

FILED

MAY 15 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302865-III

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

KEENE VALLEY VENTURES, INC.

Appellant,

vs.

CITY OF RICHLAND,

Respondent/Cross-Appellant.

**BRIEF OF RESPONDENT AND CROSS-APPELLANT
CITY OF RICHLAND**

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
GEORGE FEARING WSBA #12970
Attorneys for City of Richland
2415 W. Falls Avenue
Kennewick, WA 99336
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**I. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENT OF ERROR**

A. Whether the Superior Court abuses its discretion when concluding that the opinion of a landowner, as to the value of the property, is worthless when the owner has no experience in valuing land and tries to rely on assessed values of other land without being able to compare the other land to his land?

B. Whether the Superior Court abuses its discretion when ruling the landowner has proved no damage to its property when there is no testimony about the diminution in value resulting from a nuisance, trespass or taking?

C. Whether the Superior Court abuses its discretion when concluding that the opinion of a plaintiff landowner, as to the value of property, is worthless when he never disclosed an opinion in answer to interrogatories?

D. Whether the Superior Court abuses its discretion when concluding a landowner's testimony of the cost to apply fill to land is worthless when the owner relies only on hearsay and a projection made ten years earlier, and when the landowner provides little detail as to how he

arrived at his stated amount of fill nor any detail as to how he arrived at his earlier projection of cost?

II. CROSS ASSIGNMENT OF ERROR

The Superior Court erred when failing to find and/or conclude that the nuisance and trespass was permanent and when ruling that restoration costs were available to KVV as a remedy, assuming it presented proof of the costs.

This assignment assigns error to Finding of Fact 77, which reads, in relevant part:

The damage to the tract is temporary.

CP 414.

III. ISSUES PERTAINING TO RICHLAND'S

CROSS ASSIGNMENT OF ERROR

A. Whether a nuisance or trespass is permanent when the trespasser is a municipal corporation who has allocated no money to solve the trespass and has no definitive plans to take any remedial measures?

B. Whether a landowner should be awarded the cost to remedy a nuisance or trespass when the owner states it will never take the remedial measures?

C. Whether a landowner should be awarded the cost to remedy a nuisance or trespass when the cost to remedy significantly exceeds the land's value and purchase price.

D. May restoration damages be awarded when there is no evidence of the pre-injury fair market value of the property?

The issues relevant to the cross assignment of error may also be considered issues arising out of appellant's assignments of error.

IV. STATEMENT OF FACTS

This appeal principally entails whether a landowner proved damages in a suit contending a municipality's storm drainage system raised the groundwater level on its land and interferes with development of the land as a residential subdivision. Appellee City of Richland disagrees with the trial court's findings and conclusions imposing liability upon it, but recognizes that facts support those findings and thus does not challenge the ruling on liability. Appellant Keene Valley Ventures, Inc. (KVV), however, challenges the trial court's discretionary findings, entered in a bench trial, that it failed to prove damages.

Plaintiff KVV is the successor corporation to Baines Corporation (Baines). The principal of each corporation is Ron Johnson, who resides

in Meridian, Idaho. RP 39, 41. His career has been home building, rather than developing subdivisions. RP 113. Johnson has no background in geology, hydrology, or engineering. RP 115, 6.

In November 2000, Baines purchased the subject 22 acres, known as the Keene Valley Ventures (KVV) site, for \$47,500. Finding of Fact 3, CP 407; Exhibit 1; RP 42, 50, 1. Baines planned to develop the property for single family residences. RP 48

As its name implies, the KVV site lies in a valley within the City of Richland. On the north of the valley is Frank Hill and to the south is Badger Mountain. RP 311. Keene Road bisects the Keene Valley, and the KVV site lies north of the road. Findings of Fact 3, 8, CP 47; RP 310, 1. Property south of Keene Road was earlier in orchards and there remains today some active orchards. RP 308. Most orchards disappeared with a transition to residential development in the valley. RP 309. Water from the Kennewick Irrigation District (KID) East Badger Lateral canal irrigates the orchards and residences in the valley. RP 309, 10.

Groundwater under the KVV site and surrounding acreage falls into a basin identified by Richland as Sub-basin 3. RP 236. Drainage of stormwater and groundwater from the basin passes through the KVV site

on its journey to the Yakima River. RP 373, 461.

At the time Keene Road was built it lay outside the limits of the City of Richland. Finding of Fact 8, CP 407. In the 1990s, the City of Richland significantly improved Keene Road, originally a two-lane county road. Finding of Fact 9, CP 407; RP 322, 3. Phase I and Phase II of the Keene Road project occurred along the KVV property. Finding of Fact 9; CP 408. During Phase I, completed in 1996, Keene Road was widened to four lanes and water and sewer utilities were installed. RP 328. An old rail bed, on the north side of Keene Road, was lowered and turned into a bike path. RP 328, 331. During Phase II, in 1999 and 2000, ditches were added on the north and south sides of Keene Road and storm drain culverts placed between the two ditches under the road. Finding of Fact 24, CP 410; RP 331- 4. The ditches and culverts were completed before Baines took title to its land. RP 128.

Beginning in the late 1990s, developers purchased orchards and constructed high-end residential subdivisions in the Keene Valley. RP 340. All of these subdivisions, except Cherrywood Estates, have been south of or across Keene Road from the KVV site. The Vineyards was the first development. RP 143, 340. In 1999, the Vineyards' developer

installed a storm drainage system, including catch basins. RP 341. The system routes water to a pipe under Shockley Road and then to the south ditch along Keene Road. 341. Richland did not design nor construct the storm water system at Vineyards. RP 143, 4.

Baines' owner Ron Johnson visited the KVV site three or four times before the November 2000 purchase and noticed a large, two-acre wetland, which was fenced. Finding of Fact 27; CP RP 47, 116 - 8. Digging found high groundwater near the wetland. RP 120.

Baines hired Tom Deubendorfer to prepare a wetland delineation study on the site. Exhibit 6. Deubendorfer identified three wetlands that he captioned Wetlands A, B, and C. RP 121; Exhibit 6, Figure 4. The larger wetland that Johnson earlier saw was Wetland B. RP 51. Johnson considered Wetland B to be an attractive feature. RP 119.

