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SUPREME COURT  
STATE OF WASHINGTON  
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CLERK

No. 95221-3

SUPREME COURT,  
OF THE STATE OF WASHINGTON

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CITY OF REDMOND,,

Respondent,

v.

UNION SHARES LLC,,

Appellant.

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RESPONSE TO PETITION FOR REVIEW

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**TABLE OF AUTHORITIES**

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**A. INTRODUCTION**

Appellant Union Shares LLC (“Union Shares”) presents to this court a request for discretionary review of a non-published decision from Division I, Court of Appeals. The decision was non-published because it presents no new questions of law and is supported by the most recent case law from the court of appeals and from this court addressing eminent domain actions for projects where one or more third parties may economically benefit as a consequence of a proposed municipal project with strong public purpose and benefit.

**B. ASSIGNMENTS OF ERROR**

*Assignments of Error*

In its motion for discretionary review, Union Shares seeks review of the decision of the Court of Appeals affirming the trial court’s determination of *public use and necessity* assigning error to the determination of *public use*.

*Issues Pertaining to Assignments of Error*

1. Whether a city project the purpose of which is the enhancement of the natural environment and a public park network in East Redmond, WA would violate the Public Use

Clause due to a possible private economic benefit to third party land owners, even though the private benefit is separable from the project and incidental to the project purpose.

2. Whether a city project the purpose of which is the enhancement of the natural environment and a public park network in East Redmond, WA is a public park use under RCW 8.12.030 or simply a public project for which an optional municipal code city operating under Title 35A. RCW has authority to condemn property both within and without the city limits?
3. Whether an unpublished decision by the court of appeals that is neither in conflict with recent published decisions of the Supreme Court and Court of Appeals and raises no significant question of law or issue of substantial public interest should be accepted for review.

**C. STATEMENT OF THE CASE**

Puget Sound Chinook Salmon were designated as “threatened” by the National Marine Fisheries Service (“NFMS”) in 1999 (64 FR 50393). A potential project for the relocation of Evans Creek by Redmond was first

identified in 2005 Lake Washington/Cedar/Sammamish Watershed (WIRA 8)<sup>1</sup> Chinook Conservation Planning by King County and local jurisdictions. The relocation of Evans Creek out of industrially developed properties was identified as a specific project to improve habitat for Chinook salmon and other fish species in the watershed. RP 48 - 50; 98:18 - 99:5. Redmond<sup>2</sup> subsequently funded a consultant's study of the feasibility of an alternative routing of Evans Creek around the industrial properties through which the stream<sup>3</sup> currently flows. The consultant addressed the study to Redmond's Natural Resources Department. Ex. 2:RED-00963. The consultant identified that rerouting would allow for improved fish habitat and buffering of the stream channel from development. Ex. 2:RED\_00964-00965 and RP 98:18-99:5. The consultant concluded that a "Proposed Route 1" ("the preferred option") routing a segment of Evans Creek around industrial development and through Union Shares property (Ex. 2:RED-00969) was feasible (hydrological) and would provide "... a greater benefit from both environmental and development perspectives as it would be moved north of the existing developed parcels and onto City-owned property." Ex. 2:RED\_00968.

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<sup>1</sup> "WIRA" is an acronym for "Water Inventory Resource Area."

<sup>2</sup> Redmond is a non-charter code city, operating under Title 35A RCW. RMC 1.02.010.

<sup>3</sup> Evans Creek will interchangeably be referred both as a creek and as a stream in this brief. The words creek and stream are synonyms.

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In 2000, Redmond, through the lead of its Park and Recreation Department, acquired easement rights for and then constructed a recreational Trail across Union Shares property. Ex. 3:17 and 21, Ex. 4:, Ex. 8:Figure1 and Figure 2, Ex. 13 and Ex. 14. Subsequently in 2009, having benefit of the 2005 Evans Creek Relocation Feasibility Study, the Redmond Parks and Recreation Department completed and presented to the “Redmond City Council the East Redmond Corridor Master Plan” (“ERCMP”) (Ex. 3). the plan incorporated the relocation of Evans Creek, and proposed improvements to the existing recreational Trail to accommodate and take advantage of the proposed relocation of Evans Creek for passive recreation purposes and the improvement of the City’s Martin Park. Ex. 3:21 and RP 37:14-39:15.

The Washington State Department of Transportation in 2012-2013 having knowledge of the ERCMP and as part of its environmental mitigation for the SR 520 Project, acquired property and constructed a stream channel segment northeast of the Union Shares Property. The channel was constructed by WSDOT to be in alignment for future connection with Redmond’s proposed Evans Creek relocation. Ex 9; RP:56.<sup>4</sup>

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<sup>4</sup> <http://www.wsdot.wa.gov/Projects/SR520Bridge/MedinaTo202/evanscreek.htm>  
{GAR1650121.DOCX;1/00020.175065/ }

The ERCMP and WSDOT mitigation construction provided the impetus for Redmond staff and officials to pursue acquisition of greater easement rights over Union Shares property than previously acquired in 2000 for the existing recreational Trail construction. When negotiations for purchase of the additional easement rights from Union Shares were stalled in 2012 the Redmond City Council approved Ordinance No. 2654 allowing for the condemnation of additional Union Shares property interests necessary for the Project. EX 3. The Ordinance cited among other things that improvements to Martin Park would result from the stream relocation identified in the ERCMP. RP 37:14-39:15. The City Council approved Ordinance No. 2654 with the understanding that negotiations between the City and Union Shares would continue and the matter would come back to council for approval of the commencement of a condemnation action, should negotiations not result in a purchase agreement. Exs. 16-19.

While negotiations between the City and Union Shares were still ongoing, the City through its Department of Public Works, Engineering Division, engaged in project planning. The City Council included the Project in its Capital Investment Program (“CIP”) budgeting. Exs. 5 and 6; and RP 60-67. HDR, Inc. was hired as a consult to provide a design for the relocation of Evans Creek anticipated to begin at the existing upstream limit

of the WSDOT SR 520 Eastside Wetlands Mitigation project. Ex. 20. In 2014 HDR presented a “Preliminary Design Report” also referred to as the 30% Design Study by city staff. Exs. 8 and 9; RP 16:1013. The report refined the “preferred alignment” identified in the 2005 study and detailed its advantages over other possible routes, including a route that left the segment of the stream channel through the industrial properties in place.

The report identified the environmental benefits of removing Evans Creek from the industrial properties. Those benefits included lowering the contamination in the creek and allowing for the City to improve the creek with stream buffers (100 feet each side of the channel) and habitat features in the stream such as debris, gravel and plantings that are appropriate for the bank and the flood plain. RP 12:3-25. These habitat improvements would allow Trail users to view and experience the stream (which is now out of view) as passive recreation. RP 42:25-43:22.

