NO. 1030142

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent,

and

DEUTSCHE BANK AG, JONES, SHAWN C.,

Defendants,

v.

MICHELLE MERCERI,

Petitioner.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In Washington, the prevailing party in a civil action is not ordinarily entitled to collect attorney fees from the losing party, unless otherwise permitted by statute or agreement. More specifically, in an inverse condemnation case, an award of attorney fees is contingent upon the property owner meeting the conditions set forth in RCW 8.25.070 and .075. Prejudgment interest is awarded as simple interest at 12 percent annual rate pursuant to RCW 8.28.040 and 19.52.020.

The trial court denied Michelle Merceri's request for interest at 12 percent per annum compounding daily and ordered simple interest. It also denied her motion for attorney fees for her failure to meet the contingencies of RCW 8.25.075. The Court of Appeals correctly affirmed the trial court's rulings.

Merceri fails to state a basis for review as required under RAP 13.4(b). The decision below is not in conflict with a decision of this Court or a published decision of the Court of

Appeals, and it does not present an issue of substantial public interest. Review by this Court is unwarranted.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Merceri is entitled to interest compounded daily on the amount of just compensation she accepted in settlement.

2. Whether Merceri is entitled to an award of her costs and fees under RCW 8.25.075, despite her failure to meet the statutory requirements for such an award.

III. COUNTER STATEMENT OF THE CASE

The State acquired two contiguous residential lots located adjacent to Merceri's home in Hunts Point, Washington. CP 1, 5. In May 2011, the State began construction of a naturalized stormwater detention pond on the lots as part of a State Route 520 improvement project. CP 29. The construction of the pond violated the neighborhood's protective covenant limiting construction to single family residences. CP 5, 19-21.

A decade later, on the day before the prescriptive period of limitation expired, Merceri served her complaint against the State for the inverse condemnation of the covenant, pleading a permanent and temporary taking, and demanding just compensation, interest, and attorney fees pursuant to RCW 8.25.075. CP 1-31.

Merceri filed a motion for partial summary judgment against the State, alleging that the State's liability for the taking of the covenant had been established in 2011 inverse condemnation lawsuits, filed by Merceri's neighbors. CP 53-157. The trial court entered an order holding that the State inversely condemned the protective covenant. CP 478-81.

In discovery, Merceri provided no competent evidence of any diminution in the value of her property due to the taking of the covenant or alleged temporary damages. She did not retain a valuation expert and instead relied on her own valuation opinions and information available on the King County Tax Assessor's website. CP 483-85, 507-08, 539-40, 559-60, 562-63.

The State moved for summary judgment, alleging lack of credible evidence regarding the diminution in value of Merceri's property. CP 482-732, 735-55. After hearing oral argument, the trial court dismissed Merceri's claim for temporary damages, leaving damages for the permanent taking of the covenant as Merceri's sole remaining claim. CP 753-55.

After jury selection, but prior to commencement of trial and the jury being sworn in, Merceri voluntarily accepted the State's RCW 8.25.010 30-Day Offer of just compensation in the amount of $205,000, exclusive of interest, fees, or costs (30-Day Offer). CP 973-74. The trial court required the parties to file a notice of settlement to put the settled amount of the just compensation on the record so the jury could be excused. CP 803-06. The notice of settlement specifically states, and the parties agreed, that the 30-Day Offer was accepted, "*before the trial officially began*." CP 852-856.

A. Dispute Regarding the Accrual of Interest

The State filed a Judgment and Decree of Appropriation (Judgment) in compliance with RCW Title 8. CP 807-15. The form of Judgment included accrued statutory simple interest at 12 percent per annum pursuant to RCW 8.28.040 and 19.52.020. CP 810-15.

Merceri filed her own proposed forms of judgment that included interest from the date of the taking at 12 percent per annum, *compounded daily*. CP 858-61, 888-93.

1. Merceri and the State each filed objections to the other's form of judgment, the State objecting to the interest being compounded daily and Merceri objecting to simple interest

After hearing oral argument on the competing forms of judgment and the objections thereto, the trial court denied Merceri's form of judgment and her objections, and it ordered the State to submit its form of Judgment in conformity with the court's order. CP 894. On November 4, 2022, the State's form of judgment was entered with statutory simple interest calculated at

12 percent per annum from the date of taking to the date the judgment is paid. CP 895-901.

B. Motion for Attorney Fees

Merceri filed a motion for an award of her attorney fees and costs in an amount exceeding $1 million dollars, utilizing the lodestar method, with a 1.5 x multiplier to compensate her attorneys for the risk they allegedly assumed by agreeing to represent Merceri in what her counsel described as a "high risk" case, on a contingency fee basis. CP 911-26.

The State filed a response arguing that, as a matter of law, Merceri was not entitled to an award of costs and fees as she failed to meet the conditions of RCW 8.25.070 and .075. CP 955-87. The trial court agreed with the State, holding that, pursuant to the notice of settlement, the parties agreed that the trial had not begun before the jury was released. Thus, the judgment (the amount of just compensation) was not awarded as a result of trial. The trial court further read the 30-Day Offer as offering just compensation in the amount of $205,000, plus

interest, with no offer to pay any of Merceri's costs and fees. Therefore, RCW 8.25.075 did not authorize the trial court to award Merceri cost and fees. CP 1050-53.

Merceri appealed the judgment and the orders denying compound daily interest and an award of attorney fees directly to this Court, which transferred this appeal to Division I of the Court of Appeals.

The Court of Appeals, in an unpublished decision, affirmed the trial court's ruling, which denied compound interest and attorney fees under RCW 8.25.075.

IV. ARGUMENT

A. Summary of the Argument

Merceri fails to show how the Court of Appeals opinion conflicts with any published decision of the Court of Appeals or this Court. Her argument that the decision below somehow contravenes this Court's ruling in *Sintra Inc. v. City of Seattle*, 131 Wn.1d 640, 935 P.2d 555 (1997), *abrogated by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019), is misplaced. In

Sintra, this Court overturned an award of compound interest in an inverse condemnation case because the plaintiff failed to produce sufficient evidence that simple interest did not afford just compensation. No subsequent appellate court decision since *Sintra* has addressed circumstances in which compound interest may be awarded. Although *Sintra* may have left a question unresolved as to what type of evidence is sufficient to achieve an award of compound interest, an unanswered question does not create a conflict between decisions of this Court or the Court of Appeals.

Merceri suggests review is appropriate under RAP 13.4(b)(4) "[b]ecause inverse condemnation actions occur throughout the State and involve all levels of government," such that the issues here have statewide implications. Pet. at 9. While the State acknowledges that claims for inverse condemnation are compensable under the Washington Constitution's eminent domain clause, this appeal does not concern the propriety of the taking itself or even the amount of just compensation.

Wash. Const. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made[.]"). This appeal presents only a question of the availability and calculation of prejudgment interest and attorney fees—matters typically left to the trial court's discretion. Merceri fails to link the issues raised here with a substantial public interest.

