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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

Airport Investment COMPANY, INC.,

Appellant,

vs.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, dba
SOUND TRANSIT, et al.,

Respondent.

SOUND TRANSIT'S RESPONSE BRIEF

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INTRODUCTION

Airport Investment Company owns a 130-room hotel just south of SeaTac Airport. Sound Transit took a permanent easement and a temporary construction easement (“TCE”) along the back of the property in order to install an elevated light rail guideway necessary to extend light rail service south of the airport.

Thirty days before trial, Sound Transit offered Airport Investment \$463,500 for the two easements. At the time, there were two significant valuation issues in contention. First, Airport Investment claimed the permanent easement for the elevated light rail guideway would damage the property remainder by about \$1.6 million, whereas Sound Transit did not believe the easement and guideway, located over 75 feet from the back wall of a transportation-oriented airport hotel, would damage the remainder at all. Second, Airport Investment claimed about \$900,000 in lost income and other consequential damages allegedly resulting from the TCE, whereas Sound Transit believed those items were not legally compensable and, in any event, were speculative and unsupported.

The other valuation issues – the fair market value of the permanent easement and the fair market rental value of the TCE – were far less significant. At trial, Sound Transit’s appraiser valued the permanent easement at \$113,169, compared to Airport Investment’s appraised value

of \$210,000. But Sound Transit's appraiser consistently valued the TCE higher than Airport Investment's appraiser ever did – presenting a trial valuation of \$61,503, compared to Airport Investment's \$32,124.

After a two-week trial, the jury awarded Airport Investment \$225,000 – \$163,497 for the permanent easement, and \$61,503 for the TCE. Airport Investment does not take issue with the Trial Court's jury instructions or other substantive rulings. Instead, Airport Investment has isolated two evidentiary disputes, and claims they warrant a new trial. In addition, Airport Investment asserts it is entitled to attorney fees because Sound Transit modified the TCE to ameliorate some of Airport Investment's concerns about the TCE's impact on its business.

**RESTATEMENT OF ISSUES PERTAINING TO AIRPORT
INVESTMENT'S ASSIGNMENTS OF ERROR**

A. Evidence of Franchise Requirements and Business Practices:

Business losses and consequential damages are not compensable in eminent domain. Airport Investment nonetheless claimed that its franchisor's money-back guaranty and one-stall-per-room parking requirement entitled it to recover anticipated lost room rentals and valet parking expenses during the TCE term. Did the Trial Court abuse its discretion in excluding evidence of Airport Investment's particular

franchisor-imposed hotel operation requirements and business practices as irrelevant, misleading, and unfairly prejudicial?

To appeal an evidentiary exclusion, the appellant must have made an offer of proof showing how the excluded evidence would support a valid claim. Airport Investment failed to make any offer of proof regarding Hampton Inn's franchise requirements and business practices or how they were tied to the property's fair market value or fair market rental value rather than alleged business losses and consequential damages. Did Airport Investment preserve the issue for appeal?

B. Airport Investment's Value Opinion Based on Lamb Appraisal:

An admission by a party opponent is not hearsay, and an owner's opinion of value is admissible in eminent domain. Sound Transit elicited testimony from Airport Investment's President, Sandra Oh, about Airport Investment's prior opinion of value, which Airport Investment had communicated to Sound Transit. Did the Trial Court abuse its discretion in admitting this evidence?

Ms. Oh volunteered that the prior opinion of value was based on an appraisal. Airport Investment did not move to strike or request a curative instruction, choosing instead to elicit Ms. Oh's testimony about the appraisal's perceived limitations. May Airport Investment argue on

appeal that it is entitled to a new trial based on the appraisal evidence it introduced?

Airport Investment moved in limine to exclude the prior appraisal on the ground that it was prepared by a consulting expert and constituted an offer of settlement. The Trial Court ruled that Airport Investment waived any such privileges by giving the appraisal to Sound Transit without designating it a settlement offer, and Airport Investment has not presented contrary authority on appeal. Has Airport Investment shown it was an abuse of discretion to deny the motion?

C. Attorney Fees and Costs:

A condemnee has a statutory right to attorney and expert witness fees when it obtains a just compensation judgment at least ten percent higher than the condemnor's highest settlement offer in effect thirty days before trial, or if there was no such offer. Thirty days before trial, Sound Transit offered Airport Investment \$463,500. At trial, Airport Investment recovered \$225,000. Did the Trial Court err in denying Airport Investment's motion for fees?

Sound Transit originally sought a non-exclusive three-year TCE, with exclusive occupancy as needed for construction (projected to require periodic exclusive occupancy for a total of ten to twelve weeks). Responding to Airport Investment's parking concerns, Sound Transit

reduced the TCE area, and placed a 160-day ceiling on the total number of exclusive-occupancy days. Did these changes compel the Trial Court to hold that Sound Transit had abandoned the proceeding or nullified its 30-day offer?

Airport Investment claimed \$1.6 million in remainder damages from the permanent easement, and \$900,000 in business losses and consequential damages from the TCE. The TCE changes reduced Sound Transit's TCE value by about \$7,000 to \$61,503, which was still higher than Airport Investment's highest value. Were the TCE changes so material that they compelled the Trial Court to hold that Sound Transit had abandoned the proceeding or nullified its 30-day offer?

STATEMENT OF THE CASE

A. The Airport Investment Property

Airport Investment owns property just south of SeaTac Airport. The property consists of approximately 112,626 square feet of land area and is developed with a 4-story, 130-room hotel, constructed in 1988. CP 346. The main entrance to the hotel is via a driveway from International Boulevard, the principal north-south arterial serving the airport, which abuts the property's eastern boundary. Ex. 37 p.3. **Appendix A** (Exs. 36, 70, 37 p.3) shows aerial views of the property and its location.

Airport Investment operates the hotel under a Hampton Inn franchise. CP 343.

B. Sound Transit's Taking: the Two Easements

On July 28, 2011, Sound Transit resolved to acquire a permanent guideway easement and a TCE over the Airport Investment property. CP 2-3. **Appendix B** (Exs. 134, 135) shows the easements, both as an overlay to an aerial view of the property and in plan view.

The permanent guideway easement allows for the operation of an elevated light rail line along the property's western frontage on 28th Avenue South, behind the hotel. CP 1002, 1007-12; Ex. 134. The guideway will run approximately 31 to 33 feet above the existing grade. VRP 537-38; Ex. 40. Existing surface uses within the easement area (landscape and parking) are not inconsistent with Sound Transit's use, and may continue.¹ CP 1007. The 3,991 square-foot easement is approximately 11.5 feet wide. VRP 543. The eastern edge of the light rail guideway will be about 77 feet from the west (back) wall of the hotel building. VRP 538; Exs. 23, 40.

¹ Airport Investment's statement that Sound Transit "sought a permanent taking in fee simple" is simply false, although Airport Investment's appraiser valued it at 100% of its land value, as if it were a fee taking. VRP 1391-92, 1559-60.

Sound Transit also took a three-year TCE to enable its contractor to construct the guideway. CP 1002, 1014-19. The TCE area extends beyond the eastern edge of the guideway easement approximately ten feet farther into the property. Exs. 134, 135.

The original TCE provided for a 3,883 square-foot easement area that included a bumped-out area the contractor would need only if the guideway column placement required a driveway relocation. CP 56, 1414. Once Sound Transit confirmed the driveway would not be relocated, it agreed to eliminate the bump-out in order to partially address Airport Investment's concerns about parking impacts. CP 1414. Before trial, Sound Transit confirmed in writing that it had reduced the TCE area and provided an updated parcel map and updated right of way plan showing the change. CP 405, 1415. This reduced the TCE area to 2,885 square feet. CP 1019, 1414. Although Airport Investment had already agreed to Sound Transit's possession and use of the larger TCE area, it did not oppose the square-footage reduction. CP 405; VRP 42-46.

The original TCE provided that except for times Sound Transit required exclusive occupancy, Airport Investment would retain the right to use the TCE area for all purposes, except those inconsistent with Sound Transit's construction activities. CP 53. The TCE provided (CP 53 [emphasis added]):

[Sound Transit] shall have the right *at such times as may be necessary*, to enter upon the Easement Area ... for the purpose of constructing aerial guideway, street connections, and utility connections. ... [Sound Transit] shall have the right to fence all or a portion of the Easement Area *from time to time* during the Term. [Sound Transit's] right to use the Easement Area shall be exclusive *at such times and for such durations*, as [Sound Transit's] construction requires, in [Sound Transit's] discretion. *At all other times, [Sound Transit's] right to use the Easement Area shall be non-exclusive.* ...

... Except for those times when [Sound Transit] is making exclusive use of the Easement Area, *[Airport Investment Company] shall retain the right to use and enjoy the Easement Area ... so long as such use does not interfere with [Sound Transit's] construction* of the public improvements described in this Easement.

Sound Transit consistently communicated to Airport Investment that its construction activities would require only sporadic use of the TCE area, and for most of the three-year TCE term Airport Investment would retain the ability to use the area as it was currently used – for hotel parking. CP 1416; VRP 30-31; *see* Ex. 148.

