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No. 95887-4

Court of Appeals No. 76204-4-I

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

FREDERICK A. KASEBURG and KEITH L. HOLMQUIST,

Petitioners.

PETITION FOR REVIEW

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TABLE OF CONTENTS

IDENTITY OF PETITIONERS, CITATION TO APPELLATE DECISION & INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW 2

FACTS RELEVANT TO PETITION FOR REVIEW 2

A. This is the third appeal arising from the City's attempt to take the appellants' properties. 2

B. The properties are in a quiet residential neighborhood abutting a cove. 3

C. The City's retaliation has been successful – so far. 3

REASONS THIS COURT SHOULD ACCEPT REVIEW 5

A. This Court should accept review of two important questions of first impression: whether the appearance of fairness doctrine applies to condemnation proceedings and whether the City's violation voids the condemnation, particularly where the appellate decision conflicts with statutes and this Court's opinions. RAP 13.4(b)(1) & (4) 5

B. This Court should accept review of the important question of first impression: whether the Open Public Meetings Act applies; and whether the City's violation of the OPMA voids the condemnation. RAP 13.4(b)(4). 11

C. This Court should accept review of the significant constitutional question: whether excluding the condemnees from the condemnation process violated their due process rights vested under RCW 8.25.290. RAP 13.4(b)(3). 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Buell v. City of Bremerton,
80 Wn.2d 518, 495 P.2d 1358 (1972)....................................5, 7

Carlisle v. Columbia Irrig. Dist.,
168 Wn.2d 555, 229 P.3d 761 (2010).......................................17

Cathcart v. Andersen,
85 Wn.2d 102, 530 P.2d 313 (1975)...11

City of Seattle v. Kaseburg,
No. 76204-4-I (March 26, 2018) 1

Columbia Riverkeeper v. Port of Vancouver,
188 Wn.2d 421, 395 P.3d 1031 (2017).....................................11

Fleming v. City of Tacoma,
81 Wn.2d 292, 502 P.2d 327 (1972)...................................7, 8, 9

Harris v. Hornbaker (Harris),
98 Wn.2d 650, 658 P.2d 1219 (1983).....................................5, 8

Harris v. Pierce Cnty. (Harris 1996),
84 Wn. App. 222, 928 P.2d 1111 (1996) 8, 9, 10

Holmquist v. King Cnty. (Holmquist I),
182 Wn. App. 200, 328 P.3d 1000, *rev. denied*,
181 Wn.2d 1029 (2014)..2

Holmquist v. King Cnty. (Holmquist II),
192 Wn. App. 551, 368 P.3d 234 (2016) 1, 3, 4

In re Juvenile Director,
87 Wn.2d 232, 552 P.2d 163 (1976)...8

Mathews v. Eldridge,
424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976) 14

Miller v. City of Tacoma (Miller 1999),
138 Wn.2d 318, 979 P.2d 429 (1999).......................................16

Pub. Util. Dist. No. 2 of Grant Cnty. v. N. Am. Foreign Trade Zone Indus., LLC (NAFTZI),
159 Wn.2d 555, 151 P.3d 176 (2007)................................16, 17

Raynes v. City of Leavenworth,
118 Wn.2d 237, 821 P.2d 1204 (1992).........................5, 7, 9, 10

Reg'l Transit Auth. v. Miller (RTA),
156 Wn.2d 403, 128 P.3d 588 (2005)................................15, 17

State ex rel. Schroeder v. Superior Court,
29 Wash. 1, 69 P. 366 (1902)...8

Smith v. Skagit Cnty.,
75 Wn.2d 715, 453 P.2d 832 (1969).......................................5, 7

Standow v. Spokane,
88 Wn.2d 624, 564 P.2d 1145, *appeal dismissed*,
434 U.S. 992 (1977) 10

Zehring v. City of Bellevue,
103 Wn.2d 588, 694 P.2d 638 (1985)...5

Statutes

RCW 8.25.290 .... *passim*

RCW 8.25.290(4)(a)...12, 15

RCW 36.75.140 8

RCW 42.30.020 ....12, 15

RCW 42.30.020(2)...12

RCW 42.30.020(3)..12, 15, 16

RCW 42.30.020(4)...12

RCW 42.30.910 12

RCW 42.36.010 ....6, 7, 9, 10

RCW 42.36.030 ....6, 7

RCW Ch. 8.25..12

RCW Ch. 42.30.. *passim*

RCW Ch. 42.36..1, 6, 7, 9

Other Authorities

2007 REG. SESS. H.B. 1458 (2007) 15

2007 Wash. Laws, C 68 L 07, SHB 1458, Final Bill Report..15

RAP 13.4(b)(1)..5, 18

RAP 13.4(b)(3)..14, 18

RAP 13.4(b)(4)..5, 11, 18

IDENTITY OF PETITIONERS, CITATION TO APPELLATE DECISION & INTRODUCTION

Petitioners Frederick A. Kaseburg and Keith L. Holmquist ask this Court to accept review of the Court of Appeals' published opinion in ***City of Seattle v. Kaseburg***, No. 76204-4-I (March 26, 2018) (attached as Appendix A), and of its Order Denying Reconsideration (April 24, 2018) (App. B). *See also* Order Granting Motion to Publish Opinion (April 24, 2018) (App. C.). This appeal addresses important issues of first impression, where the City of Seattle violated the appearance of fairness doctrine, the Open Public Meetings Act (OPMA), and due process in condemning the Petitioners' properties. This Court should accept review.

Specifically, the published decision erroneously concludes that the common-law appearance of fairness doctrine does not apply in condemnation proceedings, misinterpreting this Court's decisions and misapplying RCW Ch. 42.36. The decision also erroneously concludes that the City did not violate the OPMA, where it excluded the condemnees from its entire process (while ***Holmquist II*** was pending) and no evidence exists that its condemnation final action was taken in an open public meeting. And for the same reasons, the City deprived the excluded condemnees of due process.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in failing to dismiss the condemnation petition, where the City violated the appearance of fairness doctrine?

2. Did the trial court err in refusing to dismiss the condemnation petition, where the City violated the Open Public Meetings Act?

3. Where the City excluded the condemnees from its condemnation process due to the pendency of the second appeal in this action, did it violate their constitutional due process right to notice and an opportunity to be heard under RCW 8.25.290?

FACTS RELEVANT TO PETITION FOR REVIEW

A. This is the third appeal arising from the City's attempt to take the appellants' properties.

This is the third appeal[1] arising out of the City's attempt to take the appellants' properties. In the first appeal (***Holmquist I***) the Court of Appeals affirmed a summary judgment quieting title in these appellants to the end of NE 130th Street, abutting Lake Washington. ***Holmquist v. King Cnty.***, 182 Wn. App. 200, 328 P.3d 1000, *rev. denied*, 181 Wn.2d 1029 (2014). Rather than repeat the 100-plus-years of history, the appellants refer the Court to ***Holmquist I***.

[1] The first two decisions are attached as Appendices D & E.

The second appeal (***Holmquist II***) concerned the trial court's denial of the appellants' requests for damages arising from the City's use of supersedeas without bond, suppressing appellants' rights to exclusive use and enjoyment of their properties. ***Holmquist v. King Cnty.***, 192 Wn. App. 551, 368 P.3d 234 (2016). The supersedeas permitted the City to maintain a sign on the properties, and a website inviting the public to use the properties, which it did. ***Holmquist II*** at 555. The appellate court reversed, holding that these appellants were entitled to $74,520 in damages against the City. *Id.* at 559, 566.

B. The properties are in a quiet residential neighborhood abutting a cove.

The waterfront properties at issue are in a quiet residential area along the west shoreline of Lake Washington, accessible only by a narrow private road, with some additional width for homeowner parking. CP 487. The properties include a cove with a sandy beach. *Id.* Kaseburg's property includes the south half of the cove and about 39 linear feet of bulkheaded waterfront. *Id.* The Holmquist property includes the north half of the cove and portions of a dock. CP 572.

C. The City's retaliation has been successful – so far.

While ***Holmquist II*** was pending in this Court, some members of the public and several Seattle City Council members conducted an extensive campaign to convince other council members and the

Mayor to commit to condemning the appellants' properties for a waterfront park. CP 487-92, 496-569, 578-81. This included Councilmember Bagshaw, who is a member of the "Friends of NE 130th Beach" Facebook group. CP 580.

The history of that campaign, and the commitment by all nine Councilmembers on June 8, 2015 to approve a future condemnation ordinance,[2] is detailed in emails, as summarized in the trial court (CP 487-92) and at BA 5-9. The City introduced no evidence rebutting these emails, which show that the City violated RCW 8.25.290 when it took final action on or before June 8, 2015, without giving the condemnees proper notice and a reasonable opportunity to be heard. *Id*. Indeed, when Kaseburg's fiancée tried to be heard, the Petitioners were shut out from the process *specifically because they were involved in a different ongoing litigation with the City* (CP 520):

> Until such litigation [***Holmquist II***] has as been concluded by a final ruling of the courts and publically [*sic*] announced, I and the City Attorney's Office are advising Nick to refrain from further communication with you or commenting on this matter.

The upshot was that the condemnees were excluded from participating in the condemnation proceedings before the Council.

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[2] The June 8, 2015 letter signed by all nine Councilmembers to Mayor Ed Murray supporting condemnation is at BA Appendix D. CP 494-95.

REASONS THIS COURT SHOULD ACCEPT REVIEW

A. This Court should accept review of two important questions of first impression: whether the appearance of fairness doctrine applies to condemnation proceedings and whether the City's violation voids the condemnation, particularly where the appellate decision conflicts with statutes and this Court's opinions. RAP 13.4(b)(1) & (4).

The appearance of fairness doctrine applies where notice and a hearing are required by statute. ***Zehring v. City of Bellevue***, 103 Wn.2d 588, 591, 694 P.2d 638 (1985). Notice and a public hearing are required under RCW 8.25.290. "The intent of the doctrine is to maintain public confidence in quasi-judicial decisions made by legislative bodies." ***Harris v. Hornbaker***, 98 Wn.2d 650, 658, 658 P.2d 1219 (1983). "The doctrine requires that public hearings which are adjudicatory in nature meet two requirements: the hearing itself must be procedurally fair . . . and it must be conducted by impartial decisionmakers." ***Raynes v. City of Leavenworth***, 118 Wn.2d 237, 245-46, 821 P.2d 1204 (1992) (citing ***Smith v. Skagit Cnty.***,75 Wn.2d 715, 740, 453 P.2d 832 (1969); ***Buell v. City of Bremerton***, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972)).

Here, the record is clear that the City violated the appearance of fairness doctrine by determining that it was going to condemn the properties before it notified the condemnees – indeed, while they

were excluded from communicating with council members. The hearing was neither fair nor impartial. This Court should grant review.

The Court of Appeals' error occurs here (App. A at 13):

> The appearance of fairness doctrine was modified by the legislature in 1982 when it enacted chapter 42.36 RCW . . .. That act provides, in pertinent part [emphases added]:
>
> > Application of the appearance of fairness doctrine to <u>local land use decisions</u> shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are <u>those actions of the legislative body</u>, planning commission, hearing examiner, zoning adjuster, board of adjustment, or <u>boards which determine the legal rights</u>, duties, or <u>privileges of specific parties in a hearing</u> or other contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising <u>comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of areawide significance</u>.
>
> RCW 42.36.010. The act further provides that "[n]o legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine." RCW 42.36.030.