This Court will accept a petition for review only if one or more of the conditions described in RAP 13.4(b) is satisfied. Here, Merceri relies on RAP 13.4(b)(1) (authorizing review when the decision below is in "conflict with a decision of the Supreme Court"); RAP 13.4(b)(2) (decision below in "conflict with a published decision of the Court of Appeals"); and RAP 13.4(b)(4) ("petition involves an issue of substantial public interest that should be determined by the Supreme Court"). Because the Court of Appeals correctly applied long-standing law around interest and attorney fees in inverse condemnation actions, none of the RAP 13.4(b) criteria is satisfied.

Because Merceri has made no compelling case for this Court's review, her petition should be dismissed.

B. The Opinion Below Does Not Conflict with Decisions by This Court or the Court of Appeals

1. Denial of compound interest is not in conflict with other appellate decisions, and it is in accord with *Sintra*

In eminent domain actions, just compensation fixed to be paid "shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020[.]" RCW 8.28.040. RCW 19.52.020(1) states in part:

> Except as provided in subsection (4) of this section, any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield [of the average Treasury bill rate].

Washington courts have modified RCW 8.28.040 in the context of inverse condemnation proceedings so that interest commences at the date of possession or taking. This interest compensates the property owner for "the loss of the use of the monetary value of the taking or damage from the time of the taking

until just compensation is paid." *Sintra*, 131 Wn.2d at 656 (citing *Smithrock Quarry, Inc. v. State*, 60 Wn.2d 387, 391, 374 P.2d 168 (1962)). Because RCW 19.52.020 "does not specifically provide for the compounding of interest, only simple interest is allowed." *Sintra*, 131 Wn.2d at 660 (citing *Caruso v. Loc. Union No. 690, Int'l Bhd. of Teamsters*, 50 Wn. App. 688, 690-91, 749 P.2d 1304 (1988); *Goodwin v. Nw. Mut. Life Ins. Co.*, 196 Wash. 391, 83 P.2d 231 (1938)). "Interest means simple interest absent agreement or statute to the contrary." *State v. Trask*, 98 Wn. App. 690, 696–97, 990 P.2d 976 (2000).

In determining an award of interest in eminent domain proceedings, the court is guided by RCW 8.28.040, and it specifically incorporates RCW 19.52.020, which provides the interest rate of 12 percent per annum. However, "[i]f a party proves by presenting evidence that statutory simple interest does not afford just compensation, the trial court has discretion to award compound interest." *Sintra*, 131 Wn. 2d at 660. "Absent such proof, however, a property owner . . . is entitled only to

simple interest under RCW 8.28.040[.]" *Sintra*, 131 Wn. 2d at 660–61.

It is well settled that "compound interest is never implied—it is permitted only by *express language in a statute or an agreement*. 'To create an obligation to pay compound interest there must be an agreement to pay interest upon interest[.]'" *Caruso v. Loc. Union No. 690, Int'l Bhd. of Teamsters*, 50 Wn. App. 688, 689, 749 P.2d 1304 (1988) (emphasis added) (citing *Goodwin v. Nw. Mut. Life Ins. Co.*, 196 Wash. 391, 404, 83 P.2d 231 (1938)). If the statutes do not expressly permit compounding interest,

> [T]he court cannot imply it, only simple interest is allowed. . . . [A]rgument that compound interest is a "modern banking practice" is not persuasive. . . . [Where] compound interest is used in many consumer transactions, presumably that use has been expressly provided for in the underlying bankcard agreement or other contract between the parties.

Caruso, 50 Wn. App. at 690–91.

Merceri urges this Court to ignore the above authorities, pointing instead to irrelevant federal case law in which compound interest was awarded. However, Merceri cites no

Washington cases in which this Court, or the Court of Appeals, has permitted compound interest from an award of just compensation. Not only are the federal cases cited in Merceri's brief not binding authority, but Merceri also does not allege that the compound interest awarded in those cases was anywhere near the 12 percent authorized by RCW 8.28.040 and 19.52.020. When the Legislature authorized 12 percent interest, they are presumed to have meant 12 percent *simple* interest, unless provided otherwise in "a statute or an agreement." *Caruso*, 50 Wn. App. at 689. Merceri does not, and cannot, show that any statute or agreement entitles her to compound interest.

Merceri's contention is that *Sintra* provides a road map as to how a property owner can be awarded compound interest. Merceri claims she followed that road map, by presenting declarations that she and others' deposit into bank saving accounts, which earn daily compound interest and that compound interest is fundamental in modern finance. Pet. at 17-18. However, the court in *Caruso* found that generalized

references to "modern banking practice" were not sufficient to justify compound interest. *Caruso*, 50 Wn. App at 691. Indeed, if the mere availability of a savings account with compound interest were sufficient to require compound interest as Merceri argues, then compound interest would be available in *every* action of any kind. This would completely turn the *Caruso* rule on its head. The trial court's award of statutory simple interest was consistent with RCW 8.28.040 and 19.52.020 and with all controlling authority.

Sintra requires the property owner to prove, by presenting evidence, that statutory simple interest does not afford just compensation. If the property owner does so, the trial court has discretion to award compound interest. However, absent such proof, the property owner is "entitled only to [statutory] simple interest under RCW 8.28.040[.]" *Sintra*, 131 Wn.2d at 660–61. The trial court determined Merceri had not provided such proof, and therefore, it did not award Merceri compound interest. The Court of Appeals correctly held that "Merceri does not show based on this evidence that it was an abuse of discretion by the

superior court to award statutory 12 percent simple interest[.]" Appendix 1 at 11; *Merceri v. State*, No. 85690-1-I, 2024 WL 1367160, at *4 (Wash. Ct. App. Apr. 1, 2024) (unpublished opinion).

Merceri concedes that "[n]o Washington appellate court decision since *Sintra* has addressed the circumstances in which compound interest may be employed to ensure just compensation[.]" Opening Br. at 17; *see also* Pet. at 15. Merceri has not identified any conflict between the opinion in this case and any published decisions of the Court of Appeals or decision of this Court. For these reasons, review under RAP 13.4(b)(1) and (2) should be denied.

2. Denial of Merceri's motion for award of attorney fees is not in conflict with other appellate decisions

RCW 8.25.075(3) provides that an inverse condemnation claimant is entitled to attorney fees "only if the judgment awarded to the plaintiff *as a result of trial* exceeds by ten percent or more the highest written offer of settlement submitted by the

acquiring agency to the plaintiff at least thirty days prior to trial." (emphasis added). Despite no trial having taken place below, Merceri asserts that she is entitled to attorney fees. This argument is without merit, and the Court of Appeals properly rejected it.

Merceri relies on *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980), and *City of Snohomish v. Joslin*, 9 Wn. App. 495, 513 P.2d 293 (1973), in support of her theory that a trial to verdict is not needed under RCW 8.25.075. However, neither case is helpful. Pet. at 25-27.

