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Court of Appeals
Division I
State of Washington

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No. 91436-2

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 71827-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF BELLEVUE,
a Washington municipal corporation,

Respondent,
v.

PINE FOREST PROPERTIES, INC.,
a Washington corporation,

Petitioner.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

CAIRNCROSS &
HEMPELMANN, P.S.

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A. Identity of Petitioner.

The petitioner is Pine Forest Properties, Inc., the defendant in the trial court and appellant in the Court of Appeals.

B. Court of Appeals Decision.

Division One's published decision affirms the trial court's determination that the City of Bellevue had established both a public use and necessity in condemning for the City's permanent ownership Pine Forest's entire 238,097 square foot property in Bellevue despite the City's admission that it will permanently use only two-thirds of the parcel and that the remaining one-third will be used only temporarily for construction staging.

The Court of Appeals issued its published decision on December 22, 2014, ___ Wn. App. ___, 340 P.3d 938 (2014) (Appendix A) and denied a timely motion for reconsideration on February 18, 2015. (App. B)

C. Issues Presented for Review.

When government takes private property under its power of condemnation, Washington's Constitution, Art. I, § 16 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."

1. Did the Court of Appeals err in determining as a “judicial question” that the City of Bellevue’s temporary use of Pine Forest’s property for construction and staging justified a permanent taking of that property under Art I, § 16?

2. Did the Court of Appeals err in accepting the City’s assertion of necessity to take Pine Forest’s entire fee interest in property that the City concedes it will use only temporarily and in the absence of any reasons to reject Pine Forest’s unconditional offer to grant the City a temporary easement to the property for as long as it needs the property for construction and staging that would result in the City paying a total acquisition price that is 13% less than what the City will ultimately pay for condemning the entire property in fee?

D. Statement of Facts.

Pine Forest owns approximately 240,000 square feet of real property in the Bel-Red area of Bellevue (the “Property”). (CP 2, 269-70; CP 448-49, FF 9, 12) The City of Bellevue sought to condemn the Property to build an extension of NE 15th Street and to aid Sound Transit’s construction of its East Link light rail project. (CP 182-235; CP 447, FF 5) A Memorandum of Understanding between Sound Transit and the City authorized the City “to acquire

the Property for Sound Transit's use for construction staging of the East Link Project, which is expected to continue for as long as eight years or longer, and for construction of a permanent fixed guideway system." (CP 446-47, FF 3)

As reflected in Appendix C, Sound Transit plans to build tracks across a portion of the Property to serve a new light rail passenger station directly east of and across 120th NE from the Property. That new station will be built within the Spring District, a private, City-approved, 5 million square foot Master Development Plan of mixed Transit Oriented Development uses already under construction that will transform the Bel-Red area from a warehouse district to a pedestrian friendly mixed use urban neighborhood. (CP 129-31, 287)

The City plans to improve transportation throughout the Bel-Red area by extending NE 15th, an east-west arterial, across the Pine Forest Property to feed directly into the Spring District development at the 120th NE intersection. (CP 288; CP 447, FF 5) The City has not finished its design of the NE 15th extension but it has confirmed the location of NE 15th's intersection with 120th NE. (CP 288; CP 447, FF 5) NE 15th will be elevated across Sound Transit's tracks. (CP 313, 392-404) Sound Transit has committed

to opening its Spring District Station by 2022 or 2023. (CP 313) Encouraged by the City's land use policy favoring Transit Oriented Development, Pine Forest included an 84,000 square foot portion of the Property (the "TOD Parcel"), but not the remainder of its 240,000 square foot property, in a Transit Oriented Development Master Development Plan that proposes a total of 1.16 million square feet of mixed commercial and residential use immediately adjacent to the Spring District. (CP 318-86)

The trial court confirmed that the City and Sound Transit had a "permanent need for approximately two-thirds of the total area of the Property, or approximately 160,000 square feet out of a total of approximately 240,000 square feet" and only a temporary need for the remaining 84,000 sq. ft. TOD Parcel for an undefined number of years. (CP 448-49, FF 9, 10) Pine Forest stipulated to the existence of public use and necessity for the City's condemnation of the two-thirds of the Property that will be necessary for Sound Transit's construction of its East Link light rail and the City's extension of NE 15th. (CP 448, FF 7) It contested the City's condemnation of the remaining 84,000 sq. ft. TOD Parcel that the City will use only temporarily for construction and staging.

Pine Forest initially offered the City a lease of undefined duration for the TOD Parcel. (CP 406-08) Though the City's own plans confirm that its use of the TOD Parcel will never be permanent but will serve only as a temporary construction and staging site while Sound Transit constructs its railway and the City constructs its roadway over those tracks before Sound Transit's rail goes "live," the City rejected the lease. (CP 313, 432) The City asserted that the duration and the cost of any such lease could not yet be determined and could possibly eclipse the value of acquiring the property in fee. (CP 432-34)

Pine Forest responded to the City's concerns in a February 18, 2014 letter, agreeing to sell the City, in fee, the two-thirds of the Property that the City and Sound Transit needed for permanent use, and to provide the City an easement to the TOD Parcel for as long as the City needed it for construction and staging. (Ex. 1) Pine Forest's offer resulted in a total purchase price 13% less than what the City will ultimately pay for the entire parcel.¹ Pine Forest confirmed this was a single, "lump sum" transaction; "the cost of

¹ For instance, if the entire parcel (as determined by trial or agreement) is determined to be worth \$30,000,000, the City would pay \$26,100,000. If the entire parcel is determined to be worth \$20,000,000, the City would pay only \$17,400,000, a savings of between \$3.9 million to \$2.6 million.

the temporary construction easement is fixed and the savings to the City are guaranteed.” (Ex. 1)

Following consideration of affidavits, exhibits, and argument only, King County Superior Court Judge William Downing (“the trial court”) found that the City had established both a public use and necessity for a permanent taking of the 84,000 sq. ft. TOD Parcel even though it would be used only temporarily by the City. The trial court did not mention the terms of Pine Forest’s guarantee, instead referring only to “Pine Forest’s proposal regarding how the City and Sound Transit could coordinate their projects with Pine Forest’s Transit-Oriented-Development plans.” (CP 448-49, FF 10) The trial court stated that the City had considered undefined and “not precisely quantifiable” “transaction costs associated with taking only a temporary interest in a portion of the Property,” (CP 449, FF 11), but denied Pine Forest’s motion to continue to conduct discovery of the City’s purported justifications. (CP 453, CL 17) The trial court found that “the City reasonably determined that it would be considerably more cost effective to acquire the Property in fee simple than to agree to Pine Forest’s proposal.” (CP 449, FF 11)

Division One affirmed the trial court in a published decision. Reasoning that the construction of a public light rail station was “without question . . . a public use,” (Op. ¶ 40), the Court of Appeals relied on this Court’s decisions in *HTK Mgmt., L.L.C v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005) (“*Monorail*”) and *PUD No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus, LLC*, 159 Wn.2d 555, 151 P.3d 176 (2007) to hold that the government need not identify a permanent public use to justify a permanent taking of private property. (Op. ¶ 44)

The Court of Appeals also held that Pine Forest was required to prove that the City’s decision to permanently take property that it needed only temporarily was a “legislative determination of necessity,” which was “conclusive absent proof of *actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.*” (Op. ¶ 47, emphasis in original, *citing Monorail*, 155 Wn.2d at 629) The Court held that because “neither the final design of the East Link Project nor the City’s road improvement project are complete,” the City was justified in permanently taking Pine Forest’s property. (Op. ¶ 50)

Pine Forest timely moved for reconsideration, arguing that in deferring to the City’s conclusory assertion that it would be more

“cost effective” to acquire the TOD Parcel in fee, the Court of Appeals failed to consider Pine Forest’s February 18, 2014 agreement to provide the City a construction easement for as long as the City needed, resulting in a guaranteed price of 13% less than the fair market value of the fee interest. The Court of Appeals called for an answer and then denied the motion for reconsideration. (App. B)

E. Argument Why Review Should Be Granted.

- 1. This Court should give effect to Art I, § 16 and hold that government may not permanently take private property for a temporary public use.**

The Court of Appeals decision undermines the mandatory directive of Article I, § 16 of the Washington Constitution that requires the court to determine for itself “whether the contemplated use be really public.” The Court of Appeals felt bound by this Court’s decision in the *Monorail* case to hold that the City need not articulate a permanent need for private property in order to justify a public taking. But unlike in *Monorail*, here the City conceded that it would *never* have any permanent need for the property once Sound Transit completed its light rail construction. This Court should grant review and hold that where it is undisputed that the land being condemned will not be taken for a permanent public use,

the government lacks authority to permanently take the property.
RAP 13.4(b)(1), (3).

