

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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NO. 96179-4

SUPREME COURT OF THE STATE OF WASHINGTON

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,

v.

STATE OF WASHINGTON,

Respondent.

STATE OF
WASHINGTON'S
MOTION TO
ACCELERATE
REVIEW

The State of Washington (State) seeks accelerated review, under RAP 18.12, of Petitioners' Motion for Discretionary Review of the Court of Appeals, Division I, unpublished decision in *State v. Montlake LLC, et al.*, No. 77359-3-I, 2018 WL 2041518 (Wash. Apr. 30, 2018). The unpublished decision from below is attached as Appendix 1.

I. SUMMARY OF MOTION

The State requests this court accelerate its consideration of the Motion for Discretionary Review so as to avoid the additional costs and safety risks caused by delay to construction of the next phase of the State Route (SR) 520 Bridge Replacement and HOV Project. The next

construction phase is a \$400 million design build project that will replace the Montlake Interchange and the southern portion of the West Approach Bridge, which is vulnerable to earthquake failure (Montlake Phase). Accelerated review is in the public interest; otherwise, this motion stands to delay a large public works project resulting in considerable public expense and an increased risk to public safety.

II. FACTS RELEVANT TO MOTION

The State filed an action in May 2017 to acquire property (Montlake Property) held by Montlake LLC and Stelter Montlake LLC (Petitioners). The King County Superior Court held a hearing in August 2017, and on September 6, 2017, issued its Findings of Fact, Conclusions of Law, and Order Adjudicating Public Use. The Petitioners appealed on September 8, 2017, and the Court of Appeals issued its unpublished decision on April 30, 2018. After a motion to reconsider and motion to publish were denied, Petitioners filed their motion for discretionary review on August 9, 2018. The State is filing its answer with this motion.

The Montlake Property, situated near the SR 520 Montlake Interchange, is needed for several different aspects of the SR 520 Project. Petitioners have not granted early possession of the Montlake Property to the State. Work that requires access to or use of the Montlake Property

cannot proceed until appellate review is complete and a trial is held on just compensation. WSDOT cannot obtain possession until just compensation has been determined at trial and paid to the Petitioners.

In addition to significantly increasing project costs, this matter continues to delay the replacement of vulnerable bridges and structures on SR 520. As Deputy Program Administrator Denise Cieri testified, these structures are built on hollow columns, which are vulnerable to failure in an earthquake. Appendix 2 at 48:23-49:1. One of the trial exhibits describes this in more detail:

The old SR 520 west approach bridge and the Portage Bay Bridge were designed and built in the early 1960s before modern earthquake standards existed. The bridges' hollow supporting columns could break and collapse during a major earthquake.

Appendix 3 at 4.

Along with a new revenue package, the 2015 Legislature appropriated funds to complete the SR 520 corridor from the west end of the new floating bridge to I-5. Second Engrossed Substitute S. 5987, 64th Leg., 3d Spec. Sess., 2015, Laws of 2015, 3d Spec. Sess., ch. 44, § 106.¹ This included funds for the Montlake Phase, which includes the new Montlake Interchange and the West Approach Bridge South. The West Approach Bridge South project will complete the replacement of the old

¹ http://leap.leg.wa.gov/leap/Budget/Detail/2015/cTLEAPDoc2015NL-1_0629.pdf at page 8.

West Approach Bridge, which is one of the structures built on hollow columns. Once the Montlake Phase project is complete, WSDOT will replace the Portage Bay Bridge, the other structure built on hollow columns.

The anticipated cost of the Montlake Phase is about \$400 million. As Ms. Cieri testified, without this property there is a significant delay, including increased costs for the Montlake Phase and the remainder of the SR 520 program. Appendix 4 at 135: 6-8. Ms. Cieri's declaration attached to this motion as Appendix 5 provides additional detail.

The increased costs are due largely to escalation in construction costs. WSDOT estimates these added costs at between \$8.3-18.5 million for twelve months of delay. Delay also impacts the construction cost of the new Portage Bay Bridge, because it follows in sequence from the Montlake Phase. These added contract costs are estimated between \$10 million and \$18 million for a 12-month delay, in addition to WSDOT staffing costs.

Another cost risk results from the fact that some of the work on the Montlake Phase is "in-water" work subject to environmental permit conditions that limit the times of year in which in-water work may be performed. If WSDOT misses one of these work windows, then that work and any subsequent work can be delayed, sometimes for several months.

Washington state law recognizes that not all transportation needs can be met with available gas tax funds, and requires that transportation funds be prioritized based on project needs and projected costs. RCW 47.05.010. A project list for the Washington state transportation budget can be found on the Office of Financial Management's website.² Many of these projects are projected to cost \$25-50 million or less. An increase in the cost of the SR 520 Project jeopardizes funding for some of these other necessary safety improvement and congestion relief projects.

III. GROUNDS FOR ACCELERATED REVIEW

RAP 18.12 provides for accelerated review on motion by a party.

According to the annotation to RAP 18.12:

There are times when it is necessary for the court to act swiftly, particularly in matters relating to affairs of the state or local government, or when irreparable harm to a party would result from delay.

3 Karl B. Tegland, *Washington Practice: Rules Practice* RAP 18.12 (8th ed. 2017) (emphasis added).

The court of appeals granted a similar request to accelerate review in *Manson Constr. and Eng'g Co. v. State*, 24 Wn. App. 185, 600 P.2d 643 (1979). *Manson* was a bid protest regarding a contract to replace a portion of the Hood Canal Bridge, which sank in a February 1979 windstorm. The

² <http://fiscal.wa.gov/BudgetTProjList.aspx>.

opinion does not detail the entire timeline, but notes that WSDOT issued a call for bids in June 1979. *Manson*, 24 Wn. App. at 187. The trial court ruled on the contractors' bid protest on August 8, 1979. *Id.* at 185. The State appealed, and the court granted a request to accelerate review:

We granted an accelerated hearing, and a panel of this court heard oral argument on the merits of the appeal on August 29. On that date the panel orally announced its unanimous decision to affirm the trial court. An expanded explanation of our reasoning follows.

Id. at 189-90. The court's written opinion was published on September 13, 1979. *Id.* at 185.

While this case does not deal with the replacement of an already-failed bridge, it does address a project that seeks to replace vulnerable structures before an unpredictable event results in their loss. *Manson* addressed the fact that “[t]he resultant loss of use of this highway caused harsh economic and transportation problems to a substantial portion of the state.” *Id.* at 186. In this case, the State is trying to avoid those harsh consequences.

The evidence in this case also establishes that delay results in significant additional project cost, all of which will be borne by Washington taxpayers. This court granted accelerated review in another eminent domain action in which the condemning agency alleged that possession of the subject property was needed in order to keep the project

on schedule and on budget. *Cent. Puget Sound Reg'l Transit Auth. v. Sternoff L.P.*, No. 75372-0-I, 2016 WL 6601639 (Wash. Nov. 7, 2016). In that case, the order adjudicating public use was entered on June 7, 2016, and the Court of Appeals' ruling is dated November 7, 2016. WSDOT has established the same need in this case to keep the SR 520 project on schedule and avoid additional delay costs.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the court expedite its consideration of Petitioners' Motion for Discretionary Review.

RESPECTFULLY SUBMITTED this 24th day of August 2018.

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2018 APR 30 AM 8:33

IN THE COURT OF APPEALS 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, INC., MONTLAKE)
 COMMUNITY CLUB,)
)
 Appellants,)
)
 SCOTT IVERSON & BTF)
 ENTERPRISES, INC. dba Montlake)
 Boulevard Market; HORST KIESSLING,)
 dba Hop in Christmas Trees; ANGELA)
 ROSE STERLING dba Montlake)
 Espresso; STC FIVE LLC, a Delaware)
 limited liability company; CROWN)
 CASTLE USA, INC., a Pennsylvania)
 corporation; GLOBAL SIGNAL)
 ACQUISITIONS III LLC, a Delaware)
 limited liability company; NEW)
 CINGULAR WIRELESS PCS, LLC, a)
 Delaware limited liability company;)
 SEATTLE SMSA LIMITED)
 PARTNERSHIP, a Delaware limited)
 partnership dba Verizon Wireless;)
 SPRINT SPECTRUM L.P., a Delaware)
 limited partnership; and KING)
 COUNTY,)
)
 Defendants.)

No. 77359-3-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: April 30, 2018

LEACH, J. — The Montlake Community Club (MCC) and the owners and lessees of three lots (Montlake) appeal the trial court's order of public use and necessity and two related orders. They challenge the adequacy of the project's environmental assessment, the necessity of taking these three lots, compliance with legislative direction, and the authority of the individual who selected these properties for taking. Because substantial evidence supports the trial court's factual findings and those findings support its legal conclusions, we affirm.

FACTS

In 2006, the legislature provided the Washington State Department of Transportation (WSDOT) with directions for several "Mega-Projects," including the SR 520 Bridge Replacement and HOV¹ Program ("Project").² This Project involves the replacement of a floating bridge across Lake Washington spanning from Medina to Montlake. WSDOT divided the project into segments and named the final construction segment the Rest of the West. It extends from the Montlake area to I-5.

As the first step of a two-step process to construct the Rest of the West, WSDOT will build the Montlake Phase. This extends from the floating bridge

¹ High occupancy vehicle lane.