In *Petersen*, a 30-Day Offer was made in March, and trial was set for August but not held. A judgment on agreed facts was entered in October and was within 10 percent of the 30-Day Offer. The trial court denied fees, finding that the 30-Day Offer was timely and judgment did not exceed the offer by 10 percent or more. *Petersen*, 94 Wn.2d at 481-82. The appellate court disagreed, reasoning that the first part of a bifurcated trial was held prior to the 30-Day Offer. Both parties referred to the proceeding as a "trial"; witnesses were called and subjected to

cross examination; closing arguments were made; and the court rendered oral opinions. The Court of Appeals determined that because the bifurcated trial began before the 30-Day Offer was made, the offer was untimely and Petersen was thus entitled to fees under RCW 8.25.075(3). *Petersen*, 94 Wn.2d at 481-82.

Here, in contrast, the parties agreed that the 30-Day Offer was accepted *before* the trial was to begin. No witnesses were called, no opening or closing arguments were made, and no opinion was rendered on the merits of Merceri's inverse condemnation claim. No proceedings happened that were analogous to the trial in *Petersen*, and *Petersen* is inapposite.

Reliance on *Joslin* is also misplaced because that decision predates the Legislature's amendment of RCW 8.25.075(2) to make fees optional, rather than mandatory. In *Joslin*, the plaintiff won a jury award on the inverse condemnation claim. The trial court denied fees, appearing to reason that RCW 8.25.075 applied to condemnation actions only. *Joslin*, 9 Wn. App. at 498. The appellate court reversed, finding that Joslin was entitled to

fees on the inverse condemnation claim under former RCW 8.25.075(2) (1971), which at the time provided:

> A superior court rendering a judgment for the Plaintiff awarding compensation for the taking of real property for public use without just compensation having first been made to the owner, or the attorney general or other attorney representing the acquiring agency in effecting a settlement of any such proceeding *shall* award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees.

(emphasis added). This former version of RCW 8.25.075 (like the former version of RCW 8.25.070 that this Court interpreted in *State v. Roth*, 78 Wn.2d 711, 479 P.2d 55 (1971), also cited by Merceri), reflects an outdated theory that the Legislature specifically rejected when it amended both statutes in 1977 to add the current contingent requirements for fee awards. Neither *Petersen*, *Joslin*, nor the pre-1977 version of RCW 8.25.075 are applicable to the current version of the statute. Thus, these cases are not in conflict with the Court of Appeals' decision below and do not provide a basis for review under RAP 13.4(b)(1) or (2).

Merceri's contentions further belie the applicable eminent domain statutes and the facts of this case. RCW 8.04.110 states in part:

> [A]nd in the case of *each such trial by jury the jurors by their verdict shall fix as a lump sum the total amount of damages* which shall result to all persons or parties . . . by reason of the appropriation and use of the lands, real estate, premises or other property sought to be appropriated or acquired.

(emphasis added). Here, prior to commencement of trial and the jury being sworn in, Merceri voluntarily accepted the State's RCW 8.25.010 30-Day Offer of just compensation, thereby settling the amount of just compensation. CP 973-74. The jury was no longer needed, as the sole issue for trial—the determination of just compensation—had been settled. The jury was excused. All that remained was entry of the Judgment with the statutory interest provided for by law.

An inverse condemnation claimant is not entitled to attorney fees as a matter of right, but only if they obtain an award of just compensation "as a result of trial." RCW 8.25.075(3).

Merceri did not receive any judgment as a result of trial, because no trial took place. Because the amount of just compensation was not determined by trial, it is irrelevant for the purposes of an award of attorney fees whether the amount of just compensation exceeded the 30-Day Offer by 10 percent or more. Because Merceri settled by accepting the 30-Day Offer, it is RCW 8.25.075(2), not RCW 8.25.075(3), that controls. RCW 8.25.075(2) provides that an agency *may* include attorney fees in the settlement amount. The State did not do so here, and the trial court correctly denied Merceri's motion for attorney fees.

Lastly, Merceri references *Kay v. King County Solid Waste Division*, 9 Wn. App. 2d 1012, 2019 WL 2342348 (2019) several times. Pet. at 8-9, 19, 22-23, 27. However, *Kay* is an unpublished opinion. Pursuant to GR 14.1, "[u]npublished opinions of the Court of Appeals have no precedential value and are not binding on any court." While certain unpublished opinions may be cited as non-binding authorities, no rule allows

them to be a basis for discretionary review. Review under RAP 13.4(b)(2) is limited to "conflict[s] with a *published* decision of the Court of Appeals." (emphasis added).

Merceri has failed to identify any published decision of the Court of Appeals or decision of this Court in conflict with the opinion below. Thus, review under RAP 13.4(b)(1) and (2) should be denied.

C. No Issue of Substantial Public Interest Exists Here

This Court may grant review under RAP 13.4(b)(4) of an opinion that "involves an issue of substantial public interest that should be determined by the Supreme Court." *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). This Court has described a question of great public interest or import as one "where it appears that an opinion of the court will be beneficial to the public and to other branches of the government"; in such cases, "the court may exercise its discretion . . . [including] to resolve a question of constitutional interpretation." *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 490, 585 P.2d

71 (1978) (citing *Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972)). However, an alleged infringement of an important constitutional right "in of itself, does not qualify the case as one presenting issues of broad overriding public import." *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 332, 684 P.2d 1297 (1984) (internal quotation marks omitted) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814, 514 P.2d 137 (1973)).

Merceri has failed to link the issues raised in this case to any substantial public interest. The issues here have nothing to do with the calculation of the just compensation Merceri received or the propriety of the underlying taking. Rather, the issues solely concern additional amounts Merceri alleges she and her attorneys are owed and are specific to Merceri's personal interests. The outcome of this case is of no serious public importance, nor does it raise issues that impact the public in general. Thus, Merceri's Petition should be dismissed.

D. Federal Law is Inapplicable and Does Not Present a Conflict Under RAP 13.4(b)(1) or (2)

Merceri repeatedly references federal statutes and case law to support her contentions that she is entitled to compound interest, ignoring that the federal statutes diverge from the governing state statutes, RCW 8.28.040 and 19.52.020, in their applicability, text, and intent. Merceri's citations to the federal Uniform Relocation Assistance and Uniform Real Property Acquisition Policies are unavailing and inapplicable, as they apply solely to takings by federal agencies and to programs utilizing federal financial assistance. *See* 42 U.S.C. §§ 4621, 4651. The federal policy concern expressed in 42 U.S.C. § 4621 is to establish "a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance." The policy expressed in 42 U.S.C. § 4651 is to "encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public

confidence in Federal land acquisition practices[.]" Clearly, the State is not a federal agency, and the record is devoid of any evidence that its construction of the pond was part of a program utilizing federal funds.

Therefore, the federal case law and statutes cited by Merceri do not apply to this case, nor do they provide a basis for review under RAP 13.4(b). No rule authorizes discretionary review when an inconsistency exists between a Washington court decision based on Washington law and a *federal* court decision based on *federal* law. Merceri's discussion regarding federal statute and case law is inapposite.

