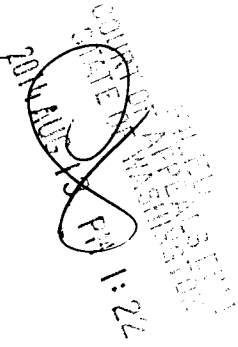
No. 71827-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON



CITY OF BELLEVUE,
a Washington municipal corporation,

Plaintiff-Respondent,
v.

PINE FOREST PROPERTIES, INC.,
a Washington corporation,

Defendant-Appellant

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE WILLIAM DOWNING

REPLY BRIEF OF APPELLANT PINE FOREST PROPERTIES, INC.

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I. INTRODUCTION

Unlike any reported condemnation case in our State's history, the City seeks a permanent take for an admitted temporary use. The City ignores the most basic facts underlying its attempted permanent take while relying upon distinguishable case law and ignoring our State's constitutional mandate that only a permanent public use warrants a permanent take. The City disputes the length of time required to use the TOD Parcel[1] for construction staging, but the fact remains that its use of this one-third portion of Pine Forest's property is temporary and will never be permanent. While in the cases cited by the City, the condemning authority could at least offer some potential permanent public use of the property, here the City has none and, unlike any other reported case, has never claimed any possible permanent use for the property.

As the issue of public use of the property is a judicial question under the Washington Constitution, this Court should analyze for itself whether the City's contemplated, purely temporary

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[1] The City disputes that the one third of Pine Forest's property that it needs only temporarily should be called the "TOD Parcel," despite the fact that its own staff has accepted and begun to process Pine Forest's application for Transit Oriented Development on this parcel and the only possible permanent future use of the parcel is for TOD. An alternate term for the TOD Parcel may be the Temporary Use Parcel to reflect the City's stated plans for this portion of Pine Forest's property.

use of the property constitutes a "really public" permanent use under our Constitution. Even if the Court analyzes the issue as a legislative question of "necessity," it must not ignore, as the City has, Pine Forest's guarantee that the City will save 13% off of **any** price the parties or a jury place on Pine Forest's entire parcel while acquiring the land it needs for permanent public use in fee, having unfettered access to the land it needs only temporarily (the TOD Parcel) for as long as it needs it, and without any additional cost. The City's insistence on a permanent take when its only public use is temporary and its guaranteed acquisition price for all the land it will use is 13% less than the price of a total, permanent take, can only be explained by the City's desire to speculate on the value of the TOD Parcel for resale. It is, by definition, arbitrary and capricious and should be reversed on appeal.

II. REPLY ARGUMENT

A. This Court's review of the trial court's decision based on a documentary record is de novo.

The City confuses the deference given to the City's legislative determination of necessity with the level of deference that a reviewing court gives to a trial court's decision based on a purely documentary record. The parties agree that the City's determination that the TOD Parcel will be put to a public use is

entitled to no deference in a condemnation action, while the City's determination that this particular property is necessary to further that public use is a legislative question. (App. Br. 11-12, Resp. Br. 18)

As discussed below (§ B, *infra*), the fact that the City has never even attempted to enunciate a permanent public use for the TOD Parcel should be analyzed as a judicial, and not a legislative, question. The less searching inquiry espoused by the City ignores the express terms of Art. I, § 16, which provides that "whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." The plain language of Art. I, § 16 requires this Court to determine for itself whether the City has *any* "contemplated public use" of the TOD parcel once both Sound Transit's and the City's related projects are finished.

For purposes of this appeal, however, this Court should review de novo the trial court's findings of fact and conclusions of law, entered after reviewing a documentary record. Appellate courts generally engage in a de novo review of trial court decisions made on a purely documentary record irrespective of a trial court's findings of fact, whether on summary judgment, *Millson v. City of*

Lynden, 174 Wn. App. 303, 309, ¶15, 298 P.3d 141 (2013), or in any other case in which "the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence . . ." *Smith v. Skagit Cnty.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969).