² RCW 47.01.380, .390, former .405. The legislature repealed former RCW 47.01.405 in 2017. LAWS OF 2017, 3d Spec. Sess., ch. 25 § 39. Former RCW 47.01.405 required the office of financial management to hire a mediator to develop an SR 520 project impact plan. It required the mediator to provide periodic reports to the joint transportation committee and the governor and submit a final project plan by December 1, 2008.

structure to the Montlake neighborhood. This case involves WSDOT's effort to condemn three lots located in a small commercial district at the southwest corner of Montlake Boulevard and SR 520: the Montlake 76 Gas Station with T-Mobile's wireless facility located on the roof, the Montlake Boulevard Market (Market), and a vacant parking lot ("Properties").

The Project requires that WSDOT work in cooperation with the Federal Highway Administration (FHWA). To comply with the National Environmental Policy Act (NEPA),³ and the Washington State Environmental Policy Act (SEPA),⁴ FHWA published the Final Environmental Impact Statement (FEIS) for the Project in June 2011. In August 2011, FHWA issued its Record of Decision (ROD) describing the Project's Selected Alternative.

During construction, WSDOT made design changes that differed from the Selected Alternative. These changes included WSDOT's decision to acquire, but not condemn, the Properties. Federal regulations interpreting NEPA require that an agency provide a supplemental environmental impact statement (EIS) whenever it makes changes that would result in "significant environmental impacts" not evaluated in the FEIS.⁵

In October 2016, FHWA and WSDOT prepared a Reevaluation incorporating the design changes. Because the Reevaluation concluded that

³ 42 U.S.C. § 4321.

⁴ Ch. 43.21C RCW.

⁵ 23 C.F.R. § 771.130(a)(1).

these changes would not result in significant environmental impacts not evaluated in the FEIS, WSDOT and FHWA did not issue a supplemental EIS. Neither Montlake nor MCC contests the sufficiency of any NEPA required document, including the Reevaluation.

On May 16, 2017, WSDOT filed a lawsuit seeking to condemn the Properties. On May 19, 2017, it filed a motion for an order adjudicating public use and necessity (PUN). In June 2017, Montlake asked for oral argument and live witness testimony with cross-examination at the hearing on WSDOT's PUN motion. In July 2017, the trial court granted MCC's request to intervene. After a hearing, the trial court granted WSDOT's PUN motion and entered two related orders addressing an environmental issue and the authority of the program administrator. Montlake and MCC appeal all three orders.

ANALYSIS

"The power of eminent domain is an inherent attribute of sovereignty."⁶ Our state constitution limits this power and requires that a court decide if the contemplated use is really public.⁷ The condemning authority bears the burden of proving public use and necessity.⁸ It must prove (1) the use of the

⁶ Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC, 159 Wn.2d 555, 565, 151 P.3d 176 (2007) (NAFTZI).

⁷ Miller v. City of Tacoma, 61 Wn.2d 374, 382-83, 378, P.2d 464 (1963).

⁸ NAFTZI, 159 Wn.2d at 566.

appropriated property is public, (2) the public interest requires this public use, and (3) condemning the property is necessary for the public interest.⁹

The need for the property does not have to be “absolute, or indispensable, or immediate” but must be “[r]easonabl[y] necess[ary] for use in a reasonable time.”¹⁰ “A declaration of necessity by a legislative body is ‘conclusive’” unless the challenger meets its burden to show “proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.”¹¹ “To establish constructive fraud [the challenger] must show willful and unreasoned action without consideration and regard for facts or circumstances.”¹²

Here, Montlake and MCC challenge the trial court’s decision that condemnation of the Properties is reasonably necessary for the construction of the Project on four grounds:

1. The trial court and WSDOT did not adequately consider the environmental impacts of the Project;
2. Taking the Properties is not reasonably necessary to build the Project;

⁹ HTK Mgmt., LLC v. Seattle Popular Monorail Auth., 155 Wn. 2d 612, 629, 121 P.3d 1166 (2005).

¹⁰ City of Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).

¹¹ NAFTZI, 159 Wn.2d at 575-76 (quoting Seattle Popular Monorail Auth., 155 Wn.2d at 629).

¹² Cent. Puget Sound Reg’l Transit Auth. v. Miller, 156 Wn.2d 403, 437, 128 P.3d 588 (2006) (quoting In re Port of Seattle, 80 Wn.2d 392, 398, 495 P.2d 327 (1972)).

3. The Secretary of Transportation improperly delegated authority to select the Properties for condemnation; and
4. WSDOT did not satisfy the Mega-Project requirements established by RCW 47.01.380, RCW 47.01.390, and former RCW 47.01.405 (2007).

The legislature delegated to WSDOT the power to determine which limited access rights it needs to acquire, by condemnation or otherwise, to construct and maintain state highways.¹³ WSDOT's determination of necessity is therefore conclusive unless Montlake or MCC proves that it was fraudulent or arbitrary and capricious amounting to constructive fraud.

The trial court upheld WSDOT's necessity determination and determined that its condemnation decision was not arbitrary and capricious to the point of constructive fraud. We review Montlake's and MCC's challenges to the trial court's findings to determine whether substantial evidence supports them.¹⁴ We view substantial evidence in the light most favorable to the respondent.¹⁵ "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."¹⁶ We accept unchallenged findings

¹³ RCW 47.12.010.

¹⁴ Petters v. Williamson & Assocs., Inc., 151 Wn. App. 154, 163, 210 P.3d 1048 (2009).

¹⁵ NAFTZI, 159 Wn.2d at 576.

¹⁶ Petters, 151 Wn. App. at 163.

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of fact as true on appeal.¹⁷ We review questions of law and the trial court's conclusions of law de novo.¹⁸

The Trial Court Adequately Assessed the Environmental Impact of the Project

A. WSDOT's Consideration of the Project's Environmental Impacts Does Not Show That Its Condemnation Decision Was Arbitrary and Capricious Amounting to Constructive Fraud

Both Montlake and MCC claim that WSDOT did not give due consideration to the environmental impacts of the Properties' condemnation, making its condemnation determination arbitrary and capricious amounting to constructive fraud. They rely on State v. Brannan,¹⁹ where our Supreme Court stated that whether the condemning authority gave "due consideration" to the environmental impacts of the project is "relevant" to whether it acted "fraudulently or so arbitrarily and capriciously as to amount to constructive fraud." Brannan explained that the condemning authority should view the impact on the environment "from the standpoint of the entire project and not on a segment-by-segment basis."²⁰ This inquiry is independent of whether the condemning authority satisfied its obligations under NEPA and SEPA.²¹

¹⁷ The-Anh Nguyen v. City of Seattle, 179 Wn. App. 155, 163, 317 P.3d 518 (2014).

¹⁸ Nguyen, 179 Wn. App. at 163, 172.

¹⁹ 85 Wn.2d 64, 75, 530 P.2d 322 (1975).

²⁰ Brannan, 85 Wn.2d at 75.

²¹ Brannan, 85 Wn.2d at 74-75 (explaining that even though the parties could not raise collaterally the sufficiency of the EIS in the current condemnation proceeding, the lower court could consider whether the condemning authority gave due consideration to the environmental effects of the project).

As a preliminary matter, Montlake and MCC claim that the NEPA Reevaluation standing alone does not show that WSDOT gave due consideration to the condemnation's environmental impacts. They note that although the Reevaluation concluded that the revised project plans would not cause significant adverse environmental impacts beyond those evaluated in the FEIS, it only considered closing the Gas Station and limiting access to the Market. The Reevaluation did not consider whether any additional environmental impacts caused by condemning the Market would require a supplemental EIS. When FHWA and WSDOT issued the Reevaluation, WSDOT had decided only to acquire the Properties as opposed to condemn them. Although the Reevaluation provides evidence that WSDOT considered the environmental impacts of the Project as a whole, it does not show that it considered the specific impacts of the Properties' condemnation.

MCC asserts that substantial evidence does not support the trial court's findings that WSDOT adequately considered the Project's environmental impacts, which support its conclusion that WSDOT's condemnation decision was not arbitrary and capricious amounting to constructive fraud. We disagree.

First, MCC claims that WSDOT failed to evaluate the transit-related impacts of the Market's closure. But WSDOT did consider how increased traffic congestion could affect community members' ability to access other markets.

Denise Cieri, deputy program administrator for the Project, testified that there are 58,000 daily trips on Montlake Boulevard. When asked if WSDOT considered that closing the Market might add up to 800 new vehicle trips per day on Montlake Boulevard, Cieri stated in her deposition, "I think it was recognized that if [Montlake] [M]arket weren't available for local people to access that there were other markets, such as Mont's a couple of blocks away, and other markets further than that that are in the vicinity of this neighborhood." Thus, WSDOT considered the issue. In addition, consistent with the State's position, 800 more vehicles would produce a 1.38 percent increase in traffic on Montlake Boulevard. The ROD states that only a traffic increase of 5 percent or more could result in measureable changes. WSDOT's failure to consider a nonmeasurable increase in congestion on Montlake Boulevard does not undermine the trial court's findings.

Second, MCC claims that substantial evidence does not support the trial court's finding that "WSDOT fully considered the adverse impacts to Montlake neighborhood residents upon closure of the Montlake Market, and balanced these impacts with the public's need to reduce traffic congestion through the SR 520 corridor." But, as the State claims, WSDOT did consider how the Market's closure would impact the community and, consistent with Brannan, extensively considered the environmental impacts of the Project as a whole.