V. CONCLUSION

Merceri fails to identify any conflict between the decision below and any Supreme Court or published Court of Appeals decision, and fails to identify any substantial public interest in the outcome of this case. This Court's review is unwarranted.

This document contains 4,095 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 29th day of May 2024.

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APPENDIX 1

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHELLE MERCERI, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, Respondent, DEUTSCHE BANK AG a/k/a DEUTSCHE BANK, doing business in the United States as DEUTSCHE BANK USA, and as DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2; and SHAWN CASEY JONES, Defendants.	No. 85865-3-I (linked with DIVISION ONE UNPUBLISHED OPINION
MICHELLE MERCERI, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION, DEUTSCHE BANK AG a/k/a DEUTSCHE BANK, doing business in the United States as DEUTSCHE BANK USA, and as DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking	No. 85690-1-I)

association, as trustee for holders of the BCAP LLC Trust 2007-AA2,

Respondents,

SHAWN CASEY JONES,

Defendant.

BIRK, J. — In this inverse condemnation action, landowner Michelle Merceri filed an action against the State of Washington, in which she joined as defendants a fellow putative owner and a lender holding a deed of trust, seeking compensation for a state highway expansion's taking of restrictive covenant rights benefiting her property. The superior court bifurcated trial, entered judgment determining the amount of compensation and interest due because of the taking, and denied Merceri an award of attorney fees, but has not yet determined the allocation of the recovery among Merceri, the putative other owner, and the lender. Merceri filed a notice of appeal from the judgment challenging the award of interest and denial of attorney fees. While the first notice of appeal was pending, Merceri unsuccessfully sought to enforce an attorney lien against the compensation recovery and separately filed a notice of appeal from the denial of that motion. We affirm the superior court's rulings denying Merceri's motions for attorney fees and compound interest, we conclude the denial of Merceri's motion to enforce an attorney lien is not appealable and so we do not review it, and we remand.

I

In a complaint filed August 6, 2021, Merceri alleged ownership of a lot in the Fairweather Basin subdivision in Hunts Point, Washington, which was subject to

protective restrictions and covenants. She alleged the State effected a taking by condemning two neighboring lots for a highway project and putting them to use in violation of the covenants. Merceri joined as parties Shawn Jones, who is on the title to Merceri's property but according to her has disclaimed any interest in the claim for just compensation, and Deutsche Bank National Trust Company, which purports to be the beneficiary of a 2006 deed of trust encumbering the property. As memorialized in a partial summary judgment order dated April 15, 2022, the State agreed its construction on the two lots violated one of the covenants, the superior court granted Merceri summary judgment on that issue, and the court reserved the amount of damages for trial. By summary judgment order dated September 6, 2022, the court limited certain of Merceri's damages claims, but otherwise ruled there was evidence requiring a jury determination of the diminution in value of Merceri's property. On September 9, 2022, the court entered an order directing that trial proceed in three phases: "(1) determination on the amount of compensation on Plaintiff's inverse condemnation claim as against [the State], (2) determination of interest on any award to Plaintiff and attorneys' fees, and (3) Deutsche Bank's entitlement to and recovery from any such award to Plaintiff."

On October 4, 2022, Merceri filed a notice of settlement between herself and the State, reflecting that Merceri had accepted the State's pretrial offer under RCW 8.25.070. The State presented a proposed judgment for the agreed amount of just compensation plus statutory interest of 12 percent from the date of taking on May 11, 2011. Merceri filed an objection to the proposed judgment. Merceri sought compound interest, citing Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935

P.2d 555 (1997), abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.2d 694 (2019). Following a presentation of judgment hearing, on November 4, 2022, the court entered its judgment and decree of appropriation for the agreed amount of just compensation and statutory interest of 12 percent. Statutory 12 percent simple interest on $205,000.00 from 2011 to 2022 amounted to $282,664.11. Merceri filed motions to amend the judgment and for an award of litigation costs including attorney fees incurred to obtain just compensation. By orders dated November 29, 2022, the court denied both motions. On December 1, 2022, Merceri filed a notice of appeal directed to the Supreme Court designating the judgment and these orders.

Separately, on May 16, 2023, Merceri filed in the superior court a "Motion to Enforce Attorney Lien Claim on Judgment." In that motion, Merceri sought disbursal of funds from the court registry to satisfy a claim of lien for attorney fees asserted by her counsel. The superior court denied this motion, and on July 14, 2023, denied reconsideration. On July 31, 2023, Merceri filed a notice of appeal directed to this court designating these orders.

This court's clerk's office docketed Merceri's July 31, 2023 notice of appeal under matter number 85690-1-I. By order dated October 3, 2023, the Supreme Court transferred Merceri's December 1, 2022 appeal to this court. The clerk's office docketed this appeal under matter number 85865-3-I. By letter, the court advised the parties that the matters would be linked for purposes of argument and disposition.

II

In advance of oral argument, the court advised the parties of its notation ruling stating, "[T]he parties are directed to be prepared at oral argument to address whether there is an appealable final judgment before the court within the meaning of RAP 2.2." The November 4, 2022 judgment states, "There is no just reason to delay entry of this Judgment and Decree of Appropriation as to the just compensation arising from the State's condemnation of the Covenant, this is a final judgment at the express direction of the Court." However, the judgment does not include findings supporting that statement, as required by RAP 2.2(d). In the absence of such findings, such a judgment is generally not appealable. Pepper v. King County, 61 Wn. App. 339, 349, 810 P.2d 527 (1991).

RAP 2.2(a) provides that "[u]nless otherwise prohibited or provided by statute or court rule," a party may appeal from only designated superior court decisions. A judgment adjudicating less than all the claims or counts, or the rights and liabilities of less than all the parties, is generally subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties. RAP 2.2(d). Generally, when a judgment is not appealable because RAP 2.2(d) is not satisfied, the appellate court must dismiss an appeal. Schiffman v. Hanson Excavating Co., Inc., 82 Wn.2d 681, 687-88, 513 P.2d 29 (1973); Pepper, 61 Wn. App. at 346 & n.4. Despite the court's direction in advance of argument, no party identified a statute or court rule making the

November 4, 2022 judgment appealable as a matter of right.[1] The court's additional research has identified RCW 8.04.150, which states,

> Either party may seek appellate review of the judgment for damages entered in the superior court within thirty days after the entry of judgment as aforesaid, and such review shall bring before the supreme court or the court of appeals the propriety and justness of the amount of damages in respect to the parties to the review: PROVIDED HOWEVER, That upon such review no bond shall be required: AND PROVIDED FURTHER, That if the owner of land, the real estate or premises accepts the sum awarded by the jury, the court or the judge thereof, he or she shall be deemed thereby to have waived conclusively appellate review, and final judgment by default may be rendered in the superior court as in other cases: PROVIDED FURTHER, That no review shall operate so as to prevent the said state of Washington from taking possession of such property pending review after the amount of said award shall have been paid into court.

