

No. 75372-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

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

Respondent,

v.

STERNOFF L.P.,

Appellant.

FILED  
Oct 07, 2016  
Court of Appeals  
Division I  
State of Washington

---

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE SUZANNE R. PARISIEN

---

REPLY BRIEF OF APPELLANT STERNOFF L.P.

---

HOULIHAN LAW, P.C.

John J. Houlihan, Jr., WSBA No. 30285

Donya W. Burns, WBSA No. 43455

Andy L. Zabel, WSBA No. 41064

100 N. 35<sup>th</sup> St.

Seattle, WA 98122

206-547-5052

[www.Houlihan-Law.com](http://www.Houlihan-Law.com)

ATTORNEYS FOR APPELLANT

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES ..... iv**

**I. INTRODUCTION ..... 1**

**II. ARGUMENT ..... 1**

**A. To Lawfully Exercise Its Power Of Eminent Domain, The Sound Transit Board Must First Make A Legislative Finding Of Public Use And Necessity Regarding The Road Widening..... 1**

1. In Order For This Court To Evaluate Whether There Is Substantial Evidence To Support A Legislative Finding Of Public Use And Necessity, There Must First Be A Finding Of Public Use And Necessity ..... 2

2. Pine Forest Provides A Clear Example Of The Legislative Determination Of Public Use And Necessity That Was Legally Required, But Not Accomplished, By Sound Transit ..... 4

3. Despite Sound Transit’s Suggestion To The Contrary, Substantial Evidence Proves That The Proposed Taking Along The Western Boundary Of The Property Is For The City’s Road Widening—Not Construction Of The East Link .....7

4. The 2015 MOU Does Not Provide After-The-Fact Justification To Take Property For The City’s Road Widening ..... 9

*a. The 124<sup>th</sup> Ave NE Undercrossing Is Being Constructed For Passage Of The East Link; The Road Widening Is A Separate Project* ..... 10

*b. Washington Law Allowing For Design Flexibility Has Never Been Extended To Include A Project That Is Not Part Of The Avowed Public Purpose* ..... 12

**B. The Sound Transit Board Was Obligated To Consider The Sternoff-Sound Transit Access Agreement Prior To Making Its Finding Of Public Use And Necessity ..... 14**

1. <u>The Sound Transit Board Was Obligated To Make Its Public Use And Necessity Determination Based On The Characteristics Of The East Link Project, Including The Sound Transit Access Agreement</u> .....	14
2. <u>Sound Transit’s Argument That Its Access Agreement With Sternoff Cannot Contractually Limit Condemnation Authority Misses The Point</u> .....	16
<b>C. This Court Has The Authority To Direct The Superior Court To Conduct Proceedings Regarding An Award Of Costs To Sternoff; And To Award Costs On Appeal</b> .....	<b>18</b>
<b>III. CONCLUSION</b> .....	<b>19</b>

## TABLE OF AUTHORITIES

### Constitutional Provisions

Wash. Const. art. I, § 16..... 1, 4

### Cases

*City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 275 P.2d 933 (1954)..... 12

*HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155  
Wn.2d 612, 121 P.3d 1166 (2005) ..... 12, 18

*Petition of Port of Seattle*, 80 Wn.2d 392, 495 P.2d 327 (1972) ..... 12

*Port of Edmonds v. Northwest Fur Breeders Co-op*, 63 Wn. App. 159,  
169, 816 P.2d 1268 (1991) ..... 18

*Public Utility Dist. No. 2 of Grant County v. North American Foreign  
Trade Zone Industries, LLC*, 159 Wn.2d 555,  
151 P.3d 176 (2007) ..... 3, 4, 12

*Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 128  
P.3d 588 (2006) ..... 4, 15, 17

*State ex rel. Hunter v. Superior Court*, 34 Wn.2d 214, 208 P.2d 866  
(1949) ..... 12

*State ex rel. Lange v. Superior Court*, 61 Wn.2d 153,  
377 P.2d 425 (1963) ..... 12

