

No. 94406-7

SUPREME COURT OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY, a regional transit authority, dba SOUND TRANSIT,
Petitioner Below; Respondent on Appeal,

v.

CITY OF SEATTLE, SEATTLE CITY LIGHT,
a Washington municipal corporation,
Respondent Below; Appellant,

and

SAFEWAY INC., a Delaware corporation, et al.,
Additional Respondents Below.

BRIEF OF RESPONDENT SOUND TRANSIT

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I. INTRODUCTION

This is an eminent domain action. Respondent Sound Transit is condemning certain interests in property located along 124th Avenue Northeast, in Bellevue, Washington for the East Link Extension of its Link light rail project, which will bring light rail to Bellevue. The light rail trackway will be constructed to run along and through the northern end of the property.

The property is bordered on the east by 124th Ave NE. Appellant, Seattle City Light (“City Light”), holds a power line easement (the “Easement”) that is part of an easement corridor that runs along 124th Ave NE, bisecting the City of Bellevue, in the area of the property. City Light claims that as a public entity holding an interest in property located in Bellevue, it has the right to block the East Link Extension.

The trial court disagreed and entered Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity as to Respondent City of Seattle on March 27, 2017 (the “PU&N Judgment”). The PU&N Judgment held that Sound Transit had statutory authority to condemn public property, and found that the property was necessary for the project.

Sound Transit requests that the Court affirm the PU&N Judgment.

II. RESTATEMENT OF ISSUES PRESENTED

1. Sound Transit's enabling statute grants it broad eminent domain authority to acquire "all" property necessary to construct and operate a regional transit system. Does City Light's status as a public entity prevent Sound Transit from condemning portions of City Light's Easement to construct and operate its regional light rail project?

2. An agency's determination that property is necessary for a public use does not require absolute, indispensable, or immediate need and is conclusive unless the party opposing condemnation shows the determination was arbitrary and capricious, amounting to constructive fraud. The trial court found Sound Transit's necessity determination was not arbitrary and capricious amounting to constructive fraud. Has City Light shown grounds to reverse the Trial Court's necessity finding?

3. The prior public use doctrine allows condemnation of public property whose current use is compatible with or inferior to the proposed use. Competing public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to an extent tantamount to destruction. Does the prior public use doctrine prohibit the condemnation when Sound Transit's project will not destroy City Light's existing easement use?

III. STATEMENT OF THE CASE

A. SOUND TRANSIT AUTHORIZING LEGISLATION

Sound Transit is a regional transit authority under RCW chapters 81.104 and 81.112 (the "RTA Statutes"). CP 7. RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows Sound Transit to "acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of high capacity transportation facilities and properties ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems." By granting Sound Transit the power to acquire, by means that include condemnation, "all" property necessary for its high capacity transportation system, the legislature vested Sound Transit with the power to condemn public, as well as private, land to construct, operate, and maintain its project.

B. EAST LINK EXTENSION PROJECT

The history of the East Link project dates back to 2008, when voters approved Sound Transit's proposal to add a light rail line between downtown Seattle and the Bellevue/Redmond area. Sound Transit

selected the station locations and trackway alignment for the East Link when it adopted Resolution R2011-10 in June 2011.¹ CP 404.

In November 2011, the City of Bellevue and Sound Transit entered into an Umbrella Memorandum of Understanding for the East Link Project (“MOU”).² Among other things, the MOU addressed Sound Transit’s “use of the City right-of-way and associated terms and conditions.” MOU at 2. The MOU shows grade separation between 124th Ave NE automotive traffic and the trackway, which would be aligned in a “retained cut under 124th Ave NE.” MOU at 35.

Contemporaneously, Sound Transit and the City of Bellevue entered into a Transit Way Agreement (“TWA”) allowing Sound Transit access to City rights of way to “construct, operate, maintain, and own” the East Link project.³ TWA at 7. It provided that Sound Transit would

¹ Resolution R2011-10 is available on Sound Transit’s website at <https://m.soundtransit.org/sites/default/files/documents/pdf/about/board/resolutions/2011/Reso2011-10.pdf>. Because it was passed and published by a public agency, it is a proper subject for judicial notice under ER 201.

² The 2011 MOU is available on Bellevue’s website at https://transportation.bellevuewa.gov/UserFiles/Servers/Server_4779004/File/Transportation/East%20Link%20Docs/MOU-EastLinkMOUApprvd-111411.pdf. Like the contemporaneous Transit Way Agreement referenced below, it was referenced in but not attached to Sound Transit’s briefing below, and is a proper subject for judicial notice under ER 201.

³ The Transit Way Agreement is available on Bellevue’s website at https://transportation.bellevuewa.gov/UserFiles/Servers/Server_4779004/File/Transportation/East%20Link%20Docs/MOU-TransitWayAgreement-111411.pdf. It was referenced in but not attached to Sound Transit’s briefing below, and is a proper subject for judicial notice under ER 201.

transfer its acquired real property to the City if the parties agreed the property was needed for the public right of way. TWA at 9. As in the MOU, the East Link project description included a “retained cut ... crossing under ... 124th Ave NE.” TWA at 41. With the MOU and TWA in place, Sound Transit’s Board advanced the East Link project into the final design stage.

C. RESOLUTION R2013-21 TO ACQUIRE PROPERTY FOR EAST LINK

In September 2013, Sound Transit passed Resolution R2013-21, which authorized condemnation proceedings to “acquire all, or any portion” of the property that is the subject of this action (the “Parcel”) “for the purpose of constructing, owning, and operating a permanent location of the East Link Extension and light rail guideway.” CP 9.

City Light’s interest in the Parcel is its electrical transmission line Easement, which runs along the east side of the Parcel (west of 124th Ave. NE) and is currently used for an electrical transmission system. CP 193. The Easement is part of an easement corridor that runs north and south, and spans both the east and west sides of 124th Ave. NE. CP 198-199. Only the portion of the corridor west of 124th Ave. NE is in use. CP 98.

D. COLLABORATIVE DESIGN AND PLANNING

After Sound Transit resolved to acquire up to the entire Parcel in September 2013, it engaged in extensive consultation and collaboration with the City of Bellevue about the final project alignment, design, and construction process. This culminated in an Amended and Restated Umbrella Memorandum of Understanding (the “Amended MOU”) and related agreements executed in May 2015.⁴ The parties agreed that the “retained cut under 124th Ave NE,” which was called out in the 2011 MOU and TWA, requires “elevating the existing roadway profile [for 120th Ave NE and 124th Ave NE], including the bridge and supporting structures and systems, to accommodate the East Link Project.” Amended MOU at 94.

The 124th Ave NE bridge is identified in the agreements as part of the East Link project. It is designed and will be constructed to accommodate the City’s plans to widen and improve 124th Ave NE. *Id.* To promote efficiency and public convenience, the bridge will be built by the City before Sound Transit builds the light rail trackway. Amended MOU at 93. As previously contemplated by the 2011 TWA,

⁴ The Amended MOU is available on Bellevue’s website at https://transportation.bellevuewa.gov/UserFiles/Servers/Server_4779004/File/Transportation/East%20Link%20Docs/MOU-TransitWayAgreement-111411.pdf. It was referenced in but not attached to Sound Transit’s briefing below, and is a proper subject for judicial notice under ER 201.

the City will eventually own and control all automotive rights of way constructed on property acquired by Sound Transit for its East Link project. Amended MOU at 98.

E. PROCEDURAL HISTORY

In this action, filed on April 21, 2016, Sound Transit seeks to condemn portions of the Parcel for the location, construction, operation, and maintenance of the East Link Extension. CP 2-3. The Petition states that in order to permanently locate, construct, operate, and maintain the East Link Extension and its related facilities, Sound Transit must condemn certain property rights, and enumerates the property interests to be taken, which are all within the property identified as necessary for the East Link Extension to Sound Transit's Link light rail system in R2013-21. CP 1-2.

Sound Transit engaged in lengthy discussions with City Light regarding its transmission line easements along 124th Ave NE and the light rail project, hoping that the two public entities could reach a negotiated resolution without the need for litigation. CP 355, 363-367. After filing its Petition in Eminent Domain, Sound Transit moved for an order and judgment of public use and necessity regarding City Light's Easement. CP 213-224. City Light opposed the motion, contending that Sound Transit "does not have the statutory authority to condemn any

property owned by a city such as Seattle.” CP 265. After extensive briefing and submissions of written evidence, the trial court entered the PU&N Judgment, which found that Sound Transit has authority to condemn publicly owned property, including City Light’s Easement, and that the Easement was necessary for the East Link Extension. CP 422-426.

City Light immediately filed a Motion for Reconsideration of the PU&N Judgment, which the trial court denied. CP 474-486, 492-493. City Light then filed a Notice of Appeal to this Court from the PU&N Judgment. CP 494. City Light filed a Statement of Grounds for Direct Review, and Sound Transit answered. City Light’s request for direct review remains pending, and the parties have proceeded to brief the issues on the merits.

F. RELATED CASES

In addition to this case, City Light and Sound Transit are litigating four related cases, each involving a parcel at the same Bellevue intersection as the Parcel, each involving the same City Light easement corridor, and each raising the same issues.

1. The Jacobsen Case

In *Sound Transit v. Ann Senna Jacobsen, et al.*, King County Cause No. 16-2-06769-7 SEA (“*Jacobsen*”), City Light opposed Sound

Transit's Motion for Public Use and Necessity on the same grounds it raises here: that Sound Transit lacked authority to condemn public property, that the proposed condemnation would render City Light's easement unusable, and that the property interests sought in condemnation were not strictly "necessary" for the East Link Extension. In *Jacobsen*, City Light also challenged Sound Transit's authority to condemn City Light property in a motion for summary judgment. On January 19, 2017, the trial court entered a revised order finding public use and necessity as to City Light's easement interest,⁵ and on December 20, 2016 denied City Light's motion for summary judgment. CP 268. City Light then appealed the PU&N judgment to the Court of Appeals under Cause No. 76252-4-1, and also sought direct discretionary review of the summary judgment denial, which this Court denied. Appx. at 1-6. On January 10, 2017 the Court of Appeals granted Sound Transit's motion for accelerated review of the Jacobsen PU&N judgment. Appx. at 7-8. Briefing in that matter is now complete, and the parties are now awaiting an expedited oral argument setting.

⁵ In this case, Sound Transit filed the Declaration of Larry J. Smith in Support of Petitioner's Reply in Support of Motion for Order and Judgment Adjudicating Public Use and Necessity - City of Seattle, which affirmed Sound Transit's commitment to work with City Light to preserve its easement interests where possible. CP 355.

2. The *Sternoff* Case

In *Sound Transit v. Sternoff L.P.*, King County Cause

No. 16-2-0880-7 SEA (“*Sternoff*”), City Light opposed Sound Transit’s Motion for Public Use and Necessity on the same grounds.⁶ On April 19, 2017, the trial court entered an order finding public use and necessity as to City Light’s easement interest. Appx. at 25-30. On May 18, 2017, City Light filed a Notice of Appeal to this Court of the trial court’s PU&N Judgment. City Light’s Statement of Grounds for Direct Review and Sound Transit’s Answer have been filed under Supreme Court Cause No. 94530-6. City Light’s opening brief was submitted to this Court on August 2, 2017, and Sound Transit’s response brief was filed on August 31, 2017. City Light’s reply brief is due on October 2, 2017, but City Light has requested an extension of this due date to November 1, 2017. The request for direct review remains pending.

3. The *Spring District* Cases

In *Sound Transit v. WR-SRI 120th North, LLC*, King County

Cause No. 17-2-00988-1 SEA (“*Spring District I*”), City Light opposed Sound Transit’s Motion for Public Use and Necessity on the same

⁶ The *Sternoff* property owner had previously challenged Sound Transit’s condemnation on necessity grounds. The trial court’s ruling finding public use and necessity as to the owner was affirmed by the Court of Appeals, No. 75372-0-I (Nov. 7, 2016) (“*Sternoff Owner Suit*”). Appx. at 9-23. This Court denied the owner’s petition for review, No. 93913-6 (Feb. 8, 2017). Appx. at 24.

grounds. On February 13, 2017, the trial court entered an order finding public use and necessity to take City Light's interest in the condemned property. Appx. at 31-36. City Light filed its Notice of Appeal to this Court on March 10, 2017. City Light's Statement of Grounds for Direct Review and Sound Transit's Answer have been filed under Supreme Court Cause No. 94255-2. City Light filed its opening brief on the merits on June 23, 2017, and Sound Transit filed its response brief on July 24, 2017. City Light received an extension of time to file its reply brief, which is due October 6, 2017. The request for direct review remains pending.

In addition, Sound Transit filed another action for condemnation of a different set of property interests on the same parcel. *Sound Transit v. WR-SRI 120th North LLC*, King County Cause No. 17-2-12144-4 SEA (*"Spring District II"*).⁷ Sound Transit filed its Motion for Public Use and Necessity in that case, and City Light opposed the motion on the same grounds it has argued in the previous cases. Appx. at 37-68. On September 22, 2017, the trial court entered its order adjudicating public

⁷ Sound Transit condemned this set of property rights separately because of anticipated valuation issues relating to the property rights being taken in *Spring District I*, where the light rail station will be located, and because Sound Transit was able to obtain from the Spring District property owner a pre-condemnation Administrative Possession and Use Agreement with respect to the owner's property interests at issue in *Spring District II*. Filing the two matters separately also provided Sound Transit with the most flexibility for the Project Schedule.

use and necessity, finding Sound Transit has the statutory authority to condemn City Light's property and that the property is necessary for Sound Transit's project. Appx. at 69-74.

Throughout the condemnation process in each of these related cases, Sound Transit has tried to work with City Light to craft a description of the taking consistent with City Light's ability to use the easement corridor for its intended purpose. CP 354-55, 363-67. Sound Transit has indicated its willingness to adopt a plan that would allow City Light to maintain aerial easement rights. CP 355. Sound Transit and Bellevue have also offered City Light multiple opportunities to provide comments on the proposed design of the Project. CP 364-66. City Light has refused to work with Sound Transit to describe the taking in terms that take both parties' future needs into account. CP 366.

In each of these cases, the trial court has rejected City Light's arguments, ruled that Sound Transit is authorized to condemn public property, and found that City Light's easement interests are necessary for the East Link Extension.

IV. ARGUMENT

A. SOUND TRANSIT'S ENABLING STATUTE GRANTS IT AUTHORITY TO CONDEMN PUBLIC PROPERTY

The trial court correctly ruled that Sound Transit has statutory authority to condemn publicly owned property, including City Light's

Easement. RCW 81.112.080(2) authorizes Sound Transit to condemn “all” property and rights of way necessary for its transit system and supporting facilities. The plain meaning of the word “all” includes public property, and other portions of the same statute confirm that “all” property includes public property. In addition, regional transit authorities building a regional transit system through dense urban areas must be able to condemn publicly owned property to achieve the statutory purpose: a “regional” transit system.

RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows Sound Transit to “acquire by purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of high capacity transportation facilities and properties ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems.” A “high capacity transportation system” is “a system of public transportation services within an urbanized region operating principally on exclusive rights of way, and the supporting services and facilities necessary to implement such a system.” RCW 81.104.010(1). “Facilities” include “any lands, interest

in land, air rights over lands, ... and other components necessary to support the system.” RCW 81.112.020(5).

Statutory analysis “always begins with the plain language of the statute.” *Rest. Dev., Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). On its face, RCW 81.112.080 specifically authorizes Sound Transit to condemn “all lands, rights-of-way, [and] property necessary for such high capacity transportation systems.” [Emphasis added]. The word “all” represents an express delegation of the power to condemn publicly owned, as well as privately owned property.⁸ That is, the legislature expressly refused to limit a regional transit authority’s power to condemn based on the nature or ownership of the land or property to be acquired.

Additionally, the statute expressly references “rights-of-way” in its grant of condemnation authority. Because rights-of-way are routinely owned by the state or one of its political subdivisions, the legislature must have intended “all lands, rights-of-way, [and] property” to mean and include publicly owned land. It would not make sense for the legislature to expressly grant condemnation rights over “all ... rights-of-

⁸ In contrast to the term “necessity,” which has been extended beyond its strict dictionary definition by over a century of Washington eminent domain case law (*see* Section B, *infra*), there is no statute or case law in condemnation jurisprudence suggesting that “all property” does not have its evident plain meaning.

way” if it intended to limit the condemnation authority to only private property.

Indeed, the structure of the statute mandates that the grant of authority to condemn “all” property includes public property. The statute does not distinguish between the types of property Sound Transit may acquire by condemnation and the types of property Sound Transit may acquire by other means—or, for that matter, the types of property Sound Transit may lease or operate. It authorizes Sound Transit to “acquire by purchase, condemnation, gift, or grant and lease, construct, add to, improve, replace, repair, maintain, operate, and regulate the use of high capacity transportation facilities and properties within authority boundaries ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems.” RCW 81.112.080(2) [emphasis added]. City Light claims that this single use of the word “all” means two different things: when it modifies the word “property” in connection with Sound Transit’s authority to “acquire by purchase, ..., gift, or grant” (and do everything else Sound Transit is authorized to do with property), it actually means “all” property, both public and private; but when that same word “all” modifies that same word “property” in connection with Sound Transit’s authority in the same clause of the same sentence to

“acquire by ... condemnation, ...” all necessary property, it doesn’t actually mean “all” property, it just means private property. City Light’s strained construction contradicts the plain statutory language and is based on little more than wishful thinking.

Finally, the remainder of the statute assumes and confirms that the power to condemn publicly owned property exists. RCW 81.112.080 contains an explicit exclusion for certain types of public property. Certain public property and facilities already used for public transportation may be acquired only by consent. The statute reads, in relevant part:

Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities.

RCW 81.112.080.⁹

“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or

⁹ RCW 81.104.015(1) explains what the legislature means by the phrase “public transportation facilities and properties.” That statute defines the term “high capacity transportation system” (which will principally operate on exclusive rights of way) by contrasting it with “traditional public transportation systems operating principally in general purpose roadways.” And the definition of “transit agency” in RCW 81.104.015(3) corresponds to the enumeration in RCW 81.112.080 of the public entities from which Sound Transit must obtain consent before acquiring or using their public transportation facilities and properties.

superfluous.” *Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)). If Sound Transit did not have the power to condemn *any* publicly owned property, there would be no reason to specifically exclude from its condemnation power certain public property already devoted to public transportation. The exclusion itself would be superfluous, meaningless, and unnecessary if regional transit authorities lacked the power to condemn other public property, including other property owned by cities. Thus, the only interpretation that gives meaning to all the statutory language is that Sound Transit is authorized to condemn public property so long as that public property is not already in use by a city, county, or transit agency for public transportation.

And this makes sense, because the purpose of the RTA statute is to provide for a single entity to plan, develop, operate, and fund a multicounty, high capacity transportation system. *See* RCW 81.112.010. Those “services must be carefully integrated and coordinated with public transportation services currently provided.” *Id.* Thus, when a city, county, or transit agency is already using property for public transportation, that property may be acquired or used by a regional transit authority only with the agency’s consent. RCW 81.112.080.

City Light claims this reference to public transportation properties is a limited grant of power to acquire public property, not an exception to the power to acquire “all” property. But the plain language of the clause shows it is an exception, not a grant. The statute provides that publicly owned public transportation facilities and properties “may be acquired or used by an authority only with the consent of the agency owning such facilities.” RCW 81.112.080. The word “only” would not be used if the clause were a grant. It is a word of limitation, and shows that absent the clause Sound Transit would have authority to acquire those facilities “by purchase, condemnation, gift, or grant and to lease” under the prior grant of authority to acquire “all” property. Thus, the exception proves the rule: that Sound Transit has the broad authority to condemn all property it needs to build its projects, even if the property is publicly owned.

In its brief, City Light asserts that RCW 81.112.080 is silent as to whether Sound Transit is authorized to condemn property owned by cities or other public entities and that such silence means that the statute only delegates power to condemn private property. However, the statute is not silent. The word “all,” in itself, distinguishes Sound Transit’s condemnation authority from the county-condemnation statute addressed

in the case relied on by City Light, *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966).

