the unpermitted connection point in  
4 compliance with RCW 47.50.040. Any unpermitted  
connection opened subsequent to July 1, 1990, is subject to  
closure by the department . . . . .

5 This is the "grandfather clause" that requires the Access Management statute to  
6 be applied prospectively. Certainly one accident in 10 years does not satisfy the  
7 accident and/or traffic data that would objectively indicate that the connection between  
8 SR 7 and the subject property does not meet acceptable standards of highway safety  
9 and mobility.

10 **Conclusion of Law No. 7:**

11 7. In this case, the number of customers who arrive by motor  
12 vehicle to patronize *La Popular* continue to grow. There are no defined  
13 driveways, sidewalks, or structures to limit customers' vehicle access to  
14 certain points of entry or exit off the highway and Appellants' property.  
15 Vehicle movement is unpredictable, and pedestrians are at risk. The  
16 Department properly designated the entire five-mile a "high accident  
17 corridor" and identified along the corridor "hazardous accident locations".  
18 The evidence shows the average daily traffic volume along the section of  
19 SR 7 encompassing the Appellants' property increased from 39,000 to  
43,000 between the years 1997 through 1999, and the Department  
recorded approximately 400 accidents per year. The evidence shows the  
Appellants' property is located within that segment of SR 7 the  
Department has designated since 1993 as a hazardous accident location.

20 Regarding Conclusion of Law No. 7, Appellants respectfully submit that the first  
21 sentence is pure speculation, with no data of record to support the stated conclusion.  
22 The balance of the paragraph seeks to justify a police power regulation of the access  
23 rights to the subject property. Unfortunately, the stated legal conclusion ignores the fact  
24 that there has been only one non-injury accident in front of the subject property in the  
25 last 10 years. If anything, the data should suggest that the department not force all  
26 traffic through county road intersections, where literally hundreds of rear end collisions  
27 occur.

**Conclusion of Law No. 8:**

8. Accordingly, I conclude the increase traffic flow, the high rate of accidents, the absence of driveways and sidewalks, and the high accident corridor and hazardous accident location designation, are a significant change in the use, design, and traffic flow of SR 7 and the Appellants' property.

Appellants contend that Conclusion of Law No. 8 makes no sense at all. It is plainly erroneous, if not outright embarrassing, in view of the fact that there has been only one accident in front of the Appellant's property in the last 10 years. This project has been on the shelf for nearly 15 years because it didn't have a high enough priority to be constructed without the nickel gas tax increase.

**Conclusion of Law No. 9:**

9. The state's established public policy is to protect the citizen's health, safety and welfare by regulating access to state highways. SR 7 has grown from a country road to a busy highway through an urbanized area. WAC 468-52-060 promotes highway uniformity and continuity and requires the undersigned to consider the five mile segment of SR 7 as one unit, not discreet and separate parts identified by a certain number of accidents. Attaching a different characterization to every distance, whether a mile or less, based on the number of accidents in that discreet distance is unreasonable and unsafe, and is not supported by the access management law or the Department's rules. It is possible less accidents occurred on the roadway directly in front of the Appellants' property, or that more accidents happen at one place than another. However, the five mile segment should be planned and improved with uniformity because the evidence supports the Department's designation of the roadway as a high accident corridor, and a stretch of roadway within which the Appellants' property is located as a hazardous accident location. See, WAC 468-52-060.

Appellants challenge Conclusion of Law No. 9 first of all, on the basis that there is no express statutory authority to develop a 5 mile project under Chapter 47.50 RCW. Secondly, Appellants challenge Conclusion No. 9 on the basis that the same statements made in Conclusion No. 9 would be applicable to a project designed under Chapter 47.52 RCW, the state Limited Access statute, which requires payment of just

1 compensation for the taking of access rights. This project has not had the substantive  
 2 and procedural due process protections inherent in the context of a Limited Access  
 3 Hearing. As a result, neighbors have been treated differently, depending upon their  
 4 ability to afford legal counsel, and upon their aggressiveness in challenging the  
 5 WSDOT.

6 **Conclusion of Law No. 10:**

7 10. The undersigned concludes that the Appellants' property  
 8 will have reasonable access under the SR 7 Safety Improvement Project.  
 9 The Department's proposed access to the subject property is outlined  
 10 more fully in Attachment "A" attached to this decision and incorporated by  
 11 reference. The Department will install an 11.8 foot cement concrete  
 12 driveway and 26 foot wide approach and a 6 foot cement concrete  
 13 sidewalk on SR 7 in front of Appellants' property. The Department will  
 14 allow use of the state's right-of-way to ingress and egress the property. A  
 15 cement concrete driveway approach and cement concrete sidewalk will  
 16 improve highway safety and reduce accidents by utilizing defined access  
 17 and egress along the SR 7 route and the Appellants' property.  
 18 Pedestrians will be safer along designated sidewalks. (Conclusion of Law  
 19 # 10 as Amended by Peterfeso).