The only case cited by the City for a more deferential standard of review, *PUD No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*, 159 Wn.2d 555, 578, 151 P.3d 176 (2007) (Resp. Br. 19), contains **no** substantive discussion or analysis of the standard of review of a trial court's findings of public use and necessity made without an evidentiary hearing. This Court should engage in de novo review because the trial court was not called upon to make significant credibility determinations nor to weigh and resolve evidentiary conflicts from an enormous amount of documentary evidence, but made its findings based on a relatively short documentary record that was not significantly disputed. *Compare Dolan v. King Cnty.*, 172 Wn.2d 299, 311, ¶21, 258 P.3d 20 (2011); *Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003). The parties do not dispute the fact that the City needs the TOD Parcel only temporarily and the City did not object

to the admission of Exhibit 1, Pine Forest's unequivocal guarantee that the City will pay 13% less (than any agreed or determined price for the entire parcel) if it takes the TOD Parcel only for the temporary use it repeatedly has confirmed it needs. The only dispute is the legal determination of whether the City's temporary use justifies a permanent take.

B. The City may not permanently take the TOD Parcel for a temporary public use.

It is undisputed that the City will not use the TOD Parcel for any public purpose once it completes construction of the elevated section of NE 15th St. across Sound Transit's tracks. The trial court erred in concluding that the City's permanent taking of this parcel for the temporary purpose of construction staging for Sound Transit and NE 15th St. constituted a public use.

The City's argument that the enunciation of a public purpose for a project is sufficient to justify any taking, regardless of its scope and duration, effectively obliterates both the need for any temporary take and the constitutional guarantee of Article I, Section 16, which expressly states that "whether the contemplated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is

public." The City rewrites this constitutional guarantee to require only that the government's contemplated general purpose, not its use of the property, is public.

Neither the *Seattle Monorail* nor the *PUD No.2 of Grant County* case supports the City's argument that a project's public purpose, rather than whether the property is put to public use, is the only "judicial question" presented under Art. I, § 16. The *Seattle Monorail* case supports the proposition that "decisions as to *the amount* of property to be condemned are legislative questions, reviewed under the legislative standard for necessity." *HTK Management LLC v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 633, ¶46, 121 P.3d 1166 (2005) (emphasis added). Unlike *Seattle Monorail*, Pine Forest does not contest the City's ability to take the entire parcel, but the duration of the take to suit the City's permanent and temporary uses. And in the *Seattle Monorail* case, despite the City's claim to the contrary, the government stated possible permanent uses for the entire parcel; there was evidence not only that "the remaining portion of the property could be used for at least 10 years for construction and remediation," but that some design plans "show the station footprint covering the entire property," and that "a portion of the

property may be used for loading and unloading passengers," 155 Wn.2d at 620, ¶15, 633, ¶46.

More strikingly, the City claims that the *Seattle Monorail* use was approved by the Court because the government "had not identified a permanent public use for a substantial portion of the property." Resp. Br. 21 (citing 155 Wn.2d at 633). In fact, the Court approved the government's public use in part because it was likely that "the surrounding land may need to be owned permanently by the condemning authority due to the particular traffic patterns of monorail stations." 155 Wn.2d at 633, ¶46. This mischaracterization of *Seattle Monorail* crystalizes the City's unprecedented and unacceptable stretch of both the *Seattle Monorail* and the *Convention Center* cases. The City seeks support in decades of case law for the proposition that the government may constitutionally permanently take private property for which it has only temporary use, but no such support exists. Those cases each involved possible permanent and architecturally necessary uses for the contested portions of property. No permanent public use can exist when the government presents only a temporary use.

