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SUPREME COURT NO. 96901-9

COURT OF APPEALS NO.77447-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RITE AID CORPORATION and THRIFTY PAYLESS, INC.,
Petitioners

v.

THE CITY OF KIRKLAND,
Respondent

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are Rite Aid Corporation and its wholly owned subsidiary, Thrifty Payless Inc., (together “Rite Aid”). Rite Aid operates a retail pharmacy in a portion of a shopping center which the City of Kirkland (the “City”) seeks to condemn.

II. CITATION TO COURT OF APPEALS DECISIONS

On December 17, 2018, the appellate court affirmed an order of public use and necessity. *See* Appendix A (“App. Op.”). On January 29, 2019, the appellate court denied Rite Aid’s motion for reconsideration. *See* Appendix B.

III. ISSUES PRESENTED FOR REVIEW

The manner in which the City seeks to exercise compulsory condemnation powers in this case raises significant questions of law under the Washington Constitution and involves issues of substantial interest to the public. The appellate court’s opinion also “is in conflict” with two prior opinions of this Court because it misconstrues the analysis in both *Pullman v. Glover*, 73 Wn.2d 592, 594-95, 439 P.2d 975 (1968), and *Pub. Util. Dist. No 1 of Pend Oreille County v. Inland Power & Light Co.*, 64 Wn.2d 122, 126, 390 P.2d 690 (1964). The Court should accept review of the following issues pursuant to RAP 13.4(b)(1), (3) and (4):

1. Whether the Constitution allows condemnation of property that is

admittedly three to four times the size necessary for the public use identified in the City's ordinance and where the City fails to determine the use for the larger portion of excess property.

2. Whether public use for a taking must be made prior to the taking or whether the Constitution allows condemnation of excess property (land banking) for future public or private uses which are not yet identified by the City Council.

3. Whether a public use must be legislatively identified by ordinance rather than merely by testimony of City staff or counsel.

4. Whether a public use and necessity motion is a summary judgment motion that prohibits the courts from making findings on substantially controverted matters of fact without holding an evidentiary hearing.

5. Whether, RCW 8.12.060 requires the joinder of all tenants of the shopping center who have reciprocal rights and obligations relating to the entire shopping center.

IV. STATEMENT OF THE CASE

A. The Take Property Far Exceeds What is Needed for a Fire Station.

Several years ago the City decided to "relocate" some existing fire stations to improve response times in Kirkland.¹ Beginning in 2011 the

¹ See CP0469 (City Man. Dep. at 10:24-11:11). The fire stations in Kirkland include fire stations 21, 22, 24, 26, and 27. They respectively have 8,541, 9,071, 3,748, 9,795, and 8,159 of building square footage. See CP0585-89. The Rite Aid building is listed as

City considered a number of properties on which to relocate fire station number 24 (“FS24”). *See, e.g.*, CP0092-93 (¶ 10). In 2014, the City Council was presented with seven possibilities for relocating station FS24. *See* CP0470 (City Man. Dep. at 19:16-20:7); CP0484-502. All seven of these properties are large enough to accommodate FS24. *See* CP0461 (Fire Chief Dep. at 12:3-13); CP0471 (City Man. Dep. at 22:13-24:5). These properties ranged from as little as 0.71 acres and one by far the largest site, the Rite Aid Property, consisting of 2.52 acres. *See* CP0490. As the Rite Aid Property was far larger than needed for a fire station, the City designed a plan for taking less than half of it (1.09 of the 2.52 acres). *See* CP0496. Under the City’s own plans for either the proposed “full” or “partial” taking of the Rite Aid Property, removal of the building in which the Rite Aid store is located *was not necessary*. *See* CP0496-97.

In 2015, the City considered another location for relocating FS24 consisting of four adjacent single-family residences. *See* CP507-13. The City’s fire station drawings for this location make clear that only three of the four single family lots were necessary to relocate FS24. *See* CP509 & CP0512; *see also* CP0462 (Fire Chief Dep. at 37:2-9) (confirming that only three lots were necessary). The three lots total only 0.70 acres.²

having 25,234 building square footage on a lot of 109,671 square feet. *See* CP0590-91.

² *See* CP0595-98. The fourth lot was an additional 0.23 acres. *See* CP0599.

“City staff ha[d] commenced negotiations with the four property owners for the proposed [FS24] site.” CP0515-16. On January 6, 2016, the City Manager recommended to the City Council that it acquire the single-family lots. *See* CP0473. And the City Council agreed to do so on January 19, 2016, by passing Ordinance 0-4512 which found that taking the single-family residences was “necessary for the public purpose of construction and operation of a fire station [FS24].” CP0523-26. The City entered into binding purchase and sale agreements with the owners of all three residences needed for the fire station.³

Having identified what its true needs were, having passed a legislative ordinance consistent with those needs, and having all the property necessary under contract, there would then have been no need for this case. However, in the spring of 2016, City staff decided that it no longer wished to use the 0.70 acres of property it already controlled for FS24. Without any indication from the City that it intended to do anything different from relocating [FS24] and building no more than the “fire station” that would require no more than the 0.70 acres already under contract, the City on May 17, 2016 passed Ordinance number 0-4519

³ *See, e.g.*, CP0448-49 (Dep. City Man. Dep. at 25:14 -26:7) (acknowledging that two lots were under contract and one lot was already purchased by the City). The City estimated it could purchase this land, sufficient to meet its needs for a fire station for less than \$1.09 million. *See* CP0512. It appears that the City paid approximately \$558,000 for the lot it purchased. *See* CP0603. In comparison, the City offered nearly three times that amount, \$3.07 million, to the owner of the Rite Aid Property. *See* CP0541.

curiously now finding that the almost four times larger 2.52 acre Rite Aid Property was now “necessary for the [identical] public purpose of construction and operation of a fire station [FS24].” CP0531-34. Ordinance number 0-4519 says nothing about needing the land for any other additional public uses, such as a fire training facility, a parks maintenance center, or anything else.

Before initiating any action to take the Rite Aid Property, the City recognized its proposed taking would be excessive. In its Fall 2015 assessment, the City acknowledged that they could fulfill the need for a fire station by using less than half of the Rite Aid Property. *See, e.g.*, CP0496 (the “Rite Aid Partial” using only 1.09 acres). At that time, in assessing the full Rite Aid Property, the City itself acknowledged that the “Site is too large, co-development or partial sale” would be required. CP0497; *see also* CP0504-05 (on January 27, 2015, the City’s capital projects team manager explained that the City’s “preference is [to take] the whole site (including the building) and then sell off what we don’t need”) (emphasis added).

After Ordinance number 0-4519 was passed, the City readily admitted that the Rite Aid Property is larger than needed for relocating FS24. *See* CP0472 (City Man. Dep. at 35:4-7) (“Q. So if you’re thinking about just the fire station, the site is too large? A. Just the fire station. We

don't need that much space for just the fire station.”); *id.* (35:22-24) (“Q. But [the property] is bigger than you need for just the fire station. A. Yes”); CP0578-79 (Deputy City Manager explaining that “the preliminary site plans didn't take into consideration leaving the rite aid building there for *another* public use”) (emphasis added); CP0464 (Fire Chief Dep. at 43:3-6) (“Q. You'll agree, though, that the site also allows for a lot of other potential uses as well beyond just the fire station. A. Yes.”).

B. The City Has Not Decided On A Use for The Excess Property.

To date, every plan the City has produced shows that the City will use far less than half the Rite Aid Property for a fire station. *See, e.g.*, CP0496-97; CP0548; CP0552; CP0559-65; CP0622. The City readily admits that it will not use the property solely for that purpose. Since filing its petition, the City has discussed but has not selected any of numerous additional or alternative uses for the excess land.

In January 2017 – eight months after Ordinance 0-4519 was passed – one prominent City Council member, Toby Nixon,⁴ explained that

Putting a station on the [Rite Aid] site toward the front of the lot (closer to NE 132nd St) would not preclude other uses of the rear part of the [Rite Aid Property] where the building is currently located. The [Rite Aid Property] (rear part), Goodwill, service station, and bank sites could be combined and redeveloped as a mixed-use multi-story

⁴ Mr. Nixon is one of three members of the public safety committee, the committee likely in charge of determining how the additional land on the Rite Aid Property will be used or disposed of. *See* CP0476-77 (City Man. Dep. at 113:6-114:5).

structure like Juanita Village. I hope this helps explain the city's current thinking on this.⁵

Other City Council members are also interested in directing alternative ways to use the “excess taking” the Rite Aid Property would provide. During the February 2017 City Council retreat, the City Council expressed a desire to be involved in determining “how to use the remainder of the [Rite Aid Property] not needed for the [fire] station.” CP0570 (emphasis added.); *see also* CP0453-54 (Dep. City Man. Dep. at 60:21-62:20) (explaining notes were taken at the February 3, 2017 City Council retreat); *id.* (64:5-9) (“Q: It says ‘not needed,’ correct? A. ‘Not needed.’ So, I think – what that says is if staff has ideas about how to use the additional space, please consult the City Council.”). Indeed, the Council further wished that the City would “[i]dentify the cost of alternate uses of Rite Aid site,” CP0570, and was interested in keeping the site available for retail use, *see id.* (“Don’t take away retail use (sales tax generator) unless necessary”). The Council plainly had not considered the whole parcel “necessary” for a “fire station” as stated at the time it passed Ordinance 0-4519. In fact, the City *still* has not decided how to use the excess land. But, selling it for private use appears to be a top option.

