

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

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

Appellants,

v.

CITY OF NOOKSACK,

Respondent.

2010 MAR 24 AM 10:55  
COURT OF APPEALS  
DIVISION I

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REPLY BRIEF AND CROSS-RESPONDENT BRIEF OF APPELLANTS

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## I. INTRODUCTION

Once again the Respondent is trying to direct attention to other issues. They go into great detail about the appellants marketing of the property and how no issues of access made it into the MLS (Multiple Listing Service). They infer there is some claim that the property is landlocked with no access available. However, the issue is not about whether the property has potential for access. Everyone is well aware that the property has access potential. The issue is about “a right of access”. Whether the Appellant had a right of access, was that right taken away and whether the Appellants have any remaining right of accesses? Contrary to the Respondents statements regarding the access issue, to the Appellant’s 29.5 acre parcel, we are not asking this Court to re-weigh the evidence but to review the established findings already determined and come to a different legal conclusion.

The Respondent has also completely ignored or just simply avoided the real issue with the residential storm water invasion or trespass. The issue was the residential storm water invasion was not disclosed to the Appellant upon discovery. The Appellant had no knowledge that the Respondent was directing residential storm water with manmade piping onto the Appellants property prior to trial.

The Respondents arguments regarding the cross appeal issues are completely without merit, have no basis in law or fact, are supported by no evidence, and have been repeatedly rejected by the trial court. As a result, we respectfully request that this Court

reject them as well and that the findings of the trial court be affirmed regarding the quarter acre parcel.

## II. STATEMENT OF FACTS REGARDING CROSS APPEAL

### A) **Factual Background**

The Appellant made an application for a shoreline development permit on March 18, 2002 for a farm improvement project they had been working in conjunction with the Natural Resource Conservation Service and the Farm Service Agency that was designed to enhance the natural environment on the farm. The plan was to construct fences and build a berm along the barn. On September 1, 2002 the Mayor and the Police came unto the Appellant's property alleging the Appellants were constructing a fence illegally within the wetland buffer. On September 9, 2002 the police came again this time alleging the Appellant was removing a fence within a wetland buffer and the Appellant received criminal citations for their fencing activity. The application was revised on September 11, 2002 to include all the fencing on the quarter acre parcel. On October 21, 2002 the respondent issued the report of decision regarding the shoreline development permit whereas components of the application were denied including the fencing.

On February 18, 2003 the Appellant's made another application for a shoreline development permit for their quarter acre parcel this time for the construction of a single family residence. On May 12, 2003 the Appellant made a written request to utilize the alley to access their quarter acre parcel. That request was denied. On May 23, 2003 the Appellants modified their written request and requested to utilize the alley for access

again. That request was denied a second time. On December 1, 2003 the Respondent issued the report of decision thereby denying the development request. The Respondent fined the Appellant a total of 13 citations for the fencing and even continued to fine them after the fence was removed when they had no trespassing signs posted on their property that they were required to remove because they were in the buffer area. RP 250-253

## **B) Procedural Background**

In this case, the Appellant's had brought forward an action for inverse condemnation regarding two separate parcels of land. Parcel number (2) was a 29.5 acre parcel where the Appellant's alleged a property damage regarding the Respondent and the vacation of West Third Street. The other parcel, parcel number (3) was an approximately quarter acre parcel whereas the Appellant's alleged a regulatory taking. The Respondent made a motion for summary judgment on June 29, 2007 seeking to have the case dismissed. An order was entered on September 7, 2007 whereas some of the issues were dismissed. The issues relating to inverse condemnation for the 29.5 acre parcel (parcel 2) and for the quarter acre parcel (parcel 3) remained to move forward for trial. The Appellant's made a motion for summary judgment on July 14, 2008 and noted a hearing date for August 15, 2008. The Respondent responded to the motion on August 1, 2008 whereas their response included their own motion for partial summary judgment relating to the quarter acre parcel. They never noted a separate hearing date for their motion. The hearing was held on August 15, 2008 whereas both motions were denied.

A bench trial was held on November 4, 2008 regarding the (2) separate claims of inverse condemnation. The trial court held that the vacation of West Third Street did not rise to the level of an unconstitutional taking of the appellant's 29.5 acre parcel but that there was a total regulatory taking of the appellant's quarter acre parcel. The issue of damages was then heard by a jury on March 24, 2009. The appellant's then filed a timely appeal to this Court and the respondent also filed a timely cross- appeal.

