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STATE OF WASHINGTON
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No. 295303

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GENE H. TOM AND BARBARA
TOM, HUSBAND AND WIFE,

Appellants,

vs.

STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANTS

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

GENE H. TOM and BARBARA) No. 295303
TOM, HUSBAND AND WIFE,)
) Appellants,)
) vs.) REPLY BRIEF OF APPELLANTS
STATE OF WASHINGTON,)
) Respondent.)

INTRODUCTION

As a proximate result of noise pollution emitted from a firing range on Washington State Penitentiary grounds adjacent to Tom land, the value of Tom property has measurably declined. The measurable decline in value has occurred within ten years prior to commencement of this action. (CP 28-29,90-91)

By asserting that the Toms cannot show a taking, the State misconceives governing legal principles and misapprehends the facts. Dispositive authority dictates reversal of the decision below.

ARGUMENT IN REPLY

I. NEITHER THE FACTS NOR THE LAW
SUPPORT THE STATE'S CONTENTION
THAT NO ACTIONABLE TAKING HAS
OCCURRED.

The State asserts that the Toms lack standing. This assertion lacks foundation in fact and in law. The Toms do not quibble with the principle that a subsequent property owner has no right to assert a claim for damages that occurred prior to his or her coming into title. But, as noted in State v. Sherrill, 13 Wn. App. 250,257, n. 1, 534 P. 2d 598 (1975) (quoting from 30 C.J.S. Eminent Domain, §390 (1965) at page 461):

Ordinarily, a grantee or purchaser cannot sue for a taking or injury occurring prior to his acquisition of title, but he may sue for any new taking or injury.

As is clear from the Toms' complaint as well as other submissions by both parties,

the taking of which the Toms complain occurred in 2004, long after the Toms came into title of the property in question. (CP 4,29,33,34) Therefore, the Toms have standing to bring the instant condemnation action.

The State conflates condition and causation. Its reliance on Lambier v. Kennewick, 56 Wn. App. 275, 783 P. 2d 596 (1989) and Hoover v. Pierce County, 79 Wn. App. 427, 903 P. 2d 464 (1995) is misplaced. In actual application, each case supports the Tom position.

What caused the taking in this case? It was noise pollution emitted from a firing range within the last ten years that caused a measurable decline in the value of the Tom property. Specifically, the loss in value that occurred in 2004 as calculated by Gene H. Tom is \$3,700,000. (CP 91) This measure of damages is unrecorded in the record.

In Lambier v. Kennewick, supra, the plaintiffs brought an inverse condemnation action for damages arising from the failure of motor vehicles to negotiate a curve in Canal Drive that led to crashes on the plaintiffs' property. Kennewick asserted that the taking had to do with the construction of the road, which had been completed more than ten years before the plaintiffs instituted their action. This argument was rejected by this Court in upholding the trial court's findings and conclusions that the plaintiffs' damages were the result of the incursion of motor vehicles, and not construction of the road. Analogously in this case, the Toms have sustained damages because of noise pollution occurring within the last ten years, not the establishment of a firing range. Thus, the analysis in Lambier v. Kennewick, 13 Wn. App. at 284-285 supports the Toms.

Similarly, the Tom position is

buttressed by the holding and rationale in Hoover v. Pierce County, supra. There, the plaintiff's claim of inverse condemnation resulting from flooding was denied because structures established by the county were the cause of the flooding, and those structures were established long before the plaintiffs came into title. The flooding was not governmental action causing a decline in property value. Rather, the pertinent governmental action was the construction of structures which caused the flooding. The flooding was merely a natural event that the county-built structures affected to cause damage. Here, the damage is not the result of a natural event. It is the result of governmental action, namely, noise pollution. Noise pollution has been emitted from and after June 30, 2004, with the resulting reduction in value of the plaintiffs' property. Thus, Hoover, 79 Wn. App. at 435-436 supports the Tom position.

The State misconceives the meaning of Hoover, 79 Wn. App. 427, Highline School Dist. 401 v. Port of Seattle, 87 Wn. 2d 6, 548 P. 2d 1085 (1976) and Petersen v. Port of Seattle, 94 Wn. 2d 479, 618 P. 2d 67 (1980) in its argument that an initial judgment for preliminary damages is necessary to determine whether a measurable decline in value has subsequently occurred. (State's brief at 7). Nothing in those cases requires an initial judgment for preliminary damages. The rule is clearly set forth by Judge Fleischer in Hoover v. Pierce County, 79 Wn. App. at 434:

A new taking cause of action accrues with each measurable or provable decline in market value of the property. Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6,15, 548 P.2d 1085 (1976). Furthermore, additional activity, following a judgment for a damaging, that causes further damaging is compensable as a taking. Petersen, 94 Wn.2d at 483.

The foregoing text supports the Toms. One need not have an initial judgment for

damages to obtain a second one. Rather, an initial judgment for damages does not preclude a second judgment for damages. The measure is the difference in value.

