IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; T-MOBILE USA, and the Montlake Community Club

Appellants.

RESPONDENTS MONTLAKE LLC AND STELTER MONTLAKE LLC'S RESPONSE TO STATE OF WASHINGTON'S MOTION TO ACCELERATE REVIEW

Supreme Court Number

96179-4

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I. IDENTITY OF RESPONDING PARTIES

This case concerns the condemnation and threatened demolition of the Montlake Market near Husky Stadium in Seattle. Montlake LLC and Stelter Montlake LLC (collectively for this briefing, the "Market Owners") are the owners of three parcels of land (the "Montlake Properties"). BTF Enterprises, Inc. is a tenant of the parcels. The Washington State Department of Transportation ("WSDOT") seeks to condemn the parcels and demolish the Market as part of its replacement SR 520 project (the "Project").

II. RELEVANT FACTS

WSDOT has persistently moved for accelerated review of issues arising from its eleventh-hour decision to condemn the Montlake Properties and demolish the Montlake Market. The results of accelerated review so far have been erroneous judicial decision-making, procedural confusion, and multiplicity of appellate proceedings. It is difficult to fully understand all of the issues and potential legal problems when review is accelerated. What follows is a very brief summary of the proceedings. Ultimately, the Market Owners do not oppose accelerated review provided that there is thorough *review* of the *consolidated* legal issues that WSDOT has created to date.

Since the beginning, and for many years thereafter, there was never any threat of WSDOT demolishing the Montlake Market. As identified in the 2011 NEPA EIS "Preferred Alternative" from the Federal Highway Administration and WSDOT, the Project was originally designed to avoid using the Montlake Properties.[1]

In 2016, WSDOT abruptly changed course, without additional SEPA environmental review, and announced it needed to condemn the Montlake Properties, demolish the community's Montlake Market, and use the land for a decade of construction staging. It has made a continuing series of changing, often conflicting, explanations why it "needs" now needs the properties for the SR 520 project, and short-circuited relevant processes at every turn since as it sought to provide legal cover, or modestly plausible factual explanations, for its continued, changing, inconsistent positions. At bottom, it wants these properties for the construction staging it promised not to use them for.

Despite public pronouncements and presentations promising not to use the Montlake Properties for general construction staging, and a plan to

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[1] In November 2011, WSDOT and the City of Seattle also entered a Memorandum of Understanding ("MOU") in which they agreed to implement the FEIS preferred alternative. *See* City of Seattle Ordinance 123733 (subject to ER 201; directing the Mayor to ensure the MOU is "faithfully kept and performed."). The MOU has not been amended.

save the Montlake Market and become its landlord, in May 2017, WSDOT filed its condemnation petition and motion for an order of public use and necessity seeking to condemn the entirety of all three properties. *See State v. Montlake LLC et al.*, Slip Opin. No. 77359-3-I at 4 (Apr. 30, 2018). And WSDOT sought accelerated proceedings. On September 6, 2017, the Superior Court granted WSDOT's motion to take all three parcels of the Montlake Properties.

On appeal, again on an accelerated schedule, Division One erroneously held that WSDOT met SEPA's requirements when WSDOT relied solely on a 2016 NEPA re-evaluation, even though WSDOT had failed to perform any supplemental analysis of the environmental impacts of demolishing the Montlake Market. *Id.* at 12; *cf. Magnolia Neighborhood Planning Council*, 155 Wn. App. 305, 319, 230 P.3d 190 ("NEPA [is to] work *in conjunction with* analogous state laws[.]") (emphasis added); WAC Ch. 197-11. Moreover, Division One found that WSDOT's arbitrary and capricious lack of adherence to its own manuals did not "undermine the trial court's findings." *Id.* at 11; *cf. Esses Daman Family LLC v. Pollution Control Hearings Bd.*, 2017 WL 3476785 at *7 (Aug. 14, 2017) (unpublished).

While the appeal was pending, WSDOT sought to accelerate a determination of just compensation and convinced the Superior Court to

impose a $1 million bond on the Market Owners for them to stay WSDOT's request to occupy the Montlake Properties for 16 days of invasive testing, even though an order of public use and necessity is not final during appellate review. *Cf. State ex rel. Wash. v. Allerdice*, 101 Wn. App. 25, 31, 1 P.3d 595 (2000). The Market Owners were forced to separately appeal the compelled discovery and the requirement of a bond.

On March 9, 2018, the Legislature enacted Engrossed Substitute Senate Bill 6106, funding WSDOT's projects. Sec. 306, clause 33, directs WSDOT to preserve the Montlake Market structure to the maximum extent practicable, and to work with the City of Seattle as equal partners to try to save the Market. *Cf.* WSDOT Motion at 2 ("The Montlake Property... is needed for several different aspects of the SR 520 Project.").

Consequently, the Market Owners have moved under CR 60(b) for relief in the Superior Court based on recent evidence bearing on WSDOT's claims of public need and thorough, or at least sufficient, process, specifically including the Legislature's action and WSDOT's July 2018 re-evaluation of the EIS (which expressly admits neither WSDOT nor the Federal Highway Administration had evaluated the environmental impacts of taking and demolishing the Montlake Market as of the date the trial court entered its OAPU).

In the interim, the Market Owners now seek Supreme Court review of both the substantive Division One opinion and the bond appeal, and are concurrently moving to consolidate these matters for this Court's consideration.

III. ARGUMENT

Appellate review can be accelerated. RAP 18.12 ("The appellate court on its own motion or on motion by a party may set any review proceeding for accelerated disposition."). Acceleration of an appeal process is often accomplished in situations when either rights would be rendered moot during the typical review timeframe. *See* 3 Wash. Prac., Rules Practice RAP 18.12 (8th ed.). The Supreme Court does not frequently or lightly invoke RAP 18.12. *See, e.g., Riddle v. Elofson et al.*, Case No. 95959-5 (Order, Jun. 18, 2018) (matter deemed urgent because elected office may be vacated without accelerated review); *Eyman et al. v. Wyman et al.*, Case No. 95749-5 (Order, Jun. 6, 2018).

WSDOT claims the public suffers harm while this case proceeds through legal process. So do Respondents. However, the results of accelerated review in this action have been poor so far, including substantive errors, procedural confusion, and multiplicity of appellate proceedings.

The laws that apply to WSDOT's actions are in desperate need of this Court's clarification. The Market Owners do not oppose accelerated review, in fact they welcome it—provided it is a thorough review of the consolidated appeals arising from WSDOT's condemnation proceeding and the trial court's erroneous imposition of a $1 million bond for the Market Owners to prevent WSDOT's drilling on the property pending appeal of the public use and necessity ruling. Consolidation of the discovery and bond appeal in this proceeding will help assure that these important issues are not rendered moot, and avoid further confusion going forward.

IV. CONCLUSION

For the reasons stated above, the Montlake Owners respectfully defer to the Court on WSDOT's Motion to Accelerate Review, while emphasizing the importance of consolidation upon the granting of discretionary review.

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RESPECTFULLY SUBMITTED this 7th day of September 2018.

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CERTIFICATE OF SERVICE

I certify that on September 7, 2018, I caused to be served upon the below named counsel of record and pro se parties, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document and this Certificate of Service.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bellevue, Washington, on September 7, 2018.

Karen Campbell

PERKINS COIE LLP

September 07, 2018 - 2:23 PM

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