*State v. Burdulis* 70 Wn.2d 24, 421 P.2d 1019 (1966) ..... 10

*State v. Hutch*, 30 Wn. App. 28, 631 P.2d 1014 (1981) ..... 12

*State v. Slater*, 51 Wn.2d 271, 317 P.2d 519 (1957)..... 12

### Court Rules and Statutes

RAP 14..... 19

RCW 8.25.075 ..... 18, 19

## **I. INTRODUCTION**

Sternoff brings this appeal in defense of its private property rights under Washington's Constitution, statutes and supporting case law. The issues here are not grounded in the minute details of individual properties, or the specificity of Sound Transit's plans in 2013, or whether Sound Transit is allowed "design flexibility." Rather, the issues here are grounded in the most basic constitutional tenets of Washington eminent domain law: a prerequisite legislative finding of necessity; condemned property to be used only for the avowed public purpose; honest and fair consideration of facts and circumstances regarding the necessity of property for a public project. Respondent's Brief ("Response") seeks to obfuscate and marginalize these basic constitutional principles. Ultimately, though, the substantial evidence shows that Sound Transit failed to adhere to these basic tenets. For this reason, this Court should dismiss Sound Transit's Petition in Eminent Domain.

## **II. ARGUMENT**

### **A. To Lawfully Exercise Its Power Of Eminent Domain, The Sound Transit Board Must First Make A Legislative Finding Of Public Use And Necessity Regarding The Road Widening.**

Sound Transit does not dispute the Board's (and the City's) failure to make a finding of public use and necessity for the Road Widening project. Nor does it challenge the legal requirement that a condemning authority

must *first* make a finding of public use and necessity in order to bring an eminent domain petition in court. Rather, Sound Transit posits that it should be unburdened by these basic constitutional requirements because it is convenient and cost-effective to combine the City's separate Road Widening project with the East Link construction. Sound Transit's theory undercuts decades of Washington condemnation law and asks this Court to excuse Sound Transit from its legal obligation to adhere to the constitutional safeguards afforded private property owners.

1. In Order For This Court To Evaluate Whether There Is Substantial Evidence To Support A Legislative Finding Of Public Use And Necessity, There Must First Be A Finding Of Public Use And Necessity.

Sound Transit argues that the Board's mere passage of R2013-21 provides substantial evidence to support Sound Transit's proposed acquisition of the Property for the Road Widening project.<sup>1</sup> Response at 21-23 (Argument A). But this ignores simple fact: there has never been *any legislative finding of public use and necessity* for the Road Widening that for the Court can evaluate. Before a court can assess the public use and necessity of a taking, there must first be a legislative determination that there is a public use for which taking the property is necessary. *Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone*

---

<sup>1</sup> The Road Widening project includes widening of 124th Ave. NE, and installing sidewalks, landscaping, signalization, and accommodations for a future City of Bellevue multipurpose trail. CP 438.

*Industries (“NAFTZI”), LLC*, 159 Wn.2d 555, 565, 151 P.3d 176 (2007).

The substantial evidence in this case supports only one conclusion: there has been no such prerequisite legislative determination by Sound Transit or the City for the Road Widening project.

Sound Transit’s own Response sets out the narrow, avowed purpose of acquiring the Sternoff Property under R2013-21: “specifically, that acquisition was for light rail construction, operation and maintenance in the Bel-Red corridor of Bellevue between 120th Ave. NE and 148<sup>th</sup> Ave. NE.” Response at p. 23 citing CP 202-03. Sound Transit’s CR 30(b)(6) witness unequivocally testified that R2013-21 does not relate in any way to the acquisition of property interests for the City’s project:

Question (Counsel for Sternoff): R2013-21, in September of 2013, did it relate to Sound Transit acquiring property interests for the City of Bellevue’s 124th [Ave. NE] widening project?

Answer (Sound Transit): No, not that I’m aware of, it did not.

CP 278 (30(b)(6) Dep. Melton, 16:12-15). *See also*, CP 277 (30(b)(6) Dep. Melton, 11:23-12:1). The substantial evidence shows that R2013-21 *does not* include, or even contemplate, taking the Property for the City’s Road Widening project.

Sound Transit asks this Court to substitute its own judgment where Sound Transit failed. But, as both parties acknowledge, only the

condemning authority's legislative body can make a determination of public necessity. *NAFTZI*, 159 Wn.2d 555, 575. Any deference afforded by the courts to such a legislative decision is based upon the assumption that the legislature adhered to the procedural safeguards afforded by the Washington Constitution, statutes and supporting case law. *See, Puget Sound Regional Transit Authority v. Miller* ("Miller"), 156 Wn.2d 403, 419, 128 P.3d 588 (2006) (an administrative agency must act "within the scope of and to carry out its statutory and constitutional functions"). Sound Transit should not be allowed to exercise its power of eminent domain where it failed to make the constitutional prerequisite finding of public use and necessity to take the Property for the Road Widening project.

