

Case No. 67315-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CATHERINE LAKEY, a single woman; GERTHA RICHARDS, a single woman; MICHAEL HESLOP, a single man; TROY FREEMAN and CAROLINA AYALA de FREEMAN, husband and wife; PATRICK MCCLUSKY and MICHELLE MCCLUSKY, husband and wife; SHAHNAZ BHUIYAN and ANN RAHMAN, husband and wife; STEVEN RYAN and NORA RYAN husband and wife; KEVIN CORBETT and MARGARET CORBETT, husband and wife; KATHRYN MCGIFFORD, a single woman; and JACQUELYN MILLER, a single woman,

Appellants,

v.

PUGET SOUND ENERGY INC., a Washington corporation; and CITY OF KIRKLAND, a Washington municipal corporation,

Respondents,

RESPONDENT CITY OF KIRKLAND'S APPEAL BRIEF

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I. INTRODUCTION

This action originated as a lawsuit by Plaintiffs against Puget Sound Energy, Inc., (“PSE”) claiming damages regarding electromagnetic fields (“EMFs”) allegedly emanating from a PSE substation. Plaintiffs are property owners living adjacent to or near the PSE substation. The City approved a variance for the substation in February 2009. However, none of the Plaintiffs challenged the City’s issuance of the variance under the Land Use Petition Act (“LUPA”) even though several Plaintiffs participated in the administrative variance proceedings.

The Plaintiffs’ decision to add the City as a defendant in this case was triggered by a question from the trial court: Why didn’t the Plaintiffs appeal the City’s issuance of the variance under LUPA? (CP 768) The Plaintiffs’ response was to move to amend their complaint to add an inverse condemnation claim against the City six months after the filing of the original complaint and over two years after the City’s issuance of the variance.

The City submits that the trial court posed the right question, but that the Plaintiffs provided the wrong answer. Ultimately, the trial court dismissed the Plaintiffs inverse condemnation claim on summary judgment for the same reason that prompted the trial court’s original

question: The Plaintiffs failed to appeal the variance decision under LUPA.

In addition, there are two alternate grounds under which the trial court could have granted the City's summary judgment motion: (1) As a matter of law, there was no governmental "taking or damaging" of the Plaintiffs' properties; and (2) The alleged taking was not for a "public use." Finally, the trial court's dismissal of Plaintiffs' nuisance and trespass claims against PSE warrants dismissal of the Plaintiffs' claims against the City, which are based solely on the City's issuance of a land use permit to PSE.

II. STATEMENT OF THE CASE

In 2008, PSE applied to the City for a variance to construct a substation at property known as 10910 NE 132nd Street in Kirkland, Washington ("Subject Property"). The Subject Property is zoned "RSX 7.2" which is a single family zone with a minimum lot size of 7,200 square feet per dwelling unit. (CP 1586). The Subject Property is rectangular in shape and is approximately 1,270 feet long. It ranges from 80 feet to 90 feet in width. (CP 1586).

There is an existing substation on the southern portion of the Subject Property that was constructed in 1960. (CP 1586) Prior to

construction of the new substation, overhead electrical transmission and distribution lines ran the length of the Subject Property in a north and south direction. (CP 1586) The new substation provides increased service capacity and includes a second transformer that creates a looped configuration that allows the substation to continue to operate in the event a transmission line to the north or south is disrupted. (CP 1587).

A Public Utility use is an allowed use in an RSX zone. (CP 1599). The Kirkland Zoning Code, Section 5.10.745, defines a “Public Utility” as:

A private business organization such as a public service corporation, including physical plant facilities, performing some public service and subject to special governmental regulations, or a governmental agency performing similar public services, the services by either of which are paid for directly by the recipients thereof. Such services shall include but are not limited to: water supply, sewer pump stations, **electric power**, telephone, cable television, gas and transportation for persons and freight . . .

(CP 1600, emphasis added). The definition of “Public Utility” makes clear that either a private business organization or a public entity can be a public utility provider. The Public Utility use is based on the nature of the service provided, not the form of entity of the provider.

Although the Public Utility use is an allowed use on the subject property, PSE applied to the City for variances from the setback, building height and landscape buffering provisions of the Kirkland Zoning Code.

