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I. INTRODUCTION

In this case, the City of Bainbridge Island ("City") has refused to endanger the public by re-opening a small section of a road terminus that has been repeatedly washed out by dozens of landslides and covered in tons of debris from the hillside above, in a neighborhood where nearly half the homes have been damaged or destroyed and an entire family has perished from these landslides. Despite the fact that Appellants' rental property does not border the street in question – or any other street at all – they claim that the City's refusal to spend millions of dollars to reopen the road constitutes a taking of their property. As discussed below, Appellants' arguments are completely without merit, have no basis either in law or fact, are supported by no evidence, and have repeatedly been rejected by the trial court. As a result, the City respectfully requests that the trial court's dismissal of Appellants' claims be affirmed.

II. STATEMENT OF FACTS

A. Factual Background¹

This case concerns a neighborhood on the eastern shore of Bainbridge Island known as "Rolling Bay Walk." Rolling Bay Walk

¹ As this Court is aware, the factual background in this case is highly complex and stretches back more than a decade. Because the single issue on appeal is the legal merit of Appellants' takings claim, only a brief factual background is necessary here. The entire factual history of the landslides at issue and a full discussion of the interactions between Appellants and the City is available at CP 397-421.

consists of approximately 20 homes lined along the beach in a north-south direction. CP 23. These properties sit at the bottom of a steep bluff that rises more than 120 feet directly behind them. CP 53. Appellants own two separate properties in the neighborhood: the first property on the northern end of the string of houses (House #1), and the property three doors to the south (House #4). CP 505. Appellants William and Penelope Hulett are long-time residents of Ohio, and have never lived at either property.

At the northern end of the neighborhood, Gertie Johnson Road winds down from the bluff and terminates in a circular turnaround area 15 feet from the property line of Appellants' northern property (House #1). CP 2. To reach their properties, Appellants claim they – i.e., their *tenants* – would traditionally park in the turnaround area, then walk across the 15-foot strip of intervening land that lies **between** the northern property (House #1) and Gertie Johnson Road.² *Id.*

At issue here is a long series of landslides from the overhanging bluff – the last of which occurred more than 10 years ago. In particular,

² Appellants have continuously claimed their tenants parked in the turnaround area and walked to the home, but the historic photos Appellants submitted in discovery clearly show cars parked directly next to House #1. So, it is clear that the tenants would actually drive off the road, over the intervening land, and clear up to the house.

several slides completely covered the turnaround area at the terminus of Gertie Johnson Road, making it impossible for vehicles to park there.³

After these landslides, the City of Bainbridge Island conducted extensive analysis to determine if it was practical, or even *possible*, to remove the landslide debris from the roadway and re-open the turnaround area. However, geotechnical experts studying the area concluded that the landslide debris covering the turnaround area was supporting the hillside above, and that removing the debris would simply cause more landslides that would re-cover the road and likely damage other homes or properties. CP 230, 374. As a result, the City decided not to remove the debris, and not to re-open the turnaround area. *Id.* This decision was especially practical since the portion of the road that was blocked is at the complete end of the dead-end street, and does not border on any residential property.

B. Procedural Background

Based on the City's decision *not* to clear the landslide debris and re-open the turnaround area, Appellants brought this lawsuit alleging multiple counts of negligence, multiple permanent and temporary takings, and deprivation of their equal protection and due process rights. With respect to their takings claims in particular, Appellants alleged that the City's decision not to clear the debris from the roadway – which meant

³ As Appellants admit, none of the various landslides at issue have ever physically impacted either of their two properties.

their tenants could no longer park there – denied them the “right of access” to their properties, and therefore constituted a taking. CP 4-11.

Once discovery had been completed – after several case schedule extensions – the City brought its motion for summary judgment on July 27, 2007. CP 396 *et seq.* The City pointed out that the strip of land **between** the end of Gertie Johnson Road and Appellants’ northern property (“the 15-foot strip”) was important for two reasons. First, the fact that Appellants’ properties did not abut Gertie Johnson Road – *or any other street* – meant they had no *per se* legal right to access their property from the turnaround area. *Id.* And second, the 15-foot strip of intervening land was actually an unopened City right-of-way, which itself was important because (1) the City Code explicitly prohibits use of unopened rights of way to access private property, and (2) being government property, Appellants could not claim any sort of prescriptive easement or adverse possession rights to the 15-foot strip. *Id.*

On August 24, 2007, the trial court heard arguments on the City’s summary judgment motion. At that hearing, Appellants presented no argument, evidence, or analysis regarding the existence or ownership of the right-of-way. In fact, they admitted that “Appellants were still trying to determine the legal status of the right-of-way.” CP 739. Three days

later, the trial court granted summary judgment in favor of the City on all of Appellants' claims. CP 593-594.

Two days later, on August 29th, Appellants faxed a letter to the trial court indicating, "We have discovered information that is relevant to this question and contradicts the City's position that it has the right to exclude the Hulets from use of the right-of-way in question." CP 739. Along with the letter, Appellants sent a supplemental memorandum and a declaration from a former City employee, Jeff Waite. CP 777-790. Appellants contended that these supplemental materials show that the 15-foot right-of-way had been automatically vacated under a state statute more than a hundred years ago, and had never been re-established. *Id.* Appellants asked for reconsideration of their takings claim based on these new materials (CP 595-608), and on September 11, 2007, the trial court denied that request without asking for responsive briefing from the City. (CP 638).

Shortly thereafter, Appellants abandoned all but their takings claim, which they appealed to this Court. In their *Opening Brief*, Appellants repeatedly cited to the evidence they submitted after summary judgment had already been issued. The City objected, arguing that the "new evidence" had never been considered by the trial court, and therefore should not be considered on appeal. After several rounds of briefing, the

Court of Appeals remanded the case and ordered the trial court to (1) assess the evidence regarding ownership of the 15-foot strip, and (2) determine whether that new evidence merited reconsideration and reversal of the summary judgment dismissal. CP 798-801. The Court of Appeals asked the trial court to enter written findings and conclusions to specifically outline why the new evidence would or would not affect the outcome of the case.

On remand, the trial court accepted additional evidence from Appellants, two additional briefs from Appellants, and heard oral argument on the issues. *Id.* Appellants argued that the plat through which their property was initially established did not dedicate the 15-foot strip to the City as a public right-of-way. *Id.* They again admitted that they had no idea who owned the 15-foot strip, but that they might have some unknown and undiscovered rights in it that would support their takings claim. CP 681-708, 767-776.

After briefing and oral argument, the trial court issued its Order on Remand, including findings of fact and conclusions of law regarding Appellants' claims. CP 798-801. The trial court rejected Appellants' arguments, finding that the plat of Appellants' property clearly dedicated the 15-foot strip as a public right-of-way, and that Appellants failed to

present any evidence or argument sufficient to preclude summary judgment. *Id.* This appeal followed.