2. *Pine Forest Provides A Clear Example Of The Legislative Determination Of Public Use And Necessity That Was Legally Required, But Not Accomplished, By Sound Transit.*

Sound Transit repeatedly relies on the *Pine Forest* case that directly undercuts Sound Transit's argument. *See*, Response at p. 26-28, 40 citing *City of Bellevue v. Pine Forest Properties, Inc.*, 185 Wn. App. 244, 340 P.2d 938 (2014).

*Pine Forest* presents procedural facts notably different from the case at hand. It does involve the same segment of Sound Transit's East Link, a City of Bellevue road improvement project (just a few blocks away from this one), and the 2011 MOU. *Pine Forest*, 185 Wn. App. at 248-49. But



there is a critical difference in *Pine Forest* that Sound Transit continually ignores: Bellevue's ordinance authorizing the condemnation of the Pine Forest property clearly and specifically found that it was necessary not only for the City's road project, *but also for the East Link*. *Id.* at 250-52.

Bellevue's ordinance provided that taking the Pine Forest property was necessary to undertake the City's NE 15 Street (Zone 1) project *and* to "implement the terms of the Memorandum of Understanding [2011 MOU] in furtherance of the East Link Project." *Id.* The stark difference between *Pine Forest* and the case at hand is that Sound Transit's R2013-21 makes no mention of the City's Road Widening; it makes no finding of public use and necessity for the Road Widening; and it *only* finds public use and necessity regarding construction, operation and maintenance of the East Link. CP 8-11. Sound Transit's argument suggests R2013-21 says something it does not say, or even imply.

Moreover, unlike Bellevue's pre-hearing notice in *Pine Forest*, which specifically referenced condemnation for both Bellevue's and Sound Transit's projects, Sound Transit's notice to Sternoff regarding R2013-21 made absolutely no mention of taking property for the City's Road Widening. *See, id.* at 249-50. Sound Transit's notice only stated, "... the Sound Transit Board will consider a resolution authorizing Sound Transit

to acquire property interests *needed for the construction, operation and maintenance of the East Link Extension.*” CP 125.<sup>2</sup>

There is another notable difference in *Pine Forest* as compared to this case: the 2011 MOU had already been adopted when the Bellevue City Council approved the condemnation in *Pine Forest*, and it obligated Bellevue to acquire property for the purpose of Sound Transit’s East Link.

Contrary to Sound Transit’s suggestion in this case, the 2011 MOU *did not* require Sound Transit to acquire property for the City’s Road Widening project as of 2013 when the Board adopted R2013-21. *See*, Response at p.6, 10. Sound Transit’s obligation to acquire property for the City to widen and improve 124th Ave. NE arose two years *after* adoption of R2013-21, when the parties entered into the 2015 Amended MOU.

Sound Transit incorrectly states that Sternoff disputes Sound Transit’s ability to exercise its power of eminent domain for the City Road Widening under the 2015 MOU. Response p.28. This entirely misstates the issue. Sound Transit’s obligation to acquire property for the City of Bellevue’s Road Widening arose in 2015 *two years after the passage* of Sound Transit’s Board Resolution R2013-21.

---

<sup>2</sup> The City of Bellevue has or will presumably provide the requisite notice to other property owners along 124<sup>th</sup> Ave NE who are potentially impacted by the Road Widening. Sound Transit’s condemnation by proxy deprives Sternoff of this same procedural safeguard—merely because the Sternoff Property is at the intersection of the two, separate public projects.

Sound Transit’s petition to acquire a portion of the Sternoff property for the Road Widening incorporates a project for which there has never been public notice, a hearing or any legislative determination of public use and necessity, and which is not the avowed purpose identified in R2013-21’s legislative determination of public use and necessity. This Court’s decision in *Pine Forest* supports dismissal of this condemnation action as it relates to the City’s Road Widening project.