Specifically, the court's error is in applying RCW Ch. 42.36 to condemnation proceedings. On its face, RCW 42.36.010 expressly limits that chapter to "local land use decisions" – excluding other types of decisions. The Court of Appeals erroneously treats a condemnation ordinance as a local land use decision.

Having misapplied Chapter 42.36, the Court of Appeals then reads RCW 42.36.030 (exempting legislative actions like area-wide rezones and area-wide comprehensive plans) to exempt Seattle's condemnation ordinance as a legislative species of a local land use decision and not a quasi-judicial act. The appellate court mixes apples and oranges – which can only produce a legal fruit salad – and has set a new precedent in misreading RCW Ch. 42.36.

Since this Court's common-law appearance of fairness doctrine was *not* modified by RCW Ch. 42.36 as to other quasi-judicial decisions like condemnation, it remains intact. This Court established the appearance of fairness doctrine in a series of cases beginning in 1969. ***Smith***, 75 Wn.2d at 70; ***Buell,*** 80 Wn.2d at 523; and ***Fleming v. City of Tacoma***, 81 Wn.2d 292, 299, 502 P.2d 327 (1972), *overruled in part on other grounds,* ***Raynes***, 118 Wn.2d at 247 (overruling ***Fleming*** solely as to comprehensive plans and zoning code amendments as required by RCW 42.36.010, enacted after ***Fleming***). This Court's common-law doctrine requires all quasi-judicial public hearings that affect individual property rights to be procedurally fair and conducted by impartial decision makers. *Id*. The appellate decision conflicts with ***Smith***, ***Buell***, and ***Flemming***.

The appellate court relies on ***Harris v. Hornbaker***, 98 Wn.2d 650, 658 P.2d 1219 (1983). App. A at 14-15. ***Harris*** involved a board of county commissioners' recommendation to the Department of Transportation (DOT) regarding the location of a highway interchange. 98 Wn.2d at 652. "The determination of where to place a road has traditionally been a distinctly legislative decision." *Id.* at 658 (citing RCW 36.75.140; ***State ex rel. Schroeder v. Superior Court***, 29 Wash. 1, 69 P. 366 (1902)). And in that case, "notice and procedural requirements were followed for both hearings," and the Board adopted "a 6-year plan including its recommendation to the [DOT]." *Id.* at 656. ***Harris*** is nothing like this case.

But ***Harris*** does cite and discuss the controlling case, ***Fleming***, 98 Wn.2d at 657. ***Harris*** specifically notes that "legislative bodies may be entrusted with essentially adjudicatory tasks." *Id.* (citing ***Fleming*** ("county board's rezoning decisions deemed quasi-judicial"); ***In re Juvenile Director***, 87 Wn.2d 232, 552 P.2d 163 (1976)). Again, under the common-law appearance of fairness doctrine exemplified in ***Fleming***, the appearance of fairness doctrine survives and applies in this matter.

The City cited – but did not apply – a four-part test for distinguishing quasi-judicial from legislative actions, quoting ***Harris***

v. Pierce Cnty., 84 Wn. App. 222, 928 P.2d 1111 (1996) ("***Harris 1996***") (quoting ***Raynes***, 118 Wn.2d at 244-45). BR 38-39. ***Harris 1996*** involved a county council's adoption of a master trail plan. 84 Wn.2d at 226. "Such policymaking decisions, which are based on the consideration of public opinion, are within the purview of legislative bodies, not courts of law." *Id.* at 229 (citing ***Raynes***, 118 Wn.2d at 245). ***Harris 1996*** is nothing like this case.

In ***Raynes***, which the City also did not discuss, the Court faced a zoning amendment. 118 Wn.2d at 245. The Legislature adopted RCW Ch. 42.36 after ***Fleming***, so the Court held that the county's zoning decision was legislative, per that statute. *Id.* at 249. But in the course of its decision, even ***Raynes*** noted that the "statute defines quasi judicial to include actions of local legislative bodies 'which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.' RCW 42.36.010." *Id.* at 247. Indeed, that statute distinguishes between quasi-judicial "actions of local decision-making bodies . . . which determine the legal rights, duties, or privileges of specific parties," on the one hand, and "legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning

ordinances or the adoption of a zoning amendment that is of area-wide significance," on the other. RCW 42.36.010 (emphases added).

The distinction is clear: condemnation remains a quasi-judicial action because it determines the legal rights of specific parties (the condemnees) without rezoning or affecting other comprehensive community-wide plans. While the City argues that this condemnation is consistent with existing plans, it does not amend or revise them.

Although the City did not address the ***Harris 1996*** factors in its briefing, the appellate court did so *sua sponte*. App. A at 14. Yet it focused not on the decision to condemn the properties – the action the Council actually took – but rather on the adoption of "an ordinance" generally. *Id*. Applying the test to the action at issue – condemnation – shows it to be quasi-judicial:

> (1) whether the court could have been charged with the duty at issue in the first instance [courts can and do make condemnation decisions];
>
> (2) whether the courts have historically performed such duties [same];
>
> (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prosecutive [*sic*][3] application [condemning

[3] The Court of Appeals quoted ***Harris 1996***, which *misquoted* **Raynes**, which correctly quotes ***Standow v. Spokane***, 88 Wn.2d 624, 631, 564 P.2d 1145, *appeal dismissed*, 434 U.S. 992 (1977). The word is prospective.

> two people's property in retaliation for prior appellate victories destroys individual property rights and is not a general law of prospective application]; and
>
> (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators [taking people's property is not legislation].

In sum, the common-law appearance of fairness doctrine applies here because the Council's condemnation decision was quasi-judicial. Indeed, condemnation cannot proceed without an actual judicial proceeding that reviews and confirms (or perhaps rubber-stamps) the City's quasi-judicial decision. The courts erred in concluding that the initial decision is not subject to the appearance of fairness doctrine. And the condemnees' exclusion precluded even the appearance of fairness. This Court should accept review.

B. This Court should accept review of the important question of first impression: whether the Open Public Meetings Act applies; and whether the City's violation of the OPMA voids the condemnation. RAP 13.4(b)(4).

"The OPMA is Washington's comprehensive transparency statute." ***Columbia Riverkeeper v. Port of Vancouver***, 188 Wn.2d 421, 434, 395 P.3d 1031 (2017). "Enacted in 1971, the Act seeks 'to ensure public bodies make decisions openly.'" *Id.* (citation omitted). "'[T]he purpose of the Act is to allow the public to view the decisionmaking process at all stages.'" *Id.* (quoting ***Cathcart v.***

Andersen, 85 Wn.2d 102, 107, 530 P.2d 313 (1975)). The statute "shall be liberally construed." RCW 42.30.910.

Here, the open public hearing mandated by RCW 8.25.290 and the OPMA simply never occurred. Instead, the full Council committed in writing to authorize condemnation on June 8, 2015, in a "briefing" of the full Council. CP 494-95, 549. The Council's notice of final hearing, and the September 21, 2015 hearing adopting the condemnation ordinance, were predetermined. *Compare id. with* CP 52. The true final decision was made three months earlier in a "briefing" that did not comply with RCW Ch. 8.25 and the OPMA. *Id.* This Court should accept review on this question of first impression.

Specifically, RCW 8.25.290(4)(a) incorporates RCW 42.30.020, under which "meeting" means "meetings at which action is taken." RCW 42.30.020(4). "Action" means "the transaction of the official business of a public agency by a governing body including but not limited to . . . deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3). "Governing body" means "the . . . council . . . <u>or any committee thereof</u> when the committee acts on behalf of the governing body . . . or takes . . . public comment." RCW 42.30.020(2) (emphasis added). Since the

appellate court has determined that the series of emails was not a "chain meeting," there simply was no meeting satisfying the OPMA.

But the City claimed – and the appellate court apparently believed – that the "the Letter [*sic*] was signed in an open, public briefing." *Compare* BR 37 (citing CP 549; CP 586:1-2; RP 7:14-8:17) *with* App. A at 12 ("the council members singed the June [8,] 2015 letter to the mayor at a council meeting *open to the public*") (italics in original). Indeed, this "finding" appears to be the lynchpin of the court's decision on the OPMA. *Id*. at 3, 12, 16 n.4.

No evidence in this record shows that the June 8 briefing was an open public meeting. *See* BA 28-29, Reply Brief 8. The City's first cite (CP 549: "All Councilmembers signed on this morning at briefing") says nothing about an open public meeting. Its second cite (CP 586:1-2) refers to the City's reply brief in the trial court, which contains no citation to a record supporting this argumentative assertion. And the City's final cite is to its lawyer's oral argument in the trial court. RP 7-8. Argument is not evidence, and counsel cited no evidence supporting her assertions. *Id*. None exists.

And even if an open public meeting had occurred, it was not open to the excluded condemnees.

This Court should accept review to examine the important issues of first impression whether the OPMA applies to condemnation proceedings and whether the City's violation should void its improper condemnation determination.

C. This Court should accept review of the significant constitutional question: whether excluding the condemnees from the condemnation process violated their due process rights vested under RCW 8.25.290. RAP 13.4(b)(3).

Even if this Court were to disagree that the common-law appearance of fairness doctrine and the OPMA apply and/or were violated, then it should reverse and void the condemnation because excluding the condemnees from the process violated their constitutional due process rights vested under RCW 8.25.290. The Court should accept review to examine this significant constitutional question. RAP 13.4(b)(3).

Due process requires notice and a meaningful opportunity to be heard. *See, e.g.*, ***Mathews v. Eldridge***, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976). The notice statute for condemnations, RCW 8.25.290, required the City to provide notice and an opportunity to be heard before taking "final action" in deciding to condemn the properties. The City violated due process in deciding

to condemn the properties before even hearing from the condemnees – indeed, while excluding them from the process.

In 2007, the Legislature unanimously adopted RCW 8.25.290, expressly disagreeing with this Court's 2005 decision in ***Reg'l Transit Auth. v. Miller***, 156 Wn.2d 403, 128 P.3d 588 (2005) ("***RTA***"). *See*, 2007 REG. SESS. H.B. 1458 (2007); 2007 WASH. LAWS, C 68 L 07, SHB 1458, Final Bill Report at 3.[4] ***RTA*** held that Sound Transit complied with statutory notice requirements by posting meeting information on its website. 156 Wn.2d at 415-16. But the Legislature cited Justices Alexander and Chambers in dissent, who said "due process demands that government err on the side of giving abundant notice when it seeks to take property." *Id.* at 425.

The Legislature thus adopted a notice procedure for meetings concerning condemnation, RCW 8.25.290. For "potential condemnors [like the City] subject to chapter 42.30 RCW, the open public meetings act, 'final action' has the same meaning as that provided in RCW 42.30.020." RCW 8.25.290(4)(a). And under RCW 42.30.020(3), "final action" includes "a collective positive . . . decision . . . upon a . . . proposal . . .." This definition "does not require a *formal*

[4] The Final Bill Report is at BA Appendix E.

motion; it can simply be an informal proposal resulting in a positive . . . decision . . ..” ***Miller v. City of Tacoma***, 138 Wn.2d 318, 330-31, 979 P.2d 429 (1999) (“***Miller 1999***”).[5]

In the June 8, 2015 letter signed by all nine Councilmembers, the Council concluded that “the City should use its power of eminent domain to acquire” the properties. BA App. D (CP 494-95). This was a “final action” under RCW 42.30.020(3). The City unquestionably violated RCW 8.25.290 when it took final action on June 8, 2015, without giving the condemnees a reasonable opportunity to be heard. Indeed, when Kaseburg’s fiancée tried to be heard, she was shut out *specifically because these appellants were involved in a different ongoing litigation with the City*. CP 520-21. A more blatant violation of due process is hard to imagine.

