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No. 93913-6

SUPREME COURT
of the
STATE OF WASHINGTON

Court of Appeals No. 75372-0-I
King County Superior Court No. 16-2-08800-7 SEA

STERNOFF L.P., a Washington limited partnership,

Petitioner (Appellant below),

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a
regional transit authority, dba SOUND TRANSIT,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In this eminent domain action, Respondent Sound Transit is taking certain interests in Petitioner Sternoff's property for the East Link Extension project that will bring light rail to Bellevue. The acquisition is for the light rail alignment, which will run along and through the south boundary of the property, and for a bridge that will elevate 124th Ave NE (the west boundary of the property) across the light rail trackway.

In 2013, Sound Transit determined that Sternoff's entire parcel was necessary for the East Link project. The trial court upheld this determination and found it supported the taking here. So did the Court of Appeals. Sternoff's Petition for Review does not challenge these dispositive rulings on the merits. Instead, it challenges Sound Transit's collaboration with the City of Bellevue, resting entirely on the false premise that the property Sound Transit is taking for the bridge is necessary only for the City's project to widen 124th Ave NE.

RESTATEMENT OF ISSUE PRESENTED

An agency's project design, construction plans, and determination that property is necessary for the project is conclusive unless the party opposing condemnation shows the necessity determination was arbitrary

and capricious, amounting to constructive fraud. Sternoff's Petition for Review does not challenge Sound Transit's necessity determination under this standard. Does Sound Transit's collaborative design and construction process with the City of Bellevue preclude the condemnation?

STATEMENT OF THE CASE

A. Sound Transit Authorizing Legislation

Sound Transit is a Regional Transit Authority under RCW chs. 81.104 and 81.112. CP 572. Those chapters authorize—and often require—Regional Transit Authorities to work with local governments to develop and implement transportation policy, and build and operate transportation systems and facilities.¹ RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows Sound Transit to "acquire by purchase, condemnation, gift, or grant and to lease, construct, add to,

¹ See, e.g., RCW 81.104.010 (coordination by local jurisdictions); RCW 81.104.060(4) (allowing "joint use of rights-of-way" and "joint development of stations and other facilities"); RCW 81.104.070(2) (specifically authorizing "necessary contracts [and] joint development agreements"); RCW 81.104.080(2) (requiring agencies to "promote transit-compatible land uses and development which includes joint development"); RCW 81.112.010 (requiring coordination among agencies, including "developing infrastructure to support high capacity systems ... and related roadway and operational facilities"); RCW 81.112.070 (granting power to "contract with any governmental agency ... for the purpose of planning, constructing, or operating any facility ... that the authority may be authorized to operate"); RCW 81.112.080(2) (authorizing joint use of municipal transit facilities by agreement).

improve, replace, repair, maintain, operate, and regulate the use of high capacity transportation facilities and properties ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems."

B. The East Link Extension Project

The history of the East Link project dates back to 2008, when voters approved Sound Transit's proposal to add a light rail line between downtown Seattle and the Bellevue/Redmond area. CP 201. On July 28, 2011, Sound Transit adopted Resolution R2011-10, which selected the station locations and trackway alignment for the East Link. CP 317. On November 15, 2011, the City of Bellevue and Sound Transit entered into an Umbrella Memorandum of Understanding for the East Link Project ("MOU"). CP 318.² One purpose of the MOU was to address Sound Transit's "use of the City right-of-way and associated terms and conditions." MOU at 2. The MOU shows grade separation between 124th Ave NE automotive traffic and the trackway, which would be aligned in a "retained cut under 124th Ave NE." MOU at Ex. C, p. 4.

² The MOU, which Sternoff referenced and relied on in its opposition to Sound Transit's motion for public use and necessity (*see* CP 178 ¶ 13), is posted on the City's website at http://www.bellevuewa.gov/pdf/Transportation/East_Link_MOU.pdf and the Court may take judicial notice of it under ER 201.