C. Response to Appellants' Factual Background

Prior to analyzing the legal theories at issue here, it is necessary to briefly address some of Appellants' "factual" statements. For example, their briefing repeatedly paints the picture that Appellants are simply unfortunate victims whose "family" properties have been destroyed, whose "long-standing plans to retire" are now "on indefinite hold," and whose parents and children now have no place to live. *See Appellant's Brief*, pp. 5-6, 16-17, *et al.* In reality, both of these properties are owned by a holding corporation formed by Mr. Hulett, Appellants themselves have never lived in either of the properties in their 30+ years of ownership, House #1 has never been anything other than a rental, and no family member has lived in House #4 since their adult son spent six months there nearly 20 years ago. *Id.* at p. 5.

Mr. Hulett is the former president of the Stouffer Hotel chain, the former chairman and CEO of the Rock and Roll Hall of Fame in Cleveland, Ohio, and former president and CEO of Bridge Street Accommodations, an international broker of temporary executive housing and corporate housing. While the City certainly recognizes that Appellants' financial and career situation have no bearing on the merits of

their claims here, we object to Appellants' attempt to paint themselves as hard-luck, downtrodden victims whose entire life savings and retirement dreams have been flushed away by the heartless bureaucracy of Bainbridge Island.

Second, Appellants make numerous references throughout their briefing to the perceived negligence of the City that "caused" the landslides on Gertie Johnson Road. In reality, nothing could be further from the truth. Each and every one of the geotechnical experts who have repeatedly analyzed the area – those hired by the City and by Appellants themselves – have found that landslides are inevitable on Rolling Bay Walk because of the natural topography and climate of the area. Nor is the City's alleged negligence even relevant to this appeal, since Appellants' did not appeal the dismissal of those baseless claims.

Finally, there are various other facts that Appellants blatantly misrepresent here. For example, they claim that the closure of the Gertie Johnson turnaround means that emergency vehicles cannot service their properties. *Id.* at p. 10. This same argument was made during the original summary judgment proceedings. However, the Bainbridge Island Fire Marshall testified that emergency vehicles "are prevented from accessing Gertie Johnson Road, regardless of whether the turnaround is clear or not. In other words, the blockage of the Gertie Johnson turnaround by landslide

is irrelevant to the City's ability to provide fire protection to Appellants' property." CP 561. As a result, Appellants' continued use of such arguments is both baseless and disingenuous.

III. STANDARD OF REVIEW

Appellants now argue that this Court should completely ignore the trial court's findings on remand, and conduct an entirely *de novo* review of this case. However, such an argument strains the limits of credibility given that this Court required the trial court to enter such findings in the first place.

Appellants claim the trial court findings on remand are irrelevant because an appellate court conducts a *de novo* review of summary judgment proceedings. *Appellants' Brief*, p. 22-23. However, it is clear that the remand proceedings were not a simple rehashing of the original summary judgment, but rather a motion for reconsideration regarding the new evidence accepted by the Court of Appeals. In other words, the question on remand was whether Appellants' "new evidence" merited reconsideration of the original dismissal. When viewing the remand proceedings as a motion for reconsideration, this Court's request for findings from the trial court is entirely normal, since appellate review of a motion for reconsideration uses the "abuse of discretion" standard. *Rivers*

v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002).

As the Washington Supreme Court has pointed out, in order for the *abuse of discretion* standard to be properly applied, “[t]he trial court's reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal.” *Id.* at 684. In other words, while findings of fact are *irrelevant* when deciding a motion for summary judgment, they are *vital* when ruling on a motion for reconsideration.

Since findings of fact are *irrelevant* to a trial court’s ruling on summary judgment, and are *vital* to a ruling on a motion for reconsideration, the Court of Appeals’ requirement that this Court enter findings of fact on remand indicates that the remand proceedings are intended to involve a motion for reconsideration, and not an entirely new motion for summary judgment. It is simply illogical to conclude that this Court required written findings by the trial court if this Court were required to ignore those findings on appeal.

Appellants’ arguments regarding the standard of review are illogical, and are inconsistent with the realities of this case and direction from this Court. The written findings were specifically mandated by this Court, and they must be afforded their proper consideration under the abuse of discretion standard.

IV. LEGAL ARGUMENT

As the trial court has repeatedly held, and clearly explained in its findings, dismissal of Appellants' claim was appropriate because the right they claim was taken – the right to access their property via Gertie Johnson Road – never belonged to them in the first place.

As Appellants readily admit, none of the various landslides in this neighborhood have ever actually physically impacted either of their two properties. Rather, Appellants claim the City's decision not to re-open the turnaround has denied them the "right of access" to their properties. The disagreement here is whether Appellants ever had a legal right of access to begin with. As discussed below, Appellants have offered no evidence, analysis, or argument that comes close to establishing any of the required elements of a takings claim.

A. APPELLANTS HAVE NO OWNERSHIP INTEREST IN THE INTERVENING 15-FOOT STRIP OF LAND

First, the law is clear that owners of property abutting an *opened* public right-of-way – *i.e.*, an actual usable street, road, avenue, etc. – have a legal right to access their property via that street. Consequently, any decision by a local government to vacate or close that right-of-way may be characterized as a "taking" of that right, and, generally, the owner must be given just compensation under the State Constitution. "The right of access

of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation under article 1, section 16 of the Washington State Constitution.” Keiffer v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977); *See also* State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957); Walker v. State, 48 Wn.2d 587, 295 P.2d 328 (1956); Brown v. Seattle, 5 Wn. 35, 31 P. 313 (1892).

However, it is important to note that such access rights only apply to rights of way that have actually been opened for public use. In other words, unopened public rights of way are treated no differently than private property with regard to access rights. Property owners abutting an *unopened* public right-of-way – a right-of-way that has never made into an actual street, road, avenue, etc. – do not have any legally-recognized right to access their property via that right-of-way. *See generally* 10A McQuillin, Municipal Corporations, § 30.56.10 at 371 (3d ed. 1990) (indicating the general rule that proprietary rights of an abutter do not begin until street is opened for use as such); *See also* Voss v. City of Middleton, 470 N.W.2d 625 (Wis. 1991) (“a property owner has no right of access where a street does not exist but would abut his land if it did exist”).

Here, Appellants’ takings claim is premised on the closure of the Gertie Johnson Road turnaround area. So, one way Appellants can bring a

takings claim based on the closure of Gertie Johnson Road is to show that they have a property right in land **abutting** Gertie Johnson Road. However, since all parties agree that the 15-foot strip separates Appellants' northernmost property from Gertie Johnson Road, the characterization and ownership of that 15-foot strip is vital to Appellants' claim.