The Washington Constitution is clear and direct in requiring the courts to decide for themselves whether the government's contemplated use of condemned land is "really public":

Whenever an attempt is made to take private property for a use alleged to be public, the question 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.

Wash. Const., Art. I, § 16. "Although the legislature (or a properly empowered agency) may declare that a particular use of a property is a 'public use,' that determination is not dispositive." *Dickgieser v. State*, 153 Wn.2d 530, 535-36, 105 P.3d 26 (2005). "Public use" must be more than mere beneficial use. *Petition of City of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) (rejecting condemnation of private land for Westlake mall retail development).

The Court of Appeals relied on this Court's *Monorail* decision to hold that any enunciation of a *project's* public purpose answers the "judicial question" for purposes of Article I, § 16. This overly broad reading expands the *Monorail* decision beyond its narrow holding to the point of abdicating any meaningful judicial

inquiry into a public use that is asserted to justify a permanent taking of private property. This Court should hold that a wholly unsupported and non-specific assertion of “cost effectiveness” is not enough for the trial court to relinquish its constitutional duty under Art. I, § 16.

In a long line of cases, this Court consistently held that it is the court’s role to insure that government take no greater interest in property than that which will satisfy the particular public use contemplated:

Article I, section 16 prohibits the taking of private property for private use. Thus, this court must ensure that the entire parcel subject to the eminent domain proceedings will be employed by the public use. The relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project. If the anticipated public use alone would require taking no less property than the government seeks to condemn, then the condemnation is for the purpose of a public use and any private use is incidental.

State ex rel. Wash. Convention & Trade Ctr. v. Evans, 136 Wn.2d 811, 822, 966 P.2d 1252 (1998) (“*Convention Center*”).²

In *Convention Center*, this Court held that while the project was undoubtedly public, the State could not condemn that portion of the property for which it could not identify a public use. Thus, “[i]f an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay more than it needs.” *City of Seattle v. Faussett*, 123 Wash. 613, 618, 212 Pac. 1085 (1923) (citation and internal quotation omitted).

² *Accord*, 9 *Nichols On Eminent Domain* § 32.05 (3d ed. 2005); *City of Pullman v. Glover*, 73 Wn.2d 592, 595, 439 P.2d 975 (1968) (“[T]he extent of the taking may be no greater than is reasonably necessary for the stated public purpose”); *State ex rel. Tacoma Sch. Dist. No. 10 v. Stojack*, 53 Wn.2d 55, 63-64, 330 P.2d 567 (1958) (“If an attempt is made to take more property than is reasonably necessary to accomplish the purpose, then the taking of excess property is no longer a public use, and a certificate of public use and necessity must be denied.”); *State v. Larson*, 54 Wn.2d 86, 89, 338 P.2d 135 (1959) (“no greater estate or interest should be taken than is reasonably necessary to accomplish the public use or necessity.”); *State ex rel. Eastvold v. Superior Court for Snohomish County*, 48 Wn.2d 417, 294 P.2d 418 (1956); *Neitzel v. Spokane Int’l Ry. Co.*, 65 Wash. 100, 105, 117 Pac. 864 (1911) (“Courts, in construing statutes which grant the power and authorize the taking of a certain estate or interest, enforce the rule of strict construction, permitting no greater title or interest to vest than has been expressly authorized or may be necessary to the contemplated public use.”). *See generally*, Stoebuck and Weaver, 17 *Wash. Practice*, § 9.20 (2nd Ed. 2004 & 2014 Supp).

The Court of Appeals erred in distinguishing this line of authority as addressing the “legislative question” of necessity and not the “judicial question” of public use, and instead relying on *Monorail’s* statement that Art. I, § 16 does not “require[] a condemning authority to have a public use planned for property *forever.*” (Op. ¶ 44, quoting *Monorail*, 155 Wn.2d at 634, emphasis in original). But governmental *uncertainty* about potential permanent uses of property, which was the basis for the *Monorail* Court’s statement, is a far cry from the condemning authority’s *certainty* that the property will only temporarily serve a public purpose. Here, the City has repeatedly confirmed only a temporary public use that will in no event continue beyond completion of the improvements to NE 15th St, when Sound Transit opens its Spring District station. The City has never enunciated *any* possible permanent public use of this construction staging property adjacent to the City’s elevated street over Sound Transit’s tracks.

Unlike here, the condemning authority in *Monorail* asserted that all of the “sinking ship garage” property it sought to condemn could be potentially dedicated to permanent public use, alleging 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. The Court also noted 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.

The other case relied upon by the Court of Appeals, *PUD No. 2 of Grant County v. N. Am. Foreign Trade Zone*, 159 Wn.2d 555, is similarly inapposite because the PUD’s intended use of the land 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. This Court 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 NAFTAZI’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). Here, in contrast to NAFTAZI’S confirmed long term and very possible perpetual use, the City’s undisputable temporary use

cannot be converted into a permanent use merely because the City does not know the precise date it will no longer use the property.

Article I, § 16 delegates to the judiciary the duty to identify a public use, *not in the abstract*, but with respect to the particular property being taken. Where, as here, the government fails to identify any possible permanent use, but instead concedes that public use is only temporary and is guaranteed to pay less for a temporary rather than a permanent take, the Court should restrict the government from permanently taking private property. This Court should grant review to place a limit in accordance with Art. I, § 16, on the government's authority to permanently deprive an owner of its property. RAP 13.4(b)(1), (3).

2. The Court of Appeals decision fails to apply the proper standard of review to a condemning authority's decision in light of the "universal rule" that the government is entitled to no more property than necessary to fulfill its public purpose.

If, as the Court of Appeals held, the extent and duration of the City's taking of private property is a question of "necessity" rather than one of "public use," (Op. ¶ 44), its decision nonetheless grants a level of deference that effectively makes the condemning authority's decision unreviewable. The Court of Appeals adds an

insurmountable burden of proof that is not supported by this Court's decisions, which, while deferring to this "legislative decision" under Art. I, § 16, nonetheless hold government to the "universal rule that the condemner may take no greater interest than is reasonably necessary for the contemplated public use or necessity." *City of Tacoma v. Humble Oil & Refining Co.*, 57 Wn.2d 257, 260, 356 P.2d 586 (1960). RAP 13.4(b)(1), (3). This Court should accept review and hold that the City's permanent take of Pine Forest's TOD Parcel is not necessary for the City's temporary public purpose where the City failed to articulate any rational basis for foregoing an unconditional temporary construction easement at a guaranteed price that was substantially less than the cost of purchasing Pine Forest's entire Property in fee.

The Court of Appeals held that "Pine Forest did not establish actual or constructive fraud," (Op. ¶ 60), citing to this Court's cases that speak of arbitrary and capricious conduct "*amounting to*" or "*as would constitute constructive fraud.*" (Op. ¶ 47) (emphasis in original) (citing *Monorail*, 155 Wn.2d at 629; *Convention Center*, 136 Wn.2d at 823) In the context of a governmental taking of private property, this Court has used the term "constructive fraud" to mean an unreasonable decision, taken without "due

consideration of the facts and circumstances.” *Cent. Puget Sound Reg’l Transit Auth. v. Miller*, 156 Wn.2d 403, 417-18, ¶ 26, 128 P.3d 588 (2006) (describing owner’s burden of showing “that the public necessity determination was the product of arbitrary and capricious conduct or actual fraud”) (quotation omitted). That determination must be made in light of “the universal rule” that “the extent of the taking may be no greater than reasonably necessary for the stated public purpose.” *City of Pullman v. Glover*, 73 Wn.2d 592, 595, 439 P.2d 975 (1968).