3. Despite Sound Transit’s Suggestion To The Contrary, Substantial Evidence Proves That The Proposed Taking Along The Western Boundary Of The Property Is For The City’s Road Widening—Not Construction Of The East Link.

In its Response, Sound Transit suggests that its proposed acquisition of frontage along the western boundary of the Sternoff Property might not be for the purpose of the City’s Road Widening. Response at pp. 38-39. But at the trial court, Sound Transit did not dispute the fact that it was taking parts of the Property *only* for the Road Widening.<sup>3</sup> Furthermore, the substantial evidence shows that the “COB” fee take and “COB” TCE are for the City’s project, *not* the East Link tracks or 124th Ave. NE undercrossing.

---

<sup>3</sup> Sound Transit’s suggestion that the fee takes along the western boundary may not be for the City’s Road Widening should be disregarded. A party may only present a ground for affirming a trial court decision for the first time on appeal where the record has been sufficiently developed to fairly consider the ground. RAP 2.5(a).

In its Reply in Support of Petitioner’s Motion for Order and Judgment Adjudicating Public Use and Necessity, Sound Transit acknowledged that it proposes taking parts of the Sternoff Property for the City’s Road Widening by asking the trial court to find that Bellevue’s “124th road improvement projects” are a public use and that the Sternoff Property is necessary for that public purpose. CP at 285. Furthermore, Sound Transit’s own witnesses testified that the Road Widening (and therefore the property needed to widen the road) is not a part of the East Link project at the Sternoff Property. CP 255 (Dep. Billen 16:4-7 (confirming that Sound Transit could “construct the East Link line as it relates to the Sternoff property without the need to widen 124th”)); CP 264 (Dep. 30(b)(6) McGhee, 10:6-16 (confirming that Sound Transit “could develop and build the Sound Transit Link extension on 124th next to the Sternoff property without the need to widen 124th”)); CP 277 (Dep. 30(b)(6) Melton, 11:23-12:1 (confirming that “Sound Transit does not need to acquire property to widen 124th”)).

The substantial evidence establishes that the takings along the Sternoff western property boundary for the widening of 124th Ave NE are for the City’s Road Widening—not Sound Transit’s 124th Ave NE undercrossing.

4. The 2015 MOU Does Not Provide After-The-Fact Justification To Take Property For The City's Road Widening.

Sound Transit's condemnation by proxy of the Sternoff Property for the City's Road Widening is not authorized by R2013-21. Sound Transit's legislative determination in R2013-21 is specific and limited. It authorizes condemnation of the Sternoff Property because it is necessary for East Link "construction, operation and maintenance." Response at p. 23 citing CP 202-03. The fact that the East Link design incorporates an element involving 124th Ave. NE—the undercrossing at the intersection of the East Link route and 124<sup>th</sup> Ave NE—does not permit Sound Transit to take property for another government agency's project simply by virtue of that other project's proximity to the East Link tracks. Washington law prohibits the exercise of eminent domain absent a finding of public use and necessity regarding the proposed project.

Sound Transit argues that the 2015 MOU obligating Sound Transit to acquire property for the City's Road Widening is an element of the "design flexibility" for public projects allowed under Washington Law. The Court should reject this argument. The 2015 MOU, executed two years after R2013-21, addresses coordination of East Link and City's *separate* Road Widening project. A separate finding of public use and necessity for the

Road Widening is legally required in order to condemn the Property for that purpose.

a. *The 124<sup>th</sup> Ave NE Undercrossing Is Being Constructed For Passage Of The East Link; The Road Widening Is A Separate Project.*

In adopting R2013-21, Sound Transit expressly limited its own exercise of eminent domain for the specifically avowed purpose of “light rail construction, operation and maintenance in the Bel-Red Corridor.” Response at 23 citing CP 202-03. Sound Transit now attempts to characterize the Road Widening as an inextricable part of the light rail construction because of need to build a retained cut and cover beneath 124th Ave NE to allow passage of the East Link train. Contrary to Sound Transit’s implication, Sternoff does not dispute that the 124th Ave. NE undercrossing is part of the East Link design. *See* Response at p. 39 citing *State v. Burdulis* 70 Wn.2d 24, 25, 421 P.2d 1019 (1966).