In other words, if Appellants can prove some ownership interest in the 15-foot strip (fee ownership, adverse possession, prescriptive easement, etc.), then they have a clear right to access their northernmost lot via Gertie Johnson Road since the 15-foot strip abuts the roadway.⁴

In this case, the outcome is clear. Appellants have failed to present any evidence to show even the slightest hint of ownership interest in the 15-foot strip.

1. **The 15-Foot Strip is Clearly an Unopened Public Right-of-way**

The first and most obvious reason why Appellants do not own the 15-foot strip is that the City owns it. Even the most cursory review of the facts, arguments, and evidence submitted here make this point unavoidably obvious. Since the 15-foot strip is clearly an unopened right-of way, Appellants have no “abutter’s rights” in Gertie Johnson Road,

⁴ In no case can Appellants establish an abutting property right in its House #4, since that property is nowhere near the terminus of Gertie Johnson Road. This lot is separated by the road end by the 15-foot strip of land and three other lots.

which lies 15-feet away from their House #1. Consequently, the takings claim was properly dismissed.

a. The Manitou Park Plat Dedicated the 15-foot Strip To The City⁵

The Rolling Bay Walk neighborhood was originally platted in 1908. CP 759. That plat – known as “Manitou Park” – has been one of the central documents in this litigation. The face of the plat itself clearly indicates a 15-foot strip running along the northern edge of the other platted properties. *Id.* The 15-foot strip is in exactly the same place as the prior right-of-way that had been vacated by statute, it is an exact extension of Valley Road to the West, and it is indicated in exactly the same way as every other right-of-way on the plat. There is very little question that the 15-foot strip is one of the rights of way dedicated to the City on the plat.

In light of all those facts, the only argument Appellants can muster is that the 15-foot strip is not a public right-of-way because it is not labeled with a street name on the plat map. That argument is simply nonsense. Whether or not a public right-of-way is labeled with a street name on a plat map has nothing whatsoever to do with whether it is a legally-recognized right-of-way. The other rights-of-way on the plat are

⁵ Appellants spend several pages arguing that the 15-foot strip in question was originally dedicated in 1894, then vacated by statute in 1899. *See Appellants' Brief*, pp. 25-27. However, since the City has consistently admitted that fact, it is unclear why Appellants continue to present extensive argument on that subject.

labeled with street names because they are actual improved streets that had been constructed, named, and opened for public use.

To claim that the absence of a street name has any legal effect on the status of an unimproved, unopened right-of-way has no support in law. As the trial court recognized in its formal findings, “although unlabeled, the 15-foot strip of land is ‘shown’ on the Plat in accordance with the words of dedication.” CP 799. The trial court’s decision is consistent with the evidence, and Appellants have submitted no argument, evidence, or analysis to establish that that decision was an abuse of the trial court’s discretion, or in any way erroneous.

b. Every Other Official Map Clearly Shows the Right-of-Way

Next, it is important to note that the Plat of Manitou Park is far from the only indication that the 15-foot strip is a public right-of-way. The fact is that every other historical map of Bainbridge Island clearly shows the 15-foot strip as an extension of Valley Road from the top of the bluff down to the beach.

The 15-foot right-of-way is also clearly indicated on the Kitsap County Assessor’s GIS map and application. Ironically, a copy of this County GIS map was actually attached to Appellants’ claim for damages in this case, and Appellants have relied on that document to support their

lawsuit against the City. CP 749-750. The GIS map application has been provided by Kitsap County to the public to ascertain parcel ownership and tax information, and provides public evidence of the existence of this public right-of-way.

Finally, the 15-foot right-of-way is clearly identified in the City's current parcel ownership information system. As with the County's application, the City uses overhead photos with Kitsap County Assessor's tax parcel information superimposed on the photos. A copy of the City's current information – along with text from Randy Witt, the City's Public Works Director, explaining the various lines and markings – is found at CP 735.

Again and again, property maps, parcel and tax information, and official County and City records establish that the 15-foot strip in question is clearly an unopened right-of-way. None of this information has been factually contradicted by Appellants' conclusory and unsupported arguments on the issue.

c. Everyone Except Appellants' Lawyer Knows the 15-Foot Strip is a Unopened Public Right-of-Way

Given the evidence and briefing submitted in this case, one fact becomes abundantly clear: of all the people, parties, experts, and attorneys who have assessed the issue here, Appellants' lawyer is the only person

who believes that the unopened 15-foot strip is not a City owned right-of-way.

i. Conclusions of Appellants' Own Experts

When Appellants submitted their original motion for reconsideration to the trial court, they included a declaration from their attorney to explain the process by which they obtained the “evidence” they now rely on to argue that the 15-foot strip was not a public right-of-way. CP 741-743. That declaration speaks volumes about the legitimacy of their claims here.

Upon receiving the City's summary judgment materials, Appellants hired former City employee Jeff Waite to search county records “in an effort to understand the nature of the right-of-way alleged.” *Id.* On August 9, 2007, more than two weeks before oral argument, Mr. Waite reported his findings. *Id.* at p. 2:14-16. He told Appellants' lawyers in no uncertain terms that – based on his expertise and review of the documents – the City did in fact own the right-of-way. *Id.* Upon receiving the report, Appellants' lawyer called Mr. Waite and discussed the matter on the phone. Mr. Waite again confirmed his conclusion that the City owned the right-of-way. *Id.* As Appellants' lawyer admits, he asked Mr. Waite to forward the documents he had obtained, but “I did not

ask him to put a ‘rush’ on the request because our telephone discussion had led me to believe that the documents were not helpful.” *Id.* at 2:17-22

Appellants did not receive any documents from Mr. Waite until two weeks later, on August 27, 2007, which was three days after summary judgment oral argument, and the same day the trial court granted summary judgment to the City. *Id.* at p. 3. However, despite the fact that Mr. Waite – the person Appellants hired to research the issue – had concluded the City owned the right-of-way, Appellants’ attorneys came to a different conclusion. “On review of those documents... I immediately found cause to question Mr. Waite’s initial judgment.” *Id.* In other words, when Appellants’ lawyer failed to get the conclusions he wanted from his own expert, he merely dismissed those conclusions and created his own.⁶

Despite their present arguments, or their questioning of Mr. Waite’s “judgment,” the plain reality is that Mr. Waite’s conclusions about the 15-foot strip are the exact same conclusions made by everyone else who has looked at the issue... everyone, that is, *except* for Appellants’ lawyers. City Staff knows the City owns the 15-foot strip, the City’s

⁶ Mr. Waite’s agreement with the City’s position here is also clear from the Declaration he eventually signed for Appellants’ attorney (submitted with Appellants’ *Opening Brief on Remand*). The Waite declaration merely indicates why he was hired, and states that the documents attached are true and correct copies. It is truly rare that an expert declaration – submitted in Court by the party that hired the expert – includes no expert opinions or conclusions whatsoever, or even hints at that expert’s finding on the issue he was hired to address. His opinions are not included because he in fact believes the 15-foot strip is City property.

attorneys know it, Appellants' own experts know it, and the trial court made findings in support of this fact. Given that reality, Appellants' strained, unsupported, and irrelevant arguments must be rejected.

ii. Sworn Admissions of Appellants
Themselves

Perhaps the most significant indication of the weakness Appellants' claim is the fact that Appellants themselves have submitted sworn documents supporting the City's ownership of the 15-foot strip of unopened right-of-way.

