

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KIPP M. DUNLAP and MARILYN V.)	
DUNLAP, husband and wife,)	No. 63747-9-I
)	
Appellants/Cross-Respondents,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
CITY OF NOOKSACK, a municipal)	
corporation,)	
)	
Respondent/Cross-Appellant.)	FILED: October 25, 2010

Grosse, J. — A property owner is not entitled to compensation in the case of a vacation of a street where access to the property is preserved through other streets or ways. Here, the trial court’s conclusion that the city of Nooksack’s vacation of West Third Street did not amount to a taking of Kipp and Marilyn Dunlap’s 29.5-acre parcel is supported by the trial court’s findings of fact, which are in turn supported by substantial evidence. With regard to the Dunlaps’ quarter-acre parcel, the City’s regulation of this property resulted in a total taking because the regulation denied all economically viable use of the property. Accordingly, we affirm the trial court.

FACTS

The 29.5-acre Parcel

Kipp and Marilyn Dunlap’s 29.5-acre parcel lies within both the city of Nooksack (City) and adjacent unincorporated Whatcom County. The property fronts West Third Street, West Lincoln Street, and West Grant Street, all located within the City. Two sloughs run through the property; there are crossings on each slough. At the time of trial, the land was used for agricultural purposes; presently, it is zoned for both

residential and agricultural use.

In April 2002, the City vacated an improved portion of West Third Street. The Dunlaps filed an inverse condemnation action against the City alleging that the vacation of West Third Street constituted a taking of the 29.5-acre parcel. After trial, the court concluded that the vacation of West Third Street did not constitute a taking because the vacation did not result in the 29.5-acre parcel having no access or only substantially impaired access.

The Quarter-Acre Parcel

The Dunlaps' quarter-acre parcel is located entirely within the City and in a residential zone. A slough runs through the middle of the property, rendering the middle of the tract unusable.

The City denied the Dunlaps' request to construct a house on the property and to access the property through an alleyway. The City also denied their request for a shoreline variance to retain a fence they had constructed on the parcel. The Dunlaps sought a shoreline variance to construct a residence on the property. The City denied this request as well. The trial court determined that the only feasible use of the property was the construction of a 480 square-foot residence. The trial court stated that a 480 square-foot home would be "approximately 4.4 percent of the entire lot. 10,410 square feet of this lot are not usable because of buffers; 480 square feet approximately, maybe a little bit more on one end or the other of the house are usable." The court found that building a house of that size would not be economically viable and that there is no other economically viable use for the property other than residential

development. The court concluded that as to the quarter-acre parcel, the Dunlaps established a regulatory taking.

A jury trial was later held as to the value of the quarter-acre parcel. The jury returned a verdict finding that the value was \$16,750.00, and the trial court entered judgment in accordance with the verdict. The Dunlaps' appeal the judgment, and the City cross-appeals only the trial court's determination that a taking occurred; it does not appeal the jury's determination as to value.

ANALYSIS

The 29-Acre Parcel

We review a trial court's findings of fact for substantial evidence in the record and then determine whether those findings support the trial court's conclusions of law.¹ We defer to the trial court's determinations as to conflicting testimony and the credibility of witnesses.²

The Washington Constitution prohibits the taking or damaging of private property for public or private use without just compensation having first been made.³ To establish a governmental taking, the claimant must prove a property right.⁴ "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 article I, section 16 of the Washington State Constitution."⁵ The first step in the analysis of

¹ Snyder v. Haynes, 152 Wn. App. 774, 779, 217 P.3d 787 (2009).

² Snyder, 152 Wn. App. at 779.

³ Wash. Const. art. I, § 16.

⁴ Granite Beach Holdings, LLC v. State ex rel. Dep't of Natural Res., 103 Wn. App. 186, 205, 11 P.3d 847 (2000).

⁵ Keiffer v. King County, 89 Wn.2d 369, 372, 572 P.2d 408 (1977).

whether compensation must be paid in a particular case is to determine whether the government action in question has actually interfered with the right of access.⁶ This is a legal question for the court.⁷ If the right of access has been impaired, the second, and pivotal, step in the analysis is the degree of damage; this is a question of fact.⁸

To satisfy the first step, a party must show that his or her right of access was either eliminated or substantially impaired.⁹ That is, the party must show that his or her reasonable means of access was obstructed.¹

[A] landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury. If, however, the landowner still retains an alternate mode of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged.^[11]

That is, a landowner is not entitled to compensation in the case of the vacation of a street where access is preserved over other streets or ways; an added inconvenience is not a damage or a taking.¹²

The trial court concluded that the Dunlaps failed to establish that access to the 29.5-acre parcel was substantially impaired because, even after vacation of West Third Street, the Dunlaps had access to the parcel. This conclusion is supported by the trial court's findings that the entire parcel can be accessed off Lincoln Street through the Dunlaps' residential driveway, that the center portion of the parcel can be accessed by

⁶ Keiffer, 89 Wn.2d at 372.

