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No. 96901-9

SUPREME COURT
OF THE STATE OF WASHINGTON

RITE AID CORPORATION and THRIFTY PAYLESS, INC.,

Petitioners,

vs.

THE CITY OF KIRKLAND,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the City of Kirkland (“City”).

II. COURT OF APPEALS’ DECISIONS

A copy of the Court of Appeals’ Unpublished Opinion affirming the determination of public use and necessity is attached as Appendix A to the Petition for Review (“Petition”) filed by Rite Aid Corporation and Rite Aid Payless, Inc. (collectively “Rite Aid”). A copy of the Court of Appeals’ related order denying Rite Aid’s Motion for Reconsideration is attached as Appendix B to the Petition.

III. ISSUES PRESENTED FOR REVIEW

In Ordinance No. O-4519 (“Ordinance”), the Kirkland City Council (“City Council”) declared that the Rite Aid Property was necessary for the public use of a fire station. Rite Aid’s Petition asserts only that (a) the City Council should have selected a different or smaller site, (b) the Ordinance fails to identify a public use or otherwise fails to identify a public use for the entire property, (c) the trial court should have conducted an evidentiary hearing, and (d) the tenant on an adjacent property was a necessary party below, even though that tenant did not seek to intervene or object to the Ordinance and the adjacent property is not in any manner addressed by the Ordinance. Do Rite Aid’s assertions satisfy any of the review criteria set forth in RAP 13.4(b)? *No*.

IV. FACTS RELEVANT TO PETITION

This case involves the City's acquisition of property by eminent domain to locate a new Fire Station 24 ("Fire Station Project"). After spending several years considering more than 20 possible sites for the Fire Station Project, the City Council adopted the Ordinance on May 17, 2016. CP 90 and 100-01.

A. An Urgent Need Exists for a New Fire Station to Serve a Rapidly Growing Kirkland.

Effective June 1, 2011, the City annexed a substantial portion of unincorporated King County known as Finn Hill. After annexation, the City assumed responsibility from Fire District No. 41 to provide fire and emergency medical services ("EMS") in Finn Hill. CP 91. Beginning in 2004, Fire District No. 41 had begun the process to consolidate the two stations by building a new fire station on Finn Hill. CP 91 and 141.

Beginning in 2011, the City Council considered more than 20 potential sites for the Fire Station Project. CP 92-93 and 122. In July 2014, TCA Architecture and Planning prepared a study entitled "Finn Hill Fire Station Siting Analysis" ("Siting Analysis") for the City. CP 94 and 138-53. Following a presentation about the Siting Analysis to the City Council in August 2014, the City Council directed further study, and also

asked City Staff to broaden the analysis to “other properties in the area.” CP 94 and 154–55.

At its meeting on November 18, 2014, the City Council received an updated report regarding the Fire Station Project, which identified six potential sites. CP 94, 156, and 174.

The updated report specifically identified the Rite Aid Property as one of two preferred locations for the Fire Station Project. CP 94–95 and 155. “[T]he most viable options” were the Rite Aid Property and the Juanita Community Church site. Id. Both sites satisfied the City Council’s goal of four-minute Fire Department response times. CP 176 and 179–80.

At the conclusion of this presentation to the City Council, City Staff requested City Council direction regarding station sizing, and the desired programmatic building elements (e.g., inclusion of a fire training facility, one-story or two-story building, three or four truck bays, future expansion area, inclusion of community meeting room, etc.). CP 95 and 185.

The City Council received another update on the Fire Station Project on September 15, 2015. CP 95 and 186–93. On October 20, 2015, after a public hearing, the City Council adopted Resolution R-5163, approving the City Manager’s recommended short-term and long-term

strategies to improve fire and EMS services, including to “[p]urchase property for a new Station 24 . . . near Juanita Elementary School,” which is nearly adjacent to the intersection of NE 132nd Street and 100th Avenue NE, and close to the Rite Aid Property. CP 96 and 198–200.

In pursuing this adopted strategy, the City considered several other alternative sites. CP 96–97. City Staff analyzed “and discussed in detail with the City Council” the advantages and disadvantages of all three sites.¹ CP 97 and 201–03.