Indeed, since filing this action, the City has developed design

⁵ CP0554. “Juanita Village is a mixed-use development ... that is retail on the bottom and residential on the top, and – so some mixed use, very dense development.” CP0453 (Dep. City Man. Dep. at 57:18-23).

drawings that would allow both Rite Aid and a fire station to exist on the site. *See* CP0617 & CP0622. This proposal was being considered by the City at the time the City filed its motion for an order of public use and necessity (on May 11, 2017).⁶

In Superior Court, the City's counsel argued that the whole of the Rite Aid Property was necessary for uses *related to* the "fire station."⁷ This was based on the declaration of the City Manager, dated May 11, 2017. *See* CP0089-99. This declaration says that some unspecified additional components related to the fire station would be added to the Rite Aid Property. *See* CCP0098-99 (§§28-31). But, it is undisputed that the City Council has not chosen or agreed to these additional components. *E.g.*, CP0463-64 (Fire Chief Dep. at 41:22-42:2) ("Q. Has any of this

⁶ On May 16, 2017, the City Council set aside efforts to co-locate on the site with Rite Aid. *See* CP0630.

⁷ The City's attorney repeatedly misrepresented what the City Council's intentions were regarding the Rite Aid Property. *See, e.g.*, VRP at 17 (Court: [] But is the entire parcel going to be focused on fire training, fire department, and the rest? [City's Counsel] Yes.); VRP at 23-24 ("The Court: Has your client been consistent about whether a hundred percent of this parcel is needed for fire-related purposes? [City's Counsel]: Absolutely."); VRP at 26 ([City's Counsel]:[] Your Honor, you asked about is it clear that the council is going to use the entire property for the fire [station]. It is."). However, the City's attorney's representations were rebutted by the evidence. *See* CP0474 (City Man. Dep. 65:6-10) ("Q. And is that because you really haven't made a decision yet as to what this additional public use is going to be yet? A. Right. We'll present final options to the Council once the site is acquired."); CP0475 (109:18-22) ("Q. Well, because no one has really made a decision yet, right? A. The Council has not made a final decision as to what to do with the site, other than to acquire it."). Moreover, the City Council later proved the City's attorney's representations were false. On June 13, 2017, the City Council considered the possibility of a park maintenance facility being placed on the Rite Aid Property. *See* <http://www.kirklandwa.gov/depart/council/Meetings/Agendas/specmtgagnd061317.htm> (Item 7).

[community center or training center] been approved ...by the City Council? A. No. Q. Funding for any of these sort of programs? A. No., it's just been presented to them.”).

C. Goodwill Has an Interest in the Rite Aid Property

The lot on which the Rite Aid store sits and the adjoining lot where Goodwill Industries has its store (the “Goodwill Property”) are parts of a unified shopping center (the “Shopping Center”) under the common ownership of Wal Properties, LLC (“Wal”). *See* CP0536-39. Albertson’s has a long-term lease for the entire Shopping Center. *See* CP0246-310. Rite Aid subleases part of the Shopping Center. *See* CP0312-95. This sub-lease reserves rights to Albertson’s for itself and other subtenants of other portions of the shopping center:

The leasing of [the Rite Aid Property] is subject, however, to the right of [Albertson’s] and other tenants of [Albertson’s] and their respective invitees, customers and employees to use in common with [Rite Aid] and its invitees, customers and employees of the portions of the [Rite Aid Property] not now or hereafter occupied by buildings for purposes of parking motor vehicles, loading and unloading, ingress and egress to buildings located in the Shopping Center and pedestrian walkways and sidewalks. (emphasis added).

CP0312 (¶1). The sublease also grants Rite Aid rights to use the common areas of other portions of the Shopping Center, including the parking lot on the Goodwill Property. *See id.*

Goodwill also has a sublease with Albertson's. *See* CP0397-433. Under its sublease, Goodwill also has the right to use the common areas, including the parking lot and access points of the entire Shopping Center. *See* CP0400 (¶¶ 1.7-1.8). Under their respective subleases Rite Aid and Goodwill are required to pay common area expenses of the entire shopping center based on the respective relative square footage of building space. *See* CP0314-16 (¶6); CP0407-09 (¶8.2). The City's taking will have a direct effect on the common areas to which Goodwill will have access and will also affect Goodwill's rent.⁸

Goodwill has an interest in the Rite Aid Property created by both its own sublease and reserved by the Rite Aid sublease. Goodwill repeatedly informed the City of its use of the Rite Aid Property. *See* CP0574-76 (Goodwill informing the City of its use of the Rite Aid Property); CP0450-51 (Dep. City Man. Dep. at 33:23-34:20) (the City recognizes that Goodwill uses the Rite Aid Property); *id.* (44:7-23) (Goodwill informed the City it had a property interest in the Rite Aid Property). The City recognizes that Goodwill has a property interest at stake in this matter. *See* CP0583 ("Prioritize the understanding of the lease rights. Goodwill has access on property. How will court handle?").

⁸ The interdependence of the Shopping Center is also demonstrated by the Second Amendment to the Rite Aid/Albertson's lease which provides for pharmacy and grocery supermarket exclusives on each parcel. *See* CP0435-38; *see also* CP0642-44 (Albertson's treating the two properties as one "shopping center").

And the City understands that Goodwill’s rights relating to the Rite Aid Property affect the valuation of the taking. *See* CP0538. But, the City elected not to include Goodwill in its petition.⁹

V. ARGUMENT

A. Courts Cannot Fulfill Their Constitutional Mandate to Determine if Use is “Really Public” When the City Council Leaves Public Uses Undecided

Washington’s constitution requires the Court to police legislative attempts to take property by eminent domain. WASH. CONST. art. I, § 16 provides:

Private property shall not be taken for private use No private property shall be taken or damaged for public or private use without just compensation having been first made Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. (emphasis added).

“In order for a proposed condemnation to meet the constitutional requirement of Const. art. I, § 16, ***the court must find*** (1) ***that the use is really public***, (2) that the public interests requires it, and (3) ***that the property appropriated is necessary for the purpose.***” *In re Pet. of Seattle (“Westlake”)*, 96 Wn.2d 616, 625, 638 P.2d 549 (1981) (emphasis added).

The burden of proof is on the City – not on Rite Aid – to demonstrate to

⁹ *See* CP0001-8. Rite Aid repeatedly informed the City of Goodwill’s property interest. *E.g.*, CP0647; CP0651; CP0440 (¶2); CP0477-78 (City Man. Dep. at 116:6-118:24).

the Court that the condemnation is for a public use and that it is necessary for the public use stated in the ordinance. *See State ex. rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998); *see also Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 566, 151 P.3d 176 (2007).

1. The Take Exceeds What Is Needed for the Stated Public Use

The City has repeatedly admitted that it is taking land in excess of what is necessary for a “fire station.” This Court has long explained that it must find that “the extent of the taking [] be no greater than is reasonably necessary for the *stated public purpose*.” *Pullman*, 73 Wn.2d at 595 (emphasis added); *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959) (“no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity.”). “[T]aking of excess property is no longer a public use, and a certificate of public use must be denied.” *State ex. rel. Tacoma School Dis. No. 10, Pierce County v. Stojack*, 53 Wn.2d 55, 64, 330 P.2d 567 (1958). Other courts agree.¹⁰

¹⁰ Indeed, it is universally accepted that courts should not allow land beyond what is necessary for the stated public use to be taken. *See, e.g., Zutt v. State of New York*, 99 A.D.3d 85, 104 (N.Y. App. 2012) (“as a general principle ... there is no right to condemn land in excess of the need for public purposes, and ... no more may be taken than is required for the particular public purpose”) (citation and quotations omitted); *Springfield v. Gross*, 840 N.E.2d 1123, 1127 (Ohio App. 2005) (“It follows *a fortiori* that the city is required, not only to define specifically the purpose of the appropriation in its legislation, but it is incumbent upon the city to sustain such requirement by proof of its necessity, since the power granted to a municipality to appropriate excess property in furtherance of a public use is only granted when the excess is reasonably needed for that use.”); *County*

The law is clear that when land is more than necessary for the stated purpose, the taking cannot be allowed. Here, the City readily acknowledges that the Rite Aid Property is more than it needs for the stated use of a “fire station.” Indeed, all of the evidence shows that the proposed taking is three to four times the size of lot the City needs.