In that case, King County sought to condemn a 60-foot right-of-way from an existing road owned by the City of Seattle. The City filed a motion for summary judgment, arguing that King County lacked specific statutory authority to condemn property owned by another municipal corporation. This Court agreed, based on the language of the authorizing statute, which provides: “[e]very county is hereby authorized and empowered to condemn land and property within the county for public use.” RCW 8.08.010. The Court held that this language did not provide “an express or necessarily implied legislative authority for counties to condemn the property or rights of the state or any of its subdivisions.” *King County*, 68 Wn.2d at 691-92.

But King County’s general authority to condemn for public use within municipal limits is much different from the authorization given to regional transit authorities.

First, unlike the county authorizing statute, which “King County argued ... constituted a grant of authority to acquire ‘all property’” (Opening Brief at 19), RCW 81.112.080 actually and expressly does grant regional transit authorities the power to condemn “all” property

necessary for their projects.¹⁰ Second, Sound Transit's authorizing statute provides context regarding the type of property that it is authorized to condemn, demonstrating the legislature's intent to grant Sound Transit the authority to condemn public property. Notably, the statute explicitly authorizes Sound Transit to condemn rights of way, which are routinely property of the state or its political subdivisions. And finally, RCW 81.112.080 specifically precludes Sound Transit from condemning public transportation property owned by cities, counties, or transit agencies. This exception to Sound Transit's condemnation power would not be necessary unless the power to condemn "all" necessary property included publicly owned property.

In contrast, the authorizing statute in *King County* contained neither the express authority to condemn "all" property, nor other references to the condemnation of public property, nor an exception for certain types of public property. The distinctions between the statutes at

¹⁰ City Light's characterization of King County's argument as seeking authority to condemn "all property" is a tacit acknowledgment that the commonly accepted meaning of "all property" includes public property. In an attempt to explain away the plain language allowing Sound Transit to condemn "all" property, City Light notes that a provision in the original House Bill creating regional transportation authorities that allowed for "liberal construction" was removed from the final statute. Opening Brief at 24. But as shown above, whether strictly or liberally construed, the statute's plain language cannot support the distinction between public and private property that City Light advocates. With respect to Sound Transit's condemnation authority, the only distinction the statute supports is between certain publicly-owned public transportation facilities and other public property.

issue demonstrate why the result here must be different from the result this Court reached in *King County*.

And this Court's ruling in *Newell v. Loeb*, 77 Wash. 182, 200, 137 P. 811 (1913), supports this conclusion. In *Newell*, waterway district commissioners sought a right of way to straighten and deepen the Duwamish River. *Id.* at 188. Appellants that owned and operated a steam electrical plant along the river argued they were already using water from the river for a public use, and the water commission's eminent domain statute did not authorize the condemnation of property already devoted to a public use. *Id.* The commission's eminent domain statute was similar to RCW 81.112.080(2), authorizing the condemnation of "all" necessary and needed property to improve the waterways. *Id.* at 199. Acknowledging that property devoted to a public use could not be taken for another public use without express or necessarily implied legislative authority, this Court interpreted the underlying condemnation statute and held that the use of the word "all" conferred the power "to acquire, either by purchase or condemnation as the commission may see fit, all necessary and needed rights of way," even those already devoted

to public use. *Id.* at 199-200.¹¹ Thus, under *Newell*, use of the word “all” is effective to authorize condemnation of both public and private property necessary to effectuate the statutory purpose.¹²

Finally, City Light simply ignores the long line of cases that hold condemnation statutes cannot be construed to defeat the purpose of the granted condemnation authority. Although “statutes which delegate the state’s sovereign power of eminent domain to its political subdivisions are to be strictly construed,” the power may be conferred “in express terms or by necessary implication;” “a statutory grant of such power is not to be so strictly construed as to thwart or defeat an apparent legislative intent or objective.” *State ex rel. Devonshire v. King County*, 70 Wn.2d 630, 633, 424 P.2d 913 (1967) (citing *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965)). This Court articulated the standard for statutory construction in the condemnation context in *State ex rel. Hunter v. Superior Court for Snohomish County*:

¹¹ Although the *Newell* court was examining an issue of public use, not authority to condemn public property, the analyses are the same, and *Newell* applies equally to this case. This Court held in *Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 540 ¶ 33, 342 P.3d 308 (2015) (“*Okanogan County*”), that “the analysis for determining a municipal corporation’s authority to condemn state land held by the state in its governmental capacity is similar to that for determining a corporation’s authority to condemn property already serving a public use.”

¹² City Light’s purported support for its contrary argument that the legislature “knows” this Court will not construe “all” property to include publicly-owned property is a criminal case that has nothing to do with eminent domain and construes a statute that does not include the word “all.” See Opening Brief at 22-23; *State v. Larson*, 184 Wn.2d 843, 851-54, 365 P.3d 740 (2015).

“statutes relating to eminent domain are strictly construed, but it is not necessary that such statutes cover in minute detail everything which may be done in order to carry out their purposes. Even though a power may not be expressly given in specific words, if its existence is reasonably necessary in order to effectuate the purposes intended, such power may be implied.”

34 Wn.2d 214, 217, 208 P.2d 866 (1949) [emphasis added]. *See also* *Petition of Port of Grays Harbor*, 30 Wn. App. 855, 861-862, 638 P.2d 633 (1982) (citing *State ex rel. Hunter*). Thus, in addition to the condemnation powers expressly conferred, Sound Transit has the authority to condemn public property because that power is “reasonably necessary” in order to effectuate the RTA enabling statute, RCW ch. 81.112.

The purpose of the RTA statute is to provide for a single entity to plan, develop, operate, and fund a multicounty, high capacity transportation system. *See* RCW 81.112.010. Because a regional public transportation system must, by definition, span and connect numerous local jurisdictions and cross or abut thousands of properties, including public rights of way, the power to condemn public property is “reasonably necessary” to effectuate the statutory purpose. City Light’s contrary reading would limit regional transportation authorities to transportation projects that avoid public property rights entirely, or give veto power to each and every public entity that holds an interest in

property intersecting the proposed project. Either choice would render the construction and operation of a regional transit system impossible and the statute meaningless. Such a result would defeat the purpose of the grant—to enable regional transportation authorities like Sound Transit to design, construct, and operate a comprehensive regional public transportation facility. RCW 81.112.080; see also RCW 81.112.010. Even if the power to condemn publicly-owned property were not expressly granted as part of the power to condemn “all” property, it would be necessarily implied to effectuate the statutory purpose.

B. CONDEMNATION OF CITY LIGHT’S EASEMENT IS NECESSARY FOR THE CONSTRUCTION OF THE EAST LINK EXTENSION

Necessity has a very specific meaning in eminent domain law. It does not mean the project could not exist without the property; rather, it means that the property has been selected for and will actually support a designated public use. *E.g., Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC (NAFTZI)*, 159 Wn.2d 555, 576 ¶ 40, 151 P.3d 176 (2007) (necessity exists if the project fulfills a “genuine need” and “condemnor in fact intends to use the property for the avowed purpose”) [internal quotations omitted]. “[A] particular condemnation is necessary as long as it appropriately facilitates a public use.” *Sound Transit v. Miller*, 156 Wn.2d 403, 421

¶ 36, 128 P.3d 588 (2006). “Put another way, when there is a reasonable connection between the public use and the actual property, this [necessity] element is satisfied.” *Id.*

“Since the turn of the [twentieth] century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings.” *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 631 ¶ 42, 121 P.3d 1166 (2005). An agency’s determination that property is necessary for a public use is conclusive unless the party opposing condemnation shows the determination was arbitrary and capricious, amounting to constructive fraud. *Welcker*, 65 Wn.2d at 684.

Sound Transit determined that each of the properties along the light rail alignment was necessary for its light rail project, and authorized acquisition by purchase or condemnation of “all or any portion” of those properties. CP 9. Resolution R2013-21 specifically determined that the Parcel was “necessary for the construction and permanent location of the East Link Project,” and that the acquisition was “for the light rail construction, operation and maintenance in the Bel-Red Corridor of Bellevue between 120th Ave NE and 148th Ave NE.” CP 8. In addition, the evidence before the trial court showed that Sound Transit’s decisions

were driven by the chosen alignment of the project, a design choice dating back to before Resolution R2013-21 was adopted (*e.g.*, CP 364).

Based on that evidence, the trial court found that the construction of Sound Transit's East Link project will serve a public purpose, is necessary for the public interest, and that the Parcel, consisting of the fee simple land and easements being acquired in this condemnation action, is necessary for this purpose. CP 425. Additionally, the trial court found that there was no fraud, actual or constructive, no abuse of power, bad faith, or arbitrary and capricious conduct by Sound Transit. *Id.*

The trial court's findings are reviewed under the substantial evidence test. *City of Bellevue v. Pine Forest Properties, Inc.* (hereafter, "*Pine Forest*"), 185 Wn. App. 244, 263-64 ¶¶ 52-53, 340 P.3d 938 (2014), *rev. denied*, 183 Wn.2d 1016 (2015). Under that test, the evidence is viewed in the light most favorable to the respondent on appeal. *NAFTZI*, 159 Wn.2d at 576 ¶ 41. Substantial evidence supports a finding if, "viewed in the light most favorable to the respondent," it "would persuade a fair-minded, rational person" that the finding is true. *Miller*, 156 Wn.2d at 419 ¶ 29, [internal quotations omitted]. Thus, to succeed on appeal based on an argument that its Easement is not "necessary" for Sound Transit's project, City Light must demonstrate that the only conclusion a "fair-minded, rational person" could draw

from the evidence is that Sound Transit engaged in arbitrary and capricious conduct amounting to constructive fraud when it determined the property was necessary. This argument fails.

Sound Transit's necessity determination was not arbitrary and capricious or fraudulent. As an initial matter, City Light has never alleged or put forth any evidence suggesting that Sound Transit's necessity determination was arbitrary and capricious amounting to actual or constructive fraud. City Light's brief does not even assign error to the trial court's finding of fact number 9, which finds that there was no actual or constructive fraud, or arbitrary and capricious conduct by Sound Transit. Opening Brief at 2. Because City Light has never challenged Sound Transit's necessity determination on the only grounds upon which a necessity determination may be contested, the trial court's necessity finding must stand.

Additionally, Sound Transit's legislative determination that the Parcel was necessary for the East Link project is, in itself, substantial evidence to support the trial court's necessity finding. *See, e.g., NAFTZI*, 159 Wn.2d at 577 ¶ 42 (board resolution identifying public purpose and selecting property to accomplish that purpose was sufficient); *City of Seattle v. Loutsis Inc. Co., Inc.* (hereafter, "Loutsis"), 16 Wn. App. 158, 167, 554 P.2d 379 (1976) ("determination of necessity

was for the City to make”); *King County v. Olson*, 7 Wn. App. 614, 619-20, 501 P.2d 188 (1972) (substantial evidence supported necessity of take when agency presented overall plans for park and showed “that open space land within the proposed park area had been selected for acquisition”).

Moreover, demonstrating fraud, bad faith, or arbitrary and capricious conduct is a heavy burden that City Light failed to meet. For example, in *In re Port of Seattle*, the owner challenged the Port’s necessity determination, claiming it was arbitrary and capricious because “the plans for the use of the property to be acquired are not specific.” 80 Wn.2d 392, 398, 495 P.2d 327 (1972). The court rejected the argument. First, the court noted there was a specific public use—air cargo facilities—designated for the property. *Id.* at 398-99. Second, the court held that the lack of “specific or detailed plans for the facilities to be constructed” is insufficient to establish arbitrary and capricious decision-making amounting to the constructive fraud. *Id.*

Instead of addressing the evidence that supports the trial court’s necessity finding or challenging Sound Transit’s necessity determination under the required arbitrary and capricious analysis, City Light makes a cursory argument that Sound Transit is condemning the Easement interests for the City of Bellevue’s road widening project and not for the

East Link light rail project. What City Light fails to tell the Court, however, is how 124th Ave NE and the light rail alignment will intersect.

As it plans, designs, and constructs its light rail system, Sound Transit enjoys the right to choose the alignment, design, and construction parameters it deems best serves the needs of the region as a whole.

Miller, 156 Wn.2d at 421-22 ¶ 37 (holding that Sound Transit's "site selection is essentially a legislative question, not a judicial one"). Sound Transit's decision to condemn the Parcel was driven by its chosen light rail alignment and project design. The alignment is reflected in the MOU, which shows the light rail trackway in a retained cut under 124th Ave NE that will enable light rail trains to travel safely under 124th Ave NE, without interrupting the flow of vehicular traffic on the 124th Ave NE right of way. MOU at 35.

In order to implement this plan, the roadway must be raised to create a bridge that will carry vehicles traveling along 124th Ave. NE over and across the light rail tracks. CP 408. The bridge is specifically identified as part of the East Link project. *Id.* And it is well within the definition of a "high capacity transportation system" under RCW 81.104.015(1), which includes "supporting services and facilities" for a system where public transportation operates "principally on exclusive rights of way." "Facilities" are likewise defined to include

“components necessary to support the system.” RCW 81.112.020(5). Without the bridge over the light rail trackway, the light rail line would cross the roadway at grade, contravening this legislative preference that high capacity transportation systems operate on their own exclusive rights of way. Thus, by statute, the bridge is part of the high capacity transportation system, and Sound Transit has the authority to condemn property for the bridge. RCW 81.104.080(2) (granting regional transit authorities power to acquire (including by condemnation) “all lands, rights of way, property, equipment and accessories necessary for such high capacity transportation systems”).

Although City Light characterizes Sound Transit’s acquisition as one for “road widening,” it is actually complaining about the width of the bridge. The bridge does not yet exist, and cannot be “widened.” Moreover, the bridge is necessary only because Sound Transit’s light rail line crosses 124th Ave NE, and the project is designed to include a bridge that will separate vehicular traffic from the light rail line at that intersection. City Light’s challenge, therefore, is actually to Sound Transit’s bridge design, which reasonably—not arbitrarily or capriciously—will match the width of the bridge to the soon-to-be -widened 124th Ave NE.

Sound Transit has an interest in selecting a design and construction that will stand the test of time, serve the needs of the public into the future, and avoid costly upgrades for future needs that are foreseeable now. One such need (which is imminent, not just foreseeable) is the City of Bellevue's longstanding plan to widen 124th Ave NE. It would be ludicrous for Sound Transit to design and build a bridge that is narrower than the roadway the City of Bellevue plans for 124th Ave NE, thereby creating a bottleneck that will have to be rectified in the near future at great public cost in money and inconvenience. The necessity standard does not require such short-sighted decisions. Rather, its flexibility is intended to facilitate projects like this one, in which the 124th Ave NE bridge that is part of the East Link Extension project has been appropriately designed to conform to plans for the surrounding road.

City Light also argues that Sound Transit's condemnation of the Easement is "not necessary for Sound Transit's light rail system" because some of the property rights sought will eventually be transferred to Bellevue. Opening Brief at 26. This is nearly identical to the argument made repeatedly and unsuccessfully by the property owner in a case involving the property across the street. *Sternoff Owner Suit*, Appx. at 9-23. In that decision, the Washington Court of Appeals held that the

condemnation was necessary for the East Link project, rejecting the very argument City Light is making here. The court held that, absent a finding of arbitrary and capricious conduct, the finding of necessity in Resolution R2013-21 was conclusive, and “[t]he property interests the petition seeks to acquire [to build a bridge with a wider roadway and supporting facilities] are tied to the East Link extension.” The court affirmed the trial court’s judgment that the condemnation was necessary to facilitate the East Link project, and this Court denied the owner’s petition for review. Appx. at 21, 24.

The Court of Appeals decision was correct and the same analysis applies to City Light’s challenge here. Sound Transit is a regional transit authority under RCW chapters 81.104 and 81.112. Those chapters authorize—and often require—regional transportation authorities to work with local governments to develop and implement transportation policy, and build and operate transportation systems and facilities.¹³ The

¹³ See, e.g., RCW 81.104.010 (coordination by local jurisdictions); RCW 81.104.060(4) (allowing “joint use of rights-of-way” and “joint development of stations and other facilities”); RCW 81.104.070(2) (specifically authorizing “necessary contracts [and] joint development agreements”); RCW 81.104.080(2) (requiring agencies to “promote transit-compatible land uses and development which includes joint development”); RCW 81.112.010 (requiring coordination among agencies, including “developing infrastructure to support high capacity systems ... and related roadway and operational facilities”); RCW 81.112.070 (granting power to “contract with any governmental agency ... for the purpose of planning, constructing, or operating any facility ... that the authority may be authorized to operate”); RCW 81.112.080(2) (authorizing joint use of municipal transit facilities by agreement).

collaboration between Sound Transit and the City of Bellevue for this purpose does not undermine the trial court's necessity finding.

It is likewise immaterial that Sound Transit has agreed to transfer its acquired real property to the City of Bellevue if the parties agree the property is needed for the public right of way.¹⁴ Amended MOU at 98. Throughout its briefings in this and related cases, City Light has attempted to cast Sound Transit's position in apocalyptic terms, claiming that Sound Transit wants the ability to condemn any public land in the state and transfer it to any other public entity, for any other purpose. This hyperbole is pure fiction completely unmoored from the facts of this case: Sound Transit is condemning property in the immediate vicinity of its light rail trackway to build light rail infrastructure that rationally conforms to the adjacent City of Bellevue right of way improvements and accommodates a longstanding City project. Such collaboration has ample support in Washington law.

First, *Pine Forest* makes it clear that a condemning authority may allow another public agency to use the property it acquires.

185 Wn. App. at 254-55 ¶ 27 (in the context of the same East Link

¹⁴ City Light misrepresents Sound Transit's acknowledgment that once the bridge is constructed, property rights acquired by Sound Transit that are needed for the City's public right of way will be transferred to Bellevue, claiming it is an admission that Sound Transit is condemning property for Bellevue's separate road-widening project. *See* Opening Brief at 8. The Sound Transit brief City Light cites contains no such admission. *See* CP 351.

project at issue here, the City of Bellevue established necessity to condemn property that would be used by Sound Transit). Further, the condemnor may collaborate with others to build the project, effectuate the purpose, and implement the plans. *Port of Seattle*, 80 Wn.2d at 396-97 (affirming necessity determination even though air cargo facility for which property was condemned would be leased to and operated by a private party). The condemnor may also take property that it has agreed to transfer to another public entity when the project is complete. *State v. Slater*, 51 Wn.2d 271, 272, 317 P.2d 519 (1957). And the condemnor may accept funds from another public entity that will also benefit from the project—even if that entity does not have the power of eminent domain. *State Parks & Rec. Comm'n v. Schluneger*, 3 Wn. App. 536, 539, 475 P.2d 916 (1970), *rev. denied*, 78 Wn.2d 996 (1971).

To summarize, City Light's legal argument ignores longstanding, well-established precedent about the standards under which an agency's necessity determination and the trial court's necessity finding are reviewed. And City Light's factual argument improperly ignores the evidence that overwhelmingly supports the trial court's finding that the condemnation is necessary for Sound Transit's high capacity transportation project.

C. THE PRIOR PUBLIC USE DOCTRINE PERMITS THIS CONDEMNATION

The prior public use doctrine is implicated when a condemnor seeks to condemn publicly owned land that is already devoted to a public use. See *Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 538-40 ¶ 31, 342 P.3d 308 (2015) (“*Okanogan County*”). Under the prior public use doctrine, the condemnor always has the power to condemn such land for a new use compatible with the prior public use. *Id.* Public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Id.* at 538-40 ¶ 31 (citing 1A NICHOLS ON EMINENT DOMAIN § 2.17 at 2-58 (Julius L. Sackman ed., 3d ed. 2006)).

To condemn property previously devoted to a public use for a new use that is incompatible with the existing use requires that the condemnor have the power to do so either by express statutory language

or necessary implication. *Id.* at 539 ¶ 31.¹⁵ Once express or implied statutory authority to condemn a competing public use is established, the court engages in a balancing test to determine which of the competing public uses is superior and should prevail. *Id.* at 543 ¶ 39.

