No. 95887-4

SUPREME COURT
OF THE STATE OF WASHINGTON

FREDERICK A. KASEBURG and KEITH L. HOLMQUIST

Appellants,

vs.

THE CITY OF SEATTLE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This appeal arises from the City of Seattle's condemnation action regarding a small waterfront parcel on Lake Washington (the "Property"). The Property has been used as a public beach for decades and the City seeks to acquire the Property to reinstate that use after title was previously quieted in favor of Appellants.

Appellants' Petition for Review does not concern the issues before a trial court in a condemnation action. Indeed, it is entirely tangential to the trial court's public use and necessity determination. There is no dispute the Property will be used for a public park, or that it will reasonably facilitate that use. Instead, this appeal consists of attacks on the legislative activities that led up to the City Council's authorizing the City to acquire the Property via negotiation or eminent domain.

The trial court and the Court of Appeals both rejected Appellants Frederick A. Kaseburg and Keith L. Holmquist's efforts to rewrite settled law via inapt and collateral legal doctrines.[1] In short, a condemnee has constitutional procedural due process rights in a judicial condemnation action, not the underlying legislative process; the City complied with all

[1] The Court of Appeals Opinion ("Op.") is attached to Appellants' Petition for Review ("Pet.") at Appendix A; *see also* 2018 WL 1472713. Appellants are referred to collectively herein as "Kaseburg".

applicable notice requirements and there is no violation of the Open Public Meetings Act; and the appearance of fairness doctrine has no application in the legislative process resulting in a condemnation ordinance.

There is no basis under RAP 13.4(b) for this Court to review the Court of Appeals' opinion and Appellants' Petition should be denied.

II. COUNTERSTATEMENT OF THE CASE

A. The Property.

The Property consists of portions of two parcels of property at the end of NE 130th Street that together form a beach on Lake Washington.[2] Beginning in the 1920s, when NE 130th Street was first platted and the neighborhood established, the Property served as a community beach.[3] The City long believed that it had acquired the Property as a public street-end, and for decades, the public used the Property for shoreline access.[4]

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[2] CP 124; CP 448; CP 468; Op. at 2.

[3] CP 26:22-27; Op. at 2.

[4] CP 124-129; Op. at 2. The City has an established policy of preserving and improving street ends as public shoreline access points for park, recreation, and open space use. *E.g.* CP 131-140; CP 209-210 at ¶ 2; CP 210 ¶ 7; CP 443-471, (Seattle Department of Parks and Recreation ("DPR") 2006 Shoreline Access Gap Report); CP 57 at ¶ 3; CP 64:18-20 (2008 parks levy); CP 148-187 (Seattle Department of Transportation ("SDOT") Shoreline Street Ends Work Plan); CP 235 (DPR's 2011 Development Plan). The City's planning documents show that it intended to preserve the Property as a public shoreline access point. *E.g.* CP 64:18-20; CP 81; CP 133:11-14; CP 137 at No. 123; CP 167-168; CPP 448.

B. The Quiet Title Action.

Appellants Holmquist and Kaseburg live on either side of the Property. In 2012, shortly after the Parks Department posted a sign on the Property regarding planned improvements, the City learned that Holmquist and Kaseburg had filed a lawsuit seeking to quiet title in the Property in their favor.[5] That lawsuit resulted in Holmquist and Kaseburg each becoming an owner of one of the parcels that make up the Property.[6]

C. Public Outreach to Elected Representatives.

In response to Appellants' quiet title action and acquisition of the Property, members of the public became engaged. They reached out to City Councilmembers about the importance of a public beach at the Property and they expressed their frustration at having lost a valued community asset.[7] They emailed their Councilmembers and arranged for walking tours of the area in hopes of garnering support for the City to acquire the Property to restore its public use.[8]

Interested members of the public organized as a community and voiced their collective concerns and desires to their elected

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[5] CP 57 at ¶ 5.

[6] *See generally Holmquist v. King Cty.*, 182 Wn. App. 200, 328 P.3d 1000 (2014); Op. at 2; CP 487 at ¶ 2.

