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IN THE SUPREME COURT OF COURT FOR
THE STATE OF WASHINGTON

Washington State Court of Appeals Case No. 75372-0-I

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,
a regional transit authority, dba SOUND TRANSIT,

Respondent,

v.

STERNOFF L.P.,

Petitioner.

Court of Appeals Case No. 75372-0-I
Appeal from the Superior Court of the
State of Washington for King County

STERNOFF, L.P.'S REPLY IN SUPPORT OF ITS
PETITION FOR REVIEW TO THE
WASHINGTON STATE SUPREME COURT

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I. INTRODUCTION

The lower courts' decisions—and Sound Transit's argument—rest on a characterization that runs contrary to Washington law and defies the facts in the record. They characterize the City of Bellevue's Street Widening Project as so inextricably intertwined with Sound Transit's East Link Project that it cannot (or should not) be considered a separate project requiring a separate finding of public use and necessity.

It is undisputed that Sound Transit failed to make the constitutionally required finding of public use and necessity authorizing condemnation of the Sternoff property for the city's separate street Widening and multi-use trail project. It is undisputed that Sternoff never received any pre-condemnation notice that its property would be taken by Sound Transit for the separate City Project. The procedures that condemning authorities must follow under Washington's constitution and statutes exist to protect Washingtonians from unnecessary or unjust deprivation of their private property under the commanding authority of government entities. Adherence to these basic constitutional protections is an issue of substantial public interest warranting review by this Court.

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**II. ISSUES PRESENTED FOR REVIEW:
SOUND TRANSIT’S “RESTATEMENT OF ISSUE PRESENTED”
CONTORTS STERNOFF’S ARGUMENT AND ATTEMPTS TO
SHROUD AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST**

Contrary to Sound Transit’s “restatement” of the issue on appeal, this appeal is not about deference to an agency’s decision as to the scope of taking for their public project. Rather, the issue on appeal is whether Sound Transit can take the Sternoff property on behalf the City—a wholly separate public entity—for the City’s different and separate public project when it is undisputed that there has never been the constitutionally required pre-requisite finding that the City Project is a public project for which taking the Sternoff property is necessary. This “condemnation by proxy” appears to be a new and unprecedented expansion of condemnation authority in Washington.

The uncontroverted record establishes that the Sound Transit Board *did not make a determination of public use and necessity* with respect to the City’s Project. As such, Sound Transit’s lengthy discussion of the arbitrary and capricious standard is misplaced. That standard applies to the evaluation of an actual finding of public use and necessity. It does not apply here because there is no public use and necessity determination to adjudicate regarding the City Project. Rather, the applicable standard is whether the condemnor in fact intends to use the property proposed for

condemnation for the avowed purpose. *NAFTZI*, 159 Wn.2d 555, 576 citing *Miller*, 156 Wn.2d 403, 418.

Taking the Sternoff property by proxy for the City's separate road widening and multi-purpose trail project does not fall within the limited and circumscribed avowed purpose of Sound Transit Board Resolution R2013-21. By its own express terms, R2013-21 is limited to "*light rail construction, operation and maintenance in the Bel-Red corridor of Bellevue between 120th Ave. N.E. and 148th Ave. N.E.*" CP 9.

III. ARGUMENT

Washington's courts provide private property owners' with the constitutional check and balance to condemnation by government authorities such as Sound Transit. The courts must adjudicate whether a condemnation authority followed lawful procedure—including whether the condemnation authority made proper legislative findings. Here, that requires analysis of whether the property ultimately sought for condemnation in Sound Transit's Petition in Eminent Domain is for the purpose of the *avowed public project*.

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A. Washington Law and Policy Granting Broad Authority For Project Design and Encouraging Collaboration Among Condemning Authorities Does Not Relieve Sound Transit or The City Of Its Constitutional Obligations

For a proposed condemnation to be lawful, the condemning authority must first make a legislative finding of public use and necessity regarding the property proposed for taking; and the condemning authority must in fact intend to use the property for the avowed purpose. *NAFTZI*, 159 Wn.2d 555, 576-77; *Miller*, 156 Wn.2d 403, 418; *Grays Harbor*, 30 Wn. App. 855, 864. The avowed and limited purpose in this case, per R2013-21, is for “*light rail construction, operation and maintenance in the Bel-Red corridor of Bellevue between 120th Ave. N.E. and 148th Ave. N.E.*” CP 9 (R2013-21).

It is undisputed that R2013-21 is devoid of any mention of the City’s road widening and multi-use trail project. It is undisputed that R2013-21 does not make the constitutionally required pre-requisite finding that the City Project is a public project for which taking the Sternoff property is necessary. Sound Transit’s own 30(b)(6) deposition witness testified that the City Project is not included in R2013-21. CP 278. (Discussion regarding the distinction between the East Link Project and the City Project *infra* at Section III.B.)

Sound Transit argues that the Board's limited and circumscribed public use and necessity determination for "*light rail construction, operation and maintenance in the Bel-Red corridor of Bellevue between 120th Ave. N.E. and 148th Ave.*" can be expanded after-the-fact to allow them to act as the City's proxy and condemn parts of the Sternoff property for the City's separate road project. Not only does Sound Transit's condemnation by proxy violate the basic constitutional prerequisites, but the law upon which Sound Transit relies is inapposite.

Sound Transit refers to condemning agencies' broad authority to design their public projects in anticipation of future needs and to maximize cost effectiveness. Answer at 13-14, citing *Hunter*, 34 Wn.2d 214, 216; *Miller*, 156 Wn.2d, 418, 422; *Port of Seattle*, 80 Wn.2d 392, 397. But this broad authority imparted on a condemning agency to design its own public project does not contemplate the inclusion of a separate project for a different agency.¹ It does not allow Sound Transit, two years after R2013-21 was passed, to add the City's Project to the original avowed public purpose designated in R2013-21.