## II. STANDARD OF REVIEW

Summary judgment orders are reviewed de novo; the appellate court performs the same function as the trial court. Mike M. Johnson, Inc. v. County of Spokane, 150 Wn. 2d 375, 386 n4, 78 P.3d 161 (2003). Summary Judgment is appropriate only when there are no genuine issues of material fact. Wilson v. Steinbach, 98 Wn. 2d 434, 437, 656 P 2d 1030 (1982). A court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. Telford v. Thurston County Bd. Of Com'rs, 95 Wn. App. 149, 157, 974 P. 2d 886 (1999). It is important to note that summary judgment review in appellate court reviews the same circumstances as the trial court. This is not an opportunity for the Respondent to have another summary judgment where they can correct their own errors. Finding of facts are reviewed under the abuse of discretion standard.

## III. ARGUMENT

### A) **Access to the 29.5 acre parcel**

Finding of Fact (12)” Before the partial street vacation, the previous use of West Third Street was intermittent at best;” This finding is consistent with the testimony at RP 228-229. The Appellant used the access to access their agricultural property for agricultural purposes when necessary. The use could be described intermittently, occasionally, or once in a while. The frequency of the access is of no relevance, the importance of this finding is that the Appellant was exercising their right of ingress and egress to their property on this improved opened right of way the same as the other abutting property owners. Had the Appellant been able to complete the construction of their home the frequency of the access would have increased to daily use.

Finding of Fact (13) (14) “The vacated portion of West Third Street was not improved right of way beyond what is essentially a graveled driveway for neighboring houses; The vacated portion was not fully developed to the same level as the other streets in the City of Nooksack in so far as it is not paved as the others are;” This is consistent with the testimony at RP 54,104. What’s of significance of this finding is that it shows the right of way is open and improved to a gravel roadway which can clearly be seen in exhibit (A) from the Appellants brief and that all of the abutting property owners are exercising their right of ingress and egress from this right of way and utilizing this improved right of way. This can be referred to as substandard street, gravel street, or a gravel roadway but it should not be referred to as an unopened right of way or unimproved right of way. The Appellants remaining access potentials are unopened and unimproved right of ways where there are no improvements and nothing exists except sod and no one is accessing property from them or exercising any rights of access. You

can't even tell of their existence if not for the plat maps. The City in this instance was even regulating that right of access on West Third Street whereas they were charging the users of that access, overweight permit fees to use the street including the Appellant. See RP138. The Respondent claims that West Third Street was substandard, however a right of access is not a right to a particular surface or size of access. An abutting property owner has no right to a highway of a particular surface or pavement. City of Louisville v. Louisville Scrap Material Co. Inc. 932 S.W. 2d. 352 Ky. (1996)

Finding of Fact (11) "The City Council of the City of Nooksack vacated a portion of West Third Street on April 15, 2002;" This fact is consistent with the testimony RP 133-136. The importance of this fact is that it shows that the right of access was only removed for the Appellant and the other property abutters retained a private granting for a right of access, or right of ingress and egress through the vacation which the Appellants were excluded from. See Clay v. City of Los Angeles, 21 Cal. App 3d 577 (1971) "persons purchasing and constructing homes on lots abutting the street reasonably expect that the street will continue in a usable condition."

Finding of Fact (9) "As to the center portion of the plaintiffs' property between the two sloughs, there is access via the unimproved rights of way." The significance of this finding is that the remaining accesses are unopened and unimproved right-of- ways. It is important to note that access rights only apply to right of ways that have actually been opened for public use. In other words, the courts treat unopened public right-of- ways no differently than private property with regard to access rights. Property owners

abutting an unopened public right-of-way that has never been opened or made into an actual street, road, avenue, etc. do not have any legally-recognized right to access their property via that right-of-way. See Generally 10A McQuillin Municipal Corporations, 30.56.10 at 371 (3d ed. 1990) (indicating the general rule that proprietary rights of an abutter do not begin until street is opened for public use; See also Voss v. City of Middleton, 470 N. W. 2d 625 (Wis.1991) “a property owner has no right of access where a street does not exist but would abut his land if it did exist” That right of access is only recognized to a property owner who abuts an improved public street. The city has been given control to lay out, establish, open, close, or modify public streets through RCW 35.22.280. What makes anyone think for one minute that the City of Nooksack would even grant the request of the Appellant to use these unopened right of ways? The Appellant has already been denied their request to utilize an unopened right of way on three separate occasions see CP 106-109, RP 244,213-214, and RP Judges Oral ruling on page 10.

