

No. 34604-4

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

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

Respondents/Cross-Appellants,

vs.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant/Cross-Respondent.

**BRIEF OF RESPONDENTS/CROSS-APPELLANTS
MASEWICZ AND ASH**

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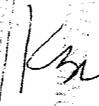
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Respondents/Cross-Appellants James R. Masewicz, Virginia F. Masewicz, and Ash Resources, LLC hereby respond to the Opening Brief of Appellant and submit their Opening Brief of Cross-Appellants:

I. SUMMARY OF ARGUMENT

This case is about the State taking private property without paying just compensation to the property owners. Regardless of the State's reasons for the taking, the taking is unconstitutional both facially and as applied to the property owners in this case. When the State's revised proposal for Pacific Avenue is implemented, the Respondents will not be left with reasonable access to their properties. Judge Worswick's order on summary judgment holding that the Highway Access Management Act is facially constitutional must be reversed, and Judge Thompson's decisions finding that the property owners will be left with unreasonable access and that they should receive just compensation must be upheld.

II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred in granting the State's motion for partial summary judgment, finding that the Highway Access Management Act was facially constitutional.

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III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR ON CROSS-APPEAL

Does the Highway Access Management Act effect a regulatory taking, making it unconstitutional both facially and as applied, when (1) it statutorily transfers access rights previously held by abutting property owners to local governments and (2) it does not provide for just compensation to the property owners?

IV. STATEMENT OF THE CASE

A. MASEWICZ PROPERTY

James and Virginia Masewicz acquired their property in 1994. CP 54. The property is approximately .42 acres and is improved with a building used by five commercial and four residential tenants. *Id.* The building covers the entire frontage of the property, and the only access is from Pacific Avenue. *Id.* The Pierce County Code requires that the Masewiczes provide 27 parking spots for their property. CP 190. However, the State's first proposal allowed no parking spots; the State's revised proposal only allows for 3 parking spots for four residential tenants and five businesses. Administrative Record¹ (hereinafter "AR")

¹ The Administrative Record was not paginated by the Clerk's Office; indicated page numbers in this brief are to the existing Bates'-stamped numbers. Further, Bates-stamped pages numbered 1-506, 881 – 1174, and 1521-1937 are not included in the record, even though some of these Bates'-numbered pages are cited in the State's Opening Brief.

300001722-300001723; CP 189-190. The State's proposal would not leave reasonable access.

The State's evidence showed there was only one accident in front of the Masewicz property between January 1, 1999 and December 31, 2002. AR 300002163; CP 189-190.

B. ASH PROPERTY

Glenn and Mary Ash, doing business as Ash Resources, LLC, acquired their property in 1993. CP 54. They own lots 3-24 of block 17 of the Howell Addition on Pacific Avenue (approximately 7.5 acres), 430 feet of which front on Pacific Avenue. AR 300001011; CP 190-191.

The Ashes lease their property to G & L Bark. *Id.* Traffic on the property includes large semis, dump trucks with and without trailers, cars with and without trailers, and pick-ups. AR 300001027; CP 191-192. Suppliers bring large trucks and trailers onto the property 5-6 times a day, and customers bring 50-150 vehicles onto the property per day. *Id.*

The semis are 75 feet long and have a 60-foot turning radius. AR 300001028; AR 300001055-300001056. When a semi comes onto the Ashes' property, it takes up the entire entryway and must make a wide arc before coming into the yard. AR 300001028-1029; CP 192. To make the maneuver, the semis must sometimes stop to wait for customers to back up and clear a path on the Ashes' property, so traffic on Pacific Avenue (a 40

mph highway) behind the semis also has to stop. AR 300001029-300001032; CP 192-193.

There are currently two access points from the lots onto Pacific Avenue. AR 300001030-300001031; CP 193. With two access points to the property, it is possible for the Ashes to designate one entry and one exit point. AR 300001031; CP 193. The State's revised proposal leaves the Ashes with only one access point. AR 300001032-300001033; CP 193. The State's original proposal was for a single access point of 40 feet (code requires one access point for 330 feet; the Ash property is 430 feet (AR 300000962)). AR 300000885; AR 300001180, Appendix 5. At the administrative hearing, the State proposed a single access point of 50 feet (AR 30000950), insufficient for a truck and trailer, which have a 60-foot turning radius.