As this Court is aware, RCW 4.96.020 requires potential Plaintiffs to file a signed and verified claim for damages prior to instituting civil tort proceedings against a local governmental entity. Here, Appellants timely filed such a claim with Bainbridge Island. CP 766, 749-750. William Hulett verified and signed the document under oath: "I HAVE READ THE ABOVE CLAIM, KNOW THE CONTENTS THEREOF, AND BELIEVE THE SAME TO BE TRUE." CP 766.

Attached to that claim – along with in-depth descriptions of the facts, allegations, and claimed damages – are two separate parcel maps of the neighborhood. CP 749-750. On the first map (CP 749), Mr. Hulett filled in the names of the property owners on each parcel. On the 15-foot strip – which is clearly delineated on the map – Mr. Hulett wrote "City

Property.” *Id.* On the second map (CP 750), Mr. Hulett filled in the names of the property owners and even colored in the area covered by the landslides. He then drew an arrow to the 15-foot strip and wrote “City Property” on this map as well. *Id.* Again, it is important to note that Mr. Hulett did not simply print out maps that identified the 15-foot strip as City property; rather, he printed blank maps and took the extra step of actually hand-writing the words “City Property” on the specific 15-foot strip that they now vehemently argue is not City property.

Appellants now argue that “Mr. Hulett labeled the 15-foot strip as ‘City Property’ in reliance on the County’s own GIS system; he had no independent knowledge of the ownership status of the land...” *Appellant’s Brief*, p. 34. That claim is disingenuous, since there is nothing in the printout or on the GIS system that in any way identifies the 15-foot strip as City property. If the system itself did so, Appellant would not have needed to insert the words “City Property” along with the names of the other parcel owners in his own handwriting.

The fact that Mr. Hulett swore under oath in two separate instances that the 15-foot strip was “City Property” means that Appellants’ should be estopped from arguing to the contrary now. However, even if this Court does not hold Appellants’ to their prior sworn statements, and does not apply estoppel against them, these sworn admissions – in Appellants’

own handwriting – are at the very least highly indicative of the strength of their arguments on the issue of ownership.

2. Appellants’ “Evidence” Does Not Contradict the City’s Ownership of the 15-Foot Strip

Not only does the City’s evidence clearly establish that the 15-foot strip is a City-owned, unopened right-of-way, but Appellants’ own evidence does nothing to contradict this fact. In fact, the majority of the “evidence” on which Appellants base their arguments is incomplete and incompetent to serve as legitimate evidence.

For example one piece of “evidence” on which Appellants’ rely is Exhibit C to the Declaration of Jeff Waite, which was submitted multiple times both to the trial Court and the Court of Appeals. CP 786-788. The first page of that exhibit purports to be a 20-year old letter from a city resident – a lawyer at Bogle & Gates at the time – arguing that a piece of property near his house was not a City right-of-way. CP 786. As an initial matter, it is unclear why this letter has any relevance to our case. The right-of-way referred to in the letter is merely a few feet of the intersection of two roadways at the top of the bluff, and is wholly unrelated to this case. Second, the letter is not authenticated by the author or anyone with personal knowledge of its creation or submission. Moreover, even if the letter were relevant to this case, the fact is that it

only includes the first page of that letter, which ends mid-sentence: “As it stands now, I...” Consequently, even if the letter were somehow relevant to the 15-foot strip at issue here – which it clearly is not – there is no way to know what the rest of the letter said. Appellants’ failure to include any more than the first page surely prohibits their dependence on that letter as competent evidence.

The second and third pages of Exhibit C are a Petition for Vacation (apparently concerning the small triangle of land addressed by the letter) and a signature sheet with the names of area residents. CP 787-788. It is unclear whether the Petition and signature sheet were somehow attached to the letter from 1990, or whether Appellants simply neglected to identify the petition documents as a separate exhibit. Regardless, even those documents are incomplete. For example, the petition includes space to describe the actual right-of-way being vacated – which may have some relevance to this case if it is the same right-of-way. Unfortunately, the space for that description simply says “See Exhibit A of Engineer’s Report for Legal Description.” Needless to say, neither the engineer’s report nor the legal description is included in Appellant’s materials. Nor have they included “the attached drawing” that the document refers to.

Finally, exhibit D to Mr. Waite’s Declaration purports to be a “true and correct copy” of the minutes from a meeting of the County

Commissioners, also in 1990. CP 790. Again, that meeting apparently concerned the petition for vacation of the right-of-way referred to in the Exhibit C letter. And again, aside from having nothing to do with the unopened right-of-way at issue in this case, the “minutes” identified in Exhibit D consists of a single page of a multi-page document. The included page indicates that one of the County Commissioner introduced a hearing on the vacation issue, then offered his own opinion that “the property was private property, not public property....” The remainder of that sentence is carried over onto the subsequent page of the document. Perhaps not surprisingly, that second page is not included.

The opinions of a single legislator (here, a single County Commissioner) are not relevant to legislative decision-making or the opinions or position of the government as a whole. *United States v. Morgan*, 313 U.S. 409, 61 S.Ct 999, 85 L.Ed. 1435 (1941); *Goebel v. Elliot*, 178 Wn. 444, 447-448, 35 P.2d 44 (1934). See also *Cornelius v. Seattle*, 123 Wn. 550, 213 P. 17 (1923); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986). Again, even if the 20-year old opinion of one County Commissioner regarding an entirely unrelated piece of property has any relevance to this case, the fact remains that Appellants’ evidence is clearly incomplete and wholly incompetent to support their takings claim.

The trial court recognized these shortcomings with Appellants' "evidence" and even issued formal findings about those issues:

4. In 1990 a different portion of the same right-of-way was vacated by the county. This act is not relevant. The county did not vacate the 15-foot piece of land in question and made no determination as to its ownership.