In its motions in limine filed the week before trial, Airport Investment requested the Trial Court to exclude any evidence that Sound Transit would use the TCE area for less than the entire three-year term. CP 396. When the motions in limine were heard on the first day of trial, the Trial Court agreed with Airport Investment that if Sound Transit had the *right* to exclusive use of the TCE area for the entire three-year term it

could not show the jury that its *actual* use would be far less. VRP 31-37, 60-61. As a result, Sound Transit stated it would try to craft new TCE language that would limit Sound Transit's exclusive right to use the TCE area to be more consistent with its anticipated use. VRP 388. The Trial Court granted Airport Investment's motion in limine, "provided, however, this ruling ... does not preclude [Sound Transit] from submitting a revised form of [TCE] providing for the actual time of use of the easement area." CP 904.

Sound Transit quickly revised the TCE and provided it to Airport Investment after jury selection, but before trial began. CP 1417; VRP 447. The revised TCE retained the nonexclusive three-year term, and gave Sound Transit the right to exclusive use of the TCE area for up to a total of 160 non-consecutive days during that term (CP 1015):

Grantee's right to exclusive use of the Easement Area shall be limited to a maximum of one hundred sixty (160) non-consecutive days between August 1, 2013 and July 31, 2016. Grantee may group one or more days of exclusive use into periods of exclusive use to accommodate the various phases of construction for which the Easement Area is needed.

The 160-day limit on exclusive use was about twice as much as Sound Transit anticipated and had previously communicated to Airport Investment it would need, thereby allowing for possible construction delays, schedule changes, and other unforeseen contingencies. CP 1417.

The revised TCE also required fourteen days' notice to Airport Investment before each exclusive use period. CP 1015. Airport Investment complained the revised language was still not specific enough and fourteen days' notice was too short, but did not otherwise oppose the changes, and did not contest Sound Transit's right to make them. VRP 36-37, 399-401, 448, 570-71, 1284, 1431-36. Trial proceeded under the revised TCE. VRP 550-57, 610-15, 1695-96; Ex. 149.

C. The Appraisals

In May 2012, Sound Transit sent Airport Investment an offer to purchase the easements for \$142,300 based on an initial appraisal by Murray Brackett, the appraiser who testified for Sound Transit at trial. CP 216. Sound Transit provided Airport Investment with Mr. Brackett's initial appraisal and informed Airport Investment that it had the right to obtain its own appraisal at Sound Transit's expense. CP 204, 216. Airport Investment did so, hiring Patrick Lamb, who valued the acquisition at \$485,000. CP 204, 219, 257. Airport Investment submitted the Lamb appraisal to Sound Transit in July 2012, with an invoice for the Lamb appraisal fee and a letter that expressed Airport Investment's strong belief that it was entitled to \$485,000 as just compensation for the two easements. Airport Investment Appendix 7 (Unadmitted Ex. 158).

Early in 2013, Airport Investment informed Sound Transit that it would be engaging another appraiser. CP 206. That appraiser was Scott Biethan, who testified at trial for Airport Investment. CP 257. Mr. Biethan completed his appraisal in late May 2013. CP 675. He valued the permanent easement area at \$210,000 and appraised the easement at 100% of the land value, for an easement value of \$210,000. VRP 1391-92, 1502, 1559-60. He also concluded that the permanent easement would damage the remainder of the hotel property in the amount of about \$1.6 million. CP 348, 1412-13. At trial, Mr. Biethan testified that the permanent easement damaged the property remainder in the amount of \$1,457,000. VRP 1538-39.

Sound Transit's appraiser, Murray Brackett, updated his appraisal in May 2013. CP 533-34; VRP 1110-11. He valued the permanent easement at \$113,169. CP 535; VRP 1072. This was based on a 50% reduction in land value for the easement area plus the value of site improvements to be removed from the area and the cost of replacing a sign. VRP 1054-59. He concluded that the easement acquisition and guideway would not result in any damage to the remainder. VRP 1072. These were the opinions he testified to at trial. VRP 1111.

Based on the original TCE square footage, Sound Transit's appraiser valued the TCE at \$68,657 in his May 2013 appraisal. CP 535,

1415. The smaller TCE reduced Mr. Brackett's TCE valuation to \$61,503, which was the amount Sound Transit presented at trial. CP 1415; VRP 1119-20.

Based on the original TCE square footage, Airport Investment's appraiser valued it at \$56,000. CP 1415. He also concluded that the TCE would result in damages totaling about \$900,000 in lost room rentals and valet parking expenses. CP 694, 1413. At trial, Mr. Biethan valued the TCE at \$32,124. CP 1415; VRP 1502. The reduction was due in part to the decrease in square footage, but mostly reflected the elimination of compensation for a fourth year of the TCE.² CP 1415.

Although Airport Investment would, for most of the TCE term, retain the ability to use the TCE area, both appraisers always valued the TCE at 100% of the three-year fair market rental value of the TCE area, as if Sound Transit would have exclusive use of the TCE area throughout the TCE term. CP 1418; VRP 1093-94; VRP 1501-02. Sound Transit's TCE valuation was higher than Airport Investment's because Sound Transit's appraiser included compensation for the entire area of the parking stalls rendered unusable by the TCE (about 4,000 square feet), even if the TCE

² AIC's appraiser's \$56,000 valuation was erroneously based on a 4-year TCE, rather than a 3-year TCE with a fourth-year option. CP 1415.

encompassed only part of the stall. VRP 1090-91.

The revised TCE language that limited Sound Transit's exclusive use of the TCE to a total of up to 160 days did not change either appraiser's TCE valuation. CP 1415-17. They both continued to evaluate the TCE's fair market rental value as if Sound Transit would have exclusive use of the area throughout the entire three-year term. *Id.*

What ultimately made a difference in the appraisal Airport Investment presented at trial was the Trial Court's agreement with Sound Transit that, as a matter of law, lost income and consequential damages were not compensable. CP 1417. As a result of this legal ruling, which Airport Investment does not challenge on appeal, Airport Investment's appraiser did not present to the jury his opinion that Airport Investment would suffer \$900,000 in lost profits and valet parking expenses due to the TCE. CP 348, 1413; VRP 444-45, 1306-08, 1484-87.

D. Pretrial Procedure: Discovery and Continuance

Sound Transit filed this action in October 2012. CP 1. It obtained an order adjudicating public use and necessity for the acquisition in early November 2012. CP 87-91. In late November, Airport Investment stipulated to possession and use. CP 111-114.

Sound Transit propounded written discovery on Airport Investment in November 2012, which Airport Investment did not respond

to until April 2013. CP 206-08. After receiving Airport Investment's responses, Sound Transit noted depositions of Airport Investment's experts and representatives. CP 210. Sound Transit moved for a timely appraisal exchange, which Airport Investment opposed. CP 129-33, 139.

Airport Investment propounded written discovery on March 28, 2013, the last possible date before the April 29, 2013 discovery cutoff. CP 209. Sound Transit responded on time. *Id.* Airport Investment did not note or otherwise approach Sound Transit before the discovery cutoff about taking any depositions. CP 210.

On May 2, after the discovery cutoff, Airport Investment moved to continue the trial because Mr. Biethan, the appraiser it had hired to testify, could not complete his appraisal in time for trial. CP 1413. Sound Transit did not object to the continuance, but asked the Trial Court to extend the time for conducting depositions Sound Transit had previously noted until after Airport Investment's appraisal was complete. *Id.* Although Airport Investment had failed to note any depositions, it then asked in its reply for permission to depose a Sound Transit representative and Sound Transit's appraiser. *Id.* This was the first time Airport Investment had expressed interest in conducting these or any other depositions. *Id.*

On May 16, the court continued the trial from June 17 to July 15, 2013. CP 284. The continuance order provided that "***Previously noted***

depositions shall be postponed to mutually convenient dates and times to be determined by the parties during the week of June 3, 2013 (after Respondent's full appraisal is provided to Sound Transit pursuant to outstanding discovery requests, and at least six weeks before trial)." *Id.* [emphasis added]. Nonetheless, Airport Investment noted depositions of Sound Transit's appraiser and a Sound Transit representative the following day. CP 1414. Sound Transit allowed Airport Investment to depose its appraiser and gave Airport Investment the choice to either depose Kim Wong, Sound Transit's representative, or meet with him informally. *Id.* Airport Investment chose the latter, and the meeting occurred on May 30, 2013. *Id.* Airport Investment eventually deposed Kim Wong on July 16, the day before trial began; the deposition was by agreement – Airport Investment never asked the Court for leave to depose Mr. Wong or sought to compel the deposition. *Id.*

E. Sound Transit's 30-Day Offer

Sound Transit made its 30-day offer on June 14, 2013 in the amount of \$463,500. *Id.*; CP 1334. By that time the parties had fully discussed Sound Transit's plan to reduce the TCE square footage to partially accommodate Airport Investment's parking concerns. CP 1414-15. In addition, Airport Investment had discussed the construction schedule with Kim Wong, and knew that Sound Transit anticipated it

would need exclusive use of the TCE area for a total of only ten to twelve weeks out of the three-year TCE term. CP 1416.

Sound Transit's \$463,500 offer remained open until July 17, the first day of trial. CP 1414. Sound Transit formally agreed to the reduced TCE area and provided an updated parcel map and updated right of way plan reflecting that agreement on July 1, while the 30-day offer was still pending. CP 1414-15.

F. Motions in Limine

Both parties filed multiple motions in limine, which were heard on the first day of trial. VRP 3-81.