According to traffic safety engineer Christopher Brown, a licensed civil engineer, not only is the State's proposal unreasonable regarding access (AR 300001055), it would increase accidents: "You would very like have an increase in rear end accidents – especially when we are dealing with a combination of large rigs trying to access a single driveway – the last thing you want to do is be dillying and dallying about on a roadway with a 40 mile per hour limit." AR 300001065-300001066.

According to the State's evidence, **there have been no accidents in front of the Ashes' property and the Ashes' property was not listed as a "high accident location" between 1993 and 2003.** AR 30000963; AR 300001376; CP 197.

C. PROCEDURAL BACKGROUND

The State moved for partial summary judgment on August 5, 2005, requesting that the trial court rule that the Highway Access Management Act ("HAMA"), Chapter 47.50 RCW, was constitutional. CP 30-52. The Masewiczes and Ashes responded that HAMA was facially unconstitutional because it statutorily "took" private property (access rights of abutting property owners to existing state highways) without just compensation. CP 53-68. After hearing oral argument, Judge Lisa Worswick ruled that HAMA was facially constitutional, but did not make any ruling as to whether HAMA was unconstitutional "as applied" to the Masewiczes and Ashes. CP 1-3.

Subsequently, Judge Pro Tem Donald Thompson determined that the State's revised proposal **substantially** reduced the Masewiczes' and Ashes' access to Pacific Avenue. 11/28/05 RP at page 84, lines 12-25; page 85, lines 1-9. Judge Thompson ruled that the Masewices and Ashes would not be left with reasonable access to their properties. CP 5. He also ruled that such loss of property rights was a "taking" and that there

should be a jury trial to determine what “just compensation” was owed to the Masewiczes and Ashes. 11/28/05 RP at page 84, lines 12-25; page 85, lines 1-9. Judge Thompson denied the State’s motion for reconsideration. CP 24-25.

The State appeals from Judge Thompson’s decision, and the Masewiczes and Ashes cross-appeal from Judge Worswick’s order.

V. ARGUMENT

A. JUDGE WORSWICK ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE HAMA IS FACIALLY UNCONSTITUTIONAL.

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). CR 56 provides that a motion for summary judgment may be granted only

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c).

When the State, by virtue of its sovereignty, exercises its police power and regulates the use of a private property interest for a public use,² a regulatory “taking” occurs and the regulation is subject to a “facial”

² In this case, the State has never disputed that the Masewiczes’ and Ashes’ property was being taken for a public use.

challenge³ if: (1) the regulation effects a total taking of all economically viable use of the owner's property; (2) the regulation results in an actual physical invasion upon the owner's property; (3) the regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others, and dispose of the property); or (4) the regulation was employed to enhance the value of publicly held property.

Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 355, 13 P.3d 183 (2000). **A regulatory taking also occurs when a property right is statutorily transferred.** *Id.* at 369. A landowner does not need to exhaust administrative remedies before making a facial challenge, as **administrative agencies cannot pass on the facial constitutionality of the statutes they administer.** *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 333, 787 P.2d 907 (1990), *cert. denied*, 498 U.S. 911, 111 S. Ct. 284, 112 L.Ed.2d 238 (1990); *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987), *rev. denied* 108 Wn.2d 1020 (1987). Here, because HAMA statutorily "took" private property rights and transferred them to governmental entities, HAMA is facially unconstitutional and Judge Worswick's order must be reversed.

³ A statute can be challenged in two ways. A "facial" challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). An "as-applied" challenge is characterized by a party's allegation that the application of the statute in the specific context of the party's actions or intended actions is unconstitutional. *Id.* at 668-69.

1. An abutting landowner's right to access is a recognized property right protected by the Washington Constitution.

Article 1, section 16 of the Washington State Constitution provides in pertinent part:

No private property shall be taken or damaged for public or private use **without just compensation having first been made**, or paid into court for the owner . . . , **which compensation shall be ascertained by a jury**
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 legislative assertion that the use is public. . . .

(Emphasis added.) This clause is “**self-executing**” and neither consent to sue the State nor the creation of a statutory remedy is necessary to obtain relief thereunder. *Deaconess Hosp. v. State*, 10 Wn. App. 475, 479, 518 P.2d 216 (1974), *rev. denied* 84 Wn.2d 1001 (1974).

