

Case No. 70855-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CITY OF BELLEVUE,

Respondent,

v.

BEST BUY STORES, LP,

Appellant,

and

**HD DEVELOPMENT OF MARYLAND, INC.; HOME DEPOT
USA, INC.; 457 120TH AVENUE NE, LLC; PUGET SOUND
ENERGY, INC.; and KING COUNTY,**

Other Parties.

Appellant's Brief

R. Gerard Lutz, WSBA No. 17692
Clark Nichols, WSBA No. 8662
Edward C. Lin, WSBA No. 41857
PERKINS COIE LLP
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Telephone: 425.635.1400
Facsimile: 425.635.2400

Attorneys for Appellant
Best Buy Stores, LP

TABLE OF CONTENTS

I. ASSIGNMENT OF ERRORS 1

 A. Assignments of Error. 1

 B. Issues Related to Assignments of Error. 3

II. STATEMENT OF THE CASE 4

 A. Brief Introduction..... 4

 B. The Facts and Procedural Background. 4

III. SUMMARY OF ARGUMENT 14

IV. ARGUMENT 15

 A. Legal Standard. 15

 B. A 5-Lane Road Is Not “Necessary” Under the Facts
 and Circumstances; the City Has Repeatedly
 Acknowledged that a 4-Lane Road Will Meet the
 City’s Transportation Objectives 17

 C. Best Buy’s Related Pending SEPA/Writ Petition,
 Cause No. 13-2-06072-8 SEA (the "SEPA appeal") 25

 D. The Ordinance and Petition Do Not Reasonably
 Describe the Property Interests to Be Acquired or
 Damaged. 29

V. CONCLUSION 31

TABLE OF AUTHORITIES

Cases

<i>Central Puget Sound Regional Transit Authority v. Miller</i> , 156 Wn.2d 403, 128 P.3d 588 (2006).....	16, 17
<i>City of Des Moines v. Hemenway</i> , 73 Wn.2d 130, 437 P.2d 171 (1968).....	15
<i>City of Tacoma v. Welcker</i> , 65 Wn.2d 677, 399 P.2d 330 (1965)	17
<i>Hayes v. City of Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179 (1997)	17
<i>King County v. Theilman</i> , 59 Wn.2d 586, 369 P.2d 503 (1962).....	15, 20
<i>Koontz v. St. Johns River Water Management Dist.</i> , 133 S.Ct. 2586, 2593 (2013)	22
<i>McMoran v. State</i> , 55 Wn.2d 37, 345 P.2d 598 (1959).....	30
<i>Mueller v. Miller</i> , 82 Wn. App. 236, 917 P.2d 604 (1996).....	26
<i>Nielsen v. Employment Sec. Dept. of State</i> , 93 Wn. App. 21, 966 P.2d 399 (1998).....	27
<i>Port of Olympia v. Deschutes Animal Clinic, Inc.</i> , 19 Wn.App. 317, 576 P.2d 899 (1978).....	17
<i>Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC</i> , 159 Wn.2d 555, 151 P.3d 176 (2007).....	15
<i>Skagit County v. Skagit Hill Recycling, Inc.</i> , 162 Wn. App. 308, 321, 253 P.3d 1135 (2011).....	26
<i>State ex rel. Tacoma School Dist. No. 10, Pierce County v. Stojack</i> , 53 Wn.2d 55, 64, 330 P.2d 567 (1958).....	16, 17, 23
<i>State ex rel. Willapa Elec. Co. v. Superior Court In and For Pacific County</i> , 196 Wash. 523, 83 P.2d 742 (1938).....	29
<i>State v. Larson</i> , 54 Wn.2d 86, 338 P.2d 135 (1959).....	16, 23
<i>Unlimited v. Kitsap County</i> , 50 Wn. App. 723, 750 P.2d 651 (1988).....	16, 21

Statutes

RCW 8.12.060 28
RCW 8.12.090..... 3
State Environmental Policy Act (SEPA), chapter 43.21C RCW 8

I. ASSIGNMENT OF ERRORS¹

A. Assignments of Error.

1. The trial court erred in entering the Findings of Fact and Conclusions of Law Adjudicating Public Use and Necessity dated August 7, 2013 and Order Re: FFCL on Public Use and Necessity dated August 7, 2013.
2. The trial court erred in finding that City Council reviewed considerable community input and considered alternative design concepts for the project, Finding of Fact Nos. 9-12 (CP 866-67), as the process the City followed in making its decision regarding the project alignment is being challenged in a SEPA/Writ Petition currently pending in King County Superior Court, Case No. 13-2-06072-8 SEA.
3. The trial court erred in finding that the City undertook an alternatives analysis, Finding of Fact No. 14 (CP 868), as that alternatives analysis is being challenged in a SEPA/Writ Petition currently pending in King County Superior Court, Case No. 13-2-06072-8 SEA.
4. The trial court erred in finding that “Best Buy representatives have indicated on multiple occasions that Best Buy will appeal all permit decisions and approvals necessary to construct the

¹ Copies of the trial court's (i) Findings of Fact and Conclusions of Law Adjudicating Public Use and Necessity dated August 7, 2013 (hereafter “Order Adjudicating Public Use and Necessity”), (ii) Order Re: FFCL on Public Use and Necessity dated August 7, 2013 (hereafter “Order Re FFCL”), and (iii) Order Denying Motion for Reconsideration dated August 19, 2013 are included in the Appendix.

Project in order to delay the Project, including the potential loss of grant funding.” Finding of Fact No. 15 (CP 868).

5. The trial court erred in concluding that the property rights described as the Take Property in the City’s Petitions in Eminent Domain will be taken for the public use of public street improvements. Order Adjudicating Public Use and Necessity at Order Paragraph 1 (CP 869).

6. The trial court erred in concluding that the Take Property described in the City’s Petitions in Eminent Domain is necessary for the implementation of the public use of the NE 4th Street Extension Project. Order Adjudicating Public Use and Necessity at Order Paragraph 2 (CP 869).

7. The trial court erred in issuing the Order Re FFCL to the extent that the Order Re FFCL supports the Findings and Conclusions assigned error above.

8. The trial court erred in not requiring a more detailed description of the terms and conditions the City proposes for the easements it is condemning.

9. To the extent there is any question as to the lack of necessity of the fifth lane, the trial court abused its discretion in not granting Best Buy’s motion to have live witnesses and the trial court erred in concluding that the fifth lane was necessary.

B. Issues Related to Assignments of Error.

1. Is the City's taking of right of way for a 5th lane from Best Buy for the City's planned NE 4th extension legally and reasonably "necessary" for a "public use" and in the "public interest", or is it an abuse of the City's discretion amounting to constructive fraud, when the City concedes that it does not currently need the 5th lane and that the 5th lane only becomes necessary if and when Best Buy's Landlord undertakes private redevelopment of the property, after Best Buy's lease expires, in ways that may increase traffic flow on NE 4th between NE 120th and NE 116th? Assignments of Error 1, 5-7.

2. Did the City demonstrate compliance with RCW 8.12.090 and demonstrate that the easements it is condemning are "necessary" for a "public use" and in the "public interest" when the City failed to provide any details regarding the terms and conditions of the easements it proposes to acquire? Assignments of Error 1, 5-8.

3. Did the City Council violate the clear dictates of the law and abuse its discretion in finding that the property to be taken is "necessary" for a "public use" and in the "public interest" if the City has violated the environmental review and land use permitting processes conducted in violation of applicable law (assuming Best Buy's challenges

to the City's actions, still pending, are granted)? Assignments of Error 1-4.

4. Did the trial court abuse its discretion in not granting Best Buy's motion to have live witnesses and in concluding that the fifth lane was necessary to the extent there is any question as to the lack of necessity of the fifth lane? Assignment of Error 9.