[7] *E.g.* CP 494; CP 498; Op. at 3.

[8] *E.g.* CP 498; CP 501-502; CP 504; CP 506-508; CP 523; CP 530-533; Op. at 3.

representatives—and they persisted even though some of those representatives initially did not express a similar interest in the prospect of re-acquiring the Property.[9]

The City Council engaged with the public, as one would expect elected representatives to do with their constituents.[10] In response to citizen outreach, various Council members began to express support for a potential acquisition of the Property by the City.[11] On June 8, 2015, during a public briefing, the Councilmembers signed on to a letter to the Mayor.[12] The Letter advised the Mayor that the Councilmembers had received numerous inquiries from concerned Northeast Seattle residents regarding the loss of public beach access.[13] The Letter noted the historical use of the Property as a public beach and expressed support for the City's acquiring the Property "for public park purposes."[14]

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[9] *E.g.*, CP 498; CP 501-502; CP 504; CP 506-508; CP 511-512; CP 523; CP 530-533; Op. at 3.

[10] *Id.*

[11] *E.g.* CP 536-537.

[12] CP 189-190 (the "Letter"); CP 549; CP 586:1-2; RP 7:14-8:17; Op. at 3-4. The Council's open briefing sessions are video-recorded and available online. *See generally* http://www.seattlechannel.org/CouncilBriefings. Video of the June 8, 2015 briefing is available at https://www.seattlechannel.org/CouncilBriefings?videoid=x55651 (*see* discussion at ~33:19 – 38:14). Under ER 201, the Court may take judicial notice of the public briefing as posted on the City's public-access website.

[13] CP 189; Op. at 3-4.

[14] *Id.*

D. Legislative Authorization.

1. The Ordinance and Notice.

Given the public and political support for acquiring the Property to restore its public use, and the City's shoreline access policies, Department of Parks and Recreation ("DPR") personnel prepared Council Bill 118500 (the "Ordinance") at the Mayor's direction.[15] In preparing the Ordinance, DPR relied on the longstanding public use of the Property, the 2006 GAP Report, and its 2011 Development Plan.[16] The Ordinance was drafted to authorize the Superintendent of Parks to "acquire, through negotiation or condemnation, [the Property] for open space, park, and recreation purposes[.]"[17]

On September 1, 2015, the City sent Kaseburg notice of the City Council and its Parks Committee's upcoming consideration of the Ordinance via certified mail.[18] The Notice advised that the Parks Committee would be taking public comment during its upcoming meeting, and provided details regarding the meeting.[19] The Notice further

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[15] CP 56-57 at ¶¶ 2-6 (paragraph 6 of CP 57 is incorrectly numbered as paragraph 4); CP 207 at ¶¶ 2-3; CP 210 at ¶¶ 3-4.
[16] CP 210 at ¶¶ 2-3.
[17] CP 26:6-8; Op. at p. 4.
[18] CP 192-201; CP 768-778 (collectively, the "Notice"); Op. at p. 4.
[19] *Id.*

explained that if property owners attended the meeting, they would "have the opportunity to express [their] views on the ordinance during the public comment period" and that they could also "submit comments in writing to Committee Chair Jean Godden," and provided contact information.[20]

The Notice also included a description of the upcoming "Final Action"—consideration of a condemnation ordinance by the Council.[21] Appellants do not dispute that they timely received the Notice.

2. The Public Committee and Council Meetings.

On September 15, 2015, two DPR employees presented the Ordinance to the City Council's Parks Committee.[22] The Committee considered the Bill and voted to approve sending it to the full Council.[23] There is no evidence that either Kaseburg or Holmquist attended the Committee meeting or submitted any written comments.

The full City Council considered and passed the Ordinance in a public meeting on September 21, 2015.[24] There is no evidence that either

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[20] *Id.*
[21] CP 196; CP 773; Op. at 4-5.
[22] CP 208 at ¶ 4; CP 211 at ¶ 8; Op. at 5.
[23] *Id.*
[24] CP 26-29; Op. at 5.

