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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.

**REPLY IN SUPPORT OF
BRIEF OF
APPELLANTS HEGLUND**

John P. Braislin, WSBA No. 00396
James D. Nelson, WSBA No. 11134
Sean B. Malcolm, WSBA No. 36245
BETTS, PATTERSON & MINES, P.S.
Attorneys for Petitioners Albert Heglund, Jr.,
Helene Heglund, and A. Heglund, Jr. d/b/a
A H Properties

701 Pike Street, Suite 1400
Seattle, Washington 98101-3927
(206) 292-9988

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Appellants Albert Heglund, Jr., Helene Heglund, and A. Heglund, Jr. d/b/a A H Properties (“Heglund”) hereby reply to the City of Seattle’s Brief in Response to Brief of Heglund (“Response”).

A. It Cannot Be Determined Whether The Mercer Corridor Project Is For A Public Use.

The City argues that the Mercer Corridor Project (the “Project”) is a road-widening project and that “RCW 8.12.030 expressly authorizes cities to condemn property for road-widening purposes.” The City oversimplifies the law and the facts. The power of eminent domain is “limited by the constitution and must be exercised under lawful procedures.” *Miller v. City of Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963). Statutes that delegate a state’s power of eminent domain to a political subdivision (e.g. a city) should be strictly construed. *PUD No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 565, 151 P.3d 176 (2007).

While a road-widening project is generally for a public use, neither RCW 8.12.030, or any other law dictates that the judicial determination regarding public use that is mandated by the Washington Constitution can be dispensed with simply because a City classifies a project as a road-widening project, passes an ordinance declaring the project to be for a public use, and then has a City employee make a bare recital in support of the ordinance. See *In re City of Seattle*, 96 Wn.2d 616, 635, 638 P.2d 549 (1981) (“Westlake I”) (Stafford, J., concurring) (“The state constitution expressly prohibits the taking of any property for a project which is

primarily private in nature. Legislative pronouncements to the contrary are meaningless and the presence or absence thereof are unnecessary to a resolution of the case before us.”).

It is the project as a whole that must pass constitutional muster. *City of Lynnwood v. Video Only, Inc.*, 118 Wn. App. 674, 680, 77 P.3d 378 (2003). In this case, the trial court did not have sufficient information to determine whether the Mercer Corridor Project as a whole is for a public use – transportation improvement – or whether it impermissibly involves a private use combined with a public use in such a way that the two cannot be separated. The City of Seattle has previously attempted to prematurely condemn properties for projects that, at least initially, involved impermissible comingling of private and public uses. *See Westlake I*, 96 Wn.2d at 627. This Court previously stated: “If a private use is combined with a public use in such a way that the two cannot be separated, the right on eminent domain cannot be invoked.” *Westlake I*, 96 Wn.2d at 624-25.

In the instant case there is evidence that the Project involves significant private funding and therefore some undisclosed private use. The central focus of Appellants’ appeal is that because the City has chosen not to reveal any details surrounding the private use on the Mercer Project, the trial court did not have sufficient information to make a constitutionally sound judicial determination about whether there are private uses on the Mercer Project (considering the Project as a whole) that cannot be separated from the public uses. *See, e.g., Westlake I*, 96

Wn.2d at 624-25. The City repeatedly glosses over the fact that this “road-widening project” depends upon over \$36 million in private funding (19% of the total project cost) from an undisclosed source and in exchange for undisclosed public commitments and private uses. *See* CP 57-58. In this case, there was simply insufficient information available to the trial court to determine whether or not the public and private use concomitant with \$36.25 million of funding are impermissibly combined or constitutionally incidental.

Citing to the Declaration of Angela S. Brady,¹ the City argues that the only evidence before the trial court was that the use on the Project will be entirely public. This is disingenuous. It ignores the evidence of \$36.25 million in private funding, the details of which the City has chosen not to disclose. *See* CP 57-58. Further, Ms. Brady’s declaration simply constitutes – at most – a bare recital that the project is for a public use.

Ms. Brady declares:

The project is a City of Seattle roadway project. The assets constructed will be constructed in a project owned entirely by the City of Seattle and the assets created or improved by the project will be owned by the City. All of the land to be acquired by this project will be owned by the City. There will be no private ownership of any asset acquired by the City in this project.

¹ CP 468-71.

CP 469 (Decl. of Angela S. Brady at ¶ 4).² Nowhere does Ms. Brady in fact state that there will be no private uses on the Project, or concomitantly that all of the uses on the Project will be public.

In fact, Ms. Brady's bare recital is so inapposite to the public use question that, except for the word "roadway," it could also have generally described the City of Seattle's impermissible project design in *Westlake I* in which the Court held that the City could not condemn the proposed property because the proposed project was for both public and private uses. See *Westlake I*, 96 Wn.2d at 619-20 (court held condemnation impermissible in City of Seattle project wherein City would own buildings that would ultimately be utilized for private retail uses). Ms. Brady's declaration speaks primarily to ownership structure, not to nature of use.

