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

ALBERT HEGLUND, et ux, et al.,

Appellant,

vs.

CITY OF SEATTLE, a municipal corporation,

Respondent.

**THE CITY OF SEATTLE'S
BRIEF IN RESPONSE TO
TO BRIEF OF WEST MARINE**

THOMAS A. CARR
Seattle City Attorney

William G. McGillin, WSBA # 6018
Assistant City Attorney
Attorneys for Respondent
City of Seattle

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION	1
II. MISSTATEMENTS IN WEST MARINE BRIEF	2
III. ISSUES	2
IV. COUNTERSTATEMENT OF THE CASE.....	3
V. ARGUMENT.....	3
A. City Response Brief to Heglund Incorporated by Reference	3
B. West Marine’s Case Rests on Fundamentally False Premise	3
C. Road-widening Project is Categorically a Public Use.....	5
D. Lynnwood Case Incorrectly Characterized.	7
E. Balancing What?.....	9
F. Regulatory Takings Cases Not Relevant	9
G. Claims of Fraud and Constructive Fraud.....	9
H. Claim that public interest does not require a project which does not solve the problem	11
I. West Marine’s Reading of RCW 8.12.040 is Incorrect.....	11
VI. CONCLUSION.....	11

TABLE OF AUTHORITIES

Page(s)

CASES

Mercer Island School District No. 400 v. Scalzo, Inc.,
54 Wn.2d 539, 342 P.2d 225 (1959)..... 4

State ex rel. Coyle v. Superior Court for Walla Walla County,
128 Wash. 460, 223 P. 3 (1924) 6

State ex rel. Washington State Convention and Trade Center v. Evans,
136 Wn.2d 811, 819, 966 P2d 1252 (1998)..... 5

State ex. rel McPherson v. Superior Court of Douglas County,
148 Wash. 203, 205, 268 P. 603 (1928) 6

State ex. Rel. Sternoff v. Superior Court,
52 Wn.2d at 289, 235 P.2d 305 (1958)..... 5

State v. Brannan,
85 Wn.2d 54,68, 530 P.2d 322 (1975)..... 7

Town of Steilacoom v Thompson,
69 Wn.2d 705, 419 P.2d 989 (1966)..... 4

STATUTES

RCW 8.12.030 5, 6

RCW 8.12.040 11

COURT RULES

RAP 18.9(c)(2) and 18.14..... 1

I. INTRODUCTION

We implore the Court to dismiss this appeal pursuant to RAP 18.9(c)(2) and 18.14, rather than sending it to the Court of Appeals as delay will cost taxpayers \$440,000.00 to \$970,000.00 per month. The city has filed a motion to dismiss simultaneously with this brief.

What West Marine really asks can be found in the following trial court colloquy. Explaining that there is no law in support of its positions, counsel for West Marine said:

“There is nothing your honor. Frankly this is a new case. This is cutting edge public use and necessity” RP 27, line 9-10.

West Marine’s entire case is about private funding, weaving a confusing argument which mixes and misuses “private use” and “private benefit”. They mischaracterize “private funding” and from that premise argue “private use” might or may occur.

They had the burden of meeting the clear, cogent and convincing standard for fraud and having no evidence, make the utterly false claim that the city refused to give information germane to the hearing. The City was not asked and did not refuse.

We ask that the appeal be dismissed and that the city recover its attorney fees and costs.

II. MISSTATEMENTS IN WEST MARINE BRIEF

On page 1 of its brief, West Marine posits a falsehood on which it bases much of its argument throughout the remainder of the brief. They claim that the City refused to disclose sources of funding. There is nothing in the record to support that claim.

The city's oral argument can be found at CP 599-612 and 635-639. The city was never asked to disclose the identity of the private funding sources nor did it refuse to do so. The city's motion papers are found at CP 7-48. Nowhere in those pleadings does the city make such an outrageous statement.

Likewise, the argument made by West Marine at page 21-26, implies that the city violated the Public Records Act. This claim is utterly false.

They further allege that the city committed fraud and constructive fraud by refusing to disclose information. There is absolutely no evidence to support the claim that the city refused to provide anything requested under the Public Records Act. West Marine fails to offer any proof that a request for information was made, rendering this argument appalling.

III. 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?

IV. COUNTERSTATEMENT OF THE CASE

The city generally accepts West Marine's statement of the case and incorporated its Counter Statement of the Case contained in the city's response to the Heglund brief.

V. ARGUMENT¹

A. City Response Brief to Heglund Incorporated by Reference

The city incorporates by reference its brief in response to the Heglund brief.

B. West Marine's Case Rests on Fundamentally False Premise

¹The city is unable to discern all of the arguments made in West Marine's brief because of including incorrect citations to Clerk's Papers found at page 29--CP 385 and CP 198; page 30—CP 163, 383; page 40—CP 15 and 383. It may be that these mistakes are innocuous, but we reserve the right to further brief the issues if the correct citation changes the arguments we believe they are making.

