

63747-9

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No. 63747-9-1
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KIPP M. AND MARILYN V. DUNLAP, husband and wife

Appellants,

v.

CITY OF NOOKSACK,

Respondent.

REVISED OPENING BRIEF OF APPELLANTS

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2009 DEC 29 AM 10:48
COURT OF APPEALS
DIVISION I
KIP M. DUNLAP

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I. INTRODUCTION

This case involves an inverse condemnation complaint relating to property access resulting from the vacation of a public street and the residential invasion of storm water unto private property. This case is before the Court of Appeals because the trial court found that the Dunlap's have remaining access and the remaining access was not substantially impaired to rise to the level of an unconstitutional taking and the trial court never made a finding on the residential storm water invasion. The uncontested evidence shows that the Dunlap's utilized West Third Street to access their property prior to the public city street being vacated, the Dunlap property abutted the public street that was vacated. The Dunlap's contend that the remaining access is an unimproved street right of way that would cost a great deal of money to improve and that this fact is the substantial impairment. The City argues the West Third Street wasn't good access to begin with and that the Dunlap's still have access and therefore have not been damaged. The trial court agreed with the City's argument and found that access remains to the Plaintiff's parcel and therefore the property has not been damaged. The fundamental question is can the City remove an existing improved access to the Dunlap's property and leave them with access from an unimproved right of way? The trial court also never made a finding regarding the City redirecting residential storm water unto the Dunlap property. The City's expert witness admitted that the City is redirecting their residential storm water through piping unto the Dunlap's property. The trial court never found the City liable for a taking of the Dunlap's 29.5 acre property and this is contrary to law and should be

reversed by this court and remanded back to trial to determine damages and to avoid manifest injustice.

II. ASSIGNMENT OF ERROR

1. The trial court erred when they found that the Dunlap's property could be accessed from a residential driveway off Lincoln Street.
2. The trial court erred when it found that the remaining unimproved access to the Dunlap's property is not substantially impaired.
3. The trial court erred when it granted the City its Order Denying and Granting in Part the Defendants First Motion in Limine dated November 5, 2009 regarding the exclusion of the evidence relating to the log home damage.
4. The trial court erred when they bifurcated the trial because they did not allow the jury to determine the genuine issues of material fact regarding whether the remaining access was substantially impaired.
5. The trial court erred when they did rule on the regulatory taking issue on the 29.5 acre parcel and when they didn't find liability with the City for directing storm water unto the Plaintiff's property to their injury without paying just compensation.

III. ISSUES RELATED TO THE ASSIGNMENT OF ERROR

1. Whether an owner of property can have their access taken away and be forced to provide their own access through a separate parcel of land.

2. Whether an improved street access can be taken away and the remaining access is an unimproved right of way whereas a street has to be built to city street standards at the burden of the landowner without being a special injury or peculiar damage.
3. Whether the Plaintiff's damage to their log home should be excluded as evidence because it was not yet built and therefore not a permanent part of the real property
4. Whether there are any genuine issues of material fact regarding the remaining access and if it is substantially impaired and if those are findings of fact that need to be determined by a jury because they are directly related to just compensation.
5. Whether there is a regulatory taking whereas the City regulates the slough by Critical Area Ordinance, Shoreline Master Plan, and Floodway regulations and by declaring the slough the Cities storm water system and the City directs storm water from man made piping unto the Plaintiff's property to his injury without paying just compensation constitutes a taking under the law.

III. STATEMENT OF THE CASE

The Dunlap's have a farm within the City of Nooksack and own four separate adjacent parcels of land in Nooksack. Parcel #2 & #3 were the parcels involved in the lawsuit and

