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WHATCOM COUNTY
WASHINGTON
BY [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

KIPP DUNLAP and MARILYN DUNLAP,
husband and wife,

NO. 06-2-00393-1

Plaintiffs,

FINDINGS OF FACTS;
CONCLUSIONS OF LAW; AND
DECISION

v.

CITY OF NOOKSACK, a municipal
Corporation,

Defendant.

THIS MATTER HAVING been tried before the Court on November 4, 2008, and the Court having heard the testimony of witnesses, considered exhibits admitted at trial, having reviewed the memorandums of authority submitted by both the plaintiffs and the defendant, and having heard argument, now enters the following findings of facts, conclusions of law, and decision granting in part and denying in part the relief sought by the plaintiffs.

I. FINDING OF FACTS

(29.5 acre parcel, Whatcom County tax parcel No. 4004290713850000)

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FINDINGS OF FACTS; CONCLUSIONS OF
LAW; AND DECISION

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1 1) The plaintiffs own real property located within the City of Nooksack and
2 adjacent unincorporated Whatcom County. The real property includes a 29.5 acre parcel,
3 Whatcom County Tax Parcel No. 4004290713850000. The parcel is essentially square.
4 The eastern one-half of the parcel is located within the City of Nooksack; the western one-
5 half is located in unincorporated Whatcom County;

6 2) When the 29.5 acre parcel was purchased by the plaintiffs in 1990, it fronted
7 the following platted rights-of-way located within the City of Nooksack, West Third Street,
8 West Lincoln Street and West Grant Street. Of these platted rights-of-way West Second
9 Street is unimproved and West Third Street is unimproved and sub-standard. Only Lincoln
10 Street is a platted right-of-way which both meets City standards and has been improved;

11 3) The 29.5 acre parcel is bisected by two sloughs; one that runs through the
12 center of the property, the second runs across the southeast corner;

13 4) There are crossings on each slough at the south edge of the property along
14 the south property line;

15 5) There is also an approved crossing in the center of the southern slough in
16 the general vicinity of the plaintiffs' barn. This crossing has been used by the plaintiffs to
17 access the southern portion of the property;

18 6) The property has a current use as a farm and this agricultural use could
19 continued in the future;

20 7) The 29.5 acre parcel currently has access off Lincoln Street through the
21 plaintiffs' residential driveway. From the driveway, all of the 29.5 parcel can be accessed;

22 8) The plaintiffs' have been able to carry on all of their farming activities,
23 including crossing the slough by their barn given their access from Lincoln Street;

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FINDINGS OF FACTS; CONCLUSIONS OF
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1 9) As to the center portion of the plaintiffs' property between the two sloughs,
2 there is access via the unimproved rights of way. In addition to getting to the center portion
3 from Lincoln Street, the center portion can be accessed by improving Second Street and
4 Grant Street;

5 10) Access to the southeast corner of the plaintiffs' can be achieved by going to
6 the south boundary line and crossing over the east slough crossing or the southeast
7 corner can be accessed by crossing the approved, but not perfected slough crossing that
8 runs across the southern slough near the plaintiffs' barn;

9 11) The City Council of the City of Nooksack vacated a portion of West Third
10 Street on April 15, 2002;

11 12) Before the partial street vacation, the previous use of the vacated portion of
12 West Third Street was intermittent at best;

13 13) The vacated portion of West Third Street was not improved right-of-way
14 beyond what is essentially a graveled driveway for the neighboring houses;

15 14) The vacated portion of West Third Street was not developed to the same
16 level as the other streets in the City of Nooksack in so far as it is not paved as the others
17 are;

18 15) The vacation of a portion of West Third Street is not the equivalent to losing
19 access from a fully developed active and functioning street;

20 16) The Court heard the testimony of two appraisers, Mr. Berg who testified for
21 the plaintiffs and Mr. Gustafson who testified for the defendant;

22 17) Mr. Gustafson's analysis is more complete and more persuasive;

23 18) Mr. Berg's analysis was that the 29 acre parcel had sufficient for its current
24 and intended use prior to the vacation of West Third Street and that the vacation caused
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FINDINGS OF FACTS; CONCLUSIONS OF
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1 damage to the 29 acre parcel. Mr. Berg's comparables were to existing, fully serviced lots
2 and were comparing residential property to what is currently agricultural land;

3 19) Mr. Berg did not consider the alternative access via Second Street and Grant
4 Street in his appraisal;

5 20) Mr. Berg did not take into account the fact that the vacated portion of West
6 Third Street was, as it had been previously dedicated prior to the vacation, insufficient to
7 provide necessary access;

8 21) The vacated portion of West Third Street is not wide enough to meet current
9 City standards;

10 22) For West Third Street to be used, it would have to be widened and property
11 purchased to do so and developed into standards that the City would require;

12 23) The expert opinions as to the diminution of value weigh in favor of the
13 determination of Mr. Gustafson in that there is no diminution of value of the 29.5 acre
14 parcel due to the vacation of a portion of West Third Street.

15 16 **II. CONCLUSIONS OF LAW**

17 **(29.5 acre parcel, Whatcom County tax parcel No. 4004290713850000)**

18 24) The vacation of a portion of West Third Street does not meet the standards
19 to justify the finding of a taking that are required in law as set forth in Washington State
20 appellate decisions such as Hopkins v. City of Kirkland, London v. City of Seattle, and
21 Union Elevator and Warehouse Company, Inc. v. State Department of Transportation;

22 25) The plaintiffs have not established that their access to the 29.5 acre parcel
23 was substantially impaired as the Washington State Courts have required;

24 26) The plaintiffs have existing access to the 29.5 acre parcel;

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FINDINGS OF FACTS; CONCLUSIONS OF
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1 27) The plaintiffs have another option for access and there are ways to have
2 connection inside the property;

3 28) The 29.5 acre parcel is one legal tax lot that has not been subdivided;

4 29) As to the 29.5 acre parcel, the vacation of a portion of West Third Street
5 does not justify an award of damages or to find a taking.

