

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/12/2023 8:00 AM  
BY ERIN L. LENNON  
CLERK

No. 1018941

SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF SAMMAMISH, a Washington municipal  
corporation,

Respondent,

vs.

JOHN TITCOMB, JR. and LINDE R. BEHRINGER, husband  
and wife, and the marital community comprised thereof; and  
KING COUNTY,

Petitioners.

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ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

This eminent domain case involves the proper exercise by the City Council of the City of Sammamish of its express statutory authority to condemn private property for the public use of improving public stormwater facilities.

After years of deliberation regarding the George Davis Creek Project (“Project”), the Sammamish City Council by ordinance determined it to be necessary to re-route the George Davis Creek away from the property of John Titcomb and Linde Behringer (collectively “Titcomb”) for the public use of improving stormwater drainage capacity and conveyance in an area adjacent to the East Lake Sammamish Parkway, a major arterial in Sammamish. While the stormwater improvement Project further confers the additional public benefit of removing barriers to fish passage for Kokanee salmon as they migrate from Lake Sammamish to their upstream spawning grounds in George Davis Creek, the City Council did not exercise its eminent domain authority for purposes of improved fish passage. In

constructing the Project, however, state law does require the City of Sammamish to remove any barriers to fish passage.

The law established by this Court has for many years placed the burden on Titcomb to demonstrate that the Sammamish City Council acted in an actually or constructively fraudulent manner in selecting the Titcomb's property for the stormwater Project. No evidence of fraud exists in this record. In the absence of proof of such fraud, the City Council's determination of public necessity is deemed "conclusive" on the trial court.

The unanimous decision of the Court of Appeals simply restates this long- and well-established law. The Petition fails to satisfy any of the criteria set forth in RAP 13.4(b) necessary for further review.

## II. IDENTITY OF RESPONDENT

Respondent is the City of Sammamish ("City" or "Sammamish").



### III. COURT OF APPEALS' DECISIONS

A copy of the Court of Appeals' published opinion ("Opinion") is attached as Appendix A to John Titcomb, Jr. and Linde R. Behringer's (collectively "Titcomb") Petition for Review ("Petition").

### IV. ISSUES PRESENTED FOR REVIEW

In Ordinance No. 02021-526 ("Ordinance"), the Sammamish City Council specifically declared property owned by Titcomb to be necessary for the Project. As explained in the Ordinance, the Project will result in the construction of important stormwater drainage improvements. Under state law, construction of those stormwater drainage improvements "must provide unimpeded passage for all species of adult and juvenile fishes." Titcomb concedes in their briefing below and in the Petition that express statutory authority exists for the City to condemn private property for stormwater improvements.

Under these facts, should review be granted under the criteria set forth in RAP 13.4(b)?

## V. FACTS RELEVANT TO PETITION

### A. Factual Background.

The property at issue in this eminent domain action is owned by Titcomb and is located at 629 East Lake Sammamish Shore Lane NE in Sammamish (“Titcomb Property”). The George Davis Creek (“Creek”) runs underneath the Titcomb residence located on the Titcomb Property. CP 31; photo at CP 38. In constructing the Project, the City will re-route the Creek to City-owned property adjacent to the Titcomb Property. CP 31.

The Sammamish City Council on March 2, 2021, adopted the Ordinance, exercising its powers of eminent domain for the Project. CP 5 – 12. In the Ordinance, the City Council declared that doing so was “necessary” for the Project. CP 7.

The Ordinance includes the City Council’s express findings that the Project will “reduce or eliminate storm drainage conveyance system capacity issues, improve traffic safety of adjacent roadways by reducing hazardous flooding conditions,

and provide greater flood protection.” CP 6.

The Project also confers the additional public benefit of improved fish passage from Lake Sammamish to the Creek. CP 5 – 7. When constructing stormwater improvements like those included in the Project, state law requires Sammamish also to improve fish passage. CP 728; WAC 220-660-190; see CP 32 – 34, 62 – 69.

B. Necessary Stormwater Improvements.

For decades, improvements have been needed to the drainage and conveyance capacity of the existing stormwater infrastructure in the Creek. CP 727.

