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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

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No. 63747-9-1

COURT OF APPEALS, DIVISION I OF
THE STATE OF WASHINGTON

KIPP M. AND MARILYN V. DUNLAP,)
Husband and wife)
)
)
Appellants,)
)
v.)
)
CITY OF NOOKSACK,)
)
Respondent)

No. 06-2-00393-1

REPLY BRIEF OF RESPONDENT
ON CROSS APPEAL

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ORIGINAL

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I. INTRODUCTION

The respondent, the City of Nooksack, in its response will clarify overlooked citations in the City's opening brief and address arguments made by the appellants/plaintiffs regarding the Trial Court's denial of the City of Nooksack's motion for partial summary judgment.

II. ARGUMENTS

A) Omitted Citations

- 1. As to the Plaintiffs' 29 acre parcel, the Findings of Facts made by the Trial Court are supported by the evidence admitted at trial.**

In the Brief of Respondent's and Opening Brief on Cross Appeal at pg. 15, second paragraph, second sentence, is the statement "It is very well settled law that the function of the appellate court is to review the action of the Trial Court". Following this sentence should be the citation to the Court of Appeals of Washington Division III

decision in the case of Quinn v. Cherry Lane Auto Plaza Inc., 153 Wn. App. 710, 717, 255 P. 3d. 266 (2009). The subsequent citations using the word “Id.” in the following paragraph are in reference to the Quinn decision.

2. The Findings of Facts 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 Plaintiffs’ quarter acre Parcel.

In Respondent’s Brief and Opening Brief on Cross Appeal at page 28, first paragraph, second sentence is the statement “in *Orion*, the Washington State Supreme Court held that when the takings challenge concerns the application of the regulatory regime to a specific piece of property, the Court looks to the challenged regulation’s economic impact and the extent of its inference with reasonable, investment backed expectations”. The Washington State Supreme Court decision referred to in that statement is Orion v. State of Washington, 109 Wn. 2d. 621, 747 P. 2d. 1062 (1987). The subsequent citations using the word “Id.” in the remainder of the paragraph are in reference to the Orion decision.

B) The Trial Court was in error when it denied the defendant’s motion for partial summary judgment.

In the instant case, the City of Nooksack acted at the instance of, and in some material degree, under the direction and control of the state of Washington when it adopted a Shoreline Master Program pursuant of RCW 90.58.090. Whether the alleged taking was due to a facial challenge or as an applied challenge to the regulation is irrelevant. In either instance, the City of Nooksack was required to adopt and implement regulation due to the passage of the Shoreline Management Act of 1971. Further, it is the State of Washington by way of the Shoreline Hearings Board who is the final arbiter as to whether the plaintiff's application for a development permit should have been approved. WAC 461-08-500. In the instant case, the finding made by the Trial Court that a taking of the quarter-acre parcel had occurred was in part due to a decision made by the Shoreline Hearings Board to the extent that the findings made by the Board following the plaintiffs' appeal was that the plaintiffs could not keep the fence on their quarter-acre parcel. Had the plaintiffs properly prosecuted their appeal to the Shoreline Hearings Board regarding their desire to build a residence on the quarter-acre, it ultimately would have been the Shoreline Hearings Board who would have determined whether their permit should have been granted. In either instance, it is the implementation of land use regulation by an agency of the State of Washington that the plaintiffs find objectionable.

The plaintiffs argue that if the State of Washington should have been named as a party, then it is the City of Nooksack who should have joined the State of Washington pursuant to CR20. While this was an option for the City of Nooksack, the City as defendant has

no obligation to include the proper party on behalf of the plaintiffs. Assuming the plaintiffs can establish that a taking of their quarter-acre parcel has occurred due to the adoption and implementation of shoreline regulations, the City is not liable because, as aforesaid, the City was acting on behalf of the State of Washington. The Dunalps, as plaintiffs, to perfect their lawsuit, need to name the correct parties. Because the plaintiffs failed to do this when they did not join the State of Washington, the Trial Court was in error when it denied the defendant's motion for partial summary judgment.

III. CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Brief of Respondent and Opening Brief on Cross Appeal, it is respectfully requested that the Appellate Court uphold the Trial Court in regards to its determination that the plaintiffs did not establish the partial street vacation of West Third Street resulted in the taking of their 29 acre parcel. It is further respectfully requested that the Appellate Court overturn the Trial Court's decision that the regulatory enforcement by the City of Nooksack resulted in a taking of the plaintiffs' quarter-acre parcel. This is because the Trial Court was in error when it denied the defendant's motion for partial summary judgment and the evidence and findings by the Trial Court do not support the legal conclusion that the plaintiffs suffered a taking of their quarter acre parcel.

DATED this 27th day of April, 2010

Respectfully submitted,



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