Kaseburg or Holmquist attended the Council meeting. The Mayor signed the legislation on September 29, 2015.[25]

E. The Condemnation Action.

The City initiated two condemnation actions to acquire the Property—one against Kaseburg (CP 1-20) and the other against Holmquist (CP 594-613)—that were subsequently consolidated. It is undisputed that Kaseburg and Holmquist both received notice and service of the condemnation petitions.

On December 9, 2016, the trial court held a hearing on the City's PUN Application in the consolidated action, and counsel for the parties presented substantial argument.[26] The trial court found that (i) the requirements for finding public use and necessity were met, (ii) the City had complied with RCW 8.25.290, and (iii) the Council adopted the Ordinance in a lawful manner.[27] The trial court also made detailed rulings regarding Kaseburg and Holmquist's collateral attacks on the legislative activities of the Council and its members.[28]

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[25] *Id.*

[26] RP 1, 3:4-30:19; Op. at 5.

[27] CP 1105-1108; RP 30:21-22, 32:15-16; Op. at 5.

[28] CP 1105-1108; RP 32:10-13; RP 30:23-31:25; RP 32:1-9; RP 32:14-15; Op. at 5.

F. The Court of Appeals Opinion.

Kaseburg appealed to Division I of the Court of Appeals. On appeal, Kaseburg argued the "trial court erred by failing to find that the City of Seattle violated their due process rights, the Open Public Meetings Act of 1971[29] (OPMA), and the appearance of fairness doctrine by adopting an ordinance authorizing condemnation of their property."[30]

The Court of Appeals affirmed the trial court. Applying this Court's precedent, the Court of Appeals held that neither the adoption of the Ordinance nor prior Council actions infringed Kaseburg's constitutional due process rights.[31] The Court of Appeals also held that Appellant's OPMA argument failed for lack of evidentiary support: there was no evidence of emails sent between a majority of the Council members that could constitute a "meeting" under the OPMA and, likewise,

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[29] Ch. 42.30 RCW.

[30] Op. at 2.

[31] Op. at 5-9. The Court of Appeals also found that the Council's letter expressing support for condemning the Property was not a "final action authorizing condemnation"—*i.e.*, it didn't "authorize" any action. *Id.* at 8. Rather, the Ordinance authorized the City to move forward to initiate judicial condemnation proceedings and thus adoption of the Ordinance was the final action. *Id.* The COA decision, however, did not turn on what constitutes a "final action" (the Letter or adoption of the Ordinance), as neither resulted in any deprivation of property. *Id.* at 8-9. Thus, Kaseburg's due process rights were not implicated by either. *Id.*

there was no evidence of any Council meeting subject to the OPMA that was not open to the public.[32]

Finally, the Court of Appeals applied this Court's precedent and rejected Kaseburg's argument that adoption of a condemnation ordinance is a quasi-judicial proceeding subject to the appearance of fairness doctrine.[33] The Council's passage of a condemnation ordinance authorizing the City to initiate a judicial condemnation action is a legislative act and the appearance of fairness doctrine does not apply.[34]

Kaseburg subsequently filed a motion for reconsideration with respect to the Court of Appeals' ruling that there was no evidence of any Council meeting subject to the OPMA that was not open to the public. The Court of Appeals denied the motion.

III. ARGUMENT

A. There is No Constitutional Procedural Due Process Issue.

Kaseburg argues that Appellants' procedural due process rights were denied because of outreach to and lobbying of individual Councilmembers by citizen constituents, and the Council's Letter recommendation to the Mayor that the City acquire the Property. Pet. at

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[32] Op. at 9-12.
[33] Op. at 12-15.
[34] *Id.*

14-17. Rhetoric aside, this argument fails to implicate any question of constitutional law.

In the condemnation context, constitutional rights regarding procedural due process inhere in the court proceeding that ultimately effects condemnation—not the legislative activities relating to the enabling ordinance that authorizes the government to initiate those proceedings. Kaseburg's secondary argument about statutory notice during the legislative process likewise fails to create a constitutional issue.