Finding of Fact (7) “The 29.5 acre parcel currently has access off Lincoln Street through the Plaintiffs’ residential driveway. From the driveway, all of the 29.5 acre parcel can be accessed;” This is consistent with the testimony at RP 364, 460-461, 550-551. The importance of this fact is that this access is going through a separate parcel of property. While it may be true that there is some sort of physical access through the Appellants home parcel (parcel 1) it is not a legal access. There is no right of access or ingress or egress in private property unless one has been granted, deeded, or dedicated “The easement of the adjacent landowner, however, in the absence of some specific

grant, is not a property right in any particular type or size of street. It is, in effect, a private right of ingress and egress”. City of Houston v. Fox, 444 S. W. 2d 591 (Tex. 1969). The evidence in this case is that there has been no easement or right granted through this private property parcel.

The Respondent has not cited any case law that would support their theory that the City of Nooksack can take away an abutting property owners access and leave them with an unimproved access, or essentially a bill, to build a new access. In fact every case the Respondent has ever cited supports that Appellants legal theory that if the City takes away an abutting property owners existing right of access, and there is not a remaining right of access, then compensation is required because the law is clear that owners of property abutting an opened public right of way- i.e., and actual usable street, road, avenue, ect. have a legal right to access their property via that street. Consequently, any decision by a local government to vacate or close that right-of-way may be characterized as a “taking” of that right and the property owner must be given just compensation under article 1, section 16 of the Washington State Constitution. It is undisputed that the Appellants had a right of access and that the appellant’s property abutted the street that was vacated. The dispute seems to be if a right of access remains to the Appellants. There has been no formal granting of a private easement or access from the Appellants adjacent property parcel that could be construed to be any kind of private right of ingress or egress. It has already been determined by facts in this case that the vacation of West Third Street eliminated a right of access for the Appellant. What we’re asking this Court to decide now is do the appellants have any remaining rights of access remaining to their

29.5 acre parcel? Appellants in this case had a history of using West Third Street before it was vacated by the Respondent and it was obviously opened for public use. The Respondent did not close the street per se; they just closed the use of the street for the Appellants therefore creating a limited access. All the other property owners that abutted West Third Street are still using the street for access because the shared easement agreements or private rights of access were a condition that the City made prior to vacating the street with the exception that the Appellants were excluded. All questions of law are reviewed de novo. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn. 2d 337,341, 883 P.2d 1383 (1994). Although the review of this is de novo, the trial courts findings that legal access remains though an unopened right of way and also through a private driveway through an adjacent separate parcel of private property is an outright abuse of discretion, and needs to be corrected by this Court as soon as possible. The right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation under Keiffer v. King County 89 Wn2d 369,572 P.2D 408 (1977); See also State v. Caulkins, 50 Wn.2d 716,314 P.2d 449 (1957); Walker v. State, 48 Wn.2d 587, 295 P2d 328 (1956); Brown v. Seattle, 5 Wn. 35, 31 P. 313 (1892)

**B) Motion in Limine to exclude evidence for the cost of logs for log home**

The trial court granted the Respondents motion in limine to exclude the cost of the logs to build the Appellant's log home. This is an abuse of the courts discretion. This motion should only be granted if the evidence is so prejudicial that the party should be

spared the necessity of calling attention to it by objecting when it's offered or if it is clearly inadmissible. The Respondent has not claimed the evidence is prejudicial because clearly it is not and neither is it inadmissible. The Respondent claims that personal property is not compensable in a takings case and the only case cited is Washington Legal Foundation v. Legal Foundation of Washington. This was a case that dealt with the accrual of interest on a fund. The court ruled that the interest was not a net loss but a net gain which is not applicable here. In the present case the logs were purchased not accrued. The Washington Constitution broadens the traditional eminent domain protections to include property that is damaged, as well as taken, by the state. By this provision the framers gave us a simple, clear framework to determine when the state must compensate a property owner. Was this private property? Was it taken or damaged by the state? If the answers are yes, then the property owner must be compensated. The damaged logs did not cause the taking, but just the opposite, the taking of the access caused the damage to the logs. The issue here is whether the City can destroy property belonging to an innocent party without incurring any liability for that destruction or, alternatively, be required to pay just compensation to the property owner who is disadvantaged for the public good. If the Respondents taking action cause damage to the Appellant's property are they not liable for the damage? An innocent property owner should not be forced to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. See Texas Supreme Court outcome in Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980). There the owners of a house sought compensation after their house was set ablaze by police officers in an effort to capture fugitives hiding in the house. The Texas court properly rejected the assertion that destroying the property