Regarding the Rite Aid Property, the “Owner is amenable to sale under condemnation.” The Rite Aid Property had a long list of positive attributes. CP 202. Kirkland Fire Chief Joe Sanford testified in his deposition that “[o]ur first choice has always been the Rite Aid site because of the size,” in part because a training facility would fit. CP 210.

B. The City Council Selects the Rite Aid Property.

The City Council accordingly adopted the Ordinance on May 17, 2016, declaring the Rite Aid Property necessary for the Fire Station

¹ One of the three sites, Juanita Church, presented problems because the City received an “[u]pdate: The City was notified by the Pastor Daniel Corey that they are no longer interested in moving their property.” CP 203. Moreover, the “[s]ite grade change creates most challenging site development.” *Id.* The second site, La Chausse, presented challenges because the lot owners were unwilling to voluntarily extinguish a restrictive covenant. CP 97. The City Council chose not to file condemnation proceedings against all 14 of the lot owners, and chose instead to acquire the Rite Aid Property for the Fire Station Project. CP 97 and 745 (*see generally*, CP 743–751). Moreover, the “site is operationally the least attractive” and “site narrowness limits station design options.” CP 201.

Project. CP 90–91 and 100–02.

C. The City Council Considers, and Rejects, Rite Aid’s Proposal to Settle the Litigation by Co-Locating the Fire Station Project and the Rite Aid Store on the Rite Aid Property.

Prior to February 2017, Rite Aid’s counsel had made known to the City that Rite Aid intended to contest public use and necessity if the City Council took the entire Rite Aid Property. CP 746.

In an attempt to accommodate Rite Aid, the City continued to analyze the alternative of co-locating with Rite Aid on the Rite Aid Property (“the shared use model”).² CP 746–48.

While a “test fit” firehouse (CP 98–99) would of course “fit” on just a portion of the Rite Aid Property, substantial problems existed with the shared use model. CP 747. After consideration of those problems, the City Council affirmed its earlier decision against the shared use model. CP 630.

V. ARGUMENT FOR DENIAL OF REVIEW

A. Rite Aid Fails to Satisfy RAP 13.4(b).

This is a simple matter. In plain terms, Rite Aid complains only that the City Council selected the Rite Aid Property for the Fire Station

² As noted in the proceedings below, Rite Aid’s evidence on appeal pertaining to the shared use model arose solely from settlement discussions between the City and Rite Aid, expressly protected by ER 408. CP 654 (fn. 2) and 746–50.

Project instead of any one of several other and smaller sites, most or all of which would also have been suitable for the Fire Station Project.

Under a long-standing and unbroken string of appellate precedent in Washington, however, the City Council's site selection is conclusive here because Rite Aid failed to meet its burden to show that the *City Council's* site selection decision was fraudulent.³

In virtually every exercise of eminent domain, another property could have been selected and would have adequately served the public use at issue. Under all of the applicable precedent, site selection—including the nature and extent of the property taken—is the prerogative of the involved legislative body. The selection of the Rite Aid Property by the City Council for a fire station does not in any manner trigger any of the review criteria set forth in RAP 13.4(b).

Rite Aid cites RAP 13.4(b) at page one of its Petition, but then offers no analysis of the manner in which any of the required criteria are satisfied here. Instead, Rite Aid simply restates the legal arguments first offered unsuccessfully to the trial court and then repeated to the Court of Appeals.

³ Rite Aid criticizes the City Manager's testimony and the City's counsel's oral argument regarding site selection. The Court of Appeals understandably rejected that misguided critique not only due to its staggering factual inaccuracy, but more so because it is completely irrelevant to the determination of public use and necessity.

1. The Court of Appeals’ decision is wholly consistent with the decisions of this Court and of the Court of Appeals regarding the determination of public use and necessity (RAP 13.4(b)(1) and (2)).