Contemporaneously, Sound Transit and the City entered into a Transit Way Agreement ("TWA") allowing Sound Transit access to City rights of way to "construct, operate, maintain, and own" the East Link project. TWA at 7 ¶ 4.1.³ It provided that Sound Transit would transfer its acquired real property to the City if the parties agreed the property was needed for the public right of way. *Id.* at 9 ¶ 4.9. As in the MOU, the East Link project description included a "retained cut ... crossing under 120th Ave NE and 124th Ave NE." *Id.* at Ex. B, p. 2.

Both the MOU and the TWA contemplated that "additional agreements may be necessary to ensure successful completion of the [light rail system] Project." MOU at 3, 5 ¶ 1.12; TWA at 3, 5 ¶ 1.11. With the MOU and TWA in place, Sound Transit's Board advanced the East Link project into the final design stage. CP 197.

C. Resolution R2013-21 to Acquire Property for East Link

Over the next two years, Sound Transit and the City continued to collaborate on project design. *See* CP 318. On September 12, 2013, the Sound Transit Capital Committee recommended passage of Resolution

³ Sternoff referenced the Transit Way Agreement in opposition to Sound Transit's motion for public use and necessity (*see* CP 178 ¶ 13). It is available on the City's website at http://www.ci.bellevue.wa.us/pdf/Transportation/Transit_Way_Agreement.pdf. The Court may take judicial notice of it under ER 201.

R2013-21 to acquire a group of sixty commercial properties, including the Sternoff property, for the East Link project. CP 187, 197-223. On September 26, 2013, Sound Transit's Board passed R2013-21, which authorized condemnation proceedings to "acquire all, or any portion" of the Sternoff property "for the purpose of constructing, owning, and operating a permanent location of the East Link Extension and light rail guideway." CP 190; CP 203. Affected property owners were notified and invited to attend the September 26, 2013 meeting to provide comment, but no one attended or commented on Sternoff's behalf. CP 189-90; CP 572.

D. Collaborative Project Design and Planning

Thereafter, extensive consultation and collaboration between Sound Transit and the City about the final project alignment, design, and construction process culminated in an Amended and Restated Umbrella Memorandum of Understanding (the "Amended MOU") and related agreements executed in May 2015. CP 293-544.⁴ The parties agreed that the "retained cut under 124th Ave NE," which was called out in the 2011

⁴ In addition to the Amended MOU (CP 316-482), agreements executed in May 2015 included a Three-Party Agreement between the City of Bellevue, King County and Sound Transit for the Future Realignment of 120th Ave NE (CP 298-310), a Second Amendment to the TWA (CP 312-14), and a Funding, Right-of-Way Acquisition and Construction Administrative Agreement for Roadway and East Link Project Improvements at 120th Ave NE and 124th Ave NE (CP 484-544).

MOU and TWA, "requires raising the existing roadway profiles [for 120th Ave NE and 124th Ave NE], and constructing new bridges spanning the retained cut." CP 486 ¶ 2.1. The 124th Ave NE bridge, identified in the agreements as part of the East Link project, will accommodate the City's plans to widen and improve 124th Ave NE. *Id.* at ¶¶ 2.1, 2.3; *see also* CP 341-42, CP 406-10, CP 458, CP 484-87, CP 515. To promote efficiency and public convenience, the bridge will be built by the City before Sound Transit builds the light rail trackway. CP 338-42; CP 485-87; CP 490-93; CP 542. As previously contemplated by the 2011 TWA, the City will eventually own and control all automotive rights of way constructed on property acquired by Sound Transit for its East Link project. *Id.*

E. Petition in Eminent Domain

In this action, filed in April 2016, Sound Transit seeks to condemn portions of the Sternoff property for the "construction, operation, and permanent location of the East Link Extension." CP 203 (Resolution No. R2013-21 at § 3); *see also* CP 2 (Petition at ¶ 2); CP 572 (Finding of Fact 3). The Petition states that "in order to permanently locate, construct, operate and maintain the East Link Extension and its related facilities,"

certain property and property rights are necessary. CP 2 ¶ 2. It does not seek to acquire any property or property interests that are not tied to the East Link Extension. Rather it states that the property and property rights necessary for the East Link project must accommodate the City of Bellevue's Bel-Red Transportation Improvement plan, which includes widening 124th Ave NE, as described in the Amended MOU. *Id.*

