95221-3

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75463-7-I
Court of Appeals, Division I

CITY OF REDMOND,

Respondent,

vs.

UNION SHARES LLC,

Petitioner,

PETITION FOR REVIEW

Charles A. Klinge, WSBA # 26093
Attorney for Petitioner Union Shares LLC

STEPHENS & KLINGE LLP
10900 NE 8th Street, Suite 1325
Bellevue, WA 98004

Telephone: (425) 453-6206

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I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Petitioner and condemnee Union Shares LLC (Union Shares) seeks review of the decision of Division One of Court of Appeals, entered on July 31, 2017 ("Slip Op."). A copy of the decision is attached hereto as Appendix A. A timely motion for reconsideration was filed and, after requesting and receiving a response from the City of Redmond, the Court of Appeals denied the motion on October 12, 2017 (Appendix B).

II. ISSUES PRESENTED FOR REVIEW

1. ***Economic Development as Public Use in Condemnation.***

The City of Redmond seeks to take the unprecedented action of rerouting a stream from six industrial properties onto Union Shares' property. The City Council Ordinance avowed that the project will promote "economic redevelopment of those properties ***currently encumbered by the stream*** by relocating the stream ***to the properties to be condemned.***"[1] In furtherance of this private purpose, the City responded to the six industrial property owners' demands for economic benefits by creating the Owner Participation Alternative which requires the City to pay for design and permitting to authorize redevelopment of the private properties. The private owners have jointly, with the City, signed the

[1] Ex. 7 at 1 (emphasis added).

federal, state and county permit applications for that purpose. Despite the City's purposeful efforts to benefit six specific private owners, the Court of Appeals held that the Public Use Clause was not violated because the private economic benefits were not inseparable from the project's public purpose, and were otherwise incidental. This holding conflicts with decisions of this Court and presents a Constitutional issue of significant public interest, thus warranting review under RAP 13.4(b)(1), (3), and (4).

2. ***Condemnation for View Enhancement Outside City Limits.***

RCW 8.12.030 restricts city authority to condemn land outside city limits; stream relocation is not one of the authorized reasons. After filing the condemnation action, the City packaged the stream relocation project as a "public park" to comply with RCW 8.12.030. Yet, no public access is afforded to the condemned land for environmental purposes. Hence, the City relied solely on "enhanced viewing opportunities" from an existing public trail as constituting a "public park" under RCW 8.12.030. Despite no new public recreational access being created, the Court of Appeals held that the project was a "public park," and thus opened the door to condemnations of land far from city limits based solely on view enhancement. This holding conflicts with published decisions of the Court of Appeals and this Court's decisions, and presents an issue of significant public interest warranting review. RAP 13.4(b)(1), (2), (4).

III. STATEMENT OF THE CASE

Union Shares LLC owns land in unincorporated King County just outside the eastern city of limit of the City of Redmond. Ex. 24. Evans Creek is southwest off site of Union Shares' property and travels through six private industrial properties within the City limits. An existing public trail crosses the southwest corner of Union Shares' property within an existing easement area of five acres. Union Shares granted the trail easement to the City in 2000 limited, "solely for recreational multi-use trail purposes," and not for a stream. Ex. 13 at § 1.

The Evans Creek Relocation Project was initially considered in a 2005 preliminary feasibility study. Ex. 2. The study emphasized two goals: (1) environmental enhancement; and, (2) increased development potential for the private industrial properties. Specifically, after describing the environmental benefits, the Conclusion states:

> Relocating the creek further away from the current developed industrial and business sites ***will provide increased potential for further development and/or re-development*** while at the same time providing the required stream buffer areas. . . . Over the long term, the environmental and economic (development) benefits should outweigh the monetary costs.

Ex. 2 at 5 (emphasis added). The Project is estimated to cost between $6.3 and $7.6 million (Ex. 5), thus the financial benefit to the industrial property owners is expected to be in the millions.

In 2012, the Redmond City Council adopted Ordinance No. 2654 authorizing condemnation of Union Shares' property rights for the stream relocation. Ex. 7. The Ordinance specifically based condemnation on economic redevelopment benefits to the private industrial properties:

> WHEREAS, the plans to construct and relocate the stream channel and the associated improvements ***will also encourage economic redevelopment of those properties currently encumbered by the stream by relocating the stream to the properties to be condemned.***

Ex. 7 at 1 (emphasis added). Thus, private redevelopment of properties "encumbered by the stream" is furthered, not just by relocating the stream, but "by relocating the stream ***to the properties to be condemned***." The burden is transferred to Union Shares' property—the private benefit is ***directly tied*** to the environmental interest achieved in relocating the stream.

Importantly, the record reflects no recognition by the City Council that Union Shares' property was outside the city limits ***and reflects no discussion about whether the City even had condemnation authority*** as a public park or otherwise. *See* Exs. 16, 17, 18, 19. Union Shares sought postponement of the condemnation action. Ex. 19 at 2-3, 9:15-17. Staff basically said that the condemnation Ordinance was necessary to give the City leverage in the negotiations. Ex. 19 at 4:3-7, 4:21-25, 8:3-9. Council Member Myers shut down all further discussion:

> MR. MYERS: I guess what this motion really does is tells us how the story is going to end. ***And the story is going to end with the City of Redmond owning this property***.

