

82192-5
No. ~~821292-5~~

SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, a municipal corporation,

Respondent,

v.

ALBERT HEGLUND, JR. and HELENE HEGLUND, husband and wife,
WEST MARINE FINANCE COMPANY, INC., WEST MARINE
PRODUCTS, INC.; A. HEGLUND, JR. DBA A.H. PROPERTIES,

Appellants.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
SEATTLE PARKS FOUNDATION

K&L GATES LLP

Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Sarah C. Johnson, WSBA # 34529
Attorneys for Amicus Curiae
Seattle Parks Foundation

K&L GATES LLP
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

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I. INTRODUCTION

This appeal presents questions regarding judicial determinations of public use and necessity for government projects that rely in part on private funding. Appellants ask this Court to write new law that would require extra scrutiny of all public projects which receive some private funds, because they assume, without any basis, that such projects must have some resulting private use. But Washington law expressly allows private contribution to public projects and, absent a showing that a project has a private use, does not require such scrutiny.

Seattle Parks Foundation (“Foundation”) raises private contributions for public parks projects and has an interest in the issues of public use and necessity that are before the Court. In addition to securing funding for public parks projects throughout Seattle, the Foundation has obtained significant private funding for the development of Lake Union Park in South Lake Union. Lake Union Park will be directly and positively impacted by the improvements that are part of the Mercer/Valley Corridor Project at issue in this lawsuit. Although a portion of the Park’s funding is from private sources, this does not mean that the Park has a resulting private use. The same is true for the Project. The Foundation joins the City of Seattle (the “City”) in asking the Court to affirm the trial court’s finding of public use and necessity.

II. IDENTITY AND INTEREST OF AMICUS

The Foundation is an independent, non-profit organization created in 2001 to provide funds, project support, and advocacy to improve and expand Seattle's parks and green spaces.¹ The Foundation's efforts are primarily funded through private charitable contributions, which are dedicated to fulfilling the Foundation's mission of improving, expanding and creating Seattle's parks and green spaces and building a more vibrant community. Since its founding, the Foundation has completed 27 park projects and secured over \$28 million in funding for various park improvements throughout Seattle.

One of the Foundation's major and ongoing projects is the development and financing of Lake Union Park, located on the waterfront in South Lake Union, approximately one block from the property at issue in this appeal.² Since 2005, the Foundation has secured \$20 million in

¹ For more information about Seattle Parks Foundation and Lake Union Park, see www.seattleparksfoundation.org.

² The location of Lake Union Park and its proximity to the property at issue in this appeal is depicted in the aerial photographs attached as Appendix A to this brief. The first photograph in Appendix A is a recent aerial depicting the status of the development of the Park, and the second photograph contains a rendering of the completed Park.

private contributions to fund the approximately \$30 million budget for the development and construction of the Park.³

Lake Union Park directly abuts Valley Street, which is one of the major roadways that will be impacted by the Mercer/Valley Corridor Project at issue in this appeal (“the Project”). In addition to changes to Mercer Street, the Project includes plans to narrow Valley Street to a two lane, two-way street from its current configuration. This design will make Valley Street a quiet, pedestrian-friendly route to connect South Lake Union with Lake Union Park. These improvements to Valley Street are a crucial component to the function and vision of the Park, which was designed with these improvements in mind. Construction of the Park is underway, and when completed, the 12-acre Park will include green space, picnic areas, a waterfront boardwalk, the Center for Wooden Boats Education Center, and other maritime historic features.

Because of the benefits to both the Park and the South Lake Union area, the Foundation has a vested interest in the completion of the Project.

³ \$10 million of this total was committed by a single donor, City Investors Inc. an affiliate of Vulcan Inc. The first \$5 million was granted in 2005, and the second \$5 million was promised in the form of a challenge grant to be disbursed after the Foundation secured the remaining \$10 million in private funding and after the City moves forward with the planned reconfiguration of Valley Street. If these conditions are not met, the City is required to provide this additional \$5 million in funding for the Park. See <http://community.seattletimes.nwsourc.com/archive/?date=20050318&slug=vulcan18m>.

