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No. 71827-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF BELLEVUE,
a Washington municipal corporation,

Plaintiff-Respondent,

v.

PINE FOREST PROPERTIES, INC.,
a Washington corporation,

Defendant-Appellant

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE WILLIAM DOWNING

BRIEF OF APPELLANT PINE FOREST PROPERTIES, INC.

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I. INTRODUCTION

The trial court entered an order of public use and necessity authorizing respondent City of Bellevue to exercise the power of eminent domain over all of Pine Forest Property, Inc.'s property (the "Property") despite the fact that the City admitted it only permanently needs and will use roughly two-thirds of the Property. The City's public use of two-thirds of the Property consists of construction of a City roadway and, by agreement with Sound Transit, transfer of a portion to Sound Transit for construction of a portion of its East Link light rail system. That is not in dispute. This appeal arises from the fact that the City has no permanent use for, but has been empowered by the trial court to permanently take, the remaining one-third of the Property.

The City conceded, and the trial court found that both the City and Sound Transit will only temporarily use the remaining, southeastern one-third of the Property for construction staging for rail and roadway projects. At the conclusion of the Sound Transit and City projects, that parcel will be subject to private Transit Oriented Development ("TOD"), and is referred to as the "TOD Parcel." But based on the City's contention that unquantified "transaction costs" made the temporary acquisition of the TOD

Parcel impractical, and disregarding Pine Forest's express guarantee that Pine Forest assumes the risk of any such future costs, the trial court entered an order finding that a permanent taking of the entire Property in fee is a necessary public use.

Washington's Constitution, Art. I, § 16, requires this Court to closely scrutinize the government's attempt to take private property for an asserted public use. Because no authority supports the City's permanent taking of private property for a temporary use, and eventual sale for permanent private use, Pine Forest appeals.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Determining Public Use and Necessity, and the underscored portions of the following Findings of Fact and Conclusions of Law reproduced in Appendix A: FF 8, 9, 10, 11, 15 (CP 448-48, 51); CL 11, 12, 14, 15, 16, 17, 18, and 20 (CP 452-54).

2. The trial court erred in denying Pine Forest discovery to establish that the City intended a future private use of Pine Forest's TOD Parcel and to test the City's assertion that possible future transaction costs associated with extending a temporary use

could justify its permanent take of TOD Parcel in fee. (CL 17, CP 453)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the City satisfy its burden of justifying a permanent take of the TOD Parcel in fee when it is undisputed that neither the City nor Sound Transit will ever put the TOD Parcel to a permanent public use, Pine Forest has stipulated to the City's and Sound Transit's temporary use of the TOD parcel, and Pine Forest has guaranteed that the total lease value of the TOD Parcel, under any circumstances and over any period of time, will be 13% less than the total amount the City will spend acquiring the TOD Parcel in fee?

2. Did the trial court err in denying Pine Forest its right to conduct discovery concerning the City's allegations that additional "transaction costs" supported its decision to permanently take Pine Forest's TOD Parcel in fee?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

1. **The City sought to permanently take Pine Forest's 80,000 sq. ft. TOD parcel for the temporary public use of providing construction staging for Sound Transit's east link light rail and its own road extension project.**

Pine Forest owns approximately 240,000 square feet of real property, including improvements, in the Bel-Red area of Bellevue (the "Property"). (CP 2, 269-70; CP 448-49, FF 9, 12) The City needs a portion of the Property to build an extension of NE 15th Street and it entered into a Memorandum of Understanding (the "MOU") with Sound Transit to aid Sound Transit's construction of its East Link light rail project. (CP 184-235) The trial court found that the MOU authorized the City "to acquire the Property for Sound Transit's use for construction staging of the East Link Project, which is expected to continue for as long as eight years or longer, and for construction of a permanent fixed guideway system." (CP 446, FF 3)

The Property sits at the crossroads of Sound Transit's and the City's transit and transportation projects. Sound Transit plans to build tracks across a portion of the Property to serve a new light rail passenger station directly east of and across 120th NE from the

Property. That new station will be built within the Spring District, a private, City-approved, 5 million square foot Master Development Plan (“MDP”) of mixed Transit Oriented Development (“TOD”) uses that is already under construction. (CP 287) The City plans to improve transportation throughout the Bel-Red area by extending NE 15th, an east-west arterial, across the Pine Forest Property to feed directly into the Spring District development at the 120th NE intersection. (CP 288; CP 447 FF 5) The City has not finished its design of the NE 15th extension but it has confirmed the location of NE 15th's intersection with 120th NE. (CP 288; CP 447, FF 5) The City has also acknowledged the obvious need for NE 15th to be elevated across Sound Transit's tracks. (CP 313, 392-404)

Pine Forest stipulated to the existence of public use and necessity for the City's take of approximately two-thirds of the Property that will be necessary for Sound Transit's construction of its East Link Light rail and the City's extension of NE 15th. (CP CP 448, FF 7) The trial court confirmed that the City and Sound Transit had “a permanent need for approximately two-thirds of the total area of the Property, or approximately 160,000 square feet out of a total of approximately 240,000 square feet ”and only a temporary need for the remaining 80,000 square feet (the TOD

Parcel), for an undefined “long-term” period of time. (CP 448-49, FF 9, 10)

Pine Forest objected to the City’s attempt to permanently take the TOD Parcel for construction staging for both Sound Transit’s and the City’s construction projects. The TOD Parcel is located west of Sound Transit’s guideway right of way and south of the City’s NE 15th extension. The respective locations of these two portions of the Property are reflected in the schematic attached as Appendix B. (CP 409) The topography of the Property, the necessary location of Sound Transit’s future track across the western and northern portions of the Property, and the location of the City’s future roadway both bisecting the Property and elevated above Sound Transit’s tracks all guarantee that there will never be a permanent public use for the southeastern one-third of the Property. (CP 312-13, 342-43, 392-404) The City’s own plans confirm that its use of the TOD Parcel will never be permanent. (CP 392-97) Rather, the TOD Parcel will serve only as a temporary construction and staging site while Sound Transit constructs its railway and the City constructs its roadway over those tracks before Sound Transit’s rail goes “live.” (CP 313)

2. Encouraged by the City's and Sound Transit's regulations favoring Transit Oriented Development, Pine Forest has included the TOD parcel in a TOD Master Development Plan.

