

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

No. 34943-4-II

COWLITZ COUNTY, Respondent

v.

L. CARLYLE MARTIN and LINDA C. MARTIN,
Husband and wife; LAWRENCE OLSTAD and
ROBERTA KELLY, husband and wife;
WASHINGTON MUTUAL BANK; and U.S. BANK
NATIONAL ASSOCIATION ND, Appellants.

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COURT OF APPEALS
DIVISION II
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BRIEF OF RESPONDENT COWLITZ COUNTY

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I. INTRODUCTION

Cowlitz County filed a Petition for Condemnation in the Cowlitz County Superior Court seeking to acquire an easement interest in property which the Appellants own or in which they claim an interest. Pursuant to statute, the Superior Court held a hearing for the purpose of determining whether the county's proposed use of the property is a public use. After receiving evidence at that hearing, the Superior Court found that the proposed use is a public use and entered an Order Adjudicating Public Use and Necessity.

II. ANSWER TO ASSIGNMENT OF ERROR

The Superior Court properly found on competent proof that the county's contemplated use of the property described in the Petition for Condemnation is a public use and that acquisition of rights in that property is reasonably necessary to carry out the proposed public use.

III. STATEMENT OF THE CASE

Acting pursuant to the direction of the county legislative authority (Ex 1), the county through the prosecuting attorney filed a Petition for Condemnation on February 23, 2006 seeking to condemn rights in property adjacent to the existing right of way of Coyote Lane, a county

road. CP 1. A hearing was held on May 19, 2006 on the county's request for an order adjudicating public use. RP 1.¹

The county presented the testimony of Ryan Lopossa, engineering manager for the Cowlitz County Department of Public Works. RP 8. Mr. Lopossa testified that the county proposed to replace an existing corrugated steel culvert conveying the waters of Baxter Creek where that creek is crossed by Coyote Lane, a county road. RP 9. He further testified that the proposed replacement culvert would be a concrete box structure that would allow the stream to pass through the roadway essentially unimpeded, facilitating fish migration and providing protection against damage during storm events. RP 9-12. Finally, he testified that the easement the county seeks to acquire is necessary because the proposed new culvert will not fit within the existing county right of way for Coyote Lane. RP 11. The court also admitted into evidence the fish habitat assessment report prepared by the county's consultant analyzing the barrier to fish passage presented by the existing Coyote Lane culvert. Ex 5.

¹ The transcript of the May 19, 2006 hearing received from Appellants in response to a request made under RAP 9.5(a) was single spaced and contained neither pagination nor line numbering. The county has attempted to correlate references to the report of proceedings with references in the Brief of Appellants

IV. SUMMARY OF ARGUMENT

Appellants challenge the issuance of an order adjudicating public use and necessity issued in connection with a road improvement project proposed by the county. Statutes and case law clearly define the authority granted to the county and the issue to be determined by the court in issuing such an order. The findings of the superior court are not challenged on appeal and are supported by substantial evidence.

V. ARGUMENT

A. The Superior Court properly found that the County's proposed culvert replacement project is a public use.

The county filed its Petition for Condemnation herein pursuant to the authority granted in RCW 8.08.010. In relevant part, that statute provides as follows:

Every county is hereby authorized and empowered to condemn land and property within the county for public use; whenever the board of county commissioners deems it necessary for county purposes to acquire such land, real estate, premises or other property, and is unable to agree with the owner or owners thereof for its purchase, it shall be the duty of the prosecuting attorney to present to the superior court of the county in which said land, real estate, premises, or other property so sought to be acquired or appropriated shall be situated, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and ... the object for which the land is sought to be appropriated

The legislature went on in the same enactment (Washington Laws, 1949, Chapter 79) to declare what constitutes a public use as follows:

Any condemnation, appropriation or disposition intended in RCW 8.08.010 through 8.08.080 shall be deemed and held to be for a county purpose and public use within the meaning of RCW 8.08.010 through 8.08.080 when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof.

