

No. 94530-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Appellants.

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 at 1750 124th Avenue Northeast, in Bellevue, Washington for its East Link project, which will bring light rail to Bellevue. The light rail trackway will be constructed to run along and through the north boundary of the property. The project also entails construction of a bridge for 124th Ave NE (the west boundary of the property) where it will cross the light rail trackway, which will run underneath the bridge.

Appellant, Seattle City Light ("City Light"), holds an unused power line easement along the west side of the property (the "Easement"). The Easement 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 this Bellevue property, it has the right to block the East Link project.

The trial court rejected City Light's contentions that Sound Transit lacked statutory authority to condemn public property and that the prior public use doctrine barred the condemnation, found the property was necessary for the project, and entered Findings of Fact, Conclusions of

Law, Order and Judgment Adjudicating Public Use and Necessity re City of Seattle Property Interests (the "PU&N Judgment").

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. City Light owns a 100-mile-long electrical transmission easement bisecting the City of Bellevue. Does City Light's status as a public entity prevent Sound Transit from condemning unused portions of City Light's Easement for a regional light rail project that crosses the easement corridor?

2. The prior public use doctrine allows condemnation of property whose current use is consistent with or inferior to the proposed use. Based on evidence that City Light is not currently using the Easement, has no plans to do so in the foreseeable future, Sound Transit's project is consistent with City Light's Easement, and Sound Transit's proposed immediate use is superior to City Light's hypothetical future use, the trial court entered the PU&N Judgment. Does the prior public use doctrine bar this condemnation?

3. 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 that Sound Transit did not engage in 'arbitrary, capricious, or fraudulent conduct, and that the property was necessary and would be used for Sound Transit's project. Has City Light shown grounds to reverse the necessity finding?

III. STATEMENT OF THE CASE

A. SOUND TRANSIT AUTHORIZING LEGISLATION

Sound Transit is a Regional Transit Authority ("RTA") under RCW chapters 81.104 and 81.112. CP 403. Those chapters authorize—and often require—RTAs to work with local governments to develop and implement transportation policy, and build and operate transportation systems and facilities.

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."

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. 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").¹ 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.

¹ The 2011 MOU is available on Sound Transit'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.

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. Appx. at 7. It provided that Sound Transit would transfer its acquired real property to the City if the parties agreed the property was needed for the public right of way. Appx. at 9. As in the MOU, the East Link project description included a "retained cut . . . crossing under . . . 124th Ave NE." Appx. 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 R2013-21, which authorized condemnation proceedings to "acquire all, or any portion," of the Sternoff property that is the subject of this eminent domain action (the "Parcel") "for the purpose of constructing, owning, and operating a permanent location of the East Link Extension and light rail guideway."

CP 10.

City Light's interest in the Parcel is an electrical transmission line easement running along the west side of the Parcel, part of an easement corridor that spans both the east and west sides of 124th Ave NE. CP 674.

The easement corridor east of 124th Ave NE, including City Light's easement on the Parcel (the "Easement"), is not currently in use, nor has it ever been used since it was granted almost 100 years ago. CP 840. Petitioner has no permits or other particular plans to use the Easement now or in the future. *Id.*

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. CP 402-569. 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." CP 496.

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. CP 495. As previously contemplated by the 2011 TWA, the City will eventually own and control all automotive rights of way constructed on property acquired by Sound Transit for its East Link project. CP 500.