Cieri testified about WSDOT's awareness of the community's strong opposition to its condemnation decision. She explained, "[R]ather than impact a historic neighborhood on the other side of the road, it makes more sense to have an additional impact to this property. Impacting a historic neighborhood would be extraordinarily difficult, as well as require quite a lot of environmental evaluation." WSDOT also balanced the desires of Montlake residents to keep their walking-distance market with the ability of the nonmotorized community to access more streamlined transportation facilities. WSDOT and counsel from the Office of the Attorney General reviewed the Properties' owners' objections to the condemnation before selecting the Properties for condemnation. Cieri also explained WSDOT's need to accommodate the 58,000 daily trips on Montlake Boulevard during construction.

Further, the Project as a whole has undergone significant environmental review. The federal district court upheld the adequacy of the over 1,000-page FEIS detailing the environmental impacts of the Project.²² Cieri also testified about the Seattle design process in which WSDOT worked with the City and SR 520 neighborhoods to address City and community concerns. WSDOT's consideration of the environmental impacts of both condemning the Properties

²² Coal. for a Sustainable 520 v. U.S. Dep't of Transp., 881 F. Supp. 2d 1243, 1258-59 (W.D. Wash. 2012) (court order) (upholding the validity of the FEIS and the ROD and rejecting challengers' claims that the FEIS did not adequately analyze the adverse environmental impacts or consider alternatives).

and of the entire project support the trial court's findings that WSDOT considered the adverse impacts to the Montlake neighborhood of the Market's closure and did not select the Properties in an arbitrary and capricious manner amounting to constructive fraud.

In addition to MCC's arguments, Montlake contends that WSDOT's condemnation decision was arbitrary and capricious because it ignored policies that it could have relied on to reduce the potential environmental impacts of the Project. First, it claims that WSDOT did not follow its Design-Build Guidebook. But unlike administrative rules and formally promulgated agency regulations, internal policies do not have the force of law unless they are the equivalent of liability-creating administrative rules.²³ Here, because WSDOT did not formulate its policies in the Guidebook in response to legislative delegation, these policies do not have the force of law.²⁴ WSDOT's failure to follow its Guidebook does not undermine the trial court's findings.

Second, Montlake claims that WSDOT ignored the Project's stated purposes in the ROD. The Project's purposes includes improved mobility for people and goods from Seattle to Redmond, cost efficiency, and minimized impacts on affected neighborhoods and the environment. Although WSDOT is

²³ Joyce v. Dep't of Corr., 155 Wn.2d 306, 323, 119 P.3d 825 (2005).

²⁴ Joyce, 155 Wn.2d at 323 (holding that "because the Department [of Corrections'] policy directives are not promulgated pursuant to legislative delegation, they do not have the force of law").

not required to satisfy every enumerated purpose in the ROD, the above discussion illustrates that WSDOT has acted consistently with the Project's stated purpose. Montlake does not show that WSDOT's condemnation decision was arbitrary and capricious because it allegedly ignored select policies.

B. The Trial Court Correctly Found That SEPA Did Not Apply to the State's PUN Motion

Montlake challenges the trial court's conclusion that SEPA did not apply to WSDOT's PUN motion. SEPA requires state agencies to include in every proposal for "major actions significantly affecting the quality of the environment, a detailed statement . . . on . . . the environmental impact of the proposed action [and] any adverse environmental effects which cannot be avoided" among other environmental-related factors.²⁵ But RCW 43.21C.135 allows an agency that prepares an "adequate detailed statement" that satisfies NEPA to use it in lieu of the EIS that SEPA requires and exempts the agency from satisfying SEPA's requirements.²⁶ This means that a project does not need a SEPA EIS when it has an EIS that satisfies NEPA. Because a federal district court upheld the validity of the FEIS under NEPA²⁷ and the sufficiency of the FEIS was not at

²⁵ RCW 43.21C.030(2)(c)(i), (ii).

²⁶ RCW 43.21C.150; Boss v. Dep't of Transp., 113 Wn. App. 543, 550, 54 P.3d 207 (2002); see also Coal. for a Sustainable 520, 881 F. Supp. 2d at 1260 ("Washington courts have held that an EIS which is sufficient to meet NEPA may also be used to satisfy SEPA requirements as long as notice provisions have been met.").

²⁷ Coal. for a Sustainable 520, 881 F. Supp. 2d at 1261-62.

issue, the trial court correctly decided that SEPA did not apply to WSDOT's PUN motion.

C. The Trial Court Did Not Abuse Its Discretion by Making Select Evidentiary Rulings Related to the Environmental Impacts of the Project

MCC also challenges the trial court's decision to exclude nontransit-related evidence of the condemnation's environmental impacts and testimony from Cieri about whether the Reevaluation was subject to independent review. We review evidentiary challenges for an abuse of discretion.²⁸ "A trial court's decision on excluding evidence will be reversed only where it was based on untenable grounds or reasons."²⁹

First, MCC asserts that the trial court should have allowed evidence of nontransit-related impacts because this evidence was relevant to whether WSDOT acted arbitrarily and capriciously. Because the portion of the record that MCC cites does not show that it offered this evidence, we decline to review this claim.

Second, MCC claims that whether a person or entity independent of WSDOT had reviewed the Reevaluation was relevant to whether WSDOT's decision to condemn the Properties was arbitrary and capricious because it inadequately assessed environmental impacts. But a court could reasonably

²⁸ Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 766, 389 P.3d 517 (2017).

²⁹ Taylor, 187 Wn.2d at 766.

view this information as irrelevant because the sufficiency of the Reevaluation was not at issue. We thus reject MCC's evidentiary challenges.

WSDOT Established That Condemnation of the Properties Was Necessary

Montlake asserts that substantial evidence does not support the trial court's findings that condemnation of the Properties is necessary for construction of the Montlake Phase and that WSDOT's necessity determination is not arbitrary and capricious to the point of constructive fraud. We disagree.

As another preliminary matter, Montlake did not support its assignments of error to findings 1.18 through 1.21 with legal argument in its opening brief and thus waived these claims. "An appellate court will not consider a claim of error that a party fails to support with legal argument in [its] opening brief."³⁰ Findings of fact 1.18 through 1.21 state that WSDOT introduced evidence establishing that it needed to condemn the Properties to construct a shared-use bicycle and pedestrian path for the public, to integrate highway grade changes into the surrounding streets and adjacent properties, and to provide necessary right-of-way for the design-builder to shift traffic during construction of the new Montlake Boulevard, its approach to the Interchange/SR 520 Bridge, and the new 54-inch waterline to the east of Montlake Boulevard. Because Montlake does not provide

³⁰ Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845, 347 P.3d 487 (2015) (citing Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 486, 334 P.3d 1120 (2014)); RAP 10.3(a)(6).

legal argument in its opening brief to support its challenges to these findings, it has waived these claims.

A. Substantial Evidence Supports That Condemning the Properties Is Necessary To Complete the Montlake Phase

Montlake challenges the sufficiency of the evidence supporting the trial court's finding that WSDOT established its need to condemn the Properties by showing condemnation would reduce the financial risk associated with potential relocation of the King County combined sewer line. Montlake claims that because Cieri testified that relocation of the sewer is "highly unlikely," taking the Properties to accommodate the sewer relocation is not reasonably necessary for use in a reasonable period of time and is thus unnecessary. Montlake, however, does not address WSDOT's need for the Properties to reduce the project's financial risk in the event that WSDOT does not need to relocate the sewer or the numerous reasonably necessary uses for the Properties Cieri described in her testimony.

Consistent with the State's argument, regardless of whether WSDOT determines that it must actually replace the sewer line, it must acquire the Properties to construct the Project designs and accommodate the surrounding community in a cost effective manner; Cieri testified that if WSDOT were unable to acquire the Properties there would not be "enough right-of-way to have a buildable project." First, if WSDOT needs to replace the sewer line located north

of the Properties, Cieri testified that it would need to dig a pit where the gas station is currently located and make an access drive on what is the Market's parking lot. Alternatively, if WSDOT does not replace the sewer pipe, it will use the "protect-in-place" method, which requires that WSDOT "build around it and do[es]n't harm it." As a result, the Properties would not be at grade with the surrounding SR 520 ramps and Montlake Boulevard, which means WSDOT would need to raise the Properties to the new grade.

Further, Cieri described the need to condemn the Properties to improve nonmotorized transportation routes and provide pedestrians and bicyclists a more direct route from the Properties to the Portage Bay area. She stated that through the Seattle design process WSDOT learned that the nonmotorized community prioritizes accessibility and "those attractive routes." In addition, Cieri explained that when WSDOT reconstructs the portion of Montlake Boulevard next to the Properties, it would need to shift traffic onto the Properties to provide sufficient workspace for the contractor and accommodate the large volume of traffic. She stated that construction of the new City waterline located east of the Properties would also necessitate the shifting of traffic onto the Properties.

In addition to providing a more direct route for the nonmotorized community and shifting traffic, Cieri explained that WSDOT needs to use the Properties as a staging area. She explained that Montlake is a historic

neighborhood and a heavily built-up area where very little empty land remains. She characterized the Properties as valuable for staging because they are flat, have access to highway on- and off-ramps and the streets on all sides, and easily allow trucks to move in and out. Even if WSDOT obtained the Montlake Properties for staging, Cieri testified that she could not guarantee that she would not need more property for staging. Cieri's testimony supports the trial court's findings that condemning the Properties is necessary to allow WSDOT to complete the Project.

B. Substantial Evidence Supports That WSDOT's Necessity Determination Was Not Arbitrary and Capricious Amounting to Constructive Fraud

Montlake also challenges the sufficiency of the evidence supporting the trial court's findings that WSDOT's condemnation decision was not arbitrary and capricious amounting to constructive fraud. Montlake contends that WSDOT's condemnation decision constitutes constructive fraud for three reasons: WSDOT allegedly improperly used the larger parcel analysis in selecting the Properties for condemnation, it allegedly did not follow its Right of Way Manual ("Manual"), and it changed its position about its need for the Properties for staging.