RCW 8.08.020.

In addition to the general grant of authority to condemn property conferred under those statutes, the legislature has conferred specific authority on counties relevant to the petition filed by the county in this action. RCW 36.75.040(3) provides that county commissioners shall have the power in relation to roads to: “Acquire land for county road purposes by purchase, gift, or condemnation, and exercise the right of eminent domain as by law provided” RCW 36.85.010 provides, in relevant part, as follows:

Whenever it is necessary to secure any lands for a right-of-way for any county road or for the drainage thereof ... the board may acquire such lands on behalf of the county by gift, purchase, or condemnation. When the board so directs, the prosecuting attorney of the county shall institute proceedings in condemnation to acquire such land for a county road in the manner provided by law for the condemnation of land for public use by counties.

Finally, RCW 36.89.030 gives counties authority to develop, construct, and improve open space and storm water control facilities and to acquire land therefore by condemnation and RCW 86.12.020 gives counties broad authority to condemn property to improve stream channels for storm water control.

Against that statutory background, the county's Petition for Condemnation herein came before the superior court for hearing pursuant to RCW 8.08.030. Under the provisions of that section, the relevant test is whether the court is "satisfied by competent proof that the contemplated use for which the lands ... sought to be appropriated is a public use of the county." The appropriate analysis is described in *In re Seattle*, 104 Wn.2d 621,623, 707 P.2d 1348 (1985) as follows:

Washington Constitution, Article 1, Section 16 (Amendment 9) provides that private property may be condemned only for public purposes and "the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public ..."

For a proposed condemnation to meet the requirement of Article 1, Section 16 (Amendment 9) the court must make three separate but interrelated findings: (1) the use must be public; (2) the public interest must require it; and (3) the property appropriated is necessary for the purpose. *In re Seattle*, 96 Wash.2d 616, 625, 638 P.2d 549 (1981); *Des Moines v. Hemenway*, 73 Wash.2d 130, 138, 437 P.2d 171 (1968). The latter two findings are generally subsumed under the definition of "necessity". See North, *The Element*

of Necessity in Washington Eminent Domain Proceedings, 18 Gonz.L.Rev. 665 (1982-83).

The Legislature must ordinarily have granted the condemnor the authority to condemn property for a particular purpose in order for the courts to allow condemnation for that purpose. *See In re Seattle*, 96 Wash.2d at 629, 638 P.2d 549; *State ex rel. King Cy. v. Superior Court*, 33 Wash.2d 76, 204 P.2d 514 (1949).

The definition of “necessity” as it relates to the requisite findings of the trial court is further explained in *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683-84, 399 P.2d 330 (1965) as follows:

The word 'necessary,' when used in or in connection with eminent domain statutes, means reasonable necessity, under the circumstances of the particular case. It does not mean absolute, or indispensable, or immediate need, but rather its meaning is interwoven with the concept of public use and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement. Reasonable necessity for use in a reasonable time is all that is required.

Under the provisions of Const. Art. 1, s 16 (Amendment 9) and our interpretation thereof, the issue of whether a proposed acquisition be really for a public use is solely a judicial question, although a legislative declaration thereof will be accorded great weight. On the other hand, the issue of whether the contemplated acquisition is necessary to carry out the proposed public use presents a legislative question, and a declaration of necessity by the appropriate legislative body will, by the courts, be deemed conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.

(Internal citations omitted.)

Against that legal background, the trial court received evidence at the hearing held pursuant to RCW 8.08.030 and thereafter found that the county's proposed use of the subject property was a public use. "A trial court's decision on public use will be reversed if the finding is not supported by substantial evidence." *City of Blaine v. Feldstein*, 129 Wn.App. 73, 79, 117 P.3d 1169 (2005). Appellants apparently concede that the first part of the test, "whether a proposed acquisition be really for a public use", is conclusively established. (Brief of Appellants, p. 14) Indeed, as suggested herein, it would be futile to contend that the replacement of a culvert in a county road, designed for the purpose of allowing the road to cross over a stream, and the stream to flow through the barrier presented by the road, constitutes anything other than a public use. "It is beyond dispute that the use of land for highway purposes is a public one and that public interest requires the construction, operation, and maintenance of highways." *State v. Dawes*, 66 Wn.2d 578, 583, 404 P.2d 20 (1965).