"for the safety of the public" was a proper exercise of the police power and mandated just compensation. In other words the Texas court held innocent parties are entitled by the Constitution to compensation for their property. There have been several police action cases where personal property damage was claimed such as in Eggleston v. Pierce County, 148 Wn 2d 760 64P.3d 618 (2003) See also Conger v. Pierce County, 116 Wash. 27, 33, 198 P. 377 (1921) (rejecting the argument Pierce County was not liable for damages to private property because "the private individual must suffer for the public good) In this present case however it should be noted that this log damage was not from a police action but eminent domain action and the constitutional protections would still apply. In this case the trial court excluded the evidence saying it was inadmissible based on the fact that the structure was not yet built. The issue of whether the property was personal property or real property has never been properly addressed.

**C) Jury trial for issue of impaired access**

The question of substantial impairment is a question of fact for the jury. The respondent claims that the appellant requested a bifurcated trial when that is simply not true. The trial judge made the unilateral decision to bifurcate the trial just prior to trial and the issue was never open to discussion. The respondent also suggests that the appellant never made a jury request to hear the liability issue and that simply is not true either. The plaintiff or appellant in this case made a jury demand when they filed their complaint. They have never waived that right. To deny the jury request until after the trier of fact has been done is a disservice to our justice and our justice system.

**D) Storm Water Invasion Violation of Discovery**

The Respondent either missed the whole issue of residential storm water being directed unto the appellant's property or chose to ignore it. The issue is the Respondent never disclosed the directing of the residential storm water during the discovery process. The appellant only discovered it during the trial. The Appellant served the Respondent with the complaint alleging a government taking of personal property for public use without paying compensation and made a request to turn over all the information regarding the Appellant and their properties. The Respondent never turned over anything regarding the storm water or mentioned that they were directing storm water unto the Appellant's property. The testimony from Mr. Harper indicates one source of storm water south of the Appellant's property and the direction of flow. We can see from the testimony and the photo exhibit A on the Appellants brief that regardless of the flow, the loop of the slough from that location will put water on the Appellant's property because there is nothing to stop it. RP 429-430,602-604. The only reasonable remedy for this discovery violation is to remand the case for allowance of proper discovery and retrial with a trier of fact finding and conclusion of law. Newly discovered evidence calls for and warrants a new trial if it could change the result of the trial. See Helen Praytor v. King County 69 Wn. 2d 637 (1966)

**E) The Trial Court was in Error When it Denied the Respondents  
Motion for Summary Judgment.**

1) The Respondent filed their motion on August 1, 2008 and the hearing was on August 15, 2008 and that motion was not proper before the court. CR 56 states that a motion for summary judgment shall be filed and served no later than 28 days before the hearing date. This is to give the respondent time to respond and reply to prevent trial by ambush. The Appellant's raised this issue to the trial court. CP 546,547. The Respondent in their Memorandum in support for Summary Judgment state, "As to Parcel 3, there is a genuine issue as to material fact as to whether the defendant's actions denied of all economic use of their property." The Respondent in their conclusion to the same memorandum then request that they be granted summary judgment regarding parcel 3. CP 613 line 8, CP620-621. Summary judgment is appropriate only when there are no genuine issues of material fact. Wilson v. Steinbach, 98 Wn. 2d 434, 437, 656 P 2d 1030 (1982) The Respondent cannot argue that there is genuine issues of material fact and that summary judgment is not appropriate and then with their next breath argue that they should be entitled to a summary judgment. Their own admittance defeats their possibility for their own request.