In addition, because the Foundation's primary work is to obtain private funding for public parks, it has an interest in the question before the Court regarding the impact of private funding on the determination of public use and necessity of otherwise public projects.

III. STATEMENT OF THE CASE

The Foundation relies on the Statements of the Case provided by the parties to this appeal.

IV. ARGUMENT

Determinations of public use and necessity are the first step in the condemnation process. *Central Puget Sound Reg. Transit Auth. v. Miller*, 156 Wn.2d 403, 410, 128 P.3d 588 (2006). Whether a use is sufficiently public to warrant condemnation is a judicial question, but legislative determinations of public use are entitled to great deference. *Hogue v. Port of Seattle*, 54 Wn.2d 799, 817, 341 P.2d 171 (1959). Washington courts have established basic guidelines to determine public use, which generally provide that projects contemplated for public use will be considered public in nature. *In re City of Seattle*, 96 Wn.2d 616, 625, 638 P.2d 549 (1981) ("*Westlake I*") (first inquiry in determining public use is whether "the use is really public"); *State ex rel. Washington State Convention and Trade Center v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998) (same).

Appellants ask the Court to ignore these well-settled principles of law, and find that simply because a public project involves private financial participation, its public nature is questionable. But Appellants do not cite any authority for the proposition that an undeniably public use becomes private merely because of the presence of private funding. Likewise, although Appellants claim that the benefit to neighboring property owners and others in South Lake Union from the Project raises the specter of private use, “the project does not thereby lose its public character” simply because it benefits neighboring property owners. *Town of Steilacoom v. Thompson*, 69 Wn.2d 705, 709, 419 P.2d 989 (1966). Any resulting benefit to property owners and others in South Lake Union from the Project does not defeat its public nature.

Because the City has met its burden of establishing the public nature and use of the Project, and because Appellants have made no contrary showing, the Court should affirm the finding below of public use and necessity.

A. The Mercer/Valley Corridor Project has Significant Public Benefit and Any Private Benefit is Merely Incidental.

Appellant West Marine claims that the Mercer/Valley Corridor Project does not adequately relieve traffic congestion and, therefore, that it does not serve the public interest or a public use. West Marine App. Br. at

26-29. But the “public character of a road does not depend necessarily upon the degree to which the general public is likely to use it or the amount of traffic the general public will probably put on it.” *State v. Belmont Improvement Co.*, 80 Wn.2d 438, 443, 495 P.2d 635 (1972). Appellants’ claims regarding the utility or merits of the Project are not determinative of the Project’s public nature.

Regardless, Appellants understate the material positive impacts the Project would have on the South Lake Union and Seattle communities. Among other benefits, the planned Valley Street improvements would significantly enhance the function and atmosphere of Lake Union Park, and if these improvements are not completed, the Park cannot realize its full potential. In addition, as discussed above, if the Valley Street improvements do not move forward, Lake Union Park will lose \$5 million in private funding, which the City will be required to make up with public tax dollars. These public benefits indicate the significant public importance of the Project and contradict Appellants’ arguments to the contrary.

West Marine also contends that because the Project will benefit the surrounding property owners, the identity and benefit to these property owners must be weighed in determining whether the Project is truly for a public use. West Marine App. Br. at 30-31. But merely because a project

has an incidental benefit to neighboring property owners does not mean that it has a resulting private use or purpose. *Thompson*, 69 Wn.2d at 709 (although some property owners may benefit from a public improvement more than others, “the project does not thereby lose its public character if it is in essence for the public’s benefit and convenience”); *Belmont*, 80 Wn.2d at 443 (the fact that some of the public may use a given roadway more than others “does not deprive it of its public character”); *see also In re City of Seattle*, 104 Wn.2d 621, 625, 707 P.2d 1348 (1985) (“*Westlake II*”) (“Public parks will almost always benefit private properties that are adjacent to them”). As this Court noted in *Thompson*, “scarcely a public improvement can be conceived that does not benefit some residents of the municipality more than others.” 69 Wn.2d at 709-10.

Belmont and *Thompson* establish that the Project’s benefit to the South Lake Union area, to Lake Union Park, and to the neighboring property owners does not mean that the Project has a private use. Appellants are unable to show any potential private use, and their arguments should be rejected.