The trial court further found that acquisition of the subject property interest is reasonably necessary to accomplish the county's proposed purposes. Appellants correctly note that the determination of reasonable necessity is a legislative determination that is conclusive in the absence of proof of actual or constructive fraud. (Brief of Appellants, p. 14).

However, they fail to recognize that they bear the burden of showing such fraud. *Blaine v. Feldstein, supra*, 129 Wn.App. at 81.

Moreover, Appellants accord no consideration to the record before the trial court, including the testimony of Ryan Lopossa identifying the benefits of the culvert replacement project for fish migration and storm water management (RP 9-12), the conclusions of the fish habitat assessment report (Ex 5), and indeed the project grant agreement between the county and the Salmon Recovery Funding Board (Ex 2). As stated in the Project Summary attached as part of that agreement, “Removal of this blockage would be a big step towards salmon and steelhead recovery for this watershed and the broader Lower Columbia River Sub-basin of WRIA 26.” (Ex 2, p. 1) In light of that record, the decision of the county to proceed with the subject road improvement project can in no sense be considered “willful and unreasoning action, without consideration and regard for facts or circumstances.” *Welcker*, 65 Wn.2d at 684, 399 P.2d 330 (citation omitted). Appellants fail to show any arbitrary and capricious conduct amounting to constructive fraud. The finding of the trial court on the reasonable necessity of condemning the subject property interest is supported by substantial evidence.

B. The source of funding for the County road improvement project neither changes its character as a public use nor defeats the County's authority to condemn the subject property for that project.

The bulk of the argument presented by Appellants amounts essentially to the contention that the fact that the county identified the existing culvert as a barrier to fish passage and on that basis entered into an agreement with the Salmon Recovery Funding Board to receive financial assistance for the culvert replacement effectively negates the county's clear authority to acquire property interests for that project through condemnation. That proposition is unsupported by any authority and is simply without merit.

Appellants first seek support for their contention in the 1949 decision of the Washington Supreme Court in *King County v. Superior Court*, 33 Wn.2d 76, 204 P.2d 514 (1949). Appellants fail to note that the decision in that case pre-dates the grant of condemnation authority to counties in what is now codified as RCW 8.08.010, quoted above. Under the prior statutes actually before the court in *King County*, counties simply had not been granted authority to condemn property for parks (authority that incidentally clearly exists today under the statutes cited above). The decision provides no support for the proposition that the authority to acquire property through condemnation for the county's culvert

replacement project is nullified by virtue of the fact that the project promotes fish habitat.

Finally, Appellants cite to selected provisions of the statutes under which the legislature has provided funding for salmon recovery projects, Chapter 77.85 RCW. Initially, it should be noted that there is nothing in that chapter that even suggests it is intended to be a limitation on the county's authority to exercise granted condemnation authority. The legislature specifically declared its intent in RCW 77.85.005 as follows:

It is the intent of the legislature to begin activities required for the recovery of salmon stocks as soon as possible.... The legislature finds that a coordinated framework for responding to the salmon crisis is needed immediately. ...[A] coordinated state funding process should be established through a salmon recovery funding board; the appropriate local or tribal government should provide local leadership in identifying and sequencing habitat projects to be funded by state agencies; habitat projects should be implemented without delay;

It is hard to find in that declaration of intent any notion that counties should be deprived of the authority to utilize the statutorily granted power of eminent domain to accomplish road improvement or stream improvement projects simply because a benefit of the project is declared to be improved fish habitat.