2) Regardless of the fact that the motions for summary judgment was not proper before the court. The Respondent is still not entitled to a summary judgment. The Respondent was seeking a dismissal stating that the Appellant failed to name the State as a party in the action and then go into great detail about the RCW and WAC requirements that require a party to name the State of Washington in an appeal regarding the denial of a development permit. What the respondent fails to recognize or mention is that the Appellants named the State of Washington in every single one of their appeals regarding

a denial of a development permit as required. This is no longer an appeal of a development permit this is a civil action relating to an inverse condemnation claim alleging the Respondent took or damaged private property for a public purpose without paying compensation. Not only has the Respondent failed to show a RCW or WAC requiring that the State be named in a civil action but they haven't showed anything that would requires the Appellant to name the State of Washington in this action. The Appellant agrees with the Respondent that there is an agency relationship between the local governments and the State, however the burden of establishing an agency relationship rest on the party asserting its existence. Hewson Constr., Inc v. Reintree Corp., 101 Wn 2d 819, 823, 685 P2d 1062 (1984) It should also be noteworthy that CR 21 states that misjoinder of parties are not grounds for dismissal. Parties may be added or subtracted from civil proceedings at any time or at such terms as are just. The Respondent has been obsessive in complaining that the Appellant has never named the State of Washington as a party in this action, but yet even to this date they have never made a request to anyone that the State be named as a party. If they felt the State of Washington had a share in this regulatory taking then they should have made a request to have them added as a party because the burden is on them.

3) Despite the fact that the Respondent has failed to request the State be named as a party to the action the respondent argues that they should be dismissed from the claim and that the State of Washington should be liable for the taking. After you read their brief regarding their analogy and application of Orion v. State of Washington and Samuels v. Dept of Ecology you can't help but wonder either the Respondent does not

understand regulatory taking cases and the difference between a facial challenge and an as applied challenge or their hoping this Court doesn't understand. The Respondent has cited Orion v. State of Washington, 109 Wn 2d. 621 (1987) in that case Skagit County was dismissed in that action because it was a "facial challenge" and Skagit County never made any decision regarding the alleged taking whereas they acted solely as an agent for the State by adopting the SMP. Orion never made any application for a land use permit to the County because they alleged in their "facial challenge" that the regulation itself prevented them from use of the property. In the present case the Respondent fails to recognize that the Appellant's claim for a regulatory taking was not a "facial" challenge, but an "as applied challenge". In other words, the Appellant's are not alleging that the regulation itself constituted the taking but the way the City of Nooksack applied the regulation in this site specific property constituted the taking. In the present case the Respondent made numerous decisions always denying the Appellants' request. CP 106-110. The Respondent admits in their own brief they denied the Appellant's development permits. A shoreline master program (SMP) is developed, amended, administered, and enforced by the local government. See RCW 90.58.050, 070,080. Accordingly, an SMP is a local regulation that the Respondent actively participates in with the State and therefore the Responded has no grounds to claim that the State of Washington is responsible and they are insulated from the taking claim.

**F) Findings of Fact entered by the trial court do not justify the legal conclusion that the actions of the City of Nooksack resulted in a taking of the plaintiff's quarter acre parcel**

**1) The trial court did not enter findings or conclusions of Law on what were the plaintiff's reasonable investment expectations regarding the quarter acre parcel.**

The Respondent cites Penn Central Transt. Co v. New York in their belief that the trial court failed to enter a finding on the investment backed expectation. This Court has previously analyzed taking claims using Presbytery of Seattle v. King County, 114 Wn. 2d 320, 787 P.2d 907 (1990) for a threshold inquiry. 1) Determining whether the regulation protects public interest. 2) Determining whether the regulation destroys a property attribute. If they determine a property attribute is destroyed then the courts apply the taking analysis in Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) and Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992). In this analysis the court looks at the following. 1) Does the regulation advance a state interest? 2) Then they determine if the challenge is facial challenge or as applied challenge. In an applied challenge the court then considers: 1) the impact of the regulation on the property. 2) The extent of the regulations interference with investment-backed expectations; and 3) the character of the government action. In previous holdings the courts have held that the state was insulated from a taking claim that destroyed all economic use of property if it was done under a police action for public safety not public purpose. In other words if the property was deemed unbuildable because it was in a floodway the state was insulated from the taking claim under this police action of declaring the property a floodway to protect public safety. However Lucas v. South Carolina Coastal Coun., U.S. 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) removed the state's insulation. So now more recently in Powers v. Skagit Count, 67 Win. App. 180, 835 P.2d 230, (1992) applying Lucas, the court held the

state is no longer insulated from the taking unless the limited use was to inhere in the title itself. Powers also held there was now a pre-threshold that if the property owner demonstrates the regulation strips his property of all economic viable use then the government must demonstrate with evidence that some economic use for the property or that the use is proscribed by existing rules or nuisances. If the court finds that the government has not done that the property owner is entitled to just compensation. If the government prevails on either of those then the taking would proceed to be analyzed under Presbytery framework.