5. The County Commissioner's comments that the different portion of the same right-of-way was "private property, not public property" are not relevant. Most significantly, the comment was not in regard to the 15-foot strip of land in question. The Commissioner's comments were also made during proceedings which vacated the land. The comments are inconsistent with the county action of vacation because the county may only vacate public land. Furthermore, there is little context provided for the statement and the single opinion of a county commissioner would have only limited relevance to the government's position as a whole.

CP 800.

Based on the irrelevance and incompleteness of Appellants' "evidence," there is little support for their claim that the trial court erred in any, let alone abused its discretion in dismissing Appellants' baseless claims.

3. Even If The City Did Not Own The Strip, Appellants Still Lose

Next, Appellants have continuously argued – during the summary judgment, reconsideration, and remand proceedings in the trial court, during the original proceedings before this Court, and again on this appeal

– that their evidence proves the City *does not* own the 15-foot strip of land in question. Unfortunately, Appellants seem to be missing the point. An essential element in a takings claim is that the claimant *actually owns* the property allegedly taken. Put simply, the question here is not whether *the City* owns the property, but whether *Appellants* own the property. The only reason the City’s claimed ownership of the 15-foot strip is important is that it means Appellants *do not own it*. To support a takings claim, Appellants must present actual evidence that they have some discernible interest in the property allegedly taken. Here, they have failed to carry that burden, and their case was properly dismissed.

a. Appellants Admit They Have No Evidence Of Their Own Ownership

First, while Appellants argue vehemently that the City *does not* own the 15-foot strip, they have still presented no evidence whatsoever *they* either own the strip outright or have any other relevant property interest sufficient to support a takings claim. In fact, Appellants have explicitly and repeatedly admitted that (1) their evidence only seeks to address whether the City owns the 15-foot strip, and (2) while they believe the City *does not* own the strip, they have no idea who *actually does* own it:

- “Whether the 15-foot strip is now owned by the Huletts or by others, the one certainty is that *the City does not own it...*” CP 597.
- “While it is unclear exactly who presently owns the fifteen-foot strip of land at the end of Gertie Johnson Road, one thing is clear: the City does *not* own it.” CP 686.
- “Yet the ownership status of that land is anything but clear, and, in fact, it might belong to the Huletts. The Huletts submit three pieces of evidence showing that the City does not own or otherwise control the strip of land.” CP 685-686

Again and again, Appellants make it clear that their entire takings claim is based on the argument that the City *does not* own the 15-foot strip. However, the law is clear that a takings claim is premised on the Appellants’ positive ownership interest in the property allegedly taken. As such, even if the Court finds that the City does not own the 15-foot strip, Appellants’ repeated admission that they have *no idea who does* own the property still means their takings fails as a matter of law. Appellants’ failure to present any evidence of their ownership of the 15-foot strip is not surprising, because no such evidence exists. Even the evidence Appellants present to deny the City’s ownership of the 15-foot strip makes it clear that they themselves *do not* own it.

For example, Appellants admit that the 15-foot strip is clearly indicated on the Plat of Manitou Park. And while they argue that the strip

is not labeled with a street name and is therefore not a public right-of-way, they ignore the fact that regardless of what it is, the 15-foot strip clearly is not part of their own platted property. There can be no argument that the northern edge of the platted parcels all terminate at the southern edge of the 15-foot strip. CP 759.

In fact, while the 15-foot strip is not labeled with a street name, it is also not labeled with a parcel number either. So, if Appellants are correct that the 15-foot strip indicated on the plat is not a public right-of-way, then the only other option is that it is either (a) a strangely-shaped, unlabeled, and un-useable parcel of private property, or (b) it is not part of the plat at all, and is merely included to indicate that the plat begins 15 feet south latitudinal line intersecting the survey marker at the northwest corner of the plat.

As outlined above, Appellants do not have to prove actual fee ownership of the 15-foot strip in order to establish a takings claim. If, for example, they prove their House #1 has an easement across the 15-foot strip (from Gertie Johnson Road to their own property), then that lot would have a right to access that easement via Gertie Johnson Road.⁷ As such, the closure of Gertie Johnson Road would likely deny them that

⁷ That is assuming that the easement actually touches (i.e., *abuts*) both the roadway itself and their own property at House #1. And again, there is no question that Lot #4 has no access rights here.

right of access and result in a compensable taking. Here, however, Appellants have offered no evidence at all that they own such an easement, either by agreement or adverse possession, or any other property right in the 15-foot strip, let alone a property right sufficient to support a takings claim based on the closure of Gertie Johnson Road.

The only property right Appellants allude to in their briefing is that they may have adversely possessed an access easement to their home. Presumably, this refers only to House #1. They begin by claiming that “The Hulettts, and the owners before them, have walked over that strip of land to access their homes for almost 100 years.”⁸ Later, Appellants make the claim that “the Hulettts and two other owners of the northern properties at Rolling Bay Walk would have at least acquired access rights by adverse possession by their use, over 100 years, of that land to access their homes.” CP 683.

Despite those conclusory statements, however, Appellants fail to present even a scintilla of evidence to support their apparent claim to an adversely-possessed access easement. For example, they present no declarations or testimony from the Hulettts themselves, any prior owners of their properties, or any of the “two other owners of the northern properties” to support their claim that Gertie Johnson Road has been used

⁸ *Appellants’ Opening Brief*, 3:10-11.

to access their properties for “100 years.” In fact, they present no evidence that Gertie Johnson Road was even in existence 100 years ago, or that the properties even had houses on them at that time. In fact, given that the properties were not even platted until 1908, and that the current configuration is significantly different than when originally platted, Appellants’ claim of “100 years” of consistent use has no merit.

Further, even if Appellants’ allegations regarding historic use of the 15-foot strip *were* supported with any evidence, they still fail to present any argument, analysis, or evidence on any of the required elements for adverse possession. The first requirement for a claim of adverse possession is to prove that Appellants’ use of the 15-foot strip is “hostile” or “adverse to the true owner.” *Mood v. Banchemo*, 67 Wn.2d 835, 841 (1966). That initial step presents two problems for Appellant. First, Appellants admit they have no idea who the true owner is. Without even knowing who the true owner is, their conclusory claim to a prescriptive access easement is clearly baseless.

Second, even if Appellants *knew* who the true owner is, they have presented no evidence that use of the strip to access their house would be a hostile use. The law is clear that “We start with the presumption that the use of another's property is permissive.” *810 Properties v. Jump*, 141 Wn.App. 688 (2007) (citing *Kunkel v. Fisher*, 106 Wn.App. 599, 602

(2001). Appellants have presented no evidence to meet their burden on this first element of an adverse possession claim.