(CP 1585) PSE's variance request sought: (1) a reduction in the applicable side yard setbacks from 20 feet to 13 feet; (2) a reduction in the size of the east and west landscape buffers from 15 feet to 13 feet; and (3) an increase in the maximum allowable height from 30 feet to 35 feet. (CP 1585)

On December 4, 2008, the City of Kirkland Hearing Examiner held a public hearing on PSE's development application, its variance request, and a State Environmental Policy Act¹ ("SEPA") appeal that was brought by one of the Plaintiffs in this case. (CP 1585-86) At least five of the Plaintiffs testified at the public hearing or provided written comments and nine of the Plaintiffs are listed as parties of record. (CP 1595-97)

On December 12, 2008, the Hearing Examiner issued a decision conditionally granting the development application, and the variance request. (CP 1585-98) The Hearing Examiner also affirmed the City's issuance of a determination of non-significance under SEPA. (CP 1594) The Hearing Examiner found no regulations governing the production and emissions of EMFs and noted that, based on the record, EMFs are of greater concern with respect to electric transmission lines than with substations. (CP 1594)

¹ RCW Chapter 43.21C.

With respect to the variance, the Hearing Examiner set forth, reviewed and applied the variance criteria set forth in the Kirkland Zoning Code to PSE's variance request. (CP 1590-91, Finding of Fact No. 38; CP 1592-93, Conclusions 2-9) The Hearing Examiner concluded that the variance criteria were met and therefore approved the variance request. (CP 1594) On summary judgment, the Plaintiffs made no attempt to analyze the Hearing Examiner's variance decision or explain how it was erroneous. Similarly, on this appeal, the Plaintiffs have not presented any argument or analysis of the Hearing Examiner's decision with respect to the variance, other than to argue that its issuance led to construction of the PSE substation, which in turn lead to an alleged diminution of value in the Plaintiffs' properties. See Appellants' Opening Brief ("App. Br.") at 7-8.

Steven Ryan, one of the Plaintiffs in this case, appealed the decision of the Hearing Examiner to the Kirkland City Council, which held a closed record appeal hearing on February 3, 2009. (CP 1602) On February 17, 2009 the City Council affirmed the Hearing Examiner's Decision approving PSE's development application and variance request, except for one required change regarding landscape buffers. (CP 1602-03)

The City Council decision affirming the Hearing Examiner was the final administrative decision of the City with respect to PSE's

development application and variance request.² Under LUPA, judicial review of a land use decision must be sought within 21 days of the issuance of the land use decision. RCW 36.70C.040(3). In this case, nobody filed a LUPA with respect to the City's variance decision, which is referred to herein as the "Land Use Decision."

Instead, the Plaintiffs brought suit against PSE in September 2010 after completion of the construction of the PSE substation. (CP 1-5) The Plaintiffs' claims against PSE are based on nuisance and trespass from electromagnetic fields generated by PSE's operation of the substation. (CP 3-5) Plaintiffs did not name the City as a party in their original Complaint.

As noted in the Introduction to this Brief, the Plaintiffs' decision to amend their complaint was prompted by a question from the trial court: Why no LUPA appeal? (CP 768) The Plaintiffs' resulting inverse condemnation claim against the City is based solely on the City's issuance of the Land Use Permit.³ Plaintiffs do not allege any other actions or

² KZC Section 150.125.5 provides that under Process IIA, the "decision of the City Council is the final decision of the City." (CP 1605) Process IIA was the applicable process for the PSE's development and variance application. (CP 1585)

³ Plaintiffs allege that "PSE was able to construct, and is able to operate the Substation only by virtue of an act by the City of Kirkland granting a variance." (CP 1027, Amended Complaint, Section 3.5)

omissions on the part of the City in support of their inverse condemnation claim.⁴ (CP 1024-30).

