IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EVERGREEN TRAILS, INC., d/b/a GRAYLINE OF SEATTLE,	)	No. 64428-9-I
Appellant,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
KING COUNTY,	)	
Respondent.	)	FILED: August 23, 2010

Grosse, J. — A company that holds a certificate of public convenience and necessity from the Washington Utilities and Transportation Commission (WUTC) is entitled to statutory compensation when a metropolitan municipal corporation extends its transportation service into its service area. But here, there was no such extension. Evergreen Trails, Inc. (Evergreen) operated a unique bus service between select downtown hotels and the airport while the municipal entity continued to operate an already existing mass transit route to the airport. The summary judgment dismissal is affirmed.

FACTS

In the early 1920s, private carriers provided the bus transportation in King County and the city of Seattle. These commercial carriers were subject to state regulation and were required to obtain certificates of public convenience and necessity under the Transportation by Motor Vehicles Act of 1921 (1921 Act).[1] In that same year, the Public Service Commission, the regulatory agency under

[1] Laws of 1921, ch. 111, §§ 1(c), 4; ch. 81.68 RCW.

the 1921 Act, issued certificate 16 to the Seattle-Tacoma Union Stage Line, authorizing its preexisting dual-route service between Seattle and the area that is now Seattle-Tacoma International Airport. In 1923, the dual-route authorization was given to Park Auto Transportation Company (Park Auto), the owner of certificate 208. On July 28, 1926, Park Auto acquired certificate 16 which merged with certificate 208. That same year Park Auto changed its name to North Coast Transportation Company (North Coast); certificate 16 was reissued to reflect the change.

In 1944, the airport was completed and North Coast provided bus transportation between downtown Seattle and the airport. North Coast sold its certificate 16 to Greyhound in 1948. Greyhound provided the mass transportation between Seattle and the airport via Route 11, until it sold its certificate to Overlake Transit (Overlake) (the owner of certificate 484). Upon receiving Overlake's assurance that it would adopt all of Greyhound's local routes and services, including Route 11, the WUTC approved the sale, stating:

> No other common carrier has authority issued from this Commission to engage in the type of transportation here being considered along the involved routes.

Certificate 16 was then merged into Overlake's certificate 484. Overlake itself eventually merged with two other bus companies to become the Metropolitan Transit Corporation (Metropolitan). Metropolitan operated Route 7 from downtown Seattle to the airport. Route 7 had limited stops and boasted fast service with travel times of 30 to 34 minutes.[2]

[2] Route 7 served downtown Seattle, the SODO district, Boeing Field, and

In the 1970s, Metropolitan faced bankruptcy because of low ridership. In 1972, King County voters authorized the Municipality of Metropolitan Seattle (Metro) to buy Metropolitan and operate the county's mass transit bus system. The WUTC authorized the transfer of Metropolitan's certificate 484 and all of its operations and assets to Metro.

In 1983, Metro added a second route, Route 191, between downtown Seattle and the airport. In 1986, the route number changed to 194. In 2003, Metro added some weekday runs to Route 194 and shortened the time on some runs by reducing stops. Route 194 terminated in February 2010 with the advent of Sound Transit's light rail service from downtown to the airport.

Meanwhile in 1946, Gray Line Tours (Gray Line) sought a certificate of public convenience and necessity to overlap North Coast's service between Seattle and the airport with its proposal to operate an "upscale" service between certain downtown hotels and the airport. North Coast appeared at the hearing, and did not oppose the certificate so long as Gray Line was prohibited from offering mass transit. After a specific finding that some airline passengers required deluxe ground transportation and would not use the ordinary buses, the Washington State Department of Transportation (Department) issued Gray Line a certificate of convenience and necessity, but limited that certificate to the transportation of airline passengers and flight crews between the airport and hotels and airline offices in downtown Seattle at rates substantially higher than the fares of regular common carriers. In March 1947, the Department issued

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Riverton Heights before arriving at the airport.

Gray Line partners an overlapping certificate that restricted their service as agreed:

> Service hereunder is expressly limited to the transportation of airline passengers and flight crews . . . between Seattle-Tacoma Airport on the one hand and hotels and airline offices in Seattle and Tacoma on the other hand, at rates substantially higher than the fares of regular common carriers.