The culverts, pipes, and other drainage infrastructure within the Creek are not adequate to convey even a two-year storm event let alone major storm events. These storm events result in periodic flooding, additional facility maintenance, and reduced traffic safety on adjacent roadways including the East Lake Sammamish Parkway (“ELSP”), a major arterial roadway running parallel to the lake front homes on Lake Sammamish.

The Project will update the stormwater infrastructure eliminating street flooding along the ELSP. CP 32.

The Creek is a component of the City’s surface and stormwater management system. CP 671; Sammamish Municipal Code (“SMC”) 13.10.760.

Stephanie Sullivan, P.E., is the City’s Senior Engineer – Stormwater, with more than ten years of experience in her field. CP 669.

Ms. Sullivan testified, “[s]tormwater systems discharge to George Davis Creek and thus, George Davis Creek conveys stormwater flows.” CP 671; see SMC 13.10.750.<sup>1</sup>

Ms. Sullivan continued, “[t]he George Davis Creek Fish Passage Project includes multiple activities defined as part of the services provided by the City’s Surface Water Utility.” Id. Ms. Sullivan concluded:

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<sup>1</sup> Subsequent to the briefing to the Court of Appeals, Title 13 of the Sammamish Municipal Code was repealed and replaced in Title 21. The full text of the cited sections from Chapter 13.10 is included in the cited page of the Clerk’s Papers.

The title and description of the [P]roject focused on the fish passage benefits for the purpose of grant applications, but [that] is just one aspect of the project. In addition to fish passage, the project will remove a concrete dam further upstream, increase flow and sediment transport capacity, eliminate the need for a sedimentation pond and diversion system, and reduce or eliminate maintenance for those systems.

CP 671 – 672 (emphasis added).

In 2018, the City initiated the Project for two reasons – to replace storm drainage infrastructure and to eliminate existing barriers to fish passage. CP 32; see CP 32 – CP 36. Prior to the City Council’s selection of the Titcomb Property for the Project, City Staff analyzed multiple project alternatives and presented those analyses at multiple City Council meetings. Four alternatives were selected as the “most feasible” and were “weighed against a common set of criteria” that included both fish passage and “long-term stability, maintenance and construction feasibility” of stormwater facilities. CP 36.

The City Council ultimately selected Alternative 4 for the Project. CP 37; see CP 5 – 6.

The Creek currently runs down a hill to the ELSP and then enters Lake Sammamish through the Titcomb Property. At the juncture with ELSP, the Creek meets a sediment basin, then enters stormwater culverts, after which the Creek bypasses ELSP and enters Lake Sammamish via the Titcomb Property. CP 32 – 33; see also presentation to City Council with diagrams at CP 62 – 69.

King County built a bypass system at the juncture of the Creek and the ELSP in the 1990s, before Sammamish incorporated as a city in 1999. CP 33; CP 727. This bypass system was intended to capture overflow water for occasional storm-related flooding. Instead, because of increased flow through the historic stream alignment, most of the water is diverted to the bypass system. The bypass system was never intended to handle the volume of water in the Creek. CP 33; CP 62 – 69.

Christopher “Toby” Coenen, P.E., serves as the City’s Senior Stormwater Engineer. Mr. Coenen graduated from Michigan Technological University with a degree in Civil Engineering, is a licensed professional engineer, and has been a stormwater engineer for more than 30 years, serving municipal and private clients throughout the Pacific Northwest. CP 726.

Mr. Coenen testified:

The George Davis Creek Project (“Project”) is fundamentally a stormwater facilities improvement project. The need to improve the drainage capacity of the George Davis Creek stormwater infrastructure goes back decades. . . . Attached hereto collectively as Exhibit A are photographs with explanations of the historic flooding problems occurring at the [Titcomb] property from December, 2015, to January, 2022. . . . The Project – and the City’s acquisition of the [Titcomb] property – would fix these flooding issues on the ELSP and reduce or eliminate the need for extensive maintenance to ensure the base-level function envisioned by the design.

CP 727; see CP 732 – 733 (photographs of flooding and sediment); see CP 33, CP 62 – 69.