Clearly, the fact that a city intends to own project assets after condemnation does not preclude that a project may still contain inseparable private and public uses. Such was the general nature of the project impermissibly attempted by the City of Seattle in *Westlake I*. The City's Westlake Project passed constitutional muster when it divested ownership of the retail portion of the project to private interests. See *In re City of Seattle*, 104 Wn.2d 621, 622, 707 P.2d 1348 (1985) ("Westlake II"). In light of *Westlake I*, the fact that the City will retain full ownership

² Of course, Ms. Brady is not even *competent* to testify that there would be no private use on the project. ER 602. According to the City, the details of the private contribution were still "being negotiated." RP 15. As a result, Ms. Brady literally could not have had personal knowledge of the final details of the

of assets in a project with 19% private funding, as declared by Ms. Brady, makes this Project more constitutionally suspect.

In *Cincinnati v. Vester*, 281 U.S. 439, 50 S. Ct. 360 (1930), the Supreme Court, invalidating a condemnation action, stated:

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 (emphasis added). 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. Ms. Brady’s bare recital (if it amounts to that) does not constitute evidence that the Project is solely for a public use.

The evidence relating to the Project, including the fact that the Project depends on \$36.25 million in private funding from an undisclosed source (which constitutes 19% of the Project’s anticipated cost), strongly suggests that there are private uses in the Project that are impermissibly

(continued . . .)
private contribution, ownership, or use at the time she signed her declaration. Such details simply did not exist.

comingled with the public transportation uses. It certainly invalidates the City's oft-repeated statement in its Response that the only evidence is that the Project is for a public use. Having delayed the Project for its own reasons, the City is now in a hurry to rush the Project through, and sued to condemn the property before sufficient information was available for the trial court to conduct a constitutionally sound judicial determination on the nature of the public and private uses in the Project, and their degree of separation. The City's strategy to rush the condemnation along is to choreograph a dearth of information about the private use on the Project and rely on the weight given to its ordinance and bare recitals declaring that the Project is for a public transportation use. A judicial determination of public use under those circumstances, however, does not pass constitutional scrutiny.

There was insufficient information available to the trial court to determine to the extent required by the Constitution whether the private and public uses were impermissibly inseparable. *See Westlake I*, 96 Wn.2d at 624-25. Were it not for the clear evidence that the Project depends for 19% of its funding on private funding from an undisclosed source and for an undisclosed purpose, the City might have been able to rely on its false and conclusory statement that "[t]he only evidence on the subject is that the use will be entirely public." But for the evidence of the private funding, it would have been impossible for Appellants to disprove a negative.

The City improperly attempts to shift the burden to Appellants to provide evidence of private use while the City chooses not to disclose the details of the substantial private funding. The City must produce evidence to the trial court, beyond the mere assertion in an ordinance and bare recital, that the Property will be put to a use that is “really public.” See, e.g., *Westlake I*, 96 Wn.2d at 625; *Cincinnati*, 281 U.S. at 447. 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. *State ex rel. Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 822-23, 966 P.2d 1252 (1998) (“Convention Center”). Appellants cannot disprove the City’s statement that there is no private use on the Project if the City does not release the details of the private funding. In the face of this significant private funding, upon which the Project depends, the burden on the City under Washington’s Constitution is to present to the trial court more than an ordinance and a bare recital from a City official.

B. In This Case The Court Did Not Have Sufficient Information To Determine The Nature Of The Private Use, And The Judicial Determination Was Premature.

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 other

states.³ This State'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.⁴

³ 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").

⁴ *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 Auth.*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005); *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962).

The City tries to focus the analysis solely on Appellants' property, but it is the Project as a whole that must pass constitutional muster. *City of Lynnwood*, 118 Wn. App. at 680. There is evidence that some property on the Mercer Project will be put to a private use – 19% of the Project depends on private funding, for example. The City is asking this Court to accept on a bare recital that there will be no private use on the Project in exchange for \$36.25 million of private funding.

Faced with evidence of substantial private funding from an undisclosed source and for an undisclosed purpose, the trial court was unable to conduct the constitutionally mandated inquiry into the nature of the private use on the project as a whole. In this case, the trial court was unable to determine whether it was faced with a *Convention Center*-type analysis involving “condemnation of property on which a significant part was never going to be put to a public use,” *see Monorail*, 155 Wn.2d at 633; a fact pattern similar to that in *Westlake I*, or a fact pattern similar to that in *Monorail* or *Westlake II*. There is significant evidence of substantial future private use on this Project. For example, the Mercer Corridor Project depends on a significantly higher percentage of private funding than that proposed in the Convention Center project.⁵

The City seeks to simplify this Court's holdings in *Convention Center* and *Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966),

⁵ Private funding comprises 18.9% of the Mercer Corridor Project, but it comprised only 13.4% of the Convention Center project.

and push Washington's eminent domain law beyond a constitutionally permissible level to a threshold where condemnation is constitutional based solely on a City's ordinance and bare recitals. Appellants are not arguing that any private use on a project is impermissible. It is clear under Washington law that condemnation proceedings in projects involving incidental private uses can be lawful. *See Convention Center*, 136 Wn.2d at 819. The issue that Appellants raise on appeal is that in the instant case the trial court had evidence of private use – namely \$36.25 million in funding – but did not yet have sufficient information to conduct the constitutionally mandated scrutiny necessary to determine whether the private use was incidental or impermissibly combined with the public transportation use on the Project. *Westlake I*, 96 Wn.2d at 624-25.