II. STATEMENT OF THE CASE

A. Brief Introduction.

The City of Bellevue ("City") proposes to exercise its eminent domain authority to take a significant portion of a commercial property leased through the year 2023 (and potentially through 2043, by exercising lease extension options) by Best Buy Stores, LP ("Best Buy") as well as a portion of an adjacent property owned by HD Development of Maryland, Inc. ("Home Depot") for the City's proposed four-block extension of NE 4th Street from 116th Avenue NE to 120th Avenue NE. In this appeal, Best Buy is challenging the superior court's adjudication of public use and necessity.

B. The Facts and Procedural Background.

Best Buy leases and operates a retail store located at the property commonly known as 457 120th Avenue NE in Bellevue (the "Best Buy Parcel"). Declaration of Brendan Stuckey ("Stuckey Decl.") ¶4, Clerk's

Papers (“CP”) 451. Best Buy initially owned the Best Buy Parcel and custom built its store on the property. Best Buy later entered into a sale-leaseback with a passive investor in 2003. Declaration of Melissa Moseley (“Moseley Decl.”) ¶3, CP 906. The initial lease term lasts until 2023, and Best Buy has options to extend through 2043. *Id.*

The Best Buy Parcel and Home Depot Parcel were developed to function as mutually beneficial parts of an integrated shopping center. Stuckey Decl. ¶7, CP 451. The parcels are each burdened and benefitted by a Declaration of Covenants, Conditions and Restrictions (“CC&Rs”). *Id.* Under the CC&Rs, Best Buy and Home Depot have reciprocal parking and ingress/egress rights over the parking areas and driveways on the two parcels and share various utilities. Stuckey Decl. at ¶¶8-9, CP 452.

In 2006, an entity called KG Investment (“KG”) was negotiating a development agreement with the City of Bellevue to support KG’s plans to redevelop various properties in the Wilburton neighborhood just east of Downtown Bellevue. *See* Attachment F to Declaration of Edward Lin (“Lin Decl.”), CP 623-628. The properties KG proposed to redevelop included the Best Buy Parcel. *Id.* at CP 626. As part of the development agreement and to address increased traffic from KG’s plans for more intensive land uses, the City was expecting that KG would privately construct and dedicate an extension of the NE 4th Street from 116th to

120th Avenue NE. *Id.* KG wanted the City to commit to condemn Best Buy and Home Depot property if necessary to acquire the right of way for the NE 4th extension and offered to pay the City's costs for the condemnation action. *Id.* KG was concerned that it might not be able to acquire the right of way without at least the threat of City condemnation action. *Id.*

In 2007, KG Investment continued to lobby the City for various land use changes and approvals needed for its redevelopment plans for its properties along 116th Avenue NE (a/k/a "auto row") as well as the Best Buy Parcel. Attachment G to Lin Decl., CP 634-645. For example, KG was requesting a height increase for development from the current 30 feet under CB zoning up to 75 feet under new GC zoning, and noted to the City's Planning Commission that KG would be required to dedicate and construct the full 60-foot cross-section of NE 4th Street across the project site. *Id.* at CP 635-636, 639.

In 2007, an entity called 457 120th Avenue NE, LLC ("Landlord") acquired the Best Buy Parcel from the lessor and became Best Buy's new landlord. Decl. of M. Moseley ¶5, CP 907. Landlord is an entity affiliated with and represented by KG Investment. *Id.*; *see also* Att Q to Lin Decl. (CP 789). After Landlord acquired the property, Steve Kramer, KG's principal, approached Melissa Moseley, Best Buy's Director of Real

Estate, on multiple occasions to discuss possible redevelopment opportunities to relocate the store, but Best Buy was not interested. Moseley Decl. at ¶ 6, CP907.

In 2008, the City and KG began working as partners to fund and construct the NE 4th Street extension. On August 29, 2008, Steve Kramer wrote a letter to the Transportation Improvement Board stating that “KG Investment Management is pleased to provide this letter of partnership in support of the City of Bellevue’s NE 4th Street Extension project. . . .KG Investments has been working with the City for the past several years on defining the design parameters that would be most supportive of future development. We fully expect to participate in the implementation of the project, although the specifics of that investment have yet to be determined.” Att. I to Lin Decl., CP 650.

In September of 2008, City representatives first contacted Ms. Moseley to discuss the planned extension of NE 4th Street. Moseley Decl. at ¶¶7-10 (CP 908) and Attachment 1 (CP 914-15). Ms. Moseley learned that KG had told the City that Best Buy did not object to the City’s routing of NE 4th Street through the Best Buy store instead of the parking lot between Best Buy and Home Depot, which was the City’s original conceptual alignment. *Id.* Ms. Moseley asked the City to consider

alternative routes, but was told that the City was not looking at alternatives as the City needed to move forward with the project. *Id.*

In 2009, the City obtained a federal grant for the widening of 120th Avenue NE from the proposed new NE 4th Street extension connection at 120th Avenue NE north to NE 8th Street, which is meant to support the NE 4th extension. *Id.* at ¶ 13 (CP 909-10). Over the following years, as the City moved forward with its plans for NE 4th and widening of 120th, Best Buy objected to and challenged the City's efforts as it appeared to Best Buy that the City was taking many improper short cuts in the environmental and other processes supporting the City's alignment choice for the NE 4th extension. *Id.* Best Buy continues to challenge the City's environmental review under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, and related permitting for the NE 4th Street, which are currently pending before Judge Downing at the King County Superior Court. *See* "SEPA Appeal; Petition for Writs of Review; Petition for Declaratory Judgment; Petition for Review Under Chapter 36.70C RCW (Land Use Petition Act) (hereafter "SEPA/Writ Petition"), King County Superior Court Case No. 13-2-06072-8 SEA. Att. O to Lin Decl., CP 726-754.

In January of 2012, the City contacted Best Buy to discuss a potential new alternative alignment that the City was exploring. Moseley

Decl. ¶ 14 (CP 911); *see also* Email from N. LaCombe to M. Moseley (CP 882). The City explained that the new alternative would shift the NE 4th extension slightly south so as to avoid the Best Buy store building, and then the City would replace Best Buy and Home Depot's lost parking by acquiring portions of the former BNSF railway corridor adjacent to the Best Buy Parcel and Home Depot Parcel. *Id.*

On February 13, 2012, Ron Kessack, the City's Interim Assistant Director Capital Program Services, made a presentation to City Council regarding this new alternative. *See* Attachments B,² C (Transcript of video) and D (Council Agenda) to Lin Decl. (CP 557-591); *see also* Verbatim Report of Proceedings ("RP") 58-61 (Transcript of video exhibit played during oral argument). Mr. Kessack explained to the City Council the new alternative would only have four lanes for a portion of the NE 4th Street extension, instead of five lanes as previously designed. *Id.* When Mr. Kessack was asked by a Councilmember how the narrowing of the road would affect its functionality, Mr. Kessack explained that the City had analyzed that question and the initial analysis showed that the narrower road would still carry the traffic the City anticipated. Shortly thereafter, after Council members express concerns about grants and other

² Attachment B to the Lin Decl. was a portion of the video recording of the City Council meeting when this presentation was made. The video recording was on a CD and lodged as an exhibit in superior court, and was transferred to the Court of Appeals along with the Clerk's Papers. *See* Index to Clerk's Papers, Sub Nos. 36 and 37.

issues, the City abandoned the alternative of shifting the road to the south. Moseley Decl. ¶¶14-15 (CP 910-11).

In the following months, the City told Best Buy it was no longer considering any alternative that would shift the road to the south, but the City offered the possibility of it designing the road with four lanes instead of five if Best Buy would stipulate (i) to public use and necessity, (ii) to early possession and use, (iii) that Best Buy would not suffer damages under its leasehold, (iv) to not filing any administrative challenges, and (v) to get its Landlord's consent to Best Buy's redevelopment plans which were intended to mitigate impacts from the NE 4th Extension. *See* Letters to R. Gerard Lutz from Transportation Director David Berg and attorney Mike Kenyon (Att. S to Lin Decl.; CP 796-806); *see also* Moseley Decl. ¶¶ 14-19 (CP 910-913); Letter to M. Moseley from N. LaCombe (Att. 3 to Stuckey Decl.; CP 532-35). However, Best Buy was unable to obtain its Landlord's consent in the time-frame the City required. Moseley Decl. ¶¶14-19.