parcels #1 & #4 which includes the Dunlap's home were not part of the trial. CP 324-325, & 120. Parcel # 2 is a 29.5 acre parcel that abuts on West Third Street and the Dunlap's had a history of using West Third Street to access their property and had even purchased overweight permits from the City to use West Third Street for access for their agricultural operation. CP 112-116, RP page 228 line 9-25. The Dunlap's were in the process of building a new log home on this parcel in the county portion of the property when the City of Nooksack issued them an illegal stop work order. CP 125, RP page 229. The City then informed them they would need to upgrade West Third Street if they wanted to build a home on their property and would need permission from the City to do so. CP 129& RP 229 -230. When the Dunlap's made the request the City denied the request and then vacated the Street and as part of the vacation all the adjacent property owners were able to retain their access through shared easement agreements which the Dunlap's were excluded from. CP 138-142 & RP page132-136. The Dunlap's made an application for slough crossings and a request to improve and utilize Hayes Street on the North end of the parcel for a new access and that request was also denied by the City. CP 106-110. The Dunlap's then eventually brought a civil action against the City claiming damage in an inverse condemnation action regarding access and the street vacation. Although the Trial Court found differently the Dunlap's believe their remaining access is substantially impaired and that the City should be liable for the damages they have suffered. The Dunlap's have been unable to build their new home because the property no longer has any improved public access and any remaining access is substantially impaired and the log home is now ruined. The Dunlap's discovered the City was directing storm water unto their property during the trial while the City's Expert witness

was under cross examination. (RP page 425 line 6- page 430 line 10) There was no information disclosed to the Dunlap's during the discovery process regarding the City discharging residential storm-water unto the Dunlap's property. The Appellants's have filed timely Notice of Appeal to this Court.

IV. ARGUMENT

1. The City made two basic arguments in this case regarding the Dunlap's impaired access issue and they did a good job of coordinating all of their witnesses to conceal the fundamental issues of the case. First the City argued that West Third Street was not a street. They argued that it was a private driveway or an unimproved right of way and substandard in regards to a street and that it wasn't really an access at all because it could never be used to provide access to a subdivision of the Dunlap's property. The facts are that at the time of the street vacation the entire 29.5 acre parcel was zoned agricultural and the Dunlap's were proposing the construction of one home on the parcel which would not require the Dunlap's to do a subdivision. RP page 31 line 15- page 32 line 6, & page 37 line 21- page 38 line 1. This was a parcel that had an improved street access and the Dunlap's had a history of using the access. When the access was removed only for the Dunlap's, the City created a limited access that the Dunlap's were excluded from using. (RP page 132 line 8- page 136 line 10. CP 18-20) The Dunlap's showed evidence that the majority of streets in Nooksack are substandard. RP page 237 line 6-23 & CP 122-123. They also showed evidence that all the property owners that abutted the street were utilizing the street for access including the Dunlap's and the City was charging several of the abutting property owners fees for overweight permits to utilize the street including the Dunlaps. CP 112-116. This evidence clearly showed that West Third

Street was open to the public and clearly dedicated for public use and their argument should have been found to be without merit. The second argument the City made was that the Dunlap's still have access and can access all their land from a driveway off Lincoln Street, and because they have remaining access they are not damaged. The City also had all their witnesses testify and carefully word that the 29.5 acre parcel still had access from the existing driveway off West Lincoln Street. RP page 549 line 14- page 551 line 2 . One of the fundamental issues is, can the City take away the existing improved public access (W Third Street) and force the Dunlap's to create or deed another access from a private driveway that provides the access to another adjacent parcel? The City is wrong on this account for the basic reason that Lincoln Street runs into the slough before it reaches the Dunlap 29.5 acre parcel and this driveway off Lincoln Street is the driveway for the Plaintiff's home which is on a separate parcel of land. CP 50-51,87-89. Judge Moynihan ruled on Summary Judgment that the Defendant could not take the Plaintiffs access away and force them through a separate parcel of land to get access. CP 204-205 "That would essential land lock that parcel because they could not sell the parcel separately now". The Appellants believe that finding of Judge Moynihan to be correct and that is what we want this Court to find. If the Dunlap's were to sell the separate parcel of land that contains their home and pole building (parcel 1) that existing driveway off W. Lincoln Street referred to by the City's witness as the access to the 29.5 acre parcel (parcel 2) would cease to exist. RP page 64 line 17 – page 68 line 16, page 98 line 5- page 99 line 4, and page 107 line 12- page 108 line 13. The other parcel (parcel 1) that the Dunlap's home is on is not even adjacent to the 29.5 acres (parcel 2) because they are separated by the W. Third Street 30 foot right of way. If indeed the Dunlap's are