After the City Council selected Alternative 4 to re-route the Creek from the Titcomb Property, Titcomb contacted the City to “complain that the flow of water across [Titcomb’s] property had slowed.” CP 730. To a trained Stormwater Engineer like the City’s Mr. Coenen:

This exemplifies the drainage problems at George Davis Creek. With each significant rain event, sediment invariably moves from the steeper, less stable upstream sections of George Davis Creek east of the ELSP. Sediment collects in the sediment basin and, when that basin fills, excess material accumulates in the high-flow bypass pipe and the outlet structure, or simply flows into Lake Sammamish. These episodes have become quite regular. With each of these episodes, the City is compelled to clean out the inadequate storm drain system (sediment basin, bypass pipe, outfall).



Id. Mr. Coenen further explained to Titcomb, “You are experiencing the age-old drainage problems at George Davis Creek.” CP 749. “I want to be clear, there is no effort underway – either through action or inaction by the City – to divert water away from your property and ‘dry up’ the creek. You are simply seeing first-hand the challenges of maintaining a poorly-designed storm drainage system in our community.” CP 750.

These stormwater problems have been well-known to the City Council for years. Due to the inadequate capacity and configuration of the drain system, this Project was added to the City’s “Drainage Problem Inventory” and City’s most recent Stormwater Capital Improvement Plan. CP 728; see CP 734 – 739.

C. Removal of Barriers to Fish Passage.

The Project stormwater improvements expressly constitute a public use under RCW 8.12.030. The Project will also undeniably result in the additional public benefit of improved fish passage for Kokanee salmon.

The nexus required here between the public use of stormwater improvements and the additional public benefit of improved fish passage flows from the requirements of state law. As Mr. Coenen testified, George Davis Creek is both a water of the state and a fish-bearing stream. “As a result of these designations, any storm drainage improvements to the drainage system are required by state law to be made fish passable.” CP 728.<sup>2</sup>

In designing the stormwater improvement Project, Mr. Coenen was advised by “multiple government agencies that (a)

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<sup>2</sup> WAC 220-660-190, which provides in pertinent part:

**(2) Fish life concerns:**

(a) A person must design water crossing structures in fish-bearing streams to allow fish to move freely through them at all flows when fish are expected to move.

...

**(3) Permanent water crossing structures – Generally:**

(a) The water crossing design must provide unimpeded passage for all species of adult and juvenile fishes. [Emphasis in the original.]

all new or existing improvements associated with the Project must be fish passable, and (b) the existing channel beneath the [Titcomb] residence is not and cannot be made fish passable.” Officials from both state and federal agencies advised the City that “they would not permit a stormwater project on George Davis Creek that preserves the stream running under the residence at the [Titcomb] property.” CP 729. The Muckleshoot Tribe agreed that the Creek should be re-routed away from the Titcomb Property. Id., see CP 744.

The City Council adopted the Sammamish Storm and Surface Water Management Comprehensive Plan in December of 2016 (“Plan”), which prioritizes upgrading stormwater facilities to remove barriers to fish passage and to benefit the Lake Sammamish Kokanee salmon population. CP 34 (Plan at CP 70 – 153).

The City likewise adopted its Comprehensive Plan in January 2020 which sets goals to maintain and protect surface water resources, and to encourage restoration of such resources.

D. Numerous Alternatives Were Considered by the City Council.

In 2018, the City Council listed the Project as a City Council high priority project due to emerging information on the extremely low returns and current emergency status of native Lake Sammamish Kokanee salmon. Id.

City Staff analyzed multiple project alternatives within the lower reaches of the Creek. Four alternatives were identified as the most feasible and representative of a wide range of project scopes and costs. CP 36. At its March 2, 2021, meeting, the City Council considered the issue, assisted by a Staff presentation. CP 47 – 69. The PowerPoint presented to the City Council that evening identifies the Key Take-Aways as:

**Key Take-Aways**

- Project Addresses Clear Public Need
  - Reduces risk of flooding
  - Improves capacity of critical public facility
  - Reduces maintenance demands
- Project Supports Kokanee Salmon
- Stream Relocation is Critical to Project

CP 63. The first “Project Driver” was identified as “Storm Drainage.” CP 64.