Rite Aid fails to identify any cases in conflict with the Court of Appeals’ decision.⁴ Rite Aid cites Cowlitz County v. Martin for the proposition that an attorney cannot articulate a different purpose for a condemnation than is stated by the municipality. Petition at 15-16, citing 142 Wn. App. 860, 868, 177 P.3d 102 (2008). The City agrees, but the Court of Appeals’ decision is not contrary to Cowlitz. The public use here is specifically identified by the City Council in the Ordinance.

2. The City Council’s decision that the Rite Aid Property is necessary for the Fire Station Project is “deemed conclusive” on the Court in the absence of actual or constructive fraud.

Rite Aid agrees that a fire station constitutes a public use. Petition at 14. The Court then need only analyze the City Council’s express determination that the Rite Aid Property is “necessary” to construct the public use. CP 100–01. Under virtually every applicable appellate precedent, the City Council’s determination of public necessity is a “legislative question, and a declaration of necessity by the appropriate

⁴ Rite Aid cites this Court’s opinion in Cent. Puget Sound Reg’l Transit Auth. v. WR-SRI 120th N. LLC, 191 Wn.2d 223, 254, 422 P.3d 891 (2018). That decision is squarely on point with the City’s argument here and the Court of Appeals’ decision. See Petition at 17.

legislative body 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.” Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965); see also HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth. (“Seattle Monorail”), 155 Wn.2d 612, 629, 121 P.3d 1166 (2005); Deaconess Hospital v. Highway Commission, 66 Wn.2d 378, 405, 403 P.2d 54 (1965) (determination of public necessity “will not be set aside or molested by the courts” in the absence of fraud or arbitrary and capricious conduct). Rite Aid cites to no contrary or conflicting decision of this Court or the Court of Appeals.

Rite Aid expressly bears the heavy burden to prove the fraud necessary to upset the City Council’s determination of public necessity. City of Blaine v. Feldstein, 129 Wn. App. 73, 81, 117 P.3d 1169 (2005). Rite Aid offers no proof—none—of fraud by the City Council in selecting the Rite Aid Property.

In reaching its considered decision, the City conducted an extensive site selection process over many years in order to determine the location for the Fire Station Project. City Staff investigated and analyzed over 20 potential sites and presented these analyses at many City Council and other public meetings. CP 89–99. In making its ultimate selection, the City Council properly considered the undisputed need to serve its

rapidly growing population and to protect its rapidly growing inventory of housing and commercial buildings.⁵ CP 91–92; City of Bellevue v. Best Buy Stores, LP, 180 Wn. App. 1034, 2014 WL 1600924, at *5 (2014),⁶ citing Welcker at 685-86. The City Council’s decision reflects sound public policy and legislative prerogative, not actual or constructive fraud.

Rite Aid suggests that the City has not yet decided what it will do with the Rite Aid Property. Petition for Review at 6. But the City Council, in the Ordinance, expressly decided that the Fire Station Project would be built on the Rite Aid Property. The City Council considered other sites, and rejected those. CP 90, 92–97, 630, and 745–48. The City Council considered co-locating with Rite Aid on the Rite Aid Property, and similarly rejected that. CP 630 and 745–48. The City Council decided to condemn the entire site, and it will be put to a public use. Id.⁷

⁵ The City has experienced an unprecedented surge in population growth and associated development activity. Due to the annexation and other growth throughout Kirkland, its population increased by 73% between 2010 and 2016, from 48,787 residents to 84,680 residents. CP 91–92 and 107–08.

⁶ The City offers this cite as non-binding but wholly persuasive authority pursuant to GR 14.1(a).

⁷ See also CP 474 (TR at 63:18–19, “to condemn the whole parcel, we had to have public use of the whole parcel;” TR at 64:7–10, “Q. So, did you in fact tell the Council that if we condemn the whole parcel we’ve got to come up with more public use? A. Yes;” TR at 65:12–17, “Q. So you’ll decide what the public use is after you’ve completed the condemnation? A. Right. We know we have more than enough public uses for the site, but . . . the final preferred use of all of the site would be a final decision made by the Council.”); CP 454, p. 60, ln. 12–20 (As stated in the deposition of the Deputy City Manager, Marilynne Beard: “[T]he one potential that was discussed was we can put a maintenance - - can we put some of our maintenance functions in the back, because we need extra space, and the determination was that it wasn’t appropriate for that but it would be appropriate for a training - - a training - - fire training facility, which, to my knowledge, is the only other public use that we’ve talked about.”).