In *Westlake I*, *Westlake II*, *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962), *Convention Center*, and *Steilacoom*, the court knew the scope and nature of the private use. In the instant case, the trial court did not have sufficient information to determine whether or not the taking is an integral and inseparable part of a private development. The trial court could not therefore determine whether the Project is for a constitutional public use.

**C. Heglund Is Not Raising On Appeal The Issue Of Necessity
*Per Se***

Contrary to the City's assertion regarding necessity, Heglund is not raising an assignment of error relating to the finding of necessity, *per se*. "For a proposed condemnation to be lawful, the condemning authority

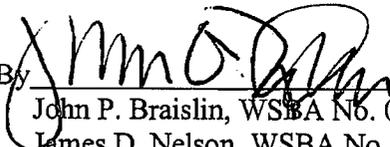
must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose.” *Monorail*, 155 Wn.2d at 629. Part of the constitutionally mandated *public use* inquiry – separate from the third part of the test – seeks to determine whether the government is condemning more property than is needed for the project. *Convention Center*, 136 Wn.2d at 822 (“[a] court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use 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”); *State ex. rel. Tacoma School Dist. No. 10 v. Stojack*, 53 Wn. 2d 55, 63-64, 330 P.2d 567 (1958) (“the taking of excess property is no longer a public use”). The terms “public use” and “public necessity” overlap to some extent. *Monorail*, 155 Wn.2d at 629.

While some of Appellants’ arguments may appear to address the third prong of the condemnation test, Appellants are addressing the issue of necessity only to the extent that it is subsumed within the public use prong of the test. *See Convention Center*, 136 Wn.2d at 821-23 (court considering as part of the public use analysis whether the “government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project”); *see also Theilman*, 59 Wn.2d at 594 (“ ‘Public use’ and ‘necessity’ cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter.”).

“Unlike a determination of public use, questions concerning whether an acquisition is necessary to carry out a proposed public use are legislative. Thus, a determination of necessity by a legislative body is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute fraud.” *Convention Center*, 136 Wn.2d at 823. Appellants are not arguing that the City engaged in fraud, constructive or otherwise. As such, the arguments relating to necessity, *per se*, in sections D (“Legislative Determination of Necessity”); G (“Absence of Fully-Budgeted Project Not Enough”); H (“Lack of Final Plans Not Enough”); and I (“Heglunds Cannot Raise New Issues on Appeal”) of the City’s Response are inapposite to the issues Appellants raise on appeal.

DATED this 19th day of February, 2009.

BETTS, PATTERSON & MINES, P.S.

By 
John P. Braislin, WSBA No. 00396
James D. Nelson, WSBA No. 11134
Sean B. Malcolm, WSBA No. 36245
Attorneys for Petitioners Albert Heglund, Jr.,
Helene Heglund and A. Heglund, Jr. d/b/a A H
Properties

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Counsel for King County

Margaret A. Pahl
Office of the Prosecuting Attorney
516 Third Avenue, Rm. W400
Seattle, WA 98104

Counsel for Plaintiff

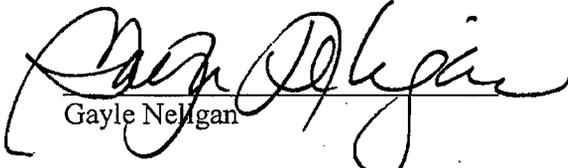
William G. McGillin
City of Seattle
600 Fourth Avenue, 4th Floor
Seattle, WA 98124

Counsel for For Respondents West Marine, Inc. et al.

Catherine C. Clark
John Bagley
Law Office of Catherine C. Clark PLLC
701 Fifth Avenue, Ste. 4785
Seattle, WA 98104

I declare that I am employed in the office of Betts, Patterson & Mines, P.S. and am over the age of eighteen years.

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


Gayle Neligan

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Dear Court Clerk: <<Appellant Heglund's Reply in Support of Brief of Appellant Heglund.pdf>>
Please find attached the Reply in Support of Brief of Appellants Heglund for filing with the Court by Appellant Albert Heglund, et ux, et al..

Thank you for your assistance in this regard. If you should have any questions or need anything further, please let me know

Gayle L. Neligan
Legal Assistant
Betts, Patterson & Mines, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988 fax:(206)343-7053
<http://www.bpmlaw.com>

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