The Plaintiffs and the City brought cross-motions for summary judgment. After oral argument on June 24, 2011, the trial court granted the City's summary judgment motion and dismissed Plaintiffs' claims against the City. The trial court based her ruling on the fact that Plaintiffs failed to appeal the City's Land Use Decision under LUPA. (CP 1668)

III. LEGAL ARGUMENT

A. Standard of Review.

Summary judgment is appropriate “if the pleadings... together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56; City of Seattle v. Mighty Movers, Inc., 152 Wn.2d 343, 348, 96 P.3d 979 (2004). “All facts and reasonable inferences are

⁴ It is important to be mindful of the scope of Plaintiffs' claims because, on summary judgment, the Declarations submitted by Plaintiffs extend well beyond the EMF allegations of the Amended Complaint. For example, on summary judgment, Plaintiffs complained about the size of the substation as well as sounds and light emanating from the Substation and alleged damages to their properties during the substation construction process, although there do not appear to be any connections between those issues and the EMF allegations in their Amended Complaint. (CP 1426-28) Nor do Plaintiffs attempt to explain how the City is legally responsible for any of this other than the City's issuance of a land use permit for the Substation. The City indicated in its Response to Plaintiffs' Summary Judgment Motion that it does not consent to the adjudication of additional issues beyond the scope of Plaintiffs' Amended Complaint. (CP 1608). See also CR 15(b).

considered in the light most favorable to the nonmoving party, and all questions of law are reviewed *de novo*.” Liberty Mutual Ins. Co. v. Tripp, 144 Wn.2d 1, 10-11, 25 P.3d 997 (2001). In opposing summary judgment, a party may not rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). On appeal, the trial court’s summary judgment decision is reviewed *de novo*. Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998).

B. Overview of Plaintiffs Inverse Condemnation Theory.

Before addressing the legal arguments in support of the City’s position, it is important to note an overarching flaw in the Plaintiffs’ theory of this case. Plaintiffs’ theory with respect to the validity of the City’s Land Use Decision is inherently inconsistent. On one hand, in an attempt to avoid the procedural bar of LUPA, Plaintiffs claim that they are not really challenging the validity of the City’s Land Use Decision. See App. Br. at 14 (“Invalidity of the government action is **not** an element of an inverse condemnation claim. [emphasis in original]”).

On the other hand, Plaintiffs have alleged in their Amended Complaint, at summary judgment and on this appeal that the City’s Land

Use Decision was a taking for private use since it benefitted PSE. (CP 1027, 1428-30); App. Br., pp. 15-17. Under Article I Section 16 of the State Constitution, such an action would be inherently invalid—local governments are absolutely prohibited from taking property for private use beyond the scope of Article I, Section 16.⁵ See Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 374, 13 P.3d 183 (2000) (“The state constitution's absolute prohibition against taking private property solely for a private use is not conditioned on payment of compensation”). Contrary to the Plaintiffs’ assertions, they cannot simply “waive the prohibition against appropriation for private use.”⁶ Since the Plaintiffs’ claims are based solely on the City’s issuance of the Land Use Decision, they were required to challenge that decision under LUPA.

C. The Trial Court Properly Granted Summary Judgment Based on the Plaintiffs’ Failure to Appeal the City’s Land Use Decision under LUPA.

LUPA provides the process for judicial review of land use decisions. Mercer Island Citizens v. Tent City 4, 156 Wn.App. 393, 398, 232 P.3d 1163, 1166 (2010). The stated purpose of LUPA is to “reform

⁵ It is undisputed that the taking alleged by Plaintiffs does not fall within the narrow exceptions provided for in Article I, Section 16.

⁶ App. Br., p.17. The City will expand on this argument, *infra*, in Section III.D.2 of this Brief.

the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. LUPA declares that chapter 36.70C RCW is “the exclusive means of judicial review of land use decisions.” Habitat Watch v. Skagit County, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (quoting RCW 36.70C.030(1)).

Plaintiffs do not dispute that the issuance of a variance is a land use decision for the purposes of LUPA. A land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA's specified 21-day timeline. Habitat Watch, 155 Wn.2d at 406-07; RCW 36.70C.040(3). Once the 21-day period passes, a land use decision becomes final and binding and is deemed valid and lawful. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 182, 4 P.3d 123 (2000). Thus, "even illegal decisions must be challenged in a timely, appropriate manner." Habitat Watch, 155 Wn.2d at 407 (holding that LUPA bars untimely challenges even when the government agency failed to provide proper public notice of proceedings).