This Court has defined “arbitrary and capricious” conduct as “conclusory action taken without regard to the surrounding facts and circumstances.” *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, 954 P.2d 250 (1998); *Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179, 943 P.2d 265 (1997). Here, the Court of Appeals misapplied the arbitrary and capricious standard by relying on conclusory assertions that lacked any foundation in fact. It erroneously assessed the City’s “necessity” for a permanent take and the reasonableness of its conduct by relying upon Pine Forest’s superseded October 16, 2013 proposal, rather than the applicable February 18, 2014 letter, characterizing Pine Forest as willing to only “allow use of the construction staging area by way of

a temporary ground lease' subject to a number of conditions," including "a specific expiration date, a monthly net rental payment, and holdover costs." (Op. ¶ 13)

Pine Forest withdrew any of those temporal requirements and lease obligations in its February 18, 2014 letter, which included no lease, no undefined lease payments, no holdover payments, and no required timeline. Under Pine Forest's February 18, 2014 agreement, the City has absolutely no risk of paying an uncertain amount for its temporary easement that could exceed the value of a permanent take. The City is guaranteed a price 13% less than the price it would pay for the entire parcel, and the City and Sound Transit will have unfettered temporary use of the 84,000 square feet for so long as they need it. The Court of Appeals failed to address these protections.

The Court of Appeals erroneously relied on the "undisputed . . . long-term need to use the property for construction staging," holding that "the failure to have in place a definitive use plan for the entire life of the property [does not] make[] the condemning authority's actions arbitrary and capricious." (Op. ¶¶ 49-50, quoting *Monorail*, 155 Wn.2d at 638 n.21) But the necessity question looks to the reasonableness of the condemning authority's

actions with respect to the particular property at issue in light of the principle that “where the grant is of power to acquire only necessary property, there must be a showing that the particular property sought to be acquired is thus necessary.” *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 494, 214 Pac. 1064 (1923).

Thus, in *Everett Improvement*, this Court reversed a judgment of public use and necessity where the Port had no “definite stated plan of improvement” for the property at issue. By contrast, in the *Monorail* case, the Court found condemnation of all of the property necessary because SMP “needs all of the property for a substantial period of time to build and construct a monorail station and may need all of it indefinitely” and because the “cost of the temporary construction easement . . . could eclipse the cost of a fee interest.” 155 Wn.2d at 638, ¶ 55.

Here, there is no contention that the TOD parcel will be needed after completion of the light rail tracks and the NE 15th St improvements, so there is neither a permanent nor even potential permanent need for Pine Forest’s TOD Parcel. More importantly, there is *no* potential that the cost of an easement “could eclipse the cost of the fee interest” given Pine Forest’s agreement to grant an easement that would result in the City paying 13% less for all the

land it needs. (Ex. 1) The City, with its unequivocal confirmations of temporary use and its unsupported alleged concerns about “not precisely quantifiable” “transaction costs associated with taking only a temporary interest in a portion of the Property” (CP 449, FF 11), pushes the *Monorail* decision beyond any remotely logical conclusion. The City’s position would abolish the need to ever take property temporarily.

While the *Monorail* decision gives substantial deference to the “legislative question” of necessity, 155 Wn.2d at 631, ¶ 42, this Court has never overruled its precedent, dating from the early days of statehood, that requires the condemning authority to narrowly exercise its discretion by taking no more property than necessary to accomplish its public purpose. *See cases cited at supra* at 11 n. 2. In holding that these cases apply neither to the determination of public use nor necessity, the Court of Appeals extends that deference beyond the acceptable arbitrary and capricious standard of review. This Court should accept review and hold that a governmental condemning authority must set forth *specific facts* to justify its claim that a fee interest is necessary for a temporary public use. Because the City’s justification for a permanent take did

not address the facts and circumstances of Pine Forest's February 18, 2014 agreement, it should reverse.

F. Conclusion.

The Court of Appeals decision effectively eliminates judicial review of a condemning authority's declaration of public use and necessity. This Court should restore the proper balance imposed by the drafters of Art I, §16 by accepting review and reversing the trial court's unsupported determination that the City of Bellevue may permanently condemn Pine Forest's entire fee interest in property that will be used only temporarily.

Dated this 19th day of March, 2015.

CAIRNCROSS &
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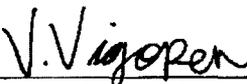
DECLARATION OF SERVICE

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

That on March 19, 2015, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 19th day of March,
2015.



Victoria K. Vigoren

340 P.3d 938

Court of Appeals of Washington,
Division 1.

CITY OF BELLEVUE, a Washington
municipal corporation, Respondent,

v.

PINE FOREST PROPERTIES, INC., a
Washington corporation, Appellant,

and

The Prudential Insurance Company of America,
a New Jersey corporation; Prudential Asset
Resources, Inc., a Delaware corporation;
Sharebuilder Corporation, a Washington
corporation; Clearwire Legacy, LLC, a Delaware
limited liability company, Defendants.

No. 71827-4-I. | Dec. 22, 2014.

Synopsis

Background: City filed eminent domain petition, seeking condemnation of private property for light rail and road improvement construction projects. Property owner objected to condemnation of one-third of property for construction staging. The Superior Court, King County, William L. Downing, J., determined public use and necessity and authorized city to condemn property. Property owner appealed.

Holdings: The Court of Appeals, Schindler, J., held that:

[1] condemnation of property for construction projects was public use;

[2] substantial evidence supported finding that city met burden of establishing necessity to condemn property in fee simple; and

[3] record supported trial court's denial of owner's request for discovery.

Affirmed.

West Headnotes (13)

[1] **Eminent Domain**

Public Use

Eminent Domain

Necessity for appropriation

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148I Nature, Extent, and Delegation of Power

148k12 Public Use

148k13 In general

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k54 Exercise of Delegated Power

148k56 Necessity for appropriation

In determining public use and necessity in eminent domain proceedings, a trial court must make three separate but interrelated findings: (1) whether the proposed use is really public, (2) does the public interest require it, and (3) is the property to be acquired necessary for that purpose; the latter two findings address necessity.

Cases that cite this headnote

[2] **Eminent Domain**

Conclusiveness and effect of legislative action

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k65 Determination of Questions as to Validity of Exercise of Power

148k67 Conclusiveness and effect of legislative action

The question of whether a contemplated use is really a public use is a judicial question without regard to a legislative assertion that the use is public. West's RCWA Const. Art. 1, § 16.

Cases that cite this headnote

[3] **Eminent Domain**

To Private Corporation

Eminent Domain

Highways or other roads or ways

148 Eminent Domain

148I Nature, Extent, and Delegation of Power

148k6 Delegation of Power
148k10 To Private Corporation
148k10(1) In general
148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k16 Particular Uses or Purposes
148k19 Highways or other roads or ways
Condemnation of private property for light rail system and road improvement construction projects was public use, notwithstanding absence of identified permanent use of property. West's RCWA Const. Art. 1, § 16; West's RCWA 8.12.030, 35.68.010, 35.75.010, 35A.11.010, 35A.47.020, 35A.64.200, 39.34.010, 39.34.060, 81.104.010, 81.112.080.

Cases that cite this headnote

- [4] **Eminent Domain**
-- Conclusiveness and effect of legislative action

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 Conclusiveness and effect of legislative action
A party challenging the legislative determination of necessity of a proposed condemnation must establish arbitrary and capricious conduct amounting to constructive fraud.

Cases that cite this headnote

- [5] **Eminent Domain**
-- Conclusiveness and effect of legislative action

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 Conclusiveness and effect of legislative action
Whether condemnation of a fee interest in the property is necessary is a legislative question that is conclusive absent proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.

Cases that cite this headnote

- [6] **Eminent Domain**
-- Conclusiveness and effect of legislative action

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k67 Conclusiveness and effect of legislative action
When reasonable minds can differ, the court will not disturb the decision of the legislative body that necessity of a contemplated use exists, so long as it was reached honestly, fairly, and upon due consideration of the facts and circumstances; and although the decision may be unwise, it is still a decision for the legislative body to make, not the court.

Cases that cite this headnote

- [7] **Eminent Domain**
-- Conclusiveness and effect of exercise of delegated power

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 Conclusiveness and effect of exercise of delegated power
Substantial evidence standard of review, rather than de novo review, applied to trial court's determination that city established condemnation of private property in fee simple and plan to use property for construction staging was necessary, where trial court reviewed documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings.

Cases that cite this headnote

- [8] **Appeal and Error**
-- Credibility of witnesses; trial court's superior opportunity
30 Appeal and Error

30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.1 In General
30k1008.1(4) Credibility of witnesses; trial court's superior opportunity
Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court.