The appellate decision nonetheless holds that *adopting the ordinance* was the final final action and that – even then – the condemnees’ constitutional rights were not implicated because only judicial condemnation proceedings require due process. App. A at 8-9 (quoting ***Pub. Util. Dist. No. 2 of Grant Cnty. v. N. Am. Foreign Trade Zone Indus., LLC***, 159 Wn.2d 555, 570, 151 P.3d 176 (2007)

[5] The ***Miller v. City of Tacoma*** from 1968 is cited in the opening brief.

(***NAFTZI***); ***Carlisle v. Columbia Irrig. Dist.***, 168 Wn.2d 555, 569, 572, 229 P.3d 761 (2010)). This holding defies the Legislature's express rejection of ***RTA*** and adoption of RCW 8.25.290.

The appellate court's reliance on ***NAFTZI*** is misplaced because it was decided prior to RCW 8.25.290, which supersedes it on this point. As for ***Carlisle*** – which no one cited below – it is inapposite and failed to recognize that RCW 8.25.290 intentionally displaced ***RTA*** and its progeny like ***NAFTZI***. ***Carlisle*** involved a special assessment under a LID, not a condemnation proceeding. 168 Wn.2d at 560. Thus, RCW 8.25.290 was irrelevant in that case. ***Carlisle*** in no way supports the appellate decision.

In sum, the City violated the condemnees' due process rights vested under RCW 8.25.290. It excluded them from the condemnation process, depriving them of a reasonable opportunity to be heard. This Court should accept review to consider this significant constitutional question.

CONCLUSION

This Court should accept review under RAP 13.4(b)(1), (3) & (4) to examine the important issues of first impression whether the common-law appearance of fairness doctrine and the OPMA apply in condemnation proceedings and whether the City's violations of them should void its retaliatory condemnations in this action. If not, then the City violated the condemnees' due process rights vested under RCW 8.25.290 by excluding them from the condemnation process, depriving them of a reasonable opportunity to be heard.

RESPECTFULLY SUBMITTED this 24th day of May 2018.

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APPENDICES
TABLE OF CONTENTS

A. ***City of Seattle v. Kaseburg***, No. 76204-4-I, 2018 Wash. App. LEXIS 686 (March 26, 2018)

B. ***City of Seattle v. Kaseburg***, No. 76204-4-I, Order Denying Motion for Reconsideration (April 24, 2018)

C. ***City of Seattle v. Kaseburg***, No. 76204-4-I, Order Granting Motion to Publish Opinion (April 24, 2018)

D. ***Holmquist v. King Cnty.***, 182 Wn. App. 200, 328 P.3d 1000, *rev. denied*, 181 Wn.2d 1029 (2014) (***Holmquist I***)

E. ***Holmquist v. King Cnty.***, 192 Wn. App. 551, 368 P.3d 234 (2016) (***Holmquist II)***

F. Cited Statutes: RCW 8.25.290, 42.30.020, 42.30.910, 42.36.010, and 42.36.030

APPENDIX A

City of Seattle v. Kaseburg, No. 76204-4-I, 2018 Wash. App. LEXIS 686 (March 26, 2018)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, a municipal corporation, Respondent, v. FREDERICK A. KASEBURG, an individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; BANK OF AMERICA, N.A., a Delaware corporation; and KING COUNTY, a subdivision of the state of Washington, Appellants.	DIVISION ONE No. 76204-4-I UNPUBLISHED OPINION
THE CITY OF SEATTLE, a municipal corporation, Respondent, v. KEITH L. HOLMQUIST, an individual and Personal Representative of the Estate of Kay A. Burdine; HEIRS OF KAY A. BURDINE, deceased and Keith L. Holmquist; J.P. MORGAN CHASE & CO., successor-in-interest to WASHINGTON MUTUAL BANK, a Delaware corporation; and KING COUNTY, a subdivision of the state of Washington, Appellants.	FILED: March 26, 2018

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DWYER, J. — Frederick Kaseburg and Keith Holmquist appeal from the trial court's order entering findings of public use and necessity, determination of required notice, and setting discovery deadlines. On appeal, Kaseburg and Holmquist contend that the trial court erred by failing to find that the City of Seattle violated their due process rights, the Open Public Meetings Act of 1971[1] (OPMA), and the appearance of fairness doctrine by adopting an ordinance authorizing condemnation of their property. Kaseburg and Holmquist also contend that the trial court erred by failing to find that the City's conduct was arbitrary and capricious. Finding no error, we affirm.

I

Frederick Kaseburg and Keith Holmquist (collectively the Appellants) own waterfront property located at the end of NE 130th Street in Seattle (the Property). The Property was platted in the early 1920s and was commonly used as a community beach for decades. In 2012, the Appellants filed a quiet title action against King County. The court granted summary judgment in favor of the Appellants and the City appealed, filing a notice of supersedeas without bond. We affirmed. Holmquist v. King County, 182 Wn. App. 200, 328 P.3d 1000 (2014) (Holmquist I). Following our resolution of that case, the Appellants moved the trial court to award damages resulting from the City's decision to supersede the judgment quieting title. The trial court denied their motion. We reversed. Holmquist v. King County, 192 Wn. App. 551, 368 P.3d 234 (2016) (Holmquist II).

[1] Ch. 42.30 RCW.

Following Holmquist I, community advocates began to contact the Seattle City Council (Council) and express concern over the loss of their community beach. Some community members asked the Council to take action and secure the Property for community use through eminent domain. Community advocates arranged for some council members to visit the Property, tour the beach, and meet with other members of the community who supported the City's acquisition of the beach.

While Holmquist II was pending in this court, Kaseburg's fiancée, Pepper Schwartz, e-mailed council member Nick Licata to express her disapproval of any potential acquisition of the Property. Frank Video, a legislative aide to council member Licata, replied to Schwartz. Video informed Schwartz that, until the ongoing litigation between the Appellants and the City was concluded, the Council was advised not to communicate further with the Appellants. Video advised Schwartz to direct any further communication to the City's legal department.

On June 8, 2015, during a council meeting that was open to the public, all of the council members discussed and signed a letter to the mayor expressing their support for the acquisition of the Property.

> Over the past several months, the City Council has received numerous inquiries from concerned residents of northeast Seattle about the N.E. 130th Street beach on Lake Washington . . . .
>
> The N.E. 130th Street beach had offered the only public access to the northern end of Lake Washington in a 5.5 mile span stretching from Matthews Beach in the south to Log Boom Park in the north.
>
> We believe the N.E. 130th Street beach provided an important public benefit for at least 83 years. And we believe the City should

> use its power of eminent domain to acquire this beach property and restore the public access that previously existed. We also believe that this property should be acquired for public park purposes under the jurisdiction of the City's Department of Parks and Recreation, identified as a public park and maintained as such.
>
> We appreciate that you have begun exploring the option of acquiring the two properties involved though condemnation. We look forward to learning the City's progress in pursuing eminent domain and moving forward with the acquisition of this property for the public's use.

Thereafter, the City's Department of Parks and Recreation prepared Ordinance No. 124864 (the Ordinance). The Ordinance authorized the superintendent of the department to "acquire, through negotiation or condemnation, [the Property] for open space, park, and recreation purposes."

On September 1, 2015, the City sent the Appellants a "Notice of Seattle City Council Final Action to Adopt an Ordinance Authorizing Condemnation (Eminent Domain)" of the Property (the Notice). The Notice informed the Appellants that the Council would be voting on an ordinance authorizing the acquisition of the Property and that the City would be taking public comment on September 15, 2015. The Notice stated that the Appellants would be provided with an opportunity to comment on the Ordinance in person and that they could also submit comments in writing to the committee chair. The Notice also informed the Appellants when the Council would be taking final action on the Ordinance:

> Final Action
>
> Should the Parks, Seattle Center, Libraries and Gender Pay Equality Committee pass the Council Bill on to the City Council, the ordinance authorizing condemnation of your property will be presented for final action (adoption) to the Seattle City Council on

> Monday September 21 at 2:00 p.m., in the City Council Chambers . . . . After approval of the ordinance the City of Seattle will be authorized to acquire your property through voluntary negotiation or it may use its powers of eminent domain to condemn your property.

On September 15, 2015, the committee approved sending the Ordinance to the Council. On September 21, 2015, the Council voted to approve the Ordinance. The mayor signed the legislation eight days later. On August 12, 2016, the City filed its petition for eminent domain in the superior court. Following a hearing, the trial court found that the City had provided the Appellants with proper notice, that the City's acquisition of the Property was for a public use, and that the acquisition was necessary to serve that public use. The trial court also found that the City had not violated the Appellants' due process rights, the OPMA, or the appearance of fairness doctrine, and that the City's conduct was not arbitrary or capricious.[2]

II

The Appellants do not directly dispute the trial court's findings of public use and necessity. Rather, they rely on a series of collateral attacks on the order. Each is addressed in turn.

A

The Appellants first contend that the trial court erred by finding that the City had not violated their constitutional due process rights. The Appellants assert that the council members "pre-decided" to condemn the Property prior to

[2] The trial court incorporated its oral findings into its written order.

holding a public hearing on the Ordinance, thus depriving them of notice and a meaningful opportunity to be heard. We disagree.

Article I, section 3 of the Washington Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law." A deprivation is a "direct and adverse effect." Wenatchee Reclamation Dist. v. Mustell, 102 Wn.2d 721, 725, 684 P.2d 1275 (1984). "It is not a theoretical harm, nor is it an increased probability of harm." Carlisle v. Columbia Irrig. Dist., 168 Wn.2d 555, 568, 229 P.3d 761 (2010). "Even if a deprivation becomes more likely as a result of government action, due process does not apply if an actual deprivation is contingent on a subsequent action." Carlisle, 168 Wn.2d at 568.

"Before the judicial process for condemnation may begin, a city must adopt an ordinance authorizing the condemnation." Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC, 159 Wn.2d 555, 565, 151 P.3d 176 (2007) (NAFTZI) (citing RCW 8.12.040). Pursuant to RCW 8.12.030, cities are authorized to condemn land and property for, among other uses, public parks. "Once an entity with the power of eminent domain makes its initial determination to authorize a condemnation action of private property, the matter moves to the superior court for the condemnation, which involves the court determining public use and necessity, fixing the amount of just compensation, and transferring title." NAFTZI, 159 Wn.2d at 565 (citing In re Seattle Popular Monorail Auth., 155 Wn.2d 612, 629, 121 P.3d 1166 (2005)).

In a condemnation proceeding, a property owner's due process rights are not implicated until the judicial process commences. NAFTZI, 159 Wn.2d at 570-

71. The adoption of an ordinance authorizing condemnation "does not result in a taking of property and does not deprive a property owner of any rights." NAFTZI, 159 Wn.2d at 570. "Even if the resolution is approved, the condemnation action may or may not go forward. The actual condemnation action does not occur until the judicial hearing." NAFTZI, 159 Wn.2d at 570-71. Thus, prior to the judicial proceeding, property owners suffer "no deprivation cognizable under the law of due process." Carlisle, 168 Wn.2d at 569.

In 2007, the legislature enacted certain notice requirements for the adoption of condemnation ordinances, codified at RCW 8.25.290. Pursuant to that statute, a condemnor must provide notice to property owners before "tak[ing] a final action to authorize the condemnation of a specific property." RCW 8.25.290(1)(a). This notice must include a description of the property and the "date, time, and location of the final action at which the potential condemnor will decide whether or not to authorize the condemnation of the property." RCW 8.25.290(2)(a)(ii). "Final action" means "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance." RCW 8.25.290(4)(a); RCW 42.30.020(3).

