

FILED

JAN 31 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 295303

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

STATE OF WASHINGTON,

Respondent.

---

BRIEF OF APPELLANTS

---

Michael E. de Grasse  
Counsel for Appellants  
WSBA #5593

P. O. Box 494  
59 So. Palouse St.  
Walla Walla, WA 99362  
509.522.2004

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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. ) BRIEF OF APPELLANTS  
                                  ) )  
STATE OF WASHINGTON, ) )  
                                  ) )  
                                  Respondent. ) )

INTRODUCTION

The plaintiffs below, Gene H. Tom and his wife, Barbara Tom, brought this inverse condemnation action after the respondent refused to abate noise pollution generated by its operation of a firing range at the Washington State Penitentiary. (CP 1-3) The noise pollution caused the Tom property, adjacent to the Washington State Penitentiary grounds, to have no value for residential development, a use that had been permitted since June 30, 2004. (CP 90)

The respondent resisted the appellants' claim on grounds that no taking had occurred,

or, if it had, the taking antedated the appellants' title and possession. (CP 37-38)

The trial court granted the respondent's motion for summary judgment of dismissal. (CP 106-107) The appellants seek a decision of this Court reversing the trial court, denying the respondent's motion for summary judgment and granting the appellants' motion for partial summary judgment. The case should then be remanded for determination of the appellants' damages, costs and attorney fees.

#### ASSIGNMENTS OF ERROR, ISSUES

#### PERTAINING THERETO AND STANDARD OF REVIEW

#### Assignments of Error

1. The trial court erred in denying the appellants' motion for partial summary judgment. (CP 106-107)

2. The trial court erred in granting the respondent's cross-motion for summary judgment dismissing with prejudice all the appellants' claims. (CP 106-107)

3. The trial court erred in denying

the appellants' motion for reconsideration.  
(CP 103-105)

4. The trial court erred in ruling that the respondent's continued noise pollution of the appellants' property, after it was rezoned, by the operation of a firing range could not have caused a loss in market value. (CP 104)

5. The trial court erred in ruling that the appellants' inverse condemnation action was time-barred. (CP 104)

6. The trial court erred in failing to recognize factual issues concerning changes in the frequency and intensity of noise pollution and their effects. (CP 103-105)

#### Issues Pertaining Thereto

1. Whether the trial court erred in denying the appellants' motion for partial summary judgment.

2. Whether the trial court erred in granting the respondent's cross-motion for summary judgment dismissing with prejudice all the appellants' claims.

3. Whether the trial court erred in denying the appellants' motion for reconsideration.

4. Whether the trial court erred in ruling that the respondent's continued noise pollution of the appellants' property, after it was rezoned, by operation of a firing range could not have caused a loss in market value.

5. Whether the trial court erred in ruling that the appellants' inverse condemnation action was time-barred.

6. Whether the trial court erred in failing to recognize factual issues concerning changes in the frequency and intensity of noise pollution and their effects.

#### Standard of Review

The appellants' seek review of the trial court's order granting summary judgment. Review on appeal is de novo. Herron v. Tribune Pub. Co., Inc., 108 Wn. 2d 162,169, 736 P. 2d 249 (1987).

## STATEMENT OF THE CASE

### Nature of the Case

The appellants brought this inverse condemnation action because the respondent refused to stop operating its firing range on the Washington State Penitentiary grounds near the appellants' property. (CP 3-5) As a result of noise pollution caused by the firing range operations, the value of the appellants' property for residential purposes was lost. (CP 4:11-17)

Although the appellants had devoted their property to agriculture for many years (CP 28:18-21), in 2004 it was rezoned to permit residential development. (CP 29:2-3) The respondent then refused to abate its noise pollution, with a consequent loss in market value of the appellants' property. (CP 29:9-12)

The respondent challenged the appellants' position on grounds that they acquired their property long after the firing range was in operation. (CP 37:6-9) Additionally, the

respondent asserted that no taking could be proven, as a matter of law, because the loss in value of the Tom property resulted from the rezone and not from the firing range. (CP 38:11-17)