The Redmond staff followed up the 30% design report with its own “Business Case Planning” by its Capital Improvements Project Governance Committee. Business Case Planning required the proposed relocation project to pass through a city department wide analysis and evaluation. Ex 11; RP 60-72:21. The project would use the entire 10.8 acre easement area for planting of native species except for the stream corridor along the Trail

(for safety purposes) and the stream channel. RP 83:9-84:4. Passive recreational benefits including the viewing of birds and small animals would result. RP 85:25-86:20 and 89:2-10.

City staff with the help of its consultant also pursued discussion of the stream location project with the owners of the industrial properties seeking their cooperation with the Project. RP 135-140. The Project would leave an open channel through their properties, but provide an opportunity for them to obtain permission to backfill the channel at their own expense. The 30% design report identified the preferred option as an “owner participation alternative” where the industrial property owners would secure the permitting and pay for the fill of the abandoned stream channel across their properties.

The industrial property owners have signed the permit applications for the Evans Creek Relocation Project that will go to Federal and State agencies if the project is to be constructed. It is necessary the owners sign the permit applications as they own the property through which Evan Creek currently flows. The fill work, however, is not a part of the City proposed project. RP 244:23-247:14. The industrial property owners will have to obtain additional individual permits for the fill work from the City even with the approval of the Federal and State regulatory agencies. The City will

require of the industrial property owners as environmental mitigation for the fill permits, the dedication of additional land to accommodate increased wetland buffer area for the relocated stream. This quid pro quo owner participation alternative is not essential to the Project. The City can construct the relocated channel without the fill work by the industrial owners. RP:18-22:20. Increased development potential for the industrial properties is a consequence, not a purpose of the Project for Redmond. RP 107:10-24.

With the completion of the 30% design report, the staff business case study, and industrial property owners apparent buy-in of the “owner participation alternative, the City Council approved the initiation of this condemnation action in 2015. RP 60-72:21; 208:11-16.

The trial court allowed Union Shares a two-day evidentiary hearing before making its determination of public use and necessity. RP 294:12-14. Five witnesses testified, including Redmond employees Haley, Dane and Spangler, Redmond consultant Deleuw and Union Shares expert witness Greg Stuart. RP 169. Stuart’s testimony was extensive but as noted by the trial court he presented no new evidence and his testimony was viewed by the court as simply an argumentative review of evidence the court had already seen and looked at.” RP 252:8-12.

**D. SUMMARY OF ARGUMENT**

None of the listed “considerations governing acceptance of review in RAP 13.4 are applicable to the Union Shares motion for discretionary review. There is no constitutional issue of substantial public interest arising from the proposed stream relocation project as argued by Union Shares. The potential for the redevelopment of the industrial sites over which Evans Creek currently passes is a consequence of the project, not the purpose behind or the reason for the project. For these reasons review should be denied.

The purposes for the Evans Creek Relocation Project are to improve the stream environment and a segment of the East Redmond Park Corridor. These are public purposes for which Redmond is authorized to condemn property for public use. No private use of the property rights over Union Shares property being condemned will result from the project. The potential for the redevelopment of the six industrial lots over which Evans Creek currently passes is at best a by-product of the stream relocation, not a purpose driving the project. Independent of the city project, those private property owners will have to obtain at their own expense from the City, fill permits to fill the vacated stream channel and dedicate land for additional stream buffer for the relocated Evans Creek as environmental mitigation, to

satisfy the conditions for the fill permits. The project will happen with or without the fill of the vacated stream channel by the six industrial property owners.

No reported decision in this state has found public purpose to be defeated by private benefit where the property to be condemned will remain in public use and ownership after the condemnation. Recent decisions of the Supreme Court have also upheld the determination of public use where the private benefit is incidental or can be separated from the project.

Redmond, the public entity proposing the Evans Creek Relocation Project, is a Title 35.A optional municipal code city whose authority to condemn for public use includes the condemnation authority of any class city and is circumscribed only by express statutory limitation or restriction. RCW 35.23.311 expressly authorizes condemnation for, “*the purpose of widening, straightening or diverting the channels of streams*” without restriction of city boundaries. Authorization for condemnation for *public park* purposes outside the city limits is expressly authorized by RCW 8.12.030. The same statute authorizes condemnation for *public purposes* without restriction of city boundaries.

The court of appeals did not publish its decision in the instant case because the decision did not make new law. There is no significant issue

affecting the state or federal constitutions or of state significance to be decided. *Kelo v. City of New London*, 545 U.S. 469 (2005) has no resemblance to the instant case factually. The extent to which economic development is a public purpose authorizing a municipal condemnation is not at issue in this case. The Court of Appeals correctly noted in its decision that economic development was not the only purpose of the project as was the case in *Kelo*. Slip Op. at 7. Economic development is not the purpose of the Evans Creek Relocation Project, only a possible side benefit of the project that encourages support for the project from the land owners over which the stream currently passes.

The motion for discretionary review should be denied.

**E. ARGUMENT**

The trial court made a considered and reasoned determination of public use. See the Trial Court's written decision (CP-325-357) attached hereto as an Appendix. The trial court correctly found that the participation of the industrial property owners in the project was separable from the project and a consequence not the purpose for the project. The trial court determined *State Ex Rel. WSCTC v. Evans*, 136 Wn.2d 811, 966 P.2d 1252 (1998) to be most factually on point and dispositive on the issue of public use. CP at 337. The trial court further found that the express language of

RCW 8.12.030 allowed Redmond to condemn and damage land outside its border for public parks and that the recreational purposes for the project identified in the record supported a finding that the project's purpose of improving a trail and to expand a stream that flows through an existing park into another stream does so in a way that meets with the public parks language of the statute. CP 336. The case most on point on the park issue is *In re Condemnation of Property for Improvement of Discovery Trail (aka In re Petition of the City of Long Beach)*, 119 Wn. App. 628, 82 P.3d 259 (2004). CP 333. The Court of Appeals affirmed these decisions of the trial court. As noted by the Court of Appeals, an appellate court will affirm the decision of a trial court on a determination of public use and necessity supported by substantial evidence. *City of Blaine v. Feldstein*, 129 Wn.App. 73, 79, 117 P.3d 1169 (2005). Union Shares fails to demonstrate that the decision of the trial court affirmed by the court of appeals is not supported by substantial evidence.

Union Shares mistakenly relies upon the signatures of the industrial property owners on the permit applications to the state and federal environmental regulatory agencies whose approval is necessary for the Evans Creek Relocation Project to go forward in support of its argument. Furthermore, the argument<sup>5</sup> made by Union Shares that the recreational and

environmental improvements to be accomplished by the project do not constitute park improvements because the public will not be able to physically access the stream, buffer and wetland areas improved by the project outside of the improved recreational trail, is not supported by fact, logic or any evidence in the record.