What West Marine really asks can be found in the following trial court colloquy. Explaining in answer to the court's question, that there is counsel for West Marine admits that there is no law in support of its positions:

“There is nothing your honor. Frankly this is a new case. This is cutting edge public use and necessity” RP 27, line 9-10.

Stripped of its voluminous citation and repetition, West Marine really only makes three arguments: 1) private funding will be part of the budget and therefore private use may occur; and 2) that necessity cannot be determined because private funding may lead to private use; and 3) therefore the court must fully delve into project details looking for any private use. All further arguments by West Marine are merely a recasting of these three arguments.

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

- i. 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).
- ii. 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)).

iii. 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).

C. Road-widening Project is Categorically a Public Use

On page 1 of its brief West Marine's asserts that the city contends that roadway project is entitled to a "rubber stamp". They make no citation to the record in support of that claim and the city has made no such statement.

While we believe that a transportation use is categorically a public use we concede that in instances where there was proof of a non-public use and other unusual circumstances, courts have declined to find public use. However, reading the cases cited by West Marine on page 1 of their brief is instructive. Starting with *Theilman*, the very last thing the court said was:

"We find the facts of the instant case *bizarre, if not unique.*" *Theilman* p 595 (emphasis added)

Next, we move to the *State v. Superior Court of Yakima County* case. That case involved the siting of a new highway, not the widening of an existing roadway. It did not involve a city condemning land under RCW 8.12.030. The route chosen, out of all the open space in Eastern

Washington, ran right through the land owners packing sheds. On these unique facts, the court concluded that the route chosen inflicted unnecessary harm on a single owner by destroying his business when other land adequate to the route of this new road lay easily nearby. The issue was not public use, but necessity.

The holding in *Yakima* is distinguished in *State ex rel. Coyle v. Superior Court for Walla Walla County*, 128 Wash. 460, 223 P. 3 (1924) and *State ex. rel McPherson v. Superior Court of Douglas County*, 148 Wash. 203, 205, 268 P. 603 (1928). In both the *Walla Walla* and *Douglas County* cases, the court found no evidence private use would be made or that there were facts corrupting the finding of necessity.

Citing the *Cowlitz* case is really peculiar. That case presented a question of first impression, whether the Salmon Recovery Act granted authority to condemn property solely for the purpose of providing fish passage when the statute did not enumerate that purpose. In the Mercer Project, the only uses are specifically enumerated transportation uses. RCW 8.12.030.

State v. Bank of California involved a somewhat unique situation as well, where the sole purpose for which the land was sought was to create a green belt to benefit property owners along the highway.

Both *Theilman* and *Bank of California* are distinguished in *State v. Brannan*, 85 Wn.2d 54,68, 530 P.2d 322 (1975).

Reading these cases cited by West Marine on this issue reveals that once the cases with “bizarre” or “unique” facts are weeded out, transportation projects including widening a road are categorically public uses for which cities are specifically granted authority to condemn.

D. Lynnwood Case Incorrectly Characterized.

The *Lynnwood* case discussed at page 13 of the West Marine brief, mischaracterizes the case. 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.

The misstatements at page 1 of West Marine’s brief regarding an alleged refusal by the city to disclose information which are discussed in the Introduction to this brief, are the premise on which much of their argument is based.

At page 13 of West Marine’s brief, the quoted caselaw assumes the existence of a private use; a “joint enterprise.” The evidence in the record here is that all uses to be made are entirely public for the widening an existing roadway. CP 30-43, CP 468-471

Similarly at page 14, West Marine says that “the city argues that since there will *allegedly* be no private use...the extent of private use is irrelevant.” They cite to nothing in the record in support of that contention.

What the City did argue is that a private funding source alone is not sufficient to prove private use and that sources of funding were not issues.

RP 3-16 and 39-43 What the City furnished is the sworn declaration of Angela Brady, P.E., PMP, to the effect that the uses are all public. CP 468-471

At the bottom of page 15, they assume a fact not present in this case; that private participation in the use will occur. In fact, the evidence is that all uses will be public without legal authority to support their allegation. At the public use and necessity hearing West Marine argued: “...the question is not only money, it’s what is the deal? What am I getting for it?” CP 618, lines 7-8

Without any evidence they claim there is some sinister backdoor deal. In fact, both West Marine and the Heglunds see the same sinister conspiracy, as evidenced at RP 35, line 19 through RP 36, line 23.

The problem with their collective arguments is that they want insinuation with no evidence to carry the day. They make similar assumptions and posit similar arguments throughout their brief.

E. Balancing What?

At page 16, West Marine's argument first assumes private use will occur (all facts to the contrary) and then makes an argument which is not supported by any law; namely that the presence of private funding requires a "constitutionally mandated" balancing test. There are no cases cited for the proposition that funding requires a balancing test or that one is constitutionally mandated.