Ex. 19 at 10:8-13 (emphasis added). With that statement, the discussion ended and the Council voted to adopt the Ordinance without ever discussing condemnation authority for public park or otherwise. *Id.* at 11. Later, the City Council approved a consultant agreement to spend over $900,000 to complete preliminary design and permitting, specifically stating that the Project would: "Allow for potential redevelopment of adjacent industrial properties." Ex. 20 at 1, 3 and Att. B at Ex. A at 9.

The City needed support from the six industrial property owners. But, in seeking that consent, the project morphed far beyond public environmental benefits into a specific effort to grant those six property owners approval to redevelop their properties. Union Shares' expert at trial provided unrebutted testimony that ***targeting benefits*** to six specific property owners was not even "economic development" as that is understood as an open public program achieving broad goals. 1 RP 126:6-16, 143:8-14. Tellingly, this scheme was not discussed in public, but rather the City staff and consultant orchestrated ***secret meetings*** solely with the industrial property owners—no meeting invitations were sent to the public, environmental organizations, state or federal agencies, and not to other property owners such as Union Shares. 1 RP 135-140, Ex. 21.

City staff pitched the private benefits of moving the stream, and the possibility of future redevelopment. *See, e.g.*, Ex. 21 at 4 ("Key

Messages" "free up industrial land where the creek is currently located for future development") But, the industrial property owners wanted more—they wanted approval to fill the old channel and use it for redevelopment, and they made a sustained effort to achieve that result. Ex. 21 at 9-35. The City specifically accommodated that request with the Owner Participation Alternative (Ex. 8 at 9 and Fig. 4) in which the City would sponsor the project and pay for the State and Federal permitting, at a cost of $900,000, that would authorize moving the stream ***and authorize filling the old channel***. The property owners would obtain approval for redevelopment of their properties free of stream impacts by bearing the minor cost of filling the old channel under City fill permits. The property owners agreed and joined the City by signing the federal, state and county permit applications. 1 RP 34:4-25 to 35:1-10. City staff said that the permits would be "very challenging," *i.e.* near impossible, for the property owners to obtain ***on their own***. Ex. 21 at 33.

In an official letter, the City summed up the two purposes of the project and that approval to fill the old channel would be under the umbrella of the City's State and Federal permits:

> While the primary motivation to relocate Evans Creek out of the industrial area into adjacent open space is to restore in-stream habitat for salmon, the project has broad support because it also benefits the industrial properties ***by creating the opportunity to fill the old stream channel and consolidate industrial uses away***

> ***from the new stream channel***. Filling the old stream channel will reduce Critical Areas buffers that impact potential redevelopment of your property. As discussed at meetings in February and June, ***the City is providing the opportunity for each industrial property owner to participate under the umbrella of the City's State and Federal permits***. Prior to commencing work, each property would also need to secure a city Clear and Grade permit. While permitting and channel fill may involve some up-front cost to each owner it could increase the value of the property.

Ex. 34. The City's own witness confirmed that this paragraph ***was a correct summary of the purpose of the project***. 1 RP 74:5-3.

The City waited until the industrial property owners had consented to the Owner Participation Alternative, and then filed the Petition for Condemnation. CP 1-13. A two-day testimonial hearing was held. 1 RP 1-171, 2 RP 172-296, CP 320-323 (Exhibits), CP 324 (Witness record). The trial court ruled orally and subsequently entered a written decision which incorporated the findings in the oral ruling. CP 325-357.

It was only in the litigation that the City sought to justify the condemnation by declaring that Evans Creek Relocation Project was actually a "public park" project under RCW 8.12.030. The City relied entirely on new "passive recreational opportunities" created by viewing the relocated stream from the existing trail, *i.e.* view enhancement. CP 44-45 at ¶ 7, ¶ 10; 1 RP 26:8-17. The key point is that the project is adding no public parkland in the traditional sense—***public use and activity will be confined to the existing trail***. The public will not be free to traverse the condemned 10.8

acre area—that area is completely set aside, not for public park purposes, but for the stream and buffer plantings. 1 RP 43:18-22. The trial court followed the City's contention that ***view enhancement from the existing trail*** is sufficient to meet the "public park" activity in the statute. CP 335:15-19.

On appeal, the Court of Appeals affirmed (Slip Op., App. A), and then denied the motion for reconsideration terminating review. App. B.

IV. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Whether Economic Development Satisfies the Public Use Clause is a Constitutional Issue of Substantial Public Interest

In 2005, the United States Supreme Court's 5-4 decision in *Kelo v. City of New London*[2] declared that economic development, or redevelopment, was consistent with the Public Use Clause of the Fifth Amendment.[3] The *Kelo* dissent decried the ruling, stating that: "[A] law that takes property from A and gives it to B: It is against all reason and justice."[4] The dissent was blunt in its denunciation of the majority:

> Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner.

545 U.S. at 494. The ruling sent shock waves throughout the country and

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[2] 545 U.S. 469 (2005).
[3] U.S. Const. amend. V; *see also* Wa. Const. art. I, § 16
[4] 545 U.S. at 494 (O'Connor, dissent) (quoting Justice Chace in Calder v. Bull, 3 Dall. 386, 388 (1798).

a respected university poll showed 89% of Americans opposed the *Kelo* decision.[5] Yet, in this State, many esteemed commentators, including Hugh Spitzer, initially proclaimed no concern arguing that this Court prohibits condemnation for economic purposes, so "the *Kelo* decision will have little or no effect on condemnations in this state."[6] However, the Attorney General's Eminent Domain Task Force addressed the "mixed results" by Washington courts interpreting the Public Use Clause limitation: "The Task Force believes that the existing law in Washington does not adequately protect individuals from the use of eminent domain for economic development purposes."[7] A 2010 study found that condemnation for economic development was a massive problem in Washington State affecting 48,000 residents in the prior 10 years who were threatened with, or subject to, condemnation by government seeking to transfer property to private developers with the result, "to generate profits for developers, while increasing tax revenues for local officials."[8]

