No. 96179-4

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.

Petition for Review

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

APPENDICES

I. INTRODUCTION

This motion is narrowly about the condemnation and demolition of the beloved Montlake Market familiar to neighborhood residents, University of Washington students, and Husky fans. But it is more broadly about the many ways that the Washington State Department of Transportation (WSDOT) has overreached and acted unfairly toward the community, property owners and residents as it has attempted to address its own poor planning with respect to the $4.5 billion SR 520 bridge replacement project. The trial court and the Court of Appeals both labored mightily to rationalize WSDOT's overreaching and to rule with the haste that WSDOT demanded because of WSDOT's own delays. But in the process, the law has been distorted regarding the State Environmental Policy Act (SEPA), review of arbitrary and capricious agency action, and the right of property owners to appeal public use and necessity findings. This Court should review the following issues.

First, WSDOT said for years that it would not take the Montlake Market property and would protect it. When WSDOT abruptly changed its mind in 2016, it did not have the necessary environmental review to pursue its new, changed plans. WSDOT attempted to cover its changes by citing the overarching National Environmental Policy Act (NEPA) review for the entire project, even though SEPA clearly requires review of such changes.

The Court of Appeals let WSDOT avoid SEPA compliance with an incorrect and inappropriately expansive holding that the NEPA review discharged SEPA requirements. That holding conflicts with other decisions of the Court of Appeals, this Court, and the Washington Administrative Code (WAC). RAP 13.4(b)(1), (2), (4).

Second, the Court of Appeals' arbitrary and capricious review was inappropriately toothless and even expressly defanged as to key evidence of WSDOT's unfairness and arbitrariness. The Court of Appeals expressly rejected giving weight to the fact that WSDOT's flip-flop and acquisition decisions violated WSDOT's own policy manuals, and gave no weight to the flip-flop itself, which by its very nature is arbitrary unless adequately explained with good reasons. When agencies tell community residents one thing for many years regarding an important question, and then all of the sudden do a 180, courts appropriately demand a solid explanation of that U-turn. The Court of Appeals did not hold WSDOT to that standard, and instead crafted a new one unsupported by, and in conflict with, Washington case law. RAP 13.4(b)(1), (2).

Finally, Petitioners flag a related issue that it may soon warrant the Court's review, but for procedural reasons cannot be reviewed in the present motion. WSDOT has insisted throughout this appeal process that the property owners here must post a bond covering construction delays to

WSDOT caused by the property owners' exercise of their right to appeal the trial court's public use and necessity order. WSDOT sought nearly $30M as a bond, and the trial court imposed a $1M bond requirement without express factual findings. There should have been no requirement that the condemnees seek a stay at all, much less post a bond, because an order adjudicating public use and necessity is only final after an appeal. *State ex rel. Wash. v. Allerdice*, 101 Wn. App. 25, 31, 1 P.3d 595 (2000). WSDOT's bullying will deter other property owners from exercising their right of appeal. If this issue become ripe for review, Petitioners may seek this Court's review of the issue and move to consolidate review with this case.

II. IDENTITY OF PETITIONERS

Petitioners Montlake LLC and Stelter Montlake LLC own three parcels that WSDOT seeks to condemn and demolish for use as a general "project staging area." Petitioner BTF Enterprises, Inc. is a tenant of the parcels. Petitioner T-Mobile operates wireless facilities on the parcels. Collectively, this motion refers to the Petitioners as the "Market Owners."

III. COURT OF APPEALS DECISION

The Market Owners seek review of the decision in *State v. Montlake LLC, et al.*, No. 77359-3-I, 3 Wn. App. 2d 1045 (unpublished) (April 30, 2018) (attached as Appendix A).

IV. ISSUES PRESENTED FOR REVIEW

1. Does RCW 43.21C.150 broadly exempt a state agency from all SEPA requirements, including those contained in Chapter 197-11 WAC, where a NEPA environmental impact statement (NEPA EIS) has been prepared but the project thereafter changed substantially?

2. Does an agency's disregard of its own policy manuals constitute evidence of arbitrary and capricious conduct?

V. STATEMENT OF THE CASE

WSDOT's overall project to replace the SR 520 floating bridge is divided into several segments, the last of which is the Rest of the West Project (the "Project"), which involves the segment of SR 520 extending from the Montlake area to I-5. *Montlake LLC*, slip op. at 2. As part of the Project, WSDOT seeks to condemn three separate, contiguous lots. *Id.* at 3. These three properties, referred to as the "Montlake Properties," are a small commercial district at the southwest corner of Montlake Boulevard and SR 520, north of Roanoke. *Id.* A gas station occupies one lot, the second lot is the home of the Montlake Market, and the third is a vacant parking lot next to the Market. *Id.* T-Mobile operates wireless facilities located at the Market that provide vital wireless service to the neighborhood, which would otherwise be a dead zone.

WSDOT's original plan was to avoid impacting these properties. In 2011, the Federal Highway Administration (FHWA) and WSDOT completed an environmental impact statement for the Project under NEPA. *Id.* at 3. Of the various alternatives considered for the Project, the NEPA EIS's "Preferred Alternative" minimized environmental and neighborhood impacts and almost fully protected the Market and the Gas Station. None of the options analyzed in the 2011 environmental impact statement ever considered taking, demolishing, and closing the Market, or using the Montlake Properties for general project staging.

But in 2016, WSDOT suddenly flip-flopped. It decided instead to condemn the Montlake Properties, demolish the Market, displace all occupants, and use the properties for 10 years of general project staging. CP 2784-87. It did not, however, undertake any additional environmental review before so choosing, let alone prepare a new or supplemental environmental impact statement. In other words, WSDOT used an environmental analysis based on *avoiding* the Montlake Properties to justify *demolishing* them.

When the Market Owners learned that WSDOT now desired to condemn and demolish the Montlake Properties, they asked the agency to undertake a supplemental environmental review. Members of the Montlake community also protested, and WSDOT officials publicly backtracked,

stating that although they were still intending to acquire the Montlake Properties, they would not close the Montlake Market or use the Montlake Properties for general construction staging for the Project.

In October 2016, WSDOT purportedly analyzed the environmental impact of its changed plans. *Montlake LLC*, slip op. at 3-4. But that "reevaluation" did *not* address either demolition of the Montlake Market or the use of the Market Properties for general project staging. *See id.* at 8. And throughout November and December of 2016, WSDOT personnel continued to insist in news interviews and public meetings WSDOT's intention to keep the Market open and that it would not use the Montlake Properties for general project staging. *Id.* at 19.

In April 2017, with only pro forma Market Owner input and no further public meetings other than the Owners' presentation under RCW 8.25.290, WSDOT advised the Market Owners that they were condemning the Montlake Properties. But at that point, WSDOT's last public pronouncements were that (1) it did not need to demolish the Market, (2) it wanted to be the Market's landlord, and (3) it did not intend to use the properties for general project staging. In May 2017, WSDOT filed its condemnation petition and motion for an order of public use and necessity. *Id.* at 4. The Market Owners opposed the motion, and requested discovery and a hearing, joined by co-condemnee T-Mobile and the Montlake

Community Club, which intervened. Among the Market Owners' objections was WSDOT's plan to condemn but become the Market's landlord.

Two months after filing the case, WSDOT delivered responses to the Market Owners' written discovery. Those responses included for the first time demonstratives and related documents purporting to show the need to demolish the Market and use the Montlake Properties for "temporary lane shifts," a "potential" (but highly unlikely) sewer line relocation, and other temporary purposes. WSDOT now abandoned its attempt to defend the story that it would preserve the Market structure but work to become the Market's landlord or that it would not use the properties for general construction staging. WSDOT had conducted no further environmental review past the October 2016 reevaluation, which evaluated neither scenario nor possible alternatives.

In September 2017, after several motions and a 2-day hearing, the Superior Court granted WSDOT's motion for an order of public use and necessity to take all three parcels. CP 3474-89. The Market Owners appealed.

On appeal, the Market Owners argued that WSDOT failed to satisfy SEPA's requirements because it failed to perform supplemental environmental analysis of the environmental impacts of demolishing the

Montlake Properties and using them as a staging area, and possible alternatives. But in its opinion, the Court of Appeals held that "the trial court correctly decided that SEPA did not apply to WSDOT's [public use and necessity] motion." *Montlake LLC*, slip op. at 13. The court reasoned that RCW 43.21C.135[1] [*sic*]

> allows an agency that prepares an "adequate detailed statement" that satisfies NEPA to use it in lieu of the [environmental impact statement] that SEPA requires and exempts the agency from satisfying SEPA's requirements.[] This means that a project does not need a SEPA [environmental impact statement] when it has an [environmental impact statement] that satisfies NEPA.

Montlake LLC, slip op. at 12.

The Court of Appeals also held that WSDOT's failure to follow its own manuals did not play a role in the court's arbitrary and capricious analysis. The Court of Appeals reasoned that because WSDOT "did not formulate its policies in the Guidebook in response to legislative delegation," the policies do not have the force of law. *Montlake LLC*, slip

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[1] That citation is undoubtedly in error. RCW 43.21C.**135** refers to the authority of local governmental units to adopt rules, guidelines, etc., by reference. The Market Owners believe the Court of Appeals meant to reference RCW 43.21C.**150**, which sets out when an agency may rely on a NEPA adequate detailed statement (aka EIS) to satisfy SEPA, and that the reference the Court of Appeals' citation to RCW 43.21C.135 is a typographical error.

op. at 11. Therefore, the failure of WSDOT to follow its own manuals "does not undermine the trial court's findings." *Id.*

The Market Owners filed a motion for reconsideration. Appendix B. The Court of Appeals denied reconsideration. Appendix C.

From the beginning of this appeal, WSDOT used strong-arm tactics to dissuade the Market Owners from exercising their right to appeal. The Market Owners filed a timely appeal of the trial court's order granting WSDOT's motion for an order of public use and necessity. While the appeal was pending, WSDOT moved under CR 26(b) to compel entry onto the Montlake Properties to perform 16 days of invasive valuation testing of the properties it now considered its own, even though Washington condemnation law is clear that an order of public use and necessity is not final if appellate review is sought.

The Market Owners filed a notice of a supersedeas stay pursuant to RAP 8.1 and posted a $5,000 bond. WSDOT responded by arguing that the bond should be between $12.7M and $26.4M as compensation for alleged "delays" caused by the Market Owners' exercise of their right of appeal. Without factual findings, the trial court ordered the Market Owners to post an additional $1 million bond. Appendix D.

The Owners appealed the imposition of a $1 million bond and the Court of Appeals assigned a different appellate number to the bond appeal

(77644-4-I) than this "main" action (77359-3-I). After the Court of Appeals' decision in the main action, the Commissioner dismissed the Owners' bond appeal as moot. The Market Owners filed a motion to modify the Commissioner's ruling, arguing that the issues are not moot, especially because the appeal in the main action is ongoing while the Market Owners seek this Court's review. Appendix E. The motion to modify is currently pending.

VI. ARGUMENT

SEPA is not simply a mirror of NEPA. Unlike NEPA, SEPA guarantees that "each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 41.21C.020(3). To that end, the Washington Supreme Court has held that "[t]he comprehensive review envisioned by SEPA is to be 'detailed' and does not invite a lackadaisical approach." *Eastlake Cmty. Council v. Roanake Associates, Inc.*, 82 Wn.2d 475, 494, 513 P.2d 36 (1973).

A. The Court of Appeals' broad holding that SEPA does not apply to this case is legally incorrect and in conflict with Division II's decision in *Boss*, Chapter 197-11 WAC, and this Court's decision in *Brannan*

The Court of Appeals, like the trial court, took the sort of lackadaisical approach that this Court warned against in *Eastlake Cmty. Council*. It failed to interpret SEPA in a way that both preserves the

legislative intent in RCW 41.21C.150 *and* the requirements and intent of administrative regulations in Chapter 197-11 WAC. Instead, its overbroad and summary holding creates conflict where there is none, thereby displacing rules such as WAC 197-11-600, -610, and -630.

RCW 43.21C.030(2)(c) directs that all branches and state agencies *shall*:

> Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
> (i) the environmental impact of the proposed action;
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (iii) alternatives to the proposed action;
> …

RCW 43.21C.030(2)(c). In 1974, in order to reduce duplicative reports, the legislature enacted RCW 43.21C.150. LAWS of 1973-1974, 1974 1st ex. sess., ch. 179, § 12; *Boss v. Wash. State Dep't of Transp.*, 113 Wn. App. 543, 551, 54 P.3d 207 (2002). This statute makes the requirements of RCW 43.21C.030(2)(c) inapplicable in certain circumstances:

> The requirements of RCW 43.21C.030(2)(c) pertaining to the preparation of a detailed statement by branches of government shall not apply when an ***adequate*** detailed statement has been previously prepared pursuant to the national environmental policy act of 1969, in which event said prepared statement ***may*** be utilized in lieu of a

> separately prepared statement under RCW 43.21C.030(2)(c).

RCW 43.21C.150 (emphasis added).

For purposes of this case, the two bolded, italicized words above are most significant. RCW 43.21C.150 does not exist in a vacuum. Pursuant to RCW 43.21C.110, the Department of Ecology promulgated specific procedural and substantive rules that control the discretion of state agencies in the adoption of NEPA environmental impact statements and other federal environmental documents to satisfy the requirements under SEPA. These administrative rules require that an agency "may" adopt any environmental analysis prepared under NEPA "by following WAC 197-11-600 and 197-11-630." WAC 197-11-610(1). For example, before an agency adopts a NEPA environmental analysis, such as an environmental impact statement, the state agency must "independently review the content of the document and determine that it meets the adopting agency's environmental review standards[.]" WAC 197-11-630(1).

There are other substantive requirements in adopting a NEPA environmental impact statement. The agency "shall use an environmental document unchanged, except [in specified circumstances]" WAC 197-11-600(3). And for environmental impact statements specifically (including those promulgated under NEPA that an agency may wish to rely upon

under RCW 43.21C.150), an agency must perform a supplemental environmental impact statement if there are "substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts," or "[n]ew information indicating a proposal's significant adverse environmental impacts," which include discovery of misrepresentation or lack of material disclosure. WAC 197-11-600(3)(b)(i)-(ii) and (4)(d)(i)-(ii).

The Court of Appeals opinion falters on both these procedural and substantive requirements. WSDOT's current proposal—which now seeks to condemn to demolish the Market and Properties and use them for general construction staging—presents an obvious substantial change to the 2011 NEPA environmental impact statement and the 2016 reevaluation. Those changes are "likely to have significant adverse environmental impacts," WAC 197-11-600(3)(b)(i), and are also plainly "[n]ew information indicating a proposal's probably significant adverse environmental impact." WAC 197-11-600(3)(b)(ii). But the Court of Appeals could not be more clear in the broadness of its holding: "This means that a project does not need a SEPA [environmental impact statement] when it has an [environmental impact statement] that satisfies NEPA." Slip op. at 12. Such a broad holding reads administrative rules such as WAC 197-11-600, -610, and -630 out of existence.

The Court of Appeals opinion also conflicts with prior case law which *does* recognize the requirements of Chapter 197-11 WAC, and that NEPA works *with* SEPA and does not displace it. S*ee Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 319, 230 P.3d 190 (2010) ("NEPA [is to] work in conjunction with analogous state laws[.]"). In *Boss*, the Court of Appeals similarly held that *generally* a NEPA environmental impact statement may serve as a substitute for a state agency's separate SEPA environmental impact statement. *Boss*, 113 Wn. App. at 552. *Boss* also addressed the "critical question, whether DOT must comply with SEPA regulatory requirements for the adoption of a NEPA [environmental impact statement] before it may utilize the [environmental impact statement]?" *Id.* at 553. *Boss* holds that the answer is yes. *Id.* at 554. But in *Boss*, "there apparently is no dispute that DOT used the [environmental impact statement] unchanged," and therefore further discussion on the requirements of Chapter 197-11 WAC was unnecessary under the facts of that case. *Id.* The Court of Appeals holding here directly conflicts with *Boss* because if fails to recognize the important requirements of Chapter 197-11 WAC.

