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No. 82192-5

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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CLERK *R/R*

ALBERT HEGLUND, et ux, et al.,

*Appellant,*

vs.

CITY OF SEATTLE, a municipal corporation,

*Respondent.*

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**THE CITY OF SEATTLE'S  
BRIEF IN RESPONSE TO  
BRIEF OF HEGLUND**

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## I. INTRODUCTION

A road-widening project is categorically a public use.

By conflating the terms "private funding" and "private use", the Heglunds attempt to conjure an issue regarding public use where none exists. They claim that lack of final budget, the presence of private funds and lack of final plans defeat eminent domain.

These theories have no merit and have been repeatedly rejected by this court in more than 120 years of jurisprudence:

- A. The absence of a fully budgeted project is not enough. *Mercer Island School District No. 400 v. Scalzo, Inc.*, 54 Wn.2d 539, 342 P.2d 225 (1959).
- B. The presence of private funding is not enough. *Town of Steilacoom v Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966). (Cited with approval in *State ex rel. Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 819, 966 P.2d 1252 (1998)).
- C. The absence of final project plans is not enough. *State ex. Rel. Sternoff v. Superior Court*, 52 Wn.2d at 289, 235 P.2d 305 (1958).

The Heglunds are inviting the court to supplant the legislative determination. This will add cost and will cause delay in public projects.

This appeal is without merit. It should be dismissed and the City should recover costs and fees.

## **II. ISSUES**

1. Whether the presence of private funding is sufficient to defeat the exercise of eminent domain.
2. Whether the trial court finding of public use and necessity is in error where the use is a statutorily enumerated public use and the evidence introduced by the City is that the land condemned will be put solely to a public use.
3. Whether the Heglunds' attack on the finding of necessity, which is raised for the first time on appeal, should be stricken because they were not raised in the trial court.

## **III. COUNTERSTATEMENT OF THE CASE**

City ordinance 122505 adopted in October 2007 [CP 30-33]

authorizes the condemnation and acquisition of property interests in order to widen Mercer Street.

The overall project design was at 60% in October 2007, when the ordinance was adopted. [CP 34]. At that time, the city had identified a list of the 63 parcels to be acquired and attached that list as part of its ordinance. [CP 35-36] Attached to and part of the ordinance is a figure illustrating the fee and temporary construction easement property interests to be acquired from Heglunds. CP 43

The city's project manager is Angela S. Brady. Ms. Brady is a highly-educated licensed Professional Engineer in the State of Washington and a certified Project Management Professional. She signed a detailed

declaration regarding the public use to which the property will be put and the necessity for the Heglund property. CP 468-471

The Mercer Corridor Improvement Project is a multi-year phased project that widens Mercer Street between I-5 and Dexter Avenue by 70 feet. The project is budgeted at \$200,000,000.00. CP 469, lines 1-9

The project is a City of Seattle road project. The project and all of its assets will be owned by the City. The land to be acquired by the City will be owned by the City. There will be no private ownership of any asset acquired by the City in this project. CP 469, lines 10-14

The city needs to acquire 8,521 square feet of the Heglunds' property in fee ownership, and 6,224 square feet as a temporary construction easement for the duration of the project. CP 470, lines 19-22

As of the date of the public use and necessity hearing, the City had expended approximately \$12,000,000.00 in planning, right-of-way work, tenant relocation and property acquisition, and had appraisals of all of the property required for the project. CP 469, line 22

At the time of the public use and necessity hearing, the project had reached 90% design, the city had already acquired property rights for the project and its right-of-way agents were in the process of relocating tenants from the properties. CP 470, lines 8-10

City ordinance 122686 is a budget ordinance. CP 54-61 It

reappropriates funding from other budgeted City Capital Improvement Projects (CIP), transferring funds to the Mercer Corridor Project and the Spokane Street Project. It added \$18,000,000.00 to funding to the Mercer Project and authorized continuing project development including acquisition of property rights for the project. CP 469, lines 17-23 and CP 470, lines 1-2

In the trial court proceeding, counsel for Heglunds abandoned any argument related to necessity: "I can't win over there". RP 33, lines 1-9.

#### **IV. ARGUMENT**

##### **A. Summary**

Widening a road is a categorically public use for which cities are specifically granted authority. The city's ordinance finding of public use is entitled to great deference before the court and the determination of necessity is conclusive absent a showing of fraud or arbitrary and capriciousness amounting to constructive fraud.

The Heglunds' arguments are contrary to law in Washington.

1. A private source of project funding is not evidence of a private use.
2. A "Convention Center" balancing test is not required absent the presence of a private use.
3. The absence of a complete budget does not defeat a finding of necessity.