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[5] Jeanette M. Petersen, "When Government Takes Your Home: Eminent Domain Abuse and Washington's Community Renewal Law" at 1 (Washington Policy Center & Institute for Justice Washington Chapter Policy Brief, January 2010), available at: https://www.washingtonpolicy.org/library/docLib/Jan._2010_EminentDomainPB.pdf

[6] Municipal Research and Services Center, "The Kelo Decision and Condemnation for Economic Development" (Modified May 11, 2016) (citing Hugh Spitzer) available at: http://mrsc.org/Home/Explore-Topics/Legal/General-Government/Eminent-Domain/The-Kelo-Decision-and-Condemnation-for-Economic-De.aspx

[7] Attorney General of Washington, "Eminent Domain Task Force: 2009 Final Report" at 17, available at: http://mrsc.org/getmedia/6def4121-212e-4efa-9f3d-c4fdd22aa023/w3edtf.pdf.aspx

[8] Jeanette M. Peterson, *supra* at 2.

Another example was the City of Seattle's 2013 condemnation of a parking lot owned by 103-year-old Myrtle Woldson merely to operate its own parking lot, but with plans for future private development.[9]

The Municipal Research and Services Center summed up the public concern and lack of resolution:

> Following the *Kelo* decision and in response to public concern, the state legislature has in each year introduced bills to reaffirm that the state constitution does not authorize condemnation for economic development purposes or to otherwise address concerns about the impact of *Kelo*. To date, and for whatever reasons, no such legislation has been enacted.[10]

For example, earlier this year, the Legislature considered SB 5445 which, like previous bills, sought to declare unequivocally that: "No public entity may take property for the purpose of economic development." Sec. 2. The Bill passed the Senate the last two years (SB 5363 in 2016, vote 30-19) with "do pass" Majority recommendations from the House Committee on Judiciary, but the Bills did not make it to the floor of the House either year.

Subsequent to *Kelo*, this Court has never addressed whether economic development is a sufficient ground for condemnation under the Public Use Clause. The *Kelo* case was discussed by this Court in

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[9] Marc Stiles, *City of Seattle plays Darth Vader in property fight with elderly woman,* Puget Sound Business Journal, Oct. 18, 2013.
[10] Municipal Research and Services Center, *supra* at 2.

two cases, but in each case the majority of the Court determined that *Kelo* was inapposite—economic development was not at issue.

The first case was the Seattle Monorail case. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn. 2d 612 (2005). The majority found that the monorail, as a public transportation use, was clearly a valid public use (*id.* at 630) bearing "no resemblance" to the use considered in *Kelo*. *Id.* at 616, fn. 1. Otherwise, the majority held that the scope of property to be condemned goes to necessity (the third prong), not public use (the first prong). Yet, the dissent invoked *Kelo*, and argued that the majority was failing to protect citizens from eminent domain abuses. *Id.* at 639-640 (J.M. Johnson, J., dissent).

The second case was *Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC* (*NAFTZI*), 159 Wn. 2d 555 (2007). The majority concluded that the public utility's generation of electric power was a public use, and that any private benefit in potentially reselling the generators was "incidental to the public use." *Id.* at 185-186. The dissent again invoked *Kelo* to argue that the majority opinion was following *Kelo* in finding economic development an adequate public use, and was not respecting the "more protective provisions of the Washington Constitution" requiring a contrary result. *Id.* at 605 (J.M. Johnson, J., dissent).

The extreme nature of this case demands review. The United States Supreme Court majority in *Kelo* approved the city's general economic development plan because it did not "benefit a particular class of identifiable individuals." 545 U.S. at 478. The majority said: "It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.* at 478 fn. 6. Here, Union Shares' property rights are being transferred to six identified property owners contrary to the *Kelo* majority. The transfer to the industrial property owners in which only they "can freely use" the rights, and not the public, is akin to the violation found by this Court in *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 373 (2000) (statutory right of first refusal granted to mobile home tenants, and taken from landlords, improperly benefitted private interests).

This Court has not taken up the Public Use Clause in any case since the *NAFTZI* decision, and has not addressed the issue in a condemnation case since 1998 in *State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811 (1998) (*Convention Center*). Yet, as described above, the issue remains an ongoing issue and an important public concern that will continue to affect the State for decades to come.

The Court of Appeals in this case essentially applied the exceedingly broad standard in *Kelo,* or went beyond *Kelo*, in authorizing the City's purposeful targeting of economic development benefits to six identified industrial property owners as acceptable under the Public Use Clause. The Court of Appeals went so far as to base its conclusion on Union Shares' failure to prove that benefitting the industrial property owners was ***the City's only purpose of the project***. Slip Op. at 7. But, that is not the law according to this Court.