State v. Scheel held that when determining the allocation of a condemnation award, the trial court had no authority to alter the judgment for just compensation because it had not been appealed. 74 Wn.2d 137, 137, 140, 443 P.2d 658 (1968). The court said, "Having failed to give notice of appeal within 30 days according to law and rule, [the appellants] cannot now reopen the matter in a subsequent trial for equitable distribution." Id. at 140. In State v. Wachsmith, the court held the portion of a condemnation judgment awarding attorney and expert witness fees is appealable under RCW 8.04.150. 4 Wn. App. 91, 96, 479 P.2d 943 (1971). In a

[1] Merceri sought to rely on the superior court's CR 54(b) direction, despite its lack of the required findings, or alternatively discretionary review under RAP 2.3(b). Wash. Court of Appeals oral argument, Merceri v. Dep't of Transp., No. 85865-3-I (Feb. 28, 2024), at 1 min., 49 sec. to 2 min., 02 sec. and 2 min., 52 sec. to 3 min., 36 sec, https://tvw.org/video/division-1-court-of-appeals-2024021466/. The State sought to rely on RCW 8.04.110 and .130, but those statutes do not address appealability. Id. at 11 min., 38 sec. to 12 min., 12 sec. and 19 min., 04 sec. to 19 min., 31 sec.

motion to dismiss the appeal, Wachsmith argued the portion of the judgment awarding such fees was not appealable because they did not qualify as "the propriety and justness of the amount of damage." Id. at 92, 96. We disagreed, noting the enactment of RCW 8.25.070 permitted a trial court to award attorney fees in the judgment for damages in an eminent domain proceeding, the trial court made such an award and included it in the judgment for damages, and this award merged in the total judgment for damages. Id. at 96. Accordingly, the "remedy of review by appeal is proper." Id. (citing RCW 8.04.150). These decisions satisfy us that the November 4, 2022 judgment is appealable under RCW 8.04.150.

The same is not true of the superior court's later orders denying Merceri's motion to enforce an attorney lien. RCW 8.25.070 speaks to the condemnor's liability for attorney fees as part of the gross award of just compensation, and RCW 8.04.150 contemplates appeal of the amount of just compensation separate from subsequent proceedings to determine the allocation among claimants. The July 2023 superior court orders lack any CR 54(b) certification, as well as the supporting findings required under RAP 2.2(d). The parties have identified, and the court has located, no statute or court rule making the July 2023 orders denying enforcement of an attorney lien appealable as a matter of right.

In the absence of an appealable final judgment, a party seeking review is limited to discretionary review. RAP 5.1(c) states that "[a] notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review." Thus, when CR 54(b) and RAP 2.2(d) are not met, an appellate court may still accept review if the criteria for discretionary review under

RAP 2.3(b) are met. Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 156 Wn.2d 253, 257, 261 n.4, 126 P.3d 16 (2006); Glass v. Stahl Specialty Co., 97 Wn.2d 880, 883, 652 P.2d 948 (1982). Here, they are not. Regardless of whether the superior court's rulings denying current enforcement of an attorney lien are error, which we do not decide, they are not "obvious" or "probable" error, and even more plainly they do not "render further proceedings useless" or "substantially alter[] the status quo or substantially limit[] the freedom of a party to act." RAP 2.3(b)(1)-(2). To the contrary, they expressly contemplate that further proceedings must occur.

As to Merceri's July 31, 2023 notice of appeal, matter number 85690-1-I, review is dismissed. Because neither Merceri nor Deustche Bank has prevailed on review, we direct that no party is awarded attorney fees or costs at this time, but this direction is without prejudice to any party's establishing an entitlement to attorney fees or costs in subsequent proceedings.

III

Merceri argues the superior court erred by failing to award compound interest.[2] We disagree.

The state constitution requires that "just compensation" be paid in case of a governmental taking of private property. WASH. CONST. art. I, § 16. An inverse condemnation claim seeks to recover the value of property that the government

[2] The State argues Merceri's alleged error concerning interest cannot be reviewed, because she did not supply a report of proceedings from a November 3, 2022 presentation hearing. The parties presented their arguments to the superior court in the form of proposed judgments and their respective written objections to each other's proposed judgments. The record affords a basis for review.

appropriated without a formal exercise of its eminent domain powers. Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrig. Dist., 175 Wn. App. 374, 388, 305 P.3d 1108 (2013). "Just compensation requires that the property owner be put in the same position monetarily as he or she would have occupied had the property not been taken. It consists of the full equivalent of the value of the property paid contemporaneously with the taking." Sintra, 131 Wn.2d at 655-56. In an inverse condemnation action, interest is necessary to compensate the property owner for the loss of the use of the monetary value of the taking or damage from the time of the taking until just compensation is paid. Id. at 656. Interest in this context is a measure of the rate of return on the property owner's money had there been no delay in payment. Id.

RCW 8.28.040 requires a court in an eminent domain proceeding tried to verdict by the jury or the court to impose postverdict interest as part of the compensation for the taken or damaged property. The interest must be set at the maximum interest rate permitted at that time under RCW 19.52.020 from the date of entry of the verdict to the date of the payment. RCW 8.28.040. The maximum interest rate allowable under that statute is 12 percent. RCW 19.52.020(1)(a).

In Sintra, the court held that awarding compound prejudgment interest instead of simple interest constituted error. 131 Wn.2d at 660. The trial court awarded 12 percent interest on the compensation award compounded annually. Id. at 651. The Supreme Court reversed, noting RCW 8.28.040 guides the trial court's determination of a prejudgment interest award as part of the award of just compensation. Sintra, 131 Wn.2d at 660. Because RCW 19.52.020 "does not

specifically provide for the compounding of interest, only simply interest is allowed." Sintra, 131 Wn.2d at 660. However, if a party proves by presenting evidence that statutory simple interest does not afford just compensation, the trial court has discretion to award compound interest. Id. Absent such proof, "a property owner in a temporary regulatory takings case is entitled only to simple interest under RCW 8.28.040 as part of just compensation." Sintra, 131 Wn.2d at 660-61. We review the superior court's decision to allow simple interest and not compound interest for an abuse of discretion. See id. at 660. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

Merceri submitted several declarations in support of her request for daily compound interest instead of simple interest to fully compensate her. University of Washington Accounting Associate Professor Ed deHaan stated compound interest is "fundamental in modern finance . . . for standard financial products such as savings accounts or loans," "is what the financial world earns and pays in everyday transactions," and "daily compounded interest is relatively easy to calculate on[e]self." Vickie Reynolds, a businesswoman and investor residing in King County, stated she expected financial institutions would pay daily compound interest and she would "never accept simple interest because simple interest is not the standard for the payment of interest on savings accounts in Washington." Merceri filed her own declaration stating, "Paying me less than interest compounded daily would not provide just compensation and would not make me

whole." She claims, "No reasonably prudent investor or involuntary creditor, which I am, would accept less than interest compounded daily" and repeats that she is entitled to full just compensation, which means interest compounded daily.