According to the City’s logic, courts do not have the authority to evaluate the physical realities of the proposed taking so long as the ordinance states the taking is “necessary” and so long as the City was “thoughtful” in its review for a public use. *See, e.g.*, CP0085 (15:12-16). The City is wrong. Cities are not allowed to take private land beyond what is needed, and what they intend to use, for the *stated* public use. The Court should take this opportunity to make clear that legislative bodies cannot merely use a stated public use as a pretext to bank excess land for needs not yet determined. That is what the City admittedly did here.¹¹

of St. Clair v. Faust, 662 N.E. 584, 586 (Ill. App. 1996) (“condemnation of the additional acreage is grossly in excess of the amount of land necessary for the public use. The trial court clearly abused its discretion in finding otherwise. Where the amount of property sought to be taken is grossly in excess of the amount necessary for the public use, the taking must be stopped.”); *People ex rel Director of Finance v. Young Women’s Christian Ass’n of Springfield*, 427 N.E.2d 70, 80 (Ill. 1981) (“Obviously it cannot be said that there was any substantial evidence of need for that portion of the property sought for the [public] use, and the petition attempting to take the entire block should have been dismissed as an attempt to take a ‘grossly excessive’ amount of land.”); *Seadade Industries, Inc. v. Florida Power & Light Co.*, 232 So.2d 46, 51 (Fla. App. 1971) (“Generally, condemning more property than is needed for a public use is held to be a denial of due process.”).

¹¹ As Rite Aid has long argued, the City’s taking is arbitrary and capricious (constructive fraud) and also constitutes actual fraud. CP0232-35. The appellate court was incorrect in

2. The Public Use for the Excess Land Must Be Legislatively Determined Prior to the Taking

To be clear, Rite Aid agrees that a “fire station” is a public use. However, in this instance, the City seeks to take some land under the pretext of it being for a “fire station” but fully intends on using most of the land – the excess land – for a use that has not yet been legislatively determined.¹² It is not possible for the Court to meet its constitutional obligation to determine “whether the contemplated use be really public” where, as here, the City has not legislatively declared and identified what most of the land is to be used for. *Cf. Dickgieser v. State of Washington*, 153 Wn.2d 530, 535, 105 P.3d 26 (2006) (“[t]he question whether the contemplated use be really public shall be a judicial question.”). Here, it is admitted that the City does not even plan to decide how the land will be used until after the City acquires it! CP0474 (City Man. Dep. at 65:6-14). The alternative purpose *might* be a community center, a park maintenance facility, or a training center. Or, the City Council *might* sell the land to

asserting that Rite Aid argued that the City’s actions were fraudulent for the first time on appeal. *Cf. App. Opp.* at n. 13 to CP0233 (Rite Aid argued that the City’s representation that “the taking is necessary for a fire station – when it is actively contemplating numerous other uses for the very same land including co-existing with [Rite Aid] – meets the elements for actual fraud” and explained how all the elements for fraud were met).

¹² In *State ex rel Hunter et ux. v. Superior Court of Snohomish County*, this Court did agree that the land taken for the stated purpose of being *both* a fire station and for a related fire training facility was appropriate as a public use. 34 Wn.2d. 214, 220, 208 P.2d 866 (1949). However, in that case, the county already had determined that it would use the property for both public uses. In this instance, the City Council, in its ordinance or otherwise, has never stated that it intends on using the land in excess of what is needed for the fire station for a fire training facility or any other joint public use.

create a private multi-use retail and residential development. *See* CP0553; *see also* CP0613-22.

This “take it now” and “decide what to do with it later” approach is blatantly unconstitutional. Without knowing what the City is going to use most of the land for, it is impossible for the Court to fulfill its constitutional mandate to determine that the use “be really public.” The Washington Constitution does not afford cities the ability to “land bank” property through the coercive exercise of condemnation. To force a sale through condemnation the “public use” for which that property is actually to be used must be articulated in the legislative action authorizing the taking. Here it was not. The City only planned on using a portion of the Rite Aid Property for the stated public use of a “fire station.”

3. The Council, In Legislation, Not Employees or Lawyers, In Argument, Must Identify the Public Use

The only evidence the City provides that indicates that the entire Rite Aid Property *may* ultimately be used for purposes which in some unspecified way may be *related to* a fire station, is the City Manager’s declaration which was contrary to testimony he gave in his deposition. But, only the City Council has the authority to “determine the necessity requiring the condemnation.” *Cowlitz County v. Martin*, 142 Wn.App. 860, 868, 177 P.3d 102 (2008) (finding that the county’s attorney “has no

authority to determine the necessity for condemnation, and therefore acted without authority when articulating an additional purpose [for the taking]”). Here, the City Council did not state the use for the excess land.

Contrary to the City Manager’s vague declaration and the City lawyer’s argument during the hearing – the evidence is clear that the City has not yet determined what it is going to do with the “excess land.” Inconsistent with *Cowlitz County v. Martin, supra*, the only person articulating that the City was “absolutely” going to use the entire Rite Aid Property for only “fire related purposes” was the City’s lawyer during argument.¹³ Courts cannot fulfill their constitutional duty to determine that the use is really public if the use for which the land is actually intended is not identified in the legislative action.

4. An Evidentiary Hearing Should Be Held For Disputed Factual Issues

The City Manager’s declaration, which was rebutted by

¹³ See, e.g., VRP14-16 and Footnote 7, *supra*. Moreover, the Court should not be misled by a shift from the clear wording of the ordinance, “fire station”, to the advocate’s vague phrasing, “fire related purposes” and “fire station project.” The Superior Court had both the City and Rite Aid draft proposed findings, conclusions and order. See CP0761-67 (the City’s proposed order) & CP0769-80 (Rite Aid’s proposed order). Albertson’s objected to the City’s proposed order, but had no objection to Rite Aid’s proposed order. See CP0753-59. The City’s proposed findings invented the more expansive and vague phrase “fire station project” rather than the limited and precise wording of the actual Ordinance – “fire station.” The hearing was held on June 8, 2017. On September 5, 2017, the Superior Court entered the City’s proposed findings without making a single change in wording. Cf. CP0761-67 to CP0813-19. This caused Albertson’s to move for reconsideration arguing that the Superior Court must not have considered its objections filed June 16, 2017. CP0820-26. The Superior Court ultimately accepted Albertson’s proposed alterations in its amended order. Cf. CP0829-35 to CP0863-69.

overwhelming evidence,¹⁴ was insufficient to support the Superior Court’s factual findings on public use and necessity. This Court has recently explained that “a single deposition, whose conclusions are challenged by two competing depositions, is insufficient to persuade a fair-minded person that the trial court’s finding was correct.” *Cent. Puget Sound Reg’l Transit Auth. V. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 253-54, 422 P.3d 891 (2018). Here the single declaration that the City provided to claim that the Rite Aid Property would be used for uses *related to* a fire station, was controverted by the same individual in his deposition, other deposition testimony, and substantial documentary evidence.¹⁵

Rite Aid’s position is that the admitted facts (discussed above) required denial of the City’s motion and dismissal of the condemnation petition. However, Rite Aid was equally clear that if the Superior Court disagreed and if there were issues of fact, an evidentiary hearing would need to be held at a later hearing. Appellants’ Brief pp. 24-26; Appellants’ Reply Brief pp. 23-24. VRP at 7:4-21; VRP at 8:10-13. The right to an evidentiary hearing with live testimony exists, was not waived,

¹⁴ This evidence included deposition testimony from the City Manager, *see* CP0474-76, from the Deputy City Manager, *see* CP0455, from the Fire Chief, *see* CP0463-64, statements made by the City Council itself, *see* CP0554, CP0570, and numerous designs showing alternative potential plans for use of the excess taking, *see* CP0548, CP-560-65.

¹⁵ *Cf. McCormick v. Lake Washington School District*, 99 Wn.App. 107, 111, 992 P.2d 511 (1999) (“Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact.”).

and was sufficiently preserved before the Superior Court.

B. The Failure to Include Goodwill in the Petition Requires Reversal

The City failed to meet the requirements of RCW 8.12.060 by not including Goodwill in its petition. The statute provides that the

petition *shall* contain a copy of said ordinance, certified by the clerk under the corporate seal, a reasonably accurate description of the lots, parcels of land and property which will be taken or damaged, *and the names of the owners and occupants thereof and of persons having any interest therein*, so far as known, to the officer filing the petition or appearing from the records in the office of the county auditor. [emphasis added].