This Court has expressly determined that improperly combining public and private purposes can violate the Public Use Clause when either: (1) the private purpose is not incidental to the project; or, (2) the public and private uses cannot be separated. *In re City of Seattle*, 96 Wn.2d 616, 627 (1981) (*Westlake I*) (public park purposes cannot be separated from private retail uses); *In re City of Seattle*, 104 Wn.2d 621 (1985) (*Westlake II*) (incidental private benefits to retail not a violation); *Convention Center*, 136 Wn.2d 811, 817 (incidental private benefits not a violation and private benefits are separate); *see also Manufactured Housing*, 142 Wn.2d 347, 370-374 (public benefit does not constitute public use in inverse condemnation case). Thus, the rule in this Court's precedents is that the Public Use Clause is violated where private interests are benefitted as ***a primary purpose*** of a project in a manner that the private purpose is

not incidental or the private purpose is inseparable from the public purpose. *Convention Center*, 136 Wn.2d at 819 ("unlike *Westlake [I]*, the retail development in this case is not ***a primary purpose*** of the project"). The Court of Appeals' decision conflicts with this Court's precedents by requiring private benefits as ***the only purpose*** before a violation of the Public Use Clause is found.

The Court of Appeals also went astray here in concluding the private purposes are separable from the public purposes. This Court made it clear in *Westlake I* that intertwining the public purpose (park) and private purpose (retail) was a violation of the Public Use Clause. 96 Wn.2d 616. Then, when the City of Seattle excised the private retail uses from the project to focus on the park only, this Court held in *Westlake II* that the Public Use Clause was ***not*** violated because any private benefits were incidental. Here, the Court of Appeals concluded that the private purpose could be separated based on a hypothetical fact that does not exist—that the City and industrial property might not continue to be so bound in the future. But, the undisputed fact is that ***they are bound now***—the six industrial property owners have signed the permit applications and have agreed with the City to pursue the Owner Participation Alternative. The private benefits have not been removed from the project unlike the City of Seattle's removal of the retail uses, yet the Court of Appeals here

improperly follows *Westlake II* to find the private benefits separable.

The Supreme Court has not substantively reviewed the scope of the Public Use Clause in a condemnation case since *Convention Center* in 1998—going on 20 years and before the *Kelo* decision. The lack of decisions by this Court for two decades has caused the Court's decisions on Public Use to lose precedential strength in the lower courts. This case provides the opportunity to again address the Public Use Clause, and in particular to address *Kelo* and the extent to which "economic redevelopment" supports condemnation.

B. This Court Should Review Whether View Enhancement Alone with No New Public Access Created Qualifies as a "Public Park" Pursuant To The Limited Authority to Condemn Property Outside the City Limits

The City Council assumed that it had condemnation authority and expressed no recognition that the Union Shares' property was outside the city limits where its power was limited. Recall that the City Council was interested only in one thing—"how the story is going to end": "***And the story is going to end with the City of Redmond owning this property***." Ex. 19 at 10:8-13 (emphasis added). In this litigation, the City was forced to spin the facts to make it sound like the City is building a public park when it is not. The Evans Creek Relocation Project is intended to improve stream habitat

and benefit the private industrial property owners. State law provides no authority to condemn land outside the city limits for such a project.

The Court of Appeals analysis avoids discussing the key issue—***it is undisputed that the condemnation area—the stream and mitigation plantings—will be off limits to public access.*** The Court of Appeals' ruling that the condemnation is for a public park under RCW 8.12.030 is solely based on view enhancement with no addition of public recreational access. The Court of Appeals' ruling is summed up by the following:

> By moving the Creek and riparian habitat closer to the [existing] trail, the users will have greater opportunities to observe and experience the natural surroundings. The trial court correctly concluded the proposed use was a park use.

Slip Op. at 13-14. Experiencing natural surroundings is not the same as a creating a park with usable public access. The facts are undisputed that the trail is already there, and habitat and wildlife viewing already occurs—the project merely "enhances" those existing viewing opportunities. The City's own witnesses confirmed these facts: (1) the existing trail already provides habitat and wildlife viewing opportunities, *i.e.* passive recreation (1 RP 43:11-13 [current meadow view is passive recreation], 1 RP 89:2-18 [wildlife viewing available now]); and, (2) the entire 10.8-acre easement condemnation area would be planted with shrubs and trees, would be maintained by Redmond for at least 10 years, and would be off limits to

active uses. 1 RP 43:18-22 (no usage by kayaks or other active uses), 1 RP 83:23-25 (ref. to Ex. 31), 84:1-15, 52:13-22 (plantings).

The Court of Appeals reasons that the *Discovery Trail* case is a "comparable scenario" and that the park elements here "parallel those in Discovery Trail." Slip Op. at 12 (citing *In re Petition of City of Long Beach*, 119 Wn. App. 628 (2004)). But, that argument ignores the key difference in the *Discovery Trail* case—the City of Long Beach was building ***a new trail*** outside the city limits which would provide ***new public recreational access opportunities***. The court in the *Discovery Trail* case said, "the trail at issue here is a 'park'" and that the, "Discovery Trail is designed primarily for pedestrians and bicyclists" which when completed, "will stretch nearly two miles, providing a seaside, recreation space from Long Beach to Ilwaco along the ocean shore." *Id.* at 634. Thus, the court in the Discovery Trail case never had the occasion to consider whether ***view enhancement alone with no new public recreational access*** constitutes a "public park" under RCW 8.12.030. The trail in that case created new public recreational access opportunities while stream relocation here only adds aesthetic enhancement to an already existing trail and does not add any new public access.[11]

The Court of Appeals decision conflicts with the express delegation and strict construction standards of RCW 8.12.030 required by this Court's

[11] Similarly, the only other case cited by the Court of Appeals, *City of Blaine v. Feldstein*, 129 Wn. App. 73 (2005), involved a newly created boardwalk adding new public access.

decisions in *City of Des Moines v. Hemenway*, 73 Wn.2d 130 (1968) and *Westlake I*, 96 Wn.2d 616. The Court of Appeals cites *Westlake I* for the strict construction standard, but then in footnote 4 ignores the applicable standard in stating that liberal construction may apply. Slip Op. at 12, fn. 4. The *City of Des Moines* case is never addressed.