¹ This is a different concept from disposing of condemned property subsequent to its use for an avowed public purpose. See, *HTK*, 155 Wn.2d 612, 637 (condemning authority intended to use entire property for avowed public purpose, including construction staging, although the condemned property was in excess of final footprint that public project); *Convention Center*, 136 Wn.2d 811, 823-24 (agency could condemn private property despite anticipated private use of property because agency sought to condemn no more property than would be necessary to accomplish the purely public component of project). See also, *Schluneger*, 3 Wn. App. 536, 634; *accord, Cavanaugh*, 45 Wn.2d 500, 501.

Sound Transit also points to its obligation to coordinate with local governments regarding high capacity transportation development and implementation. Answer at 17 n. 7, citing *Pine Forest*, 185 Wn. App. 244, 247 (citing RCW 81.104.010). This obligation to coordinate, though, is distinct from the Sound Transit Board’s constitutional obligations. *See e.g., Pine Forest*, 185 Wn. App. 244, 250-51.

By Sound Transit’s reasoning, R2013-21’s limited and circumscribed purpose of “light rail construction, operation and maintenance” allows Sound Transit to take Sternoff’s property for *any* City purpose, so long as the City was able to negotiate that additional taking in an interlocal agreement process. Sound Transit reasons that no finding of public use and necessity is required for the separate project and none of the pre-condemnation notice and hearing protections are required.

According to Sound Transit’s responses at the appellate court oral argument, no finding of public use and necessity would be required for any City Project no matter how tangential or far removed from R2013-21’s avowed purpose of “light rail construction, operation and maintenance”—for example, taking the Sternoff property for construction of a City of Bellevue public school or a storm water detention facility. This expansive, and apparently new, “condemnation by proxy” circumvents and severely undermines Washington’s constitutional

protections for private property owners and presents an issue of substantial public interest warranting this Court’s review and determination.

B. The Record Shows the City Project Is Distinct From Sound Transit’s East Link And Thus Requires A Separate Legislative Finding of Public Use and Necessity.

The 124th Ave NE bridge—which will provide the East Link with a crossing beneath 124th Ave NE—should not be conflated with the City’s 124th Ave NE Street Widening Project to the north. The City Project is distinct from Sound Transit’s East Link and is not authorized by R2013-21.

Throughout its Answer to Sternoff’s Petition for Review, Sound Transit notes that the City Project is ‘related to,’ ‘intersects with’ and ‘is in the same jurisdiction as’ the East Link Project. *See e.g.*, Answer at 13, 15. But these coincidences do not render the two agencies’ projects as one, do not justify ignoring basic constitutional private property protections, and do not justify Sound Transit’s failure to make a legislative finding of public use and necessity for the City Project.

The distinction between Sound Transit’s and the City’s respective projects is demonstrated by the very fact that Sound Transit’s Petition in Eminent Domain proposes a separate fee take and separate temporary construction easement specifically *for the City of Bellevue’s Project*. CP 2-3, 34-37. The Petition states, “certain real property and real property

rights are necessary *for the City of Bellevue's* Bel-Red Transportation Improvements, which includes widening 124th Ave NE.” CP 2 (emphasis added).

Further, and as noted in Sternoff’s Petition for Review, witnesses for Sound Transit testified that the East Link Project can be constructed without the City Project being constructed. CP 251, 264, 277. Sound Transit contends that this testimony does not prove that Sound Transit could construct the East Link project without acquiring the “COB” property along Sternoff’s west boundary. Answer at 14 n. 6. But one need only look at Sound Transit’s Petition in Eminent Domain for definitive evidence that, but for the City Project, this portion of property would not be proposed for condemnation by Sound Transit. *See discussion supra*, citing CP 2-3, 34-37.²

C. Sound Transit’s Failure to Make a Finding of Public Use and Necessity Regarding the City Project Deprives Sternoff of Its Right to Notice and Hearing.

Oddly, Sound Transit contends that because the Sternoff Property abuts and is subject to condemnation for Sound Transit’s East Link train project, Sternoff is not entitled to the most basic notice and hearing protections afforded to Sternoff’s neighbors along 124th Ave NE with

² Throughout these proceedings, Sound Transit has never even suggested how the west section of Sternoff Property beyond the 124th Ave NE bridge might be used to construct, operate or maintain the East Link.

respect to the City's road and multi-use trail project. Answer at 18. Even so, Sound Transit argues that Sternoff actually *received* those notice and hearing protections for the City Project because of the notice and hearing regarding the adoption of R2013-21 and the taking of property for a different project—"light rail construction, operation and maintenance." To the contrary, it is undisputed that neither the pre-hearing notice nor the actual Board hearing for R2013-21 included or provided any indication, that the Sternoff property would be taken by Sound Transit by proxy for the City's road widening and multi-purpose trail project. *See*, CP 125-27, 190-196.

IV. CONCLUSION

The Court of Appeals decision allows condemnation of the Sternoff Property for the City Project for which there is no constitutionally required pre-requisite legislative determination of public use and necessity. The appellate court's endorsement of Sound Transit's new "condemnation by proxy" authority would allow any public agency or local government to piggy-back on Sound Transit's light rail condemnations to acquire private property for separate projects that have never met the basic constitutional requirement of a finding of public use and necessity. The lower court decisions endorsing Sound Transit and other local governments and agencies use of "condemnation by proxy" to

circumvent the most basic constitutional protections of private property rights is a substantial public interest warranting this Court's review.

Respectfully submitted this January 20, 2017.

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