The Court of Appeals overbroad holding reads important procedural and substantive requirements in Chapter 197-11 WAC out of existence, blithely equals SEPA to NEPA, creates a conflict with Division

II's holding in *Boss*, and permits WSDOT to act to condemn before it has a legally adequate environmental review of its changed proposal, which flip flops from protecting and avoiding all three parcels to taking them and using them for 10 years of general construction staging.

Not only does the Court of Appeals undermine the vitality of Chapter 197-11 WAC and *Boss*, it also conflicts with the precedent of this Court in *Brannan* that an agency must demonstrate it has given due consideration of the environmental impacts of its condemnation decision. *State v. Brannan*, 85 Wn.2d 64, 68, 530 P.2d 322 (1975). Here, WSDOT has not only failed to give due consideration to those environmental issues; it has studiously avoided the required analysis, aided and abetted by the courts below, in hurried response to WSDOT's demands to "avoid delay." These issues warrant this Court's review under RAP 13.4(b)(1),(2), and (4).

B. The Court of Appeals failed to consider WSDOT's disregard of its own policies as evidence of arbitrary and capricious conduct

The Court of Appeals failed to adequately consider WSDOT's disregard of its own policy manuals as evidence of arbitrary and capricious conduct. Instead, the Court of Appeals held that only "policies in response to legislative delegation" that have the force of law may be

considered in an arbitrary and capricious analysis. That is both legally incorrect and makes the Court of Appeals' entire analysis suspect.

The Market Owners allege that WSDOT's condemnation decision is arbitrary and capricious, and that WSDOT's disregard of both its Design-Build Guidebook and its Right of Way Manual is evidence of this arbitrary and capricious conduct (and provides additional evidence of such misbehavior). The Court of Appeals, however, dismissed the evidence outright. It concluded that because these manuals were not "equivalent to liability-creating administrative rules," they do not have the force of law. *Montlake LLC,* slip op. at 11, 19. And because they do not have the force of law, WSDOT's failure to follow these manuals cannot prove that its decision was arbitrary and capricious. *Id.* at 19. In other words, by a simple syllogism the Court of Appeals held that *only* manuals and other documents that "have the force of law" may support a finding of arbitrary and capricious conduct if an agency ignores them.

The Court of Appeals either confused or wished to conflate two different issues. Violating manuals with the force of law would obviously break the law. But even if the manuals don't have the force of law, not following them is at least *evidence* of arbitrariness. The Court of Appeals does not cite a single case otherwise. Deviation from policies and manuals—and more generally, the inconsistency and flip-flopping that it

demonstrates—may support a finding of arbitrary and capricious conduct. *See Esses Daman Family LLC v. Pollution Control Hearings Bd.*, 200 Wn. App. 1021, 2017 WL 3476785 at *7 (August 14, 2017) (unpublished and nonbinding) (misapplication of the agency's manual considered evidence of arbitrary and capricious conduct). Federal law holds similarly. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) ("[A]n agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so."); *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) ("[u]nexplained inconsistency is…a reason for holding an interpretation to be an arbitrary and capricious change from agency practice…").

The Court of Appeals essentially threw out consideration of WSOT's violation of its policies and manuals because they do not have the force of law. That was legally incorrect. This Court should take review to clarify the correct standard—when agencies ignore their own policies and manuals, that deviation can be evidence of arbitrary and capricious conduct.

C. The trial court improperly imposed an oppressive supersedeas bond for "delay" costs that prevents property owners from exercising their right to appeal

Finally, the Market Owners flag an issue of substantial public interest which, although not immediately ripe for review, may warrant this Court's review soon. Even though this issue arises from the same facts as the issues above, the procedural peculiarity caused by assigning a different appellate case number prevents the Market Owners' from seeking review in this motion while a motion to modify is pending at the Court of Appeals. If this issue does become ripe, the Market Owners may seek this Court's review and move to consolidate these appeals.

Washington law is clear: an order of public use and necessity is not final until the appeal is exhausted. *Allerdice,* 101 Wn. App. at 31. The condemnation proceeding itself moves in a gated, step-by-step process of three judgments, each "a condition precedent to the entry of the subsequent judgment." *Pub. Util. Dist. No. 1 of Chelan Cty. v. Wash. Water Power Co.*, 43 Wn.2d 639, 641, 262 P.2d 976 (1953). In this way, condemnation decisions are not like normal civil litigation where a prevailing party holds the rights to the property during appeal. Right now, and until (1) this appeal is exhausted, (2) if this appeal is unsuccessful, a trial is held to determine just compensation, *and* (3) WSDOT deposits that money into the trial court's registry, the Market Properties are the property of the Market Owners, not WSDOT.

And yet, at WSDOT's insistence, the trial court imposed a $1M supersedeas bond upon the Market Owners for exercising their right to appeal. The trial court's order compelling the Market Owners' submission to more than 2 weeks of uncompensated, invasive valuation testing under CR 26 is contrary to Washington law and is a clear taking in violation of Wash. Const. art. I, § 16. *See, e.g., Tapio Inv. Co. I v. State*, 196 Wn. App. 528, 539-40, 384 P.3d 600 (2016); *Manuf. Housing Communities of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000) (compensation must *first* be made before a taking). The supersedeas bond here also improperly requires the Market Owners to post a $1M bond to preserve *their own property rights*—rights that under Washington law are still theirs. *See Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016) (supersedeas bonds designed to maintain status quo). The status quo during an appeal is that the property remains with the property owners, not the State.

At least equally troubling is WSDOT's position on the supersedeas bond issue. It requested that the trial court require a bond of nearly $30M to cover alleged "delays" to WSDOT's Project "caused" by the Market Owners' exercise of their right to appeal. It seeks to stifle property owners that challenge agency misconduct by demanding that they post punitive supersedeas bonds. WSDOT's actions will have a chilling effect on future

property owners considering exercise of their right of appeal. When ripe, the Market Owners may seek review of this bond issue and consolidate it with the issues on review in this motion.

VII. CONCLUSION

WSDOT used a NEPA environmental impact statement based on *avoiding* the Montlake Properties to justify *demolishing* them under SEPA. It clearly did not give "adequate consideration" of the environmental impacts of demolishing the Montlake Properties, as it must under *Brannan*. How could it? It's 2011 NEPA environmental impact statement and reevaluation did not even consider demolishing the Properties. *See Montlake LLC*, slip op. at 8. WSDOT also ignored its own policy manuals. And when the Market Owners appealed, WSDOT sought a punitive supersedeas bond designed to force them to back down.

The Court of Appeals sanctioned all of this. In doing so, it has mangled Washington environmental and condemnation law and crafted a new and unprecedented standard of review for arbitrary and capricious conduct. Although the opinion is unpublished, the changes to GR 14.1 allowing limited use of unpublished opinions all but guarantee that the Court of Appeals' holding will affect future cases. The Montlake Owners respectfully request that this Court grant its Motion for Discretionary Review.

RESPECTFULLY SUBMITTED this 9th day of August 2018.

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Appendix A

to

Motion for Discretionary Review to the Washington State Supreme Court

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 HOV[1] 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

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[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

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[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

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[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;

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[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

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[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.

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]

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[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

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[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 NEPA[27] and the sufficiency of the FEIS was not at

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[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

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[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.

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[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

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[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 County[39] to support its claim that

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[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

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[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 redelegated 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

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[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).

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

Leach, J.

WE CONCUR:

Spearman, J.

Appelwick, J.

Appendix B

to

Motion for Discretionary Review to the Washington State Supreme Court

No. 77359-3-I

COURT OF APPEALS
DIVISION I
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.

MONTLAKE LLC, STELTER MONTLAKE LLC, AND BTF ENTERPRISES, INC. MOTION FOR RECONSIDERATION AND MOTION TO SUPPLEMENT OR STAY THE MANDATE OR VACATE PENDING FURTHER DISCOVERY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

WASHINGTON CONSTITUTION

TABLE OF AUTHORITIES
(continued)

PAGE(S)

STATUTES

RULES

REGULATIONS

TABLE OF AUTHORITIES
(continued)

PAGE(S)

OTHER AUTHORITIES

I. IDENTITY OF THE MOVING PARTY

Appellants Montlake LLC, Stelter Montlake LLC, and BTF Enterprises, Inc. (collectively, the "Market Owners") seek the relief requested in Part II, Statement of Relief Sought.

II. STATEMENT OF RELIEF SOUGHT

Under the Rules of Appellate Procedure ("RAP") 1.2, 9.11, 12.2, 17.1, and 18.8, the Market Owners request that the Court admit additional evidence, or alternatively, stay the issuance of the mandate, or vacate the Court's April 30, 2018, decision ("Opinion") and remand the case to the trial court for further discovery and fact-finding, because of three new developments, all of which arose after oral argument on February 22:

1. The Legislature directed WSDOT (a) "to ensure to the maximum extent practicable that the building housing any grocery store or market currently located on parcel number 1-23190 will be preserved,"[1] and (b) to reach out to the City of Seattle (the "City"), "strongly encourage[ing]" the City to "utilize maximum flexibility in how the department meets the city's requirements and to be an equal partner in efforts to preserve any grocery store or market on parcel number 1-23190."

[1] Parcel number "1-23190" is WSDOT's designation for the real property upon which the Montlake Market sits.

2. Following that Legislative directive, WSDOT and the City started discussions regarding changes to the project requirements that could preserve the Montlake Market ("Market").

3. WSDOT announced that the Federal Highway Administration ("FHWA") and WSDOT are preparing a new, second "reevaluation" to assess the environmental impacts of demolishing the Market. WSDOT's additional environmental review with the FHWA is not complete, nor are project requirement reassessment discussions between WSDOT and the City.

Any final determination of public necessity should be informed by the additional, legislatively-mandated review and WSDOT's additional environmental review. Those processes could significantly alter any conclusion that taking the Market property and demolishing the Market structure is necessary and without significant environmental effect.

In addition, or in the alternative, the Market Owners respectfully ask the Court, under RAP 12.4, to reconsider the following elements of its Opinion:

1. The Court overbroadly held that an agency that prepares a NEPA environmental impact statement ("EIS") is exempt from SEPA's requirements. Op. at 12-13. That misstates SEPA, SEPA regulations, and case law.

NEPA does not preempt SEPA. RCW 43.21C.150 provides that an agency with SEPA obligations may use an "adequate detailed statement" (meaning an EIS) prepared under NEPA in lieu of a "separately prepared" SEPA EIS. But the "SEPA Rules" (SEPA regulations promulgated under RCW 43.21C.110, and set forth in Chapter 197-11 WAC) provide specific rules WSDOT must follow to assess whether to exercise its discretion to rely upon a NEPA EIS. Those regulations, and in particular, WAC 197-11-600 and -610 (neither of which are addressed in the Opinion), prohibit reliance on a NEPA EIS if a project changes substantially or there is new information about project impacts not assessed in the NEPA EIS (unless supplemental environmental analysis is performed). WAC 197-11-630 governs the process for adoption of a NEPA EIS or other documentation for SEPA purposes, with or without supplementation as appropriate, which the Opinion does not address either. The Market Owners made these arguments at pages 31, 33-36, and 39-40 of their opening brief, and pages 6-7 and 9-11 of their reply brief.

2. The Opinion did not analyze whether WSDOT's failure to follow (a) its own publicly-available policies, including the Design-Build Guidebook and the Right-of-Way Manual, and (b) legislative mandates imposed upon WSDOT, are evidence that WSDOT's decision to condemn was arbitrary and capricious, as argued by the Market Owners at pages 26-

30 and 35 of their opening brief, and pages 7-8 of their reply brief. The Court's holding that the Guidebook and Manual are internal policies that do not have the effect of law, and that the legislative mandates do not provide a basis for a private right of action (Op. at 17-21), does not address the *arbitrariness* of an agency failing to follow its own policies and legislative mandates. This Court has held in at least one prior unpublished decision that an agency's failure to comply with its own manuals is evidence of arbitrary and capricious conduct, and the same should be true where WSDOT fails to comply with legislative mandates that conflict with its takings justifications.

3. The Opinion did not address the Market Owners' motion for discretionary review of the trial court's order compelling discovery while this appeal of right was pending, including the trial court's unprecedented requirement that the Market Owners post a $1 million bond as a security *for their own property*, nor did the Court consider the Market Owners' motion for an emergency stay of that order pending the outcome of the appeal. Following the Court's Opinion, the Commissioner dismissed these issues as moot. The Market Owners will file a motion to modify the Commissioner's decision with this Court, and request that the Court address the issues presented in the forthcoming motion to modify in one decision as an aspect of the Court's final decision on this appeal.

III. STATEMENT OF THE GROUNDS FOR RELIEF

A. Developments Since Oral Argument Warrant a Stay or Consideration of Additional Facts

There have been three developments since oral argument. First, the Legislature's 2018 appropriations bill requires WSDOT to work to preserve the Market building to the maximum extent practicable and work with the City to avoid taking the Market. Second, that process is underway, and may eliminate WSDOT's claimed need to take the Market or related property rights. Third, WSDOT is preparing a new environmental reevaluation with FHWA analyzing, *post hoc*, the environmental impacts of WSDOT's decision to condemn and demolish the Market.

1. The Legislature passed a bill in March requiring WSDOT to work with the City to avoid the Market, and discussions are pending

On March 9, 2018, the Legislature passed Engrossed Substitute Senate Bill 6106. Section 306, Clause 33 of the bill expressly directs WSDOT to work to preserve the Market:

> (33) For the SR 520 Seattle Corridor Improvements – West End project (M00400R), the legislature recognizes the department must acquire the entirety of parcel number 1-23190 for construction of the project. ***The department shall work*** *with its design-build contractor* ***to ensure to the maximum extent practicable that the building housing any grocery store or market currently located on parcel number 1-23190 will be preserved.*** The legislature

> recognizes the city of Seattle has requirements in the project area that the department must address and that those requirements may affect the use of parcel number 1-23190 and may affect the ability of the department to preserve any grocery store or market currently located on the property. The department shall meet and confer regularly with residents in the vicinity of the parcel regarding the status of the project and its effects on any grocery store or market currently located on the property. ***The legislature strongly encourages the city to utilize maximum flexibility in how the department meets the city's requirements and to be an equal partner in efforts to preserve any grocery store or market on parcel number 1-23190***.

See Decl. of R. Gerard Lutz ("Lutz Decl."), Exh. A (emphasis added).

Following the Legislature's directive, WSDOT and the City are currently evaluating how the project can proceed without taking the Market structure and keep the Market viable. In a March 16, 2018, letter to the City, WSDOT requested that the parties meet "urgently" to discuss the matter:

> Several of the technical requirements provided by the City have a direct impact on any ability to preserve the Montlake Market building. . . . [I]t is imperative that WSDOT and the city of Seattle meet as soon as possible to discuss these technical requirements in light of the recent provision. We are asking for your support in making your staff available for a two-hour workshop.

Id., Exh. B. The Market Owners understand that WSDOT and the City will be evaluating options for preserving the Market as the design-build process moves forward.