On February 4, 2013, the Bellevue City Council's consent agenda included an ordinance (Ordinance No. 6098) authorizing the acquisition of property from the Best Buy Parcel and Home Depot Parcel for the City's NE 4th Street extension. Declaration of Nancy LaCombe ("LaCombe Decl.") ¶ 15, CP 151. Best Buy submitted a written comment letter on

that date requesting that the Bellevue City Council table or reject the condemnation ordinance. *See* Letter attached to the Declaration of Nancy LaCombe (“LaCombe Decl.”) Exh. E, CP 189-201. Best Buy commented to Council that the proposed legislative findings were legally and factually unsupported because the underlying environmental review and land use processes for the project violated applicable law and therefore passage of the ordinance would be arbitrary and capricious and contrary to law. *Id.* The City Council ignored Best Buy’s objections and passed the ordinance on the consent agenda. Thereafter, Best Buy appealed the ordinance to superior court in conjunction with Best Buy’s appeal of the City’s environmental review. *See* SEPA/Writ Petition. Att. O to Lin Decl., CP 726-754.

On April 29, 2013, the City filed a condemnation action to acquire property from the Home Depot Parcel based on Ordinance No. 6098. *See* Petition in Eminent Domain, Case No. 13-2-18238-6 SEA. (CP) 1-16. Best Buy was named as a party to that action (along with Home Depot and King County) based on its easement and rights under the CC&Rs pertaining to the Home Depot Parcel.

On May 6, 2013, the City filed a condemnation action to acquire property from the Best Buy Parcel, naming Best Buy, its Landlord, Home Depot, Puget Sound Energy, Thrivent Financial for Lutherans (since

dismissed), and King County as defendants. *See* Petition in Eminent Domain, Case No. 13-2-18869-4 SEA. Clerk's Papers ("CP) 945-67.

Best Buy moved to consolidate the two cases for purposes of the City's motion for an order adjudicating public use and necessity. CP 37-114. That motion was granted by the Court. CP 542-44. On July 13, 2013, the City filed its Motion for an Order Adjudicating Public Use and Necessity, CP 129-145, which was set for hearing on August 6, 2013. The City also filed supporting declarations from the City's Capital Projects Manager Nancy LaCombe (CP 146-307) and Assistant City Attorney Monica Buck (CP 308-377).

Best Buy opposed the City's motion, CP 389-410, and filed supporting declarations from Best Buy's transportation consultant William Popp (CP 433-49), Best Buy's architect Brendon Stuckey (CP 450-541), Best Buy's Director of Real Estate Melissa Moseley (copy attached to the Declaration of R. Gerard Lutz, CP 411-32, and original at 905-22), and attorney Edward Lin, CP 548-826. No other party opposed the City's motion.

In addition, Best Buy filed a motion to present live witness testimony at the hearing on public use and necessity, CP 381-388, which the City opposed, CP 843-49. Judge Downing sent the parties a letter stating that it was unlikely that live testimony would be needed or

allowed. CP 877. Judge Downing repeated this early during the August 6, 2013 hearing on the City's motion. Verbatim Report of Proceedings ("RP") at pp 3-4.

Judge Downing heard oral argument on the City's motion on August 6, 2013. On August 7, 2013, Judge Downing signed and entered the findings of fact and conclusions of law prepared by the City. CP 863-71. Judge Downing also issued a separate order entitled "Order Re: FFCL on Public Use and Necessity" in which he offered some explication of the Court's views on the arguments raised by the parties. CP 872-75.

Best Buy moved for reconsideration and to amend the court's findings, CP 887-902, which was denied on August 20, 2013, CP 903-04.

On September 10, 2013, Best Buy filed a notice of appeal in each of the two cases. CP 923-42, 1000-19.

At the Court of Appeals, Best Buy moved to consolidate the two appeals. The other parties did not oppose consolidation and this Court consolidated the two appeals under the above-referenced case number.

On October 29, 2013, the City filed a motion to accelerate appellate review. Best Buy opposed the City's motion and requested that the appeal be held in abeyance until Best Buy's related challenges to the City's Ordinance No. 6098 and environmental review and permitting, which is currently pending in superior court, Case No. 13-2-06072-8 SEA,

are resolved as the outcome of that case could make this appeal moot or otherwise inform or affect the issues in this appeal. Commissioner Neal granted the City's motion and set an accelerated briefing schedule with instructions to update the Court on the status of the pending land use and environmental challenges. Best Buy filed a motion to modify the Commissioner's ruling, but no decision was made as of Friday, December 6, 2013.

On Monday, December 9, 2013, Judge Downing heard oral argument in the SEPA/Writ Appeal and indicated that he would rule by the end of the week.

III. SUMMARY OF ARGUMENT

The City concedes that a 4-lane extension of NE 4th Avenue for the portion across the Best Buy Parcel would meet its current and projected transportation needs and that the 5th lane is necessary only when and if the Best Buy store site is redeveloped for a different and more intensive private use that would generate more traffic on NE 4th. Best Buy has no plans to redevelop its site for any use other than for a Best Buy store, and Best Buy's transportation expert provided an un-rebutted expert declaration that the 5th lane is not necessary for the traffic predicted by the City for the NE 4th extension through 2030. CP 435. Taking "excess" property is not for a "public use." While Best Buy recognizes that a

legislative determination of “necessity” is given great deference by the courts, that deference is not warranted and should not be upheld when it is directly contradicted by undisputed evidence that there is no public need for a 5th lane and the only “need” for the fifth lane is to support speculative private redevelopment proposed by Best Buy’s Landlord in contravention of Best Buy’s lease rights.

IV. ARGUMENT

A. Legal Standard.

Entry of a decree of public use and necessity is appropriate “only when (1) the use in question is really a public use, (2) public interests require it, and (3) the property to be acquired is necessary to facilitate the public use.” *City of Des Moines v. Hemenway*, 73 Wn.2d 130, 138, 437 P.2d 171, 176 (1968). The City bears the burden of proving public use and necessity in a judicial condemnation process. *Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 566, 151 P.3d 176 (2007). As a general rule a road constitutes a “public use”, but the general rule must be applied to the facts of each case. *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962) (holding that public use and necessity was not established when a County was condemning for a road but the effect was to allow a neighboring land developer to take private property for a private use); *see generally*

Unlimited v. Kitsap County, 50 Wn. App. 723, 728, 750 P.2d 651 (1988) (holding that the public has no interest in the commercial development of property and thus County could not require dedication of roadway to support a neighboring development).

Also, the City may not condemn more property than is reasonably necessary. *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959) held that “no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity.” *See also State ex rel. Tacoma School Dist. No. 10, Pierce County v. Stojack*, 53 Wn.2d 55, 64, 330 P.2d 567 (1958) (“[T]aking of excess property is no longer a public use, and a certificate of public use and necessity must be denied”).

The condemning authority receives great deference on questions of necessity. “A legislative body's determination of necessity is conclusive unless there is proof of actual fraud or arbitrary and capricious conduct amounting to constructive fraud or the government fails to abide by the clear dictates of the law.” *Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 411, 417-18, 128 P.3d 588 (2006) (emphasis added). However, “the term constructive fraud is misleading in this context,” and “[Washington] courts, in actuality, review the declaration under the arbitrary and capricious standard.” *Port of Olympia v. Deschutes Animal Clinic, Inc.*, 19 Wn.App. 317, 321, 576 P.2d 899

(1978) (emphasis added). Courts have also stated that “selecting land for a public use will not be controlled by the courts, except for a manifest abuse of discretion, violation of law, fraud, improper motives, or collusion.” *Stojack*, 53 Wn.2d at 64.

To be entitled to deference a legislative determination of use and necessity must be reached “honestly, fairly, and upon due consideration” of the facts and circumstances. *Miller*, 156 Wn.2d at 417-418 (quoting *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965)). A City Council’s “conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious.” *Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179 (1997).