Course of Proceedings

The appellants moved for partial summary judgment seeking "an order determining that noise pollution caused by the defendant's firing range constituted a taking of their property on June 30, 2004 [the date their property was rezoned to permit residential development]." (CP 17:17-20) The respondent moved for summary judgment of dismissal. (CP 33,39)

In opposition to the appellants' motion for partial summary judgment, the respondent cited Fitzpatrick v. Okanogan County, 143 Wn. App. 288, 177 P. 3d 716 (2008), affirmed, 169 Wn. 2d 598, 238 P. 3d 1129 (2010), for the elements of an inverse condemnation action: (1) a taking or damaging; (2) of private property;

(3) for public use; (4) without just compensation being paid; (5) by a governmental entity that has not instituted formal proceedings. The respondent then conceded: "For purposes of argument only, the Department agrees that elements (2) through (5) have been met, even though the Toms have presented no evidence to support these elements." (CP 37:25-26) Thus, the only contested issue presented to the trial court was whether a taking had occurred.

#### Statement of Facts

These factual propositions are part of the record below:

1. The appellants' property that is the subject of their inverse condemnation action has been used for agriculture for decades.

(CP 28:18-20)

2. At least since the 1950s, the respondent has operated a firing range in the same location on the grounds of the Washington State Penitentiary adjacent to the appellants' property. (CP 81:23-25; CP 28:21-33)

3. According to the September 23, 2010, declaration of Armory Sergeant Michael Reddish, currently, "The firing range is used almost on a daily basis." (CP 81:26)

4. Only in the ten-year period prior to the August 12, 2010, declaration of plaintiff Gene H. Tom was an objection raised by him to the operation of the firing range. (CP 28:24-29:1)

5. During the ten-year period prior to the August 12, 2010, declaration of plaintiff Gene H. Tom, the operations of the firing range "have increased in frequency and intensity." (CP 28:23-24)

6. On June 29, 2004, Walla Walla County rezoned the appellants' property that is the subject of their inverse condemnation action to permit residential development. (CP 29:2-5;CP 30,31)

7. After measuring sound on the appellants' property, noise expert J. Jeffrey Burnett concluded: "In my opinion, noise generated by the firing range operated by the Department of Corrections renders the Tom property unmarketable for residential development." (CP 21:25--22:1)

8. The noise pollution of the appellants' 37 acres of residentially zoned property by the respondent's firing range has caused a loss in value of \$3,700,000. (CP 90-91)

None of the foregoing factual propositions was denied, disproven, or, indeed, disputed before the trial court. Therefore, they are verities on appellate review.

Disposition Below

After hearing oral argument on October 4, 2010, the trial court denied the plaintiffs' motion for partial summary judgment and granted the defendant's cross-motion for summary judgment. (CP 103)

In ruling on the plaintiffs' motion for reconsideration, the trial court issued a letter opinion refining its previous oral rulings:

The Plaintiff cites Walla Walla v. Conkey, 6 Wn. App. 6, 492 P. 2d 589 (1971), for the proposition that where governmental activity that amounts to a taking intensifies and the negative impact on the neighbor increases, an inverse

condemnation action should be allowed to proceed based on the increased taking. The Conkey case does have [sic] some similarities to the case at bar and thus needs to be reconciled with the result here. (Of added interest to local attorneys is that each side was represented by counsel who later became superior court judges themselves.) (CP 103)

. . .

