

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
4/12/2023 3:57 PM  
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No. 101894-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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Court of Appeals, Division I, No. 83886-5

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CITY OF SAMMAMISH,  
a Washington municipal corporation,

Respondent,

v.

JOHN TITCOMB, JR. and LINDE R. BEHRINGER, husband  
and wife, and the marital community comprised thereof, and  
KING COUNTY,

Petitioners.

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**PETITION FOR REVIEW**

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**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION.....	3
III. ISSUES PRESENTED FOR REVIEW .....	4
IV. STATEMENT OF THE CASE.....	4
A. George Davis Creek.....	4
B. Titcomb’s Restoration Work .....	5
C. The George Davis Creek Fish Passage Project.....	7
D. Property Negotiations and Condemnation Ordinance.....	10
E. Condemnation Proceedings .....	12
V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED .....	13
A. The Opinion Presents a Significant Constitutional Question And Question of Substantial Public Interest. ....	14
B. The Opinion Conflicts With Washington Supreme Court Precedent. ....	26
C. The Opinion Conflicts With A Published Decision of the Court of Appeals. ....	28
VI. CONCLUSION.....	30

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Cent. Puget Sound Reg'l Transit Auth. v. Miller</i> , 156 Wn.2d 403, 128 P.3d 588 (2006).....	15
<i>Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC</i> , 191 Wn.2d 223, 422 P.3d 891 (2018).....	15, 17
<i>City of Kent v. Lamb</i> , 1 Wn. App. 737, 463 P.2d 661 (1969).....	17
<i>City of Tacoma v. Taxpayers</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	16
<i>City of Tacoma v. Welcker</i> , 65 Wn.2d 677, 399 P.2d 330 (1965).....	16
<i>Cowlitz County v. Martin</i> , 142 Wn. App. 860, 177 P.3d 102 (2008).....	18, 28, 29
<i>In re City of Seattle</i> , 96 Wn.2d 616, 638 P.2d 549 (1981).....	27
<i>Painting &amp; Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.</i> , 96 Wn.2d 806, 638 P.2d 1220 (1982).....	24
<i>Pub. Util. Dist. No. 1 of Okanogan County v. State</i> , 182 Wn.2d 519, 342 P.3d 308 (2015).....	16, 17
<i>Ronken v. Bd. of County. Comm'rs of Snohomish County</i> , 89 Wn.2d 304, 572 P.2d 1 (1977).....	24

<i>State v. King County</i> , 74 Wn.2d 673, 446 P.2d 193 (1968).....	15
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	23
<i>Supporters of Center, Inc. v. Moore</i> , 119 Wn. App. 352, 80 P.3d 618 (2003).....	24

**STATUTES**

RCW 77.85.010.....	19, 22
RCW 77.85.030.....	9
RCW 77.85.050.....	19, 22, 23
RCW 77.85.120.....	9
RCW 77.95.160.....	9, 20
RCW 77.95.170.....	9, 20
RCW 8.12.030.....	14
Salmon Recovery Act, Chapter 77.85 RCW.....	18

**RULES**

RAP 13.4.....	14, 26, 28
---------------	------------

**TREATISES**

1A NICHOLS ON EMINENT DOMAIN § 3.02 (2022).....	15
---	----

**REGULATIONS**

WAC 220-660-190.....	20, 25
WAC 420-12-090.....	4, 19, 22

**CONSTITUTIONAL PROVISIONS**

WASH. CONST. art. I, § 16..... 15

## I. INTRODUCTION

This case concerns the City of Sammamish's belated effort to recharacterize a fish passage project as a stormwater project to avoid statutory prohibitions on condemnation. Although cities are delegated the authority to condemn private property for many types of public projects, salmon habitat recovery and fish passage are not among them. Accordingly, the superior court properly rejected the City's attempt to condemn Petitioners' property for the George Davis Creek Fish Passage Project.

The Court of Appeals' published decision ignores a record replete with evidence that the driving purpose of the George Davis Creek Fish Passage Project was to promote fish passage. The City's own request for proposals stated just one purpose for the project: "to remove several fish passage barriers and make George Davis Creek fish passable from the creek mouth at Lake Sammamish to a mile upstream of East Lake Sammamish Parkway." CP 515. Stormwater mitigation was not even mentioned. *Id.*

The City does not dispute that the Salmon Recovery Act prohibits condemnation for fish passage projects, or that the project is utilizing funding that prohibits use of condemnation. The Court of Appeals sidestepped these issues, however, as “not relevant to this appeal.” Opinion at 11. In doing so, the Court disregarded its obligation to ensure that the City’s exercise of the power of eminent domain was authorized.

The City’s project did not become about stormwater until the City encountered difficulties acquiring the property rights it sought from Petitioners. Voluntary acquisition is what salmon recovery projects require under state law. By voluntarily choosing to use salmon recovery grant funding that prohibits condemnation, the City voluntarily chose to forego any ability it may otherwise have had to use eminent domain.

The Court of Appeals’ decision allows the City to override this statutory and regulatory scheme prohibiting condemnation for salmon recovery projects by simply saying in its condemnation ordinance that the acquisition is for stormwater,

rendering these prohibitions entirely meaningless. As the superior court correctly concluded, the City had no authority to initiate these condemnation proceedings.

Because of the significant constitutional question of substantial interest to the public presented, as well as the conflict created between the Court of Appeals' decision and decisions of this Court and the Court of Appeals, this Court should accept review of the Court of Appeals' decision.

## **II. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION**

Petitioners John Titcomb Jr. and Linde R. Behringer (collectively, "Titcomb") own property in the City of Sammamish that the City seeks to condemn. Titcomb seeks review of the published opinion of Division I of the Court of Appeals, *City of Sammamish v. Titcomb*, No. 83886-5-I, 2023 WL 2473120 (Wash. Ct. App. Mar. 13, 2023) ("Opinion"), provided as Appendix A to this Petition.



### **III. ISSUES PRESENTED FOR REVIEW**

The City's George Davis Creek Fish Passage Project was developed as a salmon recovery project and utilizes funding designed for fish passage projects. The statutory authority for condemnation cited by the City, RCW 8.12.030, does not authorize eminent domain for salmon recovery or fish passage. Further, the Salmon Recovery Act, Chapter 77.85 RCW, prohibits condemnation for salmon recovery projects, and the City is using grant funding that cannot be used for projects involving condemnation, WAC 420-12-090. Should the court defer to the City's mere recitation of purpose in the condemnation ordinance despite its inconsistency with the project's history and funding, which establish that Petitioners' property is being condemned for fish passage?

### **IV. STATEMENT OF THE CASE**

#### **A. George Davis Creek**

This case involves a City project impacting George Davis Creek, a tributary of Lake Sammamish flowing through

Titcomb's property and into Lake Sammamish. CP 365. The Creek is home to multiple species of salmonids and countless riparian wildlife species, including kokanee salmon. CP 508.

Over the years, urban development has created barriers to salmon passage along the Creek's run. The City built East Lake Sammamish Parkway through the Creek, with the associated culvert falling "far short of meeting Washington Department of Fish and Wildlife (WDFW) design standards for fish passage." CP 375. In 1995, King County constructed a fish-impassible high-flow bypass diversion structure 500 feet upstream of the mouth. *Id.*

The Creek also ran beneath Titcomb's original 1920s home; north of Titcomb's home, the Creek runs through a channel and piping on property to the north. CP 365, 394, 534.

