

FILED

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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.

Respondent,

vs.

CITY OF RICHLAND,

Respondent/Cross-Appellant.

**REPLY BRIEF OF CROSS-APPELLANT
CITY OF RICHLAND**

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TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Baker v. Mississippi State Highway Commission</i> , 204 Miss. 166, 37 So.2d 169, 173 (1948)	5
<i>Banks v. U.S.</i> , 102 Fed.Cl. 115, 180 (2011)	4
<i>Carolina Chloride, Inc. v. Richland County</i> , 394 S.C. 154, 170, 714 S.E.2d 869 (2011)	4
<i>City of Sierra Vista v. Cochise Enterprises, Inc.</i> , 144 Ariz. 375, 697 P.2d 1125, 1131 (1984)	4
<i>Cloverport Sand & Gravel Co., Inc. v. U.S.</i> , 6 Cl.Ct. 178, 188 (1984)	4
<i>Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement in the Clinton Subterranean Geological Formation Beneath 80 Acres, Worthington Twp., Richland County, Ohio</i> , 747 F.Supp. 401, 405 (N.D.Ohio.1990)	4
<i>Crystal Lotus Enterprises, Ltd. v. City of Shoreline</i> , 167 Wn.App. 501, 274 P.3d 1054, 1056 (2012)	1
<i>DeKalb County v. Daniels</i> , 174 Ga.App. 319, 329 S.E.2d 620, 623, 4 (1985) ..	4, 5
<i>Foster v. U.S.</i> , 2 Cl.Ct. 426, 445 (1983)	4
<i>Fowler Irrevocable Trust 1992-1 v. City of Boulder</i> , 17 P.3d 797, 802 (Colo.2001)	4

<u>Cases</u>	<u>Page</u>
<i>Fricke v. City of Guntersville</i> , 254 Ala. 370, 48 So.2d 420, 421 (1950)	5
<i>Hendler v. U.S.</i> , 175 F.3d 1374, 1383 (Fed.Cir.1999)	4
<i>Interstate Cigar Co. v. U.S.</i> , 32 Fed.Cl. 66, 71 (1994)	4
<i>Kane v. City of Chicago</i> , 392 Ill. 172, 64 N.E.2d 506, 509 (1946)	5
<i>Lawrence County v. Miller</i> , 786 N.W.2d 360, 366 (S.D.2010)	4
<i>Mabe v. State ex rel. Rich</i> , 86 Idaho 254, 385 P.2d 401, 406 (1963)	5
<i>Northern Pac. Ry. Co. v. Morton County</i> , 131 N.W.2d 557, 567 (N.D.1964)	5
<i>State v. Amunsis</i> , 61 Wn.2d 160, 164, 377 P.2d 462 (1963)	3
<i>State ex rel. Shannon County v. Chilton</i> , 626 S.W.2d 426, 429 (Mo.App.1981)	5
<i>Taylor v. State, Dept. of Transp.</i> , 879 So.2d 307, 319 (La.App.2004)	4

Other Authorities

Page

Finding of Fact 70 3

Respondent - cross appellant City of Richland is entitled to file a reply brief. RAP 10.1(f)(4).

At page 8 of its reply brief, KVV unrestrainedly argues: “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 has no fair market value after the taking.”

KVV’s advocacy is overblown. Richland has never conceded a taking and does not believe there was a taking, for many reasons, including the fact that KVV purchased the property after Richland installed the storm drainage system, see *Crystal Lotus Enterprises, Ltd. v. City of Shoreline*, 167 Wn.App. 501, 274 P.3d 1054, 1056 (2012). But Richland does not appeal the trial court finding on this issue. Richland, unlike KVV, recognizes that a litigant does not appeal factual findings.

Richland argues that, assuming any damages would be appropriate, the measure of damages would be the diminution in value, but Richland has always contended and argues on appeal that there are no damages.

Going further, Richland does not agree that the water will continue to rise, nor that additional fill will be required periodically. The trial court never found that the water level will continue to rise. Richland has never conceded that the property has no productive use and that the property has no fair market value. Nor did the Superior Court enter any such finding. KVV argues that neither party holds the burden of proof as to damages and that the court must establish some diminution in value, if there is a taking. This may be the rule in a straight condemnation case, particularly since the government, in such a proceeding, seeks to take property and agrees it must pay for some damage. It makes no sense to apply such a rule in an inverse condemnation case, especially when the government entity does not agree there has been damage.