Sound Transit filed general motions in limine that included a request to exclude evidence of “the fact or dollar amount of any alleged lost income or profits because business losses are not compensable in eminent domain and are irrelevant to property value.” CP 328. Sound Transit also moved to “exclude evidence of hotel operation requirements and business practices imposed by Airport Investment’s current franchise agreement” for lack of relevance, specifically calling out the current Hampton Inn franchise requirement of one parking stall per room, and its money-back guaranty business practice. CP 339. Airport Investment asserted the evidence was relevant to the income approach to market value. CP 519-27; CP 652. Although Airport Investment claimed it was

not seeking lost profits or business damages, its proposed jury instructions would have directed the jury to award “any appropriate reduction in income to Airport Investment Company’s property during the [TCE] occupancy.” The Trial Court granted the motions. CP 736-37; CP 910. The order excluding alleged lost income or profits specifically allowed “testimony and evidence pertaining to the income approach to property value.” CP 910.

Airport Investment filed motions in limine that included a request to exclude evidence of Airport Investment’s initial appraisal by Patrick Lamb. CP 396. The asserted grounds for exclusion were work product, settlement offer, and prejudice. CP 406-08. In its written response, Sound Transit did not address the merits of this motion, but offered to agree to it if Airport Investment would similarly agree to exclude Mr. Brackett’s initial appraisal. CP 672. At the hearing, the Sound Transit explained its rationale that if Mr. Lamb’s appraisal was a settlement offer under ER 408, then so was Mr. Brackett’s initial appraisal. VRP 47. Airport Investment rejected a mutual exclusion. *Id.* The Trial Court then inquired whether the appraisals had been designated in any way as settlement offers, and learned they had not. VRP 51. As a result, and because whatever work product privilege had been waived by disclosure, the Trial Court denied the motion, but suggested the parties voluntarily refrain from

getting into the prior appraisals because they were unlikely to assist the jury. VRP 53-55. The order on Airport Investment's motions in limine denied the motion and further provided that it did "not exclude evidence of a party's opinions of value (even if reached after consideration of any such appraisal)." CP 904.

Airport Investment also asked the Trial Court to prohibit Sound Transit from introducing evidence "that Sound Transit will use the Construction Easement for a period of time less than the term set forth in the easement." CP 396. This motion had no impact on the fair market rental value of the TCE area, which both appraisers already valued based on 100% occupancy for the full three-year TCE term. CP 1417. Rather, its significance was limited to the lost profits and other consequential damages Airport Investment claimed would result from the TCE. CP 1416. Before Sound Transit prevailed on its argument that those items were not compensable in eminent domain, it also planned to show that the \$900,000 damage claim was unwarranted because Airport Investment would still be able to use the TCE area for hotel parking for most of the three-year TCE term. *Id.* Airport Investment's motion sought to preclude this evidence, and ultimately resulted in the changes to the TCE's exclusive use provisions described above. CP 1416-17. The Trial Court granted the motion as follows (CP 904):

Petitioner is excluded from presenting evidence that Sound Transit will use the Temporary Construction Easement for a period of time less than the term set forth in the easement, provided, however, this ruling (a) does not preclude evidence regarding actual activity within the easement area and (b) does not preclude Petitioner from submitting a revised form of Temporary Construction Easement providing for the actual time of use of the easement area.

G. At Trial: Franchise Requirements and Business Practices

At trial, evidence came in about the various classes of service that characterize hotels and where the Airport Investment property and Hampton Inn brand fit within those classes. VRP 819-21, 976-77.³ Evidence was also introduced that even during the TCE, the Airport Investment property would meet City code and market parking requirements. VRP 868-69. Mr. Taffin, Sound Transit's hotel expert, mentioned in passing that he had verified this conclusion with the manager of the SeaTac Red Lion. VRP 869. As a result, Airport Investment was permitted to cross-examine Mr. Taffin about Red Lion's franchise parking standards. VRP 878-880. Although Airport Investment sought to introduce evidence about its own particular Hampton Inn franchise parking requirements and standards, it did not make or request an opportunity to make an offer of proof showing how the evidence would

³ The "testimony" quoted at pages 28-29 of Airport Investment's Opening Brief was elicited in deposition, not at trial.

relate to a compensable loss of fair market rental value, as opposed to lost profits, business losses, and other consequential damages. VRP 876-79, 919-21. Later, in response to a jury question, Mr. Biethan, Airport Investment's appraiser, testified that even during the TCE, parking at the Airport Investment property would measure up to the parking provided by other similar hotel properties in the SeaTac market. VRP 1580-81.

H. At Trial: Sandra Oh Value Opinion and Lamb Appraisal

During its case in chief, Sound Transit alerted the Trial Court and Airport Investment outside the presence of the jury that it planned to introduce as a party admission Airport Investment's statement in Exhibit 158 (a letter Airport Investment sent Sound Transit after obtaining the Lamb appraisal) that as of the date of the letter, the owner believed Sound Transit's taking should be valued at \$485,000. VRP 1078. The Trial Court emphasized that to do so Sound Transit would need to show that the letter's signator, Jonathan Choi, who signed as "HR & Legal Department Lead," was Airport Investment's speaking agent. VRP 1083-85. The next morning, the Trial Court heard argument on the authority issue outside the jury's presence. VRP 1186-91. The court ruled that Sound Transit had not laid a sufficient foundation for the court to find speaking authority, but

could attempt to do so through Sandra Oh, Airport Investment's President, who was present in the courtroom. VRP 1190-91.⁴

Sound Transit called Ms. Oh to the stand, where she was vague about both Mr. Choi's authority and her knowledge of the correspondence; she claimed not to even know what the "SOIM" acronym on the Exhibit 158 letterhead stood for. VRP 1191-98. At that point, the court had the jury step out and inquired further. VRP 1198-1202. Ultimately, Ms. Oh admitted that in July 2012 she believed, based on the Lamb appraisal, that Airport Investment was entitled to \$485,000 in just compensation for the two easement takings. VRP 1202.

The Trial Court ruled Sound Transit could inquire about that belief, and the jury returned. VRP 1202-04. Based on this ruling, Sound Transit asked: "as of July 16, 2012, was it Airport Investment Company's and your belief, strong belief, that Airport Investment Company was entitled to a total of \$485,000 for just compensation?" VRP 1205. Ms. Oh responded: "I based compensation on whatever the appraiser said." *Id.* Upon direction by the Trial Court that the question called for a yes or no response, Ms. Oh responded: "Okay. Yes." VRP 1205-06.

⁴ Although Sound Transit had noted Ms. Oh's deposition, it was canceled because Airport Investment represented she would only be called to testify if Leigh Ewbank, the hotel manager, was not available. CP 672.

The Trial Court did not admit Exhibit 158. VRP 1206. Airport Investment did not move to strike Ms. Oh's reference to the appraisal or ask for a limiting instruction, choosing instead to examine her about the circumstances that led to it and the amount of Sound Transit's initial offer for the property. VRP 1207-09.

I. At Trial: Instructions, Argument, and Verdict

Jury instruction discussions occurred throughout trial. Although there were disagreements, and numerous revisions, Airport Investment has not assigned error to any instruction ruling.

In the rebuttal portion of closing, counsel for Sound Transit briefly referred to the \$485,000 owner opinion of value as of July 2012, and the fact that it was based on an appraisal by someone who had not been called to testify and which Airport Investment had come to disagree with as resting on insufficient information. VRP 1761-62. There was no objection to the comment or request for a curative instruction. *Id.*

Throughout the trial, the jury had posed witness questions that, if appropriate, the Trial Court asked. CP 730-35; CP 890-902; CP 912-950. When the jury began deliberations, the Trial Court requested that counsel establish a procedure for consultation if the jury had questions during deliberation, explaining that no questions would be answered "without talking to both sides." VRP 1774-75. That procedure was followed when

the jury asked about the “third appraiser.” CP 726. After consulting with counsel by phone, the Trial Court responded: “You may consider all the testimony and exhibits that were admitted into evidence and assign it what weight you believe it is worth.” *Id.*; CP 953.

After deliberating for more than a day, the jury awarded Airport Investment \$225,000: \$163,497 for the permanent easement, and \$61,503 for the TCE. CP 725-27; CP 995. The award was less than half of Sound Transit’s 30-day offer. CP 1412. The permanent easement amount was about midway between the permanent easement values (without damage to the remainder) testified to by the parties’ respective appraisers. VRP 1071-72, 1391-92. The TCE amount was the exact value Sound Transit’s appraiser ascribed to the TCE, which was higher than Airport Investment’s appraised value – even when Airport Investment’s appraiser erroneously included a fourth TCE option year. CP 1415.

J. Airport Investment’s Post-Trial Motion for Fees and Costs

Airport Investment filed a post-trial motion for fees and costs based on the argument that when Sound Transit changed the TCE, it “abandoned” the condemnation proceeding or nullified its 30-day offer. CP 1295. The Trial Court denied the motion. CP 1430-31.

ARGUMENT

Airport Investment has failed to identify any error in the Trial Court's substantive rulings made before or during trial. Instead, Airport Investment has assigned error to two isolated evidentiary rulings out of a ten-day jury trial. This Court should affirm because neither ruling was an abuse of discretion. In addition, the grounds argued on appeal were not preserved below. The Trial Court's order denying Airport Investment's motion for attorney fees should also be affirmed; the statutes Airport Investment relies on do not mandate a fee award here.