In this case, Plaintiffs do not claim that the City failed follow the proper procedures or provide proper notice of the variance proceedings. Indeed, many of the Plaintiffs in this case were parties of record in the

variance proceedings before the City. (CP 1595-97)⁷ Nor do the Plaintiffs allege that the City committed any acts after the issuance of the land use decision that constitute or contribute to an inverse condemnation. Rather, Plaintiffs claim that the City's issuance of the variance allowed PSE to construct and operate the substation, which in turn resulted in a taking of the Plaintiff's property. This is exactly the type of claim that Plaintiffs were required to bring under LUPA.

LUPA provides that a court may grant relief under LUPA in six situations, one of which is that the land use decision "violates the constitutional rights of the party seeking relief." RCW 36.70C.130(1)(f). This provision has been interpreted to extend to damage claims that a plaintiff may have that arise from issuance of the land use decision. For example, in Mercer Island Citizens v. Tent City 4, 156 Wn.App. 393, 398, 232 P.3d 1163, 1166 (2010), the City of Mercer Island entered into a temporary use agreement with a homeless advocacy group that allowed for a temporary homeless encampment at a church in Mercer Island. A citizen group opposed to the homeless encampment sought injunctive relief and damages under 42 U.S.C. Section 1983. The citizen's group did not challenge issuance of the temporary use permit under LUPA, nor did it

⁷ This portion of the Hearing Examiner's Decision lists individuals who testified and parties of record to the variance proceeding. Five of the Plaintiffs testified or provided written comments and nine Plaintiffs are listed as parties of record.

bring suit within the applicable 21-day period. Mercer Island, 156 Wn.App. at 397-98.

This Court held that the citizen group's claims were barred, noting that the case law "recognizes that failure to challenge a land use decision in a LUPA petition bars any claims that are based on challenges to that land use decision, including those alleging due process violations." Mercer Island, 156 Wn.App. at 402. This Court concluded that "claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails." Id at 405. Therefore, because "all of the group's claims challenged the validity of the [temporary use agreement] and were therefore subject to LUPA, the group's failure to assert them within LUPA's time limitations requires dismissal of all the claims, including those for damages." Id. See also Shaw v. City of Des Moines, 109 Wn.App. 896, 901-02, 37 P.3d 1255 (2002) (where LUPA petition challenging conditions imposed on building permit application included a claim for damages, court acknowledged: "If the petitioner loses the LUPA appeal, the damages case is moot and the matter is over").

Plaintiffs' claim that RCW 36.70C.030(1)(c) exempts them from LUPA compliance because they seek monetary damages against the City. The Plaintiffs misread that exemption and the case law interpreting it. App. Br. at 12. RCW 36.70C.030(1)(c) provides that its provisions do not

apply to claims for compensation or monetary damages. This makes sense, because the purpose of LUPA is to establish “uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. Adjudicating damage claims concurrently with review of a land use decision would slow down and complicate review. It would also be inefficient, since damage claims need not be adjudicated if the land use decision is upheld.

Washington cases repeatedly emphasize the need for the prompt review and finality of land use decisions. James v. County of Kitsap, 154 Wn.2d 574, 589-90, 115 P.3d 286 (2005) (“this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions”). LUPA's requirement of finality provides governmental entities with certainty regarding potential liability for the issuance of land use decisions. Id. In James, the Court held that the imposition of impact fees in connection with the issuance of a building permit was subject to the 21 day appeal period of LUPA and not the three year statute of limitations applicable to actions to recover improperly assessed fees. Id. at 589. The Court noted that otherwise, local jurisdictions would be faced with the prospect of waiting three years before knowing that the impact fees are not subject to challenge. Id. See

also Samuel's Furniture, Inc. v. State, 147 Wn.2d 440, 459, 54 P.3d 1194 (2002) (exempting Department of Ecology from requirements of LUPA “would leave land owners and developers unable to rely on local government decisions--precisely the evil for which LUPA was enacted to prevent”).

The Plaintiffs' position that LUPA should not apply to inverse condemnation claims is inconsistent with case law and exposes local jurisdictions to long-term liability for land use decisions. This problem is particularly acute in the context of inverse condemnation claims since there is no statute of limitations for such claims. Wallace v. Lewis County, 134 Wn.App. 1, 21-22, 137 P.3d 101 (2006). The Wallace Court observed that the passage of time does not bar an inverse condemnation claim, but in some cases the ten year prescriptive period for adverse possession bars an inverse condemnation claim.⁸ Id. There is no suggestion in LUPA, or in case law interpreting it, that an inverse condemnation exception to LUPA was contemplated or intended. Such an exception would fly in the face of the strong policy in favor of finality of land use decisions.