The Court of Appeals in Conkey reversed Judge Bradford's dismissal of the inverse condemnation claims, concluding that there was "clearly established a prima facie case of inverse condemnation resulting from the City's sewage disposal activities." Id. at 11. The appellate court acknowledged that the ruling would be valid "were it not for the undisputed fact that it was not until the 1960's that the City started accepting large quantities of industrial waste which its plants could not properly treat, to the end that sewage and industrial waste were deposited into Mill Creek and Gose Ditch with no treatment at all." Id. at 12. The Court went on to discuss at length the issue of when the taking occurred because the right to compensation must be asserted within 10 years of the taking. The Court cited the numerous cases involving the Seattle-Tacoma Airport (SeaTac) as examples for when eminent domain relief is appropriate with the noise from an increasing number of low-flying

jet aircraft. The Court held that while the decline in market value should be measured as of the time of trial, it was necessary for Conkey to establish a prima facie case that the pollution occurred within ten years prior to the commencement of the action "different in kind or substantially greater in degree than that which existed before that period commenced." Id. at 16.

This Court in rendering its oral decision was impressed by two points which stand in distinction to Conkey. First, the alleged diminution in value in the Plaintiffs' property occurred when the City of Walla Walla designated the area as part of its "Urban Growth Area." Without the change allowing for potential residential use, there would be no damage to the Plaintiffs' unincorporated agricultural land. As the Defendant points out in its brief at page 6, "in this way, it is not the firing range which is the impetus for the diminution in value (if any) but rather the City's unfortunate zoning decision." The Toms acquired their property when the activity already existed, with the recognized assumption that any diminution in value caused by the existence of the firing range was already taken into consideration in the price paid by the Toms for their land. See Conkey, supra at 17.

Second, the actual taking by the DOC in this case, that is, pollution caused by a firing range located near the Plaintiff's [sic] agricultural land, occurred decades earlier, and

the time for adverse possession in favor of the DOC had long since run. In Conkey and the Sea-Tac cases, specific information was provided about recent increased noise pollution from louder and more numerous aircraft and runways. Here there is no specific information about the use of the firing range being increased in frequency and intensity in the past 10 years, only Mr. Tom's bare assertion in his declaration that such had occurred. "Ultimate facts, conclusions of law, or conclusory statements of fact are insufficient to raise an issue of fact." Curran v. City of Marysville, 53 Wn. App. 358, 367, 766 P. 2d 1141 (1989). (CP 103-105)

Based on this letter opinion, the plaintiffs' complaint was dismissed with prejudice. (CP 106-107) This appeal ensued. (CP 108-109)

ARGUMENT

- I. WHERE, AS HERE, NOISE POLLUTION  
GENERATED BY THE STATE GOVERNMENT'S  
OPERATION OF A FIRING RANGE CAUSED  
A MEASURABLE LOSS OF MARKET VALUE  
OF THE APPELLANTS' PROPERTY, THEY  
MAY BRING AN INVERSE CONDEMNATION  
ACTION FOR LOSSES SUSTAINED DURING  
THE PRECEDING TEN YEARS.

By conflating the condition of the Tom property (its zoning classification) with the cause of its loss in value (noise pollution), the trial court erroneously concluded that no taking had occurred. Undeniably, a plaintiff in an adverse condemnation action must show that governmental conduct was a cause in fact of damage. Gaines v. Pierce County, 66 Wn. App. 715,726, 834 P. 2d 631 (1992), review denied, 120 Wn. 2d 1021 (1993). Principles of disability law should be noted here as they inform the inquiry necessary to discern a cause in fact. As stated by Justice Brachtenbach

quoting Miller v. Department of Labor & Indus.,  
200 Wash. 674, 682-83, 94 P. 2d 764 (1939) in  
Dennis v. Labor and Industries, 109 Wn. 2d  
467,471, 745 P. 2d 1295 (1987):

It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Thus, it is action by the government, not the condition or classification of the property that is damaged that must be examined. If the property would not have lost value but for the action of the government, then a taking has occurred.