Gray Line eventually ceased operation and sold its certificate to the Port of Seattle (Port), which then issued the certificate to Western Tours. In 1965, Western Tours obtained a new certificate of public convenience and necessity containing the same restrictions as the earlier Gray Line certificate.

Evergreen commenced airport-to-downtown transportation service in 1984 without a permit, initially mimicking Metro's airport bus route. Metro, the Port, and the WUTC sued Evergreen to stop its unpermitted service. While the suit was pending, Evergreen won the Port's concession contract for door-to-door hotel service for an elite class of travelers. Meanwhile, Western Tours was suffering financially and sold its certificate to Evergreen, which in turn agreed to pay 30 percent of its revenue to the Port in exchange for dropping the lawsuit.

Evergreen's buses are equipped very differently than the county's mass transit buses. Their coaches have reclining seats on an elevated seating platform, reading lights, restroom, overhead bins, and under bus luggage storage. The buses stop at eight upscale downtown hotels, making no other stops once they leave the hotels for the airport. The driver loads and unloads the luggage for passengers. Evergreen charges $11 for a one-way trip and $16

for a round trip. Additionally, Evergreen operates a shuttle van service that picks up passengers at 25 other locations and delivers them to one of the hotels for transfer to the airport.

Evergreen brought this suit in 2007, alleging that the county improperly extended its bus service into an area protected under Evergreen's certificate. Evergreen contended that RCW 35.58.240(3) required the county to buy Evergreen's buses and certificate before it expanded its operations. Evergreen also asserts an inverse condemnation claim. The trial court granted summary judgment to the county. Evergreen appealed directly to the Supreme Court, which denied discretionary review and transferred the case to this court.

ANALYSIS

We review summary judgment de novo and engage in the same inquiry as the trial court.[3] Summary judgment is proper if, viewing the facts and reasonable inferences most favorably to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[4]

Statutory Compensation

Evergreen argues that it was entitled to statutory compensation under RCW 35.58.240(3), which provides in pertinent part:

> In the event any metropolitan municipal corporation shall extend its metropolitan transportation function to any area or service already offered by any company holding a certificate of public convenience and necessity from the Washington utilities and transportation commission under RCW 81.68.040, it shall by purchase or condemnation acquire at the fair market value, from the person holding the existing certificate for providing the

[3] Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 547, 167 P.3d 555 (2007).
[4] CR 56(c); Versuslaw, Inc. v. Stoel Rives LLP, 127 Wn. App. 309, 319-20, 111 P.3d 866 (2005).

> services, that portion of the operating authority and equipment representing the services within the area of public operation.

For this statute to apply, Evergreen must prove that the county extended its bus service into Evergreen's area of operation under Evergreen's certificate of public convenience and necessity. The facts here, however, do not warrant such a conclusion. Indeed, the county maintained bus service between downtown and the airport for years before issuing Evergreen its certificate. Moreover, it is clear that the WUTC was granting Evergreen a permit for a different type of service than commuter service to the airport. Evergreen's certificate states:

> The following authority and Limitations was obtained from C-849, Western Tours, Inc. by Order M.V.C. No. 1498.
>
> PASSENGER SERVICE
>
> BETWEEN: Seattle and the Seattle-Tacoma Airport
>
> LIMITATIONS:
> 1. Service hereunder is expressly limited to the transportation of airline passengers and flight crews between Seattle-Tacoma Airport on the one hand, and hotels and air and water and ground transportation offices and facilities in Seattle on the other hand, at rates substantially higher than the fares of regular common carriers.
> 2. No express service may be rendered hereunder except in the carrying of baggage and excess baggage of passengers and flight crews.
> 3. No service may be rendered hereunder from, to or between intermediate points.

Evergreen's assertion that the county's improvement in Route 194's service to the airport impinged on Evergreen's territory does not withstand scrutiny. Gray Line (who owned the certificate before transferring it to Evergreen) obtained that certificate with these same limitations after a hearing in which the Department

found a public need for a limited, upscale service to the airport in addition to the mass transportation which was already being offered by North Coast, Metro's precursor. Hence, Evergreen's operation co-existed with the mass transportation.