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7 **III. DECISION**

8 **(29.5 acre parcel, Whatcom County tax parcel No. 4004290713850000)**

9 30) As to the plaintiffs' 29.5 acre parcel, they have not established the vacation
10 of a portion of West Third Street resulted in a taking.

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12 **IV. FINDING OF FACT**

13 **(One-quarter acre parcel, Whatcom County tax parcel No. 400429154338)**

14 31) The plaintiffs also own a second, smaller parcel of real property located
15 exclusively in the City of Nooksack, Whatcom County Tax Parcel No. 400429154338;

16 32) The second parcel is a quarter of an acre or approximately 10,890 square
17 feet;

18 33) The Nooksack slough, a category II wetland and a shoreline of the State of
19 Washington runs right through the middle of this property;

20 34) As to this property, the plaintiffs sought access to the quarter acre parcel via
21 the unimproved alley off of West Second Street;

22 35) The plaintiffs were denied this request and advised by the defendant that the
23 alleyway was not appropriate access for a proposed single family residence;

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FINDINGS OF FACTS; CONCLUSIONS OF
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1 36) Whatcom County Fire Protection District No. 1 also advised the plaintiffs that
2 no access was available to the quarter acre parcel that would allow for fire response and
3 medical response equipment and personnel;

4 37) The plaintiffs applied for a shoreline variance for the quarter acre parcel so
5 they could maintain a fence they had constructed in the shoreline buffer of the Nooksack
6 slough;

7 38) The plaintiffs' request for a variance to keep the fence in the shoreline buffer
8 was denied by the City of Nooksack and subsequently the Washington State Shoreline
9 Hearings Board following an appeal by the Plaintiffs;

10 39) The plaintiffs appealed the decision of the Washington State Hearings Board
11 to the Whatcom County Superior Court. The Court affirmed the decision of the Washington
12 State Hearings Board;

13 40) After the plaintiffs had exhausted all of their appeals, the plaintiffs did not
14 take down the fence at issue and subsequently were cited daily by the City of Nooksack
15 until the fence was removed;

16 41) The plaintiffs applied for a second shoreline variance for a single family
17 residence on the quarter acre parcel;

18 42) When the plaintiffs purchased the property there was a 100 foot buffer from
19 the slough where development could not occur. When they applied for the shoreline
20 variance to construct the single family residence, the buffer in effect was 50 feet;

21 43) Even with a 50 foot buffer there is not much space to develop the quarter
22 acre parcel because the middle of the property is totally unusable due to the presence of
23 the Nooksack slough;

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FINDINGS OF FACTS; CONCLUSIONS OF
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1 44) The plaintiffs were advised during the comment period of their proposal that
2 they should reconfigure the shape of the home so it would encroach less into the buffer
3 and they may want to raise the house on stilts so it is out of the buffer and to limit the
4 impacts of flooding;

5 45) The plaintiffs request to build the residence in the shoreline buffer was
6 denied on December 1, 2003 ;

7 46) The plaintiffs could have built a 480 square foot home on the quarter acre
8 parcel, but that is a very small home. Approximately 28 % of the size of the courtroom;

9 47) If the small home was built, the people living in it could not do anything in the
10 shoreline buffer such as put in a yard or build a fence;

11 48) Building a house of that size would not be economically viable, and there is
12 no other economically viable use for the property other than residential development;

13 49) The required shoreline buffers and critical areas buffers alone dictate this
14 small building area and even to have this size building required a variance and requires
15 the building to encroach into the shoreline buffers;

16 50) The plaintiffs' fundamental attributes of property ownership have been
17 significantly impacted and there is a total and devastating economic impact to the quarter
18 acre parcel;

19 51) The state and the defendant, the City of Nooksack, have a legitimate interest
20 in the protection of wetlands and the slough and those are appropriate.

21 22 **V. CONCLUSIONS OF LAW**

23 **(One-quarter acre parcel, Whatcom County tax parcel No. 400429154338)**

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FINDINGS OF FACTS; CONCLUSIONS OF
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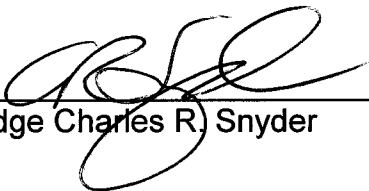
1 52) If the plaintiffs can demonstrate loss of all economic use of the property, then
2 the regulatory body has the opportunity to rebut this and show some sort of economically
3 viable use. If the regulatory body has not established an economically viable use, then a
4 regulatory taking has occurred.

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6 **VI. DECISION**

7 **(One-quarter acre parcel, Whatcom County tax parcel No. 4004290713850000)**

8 53) As to the plaintiffs' quarter acre parcel, they have established a regulatory
9 taking. This happened on December 1, 2003 when their request for a variance to build a
10 residence was denied by the defendant.


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14 DATED THIS 5 day of ^{November}~~July~~, 2009

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17 _____
18 Judge Charles R. Snyder

19 Presented by:

Copy Received; Approved for Entry:

20 **TARIO & ASSOCIATES, P.S.**

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23 _____
24 THOMAS H. FRYER, WSBA #22955
25 Attorney for Defendant

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By: 
KIP DUNLAP, Plaintiff Pro Se

FINDINGS OF FACTS; CONCLUSIONS OF
LAW; AND DECISION