It has been a long-standing rule in Washington that property owners abutting a right of way have **a property right to access**. *See Brown v. City of Seattle*, 5 Wn. 35, 43, 31 P. 313 (1892) (loss of 14-17 feet at the alley abutting residential property was a taking and owner had a constitutional right to have damages ascertained by a jury). In 1947, the rule was codified with regards to “limited access highways”:

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 condition at the time of the notice provided in RCW 47.52.133 as for the taking or damaging of property for public use.

RCW 47.52.080 (emphasis added).⁴

There are two particularly instructive Washington cases which have recognized abutting landowners' access rights, and have held that compensation may be due if access is eliminated or damaged. In *McMoran v. State*, 55 Wn.2d 37, 345 P.2d 598 (1959), the department of highways constructed a concrete curb 35 feet from the edge of its highway right-of-way. Within the 35 feet, the department constructed a frontage road which allowed access to the highway 30 feet beyond where the plaintiff's land ended. The plaintiff sued, claiming that his access to the highway had been unconstitutionally taken. The state moved for summary

⁴ For purposes of this statute, an "existing highway" was defined as "all highways, roads and streets duly established, constructed, and in use." RCW 47.52.011. Thus, Pacific Highway was an "existing highway" in 2003, the time the State gave the Masewicz and Ashes notice that their accesses were being eliminated. **If the State were required to follow RCW 47.52.080, it would have to compensate the Masewicz and Ashes before limiting their access to Pacific Avenue.**

However, RCW 47.50.010(2) makes all highways "controlled access facilities" unless they had already been designated "limited access facilities." Because Pacific Avenue was not designated a "limited access facility," the State can effectively circumvent the protections provided to abutting landowners in Chapter 47.52 RCW. Chapter 47.50 RCW statutorily transfers property owners' access rights to governmental entities without just compensation, as explained below.

judgment, which was granted. On appeal, the Washington Supreme Court reversed, explaining:

In the instant case, **the appellant was deprived of his property right by the respondent's erection of the physical obstruction of a concrete curbing, without payment of compensation therefor.** Respondent contends, however, that the appellant 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 appellant was entitled to direct access to the thoroughfare where the traffic flows . . .**

The trial court erred in granting respondent's motion for summary judgment, and entering judgment dismissing appellant's action with prejudice. The judgment of the trial court is reversed, and the case is remanded for entry of a judgment for liability only, with the damages for the taking of appellant's right of access to be determined at a trial on the merits.

Id. at 40-41 (emphasis added).

In *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977), the plaintiffs owned commercial real estate upon which several business were located. The businesses had access to the roadway at all points along their frontage. There was parking available for approximately 18 cars in front of the businesses. **Notably, as here, the parking took place partially on the State's right-of-way and partially on the private property** (*see Keiffer*, 89 Wn.2d at 375, J. Dolliver, dissenting (“For many years plaintiff used the public highway right-of-way in front of his premises as an extension of and adjunct to the parking area for his customers.”))

The county subsequently made improvements to the roadway which created two additional lanes and added a cement curb. In widening the road, the county limited access to the plaintiff's property to two curb cuts and narrowed the area in front of the businesses to that of a driveway or a parking area that could accommodate two to five cars. The trial court found that the county had virtually eliminated access to the businesses and had denied reasonable access to parking.

On appeal, the Washington Supreme Court set out a test for determining whether an impairment to access constituted a taking:

The issue of whether compensation must be paid in a particular case is best resolved through a two-step process. The first is to determine if the government action has actually interfered with the right of access as that property interest has been defined by our law. . . .

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. . . . 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.

Id. at 409-10 (emphasis added). The Court noted that the existence of “substantial impairment” should be treated as an **issue of fact**, similar to issues addressed in inverse condemnation proceedings. *Id.* at 410. The Court upheld the trial court's determinations.

Based on the foregoing, there is no question that property owners who abut existing highways have an unlimited right of access to those highways. As such, access rights are protected by the Washington Constitution and any loss of access rights triggers a “taking” analysis.

2. Under Chapter 47.50 RCW, access rights are transferred to governmental entities without just compensation, which is an unconstitutional taking.