Here, because the evidence supports finding that Sound Transit's use of the Easement area is compatible with City Light's existing use, the trial court correctly concluded that "[Sound Transit's] authority to condemn includes the authority to condemn the City of Seattle's easements burdening the Parcel." CP 425. This conclusion may be affirmed on any ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

In *Roberts v. City of Seattle*, the City of Seattle sought to condemn a 30-foot strip of school property in order to widen a road. 62 Wash. 573, 116 P. 25 (1911). This Court held that the City could condemn the land even though it had previously been devoted to a public use (education) because there was no indication that the school presently

¹⁵ Where the public property being condemned is held in a proprietary, rather than governmental, capacity, the statutory authority to condemn public land is not held to the heightened scrutiny applied when property is held in a governmental capacity. See *State v. Superior Court of Jefferson County*, 91 Wash. 454, 459 (1916). See also *Okanogan County* at 539-540. Providing electricity is a recognized proprietary function of government in Washington State, *Washington Public Power Supply System v. General Electric Company (WPSS)*, 113 Wn.2d 288, 296 (1989), and Sound Transit's statutory authority to condemn easements held in a proprietary capacity is therefore not subject to the heightened scrutiny that would be applied had these easements been held in a governmental capacity.

used the land and there was nothing to indicate that taking the land would impair the school's use of the remaining property. 62 Wash. at 576. Similarly, in *City of Tacoma v. State*, the court permitted the diversion of river water presently devoted to a public use as a fish hatchery because the proposed diversion did not destroy or critically interfere with such use. 121 Wash. 448, 453, 209 P. 700 (1922).

In this matter, the two public uses are compatible because Sound Transit's public use (high capacity transportation system) does not destroy or interfere with City Light's transmission line over the Parcel. As City Light rightly pointed out in its briefing to the trial court, it is "inconceivable" that Sound Transit's project will interfere with City Light's existing electrical transmission wires which will hang some 48+ feet above Sound Transit's light rail line. CP 274. City Light's own argument regarding the "necessity" of condemning City Light's aerial easement rights concedes that Sound Transit's use is compatible with City Light's existing public use. *Id.* Additionally, Sound Transit has consistently assured City Light that its project will not interfere with City Light's transmission system. CP 355.

Even if Sound Transit's project called for the destruction of City Light's current transmission line configuration, which it does not, City Light would be free to design an alternative configuration consistent with

its remainder easement. Sound Transit's project takes a narrow strip of land along the western edge of 124th Ave NE. The evidence City Light presented at the trial court claims only that there would not be room in the portion of its Easement remaining after Sound Transit's taking to run a 230 kV transmission system. CP 267. But there is no evidence that City Light's ability to use the remainder easement for ANY electrical transmission system will be destroyed. The compatibility test outlined by the courts asks whether the proposed use will destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Okanogan County*, 182 Wn.2d at 538-39 ¶ 31. If not, the use is compatible. *Id.* Thus, even if Sound Transit's use would require City Light to reconfigure its transmission line to fit its remaining easement interests, the prior public use doctrine would not bar the condemnation. Instead, costs associated with the reconfiguration would be a factor in determining City Light's just compensation.¹⁶

At the conclusion of Sound Transit's project, City Light will still be able to operate its existing transmission system across the Parcel, and will continue to own a substantial electrical utility easement that it may

¹⁶ *See State v. McDonald*, 98 Wn.2d 521, 525-26, 656 P.2d 1043 (1983) (where only part of a single tract of land is taken, the measure of damages is fair market value of the land taken, together with damages to the land not taken).

utilize according to its stated purpose. The two uses are thus compatible, and the prior public use doctrine does not bar the condemnation.

D. SEATTLE'S STATUS AS A HOME RULE CHARTER CITY IS IRRELEVANT TO THIS LAWSUIT

City Light's final argument, which was not raised in the trial court, is that Seattle's status as a home rule charter city grants it "complete local self-government in municipal affairs." Opening Brief at 33. Because Seattle's charter grants it a special status, City Light argues, it is superior to limited-purpose agencies like Sound Transit. But other than a high-level overview of the rights of home rule charter cities, City Light provides no case law or analysis supporting this contention. Its argument fails for two reasons.

First, the Parcel at issue in this case is not located in Seattle. It is located in Bellevue, which has been an enthusiastic partner of Sound Transit during the planning and construction of the East Link Extension to the Link light rail. Although Seattle may have substantial power over activities within its own borders under its home rule charter, City Light has provided no authority suggesting that such power can be extended beyond Seattle's borders to block a condemnation for a public project in another jurisdiction.

Second, as City Light itself points out, "it is for the Legislature ... to prescribe the relative importance of the governmental unit and the

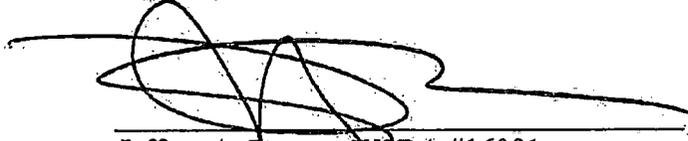
function it performs.” Opening Brief at 34 [emphasis in original]. City Light is correct. Indeed, the Washington Legislature did just that when it passed Sound Transit’s enabling statute and gave Sound Transit permission to condemn “all lands, right-of-way, [and] property necessary for such high capacity transportation systems.” RCW 81.112.080 [emphasis added]; *see also* Section IV.A, *supra*. Washington law is clear that “Home rule charter provisions are subordinate to state law.” *Washam v. Sonntag*, 74 Wn. App. 504, 509, 874 P.2d 188 (1994). Even if Seattle’s charter allowed City Light to bar the acquisition of land outside Seattle’s borders, Seattle’s authority is subordinate to that granted to Sound Transit by the Legislature. Sound Transit is limited by its statute to what it can condemn for (high capacity transportation). But it was expressly granted broad statutory authority in terms of who it can condemn from (all lands necessary for its purpose). Seattle’s status as a home rule charter city is irrelevant to these proceedings.

V. CONCLUSION

For the reasons stated above, the trial court committed no error in concluding that Sound Transit has the statutory authority to condemn City Light’s Easement and that there is public use and necessity for the condemned Easement. Sound Transit requests that this Court affirm the trial court’s Order and Judgment Adjudicating Public Use and Necessity.

DATED this 27th day of September, 2017.

MILLER NASH GRAHAM & DUNN LLP

A large, stylized handwritten signature in black ink, appearing to be 'Jeffrey A. Beaver', written over a horizontal line.

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No. 94406-7

SUPREME COURT OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY, a regional transit authority, dba SOUND TRANSIT,
Petitioner Below; Respondent on Appeal,

v.

CITY OF SEATTLE, SEATTLE CITY LIGHT,
a Washington municipal corporation,
Respondent Below; Appellant,

and

SAFEWAY INC., a Delaware corporation, et al.,
Additional Respondents Below.

APPENDIX TO BRIEF OF RESPONDENT SOUND TRANSIT

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WASHINGTON STATE
SUPREME COURT

b/h

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a regional transit
authority, dba SOUND TRANSIT,

Petitioner,

v.

CITY OF SEATTLE, SEATTLE CITY LIGHT, a
Washington municipal corporation,

Respondent,

v.

ANN SEENA JACOBSEN, who also appears of
record as ANN SEENA VERACRUZ,
individually and as trustee for THE ANN SEENA
JACOBSEN LIVING TRUST DATED APRIL 4,
2002; ASSURITY LIFE INSURANCE
COMPANY, a Nebraska company f/k/a
WOODMEN ACCIDENT AND LIFE
COMPANY; SAFEWAY INC., a Delaware
corporation; CENTURYLINK, INC., a Louisiana
corporation; PUGET SOUND ENERGY, INC., a
Washington corporation; CITY OF BELLEVUE,
a Washington municipal corporation; KING
COUNTY, a Washington municipal corporation;
and ALL UNKNOWN OWNERS and
UNKNOWN TENANTS, Respondents.,

Respondent.

NO. 94065-7

**RULING DENYING DIRECT
DISCRETIONARY REVIEW**

The city of Seattle seeks direct discretionary review of a superior court
order denying the city's motion for summary judgment in an action by the Central

75116

Puget Sound Regional Transit Authority (Sound Transit) to condemn a parcel of land within the boundaries of the city of Bellevue for Sound Transit's east link light rail line. The property sought to be condemned is part of a city of Seattle easement that Seattle City Light uses to transmit electricity through power lines from its Skagit River hydroelectric generating facilities. For reasons discussed below, the motion for direct discretionary review is denied.

In 2008 voters approved Sound Transit's plan to extend its light rail system to eastward suburbs of the city of Seattle, including the city of Bellevue. In 2011 Sound Transit adopted a resolution selecting the route the line would take and the location of its stations. At one point the line crosses 124th Avenue Northeast in Bellevue. That same year Sound Transit and the city of Bellevue entered into a memorandum of understanding and transit way agreement recognizing that the track for the light rail line would run in a retained cut under 124th Avenue. The city of Bellevue had longstanding plans to widen the street, and the memorandum of understanding showed a to-be-constructed bridge elevating the roadway above the light rail line. In 2015 Sound Transit and the city of Bellevue entered into an amended memorandum agreeing that the retained cut under 124th Avenue required constructing a new bridge to span the cut. Under the agreements, Sound Transit was to condemn the property necessary for the construction of the bridge and the widening of 124th Avenue at that point, and the city was to construct the bridge and would own and control it.

Meanwhile, Sound Transit passed a resolution authorizing condemnation proceedings to acquire all property necessary for the east link. The 124th Avenue bridge construction and widening project requires the use of a portion of the city of Seattle's electrical transmission easement, which runs along both sides of 124th. In March 2016 Sound Transit filed a petition in eminent domain seeking to acquire the

property at issue in this case, and in November 2016 it filed a motion for an order and judgment adjudicating public use and necessity. The city opposed the motion and also moved for summary judgment, arguing as to both matters that Sound Transit lacked statutory authority to condemn public property and lacked authority in particular to condemn the land it sought because it was not necessary for the light rail project.

The superior court issued separate orders on December 20, 2016, one denying the city's motion for summary judgment and one entering findings of fact and conclusions of law and a judgment of public use and necessity. In its findings and conclusions, the court determined that Sound Transit had authority to condemn public property generally and to condemn property within the city's transmission line easement in particular, and that the property sought was necessary for the project. The city quickly filed a notice of appeal to Division One of the Court of Appeals challenging the judgment of public use and necessity. Subsequently, on January 19, 2017, the superior court entered a revised judgment of public use and necessity.¹ On that same date, the city filed a motion in this court for direct discretionary review of the order denying the city's motion for summary judgment. That motion is now before me for determination.

In seeking discretionary review of the superior court's order denying summary judgment, the city relies on two of the criteria for review: (1) that the superior court committed obvious error that renders further proceedings useless, and (2) that the court committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act. RAP 2.3(b)(1) and 2.3(b)(2). Although the parties devote the bulk of their arguments to whether the superior court obviously or probably erred, I need not address that issue because the city does not

¹ The revised judgment altered a conclusion of law originally stating that construction, operation, and maintenance of electrical transmission systems is not a public use, having it read instead that an electrical transmission system is a proprietary, not a governmental, function of the city.

show that the cited criteria are otherwise satisfied. First, further proceedings plainly are not rendered “useless” by the superior court’s denial of summary judgment, since the court at the same time issued its judgment of public use and necessity, and that judgment is currently on appeal, where the same challenges to Sound Transit’s authority will be addressed and presumably resolved.² I am aware, as the city urges, that discretionary review of an order denying summary judgment may be appropriate where correcting the claimed error would prevent useless litigation. *See, e.g., Douchette v. Bethel Sch. Dist.* 403, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991); *Hartley v. State*, 103 Wn.2d 768, 774, 398 P.2d 77 (1985). But here the claimed error, the correction of which would put an end to further proceedings, is already before the Court of Appeals on direct appeal, as indicated. While it is true that if this court grants review it could bring these proceedings effectively to an end if it reverses the superior court, the same can be said of the appeal. Whether that appeal remains in the Court of Appeals or is transferred to this court (which the city says it will seek to do when the appellate briefing is complete), this matter can ultimately be resolved by that appeal. The appeal was filed first and is already proceeding on an accelerated basis with a more complete record. The city suggests that this court would resolve the matter more quickly, but there is no certainty it would do so. Under the circumstances, I am not persuaded that this court should open a second avenue of review of the same legal issues in the same eminent domain proceeding.³

² In its response to Sound Transit’s petition for a judgment of public use and necessity, the city listed as an issue whether the petition should be denied “where Sound Transit does not have the statutory authority to condemn public property or the specific property involved in this condemnation action.” In its judgment of public use and necessity, the superior court concluded as a matter of law that Sound Transit “is authorized by statute to condemn public land, including public land already in public use, for [Sound Transit]’s Project,” and that its authority “extends to the property and property interests held by the City of Seattle for use in connection with its electrical transmission system.” Further, the court determined the property was necessary to the light rail project. The city argues these same issues in this motion for discretionary review.

³ I note that the city has filed an appeal directly in this court in another eminent domain proceeding in which it challenges Sound Transit’s condemnation authority. *Cent.*

Nor does the superior court's order alter the status quo or substantially limit the freedom of a party to act. This criterion is not satisfied where "a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit." *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), *review denied*, 182 Wn.2d 1008 (2015); *see* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546 (1986). The city urges that the superior court's order limits its ability to protect its property interests in future condemnation actions brought by Sound Transit, and that the order may be given preclusive effect in such actions. But the challenged order does not alone, or even primarily, have that effect. The primary effect on the city's rights in relation to the issues it raises flows from the judgment of public use and necessity, which is now on appeal. The city is therefore in the same position with respect to protecting its interests regardless of whether this court grants direct discretionary review.

Judicial policy generally disfavors discretionary review of interlocutory orders to avoid piecemeal review. *See Hartley*, 103 Wn.2d at 773; *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). To permit fragmentary review would delay the administration of justice to the detriment of litigants and impose an unnecessary burden on appellate courts. *Crosthwaite v. Crosthwaite*, 56 Wn.2d 838, 844, 358 P.2d 978 (1960). Interlocutory review is therefore available only in those rare instances where the claimed error is obvious or probable with defined effects on the usefulness of further court proceedings or on the status quo or the parties' freedom to act. *See Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). Here,

Puget Sound Reg'l Transit Auth. v. WR-SRI 120th North LLC, No. 94255-2. But that appeal is in its very preliminary stages, and it will be some time before the court decides whether to retain it.

direct appeal is available, and has been invoked on an accelerated basis, to review the claimed errors underlying the superior court's approval of Sound Transit's condemnation of the city's property interest. The city does not show that a parallel discretionary review proceeding addressing the same issues is justified. My conclusion that discretionary review is not warranted under RAP 2.3(b) makes it unnecessary to decide whether direct review would be appropriate under RAP 4.2.⁴

The motion for direct discretionary review is denied.


DEPUTY COMMISSIONER

March 31, 2017

⁴ Since it is not necessary to decide whether direct review would be appropriate, I necessarily offer no view on that point, and this ruling is without prejudice to any motion a party may file to transfer the pending appeal to this court.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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January 10, 2017

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Page 2 of 2

Case No. 76252-4-I, Seattle v. Sound Transit

January 10, 2017

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CASE #: 76252-4-I

Central Puget Sound Regional Transit Authority, Respondent v. City of Seattle, Petitioner

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on January 6, 2017, regarding respondent's motion for accelerated disposition:

"The February/March term has been set. The motion to accelerate is granted in part. This case will be set on the next available calendar after the Brief of Respondent has been filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

2016 NOV -7 AM 8:46

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL)	
TRANSIT AUTHORITY, a regional transit	)	No. 75372-0-1
authority, dba SOUND TRANSIT, and)	
CITY OF SEATTLE,	)	DIVISION ONE
)	
Respondents,)	
)	
v.)	
)	
STERNOFF L.P., a Washington limited)	
partnership;	)	UNPUBLISHED OPINION
)	
Appellant,	)	FILED: November 7, 2016
)	
JPMORGAN CHASE BANK, N.A.;)	
W. STERNOFF LLC, a Washington)	
limited liability company dba BODYGLIDE;)	
KING COUNTY, a Washington municipal)	
corporation; and ALL UNKNOWN)	
OWNERS and UNKNOWN TENANTS,)	
)	
Defendants.)	

BECKER, J. — This is an appeal from the determination of public use and necessity authorizing Central Puget Sound Regional Transit Authority (Sound Transit) to move forward with condemnation proceedings against appellant's property. Because the Sound Transit board did not engage in arbitrary and capricious conduct when it approved condemnation and the board's resolution

confers authority to condemn the property for a city of Bellevue (City) street widening project, we affirm.

FACTS

In 1992, the Washington State legislature authorized counties in the Puget Sound area to create a transportation agency “for planning and implementing a high capacity transportation system within that region.” RCW 81.112.010. Voters later approved a ballot measure creating Sound Transit. Sound Transit has already completed light rail projects in Seattle and Tacoma. In 2008, voters approved the Sound Transit 2 plan to extend the existing light rail system to cities east of Seattle, including Bellevue.

For the last few years, Sound Transit has been in the final planning and design stages of the East Link project. In July 2011, Sound Transit selected the route and station locations by adopting Resolution R2011-10.

Appellant Sternoff LP is a business owned by William R. Sternoff. Sternoff owns property along the East Link route located at 1750 124th Avenue Northeast in Bellevue’s Bel-Red area. There are two buildings on the property, each including office space and warehouse space. The only means of accessing the property are two driveways on 124th Avenue. Sternoff’s tenants require regular access to conduct business, including to ship and receive goods. One tenant in particular, a medical device supplier, requires round-the-clock access.

The East Link alignment will run along and through the south portion of Sternoff’s property. The construction plans for 124th Avenue Northeast include building Sound Transit’s light rail trackway, as well as the City’s project of

building a bridge over the trackway. The City also has a long-standing plan to widen the avenue to provide increased mobility and safety by creating a five lane section with landscape zones and sidewalks. The new bridge will be constructed to accommodate the wider roadway.

In December 2011, Sternoff entered into an agreement with the City that permitted survey work on the property related to the City's plans to improve 124th Avenue. Sternoff entered into another access agreement in April 2013, this time with Sound Transit. The agreement permitted Sound Transit to conduct surveys on the property related to East Link construction. Both agreements guaranteed that Sternoff and his lessees would have largely unimpeded access to the property during the survey work. The City assured Sternoff that its representatives "will not block access to the business park or buildings or impede access around the buildings." Sound Transit assured Sternoff that "during and after the expiration of the Term, except as needed and temporarily, Sound Transit will not block access to the business park or buildings or impede access around the buildings needed for tenants, clients and deliveries, and will not otherwise interfere with the day to day business operations of the Property."

In September 2013, Sound Transit began the process of condemning properties for East Link construction. At a meeting of the Capital Committee, Sound Transit's property director presented a proposed resolution, R2013-21, which identified 60 commercial properties as "necessary for the construction and permanent location of the East Link Project." This list included Sternoff's property. The resolution authorized condemnation proceedings "to acquire all, or

any portion thereof, of the properties and property rights." The committee voted to recommend that Sound Transit's board pass the resolution.

The board adopted the resolution as part of its consent agenda during a meeting on September 26, 2013. Sound Transit provided notice of the meeting to affected property owners, as required per RCW 8.25.290.

In May 2015, Sound Transit and the City adopted an amended Memorandum of Understanding, superseding a previous version adopted in 2011. The previous version is not designated as part of the appellate record. The 2015 memorandum states that pursuant to the 2011 agreement, "the Parties engaged in a collaborative process for design and development of the East Link Project" and worked to "identify projects to be completed jointly for reduced impacts to the public, and overall cost savings and efficiencies." In a section titled "Project Coordination," under a subsection titled "Shared Cost Agreement," the memorandum explains that Sound Transit and the City coordinated their projects on 124th Avenue:

The Project⁽¹⁾ is designed to cross under two existing roadways, 120th Avenue NE and 124th Avenue NE, which will require elevating the profile of the roadway as identified in Exhibit M, Section E. The City has identified 120th Ave NE, between NE 12th Street and NE 16th Street (CIP Plan Project PW-R-168), and 124th Ave NE, between NE Spring Boulevard and NE 18th Street (CIP Plan Project PW-R-166) for widening and other improvements. The City and Sound Transit desire to coordinate and share the costs for the design, right-of-way acquisition and construction of the two projects to improve efficiencies and reduce costs. Upon execution of this MOU, the Parties shall enter into the Funding, Right-of-Way

¹ The memorandum defines "Project" as "the segments of the Light Rail Transit System in the City of Bellevue as described in Exhibit C-1 (Project Description), attached and incorporated herein, and as may be modified as described in this MOU [Memorandum of Understanding]."