1. Any private benefit is separate and incidental to the project purposes.

Substantial evidence supports the trial courts finding of public use affirmed by the Opinion of this court. “That the City [Respondent Redmond] would go forward with the Project without benefiting the private industrial property owners” – is not a “hypothetical fact” – “unsupported” by the record as argued by Appellant.<sup>5</sup> The fact that “[T]he City is paying \$900,000 for all the study and engineering work necessary to apply for the umbrella State and Federal permits...” is not a “massive private benefit” to the industrial property owners. The expenditure is for the entire Stream Relocation Project.<sup>6</sup> It is not payment for the fill permit the industrial property owners will ultimately need from the City to fill the existing channel. Moreover, the Project costs paid by the City are no benefit at all to the industrial property owners if they do not go forward with obtaining the

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<sup>5</sup> Testimony of Haley at RP 20:7-17, 22:7-20 and 35:11-25.

<sup>6</sup> See testimony of Dane at RP 245-247.

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City fill permit and comply with City fill permit conditions which will include the dedication of land for increased wetland buffers. The participation of the industrial property owners is unnecessary for the Project improvements to be completed by the City on the Appellant's land to be acquired by this action in eminent domain. Private participation as envisioned in the *Owner Participation Alternative* is not essential to the City's relocation of Evans Creek. The Creek will be relocated regardless their participation.<sup>7</sup>

The rerouting of Evans Creek around the industrial properties and through Appellant's property is a Project certainty. The selected route of the new stream channel will go forward, with or without the industrial property owner's participation.<sup>8</sup> If the PIPOs decide not to dedicate land and obtain a fill permit from the City they receive absolutely zero benefit from the umbrella permits obtained by the City. The industrial property owners only benefit from the umbrella permit if they go forward with filling the abandoned stream channel.

Substantial evidence exists in the record supporting that the Project is for a public use separate from the industrial property owner's potential

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<sup>7</sup> RP 244:23-247:14.

<sup>8</sup> *Id.*

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for fill of the existing stream channel. Private fill of the abandoned stream channel is separable and incidental to the public project.<sup>9</sup> Moreover, the property rights acquired by the City from this action in eminent domain will not be used by the Appellants. There is no transfer of property rights to be acquired by the City from Union Shares to the industrial property owners. The facts before the U.S. Supreme Court in *Kelo* have no resemblance to this case. *Kelo* was not cited nor relied upon by either the trial court or the Court of Appeals in their decisions.

Union Shares is wrong. This case does not provide the opportunity or even any need for this Court to address the Public Use Clause or to address *Kelo* and the extent to which “economic redevelopment “ supports condemnation in Washington State.

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<sup>9</sup> RP 244:23-247:14.  
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2. The Project improvements to the recreational trail and the new passive recreational opportunities from the stream relocation, planted buffers, and wetland plantings are public park improvements authorized outside the city limits by RCW 8.12.030.

There is no factual dispute that the Project includes physical enhancements to the existing “recreational trail” for viewing of the enhanced stream, natural environment and wildlife.

Appellant is critical of the Opinion because it fails to acknowledge that the Project creates no “new” public recreational access because the recreational trail will remain where currently located. Appellant argues that the trail enhancements and habitat improvements included in the Project does not make for a public park property as did the recreational trail at issue in *In re Petition of City of Long Beach*, supra. Appellant’s argument is wholly unsupported by any authority or by reasonable conclusion. The new viewing areas at the new bridge locations along the recreational trail at stream crossings provide views of Evans Creek. The Creek is currently not visible from the recreational trail. The stream buffer and wetland enhancements and restoration work will provide opportunities for wildlife viewing and views of natural scenery not currently available to for trail users.<sup>10</sup>

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<sup>10</sup> RP 85:25-86:20; 89:2-10.  
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The Evans Creek Relocation Project will new passive recreational experiences for the users of the existing recreational trail. Trail users will be able to view and experience Evans Creek for the first time. The flood plain area over which the recreational trail passes, currently overgrown with non-native vegetation, will be restored with native plantings benefiting birds and other wildlife. The public via the recreational trail will have access to view the restored natural environment. Union Shares argument that “increased passive recreation” from the recreational trail without physical public access to the entire 10.8 acre easement area will not qualify as a “public park” under the statute is meritless. The argument is nothing more than the unsubstantiated opinion of Union Shares.

*In re Petition of City of Long Beach*, is not distinguishable as argued by the Union Shares. Whether not a recreational trail from which the public will be aesthetically and recreationally benefited will be newly constructed (*Long Beach*) or enhanced (the Evans Creek project) results in a park property improvements either way. The public will benefit recreationally from the improvements. The existing recreational trail provides active recreation for runners, cyclists and walkers. The enhanced trail will provide

new passive recreational opportunities.<sup>11</sup> The trail, as found by the trial court, will provide access to passive recreational opportunities.<sup>12</sup>

Both the trial court and the Court of Appeals correctly interpreted and applied Washington law in determining that the public park purposes of the project support the condemnation outside the City boarder. There is no need for this court to further review this determination under any of the standards for review in RAP 13.4.

**F. CONCLUSION**

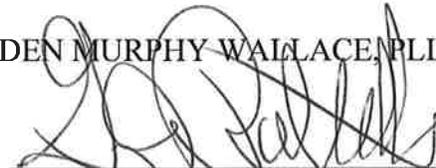
The Union Shares Petition for Discretionary Review should be denied.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of December, 2017.

Respectfully submitted,

OGDEN MURPHY WALLACE, PLLC

By

  
\_\_\_\_\_  
Greg A. Rubstello, WSBA #6271

E-Mail: [grubstello@omwlaw.com](mailto:grubstello@omwlaw.com)

Attorneys for Respondent City of Redmond

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<sup>11</sup> CP 42:25 – 43:25.

<sup>12</sup> CP 335:5 – 336:15.

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**Declaration of Service**

I, Charolette Mace, declare that on the date below I e-filed this document, and e-served the following counsel of record:

Charles A. Klinge  
STEPHENS & KLINGE  
10900 NE 9th Street, Suite 1325  
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*For Appellant Union Shares, LLC*

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

Executed at Seattle, Washington, this 13<sup>th</sup> day of December, 2017.

  
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Charolette Mace, *Legal Assistant*

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APPENDIX

APPENDIX 1 Findings, Conclusions and Order Adjudicating Public Use  
and Necessity

The Honorable Catherine Shaffer

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

CITY OF REDMOND, a municipal corporation of )  
the State of Washington, )

Petitioner, )

v. )

UNION SHARES, L.L.C., a Washington limited )  
liability company; *et al.* )

Respondents; )

NO. 15-2-12698-9 SEA

~~PROPOSED~~ FINDINGS, CONCLUSIONS  
AND ORDER ADJUDICATING PUBLIC USE  
AND NECESSITY

\_\_\_\_\_

This matter coming on for hearing on the motion of the Petitioner City of Redmond, Washington, for a determination of the public use and necessity for the condemnation of certain rights to the use and possession of the real property described in the Petition for Condemnation filed in the above titled and numbered cause of action; and the court having granted the request of the Respondent Union Shares LLC for an evidentiary hearing; and the evidentiary hearing having been held on May 9 and 10, 2016; and the court having received both documentary and testimonial evidence from the parties, heard the oral arguments of counsel and reviewed the legal briefing filed by the parties, NOW, HEREBY, ENTERS THE FOLLOWING:

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I. FINDINGS OF FACT

1.1 Petitioner is the City of Redmond, Washington ("Redmond"), organized under Title 35A RCW as a non-charter code City with a mayor - council form of government.