⁸ It should be noted that the ten year prescriptive period would not apply to issuance of a land use decision, because such an action typically would not meet the elements of adverse possession or a prescriptive easement. The exposure to local jurisdictions would essentially be open-ended.

The fact that a claim for damages need not be included in a LUPA action does not excuse a plaintiff from bringing a LUPA action prior to seeking damages. The case law is clear that failure to prevail in a LUPA action is fatal to a claim for damages based on the issuance of that land use decision. See James v. Kitsap County, 154 Wn.2d 574, 589-90, 115 P.3d 286 (2005) (failure to challenge condition of building permit approval assessing impact fees under LUPA precluded an action for damages based on permit condition); Mercer Island, 156 Wn.App. at 402; Asche v. Bloomquist, 132 Wn.App. 784, 800, 133 P.3d 475 (2006) (the failure to challenge issuance of building permit under LUPA precludes a public nuisance action based on issuance of the permit); Shaw, 109 Wash.App. at 901-02. Under RCW 36.70C.030(1)(c), it is clear that a petitioner may bring a LUPA action and claim damages in a subsequent action if the petitioner prevails on the LUPA claim. It is equally clear that a petitioner may claim damages in a LUPA petition, although the damages claim will not be subject to the procedures and standards that govern review of the land use decision. RCW 36.70C.030(1)(c). What a plaintiff may not do is fail to challenge a land use decision and then claim damages resulting from issuance of that land use decision.

The Plaintiffs' reliance on Asche v. Bloomquist, 132 Wn.App. 784, 133 P.3d 475 (2006) is misplaced because that case actually supports

the City's position. In Asche, neighboring property owners challenged the issuance of a building permit for a residence that would obstruct their view of Mount Rainier. Id. at 788. The plaintiffs alleged that they did not know about the issuance of the building permit until after the LUPA appeal period expired. Id. at 788-89. The Court affirmed dismissal of the public nuisance action against Kitsap County because the claim was based entirely on the issuance of the land use decision. Id. at 801.

Similarly, the Plaintiffs' inverse condemnation claim in this case depends entirely on the City's issuance of the Land Use Decision. In some LUPA cases, such as Asche, there are grounds for concern about whether there was notice and opportunity to participate in the process leading up to the issuance of a land use decision.⁹ This is not one of those cases. Plaintiffs in this case had notice and the opportunity to participate in the process leading up to issuance of the Land Use Decision. (CP 1595-97) Many of the Plaintiffs did, in fact, participate. (CP 1595) In addition, the Plaintiffs sought and obtained legal advice from their previous attorney and made a considered decision not to challenge the City's Land Use Decision under LUPA. (CP 366, Heslop Declaration, paragraph 4).

⁹ Habitat Watch v. Skagit County, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005) (LUPA bars collateral attack on land use decision even when the local jurisdiction fails to provide the required public notice); (Asche v. Bloomquist, 132 Wn.App. 784, 798-99, 133 P.3d 475 (2006) (plaintiffs' public nuisance action against county was barred under LUPA despite the fact that plaintiffs did not become aware of the land use decision until after the 21 day LUPA appeal period expired).

The Plaintiffs have not articulated a principled reason as to why an inverse condemnation claim should be treated any differently than any other type of claim that arises out of the issuance of a land use decision. Since LUPA is the exclusive means for the review of land use decisions, it applies as much to claims of inverse condemnation as any other type of claim for damages arising from a land use decision. At its heart, the Plaintiffs' claim is that the City's issuance of the Land Use Decision violated their rights under Article I, Section 16 of the state constitution. That is a claim the Plaintiffs were required to bring under LUPA. See RCW 36.70C.130(1)(f) (providing for review of a land use decision that "violates the constitutional rights of the party seeking relief"). The trial court correctly dismissed Plaintiffs' claims against the City on summary judgment.