Here, the City provided the Appellants with notice of the date, time, and location of the final action, thus complying with the notice requirements set forth in RCW 8.25.290. The council members then voted to adopt the Ordinance. The adoption of the Ordinance authorized the City to file its petition for eminent domain but did not itself result in a deprivation. Accordingly, the adoption of the

Ordinance could not have violated the Appellants' due process rights. See NAFTZI, 159 Wn.2d at 570.

Nevertheless, the Appellants contend that the council members "pre-decided" to condemn the Property when they signed the June 2015 letter to the mayor and that such a decision constitutes a "final action" pursuant to RCW 8.25.290. Because they were not provided with notice or an opportunity to be heard before the council members took final action, the Appellants aver, they were deprived of constitutional due process.

As a preliminary matter, the council members' decision to support the *possibility* of condemnation—or "pre-deciding" as the Appellants characterize it—could not possibly constitute a "final action to *authorize the condemnation*." RCW 8.25.290(1)(a) (emphasis added). This is so because the condemnation was not *authorized* until the Ordinance was adopted. The June 2015 letter to the mayor authorized no action whatsoever. It is entirely unremarkable that the council members would individually or collectively support condemnation at some point in time prior to setting a public hearing on the adoption of the Ordinance.[3] The council members did not take final action to authorize the condemnation by voicing their support for eminent domain prior to the adoption of the Ordinance.

In any event, even if the council members did collectively and conclusively agree to adopt the Ordinance by signing the June 2015 letter, such a decision

[3] Indeed, "'the election of legislators is often based on their announced views and attitudes on public questions.'" Harris v. Hornbaker, 98 Wn.2d 650, 657, 658 P.2d 1219 (1983) (quoting Smith v. Skagit County, 75 Wn.2d 715, 740-41, 453 P.2d 832 (1969)). "[S]uch a predisposition is an inherent part of the political process. Appellants' recourse is through the electoral process, not judicial review of the motives of one acting in a legislative capacity." Hornbaker, 98 Wn.2d at 661.

would not have violated the Appellants' constitutional due process rights. In 2010, three years following the enactment of RCW 8.25.290, our Supreme Court again considered due process protections during condemnation proceedings:

> It did not matter that a resolution authorizing condemnation was adopted at a public meeting before the judicial hearing, thus making condemnation more likely, because an adopted resolution "does not result in a taking of property and does not deprive a property owner of any rights."

Carlisle, 168 Wn.2d at 569 (quoting NAFTZI, 159 Wn.2d at 570). Notably, the court also recognized that due process does not require the government to provide individuals with notice and an opportunity to be heard at every decision making stage that ultimately results in a deprivation:

> Due process does not entitle a property owner to notice and a hearing on the decisions leading up to the [deprivation]. If notice and a hearing preceded every government action, government would be paralyzed. Government decision making is often a multistep process, with several intermittent stages between the start of the process and the final decision. It is not practicable or necessary for notice and hearing to accompany every stage.

Carlisle, 168 Wn.2d at 572.

Here, the City did not take final action to authorize the condemnation until the Council voted to adopt the Ordinance. Even then, the adoption of the Ordinance did not implicate the Appellants' constitutional due process rights. There was no error.

B

The Appellants next contend that the trial court erred by finding that the City had not violated the OPMA. This is so, they assert, because the council

members agreed to condemn the Property after conducting a "chain meeting" via e-mail that was not open to the public. We disagree.

The OPMA is intended to ensure that public bodies make decisions openly:

> The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

RCW 42.30.010. The act is to be liberally construed. RCW 42.30.910.

Pursuant to the OPMA, "[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. A "meeting" is defined as "meetings at which action is taken." RCW 42.30.020(4). "Action" is defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3).

Here, the Appellants contend that the City violated the OPMA by communicating via e-mail with members of the community. The Appellants assert that such communications constituted a "chain meeting" that was not open to the public. Br. of Appellants at 18. Alternatively, the Appellants contend that an open public hearing simply never occurred because the council members had pre-decided to condemn the Property before the public hearing on the Ordinance, as evidenced by the June 2015 letter to the mayor.

In support of their first proposition, the Appellants rely on Wood v. Battle Ground School District, 107 Wn. App. 550, 27 P.3d 1208 (2001). Wood concerned a number of e-mails regarding official board business sent between a quorum of the members of a school board. 107 Wn. App. at 565. Division Two of this court held that the OPMA's definition of "meeting" as "meetings at which action is taken" was broad enough to include the exchange of e-mails between members of a governing body. Wood, 107 Wn. App. at 563-64. The court stated that, in order for a violation of the OPMA to occur: (1) a majority of the governing body must meet, (2) all participants must collectively intend to transact official business, and (3) the participants must discuss issues that may or will come before the governing body for a vote. Wood, 107 Wn. App. at 564-65. Noting that "the active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business," the court ruled that genuine issues of material fact remained concerning whether the e-mails constituted a meeting in violation of the OPMA. Wood, 107 Wn. App. at 566.

Here, unlike in Wood, there is no evidence of e-mails sent between a majority of the council members concerning official Council business. Rather, the e-mails upon which the Appellants rely were communications between individual council members and *members of the community.* Were the Appellants correct that such communications constitute a meeting, virtually all communications between council members and the public would constitute a meeting in violation of the OPMA.

The Appellants' alternative contention is likewise unpersuasive. As discussed herein, the council members signed the June 2015 letter to the mayor at a council meeting *open to the public*. That some or all of the council members may have "pre-decided" to sign the letter prior to the public meeting is of no moment. Similarly, the adoption of the Ordinance occurred at a meeting open to the public. The Appellants have produced no evidence of any meeting between council members subject to the OPMA that was not open to the public.

There was no error.

C

The Appellants next contend that the trial court erred by finding that the appearance of fairness doctrine does not apply in these circumstances. The Appellants assert that the adoption of a condemnation ordinance constitutes a quasi-judicial proceeding that must comply with the appearance of fairness doctrine. They are wrong.

The appearance of fairness doctrine was established to ensure fair hearings by legislative bodies. Raynes v. City of Leavenworth, 118 Wn.2d 237, 245, 821 P.2d 1204 (1992). "The doctrine requires that public hearings which are adjudicatory in nature meet two requirements: the hearing itself must be procedurally fair . . . and it must be conducted by impartial decisionmakers." Raynes, 118 Wn.2d at 245-46 (citing Smith v. Skagit County, 75 Wn.2d 715, 740, 453 P.2d 832 (1969); Buell v. City of Bremerton, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972)). "The intent of the doctrine is to maintain public confidence in

quasi-judicial decisions made by legislative bodies." Harris v. Hornbaker, 98 Wn.2d 650, 658, 658 P.2d 1219 (1983).

The appearance of fairness doctrine was modified by the legislature in 1982 when it enacted chapter 42.36 RCW, "Appearance of Fairness Doctrine—Limitations." Raynes, 118 Wn.2d at 246. That act provides, in pertinent part:

> Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

RCW 42.36.010. The act further provides that "[n]o legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine." RCW 42.36.030.

Our Supreme Court has announced four factors for courts to consider when determining whether an action is quasi-judicial or legislative in nature:

> "(1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prosecutive application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators."

Harris v. Pierce County, 84 Wn. App. 222, 228, 928 P.2d 1111 (1996) (quoting Raynes, 118 Wn.2d at 244-45).

Here, applying the four factors, it is clear that the adoption of a condemnation ordinance is not a quasi-judicial act. Courts have no authority to adopt an ordinance authorizing condemnation and have not historically done so. Neither do courts authorize the expenditure of City funds for the benefit of the public. "Such policymaking decisions, which are based on the consideration of public opinion, are within the purview of legislative bodies, not courts of law." Harris, 84 Wn. App. at 229 (rejecting the contention that the city council's adoption of a master trail plan was a quasi-judicial act).

Nevertheless, the Appellants contend that the appearance of fairness doctrine applies to the adoption of condemnation ordinances. The Appellants cite to no authority holding that such hearings are quasi-judicial in nature or that the doctrine applies to the adoption of condemnation ordinances. Rather, they assert that the doctrine applies to hearings "of any sort," that are required by statute and affect individual property rights. Br. of Appellants at 19-21.

In support of their contention, the Appellants rely on the general principles articulated by our Supreme Court in Smith, 75 Wn.2d at 739-40. Smith concerned a statutory requirement that a public hearing be held prior to the amendment of a comprehensive zoning plan. 75 Wn.2d at 732-33. Noting that such hearings were "an integral part of the legislative process required by statute," the court held that the appearance of fairness doctrine applied. Smith, 75 Wn.2d at 733, 739-41.

The Appellants' reliance on Smith is misplaced. "Subsequent cases clarifying the applicability of the doctrine . . . have recognized that the rezoning of specific tracts is adjudicatory in nature, not legislative." Hornbaker, 98 Wn.2d at 659 n.2 (citing Fleming v. City of Tacoma, 81 Wn.2d 292, 301, 502 P.2d 327 (1972) (overruled on other grounds by Raynes, 118 Wn.2d 237)). "Thus, the statement in Smith is explained by the fact that the case preceded the adoption of the term quasi judicial to identify adjudicatory decisions by legislative bodies; it does not reflect an application of the doctrine to legislative decisions." Hornbaker, 98 Wn.2d at 659 n.2.

Smith did not extend the appearance of fairness doctrine to legislative hearings simply because they are required by statute.

> A statutory public hearing by a legislative body is not the talisman for invoking the appearance of fairness doctrine. If it were, we would unfairly constrain the Legislature in its attempt to provide opportunities for public participation in legislative decisions. If by requiring a public hearing the Legislature would implicitly force its subdivisions to adhere to a full panoply of adjudicatory safeguards, it might well decide to eliminate such hearings altogether. Prior cases should not be interpreted as indicating that a decision becomes quasi judicial and triggers the appearance of fairness doctrine by the mere fact that a hearing is required by statute.

Hornbaker, 98 Wn.2d at 660 (citing Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 67-68, 578 P.2d 1309 (1978)).

The trial court did not err.[4]

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[4] The other cases cited by the Appellants are likewise unpersuasive. Buell, 80 Wn.2d 518, Fleming, 81 Wn.2d 292, and Hayden v. City of Port Townsend, 28 Wn. App. 192, 622 P.2d 1291 (1981), all involved quasi-judicial actions related to rezoning decisions. Most important, all of these cases were decided before the enactment of RCW 42.36.010, which clarified which land use decisions were quasi-judicial and therefore subject to the application of the appearance of fairness doctrine. None of these cases suggest that the doctrine may be applied to legislative decisions or that hearings required by statute are necessarily quasi-judicial in nature.

D

Finally, the Appellants contend that the trial court erred by adopting the findings and conclusions in the Ordinance. This is so, they assert, because the City's adoption of the Ordinance was arbitrary and capricious. We disagree.

Following the adoption of an ordinance authorizing a condemnation action, the condemnor must file a petition in superior court requesting a decree of public use and necessity. RCW 8.12.050. The question of whether the use is "really a public use" is a judicial determination, whereas the question of necessity is a legislative determination. NAFTZI, 159 Wn.2d at 573, 575.