Aerial photos taken in the 1950s of Keene Valley show no wetlands on the KVV site. RP 121, 3. Nor do 1965 photos. Exhibit 46; RP 299, 300. Tom Deubendorfer concluded that the formation of the wetlands resulted from irrigation water applied to neighboring orchards as well as leaks from the KID's nearby East Badger Lateral. RP 121, 123, 195, 210, 211. The wetlands formed and water moved from surrounding

land to the KVV site before Richland built ditches along Keene Road.

199, 200.

Even before Tom Duebendorf's 2001 study, a 1994 report, prepared by Sheldon & Associates, showed a wetland forming on KVV property. Exhibit 19. The report stated that irrigation to the south may influence the wetland. RP 218. In 1994, there was groundwater within zero to four inches of the soil surface at the KVV site. RP 220.

Upon purchase of the 22 acres, Baines intended to fill Wetland A. RP 51, 124. Baines also intended to fill the eastern portion of Wetland B. RP 51. Baines planned to fill the two wetlands with 27,000 cubic yards of dirt. RP 53. Johnson anticipated a maximum cost of fill to be \$10 per cubic yard, although Johnson was expecting to use donated fill. RP 53.

Applewood Estates, directly across Keene Road from the east end of the KVV site, began development steps in 2001. RP 135, 6. The Applewood Estates subdivision plat conditions required the subdivision's storm drainage system to be oversized in order to handle the additional flow from the development. RP 137. The conditions also demanded that the developer provide additional drainage capacity along the north side of Keene Road for all runoff delivered from the development, which

provision would require the developer to prevent runoff to enter the neighboring KVV property. RP 138. Ron Johnson does not believe Applewood Estates fulfilled the conditions in the plat. RP 140. Richland did not design the storm water system inside Applewood Estates. RP 143. Applewood Estates' collection system ties into a pipe which connects to the ditch on the south side of Keene Road. RP 166.

Other residential subdivisions constructed south of Keene Road include Bordeaux Groves, Badger Den, and Westcliffe. Finding of Fact 410, CP 410; RP 360. These developments constructed stormwater retention ponds that retain most stormwater runoff. RP 359 - 61.

Baines Corporation sold the KVV site to its sister company, KVV, in February 2003 for \$189,700. RP 58, 9, 127. The price was arrived at through discussions with KVV's accountant. RP 59. No testimony was provided as to why the accountant assigned the value of \$189,700. Finding of Fact 32, CP 410, 1. The tract was not then appraised. Finding of Fact 32, CP 411.

KVV began placing fill on its site around 2003. RP 56. About 18,000 to 20,000 cubic yards have been placed on site. RP 57. KVV has not paid anything for the fill, but has paid for stripping and placing the fill

and compaction. RP 57. The cost is unknown. RP 57.

Development began at neighboring Cherrywood Estates' in 2005. RP 132, 343. To build homes on the site, the developer imported fill dirt. RP 141, 2. Portions of Cherrywood Estates is lower in elevation than the KVV site. RP 142.

The Cherrywood Estates developer designed a stormwater drainage system that includes a 1200 square foot pond on the east side of the property near the boundary with KVV. RP 133, 4. KVV has not complained about the system at Cherrywood Estates. RP 134. Ron Johnson "assumes" water from the pond percolates into the soil. RP 134. Richland did not build any of Cherrywood's storm water system. RP 135.

Richland believes that the stormwater drainage systems in the Keene Valley subdivisions has not impacted the amount of water reaching the KVV site, since the same volume of water moves within the subbasin. RP 367, 8, 381. Also, orchards generally use more water than residences, so development reduces water use. RP 371.

KVV called to testify Edward McCarthy, a hydrologist and engineering consultant. RP 147. McCarthy stated that, when land is developed, there will be an increase in stormwater runoff rate and volume,

because the developer removes the upper more pervious layers of soil and lays impervious surfaces such as roads and sidewalks. RP 155. He accused culverts running under Keene Road as transferring water from the south ditch of Keene Road to the north ditch. RP 180, 1. McCarthy did not agree with Richland that, even without the residential developments, the wetlands on and groundwater level under the KVV site would have increased and that the stormwater system has not impacted the level. RP 202, 367. Nevertheless, he agreed that movement of water to the north side of Keene Road, as a result of irrigation, was gradual and he did not know if the impact upon the KVV site groundwater had become static by 2000. RP 205, 13. No measurements were ever taken of the flow of groundwater into the KVV site, although measurements would be possible. RP 226, 7.

The Superior Court found that Richland's stormwater system increased water flowing to the KVV site. The Superior Court further found that the damage to the KVV site is temporary. Finding of Fact 77, CP 414. The damage could be eliminated by blocking or removing the culverts that direct water under Keene Road and by revising an east flowing wasteway to accommodate the increased flow and volume of

water. Finding of Fact 77, CP 414.

In 2005, the City of Richland prepared a Stormwater Management Plan to address drainage in Keene Valley. Exhibit 8. The plan contemplates laying a storm mainline pipe running to and down Shockley Road with a terminus at Keene Road. RP 242. From the terminus, water would be forwarded by pipe to the Jericho Road Regional Facility, a 3.8 acre infiltration detention facility. RP 242, 3. Richland has taken no steps to design the mainline or facility. Finding of Fact 59, CP 413; RP 446. The two projects are not in the city's capital improvement plan. 447. If and when the city wishes to proceed with one or both projects, city staff will place a proposal in an annual budget for funding by the city council. RP 452. The city council has yet to approve any spending for the mainline or Jericho Street project, and such approval is required. RP 453. Neither the mainline nor facility may ever be built. RP 454.

Exhibit 8, the Storm Water Management Plan, shows the city projected a unit price of \$30,000 per acre to purchase four acres of property for the detention plant. RP 247. The price is an engineer's estimates of costs and the city would not rely on the engineer's estimate of a purchase price when purchasing land. RP 380. The city would hire a

professional appraiser. RP 380. If Richland purchases land for the Jericho Street facility, the engineer's estimate would have no bearing on the purchase price. RP 451.

KVV received an offer for its acres in February 2006, for a price of \$541,500. RP 66, 7; Exhibit 32. The court admitted the written offer as an exhibit over the objection of Richland. RP 67, 82. The sale did not close and Ron Johnson does not know why. RP 67, 8.

In January 2007, Envision Homes offered to purchase the KVV land for \$575,000. RP 68, 9; Exhibit 33. The court overruled an objection to the purchase offer as an exhibit, but sustained Richland's objection to testimony from Ron Johnson as to the reason the sale did not close. RP 68 - 70, 82. Johnson's basis of knowledge was what someone told him. RP 69.