20 Appellants challenge Conclusion No. 10 on the basis that the WSDOT did not  
 21 consider the existing business on the property. Mr. Greer, the sole qualified appraisal  
 22 witness testified unequivocally that if either of the WSDOT plans were adopted (the first  
 23 providing no vehicular access to the subject property and the second limiting access to  
 24 allow only 2 parking spaces for 2300 square feet of retail commercial space) the  
 25 building would be worthless for retail commercial uses, and would most likely have to  
 26 come down, causing a \$95,000 to \$100,000 loss in value to the Appellants.

27 **Conclusion of Law No. 11:**

28 11. Under the plan that I conclude is reasonable, ~~the Appellants  
 will lose spaces they previously used for parking. The fact that the  
 Appellants lose spaces they used for parking, and do not have the  
 particular access they believe necessary does not make the access  
 unreasonable. the fact that Appellants will no longer be able to use state-  
 owned highway right of way for parking purposes and the fact that  
 Appellants do not have the particular access that they believe is~~

1 necessary does not make Appellants' access unreasonable. Here the  
 2 Appellants use the state's right-of-way for parking without authorization  
 3 from the Department. Absent a lease, license, or permit from the  
 4 Department an adjoining owner is not authorized to use the state's right-  
 5 of-way. See, WAC 468-30-110, and generally, chapter 468-34 WAC. A  
 6 property owner may not acquire an interest in state highway property by  
 7 adverse possession. See, e.g., *State v. Scott*, 89 Wash 63, 76, 154 Pac.  
 8 165 (1916); *Mueller v. Seattle*, 167 Wash. 67,75,3 P.2d 994 (1932).  
 9 (Conclusion of Law #11 as Amended by Peterfeso).

10 Under RCW 46.61.570 motorists can park anywhere that parking is not  
 11 prohibited. In the Galvis-Moncada case, customers of Appellant's business and their  
 12 predecessor's businesses have utilized the 8-9 foot strip owned by Appellants in front of  
 13 their business for head-in angle parking together with a portion of the State right of way  
 14 that was not being used for highway purposes. This occurred for well over 50 years.  
 15 No signs were posted prohibiting angle parking partially on State right of way; no tickets  
 16 were issued to customers or owners of the business; and Appellants had no notice of  
 17 either the pendency of the state's project or the extent of the State right of way. Like  
 18 those before them, Appellants continue to utilize the angle parking spaces to this date,  
 19 as those spaces have been utilized for the past 55 years. As in *Benedict Motel*,  
 20 *supra*, where the City was held to be estopped from claiming Plaintiff's parking spaces  
 21 were illegal, here, WSDOT must be estopped from claiming that Appellant's parking  
 22 spaces are illegal. As in *Benedict Motel, supra*, WSDOT's position alleging illegal  
 23 parking partially on State right of way is simply a means to avoid payment of just  
 24 compensation for the taking of access from Appellants.

25 **Conclusion of Law No. 12:**

26 12. Further, the Appellants' right to have their desired  
 27 access is subordinate to the public's right to a safe and efficient highway.  
 28 The Appellants will not have to use any of their property or pay for any of  
 the improvements. ~~The loss of property where the Appellants' customers  
 parked their vehicles was not the Appellants' property. Not being able to  
 use that property for parking does not make the Appellants' access  
 unreasonable. The Appellants parking spaces have been reduced from~~

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1 six to two. Part of the property upon which Appellants' customers parked  
 2 their vehicles was not the Appellant's property, but instead, the property  
 3 was state-owned highway right of way which will now be used for the SR 7  
 4 highway safety project. Not being able to use state-owned highway right  
 5 of way for parking does not make the Appellants' access unreasonable.  
 6 The appellants will retain room that they previously had for two lawful  
 7 parking spaces located on their property. They believe this will adversely  
 8 affect their business. The undersigned does not minimize the difficulty the  
 9 reduced parking spaces may have on the Appellants' ability to attract  
 10 customers, and the overall impact on their business. But growth and  
 11 development have made the area unsafe for vehicular and pedestrian  
 12 traffic. A cement concrete driveway approach and cement concrete  
 13 sidewalk will improve highway safety. (Conclusion of Law # 12, as  
 14 Amended by Peterfeso).

