NO. 82192-5

SUPREME COURT OF THE STATE
OF WASHINGTON

ALBERT HEGLUND, JR. and HELENE HEGLUND, husband and wife; A. HEGLUND, JR. d/b/a A H PROPERTIES; WEST MARINE FINANCE CO., INC.; WEST MARINE PRODUCTS, INC.,

Appellants,

vs.

CITY OF SEATTLE, a municipal corporation,

Respondent.

BRIEF OF APPELLANTS
ALBERT HEGLUND, JR., HELENE HEGLUND, AND A. HEGLUND, JR. d/b/a A H PROPERTIES

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 5

I. THE TRIAL COURT ERRED IN HOLDING THAT THE CONDEMNATION OF THE PROPERTY WAS FOR A PUBLIC USE BECAUSE THE NATURE AND SCOPE OF THE PRIVATE USE IS UNDISCLOSED AND COULD NOT BE SCRUTINIZED 7

A. The City States That The Project is For A Public Use 9

B. The City Failed to Meet Its Burden To Present Sufficient Evidence That The Project Is For A Public Use 10

C. It is Not Possible For The Trial Court To Determine Whether The Private Use Is Incidental Because The Nature of The Private Funding And Concomitant Use is Not Disclosed 11

D. There Is No Evidence That The Excess Property Taken In Fee Simple For Temporary Construction Use Is Required For A Public Use 16

V. CONCLUSION 22

387008/010709 1532/70550001

TABLE OF AUTHORITIES

Cases **Pages**

Cincinnati v. Vester, 281 U.S. 439, 440, 50 S. Ct. 360 (1930).....17-18

City of Lynnwood v. Video Only, Inc., 118 Wn. App. 674, 680, 77 P.3d 378 (2003).....8,17

City of Seattle v. Faussett, 123 Wn. 613, 618, 212 P. 1085 (1923).....20

City of Tacoma v. Humble Oil & Ref. Co., 57 Wn.2d 257, 260, 356 P.2d 586 (1960).....21

Decker v. State, 188 Wn. 222, 227, 62 P.2d 35 (1936).....6

Estate of Rochez, 558 A.2d 605, 608-09 (Pa. Commw. Ct. 1989).....21

Healy Lumber Co. v. Morris, 33 Wn. 490, 501, 74 P. 681 (1903).....6

HTK Management, L.L.C. v. Seattle Popular Monorail Authority, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005) ("Monorail").....6-7,11,14,18

In re City of Seattle, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) ("Westlake I").....6-8,10,13-15

In re City of Seattle, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985) ("Westlake II").....7,13-15

Neitzel v. Spokane Int'l Ry. Co., 65 Wn. 100, 105, 117 P. 864 (1911).....20

Port of Everett v. Everett Improvement Co., 124 Wn. 486, 493-94, 214 P. 1064 (1923) 18

Pullman v. Glover, 73 Wn.2d 592, 595, 439 P.2d 975 (1968).....21

King County v. Theilman, 59 Wn.2d 586, 595, 369 P.2d 503 (1962) 6-8,10,13,15

State v. Larson, 54 Wn.2d 86, 89, 338 P.2d 135 (1959).....20

State ex rel. Puget Sound Power & Light Co. v. Superior Court, 133 Wn. 308, 233 P. 651 (1925).....6-8

State ex. rel. Tacoma School Dist. No. 10 v. Stojack, 53 Wn.2d 55, 63-64, 330 P.2d 567 (1958) 19,21

Cases (cont'd)

State ex rel. Washington State Convention and Trade Center v. Evans, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998) ("Convention Center") 7,10-16,19,21

Steilacoom v. Thompson, 69 Wn.2d 705, 419 P.2d 989 (1966).....13

Constitutional Provisions

Washington Constitution, art. I, § 16.....5-6

Statutory Provisions

RCW 8.25.075.....22

Other Authorities

9 Nichols on Eminent Domain § 32.05.....20

I. INTRODUCTION

Petitioners Albert Heglund, Jr., Helene Heglund, and A. Heglund, Jr. d/b/a A H Properties ("Heglund") respectfully request that this Court reverse the Findings And Order Of Public Necessity And Use And Setting Discovery Deadlines ("Order") entered by the Superior Court of Washington For King County on September 22, 2008.