Cases that cite this headnote

[9] Eminent Domain

• Conclusiveness and effect of exercise of delegated power

148 Eminent Domain
1481 Nature, Extent, and Delegation of Power
148k65 Determination of Questions as to Validity of Exercise of Power
148k68 Conclusiveness and effect of exercise of delegated power

Substantial evidence supported finding that city met burden of establishing necessity to condemn a fee simple interest in private property for construction staging for light rail system and road improvement construction projects, and that actual or constructive fraud was not established, even though property owner had proposed temporary construction easement; evidence was presented that property would be used for construction staging for at least several years, that design of projects had not been completed, that permanent use of areas on property could shift or increase, that property owner's proposal imposed significant limitations on city and transit authority, and that city reasonably considered relative cost of a complete take as compared to a temporary construction easement.

Cases that cite this headnote

[10] Pretrial Procedure

• Sequence and timing; condition of cause

307A Pretrial Procedure
307AII Depositions and Discovery

307AII(A) Discovery in General
307Ak25 Sequence and timing; condition of cause

Record supported trial court's denial of private property owner's request to engage in discovery, in eminent domain proceedings brought by city; trial court had granted two joint motions to reschedule deadline to set public use and necessity hearing, owner failed to raise issue of discovery or make any effort to conduct discovery despite previous two continuances, and owner failed to identify any evidence that would show city's determination of public use and necessity was result of constructive fraud.

Cases that cite this headnote

[11] Pretrial Procedure

• Discretion of court

307A Pretrial Procedure
307AIV Continuance
307Ak713 Discretion of court

A court has broad discretion to grant or deny a continuance.

Cases that cite this headnote

[12] Appeal and Error

• Continuance

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k963 Proceedings Preliminary to Trial
30k966 Continuance
30k966(1) In general

Appellate court reviews denial of a continuance request for a manifest abuse of discretion.

Cases that cite this headnote

[13] Pretrial Procedure

• Grounds for continuance in general

307A Pretrial Procedure
307AIV Continuance
307Ak714 Grounds for continuance in general

A continuance to conduct discovery must be supported by a showing of due diligence.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

SCHINDLER, J.

¶ 1 Property owner Pine Forest Properties Inc. appeals the determination of public use and necessity and the order authorizing the city of Bellevue (City) to condemn property for construction staging during the expansion of the Central Puget Sound Regional Transit Authority (Sound Transit) light rail system from downtown Seattle to the east side, the “East Link Project,” and road improvement construction projects. Pine Forest contends that absent an identified permanent use, condemnation of the property for construction staging is neither a public use nor a necessity. The Washington State Supreme Court decision in *HTK Management, L.L.C. v. Seattle Popular Monorail Authority (Monorail)*, 155 Wash.2d 612, 121 P.3d 1166 (2005), controls. In *Monorail*, the court held that the decision of the condemning authority as to the type and extent of property interest necessary to carry out the public purpose is a legislative question subject to a deferential standard of review. *Monorail*, 155 Wash.2d at 634–35, 121 P.3d 1166. We affirm the determination of public use and necessity and the order authorizing the City to condemn the property.

*940 FACTS

¶ 2 In March 1990, the Washington State Legislature passed “AN ACT relating to high capacity transportation systems,” Substitute House Bill No. 1825. Laws of 1990, ch. 43. ¹ The legislature states that “[i]ncreasing congestion on Washington’s roadways calls for identification and implementation of high capacity transportation system

alternatives” and requires local jurisdictions to “coordinate and be responsible for high capacity transportation policy development, program planning, and implementation.” LAWS OF 1990, ch. 43, § 22. ²

¶ 3 On November 4, 2008, voters approved the Central Puget Sound Regional Transit Authority (Sound Transit) proposal to expand the existing link light rail from downtown Seattle to Mercer Island, south Bellevue, downtown Bellevue, Bel-Red, the area between State Route 520 and Bel-Red Road, and Overlake, the “East Link Project.”

¶ 4 In February 2009, the Bellevue City Council (City Council) adopted a long-term land use and transportation plan for the Bel-Red area. The “Bel-Red Plan” identifies the anticipated light rail station at 120th Avenue NE and related road improvement projects, including the need to extend and expand NE 15th Street between 116th Avenue NE and 120th Avenue NE.

¶ 5 On November 15, 2011, the city of Bellevue (City) and Sound Transit entered into an interlocal agreement for the East Link Project, the “Umbrella Memorandum of Understanding for Intergovernmental Cooperation Between the City of Bellevue and the Central Puget Sound Regional Transit Authority for the East Link Project” (MOU).

¶ 6 The MOU states that Sound Transit and the City have a joint interest in ensuring “a high-quality investment for taxpayers, the City and Sound Transit.” In recognition of the “mutual benefits of a tunnel alignment through downtown Bellevue” and a “high capacity light rail system to meet long-term regional transportation needs,” the City agreed to facilitate construction of the light rail system and contribute \$160 million. The contribution includes the agreement to acquire designated property needed for the East Link Project.

¶ 7 Pine Forest Properties Inc. owns approximately 11.6 acres in the Bel-Red area. The property is located near the anticipated East Link light rail station at 120th Avenue NE. One of the parcels designated for acquisition in the MOU is a parcel owned by Pine Forest, parcel number 1099100005. Parcel number 1099100005 is a 238,097 square-foot lot located at 1445 120th Avenue NE. The MOU specifically identifies the “Type of Take” of the designated parcel located at 1445 120th Avenue NE as a “Full Take.” The City agreed to “deliver the Property to Sound Transit no later than June 2015.”

¶ 8 Sound Transit plans to use the parcel to construct a permanent fixed “Guideway” system on the property and for construction staging. The City plans to use the property “to construct the extension of NE 15th Street across the Property in order to provide an arterial connection between 116th Avenue NE and 120th Avenue NE,” and for construction staging.

¶ 9 On April 24, 2013, Pine Forest submitted an application for a proposed master development plan (MDP) to the City. Pine Forest proposes converting the 8.2 acres at the intersection between 1415 and 1445 120th Avenue NE, NE 15th Street, and 120th Avenue NE “from office/industrial/warehouse use to a mixed-use transit-oriented development connected to the future light rail station.” The majority of the 8.2 acres is located south of the parcel designated for acquisition in the MOU.

¶ 10 The MDP application identifies the Sound Transit East Link Project and the “Bel-Red Transportation Improvement *941 Plan” as projects “directly affecting” the MDP proposal.

Sound Transit has adopted the East Link Light Rail alignment plans that require acquiring Pine Forest property from the north parcel. The City of Bellevue has adopted the Bel-Red Subarea Plan and Transportation Improvement Plans that include a widened 120th Avenue NE and a new NE 15th Street. These new and expanded roadways will require acquiring additional property from the north and eastern portions of the Pine Forest property.

¶ 11 On August 14, 2013, the City notified Pine Forest that on September 3, the City Council was scheduled to take final action on adoption of an ordinance that would authorize condemnation of the parcel it owned at 1445 120th Avenue NE. The notice states, in pertinent part:

This letter provides notice that the Bellevue City Council is scheduled to vote (take final action) to adopt an ordinance authorizing acquisition of your property at 1445 120th Avenue NE, Bellevue, Washington. The purpose of the ordinance is to

authorize staff to pursue property acquisition, including through the condemnation process if necessary, to facilitate the completion of the East Link Project, East Link MOU Commitments, referred to as CIP [(Capital Investment Program)] Plan No. PW-R-181, as well as the NE 15th Street (Zone 1)—116th to 120th Avenue NE Project, referred to as CIP Plan No. PW-R-172.

¶ 12 On September 3, 2013, the City Council passed Ordinance No. 6122. Ordinance No. 6122 authorizes condemnation of the property located at 1445 120th Avenue NE for the East Link Project and the NE 15th Street to 120th Avenue NE road improvement project. The City Council found that condemnation of the property was necessary to implement the MOU and for construction of NE 15th Street from 116th Avenue NE to 120th Avenue NE. Ordinance No. 6122 states, in pertinent part:

WHEREAS, the City Council finds that the public health, safety, necessity and convenience demand, that the NE 15 Street (Zone 1) and East Link projects be undertaken at this time, and that in order to carry out the projects and implement the terms of the Memorandum of Understanding in furtherance of the East Link Project, it is presently necessary for the City to acquire interests and rights to the property described herein; and

WHEREAS, the City Council finds and declares it necessary and in the best interest of the public that interests in the land and property hereinafter described be condemned, appropriated, and taken for public use, subject to the making or paying of just compensation to the owners thereof; now, therefore,

THE CITY COUNCIL OF THE CITY OF BELLEVUE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. The land and property rights within the City of Bellevue, King County, Washington, commonly known as 1445 120th Avenue NE (Tax Parcel No. 109910-0005) as now legally described in Exhibit “A” and generally depicted on Exhibit “B”, are necessary both to implement the Memorandum of Understanding in furtherance of the construction of the East Link Project and for the construction of NE 15th Street from 116th Avenue NE to 120th Avenue NE (referred to as Zone 1), all as described

above, subject to making or paying just compensation to the owners thereof in the manner provided by law.