In *City of Des Moines*, this Court held that condemnation outside the city limits required an express legislative delegation, and hence the proposed marina could not be construed to fit within the public park use in RCW 8.12.030. *Id.* at 138.[12] A marina is more than passive recreation—a marina is active recreation, yet that was insufficient under the express delegation and strict construction requirements. The same result should have occurred here. The common component of any "public park" is public access—without public access the relocated stream is merely a government mitigation area which is not a "public park" if strict construction applied. [13]

The Court of Appeals decision also conflicts with a Division I case holding that a street widening project was not authorized outside the city limits under RCW 8.12.030. *In re City of Kent*, 1 Wn. App. 737, 739 (1969). *City of Kent* held that a mere street widening could not be categorized as a "boulevard" to come within the power to condemn outside the city limits.

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[12] But, the Court allowed condemnation inside the city limits for marina use.
[13] *See also Cowlitz County v. Martin*, 142 Wn. App. 860 (2008) (no eminent domain authority for stream restoration under Salmon Recovery Act).

That court followed strict construction citing *City of Des Moines*.

This Court should review whether the Legislature intended to afford cities this expansive new power—the power to condemn land outside the city limits merely to improve the view for purely aesthetic purposes. As in this case, cities would not even need to condemn the fee title, but instead could condemn a "view easement" which would serve to restrict development rights—even though cities have no power to impose development restrictions outside their boundaries in the unincorporated area.

In the extreme case, Redmond, or another city such as the Seattle, could simply look to the mountains and condemn a view easement that stops use of property far from the city's boundaries. There is no limit to this approach. Incredibly, the trial court seemed to agree with this concern stating that: "I have a feeling that the defendant is right and that there is a limit to how much the city can do, for example, to enhance passive use and views." CP 337:5-8. Yet, the trial court and the Court of Appeals granted that authority—a public park no longer requires usable public access.

V. CONCLUSION

In discussing the Public Use Clause, this Court stated the following important principle:

> [I]t is the duty of the courts to uphold the rights of private property against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good.

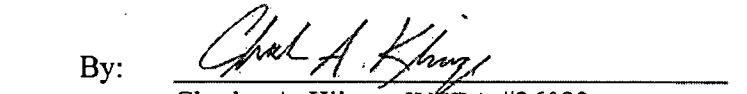
Hogue v. Port of Seattle, 54 Wn.2d 799, 838 (1959). Forty one years later this Court cited this same passage from *Hogue* in the *Manufactured Housing* case. 142 Wn.2d 347, 373 (2000). This Court should apply this principle to preserve these rights by limiting economic development as public use.

Relocating a stream with a tangential effect of enhancing the view for users of an existing trail is categorically different than taking land for a public park. Here, the condemned area is totally off limits to public access. *Des Moines* and *Westlake I* apply here to require strict construction of the statute. The statute authorizes public parks, and thus cannot and should not be expansively read such that "public parks" includes stream relocation or view enhancement, especially given the benefits to private parties.

This Court should accept review, reverse the Court of Appeals, order that the Condemnation Petition be dismissed, and award attorney fees to Union Shares LLC.[14]

RESPECTFULLY submitted this 13th day of November, 2017.

STEPHENS & KLINGE LLP

By: 

Charles A. Klinge, WSBA #26093
Attorneys for Petitioner Union Shares LLC

[14] For the record, Union Shares continues its request for attorney fees made in the Opening Brief at 47 (citing RCW 8.25.075(1)(a); *Cascade Sewer Dist. v. King County*, 56 Wn. App. 446 (1989)).

DECLARATION OF SERVICE

I, Charlene Stephens, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Stephens & Klinge LLP in Bellevue, Washington. On November 13, 2017, I caused a true copy of the foregoing PETITION FOR REVIEW to be served on the following persons via the following means:

For the City of Redmond:

James E. Haney	☐ King County ECF system
Greg Rubstello	☒ First Class U.S. Mail
Ogden Murphy Wallace, P.L.L.C.	☐ Federal Express Overnight
901 Fifth Avenue, Suite 3500	☒ E-Mail: grubstello@omwlaw.com
Seattle, WA 98164-2008	☐ Other: **ABC Messengers**

For King County:

John Briggs	☐ King County ECF system
CIVIL DIVISION	☒ First Class U.S. Mail
W400 King County Courthouse	☐ Federal Express Overnight
516 Third Avenue	☒ E-Mail: john.briggs@kingcounty.gov
Seattle, WA 98104	☐ Other: **ABC Messengers**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed this 13th day of November, 2017 at Bellevue, Washington.

Charlene Stephens

Charlene Stephens

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF REDMOND, a municipal corporation of the State of Washington, Respondent, v. UNION SHARES, L.L.C., a Washington limited liability company; Appellant, PUGET SOUND ENERGY, INC., a Washington corporation, on its behalf and as successor in interest to PUGET SOUND POWER & LIGHT COMPANY, a Washington corporation; CAMPBELL LUMBER COMPANY, a Washington corporation; KING COUNTY, a political subdivision of the State of Washington; and all other persons or parties known or unknown or unknown heirs claiming and rights, title, estate, lien or interest in the real estate described herein; Defendants.	)	No. 75463-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 31, 2017

APPELWICK, J. — The City condemned an easement over Union Shares' land outside the city boundaries in order to reroute a stream. Union Shares argues that the condemnation is not a sufficiently public use, because it benefits other private landowners. And, it argues that the City does not have statutory authority to condemn the land because relocation of the stream is not a park use. We affirm.