Rather, the issue at hand is that the East Link project design *does not include widening 124<sup>th</sup> Ave. NE, constructing sidewalks, and installing signalization, landscaping, and accommodations for a City of Bellevue multipurpose trail.* *See* CP 255 (Dep. Billen 16:4-7); CP 263-64 (Dep. 30(b)(6) McGhee, 10:6-16); CP 277 (Dep. 30(b)(6) Melton, 11:23-12:1). The Road Widening is not part of the construction, operation or maintenance of the East Link. The City has its own long-standing budget

plan for the Road Widening and other 124th Ave. NE improvements. The Road Widening is a separate, City of Bellevue project. CP 263-64 (Dep. 30(b)(6) McGhee, 9:5-8, 9:18-21). Sound Transit's witnesses testified to that very clear and simple fact.

The 2015 MOU acknowledges the benefits of coordinating Sound Transit's 124<sup>th</sup> Ave NE undercrossing with the City's separate Road Widening project. But the 2015 MOU does not give Sound Transit, or the City, leave to ignore the constitutional prerequisite of a legislative finding of public use and necessity for the Road Widening. Allowing Sound transit to rely on an after the-fact contract with the City to take the Sternoff Property for a wholly different public project violates Sternoff's constitutionally protected private property rights.

Regardless of the Property's physical proximity to the East Link tracks or whether it's convenient or efficient or cost effective to coordinate another government agency's adjacent project, the substantial evidence establishes that neither Sound Transit's nor the City's legislative bodies ever found that the Road Widening is a public use for which taking the Sternoff Property is necessary. Consequently, Sound Transit's attempt to take the Property for the Road Widening is unconstitutional and must be dismissed.

b. *Washington Law Allowing For Design Flexibility Has Never Been Extended To Include A Project That Is Not Part Of The Avowed Public Purpose.*

Sound Transit relies on a number of cases that discuss a condemning authority's ability to acquire property by eminent domain although the details or timeline of the subject public project may not be established at the time the condemnation was authorized. Response pp. 24-26, 41-43. Sound Transit's reliance on these cases, however, is misplaced. *None* of these cases purport to override the rule that *the necessity of a particular property exists only if the condemnor in fact intends to use the property for the avowed purpose.* *NAFTZI*, 159 Wn.2d 555, 576.<sup>4</sup>

Here, Sound Transit is not condemning the Property solely for the East Link project. Sound Transit is taking portions of the Property by proxy

---

<sup>4</sup> Sound Transit's discussion of these cases, at Response pp. 23-25 and 40-41, includes: *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 633, 121 P.3d 1166 (2005) (Sound Transit could condemn property larger than the footprint of the public project—a monorail station—so long as interim use was for that purpose); *Petition of Port of Seattle*, 80 Wn.2d 392, 398, 495 P.2d 327 (1972) (Port could condemn property devoted to purpose air cargo facilities, despite lack of detailed plans for those facilities); *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 158-59, 377 P.2d 425 (1963) (state could condemn property for purpose of road expansion, despite imprecise plans and timeline); *State v. Slater*, 51 Wn.2d 271, 272, 317 P.2d 519 (1957) (city could condemn property for the purpose of improving city's traffic flow, with potential transfer that property to the county after completion of the project); *State ex rel. Hunter v. Superior Court*, 34 Wn.2d 214, 216, 208 P.2d 866 (1949) (fire district could condemn property for purpose of fire district improvements, despite the fact the property would not be developed for that purpose immediately); *State v. Hutch*, 30 Wn. App. 28, 39, 631 P.2d 1014 (1981) (college could condemn property for purpose of campus expansion, despite the fact the property would not be developed for that purpose immediately), *rev. denied*, 96 Wn.2d 1011 (1981). Sound Transit also cites to *City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 501, 275 P.2d 933 (1954). *Cavanaugh* is off-point, however, because it addresses the extent of a city's statutory authority to condemn property for a city project that might, one day, become part of a state highway system. *Cavanaugh*, 501-02.



for the City's separate Road Widening project. None of the cases discussed by Sound Transit in its Response allow one government agency to act as the proxy to take property for another government agency's project that has not independently met the constitutional requirements for the exercise of eminent domain.