1. Larger Parcel Analysis

First, Montlake claims that the trial court erred in holding that WSDOT's use of "larger parcel" analysis to select the Properties for condemnation was not proof of arbitrary and capricious conduct. Montlake asserts that "larger parcel"

analysis is a just compensation concept that WSDOT cannot use to avoid establishing an individual need for each of the three parcels that comprise the Properties. Montlake also claims that WSDOT's larger parcel analysis is legally and factually flawed because the Properties do not constitute a "larger parcel."³¹ "Larger parcel" analysis is, in fact, used to determine just compensation.³² But Montlake does not cite legal authority to support its proposition that an agency cannot consider the cost of the property when making a condemnation determination. In fact, a condemning authority should consider the cost of condemnation in a project funded by taxpayer dollars.

In HTK Management, LLC v. Seattle Popular Monorail Authority,³³ our Supreme Court explained that an agency may consider the cost of a temporary versus a permanent acquisition when making the decision to condemn: "It is significant [when] cost of the temporary construction easement combined with likely cost of damages due to a ground lessee could eclipse the cost of a fee interest." Because larger parcel analysis informs an agency's evaluation of the cost of the properties at issue, a court could reasonably interpret its application as relevant to an agency's condemnation decision as the trial court did here.

³¹ State v. McDonald, 98 Wn.2d 521, 526-27, 656 P.2d 1043 (1983) (requiring unity of ownership, unity of use, and contiguity to establish a single tract for purposes of compensation).

³² McDonald, 98 Wn.2d at 526-27.

³³ 155 Wn. 2d 612, 638, 121 P.3d 1166 (2005).

2. Right of Way Manual

Next, Montlake asserts that WSDOT's alleged failure to follow its Manual amounted to constructive fraud. But consistent with the State's argument, Montlake mistakes the Manual's discretionary guidelines for mandatory procedures. As discussed above, because WSDOT did not formulate its internal policies in response to legislative delegation, these policies do not have the force of law.³⁴ WSDOT's alleged failure to follow its Manual does not prove that its condemnation decision was arbitrary and capricious.

3. Iterative Design Changes

Last, Montlake claims that WSDOT's condemnation decision was arbitrary and capricious because WSDOT changed its position about its need to use the Properties for staging. During a public presentation in December 2016, WSDOT stated that it would not need the Properties for staging. Later, it justified selecting the Properties for condemnation, in part, by claiming that it did need the Properties for staging. The trial court found, however, that "[i]terations of project design are not evidence of arbitrary or capricious conduct amounting to constructive fraud." Because Montlake does not challenge this finding, it is true on appeal.³⁵ In addition, Cieri testified that during the initial stages of the design process when the ROD is developed, designs are only "half a percent to maybe

³⁴ Joyce, 155 Wn.2d at 323.

³⁵ Nguyen, 179 Wn. App. at 163.

up to five percent” complete. Cieri stated that when she gives a project like the SR 520 Project to the design-builder, the design is typically only fifteen to thirty percent complete. Because design changes are an expected part of the process, a trial court could reasonably conclude that WSDOT’s changed staging needs did not show that its condemnation decision was arbitrary and capricious.

The Mega-Project Requirements Do Not Prevent WSDOT from Condemning the Properties

Montlake asserts that the trial court’s order failed to enforce the legislature’s “Mega-Project”-specific requirements under RCW 47.01.380, RCW 47.01.390, and former RCW 47.01.405. But because chapter 47.01 RCW does not provide a private cause of action, we reject this claim. To determine whether to imply a cause of action, a court must address the following issues: “first, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.”³⁶ To determine the legislative purpose of multiple statutes, a court should construe together statutes that relate to the same subject matter.³⁷

RCW 47.01.380, RCW 72.01.390, and former RCW 47.01.405 direct WSDOT to mitigate the impacts of the Project and comply with NEPA. The

³⁶ Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990).

³⁷ Beach v. Bd. of Adjustment, 73 Wn.2d 343, 346, 438 P.2d 617 (1968).

statutes require WSDOT to report to the joint transportation committee and to the governor.³⁸ So WSDOT has a duty to the legislature and to the governor. But because these statutes do not explicitly or implicitly communicate that the legislature intended individuals to have a right to enforce WSDOT's compliance with the statutory requirements, chapter 47.01 RCW does not provide Montlake with a private right of enforcement. We thus decline to review the merits of Montlake's assignment of error to the trial court's conclusion that WSDOT complied with all relevant statutory mandates.

Secretary Millar Did Not Improperly Redelegate His Condemnation Power to
Program Administrator Meredith

Montlake asserts that the legislature gave only the secretary of transportation eminent domain power, and Secretary Roger Millar acted outside the scope of WSDOT's statutory condemnation authority when he allowed Mega-Project Program Administrator Julie Meredith to decide to condemn the Properties. We disagree.

Neither party challenges the trial court's finding that Meredith made the final decision to seek condemnation of the Properties. So we accept this finding as true on appeal. Montlake cites State v. King County³⁹ to support its claim that

³⁸ RCW 47.01.390; former RCW 47.01.405.

³⁹ 74 Wn.2d 673, 676, 446 P.2d 193 (1968) (holding that the state board did not impermissibly delegate its eminent domain power but, instead, properly delegated to the local board the day-to-day ministerial control of the community college district subject to its supervision).

the redelegation of eminent domain powers is generally invalid. But the issue in King County was whether the Washington State Board for Community College Education had improperly delegated its condemnation power to a local board of trustees of a community college without legislative authorization.⁴⁰ Here, the legislature explicitly authorizes the secretary to delegate his powers as he deems necessary. Although RCW 47.12.010 delegates to the secretary the power to select properties for condemnation,⁴¹ RCW 47.01.101(3) gives the secretary the authority to “delegate any powers, duties, and functions to . . . any officer or employee of the department as deemed necessary to administer the department efficiently.”

A 2015 executive order issued by the previous secretary delegated to the “Mega-Project Administrators” the “authority to approve any and all contracts and documents pertaining to [her] organizations’ assigned program areas.” Secretary Millar stated that he met with Meredith on a biweekly basis to discuss the Project and “concurred in [Meredith’s] assessment of the need for the [Montlake] property and also . . . determined the State should acquire the entire parcel.” Millar acted within the scope of the plain language of RCW 47.01.101(3) by delegating to Meredith the power to make decisions, including condemnation

⁴⁰ King County, 74 Wn.2d at 674-75, 677.

⁴¹ “[I]n such action the selection of the lands or interests in land by the secretary of transportation shall, in the absence of bad faith, arbitrary, capricious, or fraudulent action, be conclusive.”

decisions, related to the Project. Thus, Montlake has not shown that Millar improperly re delegated his eminent domain power.

Montlake also asserts that this court should not grant “legislative deference” to Meredith’s condemnation decision. Montlake does not define “legislative deference” and cites as its only supporting authority In re Petition of Puget Sound Power & Light Co.,⁴² which does not substantiate its claim. When a party does not support its assertions with authority, a reviewing court assumes that it has found none.⁴³ We decline to consider this issue.

ATTORNEY FEES

Montlake requests attorney and expert witness fees under RCW 8.25.070. RCW 8.25.070 requires that a court award reasonable attorney and expert witness fees in select circumstances involving a just compensation determination or stipulation by the condemnee to an order of immediate possession by the condemnor. Because this case concerns neither of these circumstances, we decline to award Montlake attorney or expert witness fees.

CONCLUSION

Substantial evidence supports WSDOT’s necessity determination and that its condemnation decision was not arbitrary and capricious amounting to

⁴² 28 Wn. App. 615, 619, 625 P.2d 723 (1981) (explaining that a governmental body exercising its power of eminent domain must make its decision in a public forum where affected citizens have an opportunity to object).

⁴³ State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

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constructive fraud. Montlake did not show that Secretary Millar improperly re delegated his condemnation authority to Program Administrator Meredith. We affirm.

Leach, J.

WE CONCUR:

Speelman, J.

Appelwick, J.



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 FOR THE COUNTY OF KING**

STATE OF WASHINGTON,

 Petitioner,

vs.

Case No. 17-2-12389-7 SEA

MONTLAKE LLC, a
 Washington limited
 liability company,
 and STELTER MONTLAKE
 LLC, a Washington limited
 liability company, et al.,

Respondents.

VOLUME I OF II

MOTION FOR PUBLIC USE AND NECESSITY

HELD ON
 THURSDAY, AUGUST 11, 2017
 9:00 A.M.

BEFORE THE HONORABLE
 VERONICA ALICEA GALVAN, SUPERIOR COURT JUDGE

KING COUNTY COURTHOUSE
 516 THIRD AVENUE
 SEATTLE, WASHINGTON 98104

1 future, we have that forward capability with the
2 bridge project.

3 **Q. Have these project benefits been published**
4 **for the general public to understand gather?**

5 A. Yes. They've been published in various
6 ways, such as our website.

7 **MR. PALAY:** Okay. I'd like to -- may I
8 approach, Your Honor?

9 **THE COURT:** You may.