The Petition relies on Resolution R2013-21, which identified the entire property as necessary for the East Link project. CP 2-4. It enumerates the property and property interests to be taken, which are all within the property identified as necessary for the East Link project in R2013-21, and categorizes them by the nature of the interest, the purpose of the taking, the work that will be performed, which entity will perform work there, and which entity will ultimately take title and assume maintenance responsibility under the Amended MOU. CP 3-4; *see* CP 33, 37, 45-46, 54-55, 63-64, 72-73, 81, 89-90, 98-99, 108-09. It states: "Purpose and Necessity: The object and use for which the Condemned Property is sought to be taken is for public use and purpose, namely: to locate, construct, operate and maintain the Project [defined as

'the East Link Extension and its related facilities'] as contemplated in the Resolution [defined as R2013-21]." CP 2-4 ¶ 5 [emphasis added].

F. Public Use and Necessity Hearing

Sound Transit moved for a finding of public use and necessity. CP 110-118. Sternoff opposed the motion, contending that any necessity finding should be limited to the light rail alignment, and not include property and property rights associated with the 124th Ave NE bridge.⁵ Sternoff argued that because the bridge will accommodate a widened 124th Ave NE roadway that the City had not yet formally resolved to construct, Sound Transit's acquisition should be circumscribed. CP 149-51. After extensive briefing, written evidence submissions, and oral argument, the trial court found that the property was necessary for Sound Transit's East Link project. CP 110-566; VRP 1-25; CP 574-576.

Sternoff filed a timely Notice of Appeal. CP 568. Sternoff challenged Findings of Fact 7, 8, and 10 (CP 574):

7. The Condemned Property is necessary to and will be used for public purpose—locating, constructing, operating and maintaining the Project [defined at CP 572 as the East Link Extension and related facilities].

⁵ The other arguments Sternoff made are outside the scope of the Petition for Review.

8. Petitioner has determined that the construction of the Project will serve a public purpose, is necessary for the public interest, and that the Condemned Property is necessary for this purpose. The Respondents have been served with notice and a copy of the Petition....

10. There was no fraud, actual or constructive, no abuse of power, bad faith, or arbitrary and capricious conduct by Sound Transit.

Sternoff further challenged Conclusions of Law 5, 6, 7, and 8 (CP 575):

5. The taking and damaging of lands, properties and property rights in order to locate, construct, operate and maintain the Project is for a public use.

6. The public interest requires the proposed use.

7. Appropriation of the Condemned Property is necessary for the proposed use.

8. Petitioner is entitled to the issuance of an order finding public use and necessity for the taking of the Condemned Property for public purposes.

Because Sound Transit needs the property to keep moving forward with the East Link project and construction timeline, the Court of Appeals granted Sound Transit's motion for accelerated disposition. Oral arguments were heard on November 2, 2016, and the Court of Appeals affirmed by unpublished opinion filed November 7, 2016.

ARGUMENT

Public use and necessity has three elements: (1) the use for which the property is condemned is really a public use; (2) the public interest requires condemnation; and (3) the property to be acquired is necessary for that use. *Id.* Sternoff challenged only the third element: necessity.

The "necessity" of acquiring particular property or property rights is a legislative determination for the condemning agency. *E.g., HTK Management L.L.C. v. Seattle Popular Monorail Authority* (hereafter, "*HTK*"), 155 Wn.2d 612, 629 ¶ 39, 121 P.3d 1166 (2005). This determination "will, by the courts, be deemed conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud." *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965); *accord, In re Port of Seattle*, 80 Wn.2d 392, 398-99, 495 P.2d 327 (1972).