The avowed purpose stated in R2013-21 is *only* the East Link. Sound Transit's witnesses testified that condemnation for the Road Widening was not included in R2013-21 and that the East Link construction at the Sternoff Property can be accomplished without widening 124th Ave. NE. *See supra*, Secs. II.A.3 and 4.a citing CP 255, 264 and CP 277. This Court should reject Sound Transit's after-the-fact attempt to shroud the unconstitutional taking for the Road Widening under the guise of "design flexibility" or intergovernmental convenience.

Widening and improving 124th Ave. NE is simply not the avowed public purpose identified in R2013-21. Taking the Sternoff Property for another government agency's project that is not the avowed purpose of R2013-21 is unlawful. No level of "design flexibility," coordination or contractual obligation that Sound Transit says arose two years after the adoption of R2013-21 should allow Sound Transit to unconstitutionally take any portion of the Property for the City's Road Widening.

The substantial evidence shows that Sound Transit's proposed condemnation of the Property for the City's Road Widening exceeds the very specific and limited condemnation authority granted by R2013-21. The Court should reverse the trial court's rulings to the contrary.

**B. The Sound Transit Board Was Obligated To Consider The Sternoff-Sound Transit Access Agreement Prior To Making Its Finding Of Public Use And Necessity.**

Sound Transit acknowledges Washington's legal requirement that a condemning authority must consider the design characteristics of a public project when considering a determination of public use and necessity. *See*, Response at p. 31. The Sound Transit Access Agreement is one of those design characteristics that the Board should have, but did not, consider.

Sternoff has never contended that the Board should have looked at every single detail of every single property potentially impacted by the East Link. *See* Response at p. 30-32. Rather, Sternoff points out Sound Transit's unlawful failure to consider known facts and circumstances that impact the East Link project design: the Sound Transit Access Agreement.

1. The Sound Transit Board Was Obligated To Make Its Public Use And Necessity Determination Based On The Characteristics Of The East Link Project, Including The Sound Transit Access Agreement.

Sound Transit's Response implies that there is no law requiring a condemning authority to consider facts that are peculiar to a property being targeted for condemnation in a determination of public use and necessity.

But Sound Transit’s discussion of *Central Puget Sound Reg'l Transit Auth. v. Miller* actually exemplifies the existence of this legal requirement, noting that the Sound Transit Board in *Miller* “was ‘aware’ of the alleged historical significance of the property.” Response at p. 31 citing *Miller*, 156 Wn.2d 185 Wn. App. 244, 410, 340 P.3d 938 (2014). That is *exactly the point*—the Board in *Miller* was aware of the facts and circumstances of the subject property’s historical significance relative to the proposed public project and it made a finding of public necessity nonetheless.

Sound Transit’s position is that the mere existence of Board Resolution R2013-21 is conclusive and determinative of judicial review. Response at 20-24. But judicial deference to Sound Transit’s resolution is not automatic and should not be provided where Sound Transit staff knew, but did not disclose, relevant facts and circumstances to allow the Board to make an informed decision.

What Sound Transit misses in its briefing is not that the Sternoff Access Agreement somehow estops the Board from exercising its condemnation authority, but rather that the facts of the Access Agreement, the promises it made to Sternoff and the impact on project design *were never disclosed to the Board*. See Response at 33-34.

The Sound Transit Access Agreement contained information relevant to the design of the East Link project. The Access Provisions in

that Agreement promise that, even after the Sound Transit’s license to enter the Property for civil survey work had expired, Sound Transit would incorporate into its design features for access to, from and within the Property during construction and operation of the East Link. CP 168. Sound Transit’s own counsel assured Sternoff that access and circulation on the Property “is and will continue to be a *high design priority*.” CP 175 (emphasis added).

The staff members who presented the draft R2013-21 and the Staff Report to the Board not only knew of the Access Agreement, but were involved in the related negotiations on the Sternoff Property with Mr. Sternoff. CP 276 (Dep. 30(b)(6) Melton, 9:7-10:4). Yet they did not disclose those facts and circumstances to the Board. The Board could *not* have considered these facts and circumstances in making its determination of public use and necessity. The Board’s failure to consider the facts and circumstances because of staff’s nondisclosure renders the Board’s determination of public use and necessity arbitrary and capricious.