The *Grant County PUD* case is similarly inapposite because there, the condemned land was already being used for a public purpose, as the PUD had been leasing the land for its generators. The PUD's intended use of the land was not temporary, but was primarily intended for long term power generation. The PUD stated it needed "to purchase the land, obtain a permit to operate the generators, use the generators to provide reserve energy, and *possibly* sell some or all of the generators at a later date." 159 Wn.2d at 574, ¶35 (emphasis added). None of the PUD's plans "involved taking NAFTZI's property solely in order to store the generators until buyers removed them." *Id.* The Court thus held that the possibility that the PUD might "subsequently sell the generators. . . . [and therefore, no longer use the land on which they were located] would not convert the use of NAFTZI's property from a public use to a private one." 159 Wn.2d at 574-75, ¶36 (citing *Seattle Monorail*, 155 Wn.2d at 634).

The City relies on the fact that neither the Seattle Popular Monorail nor the Grant County PUD had definitive plans to "use the condemned property for a public purpose forever," in these two cases. 159 Wn.2d at 575, ¶36. However both public entities – unlike the City of Bellevue in this case – articulated *some specific*

potential permanent public use for the property – power generation in Grant County, and public ingress and egress to the monorail station. Here, by contrast, the City has repeatedly confirmed only a temporary public use of ten years or more, and has never enunciated *any* possible permanent public use of this sunken construction staging property adjacent to Sound Transit's tracks and the City's roadway, which must be elevated over Sound Transit's tracks to meet the existing intersection at 120th NE.

The other cases cited by the City for its contention that the condemning authority has discretion to identify the scope of the interests taken under its condemnation power (Resp. Br. 22), do not authorize the City to take property in fee for only a temporary public use. In each of these cases, the government was able to either enunciate a permanent public use for a fee interest in the specific property at issue,[2] or the court held that the public use was

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[2] *See City of Tacoma v. Humble Oil & Ref. Co.*, 57 Wn.2d 257, 258, 356 P.2d 586 (1960) (condemnation of mineral, as well as surface rights, for creation of public reservoir); *State ex rel. Tacoma Sch. Dist. No. 10, Pierce Cnty. v. Stojack*, 53 Wn.2d 55, 64, 330 P.2d 567 (1958) (condemnation of land for "student activity areas, and related facilities to establish an adequate senior high school in accordance with present day educational requirements.").

properly limited to less than a fee interest in the property.[3]

These cases in fact confirm Pine Forest's point: When the government cannot identify a public use for *all* of the property taken, "then the taking of excess property is no longer a public use, and a certificate of public use and necessity must be denied." *Tacoma Sch. Dist. v. Stojack*, 53 Wn.2d at 64. Here, the City identified no more than a temporary public use for the TOD parcel, yet claimed that this excess property – the fee – was necessary for a public use. The trial court erred in authorizing the condemnation of the TOD parcel in fee in the absence of even a *possible* permanent public use for this property.

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[3] *City of Pullman v. Glover*, 73 Wn.2d 592, 595, 439 P.2d 975 (1968) (affirming power to "take less than the whole of the property"); *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959) (authorizing State to "condemn only a limited easement for ingress and egress, leaving the remaining use and title in the owner."); *Eastvold v. Superior Court for Snohomish County*, 48 Wn.2d 417, 420, 294 P.2d 418 (1956) (authorizing amendment to condemn smaller portion of property); *City of Seattle v. Faussett*, 123 Wash. 613, 616-18, 212 Pac. 1085 (1923) (city may take easement rather than fee); *Neitzel v. Spokane Int'l Ry Co.*, 65 Wash. 100, 107, 117 Pac. 864 (1911) (By statute, "when a public service corporation acquires property by the right of eminent domain, the permanency of the right, title, or easement which it obtains will, in the absence of a statute vesting an absolute fee, be dependent upon continued application to the public use.").

C. The City's permanent take for purposes of temporary construction is not necessary.

Even were this Court to accept the City's invitation to limit its inquiry to a "legislative" determination that the fee was necessary for a temporary public use, the City's financial and administrative justifications for the take are arbitrary and capricious. The City cannot offer any justification for ignoring Pine Forest's guarantee to sell all of the property needed for Sound Transit's and the City's permanent and temporary construction easements for 87% of the fee value of the entire parcel.