Merceri does not show based on this evidence that it was an abuse of discretion by the superior court to award statutory 12 percent simple interest on $205,000 from 2011 to 2022, amounting to $282,664.11. Merceri relies on primarily federal case law supporting compound interest. But her argument, and the above evidence, ignores the rates at which federal authorities have allowed compound interest. Merceri's authorities, discussed below, use commercial interest rates, in contrast to Washington's statutory rate.

The rule allowing compound interest in takings cases is based on the constitutional intent to provide just compensation. See Sintra, 131 Wn.2d at 660. The purpose of allowing interest in cases where the property owner is not paid at the time of the taking is to ensure the owner "is placed in as good a position pecuniarily as [the owner] would have occupied if the payment had coincided with the appropriation." Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10-11, 104 S. Ct. 2187, 2194, 81 L. Ed. 2d 1 (1984). In Whitney Benefits, Inc. v. United States, the court held just compensation required awarding compound interest in that case because of the government's delay in payment, the taken property's characterization as commercial and income-producing, consistency where the discount rate used at trial for future earnings adopted a compound interest rate, and consistency where Congress's recent amendment to the Declaration of Taking Act, 40 U.S.C. § 258e-1 (1988), provided that compound interest would be

awarded where the government exercised its eminent domain authority. 30 Fed. Cl. 411, 414-16 (1994). While there was delay in this case, for reasons the parties dispute, the other factors relied on in Whitney Benefits are absent.

In Brunswick Corp. v. United States, a patent infringement case, the court imposed interest rates compounded annually "since no prudent commercially reasonable investor would invest at simple interest. Compounding interest annually, therefore, is more likely to place the patentee in the same financial position it otherwise would have held had royalties been timely paid." 36 Fed. Cl. 204, 219 (1996). The court ordered compound interest "commensurate with the prime rate." Id. at 207. Noting that determining the appropriate rate of interest in Court of Claims takings cases is a question of fact, the court rejected the condemnee's own after-tax weighted average cost of capital as the measure of just compensation, which the condemnee asserted ranged from 8.76 percent to 12.5 percent. Id. at 219. Another case allowed compound interest at a federal statutory rate requiring use of " 'the weekly average one-year constant maturity Treasury yield.' " Vaizburd v. United States, 67 Fed. Cl. 499, 504 (2005) (quoting 40 U.S.C. § 3116). Another used "the seven-year Treasury STRIPS [Separate Trading of Registered Interest and Principal of Securities] rate" as the measure of just compensation. Nat'l Food & Beverage Co., Inc. v. United States, 105 Fed. Cl. 679, 704 (2012) (footnote omitted). These cases look to what " 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal' " would receive. Schneider v. Cnty. of San Diego, 285 F.3d 784, 792 (9th Cir. 2002) (quoting United States v. 50.50 Acres of Land,

931 F.2d 1349, 1355 (9th Cir. 1991)). Merceri cites United States v. N. Pac. Ry. Co., 51 F. Supp. 749, 749-50 (E.D. Wash. 1943), in which the court allowed compound interest at 6 percent, but the court did not explain the reason for its selection of that rate, and it is no longer consistent with Court of Claims decisions.

The combination of Merceri's evidence not addressing rates and these decisions using commercial rates does not support that statutory 12 percent simple interest for the delay from 2011 to 2022 was inadequate to place Merceri "in as good a position pecuniarily as [she] would have occupied," Kirby Forest, 467 U.S. at 10, based on a reasonable return while maintaining safety of principal, if payment had been made in 2011. The superior court was within its discretion to decline to compound interest.

Merceri argues the Washington legislature has changed eminent domain law to conform with federal law, but the changes made do not include amending RCW 19.52.020 to mandate interest be compounded. Merceri points to provisions of Washington law enacted to match the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and its corresponding regulations under 49 C.F.R. §§ 24.1-24.306. Chapter 8.26 RCW and its corresponding regulations in chapter 468-100 WAC contain substantially the same provisions. Both these federal and state statutes indicate that their primary purpose is to minimize the hardship of displacement for individuals and businesses affected by public projects by providing uniform procedures for providing relocation assistance. 42 U.S.C. § 4621(b); RCW 8.26.010(1)(a). They do not address interest on takings.

IV

Merceri argues she was entitled to attorney fees under RCW 8.25.075. We disagree.

Reasonable attorney fees incurred in an inverse condemnation action are not available unless provided in contract, statute, or recognized equitable principles. State v. Costich, 152 Wn.2d 463, 469-70, 98 P.3d 795 (2004). RCW 8.25.075(2) authorizes an acquiring government agency's attorney to include in the settlement amount reasonable attorney fees, when appropriate, where a claim is settled in an inverse condemnation action. Daviscourt v. Peistrup, 40 Wn. App. 433, 442 n.9, 698 P.2d 1093 (1985). RCW 8.25.075(3) provides that in an inverse condemnation action, a plaintiff is entitled to attorney fees "but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial."

Merceri does not dispute that the amount of just compensation in her case was established by settlement after the jury was selected but before it was sworn. She relies on Petersen v. Port of Seattle, where the court reversed the trial court's denial of an award for attorney and expert witness fees in an inverse condemnation case. 94 Wn.2d 479, 481-82, 489, 618 P.2d 67 (1980). The plaintiffs sought recovery of the diminished value of their property resulting from the Port of Seattle's operation of Sea-Tac Airport. Id. at 481. A proceeding began in superior court to test the validity of defenses asserted by the Port. Id. Several days of hearings followed where several witnesses were called and subjected to direct and

cross-examination and closing arguments were made to the court. Id. at 481, 488. The court rejected the defenses. Id. at 481. The trial to determine the amount of compensation due to the plaintiffs was never held because the superior court entered a judgment on agreed facts. Id. at 481-82. The Petersen court viewed the series of hearings to test the Port's defenses as the first portion of a bifurcated trial. Id. at 488. The Port was held liable for attorney and expert witness fees under RCW 8.25.075 because its written settlement offer was not made 30 days before the start of those series of hearings. Id. "This is in keeping with the legislative encouragement to avoid trials." Id. "In light of the legislative objective of settling rather than trying matters such as this, it seems anomalous to contend that the evaluation of defenses requiring the taking of testimony for several days is not at least a portion of a trial." Id. at 488-89.

Petersen is distinguishable. In Petersen, while there was not a full trial, the obligation to pay just compensation was established through a contested adjudication of the Port's defenses. Here, the amount of just compensation and the State's undisputed payment of statutory interest followed as a result of settlement. The statute makes an award of attorney fees available in cases where the amount of compensation was determined as a result of trial. In this case, the amount was determined by settlement in advance of trial.