1. Challenges to Legislative Activities Regarding a Condemnation Ordinance Do Not Implicate a Constitutional Issue.

Kaseburg argues his constitutional procedural due process rights were violated in two ways.

Kaseburg argues the City violated a statutory notice requirement for the hearing at which the Council adopted the Ordinance because the Councilmembers had "pre-decided" their positions as expressed in the prior Letter. Pet. at 16; CP 494-495.

Kaseburg also argues that the condemnees were "excluded" from the "process" because when his fiancée emailed a Councilmember to lobby for Kaseburg's position, she was advised to direct future

communications through the City Attorney's office given then pending litigation between the City and Kaseburg. Pet. at 1, 16; CP 520-521.[35]

Neither of these arguments raises any constitutional muster. Both concern the Council's legislative process and selection of the Property for condemnation, not the subsequent judicial condemnation action. It is well-settled law that an individual property owner has constitutional due process rights in the judicial condemnation proceedings, but not in the underlying legislative process that authorizes the government to initiate the judicial action. Simply put:

> A resolution does not result in a taking of property and does not deprive a property owner of any rights. Even if the resolution is approved, the condemnation may or may not go forward. The actual condemnation action does not occur until the judicial hearing. Hyperbole and inflated rhetoric do not alter the fact that the individual landowner's constitutional rights are protected in the judicial proceeding, *not* in the public meeting authorizing condemnation.

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[35] Councilmember Licata responded to Ms. Schwartz that he was not aware of the information she provided and he asked his assistant to "look into it." CP 520-21. Kaseburg's "exclusion" argument is also undermined by the fact that he and Holmquist were invited to attend the Parks Committee meeting and provide comment; and they also received notice that they could attend and provide comment before the full Council. CP 192-201; CP 203-206; CP 768-778; CP 780-783. There is no evidence that Kaseburg or Holmquist made any effort to engage in this process.

Public Utility Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC ("*NAFTZI*"), 159 Wn.2d 555, 570-71, 151 P.3d 176 (2007) (emphasis in original).[36]

Here, the Court of Appeals applied relevant precedent to hold that the City's adoption of the Ordinance and the underlying legislative activities do not implicate constitutional due process rights. Op. at 6-9. "The actual condemnation action does not occur until the judicial hearing" and, "[t]hus, prior to the judicial proceeding, property owners suffer 'no deprivation cognizable under the law of due process.'" Op. at 7 (quoting *NAFTZI*, 159 Wn.2d at 570-71; *Carlisle*, 168 Wn.2d at 569).

2. Kaseburg's Statutory Notice Arguments are Inapposite.

Kaseburg's arguments regarding the notice provided for by RCW 8.25.290 do not change this settled law. RCW 8.25.290 requires the City

[36] *See also Carlisle v. Columbia Irrig. Dist.*, 168 Wn.2d 555, 568-69, 229 P.3d 761 (2010) (constitutional due process inapplicable if actual deprivation is contingent on subsequent action). The United States Supreme court has "repeatedly characterized the condemnor's decision on the necessity for a taking and the quantity to be appropriated as legislative and has, therefor, denied to land-owners the right to participate in that decision-making process or to litigate on federal constitutional grounds the decision to condemn private property." *Joiner v. City of Dallas*, 380 F.Supp. 754, 764-65 (N.D.Tex. 1974) (citing cases); *see also Brody v. Village of Port Chester*, 434 F.3d 121, 133 (2nd Cir. 2005) (property owner "has no constitutional right to participate in the Village's initial decision to exercise its power of eminent domain").

to give property owners individualized notice before it "takes a final action authorizing condemnation as provided in RCW 8.12.040."

The Washington State legislature enacted this statute in response to *Central Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), which held that the then-operative Washington statutes did not require personal notice of the public meeting establishing necessity (*i.e.*, the legislative selection of property for acquisition). *See* Appendix 1 (final bill report).