The deployment of principles found in tort and disability law in the analysis of causation in inverse condemnation cases is

implicitly recognized by Judge Morgan in Gaines v. Pierce County, 66 Wn. App. 715,726, 834 P. 2d 631 (1992), review denied, 120 Wn. 2d 1021 (1993):

The need for a causal relationship between governmental conduct and damage sufficient to constitute inverse condemnation is not expressly discussed in the Washington cases, probably because the relationship is not usually in dispute. Nevertheless, such a relationship must exist before liability for inverse condemnation can attach. In other words, governmental conduct that is not a cause of damage to plaintiff cannot constitute a "taking" for purposes of inverse condemnation. See Thelen v. Billings, 238 Mont. 82, 85-86, 776 P. 2d 520, 522 (1989) (cause of action for inverse condemnation requires proof of proximate cause); Loesch v. United States, 645 F.2d 905, 913 (Ct. Cl. 1981) (same); Belair v. Riverside Cy. Flood Control Dist., 47 Cal. 3d 550, 559-60, 764 P.2d 1070, 253 Cal. Rptr. 693, 698 (1988) (same); Van Dissel v. Jersey Cent. Power & Light Co., 194 N.J. Super. 108, 119-20, 476 A.2d 310, 317 (1984)(same); Dallas v. Ludwick, 620 S.W.2d 630, 632 (Tex. Civ. App. 1981) (same); 6A R. Powell, Real Property ¶ 876.12[2] (1984).

At a minimum, the causal relationship required for inverse condemnation must include cause in fact as one of its components. In summary

judgment proceedings, this means that the evidence must at least support a reasonable inference that the damage alleged to constitute inverse condemnation would not have occurred but for the governmental conduct in issue. If the evidence fails to support such an inference, it cannot be said that governmental conduct was a "taking" of the type needed for inverse condemnation.

Simply put, "A 'taking' has occurred when government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value." Lambier v. Kennewick, 56 Wn. App. 275,279, 783 P. 2d 596 (1989) citing Martin v. Port of Seattle, 64 Wn. 2d 309,320, 391 P. 2d 540 (1964), cert. denied, 379 U.S. 989 (1965). The record below amply supports the appellants' claim of a taking.

Governmental action, not a zoning change, caused the appellants' property to lose value. It is the noise from the respondent's firing range that has caused the loss. (CP 21-22)  
The zoning change in 2004 caused no loss in property value. If the respondent had discontinued the operation of its firing range with its resulting

noise pollution, no damages would have been sustained by the appellants. 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.

Obviously, zoning is a factor in computation of damages, but the cause of those damages was noise pollution generated by the respondent, not a zoning change.

Proper analysis leads to the conclusion that the respondent's governmental action was a cause in fact of a measurable loss in value of the appellants' property within a 10-year

period preceding commencement of their inverse condemnation action. The zoning change in 2004 starkly demonstrated a marked decline in market value, but it did not cause a decline in market value. The effect of a zoning change in inverse condemnation is best seen in State v. Motor Freight Terminals, 57 Wn. 2d 442,443, 357 P. 2d 861 (1960). Justice Hill recognized that a probable change in permitted use of property may affect the determination of damages in eminent domain cases. Thus, had the instant inverse condemnation action been instituted prior to June, 2004, the plaintiffs could well have been engaged in presenting evidence of a likely change in zoning to support a claim for damages à la State v. Motor Freight Terminals. Having instituted their action after the zoning change, speculation concerning the probability of that change is obviated. In any event, the change in zoning, whether a possibility or a fact, is involved in the determination of damages, not in the determination of whether a taking has occurred.

II. NEITHER THE FACTS NOR THE LAW  
ALLOWED DISMISSAL OF THE AP-  
PELLANTS' COMPLAINT FOR THEIR  
FAILURE TO COMMENCE THEIR ACTION  
WITHIN THE TIME PERIOD LIMITED BY  
STATUTE.

Perhaps only the trial judge thought that the appellants' inverse condemnation action was time-barred. That theory was never advanced by the respondent; not even a pro forma statute of limitations affirmative defense is found in the answer to the complaint. (CP 3) Yet, the trial court's letter opinion expressly grounded its decision on a notion of adverse possession and the governing statute of limitations. (CP 104):

Second, the actual taking by the DOC in this case, that is, noise pollution caused by a firing range located near the Plaintiff's [sic] agricultural land, occurred decades earlier, and the time for adverse possession in favor of the DOC had long since run.