D. Plaintiffs also Fail to Establish the Required Elements of an Inverse Condemnation Claim.

The trial court based her summary judgment ruling on Plaintiffs' failure to challenge the City's Land Use Decision under LUPA. (CP 1668) However, there are other bases under which the trial court could have granted the City's summary judgment motion as well. An appellate court may affirm a summary judgment ruling on any theory established by

the motion papers, even if the trial court did not consider it. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Inverse condemnation is an action to recover the value of private property that a government agency has taken or damaged without formal exercise of the government's right of eminent domain. Phillips v. King County, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). A party alleging inverse condemnation must establish the following elements: (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 to condemn the property. Id. at 957.

1. Plaintiffs have not Established the “Taking or Damaging” element of their Inverse Condemnation Claim.

A taking or damaging occurs when government invades or interferes with the use or enjoyment of property, and its market value declines as a result. Gaines v. Pierce County, 66 Wn.App. 715, 725, 834 P.2d 631 (1992). There must be more than a mere “tortious interference.” Northern Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 924, 540 P.2d 1387 (1975). Inverse condemnation requires an invasion that is permanent or recurring, or that involves a chronic and unreasonable pattern of behavior by the government. Gaines, 66 Wn.App. at 725-26.

Two cases are particularly helpful in illustrating why the City's Land Use Decision in this case is not an inverse condemnation. First, in Pierce v. Northeast Lake Washington Sewer & Water Dist., 69 Wn.App. 76, 847 P.2d 932 (1993), aff'd 123 Wn.2d 550, 870 P.2d 305 (1994), property owners sued a utility district over construction of a water tank on adjoining property. The plaintiffs presented uncontroverted evidence that the presence of the water tank on the adjacent property diminished their property values by \$30,000. Pierce, 69 Wn.App. at 79-80 and n.2. The water tank partially blocked the view from the plaintiffs' property and was not aesthetically pleasing. Id. at 82. The Court noted that although structures or uses such as water tanks, jails, fire stations and cemeteries have an effect on the market value of properties in the vicinity, the owners of the impacted properties generally do not have a right to compensation. Id. The Court dismissed the plaintiffs' inverse condemnation claim against the utility district since it constructed and operated the water tank lawfully and in a manner that did not constitute a nuisance. Id.

Second, in Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998), the Washington Supreme Court performed an extensive analysis of government liability for inverse condemnation in the context of the land use permitting process. That case involved whether King County could be held liable for approving a surface water drainage system that flooded

adjoining properties. The Court separated its analysis into three parts. The first issue was whether a government entity is liable for inverse condemnation if its only action is to approve private development under existing regulations. Phillips, 136 Wn.2d at 960-962. The Court emphatically said “no”:

If all that the County had done was to approve private development, then one of the elements of an inverse condemnation claim, that the government has damaged the Phillips' property for a public purpose, would be missing. There is no public aspect when the County's only action is to approve a private development under then existing regulations. Furthermore, the effect of such automatic liability would have a completely unfair result. If the county or city were liable for the negligence of a private developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties.

Id. at 961-62. The Court went on to observe that the public duty doctrine as it applies to land use regulation also “militates against finding municipal liability based only on approval of private development.” Id. at 963. See also Pepper v. J.J. Welcome Constr. Co., 73 Wn.App. 523, 531, 871 P.2d 601 (1994) (“The fact that a county regulates development and requires compliance with road and drainage restrictions does not transform a private development into a public project”).

The second issue in Phillips was whether King County's acceptance of maintenance responsibility and ownership of residential drainage systems gives rise to liability for inverse condemnation. Again, the Court said "no," reasoning that a municipality should not be held liable for a design defect in a developer's system simply because it accepts the system after construction in order to provide proper maintenance in the future. Id. at 965-66.

The third issue in Phillips was whether King County's approval to locate the drainage system in public right of way constituted an inverse condemnation. This time the Court said "yes." It reasoned that:

The County acted as a direct participant in allowing its land, or land over which it had control, to be used by the developer. Rather than acting only to approve plans, the County here used its own property for the specific placement of drainage devices allegedly intended to drain water onto the Phillips' property.

Id. at 967.