A. Excluding Evidence of Franchise Requirements and Business Practices Was Not an Abuse of Discretion.

"Relevance issues are reviewed on an abuse of discretion standard." *Bellevue v. Kravik*, 69 Wn. App. 735, 741, 850 P.2d 559 (1993) (affirming multiple evidentiary rulings in eminent domain case). An abuse of discretion occurs "only where no reasonable person would adopt the trial court's view." *Detention of Bedker*, 134 Wn. App. 775, 777, 146 P.3d 442 (2006).

The Trial Court here had discretion to exclude hotel operation requirements and business practices imposed by Airport Investment's franchisor. Those operational requirements and business practices were irrelevant and properly excluded under two well-established principles of

Washington law: (1) just compensation should reflect only loss of market value – alleged business losses and consequential damages are not compensable; and (2) the owner’s specific use and particular business interests are not an appropriate measure of market value. As the Trial Court said, “What’s relevant is that this particular property can be used as a hotel property, not that it’s used for this particular hotel which has this particular income stream or these particular impacts on its business.” VRP 13; *see also* VRP 15-16 (Trial Court explains further: “Not what you would lose because you’re this particular franchise ...”).

In addition, even if the evidence had some potential relevance, the Trial Court had discretion to exclude it as misleading and prejudicial. Finally, Airport Investment failed to preserve the issue for appeal because it did not present an offer of proof showing how the evidence was relevant to property value as opposed to noncompensable business losses or other consequential damages.

1. Alleged Business Losses and Consequential Damages Are Not Compensable in Eminent Domain.

For over 100 years, Washington courts have consistently held that lost profits and other consequential damages are not a proper element of a “just compensation” award. The cases explain that an eminent domain

award must relate to the property's market value, not the business conducted there.

In *Seattle & Montana Railroad Co. v. Roeder*, 30 Wash. 244, 70 P. 498 (1902), a railroad petitioned to condemn a right-of-way over land used as a quarry. The court approved an instruction that allowed the jury to value the land based on its fair-market value considering the building stone in it, but not based on profits that sale of the building stone would bring. *Id.* at 261-62. The court ruled that “the character of the business transacted on the property” is an element of property value, but “the profits or supposed profits arising from the business [is] not a proper element of damages.” *Id.* at 264, quoting *Dupuis v. Chicago & N.W.R.Y. Co.*, 3 N.E. 720 (Ill. 1885).

Likewise, in *Chicago, Milwaukee & Puget Sound Railway Co. v. True*, 62 Wash. 646, 114 P. 515 (1911), the court approved an instruction that permitted the jury to consider both the nature of the condemnee's business and evidence that other locations for the business were few or nonexistent “in arriving at a decision as to the fair-market value of the land sought to be condemned.” *Id.* at 648. But compensation for lost profits or other business damages was not allowed. The court approved the trial court's charge to the jury that: “It is the property of the defendants, not their business, which is condemned,” and the jury was not

to consider “the volume or extent of such business ... or the profits ... as a measure of the market value of the property.” *Id.* at 650.

That rule has continued in modern cases. *Renton v. Scott Pacific Terminal, Inc.*, 9 Wn. App. 364, 512 P.2d 1137 (1973), approved a jury instruction that prohibited the jury from including lost profits in a condemnation award (*id.* at 368-69 [emphasis added]):

The amount of an award in condemnation proceedings is limited to the fair-market value of real property and fixtures attached. ***In no case can damages be allowed for the loss of profits of a business maintained on the property ...*** . This is true even though the business cannot be moved elsewhere.

Accord, State v. McDonald, 98 Wn.2d 521, 531, 656 P.2d 1043 (1983) (reversing because jury instructions allowed recovery of business profits).

WPI 151.05 reflects these principles:

You should not allow compensation for any loss of profits or income which may be caused by the taking. It is the real property of the owners, not their business, which is being acquired; and you should award compensation only for such rights in their real property.

Indeed, condemnation awards may not include consequential damages of any kind. In *Fix v. Tacoma*, 171 Wash. 196, 197, 17 P.2d 599 (1933), the court rejected a claim for loss of customers and rental income due to a condemnation. The court held: “Respondent’s loss comes within the category of consequential damages which are not contemplated by Art. I, § 16 of the Constitution of the State of Washington.” *Id.* at 200.

Likewise, in *Greenwood v. Seattle*, 73 Wn.2d 741, 747, 440 P.2d 437 (1968), the court held that a property owner may not recover consequential losses and expenses as an additional condemnation award. Alleged costs “made necessary by [the] taking” are considered “only to the extent that such costs affect the market value of the remaining property.” WPI 151.08; *see also* WPI 151.07.

In this case, Sound Transit moved to exclude evidence of specific franchise requirements and business practices imposed by Airport Investment’s Hampton Inn franchise agreement because Mr. Biethan, Airport Investment’s appraiser, relied on a franchise requirement of one parking stall per room and the franchisor’s 100% money-back guaranty to seek recovery of (a) additional operating expenses (valet parking) during the TCE term and (b) lost income and profits due to an increased risk of refunds. No evidence was offered to tie the Hampton Inn policies to the property’s market value because there was no evidence that the market for the property was limited to hotel operators who would adhere to the same business policies as Hampton Inn. Because the franchise requirements and practices related to business losses and consequential damages, and were not tied to any reduced income potential inherent in the property, the Trial Court properly excluded them.

2. The Owner's Specific Use and Particular Business Interests Are Not an Appropriate Measure of Market Value under Washington Law.

The Trial Court's ruling was also proper based on the principle that "damages cannot be awarded in reference solely to the particular situation, circumstances, or plans of the owner, or to the business in which he happens to be engaged, but only with reference to the uses to which the land, considered as property, may be put as affecting its present market value." *Seattle, P. A. & L. C. Railway v. Land*, 81 Wash. 206, 216, 142 P. 680 (1914). As a matter of policy, just compensation should reflect "the land's objective value" – its "lesser desirability ... to the general public," not "its particular value to a particular owner" or "personal injury to the individual." *Martin v. Port of Seattle*, 64 Wn.2d 309, 318-19, 391 P.2d 540 (1964); *accord, State v. Mottman Mercantile Co.*, 51 Wn.2d 722, 728, 321 P.2d 912 (1958) (relying on quote from *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407 (1878): "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted" [emphasis deleted]).

Airport Investment's reliance on its specific use of the property as a branded Hampton Inn hotel under a particular franchise agreement that imposed specialized requirements and business practices on hotel

operations violated this rule. It conflated Airport Investment's hotel *business* with its hotel *property*. The hypothetical "willing buyer" in the market for an airport hotel property is not limited to a Hampton Inn franchisee governed by a franchise agreement on the same terms as Airport Investment's. There was no evidence that qualifying for a Hampton Inn franchise, as opposed to some other franchise chain, increased the property value. Nor was there evidence that the Hampton Inn franchise requirements reflected a market standard for nationally-branded hotels; on the contrary, Mr. Biethan admitted that parking at the Airport Investment property would measure up to the parking provided by other similar hotel properties in the SeaTac market during the TCE. VRP 1580-81. Airport Investment's proposed evidence of franchise requirements and business practices related to alleged personal injury to the owner, a Hampton Inn franchisee, not the lesser desirability of the property to the general public. It was therefore irrelevant to the question before the jury and properly excluded.

3. The Trial Court Had Discretion to Exclude Evidence of Franchise Requirements and Business Practices as Misleading and Prejudicial.

Even if Airport Investment had established that its Hampton Inn franchise requirements and business practices had some relevance to the

property's fair market value, the Trial Court had discretion to exclude the evidence as misleading and prejudicial under ER 403.

First, the franchise evidence had great potential to mislead the jury into believing that Sound Transit had an obligation to compensate Airport Investment for anticipated operational or business losses. At a minimum, the focus on franchise requirements and operational business practices would have obscured the legal parameters of a proper just compensation award, which is limited to lost property value.

Second, the franchise evidence had great potential to induce the jury to improperly increase the award beyond lost property value in order to compensate for exactly the types of business losses and consequential damages that are not legally compensable in eminent domain. It also had the potential to stir the jury's sympathy for Airport Investment and generate antipathy against Sound Transit and other condemners. Evidence is unfairly prejudicial when it has "an undue tendency to suggest a decision on an improper basis." *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

On this ground as well, the exclusion should be affirmed.

4. Airport Investment Failed to Preserve this Issue for Appeal.

To prevail on appeal based on an evidentiary exclusion, the appellant must have made an offer of proof and explained why the

evidence should be admissible. *E.g.*, *Smith v. Seibly*, 72 Wn.2d 16, 18, 431 P.2d 719 (1967). The appellate court should not speculate about what the excluded testimony would have been. *Tumelson v. Todhunter*, 105 Wn.2d 596, 605, 716 P.2d 890 (1986). The party seeking to introduce the evidence must show the trial court how it would support a legally proper argument or valid claim. *Tomlinson v. Bean*, 26 Wn.2d 354, 360-62, 173 P.2d 972 (1946) (trial court did not err in excluding alleged oral agreement under parol evidence rule where proponent did not sufficiently articulate how excluded evidence could be construed as consistent with, but not duplicative of, written contract). In *State v. Paul Bunyan Rifle Club*, 132 Wn. App. 85, 95-96, 130 P.3d 414 (2006), a condemnation case, the court affirmed exclusion of evidence because there was no offer of proof showing the relevance of the evidence to property value.