FACTS

Union Shares owns a 39 acre rural property in the city of Redmond (City). In 2000, it sold an easement to the City for a recreational multi use trail. The trail runs near, but not immediately next to, Evans Creek. Instead, Evans Creek currently runs through several industrial properties near Union Shares' property. The City seeks to move the stream from the industrial properties, and onto a portion of Union Shares' property. This will place the Creek in proximity to the existing trail.

The genesis of this project was a 2005 study, commissioned by the City, regarding the stream relocation. That study's executive summary stated as follows:

> The proposed relocation routes will relocate Evans Creek further away from the commercial and industrial sites by moving the creek from the channelized, developed and relatively unshaded location, onto City and privately owned property east and north of the current creek location, accomplishing most of the WRIA [(Water Resource Inventory Area)] 8 recommended actions. The proposed routes will include tree and shrub plantings along the stream banks in order to provide increased shaded length over the exiting creek location. By moving the creek out of the industrial area and providing more natural cover, stream temperatures will likely be reduced. Stream enhancements along the entire length of both proposed routes, including LWD [(Large Woody Debris)], in addition to plantings, will help to restore riparian habitat. The channel will likely be allowed some room for migration over most of its new length which will allow a more natural alignment to be formed.

A senior planner from the City testified that this 2005 feasibility study was commissioned as part of a Chinook salmon conservation plan.

In 2014, the City identified three potential alternatives. Alternative 1 was to do nothing, and leave the stream in its current form. Alternative 2 would restore

the stream in place. Alternative 3, the "owner participation alternative," would relocate the stream and assist nearby owners with filling the former creek bed. The City conducted meetings with the industrial landowners in 2013 and 2014.

The City selected the owner participation alternative as its preferred alternative. This will involve the City coordinating with the industrial landowners to obtain the permits necessary to fill the empty creek bed that will result from the relocation. City planning materials acknowledged and highlighted the potential benefits that this will have for the industrial landowners: "[T]he project has broad support because it also benefits the industrial properties by creating the opportunity to fill the old stream channel and consolidate industrial uses away from the new stream channel." With the cooperation of the industrial landowners, the City will seek to fill the former stream channel, and offset this fill by installing new stream buffers on certain areas of their property.

The City filed a petition for condemnation of Union Shares' land, which the trial court granted after an evidentiary hearing. Union Shares appeals.

DISCUSSION

Union Shares makes two arguments. First, it argues that the condemnation of its land is not for a public use. Second, it argues that the project does not qualify as a public park, and therefore the City did not have statutory authority to condemn Union Shares' land. It also requests attorney fees.

I. Public Use

Union Shares first argues that the condemnation is not for a public use, and therefore outside of the City's eminent domain power.

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

Washington courts have developed a three-part test to evaluate eminent domain cases. Id. For a proposed condemnation to be lawful, the State must prove that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose. Id. Of these three requirements, Union Shares contests only the first element, that the use is public. A trial court's decision on public use will be reversed if the finding is not supported by substantial evidence. City of Blaine v. Feldstein, 129 Wn. App. 73, 79, 117 P.3d 1169 (2005).

Union Shares relies primarily on two key cases for its argument that the use here is not sufficiently public. First, it relies on In re Petition of City of Seattle, 96 Wn.2d 616, 638 P.2d 549 (1981) (Westlake I). Westlake I addressed the City of Seattle's use of eminent domain in planning its Westlake mall redevelopment. Id. at 618. The plans required Seattle to acquire all properties necessary for the project, and transfer them to the Westlake Development Authority. Id. at 622. The court held that Seattle did not have authority for the condemnation, because the proposed project contemplated a predominantly private, rather than public use. Id. at 629. The court noted that when a project's private use and public use cannot

be separated, eminent domain is not justified. Id. at 627. And, the Supreme Court relied on the trial court's finding that the retail aspects of the project were essential to its functioning. Id. at 628. Thus, the private aspects of the project barred the taking. Id. at 629. But, the court explicitly noted that "[w]ere these private uses only incidental to the public uses for which the land was condemned, a different question would be presented."[1] Id. at 634.

And, that different question was presented in Convention Ctr., the second key case that Union Shares cites on this issue. Convention Ctr. involved an effort to expand the Washington State Convention and Trade Center (Convention Center). Id. at 813. The Convention Center's existing exhibit space was four stories above ground. Id. at 814. The plans called for the creation of new exhibition space four stories above ground so that the new space would be contiguous with the existing space. Id. Some of the resulting space below the new addition would be developed for private retail by a private developer, Hedreen. Id. at 814-15. The Convention Center sought condemnation of private property to allow for the expansion. Id. at 815. The property owners challenged the condemnation on grounds that the State was condemning property for private use, pointing to the resulting space below the expansion to be sold for private use. See id.