The trial court in this case erred in its determination that the Mercer Corridor Project was a public use. Despite the clear language of the Washington Constitution, which states that the question whether s 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*, the trial court deferred to the City of Seattle's determination that the project was for a public use, and did not subject the project as a whole, with its mysterious 18% private funding from an undisclosed source, to the scrutiny that Washington's Constitution mandates it receive.

II. ASSIGNMENT OF ERROR

Error No. 1

The trial court erred in holding that the condemnation of Appellants' property was for a public use because the Mercer Corridor Project relies on private funding, the nature and scope of which funding, and any related private use, is undisclosed, thereby making it impossible for the trial court to determine whether any private development is merely incidental to a public use, or impermissibly inseparable.

III. STATEMENT OF THE CASE

This case involves a condemnation action by the City of Seattle ("City") of a property located at 1000 Mercer Street in Seattle, Washington (the "Property"), proximate to both Lake Union and Interstate 5 ("I-5"). CP 13-48. Petitioners Heglund own the Property. (*Id.*) Petitioners West Marine Finance Co., Inc., and West Marine Products, Inc. ("West Marine") are related entities, and Heglund's tenant. (*Id.*) The City desires to acquire certain properties adjoining Mercer Street and Valley Street, between Aloha Street and Republican Street, including the Property (the "Mercer Corridor"), in order to widen Mercer Street to accommodate two-way traffic, and reduce traffic on Valley Street between I-5 and Dexter Avenue (the "Mercer Corridor Project," or the "Project"). *See* CP 34.

On September 24, 2007, the Seattle City Council passed Ordinance 122505 (the "2007 Ordinance") authorizing the Director of Transportation to use the power of eminent domain to condemn desired properties, including the Property, for the purpose of the Mercer Corridor Project. CP 69-73. The condemnation of the Property includes permanent acquisition by the City of a fee simple interest in 8,521 square feet, and approximately 6,224 square feet to be used as a temporary construction easement ("TCE") during the Project. *Id*; *see also* CP 38-40. The concrete building on the Property will be taken in its entirety and demolished.

The 2007 Ordinance states that the acquisition of properties and related expenses would be funded from "funds appropriated, or to be

appropriated, for such purposes in connection with the project." CP 70-71. The 2007 Ordinance states that "[p]ublic convenience and necessity require that real property interests . . . be acquired for transportation and related purposes through negotiations and use of eminent domain (condemnation) if necessary" and designated the Director of Transportation to determine which portions of certain designated properties were necessary to the Project. CP 69-73. The 2007 Ordinance became effective on or about November 2, 2007.

On May 12, 2008, the City Council passed Ordinance 122686 relating to certain capital activities of the City's Department of Transportation ("2008 Ordinance"). CP 54-67. The 2008 Ordinance appropriates $20 million for the acquisition of the Property and certain other properties, as well as additional monies for design work. *Id.* The 2008 Ordinance identified a funding gap in the Project of $88 million. CP 56. The 2008 Ordinance recites, in part:

> WHEREAS, the revised finance plan for the Mercer Corridor Project leaves a funding gap of $88 million in currently unsecured funding anticipated from private participation and state and federal sources . . . .
>
> . . . .
>
> WHEREAS, the City Council intends to consider future appropriation authority for the Mercer Corridor Project in the context of whether substantial progress is made toward closing this funding gap . . . .

CP 56.