After extensive deliberation, the City Council chose Alternative 4, under which the Creek would be re-routed into an open stream channel through the City-owned property adjacent to the Titcomb Property, determining acquisition of the property rights required to relocate the Creek was “necessary” for the Project. CP 5 – 9.

#### VI. ARGUMENT FOR DENIAL OF REVIEW

In the Ordinance, the Sammamish City Council expressly declared that re-routing of the Creek located on the Titcomb Property was “necessary” for the Project. For many years in Washington, the law has been and remains that, in the absence of actual or constructive fraud, the City Council’s decision of public necessity “will, by the courts, be deemed conclusive.” Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).<sup>3</sup>

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<sup>3</sup> See also, State ex rel. Wash. State Convention & Trade Ctr. v. Evans, 136 Wn.2d 811, 823, 966 P.2d 1252 (1998); Cent. Puget Sound Reg’l Transit Auth. v. Miller (“Sound Transit”), 156

Titcomb here objects to what they refer to as “recharacterization” of the Project from fish passage to stormwater, but they point to no actual or constructive fraud in the City Council’s decision-making process.<sup>4</sup>

The Court of Appeals correctly noted the absence of any such fraud and ruled in the City’s favor, consistent with long-standing appellate precedent. The Opinion comprehensively reviews and squarely applies the existing law of eminent domain in Washington. The Opinion impacts none of the review criteria of RAP 13.4(b).

A. The Opinion Describes and Recites Well Established Eminent Domain Law. No Significant Constitutional Question or Question of Substantial Public Interest Is Presented.

On pages 14 – 18, the Petition simply recites much of the well-established law of eminent domain on which the City relies and the Opinion adopts. For example, Titcomb argues that,

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Wn.2d 403, 412, 128 P.3d 588 (2006) (“Out of respect for our coordinate branches of government, judicial review is deferential.”).

<sup>4</sup> Opinion at 18-19.

“Ensuring the power of eminent domain is properly exercised is a matter greatly impacting the public interest” and that, “Whether a municipal corporation has authority to condemn is a question of law reviewed de novo.”

The City agrees. In RCW 8.12.030, the Legislature expressly delegated to cities the power to condemn for stormwater improvements.<sup>5</sup> Titcomb admits as much here,<sup>6</sup> and likewise did so below.<sup>7</sup> The Opinion understandably notes, “It is well established that condemnation by municipalities for stormwater facilities constitutes a public use.” Opinion at 14. The City Council properly exercised that power here.

Titcomb similarly argues at 17 that the Opinion defers to the City Council on the question of statutory authority to condemn. That is true, and true because—as Titcomb admits—

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<sup>5</sup> See also City of Bellevue v. Painter, 58 Wn. App. 839, 842, 795 P.2d 174 (1990) (stormwater facilities are a public use as contemplated under RCW 8.12.030).

<sup>6</sup> Petition at 18 (“Titcomb does not dispute that cities have statutory authority to condemn property for stormwater purposes, RCW 8.12.030, . . .”).

<sup>7</sup> Opinion at 9.

the City Council in fact has the statutory authority to condemn for the stormwater improvements at issue here.

1. The additional benefits to fish passage do not invalidate an otherwise permissible condemnation of private property.

In the Petition at 18, Titcomb reveals their actual complaint. After conceding that the City has statutory authority to condemn for stormwater purposes, Titcomb suggests that the Project is actually a “fish passage project” and the “City has attempted to recharacterize this project as a stormwater project[.]” But the City Council made the decision here, not the “City,” and the City Council did not base its condemnation authority in any salmon recovery or fish passage aspect of the Project, nor are those issues relevant to the adjudication of public use and necessity when private property is taken for stormwater uses.