RCW 47.50.010 declares that “**all** state highways are hereby declared to be controlled access facilities as defined in RCW 47.50.020, except those highways that are defined as limited access facilities in chapter 47.52 RCW” (emphasis added). A “controlled access facility” is defined as

a transportation facility to which access is regulated by the governmental entity having jurisdiction over the facility. Owners or occupants of abutting lands and other persons have a right of access to or from such facility at such points **only and in such manner as may be determined by the governmental entity.**

RCW 47.50.020 (emphasis added). HAMA makes clear that abutting landowners’ right of access is now “subordinate” to the public’s right and interest in a safe and efficient highway system, and that abutting landowners no longer have “the right of a particular means of access.”⁵

⁵ HAMA presumes that abutting landowners only had **one** “particular means of access” to begin with. However, *Keiffer, supra*, makes clear that abutting landowners actually have the constitutionally protected right to access state highways from **all points along their frontage**. Thus, where an abutting property owner with 430 feet of frontage could have had 430 feet of access, under HAMA, that property owner now has **no** points of access

RCW 47.50.010(3). Moreover, RCW 47.50.040 provides in pertinent part:

No connection to a state highway shall be constructed or altered without obtaining an access permit in accordance with this chapter in advance of such action. **A permitting authority has the authority to deny access to the state highway system at the location specified in the permit** until the permit constructs or alters the connection in accordance with the permit requirements. . . .

Except as otherwise provided in this chapter, an unpermitted connection is **subject to closure by the appropriate permitting authority which shall have the right to install barriers across or remove the connection.**

RCW 47.50.040(1) and (3) (emphasis added).

The end result of the above-quoted statutes is that property owners whose properties abutted existing highways lost their right of access along the full frontage of their property, as described in *Keiffer, supra*. The right of access is now totally controlled by governmental entities, and **property owners are statutorily forced to pay for permits** to keep what they had previously held outright. Clearly, access rights have been **transferred from private property owners to governmental entities without just compensation**, and a regulatory taking has occurred.

This conclusion is supported by application of the two-part test set out in *Keiffer, supra*. First, there is no doubt that government action,

except what the State permits. *See* RCW 47.50.040(1) and (3). The property owner's access rights have been taken.

passage of Chapter 47.50 RCW, has affected access rights to existing highways. Property owners who could previously enter and exit their properties from any point they wished must now apply for a permit to do so, and even then could have their application **denied** if the governmental entity deems the proposed access to be a threat to public health, safety, and welfare. *See* RCW 47.50.010. Second, the loss of full access amounts to “substantial impairment,” as abutting property owners who once had **unlimited** entry and exit points along the full frontage of their property are now **limited** in number, size, and style to the access points that governmental entities permit.

Based on the foregoing, Judge Worswick erred in finding that HAMA is facially constitutional. Her order would deny Washington property owners just compensation when their property rights are taken, and must be reversed.

B. JUDGE THOMPSON’S RULINGS THAT THE STATE’S REVISED PROPOSAL UNDER HAMA WOULD EFFECT A TAKING WERE CORRECT AND MUST BE UPHELD.

On review of an agency’s decision, this Court sits in the same position as the superior court and applies the standards of the Administrative Procedure Act (“APA”) to the record before the agency. *Pitts v. State Dept. of Social and Health Services*, 129 Wn. App. 513, 522,

119 P.3d 896 (2005). Under the APA, **a reviewing court can reverse an agency order when the order is in violation of constitutional provisions on its face or as applied.** RCW 34.05.570(3)(a). This Court can affirm a trial court on any correct ground. *Baumgartner v. Dept. of Corrections*, 124 Wn. App. 738, 745, 100 P.3d 827 (2004), *rev. denied* 154 Wn.2d 1025, 120 P.3d 577 (2005).

In addition to being facially unconstitutional, HAMA is unconstitutional **as applied** to the Masewicz and Ashes, as Judge Thompson correctly concluded. As explained above, the Washington State Constitution requires that when private property is taken for public use, the property owners be granted a jury trial to determine what just compensation is owed. Here, the State plans to reduce the Masewicz and Ashes' access rights in order to change the traffic flow on Pacific Avenue. **The State admits on appeal that the Masewicz and Ashes' access rights will be "significantly smaller" under its revised proposal.** Appellant's Brief at 7. Yet, there has never been a jury trial on just compensation. Judge Thompson addressed this issue in his initial ruling:

In both of those cases [Masewicz] they have, at the present time, unlimited access to SR 7. The State is now 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.