Phillips provides a clear and useful analysis of municipal liability for inverse condemnation in the land use permitting process. In this case, the City of Kirkland did nothing more than issue the Land Use Decision to PSE based on its regulations and variance criteria. (CP 1592-93) The City's actions fall squarely within the first issue addressed by the Phillips Court. Under Phillips it is clear that approving development under

existing regulations through the land use process, without more, cannot constitute an inverse condemnation. In contrast to Phillips, Plaintiffs in this case do not allege any actions by the City that constitute an inverse condemnation beyond issuance of the Land Use Decision.

Moreover, as established in the Pierce case, even an uncontroverted loss of market value does not, by itself, result in an inverse condemnation. The Plaintiffs must do more than simply allege that the PSE substation caused a diminution of value to their property. App. Br. at 7. The Plaintiffs' method of establishing their alleged damages consists of challenging the assessed value of their properties with the King County Assessor, obtaining a reduction in assessed valuation, and then using that reduced valuation to assert a "taking or damaging" in this action. (CP 367, 1427) This approach does not meet the "taking or damaging" element of an inverse condemnation claim.¹⁰

In addition, Plaintiffs are particularly vague about what the City should have done differently. Plaintiffs do not allege that the City committed any procedural improprieties during the land use decision process. Nor do they claim that the City made substantive errors in

¹⁰ This approach also is not a reliable method of determining damages. Appealing a property tax valuation is essentially an *ex parte* process between the property owner and the Assessor in which neither the City nor PSE would have an opportunity to present competing evidence regarding the market value of the properties. There is a "bootstrap" quality to this attempt to establish damages.

applying its decisional criteria to PSE's application. And although Plaintiffs' claims appear to be based on concerns over EMF emissions, they do not cite a single regulation or source of law that would have authorized the City to condition or deny PSE's application based on EMF emissions. The Hearing Examiner's conclusion that there are no laws or regulations that would have authorized the City to regulate EMF emissions is uncontroverted. (CP 1594)

It is particularly important to note that in Pierce, it was the utility district defendant that constructed and operated the water tank. In this case, the City did not participate in the construction of the substation and it does not participate in the operation of the substation. The City's Land Use Decision in this case does not give rise to liability for inverse condemnation.¹¹

2. Plaintiffs have not Alleged or Established the "Public Use" Element of their Inverse Condemnation Claim.

A plaintiff claiming inverse condemnation must allege and establish that the claimed taking is for a public use. Phillips v. King

¹¹ See also Pande Cameron v. Sound Transit, 610 F.Supp.2d 1288, 1310-11 (W.D.Wash. 2009) (under Washington law, City of Seattle was not liable for inverse condemnation for permitting Sound Transit to construct a tunnel in the right of way; the City was not involved in the actual construction of the tunnel).

County, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). Nonetheless, the Plaintiffs allege in their Amended Complaint that the “conduct of the City was in furtherance of a private use of property prohibited under Article I, Section 16 of the Constitution of the State of Washington” [emphasis added]. (CP 1027) Plaintiffs reiterated this claim on summary judgment and on this appeal. App. Br. at 15-17. (CP 1430)

The Washington Constitution is very clear that private property may not be taken for private use except in very limited circumstances: “Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.”¹² Washington Const., Article I, Section 16.

Plaintiffs do not claim that the City’s land use decision approving the PSE Substation is for any of the permitted private uses enumerated in Article I, Section 16. As a result, Plaintiffs’ claim, by definition, challenges the validity of the City’s land use decision. See Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000). In Manufactured Housing, the Court invalidated a state

¹² Of course, the City disputes the Plaintiffs’ assertions that the Land Use Decision constitutes an illegal act as well as any suggestion that it is trying to shield itself from liability from its own illegal conduct. See App. Br. at 15. As established *supra* in Section III.D.1 of this Brief, the City’s Land Use Decision does not amount to a “taking or damaging” of Plaintiffs’ properties.

statute that provided mobile home tenants a right of first refusal for the sale of their mobile home park. The Court concluded that the statute constituted an unconstitutional taking because it caused a transfer of a fundamental attribute of ownership (the right to sell or dispose of property) from the mobile home park owner to the mobile home park tenants. Manufactured Housing, 142 Wn.2d at 374-75.