¶ 13 The City retained an appraiser and a review appraiser to determine the amount of just compensation for the property. In a letter to the City dated October 16, Pine Forest disagreed with the valuation and objected to condemnation of approximately 84,000 square-feet of the 238,097 square-foot parcel for construction staging. Pine Forest agreed “to allow use of the construction staging area by way of a temporary ground lease” subject to a number of conditions. The conditions included agreement on a specific expiration date, a monthly net rental payment, and holdover costs. Pine Forest claimed the proposal would save the City \$4 million “when compared to a fee simple purchase.” The letter states, in pertinent part:

b. **Term expiration:** No later than 2 years prior to completion of the 120th *942 Avenue Sound Transit Station. A specific expiration date shall be determined and agreed upon by the City and Pine Forest prior to the City’s purchase of the Right of Way Area. Upon expiration, the site shall be turned over clear of any improvements or equipment.

c. **Compensation:** The monthly net rental payment during the term of the ground lease shall be \$33,620. Holdover rent for occupancy of the Temporary Use Area beyond the expiration date shall be \$67,240.^[3]

¶ 14 Over the course of the next several months, the City and Sound Transit met with Pine Forest to discuss the proposal. Because “significant design, scheduling, and coordination decisions” had not been made with respect to the East Link Project or with respect to the Bel–Red Transportation Improvement Plan, Sound Transit and the City decided to proceed with condemnation of the property. Sound Transit and the City concluded that “fee simple acquisition minimizes complications, and the potential for additional costs, for both Projects.”

¶ 15 On October 18, the City filed an eminent domain petition in King County Superior Court. The scheduling order set December 2 as the deadline to file the motion for a public use and necessity hearing and December 13 as the deadline to file a jury demand. On November 27, the court granted the joint motion to change the deadlines to allow additional time to “continue ongoing discussions.” On January 7, 2014, the parties filed another motion to change the deadlines in order to pursue settlement negotiations. The court granted the motion

and changed the deadline to file the motion for a public use and necessity hearing to January 21.

¶ 16 On January 21, the City filed a motion to determine public use and necessity. The City argued that under the MOU and Ordinance No. 6122, construction of the East Link Project and the NE 15th Street road project is a public use and condemnation of the property is necessary. In support, the City submitted the declaration of Capital Projects Manager Rick Logwood. Logwood states condemnation of the property is necessary to construct the East Link Project and implement the MOU, and to “expand 120th Avenue NE along the eastern frontage of the Property [to] construct the extension of NE 15th Street across the Property in order to provide an arterial connection between 116th Avenue NE and 120th Avenue NE.”

¶ 17 Logwood describes the long-term need to use a portion of the property for construction staging for the East Link Project and the road construction project. Logwood states that “there are remaining decisions that have not yet been made, which could increase the amount of property needed to construct” the East Link Project and the Bel–Red Transportation Improvements. Logwood asserts the City “also will need to coordinate its construction of the Bel–Red Transportation Improvements with Sound Transit and is still in the process of discussing those details with Sound Transit.”

¶ 18 Logwood states that Sound Transit will need to use the southeastern portion of the property for construction staging “for as long as eight years.” Although the 2013 to 2019 CIP budget includes a majority of the funding to widen 120th Avenue NE and “funding for 60% of the design for the extension of NE 15th Street,” Logwood states that “full implementation of the extension of NE 15th Street likely would occur between 2030 and 2040” but the schedule “could be accelerated to the period of 2020 to 2030.”

¶ 19 Pine Forest filed a partial opposition to the motion to determine public use and necessity. Pine Forest conceded public use and necessity to acquire approximately two-thirds of the parcel for the East Link Project and road improvement project. Pine Forest objected to condemnation of approximately 84,000 square-feet or one-third of the property for construction staging. Pine Forest argued that because the City had not identified a future permanent use, condemnation of the property for temporary construction staging did not constitute a public use.

¶ 20 In support, Pine Forest submitted the declarations of Pine Forest Chief Executive *943 Officer Fred Burnstead, Pine Forest Asset Manager Matt Wickens, and Burnstead Construction LLC Director of Land Development Tiffany Brown.

¶ 21 Burnstead concedes that Sound Transit and the City will need “temporary use” of the property for construction staging, and that “Sound Transit is still completing its design of the East Link” and the City “is still in preliminary design for the NE 15th Street Project.” But Burnstead asserts that because Pine Forest “will agree to reasonable terms” and a cost savings of 14 percent as compared to taking a fee interest in the entire parcel, there is no need to acquire the property.

¶ 22 Wickens also concedes funding and design for the City's road improvement project is uncertain but states Pine Forest had agreed to provide the City with access for the NE 15th Street project.

Recently, the City has expressed concern about City access to the Pine Forest ... Property for future construction of NE 15th Street. Both the timetable for the NE 15th Street Project and the funding for design and construction of the Project are still uncertain. Pine Forest then assured the City that Pine Forest would provide the City with whatever use and access the City required for the NE 15th Street Project.

¶ 23 Wickens further states that “if markets allowed, Pine Forest could start work on its Phase 1 to coincide with the opening of the Light Rail Station,” and that Pine Forest and Sound Transit had agreed that Sound Transit “could use the Pine Forest property through the conclusion of its heavy civil construction of the Guideway for the East Link adjacent to the Pine Forest Property.”

¶ 24 Brown also states that Sound Transit agreed to return the property to Pine Forest “after the completion of the heavy civil construction on the East Link Guideway.” Brown states, “It was agreed the time frame for the Sound Transit temporary use of the property was ... approximately 6 to 7 years,” and if approved, “[t]he new NE 15th Street will ultimately become a major entry” to the proposed MDP

¶ 25 In response, the City submitted the declaration of the attorney representing the City, the declaration of Sound Transit Senior Real Property Agent Kent Melton, and the reply declaration of Rick Logwood.

¶ 26 The attorney states that Burnstead, Wickens, and Brown “mischaracterize settlement proposals made by Pine Forest as ‘agreements’ reached by Pine Forest, Sound Transit, and the City, when no such agreements have been made.” The attorney asserts that “there has been no agreement on the duration of Sound Transit's and the City's use of the Property.”

¶ 27 Melton asserts Sound Transit did not agree to return the property to Pine Forest after completion of construction of the East Link Guideway. Melton states Sound Transit is still in the process of planning construction and coordinating with the City, and the duration for use of the property is not yet determined. Melton also points out that because the City is responsible for acquiring the property, Sound Transit could not agree to return the property.

While it is true that Pine Forest has requested that Sound Transit agree to vacate portions of the Property that Sound Transit needs only temporarily at the conclusion of heavy civil construction of the East Link Guideway, to date no such agreement has been made. Sound Transit is still in the process of planning the construction of the East Link Project in the area of the Property and is still in the process of coordinating that construction with the City. Although Sound Transit has established an estimated construction schedule for the East Link Project, that schedule is subject to change as the project develops. Thus, the duration of time that Sound Transit will need to use the temporary interests in the Property to construct the East Link guideway and for construction staging purposes is still being determined.

... Moreover, because the Memorandum of Understanding provides that the City will purchase the Property prior to construction, Sound Transit would not have been in a position to agree to return the temporary interests in the Property to Pine Forest in any event.

*944 ¶ 28 In his reply declaration, Logwood states that “[a]t no time in any of these meetings was it ever agreed that Sound Transit would return use of the Property to Pine Forest after the completion of heavy civil construction on the East Link Guideway on the Property.” Logwood states there is no “fixed ... time frame for Sound Transit's temporary use of the Property.” Logwood reiterates that the City and

Sound Transit are still in the process of “planning, scheduling, and coordinating with respect to the construction of the East Link Project on the Property,” and that the City and Sound Transit have not “finalized how the City will coordinate construction of the Bel–Red Transportation Improvements with the construction of the East Link Project.”