The legislative enactment of RCW 8.25.290 did not, however, create a constitutional procedural due process right with respect to the required statutory notice, and Kaseburg offers no authority for his argument otherwise. Pet. at 16. Nothing in the legislative history of RCW 8.25.290 suggests that the statute "supersedes" settled law regarding the inapplicability of constitutional due process to the legislative authorization of a condemnation ordinance—or to the limitations of procedural due process as articulated in *NAFTZI* or *Carlisle*.[37] Since no constitutional due

[37] *Cf. James v. Rowlands*, 606 F.3d 646, 656-57 (9th Cir. 2010) (state notice statute does not create constitutional procedural due process); *Whittaker v. Cty. of Lawrence*, 674 F.Supp.2d 668, 695-97 (W.D.Penn. 2009) (violation of state condemnation statute does not constitute violation of Due Process Clause). Kaseburg's argument also depends upon the erroneous assertion that the Letter constituted a "Final Action" for purposes of RCW 8.25.290(1)(c). The Court of Appeals ruled that (a) the Letter was not a Final Action because it "authorized no action

process question is presented, RAP 13.4 does not provide for review of this issue.

B. There is No Evidence of any OPMA Violation.

Kaseburg challenges the Court of Appeals holding that that he failed to present any evidence and, thus, did not meet his burden of proof to support his claim that the City violated the Open Public Meetings Act ("OPMA"). Pet. at 11-13.

Kaseburg asserts that the City Council violated OPMA because a "public hearing … never occurred" and the Council members "predetermined" how they would vote on a potential condemnation ordinance when they signed on to the Letter.[38] Pet. at 12; CP 765-66.

But the law requires something more than summary allegations. As the party asserting the purported OPMA violation, Kaseburg has the burden to show that the briefing session during which the City Council

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whatsoever," and (b) the City Council's adoption of the Ordinance was the Final Action. Op. at 8-9. "Even then, the adoption of the Ordinance did not implicate the Appellants' constitutional due process rights." Op. at 9.

[38] Previously, Kaseburg's primary OPMA argument—now abandoned—was the contention that "the City violated the OPMA by communicating via e-mail with members of the community" and that such communications "constituted a 'chain meeting' that was not open to the public." Op. at 10. The Court of Appeals held that "there is no evidence of e-mails between a majority of the council members concerning official Council business." *Id.* at 11. To the contrary, "the e-mails upon which the Appellants rely were communications between individual council members and *members of the community*." *Id.* (emphasis in original).

discussed and approved the Letter violated the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001).

In this respect, Kaseburg argues that the Council briefing session was closed to the public, but fails to offer any supporting evidence.[39] For this reason, the Court of Appeals held that "Appellants have produced no evidence of any meeting between council members subject to the OPMA that was not open to the public." Op. at 12.

There is no basis in RAP 13.4(b) to review this ruling, which is grounded in a basic failure of evidence. Contrary to Kaseburg's assertion (Pet. at 11), this is not an issue of substantial public interest.

C. The Appearance of Fairness Doctrine Does Not Apply.

1. A Legislative Hearing Does Not Implicate the Appearance of Fairness Doctrine.

Kaseburg argues the appearance of fairness doctrine applies to a condemnation ordinance because notice and a hearing are required by

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[39] Kaseburg asserts that "[n]o evidence in this record shows that the June 8 briefing was an open public meeting." Pet. at 13. This argument misapprehends which party bears the burden of proof regarding a purported OPMA violation—and is contrary to the public record. *See* n.12 *supra*. Kaseburg also argues that "even if a public meeting had occurred, it was not open to the excluded condemnees." Pet. at 13. Again, Kaseburg points to no supporting evidence.

statute.[40] Pet. at 5 (citing *Zehring v. City of Bellevue*, 103 Wn.2d 588, 591, 694 P.2d 638 (1985)).

In *Zehring*, this Court held that the appearance of fairness doctrine does not apply to planning commission design review hearings for rezoning determinations because those hearings do not determine the legal rights of the parties. 102 Wn. 2d at 591. The Court also noted that design review hearings do not require a public hearing, and the appearance of fairness doctrine "has never been applied to administrative action except where a public hearing was required by statute." *Id.*

Nothing in *Zehring* supports the proposition that because notice and a hearing on a condemnation ordinance are required by statute, the appearance of fairness doctrine therefore applies. In fact, this Court has squarely rejected such an expansive argument.