The State argued that the proper remedy was payment of just compensation instead of invalidation of the statute. The Court disagreed, holding that:

Giving the provision in article I, section 16 that ‘Private property shall not be taken for private use ...’ its deserved effect, chapter 59.23 RCW must be invalidated. The state constitution's absolute prohibition against taking private property solely for a private use is not conditioned on payment of compensation.

Id. at 374. See also In re Seattle, 96 Wn.2d 616, 638 P.2d 549 (1981) (ordinance authorizing condemnation of land for Westlake Mall project was invalidated because it was for a “private use,” and not for a “public use” under Article I, Section 16).

The distinction between takings for public use and private use involves remedy. A property owner is entitled to compensation when government inversely condemns private property for a **public use**. See e.g., Phillips, 136 Wn.2d at 957 (defining and stating elements of inverse

condemnation and noting that an inverse condemnation claimant seeks to recover the value of property appropriated by government). If government appropriates property for a **private use**, compensation is not an available option. See Manufactured Housing, 142 Wn.2d at 371 (“unless a private use falls within article I, section 16’s specifically articulated exceptions, the Washington State Constitution explicitly prohibits taking private property solely for a private use--with or without compensation.”).

The Plaintiffs’ characterization of the Land Use Decision as a taking for private use is not inadvertent. Plaintiffs have emphasized this position consistently throughout this case.¹³ As a result, the Plaintiffs have made no effort to meet the “public use” element of their inverse condemnation claim.

Plaintiffs’ failure to do so is fatal to their inverse condemnation claim. Just compensation is not an available remedy for takings for private use under the Manufactured Housing and In re Seattle. Those cases both emphasize the absolute nature of the prohibition against takings for private uses. Manufactured Housing, 142 Wn.2d at 371; In re Seattle, 96 Wn.2d at 634. The remedy available to a plaintiff alleging a taking for a private use is invalidation of the government action. The Plaintiffs

¹³ See CP 771-72 (Plaintiffs’ Motion to Amend); CP 1027 (Plaintiffs’ Amended Complaint); CP 1428-30 (Plaintiffs’ Motion for Summary Judgment); App. Br. at 15-17.

failure to seek that relief—despite their extensive involvement in the City’s land use process—bars the current action against the City.

E. Dismissal of Plaintiffs’ PSE Claims Requires Dismissal of Plaintiffs’ Claims Against the City.

Finally, on May 24, 2011, the trial court issued its Frye decision in which it ruled that the testimony of Plaintiffs’ expert is inadmissible because it does not meet the Frye standard. (CP 1418-23) The trial court granted PSE’s Motion to Dismiss because “Plaintiffs cannot bring a trespass or nuisance claim based on the presence of EMFs.” (CP 1422) If the trial court’s dismissal of Plaintiff’s claims against PSE is affirmed, the dismissal of the claims against the City should be affirmed as well, since the City’s only involvement in this case was issuance of the Land Use Decision for the PSE Substation.

IV. CONCLUSION

The trial court properly dismissed the Plaintiffs’ claims against the City pursuant to LUPA. The Plaintiffs’ have not provided a principled reason why inverse condemnation claims should be treated any differently than other types of damage claims with respect to the procedural bar of LUPA. In addition, the granting of summary judgment was warranted

because the Plaintiffs failed to establish two elements with respect to their inverse condemnation claim: (1) that there was a “taking or damaging;” and (2) that the alleged taking was for a public use. Accordingly, the City respectfully requests that the trial court’s grant of summary judgment be affirmed.

DATED this 27th day of January, 2012.

CITY OF KIRKLAND

By: 
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Oskar Rey, WSBA #21990

Counsel for Respondent, City of Kirkland

CERTIFICATE OF SERVICE

I, Leta Santangelo, under penalty of perjury under the laws of the State of Washington, declare as follows:

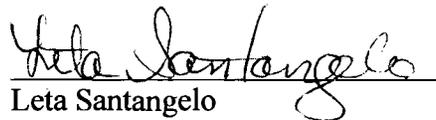
I am employed with the City of Kirkland, City Attorney's Office, attorneys for Respondent City of Kirkland. On the date indicated below, I caused an executed copy of RESPONDENT CITY OF KIRKLAND'S APPEAL BRIEF to be served via email on the following parties:

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Dated this 27th day of January 2012, at Kirkland, Washington.


Leta Santangelo