The contention of Appellants ultimately rests entirely in provisions of chapter 77.85 RCW that provide that, in order to secure funding,

projects placed on habitat project lists “must have a written agreement from the landowner on whose land the project will be implemented.” RCW 77.85.010(3). First, the quoted language says nothing about acquisition of property interests. Second, the provision in fact is directed solely to requirements attached by the legislature on selection of projects eligible for funding. However, as the discussion above demonstrates, the source of funding for a county project is not an element the trial court is directed to consider in entering an order adjudicating public use and necessity. Indeed, the Washington Supreme Court held in connection with the condemnation of property to expand the Washington State Convention and Trade Center private funding of a public project would not defeat the State’s exercise of the power of eminent domain. *State v. Evans*, 136 Wn.2d 811, 819, 966 P.2d 1252 (1998). Any concerns that Appellants harbor regarding the decision of the Salmon Recovery Funding Board to provide funding for this project are simply not relevant to the county’s authorized exercise of its delegated eminent domain powers and the trial court’s finding of public use and necessity.

Taking into account the declared legislative intent of Chapter 77.85 RCW, and reading the statute as a whole in a fashion consistent with that intent, it is clear that the sections that form the basis of the Appellants’ argument simply confirm that habitat management projects require a

landowner's written agreement when conducted on that landowner's property. In this case, the county simply seeks to acquire additional right of way to allow for construction of a concrete arch culvert servicing a county road. Because the project opens up stretches of Baxter Creek for fish habitat, the Funding Board entered into an agreement with the county to provide financial assistance. The statutes cited in the Brief of Appellants clearly demonstrate that the removal of a barrier resulting in promotion of salmon and steelhead recovery is a public use that is obviously "directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof." RCW 8.08.020.

C. The trial court properly found on the basis of proof submitted at the hearing held pursuant to RCW 8.08.030 that the County's proposed use of the subject property to facilitate replacement of a culvert in a county road would both promote fish passage and provide protection for the road in storm events.

The Appellants' final assignment of error simply reflects once again a failure to accord proper attention to the nature of the proceeding from which they appeal. The record reflects that the county filed and served on Appellants a Petition for Condemnation (CP 1) that included notice of the reasons for which the county proposed its road improvement project. (Brief of Appellants, p. 17). Thereafter, on proper notice, the

county brought that petition before the trial court for a hearing pursuant to RCW 8.08.030. After considering the evidence presented at that hearing, the trial court entered findings, including that the county's intended use of the subject property was for replacement of the culvert handling the flow of Baxter Creek under Coyote Lane, and that such replacement would promote fish passage and provide protection for the road from stream flows anticipated in storm events. (CP 19) As noted above, the issue before this court on review is whether those findings are supported by substantial evidence. *City of Blaine v. Feldstein*, 129 Wn.App. 73, 117 P.3d 1169 (2005). Again as noted above, they are. Appellants offer no authority in support of the apparent contention that the county was restricted in its presentation by language in the resolution formally adopted by the Board of County Commissioners requesting that the prosecuting attorney take action as directed in RCW 8.08.010. That argument is simply without merit.

VI. CONCLUSION

The decision of the trial court issuing an order adjudicating public use and necessity in connection with the County's Petition for Condemnation herein should be affirmed and this matter remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 5th day of February,

2007.

A handwritten signature in black ink, appearing to read "R. Marshall", written over a horizontal line.

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Chief Civil Deputy Prosecuting Attorney
Attorney for Respondent Cowlitz County

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

COWLITZ COUNTY,)
)
 Respondent,)
)
 vs.) CERTIFICATE OF
) MAILING
 L. CARLYLE MARTIN, et al,)
 Et ux,)
)
 Appellant.)
 _____)

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COURT OF APPEALS

I, Audrey J. Gilliam, certify and declare:

That on the 5 day of February, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent Cowlitz County addressed to the following parties:

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

Dated this 5 day of February, 2007.


Audrey J. Gilliam