⁷ Wandermere Corp. v. State, 79 Wn.2d 688, 695, 488 P.2d 1088 (1971).

⁸ Keiffer, 89 Wn.2d at 373-74.

⁹ Keiffer, 89 Wn.2d at 374.

¹ Union Elevator & Warehouse Co., Inc. v. State ex rel., Dep't of Transp., 96 Wn. App. 288, 296, 980 P.2d 779 (1999).

¹¹ Hoskins v. City of Kirkland, 7 Wn. App. 957, 960-61, 503 P.2d 1117 (1972).

¹² Freeman v. City of Centralia, 67 Wash. 142, 145, 120 P. 886 (1912).

improving West Second Street and Grant Street; that the southeast corner of the property can be accessed by crossing over the east slough crossing or crossing the approved, but not perfected, slough crossing that runs across the southern slough near the Dunlaps' barn. These findings are, in turn, supported by the testimony presented. The City's expert, Don Gustafson, testified as to the various means of accessing the 29.5-acre tract and concluded:

- Q. Now, are you able to form an opinion as to whether the vacation of West Third Street substantially impaired the Plaintiffs' access to their 29-acre parcel?
- A. Yes.
- Q. And what would that opinion be, please?
- A. I don't think it has any effect.
- Q. And would that be both for residential and agricultural purposes?
- A. Yes.

The trial court's findings are also supported by the testimony of John Matzinger, an engineer the Dunlaps hired to create a preliminary development plan for the 29.5 acres. Matzinger testified that although using West Third Street to access the property "worked just fine," there were other alternative means of access. He also testified that his land development plan was designed using access to the 29.5 acres by means other than West Third Street. Rollin Harper, who was under contract with the City to provide land use consulting services, testified that Matzinger's plan, accessing the 29.5-acre tract from other than West Third Street, was a viable plan. Harper also testified as to alternative means of accessing the 29.5-acre parcel aside from West Third Street and was of the opinion that the vacation of West Third Street did not result in a substantial interference for access for both agricultural and residential use of the 29.5-acre parcel.

This testimony supports the trial court's ultimate conclusion that the City's vacation of West Third Street did not constitute a taking of the Dunlaps' 29.5-acre parcel. The fact that the Dunlaps may have presented testimony to the contrary does not compel reversal of the trial court's determination because resolution of any conflicts in the testimony is a matter for the trial court, and we generally do not disturb such decisions by the trial court.¹³

Storm Water

The Dunlaps did not allege in their complaint that the City diverted residential storm water onto their property and that this diversion of water constituted a taking of their property. Rather, they claim that they first discovered this at trial during Harper's testimony. The Dunlaps claim that Harper testified that the City was diverting residential storm water onto the Dunlaps' property. However, Harper specifically stated: "I'm not indicating that the [C]ity has put storm water on the Dunlaps' land." Further, the trial court made no finding—one way or the other—as to any diversion of residential storm water. And, even though the Dunlaps argue on appeal that they are entitled to a new trial based on newly discovered evidence regarding the storm water, they did not move for a new trial on this or any other ground. For all of these reasons, this issue is not properly before us and we do not address it.

¹³ Snyder, 152 Wn. App. at 779. The Dunlaps argue that a jury, not the court, should have determined the issue of substantial impairment of access. They do not, however, cite to any place in the record where they objected to the trial court hearing the liability portion and the jury determining only damages. Because the Dunlaps do not appear to have objected to the bifurcation below, they cannot raise this argument for the first time on appeal. RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 431, 441, 191 P.3d 879 (2008). Further, because we find that no taking occurred with regard to the 29.5-acre parcel, we do not address the issue of whether the trial court erred in granting the City's motion in limine regarding the cost of the logs because this issue goes to the compensation to which the Dunlaps would be entitled had a taking occurred.