These negotiations undercut the basis by which the trial court found public use and necessity, which this Court affirmed, because they demonstrate that WSDOT may not actually need to condemn and demolish the Market after all. WSDOT's letter shows that the easing of several of the City's "technical requirements" would allow the Market to remain, such as Montlake Boulevard "lane shifts" for waterline replacement and concrete repaving, and for temporary bike and pedestrian paths, which the Court identified as justifications for taking the Market. Op. at 14-20. If the City's requirements can be modified, WSDOT's request for an order of public use and necessity to condemn, at least the Market, may become moot.

2. WSDOT is preparing another reevaluation to assess the environmental impacts of demolishing the Market

In addition to the Legislature's mandate that WSDOT try to find a way save the Market, WSDOT disclosed that it and the FHWA are preparing a new, second NEPA "reevaluation" to assess the environmental impacts of closing and demolishing the Market. WSDOT revealed to the Market Owners that the new reevaluation is being prepared for the first time on March 26, 2018, in WSDOT's answers to interrogatories in

related litigation.[2] Lutz Decl., Exh. C (see interrogatory responses 11, 14 and 16). WSDOT informed the Market Owners that the new reevaluation is anticipated to be released soon, *id.*, Exh. D (email from D. Cade and D. Palay seeking information regarding new reevaluation), and would be submitted by WSDOT and FHWA to the court in the pending matter *Montlake Community Club v. Daniel Mathis, et al.*, No. 2:17-ev-01780-JCC (W.D. Wash.), together with a second "administrative record" pertaining to the new reevaluation.

Preparation of this new, second reevaluation appears to be an admission by WSDOT and the FHWA that the environmental impacts of demolishing the Market have not yet been fully analyzed. Under NEPA, a reevaluation is only required if there are substantial changes to the project, there are new circumstances and environmental conditions that may affect the project, or a new alternative is selected. 24 C.F.R. § 58.47. Those criteria are similar to WAC 197-11-600 and -610, and RCW 43.21C.150 does not address WSDOT's ability to rely on a NEPA re-evaluation outside the WAC adoption procedures set forth in the SEPA Rules, particularly WAC 197-11-610 and -630. WSDOT's decision to take the Market was made after the FHWA/WSDOT 2016 Reevaluation. The work

[2] *BTF Enterprises, Inc., et al. v. City of Seattle and WSDOT*, City of Seattle Office of Hearing Examiner, No. W-18-001.

WSDOT claimed at trial that requires condemning the Market—justifications the Legislature has since demanded reassessment of, as discussed above—were also substantial changes to the project that was evaluated in the 2016 Reevaluation. Thus (at a minimum), a new reevaluation was warranted, and has finally been undertaken.[3] Based on the record, WSDOT would not volunteer to conduct a reevaluation if not required by applicable law.

WSDOT's admission that it did not adequately analyze the project's environmental impacts prior to deciding to condemn the Market contradicts the Court's Opinion in several places:

- "The Trial Court Adequately Assessed the Environmental Impact of the Project." Op. at 7.
- "WSDOT's consideration of the environmental impacts of both condemning the Properties and of the entire project support the trial court's findings that WSDOT considered the adverse impacts." Op. at 9-10.
- The Court affirmed the trial court's finding that "WSDOT fully considered the adverse impacts to Montlake

[3] The Market Owners believe a Supplemental EIS ("SEIS") is warranted, and that if WSDOT follows the requirements of the SEPA Rules, a SEIS will ultimately be required.

neighborhood residents upon closure of the Montlake Market." Op. at 9.

WSDOT's new reevaluation undercuts the trial court's and this Court's NEPA, SEPA, and *Brannan* findings. As the Market Owners argued and as WSDOT has now conceded by the new environmental review on one of the central questions in the condemnation, WSDOT did not fairly consider the environmental impacts of condemning and demolishing the Market before or during the condemnation process.

B. This Court Should Stay the Mandate or Permit Consideration of the New Evidence

Where new evidence directly relevant to the issues in a case is discovered or revealed during an appeal, RAP 9.11(a) authorizes the Court to "direct that additional evidence on the merits of the case be taken before the decision of a case on review." *See Sackett v. Santilli*, 101 Wn. App. 128, 135-36, 5 P.3d 11 (2000), *aff'd*, 146 Wn.2d 498, 47 P.3d 948 (2002) ("RAP 9.11 allows an appellate court to take additional evidence if, among other requisite factors, additional proof of facts would fairly resolve the issues on review and if additional evidence would probably change the decision."). The requirements of RAP 9.11 may also be waived "if the new evidence would serve the ends of justice." *Spokane Airports v.*

RMA, Inc., 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009). Under RAP 9.11, an appellate court may accept new evidence if:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a). In *Washington Federation of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 665 P.2d 1337 (1983) (en banc), the Court granted a motion to allow additional evidence on review where the evidence was relevant to the issues before the Court and "was created after initiation of this lawsuit and in anticipation of oral argument before the en banc court." *Id.* at 885.

The circumstances giving rise to the Market Owners' request for additional evidentiary process arose after oral argument and raise new questions directly relevant to the necessity and propriety of WSDOT's condemnation of the Market. Therefore, authorizing supplementation of the record or remanding the case for receipt and consideration of

additional evidence is appropriate under RAP 9.11. Any final determination of the necessity or environmental effects of taking the property and demolishing the Market should await the Legislature's requirement that WSDOT reassess the necessity, and WSDOT's own conclusion that further environmental review is required.[4]

First, as summarized above, WSDOT is reassessing the necessity of taking the Market under express legislative mandate, and WSDOT has also determined that additional environmental review of the impacts of Market demolition is required. These changed circumstances are directly relevant to the issues on review; either of the assessments could lead to a determination (as the Legislature has directed WSDOT) that the Market need not be taken and demolished after all. Second, if the City agrees to modify its technical requirements, that increases the likelihood that condemnation of the Market is not needed, and could moot that aspect of

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[4] This request is within the scope of WSDOT's authority, as described in its Design-Build Guidebook, which allows WSDOT to wait to select land for condemnation until *after* a design-builder has been selected, and after that design-builder has determined its needs for the project. Guidebook, Ex. 201 at 36. The Market Owners proposed to WSDOT that it wait to condemn the properties until a design-builder is selected, with instruction to the design-builder to attempt to avoid the properties; if the design-builder determined that this is not possible, the Market Owners would not oppose the use or necessity of taking the properties. Letter to WSDOT, Ex. 244. Awaiting the results of the design-build process before finalizing the scope of WSDOT's taking is also most consistent with the requirements of the Washington Constitution, Art. I, Sec. 16 (Amd. 9). *E.g.*, *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 P. 1064 (1923).

WSDOT's claim. Third, the Market Owners could not have presented this evidence to the trial court or at oral argument, because it did not yet exist, and is still ongoing. Fourth, if the mandate is issued under RAP 12.5, the trial court will move to the next stage of the eminent domain proceeding, which is just compensation. Moving on to just compensation is not warranted when the Legislature and WSDOT have reopened the conclusion of necessity. The Market Owners might be able to obtain relief through a CR 60 motion, but it is more fair and efficient for the current proceedings to pause to allow the second reevaluation to be completed and WSDOT's work and City negotiations about saving the Market to be completed before a final decision on public use and necessity is reached and a mandate is issued. Fifth, a new trial on the use and necessity phase after the final just compensation trial, if not precluded, would be contrary to the statutory scheme, inefficient for all parties, and would only serve to delay resolution of these central issues further. An order providing for the trial court or this Court to take and consider this new evidence is consistent with the interests of all parties in a fair and efficient process. Finally, it would be inequitable for the Court to decide this case based solely on the existing record, without considering the new evidence, because these new developments could fundamentally change the facts the

trial court relied on to find public use and necessity in the first place, and may ultimately moot at least part of WSDOT's case.

The Market Owners believe the most equitable, straightforward solution and efficient use of judicial resources is to allow the ongoing developments to run their course before issuing the mandate, or to permit consideration of the new evidence. The Court should stay the mandate or vacate its decision dated April 30, 2018, and issue a remand under RAP 9.11(b) so the trial court can "take additional evidence and to make factual findings based on that evidence." *See State v. Jones*, 183 Wn.2d 327, 336-37, 352 P.3d 776 (2015) (remanding for a RAP 9.11 evidentiary hearing).

C. The Market Owners Request Reconsideration of the Opinion

The Market Owners respectfully ask the Court to reconsider three issues: (1) the Court's determination that SEPA is inapplicable to the project because a NEPA EIS was prepared; (2) that WSDOT's failure to follow its own manuals or legislative mandates (even if not providing a private cause of action) is evidence of arbitrariness; and (3) upon receipt of the Market Owners' motion to modify the Court Commissioner's dismissal of two related appeals (due on or before June 2, 2018), that the Court incorporate into its Opinion analysis of the propriety of the trial court's continued exercise of jurisdiction, entry of discretionary orders, and imposition of a $1 million supersedeas bond on the Market Owner's

stay of trial court proceedings during this appeal, as security for speculative costs associated with WSDOT's inability to use and occupy the properties, without the consent of the Market Owners or prior compensation.

1. SEPA and the SEPA Rules of Chapter 197-11 WAC apply even when a NEPA EIS has been prepared

The Market Owners request reconsideration of the Court's determination that an agency is exempt from SEPA when a NEPA EIS has been prepared. Op. at 12. That conclusion is contrary to law and is bad policy. A Washington agency may rely on a NEPA EIS under RCW 43.21C.150 in lieu of preparing a SEPA EIS (under RCW 43.21C.303(2)(c)) in certain circumstances. WAC 197-11-610 ("An agency may adopt a NEPA EIS as a substitute for preparing a SEPA EIS…."). But such adoption is constrained both procedurally and substantively by other SEPA Rules, namely WAC 197-11-600, -610 and -630. WSDOT's use of a NEPA EIS in this case, without additional analysis, violates those regulations.

WAC 197-11-600 authorizes WSDOT to use a NEPA EIS unchanged *unless* there are "[s]ubstantial changes to the proposal so that the proposal is likely to have significant adverse environmental impacts," or there is "[n]ew information indicating a proposal's probable significant

adverse environmental impacts" including "discovery of misrepresentation or lack of material disclosure." WAC 197-11-600(3)(b). More generally, WAC 197-11-610 provides the specific process for WSDOT to use NEPA documents in general (not just an EIS as authorized by RCW 43.21C.150, but reevaluations, findings of no significant impact, etc.). But WAC 197-11-610 requires an assessment and adoption process under WAC 197-11-600 and -630 *before* WSDOT can do so. WSDOT's decision is then subject to review under SEPA, for compliance with SEPA and the SEPA Rules, and need not be filed in federal court challenging the adequacy of the federal decision under NEPA or naming the federal agency as a necessary party.[5] *In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 831, 832 (2011); *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 319, 230 P.3d 190 (2010).

Functionally, the Opinion holds that NEPA preempts SEPA whenever a NEPA document is available to WSDOT. Again, that is

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[5] While the regulations require the formal adoption of NEPA documents, a 2002 case relieved WSDOT of the obligation to comply with SEPA's adoption requirements. *Boss v. Wash. State Dep't of Transp.*, 113 Wn. App. 543, 546 (2002). But *Boss* affirmed the need to satisfy the requirements of WAC 197-11-600 (relating to when adoption may occur) and -630 (relating to the process of adoption). *Id.* at 553 ("an agency must satisfy the requirements of WAC 197-11-600 and WAC 197-11-630…."). In its Opinion in this case, the Court said that *Boss* "exempts the agency from satisfying SEPA's requirements." Op. at 12. That misstates the law and the holding of *Boss*.

contrary to established Washington law. "NEPA [is to] work in conjunction with analogous state laws," such as SEPA. *Magnolia Neighborhood Planning Council*, 155 Wn. App. at 319. The Opinion misapprehends the SEPA process and rules governing use of a NEPA EIS when the project has changed, and in so doing, compounds the trial court's mistakes. The trial court stated that "SEPA is inapplicable to this project." If that were true, then an agency would have *no obligations* under WAC 197-11-600, -610 or -630 whenever it used a NEPA EIS. That is not the law. The requirements of SEPA apply (with limited exceptions spelled out expressly in the SEPA Rules themselves), even if a NEPA document is used as a substitute for an agency's preparation of its own analysis. Those provisions serve as an important safeguard when a state agency considers using NEPA documentation to satisfy SEPA, helping ensure that flawed or stale NEPA analysis do not preempt SEPA's procedural and substantive requirements.

The Court's NEPA holding is also bad policy. Washington's environmental protections are often more stringent than those of the federal government. If the federal government were to become lax in its application of NEPA processes—and federal agencies' regulatory conduct can vary dramatically between successive administrations—SEPA still mandates that Washington state agencies thoroughly evaluate the

environmental impacts of state projects under Washington law. *E.g.*, RCW 43.21C.020.

In its Opinion, the Court observed (and to some extent speculated) that WSDOT and the FHWA did not issue a supplemental EIS because the project changes would not result in significant environmental impacts. Op. at 4. But the Court did not address the fact that WSDOT *has* changed the project, and SEPA has binding obligations when projects change. The wisdom of the processes outlined in the SEPA Rules is demonstrated by the fact that WSDOT now believes that the project changes to demolish the Market are in fact significant enough to merit additional environmental review, as described above.

2. Ignoring policy manuals and legislative mandates is evidence of arbitrary and capricious conduct

The Court should reconsider the Opinion's treatment of the Market Owners' argument about the role of WSDOT's Design-Build Guidebook and Right-of-Way Manual. The Opinion focused on whether the Guidebook and the Manual had the force of law, concluding that they did not because they had not been adopted as regulations under the Administrative Procedures Act. Op. at 11, 19. But even if the Guidebook and Manual do not have the force of law, failure to follow them is evidence of arbitrary and capricious conduct. The manuals are intended to

guide the agency toward reasonable, predictable actions and outcomes. Deviating from the reasonable, predictable path is evidence of arbitrariness. And it bears repeating, there is no evidence WSDOT considered its Right of Way Manual, and Ms. Cieri acknowledged WSDOT did not consider the Design Build Guidebook. RP 267-69; Cieri Dep., Ex. 248 at 177.

This Court has previously held that an agency's manual, while not binding law, must be complied with, and the failure to do so amounts to arbitrary and capricious conduct. *Esses Daman Family, LLC v. Pollution Control Hearings Bd.*, 200 Wn. App. 1021 (2017) (unpublished and nonbinding). In *Esses*, the Pollution Control Hearings Board (the "Board") reviewed permit applications for logging. To determine whether to grant the permits, the Board reviewed standards provided in a manual created by the Department of Natural Resources governing forestry management. The manual provided details not included in the applicable statutes or regulations but did not have the force of law. *Id.* at 4. Nonetheless, when the Board misinterpreted and misapplied the manual, this Court held that such misapplication is arbitrary and capricious, requiring remand to the Board. *Id.* at 7. The Board was instructed to correctly apply the manual's requirements according to its plain meaning. *Id.*

Here, the Court agreed that WSDOT did not follow the Guidebook. Op. at 11. That should be considered evidence of arbitrary and capricious conduct. The Market Owners respectfully ask the Court to reconsider the impact of WSDOT's failure to follow its Guidebook and Manual, and determine that the agency's failure is evidence of arbitrary and capricious conduct.