¶ 29 According to Logwood, the potential time line described by Wickens is a “Draft Conceptual Coordination Schedule” that was “prepared solely for the purposes of the City’s discussions with Pine Forest and Sound Transit regarding whether there was any possibility these projects could be coordinated.” Logwood again notes that completion of the design and construction of the NE 15th Street project is “unfunded at this time,” and the “decision on whether to accelerate the NE 15th Street Project has not yet been made and may not be made for another year or more.”

¶ 30 Logwood also addresses Pine Forest’s proposal to enter into a long-term lease. Logwood states the proposal relies on the false assumption that the City “will need to use a portion of the Property for construction staging for only six years,” and “what Pine Forest describes as ‘savings’ is actually just the purchase of a smaller amount of property at the same per square foot price, plus additional costs associated with a ground lease.” Logwood further states, in pertinent part:

Additionally, as set forth above, there are no guarantees that the City will need the temporary use area for only ten years, and in fact, the possibility remains that the duration of temporary use could be much longer. Thus, in consultation with its appraiser and review appraiser, the City has determined that it would be more cost effective to acquire the Property in fee simple than to agree to Pine Forest’s proposal.

¶ 31 According to Logwood, the City and Sound Transit concluded the proposal to enter into a long-term lease would impose significant limitations and further complicate the construction of “two extremely complex public infrastructure projects.” Based on the long-term need to use the property for construction staging, the City “decided to acquire the Property in fee simple.” In addition, Logwood explained that because of “the potential that Sound Transit’s and/or the City’s permanent use areas on the Property could shift or increase ...,

a fee simple acquisition minimizes complications, and the potential for additional costs, for both Projects.” Logwood also notes that Pine Forest consistently stated that if the proposed MDP were approved, it would proceed with the project “only if market conditions permit and, thus, there are no guarantees that Pine Forest’s project would be constructed at the same time as the City’s projects.”

¶ 32 At the public use and necessity hearing on March 7, 2014, Pine Forest submitted a letter dated February 18. The letter proposes selling two-thirds of the property to the City and providing a temporary easement to the other one-third of the property. The proposal is subject to an agreement “on a timetable that provides flexibility for the City, and provides certainty that the property will be returned to Pine Forest.”

¶ 33 The court ruled the City met its burden of establishing public use and necessity. The court concluded public transportation is a public use: the “intended use of the Property for transit and transportation purposes is undeniably a public use for all of the Property.” The court also concluded the City “reasonably determined that it requires the Property in fee simple,” and “Pine Forest has not established that the City’s determination that it requires the Property in fee simple for the East Link Project and the Bel–Red Transportation Improvements was the result of actual fraud or constructive fraud.”

¶ 34 The court entered extensive findings of fact, conclusions of law, and an order *945 determining public use and necessity. The conclusions of law state, in pertinent part:

7. Public transportation is a public use justifying condemnation.

8. The City is authorized to exercise its eminent domain power for purposes of transportation and to allow Sound Transit to use its property to construct a light rail system pursuant to RCW 8.12.030, RCW 35A.64.200, RCW 81.104.010, RCW 81.112.080, RCW 35A.11.010, RCW 39.34.010, and RCW 39.34.060.

9. Roads, sidewalks, and other transportation facilities constitute public uses justifying condemnation.

10. The Legislature has authorized the City to construct and expand roads, sidewalks, gutters, curbs, and bicycle paths pursuant to RCW 35.68.010, RCW 35A.47.020, and RCW 35.75.010. The Legislature has also authorized the City

to exercise its eminent domain power for these purposes pursuant to RCW 8.12.030 and RCW 35A.64.200.

....

14. The potential condemnor's determination of public interest and necessity, including the type and extent of property interest, is conclusive absent proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud.

15. The City need only prove reasonable necessity, not absolute, indispensable, or immediate need in order to condemn the Property. The question is not whether there is other land to be had that is equally available; the question is whether the land sought is needed for the construction of public work. The City is not required to have a public use planned for the Property forever.

16. The City Council's determination that the East Link Project and the Bel-Red Transportation Improvements are necessary and in the best interests of the citizens and that condemnation of the Property in fee simple is necessary for these projects, is conclusive evidence of public interest and necessity. There is no evidence that this determination was the result of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud.

...

18. The Property is necessary for the East Link Project and the Bel-Red Transportation Improvements.

19. The public interest requires the East Link Project and the Bel-Red Transportation Improvements.

20. The City is entitled to the issuance of an order determining public use and necessity for the taking of the Property in fee simple for the East Link Project and the Bel-Red Transportation Improvements.

¶ 35 Pine Forest filed an appeal. The City filed a motion for accelerated review. The City argued delay in resolution of the appeal would result in significant disruption and adverse construction consequences for the East Link Project. We granted the motion for accelerated review.

ANALYSIS

¶ 36 Pine Forest challenges the determination of public use and necessity and the order authorizing the City to condemn one-third of the property for construction staging. Pine Forest asserts the City did not meet its burden of establishing either public use or necessity to obtain a fee interest in the portion of the parcel Sound Transit and the City plan to use for construction staging.

[1] ¶ 37 In determining public use and necessity, a trial court must make three separate but interrelated findings: (1) whether the proposed use is really public, (2) does the public interest require it, and (3) is the property to be acquired necessary for that purpose. *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth. (Monorail)*, 155 Wash.2d 612, 629, 121 P.3d 1166 (2005). The latter two findings address necessity. *In re City of Seattle*, 104 Wash.2d 621, 623, 707 P.2d 1348 (1985). Although the terms overlap, a determination that an acquisition is for public use is not precisely the same as determining it is a public necessity. *Monorail*, 155 Wash.2d at 629, 121 P.3d 1166.

*946 Public Use

[2] ¶ 38 The question of whether the contemplated use is really a public use is a judicial question without regard to a legislative assertion that the use is public. Wash. Const. art. I, § 16 (amend.9). Article I, section 16, amendment 9 of the state constitution states, in pertinent part:

Whenever an attempt is made to take private property for a use alleged to be public, the question 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.

¶ 39 As authorized by the voters, Sound Transit plans to extend the light rail system and construct the East Link. To facilitate construction of the East Link, Sound Transit and the City entered into a MOU and the City agreed to acquire certain designated properties, including the parcel owned by Pine Forest. In conjunction with the East Link Project, the City plans to construct an extension of NE 15th Street "to improve access, circulation, and mobility options."

[3] ¶ 40 Without question, condemnation of the property for construction of the East Link Project and the City's road improvement project is a public use. *See* RCW 8.12.030,

RCW 35A.64.200, RCW 81.104.010, RCW 81.112.080, RCW 35A.11.010, RCW 39.34.010, and RCW 39.34.060 (authorization to exercise eminent domain for purposes of transportation and to construct light rail system); *see also* RCW 35.68.010, RCW 35A.47.020, and RCW 35.75.010 (authorization to construct and expand roads).

¶ 41 Pine Forest tries to characterize the type and extent of the property interest the City seeks to condemn as a question of public use rather than necessity. Pine Forest claims that absent an identified permanent use for the property, the decision to obtain fee title for the temporary use for construction staging is a question of public use. The Washington State Supreme Court considered and rejected the same argument in the *Monorail* case.

¶ 42 In *Monorail*, the condemning authority “need[ed] the entire property for construction of the staging and development of the [rail] alignment” for the first 5 to 10 years, but had not approved a plan for use of the property “outside of the footprint.” *Monorail*, 155 Wash.2d at 620, 633, 121 P.3d 1166.

Although the monorail station is not likely to take up the entire footprint of the property, the record indicates that the remaining portion of the property could be used for at least 10 years for construction and remediation of property in downtown Seattle.... In this case, for the first 5–10 years, a substantial portion of the property will be put to public use and only after that time is there a possibility that the property may be sold.

Monorail, 155 Wash.2d at 633, 121 P.3d 1166.

¶ 43 The property owner argued that the “decision to condemn a fee interest in the entire property should be analyzed under the first prong of the test for ‘public use,’ rather than under the third prong of the test for ‘necessity.’ ” *Monorail*, 155 Wash.2d at 630, 121 P.3d 1166. The Supreme Court rejected the property owner’s argument.