> A statutory public hearing by a legislative body is not the talisman for invoking the appearance of fairness doctrine … Prior cases should not be interpreted as indicating that a decision becomes quasi judicial and triggers the appearance of fairness doctrine by the mere fact that a hearing is required by statute.

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[40] Kaseburg states that the City "violated the appearance of fairness doctrine by determining that it was going to condemn the properties before it notified the condemnees[.]" Pet. at 5. But there is no citation to the record and Kaseburg makes no mention of the City Council meeting at which the Ordinance was adopted, the prior Parks Committee Meeting, and the notices that Appellants received regarding both meetings. These facts are undisputed. *See also* n.31 *supra.*

Harris v. Hornbaker, 98 Wn.2d 650, 659-60, 658 P.2d 1219 (1983).

The Court of Appeals correctly applied this precedent. Op. at 15.

2. A Condemnation Ordinance is a Legislative Act and Not Subject to the Appearance of Fairness Doctrine.

Kaseburg alternatively argues that passage of a condemnation ordinance is a "quasi-judicial" act subject to the appearance of fairness doctrine. Kaseburg's argument is not supported by law.

It is settled law in Washington that the appearance of fairness doctrines does not apply to legislative decisions. *Harris*, 98 Wn.2d at 658 and n. 2 (reaffirming that the appearance of fairness doctrine has never been applied to legislative decisions); *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992) (applicability of the appearance of fairness doctrine turns on whether the proceedings to amend the zoning code were legislative or quasi-judicial); RCW 42.36.010.

Under the common law, this Court has established a multifactor test to determine whether an action is quasi-judicial or legislative:

> (1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Harris v. Pierce Cty., 84 Wn. App. 222, 228, 928 P.2d 1111 (1996).[41]

Here, each factor reinforces that the City Council's passage of the Ordinance is a legislative act—not quasi-judicial. Op. at 13-14. Courts do not have the power to make policy decisions regarding whether to expend public funds to acquire property, nor have they historically performed that duty. A decision to select property for a public use does not involve the application of law to declare or enforce liability, and passing legislation authorizing the expenditure of City funds for the benefit of the public is the ordinary business of legislators, not the courts.

Likewise, the statutory appearance of fairness doctrine is limited to "quasi-judicial" actions—*i.e.*, "those actions of the legislative body … which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." RCW 42.36.010.

Contrary to Appellants' imprecise assertion, the applicable law does not render "condemnation" to be a "quasi-judicial action because it determines the legal rights of specific parties (the condemnees)[.]" Pet. at 10. The Ordinance does not determine any legal rights. The Ordinance, like other eminent domain legislation, authorizes condemnation

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[41] Kaseburg refers to these as the "Harris 1996 factors" and erroneously asserts that the City did not address them in its prior briefing. *Compare* Pet. at 10 *with* Respondent's Brief on Appeal at 38-39.

proceedings, but this authorization does not determine a condemnee's rights. Those are determined in a court proceeding, the judicial condemnation action. *NAFTZI*, 159 Wn.2d at 570-71; CP 26-29.

Whether the Court applies the four-factor *Harris* test or the statutory definition in RCW 42.36.010, the result is the same. The City Council's adoption of the Ordinance is a legislative action that is not subject to the appearance of fairness doctrine.[42] The Court of Appeals correctly applied the relevant law and found the Ordinance is a legislative action. Kaseburg's arguments provide no basis to revisit that ruling consistent with RAP 13.4(b).[43]

IV. CONCLUSION

The Court of Appeals correctly applied this Court's precedent regarding the constitutional aspects of condemnation proceedings and the applicable scope of the appearance of fairness doctrine, and it made an

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[42] *See also King Cty. v. Farr*, 7 Wn. App. 600, 605-18, 501 P.2d 612 (1972) (reviewing "legislative authorization of condemnation proceedings").