Ron Johnson is not a real estate appraiser. RP 45. He has never testified to values of land in the Tri-Cities or anywhere else. RP 46. Johnson does not know how to perform the different methods of assessing property. RP 46, 7. When forming an opinion as to the value of the KVV property at the time of purchase by Baines, Johnson principally relied his realtors' opinion. RP 45, 6.

During trial, KVV counsel asked Ron Johnson if he had an opinion of the value of the KVV site to be at the time of purchase. RP 43. After Johnson answered “yes,” counsel asked Johnson if the value differed from the purchase price. RP 43. Richland objected to the question on the ground of lack of foundation, which objection was sustained. RP 44. Thereafter KVV counsel attempted to lay a foundation to permit Johnson to testify, and, in turn, Richland conducted a voir dire of Ron Johnson and established that Johnson had no expertise in land valuation and only relied on others for opinions. RP 45 - 47. Richland also objected to any testimony on the ground that Johnson was never disclosed as an expert in property valuation, nor were any opinions disclosed. RP 47; See also appendix to brief. Without the court ruling on whether Richland’s objection, KVV withdrew the questioning of Ron Johnson as to valuations. RP 47.

Later KVV sought to introduce, through Ron Johnson, evidence of the value of other land. RP 107, 8. The court sustained an objection to KVV seeking to establish the value of its land by comparing the sales price of other land, since Johnson lacked experience or expertise to perform a comparable analysis of land value and no opinions were disclosed in an

answer to an interrogatory. RP 108.

KVV presented no expert testimony as to the value of the tract at any point in time. Finding of Fact 70; CP 414. KVV presented no appraisal of the tract, nor has the tract ever been appraised by an appraiser. Findings of Fact 69, 71, CP 414. The Superior Court found that Ron Johnson is not qualified to render a meaningful opinion as to the value of the tract. Finding of Fact 72, CP 414. Stated differently, Johnson lacks the expertise to render a meaningful estimate of property value. Finding of Fact 72, CP 414. In short, the trial court found it lacked sufficient evidence upon which to make a finding as to the value of the tract at any time nor as to any diminution of value in the tract due to the increased water. Finding of Fact 75, CP 414.

Because of an increased groundwater level, KVV must raise the ground level across the land to the site's highest point on the north end in order to build homes. RP 104. Ron Johnson claims 145,000 to 150,000 cubic yards of material would be needed, but he provided little explanation as to how he arrived at the figure. Finding of Fact 78, CP 415; RP 104. Nor did Johnson supply any detail about what areas would need to be

filled or the depth in various areas. RP 104, 5; Finding of Fact 78; CP 415.

KVV counsel asked Ron Johnson: what would be the cost of placing the 145 to 150,000 cubic yards on the land? RP 105. Johnson began to answer the question by stating he had received an estimate from “Mahaffey.” RP 105. The court sustained Richland’s objection to the testimony on the ground of hearsay. RP 105, 6. Johnson next testified that he anticipated, upon purchasing the land, of paying \$10 a cubic yard for fill. RP 106. He claimed that the price of fill had since increased but could give no definitive figure and he disclosed no basis for his original prediction. RP 106.

The Superior Court found that Ron Johnson had provided no basis for the figure of \$10 per cubic yard. Finding of Fact 79, CP 415. The trial court also found that Johnson lacked expertise to opine as to the cost of fill dirt. Finding of Fact 79, CP 415.

KVV has no plans to develop its acreage. RP 145. No engineering drawings have been prepared, nor any plat filed with Richland. RP 128. The zoning for the property is agricultural, and KVV has taken no steps to change the zoning. RP 128, 9. Ron Johnson declared that, if KVV must

pay for the amount of fill needed to build homes, KVV will not develop the property because of the cost. RP 145.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN FINDING THAT RICHLAND'S NUISANCE AND TRESPASS IS NOT PERMANENT AND THUS RULING THAT KVV COULD RECOVER RESTORATION DAMAGES IF PROVEN.

Before addressing whether substantial evidence supports the Superior Court's findings regarding damages, Richland detours into the question of whether the nuisance and trespass created by the raising of KVV's groundwater level is temporary or permanent. In turn, the brief sidesteps into the question of whether the court should have limited the possible award to the diminution in value of the property caused by Richland's conduct, as opposed to allowing KVV recovery under either the diminution in value of the land or the cost to restore the land to its original condition. This court need not travel on this detour since, under either measure of recovery, KVV failed to prove damages. Richland takes the trip in order to cover all territory that may be beneficial.

Washington courts have consistently asked the questions of

whether the damage to the property is permanent, or whether temporary, when determining the measure of damages to be applied in cases of damage to real property. *Colella v. King County*, 72 Wn.2d 386, 393, 433 P.2d 154 (1967); *Harkoff v. Whatcom County*, 40 Wn.2d 147, 152, 241 P.2d 932 (1952). If the injury is permanent, the general rule applicable is the difference between the market value of the property immediately before the damage and its market value immediately thereafter (diminution theory). *Colella v. King County*, 72 Wn.2d at 393. If, however, the damage is temporary, the measure of damages is the reasonable expense of restoration (restoration theory). *Colella v. King County*, 72 Wn.2d at 393. Richland challenges the application of these rules in the context of this case and questions the rationality behind distinguishing between permanent and temporary injury in any case.

Determining whether damage is permanent or temporary is problematic. Washington cases may even present different tests of whether damage is temporary or permanent. Many cases characterize damage as temporary if the property may be restored to its original condition. See *Colella v. King County*, 72 Wn.2d at 393. Richland questions the usefulness of this characterization because, on the one hand,

in a practical, but perhaps not economic, sense, all property can be restored to its original condition. On the other hand in a philosophical or scientific sense, nothing can ever be restored to its original condition because of the passage of time, movement of molecules, and entropy. For this reason, Washington courts should adopt more workable rules in measuring damage to real property.

Colella v. King County, 72 Wn.2d 386, 433 P.2d 154 (1967)

illustrates the difficulty in applying Washington rules. The trial court found that damage to land resulting from the county's drainage system was repairable and thus temporary. Nevertheless, according to the state high court, the county's refusal to correct the cause of the damage was indication that the damage may be permanent. *Id.* at 393, 4.