1. Pine Forest did not concede that the City's take of the TOD Parcel was necessary.

This Court should reject the City's assertion that Pine Forest conceded the reasonableness of the City's decision to take the TOD Parcel in fee. Pine Forest repeatedly argued that the City's take of the TOD Parcel was arbitrary and capricious and, therefore, not necessary to its identified public use of building a light rail station and constructing elevated NE 15th St. above Sound Transit's tracks. The City's contrary contention that Pine Forest conceded this issue (Resp. Br. 24), omits through strategic ellipses Pine Forest's insistence that the issue was not fraud, but "basic arbitrary and capricious decision-making by the City and manifest [ab]use of

discretion." (RP 15: "Pine Forest is not alleging fraud. It's basic arbitrary and capricious decision-making by the City and manifest [ab]use of discretion. That's different.")

Although some court decisions have equated the term "constructive fraud" with arbitrary and capricious conduct, that term is not the sole judicial definition of arbitrary and capricious. *See* § C.2., below. Pine Forest's counsel explained that the phrase "constructive fraud" did not adequately describe the standard the court should employ in reviewing the City's decision:

> [I]f one were to argue about, we could talk about constructive fraud, but we're not even going that far.
>
> The point is, the standard is not fraud. The standard is arbitrary and capricious.

(RP 15)

Recognizing that Pine Forest unwaveringly challenged as arbitrary and capricious the City's claim that a fee interest in the TOD parcel was necessary for the Sound Transit/NE 15th St. project, the trial court expressly addressed Pine Forest's challenge and concluded it did not agree. (CL 16-17, CP 453). The trial court did not even cite Pine Forest's purported "concession" in its legal conclusion that the City did not act in an arbitrary and capricious manner. Where, as here, the trial court is clearly apprised of a

party's position and rules on the issue, it is preserved for purposes of appellate review. *See Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 64 Wn. App. 838, 852, 827 P.2d 1024 (1992), *aff'd in rel. part*, 126 Wn.2d 50, 63-64, 882 P.2d 703 (1994); *Crittenden v. Fibreboard Corp.*, 58 Wn App. 649, 655-56, 794 P.2d 554, 803 P.2d 1329 (1990). This Court should reject the City's assertion that Pine Forest conceded this issue below.

2. The City's justifications for a fee take in the absence of any plan for permanent use are arbitrary and capricious

Pine Forest, in confirming the City may obtain a temporary construction easement for the TOD Parcel for as long as Sound Transit and the City need it, coupled with a purchase price for *all* of the Pine Forest property that the two entities need permanently, for a price that is 13% less than the price that the parties agree or the jury determines the entire property to be worth (February 18, 2014 letter, Ex. 1), conclusively demonstrated that taking the entire property in fee is not necessary for any public purpose. The City's purported reasons for taking the fee do not withstand even minimal scrutiny, should this Court apply the arbitrary and capricious standard to the City's decision to take a fee interest in the TOD Parcel.

In addition to "constructive fraud," the Washington Supreme Court has defined arbitrary and capricious conduct as "conclusory action taken without regard to the surrounding facts and circumstances" and "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Hayes v. City of Seattle*, 131 Wn.2d 706, 717, 934 P.2d 1179, 943 P.2d 265 (1997) (citation omitted). The City's decision here was arbitrary and capricious because the City had no planned or even hypothetical permanent use for this property, and Pine Forest's guarantee, which the City has never considered, conclusively rebutted any City assertion that the fee was necessary for the City's cost and convenience.