If this component of the trial court's letter opinion is treated merely as an alternative rationale for the decision below, it may be dis-

regarded as dicta. But, hoping for disregard may leave the appellants vulnerable to an adverse decision on the alternative ground. To avert a possible adverse outcome on this ground, the salient point should be made: governing principles do not permit a statute of limitations defense here.

On the facts and law, there is no suggestion, much less evidence, that the respondent adversely possessed the appellants' property at any time in the past. Therefore, the trial court's conclusion that "the time for adverse possession in favor of the DOC had long since run" (CP 104) is bereft of legal and factual support.

Assuming for purposes of this argument that the respondent could have acquired some sort of right by prescription to interfere with the use of the appellants' land, did it do so? First, it should be remembered that the respondent claims no prescriptive right, and none has been shown. Second, dispositive legal authority holds that the appellants' claim for damages on and after June, 2004, cannot be time-barred.

Justice Utter harmonized inverse condemnation jurisprudence concerning limitations in Highline Dist. v. Port of Seattle, 87 Wn. 2d 6, 12-13, 548 P. 2d 1085 (1976):

In determining the proper standard with which to ascertain when, in the context of airport noise, a cause of action for inverse condemnation has accrued, both parties and the trial court focused on language from Cheskov v. Port of Seattle, supra at 420, which states:

[A new cause of action accrues when] the disturbances causing the damage have become different in kind or substantially greater in degree, or greater than could reasonably have been anticipated when the airport was established.

Appellant contends this language should be read as written, in the disjunctive, so that a cause of action accrues when the interference becomes substantially greater in degree. Respondents, with whom the trial court agreed, urge that increases in noise attributable to aircraft operations, even though substantial, do not give rise to a new cause of action unless the increases are "greater than could reasonably have been anticipated."

Whatever its meaning when written, the language of Cheskov, quoted above, has not been followed in this jurisdiction for

the past 10 years. In Martin v. Port of Seattle, supra at 318, a unanimous court rejected the argument that interference with property rights must be "substantial" before it can amount to a compensable injury. The terms "substantial interference," the court said, is "not pertinent . . . in the 'inverse condemnation' context, where the action is strongly analogous to the eminent domain proceeding." The court reasoned that the balance of individual and social interests in such an action is accomplished by requiring only that the plaintiff show a measurable or provable decline in market value traceable to the interference by noise. [footnote omitted]

Justice Utter concluded his discussion of when an action for inverse condemnation may be commenced, Highline Dist. v. Port of Seattle, 87 Wn. 2d at 14-15:

A cause of action accrues on the occurrence of the last element essential to the action. Gazija v. Nicholas Jerns Co., 86 Wn. 2d 215, 543 P. 2d 338 (1976). To maintain an inverse condemnation suit for damages attributable to aircraft operations, the property owner must allege interference with the use and enjoyment of his land and a resulting loss in market value. (Martin v. Port of Seattle, supra, at 320), or in a proper case,

as noted above, a resulting need to undertake modifications. A new cause of action thus accrues with each measurable or provable decline in market value. While it is true that "where a use which causes damage to adjacent property is permanent in nature, its effect upon the market value of that property is also permanent", Cheskov v. Port of Seattle, supra at 420, this theory of damages is inapplicable where the intensity of the interference changes over time.

Consequently, the landowner may recover the total damage resulting from all of those interferences which have not been eliminated as bases for liability by the acquisition of a prescriptive right. 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. [footnote omitted]

Without controversion, the appellants 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) The trial court should be reversed.

III. THE TRIAL COURT'S SUMMARY DIS-  
REGARD OF CERTAIN FACTUAL STATEMENTS  
BY PLAINTIFF-APPELLANT GENE H. TOM  
CONFLICTS WITH GOVERNING LEGAL  
PRINCIPLES.