The 2008 Ordinance imposed requirements that the Mayor's office must satisfy as conditions precedent to additional appropriation authority for the Mercer Corridor Project. CP 57-58. One of those conditions is the requirement to provide the City Council with documentation identifying the source(s) of private participation in the Project in the amount of $36.2 million, which funding is necessary for the completion of the Project:

> Section 4. Future appropriation authority related to the Mercer Corridor Project will not be granted until the City Council has had the opportunity to evaluate the Executive's progress toward closing the existing funding gap. To inform this evaluation, the Executive will provide the following information to the City Council:
>
> 1. A fully revised financing plan for both the Spokane St. Viaduct Project and Mercer Corridor Project that includes:
>
> . . . .
>
> (c) <u>Documentation of anticipated revenues and supporting information from specific sources of funding that the Executive has characterized as "private participation" in their April 2008 financing plan for the Mercer Corridor Project.</u> These sources should total the equivalent of $36.2 million in funding for the project or reductions or off-sets in private participation funding realized through real estate acquisition for right of way needs . . . .

CP 57-58.

On August 14, 2008, the City filed a Petition for Eminent Domain and accompanying Motion for Determination of Public Use and Necessity. The Petition and Motion allege that the Property is being condemned for a

public use (i.e. the Mercer Corridor Project), and the taking of the Property is necessary. CP 1-6. Neither document identified, or even mentioned, the source of private funding for the Project, or the details of any intended private use of the condemned properties. *Id.* Appellants filed responsive pleadings to the Motion and the trial court heard oral argument on September 22, 2008. CP 474-77. At the hearing, the court asked the City about the commitment on the private side. The City's attorney responded: "Well, the commitment on the private side is in negotiation . . . ." RP 15.

On September 22, 2008, the Honorable Judge John P. Erlick of the Superior Court of Washington For King County entered his Order. CP 527-30. The Order held: "[t]hat public use and necessity exists for the City to condemn, take and damage the property which is the subject of this action and that the City's ordinance authorizing this action was adopted in a lawful manner . . . ." *Id.* The trial court ordered that a trial be had to determine the just compensation to be paid by the City for the acquired rights relating to the Property. *Id.*

IV. ARGUMENT

Washington's Constitution provides the citizens of Washington with broad protections against eminent domain abuse – protections that go beyond those in the federal Constitution, and beyond those of many

states.[1] Washington's Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having first been made." Wash. Const. art. I, § 16. Further, the Constitution states: "Whenever an attempt is made to take private property for a use alleged to be public, 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 . . . .*" *Id.* (emphasis added).

As part of this broad protection, a trial court in Washington is constitutionally mandated to conduct a searching inquiry into the question of public use, and may not simply determine that there is a public use based on an agency statement or the bare classification of a project as a roadway or transportation project.[2]

---

[1] This Court has previously noted that only a few states have an eminent domain clause that is substantially similar to the one in Washington's Constitution, especially with respect to the provision that states that public use is a judicial question. *See, e.g., In re City of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) ("Westlake I").

[2] *See, e.g., Decker v. State*, 188 Wn. 222, 227, 62 P.2d 35 (1936) ("[W]hether the use be 'really public' is for the courts to determine, and in the determination of that question they will 'look to the substance rather than the form, to the end rather than to the means.'" (*quoting State ex rel. Puget Sound Power & Light Co. v. Superior Court*, 133 Wn. 308, 233 P. 651 (1925))); *Healy Lumber Co. v. Morris*, 33 Wn. 490, 501, 74 P. 681 (1903) ("Under such circumstances the case comes to the court without any presumption one way or the other on the subject of public use, but is to be tried by the court like any other question that is submitted to its discretion."). The question of whether a use is "really public" is solely a judicial question for the court. Wash. Const. art. I, § 16; *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005) ("Monorail"); *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962).

In this case, the trial court erred in finding that the City's Mercer Corridor Project was for a public use because the trial court had not been provided with sufficient information to properly determine the nature of private involvement in the Project, primarily whether private involvement in the Project is "merely incidental," or an inseparable part of the Project. The court was therefore unable to scrutinize the nature and scope of private use to the extent mandated by the Washington Constitution.