So far as the Ash property is concerned, as I understand it, there are now two accesses. . . . And there would be the ability to have an entrance and an exit, and its an issue of fact that I think a jury needs to listen to, whether the ability of a truck and trailer requiring a 60-foot radius to utilize the property, and if they're not able to utilize the property, whether that would have an affect on the business presently operating on the property. I don't think that this decision is one that should be made by an administrative law judge. **It's a finding of fact that needs to be determined by a jury, because it goes directly to just compensation.**

11/28/05 RP Page 84, line 12 – Page 85, line 9 (emphasis added).

HAMA effects a regulatory taking and is unconstitutional as applied in this case because it allows the State, through its revised proposal, to virtually eliminate the Masewiczes' and Ashes' access rights without payment of just compensation. Judge Thompson's November 28, 2005 initial decision and April 17, 2006 decision on the State's motion for reconsideration are correct and must be upheld.

C. IF HAMA IS UNCONSTITUTIONAL, THE STATE'S ARGUMENTS REGARDING THE SUBSTANTIAL EVIDENCE STANDARD ARE BESIDE THE POINT.

The State argues at length that Judge Thompson did not correctly apply the "substantial evidence" standard provided in the APA. However, a trial court can and should overturn an agency order if the order violates

constitutional provisions, **regardless of the evidence that supports the agency's findings.** See RCW 34.05.570(3)(a).

The State does not dispute that the Masewiczes' and Ashes' access rights will be significantly reduced once the State completes its revised proposal. There is no question that the Masewiczes' and Ashes' property rights are being taken for a public purpose. What is material, and what the State overlooks, is that the Masewiczes and Ashes will have **substantially less** access when the State implements its revised plan than they have now. Judge Thompson's decisions must be upheld because WSDOT's order violated Article 1, section 16 of the Washington State Constitution and did not require a jury trial to determine just compensation to the Masewiczes and Ashes.

D. JUDGE THOMPSON'S RULING THAT THE RESPONDENTS WOULD NOT BE LEFT WITH REASONABLE ACCESS MUST BE UPHELD.

Under HAMA, "reasonable access" means an access connection (1) that is **suitable for the existing and/or proposed property use**, and (2) does not adversely affect the safety, operations, or maintenance of the State highway system. WAC 468.52.020(17). WAC 468.51.150(5) provides:

The department in its regulation of connections in compliance with Chapter 47.50 RCW and these regulations **shall allow reasonable access. If the Department's final**

order denies reasonable access, the appellants shall be entitled to just compensation in compliance with RCW 47.50.010(5). (Emphasis added.)

RCW 47.50.010 sets out legislative findings, including: “[n]othing in this chapter shall affect the right to full compensation under section 16, Article I of the state constitution.” Thus, assuming HAMA is constitutional, just compensation must be paid where there a property owner is left with “unreasonable” access.

Here, the State argues that the Masewiczces’ and Ashes’ access will be reasonable and that no compensation is owed. Judge Thompson correctly ruled otherwise and must be affirmed because WSDOT’s order was not supported by substantial evidence.

WSDOT concluded that the Masewiczces “will have reasonable access to and from State Reoute 7 pursuant to the Department’s access plan” (AR 300001523), and that the Ashes “will have reasonable access to and from State Route 7 through a single 50 foot road approach (driveway) after the implementation of the SR 7 Safety Improvement Project.” AR 300000882.

WSDOT made **no specific findings** that the Masewiczces’ and Ashes’ properties were high accident locations. The evidence showed that there was only one accident near the Masewiczces’ property and none in front of the Ashes’. AR 300002163; AR 30000963. WSDOT’s

conclusion that the Masewiczses would not lose any parking spots was **contradicted** by the evidence. WSDOT's conclusion that the Ash property would be safer with one access point was also **contradicted** by the evidence.

On the other hand, the Respondents presented evidence that the Ashes' property with two access points presently accommodates 75-foot long tractor/trailer rigs which require a 60-foot turning radius. The single 50-foot driveway that would remain under the State's plan is not "reasonable" access to this property. *See* AR 300001082-300001085. Further, accidents would increase. *See* AR 300001055-300001064; 300001076.

The Masewiczses' property is utilized by five businesses and four residential tenants. The State's proposal would leave only three parking spots on the property, an insufficient number under the Pierce County Code, and would reduce the value of the property from \$300,000 to zero. AR 300001669 – 300001670; 300001682; 300001690; 300001693; AR 3000001724; CP 188-190. Under the State's plan, the Masewiczses will lose their entire frontage and will be blocked with a sidewalk; they will not be in compliance with county code for parking; and will lose business and residential tenants.