E. PETITION IN EMINENT DOMAIN

In this action, filed against the property owner on March 22, 2016, Sound Transit seeks to condemn portions of the Parcel for the "permanent location, construction, operation, and maintenance" of the East Link Extension. CP 2. 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. *Id.* Sound Transit does not seek to acquire any property interests that are not related to the East Link Extension. Rather, the Petition states that the property and property rights necessary for the East Link Extension must accommodate the City of Bellevue's Bel-Red Transportation Improvement Plan, which includes widening 124th Avenue as described in the Amended MOU. *Id.*

The Petition relies on Resolution R2013-21, which identified the entire Parcel as necessary for the East Link project. *Id.* It enumerates the property interests to be taken, which are all within the property identified as necessary for the East Link project in R2013-21, and emphasizes that these property interests are "sought to be taken for public use and purpose, namely: to locate, construct, operate and maintain" the East Link project. *Id.*

After filing its condemnation action, Sound Transit engaged in lengthy discussions with City Light regarding its transmission line system, hoping that the two public entities could reach a negotiated resolution without the need for litigation. CP 988. Despite these negotiations, City Light sought to intervene in this action as a respondent, claiming its interests were not being protected.² CP 662-663. On June 15, 2016, City Light was granted leave to intervene. CP 807-808. By that time, the trial court had already ruled that Sound Transit had shown public use and necessity to acquire the property interests it sought in the Parcel subject to City Light's interests. CP 686.

² City Light had previously requested that Sound Transit voluntarily dismiss it as a respondent in related litigation while the parties pursued a negotiated solution. Sound Transit accommodated that request and did not initially name City Light as a respondent in this case. CP 826-27, 839.

Sound Transit has consistently told City Light that its project will not preclude City Light's future use of the Easement. CP 988. Throughout the condemnation process, 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 for its intended purpose. *Id.* Sound Transit has proposed a plan that would allow City Light to maintain the aerial easement rights City Light claims are needed to build a transmission line on the Easement in the future. CP 1058. Sound Transit has also offered City Light multiple opportunities to provide comments on the proposed design of the Project. CP 998-999. City Light has refused to work with Sound Transit to describe the taking in terms that take both parties' future needs into account. *Id.*

F. PUBLIC USE AND NECESSITY HEARING AND SUMMARY JUDGMENT HEARING

Sound Transit prevailed on appeal against the owner's challenge to public use and necessity, then sought an order and judgment adjudicating public use and necessity as to City Light. CP 826-837; CP 876-892. City Light opposed the motion, contending that Sound Transit lacks authority to condemn public property, the prior public use doctrine bars the

condemnation, and the property is not necessary for Sound Transit's project. CP 893-910.

After extensive briefing, written evidence submissions, and oral argument, the trial court rejected City Light's arguments and entered the PU&N Judgment. CP 1232-1237. City Light immediately filed a Notice of Appeal from the PU&N Judgment. CP 1337-1338. City Light's request for direct review by this Court remains pending.

G. RELATED CASES

In addition to this case, City Light and Sound Transit are litigating four related cases, each involving a parcel at the same intersection in Bellevue 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, and on December 20, 2016 denied City Light’s motion for summary judgment. CP 1232-1237; Appx. at 44-46. 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. Appx. at 47-66. On March 31, 2017, this Court denied City Light’s petition for direct discretionary review of the *Jacobsen* summary judgment denial. Appx. at 67-72. On January 10, 2017 the Court of Appeals granted Sound Transit’s motion for accelerated review of the *Jacobsen* PU&N judgment. Appx. at 73-74. City Light’s opening brief was submitted to the Court of Appeals on May 18, 2017, and Sound Transit’s response brief was submitted to the court on June 19, 2017. City Light’s reply brief is due September 11, 2017, after which the parties will receive an expedited oral argument setting.

2. The Safeway Case

In *Sound Transit v. Safeway Inc.*, King County Cause No. 16-2-09223-3 SEA ("*Safeway*"), City Light opposed Sound Transit's Motion for Public Use and Necessity on the same grounds. On March 27, 2017, the trial court entered an order finding public use and necessity to take City Light's interest in the condemned property. CP 1180-1184. City Light promptly moved for reconsideration, which the trial court denied on April 14, 2017. Appx. at 75-76. On April 19, 2017, City Light appealed the trial court's public use and necessity ruling to this Court. Appx. at 77-78. City Light filed its Statement of Grounds for Direct Review on May 8, 2017. Appx. at 79. Sound Transit filed its answer on May 22, 2017. Appx. at 95-114. The request for direct review remains pending. City Light filed its opening brief on the merits on August 14, 2017, and Sound Transit's response brief is due September 13, 2017. Appx. at 115.