The City Council’s decision to condemn here is solidly based in the public use of stormwater improvements authorized by RCW 8.12.030. See, CP 5 – 12. As Titcomb again concedes,



“While it is true that the Ordinance condemning Titcomb’s property does not cite the Salmon Recovery Act and instead cites the statute authorizing condemnation for stormwater purposes, . . . .” Petition at 29. The City Council’s decision here is squarely based on the authority conferred by RCW 8.12.030. See Opinion at 12 – 13, fn. 3 (“Although it is the purpose articulated by the relevant legislative body that determines whether statutory authority for condemnation exists, we note that the record here, beyond the Ordinance, further supports the City’s assertion that a primary purpose of the Project is to improve stormwater facilities.”).

The City Council’s determination was heavily supported by the record. See, Sections V.A. and B., *supra*. The City Council’s decision is “deemed conclusive” on the courts in the absence of actual or constructive fraud. Welcker, 65 Wn.2d at 684. Titcomb offers no proof of any such fraud.<sup>8</sup>

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<sup>8</sup> “Titcomb and Behringer nowhere assert that the City acted fraudulently or in an arbitrary and capricious manner; nor would the record support such an assertion.” Opinion at 18 – 19.

The City readily acknowledges that the Project confers a public benefit of improved fish passage in addition to the stormwater and flood control improvements. Under state and federal law, the City Council could not have selected and approved the stormwater improvement Project unless it also included the fish passage improvements – removal of those barriers is required by state and federal law for these stream crossings. CP 728; WAC 220-660-190. As the Opinion makes clear, “That the Project additionally provides fish passage benefits does not divest the City of its authority, conferred by our legislature in RCW 8.12.030, to condemn property for stormwater facilities.” Opinion at 9 –10; *see City of Redmond v. Union Shares, L.L.C.*, 200 Wn. App. 1006, 2017 WL 3228340 (2017) (affirming trial court decision finding that the re-routing of a stream to enhance a public trail system, with an added benefit to salmon habitat, constitutes a public use).<sup>9</sup>

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<sup>9</sup> Cited under GR 14.1 as a nonbinding but persuasive authority filed after March 1, 2013.

In constructing the Project, the City Council is required by law to improve fish passage for Kokanee salmon. Even if the City Council did have a questionable motive or even if the City Council did “recharacterize” the Project, however, the “motive” of a City Council is “of limited utility in determining whether the condemnor acted arbitrarily and capriciously.” State v. Hutch, 30 Wn. App. 28, 37, 631 P.2d 1014 (1981). “Indeed, ‘[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.’” Opinion at 17, quoting Sound Transit, 156 Wn.2d at 418.

No proof of constructive fraud exists. The City Council’s decision to divert the Creek from the Titcomb Property was squarely based on a desire to reduce or eliminate long-standing storm drainage conveyance system capacity issues, which will likewise improve traffic safety on an adjacent arterial by reducing hazardous flooding conditions. The City Council’s

decision does not impact a significant question of constitutional law or any issue of substantial public interest under RAP 13.4(b)(3) or (4).

2. The City is properly and permissibly expending Recreation and Conservation Office funds for purposes other than acquisition of the property. The Ordinance specifies that compensation payable to Titcomb for the property will come from the City's stormwater capital fund or general fund.

After conceding that the City has express statutory authority to condemn for stormwater improvements and further conceding that the Ordinance cites that statute as the basis for this condemnation, Titcomb focuses on salmon recovery issues and certain funding provided to the City by the Recreation and Conservation Office ("RCO"). This focus is misplaced for at least two reasons:

1. Since the inception of this case, the City has framed the issue in this case as the adjudication of public use and necessity for the take of private property rights that the City Council deemed necessary for the public use of stormwater improvements. The City successfully appealed the trial court's

order denying a motion to adjudicate public use and necessity.<sup>10</sup> Titcomb offers no legal argument or analysis on that point; rather, Titcomb argues only that the City lacks statutory authority to condemn for *salmon recovery or fish passage* purposes. The City agrees and has never argued otherwise at any stage of this case.