The fact that the City "has not seen any evidence that those cost savings will occur" (Resp. Br. 12) confirms only that the City has its eyes closed, not that there is any risk that the City will be unable to acquire the land it needs permanently in fee, it will be denied unfettered use of the land that it needs temporarily, and it will not pay 13% less for everything it needs than if it continues to insist on a fee take of the land it needs temporarily. The record also does not support the trial court's findings that Pine Forest imposed "significant limitations" on the duration of the City's use of the

property, or that Pine Forest required "separate compensation" for the TOD parcel. (Resp. Br. 28, quoting FF 10-11, CP 448-49) The opposite is true, and in order to reach these conclusions, the trial court, like the City, ignored the terms of Pine Forest's guarantee, Ex. 1, which was admitted at the hearing and considered by the trial court without any objection from the City. (RP 27)[4]

The City attempts to distinguish *Port of Everett v. Everett Imp. Co.*, 124 Wash. 486,214 Pac. 1064 (1923), as did the trial court,

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[4] The City not only continues in its Response Brief to cite to a preliminary offer Pine Forest made 4 months earlier to create cost and uncertainty issues that that do not exist (Resp. Br. 11-12), it fails to acknowledge the text of Pine Forest's February 18, 2014 guarantee:

> 1. Pine Forest will agree to sell the required NW 15th St and Sound Transit right of way to the City of Bellevue.
>
> 2. Pine Forest will grant the City an easement for temporary construction use for Sound Transit and the City as detailed above.
>
> 3. The City will engage with Pine Forest in negotiations, either face to face, or through a mediator, in order to reach agreement on the value of the overall parcel.
>
> 4. Compensation will be determined by multiplying the total agreed value of the overall parcel by 87%. The City will pay the compensation as a lump sum amount on closing of the sale/easement transaction. *Thus the cost of the temporary construction easement is fixed and the savings to City are guaranteed.*
>
> 5. Once the City and Pine Forest have agreed to the value and compensation, Pine Forest will drop its objection to the City's Motion for Public Use and Necessity and the parties will execute the required purchase and easement documents.

(Ex. 1) (emphasis added)

on the ground that the Port's resolution (that it would at some indeterminate future time exercise the general powers that the Legislature had conferred upon port districts) failed to identify with particularity any current public use of the property. The trial court stated that this case is the "opposite" of the *Port of Everett* case because there, the Port conceded it had no current use of the subject property but may need it in the future, while in this case, the City has an undeniable current use and "may not need a portion of [Pine Forest's property] in the future." (CP 452, CL 11)

The trial court's public necessity conclusion is erroneous for several reasons. First, the record could not be clearer that the City has absolutely no permanent need for the portion of the property that is the subject of this case, the TOD Parcel. The City never articulated anything but a temporary need for the TOD parcel. The City contended only that it was still "actively planning, scheduling, and coordinating with respect to construction of East Link Project on the Property," (CP 429), but has never claimed that it had of has any plan to continue using the TOD Parcel (which will essentially be a sizeable hole next to an elevated roadway), for any public purpose

once construction and all construction staging is complete. The trial court's erroneously-stated distinction of the *Port of Everett* case does not in any way create in the City, with its undeniably temporary use, the right to take the TOD Parcel permanently.

Second, Pine Forest did not impose any limitations on the duration of the City's use of the property. Pine Forest offered the City a temporary easement subject only to "the parties agreeing on a timetable that provides flexibility for the city, and provides certainty that the property will be returned to Pine Forest." (Ex. 1) The City has already confirmed that it will divest itself of the TOD Parcel when its temporary construction uses have been completed and Pine Forest's agreement to an unspecified temporary easement term expressly takes into account the possibility that completion of both Sound Transit's and the City's projects will be delayed by construction or financing issues. Contrary to the City's assertion that "the temporary easement would run only through 2021" (Resp. Br. 29, n.12) Pine Forest imposed no temporal limitation on the

City's construction easement, but instead recognized what the City has conceded all along – that the use would not be permanent. [5]

Third, Pine Forest did not require "separate compensation" for the TOD Parcel. Pine Forest offered to sell the City a fee interest in the two-thirds of its property needed for Sound Transit's and the City's rights of way, plus a temporary easement for the TOD Parcel both government entities will use for construction staging at one price, which was 87% of the agreed fee value for the entire parcel. (Ex. 1 ("Compensation will be determined by multiplying the total agreed value of the overall parcel by 87%."))