Quarter-Acre Parcel

A. City v. State Liability

The City argues that the State, not the City, should be liable for any taking with respect to the Dunlaps' quarter-acre parcel because, in denying the Dunlaps' request for a variance, the City was "only adopting and implementing regulation as required by the [s]tate of Washington." The City raised this argument in its motion for summary judgment, which the trial court denied. The City couches its argument in terms of an allegation of error with regard to the order denying its motion for summary judgment. Generally, orders denying summary judgment are not appealable as of right.¹⁴ The correct appeal is from the final judgment finding a taking with regard to the quarter-acre parcel.¹⁵

The City bases its argument on Orion Corporation v. State,¹⁶ an action alleging inverse condemnation by excessive regulation. Orion purchased a substantial amount of tidelands on which it intended to develop a residential community. While Orion was developing its plans, Skagit County adopted a Shoreline Management Plan pursuant to the Shoreline Management Act and Department of Ecology (Department) guidelines. Under the county's plan, Orion's planned development was not permitted. A threshold

¹⁴ Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329, 2 P.3d 1029 (2000); see also Draszt v. Naccarato, 146 Wn. App. 536, 540-41, 192 P.3d 921 (2008) ("[W]e will not review the denial of a summary judgment motion where the trial court denies the motion because of material facts and a trial follows on those issues. Instead, the losing party must appeal from the sufficiency of the evidence presented at trial.") (internal citations and quotations omitted).

¹⁵ We disagree with the amicus's argument that the City waived this argument by failing to raise the affirmative defense of fault of a nonparty in a responsive pleading. The issue was raised and addressed in the Dunlaps' motion for summary judgment and the court's ruling on the motion. The issue was tried by the implied consent of the parties and, accordingly, was not waived. See Bickford v. City of Seattle, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001).

¹⁶ 109 Wn.2d 621, 747 P.2d 1062 (1987).

issue in Orion's inverse condemnation action was which governmental entity—the county or the State—bore responsibility for the alleged taking. The court concluded that “[b]ecause the [c]ounty acted at the instance of and, in some material degree, under the direction and control of the State, an agency relationship developed between the parties.”¹⁷ Accordingly, the court held that as principal, the State was responsible for the alleged taking.

In Samuel's Furniture, Inc. v. Department of Ecology,¹⁸ the city of Ferndale made the same argument as to the State's liability as Skagit County made in Orion. At issue in Samuel's Furniture was the city's jurisdictional decision that the site of the store's expansion project was not within the shoreline jurisdiction, so that shoreline substantial development permits were not necessary. The court concluded that the city's decision was in no way directed or controlled by the Department and was, in fact, an indication of the city's belief that the Department did not need to be involved in the permit process for the store's expansion project.

Here, there is no evidence that the State, through the Department, directed or controlled the City in its decision on the Dunlaps' application for a variance. In fact, the Department actually recommended approval of the Dunlaps' application with changes as proposed by the Department. In short, the City fails to establish the existence of an agency relationship between it and the State such that liability for any taking should lie with the State to the exclusion of the City.

B. Taking of the Quarter-Acre Parcel

¹⁷ Orion, 109 Wn.2d at 644.

¹⁸ 105 Wn. App. 278, 19 P.3d 474 (2001), rev'd on other grounds by 147 Wn.2d 440, 54 P.3d 1194 (2002).

The City challenges the trial court's conclusion that the City's denial of the Dunlaps' request for a variance constituted a taking. The City claims that the trial court used the wrong analysis of the issue and should have applied the multi-factor analysis of Pennsylvania Central Transportation Co. v. City of New York.¹⁹ However, in a later case, Lucas v. South Carolina Coastal Council,² the United States Supreme Court held that in a takings case, where the property owner challenges a regulation as denying all economically beneficial or productive use of land, the regulatory action is "compensable without a case-specific inquiry into the public interest advanced in support of the restraint."²¹ The Washington Supreme Court adopted this analysis in Guimont v. Clarke.²²

Under the Lucas/Guimont analysis, if the City's regulation of the Dunlaps' property results in a total taking, the Dunlaps are entitled to just compensation regardless of the public interest advanced in support of the restraint, unless the City can meet a rebuttal test. Under the rebuttal test, if the Dunlaps establish that the regulation of their quarter-acre tract has denied all economically viable use of the property, the City can avoid paying compensation only by identifying "background principles of nuisance and property law that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found."²³ "In other words, the [City] must show the proscribed use interests were not part of the owner's title to begin

¹⁹ 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), adopted by Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990).

² 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

²¹ Lucas, 505 U.S. at 1015.

²² 121 Wn.2d 586, 854 P.2d 1 (1993).