Additionally if you look at the record and the trial courts findings considering the impact of the regulation on the property, the interference with the investment backed expectations, and the character of the government's actions it would still be a regulatory taking under the Presbytery framework. See RP 585, and Courts Oral Decision pages 10, 19-27.

In the present case the trial court found that the Appellant's made the showing that the regulation destroyed all economic viable use and the Respondent did not make any showing that any economic viable use remained. See RP Courts Oral Ruling page 25-27. This finding is consistent with the evidence and testimony the respondent made no showing, in fact there only defense against this claim is "the State of Washington did it". The finding of facts are pretty inclusive in showing that property attributes were destroyed and that the economic viable use was eliminated so there clearly isn't any abuse of discretion. The respondents only issue here is investment backed expectation

claiming that the property was unbuildable when the appellants purchased it so they plaintiff's should have a limited investment backed expectation. The record does not support that conclusion though. If you look at Mr. Harper's testimony that variance and exemptions were available in the 1974 regulations so that one could get a variance or exemption for the construction of a single family home. See RP 585-586.

**2) Finding of Fact (50) is a conclusion of law and as such, it is not justified by the other findings of fact on the evidence at trial.**

First off finding of facts are reviewed under the abuse of discretion standard. Finding of Fact (50) states "The plaintiffs' fundamental attributes of property ownership have significantly impacted and there is a total and devastating economic impact to the quarter acre parcel. This is clearly listed as a finding of fact under the Finding of Facts and Conclusion of Law Decision. It should also be noted that contrary to the Respondent's statement the trial court did not find that the Appellant's could build a small house. The trial court heard the evidence of what the Appellant's tried to do with their property and what they were allowed to do with their property. They weighed the evidence and the trial courts finding of fact was that the Appellants couldn't do anything with their property and their economic viable use was destroyed with also their right to exclude others. The trial court also noted that any further attempts would be futile. It is consistent with the evidence and testimony. See RP246-257. It is consistent with the trial courts findings. See RP Courts Oral Decision 19-25.

The Respondent claims that the Appellant would be able to build a single family residence on the property because they received a comment letter during the application process from the Department of Ecology recommending approval under certain conditions. The problem is the comment letter from the Department was recommending approval but yet the Respondent denied the permit application anyway disregarding the Departments suggested approval. The record indicates that the Respondent had a full understanding of their agency relationship with the Department. See RP 434-438. The Respondent could have granted the permit and put any condition they wanted as a condition of the permit or allowed the Department to add whatever conditions they felt necessary when the permit went to the Department for review. The Respondent wants to justify their decision by stating that the Appellant did not modify their application between the time the Respondent got the comment letter from the Department and the time the Respondent made their decision to deny the development permit. That would have been hard to do, given the fact that the comment letter was not sent to the Appellant nor did they even get the letter until after the development permit was denied and the Appellant was in the appeal procedure. See RP 386-388,442. The Respondent also admits in their brief, on page 27, that the Department was recommending approval and the Department will not overturn a local decision denying a development permit. One must wonder then how is it the Respondent expected that the Appellant could get approval from the Department then after they made the decision to deny the development permit.

#### IV. CONCLUSION

For the foregoing reasons, this court should reverse the judgment of the trial court and should find the City liable for a taking of the Appellant's 29.5 acre property and remanded for further proceedings, and allow a proper full discovery to be done. It is also clear that the trial court did the correct thing by dismissing the Respondent's Motion for Summary Judgment. As a result, the Appellant respectfully request that this Court affirm the trial court's decision to deny the Respondent's motion for summary judgment and affirm the trial courts holding that there was a regulatory taking of the Appellant's quarter acre parcel

Respectfully submitted on this 23<sup>rd</sup> day of March, 2010

A handwritten signature in black ink that reads "Kipp M. Dunlap". The signature is written in a cursive style and is positioned above a horizontal line.

Kipp M. Dunlap Appellant Pro Se

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