4. The absence of final plans, permits or approvals does not defeat a finding of necessity.

In the trial court, the Heglunds challenged only public use, claiming that solely on the fact that private funds will be used as part of the budget, the use might be private. From that they argued that a “balancing test” had to be applied. On appeal, they mush together several arguments to challenge both public use and necessity. (Some of the issues in the Heglunds' appeal brief were not raised in the trial court. The city objects to these new arguments as discussed below.)

**B. Road-Widening is Categorically a Public Use.**

RCW 8.12.030 expressly authorizes cities to condemn property for road-widening purposes. The condemnation of private property for public transportation is categorically a public use. *State ex rel. Devonshire v. Superior Court for King County*, 70 Wn.2d 630, 636-637, 424 P2d 913 (1967). Absent a showing of a private use, the trial court’s determination should be conclusive when the condemnation is for the purpose of widening a roadway. *City of Tacoma v. Brown* 69 Wash. 538, 125 P. 940 (1912). The only evidence on the subject is that the use will be entirely public. CP 469, lines 10-14

**C. The City's Legislative Determination of Public Use.**

The city adopted an ordinance finding that the acquisition of property for Mercer Corridor road-widening project is for a public use, in the public interest and necessary. CP 30-43

While the question of whether the use is a public use is for the court to decide, the city's ordinance is entitled to great deference before the court. *City of Des Moines v. Hemenway*, 73 Wn.2d 130, 139, 437 P.2d 171 (1968)

The city did not however rest on that principle alone. In the trial court, in addition to the ordinance the City introduced through the sworn declaration of a knowledgeable City official sufficient facts about the project to support the legislative determination that the use will be a public use. CP 468-471 These documents demonstrate that the use is for a public roadway and that the property acquired will be publicly owned.

**D. Legislative Determination of Necessity.**

A legislative body's declaration of necessity "is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud." *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965). "Seldom has this court found that a condemning authority has abused its trust in making a declaration of public necessity. This should not be surprising, for it is not to be presumed that such abuses often occur." *State v Brannan*, 85 Wn.2d 64,

68, 530 P.2d 322 (1975).

Fraud or constructive fraud is the only legal basis for challenging a legislative finding of necessity. The Heglunds did not contend in the trial court that there was fraud. They did not contest the finding of necessity at all. In oral argument, counsel for the Heglunds said "I can't win over there"; the word "there" referring to the issue of necessity. RP 33, line 9

Although entitled to rely on the conclusiveness of the legislative determination of necessity, the city did not rest on the benefit of that status. At the trial court, the City introduced facts demonstrating that the use was purely public and necessary. (See City Ordinance 122505, CP 31-43 including project design and property acquisition lists and Declaration of Brady CP 470; lines 11-22)

**E. Source of Funding Does not Defeat Eminent Domain.**

In *State ex rel Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 819, 966 P.2d 1252 (1998), the Court affirmed the long-standing rule in Washington, that mere presence of a private funding source in a project is not sufficient to challenge public use.

Appellants fail to cite any cases to support their argument that private contribution to a project's expenses defeats the exercise of eminent domain. On the contrary, in *Town of Steilacoom v Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966) this court affirmed a finding of public use and necessity where a private developer advanced funds for condemnation awards

and financed a public sewer extending to his property. Private funding of a public project alone is not sufficient to defeat the State's exercise of the power of eminent domain. (emphasis added)

**F. “Convention Center” Inquiry is Not Required**

There is no evidence that a private use is intended and the only evidence is that the uses will be public. CP 469, lines 10-14 Nevertheless the Heglunds argue that the court must undertake an exhaustive scouring of the project and balance interests. Only cases where there will be a private use require a balancing inquiry.

There was an admitted private use in each of the following cases:

*State ex rel Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 819, 966 P.2d 1252 (1998), *In re City of Seattle*, 104 Wn.2d 621, 707 P.2d 1348 (1985) and *In re City of Lynnwood*, 118 Wn. App. 77 P.2d 378 (2003). In the *Convention Center* and in *Westlake*, a balancing inquiry was required.

The *Lynnwood* case however is mis-characterized. The issues in *Lynnwood* were: 1) whether the court had subject matter jurisdiction to examine separate acquisition by a convention center PDA of a shopping center adjoining the parcel being condemned; and 2) whether the PDA's use of the shopping center was an enumerated power under the statute. There was no balancing of interests.