Evergreen asserts that Metro "extended" its service in 2003 when it added additional buses during the day and changed its schedule during the early morning and midday, having the buses return to Seattle from the airport without continuing all the way to Federal Way. This is nothing more than a scheduling change to an already existing route.

Inverse Condemnation Claim

Evergreen argues that the 2003 changes the county made to Route 194's schedule to the airport constituted an inverse condemnation of Evergreen's property. We disagree.

Article I, section 16 of the Washington State Constitution prohibits the taking or damaging of private property without just compensation. Inverse condemnation is an action alleging a governmental taking where the plaintiff seeks to recover the value of the property that has been appropriated in fact without formal exercise of eminent domain.[5] But there can be no inverse condemnation without a concomitant right to that property.[6]

To establish inverse condemnation, Evergreen must demonstrate the following elements: (1) taking or damaging (2) private property (3) for public use

[5] Dickgieser v. State, 153 Wn.2d 530, 534-35, 105 P.3d 26 (2005).
[6] Galvis v. State, Dep't of Transp., 140 Wn. App. 693, 167 P.3d 587 (2007).

(4) without just compensation (5) by a governmental entity that has not instituted formal condemnation proceedings.[7] This Evergreen cannot do. Evergreen cannot prove that the county extended its service into Evergreen's protected service area.

The fact that Evergreen's profits are impaired is not sufficient to establish a taking. In Pierce v. Northeast Lake Washington Sewer and Water District,[8] the utility district constructed a water tank 30 feet high on its own property. The unsightly tank impaired the mountain view from a home located 50 feet away. The homeowners alleged the presence of the tank lowered their property value and sued for inverse condemnation. Their claim was properly dismissed. Our constitution does not authorize compensation merely for depreciation in market value that is caused by a legal act.[9]

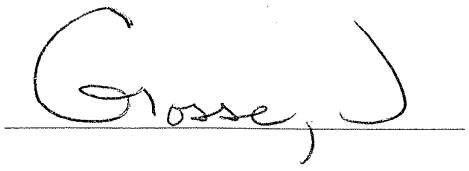
Here, Evergreen's arguments are premised on a property interest that exists solely on the basis of its certificate and is clearly limited by that certificate. Since Evergreen cannot succeed in its statutory claim, it is equally true that no property right exists for it to claim inverse condemnation. Evergreen did not acquire any greater rights under its certificate. Thus, without succeeding in its statutory action, Evergreen has no interest. As noted in Clear Channel Outdoor v. Seattle Popular Monorail Authority, "in order to be a protected property interest, the interest must be something more than a mere unilateral expectation

[7] Dickgieser, 153 Wn.2d at 535.
[8] 123 Wn.2d 550, 870 P.2d 305 (1994).
[9] Pierce, 123 Wn.2d at 562.

of continued rights or benefits."[10] Evergreen's profits from its exclusive airporter service is not a benefit which is compensable under these facts.

Evergreen relies on Delmarva Power & Light Company v. City of Seaford[11] to support its position. The Delmarva court held that the power utility had acquired a non-exclusive franchise to provide elective service in the Seaford area. That franchise was combined with a government issued certificate of need and the combination "constitute[d] a property right as to [income and profits derived from] customers served," which cannot be taken without compensation.[12] But Metro did not usurp Evergreen's routes. It does not provide the same service that Evergreen does—upscale service at higher costs than mass transit.

Evergreen never had a right to provide mass transportation to the airport, thus the property right it claims was injured did not exist. The changes implemented by the county merely shortened some runs midday (excluding stops on southern route to Federal Way) and increased the frequency of trips. Accordingly, we affirm the summary judgment dismissal.



WE CONCUR:

[10] 136 Wn. App. 781, 784,150 P.3d 649 (2007).
[11] 575 A.2d 1089 (Del., 1990).
[12] Delmarva, 575 A.2d at 1098-99.

Spearman, J.

Leach, A.C.J.