What is there to balance when the use is public?

The cases cited and argued throughout the West Marine brief (*Convention Center, Westlake, Lynnwood*) regarding private uses, have one thing in common; there is an acknowledged private use. They are not transportation cases and more specifically they are not road-widening cases.

F. Regulatory Takings Cases Not Relevant

Citing to inverse condemnation cases in the footnote on pages 16 and 17 is just plain wrong. Inverse condemnation cases are by their nature a different specie because the intent is not to take, but to regulate and it is only the property owner who claims the regulation affects individual property interests.

G. Claims of Fraud and Constructive Fraud

Starting at page 33, West Marine charges that the city has committed fraud. This outrageous claim is based once again on the misrepresentation of

the evidence regarding sources of private funding. At page 34, they make the bald-faced assertion that “the city’s steadfast refusal to disclose...is simply a fraud...”

Footnote on page 32 admits that their argument is not supported by law.

“West Marine cannot locate a case in Washington where the elements of fraud and/or constructive fraud are specifically analyzed in any case involving eminent domain.”

While claiming that the Court analyzed the question in *Theilman*, they claim there is no caselaw here, because it suits their purpose; once again, an allegation with no legal authority to support it.

The claim that the City engaged in fraud and constructive fraud is raised for the first time on appeal. While West Marine meshes something about it in their trial court opposition papers CP 448, line 22 through CP 449, line 1, they do not argue that issue and supply no evidence in support of the claim. Merely speaking the words is not the same thing as raising the issue.

Again, they cite to no portion of the record where the City has been asked or has refused to make disclosures. As recited before, the city has made no such refusal and has not been asked for such a disclosure. This portion of the brief should be stricken.

H. Claim that public interest does not require a project which does not solve the problem

At pages CP 444- 447, West Marine argues that there needs to be a problem to be solved before there can be necessity. The law is that the legislative determination on this subject is conclusive absent proof of fraud or constructive fraud.

Moreover, if anything West Marine's reliance on the voluminous traffic and neighborhood planning studies, demonstrate a carefully and long examined set of issues related to this project. CP 68- 417 What West Marine proves, is precisely the opposite of arbitrary and capricious conduct. The choice of which projects to pursue and how to pursue them is best left to the legislative body, which is why the courts defer to the legislative finding of public use and treat the legislative determine of necessity as conclusive.

I. West Marine's Reading of RCW 8.12.040 is Incorrect

At page 38 of their brief, West Marine claims that the city Ordinance 122505 which authorizes this condemnation is defective because RCW 8.12.040 "requires that the city specifically identify whether private funds..."

That provision merely says that unless the city provides for special assessment in its ordinance, it must pay for the project out of general funds.

VI. 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.

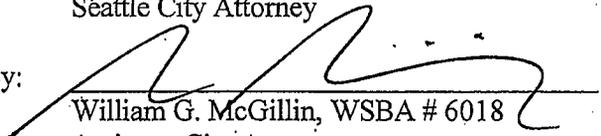
As shown in the city's motion to dismiss, this project is planned to go to right-of-way certification in April 2009, which requires that all property for the right-of-way must have been acquired and all tenants relocated before it can be submitted. The project is to go to bid in June 2009 and commence construction in August 2009. This project is on the list for the planned Obama stimulus package and must be "shovel ready" when those funds become available. If it is sent to the Court of Appeals it will take time well beyond the project dates and will be subject once again to West Marine and the Heglunds seeking discretionary review adding further delay.

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 20th day of January, 2009.

THOMAS A. CARR
Seattle City Attorney

By:



William G. McGillin, WSBA # 6018
Assistant City Attorney
Attorneys for Respondent, City of Seattle

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DECLARATION OF SERVICE

I, Teresa Eidem, hereby certify and declare under the penalty of perjury under the laws of the State of Washington, that on the 20th day of January, 2009, I caused to be served copies of the foregoing document:

**THE CITY OF SEATTLE'S BRIEF IN RESPONSE TO
TO BRIEF OF WEST MARINE**

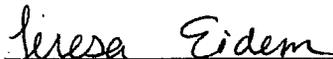
upon the following counsel of record via ABC Legal Messenger Services:

John P. Braislin
James D. Nelson
Sean B. Malcolm
Betts Patterson & Mines
701 Pike Street, Ste 1400
Seattle, WA 98101-3927
jbraislin@bpmlaw.com
jnelson@bpmlaw.com
smalcolm@bpmlaw.com

Catherine C. Clark
John Bagley
The Law Office of Catherine C
Clark PLLC
701 5th Ave Ste 4785
Seattle, WA 98104-7097
cat@loccc.com
john@loccc.com

Peggy Pahl
Daniel Satterberg
King County Prosecuting Attorney
W400 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Peggy.Pahl@kingcounty.gov

Executed at Seattle, Washington, this 20th day of January, 2009.



Teresa Eidem