In *Drake v. Smith*, 54 Wn.2d 57, 337 P.2d 1059 (1959), a logging company that operated a mill on the bank of a stream polluted the stream from which five neighboring landowners drew domestic water. One could characterize the damage as temporary, since the company could have ceased operations or constructed facilities to preclude debris from entering the creek. Nevertheless, the trial court concluded the pollution of the water was permanent. On appeal, the company argued the lack of

evidence to support a finding of permanent pollution. The supreme court upheld the trial court's finding because the court could choose to believe that the company "had no intention of removing the sawdust pile, tree tops, and similar debris from the stream, nor of removing the fills from the creek." At 60. The court wrote:

An injury of the kind in question may be permanent in a legal sense, though not coextensive with perpetual, unending or unchangeable.

At 60. *Colella v. King County* and *Drake v. Smith* teach that damage to the property is permanent if the trespasser has no plan to remedy the trespass.

KVV and Richland agree that any taking, nuisance and trespass is permanent. But the Superior Court ruled otherwise. The reason Richland and KVV agree is because Richland has not taken any steps to remedy the alleged problem. Richland may never take steps to solve the problem. In turn, KVV has no interest in remedying the groundwater level rise because of the cost. According to testimony the water level on KVV continues to rise. Therefore, if KVV were to apply fill today, the problem would stay. With continued rise of the groundwater, KVV would need to periodically apply dirt, also illustrating why damage should be considered permanent.

Other reasons call for a conclusion, in the pending suit, that either the damage was permanent or restoration damages should not be available to KVV. In *Harkoff v. Whatcom County*, 40 Wn.2d 147 (1952), also involving damage to property by reason of roadside ditches, the high court qualified the restoration rule by stating: “if the injury is easily repairable, the cost of repairing may be recovered.” at 153, Emphasis added. Later the court announced that its review of earlier decisions shows that the restoration measure of damages applies when repairs and replacements “could readily be made.” Later decisions do not employ the modifiers “easily” or “readily,” but *Harkoff*’s recognition of practical limits to the restoration rule is well taken. In this appeal, the repairs cannot be readily made and likely will never be made.

Burr v. Clark, 30 Wn.2d 149, 190 P.2d 769 (1948), involving damage to fixtures, also suggests a limitations upon the restoration rule. The court wrote that the cost of restoration is the measure of damages where the injury is temporary and the property can be restored to its original condition “at a reasonable costs and at a cost less than the diminution in the value of the property.” at 158. In *Olson v. King County*, 71 Wn.2d 279, 428 P.2d 562 (1967), the high court repeated the

“reasonable cost” restriction to granting restoration costs. Plaintiffs sued for damage to land, not fixtures, as the result of inundation of the land with rocks, dirt, silt and debris due to the washout of an embankment. at 293.

In *Pepper v. J. J. Welcome Construction Company*, 73 Wn.App. 523, 871 P.2d 601 (1994), the court of appeals limited the *Burr* holding to instances of damage to fixtures on the land. The court of appeals does not explain why the rule should be different for fixtures rather than the realty itself. The jury found that damage to plaintiffs’ lands from excess water runoff caused by neighboring subdivisions was temporary. Silt, debris and gravel deposited on the land could be removed. Because of the finding, the court reversed the trial court’s limiting of recovery to the lesser of restoration costs or diminution in value. The *Pepper* court did not address its apparent inconsistency with language in *Olson v. King County*.

The court of appeals, in *Pepper v. J. J. Welcome*, qualified its ruling allowing restoration costs even if the costs exceed the diminution in value of the property. The court agreed with the trial court’s pre-trial order limiting damages to the pre-tort value of the property. “It would be anomalous for the plaintiff to recover more in damages than he could

recover for complete destruction of the property.” At 544, 5. The *Pepper* court’s qualification was in agreement with other jurisdictions. At 544, n. 16.

Some states follow the rule that plaintiff’s recovery is always diminution in value, if the diminution is lower than the cost to repair. *Scribner v. Summers*, 138 F.3d 471 (2nd Cir.1998, applying New York law); *Stony Ridge Association v. Auerbach*, 64 Ohio App.2d 40, 410 N.E.2d 782 (1979); *United States Steel Corporation v. Benefield*, 352 So.2d 892 (Fla.Ct.App.1977). In *United States Steel Corporation v. Benefield*, the tenant violated a contract by removing from the land phosphates below ground. The contract prohibited mining below the natural ground level. The trial court awarded the landlord \$50,691 for the phosphates removed below ground and \$327,543 for the cost of fill dirt needed to restore the land to its original ground level. The Sunshine State court reversed the award for the cost of fill, because of the considerable disparity between the cost of the fill and diminution in value of the land.

In *United States Steel Corporation v. Benefield*, the Florida court noted that, since land can never completely be destroyed, a clear definition of “permanent injury to land” is difficult. At 894. The court wrote:

Looking to the reason why a distinction is made in the first place and why, when the injury is temporary, the restoration rule is generally applied, the rationale appears to be that if the diminution of value rule were to be applied when the cost of restoration is less the plaintiff would be overcompensated in that he would enjoy recovery of the decreased value of the land and then be in a position to repair the damage at the lesser cost, thus making a profit on the difference. On the other hand, it seems clear that if the cost of restoration grossly exceeds the diminution in value the fear of a plaintiff's windfall could not materialize. Accordingly, there are those cases which under such circumstances apply the diminution in value rule even though the injury complained of is temporary or reparable. The injury is deemed, in effect, permanent. We think this is the sounder approach.

at 894.

In *Terra-Products, Inc. v. Kraft General Foods, Inc.*, 653 N.E.2d 89 (Ind.App.1995), the court defined permanent injury as any time that the cost of restoration exceeds the fair market value prior to injury, at 91, thus eliminating the inquiry as to whether the damage is physically permanent or temporary. The court noted that economic waste would result when restoration costs exceed the economic benefit. 653 N.E.2d at 92. *United States Steel* impliedly follows the same rule.

KVV claims \$1.2 million in restoration damages, although it bought the property for \$189,700 and its predecessor and related

corporation paid \$47,500. Awarding KVV such money would be a windfall and the law opposes windfalls. *Pepper v. J.J. Welcome*, at 543. If the court were to award KVV's alleged restoration costs, the City of Richland might as well condemn the property and pay the fair market value of land before the taking.