¶ 44 The court held that “determinations by the condemning authority as to the type and extent of property interest necessary to carry out the public purpose have historically been considered legislative questions and are thus analyzed under the third prong of the test.” *Monorail*, 155 Wash.2d

at 630, 121 P.3d 1166; *see also Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC (NAFTZI)*, 159 Wash.2d 555, 575–76, 151 P.3d 176 (2007) (emphasizing that a claim that excess property has been taken is addressed under the necessity prong). The Supreme Court held that use of the property for construction staging was a public purpose even though the condemning authority did not identify “a public use planned for property forever.” *Monorail*, 155 Wash.2d at 634, 121 P.3d 1166⁴; *see also NAFTZI*, 159 Wash.2d at 575, 151 P.3d 176 (“a public entity need not plan to use condemned *947 property for public purpose forever to justify the initial public use”).⁵

Necessity

¶ 45 Pine Forest asserts that even if the temporary use of the parcel for construction staging is a public use, the City did not meet its burden of proving condemnation of a fee interest in the property is necessary.

¶ 46 Pine Forest contends the court erred in ruling that the City’s decision as to the “type and extent of property interest ... is conclusive absent proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud.” Pine Forest argues the court erred in requiring Pine Forest to demonstrate actual or constructive fraud rather than arbitrary or capricious conduct.⁶ We disagree.

[4] [5] ¶ 47 A party challenging the legislative determination of necessity must establish “arbitrary and capricious conduct amounting to constructive fraud.” *NAFTZI*, 159 Wash.2d at 577, 151 P.3d 176.⁷ Whether condemnation of a fee interest in the property is necessary is a legislative question that is conclusive absent proof of “actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.” *Monorail*, 155 Wash.2d at 629, 121 P.3d 1166⁸; *see also State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wash.2d 811, 823, 966 P.2d 1252 (1998); *City of Tacoma v. Welcker*, 65 Wash.2d 677, 684, 399 P.2d 330 (1965); *City of Blaine v. Feldstein*, 129 Wash.App. 73, 81, 117 P.3d 1169 (2005).

¶ 48 *Port of Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 P. 1064 (1923), is distinguishable. In *Everett Improvement*, the Port of Everett Commission had neither a present nor a future use for the property it sought to condemn. *Everett Improvement*, 124 Wash. at 492, 214 P. 1064. There was “no map, plan, specification, or detailed description of

the work intended to be constructed.” *Everett Improvement*, 124 Wash. at 492, 214 P. 1064. Absent “some definite stated plan of improvement,” the court held “necessity cannot be shown.” *Everett Improvement*, 124 Wash. at 494, 214 P. 1064.

¶ 49 But “nothing in *Everett Improvement* requires this court to find that the failure to have in place a definitive use plan for the entire life of the property makes the condemning authority’s actions arbitrary and capricious.” *Monorail*, 155 Wash.2d at 638 n. 21, 121 P.3d 1166.

¶ 50 Further, here, unlike in *Everett Improvement*, the undisputed record establishes a long-term need to use the property for *948 construction staging. Neither the final design of the East Link Project nor the City’s road improvement project are complete, and the “remaining decisions that have not yet been made” could increase the extent of the property needed to construct the East Link Project and the road projects.

[6] ¶ 51 Pine Forest argues the record does not support the court’s findings that the City established condemnation in fee simple and the plan to use the property for construction staging is necessary. When reasonable minds can differ, we will not disturb the decision of the legislative body that necessity exists “so long as it was reached ‘honestly, fairly, and upon due consideration’ of the facts and circumstances.” *Cent. Puget Sound Reg’l Transit Auth. v. Miller*, 156 Wash.2d 403, 417–18, 128 P.3d 588 (2006) (quoting *Welcker*, 65 Wash.2d at 684, 399 P.2d 330). And although “[t]he decision may be unwise, ... it is still a decision for the legislative body to make, not this court.” *Miller*, 156 Wash.2d at 418, 128 P.3d 588.

[7] ¶ 52 Preliminarily, the parties dispute the standard of review. Pine Forest asserts review of the findings is de novo because the record consists entirely of declarations and documentary evidence. The City argues the standard of review is whether substantial evidence supports the finding of necessity.

[8] ¶ 53 In *Dolan v. King County*, 172 Wash.2d 299, 311, 258 P.3d 20 (2011), the Washington State Supreme Court held that where, as here, the trial court reviewed documentary evidence, “weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings,” a substantial evidence standard of review applies.

Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no determination of witness credibility. *See Smith [v. Skagit County]*, 75 Wash.2d [715,] 719[, 453 P.2d 832 (1969)]. However, substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings. *See [In re Marriage of] Rideout*, 150 Wash.2d [337,] 352[, 77 P.3d 1174 (2003)]; *Anderson v. City of Bessemer City*, 470 U.S. 564, 574–75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (deference rationale not limited to credibility determinations but also grounded in fact-finding expertise and conservation of judicial resources).

Dolan, 172 Wash.2d at 311, 258 P.3d 20.⁹

[9] ¶ 54 Pine Forest argues substantial evidence does not support the finding that the City “reasonably determined” the need to acquire the property in fee simple. Finding of fact 9 states:

The City has reasonably determined that it requires the Property in fee simple for the East Link Project and the Bel-Red Transportation Improvements given the permanent need for approximately two-thirds of the total area of the Property, or approximately 160,000 square feet out of a total of approximately 240,000 square feet, and the long-term need to use the remainder of the Property for construction staging, possibly through 2030 and beyond. As Rick Logwood, Capital Projects Manager for the

City, testified, “[w]ith significant design, scheduling, and coordination decisions remaining to be made by both South Transit and the City with respect to both the East Link and the Bel-Red Transportation Improvements Projects, a fee simple acquisition minimizes complications, and the potential for additional costs.” [10]

¶ 55 Pine Forest does not dispute that the property will be used for construction staging for at least the first several years, that *949 Sound Transit has not completed the design of the East Link Project, and that the City is still in preliminary stages of design for the NE 15th Street project. Sound Transit Senior Real Property Agent Kent Melton testified that “the duration of time that Sound Transit will need to use the temporary interests in the Property to construct the East Link guideway and for construction staging purposes is still being determined.” Logwood testified the City needs to use the property for staging during the construction of the road projects “possibly through 2030 and beyond.” Logwood also testified that the future design decisions create “the potential that Sound Transit’s and/or the City’s permanent use areas on the Property could shift or increase.”

¶ 56 Pine Forest contends the findings do not establish the need to condemn the property because Pine Forest agreed to a construction easement and guaranteed paying a discounted amount for the portion of the property needed for construction staging. Substantial evidence supports the findings that Pine Forest’s proposal imposed significant limitations on Sound Transit and the City, and the City “reasonably considered the relative cost of a complete take as compared to a temporary construction easement.” Finding of fact 10 and finding of fact 11 state:

10. Pine Forest’s proposal regarding how the City and Sound Transit could coordinate their projects with Pine Forest’s Transit-Oriented-Development plans includes significant limitations. For example, Mr. Logwood testified that the proposal imposes “significant limitations on both Sound Transit’s and the City’s duration of use of the property” and requires that “the City agree to separate compensation for the permanent use areas and for the long-term temporary use areas at this early stage before all design decisions defining those areas have been made.”... Mr. Logwood further testified that there are “no guarantees that the City will need the temporary use area for only ten years, and in fact, the possibility remains that the duration of temporary use could be much longer.”... Pine Forest’s proposal would also require the City Council to amend

its budget for the Bel-Red Transportation Improvement Projects.

11. The City has also reasonably considered the relative cost of a complete take as compared to a temporary construction easement over any potential remainder of the Property that is not subject to a permanent use following construction of the East Link project and Bel-Red Transportation Improvement projects. In addition to the costs of acquiring the Property, the City also has considered that transaction costs associated with taking only a temporary interest in a portion of the Property and in coordinating the design and development of the City’s projects with Pine Forest’s proposed plans to develop a portion of the Property. Although these costs are not precisely quantifiable, the City reasonably determined that it would be considerably more cost effective to acquire the Property in fee simple than to agree to Pine Forest’s proposal.