Pine Forest has dedicated the TOD Parcel for development in conformity with Sound Transit's and the City's strong policies encouraging Transit Oriented Development. (CP 129-31, 287-88, 314) Under City regulations, the Spring District is identified as a Catalyst Project, a large, special project intended to lead the transformation of the City's Bel-Red Subarea from low rise light industrial and warehouse uses to a new major residential, commercial and retail mixed use, walkable urban part of the City. (CP 129-31, 287)

In reliance on the City's and Sound Transit's policies and regulations favoring Transit Oriented Development, Pine Forest has invested years of work and over a half-million dollars in submitting to the City a proposed Pine Forest TOD Master Development Plan. (CP 287, 311-12) The Pine Forest TOD Master Development Plan includes the TOD Parcel that the City wishes to take, as well as Pine Forest's adjoining property. Pine Forest has proposed a total of 1.16 million square feet of mixed commercial and residential use immediately adjacent to the Spring District. (CP 318-86) The City

has engaged the public and its Staff in reviewing this project, and confirmed in May 2013 that Pine Forest's TOD Master Development Plan, which includes the 80,000 square foot TOD Parcel, is complete. (CP 387) Pine Forest's TOD Master Development Plan is the last eligible Catalyst Project in the City.

3. Sound Transit and the City, through testimony, project plans and schedules, have confirmed that the TOD Parcel will not serve any public use once Sound Transit's tracks "go live," and the TOD Parcel is no longer needed for construction staging.

The TOD Parcel will be used only temporarily for "construction staging" by both Sound Transit and the City only for "as long as eight years." (CP 130) Sound Transit has committed to opening its Spring District Station by 2022 or 2023 and so it will be done with the construction of its tracks and finished with its use of the TOD Parcel for temporary construction purposes by 2020-21. (CP 313) Because the NE 15th extension must be elevated over ST's tracks, the City must finish its construction of the NE 15th extension by 2022 or 2023, when Sound Transit trains will begin using the tracks. (CP 313) If it does not, the City's costs and project timeline will increase dramatically as it will have to work limited periods, at night, when Sound Transit trains are not using the tracks. (CP 313)

Thus, although the trial court found that the City's use of the TOD Parcel may "possibly" extend to 2030, (CP 446, FF 9) in fact, the City must construct the NE 15th extension before Sound Transit begins using its tracks in 2022 or 2023 to avoid the limits and expenses of building over a "live" light rail system.

4. Contrary to the City's contentions and the trial court's findings, nothing in the MOU requires the City to permanently take the TOD Parcel.

The trial court accurately found that the MOU authorized the City "to acquire the [TOD Parcel] for Sound Transit's use for construction staging of the East Link Project, which is expected to continue for as long as eight years or longer, and for construction of a permanent fixed guideway system." (CP 446, FF 3) However, nothing in the MOU requires the City to permanently take the TOD Parcel in fee.

The MOU states only that the City must "purchase" the Pine Forest Property "prior to construction." (CP 221) The City confirmed this means only that it must "ensure the Property is vacant and deliver the Property to Sound Transit no later than June 2015." (CP 130) The City is not obligated by the MOU to acquire the entire Pine Forest Property in fee. Sound Transit confirmed in the trial court that, though there may be minor variations in its

schedule, it needs the TOD Parcel only temporarily. (CP 440) The City has similarly confirmed, and the trial court found, the City needs the TOD Parcel only temporarily. (CP 132; FF 9) The City will satisfy its own and any MOU obligations by purchasing what it and Sound Transit have confirmed they need: a temporary construction easement.

5. The City's fears of future "not precisely quantifiable" costs is baseless given Pine Forest guarantee that the City will pay 13% less for a temporary take of the TOD Parcel than the City would pay if it permanently took the TOD Parcel.

As described in Pine Forest's February 18, 2014 letter to the City, Pine Forest guaranteed that the City will pay 13% less for a permanent take of the property needed for Sound Transit's and the City's rights of way and a temporary take of the TOD Parcel than it will if it takes the fee interest in the entire Pine Forest Property. (Exhibit 1) Under either the City's or Pine Forest's current valuations of the property, that represents a guaranteed savings to the City of over \$2.5 million.

The City conclusorily stated that "it has determined that it would be more cost effective to acquire the Property in fee simple," because "the possibility remains that the duration of the temporary

use could be much longer” than ten years. (CP 434) The trial court did not mention Pine Forest’s guarantee, instead referring only to “Pine Forest’s proposal regarding how the City and Sound Transit could coordinate their projects with Pine Forest’s Transit-Oriented-Development plans.” (CP 448-49, FF 10) The trial court stated that the City had considered undefined and “not precisely quantifiable” “transaction costs associated with taking only a temporary interest in a portion of the Property,” (CP 449, FF 11), finding that “the City reasonably determined that it would be considerably more cost effective to acquire the Property in fee simple than to agree with Pine Forest’s proposal.” (CP 448-49, FF 10)

B. Procedural History.

The City filed its condemnation Petition, seeking a permanent take of the entire Property, on October 18, 2013. (CP 1-96) The trial court’s case schedule set a deadline for the City’s filing a Notice for a public use and necessity hearing of December 2, 2013, a discovery cut off of April 28, 2014, and a trial date of June 16, 2014. (Sub. No. 2, Supp. CP ____)

The parties engaged in early mediation and, to ensure they were able to concentrate on mediation without the cost and distraction of formal litigation, they agreed to amend the case

schedule twice, to extend the public use and necessity and jury demand deadlines. (CP 97- 111, CP 112- 26) The parties' early mediation attempts were not successful, and pursuant to the amended case schedule, the City filed its Motion for an Order Determining Public Use and Necessity on January 21, 2014. (CP 236-60) The trial court found that Pine Forest "has not identified material evidence that would be obtained through discovery" and denied Pine Forest the right to complete discovery that was already underway. (CP 451, FF 15; CP 453, CL 17)

After the completion of briefing, the trial court heard oral argument on March 7, 2014, and issued its Findings of Fact, Conclusions of Law, and Order Determining Public Use and Necessity on March 18, 2014. (CP 445-55) Pine Forest timely appealed. (Sub. No. 37, Supp. CP ____)

V. ARGUMENT

A. **Standard of Review: Because Art. 1., §16 mandates that the issue of public use "shall be a judicial question," this Court's review is de novo.**

Article I, Section 16, of the Washington Constitution expressly delegates to the judiciary the determination of whether a governmental taking is for a public use" "[W]hether 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.” Wash. Const., Art. I, § 16. *See also* RCW 8.12.090 (“Whenever an attempt is made to take private property, for a use alleged to be public under authority of this chapter, the question whether the contemplated use be really public shall be a judicial question.”). The burden of establishing a public use “is on the condemnor.” *Yakima Cnty. v. Evans*, 135 Wn. App. 212, 218, 143 P.3d 891 (2006). This Court reviews as a question of law, the City’s assertion that its permanent taking of Pine Forest’s fee interest in the TOD parcel is for a public use. *See Wallace v. Lewis Cnty.*, 134 Wn. App. 1, 24, 137 P.3d 101 (2006) (“Whether a government action is ‘for public use’ is a judicial question of law.”).