B. A 5-Lane Road Is Not “Necessary” Under the Facts and Circumstances; the City Has Repeatedly Acknowledged that a 4-Lane Road Will Meet the City’s Transportation Objectives

In this case, the evidence showed that the Council’s decision to take 5 lanes worth of property when only 4 lanes worth of property is necessary was not the result of an honest and fair decision, made upon due consideration of the facts and circumstances, and was not in the “public interest”. Thus, the superior court erred in concluding the property was necessary and for a public use. Assignments of Error 1, 2, 5-7

In February of 2012, Ron Kessack, Interim Assistant Director Capital Program Services, Transportation Department, told City Council

that, based on an initial analysis, NE 4th Phase 2 could be designed as four lanes (with one westbound lane and one dual left-turn lane) rather than five lanes, and that the four lanes could carry the traffic counts the City is anticipating because there is only one lane feeding into westbound NE 4th.³ Reducing the take from five lanes to four lanes would avoid taking approximately 2,000 square feet of Best Buy's store, take less parking, and it would allow more room for development of a parking deck (to mitigate lost parking spaces). Stuckey Decl. ¶19 (CP 454). Mr. Kessack stated that a fifth lane would be needed on NE 4th at the point west of Best Buy (the former railroad right of way), essentially for storage of westbound NE 4th traffic backing up at the NE 4th/116th intersection.

To quote a portion of Mr. Kessack's presentation to Council:

“[W]hat caused us to take a look at this though is really the impact, you're only feeding in one lane from any direction into that lane. **And so, do you need this second lane? And right now, we're looking at it and saying, you know, it's likely we don't.** We do want to run numbers on it and make sure and proof it out, but that's what we're looking at right now.”

Emphasis added. RP 61.

³ A video recording of Mr. Kessack's presentation to the City Council meeting was on a CD and lodged as an exhibit in superior court was transferred to the Court of Appeals along with the Clerk's Papers. See Index to Clerk's Papers, Sub Nos. 36 and 37. A transcript of Mr. Kessack's presentation to Council can be found at Exhibit C to the Lin Decl. (CP 588-64) and at RP 58-61.

The City concedes that the 4-lane design is feasible to meet anticipated traffic given the existing use of the Best Buy Parcel. City Motion at p. 5 (CP 133, lines 5-6). In a SEPA appeal hearing brief in late 2012, the Transportation Department stated:

“The City does not dispute that a four-lane roadway for NE 4th Street east of the BNSF railway corridor is feasible given the existing land uses present on the parcel leased by Best Buy and that Transportation staff have as articulated such during open public meetings before the City Council and to Best Buy. . . . Transportation has determined that future redevelopment of the Best Buy property will necessitate a five lane roadway.”

City of Bellevue’s Joint Hearing Brief, Hearing Examiner Case No. AAD 12-45 (Nov. 2, 2012), at p. 23, attached as Att. E to the Lin Decl. (CP 614).

The trial court was interested in another portion of Kessack’s testimony about whether the fifth lane had more “wiggle room.” RP 69. Best Buy had subpoenaed Mr. Kessack to appear and testify and, upon the trial court’s inquiry, requested that the court call him as a witness if there were any questions regarding his statements about the need for a fifth lane, which Best Buy believe the City had conceded. RP 69:3-72:15. It was an abuse of the trial court’s discretion not to grant Best Buy’s motion for live testimony to the extent that there was any question whether the fifth lane was necessary.

It does not satisfy public use and necessity for the City to acquire the fifth lane when that lane is not needed absent a speculative private redevelopment (by Best Buy's Landlord) that would violate Best Buy's lease rights. The facts in *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962), are analogous. In *Theilman*, a private developer was unable to acquire a right of way over a neighboring parcel to build a road and thus asked for the County's assistance. *Id.* at 590. The developer also agreed to reimburse the County for condemnation costs, to the extent reasonable. *Id.* The Court held that:

“Though we do not think the county's participation in taking relator's property by eminent domain is a cloak to cover private objectives, the effect of this action is to allow a private party to do indirectly that which the law forbids him to do directly. The ultimate effect is to allow a neighboring land developer to take private property for a private use.”

Id. at 595-96. Under such circumstances, the facts did not support a conclusion that public use and necessity required condemnation of the property. *Id.*

Here, the evidence shows that KG Investment, which is affiliated with and represents Best Buy's Landlord (Decl. of M. Moseley at ¶¶5-12, CP 907-909, and Att. Q to Lin Decl., CP 789), asked the City to assist with acquiring the right of way from the Best Buy Parcel and Home Depot Parcel for the NE 4th Extension in order to support KG Investment's

development plans and KG offered to reimburse the City for such costs (Att. F to Lin Decl, CP 626). Although there is no evidence that KG Investment is actually reimbursing the City for its condemnation costs as in *Theilman*, KG Investment helped the City obtain a grant for the NE 4th Extension by submitting a “letter of partnership” to the Transportation Improvement Board stating that KG “fully expect[ed] to participate in the implementation of the project.” Att. I to Lin Decl., CP 650. The effect of taking the fifth lane from the Best Buy Parcel is to take Best Buy’s 30-year leasehold interests in order to support its Landlord’s and KG’s private redevelopment plans. Taking private property for private development does not establish “public use and necessity”. See *Theilman*, 59 Wn.2d at 595-96; see also *Unlimited v. Kitsap County*, 50 Wn. App. 723, 728, 750 P.2d 651 (1988) (holding that the public has no interest in the commercial development of property and thus County could not require dedication of roadway to support a neighboring development).

Moreover, the City’s use of the possibility that it would condemn more or less road depending on property owner negotiations amounts to constructive fraud. The City’s Transportation Department representatives and former City Manager Steve Sarkozy repeatedly told Best Buy in person and in writing that it would accept a 4-lane alternative, but only on condition (among others) that Best Buy first get its Landlord’s consent to

Best Buy's plans to mitigate impacts from the street project (by rebuilding the store to the north and building a parking deck). *See* Decl. M. Moseley ¶¶ 15-16 (CP 911), Decl. B. Stuckey ¶18 (CP 453) and Att. 3 (letter from N. LaCombe to Best Buy) (CP 532-35), Decl. of E. Lin ¶ 22 (CP 554) and Att. S (CP 796-806).

Although Best Buy attempted to obtain its Landlord's consent, it could not do so within the time-frame the City imposed. Decl. M. Moseley ¶¶ 17-19 (CP 913), This should not have been a surprise to the City given that KG Investment, representative for Landlord, had been trying to get the City to condemn the Best Buy store in support of the Landlord's plans to redevelop a block of parcels surrounding the proposed NE 4th Street (including the Best Buy Parcel). *See* Decl. M. Moseley ¶¶11-12 (CP 909), Decl. of E. Lin ¶¶7, 21 and Attachments G (CP 634-45) and R (CP 795).

Given KG Investment's history of trying to construct the NE 4th Street extension while undermining Best Buy's business and leasehold interests, it was an abuse of the City's condemnation authority to acquire more property than the City's current or projected needs. The City unconstitutionally conditioned its "4-lane" option, offering to Best Buy the "carrot" that the City would take less property if Best Buy could secure its Landlord's cooperation in Best Buy's desired proposed settlement. *E.g.*

Koontz v. St. Johns River Water Management Dist., 133 S.Ct. 2586, 2593 (2013). This was doubly problematic given that the Landlords' representative, KG, wanted the City to take as much of Best Buy's property as possible, in the hope they could thereby "break" Best Buy's lease, and secure a financial windfall in the process. Decl. M. Moseley, at ¶ 19 (CP 913).