Fourth, there are only conclusory statements, not evidence in the record, that the City will achieve any savings by purchasing the entire property, including the TOD Parcel, in fee, whether through administrative costs or otherwise. As Pine Forest stated in offering to sell a temporary easement at 13% less than the cost of the fee, "the cost of the temporary construction easement is fixed and the savings to the City are guaranteed." (Ex. 1) The City

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[5] The 2021 date is taken from Pine Forest's previous, October 2013 proposal, and is not a term of Exhibit 1, the February 18, 2014 guarantee provided to the City two weeks before the hearing. The 2021 date appears in the guarantee as background for Pine Forest's previous calculation of the total property's fair market value in its previous proposal, which "assum[ed] a lease of the Temporary Use Area from 2015-2021." (Ex. 1)

mischaracterizes this guaranteed lump sum purchase price that would not change regardless of the time Sound Transit needed to complete its light rail project and the City needed to construct the elevated portion of NE 15th St, and poses the nonsensical argument that there was no "collateral" for the guarantee or identity of "who exactly is making the guarantee." (Resp Br. 28-29)

Pine Forest, as the seller, did not need to guarantee that it would pay anything. It promised the City that the City would not pay more than 87% of the property's fair market value. The City, not Pine Forest, will pay this reduced amount "on closing of the sale/easement transaction." (Ex. 1) There would be no need or precedent for Pine Forest to post collateral to ensure the City paid Pine Forest for taking its property. The City's and Sound Transit's indefinite but temporary possession of the TOD Parcel commences upon the City's payment of the 13% discounted price, and there is no need for collateral to support the City's and Sound Transit's fee purchase of 2/3 of the Pine Forest's property and its right to use the

TOD Parcel for construction staging until the two public projects are completed.[6]

The only possible reason the City wishes to permanently take property it only needs temporarily is the City's desire to sell the TOD Parcel to a private owner when its temporary use is finished, and use those funds, as opposed to tax dollars spread over its entire constituency, to finance its public projects. Rather than sanctioning this unconstitutional conduct, the *Port of Everett* Court expressly prohibited it, holding that condemnation power may not be exercised to take property for speculative future uses:

> While the term 'necessary' . . . undoubtedly means such property as is reasonably necessary for its purposes, that is, such property as its comprehensive scheme will require when completed, it does not mean all such property as the port commission may deem that it will possibly need for its purposes at some remote time in the future. Indeed, it may be seriously questioned whether the Legislature can grant to a municipal corporation the power to acquire by condemnation property which the municipality desires merely because it believes that at some time in the future it may have use for it, as this would be to say that the Legislature could grant to the municipality power to acquire property for speculative uses; but certainly where the grant is of power to acquire only necessary property, there must be a

[6] The City appears to be confusing Pine Forest's guaranteed terms of sale with a financing "guaranty," or the promise to pay the debt of another, that is often secured by collateral or other assets. Black's Law Dictionary, pp. 772-73 (9th ed. 2009)

> showing that the particular property sought to be acquired is thus necessary, and without some definite stated plan of improvement, this necessity cannot be shown.

Port of Everett, 124 Wash. at 493-94.

The City's permanent take of property for which it has no "definite stated plan of improvement," is arbitrary and capricious in much the same way the Port of Everett's permanent condemnation was. The fact that the City, unlike the Port, has a current, temporary plan for the TOD Parcel does not address the fact that the City, like the Port, has absolutely no permanent plan for the TOD Parcel that would justify a permanent take. The City's apparent desire to permanently take the TOD Parcel, so that it may speculate on the future value of the TOD Parcel, is expressly *not* a basis for a finding of public necessity. The *Port of Everett* Court denied the Port's request that it find public necessity and this court should do the same by reversing the trial court.

D. The trial court erred in refusing to allow Pine Forest discovery into the City's purported justification for permanently taking the TOD Parcel

The trial court's refusal to allow Pine Forest discovery before considering the issue of public use and necessity deprived Pine Forest of its ability to test the City's justifications for taking a fee. Even if viewed as a discretionary "trial management" decision, as

the City argues, the trial court abused its discretion because Pine Forest identified with specificity the discovery that it sought from the City and was not dilatory. *See Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) (abuse of discretion to deny plaintiff discovery after obtaining new counsel).

