

FILED

JUN 15 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302865-III

COURT OF APPEALS, DIVISION III
THE STATE OF WASHINGTON

KEENE VALLEY VENTURES, INC.,

Plaintiff/Appellant/Respondent,

v.

CITY OF RICHLAND,

Defendant/Appellant/Respondent,

REPLY BRIEF OF APPELLANT KVV

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I. INTRODUCTION

Richland has now conceded its taking of KVV's property. Richland has also argued persuasively that the taking is permanent and that just compensation is the diminution in value of KVV's property.

Further proceedings are required because the trial court concluded that Richland inversely condemned KVV's property but the trial court was unable to determine just compensation. Since there is no burden of proof for damages due to a taking, further proceedings will consist of this Appeal or possibly remand to the trial court.

II. STATEMENT OF FACTS

Richland has misstated the facts regarding Richland's Storm Water Management Plan ("SWMP") and the two planned projects, one lying above KVV's property and the other lying below KVV's property. Richland states that "water would be forwarded by pipe [from the Shockley mainline project] to the Jericho Road Regional Facility". Respondent's Brief at page p. 11.

In fact, the two projects lie on opposite sides of the KVV property and there is nothing in the SWMP that addresses how the water gets from Shockley Road to the Jericho Facility other than flowing across KVV's property. This "gap" in Richland's system explains the increased water levels

and flooding on KVV's property. RP 242-245.

III. ARGUMENT

A. KVV'S RESPONSE TO RICHLAND'S CROSS-APPEAL

Richland Now Admits that it Has Violated the Constitution.

At the start of trial, Richland reserved its opening until its case. RP 37. At the start of its case, Richland waived an opening statement. RP 285. Without an opening statement, Richland's position on KVV's claims of strict liability, nuisance, trespass, negligence and inverse condemnation, are found in its trial brief. Richland denied liability as to all claims. CP _____. Likewise in its post trial brief, Richland denied any liability and denied a taking. CP _____.

In its cross-appeal, Richland's only challenge to the Court's ruling is to argue that Richland's negligence, trespass, nuisance and taking are permanent rather than temporary. This is a bald admission of Richland's taking of KVV's property and of Richland's violation of the Constitution. Richland challenges no finding pertaining to its actions, to the rise of water or to the effect of that rise. Richland challenges no conclusion that it is liable in strict liability, negligence, nuisance and trespass. Richland does not challenge the court's conclusion that "Richland has inversely condemned

[KVV's] tract.”

Instead, Richland emphasizes that it has no plans to change what water is flowing to KVV's property. Respondent's Brief (Resp. Br.) at 19, 24. Richland concedes that the water will continue to rise requiring additional periodic filling. Resp. Br. at 19. Richland also concedes that the cost to repair or restore exceeds the diminution in value. Brief at 24. Finally, Richland contends that damages should be the diminution in value. Resp. Br. at 39.

Richland recoils at the possibility that damages could have been the restoration costs. Richland concludes the argument:

Richland might as well condemn the property and pay the fair market value of land before the taking.

Resp. Br. at 24.

The Washington Supreme Court's statement in *Wenzler v Sellen*, 53 Wn.2d 96, 330 P.2d 1068 (1958) bears repeating:

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created

The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for proven invasion of the plaintiff's rights

Wenzler, 53 Wn.2d 99. (Quoting the United States Supreme Court from its

decision in *Bigelow v RKO Radio Pictures*, 327, U.S. 251, 90 L.Ed 652, 66 S. Ct. 574).

B. KVV'S REPLY BRIEF

1. The Trial Court's Inability to Determine Just Compensation is Significant Only in Requiring Further Proceedings.

KVV does not suffer a loss by the trial court's inability to determine damages. Neither party in a taking has the burden of proof of damages. *State v Amunsis*, 61 Wn.2d 160, 164, 377 P.2d 462 (1963).¹ Once a taking has occurred the Constitution requires just compensation. The process cannot be concluded until just compensation is determined and paid. *See*, Article I, Section 16.

2. Richland Argues for an Exception to Article I, Section 16 of the Constitution that Would Swallow the Mandate.

Richland urges this Court to affirm actions that constitute a taking without just compensation even: when the taking is admitted; when the property owner has presented substantial evidence of damages; when the public entity has presented no evidence of damage and; when the public entity has not challenged the property owner's proof of damages.

¹ Richland cited foreign authority to the contrary in its Post Trial Brief, presumability unwittingly. CP _____

Richland's failure to follow eminent domain statutes makes it a wrongdoer and violates the Constitution. Now Richland, the wrongdoer, is asking this Court to create an exception to the Constitution that would effectively give KVV's property to Richland without just compensation.

In this pursuit, Richland wants this Court to ignore Richland's own Storm Water Management Plan ("SWMP") and its stated cost of moving and compacting fill on the Jericho Facility even when that stated cost is for the same activity to be undertaken on KVV's property and even though the Jericho Facility is to manage the very water that is flooding KVV's property. Ex. 8, p. 96-97, Table 7-5. Richland's stated cost simply could not be more relevant.