#### **B. Titcomb's Restoration Work**

Titcomb purchased their home on the Creek in 1985. CP 365. They have been long-time stewards and protectors of the Creek and its fish. CP 354–67, 508. Ms. Behringer is an

active member of the Kokanee Work Group, a regional collaborative group focused on restoring kokanee runs within Lake Sammamish. CP 508. She and Mr. Titcomb have devoted substantial time and financial resources to salmon recovery on and around their property. CP 364–67, 508–09.

In 2008, Titcomb partnered with federal, state, and local stakeholders to receive authorization to replace their existing house while undertaking a significant restoration effort to promote fish passage and habitat restoration for the section of the Creek on their property. CP 366–67, 508–09. Titcomb’s project is permitted under a Joint Aquatic Resources Permit Application (JARPA), which involves streamlined permitting across multiple federal and state jurisdictions. CP 367, 472.

The project improved overall conditions for salmon. CP 455–56, 463. Titcomb removed the barriers to fish passage on their property, and created a restored riparian environment using native vegetation to facilitate maximal habitat efficacy. CP 366–67, 508–09. Titcomb personally spent nearly \$400,000 on

these stream restoration efforts, which has included multiple monitoring reports to the City. *Id.* The City has acknowledged that Titcomb’s section of the Creek is the only portion currently able to facilitate salmon runs and that Titcomb made the Creek on their property “fish passable in 2009.” CP 537.

**C. The George Davis Creek Fish Passage Project**

In the years following Titcomb’s restoration work, the City and others acknowledged that the City’s and King County’s barriers to fish passage along the Creek were contributing significantly to historically low kokanee salmon runs. CP 536–41; *see* CP 365–66. The City began efforts to remove its barriers, including a culvert under East Lake Sammamish Parkway and a low concrete dam (weir) located about 400 feet further upstream. *See* CP 516–17, 524, 536–38. A fish barrier also existed on the Sigmar property adjacent to Titcomb’s, where the Creek was buried in a failing 2-foot diameter galvanized pipe before the Creek reached Titcomb’s property. CP 365, 368, 534.

In 2018, Sammamish issued a Request for Proposals for the George Davis Creek Fish Passage Project. CP 515. The sole stated purpose of the Project was “*to remove several fish passage barriers and make George Davis Creek fish passable from the creek mouth at Lake Sammamish to a mile upstream of East Lake Sammamish Parkway.*” CP 515 (emphasis added). The Project was slated to be broken into two phases. The first involved a preliminary study, identification of alternatives, and “property acquisition, and/or partnerships with local homeowners”; the second entailed final development of the project plans, specifications, and estimate. *Id.* The City’s RFP makes no reference to any need to mitigate against stormwater flows. *Id.*

The City pursued multiple sources of funding for the Project, including state grants for salmon recovery and associated fish barrier removal. Salmon recovery funding opportunities are coordinated through the State Recreation and Conservation Office (“RCO”), its boards, and partners. *See, e.g.,*

RCW 77.85.030(5); RCW 77.85.120; RCW 77.95.160; RCW 77.95.170. The City Council passed a resolution authorizing the City to apply for an RCO grant through the Brian Abbott Fish Barrier Removal Board, which ultimately authorized up to \$722,350 for the Project. CP 543, 616–18, 640–57, 864, 870. These funds have been applied toward the Project. CP 640–43. The City’s Project Agreement with the RCO regarding receipt of these funds binds the City to the RCO manual which requires the City to obtain agreement from any private landowners. *See* CP 642–43 (contract referencing RCO Manual 22); CP 603–07 & 558 (Manual 22 providing that landowner approval required and appendices providing form agreement). The goal of the project stated in the grant application was straightforward: “to support the recovery of Lake Sammamish kokanee salmon and benefit other salmonids by restoring access to high quality spawning habitat that is currently inaccessible.” CP 538.

Similarly, in its 2019 application for Conservation Futures Tax Levy Funds to acquire the neighboring Sigmar property (where Titcomb's water is to be diverted), the City stated that the George Davis Creek Fish Passage Project was "a critical project *to restore fish passage.*" CP 621 (emphasis added). The City acknowledged its planning documents did not identify any property acquisition, but that the Project "*cannot be completed to meet current fish passage standards without acquiring property.*" CP 626 (emphasis added). The stated planned use of the adjacent Sigmar property is "habitat restoration, passive recreation, and research" (not stormwater facilities). CP 627.

The acquisition of property was consistently identified as a necessary element of the fish passage improvements not, as the City now contends, part of stormwater facilities.

#### **D. Property Negotiations and Condemnation Ordinance**

For the downstream portion of the Project, the City entered into discussions with Titcomb and the owners of the neighboring

property (Sigmar). CP 368. The Sigmars agreed to sell their property to the City for \$3.927 million. CP 627.

During negotiations with Titcomb, the City assured them that it would not condemn their property rights, and that the Creek would remain on their property. CP 368–69. Titcomb worked in good faith to reach a fair settlement and were willing to complete further remodeling of their home if needed for the Project. CP 367–69. Discussions broke down after the City determined to relocate the Creek entirely from Titcomb’s property to the Sigmar property and the City’s valuation process failed to properly value the Creek to Titcomb’s property. CP 368–69.

A year later, in March 2021, the City passed an ordinance authorizing condemnation of portions of the Creek for the “George Davis Creek Fish Passage Project.” CP 5. For the first time, the City stated the purpose of the project was for stormwater management, even though the substantive nature of the project discussed with Titcomb had not changed. *Id.* The



Ordinance continued to acknowledge the fish passage purpose of the project. *Id.* at 5–6 (noting “City ‘should begin prioritizing culverts for removal and replacement for fish passage, and to benefit Lake Sammamish kokanee salmon.’”).

#### **E. Condemnation Proceedings**

The City filed its condemnation petition on July 21, 2021, seeking “all property rights in the water flowing from George Davis Creek necessary for the George Davis Creek Fish Passage Project.” CP 1. The City moved for an order adjudicating public use and necessity. CP 345.

The superior court heard argument on January 12, 2022, and took the case under advisement. VRP 34. One month later, the court issued its decision, denying the City’s motion for public use and necessity and dismissing the condemnation action with prejudice. CP 704. The City filed a motion for reconsideration and supplemental declaration. CP 709–54. The superior court denied the City’s motion without asking Titcomb to respond. CP 755. The City appealed the superior court’s decision. CP 847.

The Court of Appeals issued a published decision on March 13, 2023, reversing the superior court. The Court of Appeals' decision ignored the history of project and dismissed Petitioners' concerns as merely "assign[ing] great weight to the name of the Project." Opinion at 11 n.2. The Court also ignored the fact that grant funding under the Salmon Recovery Act cannot be used for condemnation purposes, stating "Disputed issues involving the expenditure of funds are not relevant to this appeal." Opinion at 11. The Court's opinion wholly failed to address Petitioners' argument that the City should not be permitted to subdivide the project to evade statutory limits on eminent domain. Respondents' Br. at 27.

#### **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The superior court correctly recognized that the City lacks statutory authority to condemn Titcomb's property. The Court of Appeals' decision, by contrast, gives unfettered discretion to recharacterize a project to evade statutory limits on eminent domain authority. The Court ignored the clear history of the

project—including the City’s RFP, grant application, and funding received for the project—which establishes that the George Davis Creek Fish Passage Project is, in fact, a fish passage project. The Court of Appeals abdicated its judicial responsibility to ensure the exercise of the eminent domain authority was statutorily authorized. Its decision warrants review under all four criteria of RAP 13.4(b).

**A. The Opinion Presents a Significant Constitutional Question And Question of Substantial Public Interest.**

The Court of Appeals’ decision presents a significant constitutional question and a question of substantial public interest. RAP 13.4(b)(3) & (b)(4). The City’s exercise of eminent domain authority is constrained by the constitution and state statutes. Ensuring the power of eminent domain is properly exercised is a matter greatly impacting the public interest. Municipalities do not have authority to disregard the nature of a project and recharacterize it to evade statutory limits on condemnation. The Court of Appeals erred in holding otherwise.