The same is true of the remaining elements for adverse possession. Appellants have not even addressed whether their alleged use was “open, notorious, continuous, and uninterrupted for 10 years,” nor tried to prove “knowledge of such use by the owner at a time when he was able to assert and enforce his rights.” *810 Properties, supra*. Again, it is impossible for Appellants to prove knowledge by the true owner when they admittedly have no idea who the true owner even is.

Appellants claim no actual ownership interest in the 15-foot strip aside from the single statement that they may have “acquired access rights by adverse possession.” Appellants have not made any attempt to address the actual legal requirements of such a claim, and their unsupported, conclusory, and questionable claims about prior owners’ “use” of the property is not sufficient to create a genuine issue of fact regarding adverse possession.

4. Conclusion

The entire weight of the evidence in this case makes one thing clear: the 15-foot strip at issue here is an unopened City right-of-way. The plat of Manitou Park unquestionably dedicates the 15-foot strip to the City, and Appellants’ strained arguments to the contrary, coupled with

their irrelevant and incomplete “evidence,” does nothing to counter that fact. Moreover, even if we completely ignore the evidence, and assume the City does not own the strip, the fact remains that Appellants have offered no evidence that they have any ownership interest in the property. Consequently, the trial court’s dismissal of their takings claim was entirely proper and should be affirmed.

B. APPELLANTS HAVE NO “SPECIAL OR UNIQUE DAMAGES” AS REQUIRED BY THE LAW

Appellants next argument is that even if they do not have any ownership interest in the 15-foot strip, and therefore do not have any “abutter’s rights” to access their property via Gertie Johnson Road, their takings claim should nevertheless succeed because they have suffered “special or peculiar damage differing in kind from that of the general public.” *Appellants’ Brief*, p. 35 *et seq.* However, Appellants have either misunderstood or misconstrued the cases addressing this issue. Essentially, Appellants have taken the approach of stating the law, but failing to correctly apply it to the fact of this case. Even the most cursory review of the cases discussing “special damages” show that the principle does not apply to this case.

1. **Appellants Misstate The Rule on “Special Damages”**

As discussed above, courts have historically held that those who abut a public street have a special and compensable legal right to access their property via that street. Consequently, that principle has led to argument and speculation as to whether the converse is true – are those who *do not* abut on the street being vacated completely foreclosed from seeking damages? In addressing these issues, courts have generally held that the strict construction of abutters’ rights principle leads to unjust results in certain circumstances.

The principles involved in this discussion are most easily understood with a visual reference. See CP 566. In this example, Parcel A abuts First Street, and therefore has a legal right of access to Parcel A via First Street. Parcel B abuts Second Street and therefore has a legal right of access to Parcel B via Second Street. However, since Second Street is a dead end in both directions, First Street is a necessary access route to reach Parcel B.

Assume that First Street is vacated and closed by the City. Owner A clearly has abutter’s rights in First Street, and would therefore receive compensation for the loss of access (assuming the street was vacated to the East of Parcel A). However, even though Parcel B *does not* abut First Street, it is clear that closure of First Street nevertheless denies Owner B

the exact same sort of right as Owner A is denied; the right to access their property from an *abutting public street*. The only difference is that closure of First Street denies Owner A his abutter's rights in *First Street*, and denies Owner B his abutter's rights in *Second Street*.

Since closure of First Street clearly denies both owners the right to access their property via an abutting public street, a rule limiting recovery only to those who abut the street *that was actually closed* would deny recovery to Owner B, and would clearly be unjust. Consequently, the courts have held that the question is not simply whether a property abuts the specific street that is closed, but whether closure of that street creates "special damage" to a particular property. As indicated above, the only "special damage" that distinguishes a property owner from the general public in the case of a road closure is whether that closure denies the owner their legal right of access (i.e., abutter's rights) in a public street.

The cases and commentaries make this point exceedingly clear, and Appellants take great pains to skirt the issue. For example, McQuillin explicitly states that damages for the vacation of a public street are only available in two instances: "(1) those where one claiming damages owns property abutting directly on the part of the street vacated and (2) those where the claimant owns property abutting on the same street but not on the part of the street vacated or owns non-abutting property on another

street.” 11 McQuillin Mun. Corp. § 30.192 (emphasis added). In other words, to receive damages as a result of a street closure, you do not have to abut the specific street that was closed, but you do have to abut *some public street*.

As an example of this principle, consider Parcel C in the illustrative drawing. Assume that Owner C traditionally parks at the southern terminus of Second Street, then walks across the vacant land to reach his property at Parcel C. Despite the convenience of that access, the fact remains that Owner C has no special right of access to his property via Second Street because he does not abut that street. So, while closure of First Street would require that damages be paid to Owner A and Owner B, no damages would be paid to Owner C for the closure First or Second Street because neither closure would deny Owner C a special right of access. Although such a closure would certainly deny Owner C the *convenience* of parking on a public street a short distance from his property, denial of convenience is not a compensable element of damage.

In our case, the Appellants are in the exact same position as Owner C. While the Gertie Johnson Road turnaround area certainly provided Appellants close and convenient access to their property, that convenience does not amount to a “special right” that Appellants can somehow enforce against the City.

2. The Cases Directly Oppose Appellants' Arguments

Not only have Appellants failed to accurately describe the “special damages” principle to this court, but they have failed to discuss even a single case addressing the issue, let alone apply the law to the present facts. Even the most basic review of these cases reveals a lack of any support for Appellants' claims:

- Kemp v. Seattle, 149 Wn. 197, 270 P. 431 (1928): The Court found that Plaintiff did not abut the street in question, and was therefore not damaged in any way by its closure. The Court affirmed summary judgment dismissal of Plaintiffs' claims.
- Taft v. Washington Mut. Savings Bank, 127 Wn. 409, 221 P. 604 (1923): Plaintiffs did not abut on the alley vacated. The Supreme Court remanded with instructions to dismiss Plaintiffs' case because they had no legal right of access that had been interfered with.
- Ponischil v. Hoquiam Sash, Etc. Co., 41 Wn. 303, 83 P. 316 (1906): Plaintiffs abutted the street, but not the portion vacated. Supreme Court dismissed Plaintiffs' case because they had suffered no compensable damage.
- Mottman v. Olympia, 45 Wn. 361, 88 P. 579 (1907): Supreme Court affirmed dismissal of Plaintiffs' action because “appellants' property does not abut on the street vacated.”
- Capitol Hill Methodist Church of Seattle, v. Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958): Plaintiffs did not abut on street vacated. Supreme

Court affirmed dismissal of Plaintiffs' claim because they had suffered no cognizable injury.