By contrast, courts defer to the governmental determination of whether a particular property is necessary for a public purpose, as it is a legislative question. Thus, the government’s decision to acquire a specific parcel rather than an alternative parcel is conclusive unless arbitrary, capricious or the product of actual or “constructive” fraud, which exists “if the public use was merely a pretext to effectuate a private use on the condemned lands.” *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 823, 966 P.2d 1252 (1998). *See City of Blaine v.*

Feldstein, 129 Wn. App. 73, 81, 117 P.3d 1169, 1173 (2005) (addressing “whether the City acted arbitrarily and capriciously, amounting to constructive fraud, in determining that condemning Feldstein's property was necessary.”).

For purposes of appellate review of the trial court’s decision, this Court should review the trial court’s findings of fact supporting its order of public use and necessity de novo because it heard no live testimony and entered its findings based on a documentary record. While generally findings of fact are reviewed for substantial evidence, that rule does not apply where, as here, the trial court “relies exclusively on affidavits, declarations, and other documents.” *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, 300 P.3d 799 (2013). Where, as here, “the record consists entirely of written materials and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of a witness, weigh evidence, nor reconcile conflicting evidence, then an appellate court stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.” *Gronquist v. Dep’t of Corrections*, 159 Wn. App. 576, 590, ¶ 29, 247 P.3d 436 (citing *Progressive Animal Welfare Soc. v. University of Washington*, 125

Wn.2d 243, 252, 884 P.2d 592 (1994)), *rev. denied*, 171 Wn.2d 1023 (2011).

B. The City’s attempt to permanently take the TOD Parcel is neither a public use nor is it necessary.

The City failed in its the burden of demonstrating both that the condemnation of the TOD Parcel is for a public use and that it is necessary for that public use. *See State ex rel. Sternoff v. Superior Court for King County*, 52 Wn.2d 282, 325 P.2d 300 (1958). Washington’s constitutional takings clause, Art. I § 16, is interpreted much more narrowly than its federal counterpart, requiring this Court to resolve as a “judicial question” the City’s assertion that it must permanently take the TOD Parcel for a public use. *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 359, 13 P.3d 183 (2000). A “public use” must be “either a use by the public, or by some agency which is quasi-public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.” *Healy Lumber Co. v. Morris*, 33 Wash. 490, 509, 74 Pac. 681 (1903).

Courts review the government’s declaration of necessity under a more deferential arbitrary and capricious standard. *City of Des Moines v. Hemenway*, 73 Wn.2d 130, 139, 437 P.2d 171 (1968)

(citing *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965)). Here the trial court erred in relying on the self-evident proposition that “public transportation is a public use justifying condemnation” and the City’s unfounded financial concerns to authorize the condemnation of property in fee that will be put to public use only temporarily. Because there will never be a *permanent* public use, the TOD Parcel must be sold by the City for private development in the near future, when its temporary use of the property ceases. Even if *temporary* public use of the property supports condemnation, the trial court’s finding that a *permanent* take of the TOD parcel is necessary was supported only by conclusory statements, which were refuted by uncontradicted evidence, and is therefore, by definition, arbitrary and capricious, or as the cases define the term, the result of “constructive fraud.” This Court should reverse.

1. The City’s permanent take of a temporary construction easement is not a public use.

It is undisputed that the City is not acquiring the TOD Parcel for any permanent public use. NE 15th must be elevated over Sound Transit’s tracks. Although the TOD Parcel will be used by both Sound Transit and the City for construction and construction

staging, no permanent public use will or can be made of the TOD Parcel. The trial court lacked a factual basis to authorize a permanent taking of the TOD Parcel. This Court should hold that the City has failed to satisfy its burden of establishing a public use.

The court's non-deferential determination of public use is defined by our state constitution:

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.

Washington State Constitution, Art. I, Section 16. "Although the legislature (or a properly empowered agency) may declare that a particular use of a property is a 'public use,' that determination is not dispositive." *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005) (quoting *Dickgieser v. State*, 153 Wn.2d 530, 535-36, 105 P.3d 26, (2005)). And "Public Use" must be more than mere beneficial use. *In re Petition of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) (the Westlake case).

The Supreme Court, in the *Convention Center* case, outlined the constitutional test of public use this court and every Washington court must apply:

Article I, section 16 prohibits the taking of private property for private use. Thus, this court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. The relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish the purely public component of the project. If the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental.

State ex rel. Wash. Convention & Trade Ctr. v. Evans, 136 Wn.2d at 822.

This principle — that “no greater estate or interest should be taken than reasonably satisfies the needs of the particular public use contemplated” — has been repeatedly and unequivocally confirmed, as the law of our State. *City of Seattle v. Faussett*, 123 Wash. 613, 617-18, 212 Pac. 1085 (1923); *State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack*, 53 Wn.2d 55, 63-64, 330 P.2d 567 (1958) (“If an attempt is made to take more property than is reasonably necessary to accomplish the purpose, then the taking of excess property is no longer a public use, and a certificate of public use and

necessity must be denied.”). See also 9 *Nichols On Eminent Domain* § 32.05 (3d ed. 2005); *City of Pullman v. Glover*, 73 Wn.2d 592, 595, 439 P.2d 975 (1968) (“[T]he extent of the taking may be no greater than is reasonably necessary for the stated public purpose.”); *Neitzel v. Spokane Int’l Ry. Co.*, 65 Wn. 100, 105, 117 P. 864 (1911) (“Courts in construing statutes which grant the power, and authorize the taking of a certain estate or interest, enforce the rule of strict construction, permitting no greater title or interest to vest than has been expressly authorized or may be necessary to the contemplated public use.”); *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959) (“no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity.”); *State ex rel. Eastvold v. Superior Court for Snohomish County*, 48 Wn.2d 417, 294 P.2d 418 (1956); *City of Tacoma v. Humble Oil & Ref. Co.*, 57 Wn.2d 257, 356 P.2d 586 (1960)(restating this “universal rule”). See generally, Stoebuck and Weaver, 17 *Wash. Practice*, § 9.20 (2nd Ed. 2004 & 2014 Supp.). Thus, “[i]f an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay more than it needs.” *Faussett*, 123 Wash. at 618.