Regardless, the City simply may not condemn more property than is reasonably necessary. *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959) held that "no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity." *See also State ex rel. Tacoma School Dist. No. 10, Pierce County v. Stojack*, 53 Wn.2d 55, 64, 330 P.2d 567 (1958) ("[T]aking of excess property is no longer a public use, and a certificate of public use and necessity must be denied"). As a factual matter, Best Buy has a long-term lease with an initial term through 2023 and options to extend through 2043, well past the City's transportation planning horizon, and Best Buy has no plans to redevelop the Best Buy property for any use other than the current Best Buy store retail use. Decl. B. Stuckey ¶¶ 4, 5 (CP 451). Given that there is no need for the fifth lane at any time during the City's planning horizon, the fifth lane cannot be deemed "reasonably necessary" or in the public interest.

Even if the Best Buy Parcel is redeveloped and such redevelopment results in an increase in traffic on NE 4th that would create the need for a fifth lane, the City likely could and would require the developer to construct and dedicate the fifth lane. *See* Bellevue City Code 14.60.090 (“The city may require the dedication of right-of-way in order to incorporate transportation improvements which are reasonably necessary to mitigate the direct impacts of the development”); *see also* Attachment G to Lin Decl., CP at 635-636 and at 639 (in which KG Investment stated to the Bellevue Planning Commission, “As you know, the project developer will be required to dedicate and construct the full 60-foot cross-section of the NE 4th Street through the project site for a total linear distance of 1,250 feet”).

Finally, City Council approved Ordinance No. 6098 as part of its consent agenda without any discussion or any reasoning to support a 5-lane road rather than a 4-lane one.

Based on these unique facts and circumstances, the City Council’s finding that the property described in the Ordinance is “necessary” (when the property described is based upon the 5-lane alternative) was arbitrary and capricious. There is no evidence that a decision for a fifth lane was made “honestly, fairly, and upon due consideration” of the facts and circumstances. Therefore, the superior court’s conclusions that the portion

of the property proposed to be taken for the fifth lane is “necessary” and for a “public use” was error and should be reversed. Assignment of Errors 1, 2, 5-7.

C. Best Buy’s Related Pending SEPA/Writ Petition, Cause No. 13-2-06072-8 SEA (the “SEPA/Writ Appeal”)

In the related land use appeal and writ proceeding currently pending before Judge Downing in King County Superior Court, Case No. 13-2-06072-8 SEA, Best Buy has challenged (i) the City’s environmental review for the project under the State Environmental Policy Act, ch. 43.21C RCW (“SEPA”), (ii) the City’s issuance, to itself, of a critical areas permit for the NE 4th Street Extension (the NE 4th Street, as currently proposed, will cross-over and impact steep slope critical areas adjacent to the Best Buy store site), and (iii) the City’s condemnation ordinance to acquire right-of-way across the Best Buy Parcel (Ordinance No. 6098, which is the same condemnation ordinance at issue in this appeal). *See* Att. O to Lin Decl. (CP 726-754).

The trial/review hearing of the SEPA/Writ Petition is scheduled for December 9, 2013. A decision will likely be issued shortly thereafter. If Best Buy prevails in any of those challenges, it would likely make this appeal moot. The Council’s legislative findings of public use and necessity at issue in this appeal would be in violation of SEPA if the superior court invalidates the environmental review and would be arbitrary

and capricious if the critical areas permit required for NE 4th street extension is reversed (there is no necessity for the property if the road cannot be built as currently proposed). In addition, if the condemnation ordinance at issue in both cases (Ordinance No. 6098) is invalidated, then the Court's adjudication of public use and necessity, which relied upon and granted deference to the legislative findings in Ordinance No. 6098, must be invalidated.

Thus, the outcome of the SEPA/Writ Appeal may well be relevant to the issues in this appeal or make it moot. Depending on the outcome of the SEPA/Writ Appeal. Best Buy may move the Court for an opportunity to provide supplemental briefing.

In addition, it is likely that either the City or Best Buy will appeal the decision made in that case to this Court, in which case consolidation of the cases would be appropriate under RAP 3.3(b). RAP 3.3(b) provides "The appellate court, on its own initiative or on motion of a party, may order the consolidation of cases or the separation of cases for the purpose of review. A party should move to consolidate two or more cases if consolidation would save time and expense and provide for a fair review of the cases." The Court has suggested that when there are multiple appeals with the same facts and interrelated legal issues, the parties should "consolidate their cases in order to receive a comprehensive decision that

best uses judicial resources." *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 321 n.13, 253 P.3d 1135 (2011); *see also Mueller v. Miller*, 82 Wn. App. 236, 917 P.2d 604 (1996) (court consolidated an appeal of a quiet title action related to a sheriff's sale of property with an appeal of a denial of a motion to intervene in the prior collection action to challenge the sheriff's sale); *Nielsen v. Employment Sec. Dept. of State*, 93 Wn. App. 21, 966 P.2d 399 (1998) (cases involving identical issues of law appropriate for consolidation for purposes of Court's opinion).

Here, if the SEPA/Writ Petition is appealed to this Court, the relevant facts in both appeals will be the same because both involve the NE 4th Street extension and the City's processes and decision-making supporting that project. The legal issues are intertwined, and should be considered at the same time. In that regard, the City proceeded with its request for a determination of public use and necessity in advance of the hearing on Best Buy's SEPA/Writ Petition which is "putting the cart before the horse" as the environmental review and permitting need to precede the right-of-way property acquisition in project development.

Finally, the first sentence of Finding of Fact No. 15 (CP 868) (Assignment of Error 8) states that "Best Buy representatives have indicated on multiple occasions that Best Buy will appeal all permit decisions and approvals necessary to construct the Project **in order to**

delay the Project, including the potential loss of grant funding.”

Emphasis added. This Finding is irrelevant to the issues on appeal except in that it is flat wrong and thus should be corrected. This finding of fact is based on Nancy LaCombe’s declaration in support of the City’s motion for public use and necessity; however, her declaration is factually incorrect and based upon inadmissible hearsay. CP 151. First, Best Buy has never indicated that it would appeal permits and approvals “in order to delay the project, including the potential loss of grant funding.” Rather, Best Buy has repeatedly requested that the City complete environmental review prior to committing to a specific course of action rather than rush the process to try and satisfy unrealistic grant deadlines. *See, e.g.*, March 26, 2012 Letter to City Council at p.3 stating Best Buy’s concern that NE 4th Phase 1 property acquisition was being improperly rushed and completed prior to environmental review in order to save a federal grant (letter included as Exhibit E to Ms. LaCombe’s declaration, CP 175-178). Best Buy has appealed permits and approvals for the City’s “preferred alternative”, in the manner provided by law, to challenge the City’s claimed compliance with required environmental review processes, and based on the belief (supported by qualified expert and lay testimony) that there are reasonable and better alternatives that the City was required to consider in the environmental and critical areas permitting processes.

Second, Ms. LaCombe's declaration does not identify any statement or conduct on the part of any representative of Best Buy that is the basis for Ms. LaCombe's speculation that Best Buy would appeal all permits "in order to delay the project." If Ms. LaCombe drew an inference based on oral statements, her inference is based upon inadmissible hearsay, as it is not even clear who the "Best Buy representatives" are that she alleges made such a statement. Finally, the finding is unnecessary and irrelevant to the legal issue of public use and necessity. The first sentence of Finding of Fact No. 15 should be deleted in its entirety or amended to delete the phrase "in order to delay the project, including the potential loss of grant funding."

D. The Ordinance and Petition Do Not Reasonably Describe the Property Interests to Be Acquired or Damaged.

Under Washington law, a petition for condemnation must provide a "reasonably accurate description" of the property to be taken or damaged. RCW 8.12.060; *see also State ex rel. Willapa Elec. Co. v. Superior Court In and For Pacific County*, 196 Wash. 523, 529, 83 P.2d 742 (1938) (stating that property to be condemned must be described with "reasonable certainty"). A reasonably accurate description is needed to ensure that the parties and the Court are properly advised of the City's proposed take and to ensure that the City does not take more property than is reasonably necessary. The City's Petitions simply provide that a

“Permanent Easement” and a “Temporary Construction Easement” need to be acquired. This minimal description is insufficient to meet the statutory requirement and could result in the City taking or damaging more property, for a longer period, than needed for the project.