forced to make a legal access through a separate parcel of land which would require deeding an easement through the Dunlap's home parcel that would mean the Dunlap's have suffered another damage to yet another parcel of land and would now have another new claim for inverse condemnation on their residential parcel (parcel 1). To the contrary a property owner has a vested right in access to a public right-of-way and may sue for damages for deprivation of that right. The owner must abut the right of way and/or if the access to property is interfered with and he suffers special or peculiar damage different in kind from that of the general public. *Kemp v Seattle*, 149 Wash. 197, 200-01,270 P.431 (1928) *Hoskins v. Kirkland*, 7 Wn. App. 957, 960-61, 503 P.2d 1117 (1972) See also *London v. City of Seattle* 93 Wn 2d. 657,660-61,611 P2d 781 (1980) *State v. Wineberg* 74 Wn.2d. 372,444 P2d 787 (1968) and *Capital Hill Methodist Church of Seattle v. Seattle* 52 Wn. 2d. 359, 324, P2d. 1113 (1958)

2. The City also claims that the Dunlap's still have access via the unimproved right-of-way of West Second Street, West Grant Street and the trial court agreed. There are two particularly instructive Washington cases which have recognized abutting landowner's access rights, and have held that compensation may be due if access is eliminated or damaged. First in *McMoran v. State*, 55 Wn.2d 37, 345 P2d. 598 (1959), the department of highways constructed a concrete curb 35 feet from the edge of its highway right-of-way. Within the 35 feet, the department constructed a frontage road which allowed access to the highway 30 feet beyond where the plaintiff's landed. The plaintiff sued, claiming that his access to the highway had

been unconstitutionally taken. The state moved for summary judgment, which was granted. On appeal, the Washington Supreme Court reversed, explaining:

In the instant case, **the appellant was deprived of his property right by the respondent's erection of the physical obstruction of a concrete curbing, without payment of just compensation therefore.** Respondent contends, however that the appellant has not been denied direct access to the highway, since he has direct access to the right of way. There is no merit in such contention. **The appellant was entitled to direct access to the thoroughfare where the traffic flows....**

Second in *Keiffer v. King County*, 89 Wn. 2d 369, 572 P.2d 408 (1977), the plaintiffs owned commercial real estate upon which several businesses were located. The businesses had access to the roadway at all points along their frontage. There was parking available for approximately 18 cars in front of the businesses. The county subsequently made improvements to the roadway which created two additional lanes and added a cement curb. In widening the road, the county limited access to the plaintiff's property to two curb cuts and narrowed the area in front of the businesses to that of a driveway or a parking area that could accommodate two to five cars. The trial court found that the county had virtually eliminated access to the businesses and had denied reasonable access to parking. It has been a long standing rule in Washington that property owners abutting a right of way have a property right to access. This right of ingress and egress attaches to the land. It is a property right, as complete as ownership of the land itself. In *State v. Calkins*, 50 Wn. (2d) 716, 314 P. (2d) 449 (1957), we said: "It is well established that the owner of land abutting upon a conventional highway has an easement of ingress and egress. This has been treated as a property right, attached to the land. See *Brown v. City of Seattle* 5 Wn. 35, 43,31

P. 313 (1892) In 1947 that right was codified with regards to “limited access highways,” by RCW 47.52.080

No existing public highway, road, or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner’s right of access thereto as herein provided. In cases involving existing highways, if the abutting property is used for business at the time the notice is given as provided in RCW 47.52.133, the owner of such property shall be entitled to compensation for the loss of adequate ingress to or egress from such property as business property in its existing condition at the time of the notice provided in RCW 47.52.133 as for the taking or damaging of property for public use.