1.2 Respondent is Union Shares, LLC ("Union Shares"), a Washington limited liability company owning real property in unincorporated King County, Washington, adjacent to the east boundary of Redmond.

1.3 The City has filed a petition to exercise its power of eminent domain and to condemn new easement rights on, over and across that certain real property of Union Shares described in the Petition (hereinafter "the Subject Property").

1.4 Attached hereto as Exhibit A is a transcription of the Court's oral decision. The factual findings made therein are incorporated herein by this reference as if specifically set forth.

II. CONCLUSIONS OF LAW

The conclusions of law expressed by the Court in its Oral Decision attached hereto as Exhibit A are incorporated herein as if specifically set forth.

III. ORDER

In consideration of the above Findings and Conclusions, the COURT HEREBY ORDERS AS FOLLOWS:

1. The use for which the Petitioner City of Redmond seeks to acquire and condemn the property interests described in the Petition for Condemnation filed in the above title and numbered cause of action is a public use within the meaning of RCW 8.12.030, to wit: the relocation of a portion of Evans Creek, the installation of plantings and other environmental enhancements to buffer the stream, and improvements to the existing recreational trail to accommodate the crossing of the relocated Evans Creek and provide for new and enhanced

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1 passive recreational opportunities.

2           2. The property interests sought to be condemned from the property of Respondent  
3 Union Shares, LLC described in the Petition on file herein are necessary for the Petitioner City of  
4 Redmond's Evans Creek Relocation Project and the public interest requires Redmond's  
5 acquisition of property rights from Union Shares, LLC.

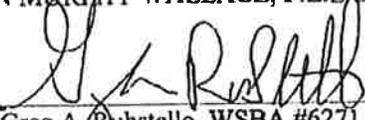
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7           DONE this 6<sup>th</sup> day of July, 2016.



JUDGE CATHERINE SHAFFER

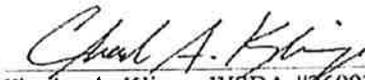
9 *Presented by:*

10 OGDEN MURPHY WALLACE, P.L.L.C.

11  
12 By:   
13 Greg A. Rubstello, WSBA #6271  
14 James E. Haney, WSBA #11058  
Attorneys for Petitioner City of Redmond

15 Approved as to form and notice of presentation waived:

16 STEPHENS AND KLINGE

17  
18 By:   
19 Charles A. Klinge, WSBA #26093  
Attorneys for Respondent Union Shares, LLC

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# EXHIBIT A

## TRANSCRIPTION ORAL DECISION

# EXHIBIT A

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1 (Open court.)

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3 THE COURT: Well, gentlemen, so interesting. This  
4 has really been fascinating to listen to. I have learned  
5 a lot about what goes on in terms of efforts to preserve  
6 and restore chinook, for example, which is something that  
7 the court did not know about before we got going, and I've  
8 learned about some of the uses in this area and where some  
9 of the local parks are. I have received a lot of really  
10 fascinating legal argument too, which I think that the  
11 court has tried to pause and consider carefully throughout.

12 I tend to be an active processor. In other words,  
13 I tend to respond to what I am hearing, as I am hearing it,  
14 it is part of how I think about things. Sometimes I change  
15 my mind about things when I argue with counsel and counsel  
16 argues back at me, sometimes I don't. So that is how the  
17 court operates and how I think is how I take in information  
18 to reach a conclusion.

19 I think that really where the court should begin  
20 in this case is the preliminary question that was raised in  
21 the briefing here. Even though that this was intended to  
22 be an evidentiary hearing, this issue is raised in the  
23 briefing, and I think that it has been pretty fully briefed  
24 and also argued by the parties and that is the question,  
25 can Redmond do this at all or are they outside of their  
Dolores Rawlins, RPR, CSR, CCR, CRR, CRC, RSA, Official Court Reporter

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authority?

Let's start there. I wanted to start with the very helpful recitation of the statute in the opposition in this case. The statute I am talking about here is RCW 8.12.030.

The statute specifically says that every city, including the town of Redmond "is...authorized and empowered to condemn land and property, including" property for... "culverts, drains, ditches," and "for the opening and widening"... "and extending of streets and avenues and highways."

And "to damage land or property for any such purpose," or to make changes in gradation, or construct slopes, or retain walls, or for the purpose of draining swamps, marshes, tide lands, tide flats or ponds or filling the same within the limits of such city.

That is the first two provisions, is that the city can do a whole bunch of stuff for these purposes within the limits of such city.

Then there is a broader grant in subsection 3, "to condemn land or property or to damage the same, either within or without the limits of such city for public parks, and for supplying freshwater and for protecting freshwater from pollution.

And I really think that there is an explicit grant

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1 here to condemn land and damage property outside of the  
2 limits of the city for public parks, because that is the  
3 express language of the statute.

4 Perhaps the court could inquire further, but I  
5 think that I can stop right there with that language,  
6 because there is also law on point.

7 I know that the defendant does not agree with  
8 these decisions. But nonetheless, they are out there.  
9 They are from higher courts than this one, which means that  
10 I am bound by them.

11 I turn first to city of Bellevue v. Painter, a  
12 decision that defendant has criticized in its briefing.  
13 That is a parallel case involving the city of Bellevue,  
14 which had contracted with the King County to deal with  
15 projects on Cold Creek, including making an agreement with  
16 the County that Bellevue would undertake construction of a  
17 detention/sedimentation pond, which would impinge on  
18 private property, located outside of the boundaries of  
19 Bellevue.

20 The Bellevue City Council authorized condemnation  
21 of the property. And then, after a hearing in the Superior  
22 court approved a finding of public use and necessity, on  
23 the appeal the court said that it was not interested in  
24 determining whether the sedimentation/detention pond at  
25 issue was a drain or a storm sewer within the language of  
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1 the statute. It said, "such definitional analysis is not  
2 necessary given the broad grant of powers under Title 35A  
3 RCW." It pointed out that the statute at issue here,  
4 8.12.030, "permits condemnation for drains or sewers or any  
5 other public use within or without the limits of a city."

6 Therefore, the court, without troubling itself  
7 further, said that the city of Bellevue had the authority  
8 to condemn this property that was outside of its borders,  
9 that belonged to this property owner, for purposes of the  
10 condemnation of the sedimentation pond.

11 Then, I also have -- and this strikes me as  
12 another case that is right on point -- the decision in  
13 Division II, In Re: The petition of the City of Long Beach  
14 at 119 Wn.App. 628. In this case, the city of Long Beach  
15 was constructing an interurban trail to commemorate the  
16 Lewis and Clark Expedition. The city planned the trail to  
17 extend outside of Long Beach, south. And the question was  
18 whether or not the city had the authority to condemn the  
19 private property for the trail outside of its city limits.  
20 And Division II said that the resolution of this turned on  
21 whether a trail was a park. The court noted that 8.12.030  
22 authorizes every city and town to condemn land and  
23 property.