For example, Best Buy has a right of free and convenient access to 120th Avenue NE. *See McMoran v. State*, 55 Wn.2d 37, 40, 345 P.2d 598 (1959) (“the owner of property abutting upon a public thoroughfare has a right to free and convenient access thereto”). It is essential for the Best Buy store to have continued access to and from 120th Avenue NE (which is the only public street currently serving the property) during the City's construction of NE 4th Street Phase 2 if the store is to stay in operation during the City's NE 4th Extension.

For the same reason, it is critical to Best Buy's ability to continue operations during construction to know whether the City will commit to provide Best Buy with useable truck access along or through the City's NE 4th construction to provide Best Buy's delivery trucks with ingress to and egress from Best Buy's loading dock on the west side of Best Buy's store. Finally, it is critical for Best Buy to know whether the City's construction will be scheduled to permit Best Buy to implement a “cure” before NE 4th work starts, and whether the City's construction can be scheduled to avoid impacting Best Buy's busy November through January winter holiday

shopping period (namely “Black Friday” through the Superbowl). Decl. of B. Stuckey ¶¶ 13-17 (CP 452-455).

Finally, the City’s temporary construction easement as shown on Exhibit B to the Ordinance is incorrect as it shows the construction easement overlapping where the Best Buy store is currently located and expected to remain (north of the “Best Buy Building Demolition Limits” shown in the same exhibit). *See* CP 307.

A more definite and corrected statement of the City’s proposed take, including appropriate terms and conditions, should have been included in the Petitions and incorporated into the superior court’s order adjudicating public use and necessity. The superior court erred in concluding that the City provided a reasonably accurate description of the property it intends to acquire when the City did not include the scope, terms or conditions for those easements. Assignment of Error 8.

V. CONCLUSION

Best Buy respectfully requests that the superior court’s Findings of Fact and Conclusions of Law Adjudicating Public Use and Necessity dated August 7, 2013 and Order Re: FFCL on Public Use and Necessity dated August 7, 2013 be reversed. The City’s taking of right of way for a 5-lane road rather than a 4-lane one under the facts and circumstances is arbitrary and capricious and an abuse of the City’s constitutional authority.

Best Buy also respectfully requests that the City be required to provide a more detailed and corrected statement of the easement interests it proposes to acquire, limitations on the City's exercise of those rights, and their schedule and duration pursuant to RCW 8.12.060.

DATED: December 9, 2013

PERKINS COIE LLP

By: Clark R. Nichols

R. Gerard Lutz, WSBA No. 17692

Clark Nichols, WSBA No. 8662

Edward C. Lin, WSBA No. 41857

Attorneys for Appellant
Best Buy Stores, LP

Appendix

FILED
KING COUNTY, WASHINGTON

AUG 07 2013

SUPERIOR COURT CLERK
BY DEBRA BAILEY TRAIL
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF BELLEVUE, a municipal corporation,

Petitioner,

vs.

HD DEVELOPMENT OF MARYLAND, INC., a Maryland corporation; BEST BUY STORES, LP, a Virginia limited partnership; and KING COUNTY,

Respondents.

NO. 13-2-18238-6 SEA ✓

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

(Clerk's Action Required)

CITY OF BELLEVUE, a municipal corporation,

Petitioner,

vs.

457 120TH AVENUE NE, LLC, a Delaware limited liability company; HOME DEPOT USA, INC., a Delaware corporation; BEST BUY STORES, LP, a Virginia limited partnership; THRIVENT FINANCIAL FOR LUTHERANS; a Wisconsin corporation; PUGET SOUND ENERGY, INC., a Washington corporation; KING COUNTY; and DOES 1-10,

Respondents.

NO. 13-2-18869-4 SEA

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW ADJUDICATING PUBLIC USE AND NECESSITY - 1



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

1 THIS MATTER having come before the Honorable William Downing upon
2 Petitioner City of Bellevue's Motion Adjudicating Public Use and Necessity, and the
3 Court being otherwise fully advised in the premises, and having reviewed the records,
4 files and pleadings herein, NOW, THEREFORE, enters the following:

5 I. FINDINGS OF FACT

6 1. Petitioner City of Bellevue is a municipal corporation organized and existing
7 under the Optional Municipal Code, Title 35A of the Revised Code of Washington.

8 2. Respondents HD Development of Maryland, Inc. ("Home Depot") and 457
9 120th Avenue NE, LLC ("Principal Group") are the respective owners in fee of adjoining
10 real property and improvements located in Bellevue, Washington, portions of which real
11 property and improvements are partially taken by and subject to these Petitions in
12 Eminent Domain. Neither Home Depot nor Principal Group opposed the adjudication of
13 public use and necessity.

14 3. Respondent Best Buy Stores, LP ("Best Buy") is Principal Group's tenant, and
15 also holds an interest in a sewer easement, a joint sewer use and maintenance agreement,
16 and Covenants, Conditions, and Restrictions ("CC&Rs") burdening the Home Depot
17 Property. Best Buy opposed the adjudication of public use and necessity.

18 4. Respondent King County holds an interest in general and special taxes and
19 charges on the property which may become due. Respondent Puget Sound Energy holds
20 an interest in a utility easement. Neither King County nor Puget Sound Energy opposed
21 the adjudication of public use and necessity.

22 5. On February 4, 2013, the Bellevue City Council adopted Ordinance No. 6098,
23 which authorized the filing of this action, and which specifically declared the Take
24

1 Property to be "necessary" for the purposes set forth in the Ordinance in furtherance of
2 Phase 2 of the NE 4th Street Extension ("Project"). The Project includes the (a) extension
3 of NE 4th Street as a new five-lane arterial public street eastward from the eastern
4 boundary of the BNSF railway corridor to 120th Avenue NE; (b) installation of bike lanes,
5 and (c) related construction or addition of curb, gutter and sidewalk, retaining walls,
6 traffic signals, illumination, landscaping, irrigation, storm drainage and detention, and
7 other utility infrastructure.

8 6. The Project is one piece of a larger project known as the "Mobility and
9 Infrastructure (M&I) Initiative." The City Council developed and implemented the M&I
10 Initiative in order to address growth and planned development in the Downtown
11 Bellevue, Bel-Red (the area generally around the common border between the cities of
12 Bellevue and Redmond), and Wilburton areas.

13 7. The Project is included within the "Wilburton Connections" component of the
14 M&I Initiative, which is the area generally south of NE 8th Street. In addition to the new
15 improvements to be constructed as part of the Project, the M&I Initiative includes a
16 comprehensive network of other public improvements for vehicle traffic, pedestrians, and
17 bicyclists including construction of NE 4th Street westward from the eastern boundary of
18 the BNSF Railway corridor connecting with 116th Avenue NE (Phase 1 of the Project), as
19 well as similar improvements along 120th Avenue NE from NE 4th Street northward to
20 NE 8th Street, and then further northward of NE 8th Street for approximately sixteen
21 blocks (extending almost to SR 520). The M&I Initiative also includes similar,
22 additional improvements to segments of NE 6th Street, NE 15th Street, NE 16th Street, and
23 124th Avenue NE. All of the listed streets or avenues are public rights-of-way.
24
25

1 8. As described in the City of Bellevue's adopted Capital Investment Program for
2 fiscal years 2011 - 2017:

3 The NE 4th Street Extension Project is one of a number of
4 high priority transportation investments that make up the
5 Mobility and Infrastructure (M&I) Initiative. The M&I
6 Initiative was formed to address recent growth and planned
7 development in the Downtown Bellevue, Bel-Red, and
8 Wilburton areas. The NE 4th Street Extension Project in
9 association with a widened and improved 120th Avenue
10 NE, the planned extension of NE 6th Street, the planned
11 NE 15th/16th Street multi-modal corridor, and
12 improvements to 124th Avenue NE will support increased
connectivity between Downtown Bellevue, Wilburton, the
new Bel-Red transit-oriented-development node, and the
Overlake regional growth center. The new route will
provide an alternate to and relieve congestion at key
intersections including NE 8th Street at 112th Avenue NE
and NE 8th Street at 116th Avenue NE. Improvements will
enhance travel time and mobility options for passenger
cars, transit, freight, pedestrians and bicycles.