10 **BY MR. PALAY:**

11 **Q. I'd like to show you what's previously**
12 **been marked as Exhibit 56.**

13 **Do you recognize these document?**

14 A. Yes, I do.

15 **Q. What are they?**

16 A. These are some printouts of WSDOT's web
17 pages regarding the project.

18 **Q. And does it detail the public's benefit**
19 **that you just described to the court using these**
20 **exhibits?**

21 A. Yes, it does. It also breaks it down into
22 the Montlake Bays and better understanding the fact
23 that it's an aging facility with vulnerable
24 structures, meaning that they're more vulnerable to
25 the seismic activity that we have in this area, such

1 as the hollow columns, et cetera. It also details
2 out some of the public benefits for the pedestrians
3 and bicycles, specifically calling out some of the
4 things I mentioned, like the shared-use path and the
5 future possibility of light rail, the community
6 connecting lids, the improved quicker trips and more
7 reliable trips for users. The HOV lane. I believe
8 it's all pretty clear in here.

9 **Q. You started with the SR 520 program in**
10 **2014 or so?**

11 A. Yes; May of 2014.

12 **Q. At that time, were any design refinements**
13 **going on from the original designs at the time of**
14 **the Record of Decision? At the -- when you started,**
15 **were any design requirements really happening?**

16 A. When I first began, the Record of Decision
17 was already completed back in, I believe it was,
18 2011 timeframe. At that point, there was no funding
19 to build the project, so there was some work that
20 was being completed working with the community,
21 better understanding their needs, but not what I
22 would say real design. Record of Decision is design
23 it. If you think of design where you would hand a
24 contract 100 percent, I would say the design is more
25 like a half a percent to maybe up to five percent



SR 520 - Montlake Phase

Overview

The next phase of construction for the SR 520 Program is the Montlake Phase. This is the first stage of construction for the Rest of the West, and will build a new Montlake interchange, lid and land bridge, as well as the new West Approach Bridge South structure. This phase is currently in the contractor-procurement stage. We anticipate hiring a contractor in 2017 and launching construction in 2018.

Managing the effects of construction

We are working to develop community-based plans to manage neighborhood traffic and minimize the impacts of construction in the project area. The first of these plans is the draft SR 520 Montlake Phase Neighborhood Traffic Management Plan.

Read the draft report

The draft Neighborhood Traffic Management Plan (pdf 7.6 mb) is online for you to read and learn about potential traffic management measures and solutions being considered. Also online are the display boards (pdf 2.8 mb) and presentation slides (pdf 1.8 mb) from our March public meeting on this topic. You also can review the public comments (pdf 1.2mb) we received on the draft report.

Design renderings



Conceptual image of the Montlake lid transit station.



Conceptual image of a bicycle-pedestrian land bridge over SR 520.

Montlake Phase timeline and next steps

- 2017: Hire design-build contractor
- 2017-18: Conduct preconstruction outreach
- 2018: Launch construction activities
- 2022-23: Complete the Montlake Phase

Note: There will be additional design work for future project phases, such as the Portage Bay Phase, with additional opportunities for public comment.

Major milestones for the remaining phases of the project are:

1. Advance conceptual design
2. Hire a contractor
3. Preconstruction outreach
4. Construction
5. Completion

How to stay involved

We know there is interest in staying informed about this upcoming work. Here are some resources you can use:

- Email: sr520bridge@wsdot.wa.gov
- Phone: 206-770-3554 (M-F, 8 to 5)
- Email updates: [Subscribe](#)
- Twitter: [@wsdot_520](#)

If your organization is interested in receiving a project briefing or presentation, please contact us.

A commitment to fair contracting

WSDOT is committed to meeting the governor's voluntary goal of providing 26 percent of the contract value for Connecting Washington transportation projects -- including the Montlake Phase of SR 520 construction -- to minority-owned, women-owned, veteran-owned and disadvantaged small

businesses. Learn more about the SR 520 Diversity Program.

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SR 520 - About

Building a new and improved SR 520 corridor

Every day tens of thousands of people travel to work or school, deliver products, visit family or friends, go to medical appointments, attend sporting events or make other needed trips via SR 520 and its floating bridge across Lake Washington.



Construction of the new floating bridge, just north of the 1960s-era bridge, moves westward toward Seattle. (Jan. 2015; photo courtesy HDR)

The SR 520 Bridge Replacement and HOV Program is making major enhancements to this vital urban highway. The program is improving traffic safety by replacing SR 520's aging and vulnerable bridges, while making other key highway improvements to enhance public mobility and transportation options throughout the corridor. The program also is making significant environmental enhancements across the region to mitigate for project impacts.

Following years of public discussion, planning, design and engineering work, SR 520 construction began in 2011. Construction is occurring in separate, phased projects based on funding and other factors. The 12.8-mile highway extends from I-5 in Seattle to SR 202 in Redmond.

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SR 520 - Safety and Vulnerability



Waves batter the south side of the old, 1960s-era floating bridge during a February 2006 storm.

Safety is our top priority. SR 520's old Evergreen Point Floating Bridge was vulnerable to failure during severe windstorms and the highway's fixed-column bridge approaches could fail in a strong earthquake. Replacing these bridges with structures that meet today's safety standards helps maintain public safety, protects Washington state's transportation infrastructure and ensures that traffic continues to flow on a key, urban highway.

SR 520's old bridges vulnerable to failure during an earthquake or windstorm

Hollow columns are susceptible to earthquakes

The old SR 520 west approach bridge and the Portage Bay Bridge were designed and built in the early 1960s before modern earthquake standards existed. The bridges' hollow supporting columns could break and collapse during a major earthquake.

This simulation video demonstrates how a major earthquake could cause a catastrophic bridge failure.

Old floating bridge vulnerable to high winds

The storms that sent waves pounding into and over the old floating bridge's southern wall demonstrated the bridge's vulnerability. The drawspan, anchor cables and pontoons all could have broken or cracked when stressed by the sustained winds of a severe storm.

This simulation video demonstrates how and why the old floating bridge could have failed during a storm with winds exceeding 75 mph.

New bridges designed to withstand once-in-a-century events

Modern design to withstand earthquakes

The new West Approach Bridge North and the funded Portage Bay Bridge and West Approach Bridge South are designed to withstand a 1,000-year earthquake. (A 1,000-year earthquake refers to a magnitude of earthquake expected to happen only once in 1,000 years.)

Stronger cables and bridge to resist the waves

The new Evergreen Point Floating Bridge pontoons, bridge deck and anchor cables are designed to withstand storms with sustained winds of up to 89 mph. The new bridge's updated design standards will protect travelers while extending the bridge's lifespan.

WSDOT is prepared if the bridge collapses or sinks

Response plan to deal with bridge failure

A catastrophic failure of either the old floating bridge or the new SR 520 floating bridge and structures would pose a threat to our region. WSDOT recognizes this threat and has developed a response and recovery plan in case a bridge fails.

This Catastrophic Failure Plan (pdf 562 kb) includes:

- Testing emergency response scenarios through guided simulations such as a tabletop exercise.
- A communications plan to keep people, emergency responders and media informed.
- A transportation plan to manage diverted bridge traffic through alternate routes.
- Action plans to replace the bridge during a partial or full closure of the SR 520 corridor.



SR 520 - Enhancing Mobility

The SR 520 construction program is replacing half-century-old bridges at risk of failure in a severe earthquake or windstorm with stronger structures built to modern safety standards. Moreover, we are making significant improvements to this key urban corridor that will enhance the public's transportation options and mobility for generations to come.

Click to jump to a section below

More growth = more traffic
Greater mobility for SR 520 users
Congestion relief for region

Related pages

Light rail in the corridor
Improving transit
Bicycle and pedestrian connections

More growth = more traffic

When SR 520 and its four-lane floating bridge across Lake Washington opened in 1963, King County had fewer than 1 million residents. Bellevue, the Eastside's largest community, had only about 13,000 people. Since then, the county's population has more than doubled, while Bellevue's has swelled tenfold. The area's robust growth is expected to continue. The Puget Sound Regional Council predicts that, between 2000 and 2040, the Central Puget Sound region could add 1.2 million more workers and another 1.8 million residents.

The region's growing population and growing traffic has long overtaxed SR 520's half-century-old design. Although traffic volumes eased some with the 2011 start of tolling on the SR 520 floating bridge, the highway remains heavily congested during peak commute times, with average speeds below 20 mph.

Because the highway is largely without shoulders, a disabled vehicle causes lengthy backups. And with no dedicated HOV lanes (yet) on the highway's western segment in Seattle, SR 520 forces buses and carpools to trudge through the often-choked general-purpose lanes.



Greater mobility for SR 520 users

The SR 520 Bridge Replacement and HOV Program is constructing new highway features that will provide greater mobility options for all users, including drivers, transit riders, bicyclists and pedestrians. When SR 520 is fully built out, the highway's corridor improvements will give the public:

- **A dedicated transit/HOV lane, in both directions**, from I-5 to Redmond, providing bus riders and carpools safer, quicker and more reliable travel.
- **Better operations on the Eastside**, with median transit stops already open at Evergreen Point Road and 92nd Avenue Northeast, and direct-access ramps open at 108th Avenue Northeast for buses and carpools to make entering and exiting the highway safer, quicker and more reliable.
- **Transit improvements in Seattle**, with HOV direct-access ramps at the Montlake interchange for buses and carpools traveling to or from the Eastside, and HOV lanes on Montlake Boulevard.
- **A regional, cross-lake bicycle and pedestrian path** along SR 520, from I-5 to I-405, with connections or close proximity to local bike trails, local and regional bus stops, and light-rail stops.
- **A**



floating bridge design that will allow for the addition of light rail on SR 520 if the region chooses that option in the future.

- **Community-connecting highway lids** that provide better connections to transit stops, bicycle-pedestrian paths, local streets and SR 520 itself.