It is also axiomatic that the City may not exercise its eminent domain power as “a pretext to effectuate a private use on condemned lands.” *Convention Center*, 136 Wn.2d at 823. “Where the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use.” *Petition of City of Seattle*, 96 Wn.2d 616, 627-28, 638 P.2d 549 (1981) (“first *Westlake* case.”). In the first *Westlake* case, the Court rejected the City’s attempt to condemn property, a substantial portion of which was intended for private retail development.

Here, in the absence of any permanent public use (and no basis to claim that acquiring a temporary use will be less expensive), the only reasonable explanation for why the City wants to take the TOD Parcel in fee is so it can use public funds to acquire private property, speculate upon the value of the TOD Parcel, and sell it at a profit to a private party (and deprive the current property owner of that profit) when its temporary public use has come to an end. Land speculation is not a necessary public use.

In authorizing a permanent taking where only a temporary public use was required, the trial court disregarded these fundamental principles, accepting the City’s argument that the *HTK*

Management, L.L.C. v. Seattle Popular Monorail Authority, 155 Wn.2d 612, 121 P.3d 1166 (2005) authorized a permanent take of the TOD Parcel based on a permanent public use that was at best speculative. In that case, however, the Seattle Monorail Project or “SMP” presented evidence of both permanent uses and an economically-sound basis for a permanent take that simply do not exist here.

The *Monorail* Court approved a permanent take of the “Sinking Ship Garage” parcel between 1st and 2nd Avenues and Yesler and James Streets in Seattle only after reviewing testimony and Monorail policy, planning and budget documents confirming that the portion of the property that would not be used to permanently house a train station may later be “used for loading and unloading passengers from paratransit vehicles, taxis and tour buses,” 155 Wn.2d at 620, and “as a park” and “not developed separately due to the ongoing need for access” to the station. 155 Wn.2d at 636-37. The Court reviewed “proposed station designs [that] include[d] plans encompassing the entire parcel.” 155 Wn.2d at 637. Based upon the significant evidence before it, developed through the course of conventional discovery, the Court found that “[t]he surrounding land may need to be owned permanently by the

condemning authority due to the particular traffic patterns of monorail stations.” 155 Wn.2d at 633.

The Court separately considered “[t]estimony as to fair market value” and SMP board determinations that, “[g]iven the cost of this undisputed need of indefinite length and the permanent need for at least a significant portion of the property . . ., the cost of the construction easement could easily eclipse the cost of a fee interest.” 155 Wn.2d at 637 (emphasis added). It also found that SMP “may need all of [the property] indefinitely.” 155 Wn.2d at 638. Because of the economic uncertainty of indeterminate future temporary construction easement lease payments and the fact that the government contemplated several possible future permanent public uses for that portion of the property that would not be used to house the monorail station the Court found a public use and confirmed necessity.

Those specific findings of permanent use do not exist here, nor could they on this record. Given all of the undisputed topographic conditions and future rail and roadway uses of the TOD Parcel, the City cannot show any future, permanent public use for the TOD Parcel. Further, Pine Forest has guaranteed a 13% discount if the City purchases in fee the two-thirds of the property

needed for a permanent public use and temporarily takes the TOD Parcel it needs only temporarily, without an obligation to pay more regardless of how long the City's and Sound Transit's temporary use may last. Its guarantee ensures that, unlike the *Monorail* case, the cost of the construction easement will never "eclipse the cost of a fee interest." The trial court's conclusory findings that transportation is a public use and that the City "reasonably considered the relative cost of a complete take as compared to a temporary construction easement" for the TOD Parcel do not and cannot satisfy the City's burden of proving that a permanent take of the TOD Parcel is a public use.

Because the question of public use is a judicial question, this Court should hold that the trial court erred in finding that a permanent take of the TOD Parcel, that will eventually be put to a private use, is a public use. This Court must act "without regard to any legislative assertion that the use is public," Wash. Const., Art. I, § 16, consider the absence of any evidence to satisfy the City's burden of proof to establish that a permanent take of the TOD Parcel is for a public use, and reverse the trial court.

2. The City's permanent take of a temporary construction easement is not necessary.

The trial court erred as a matter of law in concluding that “the type and extent of property interest” that the City seeks to condemn “is conclusive,” absent constructive fraud or arbitrary and capricious conduct. (CP 453, CL 14) While Washington Courts apply this standard to the condemnor’s choice of the *location* of a particular property, whether a particular property will be dedicated to permanent or only temporary public is also a judicial public use determination that this Court is obligated to make. (Argument § B.1, *supra*) But even if the condemnor’s discretion extends to taking a permanent interest for temporary use, the City acted arbitrarily and pretextually in permanently taking the TOD parcel in fee in this case.

Arbitrary and capricious conduct has long been defined as “willful and unreasoning [action] and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass'n v. Wash. Utilities and Transp. Comm'n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003) (quoting *Rios v. Dep't of Labor Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) (quoting *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997))). Courts have found a lack of

necessity where condemning authorities have not established a permanent public need for the property. In *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 Pac. 1064 (1923), the Port tried to condemn property in fee despite having no permanent plan for the property. The court found no necessity for the take:

[W]here the grant is of power to acquire only necessary property, there must be a showing that the particular property sought to be acquired is thus necessary, and without some definite stated plan of improvement, this necessity cannot be shown. So here, since there is no such definite plan, it is impossible for the court or anyone to know whether all or what particular part of the property here sought to be condemned is necessary for the use of the port district, and the right of condemnation must fail for this reason.

Port of Everett, 124 Wash. at 494.