2. Sound Transit’s Argument That Its Access Agreement With Sternoff Cannot Contractually Limit Condemnation Authority Misses The Point

This is not an issue of Sound Transit’s inability to “contract away its power of eminent domain.” *See*, Response at 33-34. Sternoff makes no such assertion. This is an issue of the Board’s legal obligation to actually

consider facts and circumstances relevant to the design characteristics of the East Link and in coming to a fair, informed and reasoned decision to exercise its condemnation authority.

In the *Miller* case, the Sound Transit Board was informed and aware of the historical nature of the property and decided to condemn it nonetheless. *Miller*, 156 Wn.2d 403, 420. In this case, the Board was unaware of information that the Sound Transit staff knew, negotiated, and to which Sound Transit agreed. Staff failed to disclose the Access Agreement to the Board, and its resulting misinformed resolution, reached after no more than a few minutes of discussion, failed to meet the constitutional requirement of fair and reasonable consideration of the facts and circumstances regarding the necessity of condemning property.

Regardless of whether the Board would have disregarded the Access Agreement, the constitutional issue is that the decision was for the Board (not staff) to make. Here, staff's knowing failure to disclose the Access Agreement usurped the Board's constitutional obligation to duly consider facts and circumstances relevant to the Board's determination of public use and necessity. Such a failure is arbitrary and capricious action amounting to constructive fraud and requires dismissal of Sound Transit's Petition.

**C. This Court Has The Authority To Direct The Superior Court To Conduct Proceedings Regarding An Award Of Costs To Sternoff; And To Award Costs On Appeal.**

Sternoff requests an award of attorney fees under RCW 8.25.075(1), which requires a superior court with jurisdiction of a condemnation proceeding to award costs to the condemnee if there is a final adjudication that the condemnor cannot acquire the real property by condemnation. This Court has authority to rule on this issue, directing the superior court to conduct further proceedings to determine an award of costs based upon the outcome of the case. *See e.g., HTK*, 155 Wn.2d 612, 638.

Sound Transit argues that even if this Court rules in Sternoff's favor and directs the trial court to dismiss the Petition, Sternoff would not be entitled to costs under RCW 8.25.075(1) because Sound Transit could initiate a new condemnation proceeding to acquire the Property. Sound Transit is wrong, and its reliance on *Port of Edmonds v. Northwest Fur Breeders Co-op* is misplaced. *See*, Response at p. 43 citing *Northwest Fur Breeders*, 63 Wn. App. 159, 169, 816 P.2d 1268 (1991). That case did not address the statutory attorney fees provision and therefore cannot support Sound Transit's argument.

Sound Transit's ability to begin the entire condemnation process anew does not change the fact that the reason it would have to do so because of a *final non-appealable order* holding that Sound Transit cannot acquire

the Property by condemnation. RCW 8.25.075(1) requires an award of fees and costs under such circumstances.

Sound Transit's position would work substantial hardship and injustice on property owners by requiring them to continually bear the substantial costs of defending takings without reimbursement of attorney fees, so long as the losing agency could file its petition in eminent domain anew after a court finds the agency's actions unconstitutional.

Moreover, RCW 8.25.075(1) provides for an award of attorney fees and costs where the condemning authority abandons the condemnation action. It makes no sense that a property owner could get its attorney fees awarded when a condemnation petition is voluntarily withdrawn, but *not* when a petition is found to be unconstitutional and is dismissed by the court.

Should this Court determine that Sound Transit cannot condemn all or any portion of the Property by these proceedings, Sternoff should be awarded its reasonable attorney fees incurred in the trial court phase pursuant to RCW 8.25.075 and on appeal pursuant to RAP 14.

### **III. CONCLUSION**

Sound Transit should not be allowed to disregard the Washington constitutional protections afforded to private property owners. To lawfully take the Sternoff Property for the City's separate Road Widening, Sound Transit was required to make a legislative finding of public use and

necessity regarding the that project. It is undisputed that Sound Transit has never made such a finding. No amount of design flexibility, convenience, collaboration, or cost-savings can justify violating Sternoff's constitutionally protected private property rights. Sound Transit's condemnation by proxy for the City's Road Widening should be dismissed.

The remainder of Sound Transit's Petition should be dismissed because the Board's finding of public use and necessity to take the Sternoff Property was arbitrary and capricious. The Board failed to duly consider the facts and circumstances relevant to taking the Property for East Link construction, operation and maintenance. The Board was ignorant of the Access Agreement and the promises Sound Transit made to Mr. Sternoff regarding East Link design and operations adjacent to the Property. The Board's misinformed passage of R2013-21 was arbitrary and capricious conduct constituting constructive fraud.