13 9. Before undertaking the Project, the City Council reviewed considerable
14 community input and undertook substantial community involvement over a period of
15 more than four years related to the M&I Initiative and the Wilburton Connections
16 component, including the Project. These community input and involvement measures
17 included multiple community meetings, multiple City Council meetings, and the resulting
18 consideration of several different alternative design concepts for the projects included
19 within the M&I Initiative, specifically including alternative design concepts for the
20 Project.
21

22 10. In particular with respect to the City's community input and involvement
23 processes, (a) the City conducted three "Open Houses" in 2010, all of which were
24 advertised in local media and on the City's web site; (b) announcements about the Open
25

1 Houses were sent to over 4,000 addresses in the surrounding areas, including all property
2 owners and tenants. Those unable to attend the public events were kept informed through
3 newsletters, press releases and a "Wilburton Connections" Web site; (c) multiple
4 meetings with property owners and tenants (specifically including Best Buy, Home
5 Depot, and others) were conducted during the past four years; and (d) elements of the
6 Project, including various design concepts and various street alignment alternatives, have
7 been discussed at numerous open public meetings of the City Council during the past four
8 years including, specifically, the City Council meetings of 02/25/08, 12/01/08, 1/20/09,
9 02/02/09, 07/27/09, 08/03/09, 02/01/10, 03/01/10, 04/19/10, 06/07/10, 07/06/10,
10 07/26/10, 08/02/10, 09/13/10, 09/20/10, 11/15/10, 11/29/10, 02/07/11, 03/07/11,
11 04/04/11, 10/10/11, 03/05/12, 03/12/12, 03/19/12, 03/26/12, 04/19/12, 04/16/12, and
12 02/04/13.

13
14 11. As a result, and over Best Buy's repeated objections, the City Council
15 ultimately selected the final alignment for the Project.

16 12. As part of the-above described community involvement process, City Staff
17 and the City Council expressly considered design concepts and street alignment
18 alternatives proposed by Best Buy. Numerous meetings occurred between City
19 representatives and Best Buy representatives to discuss Best Buy's concerns, including its
20 design and street alignment proposals. Meetings with Best Buy occurred on 01/28/10,
21 05/12/10, 05/18/10, 12/17/10, 12/20/10, 01/24/11, 02/01/11, 02/10/11, 03/17/11,
22 04/01/11; 06/14/11, 01/13/12, 02/28/12, 03/28/12, 04/18/13, 04/25/13, 04/30/12,
23 05/09/13, 05/16/13, and 06/06/13.
24
25

1
2
3
4
13. Additionally, City Staff and City Councilmembers received detailed letters from Best Buy dated 04/12/10, 04/19/10, 03/07/11, 03/05/12, 03/26/12, 04/16/12, and 02/04/13, in which Best Buy continued to express its concerns regarding the Project and continued to advocate for its preferred street design and alignment.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
14. Another result of the community input and involvement processes undertaken by the City and the City Council was the preparation in August 2011 of a detailed Alternatives Evaluation and Screening Technical Report ("Alternatives Analysis") for the NE 4th Street/120th Avenue NE Corridor Project. The various design and alignment alternatives considered for the Project over the years are described in particular at pp. 5-1 – 5-20 of the Alternatives Analysis.

15. Best Buy representatives have indicated on multiple occasions that Best Buy will appeal all permit decisions and approvals necessary to construct the Project in order to delay the Project, including the potential loss of grant funding. Delay can cause the City to lose portions of its state and federal grant funding for the Project. Best Buy has already appealed (a) the action of the City Council authorizing execution of a consultant agreement to complete final design and proposed plans, specifications and estimates for implementation of the NE 4th Street Extension from 116th to 120th Avenue NE, (b) administratively and judicially the issuance of the City's SEPA threshold determination, and (c) administratively the City's issuance of a Critical Areas Land Use Permit necessary for the Project (Best Buy's administrative motion for reconsideration of the Critical Areas Land Use Permit is pending as of the date of entry of these Findings and Conclusions).



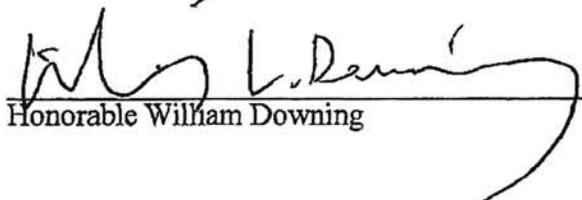
II. ORDER

WHEREFORE, having made and entered the above Findings of Fact, the Court now ORDERS, ADJUDGES AND DECREES:

1. The land, improvements, and property rights described as the Take Property in these Petitions in Eminent Domain will be taken for the public use of public street improvements for the NE 4th Street Extension Project, as more specifically described in Finding of Fact No. 5.

2. The Take Property as described in these Petitions in Eminent Domain is necessary for the implementation of the public use of the NE 4th Street Extension Project.

DONE IN OPEN COURT this 7th ^{Assess} day of July, 2013.


Honorable William Downing

Presented by:

KENYON DISEND, PLLC

By _____
Michael R. Kenyon, WSBA No. 15802
John P. Long, Jr., WSBA No. 44677
Attorneys for Petitioner
City of Bellevue

\\
\\
\\
\\
\\
\\
\\
\\
\\
\\

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW ADJUDICATING PUBLIC USE AND NECESSITY - 7



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Copy received; Agreed and Approved for Entry:

KANTOR TAYLOR NELSON EVATT
& DECINA PC

By _____
Glenn J. Amster, WSBA No. 8372
Attorneys for HD Development of
Maryland, Inc.

Copy received; Agreed and Approved for Entry:

PERKINS COIE LLP

By _____
R. Gerald Lutz, WSBA No. 17692
Edward C. Lin, WSBA No. 41857
Attorneys for Best Buy Stores, L.P.

Copy received; Agreed and Approved for Entry:

GRAHAM & DUNN, PC

By _____
Marisa Lindell, WSBA No. 18201
Larry J. Smith, WSBA No. 13648
Attorneys for Best Buy Stores, L.P.

Copy received; Agreed and Approved for Entry:

RIDDELL WILLIAMS P.S.

By _____
Courtney L. Seim, WSBA No. 35352
Attorneys for Puget Sound Energy, Inc.

≡
≡
≡

[REPOSED] FINDINGS OF FACT AND CONCLUSIONS
OF LAW ADJUDICATING PUBLIC USE AND
NECESSITY - 8



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

1 **Copy received; Agreed and Approved for Entry:**

2 DANIEL T. SATTERBERG
3 King County Prosecuting Attorney

4 By _____
5 Margaret A. Pahl
6 WSBA No. 19019
7 Senior Deputy Prosecuting Attorney
8 Attorneys for Respondent King
9 County
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS
OF LAW ADJUDICATING PUBLIC USE AND
NECESSITY - 9



Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

FILED
KING COUNTY, WASHINGTON

AUG 07 2013

SUPERIOR COURT CLERK
BY DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CITY OF BELLEVUE, a municipal
corporation,

Petitioner,

v.

HD DEVELOPMENT OF MARYLAND, INC.,
a Maryland corporation; et al.,

Respondents.

NO. 13-2-18238-6 SEA

ORDER RE: FFCL ON
PUBLIC USE AND
NECESSITY

CITY OF BELLEVUE, a municipal
corporation,

Petitioner,

v.

457 120th AVENUE NE, LLC, a Delaware
limited liability company; et al.,

Respondents.