In his initial declaration, the plaintiff Gene H. Tom described his situation in factually specific terms (CP 28:18-24):

The land that is the subject of this inverse condemnation action has been used for agricultural purposes by me and by my father for decades. During a significant part of that time the defendant has operated a firing range on land that is adjacent to mine. These operations have increased in frequency and intensity during the past ten years.

Appended to this declaration, was a log showing noise emissions from the respondent's firing range in 2008 on August 25, 27, 28, 29, 30, 31, September 3. . . . (CP 32) This log indicates heavy, but not daily use. Armory Sergeant Michael Reddish stated in his declaration of September 23, 2010, that the firing range "is used almost on a daily basis." (CP 26) Combining the factual submissions of Gene

H. Tom and Armory Sergeant Reddish, supports an inference that noise pollution was greater in degree during the 10-year period prior to the commencement of the instant inverse condemnation action than it had been theretofore.

The record below, as summarized in the foregoing paragraph, sets forth facts concerning noise pollution of the appellants' property. Particularly, the specific factual statements, based on personal knowledge, show that noise pollution increased during the 10-year period preceding the institution of the instant case.

By his declaration of August 12, 2010 (CP 28-29), the plaintiff Gene H. Tom described "an event, an occurrence, or something that exists in reality." Grimwood v. Puget Sound, 110 Wn. 2d 355,359, 753 P. 2d 517 (1988) quoting Webster's Third New World Dictionary 813 (1976). At a minimum, the facts described by the plaintiff Gene H. Tom and corroborated by Sergeant Reddish make the analysis of Walla Walla v. Conkey, 6 Wn. App. 6,16 492 P. 2d 589 (1971), review denied, 80 Wn. 2d 1007 (1972)

apposite, as an alternative ground for allowing the appellants to be heard by a jury. The trial court should be reversed.

CONCLUSION

On the basis of the foregoing argument, the trial court's order on summary judgment dismissing the plaintiffs' complaint with prejudice should be reversed. The trial court's denial of the appellants' 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 28th day of January, 2011.

Respectfully submitted,

  
Michael E. de Grasse WSBA #5593  
Counsel for Appellants

APPENDIX

Trial Court's Letter Opinion

**SCANNED**  
**SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF WALLA WALLA**

JUDGE JOHN W. LOHRMANN  
DEPARTMENT NO. 1

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October 21, 2010  
WALLA WALLA COUNTY  
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Re: Tom v. DOC  
Walla Walla County Cause No. 09-2-01080-4

On October 4, 2010, following argument the Court orally denied the Plaintiff's Motion for Partial Summary Judgment and granted the Defendant's Motion for Summary Judgment of Dismissal. Before the Court now is presentment of the Defendant's proposed order submitted pursuant to WWCSCLR 13(A), and the Plaintiff's Motion for Reconsideration.

27  
The Plaintiff cites Walla Walla v. Conkey, 6 Wn. App. 6, 492 P.2d 589 (1971), for the proposition that where governmental activity that amounts to a taking intensifies and the negative impact on the neighbor increases, an inverse condemnation action should be allowed to proceed based on the increased taking. The Conkey case does have some similarities to the case at bar and thus needs to be reconciled with the result here. (Of added interest to local attorneys is that each side was represented by counsel who later became superior court judges themselves.)