15 Appellant's challenge Conclusion of Law No. 12 on the basis of the Washington  
 16 Supreme Court decision in Keiffer v. King County, 89 Wn.2d 369, 572 P.2d 408  
 17 (1977). The Keiffer case required compensation for a taking and/or damaging of  
 18 access rights in a virtually identical factual situation to that presented here. In Keiffer,  
 19 the trial court found that the owner of commercial property had been deprived of access  
 20 to such property by installation of curbing along adjacent road right-of-way. The court's  
 21 finding that payment of just compensation was warranted was supported by substantial  
 22 evidence, including evidence that installation of curbing had decreased possible parking  
 23 capacity of property from 18 vehicles to from two to five vehicles.

24 **Conclusion of Law No. 13:**

25 13. I conclude the Department's plan provides reasonable  
 26 access for the Appellants' property and adds a safe and well planned road  
 27 with a defined traffic flow for drivers and pedestrians, and is in the best  
 28 interest of the public all around.

Appellants challenge Conclusion No. 13 for the reason that the ALJ and WSDOT  
 totally ignored the appraisal evidence indicating that this "existing business" property,  
 which abuts SR 7 and is entitled to protection against a taking or damaging of its access  
 rights under RCW 47.52.060, will lose approximately 70% of its market value if either of  
 the WSDOT plans are implemented. A 70% diminution in the market value of a

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1 commercial property clearly establishes that the proposed access is not "reasonable  
2 access."

3 Appellants also challenge both the final conclusion of the Administrative Law  
4 Judge which states:

5 **ORDER**

6 **NOW THEREFORE** the proposed agency action installing an  
7 11.8 foot cement concrete driveway approach and a 6 foot cement  
8 concrete sidewalk on SR 7 in front of Appellants' property, and allowing  
9 use of the state's right-of-way to ingress and egress the property, which  
10 plan is depicted in a design attached and incorporated in this decision as  
11 Attachment 'A' is **HEREBY ORDERED AFFIRMED**. This appeal is  
12 **ORDERED DISMISSED**.

13 And Appellants challenge the Summary or Conclusion of Law located on page  
14 3 of the **FINAL ORDER** signed by Harold Peterfeso on December 30, 2004:

15 2. Appellants Sandra M. Galvis and Alexander Moncada will  
16 have reasonable access to and from State Route 7 pursuant to the  
17 Department's access design, referenced as Attachment A and attached  
18 and incorporated by this Final Order, which provides for the construction  
19 of an 11.8 foot cement concrete driveway, a 26 foot wide approach, and a  
20 6 foot cement concrete sidewalk on SR 7 highway right of way in front of  
21 Appellants' property and which also allows Appellants' use of the states  
22 right of way for property ingress and egress.

23 Both of last two paragraphs ignore the express language of **RCW 47.50.010(3)**  
24 **(b)** which provides:

25 (b) Every owner of property which abuts a state highway has a right to  
26 reasonable access to that highway, unless such access has been  
27 acquired pursuant to chapter 47.52 RCW, but may not have the right of a  
28 particular means of access. The right of access to the state highway  
may be restricted if, pursuant to local regulation, reasonable access  
can be provided to another public road which abuts the property.

Under the unambiguous language of RCW 47.50.010(3) (b) quoted above,  
WSDOT does not have the right to restrict access to the subject property because  
WSDOT cannot provide reasonable access to another public which abuts the property.

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1 **IV. RELIEF REQUESTED**

2 1. Appellants respectfully request this court to reverse the FINAL ORDER of  
3 the Washington State Department of Transportation on the Galvis/Moncada  
4 Administrative Hearing, holding that under the Washington Constitution a superior court  
5 has exclusive jurisdiction to determine whether or not a taking or damaging of the  
6 Petitioner's property and property right occurred.

7 2. Appellants further request the Court to rule that WSDOT does not have  
8 any right to restrict the access of the Appellants Galvis, Moncada and Masewicz  
9 because WSDOT cannot provide reasonable access to another road under RCW  
10 47.50.010(3) (b) which provides:

11 **(b) Every owner of property which abuts a state highway has a right to**  
12 **reasonable access to that highway, unless such access has been**  
13 **acquired pursuant to chapter 47.52 RCW, but may not have the right of a**  
14 **particular means of access. The right of access to the state highway**  
15 **may be restricted if, pursuant to local regulation, reasonable access**  
16 **can be provided to another public road which abuts the property.**

17 Since WSDOT cannot provide reasonable access to a another public road  
18 which abuts the subject properties, WSDOT has no authority to restrict  
19 Petitioner's access to SR 7 without paying Just Compensation for Petitioner's  
20 access rights as RCW 47.52.080 and the Washington State Constitution require.