The City Council did, of course, consider one private use on the property—co-location of the Fire Station Project and a Rite Aid store, as specifically requested by Rite Aid (CP 746). Responding in good faith to Rite Aid’s specific proposal certainly cannot constitute the impermissible pretext necessary to demonstrate constructive fraud. State ex rel. Wash. State Convention & Trade Ctr. v. Evans, 136 Wn.2d 811, 823, 966 P.2d 1252 (1998); Best Buy Stores, LP, 180 Wn. App. 1034, 2014 WL 1600924, at *5.

In Cent. Puget Sound Reg’l Transit Auth. v. Miller (“Sound Transit”), this Court considered the contention that “a nearby site would be better suited for the project and that condemnation is not necessary.” 156 Wn.2d 403, 421, 128 P.3d 588 (2006). The Court concluded:

But a particular condemnation is necessary as long as it appropriately facilitates a public use. Put another way, when there is a reasonable connection between the public use and the actual property, this element is satisfied. It need not be the best or only way to accomplish a public goal. This court has explicitly held already that the “mere showing” that another location is just as reasonable does not make the selection arbitrary and capricious.

. . . We have already ruled that site selection is essentially a legislative question, not a judicial one. . . .

Id. at 421–22.

Even if there was “excess land” taken here, Rite Aid cites to no authority requiring that public use for any claimed excess land must be legislatively determined prior to condemnation and cannot be altered or amended after the condemnation has occurred. The applicable authority, of course, is to the contrary. A city may permissibly take property for one public use and then change that public use at a later time. See Seattle Monorail, 155 Wn.2d at 634; Reichling v. Covington Lumber Co., 57 Wash. 225, 228, 106 P. 777 (1910) (quoting Seattle Land & Improv. Co. v. City of Seattle, 37 Wash. 274, 277, 79 P. 780 (1905)).

3. The City is not taking “excess” property.

Particular to this Petition, this Court long ago confirmed that the taking of private property for a fire station and related fire training facilities, sufficient in size for both current needs and reasonably anticipated future needs, constitutes a public use. State ex rel. Hunter et ux. v. Superior Court for Snohomish County, 34 Wn.2d 214, 208 P.2d 866 (1949) (finding that fire district was authorized under eminent domain statutes to acquire land for fire station building and related training spaces). “The statutes do not limit the amount of property that may be acquired by eminent domain, and therefore reasonable necessity, considering present as well as probable future needs, was the standard by which the commissioners were guided.” Id. at 216.

As this Court more recently explained in Sound Transit:

[w]hen it comes to such discretionary details as the particular land chosen, the amount of land needed, or the kinds of legal interests in the land that are necessary for the project, many Washington decisions have said that the condemnor's judgment on these matters will be overturned only if there is "proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud."

Sound Transit, 156 Wn.2d at 412 (internal citations omitted) (emphasis added); *see also* Seattle Monorail, 155 Wn.2d at 633.

The City Manager openly testified that the City Council could have chosen a smaller site and could have decided to build a smaller facility. After years of consideration of many potential sites of various sizes, however, the City Council chose instead to place the Fire Station Project on the full Rite Aid Property. CP 92 and 98–99. The City Council had many good reasons for doing so. CP 98–99 and 745.

There is no "excess" land at issue here. Even if there was "excess" land, however, the City Council's decision would still stand. "Even if the decision was partially motivated by improper considerations, it will not be vacated so long as 'the proposed condemnation demonstrates a genuine need and . . . the condemnor in fact intends to use the property for the avowed purpose.'" Sound Transit, 156 Wn.2d at 418 (alteration in

original).

Rite Aid’s continued argument that the City and Rite Aid could co-locate on the Rite Aid Property under a “shared use” model⁸ is similarly flawed. In mistakenly arguing that a city may only take property that is absolutely or immediately necessary, Rite Aid relies entirely on cases decided in other states. Even the older Washington cases on which Rite Aid purports to rely support the City’s position, and this Court removed any remaining doubt in Welcker, Sound Transit and Seattle Monorail.