Market conditions were not the cause in the decline in value of the plaintiffs' property; noise pollution emitted from the State's penitentiary grounds was the cause. Damages in an inverse condemnation action must be determined to allow the injured party "full and fair compensation for the loss of his property rights." Highline Dist., 87 Wn.2d at 13, n. 5.

As noted by Justice Utter in Highline Dist., 87 Wn.2d at 13, n. 5:

Where the injury is permanent but also increases over time, the full measure of damages is the total loss of market value traceable to the interference. Thus a landowner's recovery will not be diminished by the appreciation of value in the general real estate market, if any. Otherwise if an unadjusted market value measure were applied, in a period of increasing property values the appreciation during a 10-year period of continuing interference

conceivably could offset the loss of value inflicted by the interference.

Just as a rising floor in the market value of the plaintiffs' property should not benefit the State, the State should not, here, benefit from an artificially lowered ceiling in value. If the value of the Tom property has increased (as it has here) owing to market conditions or rezoning or both, that affects the measure of damages, but does not preclude the plaintiffs' claim.

Berst v. Snohomish County, 114 Wn. App. 245, 57 P.3d 273, review denied, 150 Wn.2d 1015, 79 P.3d 445 (2002), and Pande Cameron and Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority, 610 F. Supp. 2d 1288 (WD WA 2009) provide no support to the State's position concerning a taking. Berst, is cited, apparently, for the distinction between taking through physical occupation and a regulatory taking. No regulatory taking is claimed here. Rather, the plaintiffs have suffered from noise

pollution which is in the nature of a physical invasion. See: Walla Walla v. Conkey, 6 Wn. App. 6, 492 P. 2d 589 (1971); Highline Dist., supra, Hall v. City of Santa Barbara, 833 F. 2d 1270 (9th Cir. 1986). Indeed, Berst, 114 Wn. App. at 257, n. 31, cites Hall, supra, for the rule that dismissal of an inverse condemnation claim on legal grounds should be "reviewed with particular skepticism." Berst, 114 Wn. App. at 257.

Pande Cameron, supra, furnishes no support to the State. Unlike the instant situation, Pande Cameron involved a temporary interference with the use of property that arose in the course of construction. Here, the noise pollution emitted by the State is not temporary. As noted by Armory Sergeant Michael Reddish, "[t]he firing range is used almost on a daily basis." (CP 81) Noise pollution emitted on a daily basis over a period of years is permanent, particularly, where, as here, there is no indication that it will ever cease. Thus, a taking in the

nature of a physical invasion of the Tom property has occurred.

Contrary to the State's argument, the Toms have shown that a taking occurred. Governmental action, not a zoning change, caused the Tom property to lose value. Noise pollution generated by the State has caused the loss. (CP 21-22) The zoning change in 2004 caused no loss in property value. If the State had ceased emitting noise pollution with its injurious effects on the Tom property, no damages would have been sustained. Justice Utter articulated the guiding axiom in Highline Dist. v. Port of Seattle, 87 Wn. 2d 6,15, 548 P. 2d 1085 (1976):

A new cause of action thus accrues with each measurable or provable decline in market value.

. . . .

In other words, an inverse condemnation action for interference with the use and enjoyment of property accrues when the landowner sustains any measurable loss of market value and the recovery may be had for the total

loss of value which is both attributable to the interference and sustained during the 10-year period preceding the commencement of the action.

The trial court should be reversed.

II. NEITHER THE FACTS NOR THE
LAW SUPPORT THE STATE'S
CONTENTION THAT THE TOM
INVERSE CONDEMNATION ACTION
IS TIME-BARRED.

Only in the course of this appeal has the State asserted a defense based on the statute of limitations. That theory was never advanced by the State in its pleadings or other submissions below. (CP 3) Laconically, if not grammatically, the State devotes a single paragraph to its newly revealed view that the Toms' action is time-barred:

Here, any inverse condemnation claims the Toms may have had began to accrue when they acquired title to the property, most recently in 1984. CP 47-79. At that time, the State was continuing to operate the firing range. Consequently,

after 1994, any inverse condemnation claim made by the Toms, absent those alledging [sic] an increase in noise, are no longer be [sic] actionable. (State's brief at 8)

Governing principles do not permit a statute of limitations defense here.

Without controversion, the Toms have shown a measurable loss of their property's market value as a result of the government's noise pollution during the 10-year period preceding the commencement of their action on December 21, 2009. (CP 1,3,28-29,90-91) The holding and rationale in Highline Dist. v. Port of Seattle, 87 Wn. 2d 6,12-15, 548 P. 2d 1085 (1976) are dispositive. The trial court should be reversed.

CONCLUSION

On the basis of the foregoing argument, together with the argument previously submitted, the trial court's order on summary judgment dismissing the plaintiffs' complaint with prejudice should be reversed. The trial court's denial of the plaintiffs' motion

for partial summary judgment should be reversed. This case should be remanded to the trial court for determination of damages, and an award of attorney fees and expenses pursuant to RCW 8.25.070.

Dated this 8th day of April, 2011.

Respectfully submitted,


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