Regional congestion relief

The improved SR 520 corridor, when fully built out from I-5 to I-405, will enhance highway safety, reduce congestion and lower travel times for bus riders, carpools and drivers. When all phases of the program are funded and complete, regional benefits will include:

- **More reliable and quicker trips** between Seattle and the Eastside. When compared to a no-build scenario with no improvements to SR 520, for example, reduced bottlenecks from our highway enhancements will decrease HOV travel time from Seattle to Bellevue by up to 25 minutes during peak periods, and by up to 31 minutes for drivers in the general-purpose lanes.
- **Improved on-ramps and merge conditions**, and reduced traffic queues onto local arterials after the six-lane corridor is extended to Seattle and a westbound auxiliary lane for I-5 merging is completed on the Portage Bay Bridge.
- **Wide shoulders on the new floating bridge** and connecting highway for disabled vehicles to pull off and not block traffic as they do today on the shoulderless roadway.
- **Significant economic savings** thanks to less time spent in traffic slowdowns and backups. A study of the rebuilt Eastside segment, for example, finds that drivers there are expected to save 1.4 million hours of travel time every year – and \$467 million in travel-time savings.
- **A 39 percent increase by 2030 in the number of people using SR 520's HOV lanes** daily (that's 19,000 more than the number using the Eastside's new HOV lanes).
- **A 15 to 17 percent increase in the total number of people SR 520 carries** during the morning and evening commutes as more people use buses and carpools. This increase in person trips occurs with only a 5 percent to 10 percent increase in vehicles on the highway.
- **A 5 to 10 percent reduction in vehicle miles traveled on SR 520 and a nearly 10 percent reduction in vehicles' greenhouse gas emissions** when compared to a "no-build" option with no highway improvements.

Learn more about SR 520 and transit.

Learn more about SR 520 and light rail.

Learn more about SR 520 and bicycle/pedestrian connections.

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SR 520 - Environmental Stewardship

WSDOT is committed to building and maintaining a sustainable, integrated multimodal transportation system – one that supports healthy communities and economic vitality while protecting the environment. From the start, we plan and design transportation projects with the goal of minimizing their environmental effects or avoiding impacts altogether. During construction, we require best practices to preserve the region's natural resources and promote public health and safety. When project impacts are unavoidable, we partner in initiatives to mitigate the impacts.

The SR 520 construction program undertakes mitigation projects in a variety of locations to improve the region's parks, natural areas, and historic and cultural resources.

Click to jump to a section below:

Building an environmentally smart highway
Promoting sustainability
Employing best management practices
Where to learn more

Related Pages:

Enhancing parks and natural areas
Union Bay Natural Area mitigation
Grass Creek mitigation
Evans Creek mitigation
Mitigation project map

Building an environmentally smart highway

Following years of community outreach and collaborative design refinements for the SR 520 corridor, WSDOT adopted construction plans that provide numerous environmental benefits for the region, including:

Low-impact structural designs that minimize steel and concrete requirements, such as a West Approach Bridge North design that substantially reduces the number of in-water columns and the amount of concrete needed to build them.

Dedicated transit/HOV lanes and median transit stops between I-5 and I-405, which our studies (pdf 12.5 mb) show will allow the highway to carry up to 17 percent more people during peak traffic, and 5 percent to 10 percent more vehicles.

A new cross-lake bicycle and pedestrian path (pdf 546 kb) that provides better connections to bus and light-rail stops, local bike paths, and a new Montlake Multimodal Center.

A projected 10 percent reduction in greenhouse gas emissions (pdf 1.8 mb) within the corridor when compared to a no-build option due to improved traffic movement and increased transit ridership.

New stormwater management systems along the corridor, including the new floating bridge, to capture highway runoff and improve water quality in local streams and Lake Washington.

A floating bridge design that allows retrofit for light rail should the region choose that option in the future.

Noise-reduction measures, including: quieter concrete pavement; noise-absorbing materials at lid portals; taller traffic barriers; quieter, encapsulated bridge joints to reduce highway noise for neighboring parks and communities; and noise walls on the Eastside.



Highway lids that reconnect neighborhoods, provide better transit connections, and increase community green space.

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Promoting sustainability

WSDOT strives to reflect sustainability as a core value. How? We're designing and building an environmentally responsible, multimodal transportation system that can be operated and maintained effectively and efficiently for decades to come. What's more, our process for building that system demonstrates WSDOT's commitment to sustainability. Examples include:

Contract requirements for WSDOT's SR 520 contractors to develop and implement ecologically sustainable practices, such as **reducing, reusing and recycling construction materials**, and managing their resources to reduce greenhouse gas emissions.

Reclaiming or using existing industrial/brownfield sites for construction of SR 520 bridge components or for needed corridor infrastructure, such as our new stormwater retention/treatment facilities.

[Read our 520 Sustainability Report in our Resource Library.](#)

[back to top](#)

Employing best management practices

We're following best practices during SR 520 construction to minimize the environmental effects of our work. A few examples include:

Using **specialized bubble curtains** in Lake Washington to reduce underwater construction noise from pile driving, which can harm fish.

Employing **truck-wash stations** in construction areas to reduce dust and keep streets and highways cleaner as our construction vehicles come and go.

Erecting **silt and turbidity curtains** around construction areas to halt erosion, prevent runoff and contain dredged sediments.

Using **vegetable-based hydraulic fluids** in construction equipment to minimize environmental damage if a spill occurs.

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Where to learn more

<http://www.wsdot.wa.gov/Projects/SR520Bridge/About/environment.htm>

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7/12/2017

WSDOT - SR 520 Bridge Replacement and HOV Program - Environmental Stewardship

Read more about how we're enhancing parks, natural areas, and cultural and historical resources.

View an interactive map showing many of the SR 520 mitigation projects.

View our SR 520 Environmental Documents library, where you'll find environmental impact statements, mitigation reports, studies on water quality and fish, and more.

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SR 520 - Enhancing Parks and Natural Areas

About > Environmental Stewardship > Enhancing Parks

Click on a link to jump to that section below:
 Parks enhancements
 Habitat enhancements
 Historical and cultural resource enhancements
 Where to learn more

The SR 520 program includes a wide range of projects to protect and enhance parks, fish and wildlife habitat, and sensitive natural, cultural and historical areas across the region. Some of these projects are completed, while others are underway or in the planning stage as part of the program's phased construction schedule.

Parks enhancements

Within the densely populated SR 520 corridor, we work with communities to mitigate the environmental effects of our construction program, in part by making significant improvements to local parks. Some of our parks enhancements include:

Improvements to the Washington Park Arboretum, including a new multiuse trail; restoration work to Arboretum Creek and the Waterfront Trail; a new north entry into the Arboretum with various trail and park enhancements there; and an enhanced SR 520 pedestrian undercrossing on Foster Island.



Removal of SR 520 on- and off-ramps in the Arboretum and the never-completed R.H. Thomson Expressway "Ramps to Nowhere," which will reduce traffic through the Arboretum and create a more open and natural park area.

Funding for **traffic-calming measures in the Arboretum**.

Development of **a new, four-acre public park** along Portage Bay near the University of Washington.

Trail improvements in the Portage Bay area.

A **new Bagley Viewpoint** on the planned 10th Avenue East/Delmar Drive East Iid.



Corridor-wide **connections to local parks and shared-use trails** from SR 520's new cross-lake bicycle and pedestrian path.

Habitat enhancements

The SR 520 corridor not only includes dense urban and suburban areas, but rich and diverse natural areas as well. We are making substantial enhancements in many of these natural locations to offset the environmental effects of our reconstruction effort, including:

Wetlands creation and enhancement across the Lake Washington basin, including sites adjacent to Yarrow Creek, Bear Creek, and Evans Creek on the Eastside, and on the west side in the Union Bay Natural Area, Magnuson Park, and the WSDOT peninsula.

Fish-habitat enhancements, including wetland and aquatic rehabilitation at the Cedar River Elliott Bridge Reach, aquatic mitigation along Bear Creek and Evans Creek, channel and riparian restoration on Taylor Creek in South Seattle, and Lake Washington shoreline restoration projects at the mouth of the Cedar River, at Seward Park, and along SR 520's east approach, as well as in the Grass Creek intertidal area in Grays Harbor County.



Replacement of narrow culverts beneath the highway's Eastside corridor with large-diameter culverts that unblock fish passage and aid fish migration in local streams.



Restoration and enhancement of SR 520 construction sites after work is completed, such as shoreline enhancements along the floating bridge's east approach and on Foster Island.

Historical and cultural resource enhancements

WSDOT has worked with the community to carefully assess and protect historic and cultural resources both along the SR 520 construction corridor and at other locations where components for the new floating bridge are built. Our efforts include:

Project **designs that avoid or minimize effects** on historical and cultural resources.

Consultation with stakeholders to ensure that the project's structural and landscape **designs are compatible with the historic character of neighborhoods** in the corridor.

Involving an outside expert in designing new bridges within historically sensitive areas.

Use of **temporary work bridges and barges to minimize our construction footprint** in sensitive areas as we construct replacement bridges and other permanent highway structures.

Ongoing consultation with Native American tribes, local governments, resource agencies and others to identify potential cultural resources, understand program activities, and develop appropriate mitigation steps where needed.

Surveys and inventories of historic homes, and preparation of nominations for listing in the National Register of Historic Places for Olmsted-designed parks and boulevards and the Montlake Historic District.



Where to learn more

Read more about how we're promoting environmental stewardship.

View an interactive map showing many of the SR 520 mitigation projects.