Collateral issues related to the Salmon Recovery Act and RCO funding have been, and remain, Titcomb's issues, but those issues have been, and remain, wholly unrelated to public use and necessity. Because Titcomb concedes that the City has the authority to condemn for stormwater uses, this is not a case of statutory interpretation as Titcomb urges; and

2. Disputed issues involving expenditure of RCO funds are irrelevant to the issue on appeal here: the City's appeal of the

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<sup>10</sup> "The City additionally asserts that condemnation of the Titcomb and Behringer property is for a public use and that acquisition of the property is necessary to accomplish that use. We agree. It is well established that condemnation by municipalities for stormwater facilities constitutes a public use." Opinion at 14.

adjudication of public use and necessity. To the extent that Titcomb wishes to continue an argument about funding sources and expenditures, their remedy is a declaratory judgment or writ action. Even in this record, however, the sole factual evidence proves that the City has and will expend RCO funds permissibly, and only on Project aspects other than property acquisition (CP 665). Titcomb cites to no contrary evidence.

For the actual acquisition of the Titcomb Property, the City Council expressly directed by Ordinance that the City use the Stormwater Enterprise Fund and General Fund revenue. CP 3 (“Compensation to be paid to the owners of the affected property . . . shall be paid from the City’s Stormwater Enterprise Fund, and otherwise from the general funds of the City.”); CP 670.

The only factual evidence in the record relating to funding proves that the City is not using RCO grant funding for property acquisition. CP 670 (“The City, however, is not using RCO funds for property acquisition.”). The City has instead used the

RCO grant funds for design fees, as is specifically authorized under RCO Grant Manuals 5, 8, and 22. CP 670-71; see, Opinion at 11.

Titcomb offers no evidence nor binding authority to contradict the plain terms of the RCO Grant Manuals authorizing the expenditures made by the City or demonstrating that the City's use of RCO grants funds is in some manner impermissible. Titcomb instead suggests only that, "[C]ourts have rejected similar attempts to subdivide public projects in analogous circumstances." Petition at 24.

3. The City has not and will not improperly or otherwise "subdivide" the Project.

Titcomb is initially mistaken in the unsupported claim that "[i]t is impermissible to divide [Project] into multiple sub-projects such as 'planning,' 'restoration,' and 'property acquisition.'" Petition at 25. To the contrary, the RCO Manuals specifically describe these various "sub-projects" and the manner in which they are to be processed. CP 670-71.

More fundamentally, however, the cases cited by Titcomb apply to the admittedly impermissible subdivision of public works projects under RCW 39.04 in order to avoid payment of prevailing wages required under RCW 39.12. The Project at issue here has not yet even been fully designed, let alone put out to competitive bid. Once the City bids the Project, and accepts a bid, the Project will then become a public works project and the City will of course ensure that the selected contractor pays prevailing wages.

A public works project is not yet part of the Project. This case involves expenditures for property acquisition, design, engineering, and other work necessary to create a public works project, and then put that public works project out to bid. RCW 39.04.020. Once the City accepts a bid, the City will pay prevailing wages as required by law. RCW 39.04.010(4); RCW 39.12.020.



B. The Opinion is Fully Consistent with Supreme Court Precedent.

Titcomb offers In re City of Seattle (“Westlake I”), 96 Wn.2d 616, 627, 638 P.2d 549 (1981), to support their argument that the stormwater use cannot be separated from the fish passage benefits, and that the condemnation accordingly must fail. Petition at 26. Westlake I, however, breaks squarely in the City’s favor and the Opinion remains consistent with the law of Westlake I.

In Westlake I, Seattle condemned all of the properties necessary for development of Westlake Center. The project included certain public uses (e.g., public park, public open space, public parking), but also included 186,000 square feet of retail and cinema uses. Id. at 621. The Supreme Court rejected this plan, finding that no statute existed which authorized condemnation of private property for retail and cinema uses, and concluded that the proposed use was “predominantly private, rather than public.” Id. at 629.