Merceri also cites City of Snohomish v. Joslin, 9 Wn. App. 495, 500, 513 P.2d 293 (1973). There, we remanded for an award of attorney fees, explaining that RCW 8.25.075 was not limited to condemnation actions. Id. at 498-99, 500. We said RCW 8.25.075 "clearly manifests a legislative intent that if a condemnor

chooses to take property without instituting condemnation proceedings, the owner shall be reimbursed for his costs of litigation in obtaining his constitutionally guaranteed just compensation." Id. at 500. But Joslin is not applicable, because it was decided before the 1977 amendment to RCW 8.25.075 limiting the availability of attorney fees to only cases determined "as a result of trial." See LAWS OF 1977, Ex. Sess., ch. 72, § 1, at 296. Because the amount of just compensation and the admitted statutory 12 percent interest were not determined to be owed "as a result of trial," the superior court did not err by denying Merceri's motion for attorney fees.

Pointing to the language of RCW 8.25.075(2) making it discretionary for the agency whether to include an attorney fee award in a settlement offer, Merceri argues the legislature set no standards guiding the agency's discretion. Merceri does not cite authority that a legislative grant of discretionary authority to an executive branch official fails simply because of the possibility of arbitrary implementation, she does not point to circumstances indicating that the attorney general's decision not to offer compensation for attorney fees in her case was arbitrary, and she does not suggest to the court any construction of the statute to provide the guidance she says is required. Cf. People's Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm'n, 104 Wn.2d 798, 808, 711 P.2d 319 (1985) (deference accorded to regulatory agency where the statute "in very broad terms, basically just direct[ed] them to set [utility rates] which the agencies determine to be just and reasonable.").

Merceri seeks attorney fees on appeal, but because she does not prevail we decline to award them.

V

In matter number 85690-1-I, review is dismissed and no party is awarded attorney fees or costs at this time, without prejudice to any party subsequently establishing such an entitlement in future proceedings. In matter number 85865-3-I, we affirm the superior court's November 4, 2022 judgment, and its rulings denying compound interest and denying attorney fees under RCW 8.25.075. We direct that this opinion shall be filed in both matter number 85690-1-I and matter number 85865-3-I. We remand for proceedings consistent with this opinion.

Birk, J.

WE CONCUR:

Feldman, J.

Duggan, J.

APPENDIX 2

Washington Constitution - Article I, section 16

EMINENT DOMAIN.

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. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. 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 any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

APPENDIX 3

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 61. Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (Refs & Annos)
Subchapter II. Uniform Relocation Assistance (Refs & Annos)

42 U.S.C.A. § 4621

§ 4621. Declaration of findings and policy

Currentness

(a) Findings

The Congress finds and declares that--

(1) displacement as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance is caused by a number of activities, including rehabilitation, demolition, code enforcement, and acquisition;

(2) relocation assistance policies must provide for fair, uniform, and equitable treatment of all affected persons;

(3) the displacement of businesses often results in their closure;

(4) minimizing the adverse impact of displacement is essential to maintaining the economic and social well-being of communities; and

(5) implementation of this chapter has resulted in burdensome, inefficient, and inconsistent compliance requirements and procedures which will be improved by establishing a lead agency and allowing for State certification and implementation.

(b) Policy

This subchapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance. The primary purpose of this subchapter is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons.

(c) Congressional intent

It is the intent of Congress that--

(1) Federal agencies shall carry out this subchapter in a manner which minimizes waste, fraud, and mismanagement and reduces unnecessary administrative costs borne by States and State agencies in providing relocation assistance;

(2) uniform procedures for the administration of relocation assistance shall, to the maximum extent feasible, assure that the unique circumstances of any displaced person are taken into account and that persons in essentially similar circumstances are accorded equal treatment under this chapter;

(3) the improvement of housing conditions of economically disadvantaged persons under this subchapter shall be undertaken, to the maximum extent feasible, in coordination with existing Federal, State, and local governmental programs for accomplishing such goals; and

(4) the policies and procedures of this chapter will be administered in a manner which is consistent with fair housing requirements and which assures all persons their rights under title VIII of the Act of April 11, 1968 (Public Law 90-284), commonly known as the Civil Rights Act of 1968, and title VI of the Civil Rights Act of 1964.

CREDIT(S)

(Pub.L. 91-646, Title II, § 201, Jan. 2, 1971, 84 Stat. 1895; Pub.L. 100-17, Title IV, § 404, Apr. 2, 1987, 101 Stat. 248.)

Notes of Decisions (17)

42 U.S.C.A. § 4621, 42 USCA § 4621
Current through P.L. 118-46. Some statute sections may be more current, see credits for details.

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APPENDIX 4

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 61. Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (Refs & Annos)
Subchapter III. Uniform Real Property Acquisition Policy

42 U.S.C.A. § 4651

§ 4651. Uniform policy on real property acquisition practices

Currentness

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 3114(a) to (d) of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

(10) A person whose real property is being acquired in accordance with this subchapter may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, and part thereof, any interest therein, or any compensation paid therefor to a Federal agency, as such person shall determine.

CREDIT(S)

(Pub.L. 91-646, Title III, § 301, Jan. 2, 1971, 84 Stat. 1904; Pub.L. 100-17, Title IV, § 416, Apr. 2, 1987, 101 Stat. 255.)

Notes of Decisions (39)

42 U.S.C.A. § 4651, 42 USCA § 4651
Current through P.L. 118-46. Some statute sections may be more current, see credits for details.

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APPENDIX 5

RCW 8.04.110 Trial—Damages to be found. A judge of the superior court shall preside at the trial to determine the compensation and damage to be awarded, which trial shall be held at the courthouse in the county where the land, real estate, premises or other property sought to be appropriated or acquired is situated: and in the case of each such trial by jury the jurors by their verdict shall fix as a lump sum the total amount of damages which shall result to all persons or parties and to any county and to all tenants, encumbrancers and others interested therein, by reason of the appropriation and use of the lands, real estate, premises or other property sought to be appropriated or acquired. Upon the trial, witnesses may be examined in behalf of either party to the proceedings as in civil actions; and a witness served with a subpoena in each proceeding shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. In case a jury is not demanded as provided for in *section 894 such total amount of damages shall be ascertained and determined by the court or judge thereof and the proceedings shall be the same as in trials of an issue of fact by the court. [1925 ex.s. c 98 § 2; 1891 c 74 § 5; RRS § 895.]

Rules of court: *CR 26 through 37.*

***Reviser's note:** "section 894" refers to RRS § 894 herein codified (as amended) as RCW 8.04.070, 8.04.080, 8.04.090, and 8.04.100.

Witnesses, examination of: Title 5 RCW.

APPENDIX 6

RCW 8.25.010 Pretrial statement of compensation to be paid in event of settlement. In all actions for the condemnation of property, or any interest therein, at least thirty days prior to the date set for trial of such action the condemnor shall serve a written statement showing the amount of total just compensation to be paid in the event of settlement on each condemnee who has made an appearance in the action. [1965 ex.s. c 125 § 1.]

APPENDIX 7

RCW 8.25.070, 1971 ex. s. c 39 § 3.