A legislative declaration of necessity is "conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud." Seattle Popular Monorail, 155 Wn.2d at 629. "A condemnation of private property is necessary if it is 'reasonably necessary' under the circumstances." NAFTZI, 159 Wn.2d at 576 (internal quotation marks omitted) (quoting Seattle Popular Monorail, 155 Wn.2d at 636 n.19). "Put another way, when there is a reasonable connection between the public use and the actual property, this element is satisfied. It need not be the best or only way to accomplish a public goal." Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 421, 128 P.3d 588 (2006). To establish fraud or constructive fraud in this setting, there must be evidence showing that "the public use was merely a pretext to effectuate

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In any event, even if the doctrine did apply to the adoption of condemnation ordinances, the only basis for violation set forth by the Appellants is that the council members "pre-decided" to condemn the property, as evidenced by the letter to the mayor. But, as discussed herein, the letter to the mayor was signed at a meeting *open to the public*. That the individual council members may have decided to support condemnation at some point in time prior to that public meeting is of no significance.

a private use on the condemned lands." State ex rel. Wash. State Convention & Trade Ctr. v. Evans, 136 Wn.2d 811, 823, 966 P.2d 1252 (1998).

Where the trial court has already weighed the evidence supporting public necessity, we review the record to determine only whether the factual findings are supported by substantial evidence. Miller, 156 Wn.2d at 419. "Substantial evidence is viewed in the light most favorable to the respondent and is evidence that would 'persuade a fair-minded, rational person of the truth of the finding.'" Miller, 156 Wn.2d at 419 (quoting State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

Here, the appellants contend that (1) the adoption of the Ordinance was "arbitrary and capricious and fell short of due process—including the appearance of fairness" and that, therefore, "the judicial determination necessarily will also lack due process," Br. of Appellants at 25, (2) the adoption of the Ordinance was "tainted—or even illegal—because the City secretly met with advocates" and that, therefore, the appearance of fairness doctrine "must preclude giving 'great weight' to its determinations of public use and necessity," Br. of Appellants at 25, (3) "the trial court entered no substantive findings explaining why this may be 'really a public use' or why the existing waterfront 135th Street end is not satisfactory", Br. of Appellants at 26, and (4) the trial court erred by failing to enter substantive findings justifying its legal conclusions. Br. of Appellants at 27.

The Appellants first two assertions are predicated on their arguments that the adoption of the Ordinance violated constitutional due process and the appearance of fairness doctrine. As discussed herein, both of those contentions

are meritless. The adoption of a condemnation ordinance does not effectuate a deprivation and does not implicate due process. Neither does the adoption of a condemnation ordinance implicate the appearance of fairness doctrine, which does not apply to legislative actions. Accordingly, neither due process nor the appearance of fairness doctrine preclude the trial court from affording a legislative determination of necessity great weight.

The Appellants' latter two assertions are likewise unpersuasive. The Appellants cannot seriously dispute that a public park constitutes a public use. See RCW 8.12.030 (authorizing condemnation for a wide range of public uses, including "public parks"). The trial court found that a public park was a public use—no authority requires a more robust finding of public use. Neither was the trial court required to explain why an alternative location was not satisfactory. See Miller, 156 Wn.2d at 421 ("This court has explicitly held already that the 'mere showing' that another location is just as reasonable does not make the selection arbitrary and capricious."). Finally, the Appellants cite to no authority in support of their assertion that the trial court was required to make more robust factual findings. The trial court heard testimony, weighed evidence, and found that the acquisition of the Property for a public park was a public use and was necessary to serve that public use.[5] Those findings are supported by substantial evidence and sufficiently support the trial court's conclusions of law.

There was no error.

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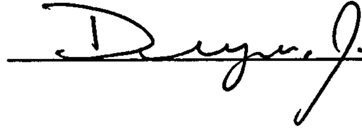
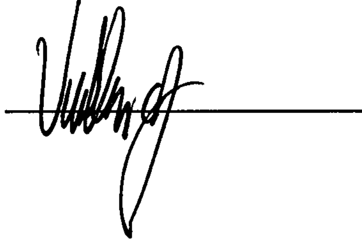
[5] Contrary to the Appellants assertion that "[n]owhere was fair consideration given to the facts relevant to the condemnees," Br. of Appellants at 26, the trial court gave fair consideration to all of the relevant facts when it heard testimony and weighed the evidence.

Affirmed.



We concur:



APPENDIX B

City of Seattle v. Kaseburg, No. 76204-4-I, Order Denying Motion for Reconsideration (April 24, 2018)

FILED
4/24/2018
Court of Appeals
Division I
State of Washington

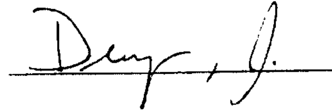
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, a municipal corporation, Respondent, v. FREDERICK A. KASEBURG, an individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; BANK OF AMERICA, N.A., a Delaware corporation; and KING COUNTY, a subdivision of the state of Washington, Appellants.	DIVISION ONE No. 76204-4-I ORDER DENYING MOTION FOR RECONSIDERATION
THE CITY OF SEATTLE, a municipal corporation, Respondent, v. KEITH L. HOLMQUIST, an individual and Personal Representative of the Estate of Kay A. Burdine; HEIRS OF KAY A. BURDINE, deceased and Keith L. Holmquist; J.P. MORGAN CHASE & CO., successor-in-interest to WASHINGTON MUTUAL BANK, a Delaware corporation; and KING COUNTY, a subdivision of the state of Washington, Appellants.	

The appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:



APPENDIX C

City of Seattle v. Kaseburg, No. 76204-4-I, Order Granting Motion to Publish Opinion (April 24, 2018)

FILED
4/24/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, a municipal corporation, Respondent, v. FREDERICK A. KASEBURG, an individual; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; BANK OF AMERICA, N.A., a Delaware corporation; and KING COUNTY, a subdivision of the state of Washington, Appellants.	DIVISION ONE No. 76204-4-I ORDER GRANTING MOTION TO PUBLISH OPINION
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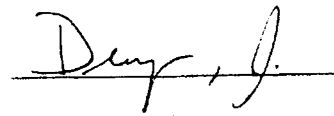
The appellants and respondent both having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby:

ORDERED that the unpublished opinion filed March 26, 2018, shall be published and printed in the Washington Appellate Reports.

For the Court:



APPENDIX D

Holmquist v. King Cnty., 182 Wn. App. 200, 328 P.3d 1000, rev. denied 181 Wn.2d 1029 (2014)(***Holmquist I***)

[Holmquist v. King County](#)

Court of Appeals of Washington, Division One

May 28, 2014, Oral Argument; June 30, 2014, Filed

No. 70500-8-I, (Consol. with No. 70504-1-I)

Reporter

182 Wn. App. 200 *; 328 P.3d 1000 **; 2014 Wash. App. LEXIS 1593 ***; 2014 WL 2931591

KEITH L. HOLMQUIST ET AL., *Respondents*, v. KING COUNTY ET AL., *Appellants*.

Subsequent History: Review pending at *Holmquist v. King County, 2014 Wash. LEXIS 1060 (Wash., Dec. 3, 2014)*

Review denied by *Holmquist v. King County, 181 Wn.2d 1029, 340 P.3d 228, 2014 Wash. LEXIS 1148 (Dec. 23, 2014)*

Decision reached on appeal by, Remanded by *Holmquist v. King County, 192 Wn. App. 551, 368 P.3d 234, 2016 Wash. App. LEXIS 161 (Feb. 8, 2016)*

Decision reached on appeal by *City of Seattle v. Kaseburg, 2018 Wash. App. LEXIS 686 (Wash. Ct. App., Mar. 26, 2018)*

Prior History: [*1]** Appeal from King County Superior Court. Docket No: 12-2-21156-6. Date filed: 05/23/2013. Judge signing: Honorable Monica Benton.

Counsel: *Daniel T. Satterberg*, *King County Prosecuting Attorney*, and *John F. Briggs*, *Deputy*; and *Peter S. Holmes*, *Seattle City Attorney*, and *Kelly N. Stone*, *Assistant*, for appellants.

Howard M. Goodfriend and *Catherine Wright Smith* (of *Smith Goodfriend PS*); and *Robert E. Ordal*, for respondents.

Randall H. Brook and *David A. Bricklin* on behalf of Friends of Cedar Park Neighborhood and Seattle Sea Kayak Club, amici curiae.

Judges: AUTHOR: Stephen J. Dwyer, J. We concur: Linda Lau, J., Marlin Appelwick, J.

Opinion by: Stephen J. Dwyer

Opinion

[*203] [1001]**

¶1 DWYER, J. — In 1926, two individuals signed real estate installment contracts, a form of executory contract, to purchase properties on Lake Washington from the Puget Mill Company. In 1932, while both individuals were still making timely installment payments, the King County Board of Commissioners vacated the street separating the two properties. The timing of the street vacation is what has, 80 years later, led to **[***2]** this property ownership dispute between Keith and Kay Holmquist, Frederick Kaseburg, King County, and the

City of Seattle.

¶2 It has long been the law in this state that a plat presumptively grants an easement interest, not a fee interest, to the public in the streets appearing thereon. When the public possesses easement rights to a street, any conveyance of the abutting parcels will presumptively convey half of the property underlying the street. However, if the street is vacated while the platter still owns both abutting properties, any conveyance thereafter will not presumptively include the vacated land.

[1002]**

¶3 In this case, the street was vacated after the two individuals contracted to purchase the abutting properties but before either completed performance under the contract and received a deed. Pursuant to the law in 1932, executory contract purchasers had the right to receive a deed to the contracted-for property once the entire purchase price was paid. That right ran with the land unless a bona fide purchaser for value without notice of the contracts procured the land from the original seller. Here, when the Puget Mill Company contracted to sell the abutting properties, half of the **[***3]** street was included in the land to be conveyed to each of the purchasers. In 1932, after one of the executory contracts was recorded, the Puget Mill Company gifted the vacated street by quitclaim deed to King County. Because King **[*204]** County was not a bona fide purchaser for value without notice, each of the contracting individuals gained equitable title to half of the vacated street upon payment of the full contract price. Accordingly, we hold that the trial court did not err by quieting title to the property in the successors in interest of the contracting individuals.

I

¶4 The property in dispute is a 60-foot-wide strip of land on the shore of Lake Washington. The legal description of the property is as follows:

> All that portion of land, sixty feet in width, lying east of the Northern Pacific Right-of-Way between Tract 12, Block 1 and Tract 1, Block 2, Cedar Park Lake Front as per plat recorded in volume 29 of plats, page 47 records of King County Auditor; situate in the City of Seattle, County of King, State of Washington.

¶5 In 1926, this piece of property and the area surrounding it were situated in King County in a neighborhood known as Cedar Park. All real property located in Cedar Park was **[***4]** owned by the Puget Mill Company. The Puget Mill Company platted the land and recorded documentation of the plat, which contained the following dedication:

> Know all men by those presents that the Puget Mill Company, a corporation, organized and existing under the laws of the State of California, and having its principal place of business in the City of San Francisco, owner in fee simple of the tract of land plotted in this plat of Cedar Park Lake Front, hereby declare this plot and dedicate to the use of the public forever all the streets shown hereon and the use thereof for all public purposes not inconsistent with the use thereof for public highway purposes,

> also the right to make all necessary slopes for cuts and fills upon the tracts and blocks shown upon this **[*205]** plot in the reasonable, original grading of streets shown hereon.[1]

One of the dedicated streets depicted on the plat was the end of E 130th Street.[2]

¶6 On August 17, 1926, Mona Müller entered into an executory contract to purchase the plot **[***5]** of land immediately north of the end of E 130th Street. This contract was not recorded, and no record of it has been found; however, it is referenced in the deed to the property. Müller is the predecessor in interest of the Holmquists.