In *HTK Management LLC v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 633, 121 P.3d 1166 (2005), the court explained why there is no need for a balancing test where the evidence does not show a private use:

[T]he court was faced with a very different situation—condemnation of property on which a significant part was *never* going to be put to a public use. (emphasis in original)

In the Mercer Project there is no evidence that *any* portion of the property would ever be put to a private use and the only evidence is that the uses will be public.

Interestingly, in *HTK*, the evidence showed that only a portion of the property was going to be permanently used for the project and after the project the large remainder would be sold to private interests.

Conversely, in the Mercer Project the city's present plan requires that a portion will be permanently retained (and covered with a public road) and the remainder used during construction and returned to the Heglunds at the end of the project.

The Heglunds also cite *King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962). That case is inapplicable because in that situation, the county sought to condemn land for a new road across private land to give a more convenient access to an adjoining private land owner. The

court found that lacked a public purpose.

**G. Absence of Fully-Budgeted Project Not Enough**

The Heglunds argue that Ordinance 122686, adopted in May 2008 (CP 54) makes the project budget uncertain. That Ordinance is a reappropriation ordinance, reallocating funds among various City capital projects, including the Mercer Street project.

Contrary to Heglunds' assertion, the measure continues the project funding. It expressly authorizes the continued acquisition of property and the completion of design and environmental work on the Mercer Project. CP 469, lines 17-23.

The Heglunds argue that the absence of final budget makes the finding of necessity premature. The fact that funding is not in place does not undermine the legislative finding of necessity. In *Mercer Island School District No. 400 v. Scalzo, Inc.*, 54 Wn.2d 539, 342 P.2d 225 (1959), the Court held that evidence of the School District's ability to pay the condemnation award should it elect to proceed with remaining phases of the condemnation was not material on a hearing for an order of public use and necessity.

In *State ex rel. Sternhoff v. Superior Court*, 52 Wn.2d 289, 325 P.2d 305 (1958), the court held that the presence of conditions which must be met before the project can be built, including obtaining federal

matching funds to finance construction are not germane. In *Sternhoff*, as here, the contention was that uncertainty about the construction of the project defeated necessity.

#### **H. Lack of Final Plans Not Enough**

The lack of final plans, permits or the like is not sufficient to defeat the legislative determination of necessity. *State ex. Rel. Sternhoff v. Superior Court*, 52 Wn.2d at 289, 235 P.2d 305 (1958), *State ex. rel. Lang v. Superior Court*, 61 Wn.2d 153, 157, 377 P.2d 425.. The absence of a specific plan for a projected use does not make the use speculative nor does it demonstrate lack of public necessity. Necessity does not mean immediate absolute or indispensable need. *Petition of Port of Grays Harbor* 30 Wash.App. 885, 638 P.2d 633 (1982).

#### **I. Heglunds Cannot Raise New Issues on Appeal.**

Although they abandoned the argument in the trial court (RP 33, line 9), in Section IV, D, pages 16-22 of their appellate brief the Heglunds raise the question of whether the City proved necessity to condemn the subject property. They assert that uncertainties of budget, design, timing and other factors create doubt about the rights needed to be acquired by the city. As discussed above these arguments fail on their own.

Nowhere in their trial court memorandum (CP 418-421) nor in oral

argument before the trial court did they make these arguments. (RP 31-39)

In their appeal brief, the Heglunds make no assignment of error regarding the finding of necessity. The court should not review a claim which was not raised in the trial court. *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983).

## V. CONCLUSION

The city ordinance finding public use is entitled to great deference and transportation uses are categorically public uses. The only evidence in the record is that the use will be entirely public; namely the widening of an existing road. These facts are found in the ordinance and the sworn declaration of the City project manager.

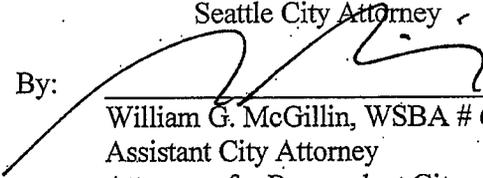
The city's legislative determination of necessity is conclusive absent a showing of fraud, or arbitrary and capricious conduct amounting to constructive fraud. The city's evidence shows that there is no question that the property is necessary.

The trial court correctly applied the law. This appeal should be dismissed. The City should be awarded its attorney fees and costs on appeal.

DATED this 20<sup>th</sup> day of January, 2009.

THOMAS A. CARR  
Seattle City Attorney

By:

  
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Assistant City Attorney  
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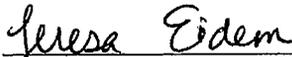
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Please accept the *City of Seattle's Brief in Response to Brief of Heglund* in Heglund v. City, Cause Number 82192-5. Thank you.

Teresa Eidem  
Legal Assistant