Further, WSDOT's violation of legislative mandates is evidence that WSDOT acted arbitrarily and capriciously. The Opinion held that none of the legislative mandates cited by the Market Owners (RCW 47.01.380, .390, and .405) create private causes of action. Op. at 20. But even if the Market Owners cannot separately sue WSDOT to enforce those mandates, WSDOT's condemnation decision should be judged considering whether WSDOT's actions conform to, or ignore, those mandates. This Court has jurisdiction to determine whether WSDOT's attempted condemnation "violates the clear dictates of law." Those statutes are the clear dictates of law, and WSDOT's disregard of those dictates is relevant to the question of whether its actions were arbitrary and capricious. The Market Owners respectfully ask this Court to reconsider whether WSDOT's violation of the legislative mandates in RCW 47.01.380, .390, and .405 is evidence of arbitrary and capricious conduct or violation of clear dictates of law, even if there is no private

cause of action for private citizens to enforce those mandates in a separate lawsuit.

3. The Court should address the stay and bond issues

In related case No. 77644-4-I, the Market Owners sought discretionary review of an order by the trial court compelling the Market Owners to submit to WSDOT's request for invasive subsurface drilling, during the Market Owner's appeal of the trial court's OAPU. The trial court's order authorized WSDOT to use the properties for over two weeks without permission or compensation, closing fuel islands, staging equipment, and taking soil samples (which the Market Owners challenged as exceeding the bounds of permissible discovery and an unconstitutional taking). The Market Owners also appealed the trial court's order granting a supersedeas stay to stop the drilling but imposing an exorbitant bond of $1 million, based on WSDOT's contention that the Market Owners are liable for SR 520 project delay costs for exercising their constitutional and statutory appeal rights.

On January 19, 2018, Commissioner Neel heard oral argument, and at the hearing indicated that only this Court could rule on the bond requirement. Lutz, Decl. Exh. E. On February 21, 2018, the Commissioner stayed a determination of both issues, pending this Court's decision on OAPU. On May 2, 2018, the Commissioner lifted the stay and dismissed

the issues as moot because of the Court's OAPU decision. That was an error. The Market Owners intend to file a motion to modify the Commissioner's order pursuant to RAP 17.7 on or before June 1, 2018, and request that this Court include its response to that motion in the Court's decision on the Market Owners request for reconsideration of the Opinion.

Appeal of a trial court's entry of an OAPU should suspend the trial court's jurisdiction during its pendency, without the necessity that a property owner obtain a stay in order to appeal, and it absolutely should not require a bond, much less a $1 million bond to cover purported delays in a highway project due to the exercise of constitutional rights protecting property owners. A holding by this Court that protects property owners in those respects would prevent that chaos that ensued in this appeal from happening again.

IV. CONCLUSION

Appellants Montlake LLC, Stelter Montlake LLC, and BTF Enterprises respectfully request that the Court stay the mandate or vacate and remand to the trial court to address the evidentiary developments. The Appellants also respectfully request that the Court reconsider its Opinion to accurately describe the relationship between NEPA and SEPA, to hold that an agency's disregard for its guidance manuals and legislative

mandates is arbitrary and capricious, and to address the bond and stay issues.

RESPECTFULLY SUBMITTED this 21st day of May 2018.

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No. 77359-3-I

COURT OF APPEALS
DIVISION I
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.

DECLARATION OF R. GERARD LUTZ IN SUPPORT OF MOTION FOR RECONSIDERATION AND MOTION TO SUPPLEMENT OR STAY THE MANDATE OR VACATE PENDING FURTHER DISCOVERY

I, R. Gerard Lutz, do hereby affirm and declare as follows:

1. I am an attorney representing Montlake LLC and Stelter Montlake LLC in this case, and I make this declaration based on my personal knowledge, public records, and on the files and records in this case. I am over eighteen years of age and am competent to testify herein.

2. Attached as Exhibit A is a true and correct copy of relevant excerpts of Engrossed Substitute Senate Bill 6106, Section 306, Clause 33.

3. Attached as Exhibit B is a true and correct copy of a letter dated March 16, 2018, from Denise Cieri, Administrator of the SR 520 Bridge Replacement and HOV Program, WSDOT, to Goran Sparrman, Interim Director, Seattle Department of Transportation, and Mami Hara, General Manager/CEO, Seattle Public Utilities.

4. Attached as Exhibit C is a true and correct copy of WSDOT's answers to interrogatories in the matter *BTF Enterprises, Inc., et al. v. City of Seattle and WSDOT*, City of Seattle Office of Hearing Examiner, No. W-18-001, dated March 26, 2018.

5. Attached as Exhibit D is a true and correct copy of an email exchange dated May 9-18, 2018, from counsel for WSDOT, Deborah Cade and David Palay, to David Bricklin, counsel for Montlake Community Club, regarding WSDOT's new environmental reevaluation.

6. Attached as Exhibit E is an excerpted transcript of the hearing in the matter No. 77644-4, on January 19, 2018, before Commissioner Mary Neel, with the relevant portions highlighted (page 7:13-24).

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

Signed this 21st day of May 2018, at Bellevue, Washington.

s/ R. Gerard Lutz
R. Gerard Lutz

EXHIBIT A

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE SENATE BILL 6106

Chapter 297, Laws of 2018

(partial veto)

65th Legislature
2018 Regular Session

TRANSPORTATION BUDGET--SUPPLEMENTAL

EFFECTIVE DATE: March 27, 2018

Passed by the Senate March 8, 2018
Yeas 47 Nays 1

CYRUS HABIB

President of the Senate

Passed by the House March 7, 2018
Yeas 96 Nays 1

FRANK CHOPP

Speaker of the House of Representatives

Approved March 27, 2018 3:16 PM with the exception of Sections 208(19), 207(8), 208(1), 208(22), 208(25), 208(26), 208(28), 208(29), 208(30), and 212(3) which are vetoed.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Brad Hendrickson, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE SENATE BILL 6106** as passed by Senate and the House of Representatives on the dates hereon set forth.

BRAD HENDRICKSON

Secretary

FILED

March 29, 2018

Secretary of State
State of Washington

(31) Within existing resources, the department shall implement a safety solution after evaluating barrier and mitigation options on state route number 167 between the intersections with 50th Ave E and E 40th Street in Pierce county to prevent vehicles from leaving the roadway and entering private property below the grade of the highway.

(32) $350,000 of the motor vehicle account—state appropriation is provided solely for implementation of chapter 288 (Substitute Senate Bill No. 5806), Laws of 2017 (I-5 Columbia river bridge), listed as Replacement Bridge on Interstate 5 across the Columbia River project number (L2000259).

(33) For the SR 520 Seattle Corridor Improvements – West End project (M00400R), the legislature recognizes the department must acquire the entirety of parcel number 1-23190 for construction of the project. The department shall work with its design-build contractor to ensure to the maximum extent practicable that the building housing any grocery store or market currently located on parcel number 1-23190 will be preserved. The legislature recognizes the city of Seattle has requirements in the project area that the department must address and that those requirements may affect the use of parcel number 1-23190 and may affect the ability of the department to preserve any grocery store or market currently located on the property. The department shall meet and confer regularly with residents in the vicinity of the parcel regarding the status of the project and its effects on any grocery store or market currently located on the property. The legislature strongly encourages the city to utilize maximum flexibility in how the department meets the city's requirements and to be an equal partner in efforts to preserve any grocery store or market on parcel number 1-23190.

Sec. 307. 2017 c 313 s 307 (uncodified) is amended to read as follows:

FOR THE DEPARTMENT OF TRANSPORTATION—PRESERVATION—PROGRAM P

Recreational Vehicle Account—State Appropriation . . . ((~~$2,480,000~~)) $3,584,000

High-Occupancy Toll Lanes Operations Account—State Appropriation. $161,000

Transportation Partnership Account—State Appropriation . . . . . ((~~$204,000~~)) $12,785,000

EXHIBIT B

Washington State Department of Transportation

SR 520 Bridge Replacement and HOV Program
999 3rd Avenue, Ste. 2200, MS: NB82-99
Seattle, WA 98104
206-770-3500 / Fax: 206-770-3569
TTY: 1-800-833-6388
www.wsdot.wa.gov

March 16, 2018 LTR 2823

Via email

Mr. Goran Sparrman, Interim Director
Seattle Department of Transportation
700 5th Avenue, Suite 3800
Seattle, WA 98104

Ms. Mami Hara, General Manager/CEO
Seattle Public Utilities
700 5th Avenue, P.O. Box 34108
Seattle, WA 98124

Dear Goran and Mami,

I am writing to the Seattle Department of Transportation (SDOT) and Seattle Public Utilities (SPU) regarding recent legislation that includes a proviso regarding the Montlake Market building and city of Seattle requirements in the SR 520 Montlake Phase project area. This legislation is the supplemental transportation budget (2017 – 2019) Engrossed Substitute Senate Bill (ESSB) 6106, which was passed by the Washington State Legislature on March 8, 2018. The proviso regarding the Montlake Market building can be found in Section 306, (33), on page 69 of the bill, and reads as follows:

> *(33) For the SR 520 Seattle Corridor Improvements – West End project (M00400R), the legislature recognizes the department must acquire the entirety of parcel number 1-23190 for construction of the project. The department shall work with its design-build contractor to ensure to the maximum extent practicable that the building housing any grocery store or market currently located on parcel number 1-23190 will be preserved. The legislature recognizes the city of Seattle has requirements in the project area that the department must address and that those requirements may affect the use of parcel number 1-23190 and may affect the ability of the department to preserve any grocery store or market currently located on the property. The department shall meet and confer regularly with residents in the vicinity of the parcel regarding the status of the project and its effects on any grocery story or market currently located on the property. The legislature strongly encourages the city to utilize maximum flexibility in how the department meets the city's requirements and to be an equal partner in efforts to preserve any grocery store or market on parcel number 1-23190.*

As you know, the Montlake Phase is the next phase of the SR 520 Program, which the city of Seattle has been a key partner in the planning and design of since the Translake Washington Study in 1997. More recently, since 2016, the Washington State Department of Transportation (WSDOT) and city staff have been working closely together to develop the technical requirements for the Montlake Phase design-build contract that are necessary to achieve the design intent we established together over many years of stakeholder coordination and public input. This includes technical requirements for project elements to be operated and/or maintained by the city of Seattle, which were provided to WSDOT by city staff. These technical requirements are included in the Montlake Phase Request for Proposals (RFP), which

was released on February 28, 2018. Since the published deadline for submittal of proposals is August 9, 2018, we must incorporate any changes to the current technical requirements no later than June 2018.

Several of the technical requirements provided by the City have a direct impact on any ability to preserve the Montlake Market building. For example, some of these technical requirements include, among others:

- Full replacement of the 54-inch water line within the SR 520 right-of-way *(found in RFP Chapter 2, Section 2.10.4.4.2)*
- Lane closure times, durations and restrictions for local streets *(found in RFP Chapter 2, Section 2.22)*
- Sidewalk widths and street trees along E. Montlake Pl. E. *(found in RFP Chapter 2, Section 2.11.4.1.1)*
- Pedestrian/bicycle detour requirements during construction *(found in RFP Chapter 2, Section 2.22.4.2.5)*
- Pavement type requirements for Montlake Blvd. E., E. Montlake Pl. E., and E. Roanoke St. *(found in RFP Chapter 2, Section 2.7.3.2.4)*

As the project is currently advertised for construction with proposals due this summer, it is imperative that WSDOT and the city of Seattle meet as soon as possible to discuss these technical requirements in light of the recent proviso. We are asking for your support in making your staff available for a two-hour workshop. I have asked Todd Harrison to coordinate with your staff to ensure their participation in this workshop. Below are a few dates and times that we are available to meet:

- Monday, April 2, between 8:00 – 11:00 a.m., or from 2:00 – 4:00 p.m.
- Tuesday, April 3, from 8:00 – 10:00 a.m.
- Wednesday, April 4, from 1:00 – 3:00 p.m., or from 2:00 – 4:00 p.m.
- Thursday, April 5, from 1:00 – 3:00 p.m., or from 2:00 – 4:00 p.m.
- Friday, April 6, from 10:00 a.m. – 12:00 p.m., or from 1:00 – 3:00 p.m.

Again, I want to stress the importance of facilitating a meeting to address this matter as quickly as possible in order to minimize any potential impacts to the Project schedule. Thank you for your continued partnership and recognition of the urgency of this request.

Sincerely,

for

Denise Cieri, PE
Administrator
SR 520 Bridge Replacement and HOV Program
Washington State Department of Transportation

Cc:
Shefali Ranganathan, Deputy Seattle Mayor
Rob Johnson, Seattle City Councilmember
Jonathan Layzer, Director of Regional and Interagency Programs, SDOT
Golnaz Camarda, Interagency Program Manager, SDOT
Gavin Patterson, Major Interagency Projects Section Manager, SPU
Calvin Chow, Seattle City Council Central Staff
Roger Millar, Secretary of Transportation, WSDOT
Keith Metcalf, Deputy Secretary of Transportation, WSDOT
Kevin Dayton, Assistant Secretary, Regional and Mega Programs, WSDOT
Ron Judd, Director of Policy and Strategy Development, WSDOT
Julie Meredith, Deputy Assistant Secretary of Mega Projects, WSDOT
Allison Camden, Director of Governmental Relations, WSDOT
Bryce Brown, Assistant Attorney General, Washington State Office of the Attorney General
David Palay, Assistant Attorney General, Washington State Office of the Attorney General
Deborah Cade, Assistant Attorney General, Washington State Office of the Attorney General
Dave Becher, SR 520 Construction Manager, WSDOT
Todd Harrison, SR 520 Program Deputy Engineering Manager, WSDOT

EXHIBIT C

OFFICE OF THE HEARING EXAMINER
FOR THE CITY OF SEATTLE

BTF ENTERPRISES, INC., a Washington corporation, MONTLAKE LLC, a Washington limited liability company, and STELTER MONTLAKE LLC, a Washington limited liability company, MONTLAKE COMMUNITY CLUB, and MARIO BIANCHI AND ELIZABETH BIANCHI, husband and wife, Appellants, v. CITY OF SEATTLE, through its DEPARTMENT OF TRANSPORTATION, Respondent, and WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Intervenor.	No. W-18-001 OBJECTIONS AND RESPONSES TO APPELLANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS Site Addresses SR 520 Medina to I-5 Montlake Blvd. And 2625 E. Montlake Pl. E. and 2605 22nd Ave. E, Seattle, WA 98122; King County Parcel Nos. 8805901070, 8805901085 and 8805901090

INSTRUCTIONS

1. These discovery requests are to be answered separately and fully, in writing and under oath, within thirty (30) days of the date of service on you.

Perkins Coie LLP
The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

2. Please produce documents responsive to the requests for production in single page Group 4, 300 DPI, TIFF format, and named according to the unique production number followed by the extension "TIF". The TIFF images should be accompanied by an Opticon format image registration file that includes a first page "Y" flag to identify the logical document breaks. Produce documents with the following metadata fields, subject to the exceptions noted parenthetically:

Metadata from Emails:

Email Subject (not to be produced for documents that are redacted)

Email Author

Email Recipient(s)

Email Received Date

Email Sent Date

Custodian

Metadata from Electronic Files:

File Name (not to be produced for documents that are redacted)

File Author

File Created Date

File Access Date

File Modification Date

Custodian

Metadata for all Documents that Contain an Attachment:

Production Number Begin

Production Number End

Production Attachment Range Number Begin

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The PSE Building
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Phone: 425.635.1400
Fax: 425.635.2400

Production Attachment Range Number End

In addition, you should either identify the particular request for production to which each document is responsive or, alternatively, produce documents in the same manner as you keep them in the ordinary course of business. Unless otherwise agreed with counsel for Appellants, you are to produce responsive documents and other tangible things that are within your possession, custody or control, at the offices of Perkins Coie LLP, 10885 NE Fourth Street, Suite 700, Bellevue, Washington 98004 within thirty (30) days of the date of service of these discovery requests.