I. THE TRIAL COURT ERRED IN HOLDING THAT THE CONDEMNATION OF THE PROPERTY WAS FOR A PUBLIC USE BECAUSE THE NATURE AND SCOPE OF THE PRIVATE USE IS UNDISCLOSED AND COULD NOT BE SCRUTINIZED

When adjudicating public use and necessity, Washington courts must apply a three-part test to evaluate whether the condemnation action is lawful: "[f]or a proposed condemnation to be lawful, the [condemnor] must prove that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose." *Monorail*, 155 Wn.2d at 629; *State ex rel. Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998) ("Convention Center"); *In re City of Seattle*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985) ("Westlake II"); *In re City of Seattle*, 96 Wn.2d 616, 625, 638 P.2d 549 (1981) ("Westlake I"), *citing Theilman*, 59 Wn.2d at 593.

In 1925, this Court held that private property may not be taken for uses that are both public and private; rather:

> it is plainly the intent according to the terms of the law and the sovereign nature of the right, that, at the time of the taking the property, the contemplated use to which it is to

> be devoted shall 'be really public,' and in the determination of that question 'courts look to the substance rather than the form, to the end rather than to the means.'

Puget Sound Power, 133 Wn. at 312. While the acquisition of private property for the construction of a public roadway is generally a public use, the facts of each case must be analyzed separately. *Theilman*, 59 Wn.2d at 595 (taking of private property to construct roadway was arbitrary and capricious where the effect was to allow a private party to take private property for private use). When adjudicating public use, the project at issue, including all property involved in the project, is properly considered. *City of Lynnwood v. Video Only, Inc.*, 118 Wn. App. 674, 681, 77 P.3d 378 (2003) ("It is only by considering the project as a whole that a court can properly adjudicate whether a component parcel is being condemned for a truly public use).

It may be that the Mercer Corridor Project, and the use of the Property, is in "the public interest;" however, "the fact that the public interest may require [a project] is insufficient if the *use* is not really public." *Westlake I*, 96 Wn.2d at 627 (emphasis added). In this case, the ultimate use of the Property is unclear and there has been insufficient information disclosed to the trial court about the entire Project and all property involved to support the trial court's finding of public use and a concomitant constitutional taking. Indeed, by the City's own admission, the nature and extent of the private participation in the Project is still "being negotiated."

A. The City States That The Project is For A Public Use.

The City of Seattle passed the 2007 Ordinance authorizing the Director of Transportation to condemn certain properties, including the Property, for the purpose of the Mercer Corridor Project. CP 69-73. The 2007 Ordinance states that the acquisition of properties and related expenses will be funded from "funds appropriated, or to be appropriated, for such purposes in connection with the project." Id. The 2007 Ordinance further states that "[p]ublic convenience and necessity require that real property interests . . . be acquired for transportation *and related purposes* through negotiations and use of eminent domain (condemnation) if necessary." *Id.* (emphasis added). The 2007 Ordinance designated the Director of Transportation to determine which portions of certain designated properties were necessary to the Project. *Id.*

The City followed the 2007 Ordinance with the 2008 Ordinance, which imposed certain requirements on the City, which must be satisfied as conditions precedent to additional appropriation authority for the Project. One of those conditions is the requirement to provide the City Council with documentation identifying the source(s) of private participation in the Project in the amount of $36.25 million, which funding is necessary for the completion of the Project. While the ordinance states that only the City Council need be provided with documentation identifying the source of private participation, the Constitution requires that this information also be available to the trial court before it can

properly adjudicate public use. Because the Project is preconditioned on securing $36.25 million of apparently uncommitted private funding from an undisclosed source, the nature and scope of the private use in the Project could not be determined or balanced at the time of the public use adjudication.