Whether a municipal corporation has authority to condemn is a question of law reviewed de novo. *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 233, 422 P.3d 891 (2018). Our state constitution expressly envisions a judicial role to ensure the power of eminent domain is properly exercised. WASH. CONST. art. I, § 16 (question of whether property properly condemned for public use “shall be a judicial question.”).

The power of eminent domain “is limited by the constitution and must be exercised under lawful procedures.” *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 410, 128 P.3d 588 (2006); WASH. CONST. art. I, § 16 (prohibiting the taking of property for private use and requiring payment of just compensation for taking or damaging of property).

The state and the federal government are sovereign entities with inherent power to condemn. *State v. King County*, 74 Wn.2d 673, 675, 446 P.2d 193 (1968); 1A NICHOLS ON EMINENT

DOMAIN § 3.02 (2022) (eminent domain powers of federal and state government “inherent in the very notion of sovereignty”).

The Opinion of the appellate court elevates the City to the same status as a sovereign. Municipal corporations like the City, however, may only exercise the power of eminent domain as expressly authorized by the legislature. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965). “As creatures of statute, municipal corporations possess only those powers conferred on them by the constitution, statutes, and their charters” and that authority “must derive from either an express grant or by necessary or fair implication from such a grant.” *City of Tacoma v. Taxpayers*, 108 Wn.2d 679, 685–86, 743 P.2d 793 (1987) (internal quotations and citations omitted); *see also Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 534, 342 P.3d 308 (2015) (“States may delegate these powers [of eminent domain] to municipal corporations and political subdivisions, but such delegated authority extends only so far as statutorily authorized.”).

“[S]tatutes delegating the power of eminent domain to a political subdivision must be strictly construed.” *WR-SRI 120th N. LLC*, 191 Wn.2d at 234. “Consequently, authority to condemn public property ‘must be given in express terms or by necessary implication.’” *Id.* (quoting *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966)). *See, e.g., City of Kent v. Lamb*, 1 Wn. App. 737, 742, 463 P.2d 661 (1969) (strictly construing statute granting eminent domain authority and concluding “street” is not a “boulevard”).

The Court of Appeals’ decision defers to the City Council of the City of Sammamish on a question of statutory authority to condemn. Opinion at 1, 9. But deference is not warranted on the threshold question of statutory authority presented by this case. *See Pub. Util. Dist. No. 1 of Okanogan County*, 182 Wn.2d at 534 (“The scope of a municipal corporation’s condemnation authority is therefore a matter of statutory interpretation, which we review *de novo*.”); *see also* WASH. CONST. art. I, § 16 (question of public use in condemnation proceedings “shall be a

judicial question, and determined as such, without regard to any legislative assertion that the use is public”). In deferring wholesale to the City Council’s characterization of the project, the Court of Appeals failed to fulfill its constitutionally required judicial role: to act as a gatekeeper and ensure the power of eminent domain is properly exercised.

Titcomb does not dispute that cities have statutory authority to condemn property for stormwater purposes, RCW 8.12.030, but as discussed above, the City’s George Davis Creek Fish Passage Project has been a fish passage project since its inception. The City has attempted to recharacterize this project as a stormwater project—years after project planning efforts began and only after negotiations with Titcomb failed—because of the clear prohibition on condemnation under the Salmon Recovery Act, Chapter 77.85 RCW.

The Salmon Recovery Act “strictly forbids condemnation” for projects undertaken under that statute. *Cowlitz County v. Martin*, 142 Wn. App. 860, 177 P.3d 102

(2008); *see also* RCW 77.85.050(1)(a) (“no private landowner may be forced or coerced into participation in any respect” for projects on SRA habitat project list); RCW 77.85.010(3) (SRA projects must have written agreement from the landowner); WAC 420-12-090 (Recreation and Conservation Office administrative code provision providing that “***board shall not approve any grant for proposals where the title to property is acquired through or as a direct result of condemnation proceedings.*** All acquisitions must be on a willing-seller basis.” (emphasis added)).

The Opinion characterizes Titcomb’s argument regarding the nature of the project as merely “assign[ing] great weight to the name of the Project.” Opinion at 11 n.2. But it is not merely the name of the project that contradicts the City’s assertion that the primary purpose of the project is related to stormwater. As outlined above, from the time the City issued its own Request for Proposals for the project, the City has consistently characterized the project as a fish passage project. *E.g.*, CP 621 (identifying



project as critical to “restore fish passage”); CP 515 (RFP identifying purpose as fish passage); CP 538 (grant application stating project’s purpose is “to support the recovery of Lake Sammamish kokanee salmon”). The Opinion ignores the clear record in this case, consisting of documents created by the City, in which the City consistently stated the project is for fish passage purposes.<sup>1</sup>

The Opinion also skirts the issue of funding under the SRA. The legislature has enacted fish passage barrier removal programs and grant funding through the Recreation and Conservation Office (RCO). RCW 77.95.160–.170. It is

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<sup>1</sup> The Opinion also cites material in the record that the City submitted on reconsideration which Titcomb has not had a factual opportunity to rebut. CP 726–31 (Second Coenen Declaration); Opinion at 3 (quoting declaration at CP 727 for proposition that need to improve drainage “goes back decades”) & 14 n. 3 (quoting declaration at CP 727 for proposition that project is “fundamentally a stormwater project”). *See also* CP 728 (discussing WAC 220-660-190 for first time); Opinion at 10 n. 1 (quoting Second Coenen Declaration at CP 728 and relying on WAC 220-660-190). At a minimum, the Court erred by denying Titcomb’s request to remand for an evidentiary hearing. *See* Opinion at 14 n.4.

undisputed that the City applied for and received a Recreation and Conservation Office (“RCO”) grant through the Brian Abbott Fish Barrier Removal Board, and that these funds have been used on the George Davis Creek Fish Passage Project. CP 616–18; CP 640–43. The source of funding in this case is not a “separate question” from whether the City has statutory authority to condemn as the Opinion suggests (Opinion at 11): it bears directly on the primary purpose of the project.

The Opinion acknowledges that RCO funds will be used, but states that “there is no indication in the record that the City will use the RCO funds to compensate Titcomb and Behringer.” Opinion at 11. The Court’s reasoning condones the City’s attempt to evade the statutory prohibition on condemnation for fish passage projects by artificially subdividing the George Davis Creek Fish Passage Project. The statutory and administrative code provisions governing the SRA and RCO funds do not merely prohibit grant funding from being used specifically to

purchase condemned property; the *project* as a whole may not utilize eminent domain if it is to receive RCO funding.

For example, projects on the SRA habitat project list *must* have the cooperation of private landowners. RCW 77.85.050(1)(a) (“No project included on a habitat project list shall be considered mandatory in nature and *no private landowner may be forced or coerced into participation in any respect*” for projects on SRA habitat project list (emphasis added)). Each project on the SRA habitat project list “must have a written agreement from the landowner on whose land the project will be implemented.” RCW 77.85.010(3). And the WAC governing the RCO provides that grant funding may not be approved in the first instance where title is acquired through eminent domain. WAC 420-12-090 (“board shall not approve any grant for proposals where the title to property is acquired through or as a direct result of condemnation proceedings. All acquisitions must be on a willing-seller basis.”).