The party challenging necessity has the burden of proof. *City of Bellevue v. Pine Forest Properties, Inc.* (hereafter, "*Pine Forest*"), 185 Wn. App. 244, 262 ¶ 47, 340 P.3d 938 (2014), *rev. denied*, 183 Wn.2d 1016 (2015). It is a heavy burden, which Sternoff failed to meet. The trial court found, and the Court of Appeals affirmed, that the

property at issue was necessary for Sound Transit's project, and there was no actual or constructive fraud, abuse of power, bad faith, or arbitrary and capricious conduct by Sound Transit. CP 574. Sternoff does not challenge these findings in the Petition for Review.

A. Sternoff's Petition for Review Rests on the Erroneous Premise that the Property Is Not Necessary for the East Link Project.

Necessity has a very specific meaning in eminent domain. It does not mean the project could not exist without the property; rather, it means the property has been selected for and will actually support a designated public use. *E.g., Pub. Util. Dist. v. N. Am. Foreign Trade Zone Indus., LLC ("NAFTZI")*, 159 Wn.2d 555, 576 ¶ 40, 151 P.3d 176 (2007); *accord, Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 421 ¶ 36, 128 P.3d 588 (2006) ("a particular condemnation is necessary as long as it appropriately facilitates a public use"); *Port of Seattle*, 80 Wn.2d at 398-99 ("the word necessity does not mean absolute, or indispensable, or immediate need" [internal quotations omitted]). "[W]hen there is a reasonable connection between the public use and the actual property, this [necessity] element is satisfied." *Miller*, 156 Wn.2d at 421 ¶ 36.

Sound Transit determined that each of the properties along the light rail alignment was necessary for the project, and authorized

acquisition by purchase or condemnation of "all or any portion" of those properties. CP 203. Specifically, Resolution R2013-21 determined that the Sternoff property was "necessary for the construction and permanent location of the East Link Project," including "the light rail construction, operation and maintenance in the Bel-Red Corridor of Bellevue between 120th Ave NE and 148th Ave NE." CP 202. This determination, which was ratified by the trial court, affirmed on appeal, and is not challenged here, belies the major premise of Sternoff's Petition for Review: that the property Sound Transit is taking for the bridge only serves the City's project to widen 124th Ave NE. Because Sternoff's Petition for Review depends entirely on the false premise that the trial court and Court of Appeals authorized acquisition of property that is not necessary or related to Sound Transit's project, it should be denied.

B. No City of Bellevue Necessity Determination Is Required.

Sternoff claims that as a matter of constitutional law Sound Transit cannot take property that will facilitate the City's project because the City has not made a necessity determination. The argument fails.

1. Sound Transit's Necessity Determination Is Sufficient.

Washington law is clear that necessity includes "reasonable anticipation of future needs." *State ex rel. Hunter v. Sup'r Court*, 34 Wn.2d 214, 216, 208 P.2d 866 (1949). The "high level of deference" accorded a condemnor's necessity determination gives agencies charged with public projects the discretion to make project design and engineering decisions, implement the project, and "ensure that such projects are developed in a cost effective manner." *Miller*, 156 Wn.2d at 422 ¶ 37, 423 ¶ 41; *HTK*, 155 Wn.2d at 639 ¶ 57. The sole test is whether the condemned property will actually be used to support the public purpose for which it is taken. *Port of Seattle*, 80 Wn.2d at 397.

Here, Sound Transit has designed and planned the project in collaboration with the City of Bellevue, whose jurisdiction the project is in and whose transportation challenges the project is intended to alleviate. Regardless of the City's widening project, the East Link project requires a bridge to elevate the 124th Ave NE roadway above the trackway alignment. CP 486 at ¶ 2.1. Designing and building the bridge to accommodate future traffic needs and right-of-way improvements is within Sound Transit's discretion. Indeed, even if the City had no plans to

widen the 124th Ave NE corridor, Sound Transit's determination to design its project to accommodate a wider roadway would be upheld unless it was found to be arbitrary and capricious amounting to constructive fraud.