B. The Presence of Private Funding Does Not Equate to the Existence of a Private Use.

Contrary to Appellants’ arguments, the Mercer/Valley Street Project is a public road improvement project created for public use, and its

benefits will be realized by the public as a whole. *See, e.g., Miller*, 156 Wn.2d at 411 n.2 (“the condemnation of private property for public transportation is . . . almost categorically a public use”); *Belmont*, 80 Wn.2d at 443 (“There is in law a strong presumption that a public highway, available for the use of all who come upon it, is, by its very nature, a public use of land.”). Without any showing that the Project has any private use, Appellants argue that the existence of private funding for the Project means there necessarily must be “some undisclosed private use.” Heglund Reply Br. at 2. Under Appellants’ argument, every public project that receives some private funding must have some resulting private use.

As a private funder of public park projects, Appellants’ argument has significant import to the Foundation’s work. It is well-established that public parks are considered public uses in condemnation. *Westlake II*, 104 Wn.2d at 624 (“It has been uniformly held that the use of land for a public park or other recreational facility constitutes the type of ‘public use’ which will justify condemnation.”). But under Appellants’ reasoning, merely because the Foundation participates in the funding of a public parks project, the public nature of that project would be called into question. The simple use of private contributions to fund a portion of a public parks project, however, does not automatically change the fundamental character

of that project. To the contrary, it is well-established that “private funding of a public project does not necessarily corrupt the public nature of that project.” *Convention Center*, 136 Wn.2d at 819; *see also Thompson*, 69 Wn.2d at 710.

Indeed, Appellants concede that private participation is permitted in public projects, but argue that courts must engage in a balancing of public and private uses when there is a showing of some private participation in a project. Appellants do not cite any authority to support this proposition, and in fact concede that there is none. RP 27:9-10 (“Frankly, this is a new case. This is cutting edge public use and necessity.”). Instead, Appellants rest their arguments on inapposite cases where there was an admitted private use. *See Westlake I*, 96 Wn.2d at 627-28; *Convention Center*, 136 Wn.2d at 818-19. Here, other than Appellants’ speculation and surmised private use, there is no showing that the Project is anything other than a public road project. Under such circumstances, there is no basis to engage in the balancing inquiry that Appellants urge.

Appellants’ claims that private participation necessarily implicates a private use are unfounded. For example, the Foundation funds many park projects with private money and does not expect or receive any resulting private use or benefit. Lake Union Park is one such project.

Simply because the Foundation has assisted in obtaining the majority of the funding for this Park from private sources does not mean that the Park will have some undisclosed private use.

The ruling Appellants seek would significantly impact the work of the Foundation and other joint public-private endeavors to create public projects for public uses. Article I, section 16 was not intended to prohibit such meritorious public-private partnerships. Appellants' requested outcome would discourage private investment in purely public infrastructure and projects, which is an ill-advised public policy, especially in the current economic times.

In sum, the argument that the mere existence of private funding for a public project could eliminate the authority to exercise eminent domain ignores the reality of public projects and is well outside the scope of any current debate under takings law. When there is no evidence that property condemned for a patently public use will be dedicated to a private use, courts need not speculate that some private use may someday arise. Appellants' arguments that private funding means private use should be rejected, and the trial court's finding of public use upheld.

V. CONCLUSION

The adoption of Appellants' position in this appeal would have significant impacts on the Foundation, its projects and any other public

projects that are in part supported by private funding. Appellants have cited no authority to support their argument that private participation in public projects results in, or even indicates, some private use. Nor have they made any showing that the Project has any purpose or use other than as a public road project. To the contrary, “[p]rivate funding of a public project alone is not sufficient to defeat the State’s exercise of the power of eminent domain.” *Convention Center*, 136 Wn.2d at 819. Because Appellants’ position is contrary to established law, the Foundation respectfully asks the Court to affirm the trial court decision below.

DATED this 17th day of April, 2009.