Contrary to the City's contention, Pine Forest was not dilatory. The parties twice submitted Joint Motions to Amend the trial court's case schedule, generated by the City's counsel. (CP 97-99, 112-14). These agreed motions to extend the City's deadline for filing its Motion for an Order of Public Use and Necessity were based upon the parties' agreement that they were "attempting to address or narrow the issues in this case by agreement, and the extension of these intermediary deadlines will allow the parties to pursue these conversations" (CP 98) and "[t]he parties have scheduled a settlement conference for January 16, 2014, and the extension of this intermediary deadline will allow the parties to pursue settlement before the City files its motion for public use and necessity." (CP 113) The parties had agreed to delay formal litigation, including discovery, pending mediation and they engaged in several discussions and two mediation sessions. (CP 282, n. 62) The City filed its public use and necessity motion late on Tuesday,

January 21, three business days after the parties' last mediation session ended late on Thursday, Jan. 18. (CP 127)

Pine Forest was clear in its Opposition to the City's Motion, filed on Jan. 28, 2014, that it intended to propound discovery specifically directed at "the City's deliberations and financial analysis leading to its arbitrary and capricious determination to take the entire Pine Forest Property, the basis for believing the MOU provides it with authority to condemn property for Sound Transit and depositions of those with knowledge of the City's deliberations and analysis of these issues." (CP 282-83, n. 62) Pine Forest propounded that discovery immediately after filing its Opposition and answers to its discovery requests were due the day the trial court heard oral argument on the City's motion. (RP 16) Pine Forest told the trial court that its discovery was narrowly tailored to the City's financial analysis that the City repeatedly cited as a justification for its permanent take. (RP 16-17) There would have been no prejudice in delaying the hearing to allow the court to consider evidence concerning the City's purported financial and administrative justifications rather than considering the motion on an incomplete record containing only the City's conclusory statements and speculation that unspecified financial and

administrative concerns justified ignoring Pine Forest's guarantee and forging ahead with a permanent take.

The City relies upon *Fruitland Irr. Co. v. Smith*, 54 Wash 185, 102 P. 1031 (1909) to defend the trial court's denial of discovery with a parenthetical stating: "no continuance where party did not object to hearing when the date for trial on just compensation was set." (Resp. Br. 32) The *Fruitland* case could not be more different than the discovery and continuance facts before this Court. There, public use and necessity had already been found, apparently without any opposition by the private property owner, when, on February 10, 1908, the trial court set a trial date, again without any objection from the private property owner, for February 14. Trial did not occur until February 26 and on the morning of trial, the private property owner asked for a continuance. 54 Wash. at 186. Pine Forest would agree that a continuance would not be appropriate in those circumstances, but in this case, on the day of the March 7, 2014 public use and necessity hearing, 7 weeks remained until the discovery cut off and over 3 months remained until trial. (CP 123) No prejudice existed justifying a denial of Pine Forest's right to conduct the most basic

discovery and provide the trial court with a complete record like the courts considered in the *Monorail* and *Convention Center* cases.

While the City's claim of necessity does not withstand even superficial scrutiny, at a minimum this Court should remand with directions to allow Pine Forest to present its opposition after engaging in the discovery authorized by the civil rules.

III. CONCLUSION

The City's reasoning justifying this permanent take of the TOD Parcel, taken to its logical end, would extinguish the need for the government ever to take property temporarily rather than in fee, and allow the government to take private property it needs only temporarily for the sole permanent purpose of selling the property for a profit. This Court should reverse the order of public use and necessity, or remand with instructions to allow discovery.

Dated this 12th day of August, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 12, 2014, I arranged for service of the foregoing Reply Brief of Appellant Pine Forest Properties, Inc., to the court and to the parties to this action as follows:

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