21 3. Appellants further request the Court to conclude that the State's proposed  
22 project constitutes an attempt to convert SR 7, an existing highway, into a de facto  
23 limited access highway facility for the 5-mile highway section between SR 507 and SR  
24 512.

25 4. Appellants further request the Court to find that the hearings held by the  
26 WSDOT outdated and ineffectual to convey proper and adequate notice to abutting  
27 property owners concerning the State's proposed Project. Appellants therefore request  
28 the court to remand the SR 7 Safety Improvement Project back to the Washington State  
Department of Transportation with direction that if WSDOT wishes to convert SR 7

1 between SR 507 and SR 512 to a limited access facility, *de facto* or otherwise, they  
2 must comply with **Chapter 47.52, the Limited Access statute**, including the offering of  
3 a Limited Access Hearing to the abutting property owners within the project limits, and a  
4 commitment to pay for the access rights of abutting property owners that are taken or  
5 damaged by the State through the WSDOT.

6 5. Appellants, on behalf of all property owners within the limits of the  
7 proposed project, request the court to determine that the "notice" process utilized by  
8 WSDOT to inform property owners on the SR7, SR 507 to SR 512 alignment that if they  
9 did not request an administrative appeal within 30 days of receiving their "notice" from  
10 the Department of Transportation, was ineffectual to alter or terminate the access rights  
11 of these abutting property owners, and that these property owners are able to file  
12 inverse condemnation actions against the WSDOT if their properties are taken or  
13 damaged without just compensation having been paid as the constitution requires.

14 6. Appellants further request the court to determine that if the WSDOT  
15 proceeds with the construction of the highway plan shown on either Exhibit 2 or Exhibits  
16 40-42 to the Administrative Hearing, a compensable taking of the Petitioner's access  
17 rights will occur and that Appellants will be entitled to have a jury trial to determine the  
18 amount of just compensation they are entitled to as a result of the State's proposed  
19 taking and or damaging of their access rights, in advance of the taking or damaging as  
20 the Washington State Constitution requires.

21 7. Appellants further request the court to make a formal determination that  
22 the Washington State Department of Transportation has abandoned its proposed plan  
23 detailed in Hearing Exhibit No. 2, which called for the construction of a 10 foot wide  
24 grass lined ditch and a 6 foot sidewalk the whole length of the Petitioner's property,  
25 directly in front of the Petitioner's building, just inside the state owned right of way that  
26 Petitioner's property abuts. This request is consistent with Finding of Fact No. 15 in the  
27 Final Order, which provides:



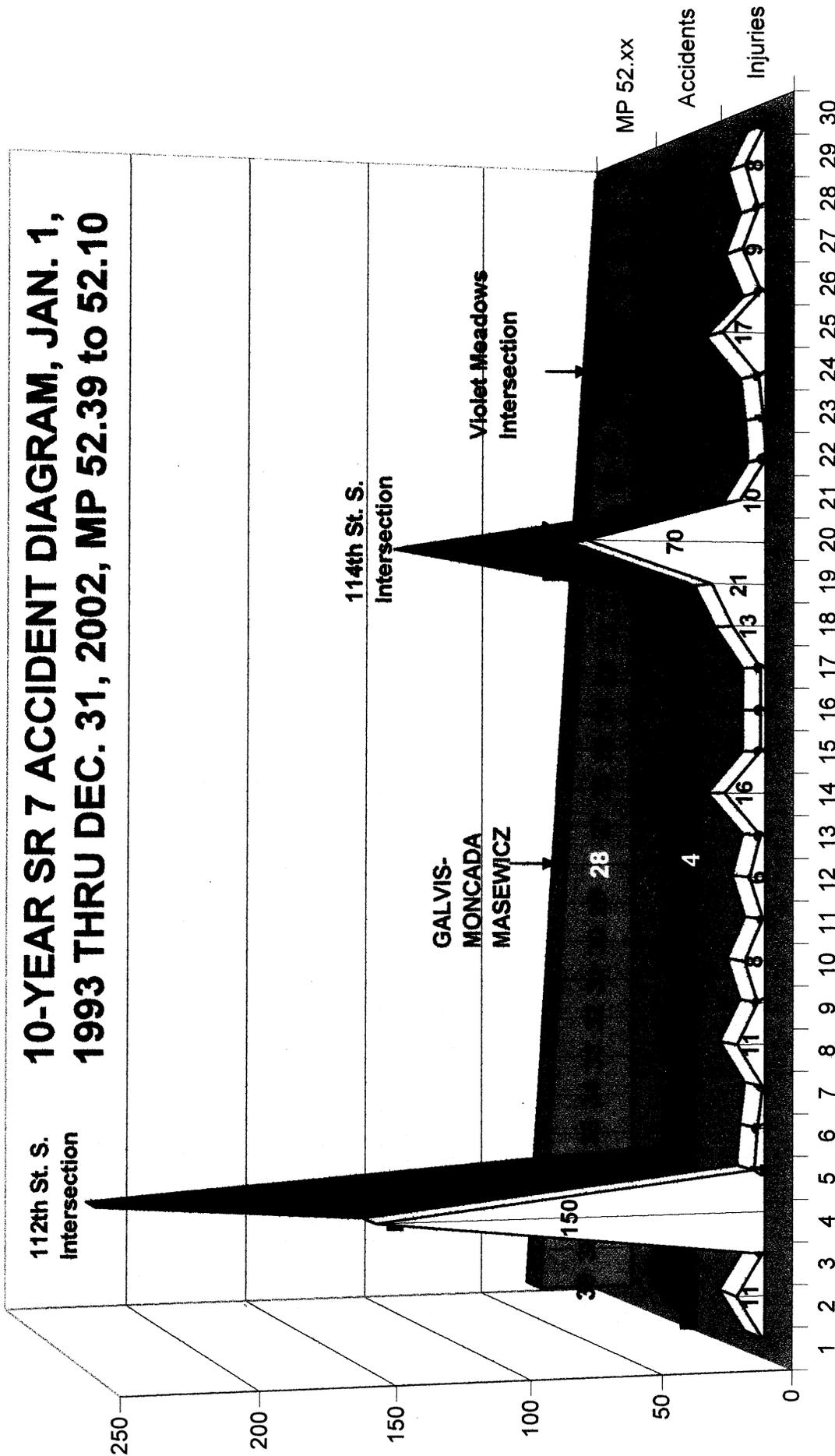
# APPENDIX “C”

10-YEAR SR 7 ACCIDENT  
DIAGRAM, JAN. 1, 1993  
THRU DEC. 31, 2002, MP  
52.39 TO 52.10

AR 300000501

# APPENDIX C

## 10-YEAR SR 7 ACCIDENT DIAGRAM, JAN. 1, 1993 THRU DEC. 31, 2002, MP 52.39 to 52.10



	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	
□ Injuries	1	11	1	150	4	3	1	11	3	8	1	6	2	16	2	2	13	21	70	10	17	10	0	1	3	17	2	9	3	8	0
■ Accidents	5	14	4	238	7	6	3	10	2	12	3	4	7	21	4	3	3	14	20	117	18	6	3	8	20	5	15	4	9	3	
▣ MP 52.xx	39	38	37	36	35	34	33	32	31	30	29	28	27	26	25	24	23	22	21	20	19	18	17	16	15	14	13	12	11	10	



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8 930 Tacoma Ave S, Room 946  
9 Tacoma, WA 98402  
10

11 C. Joseph Sinnitt  
12 Sinnitt & Sinnitt, P.S.  
13 3641 North Pearl Street, Unit D  
14 Tacoma, WA 98407  
15  
16

17  
18 I also personally served and filed the original and one true and correct copy  
19 of the OPENING BRIEF OF RESPONDENTS / CROSS-APPELLANTS  
20  
21 GALVIS/MONCADA with Appendices A, B and C attached thereto and this Declaration  
22  
23 of Service on:  
24  
25

26 Division II of the Court of Appeals  
27 950 Broadway, Room 300  
28 Tacoma, WA 98402  
29  
30

31 I certify under penalty of perjury under the laws of the State of Washington that  
32 the foregoing is true and correct.  
33

34 Dated this 6<sup>th</sup> day of October, 2006, at Tacoma, WA.  
35

36 FAUBION, JOHNSON & REEDER, P.S.

37   
38 \_\_\_\_\_

39 Robert A. Wright WSBA # 4158  
40 Of Attorneys for Respondents/Cross-  
41 Appellants Galvis and Moncada  
42

43 DECLARATION OF PERSONAL SERVICE--

44 -2

45 FAUBION, JOHNSON & REEDER, P.S.  
46 5920 100<sup>TH</sup> STREET SW, SUITE 25  
47 LAKEWOOD, WASHINGTON 98499  
48 (253) 581-0660; FAX (253) 581-0894