3. If you object to answering any of these discovery requests, or withhold documents from production in response to the requests for production, in whole or in part, state your objections and/or reasons for not responding and/or producing and state all factual and legal justifications that you believe support your objection or failure to answer or to produce. If you object to answering only part of a discovery request, specify the part to which you object and respond to the remainder.

4. If you deem any discovery request to call for privileged information or documents, and assert privilege in order to avoid divulging the information or producing the documents for which you claim privilege, provide a list with respect to each item of information or each document withheld based on a claim of privilege, stating:

a. Description of allegedly privileged communication or document withheld;

b. Persons present during or participating in allegedly privileged;

communication, or author(s) and recipient(s) of document withheld;

c. Date of allegedly privileged communication or document withheld;

d. Subject matter of allegedly privileged communication or document withheld;

e. Type of document withheld (e.g., letter, memorandum or computer database);

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f. Nature of privilege(s) claimed; and

g. the paragraph(s) of these discovery requests to which the allegedly privileged communication or document relates.

5. Please seasonably and promptly supplement your responses to all of these discovery requests as this action continues, to the full extent required by CR 26(e).

DEFINITIONS

As used in the interrogatories and requests for production set forth below, the following terms have the meanings described below:

1. "NTMP" or the "Final Traffic Plan" means the Final Neighborhood Traffic Management Plan SR 520 Montlake Phase Update issued by the Seattle Department of Transportation and dated December 2017.

2. The "Market" means the Montlake Market, located at 2605 22nd Ave. E., Seattle, WA 98112.

3. The "Gas Station" means the gas station located at 2625 E. Montlake Pl., Seattle, WA 98112.

4. The "Project" means the Montlake Phase of the SR 520 Bridge Replacement and HOV Program, covering the area from the west high rise of the Evergreen Point Floating Bridge to I-5, which Program is also known as the "Rest of the West".

5. "SDOT" means the City of Seattle Department of Transportation.

6. "WSDOT" means the Washington State Department of Transportation

7. "Identify," when used with respect to a person, means to state with respect to each such person:

a) Name;

b) Last known residence address and telephone number;

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c) Occupation, employer and business address and telephone number at the date of the event or transaction to which the discovery request refers;

d) If different than "c", present occupation, employer, business address and telephone number; and

e) Last known email address(es).

8. "Identify," when used with respect to a fact or event, means to:

a) Describe the fact or event with reasonable particularity;

b) Identify each person believed to have knowledge with respect to the fact or event; and

c) Identify each document that refers or relates to the fact or event.

9. "Identify," when used with respect to a document, means to describe the document with sufficient particularity so as to provide the basis for a motion to compel production pursuant to CR 37. In lieu of identifying a document in this manner, it will be sufficient to produce copies of the document.

10. "Communication" means any exchange or transmission of words or ideas to another person or entity, whether accomplished person to person, by telephone, in writing, via electronic mail, via social media or through another medium, and shall include, without limitation, discussions, conversations, negotiations, conferences, meetings, speeches, memoranda, letters, correspondence, notes, blogs, postings, and statements or questions.

11. "Document" means, without limitation, all tangible preservations of information, including writings, recordings, and photographs, along with all documents or electronically stored information, information preserved on computers, and any non-identical copies (whether different from the originals because of notes made on such copies, because such copies were sent to different individuals, or for any other reason) and drafts.

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12. "You," "your" or any similar word or phrase includes each individual or entity responding to these interrogatories and requests for production and, where applicable, each subsidiary, parent or affiliated entity of each such person or entity and all persons acting on its or their behalf.

13. "Person" means a natural person and, without limitation, firms, partnerships, corporations, associations, unincorporated associations, organizations, businesses, trusts, public entities, parent companies, subsidiaries, divisions, departments or other units thereof, and/or any other type of legal entity.

14. "Concerning," "reflecting," "regarding," and "related to" mean, in whole or in part, reflecting, regarding, related to, relating to, in connection with, involving, supporting, addressing, analyzing, constituting, containing, commenting on, discussing, describing, identifying, referring to, reporting on, stating, dealing with, or in any way pertaining to.

15. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and requests for production all information and documents that might otherwise be construed to be outside of its scope.

16. The singular includes the plural and vice versa. The masculine includes the feminine and neuter genders. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

17. Unless otherwise specified or clearly required by the context of a particular discovery request, the time period of these interrogatories and requests for production is from January 1, 2016, until the date of your written response.

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GENERAL OBJECTIONS

1) WSDOT objects generally to Respondents' prefatory instructions and definitions, to the extent they purport to require more than the civil rules for discovery. WSDOT neither agrees nor stipulates to the preceding definitions and procedures. All responses below are given without waiving this general objection, and are made pursuant to Civil Rule (CR) 26(g).

2) To the extent that any discovery request requires documents to be identified with information other than that which would enable Respondents to ascertain the nature of the documents specified, WSDOT objects to that request on the grounds that it is overbroad, unduly burdensome, and oppressive.

3) WSDOT specifically objects to identification of privileged and work-product documents related to this litigation and prepared by or for counsel in anticipation of litigation, including documents prepared by or for WSDOT's counsel of record or by or for consulting firms and experts including, without limitation: correspondence and other communications between WSDOT and counsel; factual and legal notes or memoranda prepared by or for counsel; attorney's notes, outlines, research, summaries, and similar documents, including documents reflecting pre-lawsuit investigation; legal or factual memoranda concerning WSDOT or Plaintiffs or the subject matter involved in this litigation; and other similar documents prepared by or for counsel, at the request of or for the use of counsel, or which reflect counsel's work product.

4) Each of these general objections shall be incorporated into each of the responses to these discovery requests, which responses are made without waiver of any of these general objections.

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INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons who answered, supplied information for answers, or otherwise assisted in preparing answers to these interrogatories, including, for each, the interrogatories that he or she answered, supplied information for, or assisted in answering.

ANSWER: Objection. To the extent this request asks for private residence information, that information is private and not calculated to lead to admissible evidence. Notwithstanding these objections, the following information is provided:

Joseph Basile
Communications consultant
EnviroIssues
999 3rd Avenue
Seattle, WA 98104
(206) 770-9640
basilej@consultant.wsdot.wa.gov

W.D. Baldwin
SR 520 Traffic Discipline Manager
HDR Inc.
999 3rd Avenue
Seattle, WA 98104
(206) 770-3615
WD.Baldwin@hdrinc.com
BaldwiW@consultant.wsdot.wa.gov

Todd Harrison
SR 520 Deputy Program Engineering Manager
HDR Inc.
999 3rd Avenue
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Suryata Halim
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Dawn Yankauskas
SR 520 Engineering Manager
Washington State Department of Transportation
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INTERROGATORY NO. 2: Identify each person at WSDOT responsible for development of the NTMP.

ANSWER:

W.D. Baldwin
SR 520 Traffic Discipline Manager
HDR Inc.
999 3rd Avenue
Seattle, WA 98104
(206) 770-3615
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Joseph Basile
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Todd Harrison
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Suryata Halim
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Kristin Sandstrom
SR 520 Deputy Communications Manager
EnviroIssues
999 3rd Avenue
Seattle, WA 98104
(206) 770-3538
sandstk@consultant.wsdot.wa.gov

INTERROGATORY NO. 3: Identify each person at WSDOT responsible for the Montlake Bld. Design, including without limitation the combined sewer overflow and the design requirement to repave Montlake Blvd. in concrete.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving this objection, WSDOT has provided all WSDOT documents relating to the NTMP as well as the identification of the individuals who participated in preparation of the NTMP.

INTERROGATORY NO. 4: Identify each person at WSDOT who analyzed whether the Project requires temporary pedestrian/bike lane(s) immediately adjacent to the temporary road during temporary relocation of Montlake Blvd. for concrete repaving.

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ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving this objection, WSDOT has provided all WSDOT documents relating to the NTMP, as well as the identification of the individuals who participated in preparation of the NTMP.

INTERROGATORY NO. 5: Describe any WSDOT consideration of alternative locations for temporary pedestrian/bike lanes during such temporary road relocation that would not require demolition of the Market, such as routing the pedestrian/bike lane to the west of the Market and the Roanoke Greenways Project.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*,

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No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving these objections, WSDOT has provided all WSDOT documents relating to the NTMP.

INTERROGATORY NO. 6: Identify any communications from WSDOT personnel to SDOT personnel describing or explaining that temporary relocation of Montlake Blvd. to accomplish concrete repaving required demolition of the northwest corner of the Market building.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake,* No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving these objections, WSDOT has provided all WSDOT documents relating to the NTMP.

INTERROGATORY NO. 7: Identify any WSDOT analysis of whether the water line relocation requires a work area so large as to require temporary relocation of Montlake Blvd. that in turn requires demolition of the northwest corner of the Market building.

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ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving these objections, WSDOT has provided all WSDOT documents relating to the NTMP.

INTERROGATORY NO. 8: Identify any WSDOT analysis of alternatives to the road relocation described in the previous interrogatory that might avoid or minimize relocation of Montlake Blvd., including without limitation the use of urban area jack-boring techniques to minimize the work area required for water line relocation, maintaining "substandard" lane widths consistent with Montlake Blvd.'s existing lane widths, and eliminating or relocating any required temporary pedestrian/bike lane to the west of the Market during the water line relocation work.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*,

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180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving these objections, WSDOT has provided all WSDOT documents relating to the NTMP.

INTERROGATORY NO. 9: Describe the results of any analysis identified in the previous interrogatory.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving these objections, WSDOT has provided all WSDOT documents relating to the NTMP.

INTERROGATORY NO. 10: Identify any WSDOT analysis of the jack-boring technique described in the following video:

https://www.youtube.com/watch?v=z1y5PIETr3Y&feature=youtu.be.

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ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Without waiving these objections, WSDOT has provided all WSDOT documents relating to the NTMP.

INTERROGATORY NO. 11: Identify any WSDOT analysis of the traffic impact of closures of Montlake Blvd. associated with temporary relocation of Montlake Blvd., including but not limited to the traffic impact on the Montlake neighborhood, I-5, Eastlake Avenue E./ and the University Bridge, and the Capitol Hill and First Hill areas.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. This request is overly broad and vague in its request for "all WSDOT analysis" associated with temporary relocation of Montlake Blvd. WSDOT further objects on the basis that the term "associated with" is vague and ambiguous. Further, this is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what

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Appellants mean by "any WSDOT analysis associated with." Subject to and without waiving the above objections, WSDOT answers as follows:

- Supplemental noise analysis for the Major Public Project Construction Noise Variance application, scheduled for submission to SDCI on March 15, 2018.
- NEPA Re-evaluation of the effects of closure and removal of the Montlake Market, currently in preparation.
- NEPA Re-evaluation, executed October 31, 2016.
- Review and comments on the TDA (Cuadra) Memos and documents from 2017.
- Evaluation of ITE Trip Generation Manual for similar sites.
- Traffic Memo for February/March 2018 Evaluation of MLM and Gas Station Closure.

INTERROGATORY NO. 12: Identify any WSDOT analysis of the other environmental impact of closures of Montlake Blvd. associated with temporary relocation of Montlake Blvd., including but not limited to the effect of concurrently closing the Lake Washington Blvd. on-ramp to eastbound SR 520.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this requests asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants.

Subject to and without waiving the above objections, to the extent this request asks

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for analysis of traffic impacts associated with Montlake Blvd, that request is cumulative and is already answered in WSDOT's response to Interrogatory No. 11.

INTERROGATORY NO. 13: Identify each person at WSDOT who prepared or conducted any analysis identified in the previous interrogatory.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this requests asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects as this request is overly broad and unduly burdensome in its request for "any analysis." This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any analysis." Subject to and without waiving these objections:

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INTERROGATORY NO. 14: Identify any WSDOT analysis of the traffic effects or environmental impact of demolition or relocation of the Montlake Market.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus

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SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects on the basis that this request is overly broad and vague in its request for "any WSDOT analysis" of the traffic effects or environmental impact of demolition or relocation of the Montlake Market. This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any WSDOT analysis." Subject to and without waiving the above objections, WSDOT answers as follows:

- Supplemental noise analysis for the Major Public Project Construction Noise Variance application, scheduled for submission to SDCI on March 15, 2018.
- NEPA Re-evaluation of the effects of closure and removal of the Montlake Market, currently in preparation.
- NEPA Re-evaluation, executed October 31, 2016.
- Review and comments on the TDA (Cuadra) Memos and documents from spring 2017.
- Evaluation of ITE Trip Generation Manual for similar sites.
- Traffic Memo for February/March 2018 Evaluation of MLM and Gas Station Closure.

INTERROGATORY NO. 15: Identify each person at WSDOT who prepared or conducted any analysis identified in the previous interrogatory.

ANSWER: Objection . This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this requests asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of

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CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects as this request is overly broad and unduly burdensome in its request for "any analysis." This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any analysis." To the extent this request asks for private residence information, that information is private and not calculated to lead to admissible evidence. Subject to and without waiving the above objections:

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INTERROGATORY NO. 16: Identify any WSDOT analysis of the traffic effects or environmental impact of demolition or relocation of the Gas Station.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects on the basis that this request is overly broad and vague in its request for "any WSDOT analysis" of the traffic effects or environmental impact of demolition or relocation of the Gas Station. This is the type of open-ended interrogatory

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which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any WSDOT analysis." Subject to and without waiving the above objections,

- Supplemental noise analysis for the Major Public Project Construction Noise Variance application, scheduled for submission to SDCI on March 15, 2018.
- NEPA Re-evaluation of the effects of closure and removal of the Montlake Market, currently in preparation.
- NEPA Re-evaluation, executed October 31, 2016.
- Review and comments on the TDA (Cuadra) Memos and documents from spring 2017.
- Evaluation of ITE Trip Generation Manual for similar sites.
- Traffic Memo for February/March 2018 Evaluation of MLM and Gas Station Closure.

INTERROGATORY NO. 17: Identify each person at WSDOT who prepared or conducted any analysis identified in the previous interrogatory.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this requests asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects as this request is overly broad and unduly burdensome in its request for "any analysis." This is the type of open-ended interrogatory which poses a

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trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any analysis." To the extent this request asks for private residence information, that information is private and not calculated to lead to admissible evidence. Subject to and without waiving the above objections,

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INTERROGATORY NO. 18: Identify each person at WSDOT responsible for monitoring, ensuring, or enforcing WSDOT's compliance with the SR 520, I-5 to Medina: Bridge Replacement and HOV Project Vision and Coordination Memorandum of Understanding entered into in January 2011 (the "MOU").

ANSWER: Objection. This request mischaracterizes the MOU and asks for an improper legal conclusion. *Brust v. Newton*, 70 Wn. App. 286, 852 P.2d 1092 (1993). The MOU is not an enforceable contract. WSDOT objects to this request as overly broad and not reasonably calculated to lead to the discovery of admissible evidence. WSDOT further objects on the basis that this request is overly broad and vague in its request for WSDOT persons responsible for "monitoring" and "ensuring". This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any analysis." Subject to and without waiving the above objections, the WSDOT Secretary of Transportation is ultimately responsible for oversight of the 520 Project. The MOU is the best evidence of its contents, and describes the authorized agency representative(s).

INTERROGATORY NO. 19: Identify any traffic management measures undertaken by SDOT or WSDOT that are intended to reduce the traffic effects of closures of Montlake Blvd. associated with temporary relocation of Montlake Blvd.