These provisions do not allow the municipality to subdivide the project into discrete components to avoid the statutory prohibition on eminent domain for fish passage projects. The reasoning of the Court of Appeals renders the statutory requirement in RCW 77.85.010(3) for landowner agreement meaningless. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (statute must be construed to give effect to all language “with no portion rendered meaningless or superfluous.”) (citation and quotation omitted)). And while the Opinion is excessively deferential to the legislature of the City of Sammamish, the Opinion fails to give equal respect to our state Legislature, disregarding the SRA’s command that “no private landowner may be forced or coerced into participation in any respect” on fish passage projects. RCW 77.85.050(1)(a).

Once the City *voluntarily chose* to accept RCO grant funding, it also *voluntarily chose* to forfeit the ability to use eminent domain on the George Davis Creek Fish Passage Project. As explained in Titcomb’s briefing, courts have rejected

similar attempts to subdivide public projects in analogous circumstances. *See Supporters of Center, Inc. v. Moore*, 119 Wn. App. 352, 80 P.3d 618 (2003) (rejecting attempt to avoid prevailing wage law); *Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 812, 638 P.2d 1220 (1982) (holding school district’s attempt to change a project’s scope from “improvements, repairs, or other public works” to “maintenance” to avoid the public bidding requirements placed “form over substance” and was improper).<sup>2</sup> The Opinion fails to address this argument or any of these cases cited in Titcomb’s appellate briefing, instead simply rejecting Titcomb’s assertion as “without merit.” Opinion at 11.

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<sup>2</sup> *See also Ronken v. Bd. of County. Comm’rs of Snohomish County*, 89 Wn.2d 304, 306–07, 311, 572 P.2d 1 (1977) (recognizing county board of commissioners acted improperly by taking a single project costing more than the statutory threshold of \$25,000 and dividing it into multiple “projects” using various classes and units of work classifications to avoid public bidding requirements).

It is impermissible to divide the George Davis Creek Fish Passage Project into multiple sub-projects, such as “planning,” “restoration,” and “property acquisition,” to circumvent grant restrictions. CP 639. Throughout the lifecycle of this project, from the RFP, ordinance authorizing condemnation, condemnation petition, and motion for public use and necessity, the City has referred to a single project: the George Davis Creek Fish Passage Project. The City cannot use creative labels or accounting to avoid the prohibition on RCO funds for a project involving condemnation.<sup>3</sup>

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<sup>3</sup> The Court’s Opinion also cites, in a footnote, WAC 220-660-190(3), a regulation of the Washington Department of Fish and Wildlife, which requires that “water crossing structures in fish-bearing streams” must “allow fish to move freely through them at all flows.” Opinion at 10 (citing WAC 220-660-190(2)). The City relied on this administrative regulation to argue that it must comply with this WAC in its stormwater projects, and that Titcomb’s arguments would convert all stormwater projects to fish passage projects simply through the City’s efforts to comply with this WAC. *See* Opinion at 10 (citing Respondent’s Br. at 3). But Titcomb never argued that a municipality’s actions to ensure a stormwater project does not impair fish-bearing streams in and of itself converts what would otherwise be a stormwater project into a fish passage project. And that is not what the record shows

The Opinion of the Court of Appeals condones the City's attempt to evade statutory limits on condemnation authority, presenting a significant constitutional issue impacting the public which warrants this Court's review. The City voluntarily sought grant funding for a fish passage project, and it must accept the restrictions that accompany that grant funding.

**B. The Opinion Conflicts With Washington Supreme Court Precedent.**

The Opinion also conflicts with decisions of the Washington Supreme Court, RAP 13.4(b)(1).

The Court's Opinion is inconsistent with *In re City of Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981) which requires an assessment of the primary purpose of the condemnation. Although addressing the question of public use and not statutory authority, the Washington Supreme Court noted in *In re City of Seattle*, that “[i]f a private use is combined with a public use in

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in this case: the record demonstrates that the City consistently described its own project as a fish passage project, and affirmatively sought out and obtained restricted RCO funding for a fish passage project.

such a way that the two cannot be separated, the right of eminent domain cannot be invoked.” *Id.* at 627.

In that case, the City of Seattle “strenuously” argued the project was for a public use. *Id.* at 629. Still, the Washington Supreme Court rejected the City of Seattle’s effort to condemn land because the “primary purpose” of the project was to promote private retail functions. *Id.* The Court stated that a different case would be presented if the retail functions were only “incidental” to public uses (like public squares, parks, museums, and off-street parking). *Id.*

Likewise here, the City’s strenuous arguments are not dispositive. Eminent domain is not authorized for fish passage, which is plainly the primary purpose of the George Davis Creek Fish Passage Project. Fish passage is not merely incidental to the stormwater function. *See* CP 715 (City’s motion for reconsideration asserting stormwater and fish passage improvements are “inextricably intertwined”). Because eminent



domain is not authorized for the City's project, the Court of Appeals erred in reversing the superior court's decision.

**C. The Opinion Conflicts With A Published Decision of the Court of Appeals.**

The decision of the Court of Appeals is also in conflict with a published decision of the Court of Appeals, *Cowlitz County v. Martin*, 142 Wn. App. 860, 177 P.3d 102 (2008), justifying review under RAP 13.4(b)(2).

In *Cowlitz County*, the County sought to condemn an expanded easement to replace a creek culvert posing an impediment to fish and received project funding through the Salmon Recovery Act. In dismissing the condemnation, the court confirmed that nothing in the Salmon Recovery Act authorizes condemnation of private property, and in fact there is "significant indication to the contrary." *Cowlitz County*, 142 Wn. App. at 865–67; RCW 77.85.050(1)(a) ("No project included on a habitat project list shall be considered mandatory in nature and no private landowner may be forced or coerced into participation in any respect."). The court declined to consider

the county's general condemnation authority because the Salmon Recovery Act "strictly forbids condemnation for projects undertaken solely under its provisions." *Cowlitz County*, 142 Wn. App. at 866–67.

Here, the City's own documents show the clear purpose of the George Davis Creek Fish Passage Project is to promote salmon recovery and fish passage. CP 515. Condemnation is not authorized by Washington law.

The Court of Appeals distinguished *Cowlitz County*, because in *Cowlitz County*, the county prosecuting attorney had added citation to additional condemnation authority in the condemnation petition filed with the court, which had not been included in the resolution authorized by the county commissioners. Opinion at 11.

While it is true that the Ordinance condemning Titcomb's property does not cite the Salmon Recovery Act and instead cites the statute authorizing condemnation for stormwater purposes, the clear history of the Project, like the project at issue in *Cowlitz*

*County*, shows the primary purpose is for fish passage. *E.g.*, CP 515 (City’s request for proposal identifying sole purposes of the project is “to remove several fish passage barriers and make George Davis Creek fish passable”). The precise way the County recharacterized the project in *Cowlitz County* differs from the manner in which the City has attempted to recharacterize the George Davis Creek Fish Passage Project. But the broader point remains the same: a municipality cannot evade statutory limits on the exercise of the power of eminent domain by recharacterizing a public project whose primary purpose is to promote salmon recovery and fish passage.

## **VI. CONCLUSION**

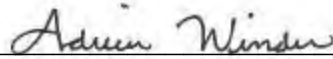
This Court should grant Titcomb’s petition for review. While the public use and necessity determination involves certain deference a municipality’s legislative authority, courts have an obligation to ensure that the power of eminent domain is properly authorized. The superior court correctly recognized that the City does not have authority to condemn Titcomb’s property.

The record in this case establishes the primary purpose of the project, as articulated by the City in its own request for proposals, is for salmon recovery and not stormwater. The City's belated attempt to recharacterize the project to evade statutory limits on condemnation is unlawful, as the superior court properly recognized.