A hypothetical example is illustrative. Assume that a landowner claims damage to property as the result of airplanes flying over her property in order to land at a neighboring public airport, and she files an inverse condemnation action against the port authority. During the trial, the landowner presents no testimony of the value of her property before the opening of the airport nor after the opening of the airport. The public entity also presents no evidence of value. Assuming the court finds a

taking, must the court enter some damage award, when it heard no evidence of property values? Must the court guess in the tailwind? Must the court pull a figure from the aviation thin air? Surely, the plaintiff in the inverse condemnation case must carry some burden of establishing damages for the adversary court system to work. Some one must carry the burden and the party seeking recovery typically carries the burden of proving the amount of damages.

In the case at bar, KVV presented no testimony of values of its property. To the contrary, when Richland voir dired KVV President Ron Johnson concerning the basis of any opinion, KVV withdrew any questioning of Johnson concerning his opinions. RP 47. No opinion had even been disclosed by KVV during discovery, despite interrogatories seeking such information. RP 47. KVV presented no testimony of the value of its land at any point in time, either with or without the taking. Finding of Fact 70; CP 414.

KVV cites *State v. Amunsis*, 61 Wn.2d 160, 164, 377 P.2d 462 (1963), for the proposition that it had no burden of proof on damages. In *Amunsis*, the State of Washington initiated the condemnation proceeding, so the suit was a straight condemnation. Moreover, the court noted that

the plaintiff - the condemner - had a burden of going forward with some evidence of value. at 162.

To Richland's knowledge, Washington courts have not addressed the issue of who, if anyone, carries the burden of proving damages in an inverse condemnation case. The majority, if not universal, American rule is that the landowner carries the burden. *Banks v. U.S.*, 102 Fed.Cl. 115, 180 (2011); *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869 (2011); *Lawrence County v. Miller*, 786 N.W.2d 360, 366 (S.D.2010); *Taylor v. State, Dept. of Transp.*, 879 So.2d 307, 319 (La.App.2004); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 802 (Colo.2001); *Hendler v. U.S.*, 175 F.3d 1374, 1383 (Fed.Cir.1999); *Interstate Cigar Co. v. U.S.*, 32 Fed.Cl. 66, 71 (1994); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement in the Clinton Subterranean Geological Formation Beneath 80 Acres, Worthington Twp., Richland County, Ohio*, 747 F.Supp. 401, 405 (N.D.Ohio.1990); *City of Sierra Vista v. Cochise Enterprises, Inc.*, 144 Ariz. 375, 697 P.2d 1125, 1131 (1984); *Cloverport Sand & Gravel Co., Inc. v. U.S.*, 6 Cl.Ct. 178, 188 (1984); *DeKalb County v. Daniels*, 174 Ga.App. 319, 329 S.E.2d 620, 623, 4 (1985); *Foster v. U.S.*, 2 Cl.Ct. 426,

445 (1983); *State ex rel. Shannon County v. Chilton*, 626 S.W.2d 426, 429 (Mo.App.1981); *Northern Pac. Ry. Co. v. Morton County*, 131 N.W.2d 557, 567 (N.D.1964); *Mabe v. State ex rel. Rich*, 86 Idaho 254, 385 P.2d 401, 406 (1963); *Fricke v. City of Guntersville*, 254 Ala. 370, 48 So.2d 420, 421 (1950); *Baker v. Mississippi State Highway Commission*, 204 Miss. 166, 37 So.2d 169, 173 (1948); *Kane v. City of Chicago*, 392 Ill. 172, 64 N.E.2d 506, 509 (1946). In *DeKalb County v. Daniels*, 329 S.E.2d 620, at 623, 4 (1985), the Peach State court expressly mentioned that the burden of proof switches to the landowner in an inverse condemnation suit.

DATED this 3rd day of July, 2012.

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CERTIFICATE OF SERVICE

I, Kristi L. Flyg, hereby certify that on the 5TH day of July, 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 E. MILLER |
| <input checked="" type="checkbox"/> | Pronto Process | 7409 W. Grandridge Blvd. Ste C |
| | Messenger Service | Kennewick, WA 99336 |
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