Read our complete Arboretum Mitigation Plan (pdf 2 mb) online.

Go to 520History.org to learn more about the early history of the communities along the SR 520 corridor and the later construction of the highway.

View our SR 520 Environmental Documents library, where you'll find environmental impact statements, mitigation reports, studies on water quality and fish, and more.

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SR 520 BRIDGE REPLACEMENT AND HOV PROGRAM

Improving bicycle and pedestrian connections throughout the SR 520 corridor

The Washington State Department of Transportation is committed to improving connectivity, access and safety in the SR 520 corridor for all users, including bicyclists and pedestrians. The SR 520 Bridge Replacement and HOV Program will create a safer and more reliable SR 520 from I-5 in Seattle to I-405 on the Eastside.

As part of these improvements, we are building a dedicated path for bicyclists and pedestrians. The path stretches across Lake Washington with access to existing local and regional trails.



Pedestrians and bicyclists enjoy the new SR 520 regional shared-use path now open from Bellevue to Lake Washington.



The regional shared-use path will offer bicyclists and pedestrians connections to Seattle trails when it reaches Montlake in 2017.

A scenic, nonmotorized way across Lake Washington

The new floating bridge and west approach bridge will include a separated 14-foot-wide bicycle and pedestrian path on the north side of the structures, connecting nonmotorized travelers to and from Seattle and the Eastside.

The cross-lake path includes belvederes on the floating bridge to provide scenic viewpoints and resting areas for bikers, joggers and walkers. Bicyclists and pedestrians don't pay a toll to cross the bridge.

Regional path's connections to existing trails

The new path will provide new recreation and commuting options for bicyclists and pedestrians throughout the SR 520 corridor.

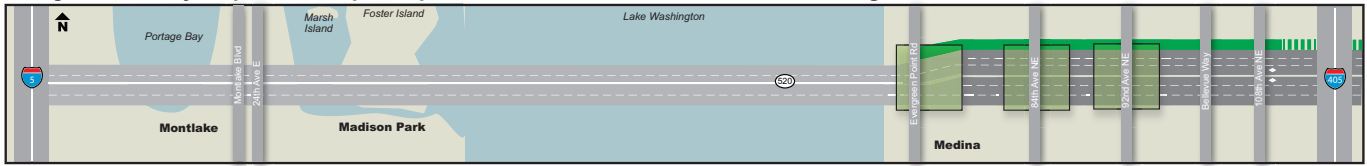
When fully built, the new bicycle and pedestrian path will connect to local and regional trails, including:

- Points Loop Trail
- Burke-Gilman Trail
- Washington Park Arboretum Waterfront Trail
- Bill Dawson Trail
- Existing SR 520 Trail east of I-405

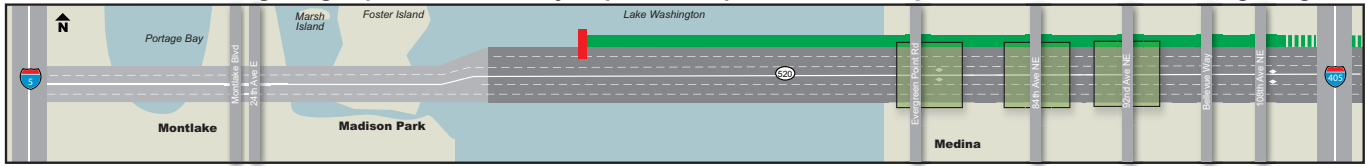
The path will also provide new connections to nearby transit hubs and regional institutions.

Opening the new bicycle/pedestrian path in phases

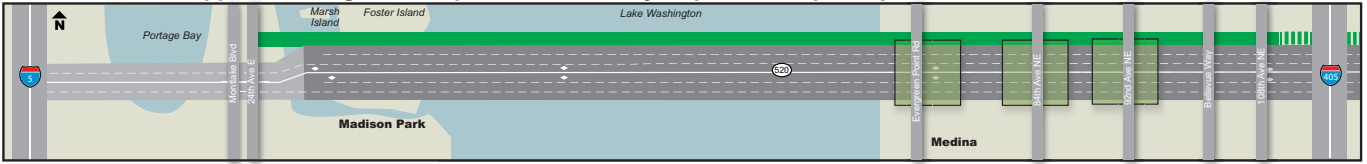
Early 2015: Bicycle/pedestrian path open from 108th Ave NE in Bellevue to Evergreen Point Rd in Medina



Summer 2016: Floating bridge open to traffic - Bicycle/pedestrian path extended only to the west end of the floating bridge

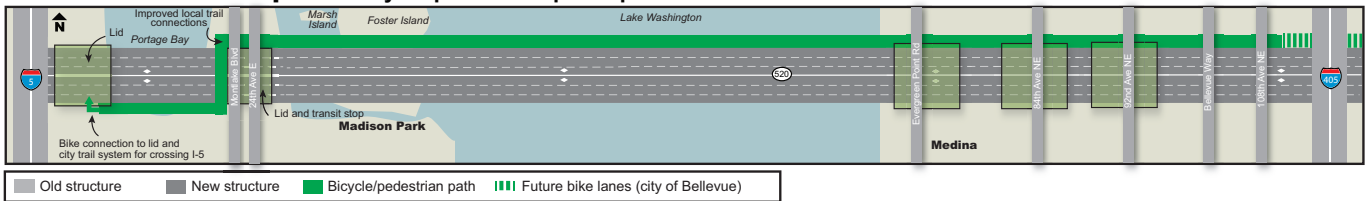


Fall 2017: West Approach Bridge North open to traffic - Bicycle/pedestrian path open to Montlake area



Note: WABN opens to vehicle traffic in summer 2017

With full corridor complete: Bicycle/pedestrian path open to Roanoke / I-5 area



Eastside regional bicycle / pedestrian path

In early 2015, WSDOT opened the first section of the new path – between Evergreen Point Road in Medina and 108th Avenue Northeast in Bellevue. WSDOT also partnered with the city of Bellevue to extend the path from 108th Avenue Northeast to the existing SR 520 trail east of I-405.

In summer 2016, WSDOT extended the path to the west end of the new floating bridge – as an out-and-back trail from Medina

West side regional bicycle / pedestrian path

When the West Approach Bridge North opens in 2017, the new regional path will extend from 108th Avenue Northeast in Bellevue, across Lake Washington, to the Montlake interchange in Seattle. The path will also connect to local trails in Seattle, such as the Burke-Gilman and the Washington Park Arboretum Waterfront Trail. Later, when the funded improvements from I-5 to Lake Washington are completed, the path will further extend from Montlake to I-5.

For more information:

Visit: wsdot.wa.gov/projects/sr520bridge

E-mail: sr520bridge@wsdot.wa.gov

Program info line: 206-770-3554
(program info/staffed 8 a.m. - 5 p.m.,
Mon-Fri)

Construction hot line: 206-708-4657
(24-hr hot line/for urgent issues)

Americans with Disabilities Act (ADA) Information: This material can be made available in an alternate format by emailing the Office of Equal Opportunity at wsdotada@wsdot.wa.gov or by calling toll free, 855-362-4ADA(4232). Persons who are deaf or hard of hearing may make a request by calling the Washington State Relay at 711.

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State v. Montlake, LLC, et al.
10004395
Appendix 3



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 FOR THE COUNTY OF KING**

STATE OF WASHINGTON,

 Petitioner,

vs.

Case No. 17-2-12389-7 SEA

MONTLAKE LLC, a
 Washington limited
 liability company,
 and STELTER MONTLAKE
 LLC, a Washington limited
 liability company, et al.,

Respondents.

VOLUME I OF II

MOTION FOR PUBLIC USE AND NECESSITY

HELD ON
 THURSDAY, AUGUST 11, 2017
 9:00 A.M.

BEFORE THE HONORABLE
 VERONICA ALICEA GALVAN, SUPERIOR COURT JUDGE

KING COUNTY COURTHOUSE
 516 THIRD AVENUE
 SEATTLE, WASHINGTON 98104

1 **THE WITNESS:** My name is Denise Cieri, D-
2 e-n-i-s-e C-i-e-r-i.

3 **DIRECT EXAMINATION**

4 **BY MR. PALAY:**

5 **Q. Good morning, Ms. Cieri. Would you please**
6 **tell the court how you are employed?**

7 A. I am employed by the Washington State
8 Department of Transportation.

9 **Q. In what capacity?**

10 A. I am the deputy administrator for the
11 State Route 520 program. I am also the -- that's
12 over the entire program. I am also the leader of
13 the Rest of the West project.

14 **Q. How long have you been the deputy**
15 **administrator for the State Route 520 program?**

16 A. About three years.

17 **Q. Before you came on board the SR 520**
18 **program, what were you doing?**

19 A. Before the State Route 520 program, I was
20 the deputy director for the State Route 405 program.
21 Prior to that, I worked in various offices and
22 departments in construction design, traffic, et
23 cetera.

24 **Q. How big is that previous program, the I-**
25 **405? What's the magnitude of that?**

1 **the Montlake Market?**

2 A. I do not believe the physical structure of
3 the market can be saved.

4 **Q. And why is that?**

5 A. Because of some of the various things that
6 we talked about today, such as the traffic shifts
7 that will be pushed over into the Montlake property
8 area.

9 **Q. Do you see any way around that?**

10 A. I do not see any way around that.

11 **Q. Is it possible the design builder may see
12 something that you don't see?**

13 A. It is possible. I'm not sure how. It's a
14 very tight, constrained urban area, but it's
15 possible, I suppose.

16 **Q. But you can't count on that possibility;
17 right?**

18 A. No. I have to provide enough right-of-way
19 to have a buildable project. Without this, I would
20 not consider this a buildable project to put out for
21 advertising.