4. No evidentiary hearing was necessary or required.

Rite Aid expressly declined the trial court’s invitation to conduct an evidentiary hearing.⁹ The Court of Appeals accordingly found no error for failure to conduct an evidentiary hearing. Rite Aid cites to no appellate decision in conflict with its own knowing decision to waive an evidentiary hearing.

In fact, the Court of Appeals’ decision here is completely consistent with other appellate decisions. A trial court has full discretion in determining the manner in which to conduct a motion to adjudicate public use and necessity. Feldstein, 129 Wn. App. at 76; *see also* Best

⁸ See fn. 3, *supra*.

⁹ “THE COURT: . . . for this particular hearing is any party requesting to produce live testimony? MR. KENYON: The City is not, Your Honor. MR. MILLER: No, not at this hearing.” RP at 7, ln. 23 – 8, ln. 1.

Buy Stores, LP, 2014 WL 1600924, at *8.

The decision to deny an evidentiary hearing is reviewed for abuse of discretion. Feldstein, 129 Wn. App. at 77. Under RAP 2.5(a), an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009). Rite Aid fails to satisfy RAP 13.4(b)(1) and (2).

In Rite Aid’s Opposition to the City’s Motion for Public Use and Necessity, Rite Aid suggested, without providing authority, that the decision on public use and necessity should be “guided by CR 56.” CP 225. Even if that was the applicable standard—and it is not—Rite Aid could have, but did not, bring a CR 56 motion.

There are simply no relevant, and certainly no material, factual disputes at issue. The parties submitted declarations containing transcript testimony, sworn statements from City Staff, and hundreds of pages of exhibits. CP 440.¹⁰ The trial court was plainly well within its discretion in declining to hold an evidentiary hearing.

¹⁰ In Feldstein, Division One similarly found that the “court had all of the information necessary, including briefs, deposition transcripts, and affidavits, to make an informed decision on whether the City’s proposed boardwalk constituted a public use and whether condemning Feldstein’s property was necessary for that use.” 129 Wn. App. at 77.

5. Goodwill is not an indispensable party.

Conclusion of Law 7 in the Amended Findings of Fact, Conclusions of Law, and Order Adjudicating Public Use and Necessity declares that Goodwill Industries is not an indispensable party because the Goodwill site is adjacent to the Rite Aid Property and the City in its petition in eminent domain did not seek to condemn that adjacent parcel.

Even if Goodwill as a lessee of an adjacent property somehow did have leasehold or other property rights in the Rite Aid Property, the applicable authority is again consistent with the Court of Appeals' decision. "An action against property being taken in condemnation, subject to an existing lease, may be maintained under RCW 8.12.060 without joining the holder of the leasehold interest." City of Pullman v. Glover, 73 Wn.2d 592, 594-95, 439 P.2d 975 (1968). Rite Aid offers no conflicting appellate authority.

Rite Aid argues that Goodwill has a contract right to "use" certain common areas on the Rite Aid Property, and that Goodwill accordingly should have been a named party under RCW 8.12.060. Goodwill has no interest in the Rite Aid Property.¹¹ The Rite Aid Property and the

¹¹ Rite Aid has no standing to assert Goodwill's claimed rights. Goodwill has not sought to intervene. Rite Aid has no standing to assert the rights of Goodwill because Rite Aid is not in any manner injured by Goodwill's absence. Trepanier v. Everett, 64 Wn. App. 380, 382-383, 824 P.3d 524 (1992). A party without standing cannot assert the rights of other parties or nonparties. Ullery v. Fulleton, 162 Wn. App. 596, 604, 256 P.3d 406 (2011).