*I certify that this brief contains 4,640 words, excluding the parts of the document exempted from the word count by RAP 18.17, in compliance with RAP 18.17.*

Respectfully submitted this 12th day of April, 2023.

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# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

CITY OF SAMMAMISH, a Washington  
municipal corporation,

Appellant,

v.

JOHN TITCOMB, JR. and LINDE R.  
BEHRINGER, husband and wife, and  
the marital community comprised  
thereof; and KING COUNTY,

Respondents.

DIVISION ONE

No. 83886-5-I

PUBLISHED OPINION

DWYER, J. — In determining whether a municipality possesses the requisite authority to condemn private property, our focus is the purpose of the condemnation as articulated by the relevant legislative body. When such authority exists, we must determine whether the condemnation is for a public use and whether the property condemned is necessary to accomplish that use. While the former is a judicial question, the latter is largely a question for the legislative body seeking condemnation.

Here, the city council of the City of Sammamish enacted Ordinance No. O2021-526 (the Ordinance) authorizing the condemnation of property rights in the water flowing from George Davis Creek, which runs through the property and beneath the home of John Titcomb and Linde Behringer. The Ordinance

authorized condemnation for the purposes of reducing and eliminating storm drainage conveyance system capacity issues, improving traffic safety, and providing flood protection, as well as supporting kokanee salmon recovery by removing barriers to fish passage. Following the enactment of the Ordinance, the City of Sammamish (the City) filed in the superior court a petition in eminent domain and a motion for an order adjudicating public use and necessity. Titcomb and Behringer opposed the City's motion. The superior court denied the motion.

Because the City has the statutory authority to condemn private property for the purposes set forth in the Ordinance, and because the City has demonstrated both public use and necessity, we reverse the superior court's order denying the City's motion and dismissing its eminent domain action.

I

In July 2018, the City initiated the George Davis Creek Fish Passage Project (the Project) "to replace storm drainage infrastructure and to eliminate existing barriers to fish passage." George Davis Creek (the Creek), located in Sammamish, runs downhill to East Lake Sammamish Parkway (ELSP), a main arterial that parallels the waterfront homes along Lake Sammamish. The last downstream portion of the Creek runs through the property of Titcomb and Behringer before flowing into the lake. The Creek flows beneath Titcomb and Behringer's residence, where they have constructed a daylit fish ladder integrated into the home's foundation.

Christopher Coenen, senior stormwater program manager for the City, described the impetus for and purposes of the Project. According to Coenen, the

need to improve the drainage capacity of the Creek's stormwater infrastructure "goes back decades." In the 1990s, King County installed a bypass system at the Creek's juncture with ELSP, which was intended to "capture overflow water for occasional storm-related flooding." However, the current system is inadequate to convey stormwater "without significant maintenance to remove accumulated sediment within the drain system." Moreover, according to Coenen, the "culverts, pipes, and other drainage infrastructure within the Creek prevent Lake Sammamish Kokanee salmon from reaching upstream spawning grounds." Thus, Coenen indicated, the Project is intended "to reduce or eliminate storm drainage conveyance system capacity issues, improve traffic safety of adjacent roadways by reducing hazardous flooding conditions, and provide greater flood protection. Likewise, the Project would remove barriers to fish passage."

In late 2018, City staff conducted a project analysis to compare four alternatives for the Project. Alternative 1 involved the replacement of multiple culverts beneath ELSP and other roadways and the construction of an open channel through the Titcomb and Behringer property, which would maintain the open channel beneath and downstream of their residence. Alternative 2 would not have impacted the Titcomb and Behringer property, but would have involved the replacement of culverts and the construction of a series of open channel stream sections on other property. Alternative 3 involved the replacement of multiple culverts beneath ELSP and other roadways, construction of an open channel through the Titcomb and Behringer property, reconstruction of an open channel beneath the residence, and reconstruction of the existing channel



between the residence and Lake Sammamish. Finally, Alternative 4 involved the replacement of the same culverts, acquisition of the private property adjacent to the Titcomb and Behringer property (the Sigmar property), and construction of the stream through that City-owned property and into Lake Sammamish. After considering these project alternatives, City staff and the project consultant team indicated that Alternatives 3 and 4 best met the City's goals for implementing the Project.

The project alternatives analysis was presented to the Sammamish City Council (the SCC) at its March 2019 meeting. The SCC thereafter directed City staff to pursue Alternative 4, involving acquisition of the Sigmar property and rerouting of the Creek through that property. The SCC concluded that the proposed stream relocation "is necessary due to constraints with the existing stream course through the Titcomb-Behringer property." An alternative involving modification of the stream through the Titcomb and Behringer property, the SCC concluded, "would be unsuccessful because it would fail to meet critical project requirements," including state fish passage rules, the capacity "to convey the 100-year flow event," and acquisition of the requisite federal permitting.

In March 2020, the City purchased the Sigmar property. The City attorney advised the SCC that "the project's relocation of the stream's water flow may constitute a taking of the Titcomb-Behringer's property rights associated with the value of the stream." Thus, City staff and the City attorney "pursued a course to provide just compensation" to Titcomb and Behringer. To that end, City staff engaged in extensive efforts to reach a settlement agreement. When, over the

course of 12 months, negotiations had not been productive, the City concluded that further discussions were unlikely to result in such an agreement.

Accordingly, the Ordinance was proposed to authorize the initiation of condemnation proceedings.

On March 2, 2021, the SCC held a public hearing at which members of the public, including Titcomb, testified against the condemnation. At the hearing, the objectives of the Project were presented, including the need to reduce the risk of flooding, improve the capacity of a critical public facility, reduce maintenance demands, and, additionally, support kokanee salmon populations. According to the summary of the Project, it would address the “clear public need” of the inadequacy of the current storm drain system, as well as supporting kokanee salmon, and “can only be completed if the stream is moved.”

The SCC voted 6-1 to adopt the Ordinance authorizing exercise of its power of eminent domain in order to acquire the Titcomb and Behringer property for the Project. The Ordinance is entitled:

AN ORDINANCE OF THE CITY OF SAMMAMISH,  
WASHINGTON, DECLARING PUBLIC USE AND NECESSITY  
FOR THE ACQUISITION OF PROPERTY INTERESTS FOR THE  
GEORGE DAVIS CREEK FISH PASSAGE PROJECT;  
AUTHORIZING USE OF CONDEMNATION PURSUANT TO  
CHAPTER 8.12 RCW AS REQUIRED FOR THE GEORGE DAVIS  
CREEK FISH PASSAGE PROJECT; AUTHORIZING PAYMENT  
FOR THE ACQUISITION OF PROPERTY INTERESTS FOR THE  
GEORGE DAVIS CREEK FISH PASSAGE PROJECT FROM THE  
CITY’S STORMWATER ENTERPRISE FUND AND OTHERWISE  
FROM THE GENERAL FUNDS OF THE CITY; PROVIDING FOR  
SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE

The Ordinance recognizes the goal, set forth in the City's comprehensive plan, "to maintain and protect surface water resources, and to encourage restoration of such resources," as well as "to acquire property to provide public control to the water's edge of State regulated shorelines." It further recognizes our state legislature's enactment of legislation "establish[ing] a fish barrier removal board to identify and prioritize the removal of fish barriers from rivers and streams."