The property owners argued that Westlake I should control, and that the condemnation was not sufficiently public in nature. Id. at 817. The Supreme Court

[1] The Supreme Court upheld a reformulated Westlake project in a second case, after the private aspects had been removed from the plans. See In re City of Seattle, 104 Wn.2d 621, 625, 707 P.2d 1348 (1985).

disagreed. Id. at 818. The court noted that the Westlake I plan called for condemnation and subsequent sale to private parties. Id. But, it distinguished the Convention Center expansion, because the private retail aspect was an independent, secondary use:

> The independence of the two projects is evidenced by the fact that if this court were to find for the property owners, the State could condemn the same land for the north expansion absent Hedreen's participation. Without the private development, the State could build the same exhibit hall, on the same property, hovering at the fourth story level on the same support columns. The project could go forward without private participation in entirely the same manner, except that three stories of vacant space would lie unused underneath the structure. Thus, the private development in this vacant space is a separable component of the expansion project. Hedreen's participation is a means to an end, but it is not an end in and of itself.

Id. at 820 (footnote omitted). Thus, the State's willingness to cooperate with private parties to maximize the outcomes that inevitably result from the public use did not render the use nonpublic.

Convention Ctr. controls here. The City seeks to move the stream. As reflected by the 2005 study, the project was instigated by the City's desire to restore Evans Creek, in large part because of the consequences for salmon runs. The result of the City's plan will leave an abandoned creek bed on the industrial neighbors' property. The City has agreed to coordinate with and assist these landowners in filling that area. About eight years after the 2005 study, in 2013 and 2014, with the assistance of project consultants, the City conducted meetings with affected industrial property owners, but not with Union Shares. The creek relocation could, and likely would, go forward without the City assisting the

industrial landowners. But, like in Convention Ctr., the City has elected to maximize the outcomes from the project, here by assisting the industrial landowners.[2]

Union Shares also points to portions of the record that show the City acknowledging potential benefits to the industrial landowners, and argues that assisting these private landowners was in fact the purpose of the project. For example, the feasibility study notes that "[r]elocating the creek further away from the current developed industrial and business sites will provide increased potential for further development and/or redevelopment while at the same time providing the required stream buffer areas." The city ordinance that provided for the condemnation notes that the relocation "will also encourage economic redevelopment of those properties currently encumbered by the stream." But, the sources of evidence that Union Shares points to do not establish that the effects of the relocation—potential private economic benefit—are inseparable from the public purpose of the project. City witnesses testified that the motivation for the project was salmon conservation and stream improvements.

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[2] Union Shares also cites Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000). There, the Supreme Court held unconstitutional a statute that gave a right of first refusal to a mobile home tenant when the owner seeks to sell the property. Id. at 351, 374. The court determined that the statute resulted in solely private use. Id. at 373. Union Shares argues that this case should control here, because the City is transferring the encumbrances of the stream restrictions from the industrial owners' property to Union Shares' property. But, unlike Manufactured Housing, there is an obvious public use contemplated here: enhancement of an existing public trail. This case is distinguishable.

Union Shares also notes that the City conducted meetings with affected landowners, but did not include Union Shares in those meetings. This, it claims, shows that the true purpose of the project is private development. But, the failure to engage Union Shares for certain aspects of the project does not establish a private purpose. Rather, as both the trial testimony and exhibits show, the project was, at the outset, driven by environmental concerns such as stream habitat. That the City engaged certain affected landowners some eight years later to discuss planning and impacts, without Union Shares, does not establish a private purpose.

The following exchange, during the cross-examination of City of Redmond Engineer Michael Haley, encapsulates the City's relationship with the industrial landowners:

> Q: In fact, haven't the industrial property owners already signed permit applications?
>
> A: Yes.
>
> Q: For that purpose that we just discussed?
>
> A: For our -- yes.
>
> Q: For the over-all permitting, which includes -- for the over-all permitting which includes the fill of the old channel?
>
> A: Yes.
>
> THE COURT: Have they signed permits or have they agreed to do the buffering that you proposed, that green buffering?
>
> THE WITNESS: In concept, yes.
>
> Q: That is part of the owner participation alternative that they are agreeing to?
>
> A: Yes.

Q: Now, after those overall permits would be granted, then as things move forward [and] the industrial property owners want to redevelop, then they would come to the City to obtain a City permit for filling in the channel; is that right?

A: That is our proposal, yes.

Q: Then they would have to pay for filling the channel after obtaining the City permits?

A: The expense of that, yes.

Q: The concept of the owner participation preferred alternative is that the City is going to obtain State, Federal and County permits, potentially, for filling in the old channel?

A: Correct.

THE COURT: What I am getting from this, folks, is that it is something that the City wants, it is something that the City is trying to on [sic] organize as part of the planning for this project but it is not necessary to this project.

That is what I am getting out of the overall.

MR. KLINGE: It is part of the project, because they have the property owners have signed [the] permit application.

THE COURT: Agreed.

That is clearly what the City is intending, at least from Mr. Haley they will go forward of [sic] Evans Creek relocation, whether or not they get these folks to go through on the agreement to get the permits and do the fill.

THE WITNESS: Is that a question to me?

THE COURT: Yes. Am I right?

THE WITNESS: Yes, that is true.[3]

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[3] The trial court also noted that it was not convinced that the fill of the industrial property would even be a benefit to the industrial landowners: "There will be a private benefit, it seems. Although, I will tell you, frankly, I question who is benefiting most from what the industrial parties in this case are being asked to do."

In its planning process, the City engaged nearby landowners and offered to assist them in mitigating the effects of the project. And, the City acknowledged that, "[i]n doing so," the project might result in economic benefit for those landowners. But, Redmond's engagement with and support of private stakeholders that are affected by the public project does not render this project a non public use. Union Shares has not established that the private benefits were not inseparable from the public purpose of the project.