Based on the foregoing, Judge Thompson’s decision that the Masewiczes and Ashes will not have reasonable access is supported by substantial evidence and should be affirmed.

E. THE STATE’S CASES ON ACCESS RIGHTS ARE DISTINGUISHABLE.

The State cites to three cases for the proposition that the Masewiczes and Ashes did not have property rights to access along the full frontage of their property. Appellant’s Brief at 11-12. The State’s cases are all distinguishable.

In *Walker v. State*, 48 Wn.2d 587, 295 P.2d 328 (1956),⁶ the Washington Supreme Court held that there was no “taking” when the State constructed a cement curb on the **centerline** of the highway abutting the plaintiff’s property, preventing traffic from turning left on to the property. *Id.* at 330. The Court noted that traffic could still access the plaintiff’s property by coming from the opposite direction and turning right. *Id.* at 331. The Court determined that the plaintiffs still had “free and unhampered ingress and egress” to their property. *Id.*

⁶ This case was dismissed on the State’s motion for demurrer, so the Court’s decision was based solely on the allegations contained in the plaintiffs’ complaint. *Id.* at 330. General demurrers have been abolished in favor of motions to dismiss under CR 12(b). *Sherwood v. Moxee School District No. 90*, 58 Wn.2d 351, 352-52, 363 P.2d 138 (1961). To succeed on a motion to dismiss, the State would now have to show that the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. *Id.* at 353. It is questionable whether a motion to dismiss *Walker* would be successful today.

However, central to the Court's ruling was the fact that there was no "physical injury to the owner's property or physical impairment of access." *Id.* The Court recognized that under different circumstances, a taking would have occurred:

The owner of property abutting a public thoroughfare has a right to free and convenient access thereto. This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself.

On numerous occasions, this court has held that the abutting property owner is entitled to just compensation if this right is taken or damaged. [citations omitted]

In these cases, there was either physical injury to the owner's property or physical impairment of access. None of them involves the division of a public thoroughfare into separate roadways by division stripes or concrete curbs. Exercise of the police power was not involved. Factually, they are distinguishable from the case before us.

Id.

Here, the State has plans to physically block the entire frontage of the Masewicz's property with sidewalks, eliminating virtually all of the parking on their property. The State plans to reduce the Ashes' access from two points to one by installing cement curbs and sidewalks, even though there was evidence presented that two access points would be safer. *See* AR 300001055-300001064; CP 194-198. Neither the Masewicz nor the Ash property have been designated "high accident locations." The State acknowledges that the Masewicz's and Ashes will

be left with “substantially reduced” access when it completes its revised proposal. Unlike the plaintiffs in *Walker*, the Masewicz and Ashes will suffer physical impairment of access, and a taking will occur. They therefore have the constitutional right to just compensation.

In *State v. Wineberg*, 74 Wn.2d 372, 444 P.2d 787 (1968), the plaintiff’s property was 20 feet away from the highway and separated by a concrete curb. The plaintiff nevertheless claimed that closure of a certain portion of another roadway had taken his access to the highway. The Court found that because the plaintiff’s property did not directly abut the portion of the roadway being closed, he could not be awarded damages for a taking. *Id.* at 376.

In the present case, there is no question that the Masewicz and Ash properties directly abut Pacific Avenue. Unlike the plaintiff in *Wineberg*, the Masewicz and Ashes will suffer a substantial reduction in their access to Pacific Avenue, which is a taking. They have the right to just compensation.

Finally, in *Iron Gate Partners, LLC v. State*, 107 Wn. App. 777, 27 P.3d 1259 (2001), the plaintiff sought to compel the State to remove a median from the center of the road that prevented traffic from turning left onto the plaintiff’s property. The State had determined that there was a high risk of collision due to back-ups caused by left-turning drivers.

There was nothing preventing drivers from turning right onto the plaintiff's property. The Court compared the case to *Walker, supra*, and concluded that there was no authority allowing a property owner damages when they still had "free and unhampered ingress and egress to their property." *Id.* at 782.

Here, the Masewicz and Ashes will not have "free and unhampered ingress and egress." To the contrary, the State has conceded that their access will be substantially reduced. Unlike the plaintiff in *Iron Gate Partners*, the Masewicz and Ashes will suffer a taking and must receive just compensation for their loss of access rights. Judge Thompson's orders must be upheld.