22 **Q. Well, I'm going to ask you to engage in a
23 hypothetical with me for just a moment. Let's
24 assume that you don't get the Montlake properties.
25 You're the team leader for the Rest of the West.**

1 **What's the next step?**

2 A. The project stays on hold. I can't put a
3 project out that doesn't have a right-of-way to
4 build it.

5 **Q. There is no plan B?**

6 A. There is no plan B. I need this property.
7 If I don't have this property, I can't build this
8 project. The best I could hope for is to break it
9 up into pieces and build parts that I might be able
10 to build but this phase of the project as it stands
11 cannot be built without that property.

12 **Q. And what does that mean for the traveling**
13 **public?**

14 A. That means that the projects that
15 Connecting Washington, the legislature provided
16 funding for, cannot be built because all of those
17 improvements, the LID, cannot be built. All of the
18 trail improvements can't be built.

19 **MR. PALAY:** Thank you, Ma'am. That's all.

20 **THE COURT:** So I suggest that we recess
21 early. Come back at 1:15 instead of bifurcating
22 your examination. So we'll will -- it's the same
23 amount of time that we get. It doesn't change.

24 **MR. LUTZ:** Your Honor, just the one
25 question is we've got one day and we originally had

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MONTLAKE LLC; STELTER
MONTLAKE LLC; BTF
ENTERPRISES, INC.; T-MOBILE; and
MONTLAKE COMMUNITY CLUB,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

DECLARATION OF
DENISE CIERI, P.E., IN
SUPPORT OF STATE'S
MOTION TO
ACCELERATE REVIEW

DENISE CIERI, P.E. declares as follows:

1. I am the Deputy Program Administrator for the State Route (SR) 520 Bridge Replacement and HOV Program (Program) for the Washington State Department of Transportation (WSDOT). A part of the Program is the West Approach Bridge – South/Montlake Interchange Project (Project). I am over the age of eighteen and competent to testify to the facts stated in this declaration. The statements in this declaration are based on my personal knowledge.

2. I have worked for WSDOT for 29 years. I received a Bachelor of Science in Civil Engineering from the University of Washington in 1988. I am a registered professional civil engineer in the

state of Washington, having received my professional engineering license on July 23, 1993.

3. The Program is being reconstructed in phases. Some of these phases are complete, such as the replacement floating bridge, while other phases are in construction, such as the West Approach Bridge – North project. The next phase to begin construction will be the Montlake Phase, which includes the West Approach Bridge – South as well as replacement of the Montlake Interchange, referred to herein as the Project.

4. The Project is fully funded and WSDOT is proceeding in the procurement of a design-build contract. WSDOT needs to acquire the Montlake Property to continue construction of the Project.

5. Design-Build contract procurement is a two-step process. First, a Request for Qualifications is issued by WSDOT and from that a shortlist of proposers is approved. Second, a Request for Proposals is sent to the approved proposers soliciting their design-build bids. WSDOT estimates it to take three months for the Request for Qualifications step and seven months for the Request for Proposal step to be completed for a total expected time period of ten months to complete the design-build contracting process.

6. Before filing its condemnation petition in this case, WSDOT anticipated issuing the Request for Qualifications for the Project in

February 2017, and proceeding to issue the Request for Proposals in May 2017, with an expectation of awarding the design-build contract in December 2017.

7. When the trial court set a hearing for June 23, 2017, to determine public use and necessity for condemnation of the Montlake properties, WSDOT updated its Project timeline to anticipate the Request for Qualifications to be issued in August 2017, the Request for Proposals in November 2017, and the contract award in June 2018.

8. Due to a two-month delay in completing the hearing on public use and necessity, WSDOT again reset the Project timeline. I anticipate that the Request for Qualifications will be issued in October 2017, and the Request for Proposals in January 2018. Assuming that those steps are taken at those times, I expect that the contract to be awarded in August 2018.

9. Now that there is an appeal of the Superior Court's ruling on public use and necessity, WSDOT must again evaluate its risk profile moving forward to determine how best to maximize its limited resources to serve the state's transportation needs. Currently under consideration are two options described below.

10. One option is to delay the design-build contracting process yet again until all appeals are exhausted and the condemnation trial is set on

a certain date. With this option, WSDOT incurs escalation and delay impact cost risks as set forth below.

11. A second option is to start the design-build contracting process before all appeals are exhausted. With this option, an estimated date the property would be available to contractors for construction would be included in the Request for Proposals for bidders to evaluate when developing their proposals. This option would help mitigate escalation and delay impact risks. However, this option would place WSDOT at risk of incurring contractual delay damages if the property were not available to the contractor on the date given in the contract.

12. WSDOT has already incurred, and will continue to incur if further delays are realized, the following adverse impacts:

a. Cost escalation of market price for construction:

WSDOT uses a Construction Cost Index and other tools to forecast cost escalation as part of their program management processes. Analysis estimates that delay of the start of the Montlake Phase is expected to range between \$1.6 and \$3.6 million for a three month delay and between \$8.3 and \$18.5 million for a 12 month delay.

b. Program costs from delaying the Montlake Phase:

The remainder of the funded SR 520 Program follows in sequence after the construction of the Montlake Phase. The cost impact to the overall SR 520 program budget resulting from delay of the Montlake Phase is expected to range between \$2.5 and \$4.5 million per three months of delay.

c. Increased overhead costs to WSDOT:

WSDOT must incur overhead cost to carry staff scheduled to work on the contract procurement and administration for the Project during the delay to the Project experienced by this appeal. Program staff, which have been awaiting the start of construction, were expected to transition to the Project in early 2017. Because of the continued delays to the start of construction, WSDOT will be forced to bill this staff to the Project even though the Project has not been advertised for proposals. A project of this magnitude must have staff poised and ready for the start of construction. The expected cost to the public due to delays ranges from \$150-300 thousand per month.

13. This \$400 million Project has two major “work window” restrictions that drive the schedule: one for in-water work, and one for a 54-inch waterline relocation. Construction work associated with these restrictions, such as bridge construction and utility relocation, is only permitted during specific months of the year. Most of these work elements, or elements dependent upon them, are critical to the Project’s overall construction schedule. Therefore, any delay to planned award and execution of the contract will push work across these work windows and create a significant domino effect to the overall schedule. In addition, this domino effect will introduce added risk to the Design-Builder that will be reflected in their bids.

14. The in-water work window is an environmental permit condition. Construction of in-water work elements is not allowed between May and September. At this point in time, any further delay to the start of construction will delay in-water work from the 2018 window to the 2019 window. In turn, this will increase the overall duration of the Project and increase costs. The carrying costs (contractor overhead) on a \$400 million project average about \$3 million per month.

15. Seattle Public Utilities, owner of a 54-inch waterline that must be relocated deeper under SR 520, will only allow this major waterline to be shut down between October and March. Furthermore, once the line is

shutdown all waterline reconnection work must be completed within 90 days. Seattle Public Utilities is charging WSDOT a service impact fee of \$30,000 per day if work occurs outside of the allowed work window.

16. The waterline relocation is a first order of work for the Project and is critical to allow the construction of the 800-foot long lid over SR 520. Under the current schedule, WSDOT expects the 2019 work window to be available to the Design-Builder for completion of the 54-inch waterline relocation work. A delay of five months or more to the start of Project construction will delay the waterline work to 2020 and add at least a year to the project duration. The added contractor overhead costs for an additional year of construction on a \$400 million project is estimated at \$36-54 million.

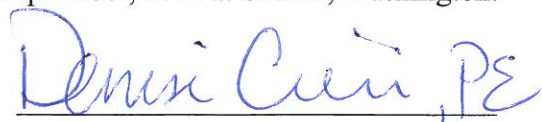
17. There are a large number of transportation related projects in the region due to recently enacted public funding initiatives. The State Legislature passed a \$16 billion transportation package in June 2015. Sound Transit recently passed a \$53.8 billion Sound Transit 3 program in 2016, which is on top of a current \$17.8 billion Sound Transit 2 program enacted in 2008. As reported in the Puget Sound Business Journal earlier this year, the number of private construction projects in the Seattle area has also skyrocketed, adding to the demand for construction contractors and labor. Marc Stiles, *There are two 'overheating' construction markets in the*

world — Seattle is one, report says, Puget Sound Business Journal, May 22, 2017. This demand is expected to push the bidding climate even further, adding to the cost impact of this project if further delays occur.

18. Delaying the procurement of the Project introduces risk of fewer proposers, fewer subcontractors available for proposers to draw from, resulting in higher bids. This is a direct result of the current high demand for construction and competitive bidding environment in the region. It is particularly the case for larger projects like the Montlake Phase. This fact is illustrated by WSDOT's State Construction Engineer reporting earlier this month to state legislators on the Joint Transportation Committee about WSDOT's data on bid environment trends. The data shows that the average number of bidders per project has decreased 55% over the last five years. Out of 56 projects so far in 2017, the average number of bidders per project has dropped to 2.5. The data also shows that, when compared to the WSDOT Engineer's estimate, bid prices have increased from 9.3% below the Engineer's estimate in 2016, to 9.8% above in 2017.

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19 day of September, 2017 at Seattle, Washington.


DENISE CIERI, P.E.

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

August 23, 2018 - 5:10 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Montlake, LLC, et al
Superior Court Case Number: 17-2-12389-7

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