[43] Contrary to Kaseburg's assertion, this decision does not "conflict" with *Smith v. Skagit Cty.*, 75 Wn.2d 715, 453 P.2d 832 (1969), *Buell v. City of Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972) or *Fleming v. City of Tacoma*, 81 Wn.2d 292, 502 P.2d 327 (1972). These cases each involved zoning decisions and pre-dated codification of the appearance of fairness doctrine for local land use decisions in RCW 42.36. Regardless, none of those decisions supports characterizing adoption of the Ordinance as quasi-judicial. *Harris*, 98 Wn.2d at n. 2 (the rezoning of specific tracts is adjudicatory in nature, not legislative).

unremarkable evidentiary ruling regarding Appellants' OPMA argument. As set forth above, Kaseburg and Holmquist have failed to satisfy any element of RAP 13.4(b) and the Court should deny review.

DATED: July 19, 2018.

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APPENDIX 1

FINAL BILL REPORT
SHB 1458

C 68 L 07
Synopsis as Enacted

Brief Description: Requiring notice to property owners before condemnation decisions.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives VanDeWege, Kessler, Rodne, Appleton, Ahern, Curtis, Kenney, Clibborn, Morrell, P. Sullivan, Eickmeyer, Armstrong, Buri, Chandler, Ericksen, Hinkle, Condotta, Anderson, Eddy, Goodman, Kelley, Haler, McCune, Kretz, Kagi, Ericks, Warnick, Pedersen, Bailey, Newhouse, McDonald, Priest, Roach, Strow, Green, Campbell, Hunter, Takko, Sells, Springer, McCoy, Upthegrove, Williams, Moeller, Ormsby, Pearson, Haigh, Linville, Conway, Dickerson, Dunn, Hasegawa, Rolfes, Ross and Lantz; by request of Governor Gregoire and Attorney General).

House Committee on Judiciary
Senate Committee on Judiciary

Background:

Eminent Domain.
Eminent domain is the term used to describe the power of a government to take private property for public use. The power of eminent domain extends to all types of property, although it is most often associated with the taking of real property, such as acquiring property to build a highway. A "condemnation" is the judicial proceeding used for the exercise of eminent domain.

The state has the power of eminent domain inherently. Many other entities have been granted the power of eminent domain by the State Constitution or through state statutes. These entities range from individual state agencies to many different kinds of local governments and to some private corporations and individuals.

Individual Notice to Property Owners.
A condemnation requires the initiation of a legal action. An entity seeking to acquire property through eminent domain must file a petition in superior court. As is the case with other civil lawsuits, part of the process of commencing a condemnation action includes notice to affected parties. State statutes and court rules prescribe generally the content, timing, and method of notices that must be given to initiate any lawsuit.

Various statutes also prescribe notices that must be given to individual property owners whose property is, or is about to become, the subject of a condemnation action. For instance, in the case of condemnations by the state, not less than 10 days before a condemnation petition is filed with the court, the condemning agency must serve notice informing the property owner that the petition is going to be filed. The notice must briefly:

- state the purpose for which the owner's property is being sought;
- provide a description of the property; and
- indicate when and where the petition for condemnation will be filed.

The notice is to be served on the property owner in the same manner as service is made in civil suits generally. For example, notice may be made by personal service at an owner's usual place of residence. If a property owner's residence is unknown, notice may be made by publication once a week for two weeks in any newspaper published in the county.

There are dozens of separate statutes dealing with the various entities that have the power of eminent domain. Some of the statutes that apply to other entities have provisions relating to procedural matters that either directly reference or roughly parallel the statute that applies to condemnations by the state.

General Notice to the Public, and the *Miller* Decision.
General public notice may also be required, not with respect to eminent domain in particular, but as part of a public agency's general decision making process. With respect to some condemning authorities, statutes by implication and reference require notice to be given to the public regarding a scheduled public meeting at which the question of condemnation of property is to be considered. Such a meeting might include, for example, the adoption by the public agency of a resolution authorizing the agency to proceed with the filing of a condemnation action.