As this Court ruled in *Inland Power*, *see infra*, failing to include all persons with an interest in the property to be taken as required by RCW 8.12.060 is reason to reverse a ruling on public use and necessity.

Goodwill has an interest in the property that the City seeks to condemn at this time.¹⁶ It has legal right to use the “common areas” including the parking lot on the parcel on which the Rite Aid store is located and the area behind the building which Goodwill uses to drive its delivery trucks around the property.¹⁷ The appellate court cites to *Pullman*

¹⁶ A leasehold interest is an interest in real property for purposes of a condemnation action. *See In re Cntry Side Rest. Inc.*, 340 Wis.2d 335, 347 (2012) (“for purposes of condemnation law, it is well settled that a lessee has a property interest; and, when that interest is completely taken by a condemning authority, the lessee is entitled to compensation.”); *Gasaway v. City of Seattle*, 52 Wn. 444, 446, 100 P. 991 (1909) (“governing condemnation suits by cities ... shall proceed in the names of the owners and occupants of the lands and all persons having an interest therein”).

¹⁷ *See, e.g., Winn-Dixie Stores, Inc. v. Dept. of Transp.*, 839 So.2d 727, 729 (Fla. App. 2003) (explaining that a “lessee is entitled to recover damages in eminent domain

for the proposition that a leaseholder need not be included in a petition. 73 Wn.2d at 594-95. However, in *Pullman* this Court found a leaseholder was not an indispensable party where its leasehold interest would be “diminished in no respect; its interest is not being condemned.” *Id.* at 594.

Here, the City does not intend to take the Rite Aid Property subject to Goodwill’s interest. *Cf.* CP0651 (the City explaining that its “petition appropriates...all of the actual property rights...associated with that one parcel.”). The City’s condemnation action will diminish Goodwill’s right to use the common areas and the rent it pays as the land will be put to a different use. CP0479-80 (City Man. Dep. at 125:19-127:12). The appellate court’s refusal to address the fact that this condemnation will affect Goodwill’s proportionate share of rent paid for the common areas, *see* App. Opp. at n.15, was improper as Rite Aid raised this issue before the Superior Court, *see* CP0223-24. Goodwill has an interest in both the use of the take property and in the rent it will pay.

In *Inland Power*, this Court ruled that failure to include all persons with an interest in the property is reason to reverse a ruling on public use and necessity. 64 Wn.2d at 126 (“[w]ithout the [party], the requirements

proceedings when its access to parking is diminished by a taking.”). Goodwill’s interest in the Rite Aid Property includes all of the “common areas”. This includes a very large parking lot (more than large enough for a fire station), transportation routes around the back of the building which are important for large trucks that load and unload items, and walkways surrounding the building. The City will not be able to build its fire station on these areas without affecting Goodwill’s interests.

of RCW 8.12.060 have not been met.”). Although this Court agreed that the petitioner did seek to condemn land for public use, it still reversed the trial court’s finding of public use and necessity because the requirements of RCW 8.12.060 had not been met.¹⁸ Although the City knows of Goodwill’s leasehold interest in the Rite Aid Property, it failed to include Goodwill as a party. For this reason alone the condemnation petition should be dismissed.

VI. CONCLUSION

This case threatens to set an unfortunate precedent. It threatens to condone: (1) knowingly taking far more land than needed for the public use legislatively stated; (2) failing to identify future uses in the ordinance for land banking purposes; (3) making summary findings on contested “public use” issues without an evidentiary hearing; and (4) disregarding clear statutory requirements. Judicial deference to local legislative bodies who fail to follow proper constitutional and statutory processes invites abuse in future cases. The petition for review should be granted.

¹⁸ See *Inland Power*, 64 Wn.2d at 126-127. The Supreme Court, in *Inland Power*, dismissed the entire action because the requirements of RCW 8.12.060 could not be met in state court since the interested party was the United States. See *id.* This is true even though the United States’ interest was only that of a mortgagee and could be terminated solely by repayment of money. See *id.* at 128 (dissenting opinion). The appellate court’s attempt to limit the holding in *Inland Power* only to cases where the United States government has an interest, see App. Opp. at 24, is contrary to this Court’s opinion and a plain reading of RCW 8.12.060.

Dated this 28th day of February 2019.

VAN KAMPEN & CROWE PLLC

s/ Delbert D. Miller

Delbert D. Miller, WSBA No. 1154

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and Thrifty Payless, Inc.*

DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury under the laws of the State of Washington, that on this day, he electronically filed a true and correct copy of the foregoing and served the following via the Washington State's Appellate Court's Portal and via first class mail, postage prepaid:

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Signed at Seattle, Washington on this 28th day of February, 2019.



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STATE OF WASHINGTON
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Appendix – A

FILED
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2018 DEC 17 AM 9:41

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF KIRKLAND, a municipal corporation,)	No. 77447-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
RITE AID CORPORATION, a Delaware corporation; and THRIFTY PAYLESS, INC., a California corporation,)	
)	
Appellants,)	
)	
WAL PROPERTIES, LLC, a Florida limited liability company; TENTH CHELTENHAM PROPERTIES, INC., a Delaware Corporation; ALBERTSONS COMPANIES, INC., a Delaware corporation, successor in interest to ALBERSTON'S, INC., formerly a Delaware corporation; ALBERTSONS COMPANIES, LLC, a Delaware limited liability company; SAFEWAY INC., a Delaware corporation; and KING COUNTY,)	UNPUBLISHED OPINION
)	
Defendants.)	FILED: December 17, 2018

SCHINDLER, J. — In May 2016, the city of Kirkland (City) passed an ordinance authorizing condemnation of property owned by Wal Properties LLC to construct and operate a fire station to serve the annexed areas of Juanita and Finn Hill. Lessee Rite

Aid Corporation and its wholly owned subsidiary Thrifty Payless Inc. (collectively, Rite Aid) appeal the superior court order adjudicating public use and necessity. We affirm.

FACTS

In 2011, voters approved annexation of the King County unincorporated areas of Finn Hill, Juanita, and Kingsgate. King County Fire District 41 had been responsible for fire and emergency medical services to Finn Hill, Juanita, and Kingsgate and had contracted with the Kirkland Fire Department to provide fire and emergency services.

Fire District 41 and the city of Kirkland had previously discussed the need to improve response times. Fire District 41 proposed consolidating Fire Station 25 on Juanita Drive NE and Fire Station 24 on 84th Avenue NE into one fire station to serve Finn Hill. In May 2011, before the effective date of the annexation, Fire District 41 entered into an "Interlocal Agreement" with the city. The city of Kirkland (City) agreed to provide fire and emergency services to the annexed areas, to "continue and take over certain District projects," and to assume responsibility for projects intended "to improve fire and emergency medical services" and "response times." Fire District 41 agreed to transfer funds and the fire station consolidation project to the City.

In 2012, the City considered the feasibility of consolidating Fire Station 24 and Fire Station 25 and the option to retain Fire Station 25 and build a new Fire Station 24, the "Organizational Evaluation, Future Planning, Feasibility of Cooperative Service Delivery and Organizational Strategic Plan."

In 2013, the City conducted a "Standard of Coverage and Deployment Plan Study" to analyze fire department resources and the ability to meet response time standards. Emergency Services Consulting International (ESCI) completed the

“Standard of Coverage and Deployment Plan” in 2014. ESCI recommended the City consider the consolidated “single station” option and the “dual station” option maintaining Fire Station 25 and building a new Fire Station 24 in the north Kirkland/Juanita area.

In July 2014, TCA Architecture Planning Inc. (TCA) completed the “Finn Hill Fire Station Siting Analysis.” The TCA report states the single station option “would reduce response times in most areas of Finn Hill but would increase response times in some other areas,” while the dual station option to build a “new station within a specific response coverage area” would “reduce fire and emergency medical service response time in the Finn Hill and Juanita areas.” Using “test fit” conceptual drawings of a basic firehouse in the “initial review,” TCA considered several potential sites for the two options. TCA evaluated 22 different sites for the consolidated single station and the dual station options.

The City Council “supported the dual station option” maintaining Fire Station 25 and building a new Fire Station 24 “in order to provide better response times to more residents without losing any service to Finn Hill.” In August 2014, the City Council “directed further study of the two added properties on NE 132nd Street and 100th Ave NE” and “asked staff to broaden the dual station analysis to other properties in the area.”

On November 6, 2014, the “Safety Facilities Steering Team” issued a “North Kirkland Fire Station Siting Update” (Update). The Update identifies six potential sites for the dual station option in Finn Hill near the intersection of NE 132nd Street and 100th Avenue NE, including property leased by Rite Aid Corporation located at 9820 NE

132nd Street. The Update states that each of the six sites could support a “2 Story crew area, single story at apparatus bays, [and] 3 drive-through bays.” The Update notes the fire station needs to be “30-40% larger” to meet safety recommendations and code requirements.