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 grounds. On February 13, 2017, the trial court entered an order finding that there was

public use and necessity to take City Light's interest in the condemned property. CP 862-867. City Light filed its Notice of Appeal to this Court on March 10, 2017. Appx. at 116-118. City Light filed its Statement of Grounds for Direct Review on March 27, 2017, and Sound Transit filed its Answer on April 10, 2017. Appx. at 119-153. The request for direct review remains pending. City Light filed its opening brief on the merits on June 23, 2017, and Sound Transit filed its response brief on July 24, 2017. Appx. at 154-241. City Light's reply brief is due October 6, 2017. Appx. at 243.

In addition, Sound Transit filed another action for condemnation of a different set of property interests on the same parcel.³ *Sound Transit v. WR-SRI 120th North LLC*, King County Cause No. 17-2-12144-4 SEA ("*Spring District II*"). Sound Transit has filed a Motion for Public Use and Necessity in that case, and City Light has opposed the motion on the

³ 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.

same grounds it has argued in the previous cases. Appx. at 244-275. The motion has yet to be decided by the trial court.

In each of these cases except for *Spring District II*, which is awaiting a public use and necessity ruling, 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 project.

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, RTAs (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."

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. That is, the legislature expressly refused to limit an RTA'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 include publicly owned land. It would not make sense for the legislature to expressly grant condemnation rights over "all ... rights-of-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). City Light's strained construction of the statutory language—that in the condemnation context "all" property only means private property—cannot withstand this statutory structure because it requires interpreting the one word "all" to mean two different things. City

Light's argument contradicts the plain statutory language and is based on little more than wishful thinking.

Finally, the remainder of the statute contains an express exclusion from the condemnation power that assumes and confirms that the power to condemn publicly owned property otherwise exists. RCW 81.112.080(2) specifically states that certain public property and facilities already used for public transportation may be acquired only by consent. It provides:

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.

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or 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 the general grant of power to condemn "all" property did not include any publicly owned property, there would be no reason to specifically exclude public property already devoted to public transportation facilities. The exclusion would be superfluous, meaningless, and unnecessary if RTAs 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 city property so long as that city property is not a public transportation facility or public transportation property.

And this exclusion 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 public agency is already using property for public transportation, that property may be acquired or used by an RTA only with the agency's consent.

City Light claims this reference to public transportation properties is a limited grant of authority 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." Thus, the exception proves the general rule: that Sound Transit has the broad authority to condemn (or otherwise acquire) all property it needs to build its projects, even if the property is publicly owned.

City Light asserts that notwithstanding Sound Transit's authority to condemn "all" property necessary for its high capacity transportation system, RCW 81.112.080 is silent as to whether Sound Transit is authorized to condemn publicly-owned property. The word "all," however, distinguishes Sound Transit's statutory condemnation authority from the county condemnation statute addressed in the case City Light relies on: *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 of an existing road owned by the City of Seattle. The City argued that King County lacked specific statutory authority to condemn property owned by another municipal corporation. This Court agreed, based on the language of the county's authorizing statute: "[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 within municipal limits for any public use is different from the targeted authorization given to RTAs like Sound Transit.

First, unlike the county authorizing statute, which "King County argued ... constituted a grant of authority to acquire 'all property'" (Opening Brief at 16), RCW 81.112.080 actually and expressly does grant RTAs the power to condemn "all" property necessary for their projects.⁴ Second, the RTA statute specifically targets a particular public use—high capacity transportation systems—for which condemnation is authorized.