24 The court, also, like Division I, cited RCW 35A,  
25 and noted that specific enumeration of the municipal powers  
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1 in the legislation should not be construed to limit the  
2 general description of power contained in the title, and  
3 that all grants of the municipal power, whether in specific  
4 terms or general terms, shall be liberally construed in  
5 favor of the municipality.

6 Then the court went on to point out that RCW  
7 8.12.030 specifically authorizes cities to condemn  
8 properties outside of their city limits, meaning that the  
9 legislature intended to subject non-residents to the  
10 municipalities' power in certain situations, and second,  
11 the court pointed out that the Supreme Court had held that  
12 the legislature could subject non-residents to "the  
13 jurisdiction of officials for whom they have no voice in  
14 selecting."

15 Finally, the court said, "we agree with the city  
16 that Discovery Trail falls within the definition of a,  
17 'park' because the city is constructing and maintaining the  
18 Discovery Trail for aesthetic and recreational purposes."

19 The court said, even though a trail is not  
20 "expressly listed among the enumerated uses for which the  
21 city may condemn property outside of the city limits, we  
22 are mindful that the legislature mandates that the courts  
23 'liberally construe' grants of power in favor of the  
24 municipality."

25 I have to tell you that I don't see anything  
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1 limiting about the Long Beach decision or about the City of  
2 Bellevue V. Painter decision. And I don't see any  
3 Washington Supreme Court case indicating that the court  
4 should read decisions like these in a crabbed manner.

5 X Expressly under the language of RCW 8.12.030, the  
6 City of Redmond has the power to condemn and damage land  
7 outside of its border for public parks. And that alone is  
8 pretty determinative on the facts of this case. Because  
9 what is proposed here in terms of the condemnation action  
10 is a link-up between an existing area through which the  
11 stream flows, which is Martin Park, and its continuation  
12 along a recreational trail, which looks darn park-like to  
13 this court by any modern definition, which is to be planted  
14 in a way that may be even more park-like with a hundred  
15 foot buffer on either side to provide that the users of  
16 this trail will essentially be in a park-like environment  
17 able to overlook the stream and see the other things that  
18 are attracted by a protected stream, like fish and local  
19 wildlife and native vegetation.

20 The stream ultimately connects with Bear Creek, in  
21 a way that is likely to produce -- from what the court has  
22 heard here -- much improved salmon runs into Bear Creek,  
23 where even the defendants' expert concedes that the  
24 evidence shows that salmon certainly do exist. According  
25 to what the court has heard here, among other things,  
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1 Chinook salmon need oxygen and they need cool water. And  
2 both of those things are promoted, obviously, even to an  
3 illiterate court in terms of environmental matters, like  
4 this one, by shade and vegetation. That is what those  
5 things produce, water and coolness, that is one of the  
6 things that makes our beautiful area so beautiful. We  
7 normally have those conditions, except when we chose to  
8 have streams flowing next to industrial areas, that is to  
9 say.

10 so, really, I don't have any problem at all saying  
11 that just as in the Division II case, this is a case of  
12 doing something to improve a trail and to extend a stream  
13 that flows through an existing park into another stream in  
14 a way that meets with the public parks or the public park  
15 language of the statute.

16 I don't know if the legislature when they first  
17 passed 8.12.030 was thinking about bike trails. It seems  
18 unlikely. Then again they had a lot more unspoiled land  
19 than we do now. Perhaps they didn't think about the trails  
20 in the same way. I doubt very much that they had some of  
21 the forms of locomotion that we see going on trails in  
22 those days. It is hard to see people dressed in 1873  
23 clothing and jogging along the trails, for example. But  
24 having said that, that is a public park purpose on its  
25 face. I think that the city is well within its statutory  
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1 authority.

2 I am not going to reach the issue that the  
3 defendant raises, although it is an interesting one,  
4 whether a city could do this just because it thought that  
5 it was more aesthetically appealing. I have a feeling that  
6 the defendant is right and that there is a limit to how  
7 much the city can do, for example, to enhance passive use  
8 and views. | But it is clear to me that the city can  
9 certainly do this kind of a public park activity and feel  
10 quite comfortable that it is within the enumerated powers  
11 given to it under 8.12.030, particularly given the broad  
12 construction that this court is required to impose on those  
13 terms, under RCW 35A. |

14 All right, that takes me to the next question,  
15 which is whether or not this land use action that the city  
16 is proposing of relocating this stream is a public use  
17 within the meaning of that term. That is a pretty key  
18 inquiry for a court in a case like this one.

19 And so now I want to turn to some of the major  
20 cases on this topic. Really, I think that the most helpful  
21 case I have found in terms of encapsulating what the court  
22 is supposed to review is probably the Washington Supreme  
23 Court decision in State v. Washington State Convention and  
24 Trade Center at 136 Wn.2d 811. I am not saying that the  
25 other cases cited to me haven't been helpful. They have.  
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1 But really I think that in many ways this is the most  
2 helpful case in setting forth the court's analysis.

3 As the Court said, there is a three-part test to  
4 evaluate eminent domain cases. For a proposed  
5 condemnation to be lawful, the governmental entity must  
6 prove first that the use is public, second, that the public  
7 interest requires it, and third, that the property  
8 appropriated is necessary for that purpose.

9 Let me begin with the issue about whether or not  
10 the use at issue here is a public use.

11 The way that this got argued in the Convention  
12 Center case, was that although a part of the Convention  
13 Center -- a good deal of it -- was intended for public use,  
14 which was exhibit hall space, that there was also such  
15 private participation in the project that -- according to  
16 the appellants -- the public nature of the project had been  
17 corrupted.

18 The property owners in that case argued that the  
19 participation by the private partner in the project was not  
20 incidental and relied specifically on Westlake (I), the  
21 same case that is argued to me today for the defendants,  
22 for the proposition that a private use is not incidental,  
23 if the public and private uses are combined in such a way  
24 that the two cannot be separated.

25 The property owners in the Convention Center case  
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1 argued to the Supreme Court that the expansion project  
2 depended upon the private partners' participation to meet  
3 legal and architectural requirements in such a way that the  
4 public and private spaces could not be separated. But the  
5 Supreme Court said that the property owners were erring in  
6 their interpretation of westlake (I) and its application to  
7 the facts of the case.

8 Because, as the Court pointed out, westlake (I)  
9 essentially involved the city planning to condemn several  
10 parcels of land, construct a park on part of the land  
11 acquired, and deed the rest to a private developer.

12 what the Court said is that the fact that there is  
13 private funding of a public project does not necessarily  
14 "corrupt the public nature of that project."