- State v. Wineberg, 74 Wn.2d 372, 444 P.2d 787 (1968): Court recognized compensable damages only when (1) property abuts on portion of street vacated, or (2) property abuts on the same block of the vacation and owner suffers peculiar damage to their access rights. Never discussed or alluded to damages for non-abutters. Owner's appeal was dismissed.
- London v. City of Seattle, 93 Wn.2d 657, P.2d 781 (1980): Plaintiffs did abut on the street vacated, but not the portion that was vacated. Court nevertheless denied injunctive relief.
- Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp., 96 Wn.App. 288, 980, P.2d 779 (1999): Union sued because closure of a road would make it more difficult to get to the street *on which it did abut*. Court remanded for trial. No indication whether damages were ever awarded at trial.
- Hoskins v. City of Kirkland, 7 Wn.App. 957, 503 P.2d 1117 (1972): Plaintiffs had been given a special permit to access a street, but did not abut that street. Court affirmed summary judgment dismissal of plaintiffs' claims because they had not "sustained special damages different in kind and not merely degree, from that sustained by the general public." *Id.* at 962 (internal quotations omitted).
- Yarrow First Associates. v. Clyde Hill, 66 Wn. 2d 371, 403 P.2d 49 (1965):
 - i. First, although the Plaintiffs in Yarrow did not abut the street being vacated, the situation in was identical to the situation

for parcel B in the illustrative drawing discussed above. The Court observed that the street “afford[ed] the sole access to [Plaintiffs’] real property.” *Id.* at 372. Consequently, vacation of the sole outlet road caused unique access damages to the Yarrow Plaintiffs, because they could no longer access the streets on which they *did* abut.

- ii. Second, the mere loss of access was not the reason the Court found in Plaintiffs’ favor in *Yarrow*. The attempted street vacation was judged illegal because the express purpose for the vacation was to deny non-City residents access to City streets. The Court held that “the Clyde Hill plan to deliberately landlocked the Yarrow property creates a special damage that will support this challenge to the attempted vacation.” *Id.* at 374.

Again, Appellants’ failure to cite even a single case in which damages were awarded to a property owner who did not abut on any street at all is entirely understandable, since no such case appears to exist in any jurisdiction anywhere in the country.⁹ Appellants simply cannot claim a legal right to access their property from a public street when their property does not abut on that or any other street. They have failed to prove the necessary elements of “special or peculiar damages” as clearly developed in the case law, and their arguments on that issue were properly rejected by the trial court.

⁹ In fact only two of the cases discussed above resulted in anything other than outright dismissal of the Plaintiffs’ claims.

C. **APPELLANTS’ “ACCESS” HAS NOT BEEN CUT OFF OR DESTROYED**

Next, even if we assume (1) that the 15-foot strip is *not* a City right-of-way, (2) that Appellants’ property *does* abut Gertie Johnson Road, and (3) that Appellants’ use of the unopened right of *is not* per se illegal, the fact remains that the extent to which Appellants’ access to their property was affected by the covering of the turnaround area does not create any cognizable injury.

1. **“Convenience” of Access**

As indicated above, the only physical access Appellants had to their property via Gertie Johnson Road before the landslide was to park at the turnaround area, then walk across the 15-foot unopened right-of-way.¹⁰ After the landslide, Appellants could no longer park on the turnaround area itself. However, the landslide that covered the turnaround did not render the location impassable; it merely made it impossible to park a full-size vehicle on the turnaround. Nor has the City ever formally vacated the Gertie Johnson Road right-of-way.

Because the area remains both physically passable and legally open for travel, Appellants still have the exact same access as they had

¹⁰ This “physical access” must be distinguished from “legal access.” Since the Bainbridge Island Code explicitly prohibits the use of unopened rights of way for “access purposes,” Appellants’ use of the 15-foot strip for that purpose is *per se* illegal. BIMC 12.32.020.

before. The only difference is that instead of parking in the turnaround area, they must simply park further up the road and walk around the landslide debris field. In fact, the debris field is passable without ever leaving the Gertie Johnson Road right-of-way. In that respect, Appellants' allegations that their access has been "cut off" or "closed down" are simply disingenuous. The access to their property via Gertie Johnson Road has simply become less convenient than it used to be; *i.e.*, Appellants have to walk *further* than they used to. With respect to convenience, the law is well settled that "an added inconvenience is not a damage or taking, within the meaning of these terms as they are used in our state Constitution." *Freeman v. City of Centralia*, 67 Wn. 142, 145, 120 P. 886 (1912). In fact, the State Legislature has expressly codified that principle:

No person, firm or corporation, private or municipal, shall have any claim against the state, city or county by reason of the closing of such streets, roads or highways as long as access still exists or is provided to such property abutting upon the closed streets, roads or highways. **Circuitry of travel shall not be a compensable item of damage.**

RCW 47.52.041 (emphasis added).

2. "Type" and "Quality" of Access

In addition to barring recovery based on a mere reduction in the convenience of access, the law is also clear that a change in the "type" or

“quality” of an owner’s access to his property is not a compensable element of damage. In other words, a City has the right to restrict, change, and control access via public streets, “so long as it does not amount to a complete taking of the right of access.” Moorlane Co. v. Highway Dept., 384 S.W.2d 415 (Tex. App. 1964):

- “[A]n abutting property owner has no right to have a highway of a particular surface or pavement.” City of Louisville v. Louisville Scrap Material Co., Inc., 932 S.W.2d 352 (Ky. 1996).
- “The easement of the adjacent landowner, however, in the absence of some specific grant, is not a property right in any particular type or size of street. It is, in effect, a private right of ingress and egress.” City of Houston v. Fox, 444 S.W.2d 591 (Tex. 1969).
- “No case has been cited, and we have found none, which holds that the inability of certain types or sizes of vehicles to go and return from the abutting property constitutes a denial of access.” Moorlane Co. v. State, 360 S.W.2d 918 (Tex. App. 1962).
- A property owner cannot demand that the adjacent street be left in its original condition for all time to insure his ability to continue to enter and leave his property in the same manner as that to which he has become accustomed” Friends of H Street v. City of Sacramento, 20 Cal.App.4th 152 (1993) (internal quotations omitted).
- “Inconvenience, reduction in profits or depreciation in the value of property that occurs as a result of a legitimate exercise of the state's police power is *damnum absque injuria* and not a

compensable taking.” Gruner v. Lane County, 773 P.2d 815 (Or. App. 1989).