Although Washington courts have not extensively discussed what constitutes “special injury”, at a minimum, “a landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury.” Hoskins, 7 Wn. App. At 960 (citing Yarrow First Assocs. V. Clyde Hill, 66 Wn 2d. 371, 403 P2d 49 (1965) see also Who, Other Than the Abutting Owner, May Maintain a Suit to Enjoin Closing or Obstructing Street or Highway, 68 A.L.R. 1285 (2007) (special injury may occur when property owners are obliged to undergo serious inconvenience in making a difficult or dangerous detour, and particularly if their property is thereby lessened in value) Similarly so in Union Elevator v. Dept of Trans 96 Wn. App. 288,293-94,980 P2d. 779 (1999) “If, however, the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged.” Hoskins, 7Wn. App. at 960-61. Thus, to maintain an action, the owner’s “ right of access must be destroyed or substantially impaired.” Id. at 961. It is fair to say that facts identical to the one presented in this case have never been addressed by a Washington court. Specifically, no case has been cited whereas the

property owner had an improved access vacated and the remaining access was an unimproved right-of-way. All the cases cited refer to access interference whereas the property owner suffers special or peculiar damage differing in kind from that of the general public. The Plaintiff's in this case have also suffered a special injury or peculiar damage. The Plaintiffs remaining access is an unimproved right-of-way. This isn't just a matter of inconvenience or a police action where the flow of traffic has simply been changed. The Plaintiff can't simply go a different route or make a driveway to another improved access that serves the property like in *Hoskins v. City of Kirkland*. In *McMoran v. State* the Plaintiff was provided with an improved right-of-way and it was still found to be a taking under the law because the court found they were entitled to a direct access to where the traffic flows. In this case the Dunlap's are now blocked from the flow of traffic and they have no improved alternate right-of-way. The Dunlap's now bear the burden and expense of building a new public access to current city street standards at a cost that exceeds the value of the property. The City's expert witness valued the property at \$571,000 and the Dunlap's expert witness valued the cost of building a new access at \$835,000. CP 28-29. The Dunlap's do not have the financial means to afford such an expense. The Dunlap's no longer have a free and unhampered access to their property and this expense constitutes the special injury because it's different in kind than that of the general public. CP18-20, 245-253, 323-342

3 The City made a motion to exclude the evidence relating to the damage of the log home for trial stating that it was not claimed nor prayed for in the complaint. CP 78, CP 73-74. The trial court excluded the evidence stating that the structure had not yet been

built and therefore was not attached to the land and therefore would be excluded. This is the wrong approach to the issue. There is nothing in the Washington Constitution that is exclusive to what type of property damage are compensable in a government taking.

Whether it is personal property or real estate property. The government can be held liable for a taking involving unintended consequences of their actions. *Wong Kee Jun v.*

Seattle 143 Wash 479 (1927) Unintended results were found compensable in the airport neighborhoods. 87 Wn. 2d 6. *Highline School District v. Port of Seattle* held that the

landowner may recover the total damage resulting from all the interferences. The trial court wanted to just consider damage to real estate property and because the structure was not yet build they viewed the structure as personal property and not real property because the structure was not yet attached to the land. The issue of whether a structure or

improvement is real property or personal property has been determined by the courts in several cases and by using those methods it can be determined that even in this case the

structure could be determined to be attached to the property. The courts apply the 3-prong test for determining whether an item is a fixture or personal property stated in *Lipsett*

Steel Prods., Inc. v. King Cy., 67 Wn.2d 650, 652, 409 P.2d 475 (1965):

Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold."

The intent to make a permanent accession is inferred from the annexor's relationship to the freehold, the nature of the item affixed, and other circumstances of the

annexation . *Western Ag Land Partners v. Department of Rev.*, 43 Wn. App. 167,

173, 716 P.2d 310 (1986). In the present case the load of logs for their log home was

delivered to the Dunlap's property with heavy equipment via West Third Street prior to the City vacating the public street. The minute the public street was vacated or the Dunlap's were excluded from any longer using the street and their remaining access being substantially impaired the log structure became annexed to the property. Without the ability to get heavy equipment on the property the structure became unmovable. The application to the use or purpose to which the part is appropriated has also certainly been met. The Dunlap's own the real estate to which they previously had access. They purchased a log home shell and had it delivered to the property via West Third Street. RP page 229 line 10. They secured a building permit to build the structure and made every reasonable attempt to regain access to the property after the street was vacated. The third test and the most important is the intention of the party making the annexation. Without a doubt the intention in this case shows the Dunlap's were planning on making the log home a permanent structure attached to the real estate for their new home. Using this criteria, the log home should be found to be attached to the real estate and included as evidence regarding damages to which the City is liable regarding the damage of property to the Dunlap's. Regardless of the finding of the log home as being personal or real property the City is still liable for the total damages their action causes even unintended consequences.