Substantial evidence supports the trial court's finding that the City's condemnation of Union Shares' land was for public use.

II. Statutory Authority to Condemn Outside City Limits

Union Shares also contends that the stream relocation here does not qualify as a public park. Therefore, the City does not have the statutory authority to condemn its land, outside the Redmond city limits.

The power of eminent domain is an inherent power of the state. City of Tacoma v. Welcker, 65 Wn.2d 677, 683, 399 P.2d 330 (1965). A municipality may exercise this power only when it is expressly so authorized by the state legislature. Id. Although courts generally construe grants of municipal authority liberally, we generally employ a narrow construction to municipal exercises of the eminent domain power. City of Tacoma v. Taxpayers of City of Tacoma, 108 Wn.2d 679, 694 n.8, 743 P.2d 793 (1987). Similarly, courts strictly construe the delegation of eminent domain powers. See Westlake I, 96 Wn.2d at 631. Statutory construction is a question of law, which courts review de novo. Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 569, 980 P.2d 1234 (1999).

RCW 8.12.030 lists a number of purposes for which a city may condemn land within city limits. It also lists certain purposes for which a city may condemn land "within or without" a city's limits. Id. Public parks is one of the purposes for which a city may condemn land outside city limits. Id.

In 2000, the City purchased an easement from Union Shares for construction of a recreational trail through its property. But, the multipurpose trail is not located immediately next to the Creek. As a senior engineer from the City testified, the planned relocation of the Creek closer to the trail will give the stream at least 100 feet of total buffer width, which will allow for habitat and add a flood plain. He also testified that it will move the Creek further from industrial properties that contaminate the Creek. The City believes that moving the Creek closer to the trail will add a passive recreation element to trail users, allowing them to observe and experience the habitat created by the new channel.

Union Shares argues that these plans do not amount to a public park. It notes that the plans will not open up any additional area to recreation, and instead will merely add passive features to the existing trails, which it argues should be insufficient. Effectively, it asks this court to find that stream relocation for habitat improvement near an existing multipurpose trail does not qualify as a public park.

The trial court viewed the evidence as supportive of a park use:

> Because what is proposed here in terms of the condemnation action is a link-up between an existing area through which the stream flows, which is Martin Park, and its continuation along a recreational trail, which looks darn park-like to this court by any modern definition, which is to be planted in a way that may be even more park-like with a hundred foot buffer on either side to provide that the users of this trail will essentially be in a park-like environment able to overlook the

> stream and see the other things that are attracted by a protected stream, like fish and local wildlife and native vegetation.

Few cases have addressed what is and is not a public park under RCW 8.12.030. But, in In re Condemnation of Property for Improvement of Discovery Trail, 119 Wn. App. 628, 634-35, 82 P.3d 259 (2004), the court addressed a comparable scenario. Long Beach filed suit to condemn land outside of the city to build a multipurpose trail. Id. at 630. The court held that the trail "falls within the statutory definition of 'park' because the City is constructing and maintaining the Discovery trail for aesthetic and recreational purposes." Id. at 634. It also cited Webster's Third New International Dictionary's definition of "park" as " 'a tract of land maintained by a city or town as a place of beauty or of public recreation.' " Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1642 (1969)). It noted that the trail will allow users to "enjoy views of the dunes, the beach, and the ocean as they move along the trail or stop to gaze." Id. at 635; see also Blaine, 129 Wash. App. at 78 (holding that condemnation for a boardwalk was for a statutorily authorized public use, in part because a "boardwalk is like a park, as it allows the public to access scenic views").

The park elements here parallel those in Discovery Trail.[4] Redmond is relocating the Creek to improve salmon habitat, and to enhance the experience of trail users. By moving the Creek and riparian habitat closer to the trail, the users will have greater opportunities to observe and experience the natural surroundings.

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[4] The Discovery Trail court applied a liberal construction in its statutory analysis. Id. at 635. Union Shares argues that this was erroneous. But, we need not address this argument, because we hold that adding riparian habitat and wildlife viewing opportunities to the trail is a public park usage under either a narrow or liberal construction of the statute.

The trial court correctly concluded the proposed use was a park use. In accordance with Long Beach and Blaine, we hold that the condemnation is within the City's RCW 8.12.030 authority to condemn land outside of the city limits for a public park.[5]

We affirm.

WE CONCUR:

Trickey, ACJ

[5] Union Shares requests attorney fees under RCW 8.25.075(1)(a), which states that a condemnee is entitled to attorney fees if the condemnee successfully defeats a condemnation action. But, because we rule in favor of the City, Union Shares is not entitled to attorney fees.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CITY OF REDMOND, a municipal corporation of the State of Washington, Respondent, v. UNION SHARES, L.L.C., a Washington limited liability company; Appellant, PUGET SOUND ENERGY, INC., a Washington corporation, on its behalf and as successor in interest to PUGET SOUND POWER & LIGHT COMPANY, a Washington corporation; CAMPBELL LUMBER COMPANY, a Washington corporation; KING COUNTY, a political subdivision of the State of Washington; and all other persons or parties known or unknown or unknown heirs claiming and rights, title, estate, lien or interest in the real estate described herein; Defendants.	No. 75463-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Union Shares LLC, has filed a motion for reconsideration. 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.

Appelwick J
Judge

STEPHENS AND KLINGE LLP

November 13, 2017 - 1:26 PM

Transmittal Information

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Appellate Court Case Title:	City of Redmond, Respondent, v. Union Shares LLC, et al., Appellant
Superior Court Case Number:	15-2-12698-9

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