Westlake I offers no support for Titcomb. As the Opinion makes clear, “we note that the record here, beyond the Ordinance, further supports the City’s assertion that a primary purpose of the Project is to improve stormwater facilities.” Opinion at 13, fn. 3. The express holding of Westlake I is simply and unremarkably that the exercise of municipal eminent domain authority “must be derived from an express legislative grant or necessarily implied.” Id. at 632. The required “express legislative grant” for stormwater improvements is codified in RCW 8.12.030.<sup>11</sup>

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<sup>11</sup> *See also* In Re Petition of City of Seattle (“Westlake II”), 104 Wn.2d 621, 624, 707 P.2d 1348 (1985) (on second review of the Westlake Center project, the Supreme Court affirmed Seattle’s sale to a developer of parcels intended for retail shopping center and also Seattle’s condemnation of a parcel for public park purposes over objection that the park was “so inseparable from and integral to” the private development that it could not be adjudicated a public use); In Re Petition of City of Bellevue, 62 Wn.2d 458, 459, 383 P. 2d 286 (1963) (condemnation permissible even though other private property owners will be benefited; “[t]hat someone is benefited by street improvements is not unusual”).

A permissible stormwater condemnation is not rendered invalid because additional benefits required by state law result. In Evans, 136 Wn.2d 811, property owners contested the State’s proposed expansion of the Washington Convention and Trade Center. The issues in Evans again involved the interpretation of “public use” in the context of a partial private use of the condemned property. Id. at 813-14. The property owners relied on Westlake I. The Evans court distinguished Westlake I on several grounds, including that “condemnation was improper in Westlake [I] because the project for which the land was to be condemned was predominantly private in nature.” Id. at 820.

The public use of stormwater improvements and the further additional benefits of salmon recovery and enhanced fish passage are inextricably intertwined. No “predominantly private” aspect exists. The Project has long been and remains a stormwater project. CP 5 – 6, 32, and 727.

C. The Opinion Is Also Fully Consistent With Published Decisions of the Court of Appeals.

In the trial court and in the Court of Appeals, Titcomb heavily relied on Cowlitz County v. Martin, 142 Wn. App. 860, 177 P.3d 102 (2008), to undercut the City's authority to condemn for stormwater improvements. The Martin case, however, is easily distinguishable – the Sammamish City Council specifically identified stormwater improvements as the necessary public use in the Ordinance. The Cowlitz County Commissioners failed to do so in Martin. Under those facts, the Martin decision was correctly decided and the Opinion remains consistent with the law in Martin.

In Martin, the County ordinance sought to condemn an easement for stream culvert replacement for the sole claimed public use of removing barriers to fish passage. Martin, 142 Wn. App. at 862–63. The County Prosecuting Attorney included stormwater improvements as an additional basis for condemnation in the condemnation petition. The stormwater

improvements were never considered by the County Commissioners, nor were they called out in the enabling ordinance. Id. As the Court made clear, “a prosecuting attorney does not have authority to articulate a different or additional purpose for condemnation not stated by the county.” Id. at 868.

The City’s Ordinance specifically details the stormwater facility improvements that will result from this condemnation action. CP 5 – 6; see Opinion at 13 – 14; see VRP 18:9 – 17 (Titcomb concedes “city council made certain findings here”).

A finding in favor of the City here is fully consistent with Martin, RCW 8.12.030, and the unbroken line of other appellate cases affirming a city council’s authority to condemn property for stormwater improvements.

## VII. CONCLUSION

Under RCW 8.12.030, the City Council has express statutory authority to condemn private property for stormwater improvements. Titcomb admits that the City Council has that authority. The City Council did so in the Ordinance. State law

requires that the City also improve fish passage in order to construct the stormwater improvements.

The Petition fails to satisfy any of the criteria for review set forth in RAP 13.4(b) necessary for further review.

I certify this document contains 4,962 words, excluding the parts of the document exempted from the word count, and complies with the word count limit set forth in RAP 18.17(c)(10).

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2023.

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DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 12<sup>th</sup> day of May, 2023, I caused a true copy of the foregoing *Answer to Petition for Review* to be served on the following through the Court’s e-service system and by e-mail as set forth below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of May, 2023, at Brookline, MA.

/s/ Margaret Starkey  
Margaret C. Starkey

# KENYON DISEND, PLLC

May 12, 2023 - 6:56 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 101,894-1  
**Appellate Court Case Title:** City of Sammamish v. John Titcomb Jr., Linde R. Behringer, & King County

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