The same is true here. Airport Investment asserts that the franchise evidence was relevant to the income approach to value. But “[t]he income to be capitalized in the income capitalization approach *is the market or economic rent of the property being appraised*,” not lost business income or profits. Uniform Appraisal Standards for Federal Land Acquisition § B-7 [emphasis added]. Airport Investment failed to show how its unique franchise agreement requirements and Hampton Inn franchise system business practices impacted the property’s income potential in the market,

as opposed to their own particular use of the property as a Hampton Inn. *See* CP 519-27.⁵ Instead, Airport Investment’s appraiser focused on the alleged refunds Airport Investment would have to provide and the alleged valet parking expenses it would have to incur to comply with its particular Hampton Inn franchise agreement – damage theories that reflected Airport Investment’s business decisions, not a loss of property value, and therefore were clearly improper under Washington law.

After Sound Transit’s hotel expert (who had worked for Red Lion for many years) introduced evidence of the market standard for parking stalls in the SeaTac airport hotel market, including information about the demand for parking at an area Red Lion, Airport Investment renewed its request to introduce its own particular franchise parking requirements and standards. But it still did not make or request an opportunity to make an offer of proof showing how that evidence would relate to a compensable loss of fair market rental value, as opposed to lost profits, business losses, and other consequential damages. VRP 878-79. In fact, Airport Investment specifically did not ask about parking standards “related to the market.” VRP 879. Instead, throughout the trial, Airport Investment

⁵ Indeed, even on appeal Airport Investment claims that the evidence supported “the appraisal valuation of this specific property as a Hampton Inn franchise.” Opening Brief at 31.

continued to grasp for a theory that would render its appraiser's opinion that during the TCE Airport Investment would suffer "lost income" due to "loss of occupancy" compensable. *See, e.g.*, VRP 1484-86, 1489-91.

Because Airport Investment failed to make an offer of proof that tied specific Hampton Inn franchise requirements and business practices to the property's fair market value or fair market rental value (rather than asserting a claim for anticipated lost profits and increased business expenses unique to Airport Investment's Hampton Inn franchised business), Airport Investment did not preserve this issue for appeal. The Trial Court's order excluding evidence of franchise requirements and business practices does not entitle Airport Investments to a new trial.

B. Admitting Airport Investment's Value Opinion Based on the Lamb Appraisal Was Not an Abuse of Discretion.

"By long-standing tradition, a property owner is allowed to testify as to the value of the property [taken in eminent domain], even if the owner does not otherwise qualify as an expert." Comment to WPI 150.15; *accord, State v. Wilson*, 6 Wn. App. 443, 493 P.2d 1252 (1972). An out-of-court statement is not hearsay if it is "offered against a party and is (i) the party's own statement, ... (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject,

or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party." ER 801(d)(2).

The statement made in a letter dated July 16, 2012 from Airport Investment to Sound Transit (Unadmitted Ex. 158) – that Airport Investment “strongly believe[d]” it was “entitled to a total of \$485,000 for just compensation” – was not hearsay under the rule. Ms. Oh’s testimony showed that the statement was (i) Airport Investment’s statement, (ii) a statement in which Airport Investment manifested an adoption and belief in its truth, (iii) a statement by a person authorized by Airport Investment to make a statement about the subject, and (iv) a statement by an agent of Airport Investment acting within the scope of his speaking authority. VRP 1192-1206.⁶ Each of these points rendered the statement admissible.

⁶ See, e.g., *Anstine v. McWilliams*, 24 Wn.2d 230, 234-36, 163 P.2d 816 (1945) (affirming admission of letter on opposing party’s letterhead based on majority rule that “where a letter sent in the ordinary course of business is answered by an agent of the individual or corporation addressed, authority of such person is presumed and the reply letter is admissible against the alleged principal without preliminary proof of authority”); see also *Lemcke v. Funk & Co.*, 78 Wash. 460, 466, 139 P. 234 (1914) (silence and inaction usually sufficient to ratify agent’s acts as to third parties); *Lodis v. Corbis Holdings*, 172 Wn. App. 835, 859, 292 P.3d 779 (2013) (calendar entries made by assistant were properly admitted at trial, but statements made could be explained or rebutted by party’s testimony). In *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983), cited by Airport Investment, the letter was hearsay because it was offered by, not against, the party who wrote it.

But the Trial Court did not admit the out-of-court statement or Exhibit 158. VRP 1202-06. Instead, the Trial Court allowed Sound Transit to ask Ms. Oh, Airport Investment's President and principal, *in court* about her and Airport Investment's opinion of value. VRP 1202-04. Ms. Oh's in-court, sworn, testimony – that as of July 16, 2012, she and Airport Investment strongly believed Airport Investment was entitled to a total of \$485,000 in just compensation – was not hearsay. *See* ER 801(c).

Airport Investment claims, though, that allowing this testimony allowed Sound Transit to introduce Mr. Lamb's hearsay valuation opinion "through the back door." It was Airport Investment, however, not Sound Transit, who referred to the Lamb appraisal. Sound Transit asked Ms. Oh: "as of July 16, 2012, was it Airport Investment Company's and your belief, strong belief, that Airport Investment Company was entitled to a total of \$485,000 for just compensation?" VRP 1205. Ms. Oh responded: "I based compensation on whatever the appraiser said." *Id.* Airport Investment did not move to strike Ms. Oh's reference to the appraisal or ask for a limiting instruction, choosing instead to examine her about the appraisal and why, in her current view, it was not accurate. VRP 1207-09.

As a result, Airport Investment cannot now object to the Lamb appraisal testimony. If an answer contains improper matter, the court should be asked to strike it and instruct the jury to disregard it.

Independent Asphalt Paving Co. v. Hein, 73 Wash. 127, 129-30, 131 P. 471 (1913). Failure to do so waives any error. *Id.* Moreover, a party cannot complain of error based on the admission of evidence introduced by that party. *E.g., Breimon v. General Motors Corp.*, 8 Wn. App. 747, 752, 509 P.2d 398 (1973).

Airport Investment likewise has no grounds to complain about the Trial Court's response to the jury question about this testimony. Where no instruction excluding or limiting consideration of evidence is requested, the jury is entitled to consider it for any purpose. *Lemcke v. Funk & Co.*, 78 Wash. 460, 467, 139 P. 234 (1914). Thus, the Trial Court's rather generic instruction – that the jury could consider all admitted testimony and exhibits, assigning whatever weight the jury deemed it was worth (given after consultation with counsel) – was proper.

Nor may Airport Investment assert error based on Sound Transit's reference to the appraisal in closing. To preserve an error relating to argument of counsel, a party must object to the statement and seek a curative instruction. *Kain v. Logan*, 79 Wn.2d 524, 528, 487 P.2d 1292 (1971); *Seattle v. Harclaon*, 56 Wn.2d 596, 597-98, 354 P.2d 928 (1960); *Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993). Failure to do so precludes that argument on appeal. *Id.* Because Airport Investment did not object to or afford the Trial Court an opportunity to

cure the appraisal reference in closing, the reference cannot provide grounds for appeal.

Finally, Airport Investment claims the Trial Court abused its discretion when it denied Airport Investment's motion in limine to exclude the Lamb appraisal. But Airport Investment has failed to present any argument that Mr. Lamb was a consulting expert whose opinion was work-product or that his opinion was an offer of compromise under ER 408, the grounds for exclusion Airport Investment asserted. On the contrary, the Trial Court correctly held that when Airport Investment voluntarily provided Mr. Lamb's appraisal to Sound Transit and failed to describe it as a settlement offer, any such privileges were waived. VRP 53. Nonetheless, Sound Transit offered a mutual exclusion on the ground that if Mr. Lamb's appraisal was a settlement offer under ER 408, then so was Mr. Brackett's initial appraisal. VRP 47. Airport Investment rejected the offer. *Id.* Neither the Trial Court's denial of the motion in limine, nor the Trial Court's willingness to allow a stipulation on the topic (which Airport Investment rejected, in any event), was an abuse of discretion.

C. Airport Investment Is Not Entitled to Attorney Fees and Costs.

This Court may affirm the Trial Court's denial of attorney fees on any ground adequately supported in the record. *E.g., State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Airport Investment claims that

changes to the TCE, made after Sound Transit's 30-day offer, entitle it to statutory fees. But the statutes Airport Investment relies on do not support its argument. The Trial Court's denial of fees should be affirmed and fees should not be awarded on appeal.

1. The Trial Court Correctly Denied Airport Investment's Request for Fees under RCW 8.25.070.

Airport Investment's argument for fees under RCW 8.25.070 fails under the law, the facts, and public policy. First, because Sound Transit did make an offer, the statute's plain language precludes a fee award. Second, Washington cases decided under the statute negate Airport Investment's theory. Third, Airport Investment has misrepresented the facts that led to the TCE changes and the nature of those changes. And fourth, a fee award here would subvert the statute's purpose.

a. *The statute's plain language precludes a fee award.*

RCW 8.25.070(1) provides, in relevant part [emphasis added]:

[I]f a trial is held for fixing the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make *any* written offer in settlement to condemnee at least thirty days prior to the commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement ... by condemnor in effect thirty days before the trial.