Following the City's lead, the trial court sought to distinguish the *Port of Everett* case on the ground that the Port did not have a current need for the property it sought to condemn, but may have had a future use for it, whereas the City here needs the TOD Parcel now despite having no permanent future use for it. (CP 452, CL 11) That is a distinction without a difference. The Court in *Port of Everett* found there was no public necessity because the Port had neither a current use nor a definite permanent future use for the subject property. Here, there is no necessity because "there must be

a showing that the particular property sought to be acquired is thus necessary, *and without some definite stated plan of improvement, this necessity cannot be shown.*" 124 Wash. at 494.

The City has outlined only a current temporary use for the TOD Parcel. It has admitted that it lacks a permanent plan (whether definite or indeterminate) for the TOD Parcel. And the City relied upon financial concerns of long-term lease payments that, because of Pine Forest's guaranteed 13% discount and no-rent temporary construction easement terms, have no basis in reality. Neither the City nor Sound Transit will have any obligation to make any temporary construction easement or other lease payments to Pine Forest, no matter how long the City and Sound Transit use the TOD Parcel. Any financial risk is entirely Pine Forest's. The City merely stated the truism that it does not need the TOD Parcel "forever" and cited a non-existent financial risk. It failed to meet its burden of establishing a public necessity for a permanent take.

The City's position is also completely distinct from the *Convention Center* case. There, the State condemned property encompassing four floors when it would only use the top floor for convention space, and it subsequently sold the lower 3 floors to a private developer. The Supreme Court held that the area to be sold

to and occupied by the private developer was “created due to structural requirements of the [fourth floor] exhibit hall. Because the heavy load exhibit space must be contiguous to the existing exhibit hall, it must be built on the fourth story level. Several floors of surplus space thus will be created out of *architectural necessity*.” *Convention Center*, 136 Wn.2d at 824.

Here, Pine Forest does not contest that the City has the right to take its land under the elevated NE 15th extension. But the City can point to no “architectural necessity” or other necessity that justifies its permanent take of the *adjoining* TOD Parcel. Unlike the State in the *Convention Center* case, the City has not even attempted to claim that there is a potential permanent use for the TOD Parcel.

Arbitrary and capricious conduct is willful and unreasoning action, without consideration and regard for facts or circumstances. Action, when exercised honestly, fairly, and upon due consideration is not arbitrary and capricious, even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

Welcker, supra, 65 Wn.2d at 684-85, 399 P.2d 330 (1965), *citing*, *Lillions v. Gibbs*, 47 Wn.2d 629, 289 P.2d 203 (1955) and *Smith v. Hollenbeck*, 48 Wn.2d 461, 294 P.2d 921 (1956).

The City's attempt to permanently take property for which it has no potential permanent use is arbitrary and capricious. It has intentionally and willfully ignored the distinction between a permanent and a temporary take, and given no consideration to the fact both that there is no possibility of any permanent City or Sound Transit use of the TOD Parcel and that the City is guaranteed to pay 13% less for a temporary construction lease of the TOD Parcel than it would for a permanent, fee take. Without any possibility of a permanent use for the TOD Parcel, without any risk of the cost of a temporary construction easement eclipsing the cost of a permanent take, and with the certainty that the permanent use of the TOD Parcel is purely private, the City arbitrarily and capriciously determined that a permanent take of the TOD Parcel was a necessary, public use.

This Court must fulfill its role as the only possible check on willful disregard of the facts and the limitless exercise of permanent eminent domain power. It should reverse the trial court.

C. The trial court erred in denying discovery into the City's bases for declaring public use and the necessity of permanently taking the TOD Parcel.

The trial court compounded its refusal to closely scrutinize the City's allegations of a permanent public use for Pine Forest's TOD Parcel by denying Pine Forest the discovery that would have tested the City's purported justifications. Parties have a right to engage in discovery, as part of the constitutional command that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. Art. I, § 10:

The right of access to the courts is closely tied to the command in section 10 of our constitution that justice be administered openly. *Id.* The "right of **access** includes the right of **discovery** authorized by the civil rules, subject to the restrictions contained therein."

Lowy v. PeaceHealth, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012), quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782–83, 819 P.2d 370 (1991). While the *regulation* of discovery is vested in the discretion of the trial court, a court necessarily abuses its discretion where its ruling is premised on an error of law or results in the deprivation of a constitutional right. See *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (constitutional right); *Council House Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006) (error of law).

The condemnation statute contemplates discovery on the issue of public use and necessity, “as in other civil cases.” RCW 8.12.090 (“the practice and procedure under this chapter in the superior court and in relation to the taking of appeals and prosecution thereof, shall be the same as in other civil actions”). In the *Monorail* and *Convention Center* cases, the property owners were allowed to conduct discovery into the City’s deliberations that resulted in its decision to permanently take the property at issue. *See also, City of Blaine v. Feldstein*, 129 Wn. App. 73, 77, 117 P.3d 1169 (2005) (trial court entered order of public necessity after trial by affidavit but considered deposition transcripts submitted by parties before issuing its decision). The trial court’s denial of discovery under the Civil Rules prevented Pine Forest from providing definitive evidence that the City’s insistence on a permanent, fee take of the TOD Parcel was economically and practically unfounded and is in fact a pretext for the City to use its power for land speculation, a private, non-public use.

The trial court’s purported justifications for the denial of discovery do not withstand scrutiny. The trial court’s case schedule set the discovery cutoff for April 28, 2014, more than 7 weeks after the March 7, 2014 hearing date on public use and necessity. (Sub.

No. 2, Supp. CP ____) Pine Forest did not immediately engage in discovery until the City turned its back on a negotiated resolution and served on Pine Forest its Motion to Establish Public Use and Necessity on January 19, 2014, requiring Pine Forest's response nine days later on January 28, 2014. More than 30 days prior to the hearing on public use and necessity, Pine Forest propounded detailed written discovery to the City into the City's deliberations regarding its proposed permanent use of the TOD parcel, whether its stated permanent public use was pretextual, and its financial analysis leading to its arbitrary and capricious determination to permanently take the entire Pine Forest Property. (CP 282)

The trial court erred in finding that Pine Forest had failed to identify "any material evidence that would be obtained through discovery." (CP 451, 453, FF 15, CL 17) Neither the City nor the trial court would suffer any prejudice by allowing pending discovery to proceed. At a minimum, this court should remand to the trial court because the trial court's denial of any discovery to Pine Forest prohibited from it developing the record to establish the pretextual nature of the City's assertions that acquiring the fee was more economical due to administrative expenses and transaction costs.