¶ 57 The record shows Sound Transit and the City engaged in extensive discussions with Pine Forest about the proposal. Logwood testified:

I have been in numerous meetings with City and Sound Transit Staff and other Pine Forest representatives over the last year. These meetings have always addressed the mutual objectives of the City, Sound Transit and Pine Forest to coordinate all the projects described above. Our meetings have included discussions and planning to facilitate, and reduce the cost, of these interrelated public and private projects. For these meetings and during these meetings, we reviewed hundreds of pages of City, Sound Transit and Pine Forest documents, drawings and plans.

¶ 58 The record shows there were a number of reasons the City decided to acquire the property in fee, including the difficulties and risk involved in trying to coordinate the East Link Project and the road improvement project with Pine Forest, and limitations on use of the property. Logwood testified, in pertinent part:

Pine Forest has proposed that the City and Sound Transit further complicate two *950 extremely complex public

infrastructure projects in order to accommodate its interest in constructing a private development project. Contrary to Mr. Burnstead's and Mr. Wickens' representations, every proposal that Pine Forest has made to date regarding how the City and Sound Transit could coordinate their projects with Pine Forest's ... plans has included significant limitations on Sound Transit's and the City's abilities to use the Property for these public projects. For example, the October 16, 2013, proposal from Mr. Wickens includes provisions imposing significant limitations on both Sound Transit's and the City's duration of use of the property. *See* Wickens Declaration, Ex. 7 at 2 (stating that temporary use term would expire “[n]o later than 2 years prior to completion of the 120th Avenue Sound Transit Station,” with significant penalties for holdover occupancy); *see also id.*, Ex. 8 (requiring a written agreement that Sound Transit vacate the Property following completion of heavy civil construction and that the City vacate the Property following completion of the NE 15th Street Project). Moreover, Pine Forest's proposals require that the City agree to separate compensation for the permanent use areas and for the long-term temporary use areas at this early stage before all design decisions defining those areas have been made. *See id.*, Ex. 7 (requesting separate compensation for the “Right of Way Area Purchase” and a temporary ground lease).

¶ 59 Substantial evidence also supports the finding that the City considered the relative cost of a fee acquisition as compared to a temporary ground lease or construction easement. Logwood testified that “what Pine Forest describes as ‘savings’ is actually just the purchase of a smaller amount of property at the same per square foot price, plus additional costs associated with a ground lease.”¹¹ Logwood states the October 16 proposal to enter into a temporary ground lease could “increase[] costs associated with meeting project schedule milestones and commitments.”

¶ 60 We hold the record supports the conclusion that the City met its burden of establishing the necessity to condemn a fee interest in the property for construction staging for the East Link Project and the road improvement project, and that Pine Forest did not establish actual or constructive fraud.

Motion to Continue

[10] ¶ 61 In the alternative, Pine Forest seeks remand to engage in discovery. Pine Forest asserts the court erred in denying its request to conduct discovery.

[11] [12] [13] ¶ 62 A court has broad discretion to grant or deny a continuance. *Doyle v. Lee*, 166 Wash.App. 397, 403–04, 272 P.3d 256 (2012). We review denial of a continuance request for a manifest abuse of discretion. *Doyle*, 166 Wash.App. at 403–04, 272 P.3d 256. A continuance to conduct discovery must be supported by a showing of due diligence. *Bramall v. Wales*, 29 Wash.App. 390, 393, 628 P.2d 511 (1981).

¶ 63 The court granted two joint motions to reschedule the deadline to set a public use and necessity hearing. For the first time in the opposition to the motion to determine public use and necessity, Pine Forest mentions in a footnote that it “will propound written discovery.” The footnote states, in pertinent part:

After completing this Opposition brief, Pine Forest will propound written discovery into the City's deliberations and financial analysis leading to its arbitrary and capricious determination to take the entire Pine Forest Property, its 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.

¶ 64 The City opposed delaying the determination of public use and necessity to conduct discovery. The City argued that “Pine Forest never raised the issue of discovery previously or made any effort to conduct *951 discovery in the many months this case has been pending.”

¶ 65 The court denied the request for discovery. The court found that despite two previous continuances, “Pine Forest failed to raise the issue of discovery or make any effort to conduct any discovery prior to filing its Opposition to the Motion.” The court also found that Pine Forest did not identify any evidence that would be obtained through discovery that would show the determination of public use and necessity was the result of constructive fraud. The court concluded Pine Forest did not act with due diligence or show good cause for a continuance, and “[f]urther delay of the Court's resolution of the City's Motion to allow Pine Forest to conduct discovery is therefore unwarranted.” The record supports the court's decision to deny Pine Forest's request to engage in discovery.

¶ 66 We affirm the findings of fact, conclusions of law, and order determining public use and necessity.

WE CONCUR: VERELLEN, A.C.J., and DWYER, J.

Footnotes

- 1 The legislation defines a “high capacity transportation system” as:
[A] system of transportation services, operating principally on exclusive rights of way, which taken as a whole, provides a substantially higher level of passenger capacity, speed, and service frequency than traditional public transportation systems operating principally on general purpose roadway rights of way.
LAWS OF 1990, ch. 43, § 22.
- 2 As amended, codified at RCW 81.104.010.
- 3 Emphasis in original.
- 4 Emphasis in original.
- 5 The cases Pine Forest cites in support of its argument that the type and extent of the property interest is a question of public use rather than necessity are inapposite. In *In re the Petition of City of Seattle (Westlake)*, 96 Wash.2d 616, 634, 638 P.2d 549 (1981), the city planned to sell or lease a significant portion of the property in order to “provide additional shopping opportunities in the core of the City’s shopping area.” The court held the project as a whole did not constitute a public use because its “primary purpose” was private retail development. *Westlake*, 96 Wash.2d at 629, 638 P.2d 549. In *State ex rel. Washington State Convention & Trade Center v. Evans*, 136 Wash.2d 811, 966 P.2d 1252 (1998), the court held that private retail development in the vacant space below the exhibit hall was “merely incidental” and “[t]he relevant inquiry is whether the government seeks to condemn any more property than would be necessary to accomplish purely the public component of the project.” *Evans*, 136 Wash.2d at 822–23, 966 P.2d 1252 (emphasis added). *City of Seattle v. Faussett*, 123 Wash. 613, 212 P. 1085 (1923), and *State ex rel. Tacoma School District No. 10 v. Stojack*, 53 Wash.2d 55, 330 P.2d 567 (1958), also address necessity, not public use. In *Faussett*, the court held that a city need not condemn property in fee simple if acquisition of a lesser interest “reasonably satisfies the needs of the particular public use contemplated.” *Faussett*, 123 Wash. at 617–18, 620–21, 212 P. 1085. Likewise, in *Stojack*, the court held that a school district board of directors has “authority to determine the area of land reasonably necessary to accommodate suitable buildings” for the purpose of public education. *Stojack*, 53 Wash.2d at 63–64, 330 P.2d 567.
- 6 Likewise, below, Pine Forest argued the standard was arbitrary and capricious.
It’s basic arbitrary and capricious decision-making by the City and manifest use of discretion. That’s different. It could ultimately—if 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.
- 7 Emphasis added.
- 8 Emphasis added.
- 9 In any event, we would reach the same conclusion if we applied a de novo standard of review.
- 10 Alteration in original.
- 11 The proposal dated February 18, 2014 is also expressly subject 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.”

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF BELLEVUE, a Washington)
municipal corporation,)

Respondent,)

v.)

PINE FOREST PROPERTIES, INC., a)
Washington corporation,)

Appellant,)

and)

THE PRUDENTIAL INSURANCE)
COMPANY OF AMERICA, a New)
Jersey corporation; PRUDENTIAL)
ASSET RESOURCES, INC., a)
Delaware corporation; SHAREBUILDER)
CORPORATION, a Washington)
Corporation; CLEARWIRE LEGACY,)
LLC, a Delaware limited liability)
company,)

Defendants.)

No. 71827-4-1

DIVISION ONE

ORDER DENYING MOTION
FOR RECONSIDERATION

FILED
COURT OF APPEALS, DIV. 1
STATE OF WASHINGTON
2015 FEB 18 PM 3:42

The appellant Pine Forest Properties Inc. filed a motion for reconsideration herein and the respondent filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 18th day of February 2015.

For the Court:



Judge

App. B

Pine Forest Properties
1445 120th Avenue Site Exhibit
Offer Letter to City of Bellevue October 15, 2013

Entire Parcel Area
238,119 SF

“Right of Way Area”
approx. 154,070 SF

“Temporary Use Area”
approx. 84,049 SF