¶7 On November 1, 1926, J.I. Shotwell entered into an executory contract to purchase the plot of land immediately south of the end of E 130th Street. The executory contract described the parcel solely by its platted lot number. Shotwell recorded the contract on September 29, 1927.[3] Shotwell is the predecessor in interest of Kaseburg.

¶8 On April 26, 1932, Shotwell, Müller, and numerous others filed a petition to vacate E 130th Street east of the Northern Pacific Railway right-of-way.[4] On June 25, **[**1003]** 1932, Shotwell and Müller executed a quitclaim deed conveying that same property to the Cedar Park Community Club, although the deed was never delivered. Shotwell's and Müller's purpose in doing so was to designate **[***6]** the land as a community beach. On June 27, 1932, the King County Board of Commissioners voted to vacate the street at the end of E 130th Street (the area at issue herein).

[*206]

¶9 On August 10, 1932, the Puget Mill Company executed a quitclaim deed conveying its interest in the vacated street to King County. This deed was lost and a replacement deed was executed on March 30, 1935. The quitclaim deed was recorded on April 10, 1935.

¶10 Müller and Shotwell each made full payment pursuant to the terms of their respective contracts with the Puget Mill Company. Accordingly, the Puget Mill Company conveyed a deed to the property north of the vacated street to Müller on September 20, 1933. The deed was recorded seven days later. The Puget Mill Company conveyed a deed to the property south of the vacated street to Shotwell on March 8, 1935. The deed was recorded, although it is unclear from the record when this occurred. Both deeds describe the properties conveyed by referencing their platted lot numbers.

¶11 The Cedar Park **[***7]** neighborhood was annexed by the City of Seattle in 1954.

¶12 In 2012, the current owners of the abutting properties, the Holmquists and Kaseburg, brought a quiet title action

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[1] The plat was signed by the Puget Mill Company on October 11, 1926 and filed with King County on October 20, 1926. A corrected plat was filed on December 7, 1926.

[2] Since renamed NE 130th Street.

[3] The various parties have litigated this matter under the assumption or implied agreement that the contracts of Shotwell and Müller were identical as to material terms. We resolve the issues presented herein consistent with the record as developed by the parties.

[4] This is the area platted for a street lying between the numbered lots being purchased by Shotwell and Müller, respectively. The legal description of this area is as previously set forth.

against King County. Seattle later intervened with permission of the trial court. The trial court granted summary judgment in favor of the Holmquists and Kaseburg, holding that each held title to one half of the vacated land, free and clear of any interest of either King County or Seattle. The trial court also awarded attorney fees to the Holmquists and Kaseburg against King County.

¶13 King County and Seattle filed separate appeals, which have been consolidated.

II

¶14 King County and Seattle [5] contend that the trial court erred by quieting title in the Holmquists and **[*207]** Kaseburg. This is so, they assert, because *Hagen v. Bolcom Mills, 74 Wash. 462, 133 P. 1000*, *reh'g denied*, *134 P. 1051 (1913)*, and *Ashford v. Reese, 132 Wash. 649, 233 P. 29 (1925)*,[6] dictate that the Puget Mill Company owned the property at issue in 1932 and, therefore, that the governments have an interest in it now. Although the Puget Mill Company did hold legal title to the property in 1932, neither King County nor Seattle has any interest in it now.

¶15 The superior court resolved this matter on summary judgment. We review the grant of summary judgment de novo. *Fiore v. PPG Indus., Inc., 169 Wn. App. 325, 333, 279 P.3d 972*, *review denied*, *175 Wn.2d 1027 (2012)*. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*. In reviewing a summary judgment order, we view the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Dumont v. City of Seattle, 148 Wn. App. 850, 861, 200 P.3d 764 (2009)*.

[1] ¶16 We first clarify the original status of the property. When the Puget Mill Company platted the Cedar Park neighborhood in 1926, it dedicated E 130th Street as a public highway. It has long been the law that the platting of a public street presumptively creates an easement for public use. *Kiely v. Graves, 173 Wn.2d 926, 930, 271 P.3d 226 (2012)* (citing **[***9]** *Schwede v. Hemrich Bros. Brewing, 29 Wash. 21, 69 P. 362 (1902))*; *see also* *Holm v. Montgomery, 62 Wash. 398, 399, 113 P. 1115 (1911)* ("It has become the settled rule of this court that the public has only an easement of use in a public street or highway."). The language of the Puget Mill Company's dedication is consistent with this presumption. The Puget Mill Company stated that it was dedicating the **[**1004]** *use* of the roads, not the *ownership* of the roads, to the public.

> **[*208]** Know all men by those presents that the Puget Mill Company, a corporation, organized and existing under the laws of the State of California, and having its principal place of business in the City of San Francisco, owner in fee simple of the tract of land

[5] The parties **[***8]** to this appeal assume that Seattle had a colorable claim of interest in the property such that its intervention was proper. The record does not reveal the nature of this claim. Nevertheless, we need not address this concern in order to resolve this appeal.

[6] *Ashford* was overruled in 1977. *See* *Cascade Sec. Bank v. Butler, 88 Wn.2d 777, 780, 567 P.2d 631 (1977)*.

> plotted in this plat of Cedar Park Lake Front, hereby declare this plot and dedicate *to the use of the public* forever all the streets shown hereon and *the use thereof* for all public purposes not inconsistent with *the use thereof* for public highway purposes, also the right to make all necessary slopes for cuts and fills upon the tracts and blocks shown upon this plot in the reasonable, original grading of streets shown hereon.

(Emphasis added.) Thus, by the terms of the dedication, **[***10]** prior to 1932, King County held a right-of-way easement over E 130th Street. When the public holds only a right-of-way easement, fee title to the land underlying the street remains with the platter: "the laying out of a street is not a surrender of title." *Chlopeck Fish Co. v. City of Seattle, 64 Wash. 315, 323, 117 P. 232 (1911)*.[7] Accordingly, fee title to the land underlying E 130th Street remained with the Puget Mill Company.[8]

[*209] III

[2] ¶17 That King County held only an easement interest in the area platted as E 130th Street affected the interests of the parties to the executory contracts. Because the Puget Mill Company held fee title to the land underlying the street, it had the right to convey that property notwithstanding the existence of the easement. Even before a street is vacated, "the owner can sell a lot adjoining a street, and part with or reserve the interest in the street, subject to the easement, as he sees fit." *White v. Jefferson, 110 Minn. 276, 282, 124 N.W. 373*, *reh'g denied*, *125 N.W. 262 (1910)*.[9] That is precisely what the Puget Mill Company did.

[3] ¶18 Pursuant to the law in 1926, a conveyance of a property abutting a street was presumed to convey half of the underlying street by implication.

> [A] **[***12]** conveyance of land abutting upon a public highway carries with it the fee to the center of the highway as part and parcel of the grant. No language is required to express such an intent on the part of a grantor in whom the title to the lot and highway vests. It follows as an inference or presumption of law that, in selling the land abutting upon the highway, he intended to sell to the center line of the adjoining highway. *Rowe v. James, 71 Wash. 267, 128 Pac. 539 [(1912)]*. While the intention to pass such a title is

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[7] Although the platter in *Chlopeck* was the State of Washington, the same rule pertains when the platter is a private entity. *See Burmeister v. Howard, 1 Wash. Terr. 207, 211 (1867)* ("[W]hen an easement is taken as a public highway, the soil and freehold remain in the owner of the land encumbered only with the right of passage in the public.").

[8] The presumption discussed is not a conclusive one. As our Supreme Court explained:

> "'The intention of the owner is the very essence of every dedication.'" *Frye v. King County, 151 Wash. 179, 182, 275 P. 547 (1929)* (quoting *City of Palmetto v. Katsch, 86 Fla. 506, 510, 98 So. 352 (1923))*. Intent must be adduced from the plat itself. *Id.* When an individual seeks to dedicate a fee interest, "that intent should be clearly stated **[***11]** and the use should be unrestricted or, if the use is a condition, the condition should be clearly stated with a specific right of reversion." [6 WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK] § 91.9(1) [practice tip (3d ed. 1996)].

Kiely, 173 Wn.2d at 933-34 (footnote omitted). Here, as discussed, the words of the plat are consistent with the presumption.

[9] The opinion in *White* is cited with approval by the court in ***Hagen. 74 Wash. at 467-70***.

always presumed and requires no special words to create it, the contrary intention will never be presumed, and before it will be held that it was the intention of the grantor to withhold his interest in the highway after parting with his title to the adjoining land, such declaration of intent must clearly appear. *Gifford v. Horton, 54 Wash. 595, 103 Pac. 988 [(1909)]*. Deeds may expressly exclude the streets, but unless they do, the implication is that the street is **[**1005]** included. *Cox v. Freedley, 33 Pa. St. 124, 75 Am. Dec. 584 [(1859)]*.

[*210] *Bradley v. Spokane & Inland Empire R.R., 79 Wash. 455, 459-60, 140 P. 688 (1914)*.[10]

[4-9] ¶19 Shotwell's **[***13]** contract described the property by its lot number on the recorded plat. By describing the property in this manner, "the intention of the grantor making such conveyance is that his vendee is entitled to all the appurtenant advantages and rights which the plat proclaims to exist, so far as the land included in it is owned by the grantor." *Olin v. Denver & Rio Grande R.R., 25 Colo. 177, 179, 53 P. 454 (1898)*; *accord* *Van Buren v. Trumbull, 92 Wash. 691, 693-94, 159 P. 891 (1916)* ("'Where, therefore, lots have been offered for sale, and have been purchased in accordance with a map or plat upon which streets are made to appear, it is presumed that the purchase was induced, and the price of the lots enhanced thereby, and the seller is estopped to deny the right which has thus been acquired.'" (quoting *City of Norfolk v. Nottingham, 96 Va. 34, 30 S.E. 444, 445 (1898)))*. One of those appurtenant rights was presumed fee title to the middle of E 130th Street. When they entered into the respective contracts, by not specifically providing otherwise, Shotwell, Müller, and the Puget Mill Company all contracted for the sale of the numbered parcels accompanied by each parcel's appurtenant interest in half **[***14]** of the platted street. Accordingly, Shotwell and Müller, upon full performance on their respective parts, were entitled to receive legal and equitable title to all of the property subject to the contracts, including the respective interests in half the street.

IV

¶20 Nonetheless, King County and Seattle contend that the foregoing analysis is irrelevant. This is so, they assert, because pursuant to the *Ashford* decision, Shotwell and Müller had no interest in the abutting properties until they received their deeds. We disagree.