Acquisition and Construction Administration Agreement for Roadway and East Link Project Improvements at 120th Ave NE and 124th Ave NE attached hereto as Exhibit N and incorporated herein by this reference.

In April 2016, Sound Transit filed a Petition in Eminent Domain against Sternoff in King County Superior Court. Sound Transit simultaneously filed a motion for a finding of public use and necessity. The petition states that certain real property rights "must be acquired for purposes of Petitioner's Link light rail project." To construct the East Link, "certain real property and real property rights are necessary for the City of Bellevue's Bel-Red Transportation improvements, which includes widening 124th Ave. NE." The petition states that the 2015 Memorandum of Understanding between Sound Transit and the City "requires certain real property and real property rights for the 124th Ave NE project."

The Sound Transit board authorized condemnation to acquire "all, or any portion" of Sternoff's property when it adopted R2013-21. The petition did not seek to take the whole property; rather, it identified 10 interests in portions of Sternoff's property for condemnation. These included permanent fee and easement interests, as well as temporary construction easements, as spelled out in legal descriptions attached to the petition.

On June 6, 2016, the court held a hearing on public use and necessity. See RCW 8.12.090; RCW 8.12.100. Sternoff argued the petition should be dismissed entirely because Sound Transit's board acted arbitrarily and capriciously in adopting R2013-21 or, in the alternative, Sound Transit should not be permitted to acquire property for the City's street widening project. On June

7, 2016, the trial court issued findings of fact, conclusions of law, and an Order and Judgment Adjudicating Public Use and Necessity.

The court found:

7. The Condemned Property is necessary to and will be used for a public purpose—locating, constructing, operating and maintaining the Project.^[2]

8. Petitioner has determined that the construction of the Project will serve a public purpose, is necessary for the public interest, and that the Condemned Property is necessary for this purpose. The Respondents have been served with notice and a copy of the Petition.

10. There was no fraud, actual or constructive, no abuse of power, bad faith, or arbitrary and capricious conduct by Sound Transit.

The court concluded:

5. The taking and damaging of lands, properties and property rights in order to locate, construct, operate and maintain the Project is for a public use.

6. The public interest requires the proposed use.

7. Appropriation of the Condemned Property is necessary for the proposed use.

8. Petitioner is entitled to the issuance of an order finding public use and necessity for the taking of the Condemned Property.

Sternoff appealed. Sound Transit filed a motion for accelerated review, asserting that possession of Sternoff's property in 2016 is required to keep the East Link project on schedule and on budget. We granted accelerated review.

Sternoff assigns error to findings 7, 8, and 10. He argues that because these findings are erroneous, conclusions 5 through 8 are not adequately supported by the court's findings.

² Defined by the petition and by the order as "the East Link Extension and its related facilities."

We will not disturb findings that are supported by substantial evidence. Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 419, 128 P.3d 588 (2006). Substantial evidence is evidence that would persuade a fair-minded, rational person of the truth of the finding, viewed in the light most favorable to the respondent. Miller, 156 Wn.2d at 419.

BOARD ACTION

Sternoff contends the Sound Transit board engaged in arbitrary and capricious conduct when adopting R2013-21, the resolution authorizing condemnation proceedings.

The government must exercise its power of eminent domain through lawful procedures. Miller, 156 Wn.2d at 410. The statute governing regional transit authorities provides that the "right of eminent domain shall be exercised by an authority in the same manner and by the same procedure as or may be provided by law for cities of the first class, except insofar as such laws may be inconsistent with the provisions of this chapter." RCW 81.112.080(2). A city authority must first pass an ordinance providing that it seeks to condemn property for public improvements "which will require that property be taken or damaged for public use." RCW 8.12.050. Once the ordinance is passed, the condemning authority must file a petition in superior court. RCW 8.12.050.

The next step is for a court to adjudicate public use and necessity. Miller, 156 Wn.2d at 410. The court must determine (1) whether the proposed use is really public, (2) does the public interest require it, and (3) is the property to be acquired necessary for that purpose. City of Bellevue v. Pine Forest Props., Inc.,

185 Wn. App. 244, 259, 340 P.3d 938 (2014), review denied, 183 Wn.2d 1016 (2015). The latter two findings address necessity. Pine Forest, 185 Wn. App. at 259, citing In re City of Seattle, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985). It is undisputed that the East Link project constitutes a public use. See HTK Mgmt., LLC v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 630, 121 P.3d 1166 (2005). Sternoff's challenges relate to the necessity issue.

"Necessity" in the eminent domain context does not mean absolute necessity, but rather that a project will fulfill a genuine need and appropriately facilitate a public use. Pub. Util. Dist. of Grant County No. 2 v. N. Am. Foreign Trade Zone Indus., LLC, 159 Wn.2d 555, 576, 151 P.3d 176 (2007); Miller, 156 Wn.2d at 421. A party challenging an agency's finding that necessity exists must demonstrate actual fraud, or arbitrary and capricious conduct sufficient to constitute constructive fraud. Miller, 156 Wn.2d at 417; Pine Forest, 185 Wn. App. at 262. Arbitrary and capricious conduct is willful and unreasoning action, without consideration and regard for facts or circumstances. City of Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965). When reasonable minds can differ regarding whether the record supports a trial court's finding of necessity, we will not disturb the decision of a condemning authority so long as it was reached honestly, fairly, and upon due consideration of the facts and circumstances. Pine Forest, 185 Wn. App. at 263. Our Supreme Court has observed that it has seldom "found that a condemning authority has abused its trust in making a declaration of public necessity. This should not be surprising,

for it is not to be presumed that such abuses often occur.” Miller, 156 Wn.2d at 412, quoting State v. Brannon, 85 Wn.2d 64, 68, 530 P.2d 322 (1975).

It is undisputed that Sound Transit is a government agency that can lawfully exercise eminent domain power pursuant to RCW 81.112.080(2). Sound Transit concluded it was necessary to exercise this authority when the board adopted R2013-21:

The Sound Transit Board deems the East Link Extension to be a public use for a public purpose. The Board deems it necessary and in the best interests of the citizens residing within Sound Transit’s boundaries to acquire the property identified in Exhibit A as being necessary for the construction, operation, and permanent location of the East Link Extension, parties to be paid relocation and re-establishment costs associated with displacements from the properties.

Sternoff argues the board’s conduct was arbitrary and capricious because the board appears not to have considered the access agreements when deciding to adopt R2013-21. He asserts that Sound Transit staff “never disclosed to the Board the Sound Transit Access Agreement” and concludes the “Access Agreements and related negotiations and assurances are exactly the ‘facts and circumstances’ that Sound Transit was obligated to evaluate in reaching an honest, fair and reasoned decision regarding the ‘necessity’ of the Sternoff Property.” The agreement states that Sound Transit will not block Sternoff’s access during or after the survey work.

An agency cannot contract away its power of eminent domain. State ex rel. Devonshire v. Superior Court, 70 Wn.2d 630, 637, 424 P.2d 913 (1967). Under this principle, Sound Transit’s agreement with Sternoff did not control the board’s decision whether to exercise its eminent domain power with respect to

his property. Sternoff, aware of this principle, does not argue that Sound Transit was estopped from exercising its condemnation authority based on the contract. Rather, he contends the agreement contained information relevant to the East Link project and the board's failure to consider this information renders its conduct arbitrary and capricious. Sternoff cites no authority for the proposition that a condemning authority's failure to consider access agreements is relevant to the arbitrary and capricious inquiry, let alone dispositive. He had notice of the meeting at which R2013-21 would be decided and thus had the opportunity to present these issues to the board. He was not entitled to rely on the board to consider them otherwise.

Sternoff suggests that the short amount of time the board spent considering R2013-21 renders its decision arbitrary and capricious. Sternoff contends the board "rubber stamped" the resolution. The board adopted the resolution during a consent agenda. According to Sternoff, "the total Board consideration of R2013-21 amounted to four minutes of time—to take 60 properties." Sternoff cites no authority for his position that the amount of time devoted to a topic at a hearing is relevant to determining whether an agency's decision was arbitrary and capricious. Legislative bodies routinely adopt resolutions during consent agendas. Adoption on a consent agenda does not mean that the decisions included were arbitrary or uninformed.

The board's adoption of R2013-21 substantially supports the finding that Sound Transit "determined that the construction of the Project will serve a public purpose, is necessary for the public interest, and that the Condemned Property is

necessary for this purpose.” The resolution also supports the finding that the “Condemned Property is necessary to and will be used for a public purpose— locating, constructing, operating and maintaining the Project.” The trial court was entitled to rely on Sound Transit’s determination of necessity in the absence of proof of actual or constructive fraud. Miller, 156 Wn.2d at 417. Sound Transit supported its eminent domain petition with evidence demonstrating its decision to condemn was based on considerations regarding the East Link’s alignment and trackway. Viewing this evidence in the light most favorable to Sound Transit, we affirm the finding that there was no arbitrary and capricious conduct by Sound Transit.

STREET WIDENING PROJECT

Sternoff contends condemnation of his property for the City’s street widening project is unconstitutional because there has never been an explicit finding by the City or Sound Transit that his property is necessary for this project.

The petition states that to construct the East Link extension and its related facilities, Sound Transit seeks to acquire portions of Sternoff’s property deemed necessary for the City’s project of widening the roadway. The petition mentions the Memorandum of Understanding by which the City and Sound Transit agreed to a collaborative process:

Certain real property and real property rights must be acquired for purposes of Petitioner’s Light rail project in order to permanently locate, construct, operate and maintain the East Link Extension and its related facilities (the “Project”). In order to construct the Project, certain real property and real property rights are necessary for the City of Bellevue’s Bel-Red Transportation improvements, which includes widening 124th Ave NE. As part of the agreement to expand light rail to Bellevue, Petitioner and the City of Bellevue

entered into a Memorandum of Understanding for Intergovernmental Cooperation for the East Link Project which requires certain real property and real property rights for the 124th Ave NE project.

The order identifies some of Sternoff's property interests being acquired as "COB" (city of Bellevue) takes.

Sternoff contends that Sound Transit's East Link extension and the City's road improvement plan are separate projects. In his view, R2013-21—which does not specifically mention widening 124th Avenue—does not confer authority to condemn property for the City's street widening project. He argues that either Sound Transit or the City had to make an explicit, separate finding of public use and necessity for the street widening project to support condemning his property for that purpose.

Sternoff submitted deposition testimony by Sound Transit staff and board members in which they agreed that the East Link extension and the City's road improvement plan are "separate" projects. He argues this demonstrates that R2013-21 does not apply to the street widening project. Deposition testimony characterizing the two projects as separate does not control our analysis of this issue. What is relevant is whether Sound Transit properly authorized the condemnation of property for the street widening project.

A government agency may exercise its power of eminent domain only if it first determines the public use and necessity requirements are met and a court later adjudicates public use and necessity. Miller, 156 Wn.2d at 410. Sternoff is correct that neither Sound Transit nor the City adopted a resolution of public use and necessity that specifically addresses the City's street widening project.

Thus, Sound Transit's petition to acquire property for improving 124th Avenue is supported only if the authority granted by R2013-21 extends to the City's project. We conclude that it does.

The property interests the petition seeks to acquire are tied to the East Link extension. R2013-21 authorizes Sound Transit to acquire "all, or any portion thereof, of the properties and property rights . . . for the purpose of constructing, owning, and operating a permanent location of the East Link Extension and light rail guideway." This language confers broad authority to condemn properties identified in the resolution when, in the agency's judgment, doing so is necessary to facilitate the East Link project.

The 2015 Memorandum of Understanding demonstrates that Sound Transit made a judgment that acquiring property for the street widening project would facilitate the East Link project. The memorandum states, "the City and Sound Transit desire to coordinate and share the costs for the design, right-of-way acquisition and construction" of the East Link and street widening projects to "improve efficiencies and reduce costs."

Sternoff argues that the court's finding of public use and necessity regarding his property is invalid because Sound Transit adopted the resolution in 2013 and only later identified a plan to coordinate the East Link with the City's street widening project, as specified in the 2015 memorandum. A condemning authority must have a general outline of intended improvements so that a court can know what particular part of the property is necessary for the stated public use. Port of Everett v. Everett Improvement Co., 124 Wash. 486, 492-94, 214 P.

1064 (1923). There is no requirement that an agency must “have in place a definitive use plan for the entire life of the property.” Monorail, 155 Wn.2d at 638 n.21.

This court recently upheld an order of public use and necessity in a different condemnation action involving the East Link and road improvement plans of the City. Pine Forest, 185 Wn. App. at 269. Condemnation of property for the City's road improvement project and for East Link construction was authorized by a resolution of the Bellevue City Council. Pine Forest, 185 Wn. App. at 250. The ordinance authorizing condemnation specifically referred both to the road project and to the East Link in finding necessity for the acquisition. Pine Forest does not hold that an ordinance *must* identify a particular project for that project to be covered by the grant of authority to condemn. Sound Transit made a finding that acquisition of Sternoff's property was necessary for construction and location of the East Link. This finding suffices to support the order authorizing condemnation of property interests that will be conveyed to the City to facilitate widening a road that approaches and crosses the East Link trackway.

Because Sternoff has not proved arbitrary and capricious conduct, Sound Transit's finding is conclusive. The trial court properly issued an order on public use and necessity which includes property interests for the City's road improvement project.

Sternoff requests an award of attorney fees pursuant to RCW 8.25.075(1). Because we deny Sternoff's request for relief, we deny his request for fees.

The city of Seattle intervened in this action because it owns interests in Sternoff's property—two easements for the construction, operation, and maintenance of an electrical transmission system. At Seattle's request, we confirm that our disposition of this appeal does not affect Seattle's property interests.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Schubert, J.

THE SUPREME COURT OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,	)	No. 93913-6
)	
Respondent,	)	ORDER
)	
v.	)	Court of Appeals
	)	No. 75372-0-I
STERNOFF L.P., et al.,)	
)	
Petitioners.)	
)	
)	
)	

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered at its February 7, 2017, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington, this 8th day of February, 2017.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

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The Honorable Sue Parisien

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a regional transit
authority, dba SOUND TRANSIT,

Petitioner,

vs.

STERNOFF L.P., a Washington limited
partnership, et al.,

Respondents.

) No. 16-2-08800-7 SEA

) ~~PROPOSED~~ FINDINGS OF FACT,
) CONCLUSIONS OF LAW, ORDER AND
) JUDGMENT ADJUDICATING PUBLIC
) USE AND NECESSITY AS TO THE CITY
) OF SEATTLE

) Tax Parcel No. 282505-9003

THIS MATTER came on regularly for hearing before the undersigned judge, upon the motion of Petitioner Central Puget Sound Regional Transit Authority ("Petitioner"). The Respondents in this action have been identified in Petitioner's Petition in Eminent Domain on file in this condemnation action (the "Petition"), and it appears that said Respondents have all received due and proper notice of this hearing.

Said Respondents or their attorneys have either appeared but not objected to entry of these Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity, have not appeared, or having appeared and objected to entry/their objections were considered and overruled. The Court, having jurisdiction over each and all of the Respondents and the subject matter of this action, having considered the motion, declarations in support,

as the City of Seattle has done ;

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO THE CITY OF
SEATTLE -- 1
4848-8456-0704.2

MILLER NASH GRAHAM & DUNN LLP
Pier 70 ~ 2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300/Fax: (206) 340-9599

1 opposition, if any, and the files and records herein, and being fully advised, has determined that
2 the relief sought by Petitioner is proper.

3 NOW, THEREFORE, this Court makes the following FINDINGS OF FACT:

4 1. Petitioner is a duly organized and acting regional transit authority, existing under
5 and by virtue of the laws of the State of Washington. RCW 81.112.080. Petitioner is authorized
6 by statute to construct and operate a high-capacity transportation system within authority
7 boundaries. RCW 81.112.010.

8 2. The City of Seattle has an interest in the land, property and property rights, which
9 are the subject of this condemnation action commenced pursuant to Chapter 81.112 RCW.

10 3. On or about September 26, 2013, by Petitioner's Resolution No. R2013-21
11 ("Resolution"), Petitioner's Board of Directors (the "Board") authorized the condemnation,
12 taking, damaging, and appropriation of certain lands, properties and property rights in order to
13 permanently locate, construct, operate and maintain the East Link Extension and its related
14 facilities (the "Project"). A copy of the Resolution is attached as Exhibit 1 to the Petition which
15 Exhibit is incorporated here by this reference. Included within these lands, properties and
16 property rights is land, property and property rights situated in Bellevue, King County,
17 Washington, in which the City of Seattle hold interests. The land, property and property rights
18 which Petitioner seeks to and is authorized to condemn, and in which the City of Seattle holds
19 interests, is identified as King County Tax Parcel No. 282505-9003 (the "Parcel").

20 4. Before taking final action to adopt the Resolution, which authorizes
21 condemnation of the subject property, Petitioner mailed and published the required notices
22 pursuant to RCW 8.25.290 with the date, time and location of the Board meeting at which
23 Petitioner intended to take final action and authorize the acquisition of the subject property
24 through condemnation, which notice also generally described the property.

25 5. With this condemnation, Petitioner seeks to appropriate the following:

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO THE CITY OF
SEATTLE -- 2
4848-8456-0704.2

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- 6.1 A permanent taking of a portion of the Parcel in fee simple absolute – ST Fee Take, as legally described and depicted in, and in substantially the form of, **Exhibit 1** hereto;
- 6.2 A permanent taking of a portion of the Parcel in fee simple absolute – COB Fee Take, as legally described and depicted in, and in substantially the form of, **Exhibit 2** hereto;
- 6.3 A permanent taking of a portion of the Parcel for a permanent Wall Footing and Maintenance Easement – ST, as legally described and depicted in, and in substantially the form of, **Exhibit 3** hereto;
- 6.4 A permanent taking of a portion of the Parcel for a permanent Wall Easement – COB, as legally described and depicted in, and in substantially the form of, **Exhibit 4** hereto;
- 6.5 A permanent taking of a portion of the Parcel for a permanent Water Line Easement, as legally described and depicted in, and in substantially the form of, **Exhibit 5** hereto;
- 6.6 A permanent taking of a portion of the Parcel for a permanent Drainage Easement, as legally described and depicted in, and in substantially the form of, **Exhibit 6** hereto;
- 6.7 A permanent taking of a portion of the Parcel for a permanent Access Easement, as legally described and depicted in, and in substantially the form of, **Exhibit 7** hereto;
- 6.8 A temporary taking of a portion of the Parcel for a temporary Environmental Monitoring Easement, as legally described and depicted in, and in substantially the form of, **Exhibit 8** hereto;

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO THE CITY OF
SEATTLE -- 3
4848-8456-0704.2

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1 6.9 A temporary taking of a portion of the Parcel for a Temporary
2 Construction Easement – ST, as depicted in, and in substantially the form
3 of, **Exhibit 9** hereto; and

4 6.10 A temporary taking of a portion of the Parcel for a Temporary
5 Construction Easement – COB, as depicted in, and in substantially the
6 form of, **Exhibit 10** hereto.

7 Exhibits 1-10 are incorporated here by this reference and the real property and real
8 property interests described in Exhibits 1-10 are hereinafter collectively referred to as the
9 “Condemned Property.”

10 6. The Condemned Property is necessary to and will be used for public purpose –
11 locating, constructing, operating and maintaining the Project.

12 7. Petitioner has determined that the construction of the Project will serve a public
13 purpose, is necessary for the public interest, and that the Condemned Property is necessary for
14 this purpose. The Respondents have been served with notice and a copy of the Petition.

15 8. Petitioner seeks to condemn the real property and real property interests described
16 and/or depicted in Exhibits 1-10, including the easements held by the City of Seattle for the
17 construction, operation and maintenance of an electrical transmission system on the Condemned
18 Property. The Court previously entered Findings of Fact, Conclusions of Law, Order and
19 Judgment Adjudicating Public Use and Necessity as to all Respondents subject to the City of
20 Seattle's existing real property interests.