In *The Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, (2006), the Washington Supreme Court addressed the question of whether a posting on a public website complied with a statutory requirement for public notice of a public meeting. The notice in question was regarding an upcoming public meeting at which the Transit Authority would consider potential sites for a project. The Transit Authority was also to consider the necessity of condemning property for the project.

One of the sites under consideration included property owned by Miller Building Enterprises, a construction company. Miller challenged the Transit Authority's use of eminent domain to acquire property and, among other things, asserted that the posting of a meeting notice on a public website was inadequate. In a five to four opinion, the court held that the public website posting met the statutory requirements for a public meeting notice.

The majority opinion in *Miller* is not about failure to provide required notice to a property owner. The property owner had apparently been in discussions with the Transit Authority for three years about the possible use of the property for a transit station. The property owner had also been served with a formal notice of intent to acquire property. The owner also received the required notice by personal service when the Transit Authority petitioned the court to begin condemnation proceedings. The majority opinion indicates that the property owner actually attended the public meeting in question.

The majority opinion is also not about due process or other constitutional claims regarding notice. With respect to notice of the Transit Authority's public meeting, the majority opinion addresses only the issue of whether the Transit Authority's use of a website posting was a

statutorily permissible means of notifying the public of an upcoming public hearing. The court held that it was.

The dissent by Justices Alexander and Chambers in *Miller*, on the other hand, argues that the purpose of the statutory public notice requirement is to give notice to potentially affected members of the public. Even though Miller may have known about the Transit Authority's interest in the property, Miller was not given explicit notice that a resolution authorizing condemnation would be considered at the public meeting in question. The dissenters disagree with the majority that a website posting is an adequate means of giving notice and state that "due process demands that government err on the side of giving abundant notice when it seeks to take property." Justice J.M. Johnson, in a separate dissent, argues that the Transit Authority also failed to follow its own internal policy on giving notice.

Summary:

Additional Individual Notice Required in the Condemnation Process.
A condemnor is required to give a property owner 15 days notice before holding a public meeting or taking final action that will select the owner's property for condemnation or that will authorize the use of condemnation to acquire the property.

Condemning Entities.
Condemning entities that are required to give notice before final action include:
- state agencies;
- counties;
- cities and towns;
- school districts;
- corporations; and
- any other entity operating under the condemnation statutes that apply to the listed entities.

Definition of Final Action.
For local governments, final action is defined by referencing the Open Meetings Act and means a collective decision, or an actual vote by a majority of the members of a governing body regarding a motion, proposal, resolution, order, or ordinance.

For state agencies, final action is to be defined by the Attorney General, who is directed to ensure that owners have an opportunity for comment before an agency makes a final decision to authorize the condemnation of a specific piece of property.

For all other entities, final action means a public meeting at which the entity decides whether to authorize condemnation of a specific piece of property.

Content of the Notice.
A notice must:
- contain a general description of the property, such as street address, lot number, or parcel number;
- specify that condemnation of the property will be considered; and

- give the date, time, and location of the final action or public meeting.

Method of Notice.
Notice must be mailed by certified letter to the property owner's address, if known or ascertainable. Notice must also be given by publication in the legal newspaper with the largest circulation in the jurisdiction in which the property is situated and, if different, in the newspaper regularly used by the condemning entity for notices.

Consequence of Failure to Give Notice.
Failing to meet the notice requirements voids any subsequent proceedings as to persons not properly served with the required notice. However, an entity may cure the failure by giving notice in compliance with the act.

Votes on Final Passage:

House	96	0
Senate	49	0

Effective: July 22, 2007

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of the foregoing document to be served on the following in the manner(s) indicated:

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DATED this 19th day of July, 2018 at Seattle, Washington.

Gabriella Sanders

Gabriella Sanders

SAVITT BRUCE & WILLEY LLP

July 19, 2018 - 2:29 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95887-4
Appellate Court Case Title:	City of Seattle v. Frederick A. Kaseburg, et al.
Superior Court Case Number:	16-2-19373-1

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