4 Article 1, section 16 of the Washington State Constitution provides in pertinent part:

No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner..., which compensation shall be ascertained by a jury... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to legislative assertion that the use public....

Impairment to access constituted a taking in *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977). Whereas the degree of substantial impairment is a finding of fact to be determined by a fact finding trier which is in accord with Washington State Law RCW 4.44.090. The Court noted that the existence of “substantial impairment” should be treated as an issue of fact, similar to issues addressed in inverse condemnation proceedings. The Washington Supreme Court set out a test for determining whether an impairment to access constituted a taking;

The issue of whether compensation must be paid in a particular case is best resolved through a two-step process. The first is to determine if the government action has actually interfered with the right of access as that property interest has been defined by our law....

where the court determines the right of access has been damaged, the degree of damage is the pivotal issue and second step in the determination of whether or not liability is present. The Court noted that the existence of substantial impairment should be treated as an issue of fact, similar to issues addressed in inverse condemnation proceedings.

RCW 4.44.090 reads, All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by the jury, and all evidence thereon addressed to them. Substantial impairment is a finding of fact that needs to be determined by a jury, because it goes directly to just compensation and it’s not a decision that should not be made by a law judge. In other words whether the Dunlap property has been

substantially impaired by the vacation of W. Third Street is a question for the jury. In the trial there was a difference in opinions with the two experts as to whether or not the property value had been diminished because of the street vacation. The City criticized the Dunlap's expert Mr. Berg by two ways. First, they criticized that the property is not subdivided, it's one parcel and therefore it is not possible to have two home sites destroyed on one parcel. Second, is that Mr. Berg did not do an evaluation of the complete parcel. Mr. Berg is correct in there is an automatic subdivision of a parcel that is governed by two jurisdictions. The Dunlap's could go to the County and seek a building permit for a single family residence on a 29.5 acre parcel whereas 15 acres lies within Whatcom County. The record indicates that is exactly what they did. The Dunlap's could also go to the City and seek a permit to build a single family residence on a 29.5 acre parcel, whereas 15 acres lies within the City without doing a subdivision or lot line adjustment and the City could grant a permit for such a request. Upon cross examination of the Cities expert Mr. Gustafason agreed with the statement made.. RP page 569 line 9- page 573 line 21. Mr. Berg did not evaluate the entire parcel whereas he was showing a before and after evaluation of the property regarding the street vacation. Mr. Berg felt that only the southern and western portions of the property were damaged by the vacation and he felt the evaluation of the center portion of the property remained the same. RP page 31 line 13- page 33 line 11, page 42 line 1-4. The Dunlap's also find fault with this methodology because the Dunlap's believe that they had one 29.5 acre parcel that use to have an improved public access from W. Third Street, and now they have a 29.5 acre parcel that has no improved public access and therefore the whole parcel has been damaged. The important detail with the Berg appraisal and the Berg testimony is that it showed how the street vacation of W Third Street damaged the Dunlap's 29.5 acre parcel and how much he felt it was damaged. The problem with Mr. Gustafason's testimony and his report is that he does not recognize the W. Third Street access. His testimony was that it could not serve as access for the property. RP page 508 line 9. His methodology is only regarding a residential subdivision of the property and a thirty foot street is not sufficient for a residential development. The property at the time of the vacation was a 29.5 acre agricultural parcel. The Dunlap's have never proposed a

residential development, their proposal was for one single family residence, whereas Whatcom County acknowledged W. Third Street as the properties access. RP page 237 line 24- page 240 line 3. Mr. Gustafason fails to recognize that W Street would be an adequate public access for one single family resident located on 29.5 acres.