In its pursuit, Richland wants this Court to further ignore Richland's own stated cost, \$30,000 per acre, for acquiring land for the Jericho Detention Facility. Ex. 8, p. 96-97, Table 7-5.

Richland's cites no authority in support of an exception to Article 1, Section 16 of the Washington State Constitution. Because Richland has cited no authority for its exception argument, this Court may presume that it found none. This Court may further decline to consider Richland's contention because it is unsupported by argument or authority. *King Co. v Sea West, Inv.*

Assocs., 141 Wn.App. 304, 317, 170 P.3d 53 (2007).

3. Ron Johnson's Testimony Stands Because There was no Showing that it was Based on Anything but His Intimate Experience with and Knowledge of the Land's Uses.

Richland has presented authority for rejecting an owner's testimony regarding the value of land but the exception is limited to instances where the witness testifies based on something other than his intimate experience with and knowledge of the lands uses. Resp. Br. at 28.

The trial court's rejection of Ron Johnson's testimony appears to have been because Ron Johnson did not qualify as an expert in appraising property.

The court's Finding of Fact:

69. The tract has never been appraised by an appraiser.
70. KVV presented no expert testimony as to the value of the tract at any point in time.
71. KVV presented no appraisal of the tract.
72. Ron Johnson is not qualified to render a meaningful opinion as to the value of the tract. Ron Johnson lacks the expertise to render a meaningful estimate of property value.

CP 414.

The trial court's rejection of Ron Johnson's testimony is because Ron

Johnson is not an appraiser violates the authority that a property owner can testify to the property's value. *Cunningham v Tieton*, 60 Wn.2d 434, 436, 374 P.2d 375 (1962).

4. Richland's Objection to Ron Johnson's Testimony Fails on Two Counts.

Ron Johnson's testimony regarding the two Purchase and Sale Agreements, Ex. 32 and 33, was to the facts that KVV had entered into the two agreements for the stated prices. Thus, the testimony was more than just an opinion.

If Richland considered Ron Johnson's testimony about the purchase and sale agreements to be beyond what was disclosed before trial, it should have objected on that basis. Richland's objection was waived when it was not made and should not be considered for the first time on appeal. *Silverhawk, LLC v Keybank*, 165 Wn.App. 258, 265, 268 P.3d 958 (2011).

5. Richland's Position Allows this Court to Conclude the Matter.

What Richland has conceded in its Brief matters. By challenging only the Finding that the taking was temporary Richland has opened the door for this Court to resolve this matter without remand. Richland's concessions greatly simplify this Courts task of satisfying the *Wenzler* Court's goal of

awarding damages when a wrong has been committed.

Richland concedes the taking. Richland concedes that damages should be the diminution in value. Because Richland has doubled down by emphasizing that it has no plans to alter its actions, that the water will continue to rise and that additional fill will be required periodically, Richland has conceded that the property has no productive use and therefore no fair market value after the taking. *See, Pruitt v Douglas County*, 116 Wn.App. 547, 66 P.3d 1111 (2003) and *Colella v King County*, 72 Wn.2d 386, 393, 433 P,2d 154 (1967).

If the property has no value after the taking then the diminution in value is the fair market value before the taking. (Richland's fall back position. See, Resp. Br. at 24.) This Court has Richland's 2005 value of land nearly adjacent to KVV's. That value is \$30,000 per acre² as set forth in Richland's Stormwater Management Plan. Ex 8 at pg. 97. This Court also has KVV's purchase and sale agreement from January 2006 and January 2007 with sale prices of \$541,500 and \$575,000.00. Ex. 32 and 33.

6. This Court Should Review the Court's Findings and Conclusions of Law as they Relate to Pre-Taking Value De Novo.

² Not \$30 per acre as stated in Resp. Br. at p. 31.

Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court.

Dolan v King County, 172 Wn.2d 299, 311, ___ P.3d ___ (2011).

Richland's SWMP was adopted in 2005, the year that the rise in water table became apparent on KVV's property. FF 53. The SWMP included a projected cost to acquire land for the Jericho Facility just down slope from KVV's property. The Jericho Facility is a project to retain the water that now flood KVV's property. See, the SWMP. Ex. 8. The SWMP excerpt describing the Jericho Facility and the projected property cost was admitted as Ex. 8 and later authenticated by Richland's Public Works Director and sole witness, Pete Rogalsky. RP 235-239.

The trial court ignored the land value of \$30,000 per acre in the SWMP.

KVV's Purchase and Sale Agreements should be assessed de novo. Ex. 32 and 33 were authenticated by Ron Johnson. RP 67-68. There is no evidence that the Purchase and Sale Agreements are other than what they purport to be. The land being sold, the date, the purchase prices and the purchasers are clearly identified.