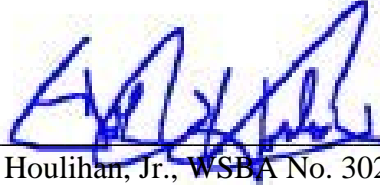
Sternoff respectfully requests that that Court reverse the trial court's order on public use and necessity; and order dismissal of Sound Transit's Petition in full, or in the alternative, dismissal as it relates to the City Road Widening. Sternoff also requests an order for further proceedings below to determine an award of attorney fees in accordance with this Court's decision.



Respectfully submitted this October 7, 2016.

HOULIHAN LAW, P.C.

By: \_\_\_\_\_

A handwritten signature in blue ink, appearing to be "John J. Houlihan, Jr.", written over a horizontal line.

John J. Houlihan, Jr., WSBA No. 30285

*John@Houlihan-Law.com / 206-547-5052*

Donya W. Burns, WSBA No. 43455

*Donya@Houlihan-Law.com / 206-547-0390*

100 N. 35th St. / Seattle WA 98103

Attorneys for Appellant Sternoff L.P.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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

Respondent,

vs.

STERNOFF L.P., a Washington limited  
Partnership,

Appellant.

Washington State Court of Appeals, Div. I  
Case No.: 75372-0-I

DECLARATION OF SERVICE

Tax Parcel No.: 282505-9003

I, Donya W. Burns, affirm that on this day I caused to be served *Reply Brief of Appellant Sternoff L.P.* in the above-entitled matter (Case No.: 75372-0-I) to each of the following parties by the method indicated below:

<u>Party Contact Information</u>	<u>Delivery Method</u>
<p><i>Attorneys for Sound Transit</i>            Jeffrey A. Beaver            Jacqualyne J. Walker            Estera Gordon            Emily Krisher            Miller Nash Graham &amp; Dunn            2801 Alaskan Way, Suite 300            Seattle, WA 98121-1128</p>	

DECLARATION OF SERVICE - 1

HOULIHAN LAW, P.C.  
100 N. 35<sup>th</sup> St.  
Seattle, WA 98103  
206-547-5052  
www.Houlihan-Law.com

<p>1 <i>Estera.Gordon@MillerNash.com</i>  2 <i>Emily.Krisher@MillerNash.com</i>  3 <i>Jeffrey.Beaver@MillerNash.com</i>  4 <i>Jackee.Walker@MillerNash.com</i>  5 <i>Heidi.Reynolds@MillerNash.com</i>  6 <i>Fara.Fusaro@MillerNash.com</i>  7 <i>Connor.O'Brien@MillerNash.com</i></p>	<p>Electronic Mail</p>
<p>8 <i>Attorneys for King County, Washington</i>  9 Jenifer Merkel, Senior Deputy PA  10 King County Prosecuting Attorney  11 King County Courthouse  12 516 Third Avenue, W400  13 Seattle, WA 98104</p> <p>14 <i>Jenifer.Merkel@KingCounty.gov</i></p>	<p>Electronic Mail</p>
<p>15 <i>Attorneys for JPMorgan Chase Bank, N.A.</i>  16 Susan T. Alterman  17 Mathew W. Lauritsen  18 Kell, Alterman &amp; Runstein, L.L.P.  19 520 Yamhill St.  20 Portland, OR 97204</p> <p>21 <i>SAlterman@KelRun.com</i>  22 <i>MLauritsen@KelRun.com</i></p>	<p>Electronic Mail</p>
<p>23 <i>Attorneys for the City of Seattle</i>  24 Russell S. King  25 Seattle City Attorney  26 701 5<sup>th</sup> Ave, Suite 2050  Seattle, WA 98104</p> <p><i>Russell.King@Seattle.gov</i>  <i>Engel.Lee@Seattle.gov</i></p>	<p>Electronic Mail</p>

21 I declare under penalty of perjury under the laws of the State of Washington, that the  
22 foregoing is true and correct to the best of my knowledge.

23 EXECUTED October 7, 2016, in Seattle, King County, Washington.

24   
25 Donya W. Burns