B. The City Failed to Meet Its Burden To Present Sufficient Evidence That The Project Is For A Public Use.

The City must produce evidence to the trial court, beyond the mere assertion of an ordinance, that the Property will be put to a use that is "really public." *See, e.g., Westlake I*, 96 Wn.2d at 625. The burden of proof is on the condemning agency, not the condemnee, to demonstrate that the condemnation is for a public use and that it is necessary for that use. *Convention Center*, 136 Wn.2d at 822-23; *Theilman*, 59 Wn.2d 586. The City presented a declaration by Ms. Angela S. Brady, a City engineer, that stated that the uses for which the property is sought are entirely a public use and that there would be no private uses of any of the property condemned. *See* CP 468-71. This is insufficient, however, to establish that the Property is being condemned for a public use. Further, it is unclear how even Ms. Brady could know that there will be no private use for any of the property condemned when it is clear from the City that the details of $36 million private funding are still "being negotiated." As such, Ms. Brady necessarily lacks personal knowledge and is incompetent to testify as to the issue of public use. In any event, no information was provided to the trial court about the source of the $36 million of private

funding, the identity of those providing it, or the nature of the private use in the Project that is represented by this funding. The City asks the trial court to rely on the vague declaration of Ms. Brady, without any level of constitutionally mandated scrutiny.

C. It is Not Possible For The Trial Court To Determine Whether The Private Use Is Incidental Because The Nature of The Private Funding And Concomitant Use is Not Disclosed.

This case has a funding profile that is similar to that which existed in the project that is the subject of the *Convention Center* case. In fact, the private funding percentage is higher in the Mercer Corridor Project. In the Convention Center expansion, the legislature appropriated $111.7 million but, as a condition, required the convention center (the private funding source) to contribute $15 million (13.4% private funding). In this case, the City has required private funding of approximately $36.25 million, as a condition to the total project expenditure of approximately $192 million (18.9% private funding). Similar to the situation in *Convention Center*, and in contrast to the facts in *Monorail*, there is no evidence in the Project that significant portions of the condemned properties on the Project (e.g. property taken in fee simple for "easements") will ever be put to a public use. Further, with regard to the total Project, there is simply no information about the nature of the private uses in the Project. The Project depends on private funding from an undisclosed source that represents approximately 18 percent of the funding required for the Project. The City has not specified the intended private use related to the Project, if any, or

the source of the private funds. Further, based on available information, the private funding has not been committed and the details of that commitment are purportedly still "being negotiated." Considering the Project as a whole, and all of the condemned properties, there is not enough information for the trial court to conduct the level of scrutiny that is mandated by the Washington Constitution. The judicial determination of public use was not constitutional under the circumstances that existed at the time of the adjudication. At best, the City's condemnation action was premature.

This case differs from prior cases where the trial court's public use adjudication was upheld on appeal. In this case, the trial court did not have the information about the nature of the private use that the court had in *Convention Center*. Further, the percentage of private funding in the Mercer Corridor Project is higher than it was in the *Convention Center* project. When a project depends on private funds that are uncommitted and unspecified as to source, and the nature and extent of the private use is undisclosed and unknown at the time of the taking, a court cannot properly determine whether a contemplated end use is "really public," or just appears to be public in form, and whether the public interest requires the condemnation.

Private participation in public projects is permitted so long as the project is fundamentally public in nature and the private use is merely incidental. The Court must have sufficient information at the time of the taking to weigh public participation against private participation and

ensure that a project is "really public." *See Westlake II*, 104 Wn.2d at 623-24. In *Westlake I, Westlake II, Theilman, Convention Center*, and *Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966), the Court knew the scope and nature of the private use. In the instant case, the court did not have sufficient information to determine whether the taking is an integral and inseparable part of a private development and could not therefore determine whether it is for a public use within the meaning of article 1, section 16 of the Washington State Constitution. The clear nature of the proposed use must be known for the trial court to be able to properly adjudicate public use.