5. A per se taking occurs whenever government causes its agents or the public to regularly use or permanently occupy property known to be in private ownership. SEE LORETTO v. TELEPROMPTER MANHATTAN CATV CORP, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) A permanent physical occupation "is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine", and as a per se taking will categorically **require the payment of compensation**. Loretto, 458 U.S. at 432. A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession. Hedlund v. White, 67 Wn. App 409, 836 P.2d 250 (1992). The concept includes a trespass by water. Phillips v. King County, 136 Wn. 2d 946 (1998) Also in Buxel v. King County, 60 Wn.2d 404, 409, 374 P.2d 250 (1962), we held that in certain situations a county can be liable for the damages caused by the trespass of surface water across a plaintiff's land, accomplishing thereby a taking of that property without compensation. Surface water is defined as vagrant or diffuse water. A municipality ordinarily is not liable for consequential damages occurring when it increases the flow of surface water onto an owner's property if the damages arise wholly from changes in the character of the surface produced by the opening of streets, building of houses, and the like, in the ordinary and regular course of the expansion of the municipality. On the other hand, it is liable if, in the course of an authorized construction, it collects surface water by an artificial channel

or in large quantities and pours it, in a body, upon the land of a private person, to his injury. Under this rule, while municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made. 18 E. McQuillin, Municipal Corporations § 53.144, at 538 (3d ed. rev. 1963). Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof. At the same time, it is the rule that the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another. In this case the Cities residential storm water collection system is designed and redirecting residential storm water unto the Dunlap's property without making provisions for proper outfall. RP page 606 -607. There is no information in the record that even establishes if the slough is a natural waterway or a man made channel. But the evidence in the record is clear that the City is directing storm water from man made piping into the slough and unto the Dunlap property. Mr. Harper testified the flow was east to west and then west to east, which would be the similar to the testimony as Mr. Dunlap where he testified the slough flows in both directions. RP page 601-608,620-621 The City has not provided for the outfall. RP page 606-607. The Dunlap's have been injured. The City was asked during discovery to produce all documents relating to the Plaintiff and their property. The City

provided no information regarding pipes discharging storm water upstream or downstream of the Dunlap property. They never provided any drainage problem report nor did they mention they were even directing residential storm water unto the Dunlap property. It may not have been done intentionally because the City objected to the questions at trial relating to the residential storm water and how it was relevant to a taking of the Plaintiff's property. RP page 604-605. Nevertheless, the details of the residential storm water issues do pertain to the inverse condemnation claim of the Dunlap's, because they have alleged their property has been taken for a public purpose without just compensation being paid. The residential storm water invasion is a taking in itself. The Cities failure to disclose these issues has prejudiced the Dunlap's taking claim. CR 26 regarding discovery states that the party may be subject to terms and conditions the trial court may deem necessary. The Dunlap's have not had time to consult with experts regarding the volume of water and the exact location of all the pipes for the residential storm water collection systems and the extent of the damages. There is enough information in the record to establish the City is liable for a taking of the Dunlap property by this invasion of residential storm water because it is a permanent invasion, it is being redirected into the slough on multiple sides of the Dunlap property and the only question remaining is to what extent are the damages. The residential storm water invasion is a permanent invasion, and a permanent invasion requires compensation no matter how minuscule and compensation is a matter that needs to be decided by a jury.

V. CONCLUSION

The Dunlap's have a farm operation that is a business. This business has been denied public access since April 2002 which causes some urgency for resolution. The Evidence

in this case shows the Dunlap's remaining access is substantially impaired and the Dunlap's have suffered a special injury or at the very least the special injury is a genuine matter of fact that needs to be determined by a jury. The jury should also be allowed to hear all the evidence relating to the Dunlap's damage including the damage to the log home and from the residential storm water invasion because it is directly related to the just compensation. The trial court never made a ruling regarding a regulatory taking of the property and the residential storm water invasion. The trial courts decision should be reversed by this Court and the City should be found liable for a taking of the Dunlap's 29.5 acre property and remanded for further proceedings.