15 The Court pointed out that the appellants before  
16 it weren't citing any cases to support their argument that  
17 the private contribution to the project expenses defeated  
18 the exercise of eminent domain.

19 Also, the Court pointed out, that the retail  
20 development in the Convention Center case was not a primary  
21 purpose of the project, as opposed to the westlake (I) case  
22 where the private mall was essential to the project.

23 Finally, the Court said that the property owners  
24 erred in emphasizing the statement in the westlake (I) that  
25 public and private uses may not be combined in such a way

1 that the two cannot be separated.

2 The Court said, "these cases ruled on the use of  
3 eminent domain where the land to be condemned was for the  
4 purposes of the creating a single facility with both public  
5 and private uses. The framework created by these cases is  
6 not helpful here, because the expansion project does not  
7 contemplate alternate public and private use of the same  
8 facility. Rather, the expansion project will consist of  
9 two entirely separate facilities, one wholly public, the  
10 other wholly private."

11 Thus, the Court looked at the overall use of the  
12 property to be taken and the court said, "the new exhibits  
13 space is a public use and its footprint spans the entire  
14 property to be condemned. Because the expansion alone  
15 would require taking no less property than the government  
16 seeks to condemn, the [private] development in the space  
17 below the exhibit hall is merely incidental."

18 Now, this isn't the exactly the same conformation  
19 that I am looking at here. In other words, this isn't  
20 exactly the same structure of this project. But really, I  
21 think that it is pretty obvious here that what is going on  
22 in this case is a condemnation in the sense of a taking of  
23 the defendant's land for a purely public use.

24 There will be a private benefit, it seems.

25 Although, I will tell you, frankly, I question who is  
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1 benefiting most from what the industrial parties in this  
2 case are being asked to do.

3 But even assuming that it is a benefit to those  
4 industrial projects, or those industrial parties to move  
5 this creek away from where it runs alongside where they  
6 are, the project here doesn't contemplate that they will  
7 have any use of the creek in its new location.

8 There is no giving here of the defendants' land to  
9 other private parties for profit or whatever they want to  
10 do. I know that the defendant knows that. These people  
11 aren't going to be coming out to the defendant's land and  
12 running whatever industries they are running.

13 That is what essentially was going on in the  
14 westlake (I) case. That is what was wrong with that. The  
15 city was taking private property for the purpose of handing  
16 that over to other private parties to profit and run their  
17 businesses.

18 That is exactly what was not happening in the  
19 Convention Center case, because the private party was  
20 subsumed within the space that the state was taking.

21 Here what is going on is that the area that is  
22 being taken is the area where the creek will be rerouted  
23 to.

24 The private parties here, in this case, absolutely  
25 have nothing to do with using that property, except as they  
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1 may be people who run back and forth on the trail, or ride  
2 a bike back and forth on the trail, or stroll slowly taking  
3 photographs on the trail, whatever it is that they do on  
4 the trail. That is it. That is the only access that they  
5 are going to have. It is the same access that the rest of  
6 the public will have.

7           So that is the first problem here, is that to the  
8 extent that we are relying on the language in Westlake (I),  
9 I think that the State Supreme Court has told us very  
10 clearly, you can't do that in a case where the government  
11 really isn't taking property and giving it to some private  
12 party for their benefit. That's what Westlake (I) was  
13 talking about.

14           I see a very clear separation, I will point out  
15 here, which leads this court to question whether despite  
16 all of the statements and the various things that Redmond  
17 has supplied to the industrial property owners and despite  
18 what Redmond has said in some of its own studies about this  
19 project, I question really how beneficial this all is for  
20 the industrial property owners anyway. I am being frank  
21 with you folks here.

22           From what I see, they have been subjected to a  
23 very polite lobbying campaign from the get-go here to step  
24 up, fill in, pay for the permits to fill in the creek bed,  
25 once the creek has been moved, and also step up and pay for  
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1 doing the fill, and also step up and pay for permits to do  
2 buffering for that relocation, and also step up and pay for  
3 the buffering for the new stream location. So far they  
4 seem to be on board with that, because they seem to think  
5 that it is going to be good for their businesses to have  
6 the creek moved away, so they don't have to worry about it  
7 any more, and they can do what they want to do on their  
8 property. And so much the better, if they are right about  
9 that. But I have to say that I am not sure whose is  
10 benefiting here truly, whether it is the city and the  
11 public, by having essentially a subsidy of the work that  
12 they might otherwise have to do from the private property  
13 owners. But I do know this, the taking here is on the  
14 defendant's land. That is where it is occurring. There is  
15 no benefit whatsoever to the private parties here from what  
16 will happen on the defendant's lands.

17 So that is my first problem with the arguments  
18 that the defendant makes here. I see the argument under  
19 westlake (I), but I think that it is distinguished away in  
20 the more persuasive case, namely the Convention Center  
21 case. I am in agreement with the Washington State Supreme  
22 Court that this is not a westlake (I) case. The language  
23 of westlake (I) simply isn't in application here.

24 In terms of the public uses of this project, they  
25 are many. The major public use is one that is sort of  
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1 diffuse because it is not unique to Redmond. In some ways  
2 it is defensive too. We have all been under the gun since  
3 the Chinook salmon was declared threatened to do something  
4 about it. By we, I mean all governmental entities in our  
5 area have been under the gun to do something about  
6 restoring habitat for the Chinook. Redmond is one of those  
7 entities.

8 It is clearly a benefit to all of us who live in  
9 this area to have healthy salmon running in our streams. I  
10 don't have to point that out to any of us here. Because it  
11 is one of the things that makes the Pacific Northwest  
12 great. It supports a heck of a lot of habitat and many of  
13 the things that we value most about our environment.

14 But, also, I think that there is a clear public  
15 purpose in restoring salmon habitat to make sure that the  
16 city and other entities aren't facing fines, fees and  
17 assessments for letting the chinook die away, when they  
18 have an obligation to do otherwise.

19 Then, too, we have the obvious public benefits  
20 from this project, which have been talked about from pretty  
21 early on, and repeated through a lot of the materials that  
22 I have seen, which is it is going to be a nicer trail in  
23 the area where the creek is going to move to. It is going  
24 to be greener, it is going to be cooler, it is going to  
25 have a creek going by and it appears to me that it will be

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1 improved by having two nice bridges along the way, too.

2 Those are all obvious public uses. This is a case  
3 where there is a lot of evidence in the record to support  
4 that there is, indeed, a strong case for finding that this  
5 is a project for purposes of public use.

6 I think that I have enunciated in what I have said  
7 so far I think that the public interest requires this use.

8 With regard to the issue of public necessity, that  
9 is a different question. The court, I think, always  
10 applies more scrutiny to whether something is a public use.  
11 That is required of us. But the question of whether or not  
12 an acquisition is necessary, as the Supreme Court pointed  
13 out in the Convention Center case, is legislative.