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ANSWER: Objection. This request is overly broad and vague in its request for "any traffic management measures undertaken by SDOT or WSDOT . . . ." This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any traffic management measures." Subject to and without waiving the above objections, WSDOT answers as follows:

The NTMP for the Montlake Phase identifies scheduled and potential traffic management measures for SR 520 construction, neighborhood traffic-calming measures, and future City projects and plans in the Montlake area. The majority of local street traffic management measures identified as a result of public feedback and evaluation with SDOT primarily include: installation of traffic circles, speed humps or cushions, and safe and efficient connections for bikes and pedestrians. The NTMP Report published in December 2017 contains a full list of identified traffic management measures.

INTERROGATORY NO. 20: Identify any traffic management measures undertaken by SDOT or WSDOT that are intended to reduce the traffic effects of the closure of the Market.

ANSWER: Objection. This request is overly broad and vague in its request for "any traffic management measures undertaken by SDOT or WSDOT . . . ." This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any traffic management measures." Subject to and without waiving the above objections, WSDOT answers as follows:

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The NTMP for the Montlake Phase identifies scheduled and potential traffic management measures for SR 520 construction, neighborhood traffic-calming measures, and future City projects and plans in the Montlake area. The majority of local street traffic management measures identified as a result of public feedback and evaluation with SDOT primarily include: installation of traffic circles, speed humps or cushions, and safe and efficient connections for bikes and pedestrians. The NTMP Report published in December 2017 contains a full list of identified traffic management measures.

INTERROGATORY NO. 21: Identify any traffic management measures undertaken by SDOT or WSDOT that are intended to reduce the traffic effects of closure of the Gas Station.

ANSWER: Objection. This request is overly broad and vague in its request for "any traffic management measures undertaken by SDOT or WSDOT . . . ." This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "any traffic management measures." Subject to and without waiving the above objections, WSDOT answers as follows:

No traffic management measures have yet been taken as the project hasn't started. The FEIS ROD for the SR 520 program identified the need to close driveway access to the gas station along the Eastbound off-ramp and Montlake Boulevard for safety and to meet statutory and regulatory requirements.

The NTMP for the Montlake Phase identifies scheduled and potential traffic management measures for SR 520 construction, neighborhood traffic-calming measures, and future City projects and plans in the Montlake area. The majority of local street traffic

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management measures identified as a result of public feedback and evaluation with SDOT primarily include: installation of traffic circles, speed humps or cushions, and safe and efficient connections for bikes and pedestrians. The NTMP Report published in December 2017 contains a full list of identified traffic management measures.

INTERROGATORY NO. 22: Identify any aspect of the NTMP that contains solutions for community traffic concerns related to the demolition or relocation of the Market.

ANSWER: Objection. This request is vague, ambiguous, cannot be answered without further clarification, and calls for improper speculation. *Bushman v. New Holland*, 83 Wn.2d 429, 518 P.2d 1078 (1974). This is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "solutions" "community traffic concerns" or "related." Furthermore, the NTMP is the best evidence of its contents. Subject to and without waiving the above objections, WSDOT answers as follows:

The NTMP speaks for itself and is the best evidence of its contents. Documents related to the NTMP will be produced.

INTERROGATORY NO. 23: Identify each person at WSDOT responsible for determining whether WSDOT could use existing environmental documents unchanged to support the NTMP, including without limitation whether WSDOT's plans announced mid-July 2017 to relocate Montlake Blvd. 4 times, demolish the Market, and use the Market and Gas Station properties for general staging were:

(i) Substantial changes to the Project that would likely have significant adverse impacts; or

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(ii) New information indicating the Project's probable significant adverse environmental impact.

ANSWER: Objection. This request calls for a legal conclusion. *Brust v. Newton*, 70 Wn. App. 286, 295, 852 P.2d 1092, 1096–97 (1993). WSDOT further objects to this request as vague and ambiguous as to "existing environmental documents" "unchanged" "support" "responsible" "substantial changes" "significant adverse impacts" "new information" and "probable significant adverse environmental impact." WSDOT further objects as this request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this requests asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not an "action" subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

INTERROGATORY NO. 24: Identify all environmental analysis documents that make up the environmental analysis conducted for the NTMP.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. WSDOT further objects on the basis that the term "all environmental analysis documents" is vague and ambiguous. The NTMP is not an action subject to SEPA. The NTMP is a tool the City and WSDOT are utilizing to address certain traffic impacts identified in the environmental documents mentioned below,

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including disruptions for drivers, bicyclists, walkers and transit riders traveling through the neighborhood during construction. The NTMP identifies traffic control and management measures implemented by the City of Seattle and WSDOT that support people traveling through Montlake Boulevard and the surrounding neighborhoods during SR 520 Montlake Phase construction and beyond. To the extent this request asks for analysis of environmental impacts associated with the 520 Project, that analysis is beyond the scope of this hearing. Subject to and without waiving these objections, the SR 520, I-5 to Medina Record of Decision (ROD, issued by FHWA in August 2011) and supporting studies contained in the Final Environmental Impact Statement (FEIS, June 2011) provide the environmental analysis for the 520 project impacts. These documents as well as NEPA/SEPA reevaluations and additional supportive studies are located on the SR 520 Bridge Replacement and HOV Program website at:

http://www.wsdot.wa.gov/Projects/SR520Bridge/Library/I5Medina.htm.

INTERROGATORY NO. 25: Identify any WSDOT, SDOT, Seattle Public Utilities, and/or King County contingency plan addressing the risk that the 108-inch sewer line under Montlake Blvd. may be broken or damaged in the course of construction on the Project.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.,* 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and

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conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and vague as to "contingency plan" and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

INTERROGATORY NO. 26: Identify any analysis by WSDOT, SDOT, Seattle Public Utilities, and/or King County of the consequences of breaking or damaging the 108-inch sewer line under Montlake Blvd. in the course of construction on the Project.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.,* 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome and vague as to "consequences" and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

INTERROGATORY NO. 27: Identify any analysis by WSDOT, SDOT, Seattle Public Utilities, and/or King County of whether the risk of breaking or damaging the

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108-inch sewer line under Montlake Blvd. is increased by moving Montlake Blvd. four times for temporary relocation in the course of the Project.

ANSWER: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, as to "risk" and "increased" and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Produce all documents identified in answer to the interrogatories above.

RESPONSE: Objection. This request is vague and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

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REQUEST FOR PRODUCTION NO. 2: Produce all responses to interrogatories and requests for production from any party in this proceeding.

RESPONSE: Objection. This request is vague and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 3: Produce any document in your possession, custody, or control that refers or relates to any of the issues in this appeal.

RESPONSE: Objection. This request is overly broad, unduly burdensome, and vague. WSDOT is unable to know precisely the scope of what appellants believe the issues are or what documents may be construed as supporting those claims. This question requires defense counsel to speculate as to what are appellants mean by "issues." The legal analysis and case theories of counsel is work product. Further this request seeks "any" document that refers or relates to "any" of the issues in this appeal. This type of open-ended request that poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production, as the defendants cannot possibly know of with reasonable certainty "any and all documents" which plaintiff may deem relevant.

REQUEST FOR PRODUCTION NO. 4: Produce each document in your possession, custody, or control that refers or relates to efforts by WSDOT, SDOT, Seattle Public Utilities, and/or King County since January 2016, to avoid taking the Market.

RESPONSE: Objection. This request is overly broad, unduly burdensome, and vague. WSDOT further objects because this request does not ask for documents relevant to

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this appeal or likely to lead to the discovery of relevant evidence. WSDOT is unable to know precisely the scope of what appellants believe the issues are or what documents may be construed as supporting those claims. This question requires defense counsel to speculate as to what are appellants mean by "issues." The legal analysis and case theories of counsel is work product. This type of open-ended request that poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production, as the defendants cannot possibly know of with reasonable certainty "any and all documents" which plaintiff may deem relevant.

REQUEST FOR PRODUCTION NO. 5: Produce each document in your possession, custody, or control that refers or relates to traffic impacts associated with WSDOT's plan for temporary relocation of Montlake Blvd.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced. To the extent the request seeks documents associated with traffic impacts for the 520 Project, those are available at: http://www.wsdot.wa.gov/Projects/SR520Bridge/Library/I5Medina.htm.

REQUEST FOR PRODUCTION NO. 6: Produce each document in your possession, custody, or control that refers or relates to traffic impacts of WSDOT's plan to demolish and/or relocate the Market.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request

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for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 7: Produce each document in your possession, custody, or control that refers or relates to traffic impacts of WSDOT's plan to demolish and/or relocate the Gas Station.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 8: Produce each document in your possession, custody, or control that refers or relates to the traffic impacts of WSDOT's plan to use the Market and Gas Station properties for construction staging for ten years.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 9: Produce each document in your possession, custody, or control that refers or relates to WSDOT's environmental analysis of the Project in connection with the NTMP, including any related analysis, records, or correspondence.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request

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for production. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent this requests asks for analysis of environmental impacts associated with the 520 Project, this request is beyond the scope of CR 26. The Traffic Management Plan is not subject to SEPA analysis, and thus SEPA analysis is beyond the scope of this appeal. WSDOT's environmental analysis under NEPA is also not within the scope of this appeal, or within the jurisdiction of the Hearing Examiner. WSDOT further objects on the basis that the term "all environmental analysis documents" is vague and ambiguous. Further, this is the type of open-ended interrogatory which poses a trap for WSDOT because it can easily produce claims that WSDOT did not completely respond to the interrogatory, as WSDOT cannot possibly know with reasonable certainty what Appellants mean by "all environmental analysis documents". Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 10: Produce each document in your possession, custody, or control that refers to solutions for community traffic concerns related to the demolition or relocation of the Market.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 11: Produce each document in your possession, custody, or control that refers to traffic mitigation and management measures

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undertaken by SDOT and/or WSDOT that are intended to reduce the traffic effects of closures of Montlake Blvd. associated with temporary relocation of Montlake Blvd.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 12: Produce each document in your possession, custody, or control that refers to traffic mitigation and management measures undertaken by SDOT and/or WSDOT that are intended to reduce the traffic effects of demolition/relocation of the Market and/or Gas Station.

RESPONSE: Objection. This request is overly broad, vague, and ambiguous and is the kind of open-ended request which poses a trap for defendants because it can easily produce claims that the defendants did not completely respond to the interrogatory/request for production. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 13: Produce all communications regarding a possible stand-down from the Montlake Neighborhood/WSDOT noise variance dispute, including but not limited to correspondence involving Lyle Bicknel, SDOT, the Seattle Office of Planning and Community Development, the Seattle Department of Construction and Inspections, or the Seattle Department of Neighborhoods.

RESPONSE: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team,

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this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 14: Produce all communications with WSDOT or others concerning potential changes to the Montlake Phase noise variance application for the January 2018 re-filing.

RESPONSE: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in State v. Montlake, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Subject to and

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without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 15: Produce all communications with SDOT or others regarding assessment of the video describing jack-boring techniques available at the following web address:

https://www.youtube.com/watch?v=z1y5PIETr3Y&feature=youtu.be.

RESPONSE: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 16: Produce all communications with SDOT or others regarding the schedule, timing, and duration of the Market demolition, Montlake Blvd. reconstruction, and the planned sewer line relocation, and other demolition activities related to the Project.

RESPONSE: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team,

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this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 17: Produce all communications with federal and state legislators, the Governor's Office, the Office of the Washington Secretary of Transportation, and the Office of the Mayor of Seattle regarding any aspect of the impact of the Project on the Montlake neighborhood, including without limitation the demolition and relocation of the Market and Gas Station, the use of the Market property for construction staging, the combined sewer overflow line, and the temporary closure and relocation of Montlake Blvd., since November 14, 2011.

RESPONSE: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public.

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WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

REQUEST FOR PRODUCTION NO. 18: Produce all communications with King County officials relating to the Project that discuss the combined sewer line under Montlake Blvd.

RESPONSE: Objection. This request asks for information not reasonably calculated to lead to the discovery of admissible evidence. To the extent it can be interpreted to request information about the necessity of engineering and design decisions of the 520 Project team, this request is beyond the scope of CR 26. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.,* 155 Wn.2d 612, 121 P.3d 1166 (2005); *City of Bellevue v. Best Buy Stores, LP*, 180 Wn. App. 1034 (2014) ("Because it is not our role to second-guess Bellevue's choice of road design, we affirm."). Public necessity has already been litigated in *State v. Montlake*, No. 17-2-12389-7 SEA, and the King County Superior Court issued findings of fact and conclusions of law holding that the 520 Project is necessary for the use of the public. WSDOT further objects as this request is overly broad and unduly burdensome, and therefore not capable of being fully and fairly answered by defendants. Subject to and without waiving the above objections, all WSDOT documents related to the NTMP will be produced.

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DATED: February 23, 2018

PERKINS COIE LLP

By: _____

R. Gerard Lutz, WSBA No. 17692
JLutz@perkinscoie.com
Telephone: 425.635.1400
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Attorneys for Montlake Appellants

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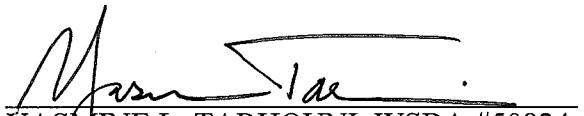
The undersigned attorney for WASHINGTON STATE DEPARTMENT OF TRANSPORTATION has read the foregoing answers and objections to interrogatories, and responses to requests for production, and they are in compliance with CR 26, 33 and 34.

ANSWERS, OBJECTIONS, and RESPONSES dated this 26th day of March, 2018.



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Assistant Attorneys General
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Department of Transportation

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STATE OF WASHINGTON)
) ss.
County of King)

Dawn Yankauskas, being first duly sworn, on oath, deposes and says:

That he or she is the SR 520 Engineering Manager for Washington State Department of Transportation, the Intervenor, that she has read the within and foregoing objections and responses to Appellants' First Set of Interrogatories and Requests for Production of Documents Propounded to WSDOT, that she knows the contents thereof and believes the same to be true.

DAWN YANKAUSKAS

SUBSCRIBED AND SWORN to before me this 26 day of March, 2018.

NOTARY SIGNATURE

NOTARY PRINTED NAME
Notary Public
State of Washington
My Commission Expires: Nov. 12, 2019

CHARLOTTE K. GRAYSTON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES NOVEMBER 12, 2019

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EXHIBIT D

From: Dave Bricklin [mailto:bricklin@bnd-law.com]
Sent: Friday, May 18, 2018 5:19 PM
To: Cade, Deborah (ATG); Palay, David (ATG)
Subject: RE: MONTLAKE CLOSURE

Debra and Dave,

I've been in deps and dealing with other things this week. I am waiting to hear from my clients to see if they have anything further to provide. I will get back to you by the end of next week. Thank you for your patience.

David Bricklin

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Seattle, WA 98101
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1-206-264-9300 (fax)
bricklin@bnd-law.com
http://www.bnd-law.com

Give me your tired, your poor,

Your huddled masses yearning to breathe free,

The wretched refuse of your teeming shore.

Send these, the homeless, tempest-tost to me,

I lift my lamp beside the golden door!

From: Cade, Deborah (ATG) [mailto:DeborahC@ATG.WA.GOV]
Sent: Wednesday, May 16, 2018 12:09 PM
To: Dave Bricklin; Palay, David (ATG)
Subject: RE: MONTLAKE CLOSURE

Dave – I believe that Dave Palay copied you yesterday addressing John O'Neil's proposal for closing Montlake.
Do any of your clients have any additional materials that they want WSDOT and FHWA to consider in the current re-evaluation that is addressing the closure of the market and demo of the market building? If they do, please provide it to us by the end of this week. Let one of us know if you have any questions.