Respectfully submitted on this 26st day of December, 2009

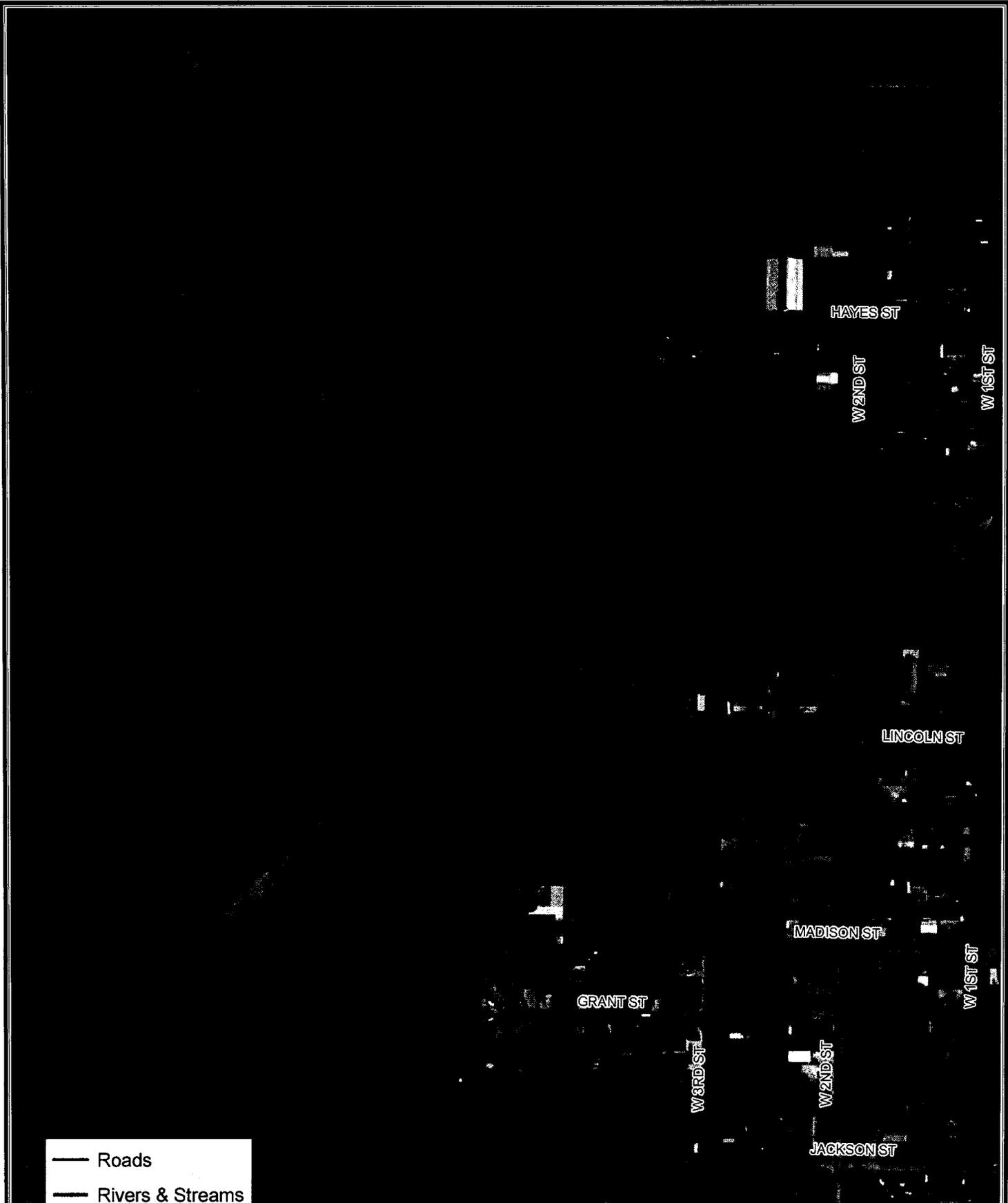
A handwritten signature in black ink, reading "Kipp M. Dunlap", written over a horizontal line.