VI. CONCLUSION

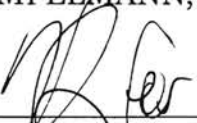
This Court should reverse the trial court's approval of City's permanent take of the TOD Parcel for a temporary public use, which ignores the guaranteed cost of a temporary take, and constitutes an arbitrary and capricious use of the City's condemnation power. The trial court's order fundamentally and unlawfully expands a municipality's eminent domain power in holding that the City need not contemplate any permanent use to justify a permanent take and eventual conversion of private property to a permanent, private use. This Court has a constitutional obligation to independently confirm public use and to critically assess the City's determination of necessity for a permanent taking when only a temporary one will be for public use. It should reverse the trial court's order of public use and necessity as it relates to the TOD Parcel.

Although the City's admissions and Pine Forest's guarantee that a temporary use will not increase the City's acquisition costs provide ample evidence of the lack of public use and necessity and arbitrary and capricious decision-making by the City, at a minimum, this Court should remand to allow Pine Forest to develop a thorough factual record produced through discovery

authorized by the Civil Rules and guaranteed as part of the right of access to the courts.

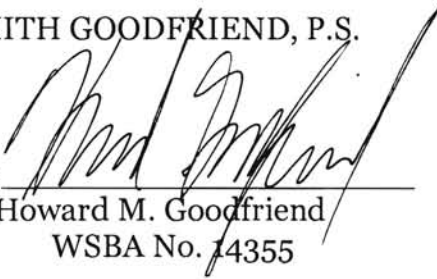
Dated this 23rd day of June, 2014.

CAIRNCROSS &
HEMPELMANN, P.S.

By: 

Stephen P. VanDerhoef
WSBA No. 20088
John W. Hempelman
WSBA No. 1680

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

Attorneys for Appellant Pine Forest, Inc.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 23, 2014, I arranged for service of the foregoing Brief of Appellant Pine Forest Properties, Inc., to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Stephen P. VanDerhoef John Hempelmann Cairncross & Hempelmann 524 Second Avenue, Suite 500 Seattle WA 98104-2323	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Matthew J. Segal Jessica A. Skelton Jamie L. Lisagor Pacifica Law Group LLP 1191 Second Ave., Suite 2100 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Jackson Schmidt Jeffrey M. Odom Pepple Johnson Cantu & Schmidt, PLLC 1000 Second Avenue, Suite 2950 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Bart J. Freedman Thomas H. Wolfendale K&L Gates, LLP 925 Fourth Avenue, Suite 2900 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 23rd day of June, 2014.

V. Vigoren

Victoria K. Vigoren

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUN 25 AM 10:07

HONORABLE WILLIAM DOWNING
Noted for hearing: March 7, 2014
With Oral Argument

MAR 18 2014

SUPERIOR COURT CLERK
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CITY OF BELLEVUE, a Washington
municipal corporation,

Petitioner,

v.

PINE FOREST PROPERTIES, INC., a
Washington corporation; THE
PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a New Jersey
corporation; PRUDENTIAL ASSET
RESOURCES, INC., a Delaware
corporation; SHAREBUILDER
CORPORATION, a Washington
corporation; CLEARWIRE LEGACY,
LLC, a Delaware limited liability
company;

Respondents.

No. 13-2-36105-1 SEA

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER DETERMINING PUBLIC
USE AND NECESSITY

This matter came before the Court on Petitioner the City of Bellevue's ("City's") Motion for an Order Determining Public Use and Necessity ("Motion"). The Court has considered the City's Motion; the Declaration of Rick Logwood in Support of the Motion; Respondent Pine Forest, Inc.'s ("Pine Forest's") Opposition to the City's Motion; the Declaration of Tiffany

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DETERMINING PUBLIC USE AND
NECESSITY - 1

ORIGINAL

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1 Brown; the Declaration of Fred Burnstead; the Declaration of Matt Wickens; the City's Reply in
2 Support of the Motion; the Declaration of Rick Logwood in Support of the City's Reply to the
3 Motion ("Logwood Reply Decl."); the Declaration of Kent Melton in Support of the City's
4 Reply to the Motion; the Declaration of Matthew J. Segal in Support of the Reply to the Motion;
5 Exhibit 1 admitted at the hearing on this matter; the argument of counsel; and the other pleadings
6 and papers on file in this matter. Based on the foregoing, the Court hereby makes the following
7 findings of fact and conclusions of law:
8

9 **I. FINDINGS OF FACT**

10 1. The property ("Property") that the City will take is located in King County,
11 Washington, and is described in **Exhibit A** to the Petition in Eminent Domain ("Petition").

12 2. On November 4, 2008, voters in the central Puget Sound region approved a
13 proposal by the Central Puget Sound Regional Transit Authority ("Sound Transit") to improve
14 and expand transit in the region, including expansion of the existing light rail system to Mercer
15 Island, South Bellevue, downtown Bellevue, Bel-Red, and Overlake ("East Link Project").

16 3. In conjunction with Sound Transit, the City determined that construction of a light
17 rail tunnel through downtown Bellevue would benefit both the City's and Sound Transit's
18 constituents. To further their common interests in constructing the East Link Project, including
19 ensuring that construction of a light rail tunnel is financially feasible, the City and Sound Transit
20 entered into an interlocal agreement, the Umbrella Memorandum of Understanding for
21 Intergovernmental Cooperation Between the City of Bellevue and the Central Puget Sound
22 Regional Transit Authority for the East Link Project ("Memorandum of Understanding"), to
23 further the construction of the East Link Project. In the Memorandum of Understanding, the
24 City agreed, among other things, to acquire the Property for Sound Transit's use for construction
25

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DETERMINING PUBLIC USE AND
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1 staging of the East Link Project, which is expected to continue for as long as eight years or
2 longer, and for construction of a permanent fixed guideway system.

3 4. The East Link Project is necessary to preserve the City's neighborhoods, to
4 provide mobility in and out of downtown Bellevue, and to support economic growth and
5 development. The construction of a light rail tunnel through downtown Bellevue, in particular,
6 will avoid additional congestion on downtown streets and impacts to the homes and businesses in
7 the neighborhood. The tunnel also will maximize the ability of the light rail system to meet
8 long-term regional transportation needs and increase run-time predictability and light rail
9 operation performance.