In short, Richland contends that restoration costs should not be available in the pending suit for four reasons: (1) the damage to the property is permanent, since Richland has no definitive plan to remedy the trespass; (2) the damage to the property is permanent, since KVV has no plan to take remedial measures; (3) the cost of restoration greatly exceeds the diminution in value of the land; and (4) the cost of restoration exceeds the pre-trespass value of the land.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN HOLDING THAT KVV LACK SUFFICIENT EVIDENCE TO SHOW DIMINUTION IN VALUE TO THE LAND AND RESTORATION COSTS.

In a suit for damage to real property, the plaintiff almost inevitably hires a professional real estate appraiser to testify as to the value of the land and diminution in value of the land resulting from defendant's

conduct. See *Proctor v. Huntington*, 146 Wn.App. 836, 192 P.3d 958 (2008). When a plaintiff, without excavation experience, alleges over a million dollars in costs to raise the level of land, the plaintiff inevitably hires an expert witness, such as an excavator, to testify to the volume of fill needed and the cost to purchase that fill. In the pending case, KVV failed to hire the witnesses desirable, if not necessary, to a successful suit. Instead, KVV relied on its owner to provide sketchy and vacuous testimony of damages based upon questionable assumptions and hearsay. As to the cost of fill, the owner mentioned that he relied on someone named Mahaffey, but neglected to call this purported expert to testify. The Superior Court legitimately determined that KVV had defaulted in carrying its burden of proof on damages.

The plaintiff holds the burden of proving damages. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn.App. 628, 639 (1997). If the plaintiff does not carry its burden, the reviewing court will not read a finding that the burden was not sustained as an abuse of the trial court's discretion. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 440, 886 P.2d 172 (1994). If a plaintiff has an opportunity to present evidence to the court of damages to property under one of the theories and fails to

satisfy the judge, the plaintiff cannot recover under that theory. *Scribner v. Summers*, 138 F.3d 471, 474 (2nd Cir.1998).

Sufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn.App. 628, 639, 939 P.2d 1228 (1997). Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn.App. 628, 639 (1997). To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn.App. 628, 641 (1997). Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of fact can with reasonable certainty determine the amount. *Wappenstein v. Schrepel*, 19 Wn.2d 371, 375, 142 P.2d 897 (1943).

In *Federal Signal Corp. v. Safety Factors, Inc.*, a buyer sought to recover damages by providing testimony from employees of “estimated expenses” of costs to repair and the testimony was not supported by any

records. The Court of Appeals affirmed the trial court's denial of damages, because the buyer failed to carry its burden. In *ESCA Corp. v. KPMG Peat Marwick*, the court of appeals affirmed the trial court's denial of an award of damages because the claim for damages was based upon an employee's "subjective self-serving characterizations" of damages. 125 Wn.2d at 641.

The weight of the opinion testimony of an owner of real property as to the value of that property is affected by the extent of his or her knowledge regarding the value of the property, such that where the presumption that an owner of real property has special knowledge as to its value is overcome by his or her own testimony, or other showing of lack of knowledge, any opinion as to the value of the property loses its probative significance and is insufficient to sustain an award. *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780, 783 (Mo.App.1992); *United States v. Sowards*, 370 F.2d 87 (10th Cir.1966). Also the owner's qualification to testify does not change the "market value" concept and permit him to substitute a "value to me" standard for the accepted rule, or to establish a value based entirely upon speculation. *United States v. Sowards*, 370 F.2d at 92 (10th Cir.1966).

While an owner may testify to property damage, when an owner's opinion is based on improper elements or foundation, his opinion loses its probative value. *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780, 783 (Mo.App.1992). Or, where the reliability of the testimony is not supported by a statement of facts on which it is based, or the basis of fact does not appear to be sufficient, the testimony should be rejected. *Carmel Energy*, 827 S.W.2d at 783. Judicial liberality in permitting an owner to testify as to his opinion of the amount of the loss does not allow an unrestricted right to engage in guesswork. *Id.*, at 783. In *Carmel Energy*, the appeals court reversed an award of damage to property because of the landowner's testimony of loss lacked probative value. In *United States v. Soward*, the appeals court also rejected the landowner's testimony of value.

A controlling decision is *Port of Seattle v. Equitable Capital Group*, 127 Wn.2d 202, 898 P.2d 275 (1995). The Evergreen high court affirmed a trial court's decision to strike the testimony of the owner as to the value of property, since the owner identified no theory or technique upon which he formulated his opinion. Although a landowner has the right to testify concerning the fair market value of his property, this right is not absolute. 127 Wn.2d at 279. In *State v. Larson*, 54 Wn.2d 86, 338

P.2d 135 (1959), the court also struck the testimony of the landowner.

The Superior Court concluded that Ron Johnson was not qualified to testify as to real property values, since he had no experience in appraising property and relied upon offers to purchase the land that never closed for unknown reasons. This reviewing court should not challenge the assessment by the Superior Court of Johnson's qualifications and the value of Johnson's opinions. The trial court's rulings on the qualifications of witnesses may not be overturned absent a showing of an abuse of discretion. *Drewett v. Rainier School*, 60 Wn.App. 728, 731, 806 P.2d 1260 (1991). The reviewing court must defer to a trial court's ruling that a witness' testimony is not credible. *Callegod v. Washington State Patrol*, 84 Wn.App. 663, 676, n. 9, 929 P.2d 510 (1997). In fact, the court gives the most deference to the trier of fact on questions of credibility. *Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011). One court stated decisions based upon credibility of a witness cannot even be reviewed on appeal. *Morse v. Antonellis*, 149 Wash.2d 572, 574, 70 P.3d 125 (2003). The appeals court also defers to the trial court on questions of the persuasiveness of testimony. *In re Marriage of Akon*, 160 Wn.App. 48, 57, 248 P.3d 94 (2011).

KVV emphasizes the sales prices found in two sales agreement for the purchase of its site. In turn, KVV argues that there was no evidence that the two sales were other than at fair market value. Nevertheless, there was no evidence that the sales were at fair market value, and plaintiff has the burden of proof in establishing the fair market value. KVV further contends that the sales prices were evidence of the value that “KVV put on the property.” As already noted, an owner may not substitute a “value to me” standard for the accepted rule. *United States v. Sowards*, 370 F.2d at 92 (10th Cir.1966).