The statute is unambiguous and is to be construed according to the plain meaning of the language used. *State v. Costich*, 152 Wn.2d at 470.

There is no dispute that Sound Transit made a settlement offer that was “in effect thirty days before the trial,” and that “the judgment awarded as a result of the trial” was less than half of that offer. Thus, Airport Investment does not qualify for fees under RCW 8.25.070(1)(b), the statutory provision that applies here.

Airport Investment, however, contends that the Court should award fees as if Sound Transit had not made an offer because Sound Transit changed the TCE after the offer was made. Airport Investment rests its argument on the theory that the 30-day offer must be tied precisely to the property rights that are ultimately taken. But that’s not what the statute says. Under RCW 8.25.070(1)(a), the condemnee is entitled to fees only if the condemnor “fails to make *any* written offer in settlement” at least thirty days before trial. There are no additional statutory criteria; the offer must be “in settlement;” it must be “written;” and it must be made at least thirty days before trial begins. There is no dispute that Sound Transit’s 30-day offer met those criteria. As a result, under the plain language of RCW 8.25.070(1)(a), Airport Investment is not entitled to fees.

Airport Investment’s argument that the settlement offer must be for “the property being condemned” (borrowing language from a different

section of the statute, RCW 8.25.070(3), which relates to possession and use) does not assist its position. There is no question that the offer was for “the property being condemned” in this action. Neither the minor reduction in TCE square footage, nor the change in language governing Sound Transit’s periods of exclusive TCE use (both of which were prompted by Airport Investment’s business concerns), changed the offer into something else.

b. The cases refute Airport Investment’s theory.

In *Costich*, the Washington Supreme Court construed RCW 8.25.070 in response to a condemnee’s argument that a settlement offer was invalid because it did not itemize just compensation for the property interests condemned. The Court held that the statutory language was unambiguous and declined to impose requirements beyond the statute’s express terms. *Costich*. at 475-77. It applied “that language **and that language alone**” to hold the offer valid. *Id.* at 470 [emphasis added], 475-77.

Likewise, in *Port of Seattle v. Rio*, 16 Wn. App. 718, 559 P.2d 18 (1977), this Court refused to invalidate “the highest written offer in settlement” made by the Port. The Court held that the offer did not have to comply with a requirement set forth in a different section of the statute,

which required the amount offered in exchange for possession and use be deposited with the court. *Id.* at 720-23.

Here, like the condemnees in *Costich* and *Rio*, who also did not obtain a sufficiently favorable result to qualify for fees under RCW 8.25.070(1)(b), Airport Investment attempts to add criteria to the statutory settlement offer requirements. As in *Costich* and *Rio*, the Court should reject that argument.

c. Airport Investment has misrepresented the facts.

In *Costich*, the Court held there “may be factual scenarios” that would warrant invalidating an offer, but refused to do so in that case, and refused to speculate about what those circumstances would be if they exist at all. *Costich* at 479. Airport Investment claims the Sound Transit’s offer should be nullified to prevent condemnors from exaggerating what property is necessary, making an offer based on the excessive taking, then reducing the taking to render it less likely that the condemnee will recover fees. Even if the conduct Airport Investment hypothesizes might warrant judicial relief, the Trial Court correctly determined that no such relief was warranted here because Sound Transit did none of those things.

First, the original TCE description reflected Sound Transit’s needs. The project was a design-build that allowed the contractor flexibility as to design details. The project plans included a potential column placement

that would have required moving a driveway, which in turn would have required all the original TCE square footage.

Second, the TCE changes were made to partially ameliorate Airport Investment's concerns about the TCE's impact on its business operations, not because Sound Transit had some secret agenda to make it harder for Airport Investment to recover fees. In Washington, a condemnor may unilaterally stipulate to a limited taking in order to mitigate damages, and the condemnation award should be limited accordingly.⁷ This advances the principle that a condemnor should not take or damage property "beyond the necessities of the case." *State v. Basin Development & Sales Co.*, 53 Wn.2d 201, 204-05, 332 P.2d 245 (1958). Invalidating a condemnor's settlement offer because the condemnor stipulates to minor changes in an effort to mitigate damages would contravene this policy.⁸

⁷ *E.g.*, *In re Municipality of Metro. Seattle v. Kenmore Properties, Inc.*, 67 Wn.2d 923, 410 P.2d 790 (1966); *State v. Basin Dev. & Sales Co.*, 53 Wn.2d 201, 332 P.2d 245 (1958); *State v. Ward*, 41 Wn.2d 794, 252 P.2d 279 (1953); *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 P. 940 (1910).

⁸ On appeal, Airport Investment seems to be flirting with the argument that Sound Transit lost its right to make even these minor changes when Airport Investment granted possession and use. Airport Investment did not make this argument below, and so cannot do so on appeal. *See, e.g.*, VRP 30 (arguing that Sound Transit could stipulate to limit use "but must ... do so definitively"); VRP 570-71 (arguing revised TCE was "not

And finally, the evidence utterly fails to support Airport Investment's contentions that the TCE changes were material or prejudiced Airport Investment's ability to evaluate Sound Transit's offer.

According to the appraisers, the TCE's fair market rental value ranged from \$56,000 (for the four-year TCE erroneously posited by Airport Investment's appraiser) to \$68,657 before the square footage reduction, and \$32,124 to \$61,503 after the reduction. And the verdict of \$61,503 was *higher* than Airport Investment's appraiser's highest opinion of the TCE's fair market rental value. In the context of Airport Investment's \$2.5 million claim, this change, which reduced Sound Transit's valuation by about \$7,000 to an amount that was still higher than Airport Investment's highest-ever valuation, was simply not material. Nor was it material in the context of the relationship between the jury verdict (\$225,000) and Sound Transit's offer (\$463,500).

Contrary to Airport Investment's argument, the stipulation that Sound Transit would have exclusive use of the TCE area for no more than 160 total days did not reduce the TCE duration from three years to six months. Both before and after the change, the TCE was for three years.

definite enough"). Moreover, although Sound Transit had the right to commence the three-year TCE term upon fourteen days' notice to Airport Investment, it had not yet done so.

Both before and after the change, the easement was nonexclusive except for the times Sound Transit was actively constructing the guideway segment adjacent to the Airport Investment property. Both before and after the changes, Sound Transit told Airport Investment that construction involving the Airport Investment property was projected to occur periodically over the course of the three-year term and last a total of about ten to twelve weeks. The “limitation” on Sound Transit’s exclusive use to 160 days was actually about twice as long as Sound Transit estimated and had told Airport Investment it would need. Indeed, “limiting” the total days of exclusive use had *no* impact on the appraisers’ valuations, which were always based on 100% of the TCE area’s fair market rental value for the entire three-year TCE term.

The change in exclusive use language was material only in the sense that it prevented Airport Investment from arguing, falsely, to the jury that it would lose all parking in the TCE area for the entire three-year TCE term. And even that became insignificant once the Trial Court ruled that, as a matter of law, Airport Investment could not recover the business losses and consequential damages it claimed would result.

Finally, although Airport Investment asserted that it evaluated Sound Transit’s offer under the original TCE, it did not allege that the outcome of that evaluation would have been any different under the

revised TCE. There is no reason to believe that Airport Investment would have accepted the offer if the TCE changes had been made earlier.

d. A fee award would subvert the statutory purpose.

The purpose of RCW 8.25.070 is to ensure that both parties make a reasonable attempt to settle before trial. *Port of Seattle v. Rio*, 16 Wn. App. at 720-22. RCW 8.25.070 awards attorney fees to a condemnee who did not receive a reasonable compensation offer and instead had to prevail at trial to obtain just compensation. Reasonableness is judged by comparing the offer with the judgment. RCW 8.25.070(1)(b); *Costich*, 152 Wn.2d at 476.⁹ Here, that comparison shows Sound Transit's offer was reasonable. In contrast, Airport Investment's decision not to accept the offer was based on alleged permanent damage to the remainder that the jury substantially rejected, and alleged lost income and consequential damages that the Trial Court correctly held were not compensable. Rewarding Airport Investment for taking these extreme, unsupported, positions would contravene the statute's purpose. It would improperly reward a condemnee who *rejected* a generous settlement offer and *did not prevail* at trial, turning RCW 8.25.070 upside down.

⁹ As a result, if Airport Investment prevails on its request for a new trial, any decision about a fee award under RCW 8.25.070 must await the results of that trial.

In addition, using a condemnor's stipulations to mitigate damages as grounds to invalidate a reasonable settlement offer and award fees would discourage such stipulations, which are an important and effective component of reasonable eminent domain settlements. The condemnor's incentive should be to listen to the condemnee's concerns and attempt to accommodate them, not to stick intractably to a taking description after learning it could be improved for the benefit of both parties.¹⁰

2. Airport Investment Is Not Entitled to Fees under RCW 8.25.075.

Airport Investment's argument that it is entitled to fees under RCW 8.25.075 also fails both legally and factually.

RCW 8.25.075(1)(b) provides for a fee award to the condemnee if “[t]he *proceeding* is abandoned by the condemnor.” [Emphasis added]. Far from abandoning “the proceeding,” Sound Transit pursued the condemnation to judgment. As a result, Airport Investment's argument for fees fails under the statute's plain language; there is no such thing as a partial abandonment.

¹⁰ Here, due to Airport Investment's discovery and appraisal-exchange delays, the opportunity to do so did not occur until trial was imminent.