21 9. There was no fraud, actual or constructive, no abuse of power, bad faith, or
22 arbitrary and capricious conduct by Petitioner.

23 UPON CONSIDERATION thereof, the Court hereby makes the following
24 CONCLUSIONS OF LAW:

25 1. The Court has jurisdiction over the parties and the subject matter of this action.

26 **FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO THE CITY OF
SEATTLE -- 4
4848-8456-0704.2**

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1 depicted in Exhibits 1-10 to this Order) for public purposes, including the City of Seattle's
2 existing real property interests in the Condemned Property.

3 DONE IN OPEN COURT this 19th day of April, 2017.

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6 _____
HONORABLE SUE PARISIEN

7 **Presented by:**

8 MILLER NASH GRAHAM & DUNN LLP

9 By /s/ Connor M. O'Brien
10 Jeffrey A. Beaver, WSBA# 16091
11 Connor M. O'Brien, WSBA# 40484
12 Attorneys for Petitioner Sound Transit

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO THE CITY OF
SEATTLE -- 6
4848-8456-0704.2

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(206) 624-8300/Fax: (206) 340-9599

FILED

17 FEB 13 10 28 AM

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

The Honorable Mariane Spearman

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a regional transit
authority, dba SOUND TRANSIT,

Petitioner,

vs.

WR-SRI 120TH NORTH LLC, a Delaware
limited liability company; et al.,

Respondents.

No. 17-2-00988-1 SEA

~~PROPOSED~~ FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER AND
JUDGMENT ADJUDICATING PUBLIC
USE AND NECESSITY AS TO
RESPONDENT CITY OF SEATTLE

Tax Parcel Nos. 067100-0000, 067100-0020,
067100-0030, 067100-0040, 067100-0060,
793330-0000, 793330-0030, and 793330-0050

THIS MATTER came on regularly for hearing before the undersigned judge, upon the motion of Petitioner Central Puget Sound Regional Transit Authority ("Petitioner"). The Respondent City of Seattle, Seattle City Light, a Washington municipal corporation, ("Respondent", "City Light" or "Seattle") is identified in Petitioner's Petition in Eminent Domain on file in this condemnation action (the "Petition"), and it appears that said Respondent has all received due and proper notice of this hearing.

Said Respondent or its attorneys ~~has either appeared but not objected to entry of these Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity, has not appeared, or~~ having appeared and objected to entry, its objections were considered and overruled. The Court, having jurisdiction over this Respondent and the subject

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO RESPONDENT CITY
OF SEATTLE-- 1

4837-0992-5953.1

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Seattle, Washington 98121-1128
(206) 624-8300 / Fax: (206) 340-9599

1 matter of this action, having considered the motion, declarations in support, and the files and
2 records herein, and being fully advised, has determined the relief sought by Petitioner is proper.

3 NOW, THEREFORE, this Court makes the following FINDINGS OF FACT:

4 1. Petitioner is a duly organized and acting regional transit authority, existing under
5 and by virtue of the laws of the State of Washington. RCW 81.112.080. Petitioner is authorized
6 by statute to construct and operate a high-capacity transportation system within authority
7 boundaries. RCW 81.112.010.

8 2. This condemnation action is brought pursuant to Chapter 81.112 RCW.

9 3. Sound Move, ST2, and ST3 provide for the construction, operation, and
10 maintenance of the Link light rail system. On or about September 26, 2013, and May 28, 2015,
11 by Petitioner's Resolution Nos. R2013-21 and R2015-10, respectively, ("Resolutions"), the
12 Sound Transit Board of Directors (the "Board") authorized the condemnation, taking, damaging,
13 and appropriation of certain lands, properties and property rights determined by the Board to be
14 necessary for the construction, operation, and maintenance of the Link light rail East Link (the
15 "East Link Extension"). Copies of the Resolutions are attached as Exhibits 1 and 2 to the
16 Petition which Exhibits is incorporated here by this reference. The East Link Extension will
17 expand light rail from downtown Seattle to Mercer Island, South Bellevue, downtown Bellevue,
18 Bel-Red, and Overlake. Included as part of the property determined by the Board to be
19 necessary for the East Link Extension is real property in which the Respondents hold an interest,
20 identified as King County Tax Parcel Nos. 067100-0000, 067100-0020, 067100-0030, 067100-
21 0040, 067100-0060, 793330-0000, 793330-0030, and 793330-0050 (the "Parcels").

22 4. Before taking final action to adopt the Resolution, which authorizes
23 condemnation of the subject property, Petitioner mailed and published the required notices
24 pursuant to RCW 8.25.290 with the date, time and location of the Board meetings at which
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FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO RESPONDENT CITY
OF SEATTLE-- 2
4837-0992-5953.1

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1 Petitioner intended to take final action and authorize the acquisition of the subject property
2 through condemnation, which notice also generally described the property.

3 5. Petitioner and the City of Bellevue entered into certain agreements with regard to
4 construction of the East Link Extension. These provide for interlocal cooperation in order to
5 ensure, among other things, that the East Link Extension segments within the City of Bellevue
6 are: (a) constructed in accordance with City of Bellevue codes, development standards and
7 permitting requirements; and (b) delivered in an efficient and cost effective manner ("Project
8 Development Conditions"). Construction of the East Link Extension segments in the City
9 Bellevue requires compliance with the Project Development Conditions, which, among other
10 things, require acquisition of portions of the Parcels for associated public improvements
11 including but not limited to right-of-way improvements.

12 6. Notice has been given by way of the Petition that modifications to the East Link
13 Extension design (the "Project Design") may occur in connection with Sound Transit's chosen
14 construction delivery method, Project Development Conditions, mitigation of damages, or
15 otherwise. Any such modifications made by Petitioner are necessary to the East Link Extension.
16 It is intended that the impact from such modifications, if any, as to the portions of the Parcels
17 being acquired will be captured as part of the parties' respective value conclusions and just
18 compensation. These modifications are not an abandonment or material modification of the East
19 Link Project. To facilitate Respondents' preparation of their case, Petitioner will, upon request,
20 provide notice of the current status of the Design as it relates to the Parcels.

21 7. With this action, Petitioner seeks to appropriate a portion of the Parcels required
22 for the East Link Extension. On information and belief the take to be acquired herein is
23 substantially as follows:
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FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO RESPONDENT CITY
OF SEATTLE-- 3

4837-0992-5953.1

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1 a. The permanent taking of portions of the Parcels in fee simple absolute, substantially as
2 described, depicted and provided for in the fee areas identified in Exhibit 1 hereto (the
3 "Fee Take Area");

4 b. The permanent taking of portions of the Parcels for permanent easements, substantially
5 as described, depicted, and provided for in the permanent easements identified in Exhibit
6 2 hereto and the accompanying exhibits; and

7 c. The temporary taking of portions of the Parcels for temporary easements, substantially
8 as described, depicted, and provided for in the temporary easements identified in Exhibit
9 3 hereto and the accompanying exhibits.

10 Exhibits 1-3 are incorporated herein by this reference and the real property and real
11 property interests described therein hereinafter collectively referred as "Condemned Property."

12 8. The Condemned Property is necessary to and will be used for public purpose --
13 locating, constructing, operating and maintaining the East Link Extension.

14 9. Petitioner has determined that the East Link Extension will serve a public
15 purpose, is necessary for the public interest, and that the Condemned Property is necessary for
16 this purpose. The Respondent has been served with notice and a copy of the Petition.

17 10. There was no fraud, actual or constructive, no abuse of power, bad faith, or
18 arbitrary and capricious conduct by Sound Transit.

19 UPON CONSIDERATION thereof, the Court hereby makes the following
20 CONCLUSIONS OF LAW:

21 1. The Court has jurisdiction over the parties and the subject matter of this action.

22 2. Petitioner is a regional transit authority, existing under and by virtue of the laws
23 of the State of Washington.

24 3. Petitioner is authorized by statute to condemn for public use. The East Link
25 Extension is a public use.

26 FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO RESPONDENT CITY
OF SEATTLE-- 4
4837-0992-6953.1

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1 4. Condemnation of lands, properties and property rights to locate, construct, operate
2 and maintain the East Link Extension is within the statutory authority of Petitioner.

3 5. Petitioner, having mailed and published notice with the date, time and location of
4 the Board meeting at which Petitioner intended to take final action and authorize the acquisition
5 of the subject property through condemnation, which notice generally described the subject
6 property, made a diligent attempt to provide sufficient notice and this Court does hereby deem
7 the notice given by Petitioner, as described in the Declaration of Mike Bulzomi attached as
8 Exhibit A to the Declaration of Marisa L. Velling filed herewith, to be sufficient to satisfy the
9 requirements of RCW 8.25.290.

10 6. The taking and damaging of lands, properties and property rights in order to
11 locate, construct, operate and maintain the East Link Extension, and to comply with relevant
12 Development Conditions, is for a public use.

13 7. Modifications made by Petitioner, if any, to the Design with regard to the Parcels
14 are necessary to the East Link Project. Such modifications do not represent abandonment or a
15 material modification of the East Link Project.

16 8. The public interest requires the proposed use.

17 9. Appropriation of the Parcels is necessary for the proposed use.

18 10. Petitioner is entitled to the issuance of an order finding public use and necessity
19 for the taking of the Parcels, including any lesser interest, for public purposes.

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25 ORDER AND SIGNATURE ON FOLLOWING PAGE

26 FINDINGS OF FACT, CONCLUSIONS
 OF LAW, ORDER AND JUDGMENT
 ADJUDICATING PUBLIC USE AND
 NECESSITY AS TO RESPONDENT CITY
 OF SEATTLE-- 5
 4837-0992-5953.1

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ORDER AND JUDGMENT

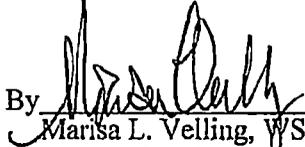
NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there is public use and necessity for taking of the Parcels, including any lesser interest, for public purposes. This Order and Judgment is binding on Respondent City of Seattle, Seattle City Light, a Washington municipal corporation.

DONE IN OPEN COURT this 13 day of Feb, 2017.



THE HONORABLE MARIANE SPEARMAN

Presented by:
MILLER NASH GRAHAM & DUNN LLP

By 

Marisa L. Velling, WSBA# 18201
Connor O'Brien, WSBA# 45355
Attorneys for Petitioner Sound Transit

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY AS TO RESPONDENT CITY
OF SEATTLE-- 6
4837-0992-5953.1

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The Honorable Jeffrey Ramsdell
Noting Date: May 31, 2017
(Without Oral Argument)
Moving Party: Petitioner Sound Transit

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, dba SOUND TRANSIT,	)	No. 17-2-12144-4 SEA
Petitioner,	)	PETITIONER'S MOTION FOR ORDER AND JUDGMENT ADJUDICATING PUBLIC USE AND NECESSITY
vs.)	
WR-SRI 120TH NORTH LLC, a Delaware limited liability company; et. al.,	)	Tax Parcel Nos. 067100-0000, 067100-0020, 067100-0030, 067100-0040, and 067100-0060
Respondents.)	

I. RELIEF REQUESTED

Petitioner, Central Puget Sound Regional Transit Authority, dba Sound Transit's ("Petitioner") moves the Court for an order and judgment adjudicating public use and necessity as to Respondents named in this action.

II. STATEMENT OF FACTS

Public Use and Necessity: This is a condemnation action. On November 5, 1996, November 4, 2008, and November 8, 2016, voters approved local funding to implement a regional high-capacity transit system for the Central Puget Sound region ("Sound Move, ST2, and ST3"). See, Declaration of Tom Wilson filed in support of this motion ("Wilson Decl."). In part, Sound Move, ST2, and ST3 provide for the implementation of a high-capacity light rail service and transit improvements. They further provide for the construction, operation,

PETITIONER'S MOTION FOR ORDER
AND JUDGMENT ADJUDICATING
PUBLIC USE AND NECESSITY -- 1
4847-7286-5863.1

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1 maintenance and permanent location of an electric light rail project (“Link light rail”) connecting
2 some of the state’s largest employment and education centers, highest density residential areas,
3 and highest regional transit ridership areas. Wilson Decl. Link light rail is being expanded from
4 downtown Seattle to Mercer Island, South Bellevue, downtown Bellevue, Bel-Red, and Overlake
5 (the “East Link Extension” or the “Project”). Certain real property and real property rights must
6 be acquired for purposes of locating, constructing, maintaining, and operating the East Link
7 Extension. *Id.*

8 In order to construct the Project, certain real property and real property rights are
9 necessary for the City of Bellevue’s Bel-Red Transportation Improvements, which includes
10 widening 124th Ave NE. *Id.* As part of the agreement to expand light rail to Bellevue,
11 Petitioner and the City of Bellevue entered into a Memorandum of Understanding for
12 Intergovernmental Cooperation for the East Link Project which requires certain real property and
13 real property rights for the 124th Ave NE project. *Id.*

14 On September 26, 2013, by Petitioner’s Resolution No. R2013-21 (the “Resolution”), the
15 Sound Transit Board of Directors (the “Board”) authorized the condemnation, taking, damaging,
16 and appropriation of certain lands, properties and property rights determined by the Board to be
17 necessary for the construction, operation, and maintenance of the East Link Extension. *Id.* A
18 copy of the Resolution is attached as Exhibit 1 to the Amended Petition in Eminent Domain on
19 file in this condemnation action, which Exhibit is incorporated here by this reference.

20 Petitioner and the City of Bellevue entered into certain agreements with regard to
21 construction of the East Link Extension. *Id.* These provide for interlocal cooperation in order to
22 ensure, among other things, that the East Link Extension segments within the City of Bellevue
23 are: (a) constructed in accordance with City of Bellevue codes, development standards and
24 permitting requirements; and (b) delivered in an efficient and cost effective manner (“Project
25 Development Conditions”). *Id.* Construction of the East Link Extension segments in the City of
26 Bellevue requires compliance with the Project Development Conditions, which, among other

PETITIONER’S MOTION FOR ORDER
AND JUDGMENT ADJUDICATING
PUBLIC USE AND NECESSITY -- 2

4847-7286-5863.1

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1 things, require acquisition of portions of the Parcel for associated public improvements
2 including, but not limited to, right-of-way improvements. *Id.*

3 Notice has been given by way of the Petition that modifications to the East Link
4 Extension design (the "Project Design") may occur in connection with Petitioner's chosen
5 construction delivery method, Project Development Conditions, mitigation of damages, or
6 otherwise and any such modifications are necessary to the East Link Extension. *Id.* It is
7 intended that the impact from such modifications, if any, as to the portions of the Parcel being
8 acquired will be captured as part of the parties' respective value conclusions and just
9 compensation. *Id.* These modifications are not an abandonment or material modification of the
10 East Link Extension. Wilson Decl. To facilitate Respondents' preparation of their case,
11 Petitioner will, upon request, provide notice of the current status of the Design as it relates to the
12 Parcel. *Id.*

13 By adoption of the Resolution, the Board resolved the East Link Extension to be a public
14 use for a public purpose. *Id.* By adoption of the Resolution, the Board also resolved that: (a)
15 such land, property and property rights identified in the Resolution are necessary for the location,
16 construction, operation and maintenance of the East Link Extension; and (b) the public health,
17 safety, necessity, convenience and welfare demands and requires that such land, property and
18 property rights be immediately acquired to locate, construct, operate and maintain the East Link
19 Extension. *Id.* The Board's finding of necessity implicitly includes a finding of necessity for
20 the taking of that portion of the land, property and property rights identified in the Resolution
21 required for construction of the East Link Extension in conformance with the Project Design and
22 with the local permitting jurisdiction's codes, development standards and permitting
23 requirements imposed as conditions to construction of the East Link Extension. *Id.*

24 Included as part of the property determined by the Board to be necessary for the East
25 Link Extension is real property in which the Respondents hold an interest, identified as King
26

PETITIONER'S MOTION FOR ORDER
AND JUDGMENT ADJUDICATING
PUBLIC USE AND NECESSITY -- 3
4847-7286-5863.1

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1 County Tax Parcel Nos. 067100-0000, 067100-0020, 067100-0030, 067100-0040, and 067100-
2 0060 (the "Parcels"). *Id.*

3 With this action, Petitioner seeks to appropriate portions of the Parcels required for the
4 East Link Extension. The Parcels to be acquired herein are substantially as follows:

- 5 1. The permanent taking of a portion of the Parcels for a permanent wall easement,
6 substantially as described, depicted, and provided for in **Exhibit 1** of the Findings
7 of Fact, Conclusions of Law and Order and Judgment Adjudicating Public Use
8 and Necessity filed herewith ("Proposed Order");
- 9 2. The permanent taking of a portion of the Parcels for a permanent sidewalk and
10 utility easement, substantially as described, depicted, and provided for in **Exhibit**
11 **2** to the Proposed Order; and
- 12 3. The temporary taking of a portion of the Parcels for a temporary construction
13 easement, substantially as described, depicted, and provided for in **Exhibit 3** to
14 the Proposed Order.

15 Exhibits 1-3 to the Proposed Order are incorporated here by this reference and the real
16 property and real property interests described therein are hereinafter collectively referred to as
17 the "Condemned Property."

18 By adoption of the Resolution, the Board resolved that: (a) the Condemned Property is
19 necessary for the location, construction, operation and maintenance of the East Link Extension;
20 and (b) public health, safety, necessity, convenience and welfare demand the Condemned
21 Property be acquired by condemnation for the location, construction, operation and maintenance
22 of the East Link Extension. Wilson Decl. The Board's finding of necessity with regard to the
23 Condemned Property implicitly includes a finding of necessity for the taking of that portion of
24 the Condemned Property required for construction of the East Link Extension in conformance
25 with the Project Design and with the Project Development Conditions imposed as conditions to
26 construction of the East Link Extension. *Id.*

PETITIONER'S MOTION FOR ORDER
AND JUDGMENT ADJUDICATING
PUBLIC USE AND NECESSITY -- 4

4847-7286-5863:1

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1 Notice of Final Action: Before taking final action to adopt Resolution R2013-21, which
2 authorizes condemnation of the subject property, Petitioner mailed and published notice as
3 required under RCW 8.25.290. *See*, Declaration of Mike Bulzomi Regarding Notice of Final
4 Action (“Bulzomi Decl.”) attached as Exhibit A to the Declaration of Jeffrey A. Beaver
5 Regarding Notice of Final Action and In Support of Petitioner’s Motion for Public Use and
6 Necessity, which Declaration is filed herewith (“Beaver Decl.”). Specifically, on September 10,
7 2013, which was at least 15 days before the September 26, 2013 Board meeting at which
8 Petitioner proposed to take final action authorizing the acquisition of the subject property
9 through condemnation, Petitioner mailed a notice of its intent to take final action (the “Mail
10 Notice”) by certified mail to each and every property owner of record as indicated on the tax
11 rolls of the county to the address provided on such tax rolls for the subject property. Bulzomi
12 Decl. Attached as Exhibit 1 to the Bulzomi Decl. is a true and correct copy of the Mail Notice
13 with Certified Mail Receipt. The Mail Notice included a general description of the subject
14 property including its address and tax parcel number and indicated that the Resolution
15 authorizing condemnation of the subject property would be considered and potentially adopted
16 during the Board meeting. *Id.* The Mail Notices gave the date, time and location of the Board
17 meeting. *Id.*

18 In addition, Petitioner also published a notice of its intent to take final action authorizing
19 the acquisition of the subject property through condemnation (the “Publication Notice”). *Id.*
20 The Publication Notice described the subject property by its tax parcel numbers or address and
21 indicated that the Board would determine at the meetings whether or not to adopt resolutions
22 authorizing Petitioner to condemn the subject property. *Id.* The Publication Notice gave the
23 date, time and location of the Board meeting. *Id.* The Publication Notice was published in *The*
24 *Seattle Times*, being the legal newspaper with the largest circulation in the jurisdiction where the
25 subject property is located, once a week for two consecutive weeks before the date of the
26 September 26, 2013 Board meeting. *Id.* *The Seattle Times* is also the legal newspaper routinely

PETITIONER’S MOTION FOR ORDER
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1 used by Petitioner. Attached as Exhibit 2 to the Bulzomi Decl. are true copies of the Affidavit of
2 Publication evidencing the dates of publication in *The Seattle Times*. *Id.* Proof of circulation as
3 established by publisher's affidavit is on file with Petitioner. *Id.*

4 Public Use and Necessity Determination as to Respondent WR-SRI 120th North LLC.

5 On December 22, 2016, James A. Pierre, Vice President of property owner WR-SRI 120th North
6 LLC, signed an agreement granting Sound Transit possession and use of Parcel 067100-0000
7 (the "Agreement"). The Agreement was recorded in King County under Recording No. 2017-
8 0103001574 on January 3, 2017, and is attached as Exhibit 5 to the Petition in Eminent Domain
9 on file herein. Pursuant to the Agreement, WR-SRI 120th North LLC surrendered and conveyed
10 to Sound Transit possession and use of the Condemned Property in accordance with the terms
11 and conditions and described, depicted, and provided for in the Agreement. In the Agreement,
12 WR-SRI 120th North LLC also acknowledged and agreed that the Project is for a public purpose
13 and that there is public use and necessity for Sound Transit's acquisition of the Condemned
14 Property. Further, WR-SRI 120th North LLC agreed to the entry of an order and judgment
15 adjudicating public use and necessity that is the subject of this motion.