In the years that have passed from when District first envisioned a new fire station, National Fire Protection Association (NFPA) recommendations and requirements, State Energy Code requirements, and the recommendations found within the City’s recent Standard of Coverage and Deployment Plan bear out the fact that an 8,406 square foot building is most likely not adequate to provide the programmatic needs of a modern fire station. Current fire station requirements for functionality, disaster preparedness supply storage and other space requirement updates may result in a more practical station size up to 30-40% larger. . . .

.....

Staff and the City’s consultant continue to work on the final programmatic station requirements and needs and will return to City Council at a future meeting to discuss those specific elements. . . .

.....

Once a final site is selected, a refined cost estimate for each of the programmatic elements can be produced. Staff will then return to the Council for a decision on which elements, if any, should be included in the final station design and then a final new station budget will be developed.

The Update concludes the Rite Aid and Juanita Community Church sites are the “most viable options” to provide “the greatest improvement in response time to the largest number of Kirkland residents.”

At the November 18, 2014 City Council meeting, staff requested direction on the size of the new fire station and other “elements” such as “a fire training facility, one- or two-story building, three or four truck bays, future expansion area, [and] community meeting room.”

On October 20, 2015, the City Council adopted Resolution R-5156 and Resolution R-5163. Resolution R-5156 is a clarification of the intent of the May 2011 Interlocal Agreement between the City and Fire District 41 and the decision to retain Fire Station 25 and build a new Fire Station 24. Resolution R-5163 adopts “a plan for improving fire/EMS¹ services and for new, renovated or enhanced fire stations throughout the City.” R-5163 identifies “Immediate Actions” as renovating Fire Station 25 and “[p]urchas[ing] property for a new Station 24 (estimated cost of up to \$2.5 million) near Juanita Elementary School.”

The City considered three sites located near Juanita Elementary School to construct and operate Fire Station 24: (1) The Juanita Community Church property located at 10007 NE 132nd Street, (2) the Rite Aid property located at 9820 NE 132nd Street, and (3) four residential properties in a subdivision located at the northeast corner of NE 132nd Street and 100th Avenue NE. City staff contacted the Juanita Community Church. The church agreed to relocate but only if the City provided “sufficient resources to purchase a new property and construct a new church of the same or larger size.” The City was “unable to reach an acceptable arrangement with the Juanita Community Church.” The City unsuccessfully attempted to locate and contact the owner of the Rite Aid property. The owners of the four residential subdivision properties indicated a willingness to sell. TCA concluded, “[T]hree to four” of the residential properties “would need to be purchased to provide adequate space for a fire station.”

In January 2016, the City Council passed Ordinance O-4512 authorizing condemnation of the residential properties for “construction and operation of Fire Station No. 24.” The title report disclosed a covenant that restricts use of the properties to

¹ Emergency medical service.

residential purposes and “other provisions that are also inconsistent with the City’s plans for a new Fire Station.” In May, the City terminated the purchase and sale agreements for the residential properties.

In the meantime, the City had identified and contacted the owner of the Rite Aid property, Wal Properties LLC. Wal Properties “indicated an interest in selling the property” and was not opposed to “condemnation proceedings.”

Between the annexation in 2011 and 2016, the City’s population increased more than 73 percent from 48,787 residents to 84,680 residents. The increased growth and “an unprecedented surge in development activity” created the need for “comprehensive planning to accommodate future growth.”

On May 17, 2016, the City Council passed Ordinance O-4519 authorizing condemnation of the Rite Aid property “for the purpose of construction and operation of Fire Station No. 24.” Ordinance O-4519 states, in pertinent part:

WHEREAS, prior to Annexation, the City entered into an Interlocal Agreement (“Interlocal”) with King County Fire Protection District No. 41 (“District”) in which the City agreed to continue and take over certain District projects intended to improve response times; and

WHEREAS, on October 20, 2015, the City Council adopted Resolution No. 5156 in which it found that construction and operation of a new Fire Station No. 24 to replace the existing Fire Station No. 24 was consistent with the purpose and the intent of the Interlocal; and

WHEREAS, the City previously identified a proposed site for Fire Station No. 24, conducted negotiations with the owners of the four properties that comprised the proposed site and authorized the City to acquire the four properties in eminent domain pursuant to Ordinance No. 4512; and

WHEREAS, the City subsequently determined that development of the previous site as a fire station was not feasible; and

WHEREAS, the City has identified a new proposed site for Fire Station No. 24; . . .

. . . .

NOW, THEREFORE, the City Council of the City of Kirkland do ordain as follows:

Section 1. The land and property rights within the City of Kirkland, King County, Washington, described in Exhibit A to this Ordinance and incorporated herein, which are necessary for the public purpose of construction and operation of a fire station, are hereby condemned, appropriated, and taken for such public purposes, subject to the making or paying of just compensation to the owners thereof in the manner provided by law.

Wal Properties owned two adjoining parcels at the intersection of 100th Avenue NE and NE 132nd Street. Albertsons LLC leased the two parcels. Rite Aid and its wholly owned subsidiary Thrifty Payless Inc. (collectively, Rite Aid) is the sublessee of the property identified in Ordinance O-4519 that is subject to condemnation. Seattle Goodwill Industries is the sublessee of the adjoining property owned by Wal Properties. The Goodwill property is not subject to condemnation.

Wal Properties agreed to sell the Rite Aid property to the City for the appraised amount of \$3,070,000 but only if the City agreed to “acquire the property subject to the lease.” The City decided to proceed with condemnation.

The City retained TCA to “assess and review” the Rite Aid site and “study the parcel for the feasibility” of using the property “for the development of Fire State 24 and a Parks Maintenance Center, and alternatively, for the development of Fire Station 24 and a Fire Training Center.”

On December 21, the City filed an eminent domain petition to condemn the Rite Aid “property and property rights” owned by Wal Properties.

On January 30, 2017, TCA issued the draft "Combined Use Site Feasibility Study." The study concludes the Rite Aid property "is too limited to support the development of a collocated Fire Station 24 and Parks Maintenance Center project." But the study concludes, "Developing the Rite Aid site for Fire Station 24 and a Fire Training Center is feasible." The study states the Rite Aid property "has been studied for a Training Center with reuse of the Rite Aid building (Study 5) and developing a Training Center with demolition of the Rite Aid building (Study 6)." Because of the "several hundred thousand dollar" cost, the City decided to postpone a "final design" for Fire Station 24 pending an order adjudicating public use and necessity.

At Rite Aid's request, the City retained TCA to consider the feasibility of the combined use and "co-location on the site with a new, smaller Rite Aid store." On February 2, 2017, TCA issued a "Final" "Combined Use Site Feasibility Study 9820 NE 132nd ST Rite Aid Parcel," concluding co-location with the Rite Aid would mean a smaller fire station.

[W]hile the final design process for the fire station has not yet begun, co-location with Rite Aid would invariably require a smaller footprint for the fire station than would be possible if the fire station occupied the full Rite Aid property. Co-location with Rite Aid would likely eliminate any opportunities to provide space for fire training, a community room, additional vehicle bays, or future expansion areas.

The City Council unanimously passed a "[m]otion to [s]et aside efforts to co-locate on the site with Rite Aid and continue condemnation proceedings."

In support of the public use and necessity condemnation petition, the City submitted the declaration of Kirkland City Manager Kurt Triplett and a number of reports, memorandum, and TCA feasibility studies.

In opposition to finding public use and necessity, Rite Aid argued condemnation was not “necessary solely for the stated use” or public purpose. Rite Aid asserted the fire station would fit on “less than half” of the property and the City “intends to use the majority of the land for a different (yet to be determined) purpose.” Rite Aid argued because the property exceeds the size needed to site a fire station, the decision to condemn the property amounts to constructive fraud. Rite Aid also argued Seattle Goodwill Industries is an indispensable party.

In his declaration, City Manager Triplett concedes Fire Station 24 “would fit on less than the full Rite Aid property” but states the City Council “has determined to use the entire Rite Aid property for the Fire Station Project.” Triplett states the final design “will be expanded well beyond the design of the basic ‘test fit’ ” and could include “several other components . . . not necessarily limited to”:

- (a) A fire training facility for Kirkland's fire department. Presently, City firefighters must travel to Bellevue or Shoreline to complete the vast majority of their required training. Fire Chief Joe Sanford has made quite clear that a training facility is a key component of his preferred fire station, and TCA Architecture and Planning has already determined that a fire training facility can be co-located with a new Fire Station 24 on the Rite Aid property;
- (b) Whether to construct three truck bays or four in order to house the fire trucks and other apparatus, and whether to plan for future construction of an additional bay or bays;
- (c) Whether to have a one-story or two-story firehouse. A one-story firehouse would occupy more land, but would shorten the time it takes for firefighters to put on their gear and get to the trucks, thereby reducing critical and potentially life-saving response times;
- (d) Whether to include a community meeting room for the public's use; and
- (e) Other related amenities recommended by the Fire Department or otherwise desired by the City Council. The final design will be approved by the City Council. Regardless of the City Council's final design decision, the City Council and I know that the entire Rite Aid property must be put to a public use.^[2]

² Footnote omitted.