A hypothetical illustrates the problem created by the lack of information before the trial court concerning the nature of the private use, given that 18% of the Project is being funded by private funds from an undisclosed source in exchange for an undisclosed use. Given the information before the court, the Mercer Corridor Project could simply be part of an urban renewal project (i.e. redevelopment of the South Lake Union area) that is packaged as a transportation project, but will have little beneficial effect on traffic patterns or congestion. Further disclosure concerning the nature of the private funding of the Project may reveal that the private funds are being committed by private development interests in the area with plans to locate a private use on some or all of the condemned properties. The private interests could be conditioning the use of their funds on the City's commitment to expand Mercer Street, not for traffic purposes, but for the private purpose of rejuvenating the area and

consolidating a large private use that is in the public interest. Without more information, it is not possible for the trial court to determine whether in the totality of circumstances, considering the Project as a whole, the Project is inseparably bound to a private use, which is the impetus for the Project, or whether any private use attached to the funding is incidental.

The fact that a project may be in the public interest is insufficient if the use is not really public. *Westlake I*, 96 Wn.2d at 627. The situation could be analogous to that in *Westlake I* where the Court found that, "[w]hile the motives of the city council are not questioned, and the court found as a fact that the City did not act arbitrarily, capriciously, or fraudulently . . . ," the facts were that one of the project's principal features, though well intentioned, may be a private use not authorized by the legislature. *See Westlake I*, 96 Wn.2d at 634. In the *Westlake I*, *Westlake II*, *Convention Center*, and *Monorail*, the nature of the private use was known. In this case, it is not. There was simply no way for the trial court to evaluate at the time of the taking whether the private use is combined with the public use in such a way that the two cannot be separated, or is only incidental to the public uses for which the land is condemned.

When private participation is involved in a public project, the private participation must be weighed against the public participation. *See Westlake II*, 104 Wn.2d at 624. "If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked." *Westlake I*, 96 Wn.2d at 627. "Therefore,

where the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute public use." *Id.* "[S]ome private use of condemned land is permissible as long as the private use is not itself the impetus for the condemnation." *Convention Center*, 136 Wn.2d at 821-822; *Westlake II*, 104 Wn.2d at 817 (incidental private use is permitted).

This case involves a roadway project that appears public in form, but is contingent on private funding from an undisclosed source. The nature and extent of the private use that may be granted in return for the funding is unspecified, and is still being "negotiated," according to the City. In such a case, the right of eminent domain is not properly invoked because there is no way for the court to determine at the time of the taking whether the action is for a public use or is simply a "cloak to cover private objectives." *See, e.g., Theilman*, 59 Wn.2d at 596. If a private use is combined with a public one in such a way that the two could not be separated . . . the right of eminent domain may not be invoked to aid the joint enterprise." *Convention Center*, 136 Wn.2d at 821-22; *Westlake I*, 96 Wn.2d at 627. In this case, the City has not identified either the City's intended private use or the source of the private funds. As such, the trial court could not properly determine whether the private use tied to the investment of $36.2 million is incidental or a fundamental purpose of the taking.

D. There Is No Evidence That The Excess Property Taken In Fee Simple For Temporary Construction Use Is Required For A Public Use.

In this case, unlike *Convention Center*, the footprint of the alleged public use – Mercer Street – does not cover the entire areas of the properties on the Project seeking to be condemned in fee simple. It is not clear whether all areas of the Project that are classified as "easements" will be taken as temporary easements, or in fee simple for future, undisclosed post-construction private uses. There is no evidence that the City has a plan for public, post-construction use of a substantive portion of the condemned properties on the Project. The City plans to condemn additional properties for the Project, but there is no pronouncement from the City, or information available to the trial court, that the extent of the fee simple appropriation of these properties is necessary for the Project's stated public use. The trial court erred in its adjudication of public use and necessity because there is no evidence that the condemnation of these properties – much of which will likely be for construction easements – some or all of which properties may be taken in fee simple or left uneconomic, will be taken for a public use. The City could take a lesser interest than fee simple on these properties to accomplish its stated purpose of establishing a temporary construction easements. The important point, though, is that the trial court did not have enough information to determine whether there is or will be an impermissible long-term or permanent private use on temporary areas taken in fee simple that is or will be inseparably combined with a public one.