[*211]

¶21 In *Ashford*, our Supreme Court stated that "an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee." *132 Wash. at 650*. In the five years following the *Ashford* decision, the Supreme Court issued a series of supplemental opinions clarifying both the effect of that decision and those rights contract purchasers possessed despite lacking title. Three years after *Ashford*, the court held, "Undoubtedly such purchaser does have a right of possession *and a right*

[10] This remains the law. *See* *Christian v. Purdy, 60 Wn. App. 798, 802, 808 P.2d 164 (1991)*.

to acquire title in accordance with the terms of the contract. Such rights, though not amounting to title, are substantial rights such as one having notice **[***15]** and knowledge is bound to respect." Oliver v. McEachran, 149 Wash. 433, 438, 271 P. 93 (1928) (emphasis added). The following year, the Supreme Court held that although the rights of contract purchasers "do not rise to the dignity of title, either legal or equitable," they "are annexed to and are exercisable with reference to the land, and therefore come within the designation of 'real property.'" State ex rel. Oatey Orchard Co. v. Superior Court, 154 Wash. 10, 12, 280 P. 350 (1929). With respect to contract sellers, the Supreme Court characterized their interest as "a legal title subject to be defeated absolutely by a performance of the contract on the part of the grantees, and subject to be reinstated in full on a breach of the contract." Culmback v. Stevens, 158 Wash. 675, 681, 291 P. 705 (1930).[11]

¶22 These rights and obligations were not altered or extinguished by the street vacation. Vacation of a street does not diminish the rights of private parties possessing an interest in the underlying land. Rowe, 71 Wash. at 271 (citing Comm'rs of Coffey County v. Venard, 10 Kan. 95, 100 (1872)). Thus, the street vacation **[**1006]** did not—and could not—have the legal effect of altering the Puget Mill Company's underlying fee interest. Moreover, the street vacation did not have the legal effect of extinguishing Shotwell's and **[*212]** Müller's contractual rights. *See* Omaha Loan & Tr. Co. v. Goodman, 62 Neb. 197, 86 N.W. 1082, 1085 (1901) (street vacation had no effect on university board's contract to purchase land).[12]

¶23 The actual effect of street vacations was articulated by the Supreme Court in *Hagen*: "[T]he general rule [is] that, upon the vacation of a street or alley, the land thus relieved of the public easement therein becomes attached to, and passed by deed under a description of the abutting property." *74 Wash. at 465*. "The reason" for this rule, **[***17]** the court stated, was "that the law will presume that [the abutting landowners] have paid an enhanced value therefor in consequence of the prospective use of the street." *Hagen, 74 Wash. at 466*.

¶24 As the court explained, the general rules regarding street vacations are "qualified when the circumstances of the particular case demand it." *Hagen, 74 Wash. at 465*. In that case, the particular circumstances led the court to conclude that the vacated street was a separate parcel belonging to the seller. When the street was vacated in 1889, Seattle Iron & Steel Manufacturing Company owned both of the abutting properties. *Hagen, 74 Wash. at 463*. For any conveyance thereafter, "'[t]he parties would contract with reference to a record showing that no street existed, where the vacation proceedings are required to be recorded.'"

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[11] None of these cases purported to overrule *Ashford*. In all three cases, the court viewed its holding as being in harmony with *Ashford*. As explained, "neither in the *Ashford* case or elsewhere has this court said that a purchaser in possession under an executory contract **[***16]** has no rights." Oliver, 149 Wash. at 438.

[12] *Goodman* was cited with approval in Broadway Hospital & Sanitarium v. Decker, 47 Wash. 586, 591, 92 P. 445 (1907).

Hagen, 74 Wash. at 469 (quoting *White, 110 Minn. at 284*). Seattle Iron did not sell any of its property until 1900. *Hagen, 74 Wash. at 464*. Thus, when the plaintiff contracted to buy the property, he could not impliedly own out to the middle of the street because there was no street. *Hagen, 74 Wash. at 473-74*. Instead, "the title to the vacated street passed in fee simple" **[***18]** to Seattle Iron as a separate parcel. *Hagen, 74 Wash. at 466*.

[*213]

¶25 This approach was reaffirmed in *Raleigh-Hayward Co. v. Hull, 167 Wash. 39, 8 P.2d 988 (1932)*.[13] In that case, Kla-Pache Avenue was vacated in 1921, a time at which Willapa Improvement Company owned all of the surrounding properties. *Raleigh-Hayward, 167 Wash. at 40-41*. Willapa did not convey any property until 1923. *Raleigh-Hayward, 167 Wash. at 41*. The court, in reliance on *Hagen*, held that "the rule does not apply that purchasers acquire the fee to a platted street when, as a matter of fact, at the time of the purchase there was no platted street." *Raleigh-Hayward, 167 Wash. at 44*. Thus, "*after* Kla-Pache avenue was vacated, it became a *distinct* parcel of land, and did *not pass as an incident or appurtenance* to the lots by the several conveyances from the company to the respondents." *Raleigh-Hayward, 167 Wash. at 43*.

¶26 Of course, this case does not resemble *Hagen* or *Raleigh-Hayward*, because here there *was* a platted street when Shotwell and Müller contracted to buy their parcels. As previously noted, a conveyance **[***19]** of a property abutting a street presumably conveys half of the underlying street by implication. *Bradley, 79 Wash. at 459-60*. Thus, unlike in *Hagen* and *Raleigh-Hayward*, the predecessors to the parties herein contracted with the implied intent that half of the street would be included in each conveyance.

¶27 In light of the case authority discussed, it cannot be said that the *Hagen* decision resulted in the Puget Mill Company acquiring unencumbered ownership of the land underlying the street upon its vacation. "'[H]e who has already been once paid for his land cannot, in equity, be heard to assert title thereto as against one who has paid him the consideration therefor.'" *Hagen, 74 Wash. at 467* (quoting *Olin, 25 Colo. at 183*). Prior to the street being vacated in 1932, the Puget Mill Company **[**1007]** had contracted to sell the two halves of the underlying property to Shotwell and Müller, and had already received partial payment and **[*214]** timely performance under those contracts. As with the adjoining numbered lots, the Puget Mill Company held legal title to the halves of the vacated street "subject to be defeated absolutely by a performance of the contract on the part of the grantees." *Culmback, 158 Wash. at 681*. **[***20]** Neither Shotwell nor Müller were delinquent in their payments in 1932. When each completed payment under their executory contracts, the Puget Mill Company was contractually obligated to convey the vacated land to them.

V

[13] *Raleigh-Hayward* was decided in March 1932, three months before the portion of E 130th Street at issue herein was vacated.

¶28 Instead of conveying the vacated land to Shotwell and Müller, however, the Puget Mill Company conveyed the land by quitclaim deed to King County. Nonetheless, the Puget Mill Company's execution of a quitclaim deed in favor of King County extinguished neither Shotwell's nor Müller's preexisting contractual interests.

¶29 *Culmback* demonstrates that this is so. In that case, Richardson signed an executory contract to purchase a parcel of land from Smith. Culmback, 158 Wash. at 676. Smith assigned the right to receive the contract's installment payments to Stevens. Culmback, 158 Wash. at 676-77. Thereafter, Smith declared bankruptcy. Culmback, 158 Wash. at 677. Despite the fact that Smith retained naked legal title to the property, our Supreme Court held that the bankruptcy trustee was entitled to nothing. Culmback, 158 Wash. at 681. By entering into the executory contract, the only true interest retained by Smith was "the right to receive the payments as they fell due on the **[***21]** contract," which Smith had assigned to Stevens prior to declaring bankruptcy. Culmback, 158 Wash. at 681. The court held that

> "[t]he vendor in a land contract who assigns that contract or the right to the payments thereunder to another holds the legal title to the land in trust for the two parties under that contract, and *such trust persists and accompanies the legal title wherever* ***[*215]*** *it may go*, unless, indeed, into the hands of a *bona fide* holder for value. Of course, *when payment is completed that trust is solely and exclusively for the purchaser, who thereby gains the complete equitable title* to the land."

Culmback, 158 Wash. at 682 (emphasis added) (quoting Foster v. Lowe, 131 Wis. 54, 110 N.W. 829, 831 (1907)). Any transfer of title to the bankruptcy trustee, who was not a bona fide purchaser for value, could not have extinguished Richardson's rights to the property. "[N]aked legal title to the property" remained "in trust" for Richardson's benefit, and as such, it was not an asset of Smith's that could be acquired by the bankruptcy trustee. Culmback, 158 Wash. at 681.

¶30 By using a quitclaim deed, the Puget Mill Company conveyed to King County "all the then existing legal and equitable **[***22]** rights of the grantor in the premises therein described." REM. REV. STAT. § 10554. As such, the Puget Mill Company could convey only the interest it retained in the property and no more, unless conveyed to a bona fide purchaser for value without notice. *Cf.* McDonald v. Curtis, 119 Wash. 384, 385, 205 P. 1041 (1922) (judgment creditor could "acquire no greater interest in the property" than debtor possessed). The interest that the Puget Mill Company held in the vacated property was subject to Shotwell's and Müller's contracts. Thus, unless it was a bona fide purchaser for value without notice, King County's title to the property after it received the quitclaim deed was also subject to Shotwell's and Müller's contracts.

[10] ¶31 The parties present no evidence that King County was a bona fide purchaser

for value of the vacated land. The deed to King County for the vacated street shows that the consideration given for the property was $10. The nominal amount demonstrates that the transfer was a gift, not a bona fide purchase for value.

[11] ¶32 Moreover, King County accepted the quitclaim deed with notice of Shotwell's contract. In 1927, the legislature enacted a bill allowing real estate purchasers to **[*216]** record **[***23]** executory contracts. LAWS OF 1927, ch. 278, § 3. Once the contract was recorded, it served as "notice to all persons of the rights **[**1008]** of the vendee under the contract." LAWS OF 1927, ch. 278, § 3. Shotwell took advantage of this statute and recorded his contract in September 1927. Thus, when it accepted the quitclaim deed in 1932, King County was on notice that at least half of the street was subject to be conveyed upon completion of an executory contract and that the Puget Mill Company was not conveying unencumbered title to the area of the vacated street.

[12] ¶33 Because it was not a bona fide purchaser for value without notice in 1932, King County held the vacated property "in trust" for Shotwell and Müller pending completion of their contracts. Shotwell and Müller both paid the contracted purchase price in full. After each completed payment, King County, like the bankruptcy trustee in *Culmback*, was no longer entitled to anything. Rather, Shotwell and Müller "'gain[ed] the complete equitable title to the land,'" including one half each of the vacated property. *Culmback, 158 Wash. at 682* (quoting *Foster, 110 N.W. at 831*).

¶34 Thus, because Shotwell and Müller gained equitable title to the vacated **[***24]** property upon satisfaction of their contractual obligations, the trial court did not err by quieting title in favor of their successors in interest, the Holmquists and Kaseburg.

¶35 Affirmed.

APPELWICK and LAU, JJ., concur.

Review denied at *181 Wn.2d 1029 (2014)*.

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APPENDIX E

Holmquist v. King Cnty., 192 Wn. App. 551, 368 P.3d 234 (2016) (***Holmquist II***)

[Holmquist v. King County]

Court of Appeals of Washington, Division One

January 7, 2016, Oral Argument; February 8, 2016, Filed

No. 73335-4-I

Reporter

192 Wn. App. 551 *; 368 P.3d 234 **; 2016 Wash. App. LEXIS 161 ***

KEITH L. HOLMQUIST ET AL., *Appellants*, v. KING COUNTY, *Defendant*, THE CITY OF SEATTLE, *Respondent*.

Prior History: **[***1]** Appeal from King County Superior Court. Docket No: 12-2-21156-6. Judge signing: Honorable Monica Benton. Judgment or order under review. Date filed: 03/10/2015.

[Holmquist v. King County, 182 Wn. App. 200, 328 P.3d 1000, 2014 Wash. App. LEXIS 1593 (June 30, 2014)]

Counsel: *Howard M. Goodfriend* and *Catherine W. Smith* (of *Smith Goodfriend PS*); and *Robert E. Ordal*, for appellants.

Peter S. Holmes, *City Attorney*, and *Kelly N. Stone*, *Assistant*, for respondent.

Judges: Authored by Stephen J. Dwyer. Concurring: Marlin Appelwick, Linda Lau.