KVV complains that the trial court discounted Ron Johnson’s testimony when Richland did not present contrary evidence. Nevertheless, Richland presented no evidence, because KVV did not carry the burden of proof and there was no need to present opposing testimony because Johnson’s testimony lacked credibility. As the trier of fact, the Superior Court was free to believe or disbelieve any evidence presented at trial. *Jensen v. Lake Jane Estates*, 165 Wn.App. 100, 104, 5, 267 P.3d 435 (2011). Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. *Id.*, at 105.

KVV claims that the court should have based a determination of

damages, in part, upon Richland's Stormwater Management Plan that list value of land at \$30 per acre. But again, a court may reject evidence that lacks reliability, *Carmel Energy*, 827 S.W.2d at 783, and the appeals court also defers to the trial court on questions of the persuasiveness of testimony. *In re Marriage of Akon*, 160 Wn.App. 48, 57, 248 P.3d 94 (2011). The value listed in the plan was prepared by an engineer, not a property appraiser. The estimate would never be relied upon when actually purchasing land.

KVV argues that the court should apply the rule in *Lange v. State*, 86 Wn.2d 585, 547 P.2d 282 (1976), which permits compensation to be measured at the time of taking rather than at the time of trial. In turn, KVV seeks a recovery based upon a an alleged taking in 2005. Richland questions whether the *Lange* rule, rather than the general rule to measure damages at trial, applies. Richland did not engage in a series of hearings and announcements before bringing a condemnation action. Also, Richland does not believe KVV argued for the *Lange* rule at trial, and thus has waived the argument. *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wn.App. 258, 265, 268 P.3d 958 (2011). Nevertheless, the rule is of no help, since KVV presented no testimony of values in 2005.

KVV relies upon language in *Pruitt v. Douglas County*, 116 Wn.App. 547, 66 P.3d 1111 (2003), that the property had a value of zero because of flooding. Nevertheless, the court of appeals reviewed a summary judgment order and presented the evidence in the light most favorable to the landowner who lost below. For all we know, the property owner had an affidavit from an appraiser that the value of the property was zero. In the case at bar, Ron Johnson, despite lacking any expertise, did not even testify that the value was zero.

KVV forwards *Gilmartin v. Stevens Investment Co.*, 43 Wn.2d 289, 261 P.2d 73 (1955), for the proposition that the trial court must award more than nominal damages if the landowner proves substantial damages. *Gilmartin* was a breach of contract case. Contrary to the case at bar, opinion testimony was provided by realtors, in addition to credible testimony from the landowner. KVV suggests that the supreme court, in *Gilmartin v. Stevens Investment Co.*, directed a reopening of the evidence for additional testimony. Nevertheless, the supreme ordered a new trial on damages, not the reopening of evidence. A new trial was ordered because of credible testimony of experts.

Finally, KVV highlights comments made by the trial court after

defendant's motion to dismiss at the completion of plaintiff's testimony. The trial court then commented as to a range for the fair market value of the property. The court's comments must be read in light of the motion to dismiss, in which the trial court should review the evidence in the light most favorable to the plaintiff. The court may then comment that there is some evidence to support a particular fact, yet the court, as the trier of fact, may, after completion of the case, conclude that the evidence is not persuasive and rule that plaintiff did not convince him of the validity of the evidence.

For the same reasons that the trial court could permissibly deny diminution damages, the court did not abuse its discretion in denying damages for restoration costs. Proof of the cost to repair should be reasonably certain and definite. *Nelson v. State ex rel. Missouri Highway and Transp. Com'n*, 734 S.W.2d 521, 523 (Mo.App.1987). Ron Johnson did not claim to be an expert on excavation and provided weak testimony on the volume of fill needed. He gave no review of the landscape of the property and the amount of fill needed on discrete sections of the land. Johnson was not an expert on the cost of fill and tried to overcome his lack of expertise with hearsay testimony that was precluded. His figure of \$10

per cubic yard was based upon an original cost estimate that was unsupported by any backup information. The trial court did not need to accept Johnson's testimony because even undisputed evidence from an interested party is not necessarily credible evidence. *Rea v. Rea*, 19 Wn.App. 496, 501, 574 P.2d 84 (1978). In this regard, the decision of *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413 (1994) is befitting.

In its issue 3, KVV states that a consultant recommended to raise the site 5 feet. The record lacks such testimony. Throughout its brief, KVV refers to reports of DWR, Stratton, Sheldon, and others. KVV impliedly argues that the trial court must accept content within the report as verities. The law does not support such a proposition and the trial court should be free to discount opinions within reports, especially when authors of the reports are not subpoenaed by a party to testify at trial. A trier of fact need not accept the opinions of an expert, even when the opinion is uncontraverted and the expert testifies at trial. *Smith v. Andrews*, 289 Conn. 61, 959 A.2d 597, 606 (2008); *Lucks v. Lakeside Mfg., Inc.*, 830 N.Y.S.2d 747, 749 (2007).

KVV also wishes the court to declare the cost of fill projected in

the Stormwater Management Plan as controlling evidence in determining KVV's damages. For the same reason that the court could ignore the cost of land projected in the Plan, the court could ignore the projected cost of fill. The author of the report was not present to verify the figure or testify to the basis upon which he arrived at the figure. The projected cost has never been relied upon and was not prepared by an excavator.

KVV highlights that the trial court stated it had the skills to make a hydraulics calculation applying Manning's Equation, and then KVV impliedly criticizes the court for not being able to follow Ron Johnson's calculation of fill volume. Nevertheless, the opposite conclusion could be drawn - the fact that the trial court has some engineering background but could not follow Ron Johnson's testimony shows the hollow nature of Johnson's testimony. More importantly, the court was not so much critical of any calculation performed as the assumptions of the calculation.

KVV's counsel attempts to overcome the deficiency of the evidence by presenting post-trial affidavits setting forth the cost of fill in a 1962 decision and then extrapolating the cost forward to 2011 by inflation rates. He also seeks to perform his own calculations of volume in the brief. Nevertheless, counsel was not a trial witness, nor did KVV file a

motion to reopen the case, which motion could be rejected within the discretion of the trial court. *Finley v. Finley*, 47 Wn.2d 307, 313, 287 P.2d 475 (1955).

C. THIS REVIEWING COURT MUST REJECT ANY CLAIM THAT THE COURT ERRED IN FAILING TO AWARD DIMINUTION DAMAGES, BECAUSE OF KVV'S FAILURE TO PRESENT AN OFFER OF PROOF.