Moreover, as previously discussed, Washington cases allow condemnors to stipulate to a limited taking in order to mitigate damages. None of those cases holds that such a stipulation constitutes abandonment.

Airport Investment's abandonment argument relies on several out of state cases. But even if they applied, those cases would not support an abandonment finding here. All involved either substitution of different property or property rights for those originally included in the taking, or a reduction in the amount of property to be taken that was so significant it entirely changed the valuation analysis. *Dep't of Transp. v. Northern Trust Co.*, 376 N.E.2d 286 (Ill. App. 1978) (area taken reduced to 16% of land originally described); *Kern County v. Galatas*, 200 Cal. App. 2d 353 (1962) (taking changed from oil, gas, hydrocarbon, and mineral interests in about 75 acres to mere right of entry in about 50 acres); *Montgomery County v. McQuary*, 265 N.E.2d 812 (Ohio Misc. 1971) (sewer route changed to take entirely different course across different part of property); *FKM P'ship, Ltd. v. Board of Regents*, 255 S.W.3d 619 (Tex. 2008) (amount of property to be taken reduced by more than 97%); *see also* additional cases cited by Airport Investment below: *Dep't of Public Works & Bldgs. v. Lanter*, 153 N.E.2d 552, (Ill. 1958) (after eight year delay and condemnee's motion to dismiss for abandonment, condemnor amended petition to eliminate access taking and take an additional five acres of

land); *City of Hammond v. Marina Entertainment Complex, Inc.*, 681 N.E.2d 1139 (Ind. App. 1997) (project redesigned to take almost none (0.3%) of the property originally described).

Nothing of that character or magnitude occurred here. The nature of the rights taken did not change. The permanent easement, which was the more significant aspect of the taking, did not change. The TCE location did not change. The TCE area was reduced by about 25%, resulting in a reduction in fair market rental value of about 10%. That \$7000 reduction represented less than 0.005% of Airport Investment's claim, less than 0.02% of Sound Transit's offer, and less than 0.04% of the jury verdict. And the TCE exclusive use language was clarified to better reflect the actual use Sound Transit anticipated, without changing either party's fair market rental valuation. In fact, after receiving the revised TCE, Airport Investment complained that the changes were insufficient: "We argue, really, it's different words, but the same thing." VRP 448. There was no abandonment.

CONCLUSION

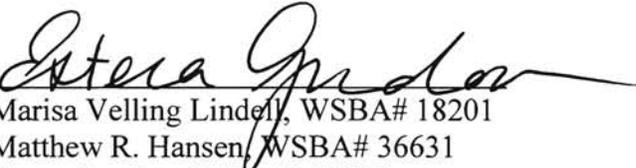
After a two-week trial, the jury awarded Airport Investment \$225,000 in just compensation. Airport Investment has failed to identify any error in the jury instructions or other substantive rulings at trial. Instead, Airport Investment has assigned error to two isolated evidentiary

rulings. This Court should affirm because neither ruling was an abuse of discretion and the grounds argued on appeal were not preserved below.

Airport Investment is not entitled to a fee award under the statute that applies because the just compensation awarded at trial was less than half the amount Sound Transit offered in settlement. The Court should reject Airport Investment's strained argument that other fee statutes, which apply in other circumstances, mandated a fee award here.

DATED this 6th day of May, 2014.

GRAHAM & DUNN PC

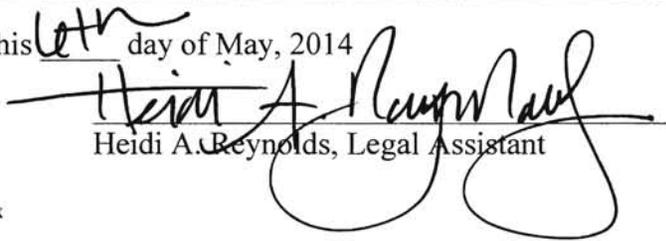
By 
Marisa Velling Lindell, WSBA# 18201
Matthew R. Hansen, WSBA# 36631
Estera Gordon, WSBA# 12655
Attorneys for Respondent Sound
Transit

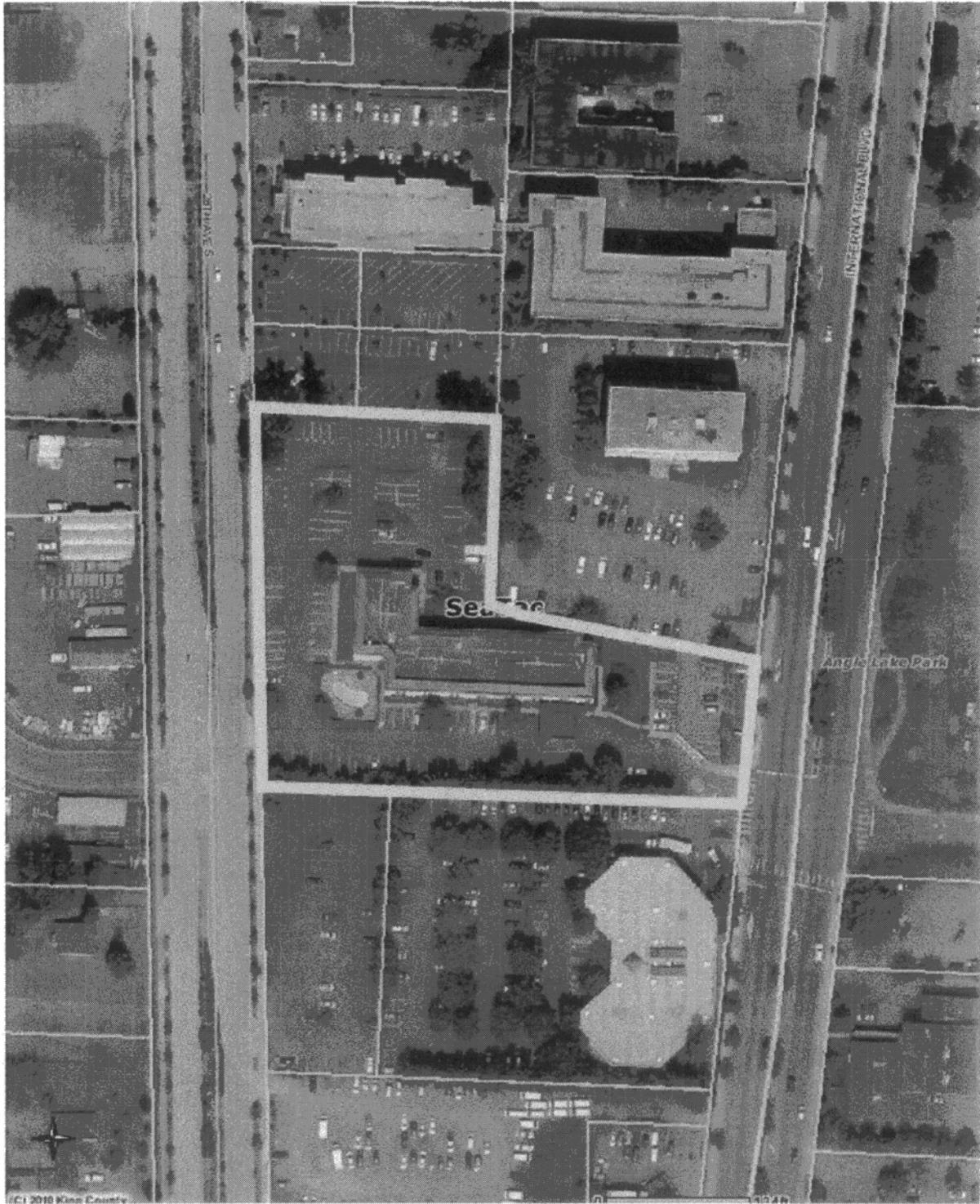
CERTIFICATE OF SERVICE

I hereby certify that I caused a true, correct and complete copy of **SOUND TRANSIT'S RESPONSE BRIEF** to be served by the method indicated below, and addressed to each of the following parties:

Averil Rothrock, WSBA# 12144 Joaquin M. Hernandez, WSBA# 31619 Milt Reimers, WSBA# 39390 Schwabe, Williamson & Wyatt, PC U.S. Bank Centre 1420 5th Avenue; Ste. 3400 Seattle, WA 98101-4010 Jhernandez@schwabe.com mreimers@schwabe.com jhicok@schwabe.com rrebusit@schwabe.com arothrock@schwabe.com <i>Attorneys for Respondent Airport Investment Company</i>	<input checked="" type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input checked="" type="checkbox"/> _____	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email
Margaret A. Pahl, WSBA# 19019 King County Prosecuting Attorney Civil Division Peggy.pahl@kingcounty.gov Lebryna.Tamaela@kingcounty.gov <i>Attorneys for Respondent King County</i>	<input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input checked="" type="checkbox"/> _____	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email (pursuant to E- Service Agreement)
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Dated this 6th day of May, 2014