The Ordinance references that the "culverts, pipes and other drainage infrastructure within George Davis Creek are not adequate to convey the two-year storm event, which results in periodic flooding, additional facility maintenance, and reduced traffic safety on adjacent roadways," and that the Project "will reduce or eliminate storm drainage conveyance system capacity issues, improve traffic safety of adjacent roadways by reducing hazardous flooding conditions, and provide greater flood protection." The Ordinance additionally notes the "significant barriers to fish passage" where the Creek flows through the Titcomb and Behringer property. It indicates that the Project "will support kokanee salmon recovery by providing barrier-free passage for fish migrating to spawning grounds, and improve in-stream habitat and passage for juvenile fish returning to Lake Sammamish." In adopting the Ordinance, the SCC determined that acquisition of the Titcomb and Behringer property "is for a public use, in the public interest, and is necessary for that public use."

On July 21, 2021, the City filed in the superior court a petition in eminent domain "condemning all property rights in the water flowing from George Davis Creek necessary for the George Davis Creek Fish Passage Project." On

December 10, 2021, the City filed a motion for an order adjudicating public use and necessity. The City therein asserted that it is authorized by statute to condemn the Titcomb and Behringer property for stormwater facilities, and that such condemnation constitutes a public use and is necessary to accomplish that use. Titcomb and Behringer opposed the motion, contending that the City does not have statutory authority to condemn private land for fish passage purposes.

On February 14, 2022, the superior court denied the City's motion for an order adjudicating public use and necessity and dismissed the City's condemnation action. The City thereafter filed a motion for reconsideration, which the superior court denied. On March 14, 2022, Titcomb and Behringer filed a motion requesting attorney fees and costs pursuant to RCW 8.25.075(1)(a). The superior court granted the motion but reduced the amount of the requested award.

The City appeals.

## II

The City contends that the superior court erred by dismissing its condemnation action. According to the City, it is statutorily authorized to condemn the Titcomb and Behringer property for stormwater facilities purposes pursuant to RCW 8.12.030. Moreover, the City asserts, the condemnation is both for a public use and necessary to accomplish that use. We agree.

## A

The power of eminent domain is an inherent power of the state that may be delegated to its political subdivisions, including cities or counties. Cent. Puget

Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC, 191 Wn.2d 223, 233, 422 P.3d 891 (2018) (WR-SRI). However, “[a] political subdivision’s authority to condemn property extends ‘only so far as statutorily authorized.’” WR-SRI, 191 Wn.2d at 233 (quoting Pub. Util. Dist. No. 1 of Okanogan County v. State, 182 Wn.2d 519, 534, 342 P.3d 308 (2015)). Thus, “the scope of the eminent domain authority of a governmental unit is a matter of statutory interpretation,” and specific rules guide our interpretation of statutes conferring such authority. WR-SRI, 191 Wn.2d at 233-234. The power to condemn “must be conferred in express terms or necessarily implied.” In re Petition of City of Seattle, 96 Wn.2d 616, 629, 638 P.2d 549 (1981). However, “[a]lthough a legislative grant of such power to a municipality is to be strictly construed, it is not to be construed so strictly as to defeat the evident purpose of the grant.” City of Tacoma v. Welcker, 65 Wn.2d 677, 683, 399 P.2d 330 (1965); see also WR-SRI, 191 Wn.2d at 235.

It is well established that municipalities “have clear statutory authority to condemn property for roadways and for storm water control facilities.” Cowlitz County v. Martin, 142 Wn. App. 860, 867, 177 P.3d 102 (2008). See also City of Bellevue v. Painter, 58 Wn. App. 839, 842, 795 P.2d 174 (1990) (recognizing statutory authority for “condemnation for drains and sewers or any other public use within or without the limits of a city”). Indeed, our legislature has expressly delegated such authority:

Every city and town . . . within the state of Washington, is hereby authorized and empowered to condemn land and property . . . [for] culverts, drains, ditches, . . . and to condemn land and other property and damage the same for such and for any other public

use after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter.

RCW 8.12.030.

Here, the parties do not dispute that the City has statutory authority to condemn private property for stormwater facilities purposes. See Br. of Resp't at 21 ("Respondents do not dispute that cities have statutory authority to condemn property for stormwater purposes."). Indeed, such a position would be contrary to the express language of RCW 8.12.030. Instead, Titcomb and Behringer assert, as they did in the superior court, that the City lacks statutory authority to condemn their property because the Project is "a fish passage project." Br. of Resp't at 16. We disagree.

Whether a municipality possesses the requisite authority to condemn private property is determined based on the purpose of the condemnation as articulated by the relevant legislative body. In the Ordinance, the SCC clearly articulated purposes consistent with the statutory grant of authority set forth in RCW 8.12.030. The Ordinance states that the current infrastructure is "not adequate to convey the two-year storm event," resulting in "periodic flooding, additional facility maintenance, and reduced traffic safety on adjacent roadways." It provides that the Project will address these issues, "reduc[ing] or eliminat[ing] storm drainage conveyance system capacity issues, improv[ing] traffic safety of adjacent roadways by reducing hazardous flooding conditions, and provid[ing] greater flood protection." These are precisely the purposes for which RCW 8.12.030 empowers municipalities to condemn private property. See, e.g., Cowlitz County, 142 Wn. App. at 867; City of Bellevue, 58 Wn. App. at 842. That

the Project additionally provides fish passage benefits does not divest the City of its authority, conferred by our legislature in RCW 8.12.030, to condemn property for stormwater facilities.<sup>1</sup>

Titcomb and Behringer nevertheless assert that the City is precluded from condemning their property because the City has received funding pursuant to the “Salmon Recovery Act,” chapter 77.85 RCW, to implement some part of the Project. The Salmon Recovery Act was enacted by our legislature “in an attempt to improve salmonid fish runs throughout the state.” Cowlitz County, 142 Wn. App. at 865; RCW 77.85.005. The act allows counties, cities, and tribal governments to apply for state funds to repair and improve salmonid fish runs after designating the repair or improvement in a “habitat project list.” RCW 77.85.050, .150, .170. As relevant here, the act provides that “[n]o project included on a habitat project list shall be considered mandatory in nature and no private landowner may be forced or coerced into participation in any respect.” RCW 77.85.050(1)(a). Titcomb and Behringer assert that, because the City has received grant funding pursuant to the Salmon Recovery Act for a certain portion of the Project, their property may not be condemned for any part of the Project.

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<sup>1</sup> Indeed, pursuant to regulations promulgated by the Washington Department of Fish and Wildlife, any water crossing structures over fish-bearing waters, including culverts, must be designed “to allow fish to move freely through them at all flows when fish are expected to move.” WAC 220-660-190(2)(a). For permanent water crossing structures, “[t]he water crossing design must provide unimpeded passage for all species of adult and juvenile fishes.” WAC 220-660-190(3)(a). As senior stormwater engineer Coenen explained, “any storm drainage improvements to the drainage system are required by State law to be made fish passable” due to the Creek’s status as a state water and a fish-bearing stream. That the City is complying with state regulations regarding fish passage in constructing the Project does not, as Titcomb and Behringer assert, render the Project a “fish passage project[.]” Br. of Resp’t at 3.

The Ordinance provides, however, that compensation for the property rights acquired through condemnation “will be made from the City’s Stormwater Enterprise Fund and otherwise from the general funds of the City.” Titcomb and Behringer do not dispute that this is true. Instead, they simply assert that the grant funding received pursuant to the Salmon Recovery Act may not be used for condemnation purposes. That is a separate question, however, from those that we are tasked to decide—whether the City has statutory authority to condemn the property and whether the Project constitutes a public use and the condemnation is necessary for that use. Disputed issues involving the expenditure of funds are not relevant to this appeal. Moreover, there is no indication in the record that the City will use the RCO funds to compensate Titcomb and Behringer. Titcomb and Behringer’s assertion that the City is precluded from condemning their property pursuant to the Salmon Recovery Act, chapter 77.85 RCW, is without merit.<sup>2</sup>

Titcomb and Behringer additionally assert that the court’s decision in Cowlitz County, 142 Wn. App. 860, demonstrates that the City is without statutory authority for condemnation. That case, however, is inapposite. There, Cowlitz County filed a petition for condemnation to acquire an expanded easement over private property to replace an existing culvert. Cowlitz County,

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<sup>2</sup> Titcomb and Behringer assign great weight to the name of the Project—the “George Davis Creek Fish Passage Project.” However, it is the elected city council to whom our legislature has granted the power of condemnation. Accordingly, it is the Ordinance enacted by the SCC—not the title assigned to the Project by an executive branch employee—that delineates the purpose of that Project. As discussed supra, the Ordinance provides ample evidence that the purposes of the Project fall within the statutory authorization for condemnation set forth in RCW 8.12.030.