Assuming KVV objected to the court's ruling that Ron Johnson was not qualified to testify to values, KVV should have presented an offer of proof as to what values Johnson would utter. Without that offer, the superior court and the court of appeals lacks evidence upon which to base any decision as to a diminution in value of the KVV land. The failure to provide an offer of proof waives any claim that the trial court failed to award damages based upon the diminution in value. The court of appeals may reject any argument based upon the failure to give an offer. See *Mad River Orchard, Inc. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978); *Tomlinson v. Bean*, 26 Wn.2d 354, 361, 173 P.2d 972 (1946).

In its issue 2, KVV declares that the property owner presented evidence of the before fair market value as \$575,000, and the after value of

zero. There was no such testimony at trial. To the contrary, after Johnson was cross-examined on his lack of expertise and the basis of any opinion, KVV withdrew its questioning of Johnson with regard to values.

D. THIS REVIEWING COURT SHOULD NOT ENTERTAIN ANY VALUATION TESTIMONY OF RON JOHNSON BECAUSE OF KVV'S FAILURE TO DISCLOSE OPINION TESTIMONY OF JOHNSON IN RESPONSE TO INTERROGATORIES.

KVV never disclosed in an answer to a pertinent interrogatory any opinions of Ron Johnson as to the value of the property or any diminution in value resulting from the rise in the groundwater level. Therefore, the trial court should have stricken any testimony from Johnson. A court may exclude testimony because of a party's failure to disclose. *Carlson v. Lake Chelan Community Hospital*, 66 P.3d 1080, 1091 (2003). Although the superior court did not base its decision upon this ground, the appeals court may affirm a trial court on any ground supported by the record. *King County v. Seawest Inv. Associates, LLC*, 141 Wn.App. 304, 310, 170 P.3d 53 (2007).

In *Port of Seattle v. Equitable Capital Group*, 127 Wn.2d 202 (1995), the trial court's exclusion of expert testimony was affirmed on

appeal. The expert and opinions were disclosed timely but the expert modified his opinions substantially seven days before trial. Johnson never disclosed any opinion before trial.

E. KVV WAS NOT ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS FEES AND COSTS.

KVV seeks reasonable attorneys fees and costs under RCW

8.25.070(3). The statute reads:

(3) A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.

The statute is predicated upon plaintiff being awarded compensation for a taking and the award of damages exceeding an offer presented by the municipality. Here KVV proved no damages and was awarded no compensation. It was given only nominal damages. Because the right to fees is determined by the legislature, any such right granted by the legislature may be reasonably conditioned as is done by the

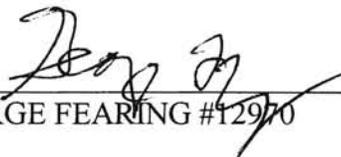
requirements of statute. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 487, 618 P.2d 67 (1980). This suit does not fit the requirements of the statute. In another context involving a civil rights statute, courts have held that a plaintiff awarded \$1 in nominal damages may not recover reasonable attorneys fees incurred when he sought a higher award. *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566 (1992); *LeBlanc-Sternberg v. Fletcher*, 922 F.Supp. 959 (S.D.N.Y.1996).

VI. CONCLUSIONS

The superior court should have only allowed recovery under a diminution theory, since the damage to the property is permanent and a restoration theory would allow an award substantially higher than the value of the land. This court, however, need not address which theory of recovery was apt, since KVV proved no damages under either theory.

DATED this 14th day of May, 2012.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
Attorneys for Appellee City of Richland



GEORGE FEARING #12970

CERTIFICATE OF SERVICE

I, Kristi Flyg, hereby certify that on the 14th of May, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

- | | | |
|-------------------------------------|------------------|--------------------------------|
| <input type="checkbox"/> | Hand-delivered | TERRY MILLER |
| <input type="checkbox"/> | First-Class Mail | Attorney at Law |
| <input type="checkbox"/> | Overnight Mail | 7409 W. Grandridge Blvd. Ste C |
| <input type="checkbox"/> | Facsimile | Kennewick, WA 99336 |
| <input checked="" type="checkbox"/> | Pronto Process | |



KRISTI FLYG

of Leavy, Schultz, Davis & Fearing, P.S.

APPENDIX

1. Page 1 of Richland's Interrogatories to Plaintiff and Answers thereto;
2. Page 7 of Richland's Interrogatories to Plaintiff and Answers thereto, including Interrogatory 3 regarding expert witnesses;
3. Page 18 of Richland's Interrogatories to Plaintiff and Answers Thereto, including Interrogatory 52 about just compensation, and KVV's signature;
4. Page 1 of plaintiff's Second Disclosure of Witnesses, disclosing Ron Johnson as a witness but mentioning no expertise on land value nor any opinions as to KVV land values or damages; and
5. Page 2 of plaintiff's Second Disclosure of Witnesses.

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Ex 2

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON**

KEENE VALLEY VENTURES, INC., a
Washington corporation,

Plaintiff,

vs.

CITY OF RICHLAND, a municipal
corporation; APPLEWOOD ESTATES
HOMEOWNER ASSOCIATION, a nonprofit
Washington corporation; CHERRYWOOD
ESTATES HOMEOWNER ASSOCIATION, a
nonprofit Washington corporation; and
GREGORY CARPENTER and LAREINA
CARPENTER, husband and wife, and the
marital community thereof,

Defendants.

No. 08-2-02072-7

**DEFENDANT CITY OF RICHLAND'S
FIRST SET OF INTERROGATORIES
PROPOUNDED TO PLAINTIFF AND
ANSWERS THERETO**

TO: KEENE VALLEY VENTURES, INC., a Washington corporation, plaintiff

AND TO: KAREN A. WILLIE, plaintiff's attorney

COMES NOW the defendant, CITY OF RICHLAND, and in accordance with Rule
33 of the Civil Rules of Superior Court of the State of Washington, requests the plaintiff to

DEFENDANT CITY OF RICHLAND'S FIRST SET OF
INTERROGATORIES AND ANSWERS THERETO - 1
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Law Offices of Karen A. Willie, PLLC
11 West McGraw Street
Seattle, WA 98119
PHONE: (206) 223-1060
FAX: (206) 223-0168

ORIGINAL

1 15. Each of these general objections shall be automatically incorporated into each of the
2 responses to these discovery requests, which responses are made without waiver of any of
3 these general objections.