 Heidi A. Reynolds, Legal Assistant



Aerial





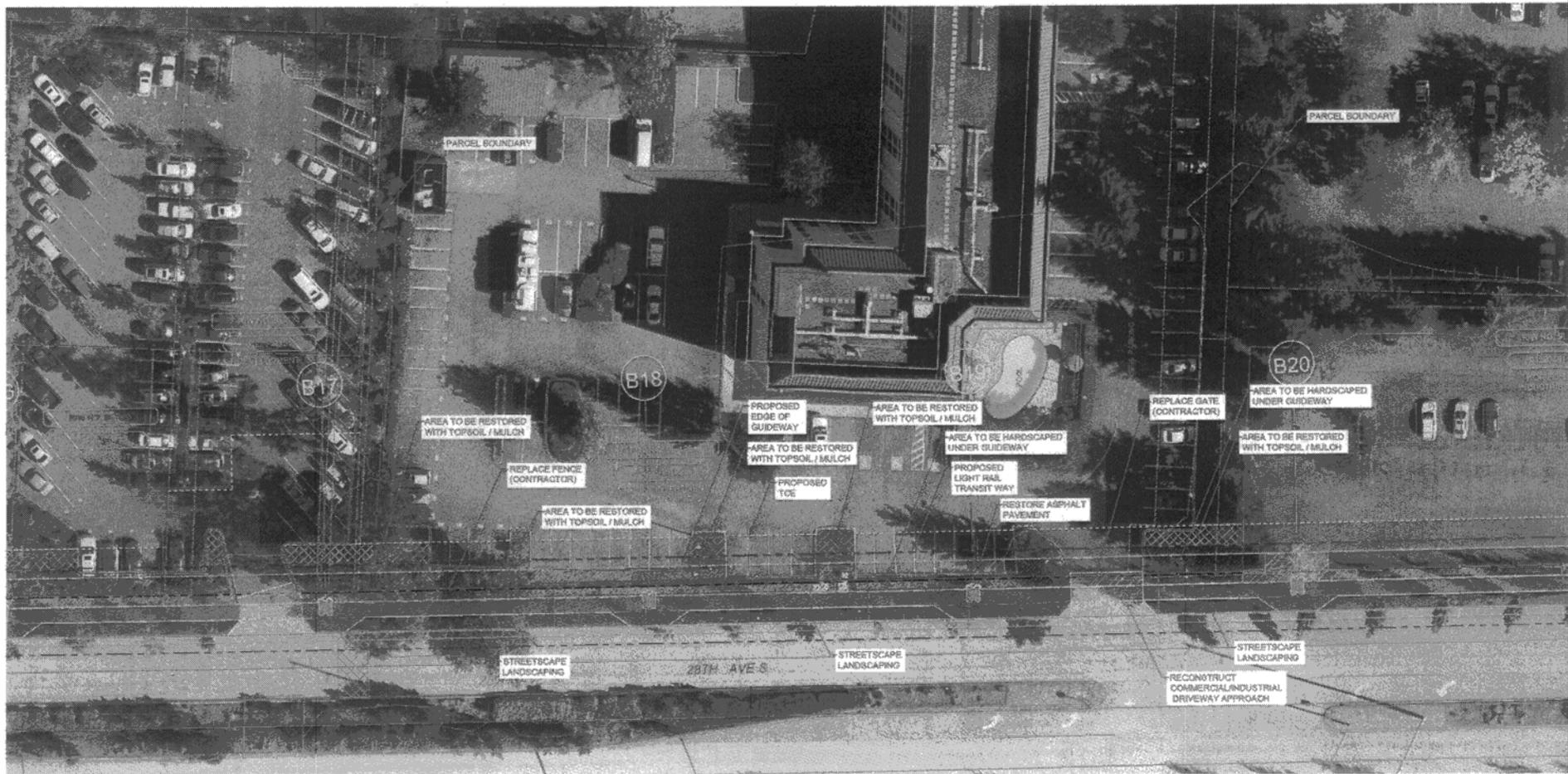
19445 International Blvd, SeaTac, WA 981

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Imagery Data

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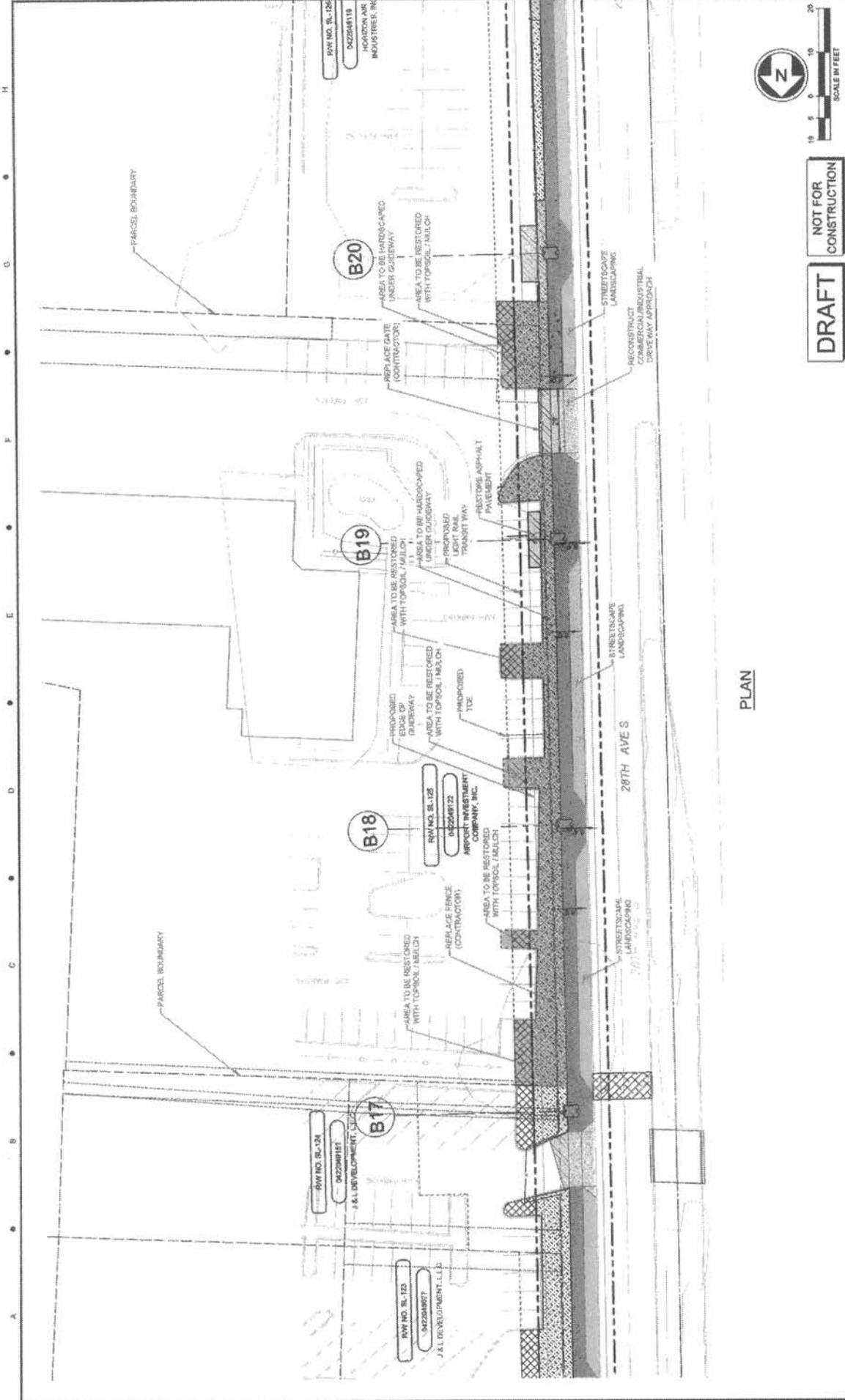
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DESIGNED BY: DRAWN BY: CHECKED BY: APPROVED BY:	<p>PCL PCL CIVIL CONSTRUCTORS, INC. 1811 NE 18th STREET, SUITE 219 ISSACAHU, WASHINGTON 98029 PH: 425-394-4200 FX: 425-394-4295</p>	<p>HDR HDR Engineering, Inc.</p>	<p>SOUND TRANSIT</p>	Title: 1"=40' Filename: Investment Company.dwg Contract No.: 8440 Date:	SOUTH LINK SEATAC/AIRPORT STATION TO S 200TH ST DESIGN BUILD CONTRACT	Drawing No.: Sheet No.: 1 Rev No.: 0
				SL-125 AIRPORT INVESTMENT COMPANY INC PROPERTY OWNER EXHIBIT		
				29TH AVE S		
				RECONSTRUCT COMMERCIAL/INDUSTRIAL DRIVEWAY APPROACH		



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PLAN

<p>Owner: Sound Transit 1900 1st Avenue Seattle, WA 98101</p>	<p>Contract No.: 6440</p>	<p>Sheet No.: 1A</p>	<p>Scale: 0</p>
<p>Project: SOUTH LINK SEATAC/AIRPORT STATION TO S 200TH ST DESIGN BUILD CONTRACT</p>	<p>Client: Sound Transit</p>	<p>Property Owner: BL-125 AIRPORT INVESTMENT COMPANY, INC.</p>	<p>Exhibit: PROPERTY OWNER EXHIBIT</p>
<p>Design Firm: H.R. Engineering, Inc.</p>	<p>Contractor: PCL</p>	<p>City: Seattle</p>	<p>State: WA</p>
<p>Project No.: 0422048112</p>	<p>Contract No.: 6440</p>	<p>Sheet No.: 1A</p>	<p>Scale: 0</p>