16 Public Use and Necessity Determination as to Respondent City of Seattle ("City Light").

17 The subject property is one of four properties located at what will be the intersection of the East
18 Link light rail trackway and 12th Avenue NE in Bellevue, WA. City Light holds easements for
19 the construction, operation, and maintenance of an electrical transmission system on the
20 properties bordering the eastern and western sides of 124th Ave NE, including the subject
21 property. City Light currently owns and operates an electrical transmission line that runs along
22 the west side of 124th Ave NE. The easements that are the subject of this condemnation action
23 run below this transmission system, and Sound Transit intends to preserve City Light's rights
24 along the west side of 124th Ave NE so as to not disrupt City Light's continued use of its existing
25 transmission line. *See* Declaration of Larry Smith filed herewith. City Light has contested
26 Sound Transit's right to condemn its easement along 124th Ave NE in all four of the

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1 condemnation matters Sound Transit has initiated concerning properties along 124th Ave NE.
2 Each of the four trial courts that has heard City Light's arguments has affirmed Sound Transit's
3 authority to condemn City Light's easement, and each has granted Sound Transit's motion for
4 public use and necessity.¹ City Light has appealed these trial court rulings, which are currently at
5 various stages of appellate review at the Court of Appeals and Washington Supreme Court.²

6 III. STATEMENT OF THE ISSUES

- 7 A. Whether Petitioner is authorized to bring and maintain this condemnation action;
8 and
9 B. Whether Petitioner's Motion should be granted and an Order and Judgment
10 Adjudicating Public Use and Necessity entered by this Court.

11 IV. EVIDENCE RELIED UPON

12 The files and records on file herein and the testimony to be adduced at the hearing, if any,
13 including the Declaration of Tom Wilson, the Declaration of Jeffrey A. Beaver, the Declaration
14 of Larry J. Smith, and the Declaration of Mike Bulzomi, together with exhibits thereto, filed in
15 support of this Motion, which declarations are incorporated here by this reference.

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20
21 ¹ See Revised Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and
22 Necessity re City of Seattle Property Interests, *Sound Transit v. Jacobsen*, King County No. 16-2-06769-7
23 SEA (Dec. 19, 2016); Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use
24 and Necessity re City of Seattle, *Sound Transit v. WR-SRI 120th North LLC*, King County No. 17-2-00988-
25 1 SEA (Feb. 13, 2017); Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public
26 Use and Necessity as to the City of Seattle, *Sound Transit v. Safeway Inc.*, King County No. 16-2-09223-3
SEA (March 27, 2017); and Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating
Public Use and Necessity as to the City of Seattle, *Sound Transit v. Sternoff L.P.*, King County No. 16-2-
08800-7 SEA (April 19, 2017) attached hereto as Exhibits B-D to the Beaver Decl.

² Seattle has appealed the Revised Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public
Use and Necessity re City of Seattle in the *Jacobsen* case. That appeal is still pending at the Washington Court of
Appeals. City Light also appealed the public use and necessity determinations in the *WR-SRI 120th North* and
Safeway Inc. cases to the Washington Supreme Court.

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V. AUTHORITY

A. PETITIONER IS AUTHORIZED TO BRING AND MAINTAIN THIS CONDEMNATION ACTION.

Petitioner undertook diligent efforts to provide the notice required pursuant to RCW 8.25.290 prior to taking final action authorizing this condemnation action. This condemnation action is brought by Petitioner pursuant to an express legislative delegation of the power to condemn.

1. **Notice of Final Action:** Pursuant to RCW 8.25.290(1), the condemnor must provide notice before it takes final action authorizing a condemnation action. The notice is to be given by certified mail to the taxpayer of record at the address on the county tax rolls and to be published. RCW 8.25.290(2). As described above, Petitioner timely mailed and published notice before taking final action to authorize the condemnation of the Condemned Property. Petitioner's efforts should be found to constitute sufficient notice under RCW 8.25.290.

2. **Express Legislative Delegation of Power to Condemn:** This condemnation action is brought by Petitioner pursuant to an express legislative delegation of the power to condemn. Specifically, Petitioner is authorized to condemn all lands, rights of way, property, equipment, and accessories necessary for the construction, operation, maintenance and location of a high-capacity regional mass transportation system pursuant to the procedures established for condemnation by cities of the first class. This authority is set forth in RCW 81.112.080, which provides, in relevant part, as follows:

An authority shall have the following powers in addition to the general powers granted by this chapter: . . . (2) to acquire by purchase, condemnation, gift or grant . . . high-capacity transportation facilities and properties within authority boundaries . . . and such other facilities and properties as may be necessary . . . together with all lands, rights of way, property, equipment, and accessories necessary for such high-capacity transportation systems . . . The right of eminent domain shall be exercised by an authority in the same manner and by the same procedure as or may be provided by law for cities of the first class, except insofar as such laws may be inconsistent with the provisions of this chapter . . .

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1 RCW 81.112.080.

2 Sound Transit anticipates that City Light will dispute Sound Transit's authority to
3 condemn City Light's property interest on the Parcel (an electrical transmission line
4 easement) on the grounds that Sound Transit's enabling statute does not explicitly enable
5 it to condemn property owned by another public entity. City Light has raised these
6 objections to Sound Transit's condemnation authority in four cases thus far, each
7 involving property abutting the same intersection as the Parcels in this case. In all four
8 cases, this trial court rejected City Light's arguments and made a finding of public use
9 and necessity in favor of Sound Transit. See the public use and necessity orders attached
10 as Exhibits B-D to the Beaver Decl.

11 **B. PETITIONER'S MOTION SHOULD BE GRANTED AND AN ORDER AND**
12 **JUDGMENT ADJUDICATING PUBLIC USE AND NECESSITY ENTERED BY**
13 **THIS COURT.**

14 The exercise of a statutory right of eminent domain by condemnation occurs in three
15 phases: (a) adjudication of public use and necessity; (b) determination of just compensation to
16 be awarded to the owner; and (c) payment of just compensation and transfer of title. *Mercer*
17 *Island School District v. Scalzo, Inc.*, 54 Wn.2d 539, 540, 342 P.2d 225 (1959); *Des Moines v.*
18 *Hemenway*, 73 Wn.2d 130, 138, 437 P.2d 171 (1968).

19 This Motion addresses only the first of the three phases – the adjudication of public use
20 and necessity. In order to enter a decree of public use and necessity, this Court must find that:
21 (1) the use is really a public use; (2) the public interest requires it; and (3) the property to be
22 appropriated is necessary for that use. *Des Moines*, 73 Wn.2d at 138.

23 1. **Public Use:** The issue of whether the proposed acquisition is actually for a public
24 use is a judicial question.

25 Eminent Domain. Private property shall not be taken for private use . . .
26 [w]henver an attempt is made to take private property for a use alleged to be
public, the question of whether a contemplated use be really public shall be a
judicial question

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1 Const. Art. 1 §16 (amend. IX). In addition, RCW 8.12.090 specifically states that the issue of
2 public use in condemnations by cities of the first class is a judicial question.

3 Whenever an attempt is made to take private property, for a use alleged to be
4 public under authority of this chapter, the question whether the contemplated use
5 be really public shall be a judicial question and shall be determined as such by the
6 court before inquiry is had into the question of compensation to be made.

6 RCW 8.12.090.³

7 However, the Court shall give a legislative determination of public use great weight. *Des*
8 *Moines v. Hemenway*, 73 Wn.2d at 133; *Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330
9 (1965). Public transportation has long been recognized as a public use within the contemplation
10 of the power of eminent domain. *State ex rel. Devonshire v. Superior Court for King County*, 70
11 Wn.2d 630, 636, 424 P.2d 913 (1967) (citing *State ex rel. McIntosh v. Superior Court for Pacific*
12 *County*, 56 Wash. 214, 105 Pac. 637 (1909), *cert. denied*, 389 U.S. 1023 (1967)).

13 In this case, Petitioner's evidence shows that the Condemned Property, which is being
14 condemned in order to permanently locate, construct, operate and maintain the Project, is being
15 acquired for a public use – a regional high-capacity mass transportation system as authorized by
16 the State Constitution and the legislature. It should be noted that the specific plans for the
17 Condemned Property are not relevant in adjudicating the public use and necessity of a
18 condemnation action. *See State ex rel. Agee v. Superior Court for King County*, 58 Wn.2d 838,
19 365 P.2d 16 (1961). Certification of public use requires only that the property condemned be put
20 to the use designated therein and determined to be public. *Id.*

21 2. **Public Interest and Public Necessity:** In contrast to public use, the issues of
22 public interest and public necessity are solely legislative. *See State ex rel. Sternoff v. Superior*

23
24 ³ RCW 8.12.090 does not require a testimonial evidentiary hearing before the issue of public use and necessity may
25 be adjudicated. *Blaine v. Feldstein*, 129 Wn. App. 73, 76, 117 P.3d 1169 (2005). Rather, the statute requires that
26 the same procedures used in "other civil actions" be used. *Id.* In other civil actions, such evidentiary hearings are at
the discretion of the trial court and are typically used only if there are relevant factual or credibility issues that
require such a hearing. *Id.*

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1 *Court for King County*, 52 Wn.2d 282, 325 P.2d 300 (1958). “Necessity” means reasonable
2 necessity under the circumstances. *Des Moines*, 73 Wn.2d at 133. “It does not mean immediate,
3 absolute or indispensable need, but rather considers the right of the public to expect or demand
4 that certain services be provided.” *Des Moines* at 140 (citing *Tacoma v. Welcker*, 65 Wn.2d 677,
5 399 P.2d 330 (1965); *In re Port of Seattle*, 66 Wn.2d 598, 404 P.2d 25 (1965)). It encompasses
6 “reasonable anticipation of future needs.” *State ex rel. Hunter v. Superior Court for Snohomish*
7 *County*, 34 Wn.2d 214, 216, 208 P.2d 866 (1949).

8 A declaration by the appropriate legislative body that the proposed acquisition is in the
9 public interest and necessary to accomplish a public purpose, “will, by the courts, be deemed
10 conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as
11 would amount to constructive fraud.” *Welcker*, 65 Wn.2d at 684; *In re Port of Seattle*, 80 Wn.2d
12 392, 495 P.2d 327 (1972)(*emphasis added*); see also *State ex rel. Dungan v. Superior Court for*
13 *Grant County*, 46 Wn.2d 219, 279 P.2d 918 (1955) (holding that in condemnation proceedings
14 brought by cities, the court is bound by the legislative determination of the city council that
15 taking or damaging certain land is necessary for the contemplated project). Moreover, selection
16 of a specific site for the proposed use is also a legislative question. The legislature’s
17 determination is deemed conclusive unless proved to have been done without statutory authority,
18 in bad faith, as an abuse of power, or in an arbitrary and capricious manner. *State ex rel.*
19 *Hunter*, 34 Wn.2d at 216.

20 The objector has the burden of proving fraud or constructive fraud. *In re Port of Grays*
21 *Harbor*, 30 Wn. App. 855, 862, 638 P.2d 633 (1982), *review denied*, 97 Wn.2d 1010 (1982).
22 Arbitrary and capricious is “willful and unreasoning action without consideration and regard for
23 the facts and circumstances.” *Welcker*, 65 Wn.2d at 683-85. The fact that there is room for two
24 opinions does not make the legislative action arbitrary and capricious if it is “exercised honestly,
25 fairly, and upon due consideration,” even where a belief may exist that an erroneous conclusion
26 has been reached. *Miller v. Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963).

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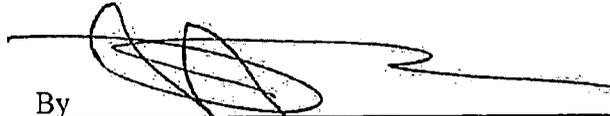
1 Petitioner, through the exercise of proper legislative authority, has declared that public
2 interest, necessity and convenience require acquisition of the Condemned Property for the
3 location, construction, operation and maintenance of the Project. See Resolution No. R2013-21
4 (Exhibit 1 to the Petition in Eminent Domain filed in this condemnation action). Petitioner's
5 Resolution regarding public interest, public necessity and site selection is conclusive on the
6 Court based on the Washington State Supreme Court's decision in *State ex rel. Sternoff*, 52
7 Wn.2d 282. Moreover, Petitioner's decision does not constitute fraud, nor is it arbitrary and
8 capricious so as to constitute constructive fraud.

9
10 **VI. ORDER**

11 A form of proposed Findings, Conclusions, Order and Judgment are filed herewith.

12 DATED this 15 day of May, 2017.

13 MILLER NASH GRAHAM & DUNN LLP

14 

15 By

16 Marisa L. Velling, WSBA# 18201
17 Jeffrey A. Beaver, WSBA# 16094
18 Connor M. O'Brien, WSBA# 40484
19 Attorneys for Petitioner Sound Transit

20 LCR 7(b)(5)(B)(vi) Certification: I certify that
21 this motion contains 3802 words, in compliance
22 with the Local Civil Rules

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PETITIONER'S MOTION FOR ORDER
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The Honorable Jeffrey Ramsdell
Noting Date: May 31, 2017
(Without Oral Argument)
Moving Party: Petitioner Sound Transit

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a regional transit
authority, dba SOUND TRANSIT,

Petitioner,

v.

WR-SRI 120th NORTH LLC, a Delaware limited
liability company; et al.,

Respondents.

No. 17-2-12144-4 SEA

CITY OF SEATTLE'S OPPOSITION TO
PETITIONER'S MOTION FOR ORDER
AND JUDGMENT ADJUDICATING
PUBLIC USE AND NECESSITY

Oral Argument Requested

Tax Parcel Nos. 067100-0000, 067100-0020,
067100-0030, 067100-0040 and 067100-0060

I. Relief Requested

Through this condemnation action, Central Puget Sound Regional Transit Authority ("Sound Transit") is seeking to condemn property within an existing Seattle-owned easement and directly underneath a Seattle-owned high voltage transmission line. The condemnation, and the extinguishment of Seattle's easements rights that would result, would destroy and render unusable the nearly 90-year old easement and make it impossible for Seattle to continue to operate the transmission line.

Given the importance of the infrastructure at risk Seattle is compelled to oppose Sound Transit's condemnation. The Court should deny Sound Transit's motion because Sound Transit does not have the statutory authority condemn public property and because the property it is seeking

1 to condemn is not necessary for Sound Transit's light rail system and thus it falls outside of Sound
2 Transit's condemnation authority. The motion should also be denied because Sound Transit's
3 condemnation is barred by the Prior Public Use Doctrine, which prohibits the condemnation of
4 property currently being used for a public purpose if the condemnation is incompatible with the
5 existing use.

6 Finally, this opposition is only preliminary response by Seattle. As referenced in Seattle's
7 motion for a continuance, Seattle needs an opportunity to conduct some reasonable, focused
8 discovery in order to fully respond to the issues raised in Sound Transit's motion.

9 II. Statement of Facts

10 A. Background

11 By its petition in eminent domain (the "Petition") filed in this action, Sound Transit seeks
12 to condemn portions of a parcel of real property adjacent to 124th Avenue NE in the City of
13 Bellevue identified by the above-referenced tax parcel numbers ("Subject Property"). Even
14 though Sound Transit is seeking to only condemn temporary construction easements and
15 sidewalk and wall easements, as reflected in the prayer for relief section of the Petition, it is
16 nonetheless seeking to fully extinguish Seattle's easement rights over the property being
17 condemned by having the title in all property being condemned conveyed to it "free and clear of
18 any right, title and interest of" of all respondents, including Seattle.

19 B. Seattle Owns a Transmission Line Easement over the Property Sound Transit Seeks 20 to Condemn.

21 In 1931 Seattle acquired an easement over the Subject Property for the construction,
22 operation, and maintenance of an electrical transmission line system ("Transmission Line
23 Easement"). Declaration of John Bresnahan ("Bresnahan Decl.") at ¶2. Ex. A. Per the terms of

1 the Transmission Line Easement, Seattle has the right to operate electrical transmission lines
2 over the Jacobsen Property, and to construct and maintain a transmission line tower and related
3 facilities on the property. *Id.* The Transmission Line Easement does not contain any limitations
4 on the voltage of the transmission line Seattle can run over the property, or on the size, type, or
5 location of the transmission line tower that it can construct on the property. *Id.*

6 The Transmission Line Easement is part of a series of similar easements and fee parcels
7 that run contiguously for 100 miles from generating facilities on the Skagit River to a Maple
8 Valley substation. (“Transmission Line Corridor”) *Id.* at ¶ 3. The Transmission Line Corridor is
9 also an integral part of a larger, regional electrical transmission line system that runs from
10 Canada to California. *Id.* For most of its length, the Transmission Line Corridor is
11 approximately 150 feet wide and is intended to accommodate two high voltage transmission
12 lines. *Id.* The corridor was established before the City of Bellevue was incorporated, and Seattle
13 undertakes regular efforts to protect and preserve the corridor from development encroachments
14 so that it can continue to serve its intended purpose. *Id.*

15 **C. Seattle Operates a 230 kV Electrical Transmission Line over the Property That Sound**
16 **Transit’s Seeks to Condemn.¹**

17 Seattle operates a dual circuit 230 kV transmission line (“Transmission Line”) within the
18 Transmission Line Easement. *Id.* at ¶4. The Transmission Line is an important part of Seattle’s
19 electrical transmission system and is particularly important because it allows Seattle to have a
20 direct electrical transmission connection to a sub-station and distribution system in the southern
21 part of the city, thereby bypassing a bottleneck in electrical transmission capacity in the north part
22 of Seattle. *Id.*

23 ¹ In Seattle’s electrical transmission system, any line over 115 kV (or 115,000 volts) is considered a high voltage transmission line. Bresnahan Decl., at ¶ 3.