⁴ 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 RTAs that allowed for "liberal construction" was removed from the final statute. Opening Brief at 22. 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 mass transit facilities and other public property.

Thus, unlike the county statute, the scope of condemnation authority is expressly measured by the statutory purpose; and for that purpose, "all" property is available. Moreover, unlike the county condemnation statute, the RTA statute provides context regarding the type of property as to which condemnation is authorized: (a) it does not distinguish the types of property that may be acquired by condemnation from types of property that may be acquired by other means, whereas the county statute deals strictly with condemnation; (b) the RTA statute explicitly authorizes condemnation of rights of way, which are routinely property of the state or its political subdivisions, whereas the county statute contains no such examples; and (3) RCW 81.112.080(2) specifically exempts from condemnation public transportation property owned by cities or other public entities, an exception that would not be necessary unless the grant of the power to condemn "all" property included public property. These distinctions demonstrate why the result here must be different from the result 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 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 199-200.⁵ 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.⁶

⁵ 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."

⁶ 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

Finally, City Light simply ignores the long line of cases holding that 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)). In *State ex rel. Hunter v. Superior Court for Snohomish County*, this Court articulated the standard:

"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

case that has nothing to do with eminent domain and construes a statute that does not include the word "all." *See* Opening Brief at 20-21; *State v. Larson*, 184 Wn.2d 843, 851-54, 365 P.3d 740 (2015).

633 (1982) (citing *State ex rel. Hunter*)). Thus, Sound Transit's condemnation power encompasses all property "reasonably necessary" to effectuate the purpose of the RTA statute.

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 RTAs 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 RTAs 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. CITY LIGHT'S EASEMENT IS NECESSARY FOR THE PROJECT

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.*⁷

⁷ City Light acknowledges this standard in its opening brief, apparently abandoning the argument it made to the trial court that "'necessary' is not defined in RCW 81.112.080, but, as a common, non-technical term it should be given its plain meaning, which is 'absolutely required,' 'indispensable,' and 'needed to bring about a certain effect or result.'" CP 943.

"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 10. 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 9. 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 404), and that,

under the terms of the Amended MOU and related agreements, Sound Transit was responsible for acquiring the Parcel, some of which might be required for both the City's right of way project and Sound Transit's East Link project (*e.g.*, CP 574).

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 1235. 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.*

As in *Port of Seattle*, the designated public use here is clear: "construction, operation, and permanent location of the East Link Extension." CP 10, §§ 3, 4. Likewise, the lack of specific or detailed plans for the East Link Extension, which was the situation when Sound Transit legislatively determined the Parcel was necessary for its project, is insufficient to establish arbitrary and capricious decision-making amounting to constructive fraud. Because City Light failed to show arbitrary and capricious conduct amounting to constructive fraud, Sound Transit's necessity determination was conclusive, and the trial court's necessity finding must be affirmed.

C. ROAD IMPROVEMENTS WHERE 124th AVE NE INTERSECTS THE LIGHT RAIL LINE ARE AN INTEGRAL PART OF THE EAST LINK PROJECT, AND COLLABORATION BETWEEN BELLEVUE AND SOUND TRANSIT DOES NOT PROHIBIT SOUND TRANSIT'S CONDEMNATION

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. CP 404. 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 over the light rail tracks. CP 496. The bridge is specifically identified as part of the East Link project. *Id.* 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 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 over the trackway 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.

City Light, however, argues that Sound Transit's condemnation of the Easement is "not part of the construction of Sound Transit's light rail system" because some of the property rights sought will eventually be transferred to Bellevue. Opening Brief at 23. This is nearly identical to the argument made repeatedly and unsuccessfully by the property owner in this very case. *Central Puget Sound Regional Transit Authority v. Sternoff L.P.*, No. 75372-0-I, 2016 WL 6601639 (Wn. Ct. App. Nov. 7, 2016) (unpublished) at CP 811-825; *see also Central Puget Sound Regional Transit Authority v. Sternoff L.P.*, 187 Wn.2d 1016 (2017) (denying property owner's petition for review). 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] are tied to the East Link extension." The court affirmed the agency's judgment that the condemnation was "necessary to facilitate the East Link project," and this Court denied the owner's petition for review. CP 809, 816, 824.