Respectfully submitted,

K&L GATES LLP

By /s/ Sarah C. Johnson

Paul J. Lawrence, WSBA # 13557

Matthew J. Segal, WSBA # 29797

Sarah C. Johnson, WSBA # 34529

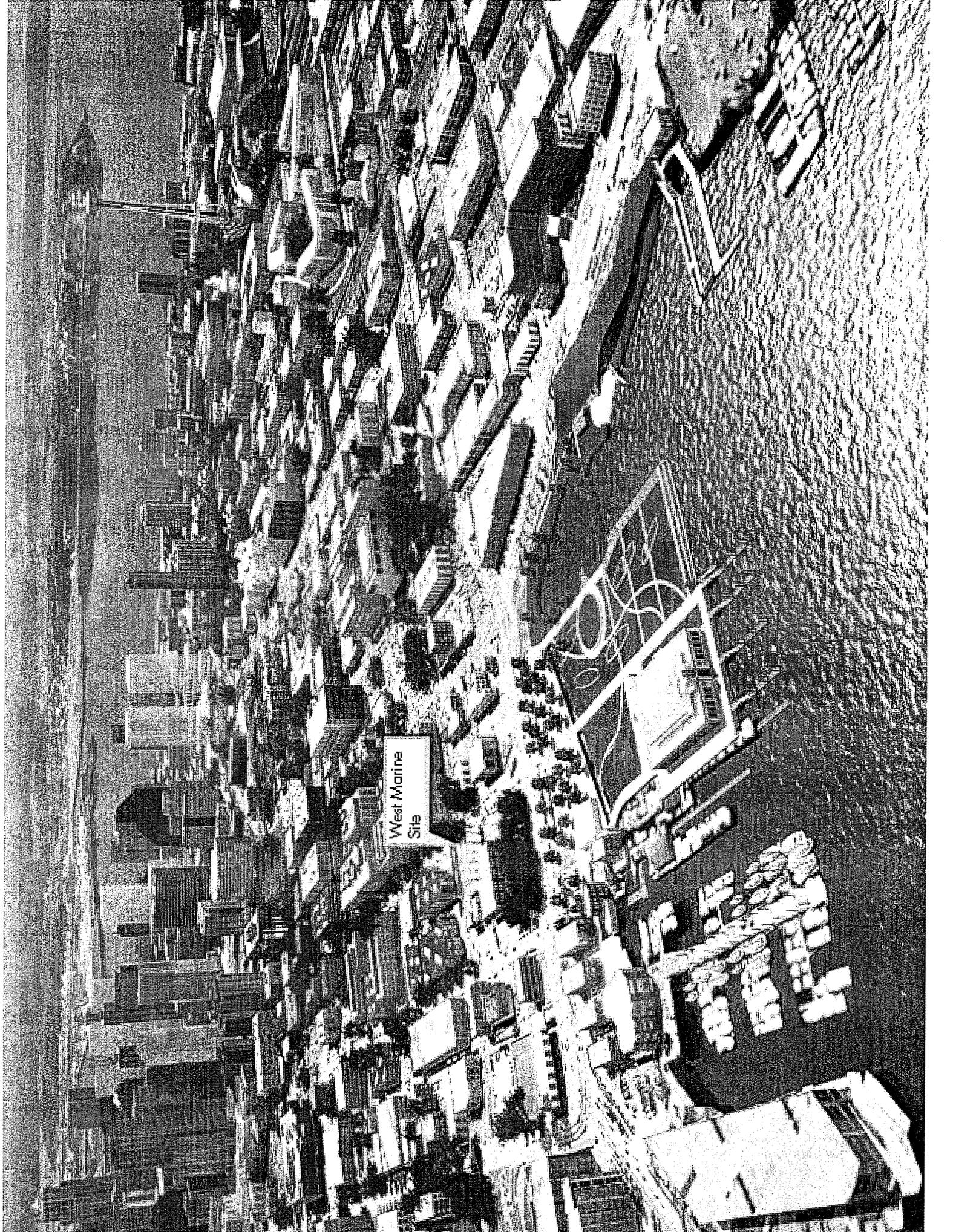
Attorneys for Amicus Curiae
Seattle Parks Foundation

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Appendix A



West Marine Site



West Marine
Site