Kipp M. Dunlap Appellant Pro Se

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APPENDIX A

TRIAL EXHIBIT 2



- Roads
- Rivers & Streams

Location Map



1:3,600



Oct, 2006
Cartographer: Andrew Phay

APPENDIX B

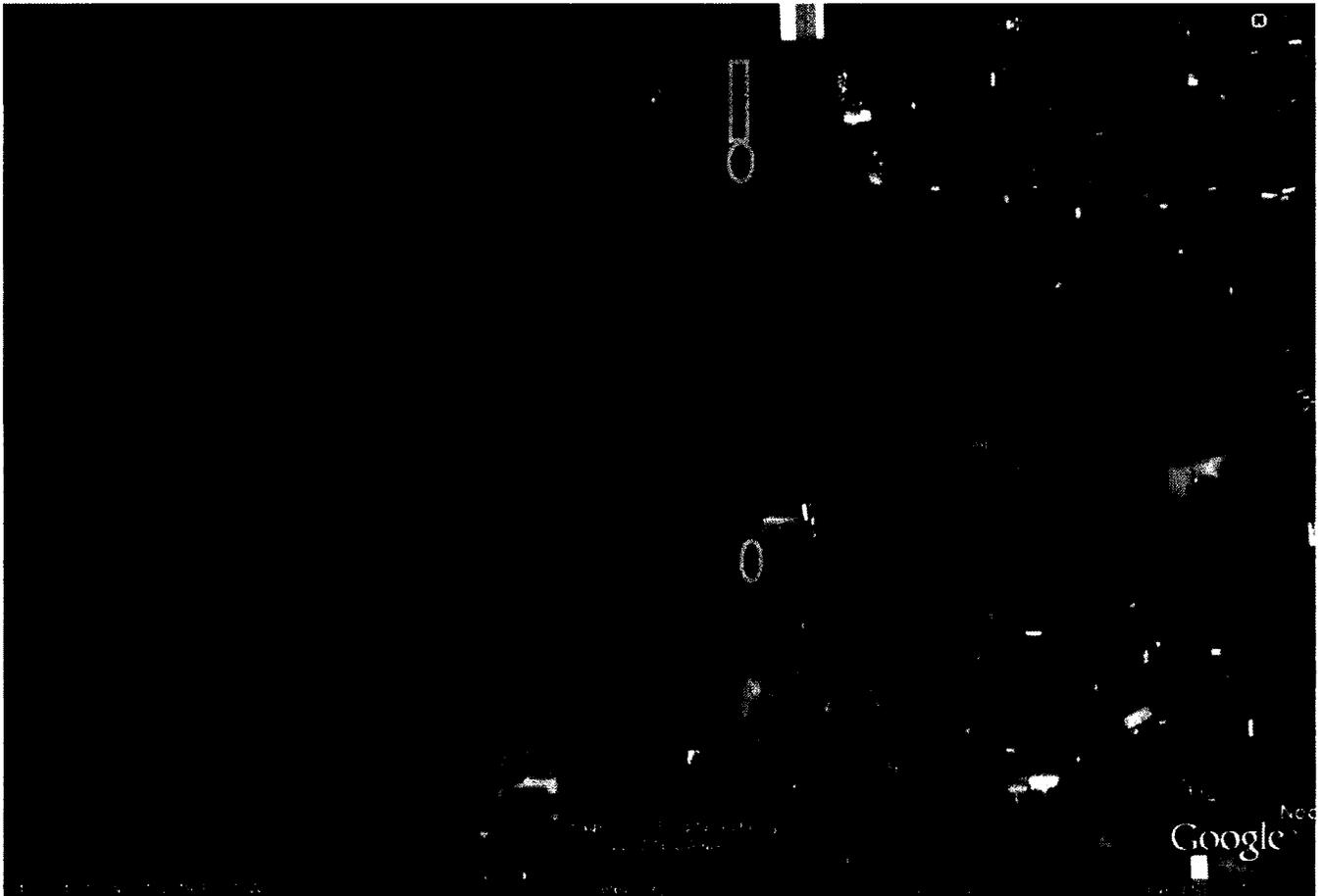
TRIAL EXHIBIT 3



Vacated 3rd Street at Parcel #2



Slough that needs to be crossed on Parcel #2



Plaintiff's Parcels Regarding Litigation

Red Parcel(Parcel #2) 400429071385 Yellow Parcel(Parcel #3) 400429154338

Pink Area represents the proposed slough crossings and the requested access from Hayes Street on the North east end of red parcel. Also note the vacated 3rd Street at the edge of the South east corner of the red parcel.

Plaintiff's Parcels not involved in Litigation

Green Parce l(Parcel #1) 400429146360 Purple Parcel (Parcel #4) 400429146386