10
11 5. The City also needs the Property for independent transportation purposes. The
12 City plans to construct a new road extending NE 15th Street between 116th Avenue NE and
13 120th Avenue NE, with two lanes in each direction and turn pockets or a center turn lane where
14 necessary, a separated multi-purpose path along the north side, a sidewalk along the south side,
15 and other infrastructure as needed; and to widen 120th Avenue NE between NE 12th Street and
16 Northup Way, including expansion of the roadway to five lanes, with two lanes in each direction
17 and turn pockets or a center turn lane, intersection improvements to accommodate the extension
18 of NE 15th Street, bike lanes, sidewalks, and other infrastructure as needed ("Bel-Red
19 Transportation Improvements" or "Improvements").

20
21
22 6. The Bel-Red Transportation Improvements are a critical component of the City's
23 long-term strategic plan to encourage and facilitate concentrated growth in a series of mixed-use,
24 pedestrian-friendly, and transit-oriented development nodes around anticipated light rail stations
25 in Bel-Red, which is a major employment area in the City. The Improvements are necessary to
improve access, circulation, and mobility options for passenger cars, transit, freight, pedestrians,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DETERMINING PUBLIC USE AND
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1 and bicycles to and between downtown Bellevue, Wilburton, and the new Bel-Red transit-
2 oriented development nodes and to mitigate impacts on adjoining areas in an environmentally
3 sustainable manner.

4 7. Pine Forest has stipulated to the existence of public use and necessity for the
5 City's acquisition of approximately two-thirds of the Property.
6

7 8. Whether it intended to or not, Pine Forest has not established that the City's
8 determination that it requires the Property in fee simple for the East Link Project and the Bel-Red
9 Transportation Improvements was the result of actual fraud or constructive fraud.

10 9. The City has reasonably determined that it requires the Property in fee simple for
11 the East Link Project and the Bel-Red Transportation Improvements given the permanent need
12 for approximately two-thirds of the total area of the Property, or approximately 160,000 square
13 feet out of a total of approximately 240,000 square feet, and the long-term need to use the
14 remainder of the Property for construction staging, possibly through 2030 and beyond. As Rick
15 Logwood, Capital Projects Manager for the City, testified, "[w]ith significant design, scheduling,
16 and coordination decisions remaining to be made by both Sound Transit and the City with
17 respect to both the East Link and the Bel-Red Transportation Improvements Projects, a fee
18 simple acquisition minimizes complications, and the potential for additional costs." Logwood
19 Reply Decl., ¶ 17.

20
21
22 10. Pine Forest's proposal regarding how the City and Sound Transit could coordinate
23 their projects with Pine Forest's Transit-Oriented-Development plans includes significant
24 limitations. For example, Mr. Logwood testified that the proposal imposes "significant
25 limitations on both Sound Transit's and the City's duration of use of the property" and requires
that "the City agree to separate compensation for the permanent use areas and for the long-term

1 temporary use areas at this early stage before all design decisions defining those areas have been
2 made.” Logwood Reply Decl., ¶ 18. Mr. Logwood further testified that there are “no guarantees
3 that the City will need the temporary use area for only ten years, and in fact, the possibility
4 remains that the duration of temporary use could be much longer.” *Id.*, ¶ 19. Pine Forest’s
5 proposal would also require the City Council to amend its budget for the Bel-Red Transportation
6 Improvement Projects.
7

8 11. The City has also reasonably considered the relative cost of a complete take as
9 compared to a temporary construction easement over any potential remainder of the Property that
10 is not subject to a permanent use following construction of the East Link project and Bel-Red
11 Transportation Improvement projects. In addition to the costs of acquiring the Property, the City
12 also has considered that transaction costs associated with taking only a temporary interest in a
13 portion of the Property and in coordinating the design and development of the City’s projects
14 with Pine Forest’s proposed plans to develop a portion of the Property. Although these costs are
15 not precisely quantifiable, the City reasonably determined that it would be considerably more
16 cost effective to acquire the Property in fee simple than to agree to Pine Forest’s proposal.
17

18 12. So far as they can be ascertained from the public records, the names of every
19 owner, person, or party encumbering, or other person or party interested in, the Property more
20 particularly described in **Exhibit A** to the Petition are as follows:
21

22 a. Pine Forest Properties, Inc. (“Pine Forest”), a Washington corporation, the
23 current title owner of the Property;

24 b. The Prudential Insurance Company of America, a New Jersey corporation,
25 the beneficiary on a Deed of Trust recorded on the Property. The Deed of Trust provides

1 that notice to Prudential should be provided to Prudential Asset Resources, Inc., a
2 Delaware corporation;

3 c. Clearwire Legacy, LLC ("Clearwire"), a Delaware limited liability
4 corporation, a tenant at the Property.¹

5
6 13. Prior to filing the Petition, the City served a Notice of Final Action Authorizing
7 Condemnation Proceedings by certified mail on each and every property owner of record as
8 indicated on the tax rolls of King County to the address provided on such tax rolls, including
9 Pine Forest on August 14, 2013. The City also served a Notice of Relocation Eligibility,
10 Entitlements, and 90-Day Assurance by certified mail on Pine Forest on September 18, 2013,
11 and on Clearwire on October 1, 2013. Additionally, the City published the Notice of Public
12 Meeting Regarding Property Acquisition in the two legal newspapers in King County with the
13 largest circulation in the jurisdiction once per week for two successive weeks before the final
14 action.
15

16 14. The City enacted Ordinance No. 6122 on September 3, 2013, authorizing
17 acquisition of the Property in fee simple, including through eminent domain, and directing that
18 the cost and expense of acquiring said property rights be paid from the Capital Investment
19 Program Plan and from other general funds of the City, including from levy funds, where
20 applicable. The City Council found that the East Link Project, including Sound Transit's use of
21 the Property for construction and staging with related uses, as provided in the Memorandum of
22 Understanding, and the Bel-Red Transportation Improvements, including the use of the Property
23 for construction of the Improvements, are public uses. The City Council also found that the
24
25

¹ Respondent Sharebuilder Corporation, which was a former tenant at the Property, was voluntarily dismissed from this action in a November 22, 2013, agreed order.