It is the project as a whole that must pass constitutional muster. *City of Lynnwood*, 118 Wn. App. at 680. It is interesting to note that many of the properties that comprise the Project appear to be owned by the same private owner(s), under variants of the name "City Investors" LLC. CP 34. There was little or no information available to the trial court regarding what, if any, condemnation proceedings are planned for these properties. The City has failed to carry its burden to demonstrate that there will be a post-construction public use for these properties, including various private properties owned by the same entity.

In *Cincinnati v. Vester*, 281 U.S. 439, 440, 50 S. Ct. 360 (1930), property owners challenged a condemnation project as not being for a public use. The city passed an ordinance stating that the immediate purpose of the project was the widening of a street and that the city would appropriate a strip of property along the street for that purpose. *Id.* at 441. As in this case, the city sought to appropriate property in excess of that which would actually be occupied by the widened street. *Id.* at 441-2. The purpose of this excess condemnation was stated in general terms, including that it was "in furtherance of the said widening of Fifth Street" and "necessary for the complete enjoyment and preservation of said public use." *Id.* at 443. It was not stated how the excess was in furtherance of the street widening, or why it was necessary for the complete enjoyment and preservation of the public use of the widened street. *Id.* Invalidating the condemnation action, the Supreme Court stated that:

> a mere statement by the [city] council that the excess condemnation is in furtherance of such use would not be

> conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted.

Id. at 447. The Court went on to underline the importance of a clear definition and statement of purpose in the case of taking any property, and stated that: "[q]uestions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose, the object of the excess appropriation not being set forth as required by local law." *Id.* at 447-48. Unlike *Monorail*, in this case there is no evidence that the City is only condemning the properties on the Project for a public use. In fact, there is some evidence to the contrary. *See* CP 38-40 (City offering to buy in fee simple the TCE portion of Appellants' property). Thus, *Vester* is applicable to the facts herein. *See also, Port of Everett v. Everett Improvement Co.*, 124 Wn. 486, 493-94, 214 P. 1064 (1923) (where there is no plan for any type of future construction or improvement, a legislature cannot grant the power to a municipality to "acquire by condemnation property which the municipality desires merely because it believes that at some time in the future it may have use for it . . . ." Where there is no definite plan, "it is impossible for the court or any one to know whether all or what particular part of the property here sough to condemned is necessary for the use of the port district, and the right of condemnation must fail for this reason.").

The initial determination that the two uses are not inseparably combined – one that the trial court in this case did not even have the information to undertake – cannot itself validate use of eminent domain. *Convention Center*, 136 Wn.2d at 822. The court must still examine whether the private use is incidental to the public project.

> Article I, section 16 prohibits the taking of private property for private use. Thus, [a] court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. The relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project. If the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental.

Convention Center, 136 Wn.2d at 821-22; *State ex. rel. Tacoma School Dist. No. 10 v. Stojack*, 53 Wn.2d 55, 63-64, 330 P.2d 567 (1958) ("If an attempt is made to take more property than is reasonably necessary to accomplish the purpose, then the taking of excess property is no longer a public use, and a certificate of public use and necessity must be denied."). Thus, part of the constitutionally mandated <u>public use</u> inquiry seeks to determine whether the government is condemning more property than is needed for the project. This concept is part of the public use analysis, and is separate from the third part of the test which seeks to determine whether the property appropriated is <u>necessary</u> for that purpose. The trial court also did not have the information to conduct this inquiry.