Walla Walla v. Conkey arose from a judgment in Superior Court in 1927 that required the City of Walla Walla to deposit cleaned sewage into Gose Ditch and Mill Creek to be used by the defendants (Conkey et al.) for irrigation purposes. The City sought declaratory relief, and Conkey counterclaimed for inverse condemnation "because of noxious odors emanating from the discharge of polluted water into Gose Ditch and Mill Creek." There was testimony at trial that the odors from the water in the mid-1960s worsened because the City's sewage treatment capabilities were over-taxed by the construction and growth of three food processing plants. During June and July "the intake into the plants increased to as much as 8 million gallons per day on some days," and "since 1966 the

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Mr. Michael deGrasse  
Mr. James Brooks Clemmons, Jr.  
October 21, 2010  
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City has bypassed much of the industrial waste without any treatment whatsoever,” and “the amount of untreated sewage and industrial waste reached its peak between 1966 and 1968.” Conkey, *supra* at 10. Nevertheless, Judge Bradford granted a dismissal at the end of Conkey’s case because the evidence showed a long history of pollution going back to the 1920’s, concluding that the prescriptive period for the City’s taking had long since run.

The Court of Appeals in Conkey reversed Judge Bradford’s dismissal of the inverse condemnation claims, concluding that there was “clearly established a prima facie case of inverse condemnation resulting from the City’s sewage disposal activities.” *Id.* at 11. The appellate court acknowledged that the ruling would be valid “were it not for the undisputed fact that it was not until the 1960’s that the City started accepting large quantities of industrial waste which its plants could not properly treat, to the end that sewage and industrial waste were deposited into Mill Creek and Gose Ditch with no treatment at all.” *Id.* at 12. The Court went on to discuss at length the issue of when the taking occurred because the right to compensation must be asserted within 10 years of the taking. The Court cited the numerous cases involving the Seattle-Tacoma Airport (SeaTac) as examples for when eminent domain relief is appropriate with the noise from an increasing number of low-flying jet aircraft. The Court held that while the decline in market value should be measured as of the time of trial, it was necessary for Conkey to establish a prima facie case that the pollution occurred within ten years prior to the commencement of the action “different in kind or substantially greater in degree than that which existed before that period commenced.” *Id.* at 16.

This Court in rendering its oral decision was impressed by two points which stand in distinction to Conkey. First, the alleged diminution in value in the Plaintiffs’ property occurred when the City of Walla Walla designated the area as part of its “Urban Growth Area.” Without the change allowing for potential residential use, there would be no damage to the Plaintiff’s unincorporated agricultural land. As the Defendant points out in its brief at page 6, “in this way, it is not the firing range which is the impetus for the diminution in value (if any) but rather the City’s unfortunate zoning decision.” The Toms acquired their property when the activity already existed, with the recognized assumption that any diminution in value caused by the existence of the firing range was already taken into consideration in the price paid by the Toms for their land. *See Conkey*, *supra* at 17.

Second, the actual taking by the DOC in this case, that is, noise pollution caused by a firing range located near the Plaintiff’s agricultural land, occurred decades earlier, and the time for adverse possession in favor of the DOC had long since run. In Conkey and the SeaTac cases, specific information was provided about recent increased noise pollution from louder and more numerous aircraft and runways. Here there is no specific information about the use of the firing range being increased in frequency and intensity in

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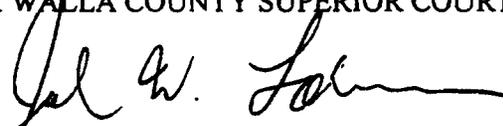
the past 10 years, only Mr. Tom's bare assertion in his declaration that such had occurred. "Ultimate facts, conclusions of law, or conclusory statements of fact are insufficient to raise an issue of fact." Curran v. City of Marysville, 53 Wn. App. 358, 367, 766 P.2d 1141 (1989).

The Plaintiffs flatly contend that the taking occurred on the date of the passage of the City of Walla Walla ordinance, on June 29, 2004--not on any other date or occasion. As indicated in the Court's oral decision, the Court can find no authority to the effect that this kind of designation may result in a taking, where the governmental activity complained of predated or was in existence for many years, and certainly over 10 years preceding June 29, 2004.

The Motion for Reconsideration is denied. I have entered the Defendant's proposed order. Copies are enclosed to each of you.

Sincerely,

WALLA WALLA COUNTY SUPERIOR COURT

  
John W. Zohrmann, Judge

JWL/II

Enclosure

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