1 City's implementation of the Memorandum of Understanding and the construction of the East
2 Link Project, including condemnation of the Property for Sound Transit's use for construction
3 and staging with related uses, and the construction of multi-modal transportation corridors
4 through Bel-Red, including the Bel-Red Transportation Improvements, are necessary and in the
5 best interests of the citizens. Further, the City Council found that condemnation of the Property
6 is necessary both to implement the Memorandum of Understanding in furtherance of the
7 construction of the East Link Project and for the Bel-Red Transportation Improvements.
8

9 15. The parties stipulated to, and the Court granted, two extensions to the public use
10 and necessity deadline in the Case Schedule as the parties were actively engaged in mediation.
11 Pine Forest failed to raise the issue of discovery or make any effort to conduct any discovery
12 prior to filing its Opposition to the Motion. Pine Forest has not offered any justification for this
13 delay or identified material evidence that would be obtained through discovery. Thus, Pine
14 Forest has not acted with due diligence or shown good cause for a continuance. Although
15 mediation efforts have thus far been unsuccessful, the City has committed to continuing
16 discussions as to a resolution upon which all might agree.
17

18 II. CONCLUSIONS OF LAW

19 1. Pursuant to RCW 8.12.030, RCW 35A.64.200, and other applicable law, the City
20 is empowered to condemn land and other property rights for the purposes of high capacity transit
21 systems, roads, sidewalks, and other transportation facilities.
22

23 2. Construction of the East Link Project and the Bel-Red Transportation
24 Improvements are within the City's constitutional and statutory authority of eminent domain.

25 3. The Court has jurisdiction over the parties and the subject matter of this action.

1 4. The City has satisfied the notice requirements of RCW 8.12.005, RCW 8.25.290,
2 chapter 8.26 RCW, and chapter 468-100 WAC.

3 5. The City has satisfied the ordinance requirements of RCW 8.12.040.

4 6. The question of whether the proposed projects are public uses is a judicial
5 question, although the Court gives great weight to the determination of public use by the
6 Legislature and other legislative bodies.

7 7. Public transportation is a public use justifying condemnation.

8 8. The City is authorized to exercise its eminent domain power for purposes of
9 transportation and to allow Sound Transit to use its property to construct a light rail system
10 pursuant to RCW 8.12.030, RCW 35A.64.200, RCW 81.104.010, RCW 81.112.080, RCW
11 35A.11.010, RCW 39.34.010, and RCW 39.34.060.

12 9. Roads, sidewalks, and other transportation facilities constitute public uses
13 justifying condemnation.

14 10. The Legislature has authorized the City to construct and expand roads, sidewalks,
15 gutters, curbs, and bicycle paths pursuant to RCW 35.68.010, RCW 35A.47.020, and
16 RCW 35.75.010. The Legislature has also authorized the City to exercise its eminent domain
17 power for these purposes pursuant to RCW 8.12.030 and RCW 35A.64.200.

18 11. Port of Everett v. Everett Improvement Co., 124 Wash. 486, 42, 214 P. 1064
19 (1923) is distinguishable from this case because the Port of Everett Court held that it was not
20 sufficient for the Port of Everett to determine that it did not need the property it was seeking to
21 condemn at the time but that it may need it in perpetuity. The opposite situation is presented
22 here, because the City undeniably needs all of the Property now but may not need a portion of it
23 in the future, which is an issue of necessity, not public use.

24 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
25 ORDER DETERMINING PUBLIC USE AND
NECESSITY - 8

1 12. The City's intended use of the Property for transit and transportation purposes is
2 undeniably a public use for all of the Property.

3 13. Courts typically consider the public interest and necessity determinations in the
4 same inquiry.

5 14. The potential condemnor's determination of public interest and necessity,
6 including the type and extent of property interest, is conclusive absent proof of actual fraud or
7 such arbitrary and capricious conduct as would constitute constructive fraud.

8 15. The City need only prove reasonable necessity, not absolute, indispensable, or
9 immediate need in order to condemn the Property. The question is not whether there is other
10 land to be had that is equally available; the question is whether the land sought is needed for the
11 construction of the public work. The City is not required to have a public use planned for the
12 Property forever.

13 16. The City Council's determination that the East Link Project and the Bel-Red
14 Transportation Improvements are necessary and in the best interests of the citizens and that
15 condemnation of the Property in fee simple is necessary for these projects, is conclusive
16 evidence of public interest and necessity. There is no evidence that this determination was the
17 result of actual fraud or such arbitrary and capricious conduct as would constitute constructive
18 fraud.

19 17. Pine Forest has not identified any material evidence that would be obtained
20 through discovery that would support a finding that the City's determination of public interest
21 and necessity was the result of actual fraud or such arbitrary and capricious conduct as would
22 constitute constructive fraud. Further delay of the Court's resolution of the City's Motion to
23 allow Pine Forest to conduct discovery is therefore unwarranted.

24 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
25 ORDER DETERMINING PUBLIC USE AND
NECESSITY - 9

1 18. The Property is necessary for the East Link Project and the Bel-Red
2 Transportation Improvements.

3 19. The public interest requires the East Link Project and the Bel-Red Transportation
4 Improvements.

5 20. The City is entitled to the issuance of an order determining public use and
6 necessity for the taking of the Property in fee simple for the East Link Project and the Bel-Red
7 Transportation Improvements.

8
9 **III. ORDER**

10 Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby
11 ORDERED that:

12 1. The Property that is the subject of this condemnation action is legally described in
13 **Exhibit A** attached to the Petition;

14 2. The City has the authority to condemn the Property for the East Link Project and
15 the Bel-Red Transportation Improvements.

16 3. The Property sought to be taken is required and necessary for the East Link
17 Project and the Bel-Red Transportation Improvements;

18 4. The East Link Project and the Bel-Red Transportation Improvements are public
19 uses and are necessary for the public interest.

20 5. Pine Forest's request for a further continuance to conduct discovery is DENIED.

21
22
23 IT IS SO ORDERED this 17 day of March, 2014.

24
25 
Honorable William Downing

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DETERMINING PUBLIC USE AND
NECESSITY - 10

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Presented by:

PACIFICA LAW GROUP LLP

By /s/ Jessica A. Skelton

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City of Bellevue

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DETERMINING PUBLIC USE AND
NECESSITY - 11

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Pine Forest Properties
1445 120th Avenue Site Exhibit
Offer Letter to City of Bellevue October 15, 2013

Entire Parcel Area
238,119 SF

“Right of Way Area”
approx. 154,070 SF

“Temporary Use Area”
approx. 84,049 SF