F. THE ASHES AND MASCEWICZES REQUEST ATTORNEY'S FEES ON APPEAL.

The Ashes and Mascewicz seek reasonable attorney fees on appeal under RCW 4.84.350 (part of the Equal Access to Justice Act) and RAP 18.1.

RAP 18.1 states in part:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses.

RCW 4.84.350(1) provides,

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 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.

“Qualified party” includes a corporation, association, or organization whose net worth did not exceed \$5 million at the time it filed the initial petition for judicial review. RCW 4.84.340(5)(b). Under this statute, a party is considered to have prevailed if that party obtains relief on a “significant issue.” *Citizens for Fair Share v. Dep't of Corr.*, 117 Wash.App. 411, 436, 72 P.3d 206 (2003) (citing *Hunter v. Univ. of Wash.*, 101 Wash.App. 283, 2 P.3d 1022 (2000), *review denied*, 142 Wash.2d 1021, 16 P.3d 1263 (2001)), *review denied*, 150 Wash.2d 1037, 84 P.3d 1229 (2004); *see also* RCW 4.84.350(1).

The Ashes and the Mascewiczses are “qualifying parties” because the respective net worth of each of them does not exceed five million dollars. They prevailed in trial and were awarded attorney’s fees and costs below. *See* CP 10. If this Court affirms Judge Thompson’s ruling, the Ashes and Mascewiczses are entitled to reasonable costs and attorney’s fees on appeal as well. *Nor-Pac Enterprises, Inc. v. Department of*

Licensing, 129 Wn. App. 556, 572, 119 P.3d 889 (2005). The Court should rule that the Department's regulatory taking, or alternatively, its decision to leave the Ashes and Mascewicz without reasonable access, cannot be "substantially justified," and should award them the costs and reasonable attorney's fees incurred on appeal.

VI. CONCLUSION

HAMA is facially unconstitutional because it transfers private property rights (the right to access along the full frontage of property abutting a right of way) to governmental entities without providing just compensation to the owners. Judge Worswick erred in concluding otherwise and must be reversed.

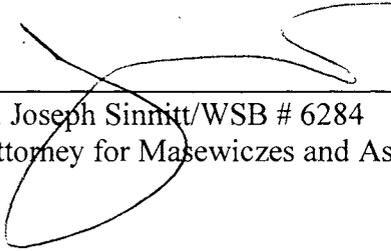
HAMA is also unconstitutional as applied to the Masewicz and Ashes because it requires them to give up virtually all of their access rights, but does not require the State to compensate them for the taking. Judge Thompson's orders must be upheld.

Even if the Court determines there was no regulatory taking, the evidence is clear (and the State concedes) that the Ashes and the Mascewicz have suffered the physical loss of access to SR 7. The Court should rule that appellants are thus entitled to full compensation for their loss, and should remand for a jury trial to determine the amount of compensation.

The Court should award costs and reasonable attorney's fees to the Ashes and Mascewicz pursuant to RAP 18.1 and Washington's Equal Access to Justice Act, codified in part at RCW 4.84.350.

Respectfully submitted this 22 day of September, 2006.

SINNITT & SINNITT, INC., P.S.



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Attorney for Mascewicz and Ashes

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I certify under the penalty of perjury under the laws of the State of Washington that the above is true and accurate.

DATED this 22nd day of September, 2005, at Tacoma, WA.



Renee M. Sowers, Legal Assistant

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SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY

SANDRA M GALVIS, a divorced woman,))
& ALEXANDER MONCADA, a single) NO. 04 2 06841 5
man, d/b/a LE POPULAR CASH &)
CARRY MARKET, L.L.C.; JAMES R) CERTIFICATE OF SERVICE
MASEWICZ & VIRGINIA F MASEWICZ)
husband & wife,)
)
) Plaintiffs,)
)
) v.)
)
)
) STATE OF WASHINGTON,)
) DEPARTMENT OF TRANSPORTATION,)
)
)
) Defendant.)
)

I certify that on the 22nd day of September, 2006, I caused a true and correct copy of the BRIEF OF RESPONDENTS/CROSS-APPELLANTS MASEWICZ AND ASH, dated September 22, 2006 to be served on the following in the manner indicated below:

WASHINGTON STATE COURT OF APPEALS - DIVISION II
950 BROADWAY #300
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