Following the public use and necessity hearing, the court entered “Amended Findings of Fact, Conclusions of Law, and Order Adjudicating Public Use and Necessity.” The findings state, in pertinent part:

There is no evidence that the City Council engaged in actual fraud, constructive fraud, or arbitrary and capricious conduct in adopting Ordinance No. 0-4519. Rather, the City Council made a deliberate and considered decision to acquire the Take Property after years of community involvement and consideration of more than 20 alternative sites. While most if not all of the sites considered would also have been feasible for the Fire Station Project, the City Council selected the Take Property in the exercise of its reasonable judgment.

... As recently as May 16, 2017, the Kirkland City Council has unanimously affirmed its earlier decision, as expressed in Ordinance No. 0-4519, to use the entire Take Property for the Fire Station Project.

The conclusions of law on public use and necessity state, in pertinent part:

1. The Fire Station Project is a public use.
2. The City Council’s determination that the Take Property (the entire Rite Aid parcel) is necessary for the Fire Station Project is “deemed conclusive” on the Courts in the absence of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud. [City of Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).] The Take Property is accordingly necessary for the Fire Station Project.
3. There is no requirement that the entire Fire Station Project be fully designed and engineered prior to the adjudication of public use and necessity. To do so in “many cases [would] be impractical, and in others impossible.” [State ex rel. Wash. Water Power Co. v. Superior Court for Grant County, 8 Wn.2d 122, 127-28, 111 P.2d 577 (1941).] The Fire Station Project is described with reasonable certainty on this record.
4. The Kirkland City Council may properly consider future growth within the City when selecting the site of the Fire Station Project.
5. The City of Kirkland is not required to choose the smallest parcel practicable for its Fire Station Project. The fact that a fire station could be built on a different parcel, or on only a portion of the Take Property, is not determinative.
6. The determination of public necessity is a legislative question, not a judicial question. Even though a court may disagree, the City Council’s decision stands provided that the proposed condemnation demonstrates a genuine need and the City in fact intends to use the

property for the avowed purpose. The Fire Station Project satisfies that test.^{3]}

The court rejected the argument that Goodwill Industries is an indispensable party. The conclusions of law state, in pertinent part, “Goodwill Industries is not an indispensable party in this matter. Any property interests concerning the parcel adjacent to the Take Property survive this condemnation action, as the City has not sought in its petition to condemn such rights.” Rite Aid filed an appeal.

ANALYSIS

Rite Aid challenges the determination of public use and necessity and the order authorizing the City to condemn the Rite Aid property for the Fire Station 24 project. Rite Aid contends condemnation of the property violates the Washington State Constitution and substantial evidence does not support the finding of public use and necessity.⁴

In determining public use and necessity, a trial court must make three separate but interrelated findings: (1) Whether the proposed use is really public, (2) does the public interest require it, and (3) is the property to be acquired necessary for that purpose. In re Petition of the Seattle Popular Monorail Auth. to Acquire by Condemnation Certain Real Prop. for Pub. Use as Auth. by Resolution No. 04-16, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005) (Monorail). The latter two findings address necessity. In re City of Seattle, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985). Although

³ Footnotes omitted.

⁴ For the first time on appeal, Rite Aid contends the court erred in failing to hold an evidentiary hearing. We do not consider arguments raised for the first time on appeal. Mukilteo Ret. Apts., LLC v. Mukilteo Inv'rs LP, 176 Wn. App. 244, 258, 310 P.3d 814 (2013). Nonetheless, we note the record establishes Rite Aid did not request an evidentiary hearing. We also note an evidentiary hearing is not necessary “[i]f there are no relevant factual disputes or credibility issues and the record is sufficient to fully inform the court.” City of Blaine v. Feldstein, 129 Wn. App. 73, 76, 117 P.3d 1169 (2005); RCW 8.12.090.

the terms overlap, a determination that an acquisition is for public use is not precisely the same as determining it is a public necessity. Monorail, 155 Wn.2d at 629.

Public Use

The question of whether the contemplated use is really a public use is a judicial determination that we review de novo. WASH. CONST. art. I, § 16 (amend. 9); Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC, 191 Wn.2d 223, 243-44, 233, 422 P.3d 891 (2018). Article I, section 16, amendment 9 of the state constitution states, in pertinent part:

Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

Rite Aid argues the City did not meet its burden of showing condemnation of the property is “really public.” WASH. CONST. art. I, § 16 (amend. 9). Rite Aid does not dispute a fire station is a public use. See State ex rel. Hunter v. Superior Court for Snohomish County, 34 Wn.2d 214, 208 P.2d 866 (1949). Rite Aid contends the City is condemning more property than necessary for the fire station without identifying the other uses. Rite Aid asserts Fire Station 24 will occupy only a portion of the land and the City has not identified use of the “excess land.”

But it is well established that the type and extent of the property the City seeks to condemn is not a question of public use but rather a question of necessity.

In Monorail, the property owner argued the “decision to condemn a fee interest in the entire property should be analyzed under the first prong of the test for ‘public use,’ rather than under the third prong of the test for ‘necessity.’ ” Monorail, 155 Wn.2d at 630. The Washington Supreme Court rejected the property owner’s argument. The

court held that “determinations by the condemning authority as to the type and extent of property interest necessary to carry out the public purpose have historically been considered legislative questions and are thus analyzed under the third prong of the test.” Monorail, 155 Wn.2d at 630; see also Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC, 159 Wn.2d 555, 575-76, 151 P.3d 176 (2007) (NAFTZI) (emphasizing that a claim that excess property has been taken is addressed under the necessity prong). In determining necessity, the City is entitled to consider not only present but future needs. Hunter, 34 Wn.2d at 216.

We hold the record establishes the City has identified other public uses of the property and the decision to condemn the Rite Aid property for Fire Station 24 is a public use.

Necessity Findings of Fact

Rite Aid challenges the court’s findings on necessity. Rite Aid contends the City did not meet its burden of establishing necessity because the record shows the City does not need to condemn the entire Rite Aid property for Fire Station 24.

We review the factual findings supporting public necessity under a substantial evidence standard. WR-SRI 120th N., 191 Wn.2d at 245. Substantial evidence is viewed in the light most favorable to the respondent and is evidence that would persuade a fair-minded, rational person of the truth of the finding. WR-SRI 120th N., 191 Wn.2d at 245. Unchallenged findings are verities on appeal. Asarco, Inc. v. Dep’t of Ecology, 145 Wn.2d 750, 764, 43 P.3d 471 (2002).

Rite Aid challenges the following findings of fact on necessity:

11. Rite Aid has produced evidence indicating that the Fire Station Project could be located on a parcel other than the Take Property, or on

only a portion of the Take Property. The City does not disagree, and the City Manager affirmatively testified that “[w]ithin reason, the City can design and construct a fire station of widely varying types and sizes to fit on parcels of similarly varied sizes.” The City Manager’s testimony concludes, however, that “[t]he City Council in this case simply chose to obtain a site that would accommodate a larger fire station.”

13. While the other sites considered by the City Council would also work for the Fire Station Project, the City Council instead selected the Take Property. The City Council’s decision specifically included consideration of a Fire Station Project of a size sufficient to meet current needs as well as the needs generated by future growth. As ultimately designed and constructed, the City Council intends that the Fire Station Project will also include training facilities for Kirkland’s firefighters, additional truck bays for fire-fighting apparatus, meeting rooms, and other fire station amenities for the public use. According to a report prepared in January 2017 by TCA Architecture and Planning, “Developing the Rite Aid site [Take Property] for Fire Station 24 and a Fire Training Center is feasible,” either with or without the existing Rite Aid building.^[5]

Rite Aid challenges the following conclusions of law on necessity:

3. There is no requirement that the entire Fire Station Project be fully designed and engineered prior to the adjudication of public use and necessity. To do so in “many cases [would] be impractical, and in others impossible.” Wash. Water Power, 8 Wn.2d at 127-28.] The Fire Station Project is described with reasonable certainty on this record.

6. The determination of public necessity is a legislative question, not a judicial question. Even though a court may disagree, the City Council’s decision stands provided that the proposed condemnation demonstrates a genuine need and the City in fact intends to use the property for the avowed purpose. The Fire Station Project satisfies that test.^[6]

Rite Aid contends substantial evidence does not support condemnation of the property that is not necessary to construct and operate Fire Station 24. Rite Aid contends that only 25 percent of the Rite Aid property is necessary for a fire station and asserts the record shows the City Council did not identify other public uses.