142 Wn. App. at 862. The county applied for and received a grant from the Salmon Recovery Fund. Cowlitz County, 142 Wn. App. at 862. Its engineering manager “explained that the County wished to replace the Baxter Creek culvert *solely because* it posed an impediment to fish passage.” Cowlitz County, 142 Wn. App. at 862 (emphasis added).

The relevant legislative authority, the county board of commissioners, passed a resolution authorizing the county prosecuting attorney to file a petition for condemnation. Cowlitz County, 142 Wn. App. at 862. The resolution stated that the project was ““necessary to remove and replace the existing culvert that has been identified as a barrier to fish passage and the Salmon Recovery Funding Board has awarded a grant for the project.”” Cowlitz County, 142 Wn. App. at 862. In the condemnation petition, the county prosecuting attorney for the first time alleged an additional reason for the condemnation—that the existing culvert was insufficient to handle storm stream flows. Cowlitz County, 142 Wn. App. at 863.

Notwithstanding the county’s assertion that the project was also authorized as a county road project, Division Two of this court held that the county did not have authority to condemn the property. Cowlitz County, 142 Wn. App. at 868. Looking to the resolution enacted by the relevant legislative authority, the court determined that “the project had no road improvement purpose independent of the culvert replacement under the Salmon Recovery Act.” Cowlitz County, 142 Wn. App. at 867. Moreover, the court held, the county prosecuting attorney—who had, for the first time, articulated inadequacy for

storm stream flows as a purpose of the project—lacked the authority to provide a purpose that had not been embraced by the county board of commissioners.

Cowlitz County, 142 Wn. App. at 867.

Thus, the court in Cowlitz County held that our legislature had “clearly elected not to grant eminent domain power . . . for projects *solely* funded and regulated by the Salmon Recovery Act.” 142 Wn. App. at 866 (emphasis added). The record there did “not reflect that the commissioners considered or were even aware of [the storm stream flow] issue when they made their finding that condemnation was necessary.” Cowlitz County, 142 Wn. App. at 865. Rather, the commissioners had “authorized condemnation *solely for the purpose of fish passage* by means of a project funded and regulated by the Salmon Recovery Act.” Cowlitz County, 142 Wn. App. at 866 (emphasis added). Indeed, the board of commissioners “made no other finding of necessity” and the record “reflect[ed] no other basis for such a finding.” Cowlitz County, 142 Wn. App. at 868.

Here, in contrast, the Ordinance enacted by the SCC clearly articulates that the Project was initiated both “to eliminate existing barriers to fish passage and replace storm drainage infrastructure” in the Creek. Unlike in Cowlitz County, the purposes for which condemnation has been authorized were properly articulated by the legislative authority to whom the power of eminent domain was granted.<sup>3</sup> Because the Project is a stormwater facilities project, the

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<sup>3</sup> Although it is the purpose articulated by the relevant legislative body that determines whether statutory authority for condemnation exists, we note that the record here, beyond the Ordinance, further supports the City’s assertion that a primary purpose of the Project is to improve stormwater facilities.

Consistent with the Ordinance, the presentation regarding the Project made at the public hearing identified reduction of flood risk, improvement of the capacity of the public facility, and

City is statutorily authorized to condemn the Titcomb and Behringer property pursuant to RCW 8.12.030.

B

The City additionally asserts that condemnation of the Titcomb and Behringer property is for a public use and that acquisition of the property is necessary to accomplish that use.<sup>4</sup> We agree. It is well established that condemnation by municipalities for stormwater facilities constitutes a public use. Moreover, given the deference afforded to the legislative authority seeking to

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reduction of maintenance demands as the public needs supported by the Project, in addition to noting that the Project supports the kokanee salmon. The presentation listed “storm drainage” as a “project driver.” The SCC’s agenda for the meeting indicated that the proposed stream relocation to the Sigmar property is necessary both to comply with fish passage rules and create capacity “to convey the 100-year flow event.”

Moreover, senior stormwater engineer Coenen explained that the Project is “fundamentally a stormwater facilities improvement project.” He explained that “[t]he Project—and the City’s acquisition of the Behringer property—would fix [the] flooding issues on the ELSP and reduce or eliminate the need for extensive maintenance to ensure the base-level function envisioned by the design.” Senior stormwater engineer Stephanie Sullivan concurred, explaining that the Project “will remove a concrete dam further upstream, increase flow and sediment transport capacity, eliminate the need for a sedimentation pond and diversion system, and reduce or eliminate maintenance for those systems.”

<sup>4</sup> Notwithstanding that the motion before the superior court was one requesting the “adjudication of public use and necessity,” Titcomb and Behringer provide no argument regarding whether the City has demonstrated that the Project meets those requisite showings. Instead, they rely solely on their assertion that the City lacks statutory authority for condemnation. Nevertheless, they contend that, if we conclude that the City has statutory authority to condemn their property, remand for an evidentiary hearing is necessary “to resolve the question of public use and necessity” and to resolve purported factual disputes. Br. of Resp’t at 37-39.

We disagree. Because the motion before the superior court explicitly sought the adjudication of public use and necessity, this issue has already been litigated. We decline to provide Titcomb and Behringer a “second bite at the apple.” Moreover, an evidentiary hearing is not necessary for a determination of public use and necessity. The purported factual disputes raised by Titcomb and Behringer need not be determined to resolve this case. As discussed *infra*, once the judicial determination of public use has been made, we owe great deference to the legislative condemning authority regarding whether acquisition of the property is necessary to accomplish that use. See, e.g., HTK Mgmt., LLC v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). The purported factual disputes raised by Titcomb and Behringer are inconsequential to the resolution of this case. Accordingly, we deny their request to remand for an evidentiary hearing.

condemn property, we conclude that acquisition of the Titcomb and Behringer property is necessary to accomplish the proposed public use.

The power of eminent domain is limited by both the Washington State Constitution and by statute. State ex rel. Wash. State Convention & Trade Ctr. v. Evans, 136 Wn.2d 811, 816-17, 966 P.2d 1252 (1998) (Convention Ctr.). Article I, section 16 prohibits the State from taking private property for private use. Convention Ctr., 136 Wn.2d at 817. Pursuant to RCW 8.04.070, a proposed condemnation must be necessary for the public use. Convention Ctr., 136 Wn.2d at 817.

Washington courts have developed a three-part test to evaluate eminent domain cases. Convention Ctr., 136 Wn.2d at 817. For a condemnation to be lawful, the municipality must demonstrate that “(1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose.” HTK Mgmt., LLC v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). “The latter two findings are generally subsumed under the definition of ‘necessity.’” In re Petition of City of Seattle, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985). Whether a proposed condemnation is really for a public use “is solely a judicial question.” Welcker, 65 Wn.2d at 684. However, “[w]hether condemnation is necessary is largely a question for the legislative body of the jurisdiction or government agency seeking condemnation.” Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 411, 128 P.3d 588 (2006). “A declaration of necessity by a proper municipal authority is conclusive

in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.” HTK Mgmt., 155 Wn.2d at 629.