NO. 13-2-18869-4 SEA

ORDER RE: FFCL ON
PUBLIC USE AND
NECESSITY

These consolidated matters came before the Court for argument on the
petitioner's motion for an order adjudicating public use and necessity. In a

ORDER RE: FFCL ON PUBLIC
USE AND NECESSITY-1

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

separate document, the Court has today entered its findings of fact and conclusions of law on the subject. This separate Order is being entered simply to offer some explication of the Court's views on the specific arguments raised.

The City Council of Bellevue has made a determination that its NE 4th Street extension project is a public use for which the taking of private property is necessary. It is beyond dispute that the use to which the property is to be put (as a public thoroughfare) is a public use. Whether or not that taking is necessary is presently disputed by respondent Best Buy Stores, LP (although not by the property owner 457 120th Avenue NE, LLC, from whom Best Buy leases the commercial space).

The determination that a governmental taking is necessary is a legislative determination that should generally not be subject to second guessing by the court. This court should only set aside the Bellevue City Council's action in issue if it were to conclude that the action was taken with such arbitrariness and caprice as to be the equivalent of a fraud.

If, for instance, the City Council were to have declared from the outset that NE 4th Street had to be precisely 70 meters in width because that is the width of the Champs-Élysées, that would be an arbitrarily chosen number and one that stemmed merely from caprice.

On the other hand, if the City Council received input from the public and affected parties, had the benefit of an analysis of transportation needs, considered alternative approaches and then made their legislative decision, such decision would be entitled to deference and, in fact, "deemed conclusive" absent

**ORDER RE: FFCL ON PUBLIC
USE AND NECESSITY-2**

**Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104**

the type of finding referenced above. It is of no moment that other alternatives to the one chosen may be equally feasible or even more feasible. "The decision may be unwise, but it is still a decision for the legislative body to make, not this court." RTA v. Miller, 156 Wn. 2d 403, 418, 128 P. 3d 588 (2006).

In its briefing, Best Buy suggests that the City's chosen alternative of a 5 lane roadway was more than the presently needed 4 lanes and that, therefore, there is no necessity "*from a transportation perspective*." It suggests that the City recognized that it was taking more than necessary but was doing so in collusion with the property owner with a view to removing Best Buy from its long-term lease and facilitating future redevelopment of the property. This, it asserts, was arbitrary and capricious. Four responses to this argument must be briefly stated.

First, for these purposes, necessity is not limited to present necessity; rather, the legislative body properly looks to future needs. Tacoma v. Welcker, 65 Wn. 2d 677, 684, 399 P. 2d 330 (1965).

Second, "the City" has decidedly not made a determination that 5 lanes were not necessary. To the contrary, the City Council has determined that they were. There has been ongoing discussion – both before and after that determination – of how other potential options might be developed and, in connection with this, city employees have expressed an openness to that proposition. However, the Council made its "intuitive" determination – and stuck with it – that it preferred the "more functionality" provided by the greater width.

Third, and most importantly, regardless of what disputes may now or in the future exist between Best Buy and its landlord, the property owner, it remains

ORDER RE: FFCL ON PUBLIC
USE AND NECESSITY-3

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

entirely speculative to suggest that the Bellevue City Council was either acting with an improper motive or utilizing improper means. This speculation is lacking in evidentiary support and the contention has not been established.

Finally, it should be noted that “[e]ven if the decision was partially motivated by improper considerations, it will not be vacated so long as ‘the proposed condemnation demonstrates a genuine need and...the condemnor in fact intends to use the property for the avowed purpose.’” RTA v. Miller, supra, at 418.

Two procedural matters remain. First, the Court concludes that the property to be taken has been adequately described. Second, Best Buy has requested that the public use and necessity order be “held in abeyance” pending resolution of the two land use petition appeals it is pursuing related to this project. Expressing confidence in its getting the project approvals reversed, Best Buy asserts this approach would serve the interests of judicial economy. However, it seems as practical to allow the promised appeal of the public use and necessity determination to proceed while the necessarily separate land use cases do the same. Certainly the option remains available for Best Buy to convince this Court in the land use cases that the Bellevue City Council acted so far outside the law that the public use and necessity determination should be vacated (with Court of Appeals approval, if necessary).

Dated this 7th day of August 2013.


Honorable William L. Downing

**ORDER RE: FFCL ON PUBLIC
USE AND NECESSITY-4**

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

FILED

KING COUNTY WASHINGTON

AUG 20 2013

**SUPERIOR COURT CLERK
ANDRE JONES
DEPUTY**

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CITY OF BELLEVUE, a municipal corporation,

Petitioner,

v.

HD DEVELOPMENT OF MARYLAND, INC.,
a Maryland corporation; et al.,

Respondents.

NO. 13-2-18238-6 SEA

ORDER DENYING
MOTION FOR
RECONSIDERATION

CITY OF BELLEVUE, a municipal corporation,

Petitioner,

v.

457 120th AVENUE NE, LLC, a Delaware
limited liability company; et al.,

Respondents.

NO. 13-2-18869-4 SEA

ORDER DENYING
MOTION FOR
RECONSIDERATION

These consolidated matters now come before the Court on defendant Best Buy Stores' Motion for Reconsideration as to the Findings and Conclusions entered on August 7, 2013.

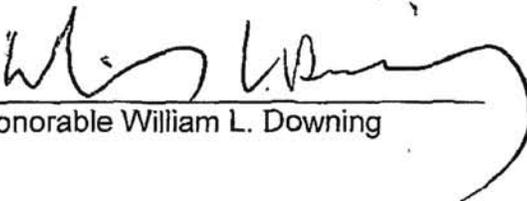
**ORDER DENYING MOTION
FOR RECONSIDERATION-1**

**Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104**

The Motion correctly points out a couple inaccuracies in that document. First, paragraph 15 stated that Best Buy then had a motion for reconsideration pending before a hearing examiner when, in fact, that motion had already been denied and a Land Use Petition Act appeal filed. Second, paragraph 12 used the phrase "proposed by Best Buy" when all agree that "advocated by Best Buy" would have been a more accurate characterization.

If the parties should agree that appellate review would be aided by making these emendations to the filed set of findings and conclusions (or by the addition of any other agreed facts), the Court would approve. Otherwise, this Order may stand as a clarification of the record and the Motion for Reconsideration is DENIED.

Dated this 19th day of August 2013.


Honorable William L. Downing

**ORDER DENYING MOTION
FOR RECONSIDERATION-2**

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

I certify subject to penalty of perjury under the laws of the State of Washington that on the 9th day of December, 2013, a true and correct copy of the following document(s):

Appellant's Brief

was served upon the below-listed parties by the methods indicated:

By Email and U.S. Mail (postage prepaid):

Attorneys for 457 120th Avenue NE, LLC

Marisa Lindell, WSBA No. 18201
Graham & Dunn, PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
mlindell@grahamdunn.com
HReynolds@grahamdunn.com (email copy only)
Ph: 206/624-8300

Attorneys for HD Development of Maryland, Inc. and Home Depot USA, Inc.

Glenn J. Amster, WSBA No. 8372
Kentor Taylor Nelson Evatt & Decina PC
901 Fifth Avenue, Suite 4000
Seattle, WA 98164
Ph: 206/625-9898
gamster@kantortaylor.com

Attorneys for King County

Margaret A. Pahl, WSBA No. 19019
Sr. Deputy Prosecuting Attorney
CIVIL DIVISION
W400 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Ph: 206/477-1120
Peggy.pahl@kingcounty.gov
Lebryna.tamaela@kingcounty.gov (paralegal)

Attorneys for Puget Sound Energy, Inc.

Courtney L. Seim, WSBA No. 35352
Riddell Williams, P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154-1192
Ph: 206/634-3600
cseim@riddellwilliams.com

Attorneys for City of Bellevue

Michael Kenyon, WSBA No. 15802
Kenyon Disend PLLC
11 Front Street South
Issaquah, WA 98027
Ph: 425/392-7090
mike@kenyondisend.com

EXECUTED this 9 th day of December, 2013, at Bellevue,

Washington.



Karen Campbell

2013 DEC 9 11:19:38
KING COUNTY