1 In the vicinity of the Subject Property, the Transmission Line runs along the east side of
2 124th Avenue, and is supported by a series of lattice towers and monopole structures. *Id.* at ¶ 5.
3 The Transmission Line runs over the full north-south length of the Subject Property. *Id.* The
4 Transmission Line wires are 48 feet above grade and the nearest support structure to the area being
5 condemned is a lattice tower located approximately 65 feet to the north. *Id.* For safety reasons,
6 the minimum clearance needed for a 230 kV line is 23.7 feet in every direction. *Id.*

7 **D. Because Sound Transit Seeks to Extinguish all of Seattle's Easement Rights Over The**
8 **Property It Seeks to Condemn, Sound Transit's Condemnation is Incompatible with**
9 **Seattle's Continued use of the Transmission Line Easement and Operation of the**
10 **Transmission Line.**

11 The Transmission Line Easement, like most other such easements owed by Seattle,
12 includes both aerial and ground easement rights. *Id.* at ¶ 6. Sound Transit's condemnation affects
13 a substantial portion of the Transmission Line Easement on the Subject Property. Bresnahan Decl.,
14 at ¶ 7. The temporary construction easement Sound Transit seeks to condemn covers the full
15 width of the easement on the northern part of the Subject Property. *Id.* The sidewalk easement
16 Sound Transit seeks to condemn runs down the center the Transmission Line Easement, directly
17 under the Transmission Line, for most of the north-south length of the Subject Property. *Id.*

18 The extinguishment of Seattle's easement rights over the portions of the Subject Property that
19 Sound Transit seeks to condemn, would destroy the Transmission Line Easement and render it
20 unusable for its intended purpose because it would be impossible for Seattle to continue to legally
21 operate the Transmission Line over the Subject Property. Bresnahan Decl., at ¶ 8. This, in turn,
22 would result in a break in the 100+ mile Transmission Line Corridor connecting the City with its
23 hydroelectric facilities on the Skagit River, thereby rendering the corridor unusable for its intended
purpose. *Id.*

1 Seattle has previously accommodated surface-level structures such as roads and sidewalks
2 within other transmission line easements within its system subject to the execution of appropriate
3 easement or consent agreements that allow both uses to safely coexist. *Id.* at 9. It could likely have
4 done so here, but for Sound Transit's quest to fully extinguish Seattle's easement rights, which would
5 render the Transmission Line Easement unusable. *Id.* Despite submitting declarations on a number
6 of occasions describing its intent to restore sufficient easement rights to Seattle so that it can continue
7 to operate the Transmission Line, Sound Transit has never transmitted a written proposal describing
8 what rights it is willing to convey or preserve nor has it identified any conditions or terms it would
9 require Seattle to submit to in order to get its easement rights back. King Decl., at ¶ 2.

10 **E. In this Action Sound Transit is Condemning Property for a Bellevue Road Widening
11 Project - not its Light Rail Project.**

12 Sound Transit is constructing a retained-cut, perpendicular light rail line crossing
13 underneath 124th Avenue NE. King Decl., at ¶ 3. As part of a separate project, Bellevue is
14 widening and improving 124th Avenue to add one or more travel lanes. The widening of 124th
15 Avenue NE in the vicinity of the Subject Property is part of a larger project to widen that road
16 between Northrup Way to NE 14th Street in connection with the redevelopment of the Spring
17 District section of Bellevue. *Id.*

18 The fact that the two projects are separate is confirmed in multiple agreements between
19 Sound Transit and Bellevue. In a May 6, 2015, Cost Sharing Agreement those parties
20 acknowledged that the Bellevue road widening project is not required for the construction of the
21 light rail line, but rather, is "necessitated as a result of the City's CIP [Capital Investment
22 Program]." *Id.* at Ex. B.

23 **F. Sound Transit Voluntarily Agreed To Condemn Property for Bellevue - It Was Not
Forced or Required to do so by any "Development Conditions."**

1 In its motion Sound Transit falsely claims that its condemnation of property for Bellevue's
2 project is required by unspecified "Project Development Conditions." If fact, Sound Transit and
3 Bellevue negotiated an arrangement whereby Sound Transit would condemn property for
4 Bellevue. Sound Transit touted its "extensive consultation and collaboration" with Bellevue in
5 previous briefing to the Supreme Court. King Decl., Ex. C. Specifically, it claimed that it
6 "engaged in extensive consultation and collaboration with the City of Bellevue about the final
7 project alignment, design, and construction process. This culminated in an Amended and Restated
8 Umbrella Memorandum of Understanding (the "Amended MOU") and related agreements
9 executed in May 2015." *Id.* In the above-reference Cost Sharing Agreement, Sound Transit and
10 Bellevue acknowledged that they agreed to coordinate in order to "improve efficiencies and reduce
11 costs" not because Bellevue imposed any requirements on Sound Transit. King Decl., Ex. B.

12 All of this flies in the face of Sound Transit's current claim that the property it is seeking
13 to condemn for Bellevue's separate project is "necessary" for Sound Transit's project because of
14 some unidentified "Project Development Conditions."

15 **G. Procedural History**

16 This the fifth lawsuit Sound Transit has brought to condemn property for these two projects.
17 The prior four lawsuits are on appeal. This suit is unique in that it is first time that Sound Transit is
18 seeking to condemn property solely for the Bellevue road widening project.

19 Although it has taken the position that it is being forced to acquire the property for the
20 Bellevue road widening project because of conditions imposed by Bellevue, Sound Transit has
21 steadfastly refused to provide any communications between it and Bellevue that would support that
22 contention. King Decl. at ¶ 6. Further, Sound Transit has contended that the acquisition of the
23

1 property for Bellevue is necessary to accommodate the perpendicular light rail crossing of 124th
2 Avenue. *Id.* At the same time, Sound Transit has refused to produce any documents that support
3 the supposed necessity, including but not limited to, any alternative designs that it considered that
4 would have allowed construction of the light rail line without the widening of the road. *Id.* In
5 conjunction with this opposition, Seattle has filed a motion for a continuance to afford it time to
6 conduct discovery to obtain, inter alia, this information and documents regarding the purported
7 necessity of the acquisition of property for Bellevue's road widening project. *Id.*

8 **III. Statement of Issues**

9 1) Whether, given that Sound Transit lacks the statutory authority to condemn any
10 public property including property owned by a city such as Seattle, this Court should deny Sound
11 Transit's Motion;

12 2) Whether, given that Sound Transit lacks the statutory authority to condemn property
13 solely for the benefit of Bellevue's road widening project that is not necessary for its light rail
14 project, this Court should deny Sound Transit's Motion;

15 3) Whether, given that Sound Transit's condemnation of the Transmission Line
16 Easement would make it impossible for Seattle to continue to operate the Transmission Line and
17 render the easement unusable for its intended public purpose, this Court should deny Sound
18 Transit's Motion based on the Prior Public Use Doctrine.

19 **IV. Evidence Relied Upon**

20 This opposition is based on the Declarations of John Bresnahan and Russell King and
21 pleadings and records on file in this matter.
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V. Authority

A. Sound Transit's Motion For Public Use And Necessity Should Be Denied Because Sound Transit Does Not Have Statutory Authority To Condemn The Transmission Line Easement.

1. A Party's Power To Condemn Is Limited By The Statute Delegating It Condemnation Authority.

An entity's authority to condemn is defined and limited by the scope of the condemnation power delegated to it by statute. *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wash. 2d 519, 534, 342 P.3d 308, 315 (2015) ("States may delegate [condemnation] powers to municipal corporations and political subdivisions, but such delegated authority extends only so far as statutorily authorized."). Statutes that delegate the State's sovereign power of eminent domain to its political subdivisions are to be strictly construed. *Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wash.2d 555, 565, 151 P.3d 176 (2007); *King County v. City of Seattle*, 68 Wash. 2d 688, 690, 414 P.2d 1016, 1018 (1966); *Spokane Airports v. RMA, Inc.*, 149 Wash. App. 930, 940, 206 P.3d 364, 369 (2009).

2. When A Party Seeks To Condemn Property That It Does Not Have Statutory Authority To Condemn, It Is Not Entitled To An Order On Public Use And Necessity As To That Property.

Where a condemning entity seeks to condemn property that it is not authorized by statute to condemn, the petition for eminent domain should be dismissed as to that property. *King County*, 68 Wash. 2d at 694. This is true regardless of whether the condemning party can establish public use and necessity. *Id.* at 692 (Petition in eminent domain was properly dismissed on summary judgment where court held that King County lacked statutory authority to condemn property owned by the City of Seattle). In effect, if the condemning party is not authorized to condemn the property, then it cannot establish public use and necessity. *See State v. Superior Court of Chelan*

1 *Cty.*, 36 Wash. 381, 386, 78 P. 1011, 1013 (1904) (“In view of the fact that this corporation has not
2 the power, in any event, to condemn the lands sought, it becomes unnecessary to discuss the
3 question as to whether the use sought to be made of the lands is a private or public one.”),
4 *superseded by statute on other grounds, City of Seattle v. State*, 54 Wash. 2d 139, 145, 338 P.2d
5 126, 129 (1959)).

6 **3. As the Condemning Party, Sound Transit has the Burden of Proof to Show that
7 its Condemnation is Authorized by Statute.**

8 Sound Transit had the burden of proof to show that its condemnation is authorized by
9 statute. *See Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159
10 Wn.2d 555, 566, 151 P.3d 176, 181 (2007) (“*Foreign Trade Zone*”) (“[a]lthough a state entity
11 bears the burden of proving public use and necessity in the judicial condemnation process, the
12 challenger bears the burden of proof that the notice of a public hearing to authorize
13 condemnation was defective.”); *King Cty. v. City of Seattle*, 68 Wn.2d 688, 693, 414 P.2d 1016,
14 1020 (1966) (finding that a condemnation proceeding could not proceed where the condemning
15 entity failed to put forward sufficient evidence to show that the condemnation was authorized by
16 statute).

17 **B. The Statute Granting Sound Transit Condemnation Power Does Not Authorize Sound
18 Transit to Condemn Public Property Owned By Cities.**

19 The statute granting Sound Transit condemnation authority, RCW 81.112.080, grants Sound
20 Transit limited condemnation authority as follows:

21 An authority shall have the following powers in addition to the general powers
22 granted by this chapter:

23 ***

 (2) to acquire by purchase, condemnation, gift, or grant and to lease, construct, add

1 to, improve, replace, repair, maintain, operate, and regulate the use of high capacity
2 transportation facilities and properties within authority boundaries... together with
3 all lands, rights-of-way, property, equipment, and accessories necessary for such
4 high capacity transportation systems.

5 ***

6 Public transportation facilities and properties which are owned by any city, county,
7 county transportation authority, public transportation benefit area, or metropolitan
8 municipal corporation may be acquired or used by an authority only with the consent
9 of the agency owning such facilities.

10 RCW 81.112.080 (emphasis added).²

11 Read together, these two sections provide that, under RCW 81.112.080, Sound Transit can
12 acquire or condemn property that is either: 1) a private or public transportation facility or property,
13 provided that Sound Transit can only purchase or use an existing public transportation facility with
14 the consent of the public owner; or 2) necessary for a high capacity transportation system. The
15 Seattle-owned property Sound Transit seeks to condemn here is not a private or public
16 “transportation facility or property” - it is an easement for an electrical transmission line.

17 Accordingly the first category does not apply.

18 **1. RCW 81.112.080 Does Not Contain An Express Grant Of Authority To**
19 **Condemn Public Property.**

20 As to the second category, property necessary for a high capacity transportation system,
21 RCW 81.112.080, is silent as to whether Sound Transit is authorized to condemn that type of
22 property when it is owned by cities or other public entities. It is a bedrock principle of
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² The statute also dictates that Sound Transit is to follow the same procedures followed by Cities when condemning property. Similar language is found in other statutes delegating condemnation authority to other types of entities, and it is interpreted as specifying the rules and procedures that the condemning authority must follow rather than expanding on the explicit grant of condemnation authority found elsewhere in the statute. *See Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wash. 2d 555, 567, n.12, 151 P.3d 176, 182 (2007).

1 condemnation law that, where a statute delegates condemnation power but is silent as to whether the
2 delegation includes the power to condemn public property, the statute will be construed as only
3 delegating the power to condemn private property. *King County. v. City of Seattle*, 68 Wash. 2d
4 688, 691, 414 P.2d 1016, 1018 (1966) (“[o]ur eminent domain act, as applied to railroads, must be
5 construed, as are all such acts, as having regard only to the taking of private property, unless there is
6 either express or clearly implied authority to extend them further.”) (citation omitted); *Seattle &*
7 *Montana Ry. Co. v. State*, 7 Wash. 150, 34 Pac. 551 (1893) (Supreme Court rejected the view
8 that a railroad had the authority to condemn state lands where a statute gave such railroads the
9 sweeping power to “enter upon any land” and acquire “so much of said land ... as may be
10 necessary” for the railroad). As Sound Transit’s authority to condemn property “extend[s] only as
11 far as statutorily authorized” and statutes “which delegate the condemnation power of the state to its
12 political subdivisions are strictly construed,” this silence is fatal to Sound Transit’s effort to
13 condemn the Transmission Line Easement. *King County*, 68 Wash. 2d at 690 (King County was
14 not authorized to condemn property owned by a city “in the absence of express or necessarily
15 implied legislative authorization” regardless whether the city’s property was devoted to a public
16 use).³

17 **2. The Legislature Does not use Language such as that Found in RCW 81.112.080**
18 **to Convey the Power to Condemn Public Property.**

19 The Legislature has enacted many condemnation statutes granting the authority to condemn
20 public property. The statute granting highway departments authority to condemn property provides
21 for condemnation of “private or public property...”. RCW 47.52.050 (emphasis added). The
22

23 ³ There is no basis for the Court to find that the power to condemn public property is necessarily implied in the statute, and doing so would be contrary to the requirement that such statutes be strictly construed.

1 statute granting condemnation authority to port districts provides for condemnation of “any public
2 and private property...”. RCW 53.34.170 (emphasis added). The statute granting condemnation
3 authority to public utility districts provides for condemnation of “any public and private
4 property...”. RCW 54.16.050. The Legislature knows how to enact condemnation statutes
5 containing express authority to condemn public property. It knows that this Court will strictly
6 construe condemnation statutes, and that simply saying “property” or “all property” will not suffice
7 to grant authority to condemn public property. Thus, given the difference in the language of RCW
8 81.112.080 and the numerous statutes that expressly grant the power to condemn “public
9 property,” this Court should conclude that, by enacted at RCW 81.112.080 as written, the
10 Legislature did not intend to and did not grant Sound Transit the authority to condemn Seattle’s
11 property. *See State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740, 744 (2015) (when trying to
12 understand the meaning of a statute it is useful to compare the language of that statute to the
13 language of other statutes addressing similar subjects).⁴

14 **D. Sound Transit Does Not Have The Authority To Condemn Aerial Rights Or Sidewalk**
15 **Easements That Are Not Necessary For The Construction Of The Below Grade Light**
16 **Rail System It Is Building.**

17 Under RCW 81.112.080, Sound Transit only has the authority to condemn property that is
18 necessary for its “high capacity transportation system.” The term “high capacity transportation
19 system” is not defined in RCW 81.112.080 but, it is defined in a related statute, RCW
20 81.104.015(2), as:

21 a system of public transportation services within an urbanized region operating
22 principally on exclusive rights-of-way, and the supporting services and facilities
23 necessary to implement such a system, including interim express services and high

⁴ The undersigned counsel was unable to find a single Washington statute that has been interpreted as conveying the power to condemn public property that did not include language such as “public property” or the description of the specific types of public property that can be condemned (i.e. “state, county, and school lands”).

1 occupancy vehicle lanes, which taken as a whole, provides a substantially higher
2 level of passenger capacity, speed, and service frequency than traditional public
3 transportation systems operating principally in general purpose roadways.

4 RCW 81.104.015(2)(emphasis added).⁵

5 Through this action, Sound Transit is seeking to extinguish all of Seattle’s easement rights
6 on and over the affected property – this includes the aerial easement rights that Seattle relies on to
7 operate and maintain its Transmission Line. It also seeks to condemn easements for sidewalks. All
8 of this property is being condemned for the benefit of Bellevue and none of it is, strictly speaking,
9 necessary for Sound Transit’s project.⁶

10 The light rail line that Sound Transit is building on the subject property will be built in a
11 “retained cut” configuration. King Decl., ¶ 5, Ex. A. That means that it will be constructed at or
12 below grade. Under these circumstances, it is inconceivable that Sound Transit needs to condemn
13 all of Seattle’s aerial easement rights over the property in question. Specifically, it is inconceivable
14 that Sound Transit needs to condemn aerial rights that extend to 48+ feet above grade (where the
15 existing Transmission Line wires are located) in order to build a below grade rail line.

16 The sidewalks that will be built on the easement being condemned by Sound Transit are part
17 of Bellevue’s road widening project. They are not connected to any part of the light rail project.
18 The sidewalks run north south and the nearest Sound Transit station is being constructed more than
19 600 feet to the west.

20 As the aerial easement rights and sidewalk easements are not necessary for Sound Transit’s

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22 ⁵ It is appropriate for the Court to consider related statutes when it is determining the legislature’s intent regarding the
23 meaning of a term in a statute. See *Washington State Dep’t of Revenue v. Fed. Deposit Ins. Corp.*, 190 Wash. App.
150, 162, 359 P.3d 913, 917 (2015)

⁶ In connection with eminent domain statutes, “necessary” means “reasonable necessity, under the circumstances of
the particular case.” *City of Tacoma v. Welcker*, 65 Wash. 2d 677, 683, 399 P.2d 330, 335 (1965).

1 light rail system, RCW 81.112.080, does not grant Sound Transit the authority to condemn those
2 property rights. Further, as Sound Transit has failed to satisfy its burden to prove that the property it
3 is seeking to condemn is necessary for its project, and thus within its condemnation authority, its
4 motion for public use and necessity should be denied. *See King County*, 68 Wash. 2d at 692-93;
5 *City of Des Moines v. Hemenway*, 73 Wash. 2d 130, 138, 437 P.2d 171, 176 (1968) (in case
6 involving condemnation for a marina, even though condemnation for such use was deemed to be a
7 public use, case was properly dismissed as to properties outside the city limits because the statute
8 delegating condemnation power to third class cities did not authorize such cities to condemn
9 property outside of their city limits).

10 **E. Sound Transit Has the Burden to Prove that its Condemnation is Necessary for its**
11 **Light Rail System and thus Authorized by RCW 81.112.080 – It is Not Entitled To Any**
Presumptions to that Effect.

12 Whether property being condemned is “necessary” for the purposes of determining public
13 use and necessity is a separate question from whether the property being condemned is among the
14 types of the property that the condemning entity has authority to condemn. On the former, the
15 legislative body's declaration of necessity is entitled to judicial deference and is conclusive in the
16 absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute
17 constructive fraud.⁷ But, the latter question, whether the property being condemned is within the
18 condemning entity's statutory condemnation power, is a judicial question and the legislative body is
19 not entitled to such deference. *King County*, 68 Wash. 2d at 693 (“the county cannot bring the
20 action within the ambit of [the statute purportedly granting it condemnation power], merely by
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22 ⁷ *See City of Bellevue v. Pine Forest Properties, Inc*, 185 Wash. App. 244, 260, 340 P.3d 938, 946 (2014) (City was
23 entitled to presumption that its determination of necessity was valid (absent fraud or constructive fraud) where it was
condemning private property for a public transportation purpose – i.e. something that was clearly within the city's
condemnation authority under RCW 8.12.030 – there was no question about whether City was authorized to condemn
the property in question)

1 legislatively declaring the fact.”).

2 Specifically to this case, Sound Transit is not entitled to any deference on the question of
3 whether the property is “necessary for a high capacity transportation system” and thus authorized
4 by RCW 81.112.080 – that is for the Court to decide. It has to prove that is the case – and it has
5 failed to do so.⁸

6 King County informs this issue. In that case, the condemning party, the County, argued that
7 it was entitled to condemn the property in question, a road owned by Seattle, under authority
8 purportedly granted to it by RCW 08.08.090. *King County*, 68 Wash. 2d at 692. According to the
9 County, that statute authorized the County to condemn property owned by a city if the
10 condemnation was done in “aid of a definitive government undertaking to build or operate a public
11 work.” *Id.* at 694. The only evidence that King County submitted to support its claim that the
12 condemnation was in support of such an undertaking was a resolution passed by the county council
13 so stating – it presented no evidence of the existence of a “government undertaking” or of any nexus
14 between the county’s condemnation and any such an undertaking. The Supreme Court held that
15 that evidence was insufficient to show that the condemnation action was in fact authorized by the
16 statute. Specifically, the Court held “the county cannot bring the action within the ambit of [the
17 statute purportedly granting it condemnation power], merely by legislatively declaring the fact.” *Id.*
18 at 693. Based on that holding, the Court upheld the dismissal of the County’s petition in eminent
19 domain on summary judgement. *Id.*

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21 _____
22 ⁸ Contrary to any suggestion for Sound Transit, the Court of Appeal’s unpublished opinion in the *Sternoff* matter did
23 not resolve the issue of whether Sound Transit’s condemnation of property in this case is necessary for Sound Transit’s
project. In addition to the fact that this case involves property interests completely different from those at issue in
Sternoff, the issue of Sound Transit’s statutory authority to condemn property was not resolved by the Court of
Appeals’ unpublished decision in *Sternoff* as that issue was not raised in the case. Further, the Court of Appeals
expressly stated in its unpublished opinion that the decision in that case did not affect Seattle’s property rights.