⁵ Most alterations in original; footnotes omitted.

⁶ Footnotes omitted.

“[W]hether the condemnation is necessary is a legislative question.” Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 417, 128 P.3d 588 (2006).⁷ “A legislative determination of necessity is ‘conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.’” WR-SRI 120th N., 191 Wn.2d at 244 (quoting NAFTZI, 159 Wn.2d at 575-76) (quoting Monorail, 155 Wn.2d at 629)); Miller, 156 Wn.2d at 417.

“Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and regard for facts or circumstances.” Miller v. City of Tacoma, 61 Wn.2d 374, 390, 378 P.2d 464 (1963). When reasonable minds can differ, courts will not disturb the legislative body's decision that necessity exists so long as it was reached “honestly, fairly, and upon due consideration” of the facts and circumstances. Welcker, 65 Wn.2d at 684-85.

Judicial review of the legislature's determination is deferential. Miller, 156 Wn.2d at 411-12.

“[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 that land that are necessary for the project, many Washington decisions have said that the condemner'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.”

Miller, 156 Wn.2d at 412⁸ (quoting 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 9.28, at 636 (2d ed. 2004)).

In WR-SRI 120th North, the Washington Supreme Court reiterated that we “avoid questioning the condemning authority's determination ‘as to the type and extent of property interest necessary to carry out the public purpose.’” WR-SRI 120th N., 191

⁷ Emphasis in original.

⁸ Internal quotation marks omitted.

Wn.2d at 245⁹ (quoting Monorail, 155 Wn.2d at 630). The court held that “necessity” in the eminent domain context “does not mean absolute necessity.” WR-SRI 120th N., 191 Wn.2d at 245.

“The word ‘necessary,’ when used in or in connection with eminent domain statutes, means reasonable necessity, under the circumstances of the particular case. It does not mean absolute, or indispensable, or immediate need, but rather its meaning is interwoven with the concept of public use and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement. Reasonable necessity for use in a reasonable time is all that is required.”

WR-SRI 120th N., 191 Wn.2d at 245 (quoting Welcker, 65 Wn.2d at 683-84).

Substantial evidence supports finding condemnation of the entire Rite Aid property is necessary. The undisputed record demonstrates a dramatic increase in population and the need to build a larger fire station for future growth and to meet emergency service response requirements for the annexed areas. When the City Council approved condemnation of the entire Rite Aid property to construct and operate Fire Station 24, the estimated population in 2016 was 84,680—a 73 percent increase from the population before annexation in 2011. Following annexation, the City was also “experiencing an unprecedented surge in development activity.” The City’s “Major Development Projects” report updated in February 2017 states the City is “reviewing and processing applications or pre-application submittals for more than 4,700 residential units and more than 1,700,000 square feet of commercial, office, and institutional projects.” The significant growth in population and development “will continue to drive the need to increase fire and emergency medical services in order to serve the new residents and new development.”

⁹ Emphasis in original.

A 2014 update to the City Council estimated that the fire station would need to be “30-40% larger” to accommodate safety recommendations and meet “the programmatic needs of a modern fire station.” “[P]rogrammatic building elements” include “a fire training facility, one- or two-story building, three or four truck bays, future expansion area, [and] community meeting room.”

City Manager Triplett testified that the ultimate design “will be expanded well beyond the design of the basic ‘test fit’ ” to accommodate a “one-story or two-story firehouse,” the fire training facility, additional truck bays, and “[o]ther related amenities recommended by the Fire Department.” The City is not required to fully design and engineer the fire station facility before a judicial finding of public use and necessity; to do so would, “in many cases, be impractical, and in others impossible.” Wash. Water Power, 8 Wn.2d at 127-28. As the Washington Supreme Court held in Deaconess Hospital v. Washington State Highway Commission, 66 Wn.2d 378, 405, 403 P.2d 54 (1965):

Once the purpose for which the lands are taken has been adjudged to be public, the kind and type of roadway, the route to be followed, the design and engineering details become the subject of administrative decision. . . .

Although the courts may well determine from the evidence whether a project is for the public benefit, convenience or necessity, they are not trained or equipped to pick the better route, much less design and engineer the project. Thus, the rule that leaves these decisions to the administrative agencies is a sensible one consistent with the idea that the public’s business be carried out with reasonable efficiency and dispatch by those possessing the superior talents to accomplish the public purposes.

Although the City has not prepared or adopted the “final design” of Fire Station 24 or the training facility, the record shows the City has “described with reasonable certainty” the general plan for the property. Wash. Water Power, 8 Wn.2d at 128. The February 2017 feasibility study includes a design that utilizes approximately one acre of

the Rite Aid property for Fire Station 24 and uses the remaining property for a fire training facility that includes a tower training area. The design utilizes 86 percent of the property. The unchallenged findings state, in pertinent part, "Due to the 'several hundred thousand dollar' cost of just the design alone (exclusive of construction costs), the final design for the Fire Station Project will not be completed until the Court has determined the City may acquire the Take Property."

In Hunter, the Washington Supreme Court upheld the determination of public use and necessity of 1.52 acres to accommodate a fire station, storage for fire equipment, and a training area and to anticipate future growth. Hunter, 34 Wn.2d at 216-18. Rite Aid argues Hunter is distinguishable because in that case, "[t]he commissioners concluded that the district should acquire sufficient land for a training area in addition to that necessary for the building." Hunter, 34 Wn.2d at 217. Here, the record shows the City Council unanimously decided to use the entire property for the public purpose of building Fire Station 24 with a training facility, additional truck bays, and a community center meeting room.

[W]here property is taken . . . with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, . . . the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest.

Seattle Land & Improvement Co. v. City of Seattle, 37 Wash. 274, 277, 275, 79 P. 780 (1905) (city condemned property for park but built an in-town terminal station); see also Monorail, 155 Wn.2d at 634; Reichling v. Covington Lumber Co., 57 Wash. 225, 226-28, 106 P. 777 (1910) (city condemned property for water system but subsequently allowed construction of logging railroad over property).

Substantial evidence also supports the conclusion that the City Council did not engage in arbitrary or capricious conduct amounting to constructive fraud. The court found there was no evidence that the City Council engaged in actual fraud or arbitrary and capricious conduct amounting to constructive fraud. The court found:

There is no evidence that the City Council engaged in actual fraud, constructive fraud, or arbitrary and capricious conduct in adopting Ordinance No. 0-4519. Rather, the City Council made a deliberate and considered decision to acquire the Take Property after years of community involvement and consideration of more than 20 alternative sites. While most if not all of the sites considered would also have been feasible for the Fire Station Project, the City Council selected the Take Property in the exercise of its reasonable judgment.

Rite Aid claims there is evidence that the City might use the land for a private use. Rite Aid relies on an e-mail from a councilmember and notes from a February 2017 City Council retreat.

In January 2017, a City resident sent the following e-mail regarding Fire Station 24 to councilmember Toby Nixon:

Location on NE 132nd st - It is soo wrong! We alr[e]ady have a fire station on NE 132nd. Are you trying to imitate Starbucks with a station on every corner?

Using up a good location that can turn into a Juanita Village is atrocious - and poor planning.^[10]

In response, councilmember Nixon described the City's plan to maintain Fire Station 25 at its current location, construct a new Fire Station 24 near 100th Ave NE and NE 132nd Street, and eventually relocate Fire Station 27 "farther east."

Councilmember Nixon's response notes that "[t]he Rite Aid (rear part), Goodwill, service

¹⁰ Juanita Village is "a mixed-use development on the corner of Northeast 116th and 100th Avenue Northeast that is retail on the bottom and residential on top."

station, and bank sites, could be combined and redeveloped.” The e-mail response states, in pertinent part:

[A new station] would be positioned roughly in the middle between Station 25 and Station 27, and able to reach all portions of Kirkland in northeast Finn Hill and northwest Juanita within four minutes. . . . We’ve looked at many, many potential locations, and all have some challenges. The Rite Aid site currently being considered has the fewest challenges and the owner of the property is willing to sell at a reasonable price.

So, to directly answer your question, No, we’re not putting a fire station on every corner. . . .

Putting a station on the Rite Aid site toward the front of the lot (closer to NE 132nd St) would not preclude other uses of the rear part of the Rite Aid site where the building is currently located. The Rite Aid (rear part), Goodwill, service station, and bank sites, could be combined and redeveloped as a mixed-use multi-story structure like Juanita Village.^[11]

The “February 2017 Council Retreat” notes state, in pertinent part:

Fire Station Projects

- Consider a pedestrian overpass from fire station site to Juanita Elementary
- Involve City Council in how to use the remainder of the lot not needed for the station
- Include community meeting space at Station 24
- Identify the cost of alternate uses of Rite Aid site
- Don’t take away retail use (sales tax generator) unless necessary.