If Ron Johnson had testified at trial, that the fair market value of the

property was \$1 million on January 1, 2006, one can be assured that Richland would have used Ex. 32, showing a sale price of \$541,500 in January 2006, to discredit Mr. Johnson's opinion of value.

But here there was no other testimony or evidence of value during the 2005 to 2006 time frame. Nor was there any challenge whatsoever to the documents or to Mr. Johnson's testimony.

The Purchase and Sale Agreements and Richland's value of \$30,000 per acre should be reviewed de novo and accepted as substantial evidence of value of the KVV property in 2005, the year that the rise in water was documented. FF 53.

7. The Authority Cited by Richland Requires Measurement of Damages by Comparing KVV's Property Value Before and After the Property was Flooded.

Richland in Respondent's Brief cites 40 cases, 29 of which are Washington cases. Of the 29 Washington Cases only eight relate to condemnation. *Colella v King County*, 72 Wn.2d 386, 433 P.2d 154 (1967), *Harkoff v Whatcom County*, 40 Wn.2d 147, 241 P.2d 932 (1952), *Lange v State*, 86 Wn.2d 585, 547 P.2d 282 (1976), *Olson v King County*, 71 Wn.2d 279, 428 P.2d 562 (1967), *Petersen v Port of Seattle*, 94 Wn.2d 479, 618

P.2d 67 (1980), *Port of Seattle v Equitable Capital Group*, 127 Wn.2d 202, 989 P.2d 275 (1995), *Pruitt v Douglas County*, 116 Wn.App. 547, 66 P.3d 1111 (2003) and *State v Larson*, 54 Wn.2d 86, 338 P.2d 135 (1959). Of those eight cases, two are eminent domain cases. *Port of Seattle, supra* 127 Wn.2d at 203 and *State v Larson, supra*, 54 Wn.2d at 87. One of the eight cases was the reversal of a summary judgment and did not involve issues of damages. *Pruitt, supra*, 116 Wn.App. At 553. In *Olson, supra*, a one time flood was determined to not be a taking. 71 Wn.2d at 204. In *Peterson, supra*, judgment was entered on agreed facts. 94 Wn.2d at 481. In both *Colella, supra* and *Harkoff, supra*, facts were very similar to the KVV taking. The courts measured damages by comparing the value of the property immediately before the damage and immediately after the damage. In *Colella, supra*, the case was remanded for the measurement of damages which could vary depending upon further action by the county. *Colella, supra*, 72 Wn.2d at 395. In *Harkoff, supra*, damages were awarded for repair or restoration, for diminution in value and for crop loss. The damages were affirmed on appeal. *Harkoff, supra*, 40 Wn.2d at 154.

*Lange, supra*³, is most similar to the KVV case when it comes to

³ Contrary to Richland's assertion in its Brief, KVV cited *Lange, supra*, in its Supplemental Trial Brief (CP 348) and discussed it in its Post Trial Brief. CP 353.

damages. In *Lange* the property owner was a developer, as is KVV. 86 Wn.2d at 586. In *Lange*, the developer held raw land as inventory, as did KVV. *Id.* In *Lange* there was no formal proceeding only actions by the state that diminished the property value. *Id.* Here, KVV's property was affected once the rising water, standing water, and obvious source became apparent. FF 53. In *Lange*, on remand the property owner was awarded the total value of the property at the time the taking became apparent. 86 Wn.2d at 593.

IV. CONCLUSION

This Court should affirm the trial court's determination that Richland's acts and omissions constitute a taking of KVV's property.

This Court should hold that damages are measured by diminution in value of KVV's property.

This Court should hold that the KVV property has no after-taking value as a result of Richland's acts and omissions.

This Court should reverse the trial court and hold that pre-taking value and thus diminution in value and just compensation is either the Purchase and Sale Agreement price of EX. 32, \$541,500, or Richland's SWMP value of \$648,000 (\$30,000 per acre x 21.6 acres) or some figure between the two.

This Court should award interest on the just compensation from November 2005, the date the taking became apparent.

This Court should award attorney fees and costs pursuant to RCW 8.25.075(3).

In the alternative to determining and awarding damages, the Court should remand to the trial court to award just compensation or to reopen the case to determine and award damages.

This Court should direct that upon satisfaction of judgment Richland's taking should be complete and title of the KVV property be conveyed to Richland.

RESPECTFULLY SUBMITTED this 12th day of June 2012.


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No. 302865-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

KEENE VALLEY)	
VENTURES, INC.,)	
)	CERTIFICATE OF
Respondent,)	SERVICE
)	
vs.)	
)	
CITY OF RICHLAND,)	
)	
Appellant.)	
)	
_____)	

I hereby certify that on this 14th day of June 2012, a true and correct copy of the REPLY BRIEF OF APPELLANT KVV and this CERTIFICATE OF SERVICE sent via legal messenger to the following:

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DATED this 14th day of June 2012.



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