- “...Commonwealth undoubtedly may prohibit vehicular access, in appropriate circumstances, under the general police power.” Hardee's Food Systems, Inc. v. Department of Transp. of Pennsylvania, 434 A.2d 1209 (Pa. 1981).
- “Similarly, other jurisdictions have recognized the power of cities or towns to pass ordinances or regulations denying an abutting owner the right of vehicular access.” *Id.*

In fact, our State Legislature has also given cities such as Bainbridge Island the specific authority to limit the types of vehicles, or ban vehicular traffic altogether, from any street when such use becomes impractical or dangerous. RCW 47.48.010; *See also Burg v. City of Seattle*, 32 Wn.App. 286, 647 P.2d 517 (1982) (holding that RCW 47.48.010 prevents a landowner from forcing a municipality to repair a roadway or otherwise open it to specific types of traffic).

In this case – assuming Appellants’ use of the unopened 15-foot right-of-way is not *per se* illegal – Appellants maintain the exact same pedestrian access to their homes via Gertie Johnson Road as they have always had. The fact that they must now park further up the road, that their walking path is narrower than it once was, and that they must now

walk over dirt rather than asphalt, does not create any compensable injury for Appellants.¹¹

3. **Appellants Cite No Cases That Even Address Non-Abutting Property Owners**

Appellants spend pages 36-42 of the Brief arguing that their access has been impaired enough to warrant a takings claim. Perhaps the best indication of the weakness of Appellants arguments is that despite the obvious amount of research and time spent on this section, they have not only failed to cite any case actually supporting their claims, but failed to identify any case that even addresses non-abutting property owners. Each of the cases they cite to and discuss deal with property owners abutting directly on a public street who had direct vehicular access to their property directly from that street.

- *Capitol Hill Methodist*, 52 Wn.2d 359, 324 P.2d 1113 (1958): “owners of property **abutting** on a street of alley...” (p. 38)
- *Lenci v. City of Seattle*, 63 Wn.2d 664, 338 P.3d 926 (1964): “the owner... of property **abutting** on a public

¹¹ Appellants’ claim that they have to “trek [] over an around unstable landslide debris” have any merit Appellants’ Brief, p. 37. It is merely another example of Appellants’ unsubstantiated allegations. They have submitted no photos or other evidence to bolster any such claims. In fact, having lived in the Midwest for at least the last 20 years, it is unclear when the last time was that Appellants have even been to either of the properties in person. The path to Appellants’ home is neither dangerous nor unstable, and in any event the entire shoreline remains available for access.

thoroughfare has a right to free and convenient access thereto...” (p. 38)

- Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp., 96 Wn.App. 288, 980 P.2d 779 (1999): Union sued because closure of a road would make it more difficult to get to the street *on which it did abut*. Court remanded for trial. No indication whether damages were ever awarded at trial. (p. 37)
- Keiffer v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977): Plaintiff was an **abutter**. “Prior to the curbing, the owner had access ‘at all points along their frontage.’” (p. 37)
- Clay v. City of Los Angeles, 21 Cal.App.3d 556 (1971): “persons purchasing and constructing homes on lots **abutting** that street reasonably expect that the street will continue in a usable condition.” (p. 41)
- State ex rel. Moline v. Driscoll, 185 Wash. 229, 53 P.2d 662 (1936): “a change of an established grade of a street or highway may constitute a damage to the property of **abutting** owners...” (p. 40)

Unless and until they can identify a single case where a non-abutter with admittedly no vehicular access was actually awarded any damages at all, Appellants' misquotations and misleading arguments are unconvincing and should be rejected.

D. “PHYSICAL TAKING” AND “EXHAUSTION OF REMEDIES”

Finally, Appellants claim that they were not required to exhaust administrative remedies because (1) they allege a “physical taking” and (2) such exhaustion would be futile. *Appellant’s Brief*, p. 43 *et seq.* In addressing their own failure to exhaust administrative remedies, Appellants accurately point out that all the cases cited by the City are cases of regulatory takings, and not physical invasions. They then accurately point out that physical takings are subject to a different analysis than regulatory takings, and that exhaustion is not required in cases of physical invasion. Unfortunately, however, Appellants fail to realize – or merely fail to point out – that this is clearly not a case involving physical invasion. As indicated above, Appellants took great pains to point out throughout their brief – both to the trial court and this Court – that none of the landslides at issue here have ever invaded, damaged, or in any way touched their property. Moreover, Appellants have not claimed that the City has denied them physical possession of anything.

The only “property” Appellants claim to have been denied is the “right of access” via Gertie Johnson Road. However, even if Appellants are correct, the City’s decision not to re-open the turnaround has no physical impact on Appellants’ property, and does not deny them the

physical right to possession or control of anything. The 9th Circuit, along with every other court in the country, has clearly held that a physical taking “involve[s] a government action that results in the occupation or confiscation of private physical property.” *Garneau v. City of Seattle*, 147 F.3d 102 (9th Cir. 1998) (emphasis added). There is simply no merit to Appellants claim that this is a case of *physical* taking. Consequently, Appellants have no defense for failing to exhaust the myriad of administrative remedies available to them.

Appellants then go on to make the bizarre claim that this is a “facial challenge” to a City regulation. However, Appellants have continuously claimed throughout their response that the City’s failure to re-open Gertie Johnson Road has specially damaged them in a way that is distinct from the general public. Appellants have never argued, nor can they, that the City’s decision not to re-open Gertie Johnson Road is unconstitutional on its face. On the contrary, they have repeatedly and vehemently argued that the closure of the Gertie Johnson turnaround only damages them. Theirs is not a facial challenge, but an as-applied challenge. As such, exhaustion is required, and failure to exhaust administrative remedies necessitates dismissal of their takings claim.

Moreover, the fact that nearly every one of Appellants’ neighbors have re-occupied their homes by complying with City requirements is

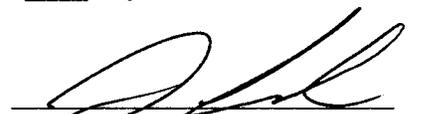
evidence that compliance with the City's administrative requirements is anything but futile.

V. CONCLUSION

Based on the foregoing reasons, it is clear that the trial court did not abuse its discretion – or commit error of any kind – in dismissing Appellants' claims. As a result, the City respectfully requests that this Court affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 5th day of March, 2009.


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DIVISION II

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STATE OF WASHINGTON

BY _____ DEPUTY

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

NO. 36801-3

FAME DEVELOPERS, LTD., WILLAM HULETT and PENELOPE
HULETT, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

CITY'S CERTIFICATE OF SERVICE

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ORIGINAL

I, Heather Hegeman, hereby declare under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action; that on the 5th day of March, 2009, I caused a copy of BRIEF OF RESPONDENT and this DECLARATION OF SERVICE to be

- faxed; and/or
- mailed via U.S. Mail, postage pre-paid; and/or
- sent via ABC Legal Messengers, Inc.

from Seattle, Washington, addressed as follows:

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