14 I quote now the Supreme Court:

15 "Thus, a determination of necessity by a  
16 legislative body is conclusive in the absence of proof of  
17 actual fraud or such arbitrary and capricious conduct as  
18 would constitute constructive fraud." The burden is on the  
19 property owners who object to a condemnation to present  
20 facts that establish fraudulent, or constructively  
21 fraudulent behavior.

22 As the Supreme Court said, "fraud or constructive  
23 fraud would occur if the public use was merely a pretext to  
24 effectuate a private use on the condemned lands," for  
25 example.

1 In fact, in the Convention Center case the  
2 property owners contended that the decision to extend  
3 northwest was arbitrary and capricious, "because it was  
4 based on the private development options presented by the  
5 north expansion." The Court said that was one basis for  
6 the choice of the north site, but not the only  
7 justification. It pointed to the other justifications for  
8 the expansion. Therefore, it rejected the claim of  
9 arbitrary and capricious.

10 Let me point out that there is even stronger  
11 language in other cases on the necessity finding. And here  
12 I am going to direct the parties' attention to King County  
13 v Farr, a case decided in 1972, at 7 Wn.App. 600. There  
14 the court quoted from City of Tacoma v. Welcker, a much  
15 older Washington Supreme Court case from 1965, saying that  
16 "necessary" when used in eminent domain statutes "means  
17 reasonable necessity, under the circumstances of the  
18 particular case...it does not mean absolute or  
19 indispensable, or immediate need, but rather its meaning is  
20 interwoven with the concept of public use and embraces the  
21 right of the public to demand and expect the services and  
22 facilities to be provided by a proposed acquisition or  
23 improvement. Reasonable necessity for use in a reasonable  
24 time is all that is required."

25 The court in that case also points out that, "the  
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1 legislative determination of necessity is entitled to great  
2 weight." As has often been said in the past, "the rule is  
3 well settled in this state that a declaration by the proper  
4 municipal authorities is conclusive, in the absence of  
5 actual fraud or such arbitrary and capricious conduct as  
6 would amount to constructive fraud."

7 I am not going to read you all the citation on  
8 this.

9 In any event, the burden is on the objector to  
10 establish that there was actual fraud or such arbitrary and  
11 capricious conduct as to establish constructive fraud.

12 This is a deferential view by the court, which  
13 does not include the ability to do what the defendant has  
14 asked me to do here, which is to go back and critique the  
15 city legislature's approach to making their decision.

16 That first of all would misplace the burden of  
17 proof, which is on the defendant, not the city. And  
18 secondly, it would really undermine the ability of the  
19 government entities to move forward with a condemnation for  
20 public use, because I dare say there is no amount of work  
21 that a city or any entity could do that would satisfy the  
22 objector, that they had done all that the objector could  
23 think of.

24 I am quite sure that I would never ever see  
25 Mr. Stuart satisfied in this case. He made it clear to me.

1 Even when work was done after the fact after the city  
2 council had made its decision, that is clearly not enough  
3 for Mr. Stuart. And that is understandable, and I think  
4 that is why the test goes the other way, and the burden is  
5 on the objector.

6 So, I don't look seriously at the question about  
7 how much the city council reviewed, or whether the city  
8 council members at the time of the decision were the same  
9 city council members who had been around at earlier times  
10 when the factual material had been developed in support of  
11 this project. I don't look to the minutiae of whether this  
12 city council demanded that the people object to the project  
13 so they could hear them, or otherwise sought to create a  
14 controversy.

15 I don't think that those things are required. But  
16 in any event, I know that the test here requires the  
17 defendant to come forward with the proof of fraud or  
18 arbitrary and capricious conduct to the point of  
19 constructive fraud, which again means that I don't spend my  
20 time second guessing the procedures that the city council  
21 used or how much they read the materials provided to them  
22 or how seriously they took them.

23 Instead, I looked to what evidence has the  
24 defendant brought before me?

25 That is really why I set this hearing because the  
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1 defendant, I think, is entitled to present that evidence.

2 There isn't any evidence here of fraudulent  
3 behavior. There is no showing here of collusion with  
4 anybody or of gain for a private party in some way that  
5 would suggest fraudulent conduct.

6 I realize that the defendant thinks that the  
7 industrial landowners here are getting some kind of a deal.  
8 I am not so sure that they or the industrial landowners are  
9 right about that. But I do know this there is nothing here  
10 that indicates that there is fraud or collusion.

11 In terms of the argument of what makes this  
12 arbitrary and capricious, I am going to point out even the  
13 cases cited to me here in the argument don't really help  
14 here.

15 Let me start, for example, with State v Birch.  
16 This is a case where there was an alternate route proposed  
17 by the objectors to the condemnation that was underway.  
18 And there was an expert witness called that offered his  
19 views that there would be less harm to the property owners  
20 under the proposed route that the objectors had, and it was  
21 a better route than the one recommended by the State. The  
22 argument on appeal was the State refusal to accept this  
23 proposed alternate route was evidence that necessitated a  
24 finding of arbitrary and capricious conduct.

25 Now, this is a lot more of a showing by those  
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1 objectors than I have gotten here. Nobody has proposed  
2 evidence from anybody, including Mr. Stuart, that there  
3 would be less harm under a proposed scheme of the defendant  
4 and that that scheme is superior to the one recommended by  
5 the city.

6 But, in any event, the court said in Birch,  
7 "arbitrary and capricious conduct is willful and  
8 unreasoning action, taken without consideration in regard  
9 to the facts or the circumstances. Our review is limited  
10 to an examination of the record to determine whether there  
11 is evidence to support the findings of fact upon which the  
12 trial court based its conclusions."

13 Therefore, the court said that it was enough that  
14 there had been testimony introduced that the proposals of  
15 the objectors would have been more cumbersome and expensive  
16 than the action proposed by the condemnation.

17 I have the same thing here in the HDR report.  
18 There is a pretty good look at what it would look like to  
19 improve this stream in place and not move it. And the  
20 answer is that it would be really expensive and it would be  
21 really ineffective. It would fail compared to any other  
22 alternative as a desirable option.

23 That, I think, is reasonable evidence for the city  
24 to consider as it moves forward with this proposed  
25 condemnation. And given the absence of any evidence by the  
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1 defendant to show me a feasible alternate and the presence  
2 of the evidence from the city to show why the alternative  
3 of enhancing the stream in place isn't a good one, I don't  
4 think that the defendants met their burden.

5 Similarly, the case of Lange v Superior Court also  
6 cited to me in argument, decided by the State Supreme Court  
7 at 61 Wn.2d 153, is an appeal by an objector to a finding  
8 of public use and necessity. The objector in that case  
9 argued that the methodology that was proposed by the  
10 condemner could have been alleviated by a different plan of  
11 moving the proposed traffic lanes 40 feet further west and  
12 using a two to one fill slope. They said if that happened,  
13 the taking would have been unnecessary and therefore the  
14 appropriation of their property was arbitrary and  
15 capricious and constructively fraudulent.