1 Here, the only “evidence” that Sound Transit submitted with its Motion for Public Use and
2 Necessity to show that the property it is seeking to condemn is necessary for its light rail crossing is
3 the resolution of the Sound Transit board and the discredited claim that Sound Transit was required
4 to condemn the property due to “Project Development Conditions.” And, Seattle has submitted
5 evidence, in the form of the agreements between Sound Transit and Bellevue, that shows that Sound
6 Transit voluntarily undertook to condemn the property in question and was not forced to do so.
7 King Decl., Exs. __ and __.⁹

8 Under the circumstances, the evidence submitted by Sound Transit insufficient for the Court
9 to conclude that Sound Transit has the statutory authority to condemn all of the property it is
10 seeking to condemnation, and Sound Transit’s Motion for Public Use and Necessity Should be
11 therefore be denied. *Id.*

12 **F. Sound Transit Cannot Expand its Condemnation Authority via an Agreement with
13 Bellevue.**

14 Sound Transit does not have the authority to condemn public property or property solely for
15 Bellevue’s project, and it cannot expand its condemnation authority through agreements with
16 Bellevue. Condemnation actions must be brought in the name of the party with the authority to
17 condemn the property in question, and condemnation authority cannot be expanded, sold, or
18 delegated via contract. *See Spokane Airports v. RMA, Inc.*, 149 Wash. App. 930, 941, 206 P.3d
19 364, 370 (2009) (“The City and the County did not have authority to delegate their power to
20 condemn to Spokane Airports.”).

21 If Bellevue needs to condemn property for its sidewalks it needs to file a condemnation
22 action. This is not an academic or abstract issue. Bellevue and Sound Transit have materially

23 ⁹ Through discovery Seattle expects to uncover additional evidence that the condemnation of property for Bellevue’s road widening project is not necessary for Sound Transit’s project.

1 different condemnation authority conveyed to them under completely different statutes.¹⁰

2 Further, in order for Bellevue to condemn Seattle's property, it would need to pass an ordinance
3 after appropriate notice and an open hearing to give the residents of Bellevue an opportunity to
4 weigh in. All of this was circumvented by the arrangement between Bellevue and Sound Transit
5 whereby Sound Transit agreed to condemn property for Bellevue.

6 **G. Sound Transit's Condemnation Of Seattle's Property Rights Is Barred By The Prior
7 Public Use Doctrine.**

8 Even if the Court concludes that Sound Transit has authority to condemn public property,
9 including city-owned property, and that the condemnation of property for sidewalks is necessary for
10 Sound Transit's below-grade light rail line, the Court should deny Sound Transit's motion because
11 its condemnation of the specific property as issue in this case is barred by the Prior Public Use
12 Doctrine because it "will either destroy the existing [public] use or interfere with it to such an extent
13 as is tantamount to destruction" *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wash. 2d 519,
14 538-39, 342 P.3d 308, 317-18 (2015)(citation omitted); A.S. Klein, Annotation, *Power of*
15 *Eminent Domain as between State and Subdivision or Agency Thereof, or as between Different*
16 *Subdivisions or Agencies Themselves*, 35 A.L.R.3d 1293, 1305 (1971).

17 Here, the condemnation and extinguishment of Seattle's easement rights over the Subject
18 Property is incompatible with Seattle's continued prior public use of the Transmission Line
19 Easement, and will make it impossible for Seattle to operate the current 230 kV transmission line or
20

21 ¹⁰ Sound Transit's condemnation authority comes from RCW 81.112.080, and Bellevue's condemnation authority
22 comes from RCW 8.12.030 and RCW 35.22.280. It's worth noting that, although the issue is not implicated here
23 because Sound Transit is the condemning party, Bellevue likely lacks the statutory authority to condemn Seattle's
property. See 1959 Op. Att'y Gen. No. 69 (RCW 8.12.030 "cannot be construed as granting the power to condemn
property of a city or town by another city" because the statute does not list city-owned property as one of the types of
property that cities are authorized to condemn.). Bellevue's condemnation would also likely be barred by the Prior
Public Use Doctrine.

1 any transmission line over the property.¹¹ Bresnahan Decl., at ¶4

2 Sound Transit presents no evidence that its condemnation is compatible with Seattle's use of
3 the Transmission Line Easement nor could it because the effect of the condemnation would be to
4 extinguish all of Seattle's easement rights over the full width of the easement. Without aerial
5 easements rights over the property being condemned, Seattle could not legally operate a
6 transmission line within the easement. *Id.* As a result, it would be impossible for Seattle to use the
7 Transmission Line Easement for its intended public purpose.

8 Instead of providing any evidence of compatibility Sound Transit attempts to avoid the bar
9 presented by Prior Public Use Doctrine by professing an "intention to restore" some of Seattle's
10 easement rights through a "residual transmission line easement" so that Seattle can continue to
11 operate the Transmission Line.¹² No matter how sincere such an intent is, it offers Seattle no
12 protection whatsoever nor does it have any bearing on the Court's legal determination of whether
13 Sound Transit's condemnation is barred by the Prior Public Use Doctrine. As an initial matter,
14 Sound Transit relies solely on the expression of it intention - it does not point to any written
15 proposal or offer that it has made to Seattle that would protect Seattle's interests - nor could it
16 because Sound Transit has never made any such proposal. More importantly, Sound Transit's
17 expression of intent has no legal significance because, if the Court grants Sound Transit's motion
18 for public use and necessity, it will set in motion a process that will inevitably lead to the
19 extinguishment of Seattle's aerial easement rights, subject only to Sound Transit paying just
20 compensation to Seattle. Once that process has started, Sound Transit will have no obligation to

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22 _____
23 ¹¹ Seattle's operation of the Transmission Line is a public use. *In Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cty.*, 8 Wash. 2d 136, 143, 111 P.2d 583 (1941) ("[t]he generation and distribution of electric power has long been recognized as a public use by this court.").

¹² This intention is expressed in paragraph 3 of the Declaration of Larry Smith filed with Sound Transit's motion.

1 convey back to Seattle the easement rights required for it to continue to operate the Transmission
2 Line nor would the Court be in a position to ensure that happened or that Sound Transit lives up to
3 its professed “intent” to preserve the Transmission Line.

4 Sound Transit could have avoided its condemnation being barred by the Prior Public Use
5 Doctrine. Had it limited its condemnation to only those areas and rights that it actually needs for its
6 project and not sought to completely and unnecessarily extinguish Seattle’s nearly 90-year-old
7 easement rights, Seattle could likely have tolerated the planned construction activities and sidewalks
8 within its Transmission Line Easement. But, instead of doing that, Sound Transit filed a petition in
9 eminent domain that asks for title in all property being condemned, including the property being
10 condemned for temporary construction easements and for sidewalk easements, to be conveyed to it
11 “free and clear of any right, title and interest of” of Seattle. As a result, the condemnation would
12 destroy the Transmission Line Easement and make it impossible for Seattle to continue to operate
13 the Transmission Line within the easement, an outcome that is prohibited by the Prior Public Use
14 Doctrine.

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VI. Conclusion

Based on the foregoing, and the other pleadings and papers on file with this Court in this matter, The City of Seattle respectfully requests that this Court deny Sound Transit's Motion for Public Use and Necessity.

DATED this 26th Day of May, 2017.

PETER S. HOLMES
Seattle City Attorney

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Attorneys for Respondent City of Seattle
The above signed attorney certifies that this memorandum
contains 5,382 words in compliance with KCLCR 7
(5)(B)(vi)

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The Honorable Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a regional transit
authority, dba SOUND TRANSIT,

Petitioner,

vs.

WR-SRI 120TH NORTH LLC, a Delaware
limited liability company; et al.,

Respondents.

No. 17-2-12144-4 SEA

~~PROPOSED~~ FINDINGS OF FACT,
CONCLUSIONS OF LAW, ORDER AND
JUDGMENT ADJUDICATING PUBLIC
USE AND NECESSITY

Tax Parcel Nos. 067100-0000, 067100-0020,
067100-0030, 067100-0040, and 067100-0060

JMR
9/22/17

THIS MATTER came on regularly for hearing before the undersigned judge, upon the motion of Petitioner Central Puget Sound Regional Transit Authority ("Petitioner"). The Respondents in this action have been identified in Petitioner's Petition in Eminent Domain on file in this condemnation action (the "Petition"), and it appears that said Respondents have all received due and proper notice of this hearing.

Said Respondents or their attorneys have either appeared but not objected to entry of these Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity, have not appeared, or having appeared and objected to entry, their objections were considered and overruled. The Court, having jurisdiction over each and all of the Respondents and the subject matter of this action, having considered the pleadings filed in support of and in opposition to the Motion, including:

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY -- 1
4825-6021-6904.3

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1. Petitioner's Motion for and Order Adjudicating Public Use and Necessity;
2. Declaration of Jeffrey A. Beaver regarding Notice of Final Action and in Support of Petitioner's Motion for and Order Adjudicating Public Use and Necessity;
3. Declaration of Larry J. Smith in Support of Motion for and Order Adjudicating Public Use and Necessity;
4. Declaration of Tom Wilson in Support of Motion for and Order Adjudicating Public Use and Necessity;
5. City of Seattle's Opposition to Motion for and Order Adjudicating Public Use and Necessity;
6. Declaration of John Bresnahan in Support of City of Seattle's Opposition to Motion for and Order Adjudicating Public Use and Necessity;
7. Declaration of Russell King in Support of City of Seattle's Opposition to Motion for and Order Adjudicating Public Use and Necessity;
8. Petitioner's Reply in Support of petitioner's Motion for and Order Adjudicating Public Use and Necessity;
9. Declaration of Marisa L. Velling in Support of Petitioner's Reply in Support of Petitioner's Motion for and Order Adjudicating Public Use and Necessity;
10. City of Seattle's Supplemental Opposition to Motion for and Order Adjudicating Public Use and Necessity;
11. Declaration of Russell King in Support of City of Seattle's Supplemental Opposition to Motion for and Order Adjudicating Public Use and Necessity;
12. Petitioner's Supplemental Reply in Support of Petitioner's Motion for and Order Adjudicating Public Use and Necessity;
13. Declaration of Marisa L. Velling in Support of Petitioner's Supplemental Reply in Support of Petitioner's Motion for and Order Adjudicating Public Use and Necessity;

- 1 14. Declaration of Larry J. Smith in Support of Petitioner's Supplemental Reply in
2 Support of Petitioner's Motion for and Order Adjudicating Public Use and Necessity;
3 and
4 15. the files and records herein.

5 The Court being fully advised, has determined that the relief sought by Petitioner is proper.

6 NOW, THEREFORE, this Court makes the following FINDINGS OF FACT:

7 1. Petitioner is a duly organized and acting regional transit authority, existing under
8 and by virtue of the laws of the State of Washington. RCW 81.112.080. Petitioner is authorized
9 by statute to construct and operate a high-capacity transportation system within authority
10 boundaries. RCW 81.112.010.

11 2. The City of Seattle City Light has an interest in the land, property and property
12 rights, which are subject to this condemnation action commenced pursuant to Chapter 81.112
13 RCW.

14 3. On or about September 26, 2013, by Petitioner's Resolution No. R2013-21
15 ("Resolution"), the Sound Transit Board of Directors (the "Board") authorized the
16 condemnation, taking, damaging, and appropriation of certain lands, properties and property
17 rights in order to permanently locate, construct, operate and maintain the East Link Extension
18 and its related facilities (the "Project"). A copy of the Resolution is attached as Exhibit 1 to the
19 Petition which Exhibit is incorporated here by this reference. Included within these lands,
20 properties and property rights is land, property and property rights situated in Bellevue, King
21 County, Washington, in which the City of Seattle holds an interest. The land, property and
22 property rights which Petitioner seeks to and is authorized to condemn, and in which
23 Respondents hold an interest, is identified as King County Tax Parcel Nos. 067100-0000,
24 067100-0020, 067100-0030, 067100-0040, and 067100-0060 (the "Parcels").

25 4. Before taking final action to adopt the Resolution, which authorizes
26 condemnation of the subject property, Petitioner mailed and published the required notices

1 pursuant to RCW 8.25.290 with the date, time and location of the Board meeting at which
2 Petitioner intended to take final action and authorize the acquisition of the subject property
3 through condemnation, which notice also generally described the property.

4 5. With this condemnation, Petitioner seeks to appropriate the following:

5 5.1 The permanent taking of a portion of the Parcels for a permanent wall
6 easement, substantially as described, depicted, and provided for in Exhibit 1 hereto;

7 5.2 The permanent taking of a portion of the Parcels for a permanent sidewalk
8 and utility easement, substantially as described, depicted, and provided for in Exhibit 2
9 hereto; and

10 5.3 The temporary taking of a portion of the Parcels for a temporary
11 construction easement, substantially as described, depicted, and provided for in Exhibit 3
12 hereto.

13 Exhibits 1-3 are incorporated here by this reference and the real property and real
14 property interests described in Exhibits 1-3 are hereinafter collectively referred to as the
15 "Condemned Property."

16 6. The Condemned Property is necessary to and will be used for public purpose -
17 locating, constructing, operating and maintaining the Project.

18 7. Petitioner has determined that the construction of the Project will serve a public
19 purpose, is necessary for the public interest, and that the Condemned Property is necessary for
20 this purpose. The Respondents have been served with notice and a copy of the Petition.

21 8. Petitioner seeks to condemn the real property and real property interests described
22 and/or depicted in Exhibits 1-3.

23 9. There was no fraud, actual or constructive, no abuse of power, bad faith, or
24 arbitrary and capricious conduct by Petitioner.

25 UPON CONSIDERATION thereof, the Court hereby makes the following
26 CONCLUSIONS OF LAW:

FINDINGS OF FACT, CONCLUSIONS
OF LAW, ORDER AND JUDGMENT
ADJUDICATING PUBLIC USE AND
NECESSITY -- 4
4825-6021-6904.3

MILLER NASH GRAHAM & DUNN LLP
Pier 70 ~ 2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 624-8300/Fax: (206) 340-9599

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Petitioner is a regional transit authority, existing under and by virtue of the laws of the State of Washington.

3. Petitioner is authorized by statute to condemn for public use, which includes locating, constructing, operating and maintaining the Project. The East Link Extension is a public use.

Pursuant to RCW 81.112.080, condemnation of all lands, rights of way, property, equipment and accessories necessary for high capacity transportation systems is
4. ~~Condemnation of lands, properties, and property rights to locate, construct, operate and maintain the Project is~~ within the statutory authority of Petitioner.

gmr 9/22/17

5. Petitioner's authority to condemn includes the authority to condemn the City of Seattle's easements burdening the Parcel.

gmr 9/22/17

6. Petitioner, having mailed and published notice with the date, time and location of the Board meeting at which Petitioner intended to take final action and authorize the acquisition of the Condemned Property through condemnation, which notice generally described the Condemned Property, made a diligent attempt to provide sufficient notice and this Court does hereby deem the notice given by Petitioner, as described in the Declaration of Mike Bulzomi attached as Exhibit A to the Declaration of Jeffrey A. Beaver filed herewith, to be sufficient to satisfy the requirements of RCW 8.25.290.

7. The taking and damaging of lands, properties and property rights in order to locate, construct, operate and maintain the East Link Extension, and to comply with relevant Development Conditions, is for a public use.

8. The public interest requires the proposed use.

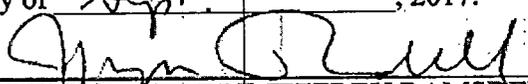
9. Appropriation of the Condemned Property is necessary for the proposed use.

10. Petitioner is entitled to the issuance of an order finding public use and necessity for the taking of the Condemned Property for public purposes.

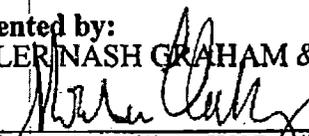
1 **ORDER AND JUDGMENT**

2 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
3 there is public use and necessity for taking of the Condemned Property (legally described and/or
4 depicted in Exhibits 1-3 to this Order) for public purposes, including the City of Seattle's existing
5 real property interests in the Condemned Property.

6 DONE IN OPEN COURT this 22nd day of Sept., 2017.

7 
8 THE HONORABLE JEFFREY RAMSDELL

9 **Presented by:**
10 **MILLER NASH GRAHAM & DUNN LLP**

11 By 
12 Marisa L. Velling, WSBA# 18201
13 Jeffrey A. Beaver, WSBA# 16094
14 Connor M. O'Brien, WSBA# 40484
15 Attorneys for Petitioner Sound Transit

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September 27, 2017 - 10:43 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94406-7
Appellate Court Case Title: Central Puget Sound Regional Transit Authority v. Safeway Inc., et al.
Superior Court Case Number: 16-2-09223-3

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- 944067_Affidavit_Declaration_20170927103759SC887058_7950.pdf
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The Original File Name was Supreme Court Declaration of Service for Brief of Respondent.pdf
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This File Contains:
Briefs - Respondents
The Original File Name was Brief of Respondent Sound Transit.pdf
- 944067_Other_20170927103759SC887058_7021.pdf
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Other - Appendix to Respondents Brief
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Note: The Filing Id is 20170927103759SC887058

No. 94406-7

SUPREME COURT OF THE STATE OF WASHINGTON

CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY, a regional transit authority, dba SOUND TRANSIT,
Petitioner Below; Respondent on Appeal,

v.

CITY OF SEATTLE, SEATTLE CITY LIGHT,
a Washington municipal corporation,
Respondent Below; Appellant,

and

SAFEWAY INC., a Delaware corporation, et al.,
Additional Respondents Below.

DECLARATION OF SERVICE

Jeffrey A. Beaver
Ester Gordon
Connor M. O'Brien
Emily Krisher
MILLER NASH GRAHAM & DUNN LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, Washington 98121
206.624.8300

Attorneys for Respondent
SOUND TRANSIT

ORIGINAL

filed via
PORTAL

DECLARATION OF SERVICE

I, Nichole Barnes hereby affirm and state, that on this 27th day of September 2017, I filed the Brief of Respondent Sound Transit; Appendix to Brief of Respondent Sound Transit; and this Declaration of Service with the Supreme Court of Washington State and served on counsel listed below as indicated.

DATED this 27th day of September, 2017.

/s/Nichole Barnes
Nichole Barnes, Legal Assistant

Philip A. Talmadge WSBA# 6973 Sidney C. Tribe WSBA# 33160 Talmadge/Fitzpatrick/Tribe 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 phil@tal-fitzlaw.com; Sidney@tal-fitzlaw.com; <i>Attorneys for City of Seattle</i>	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Email Messenger Overnight Mail Facsimile U.S. Mail, Postage Prepaid
Russell King, WSBA# 27815 Assistant City Attorneys Seattle City Attorney's Office 701 5th Avenue, Suite 2050 Seattle, WA 98104 Russell.king@seattle.gov; denise.colvin@seattle.gov <i>Attorneys for Respondent City of Seattle</i>	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Email Messenger Overnight Mail Facsimile U.S. Mail, Postage Prepaid

<p>Jenifer C. Merkel, WSBA# 34472 Sr. Deputy Prosecuting Attorney-Civil Division 516 Third Avenue, Room W400 Seattle, WA 98104 jenifer.merkel@kingcounty.gov maggie.flickinger@kingcounty.gov <i>Attorney for Respondent King County</i></p>	<p><u>X</u> _____ _____ _____ _____</p>	<p>Email Messenger Overnight Mail Facsimile U.S. Mail, Postage Prepaid</p>
<p>P. Stephen DiJulio, WSBA # 7139 Adrian Winder, WSBA# 38071 Foster Pepper PLLC 1111 3rd Avenue, Suite 3000 Seattle, WA 98101 steve.dijulio@foster.com adrian.winder@foster.com <i>Attorneys for Respondent Safeway, Inc.</i></p>	<p><u>X</u> _____ _____ _____ _____</p>	<p>Email Messenger Overnight Mail Facsimile U.S. Mail, Postage Prepaid</p>

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