Sec. 3. Section 3, chapter 137, Laws of 1967 ex. sess. And RCW 8.25.070 are each amended to read as follows:

(1) Except As otherwise provided in subsection (3) of this Section, if trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned ((~~and if the condemnee has offered to stipulate to an order of immediate possession of the property being condemned~~)) the court ((~~may~~)) shall award the condemnee reasonable attorney's fees and reasonable expert witness fees ((~~actually incurred~~)) in the event of any of the following:

((~~1~~)) (a) If condemnor fails to make any written offer in settlement to condemnee at least thirty ((~~court~~)) days prior to commencement of said trial; or

((~~2~~)) (b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor at least thirty days prior to commencement of said trial ((~~; or~~

~~(3) If in the opinion of the trial court, condemnor has shown bad faith in its dealings with condemnee relative to the property the property condemned)~~).

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day for actual trial time and the general hourly rate for preparation as provided in the minimum bar fee schedule of the county or judicial district in which the proceeding was instituted, or if no minimum bar fee schedule has been adopted un the county, then the trail and hourly rates as provided in the minimum bar fee schedule customarily used in such county. Not later than July 1, 1971 the administrator for the courts shall adopt a rule establishing standards for verifying fees authorized by this section. Reasonable expert witness fees as authorized in this section shall not exceed

the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.

Passed the Senate March 12, 1971.

Passed the House April 19, 1971.

Approved by the Governor April 29, 1971.

Filed in office of Secretary of State April 29, 1971

APPENDIX 8

RCW 8.25.070 Award of attorney's fees and witness fees to condemnee—Conditions to award. (1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property. [1984 c 129 § 1; 1971 ex.s. c 39 § 3; 1967 ex.s. c 137 § 3.]

Court appointed experts: ***Rules of court:*** *ER 706.*

APPENDIX 9

RCW 8.25.075, 1971 ex. s. c 240 § 21

NEW SECTION. Sec. 21. There is added to chapter 8.25 RCW a new section to read as follows:

(1) A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if--

(a) there is a final adjudication that the condemnor cannot acquire the real property by condemnation; or

(b) the proceeding is abandoned by the condemnor.

(2) A superior court rendering a judgment for the plaintiff awarding compensation for the taking of real property for public use without just compensation having first been made to the owner, or the attorney general or other attorney representing the acquiring agency in effecting a settlement of any such roceeding shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees.

(3) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to the provisions of subsection (4) of RCW 8.25.070.

NEW SECTION. Sec. 23. If any provision of this 1971 act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 24. This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1971.

Passed the Senate May 4, 1971.

Passed the House May 9, 1971.

Approved by the Governor May 20, 1971.

Filed in office of Secretary of State May 21, 1971.

APPENDIX 10

RCW 8.25.075 Costs—Award to condemnee or plaintiff—Conditions. (1) A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if:

(a) There is a final adjudication that the condemnor cannot acquire the real property by condemnation; or

(b) The proceeding is abandoned by the condemnor.

(2) In effecting a settlement of any claim or proceeding in which a claimant seeks an award from an acquiring agency for the payment of compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner, the attorney general or other attorney representing the acquiring agency may include in the settlement amount, when appropriate, costs incurred by the claimant, including reasonable attorneys' fees and reasonable expert witness fees.

(3) A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of real property for public use without just compensation having first been made to the owner shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.

(4) Reasonable attorney fees and expert witness fees as authorized in this section shall be subject to the provisions of subsection (4) of RCW 8.25.070 as now or hereafter amended. [1977 ex.s. c 72 § 1; 1971 ex.s. c 240 § 21.]

APPENDIX 11

RCW 8.28.040 Interest on verdict fixed—Suspension during pendency of appeal. Whenever in any eminent domain proceeding, heretofore or hereafter instituted for the taking or damaging of private property, a verdict shall have been returned by the jury, or by the court if the case be tried without a jury, fixing the amount to be paid as compensation for the property so to be taken or damaged, such verdict shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020 from the date of its entry to the date of payment thereof: PROVIDED, That the running of such interest shall be suspended, and such interest shall not accrue, for any period of time during which the entry of final judgment in such proceeding shall have been delayed solely by the pendency of an appeal taken in such proceeding. [1984 c 129 § 2; 1943 c 28 § 1; Rem. Supp. 1943 § 936-4.]

APPENDIX 12

RCW 19.52.020 Highest rate permissible—Setup charges. (1) Except as provided in subsection (4) of this section, any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

(2)(a) In any loan of money in which the funds advanced do not exceed the sum of five hundred dollars, a setup charge may be charged and collected by the lender, and such setup charge shall not be considered interest hereunder.

(b) The setup charge shall not exceed four percent of the amount of funds advanced, or fifteen dollars, whichever is the lesser, except that on loans of under one hundred dollars a minimum not exceeding four dollars may be so charged.

(3) Any loan made pursuant to a commitment to lend at an interest rate permitted at the time the commitment is made shall not be usurious. Credit extended pursuant to an open-end credit agreement upon which interest is computed on the basis of a balance or balances outstanding during a billing cycle shall not be usurious if on any one day during the billing cycle the rate at which interest is charged for the billing cycle is not usurious.

(4)(a) Prejudgment interest charged or collected on medical debt, as defined in RCW 19.16.100, must not exceed nine percent.

(b) For any medical debt for which prejudgment interest has accrued or may be accruing as of July 28, 2019, no prejudgment interest in excess of nine percent shall accrue thereafter. [2019 c 227 § 6; 1989 c 14 § 3; 1985 c 224 § 1; 1981 c 78 § 1; 1967 ex.s. c 23 § 4; 1899 c 80 § 2; RRS § 7300. Prior: 1895 c 136 § 2; 1893 c 20 § 3; Code 1881 § 2369; 1863 p 433 § 2; 1854 p 380 § 2.]

Effective date—1985 c 224: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1985." [1985 c 224 § 2.]

Severability—1981 c 78: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1981 c 78 § 7.]

Severability—Savings—1967 ex.s. c 23: See notes following RCW 19.52.005.

Interest on judgments: RCW 4.56.110.

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify, under penalty of perjury under the laws of the state of Washington, that on May 29, 2024, I served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

Woodley Law Attn: Gordon Arthur Woodly PO Box 53043 Bellevue, WA 98015-3043	☒ COA E-Service Portal ☒ Email: *woodley@gmail.com*
Anne Bremner, P.C. Attn: Anne Melani Bremner 1200 5th Ave, Ste. 1900 Seattle, WA 98101-3135	☒ COA E-Service Portal ☒ Email: *abremner@freybuck.com*
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Troutman Pepper LLP Attn: Justin Donald Balser 5 Park Plz, Ste. 1400 Irvine, CA 92614-2545	☒ COA E-Service Portal ☒ Email: *justin.balser@troutman.com*

DATED this 29th day of May 2024, at Rainier,

Washington.

*/s/ Samantha Pringle*____
SAMANTHA PRINGLE
Paralegal

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

May 29, 2024 - 11:37 AM

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