The Court of Appeals decision was correct and the same analysis applies to City Light's challenge. Sound Transit is an RTA under RCW chapters 81.104 and 81.112. Those chapters authorize—and often require—RTAs to work with local governments to develop and implement transportation policy, and build and operate transportation systems and facilities.⁸ The collaboration between Sound Transit and the City of

⁸ 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

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. 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 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

authority may be authorized to operate"); RCW 81.112.080(2) (authorizing joint use of municipal transit facilities by agreement).

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 project.

D. THE PRIOR PUBLIC USE DOCTRINE DOES NOT BAR 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 Okanogan County*, 182 Wn.2d at 538-40 ¶ 31. 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 538-539 (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. 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.

Application of each of these alternative prior public use doctrine tests supports the trial court's determination that the prior public use doctrine does not prohibit condemnation in this case. 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 1236. 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).

1. Sound Transit may condemn City Light's Easement because it is not currently in use.

The mere possibility of an incompatible future use does not prohibit condemnation under the prior public use doctrine. To invoke the prior public use doctrine's compatibility requirement, the prospective

public use must be concrete and non-speculative: "[r]easonable expectation of future needs and a bona fide intention of using it for such purposes within a reasonable time are required to protect property from condemnation." *State ex rel. Polson Logging Co. v. Superior Court for Grays Harbor County*, 11 Wn.2d 545, 567-568, 119 P.2d 694 (1941). In *Polson*, this Court rejected the condemnee's argument that the condemnation should be barred due to the possibility that the condemnee would use the road in the future: "[t]he mere possibility that relator may at some future time desire to use the grade for a logging railroad . . . does not exempt that right of way from condemnation." *Id.* "[A] future use that rests upon conjecture or a contingency should yield to the more immediate necessity of the party seeking condemnation." *Id.* (quoting 18 Am. Jur. 720).

Likewise, 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. 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 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. 573, 576, 116 P. 25 (1911).

City Light does not presently use the Easement at issue here.

CP 998. In fact, in the 89 years that City Light has owned its electric transmission line easement, it has never used the portion of the easement east of 124th Ave NE. City Light's only electrical transmission system in the area is across the street from the Parcel, where it operates an electrical transmission line along the west side of 124th Ave NE. CP 997. City Light does not have any defined future plans to use its Easement. CP 998. Because the Easement at issue here is not in use, the prior public use doctrine does not bar the condemnation.

2. Even if the possibility of future use by City Light invoked the prior public use doctrine, Sound Transit may condemn the Easement because its Project is compatible with the future use.

Washington's prior public use doctrine allows the condemnation of public land already devoted to a public use when the proposed public use will not destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Okanogan County*, 182 Wn.2d at 538-40 ¶ 31 (citing 1A NICHOLS ON EMINENT DOMAIN § 2.17 at 2-58 (Julius L. Sackman ed., 3d ed. 2006)). For example, in *City of Tacoma v. State*, this

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).

Sound Transit presented evidence showing that, after its condemnation of the Easement, the remaining Easement area leaves room to construct an electrical transmission line with at least the same capacity as City Light operates across the street. CP 1058-1059. Such a system would require City Light to utilize a transmission line monopole design that is widely accepted in the industry but is not currently in use by the City. *Id.* While adopting such a pole may come with increased maintenance and operation costs, those costs do not destroy City Light's Easement, nor do they interfere with it to such an extent as is tantamount to destruction. At the conclusion of Sound Transit's project, City Light will be able to utilize its remaining Easement according to its stated purpose.