Deborah L. Cade
Assistant Attorney General
P. O. Box 40113
Olympia WA 98504-0113
360-753-4964 (Olympia office M-Th-F)
206-805-5312 (Seattle office T-W)
360-918-1674 (cell)

From: Dave Bricklin [mailto:bricklin@bnd-law.com]
Sent: Wednesday, May 09, 2018 10:31 AM
To: Cade, Deborah (ATG) <DeborahC@ATG.WA.GOV>; Palay, David (ATG) <DavidP4@ATG.WA.GOV>
Subject: MONTLAKE CLOSURE

Debra, David,

Did you have a chance to check with your client regarding the idea of closing Montlake for nine straight days as a means of avoiding the need to demolish the market (and reduce a lot of other construction logistic issues)? Anything to report?

David Bricklin

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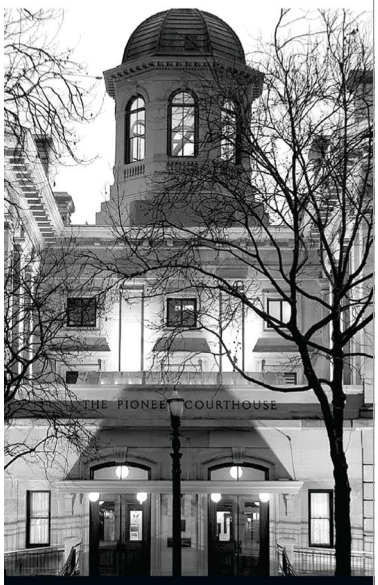
1-206-264-9300 (fax)
bricklin@bnd-law.com
http://www.bnd-law.com

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!

EXHIBIT E



COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs. No. 77644-4

MONTLAKE LLC, a Washington Limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation,

Petitioners.

TRANSCRIPT OF

HEARING

TAKEN ON
FRIDAY, JANUARY 19, 2018

BEFORE THE HONORABLE
MARY NEEL, COMMISSIONER

COURT OF APPEALS, DIVISION I
600 UNIVERSITY STREET
SEATTLE, WASHINGTON 98101

just enforcing that trial court order. There's no -- there's nothing to enforce on an order adjudicating public use and necessity. Like, enforcing it doesn't mean you get to have a just compensation trial. Like, taking their position just to its logical course, that would mean that the trial court could just charge ahead, do a full just compensation trial, maybe even order the money paid in, before this court gets done adjudicating whether it's in the public use and necessity.

That is absurd. There's no case saying you can do that. And because each stage is a condition precedent to the next, you can't do that.

COMMISSIONER NEEL: So clarify for me exactly what relief you're asking for.

MR. WOLFF: So what happened -- okay. The relief we're asking for would be to just vacate the trial court order requiring a bond and the motion that -- the order to compel on the drilling.

COMMISSIONER NEEL: And that's not something that I could do. A panel would have to do that.

MR. WOLFF: Okay. So what you --

COMMISSIONER NEEL: So that's what I was trying to get at.

MR. WOLFF: Okay.

COMMISSIONER NEEL: So you're asking for --

Appendix C

to

Motion for Discretionary Review to the Washington State Supreme Court

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

No. 77359-3-I

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO SUPPLEMENT OR STAY THE MANDATE OR VACATE PENDING FURTHER DISCOVERY

limited partnership; and KING COUNTY,)
)
)
Defendants.)
)

Appellants Montlake LLC, Stelter Montlake LLC, and BTF Enterprises, Inc., having filed a motion for reconsideration and a motion to supplement or stay the mandate or vacate pending further discovery, and the hearing panel having determined that the motions should be denied, now, therefore, it is hereby

ORDERED that the motion for reconsideration and the motion to supplement or stay the mandate or vacate pending further discovery are denied.

For the Court:

Judge

Appendix D

to

Motion for Discretionary Review to the Washington State Supreme Court

THE HONORABLE VERONICA ALICEA-GALVAN

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Petitioner,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; 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; T-MOBILE USA, INC.; and KING COUNTY,

Respondents.

NO. 17-2-12389-7 SEA

ORDER ON SUPERSEDEAS AND CR 37 SANCTIONS

This matter came before the Court upon Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1, the State's Response to Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1 and Motion for CR 37 Sanctions, and the Court after considering these pleadings, along with the records and materials filed by the parties, and being fully advised, now therefore

IT IS ORDERED, ADJUDGED, AND DECREED:

1. Respondent Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1(b)(2) is with respect to the Order Adjudicating Public Use and Necessity is GRANTED. Trial on just compensation will be stayed.

2. Respondent Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1(b)(2) with respect to the Order to Compel is GRANTED. The Court finds that the parties are not prohibited from conducting discovery in this matter in order to prepare for trial on just compensation.

3. The Court finds that Respondent Owners' posted bond of $5,000.00 is insufficient. Respondent Owners are ordered to post an additional bond of $1,000,000 forthwith.

4. The State's Motion for CR 37 Sanctions is DENIED.

DATED this 7th of December, 2017

JUDGE VERONICA ALICEA GALVAN
DEPT. 21

Presented by:

ROBERT W. FERGUSON
Attorney General

DEBORAH L. CADE, WSBA #18329
DAVID D. PALAY, JR., WSBA #50846
YASMINE L. TARHOUNI, WSBA #50924
Assistant Attorneys General
Attorneys for Petitioner State of Washington

Appendix E

to

Motion for Discretionary Review to the Washington State Supreme Court

No. 77644-4-I

COURT OF APPEALS
DIVISION I
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;

Appellants.

MONTLAKE LLC, STELTER MONTLAKE LLC, AND BTF ENTERPRISES, INC. MOTION TO MODIFY RULING OF COMMISSIONER

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Attorneys for Montlake LLC and Stelter Montlake LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES
(continued)

PAGE(S)

STATUTES

TABLE OF AUTHORITIES
(continued)

PAGE(S)

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Following this Court's decision affirming the trial court's public use and necessity order ("OAPU") in Case No. 77359-3-I, the Commissioner dismissed as moot the Owners' objections to WSDOT's attempt to enter the Montlake Properties for invasive soil drilling and site occupation and the trial court's requirement that the Owners obtain a stay to prevent WSDOT from entering the properties by posting a $1 million bond. The issues are not moot, and this Court should correct the trial court's errors to prevent the unfair procedural confusion that occurred here from harming other property owners in the future.

The trial court made multiple procedural errors that remain at issue. First, the trial court treated its OAPU ruling as "final" even though RCW 8.04.070 plainly says that it is not "final" if appellate review is sought, and the binding authority of *Allerdice* holds that a trial court's OAPU is not legally effective until appellate review concludes. Second, the trial court incorrectly compelled valuation "discovery" to prepare for a just compensation trial prior to a final determination of OAPU. Third, the trial court imposed an extraordinary bond ($1 million) to stay that discovery during the Owners' appeal, to compensate WSDOT for loss of its purported right to enter and take property *before* a final OAPU, *before*

a determination of just compensation, and *before* WSDOT has paid a penny for the property, all without consent of the Owners.

WSDOT can only take possession of property over a property owner's objection—and when a bond might otherwise be required—is *after* payment of just compensation, and then only "*after* the amount of said award shall have been paid into court." RCW 8.04.150 (emphasis added). WSDOT cannot cite a single condemnation case where the State has been allowed to enter and take property at this stage of the proceedings, nor a case requiring the property owner to post a bond to stay testing (i.e., exclude others) during appeal, and even worse, to reimburse the State for "construction delay costs" that arise from the Owners' timely exercise of due process rights. Everything should have been stayed pending the OAPU appeal and there should have been no bond required.

The Commissioner erred by concluding that these issues are moot. The OAPU remains on appeal, and thus the trial court's $1 million bond requirement is not moot, nor is the trial court's implicit conclusion that the Owners could be liable for the State's potential construction cost increases due to the appeal. Moreover, also not moot is the trial court's mandate that the Owners submit to WSDOT's invasive sixteen-day possession and use of the property for testing, which is a taking and exceeds the scope of discovery permitted by statute, caselaw, and the Civil Rules.

The Owners' ongoing substantive rights are impacted by the Commissioner's failure to address these issues and thus they cannot be moot. The Owners request that the Commissioner's ruling be modified to address the merits, and that the trial court's orders be vacated for lack of jurisdiction and because they amount to a taking, exceed discovery, or in the alternative, because the bond amount is unjust and unwarranted.

II. IDENTITY OF THE MOVING PARTY

Appellants Montlake LLC, Stelter Montlake LLC, and BTF Enterprises, Inc. (collectively, the "Owners") seek the relief requested in Part III, Statement of Relief Sought.

III. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 17.7, the Owners respectfully request that the Court modify and set aside the Commissioner's May 2, 2018 ruling that the issues raised in the Owners' motion for discretionary review and motion objecting to the trial court's supersedeas order are moot.[1]

Instead, the Owners request that this Court address the issues raised in the motions, including determining:

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[1] A copy of the Commissioner's May 2, 2018 ruling is attached as Appendix A. All other citations to the record are provided in the Owners' prior briefing.

1. That the trial court's order compelling the Owners to submit to sixteen days of occupancy and testing be reversed because the trial court lacked jurisdiction to compel discovery pending review;

2. That the trial court's order compelling that discovery be reversed because it is an uncompensated and unconstitutional taking and exceeds the permissible scope of discovery under Civil Rule 26(b)(1);

3. That the $1 million supersedeas bond is arbitrary, unjust, and unwarranted, and should be reversed; and

4. That the Court continue to stay the Owners' obligation under RAP 8.1(e) to post the additional $1 million bond pending a determination of all of these issues by this Court.

IV. FACTUAL BACKGROUND RELEVANT TO MOTION

A. WSDOT Demands Access to the Montlake Properties to Conduct Invasive Drilling and Site Inspections Prior to the OAPU Going Final After an Appeal

On September 6, 2018, the trial court granted WSDOT's motion for an OAPU authorizing WSDOT to condemn three separate but contiguous lots (the "Montlake Properties") owned or leased by the Owners. On September 8, the Owners appealed the trial court's OAPU. That matter is currently before this Court in Case No. 77359-3-I, where the Owners' motions for reconsideration and to publish are pending.

Prior to the trial court's OAPU, WSDOT requested entry onto the Montlake Properties "for purposes of inspecting, measuring, surveying, photographing, testing, and/or sampling the property, [and] for purposes of evaluating the impacts of the State's project on the subject property." Mot. Disc. Rev., App. B at 2. WSDOT requested expansive access: testing from September 15-25 from 10:00 p.m. until 6:00 a.m. each day. *Id.* The Owners objected to the access and testing. *Id.*, App. I at 2.

On September 20, WSDOT served an amended request for entry. *Id.*, App. C. The amended request expanded the scope of WSDOT's original request: WSDOT now sought entry to the Montlake Properties for sixteen days, from November 15-30, for eight hours per day, for subsurface boring. *Id.* at 2. WSDOT's proposed subsurface boring would require cutting through paved surfaces, drilling through soil and bedrock, removing samples from the holes, and filling the holes with bentonite, crushed rock, and re-paving. *Id.* The holes would be six to twelve inches in diameter and up to 70 feet in depth. *Id.* WSDOT also requested that it be permitted to unload and store drill rigs and equipment on the properties for those sixteen days. *Id.* In addition, WSDOT requested permission to conduct a "separate and distinct inspection" of the structures on the properties, and examining the site conditions, including taking samples. *Id.* at 3. WSDOT concedes these investigations are for the sole purpose of

obtaining valuation evidence relevant to just compensation. *Id.*, App. D, at 3, 6-7. WSDOT did not offer compensation, nor did the Owners consent.

On October 10, WSDOT moved to compel the site entry and testing. *Id.*, App. D. The Owners objected that the trial court did not have jurisdiction to grant the motion under RAP 7.2, and that during an eminent domain proceeding, a trial court cannot authorize discovery on valuation before an OAPU appeal is final. *Id.*, App. E. The Owners also argued that WSDOT's demand would be a taking and violates the scope of discovery under Civil Rule 26(b)(1). *Id.* On October 19, the trial court summarily granted WSDOT's motion to compel ("Compel Order"). *Id.*, App. A at 2.

B. The Owners Obtain a Supersedeas Stay and File a Motion for Discretionary Review of the Trial Court's Order Compelling WSDOT's Site Entry

Following the Compel Order, on November 13, the Owners filed notice of a supersedeas stay pursuant to RAP 8.1 by posting a $5,000 bond. Emer. Mot. to Rev. Supersedeas, App. 1. On November 20, WSDOT responded to the supersedeas stay arguing that the bond should be "between $12.7 million to $26.4 million dollars" as compensation for alleged project delays due to the OAPU appeal. *Id.*, App. 2 at 11.

On December 4, the Owners filed a motion for discretionary review before this Court asking that the Court reverse the Compel Order because the trial court failed to address or expressly rule (1) whether the

trial court had jurisdiction to compel valuation discovery while an OAPU is on appeal; (2) whether more than two weeks of occupancy, subsurface boring and other invasive testing without property rights or compensation is an unconstitutional taking; and (3) whether WSDOT's discovery exceeds the permissible scope of discovery under Civil Rule 26(b)(1).

On December 7, without citing any factual basis in the record, the trial court ordered that the Owners post an additional $1 million bond to maintain the supersedeas stay of WSDOT's site entry and drilling ("Bond Order"). *Id.*, App 5. On December 14, the Owners filed an emergency motion for review of the Bond Order and to stay enforcement of the trial court's order pending the motion for discretionary review.

C. Commissioner Hearing and Initial Decision

On January 19, 2018, the Commissioner heard argument addressing both the Owners' emergency motion and the motion for discretionary review. During argument, the Commissioner indicated that only this Court could rule on the bond requirement. Mot. for Recon. at 21.

On May 2, the Commissioner issued a decision stating that in view of this Court's April 30 order in Case No. 77359-3-I, affirming the OAPU, that "the issues raised in the owners' motion for discretionary review and the objection to the supersedeas pending review in this court are now moot. Accordingly, the stay is lifted and review is dismissed." The

Commissioner did not address the trial court's $1 million bond. Nor did the Commissioner address whether the trial court had jurisdiction to (a) compel the Owners to submit to invasive drilling and site occupation while their appeal was pending, to (b) order such submission without WSDOT first paying just compensation, or (c) whether the Compel Order exceeds the scope of discovery permitted by the Civil Rules or statute.

V. STATEMENT OF THE GROUNDS FOR RELIEF

The Owners respectfully request that this Court modify the Commissioner's ruling that the case is moot. A case is not moot if the court's resolution of an issue will affect the substantive rights of the parties before the court. *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201, 214, 634 P.2d 853 (1981). The motion for discretionary review is not moot because the rights of the Owners are directly impacted by the Commissioner's failure to address the issues in the motion. The Compel Order should never have been issued because the trial court lacked jurisdiction to compel valuation discovery while an OAPU is on appeal. Moreover, WSDOT's demand for site occupancy and use constitutes a taking and exceeds the permissible bounds of discovery. Likewise, the emergency motion challenging the bond amount is not moot because the case is still on appeal, pending this Court's decision on the Owners' motion for reconsideration and a potential petition for review.

A. The Motion for Discretionary Review Is Not Moot

In the motion for discretionary review, the Owners argued that the Court should accept review because (1) under RAP 7.2, the trial court did not have the authority to compel discovery related to valuation while the OAPU appeal is pending; and (2) the trial court erred in compelling WSDOT's uncompensated property use for invasive testing and inspections without any property rights because it is a taking and exceeds the permissible scope of discovery. These issues directly affect the Owners' ongoing substantive rights and are not moot.