The City's role in constructing and ultimately taking ownership of the bridge right of way does not change the fact that the bridge is part of the East Link project, required to achieve grade separation of the roadway and trackway at the 124th Ave NE intersection. *E.g.*, CP 341. This grade separation is and always has been part of the East Link project. *E.g.*, MOU at Ex. C, p. 4; CP 362.

Sternoff's contrary assertion relies on testimony that the City and Sound Transit projects are "separate" and Sound Transit's project could proceed without the City widening 124th Ave NE. *See, e.g.*, Petition for Review at 5, 10. But that does not undermine Sound Transit's discretion to design the bridge to address future needs and acquire property sufficient to implement the design it chose.⁶ Further, the testimony addresses the

⁶ Sternoff misrepresents Kent Melton's testimony. Petition for Review at 10. Mr. Melton was not asked if Sound Transit could construct the East Link project without acquiring property from Sternoff's west boundary; rather, the question was whether the City's road-widening project was necessary for Sound Transit to construct the East Link. CP 277. Sternoff is engaging in semantic gamesmanship to obscure the fact that Sound Transit determined back in 2013 that Sternoff's entire property was necessary for the East Link project, both the trial court and the Court of Appeals upheld this determination, and Sternoff no longer argues that the determination was arbitrary, capricious, or fraudulent.

124th Ave NE right-of-way corridor, not its intersection with the trackway or the grade-separation bridge that is part of Sound Transit's project. *See, e.g.*, CP 263 at 9:12-21. In fact, the projects physically intersect at the Sternoff property, and there is no evidence that any of the interests Sound Transit is acquiring are solely for the City's project. *See* CP 233 at 32:12-34:4. As a Sound Transit Board member testified, "Sound Transit might have acquired properties that were necessary for both purposes, not just light rail purposes." *Id.* at 32:20-22. This is because the two projects overlap; "they're not separate in space and time." *Id.* at 33:12-20.

Sternoff also, without support, asserts that property and property interests designated "COB" (for City of Bellevue) in the Petition are only being taken for the City's project. The "COB" designation reflects who will be doing the work or will ultimately take title in the area. *See* CP 490-91. It does not mean those areas are necessary only for the City project and not for the East Link project. *C.f.*, CP 492, 498-500 (Sound Transit contributing its proportionate share of costs). Indeed, the Petition, the source of the "COB" designation, specifically states that all of the property and property rights described are "for purposes of Petitioner's

Link light rail project in order to permanently locate, construct, operate and maintain the East Link Extension and its related facilities." CP 2.

Moreover, agency flexibility with respect to proper use of condemned property goes far beyond what Sound Transit contemplates for the "COB" property. The property acquired for a project may extend beyond the final project footprint. *E.g.*, *HTK*, 155 Wn.2d at 633 ¶ 46. The condemnor may allow another public agency to use the property it acquires. *Pine Forest*, 185 Wn. App. at 254-55 (property condemned by the City of Bellevue would be used by Sound Transit). The condemnor may collaborate with others to build the project, effectuate the purpose, and implement the plans. *Port of Seattle*, 80 Wn.2d at 396-97 (affirming necessity determination even though air cargo facility for which property was condemned would be leased to and operated by a private party). The condemnor may take property it has agreed to transfer to another public entity when the project is complete. *State v. Slater*, 51 Wn.2d 271, 272, 317 P.2d 519 (1957). The condemnor may accept funds from another public entity that will also benefit from the project—even if that entity does not have the power of eminent domain. *State Parks & Rec. Comm'n v. Schluneger*, 3 Wn. App. 536, 539, 475 P.2d 916 (1970), *rev. denied*,

78 Wn.2d 996 (1971). And if the need for the property is temporary, or if needs change after property is taken, the property may be transferred to another entity, or put to an entirely different use. *Id.* at 634 ¶¶ 47-48; *accord, City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 501, 275 P.2d 933 (1954) (affirming necessity determination, although property taken for city street might later become part of state highway). In short, the fact that property necessary for East Link will also support the City's separate project does not invalidate the taking here.⁷