²³ Guimont, 121 Wn.2d at 598 (quoting Lucas, 505 U.S. at 1031).

with.”²⁴ If the Dunlaps prove a total taking and the City fails to rebut that claim, then the Dunlaps are entitled to compensation without any case-specific inquiry into the legitimacy of the public interest supporting the regulation.²⁵

The trial court’s findings of fact and conclusions of law indicate that the trial court correctly applied Lucas and Guimont to analyze the Dunlaps’ total takings claim.²⁶ The trial court was not, as the City argues, required to enter findings and conclusions regarding the Dunlaps’ reasonable investment-backed expectations.

The City next challenges the trial court’s findings and conclusions that a total taking occurred. The City argues that because the Department recommended approval of the Dunlaps’ request for a variance, with proposed mitigation, and because the Dunlaps could have constructed a 480 square-foot residence on the tract, the City’s regulation of the property did not deprive the Dunlaps of all economically viable use of it.²⁷

In its assignments of error, the City does not challenge any of the trial court’s findings of fact by number, but rather states: “The evidence presented at trial and the findings of fact entered by the [t]rial [c]ourt do not justify the legal conclusion that the actions of the [c]ity of Nooksack resulted in a taking of the plaintiff’s quarter-acre parcel.” This assignment of error is not in compliance with RAP 10.3(g), which requires

²⁴ Guimont, 121 Wn.2d at 598.

²⁵ Guimont, 121 Wn.2d at 602-03.

²⁶ “If the plaintiffs can demonstrate loss of all economic use of the property, then the regulatory body has the opportunity to rebut this and show some sort of economically viable use. If the regulatory body has not established an economically viable use, then a regulatory taking has occurred.”

²⁷ The Department suggested reconfiguring the proposed residence from a rectangle to a square or triangle and building the residence on stilts.

a separate assignment of error for each finding of fact a party contends was improperly made, with a reference to each finding by number. Further, the only assignment of error the City specifically identifies in the argument portion of its brief is finding of fact 50, which states: “The plaintiffs’ fundamental attributes of property ownership have been significantly impacted and there is a total and devastating economic impact to the quarter-acre parcel.”

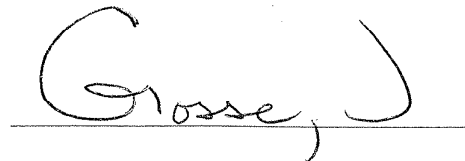
Assuming the City had properly challenged finding of fact 50, the remainder of the court’s findings are unchallenged and therefore verities.²⁸ The findings establish that the Nooksack slough runs through the middle of the quarter-acre parcel. The City denied the Dunlaps’ request to access the parcel via an unimproved alley because, the City stated, the alley was not appropriate access for a proposed single-family residence. The county fire protection district advised the Dunlaps that no access was available to the parcel that would allow for fire and medical response. The City, and later the Shoreline Hearings Board and the trial court, denied the Dunlaps’ request for a variance so they could retain a fence they constructed in the shoreline buffer. When the Dunlaps applied for a shoreline variance to construct a single-family residence, there was a 50-foot buffer from the slough where development could not occur. This left very little space to develop the parcel given that the middle of it is unusable because of the slough. The Dunlaps could have constructed a 480 square-foot home on the parcel, but the occupants would be unable to construct a yard or a fence in the shoreline buffer. Given this, the court found that building a 480 square-foot house

²⁸ Unchallenged findings are verities on appeal. Zunino v. Rajewski, 140 Wn. App. 215, 220, 165 P.3d 57 (2007). The following factual discussion is taken from the court’s findings of fact.

would not be economically viable and there is no other economically viable use for the property other than residential development.

The court's findings support the trial court's conclusion that a total taking occurred. Even if not verities, the court's conclusion must be affirmed because the testimony supports the court's findings. Rollin Harper was asked whether, with the proper mitigation, it would be possible to construct a single-family residence on the quarter-acre parcel in conformity with the shoreline variance criteria. He responded that although it would not be impossible to do so, it would be very difficult and very expensive to do so. Donald Gustafson testified that residents of a 480 square-foot house on the property would be unable to use the buffer for a yard, a patio, a deck, or anything else. All that would be usable would be the interior of the residence; the buffer would be right outside of the house. This testimony supports the trial court's findings, which in turn support the trial court's conclusion that a total taking of the quarter-acre parcel occurred.

We affirm the trial court.

A handwritten signature in cursive script, reading "Grosse, J.", is written above a horizontal line.

WE CONCUR:

Jan J.

Appelwick J.