4 **INTERROGATORY NO. 1:** Please set for the date, time, and manner by which
5 defendant(s) were served with a copy of the summons initiating this action.

6 **ANSWER:** The City has not asserted insufficiency of process as a defense in this
7 matter and there is no relevancy to this interrogatory. Without waiving this objection,
8 plaintiff caused NW Legal Support to effect service on the City of Richland by leaving a
9 summons and complaint with Debby Barham, Deputy City Clerk, at 975 George Washington
10 Way, Richland, WA 99352 at 2:45 PM on November 3, 2008.

11 **INTERROGATORY NO. 2:** Please provide the names, addresses and phone
12 numbers of all persons who information relevant to the claims and defenses of the parties.
13 For each such person, indicate the knowledge held.

14 **ANSWER:** Plaintiff disclosed its witnesses on December 15, 2008 in accordance
15 with the Civil Case Schedule Order. Plaintiff will seasonably supplement this interrogatory
16 with the knowledge held by the disclosed witnesses as it is developed in discovery.

17 **INTERROGATORY NO. 3:** Please provide the names, addresses, phone numbers,
18 and qualifications of all expert witnesses you plan to call to testify at trial. For each expert
19 witness, please provide the witness' opinions and basis of opinions.

20 **ANSWER:** Plaintiff disclosed its witnesses on December 15, 2008 in accordance
21 with the Civil Case Schedule Order. Plaintiff will seasonably supplement this interrogatory
22 with the qualifications of and knowledge held by the disclosed witnesses.

23 **INTERROGATORY NO. 4:** Please provide the names, addresses, phone numbers
24 and ownership interest held for each owner of the plaintiff.

25 **ANSWER:** Ron Johnson is the president and sole owner of Keene Valley Ventures,
26 Inc. a Washington corporation, UBI # 602252248.

INTERROGATORY NO. 5: For each lawsuit to which you or a majority owner of
the plaintiff has been a party, please indicate the nature of the lawsuit, the names of the
parties to the lawsuit, the year the lawsuit was filed, the name and addresses of the attorneys
representing parties in the lawsuit, the court in which the lawsuit was filed, the case number
of the lawsuit, and the disposition of the suit. Please include any divorces and bankruptcy
filings.

1 ANSWER: The acts of the City of Richland interfering with the development of the
2 KVV property are set out in letters from attorney Brian Lawler dated August 16, 2007 and
3 from Ron Johnson dated March 26, 2007 to City Attorney Thomas Lampson.

4 INTERROGATORY NO. 52: What just compensation is owed the plaintiff?

5 ANSWER: Plaintiff has not yet developed information responsive to this
6 interrogatory. Plaintiff will seasonably supplement this interrogatory response as necessary.

7 These interrogatories shall be deemed continuing so as to require supplemental
8 answers if you or your attorneys obtain further information between the time answers are
9 served and the time of trial.

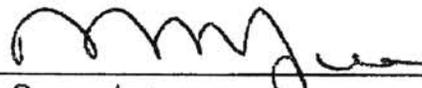
10 DATED this 10th day of December, 2008.

11 LEAVY, SCHULTZ, DAVID & FEARING, P.S.
12 Attorneys for Defendant City of Richland

13 By: 
14 GEORGE FEARING
15 WSBA NO. 12970

16 STATE OF WASHINGTON)
17) ss.
18 COUNTY OF _____)

19 Keene Valley Ventures Inc, plaintiff above named being first duly
20 sworn, deposes and states: That the answers to the above and foregoing interrogatories are true
21 and correct.

22 
23 by Ron Johnson
24 Its President

25 DEFENDANT CITY OF RICHLAND'S FIRST SET OF
26 INTERROGATORIES AND ANSWERS THERETO - 18
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28 First Rogs to Plaintiff and Answers Thereto.doc

29 Law Offices of Karen A. Willie, PLLC
30 11 West McGraw Street
31 Seattle, WA 98119
32 PHONE: (206) 223-1060
33 FAX: (206) 223-0168

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON**

KEENE VALLEY VENTURES, INC., a
Washington corporation,

Plaintiff,

vs.

CITY OF RICHLAND, a municipal
corporation; APPLEWOOD ESTATES
HOMEOWNER ASSOCIATION, a nonprofit
Washington corporation; CHERRYWOOD
ESTATES HOMEOWNER ASSOCIATION, a
nonprofit Washington corporation; and
GREGORY CARPENTER and LAREINA
CARPENTER, husband and wife, and the
marital community thereof,

Defendants.

No. 08-2-02072-7

PLAINTIFF'S SECOND DISCLOSURE
OF WITNESSES

Pursuant to the Civil Case Schedule Order, Plaintiff Keene Valley Ventures, Inc.
discloses the following lay and expert witnesses.

1. Ron B. Johnson
c/o Law Offices of Karen A. Willie
11 West McGraw St.
Seattle, WA 98119
(206) 223-1060

PLAINTIFF'S SECOND DISCLOSURE OF WITNESSES - 1
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of Witnesses.doc

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1 Ron Johnson is a principal with Keene Valley Ventures, the owner of the subject
2 property since its purchase in 2001. He is also knowledgeable about the property's potential
3 for residential development and problems preventing that use.

- 4 2. Tom Duebendorfer, MA, PWS
5 P.O. Box 167
6 Colburn, ID 83865
7 (208) 660-1494

8 Mr. Duebendorfer prepared the wetland delineation report dated January 8, 2001.

- 9 3. Lloyd J. Reitz, P.E., Principal Engineer
10 Shannon & Wilson, Inc.
11 303 Wellsian Way
12 Richland, WA 99352

13 Mr. Reitz of Shannon & Wilson prepared the Preliminary Geotechnical Engineering
14 Study of January 2005.

- 15 4. Michael T. Black, P.E.
16 Columbia Engineers and Constructors LLC
17 1806 Terminal Drive
18 Richland, WA 99354

19 Mr. Black prepared the Geotechnical Investigation for proposed Keene Valley
20 Ventures, Richland, WA November 16, 2005 report. As part of Ashley--Bertsch Group, Inc.,
21 Mr. Black investigated the static water levels at the KVV property on November 12, 2007.
22 He continues to work at the property with KVV. Mr. Black's qualifications are attached to
23 this witness disclosure.

- 24 5. Scott Bender
25 Bender Consulting, LLC
26 630 6th Street
Kirkland, WA 98033
(425) 828-7545