1. The trial court still does not have jurisdiction to compel drilling and testing while the OAPU is on appeal

Review remains warranted under RAP 2.3(b)(2) because the trial court exceeded the scope of its limited jurisdiction under RAP 7.2 by issuing the Compel Order after the OAPU had been appealed. Under RAP 7.2(a), "[a]fter review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule." This authority is limited to "ministerial actions," *State v. Korum*, 120 Wn. App. 686, 720, 86 P.3d 166 (2004), *rev'd other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006), and the Compel Order was invalid under RAP 7.2.

Moreover, the trial court could not "enforce" the decision on OAPU under RAP 7.2(c) to order discovery on valuation because a final determination on OAPU is required before an inquiry into valuation is

permissible. Public use and necessity must be decided "before there is a justiciable issue as to severance damages." *In re SW Suburban Sewer Dist.*, 61 Wn.2d 199, 201-04, 377 P.2d 431 (1963). Each phase of a condemnation proceeding is separate and distinct and "is a condition precedent to the entry of the subsequent judgment." *Pub. Util. Dist. No. 1 of Chelan Cty. v. Wash. Water Power Co.*, 43 Wn.2d 639, 641, 262 P.2d 976 (1953) (eminent domain requires three separate and distinct judgments—public use and necessity, valuation, and transfer of title). This process is constitutional, statutory, and mandatory. *Pelley v. King Cty.*, 63 Wn. App. 638, 641, 821 P.2d 536 (1991); WASH. CONST., Art. I, Section 16 (Amend. 9); RCW 8.04.070, .080; *see also* RCW 8.12.090.

Before the trial court can begin the valuation stage of an eminent domain proceeding, a determination on public use and necessity must be final, including the exhaustion of all appeals. *State ex rel. Wash. v. Allerdice*, 101 Wn. App. 25, 31, 1 P.3d 595 (2000) ("An [OAPU] entered by the trial court is interlocutory and appealable as a matter of right. *Therefore, an [OAPU] cannot be legally effective until the appeal is resolved*.") (emphasis added). A judgment is not final until "all litigation on the merits ends," including all appeals. *In re Skylstad*, 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007); *Woodcraft Const., Inc. v. Hamilton*, 56 Wn. App. 885, 888, 786 P.2d 307 (1990) ("An appeal from a judgment entered

in the trial court is not final until it is affirmed and the case mandated."). Until an OAPU appeal is final, the subsequent phases to condemnation—valuation and title transfer—must await resolution of the appeal.

RAP 7.2 does not allow the trial court to enter an order compelling the Owners to submit to WSDOT's invasive, sixteen-day "inquiry" into valuation during the OAPU appeal. The Commissioner never addressed this issue, which was an error, and the status of the trial court's order compelling testing remains at issue as long as the OAPU is on appeal and is not moot. Accordingly, the Owners request that this Court modify the Commissioner's ruling and determine that the Compel Order was invalid from the start because the trial court lacked jurisdiction to issue the order and neither the supersedeas stay or a bond should ever have been required.

2. Even if the appeal were resolved, the Compel Order amounts to a taking and exceeds the bounds of permissible discovery

By compelling the Owners to submit to drilling, site inspections, and occupation before just compensation is paid, the Compel Order amounts to a taking, which the Commissioner should have disallowed and is not moot. Washington does not permit the type of use and occupation of a property authorized by the trial court before just compensation is paid: "No private property shall be taken or damaged for public or private use without just compensation." WASH. CONST., Art. I, Section 16 (Amend.

9); *Conger v. Pierce Cty.*, 116 Wash. 27, 34-35, 198 P. 377 (1921) ("[O]ur Constitution expressly forbids the taking or damaging of private property for public use, except upon just compensation first made.").

Washington courts have consistently recognized that "the right to possess, *to exclude others*, or to dispose of property" are "fundamental attribute[s] of property ownership." *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993) (emphasis added). Indeed, "[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." *Tapio Inv. Co. I v. State by & through the Dep't of Transp.*, 196 Wn. App. 528, 539-40, 384 P.3d 600 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 331 (2017) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)). Anything which destroys the unrestricted right of use, enjoyment and disposal of property destroys the property itself. *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960) (citations omitted), *overruled on other grounds Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). In *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), the Supreme Court compared the takings clauses between the U.S. Constitution and the Washington Constitution and observed that a significant difference in Washington is, before a taking, "compensation must *first* be made." *Id.* at 357 (emphasis added).

What WSDOT seeks to do is the clearest and most basic form of taking without consent or compensation. The Owners still own the Montlake Properties. WSDOT concedes that it has no property rights whatsoever in the Montlake Properties. WSDOT seeks to drill 70-foot holes on the properties to remove samples while occupying the properties for over two weeks which will interrupt and harm business operations. Mot. Disc. Rev. at 19. WSDOT concedes further that its drilling will "damage" the properties. Resp. to Mot. Disc. Rev. at 11. That is a taking.

When confronted with the same type of site entry and drilling sought by WSDOT, courts in other jurisdictions have found a taking. *See* Mot. Disc. Rev. at 14-15. WSDOT has suggested that those cases are different because the inspections were initiated before condemnation proceedings began. But that makes no difference for a takings analysis. As in this case, there was a taking because the government had no property rights and no compensation had been paid. *Id.* at 16-17. WSDOT's initiation of a condemnation does not suddenly provide WSDOT with the authority to take private property and do what it wants to it. Washington is not a "quick take state," and WSDOT is not entitled to use or possession until just compensation is paid, except as provided in RCW 8.25.070.

At this stage of the case, there has been no final determination that WSDOT can even condemn the Montlake Properties, let alone "damage"

them in an attempt to prematurely value them. The Owners are under no obligation to surrender their property so WSDOT can conduct invasive drilling on property it *might* someday have rights to. The Commissioner erred in determining that these issues are now moot, particularly when the OAPU appeal is still pending, and WSDOT is actively pursuing use, occupancy, and testing without the Owners' consent, and regardless of the Owners' decision whether to stipulate to such use under RCW 8.25.070.

Likewise, the Commissioner also failed to rule on whether the Compel Order subjects the Owners to impermissible discovery, which is not moot either. Inspections of land and property cannot be "unduly burdensome." Civil Rule 26(b)(1)(C). Here, the trial court authorized WSDOT to conduct active drilling and testing operations on the properties for more than two weeks, for eight hours each day, to drill 70-foot subsurface holes, and conduct other "distinct" testing and inspections. Mot. Disc. Rev., App. C at 2-3. It further authorized WSDOT to store large equipment on (i.e., occupy) the properties during the other sixteen hours a day when it is not conducting active operations. *Id.* Despite WSDOT's assertion that the properties "will not suffer adverse impacts caused by the six inspections," the subsurface boring would require cutting through paved surfaces using heavy equipment such as drilling machines. *Id*. The drilling would also produce drilling cuttings and other

waste. *Id.* WSDOT promises to backfill the holes with bentonite, crushed rock, and concrete (*id.*), but WSDOT cannot deny that both the subsurface and surface of the Montlake Properties will be irreparably altered by WSDOT's drilling. Indeed, WSDOT concedes that the testing could lead to complications or "exigencies," which would increase the harm, time of occupancy and use, and burdens upon the Owners. *See id.*, App. E at 11.

In *Gillett v. Conner*, 132 Wn. App. 818, 133 P.3d 960 (2006), the trial court granted a motion to compel inspection of a property. *Id.* at 821. On appeal, this Court observed that there is greater scrutiny of the necessity of entry onto land, as opposed to producing documents and reversed the trial court, ordering a more careful assessment as to whether a physical inspection was necessary and what restrictions should be placed on such an inspection under Civil Rule 26. *Id.* at 824-25.

There is no evidence that the trial court conducted a careful assessment of the necessity of the intrusion. The trial court summarily granted the motion and failed to assess any of the Civil Rule 26(b)(1) factors. Those factors are particularly relevant since, if the Owners' appeal is ultimately successful, WSDOT's desired testing will be completely irrelevant and WSDOT will have no basis whatsoever to enter the properties, but the Owners will still have been damaged. *See Pulcino v. Fed. Ex. Corp.*, 94 Wn. App. 413, 426-27, 94 P.2d 522 (1999) (denying

motion to compel since CR 26(b)(1) "allows the court to limit discovery"). Moreover, the recent legislative direction that WSDOT "ensure to the maximum extent practicable that the building housing any grocery store or market . . . be preserved" could render elements of WSDOT's proposed use and inspection of the properties irrelevant and even moot itself, as could WSDOT's new environmental review. Mot. for Recons. at 5.

But even if the Owners' OAPU appeal is unsuccessful, WSDOT's drilling will damage the Montlake Properties. WSDOT's occupancy and use will result in lost revenues from at least the gas station operations, and the testing, sampling and storage will burden and financially damage the Owners. Applying the balancing required by Civil Rule 26(b)(1)(C), the extent and duration of WSDOT's drilling and site occupation is not justified. This Court's decision affirming OAPU does not moot whether WSDOT's requested site entry, occupancy and use is appropriate. The Commissioner erred in failing to address these issues.

B. The Emergency Motion is Not Moot; the Owners Should Not Be Required to Post a $1 Million Bond to Stay Testing While the Case Remains on Appeal

The Commissioner also erred in determining that the issues raised by the emergency motion were moot following this Court's decision affirming the OAPU. The issues are not moot because the Court's decision is under reconsideration and may be subject to a petition for review before

a mandate issues. Under RAP 8.1(b), "[a]ny party to a review proceeding has the right to stay enforcement of a money judgment or a decision affective real, personal or intellectual property pending review." Until the OAPU appeal is fully resolved, the Owners are entitled to stay the trial court proceedings. Thus, the trial court's determination that a $1 million bond is required to stay the proceedings remains at issue, and the Commissioner erred in determining the issue of the bond amount is moot.

The emergency motion requested that the Commissioner review the Bond Order, because the trial court abused its discretion (and exceeded its jurisdiction) by ordering the Owners to pay an exorbitant $1 million bond to prevent WSDOT from conducting invasive subsurface drilling on the Owners' property, while this Court's OAPU review was pending. Neither party advocated for a bond amount even close to $1 million and the trial court provided no explanation, citation to the record, or legal basis in support of the $1 million bond. *See Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707-11, 592 P.2d 631 (1979) (trial courts must provide findings sufficient to "inform the appellate court, on material issues, what questions were decided by the trial court, and the manner in which they were decided") (internal citations omitted).

Moreover, there is also no indication that the trial court complied with RAP 8.1(c)(2) in requiring an additional $1 million bond.

To comply with RAP 8.1(c)(2), the trial court would ordinarily need to demonstrate that $1 million is "equal to the reasonable value of the use of the property during review." There is no evidence in the record supporting a determination that the reasonable value of WSDOT's testing and use during appeal would be $1 million.

In any event, basing the bond on the value of WSDOT's use of the property during the duration of the OAPU appeal is inappropriate. Emer. Mot. to Rev. Supersedeas, App. 3 at 9-10. This is not a case where the prevailing party has rights to real property and is being deprived of those rights because of an appeal. *Compare Norco Cons., Inc. v. King Cty.*, 106 Wn.2d 290, 721 P.2d 511 (1986) (developer entitled to damages where denied ability to develop its property because of illegal delays by King County). The purpose of a supersedeas bond is to preserve the status quo between the parties. *Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 498 (2017) (citations omitted). The trial court's exorbitant bond disrupts the status quo because instead of requiring WSDOT to compensate the Owners for occupying and using *WSDOT's property* as would by typical in a bond scenario (and is also constitutionally required to avoid an unconstitutional taking), the Bond Order improperly requires the Owners to post a $1 million bond to preserve *their own property rights* pending final resolution of OAPU,

payment of just compensation and transfer of title—effectively flipping the parties' rights on their heads.

At most, "the reasonable value of the use of the property during review," would be based on the duration of WSDOT's occupation of the properties, which for sixteen days of rent would be $34,109.59 using the State's appraisal. Emer. Mot. to Rev. Supersedeas, App. 3 at 10. However, given that WSDOT has no rights in the properties, the $5,000 bond posted by the Owners as an estimate of the costs WSDOT would incur as relating to the mobilization and demobilization of its drilling operations is a more appropriate estimation of the actual damages incurred by WSDOT.[2] *Id.*

Since the case remains on appeal, a stay remains necessary and is not moot. The Commissioner erred by not addressing these issues, and the Owners request that the Court do so now and reverse the Bond Order.

C. The Court Should Address the Issues Raised in the Motions Because They Are a Matter of Substantial Public Interest

Finally, the Court should address the issues raised in the motions because they raise critical issues of a substantial public interest. *See State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015). The trial court's

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[2] WSDOT maintains that its actual damages for rescheduling the testing are about $35,000. If the Court agrees with this amount, the Owners are willing to post this amount, and that it be secured by the Montlake Properties pursuant to RAP 8.1(c)(2). Emer. Mot. to Rev. Supersedeas, App. 3 at 10.

requirement that for a property owner to preserve his property from a taking, while he exercises his due process rights to appeal an OAPU order, he must obtain a stay and post a burdensome bond, conflicts with the Washington Constitution, the statutory scheme in Chapter 8.04 RCW, and established caselaw. "The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or regulations, and matters that are sufficiently important to the appellate court," and is warranted here to correct the trial court's repeated errors of law from recurrence. *Id.*

VI. CONCLUSION

The Owners respectfully request that the Court modify the Commissioner's ruling as not moot and hold that the trial court lacked jurisdiction to compel submission to WSDOT's testing, that the proposed use and occupancy without consent or just compensation is a taking, that such testing exceeds the scope of discovery authorized by the Civil Rules or statute, and that the trial court's exorbitant bond requirement is arbitrary, unwarranted and unfair. The Owners further request that this Court address its resolution of this Motion to Modify in its ruling on the Owners' motion for reconsideration.

RESPECTFULLY SUBMITTED this 1st day of June 2018.

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APPENDIX A

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CASE #: 77644-4-I
State of Washington, Respondent v. Montlake LLC and Stelter Montlake LLC, Petitioners

Counsel:

The following ruling by Commissioner Mary Neel of the Court was entered on May 1, 2018, lifting stay and dismissing review:

This matter involves an eminent domain proceeding regarding three contiguous parcels of property (market, gas station, and parking lot) located on Montlake Blvd. near the SR 520 Interchange. The Washington State Department of Transportation (WSDOT) sought to condemn the property as part of a road and bridge construction project. In August 2017, the trial court granted WSDOT's request and issued an order of public use and necessity (OAPU). The property owners appealed in No. 77359-3-I.

Meanwhile WSDOT sought entry onto the property to inspect, measure, survey, photograph and conduct testing/sampling for the purpose of obtaining valuation evidence relevant to just compensation/damages. The owners objected. In October 2017, the trial court granted WSDOT's motion to compel. In November 2017, the owners sought discretionary review and posted a supersedeas bond of $5,000. After briefing, the trial court ordered the owners to post a bond of $1 million. The owners objected. See RAP 8.1(h).

In February 2018 I heard argument on the property owners' motion for discretionary review and their motion objecting to the order on supersedeas. At that point the appeal of the OAPU in No. 77359-3-I was set for consideration before a panel within a few days. Accordingly, I stayed review of the trial court orders pending a decision in No. 77359-3-I.

On April 30, 2018, in No. 77359-3-I a panel of this court affirmed the OAPU. In view of the decision, the issues raised in the owners' motion for discretionary review and the objection to the supersedeas pending review in this court are now moot. Accordingly, the stay is lifted and review is dismissed.

Therefore, it is

ORDERED that review in this matter is dismissed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

PERKINS COIE LLP

August 09, 2018 - 2:52 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Montlake, LLC, Appellant (773593)

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