The trial court's conclusion that Sound Transit may condemn the Easement is therefore also supported by substantial evidence that the two uses are compatible.⁹

⁹ As City Light notes, the trial court made an "implicit[] finding that Seattle's electrical transmission corridor would not be disrupted by Sound Transit's taking." Opening Brief at 26. This finding is supported by substantial evidence in the record showing that the

3. Even if Sound Transit's proposed use was incompatible with City Light's future use, the prior public use doctrine does not bar the condemnation because Sound Transit's use is superior.

Under the prior public use doctrine, when a proposed use is incompatible with an existing public use, the courts examine whether the condemnor has the power to condemn the competing public use either by express statutory language or necessary implication. Once statutory authority is established, the courts examine the superiority of rights and interests between the competing parties. *Okanogan County*, 182 Wn.2d at 539, 543 ¶ 39 (citing *State v. Superior Court for Jefferson County*, 91 Wash. 454, 460-461, 157 P. 1097 (1916)). Specifically, courts consider "the present and prospective use of such property by the condemnee, the prospective use thereof by the condemner, the comparative advantages flowing to the public as between the ownership thereof by the condemnee and condemner, and the comparative advantage and disadvantages flowing to the condemnee and condemner by the

easement corridor will remain usable after the taking. *See, e.g.* CP 857 (finding that unused easement on parcel immediately south of the Sternoff parcel would not be destroyed by condemnation), 988 (testimony showing that Sound Transit intends to preserve City Light's easement for its intended use), 1058-59 (testimony showing that City Light would still be able to construct an electrical transmission line with industry standard equipment after condemnation).

ownership of such property." *Id.* (citing *State ex rel. Wash. Boom Co. v. Chehalis Boom Co.*, 82 Wash. 509, 514, 144 P. 719 (1914)).

Here, the trial court held that condemnation of the Easement fell within Sound Transit's condemnation authority. CP 1236. As described above, this decision should be affirmed because City Light is not presently using the Easement and its future use is compatible with Sound Transit's use. In addition, the decision is a correct application of the prior public use doctrine because Sound Transit's use is superior.

As to authority to condemn property already put to a competing public use, the analysis is the same as for the authority to condemn publicly owned property (*see* Argument A). Sound Transit has express statutory authority to condemn "all" property, except certain public property already in use for public transportation facilities, which Sound Transit may acquire only with the public owner's consent. RCW 81.112.080(2). City Light's Easement is not a public transportation property or facility, so Sound Transit's statutory condemnation grant is clear.

And under the balancing test, Sound Transit's use is superior. First, Sound Transit's imminent use is superior to City Light's unplanned, undefined, future use, which may never come to pass. Second, even if

City Light could not construct a transmission line identical to its current transmission line configuration on the west side of 124th Ave NE, it would be free to design an alternative configuration consistent with its remainder easement. The effect on City Light as a result of this taking would be the potential for increased costs associated with design, operation, and maintenance of its hypothetical future transmission line. On the other hand, if Sound Transit is denied the right to condemn the Easement, Sound Transit's multi-billion dollar, regional transit project could come to an abrupt halt, severed by City Light's electrical transmission line corridor, which runs north-south for miles. At a minimum, the carefully designed transportation plan, collaboratively developed over many years by Sound Transit, the City of Bellevue, and other regional stakeholders, would be dismantled. Thus, the advantages that will flow to the public from Sound Transit's acquisition of the Easement far outweigh any disadvantages to either the public or to City Light from the acquisition. Indeed, the only disadvantage—potentially increased costs of a hypothetical transmission line project—can be professionally appraised and is properly dealt with during the just compensation phase of these proceedings. It does not bar condemnation under any recognized principle of law.

E. SEATTLE'S STATUS AS A HOME RULE CHARTER CITY IS IRRELEVANT

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 31. 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 Light Rail expansion. 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 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 32. 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 could enable 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
PU&N Judgment.

DATED this 31st day of August, 2017.

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