A fundamental principle in condemnation proceedings is that "no greater estate or interest should be taken than is reasonably necessary to

accomplish the public use or necessity." *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959); *Neitzel v. Spokane Int'l Ry. Co.*, 65 Wn. 100, 105, 117 P. 864 (1911) (no greater title may be taken than that which is necessary to the contemplated public use. If an easement is sufficient, there is no support for a greater interest or estate); *accord*, 9 Nichols on Eminent Domain § 32.05 ("a condemnor should only take an easement rather than a fee interest if the former will suffice"). This Court stated the rule, which was supported by early Washington statutes, as follows:

> Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires; and this rule applies both to the amount of property and the estate or interest in such property to be acquired by the public. If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay for more than it needs. Furthermore, it is universally recognized that a grant of the power of eminent domain will not be extended by implication, and that when an easement will satisfy the purpose of the grant the power to condemn the fee will not be included in the grant unless it is so expressly provided. Accordingly, it is well settled that when land is taken for the public use, unless the fee is necessary for the purposes for which the land is taken, as for example when land is taken for a schoolhouse or the statute expressly provides that the fee shall be taken, the public acquires only an easement.

City of Seattle v. Faussett, 123 Wn. 613, 618, 212 P. 1085 (1923). At least in the case of the fee simple takings of properties on the Project for areas that are designated TCEs or for "temporary" public use, the evidence suggests that a temporary easement is the most that is required by the City

for its road construction Project. *See, e.g.,* CP 38-40 (City offering to purchase in fee simple the TCE portion of Appellants' property).

It is a "universal rule" in Washington eminent domain case law that where a government entity seeks to condemn more property than is needed, the excess property is not for a public use and may not be lawfully condemned. *Convention Center*, 136 Wn.2d at 821-22; *Stojack*, 53 Wn.2d at 63-64; *see also, City of Tacoma v. Humble Oil & Ref. Co.*, 57 Wn.2d 257, 260, 356 P.2d 586 (1960). Further, a decision to acquire fee interest in land to be used only temporarily is "a clear abuse of discretion." *Estate of Rochez*, 558 A.2d 605, 608-09 (Pa. Commw. Ct. 1989). In exercising its power of eminent domain, a sovereign may take less than the whole property and, in fact, must take no more than that which is reasonably necessary for the stated public purpose. *Pullman v. Glover*, 73 Wn.2d 592, 595, 439 P.2d 975 (1968); *Stojack*, 53 Wn.2d at 63-64.

In this case, the extent and nature of the private uses are unknown, and there is a significant amount of private funding, yet no information on any concomitant private use. Further, there is little or no information about future condemnation proceedings on other properties in the Project, especially numerous properties that appear to be under uniform private ownership, and any associated permanent private uses on those properties that are related to the Project. Thus, it is not yet possible for the trial court to determine, for example, whether the private use in this case tied to the substantial private funding is incidental or an inseparable impetus for the Project, and whether the post-construction use for other properties in the

Project is public. It was an error for the trial court to determine in this landscape that the Project was for a public use.

Should the court reverse the trial court and find that the City cannot acquire the property through condemnation, Appellants are entitled to an award of costs and attorney's fees, pursuant to RCW 8.25.075.

V. CONCLUSION

For the above reasons, this Court should reverse the Order entered by the Superior Court of Washington For King County on September 22, 2008, and award Appellants their costs and attorney's fees.

RESPECTFULLY SUBMITTED this 7th day of January, 2009.

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Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 7th day of January, 2009:

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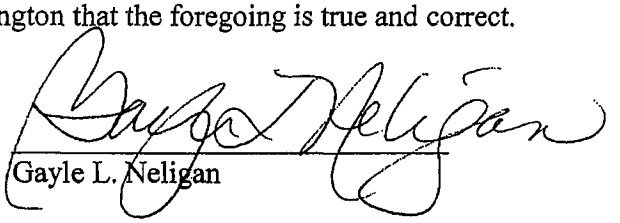
I declare that I am employed in the office of Betts, Patterson & Mines, P.S., am over the age of eighteen years, not a party to or interested in the above-entitled action.

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



Gayle L. Neligan