Goodwill property are separate and adjacent parcels. The petition in eminent domain at issue here addressed only the Rite Aid Property. CP 1–8. The sublease between Albertson’s Inc. and Rite Aid authorizes Goodwill’s “invitees, customers, and employees to use in common” with Rite Aid the portion of the Rite Aid Property not “now or hereafter occupied by buildings” in order to park and access the store. CP 312 (emphasis added). To the extent that Goodwill has any license to use the Rite Aid Property, all of its “invitees, customers, and employees” also have the same rights. To adopt Rite Aid’s argument here would require the City to name as necessary parties to the Petition all of Goodwill’s invitees, customers, and employees. Goodwill has separate and independent property rights under its sublease with Albertsons. If the City ever needs to acquire Goodwill’s *property* rights, it will do so separately by negotiation or condemnation.

Rite Aid relies on Public Utility District No. 1 of Pend Oreille County v. Inland Power & Light Company, 64 Wn.2d 122, 390 P.2d 690 (1964). As noted by the Court of Appeals, in Inland Power, the United States was a party to the action but had not consented to be sued. The petition was dismissed on that basis—not because the county had failed to join an indispensable party. Id. at 126–27. While the Court in Inland Power noted in dicta that the United States would have been a necessary

party in that case,¹² the same Court four years later in Glover had little trouble finding that “Inland is readily distinguishable from the case at hand” because the United States’ interest in Inland “would have been materially affected” by the condemnation. Glover, 73 Wn.2d at 594. The interest of the United States in Glover was not affected at all and the condemnation proceeding accordingly went forward; similarly, to the extent that Goodwill has any interest in the Rite Aid Property, it will likewise remain unaffected. Any such rights will simply be reserved.

B. No Significant Question of Constitutional Law or Issue of Substantial Public Interest Exists Sufficient to Grant Review (RAP 13.4(b)(3) and (4)).

Nowhere in its Petition does Rite Aid expressly argue that this case presents a significant question of law under the state or federal Constitutions, or that it presents an issue of substantial public interest sufficient to grant review. Rite Aid merely restates its earlier arguments without analyzing the review criteria set forth in RAP 13.4(b).

Any constitutional issues that arise break fully in favor of the City here. Condemnations by cities are constitutionally and statutorily authorized.¹³ Rite Aid argues that the City here is appropriating more property than is necessary, but the uninterrupted line of cases cited herein,

¹² 64 Wn.2d at 125.

¹³ Washington State Constitution, Art. I, § 16; Chapter 8.12 RCW.

from both this Court and the Court of Appeals, confirm Rite Aid's fundamental misunderstanding of the term "necessary." In the absence of fraud, the City Council's decision is conclusive, even when other suitable sites exist. Reasonable necessity is the standard, not absolute or immediate or indispensable necessity. Welcker, 65 Wn.2d at 683–84.

Rite Aid also fails to identify any substantial public interest in this matter which would warrant review by this Court. Rite Aid's protracted opposition to the City's petition in eminent domain has been wholly unsuccessful because Rite Aid has done nothing more than repeat the same unsuccessful approach that property owners have used in many of the binding appellate precedents cited herein—specifically, that a different or smaller property would also accommodate the proposed public use. The City agrees (CP 471 and 98), but the existence of other suitable sites is irrelevant. In virtually every condemnation case brought by any government agency, suitable alternative sites will exist. Courts grant substantial deference to legislative bodies on site selection, however, because "courts are not trained or equipped to pick the better route, much less design and engineer the project." WR-SRI 120th N., 191 Wn.2d at 246.

While a decision by the Court of Appeals that has the potential to affect a number of proceedings in the lower courts may warrant review as

an issue of substantial public interest under RAP 13.4(b)(4), such is surely not the case here.¹⁴ The City Council's considered decision to take the Rite Aid Property for the Fire Station Project to serve its rapidly growing residential and commercial populations has no bearing on any other case in this state.

VI. CONCLUSION

Rite Aid's Petition fails to satisfy any of the criteria for review set forth in RAP 13.4(b). Rite Aid's Petition should be denied.

RESPECTFULLY SUBMITTED this 19th day of March, 2019.

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¹⁴ State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (public interest found where the case might affect "every sentencing proceeding in Pierce County . . .").

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Transmittal Information

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Appellate Court Case Title: City of Kirkland v. Rite Aid Corporation, et al.
Superior Court Case Number: 16-2-30496-6

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