2. Sternoff Had No Constitutional or Statutory Right to a City Necessity Determination.

In *Miller* and *NAFTZI*, this Court decided that an owner whose property may be taken in eminent domain has no due process or other constitutional right to notice of the public hearing where the agency is to consider that action. 159 Wn.2d at 569-570 ¶¶ 23-27; 156 Wn.2d at 412-17 ¶¶ 12-24. The notice requirement is statutory. When *Miller* and *NAFTZI* were decided, they were governed by Sound Transit's enabling legislation, RCW 81.112.080(2) and city open meeting requirements,

⁷ Indeed, the statutory directive under which Sound Transit was formed requires local governments and transportation agencies to "coordinate" their responsibilities for "high capacity transportation policy development, program planning, and implementation." *See Pine Forest*, 185 Wn. App. at 247 ¶ 2 (quoting RCW 81.104.010).

RCW 35.22.288. *See Miller*, 156 Wn.2d at 412-13 ¶¶13-16. Thereafter, the legislature enacted a notice statute specific to eminent domain decisions, which requires personal notice to owners whose property may be the subject of final action authorizing condemnation. RCW 8.25.290. It is undisputed that Sternoff was properly notified of the hearing at which Sound Transit's Resolution R2013-21, which authorized condemnation of up to the entire Sternoff property, was considered and adopted. CP 572.

Sternoff contends, however, that it is also entitled to notice and opportunity to be heard by the City because the City's project depends on the Sound Transit taking. But the notice and public hearing requirements are limited to final action authorizing condemnation. RCW 8.25.290. Because Sound Transit, and not the City, authorized condemnation of the Sternoff property (which, unlike the neighboring properties along 124th Ave NE, abuts, intersects, and is necessary for the light rail alignment), Sound Transit, and not the City, held the required public hearing and gave the required notice. CP 572.⁸ Sound Transit's necessity determination

⁸ Sternoff cites *Harvey v. Snohomish County*, 124 Wn. App. 806, 103 P.3d 836 (2004), for the proposition that an interlocal agreement (here, the Amended MOU) cannot be used to take action that would otherwise be improper. But Sternoff fails to articulate any impropriety by Sound Transit, simply assuming away the dispositive finding that the bridge property is necessary for the East Link project.

was upheld because Sternoff did not show it was arbitrary and capricious amounting to constructive fraud. CP 572-75. The Court of Appeals confirmed that all the property Sound Transit is taking is within the scope of that necessity determination, within the scope of Resolution R2013-21, and will actually be used for the East Link project. Tellingly, Sternoff's Petition for Review does not challenge these rulings.

C. The Basis for Sternoff's Public Interest Argument—that the Court of Appeals Decision Allows Condemnation for Unrelated Projects—Is False.

Sternoff claims this matter raises an issue of substantial public interest because it would allow public entities to "piggy back" on each other's condemnations for unrelated projects, thereby depriving the owner of constitutional and procedural protections. Petition for Review at 10-11. But this argument depends entirely on assuming away Sound Transit's determination, the trial court's findings, and the Court of Appeals' opinion that the property Sound Transit is taking to build a bridge over the light rail trackway is necessary for the East Link project. The requirements for finding public use and necessity are longstanding and well established under Washington law. They protect property owners from the

hypothetical abuse Sternoff claims raises an issue of substantial public interest, and are dispositive here.

CONCLUSION

Sound Transit has done what its enabling legislation encourages and requires it to do: collaborate with the local municipality its East Link project will serve to develop and implement transportation policy in order to design, construct, and operate its transportation systems and facilities. Sound Transit determined that the Sternoff property was necessary for its East Link project. The trial court upheld the determination because Sternoff failed to show it was arbitrary and capricious amounting to constructive fraud. The Court of Appeals found substantial evidence supported the trial court. Sternoff's Petition for Review, however, assumes the contrary and uses that false and unsupported assumption to

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manufacture grounds for review. The Petition for Review fails to show an issue of substantial public interest and should be denied.

DATED this 5th day of January, 2017.

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