16 But, again, in that case, the court said that "the  
17 state's evidence reveals such factors, as a proposed  
18 offramp, commencement of an interchange to the north, and  
19 proper drainage" and other needs that necessarily entered  
20 into the determination of "fill slope and the right-of-way  
21 width at the point in question."

22 That evidence was enough to support the court's  
23 determination, after looking at the objector's evidence,  
24 that the acquisition was not excessive or arbitrary and  
25 capricious or constructively fraudulent. Again, here I  
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1 don't have any evidence from the defendant to show me what  
2 alternative they would propose. And in any event, the  
3 evidence that I do have from the city indicates that there  
4 are good reasons for rejecting the alternative of trying to  
5 correct the conditions of the stream in place.

6 In addition, I want to cite one more case for you  
7 on this question, which is Central Puget Regional Transit  
8 Authority versus Miller, 156 Wn.2d, 403 decided in 2006.

9 I will just quote here: "This court has  
10 explicitly held already that the mere showing that another  
11 location is just as reasonable does not make the selection  
12 arbitrary and capricious."

13 So there is that, too. As time has gone on the  
14 court has quite strong in saying that just because there is  
15 an another location that the governmental entity could  
16 choose, that doesn't mean they are acting arbitrarily and  
17 capriciously. And here as I have said, there is not a  
18 showing of any of that, that correcting the stream in place  
19 is anything like a reasonable alternative.

20 Having found, therefore, that I have a showing  
21 before me of both the public use and the necessity, because  
22 the claims of an alternative simply don't fly, we come  
23 finally to the related argument that this condemnation  
24 can't proceed because of the purchase and sale agreement  
25 and the related easement, which the city, Redmond, entered

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1 into in 2000 with the defendant.

2 Now, I am willing to construe clause 11 of the  
3 purchase and sale agreement to say that arguably the city's  
4 condemnation action here breaches the promises that were  
5 made at this section of the purchase and sale agreement.

6 But let me point out that although we in  
7 Washington have certainly taken seriously the contention  
8 that a condemnation breaches or impairs contractual rights,  
9 the major cases cited to me and really the only ones that  
10 the court has found that seem to discuss this are bond  
11 cases.

12 One of them is Tyrpak v Daniels, at 124 Wn.2d 146  
13 in which the Supreme Court threw out a court district plan  
14 to annex territory within the other court district.

15 The second case is Pierce County v. State, 159  
16 Wn.2d 16, which was a case involving the question about  
17 whether I-776 impaired a contract between bond holders and  
18 Sound Transit.

19 The thing about bond contracts is that the  
20 property pledged to support the bond is key to the ability  
21 to issue a bond. It is key to the contractual relationship  
22 between the bond holders and the bond issuer. That is why  
23 the court in those two cases found where a contractual  
24 relationship, namely, the bond relationship existed, that  
25 legislation, like the kind proposed in these two cases,

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1 which impaired the nature of the property for which the  
2 bond holders had been willing to provide money -- I'm not  
3 putting that very well -- impaired the nature of the  
4 collateral, on which the bond had been issued, was a  
5 substantial impairment of the contractual relationship.  
6 And therefore found, too, that it wasn't in those cases  
7 reasonable and necessary to serve a legitimate public  
8 interest.

9           Assuming for the sake of argument that we have a  
10 substantial impairment of the purchase and the sale  
11 agreement in this case through the city's proposed  
12 condemnation to disturb or construct improvements within  
13 the easement area, and I assume that without deciding it,  
14 where this court has difficulty is in the third prong of  
15 the test, which is finding whether or not it can be said  
16 that it is not reasonable and necessary to serve a  
17 legitimate public purpose.

18           There was no real police power justification in  
19 the Tyrpak case. And there was the skinniest of  
20 justifications, which was a desire for tax revenues, in the  
21 Pierce County case.

22           Here I have considerable reasons for the taking  
23 that is proposed here within the easement area. I think  
24 that there is plainly a reasonable governmental  
25 justification, a unnecessary exercise of the state

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1 sovereign power, or the rather the city sovereign power, in  
2 this case.

3 I add it to something that I think is really  
4 important for all of us to keep in mind, that is the  
5 footnote that appears in Tyrpak and I am quoting here:  
6 "we note that contract rights are a form of property and as  
7 such may be taken for a public purpose provided that just  
8 compensation is paid. Moreover, a contract with the  
9 government does not impose upon it a binding obligation to  
10 maintain with photographic precision the status quo at the  
11 time of the contract. What it does require is that the  
12 policy changes and political evolutions not discard the  
13 legitimate expectations embodied in the contract, nor  
14 dramatically diminish the inducements which led to the  
15 initial formation of the contract."

16 It seems to me that in this case not only do I  
17 have reasonable and necessary exercise of governmental  
18 power to, perhaps, breach this provision of the purchase  
19 and the sale agreement, but in addition, to the extent that  
20 this is yet another item of the defendant's property that  
21 is being taken for public use, namely, its contract rights,  
22 that is an item for just compensation.

23 I think that the question that awaits us all is  
24 this one, and that is, what does the case law say to us  
25 about how to compensate a contract holder for loss of

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1 contract rights?

2 To the extent that we can find a way to be within  
3 normal concepts of just compensation, we can combine that  
4 inquiry, it seems to me, in the just compensation portion  
5 of this case.

6 To the extent that we can't find usable standards,  
7 I think probably what we will need to do is a bifurcated  
8 inquiry into whether or not there has been breach of the  
9 contract at issue here. And if so, what additional  
10 compensation is due to defendant over and above the normal  
11 calculation of the just compensation.

12 I am not going to adjudicate this issue. I told  
13 you many times I am not adjudicating this breach of  
14 contract claim.

15 I am only here considering for the purpose of the  
16 argument that was submitted to me. But having said that, I  
17 am not ruling out we may not be able to fold it into the  
18 just compensation inquiry. I am just not sure how.

19 I think that the real question is what was the  
20 development of the case law that Tyrpak cites?

21 what, if anything, has it done to inform the  
22 calculation of the just compensation?

23 All right. I found this fascinating. I  
24 appreciate the presentation by all parties here.

25 All right. I am finding public use and necessity  
Dolores Rawlins, RPR, CSR, CCR, CRR, CRC, RSA, Official Court Reporter

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1 as requested by the city. This case will move forward on  
2 the question of what just compensation is owed to the  
3 defendant.

4 The defendant has not lost its breach of contract  
5 action, nor its ability to claim any additional damages  
6 that are arguably due to the breach of contract here  
7 because of the court's ruling today. That is the ruling of  
8 the court.

9 We are in recess.

10 MR. KLINGE: How will we go forward?

11 THE COURT: Get me an order and then we will set a  
12 trial for a just compensation.

13 Thank you, everybody.

14  
15 (Court was adjourned for the day.)  
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**OGDEN MURPHY WALLACE, PLLC**

**December 13, 2017 - 11:58 AM**

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**Appellate Court Case Title:** City of Redmond v. Union Shares LLC, et al.,  
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