In enacting RCW 8.12.030, our legislature authorized municipalities to condemn property for the purpose of stormwater facilities. Although the question of public use is a judicial one, decisional authority confirms that condemnation for that purpose constitutes a public use. See, e.g., Cowlitz County, 142 Wn. App. at 867; City of Bellevue, 58 Wn. App. at 842. The Ordinance enacted by the SCC clearly articulates the proposed public use of “reduc[ing] or eliminat[ing] storm drainage conveyance system capacity issues, improv[ing] traffic safety of adjacent roadways by reducing hazardous flooding conditions, and provid[ing] greater flood protection.” Accordingly, we conclude that the proposed use of the Project is a public one.

We next turn to the issue of necessity. Because questions concerning whether a property acquisition is necessary to carry out a proposed public use are legislative, we defer to the legislative body seeking condemnation with regard to such determinations. Convention Ctr., 136 Wn.2d at 823. “This deference to the condemnor’s decision regarding necessity has its root in the concept of eminent domain itself.” In re Petition of Puget Sound Power & Light Co., 28 Wn. App. 615, 618, 625 P.2d 723 (1981). “The power to assert eminent domain rights is an attribute of state sovereignty—exercised through the legislature—and is thus subject to judicial review only to determine whether the State exceeded its lawful authority.” Petition of Puget Sound Power & Light Co., 28 Wn. App. at

618. Our Supreme Court has articulated the wisdom of this constrained judicial review:

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.

Deaconess Hosp. v. Wash. State Highway Comm'n, 66 Wn.2d 378, 405, 403 P.2d 54 (1965).

“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.” Miller, 156 Wn.2d at 417-18 (quoting Welcker, 65 Wn.2d at 684). Indeed, “[e]ven 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.’” Miller, 156 Wn.2d at 418 (second alteration in original) (quoting In re Petition of Port of Grays Harbor, 30 Wn. App. 855, 864, 638 P.2d 633 (1982)). Moreover, “necessary” in the context of condemnation does not mean absolute necessity. Rather,

[t]he word ‘necessary,’ as used in connection with eminent domain statutes, means reasonable necessity under the circumstances. State ex rel. Lange v. Superior Court, 61 Wn.2d 153, 377 P.2d 425 (1963). It does not mean immediate, absolute, or indispensable need, but rather considers the right of the public to expect or demand that certain services be provided. Tacoma v. Welcker, 65 Wn.2d 677, 399 P.2d 330 (1965).

City of Des Moines v. Hemenway, 73 Wn.2d 130, 140, 437 P.2d 171 (1968).

Accordingly, “[a] legislative body’s determination of necessity is conclusive unless there is proof of actual fraud or arbitrary and capricious conduct amounting to constructive fraud or the government fails to abide by the clear dictates of the law.” Miller, 156 Wn.2d at 417.

Here, the SCC considered four project alternatives and the analysis set forth by City staff in comparing the relative merits of each. The SCC thereafter concluded that the Project required acquisition of the Titcomb and Behringer property. Relocation of the stream is necessary, as determined by the SCC, “due to constraints with the existing stream course through the Titcomb-Behringer property.” The SCC rejected an alternative involving modification of the stream course through that property because “it would fail to meet critical project requirements,” including state fish passage rules, the capacity “to convey the 100-year flow event,” and the requisite federal permitting. Thus, the Ordinance enacted by the SCC states that condemnation is “necessary for the public use of the construction of the George Davis Creek Fish Passage Project.”

The SCC’s necessity determination was reached following due consideration of the merits of multiple project alternatives. Titcomb and Behringer nowhere assert that the City acted fraudulently or in an arbitrary and

capricious manner; nor would the record support such an assertion. Our deference to the legislative authority in determining necessity for condemnation is rooted both in our respect for the other branches of government and our recognition of the institutional competence of courts. Miller, 156 Wn.2d at 421. In the absence of proof of fraud or arbitrary and capricious conduct, we will not disturb the SCC's determination that the acquisition of the Titcomb and Behringer property is necessary for the proposed public use. HTK Mgmt., 155 Wn.2d at 629.

The stormwater facilities purpose of the Project, articulated in the Ordinance adopted by the SCC, constitutes a public use. The record demonstrates no fraud or arbitrary and capricious conduct on the part of the City. Extending the deference owed to the SCC, we conclude that acquisition of the Titcomb and Behringer property is necessary to accomplish the proposed public use. Accordingly, we reverse the superior court's order denying the City's motion for an order adjudicating public use and necessity and dismissing the City's petition in eminent domain.

### III

The City further asserts that the superior court erred by awarding attorney fees and costs to Titcomb and Behringer. We agree.

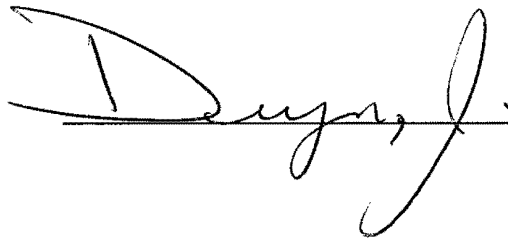
The superior court awarded attorney fees and costs to Titcomb and Behringer pursuant to RCW 8.25.075(1)(a). The statute provides that, in a condemnation action, the superior court "shall award the condemnee costs including reasonable attorney fees . . . if . . . [t]here is a final adjudication that the



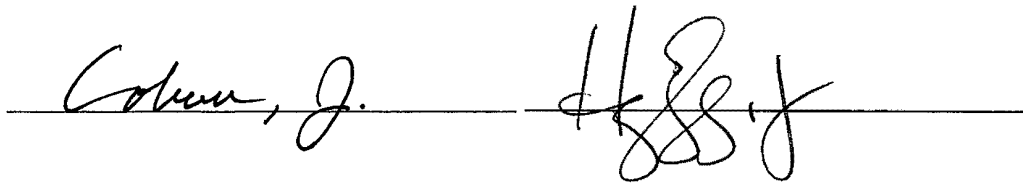
condemnor cannot acquire the real property by condemnation.” RCW 8.25.075(1)(a). Because we conclude that the City has demonstrated the requisite public use and necessity to condemn the Titcomb and Behringer property, the statute does not authorize such an award. Accordingly, we reverse the award of attorney fees and costs awarded by the superior court to Titcomb and Behringer.

Titcomb and Behringer additionally request an award of attorney fees and costs on appeal. Again, the relevant statutory authority, RCW 8.25.075(1)(a), permits such an award only upon a final adjudication that the condemnor cannot acquire the property by condemnation. Thus, for the same reason that we reverse the superior court’s award of fees and costs, we decline to grant such an award to Titcomb and Behringer on appeal.

Reversed.

A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.

WE CONCUR:

Two handwritten signatures in cursive script, one reading "Cohen, J." and the other "H. B. J.", written over a horizontal line.

## DECLARATION OF SERVICE

I hereby certify that I am a legal assistant at Foster Garvey PC and that I filed the foregoing document with the Court of Appeals and served the pleading via e-mail and court e-service on the following persons:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

Executed at Seattle, Washington, on April 12, 2023.

*s/McKenna Filler*

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McKenna Filler, Legal Practice Assistant

**FOSTER GARVEY PC**

**April 12, 2023 - 3:57 PM**

**Filing Petition for Review**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Appellate Court Case Title:** City of Sammamish, Appellant v. John Titcomb, Jr., Linde R. Behringer, & King County, Respondent (838865)

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