Rite Aid contends the e-mail response and notes from the retreat show that the City is “interested” in alternative, private ways to use the Rite Aid property. Neither councilmember Nixon’s speculation nor the notes from the council retreat indicate a final council determination. All of the councilmembers must make the final determination on use. City staff, including City Manager Triplett, meet with “the public safety committee . . . first, and then those committees make recommendations to the full Council.” The record does not support Rite Aid’s assertion that the City intends to use any portion of

¹¹ Emphasis in original.

the property for a private use. Further, Deputy City Manager Marilynne Beard testified the only “discussion of commercial use” was related to Rite Aid’s request to consider co-location:

There have been some discussions with Rite Aid about is there — there’s been interest on Rite Aid’s part to remain on the site somewhere, and to the — you know, we’ve listened and are, you know, looking at . . . is that even possible.

But a multiuse site, other than Rite Aid, I’m not aware of.

Rite Aid also claims the decision to condemn the Rite Aid property was arbitrary and capricious because the City could have built Fire Station 24 on the residential subdivision properties. The record does not support Rite Aid’s argument.

Site selection is not subject to judicial interference. WR-SRI 120th N., 191 Wn.2d at 245-46. “ ‘Courts give especial deference to agency site selection decisions 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 246¹² (quoting Miller, 156 Wn.2d at 422)).

Rite Aid argues the City Council’s conduct was arbitrary and capricious because the Rite Aid property costs more than the residential properties. Rite Aid’s argument ignores the restrictive covenant that prevented the City from proceeding with consideration of the residential properties. Further, even considering cost “as a relevant factor,” the record shows the estimated total cost of the residential properties is \$12,124,128 and the total cost using the Rite Aid property is \$11,814,305. Monorail, 155 Wn.2d at 635-36. No evidence shows the City made its selection in bad faith or the City Council “acted in an arbitrary or capricious manner.” Hunter, 34 Wn.2d at 218-19. The record shows the City Council considered many properties and gave weight to

¹² Internal quotation marks omitted.

many factors, including the size and feasibility of building a larger facility, the costs of acquiring land, and the costs of the project as a whole.

The record also shows that before the City Council passed Ordinance O-4519, the City prepared a "Site Comparison" of the residential properties and the Rite Aid property. The Site Comparison states the Rite Aid property "provides additional area in back to conduct training" and has the "[m]ost flexibility for station design [and] parking." After five years of consideration and planning, the City chose a larger site to anticipate future needs and to accommodate a larger fire station, including additional truck bays and a training facility.

Substantial evidence supports the court's finding that the City Council made "a deliberate and considered decision to acquire the Take Property While most if not all of the sites considered would also have been feasible for the Fire Station Project, the City Council selected the Take Property in the exercise of its reasonable judgment."

We conclude that the findings support public necessity and that Rite Aid did not establish arbitrary and capricious conduct amounting to constructive fraud.¹³

Indispensable Party

Rite Aid contends the court erred by concluding Goodwill Industries is not an indispensable party to the condemnation under RCW 8.12.060.

RCW 8.12.050 requires a city to file a petition for condemnation in superior court identifying all owners with an interest in the property. RCW 8.12.060 provides:

Such petition shall contain a copy of said ordinance, certified by the clerk under the corporate seal, a reasonably accurate description of the lots, parcels of land and property which will be taken or damaged, and the

¹³ For the first time on appeal, Rite Aid argues that the City committed actual fraud on the court. Rite Aid did not argue the City Council committed actual fraud below. Rite Aid argued that the City Council's conduct was so arbitrary and capricious that it amounted to constructive fraud.

names of the owners and occupants thereof and of persons having any interest therein, so far as known, to the officer filing the petition or appearing from the records in the office of the county auditor.^[14]

Wal Properties owns the 2.52-acre property that is subject to condemnation. Wal Properties also owns the adjacent property. Wal Properties leased both properties to Albertsons. Albertsons subleased the 2.52-acre property to Rite Aid and subleased the adjacent property to Goodwill Industries.

The court found, "There is no evidence that Goodwill Industries, the lessee of the adjacent separate parcel, has a property right in the Take Property," finding of fact 16. The court concluded, "Goodwill Industries is not an indispensable party in this matter." Albertsons filed a motion for reconsideration. Albertsons requested the court to delete finding of fact 16 and amend conclusion of law 7 to state:

Goodwill Industries is not an indispensable party in this matter. Any property interests concerning the parcel adjacent to the Take Property survive this condemnation action, as the City has not sought in its petition to condemn such rights.

The City did not oppose the motion. The court granted the motion for reconsideration. The Amended Findings of Fact, Conclusions of Law, and Order Adjudicating Public Use and Necessity does not include former finding of fact 16 and adopts the language Albertsons proposed to conclusion of law 7.

Rite Aid contends Goodwill Industries is a party in interest under the sublease with Albertsons because Goodwill Industries has a right to use the "common areas."¹⁵

RCW 8.12.060 does not require joining the holder of a leasehold interest. City of Pullman v. Glover, 73 Wn.2d 592, 594-95, 439 P.2d 975 (1968). "An action against

¹⁴ Emphasis added.

¹⁵ For the first time on appeal, Rite Aid also contends Goodwill Industries is a party in interest because the condemnation will impact Goodwill Industries' proportionate share of common area expenses. The court does not consider arguments raised for the first time on appeal. RAP 2.5(a).

property being taken in condemnation, subject to an existing leasehold, may be maintained under RCW 8.12.060 without joining the holder of the leasehold interest.”

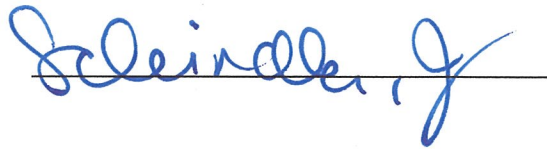
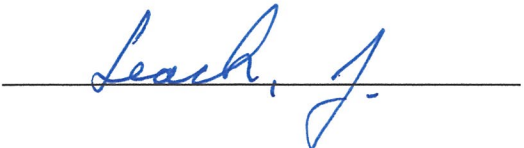
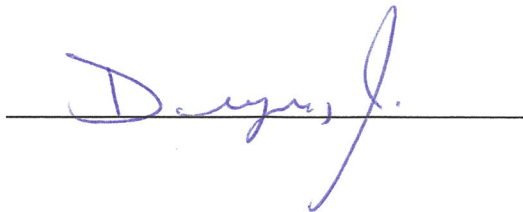
Glover, 73 Wn.2d at 594-95.

The case Rite Aid cites to argue Goodwill Industries is an indispensable party is inapposite. In Public Utility District No. 1 of Pend Oreille County v. Inland Power & Light Co., 64 Wn.2d 122, 123, 390 P.2d 690 (1964), the court addressed whether a state court has jurisdiction to “entertain an action of eminent domain against properties in which the United States has an interest.” Because the United States was a “necessary and indispensable party to the eminent domain proceeding,” the state court could only maintain the action if the United States consented to be sued. Pub. Util. Dist. No. 1, 64 Wn.2d at 124-26.

We conclude the court did not err by concluding Goodwill Industries is not an indispensable party in the petition.

We affirm the Amended Findings of Fact, Conclusions of Law, and Order Adjudicating Public Use and Necessity.

WE CONCUR:

A handwritten signature in blue ink, appearing to read "Schneider, J.", written over a horizontal line.A handwritten signature in blue ink, appearing to read "Leach, J.", written over a horizontal line.A handwritten signature in blue ink, appearing to read "Dwyer, J.", written over a horizontal line.

Appendix – B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF KIRKLAND, a municipal corporation,)	No. 77447-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
RITE AID CORPORATION, a Delaware corporation; and THRIFTY PAYLESS, INC., a California corporation,)	
)	
Appellants,)	
)	
WAL PROPERTIES, LLC, a Florida limited liability company; TENTH CHELTENHAM PROPERTIES, INC., a Delaware Corporation; ALBERTSONS COMPANIES, INC., a Delaware corporation, successor in interest to ALBERSTON'S, INC., formerly a Delaware corporation; ALBERTSONS COMPANIES, LLC, a Delaware limited liability company; SAFEWAY INC., a Delaware corporation; and KING COUNTY,)	ORDER DENYING MOTION FOR RECONSIDERATION
)	
Defendants.)	

Appellants Rite Aid Corporation and Thrifty Payless Inc. filed a motion for reconsideration of the opinion filed on December 17, 2018. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:


Judge

VAN KAMPEN & CROWE PLLC

February 28, 2019 - 10:51 AM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: Rite Aid Corporation and Thrifty Payless, Inc., Appellants v. The City of Kirkland, Respondent (774476)

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