Opinion by: Stephen J. Dwyer

Opinion

[*553] **[**235]**

¶1 DWYER, J. — Keith and Kay Holmquist and Frederick Kaseburg (collectively the owners) prevailed against King **[*554]** County (County) and the city of Seattle (City) in this action to quiet title to certain Seattle real property. Both the City and the County appealed, but only the City filed a notice of supersedeas without bond. After we affirmed the trial court judgment, the owners moved the trial court to award damages resulting from the City's decision to supersede the judgment quieting title. The trial court denied their motion. We now reverse that decision **[***2]** and remand the matter to the superior court for entry of an award of damages consistent with this opinion.

I

A. Adjacent property owners quieted title to the street end of NE 130th

¶2 The Holmquists and Kaseburg, the owners of developed single family residential lots, filed this action seeking to quiet title to certain street end property located between their properties. The real property at issue abuts Lake Washington. In this action, filed initially against the County, the owners traced their title to their predecessors, who came into ownership

when the County vacated the NE 130th Street right-of-way in 1932.[1] The superior court granted the City's motion to intervene, over the owners' objection that the City lacked any colorable claim **[**236]** to or interest in the vacated NE 130th Street right-of-way. On May 23, 2013, the trial court entered judgment quieting title against the County and the City and in favor of the owners, each for one-half of the former street end property.

B. The City superseded enforcement of the judgment quieting title

¶3 Both the City and the County appealed, but only the City sought to stay enforcement **[***3]** of the trial court's judgment quieting title in the owners. The City filed a notice of **[*555]** supersedeas without bond pursuant to RCW 4.96.050[2] and RAP 8.1(b)(2) and (f).[3]

¶4 The owners objected to the City's maintenance, during the appeal, of a four-foot by four-foot sign on the vacated NE 130th street end right-of-way property announcing the City's intention to develop a forthcoming "N.E. 130th Shoreline Street End Improvement" and reciting that the project is intended to "improve public access to the shoreline street end." The sign contained the familiar logo of the Seattle Parks and Recreation department, and invited the observer to "visit us at seattle.gov/parks." The City also maintained a web site showing the vacated property as a public waterfront street end, inviting public use and occupancy as a public beach. The trial court allowed the City to maintain its sign on the contested property during the appeal.

¶5 As a result of the City's notice of supersedeas, the public continued to use the contested property while the City's appeal progressed. During the summers of 2013 and 2014, members of the public accessed the property from the Burke-Gilman trail and used the property for a public beach, swimming, storing and launching watercraft, parking cars, mooring boats, and staging beach parties.

[*556]

¶6 The City's appeal was unsuccessful. We affirmed the trial **[***5]** court's decision,

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[1] Further details of the underlying action are set forth in Holmquist v. King County, 182 Wn. App. 200, 328 P.3d 1000, *review denied*, **181 Wn.2d 1029 (2014)**.

[2] RCW 4.96.050 provides, in pertinent part, "No bond is required of any local governmental entity for any purpose in any case in any of the courts of the state of Washington."

[3] RAP 8.1 provides, in pertinent part:

> **(b) Right to Stay Enforcement of Trial Court Decision.** A trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule. Any party to a review proceeding has the right to stay enforcement of … a decision affecting real … property, pending review. …
>
> … .
>
> (2) *Decision Affecting Property*. Except where prohibited by statute, a party may obtain a stay of enforcement of a decision affecting rights to possession, ownership or use of real property … by filing in the trial court a supersedeas bond … .
>
> … .
>
> **(f) Supersedeas by Party Not Required to Post Bond.** If a party is not required to post a bond, that party shall file a notice that the decision is superseded without bond and, after filing the notice, the party shall be in the same position as if the party had posted a bond pursuant to the provisions of **[***4]** this rule.

questioning the basis for the City's assertion of any interest that could justify the City's intervention in the owners' quiet title action against the County, given that the City was never in the chain of title. Holmquist v. King County, 182 Wn. App. 200, 328 P.3d 1000 (2014). The Supreme Court denied the City's petition for review. *181 Wn.2d 1029 (2014)*. The case was mandated on February 13, 2015. *See* RAP 12.5(a), (b)(3).

C. The superior court denied the owners' motion for an award of damages caused by the City's supersession of its judgment

¶7 After the mandate issued, the owners sought an award of damages against the City for depriving them of the exclusive use and enjoyment of the property and for the City's public benefit in continuing to maintain the property for public use during the 21 months in which the City's appeal was pending. As a measure of damages, the owners advanced the City's own calculation of the price per square foot charged by the City to private parties to lease comparable waterfront street end properties. *See* Seattle Ordinance (SO) 123611 (June 3, 2011). The City contested the owners' right to collect damages but did not offer the court a different methodology for calculating damages.

¶8 The superior court denied the motion **[**237]** for an award of damages on March **[***6]** 10, 2015.[4] The owners timely appealed.

II

[1-6] ¶9 The owners first contend that the City is liable for any damages they incurred as a result of its decision to supersede the trial court's judgment. This is so, they assert, because a local government that supersedes without bond is nevertheless liable for damages resulting from that supersession. We agree.

[*557]

¶10 The question of whether the City may be liable to the owners for damages caused by its choice to supersede, without bond, the trial court's judgment regarding ownership of the street end property is controlled by our Supreme Court's decision in Norco Construction, Inc. v. King County, 106 Wn.2d 290, 721 P.2d 511 (1986).

¶11 Therein, our Supreme Court held that the County's supersedeas of an adverse land use decision without bond did not exempt it from damages resulting from the inability of the property owner, Norco, to use its property while the supersedeas was in place.

> We now turn to Norco's claim that it is entitled to recover damages allegedly resulting from King County's supersession of enforcement of the trial court's writ of mandamus.
>
> It is undisputed that King County did not have to post a bond in order **[***7]** to supersede enforcement of the trial court decision. Ordinarily, a party must file a supersedeas bond in order to supersede the enforcement of a trial court decision pending appeal. RAP 8.1(b). The State, however, is not

[4] The order states simply, "IT IS HEREBY ORDERED that the Motion to Establish Damages Due to City's Stay is DENIED."

required to post such a bond in order to supersede enforcement, on the theory that if the trial court judgment is affirmed, the State treasury provides an adequate guaranty that the prevailing party will be able to collect the amount of the judgment. *See* RCW 4.92.080; Rutcosky v. Tracy, 89 Wn.2d 606, 612, 574 P.2d 382, *cert. denied*, *439 U.S. 930 (1978)*. This exemption from the requirement of posting a supersedeas bond also applies to counties. Hockley v. Hargitt, 82 Wn.2d 337, 347, 510 P.2d 1123 (1973). King County clearly complied with these rules by filing a notice that the decision was superseded without bond. This act put King County "in the same position as if [it] had posted a bond …" RAP 8.1(c).

Norco contends that, pursuant to RAP 8.1(b)(2), it is entitled to damages caused by King County's superseding enforcement of the trial court judgment. RAP 8.1(b)(2) concerns the amount of the supersedeas bond to be fixed in decisions affecting property. It provides,

> If the decision determines the disposition of property in controversy, or if the property is in the custody of the sheriff, **[*558]** or if the proceeds of the property or a bond for its value are **[***8]** in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure any money judgment *plus the amount of loss which a party may be entitled to recover as a result of the inability of the party to enforce the judgment during review*.
>
> (Italics ours.)
>
> Thus, RAP 8.1(b)(2) authorizes the trial court to include the amount of loss resulting from the supersession of enforcement of a decision affecting property in the bond amount. This indicates that when a party supersedes a trial court decision affecting property and is unsuccessful on appeal, the prevailing party may recover damages resulting from the supersession.
>
> … .
>
> We conclude that pursuant to RAP 8.1(b)(2), a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement. King County's exemption from the requirement of posting a bond does not affect its potential liability for such damages. As **[**238]** long as it has filed a notice that the trial court decision is superseded without bond, a party that is exempt from the bond requirement is in the same position as if it had posted a bond. **[***9]** RAP 8.1(c).
>
> We hold that Norco is entitled to recover damages which resulted from King County's supersession of enforcement of the trial court's writ of mandamus.

Norco, 106 Wn.2d at 295-97 (first and second alterations in original); *see also* Ames v. Ames, 184 Wn. App. 826, 855, 340

P.3d 232 (2014) (In *Norco*, "our Supreme Court … noted that under RAP 8.1(b)(2), a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement.").

¶12 Pursuant to *Norco*, Washington courts follow the established rule that once an appeal has failed, the supersedeas obligor's "liability for damages … is *absolute*." **[*559]** *John Hancock Mut. Life Ins. Co. v. Hurley, 151 F.2d 751, 755 (1st Cir. 1945)* (emphasis added).

¶13 In all aspects relevant to the question of liability arising from supersedeas without bond, this case is indistinguishable from *Norco*. Like the County, the City was statutorily exempt from posting a supersedeas bond. RCW 4.96.050. The City chose to take advantage of this exemption by filing a notice of supersedeas without bond. Thereafter, the City's appeal was unsuccessful. Therefore, like Norco, the owners "[are] entitled to recover damages which resulted from [the City]'s supersession of enforcement of the trial court's [judgment]." *Norco, 106 Wn.2d at 297*.

¶14 The superior court's rationale for denying the owners' motion for an **[***10]** award of damages was not made clear in its order. To the extent that its decision was based on the incorrect conclusion that the City was not subject to liability for superseding the judgment, it erred.

III

¶15 The owners next contend that the trial court erred by denying them an award of damages. This is so, they assert, because they established that they were damaged by the City's supersession of the trial court's decision and presented a valid methodology for quantifying their damages. We agree.

[7-9] ¶16 We apply general principles for establishing damages. Claimants generally must establish damages with reasonable certainty.[5] *Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 717, 845 P.2d 987 (1993)*; *accord* *Sherrell v. Selfors, 73 Wn. App. 596, 601, 871 P.2d 168 (1994)* (applying the reasonable certainty standard to an intentional trespass case). "Furthermore, the doctrine **[*560]** respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage*." *Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 712, 257 P.2d 784 (1953)*. Once the fact of loss is proved with reasonable certainty, uncertainty or difficulty in determining the amount of the loss will not prevent recovery. *Lewis River Golf, 120 Wn.2d at 717-18*; *accord* *Barnard v. Compugraphic Corp., 35 Wn. App. 414, 417, 667 P.2d 117 (1983)* ("[Plaintiffs] are not to be denied recovery because the amount of damage is not susceptible to exact ascertainment."). Although mathematical certainty is not required, **[***11]** the amount of damages

[5] The fact of loss is established with reasonable certainty when it is established by a preponderance of the evidence. *Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 717-18, 845 P.2d 987 (1993)* (citing Roy Ryden Anderson, *Incidental and Consequential Damages*, 7 J.L. & COM. 327, 395-96 (1987)).

must be supported by competent evidence. Fed. Signal Corp. v. Safety Factors, Inc., 125 Wn.2d 413, 443, 886 P.2d 172 (1994). Evidence of damage is sufficient if it gives the trier of fact a reasonable basis for estimating the loss and does not require mere speculation or conjecture. Clayton v. Wilson, 168 Wn.2d 57, 72, 227 P.3d 278 (2010); *accord* Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 510, 728 P.2d 597 (1986) ("Damages must be supported by competent evidence in the record; however, evidence of damage is sufficient if it affords a reasonable basis for estimating the loss and does not subject the **[**239]** trier of fact to mere speculation or conjecture." (citation omitted)). In this regard, the law has not significantly changed since it was summarized by the Supreme Court six decades ago.

> The most important qualification, and one relevant to the case at bar, is the difference in the quantum of proof needed to establish the fact of damage as against that needed to establish the amount of damage:
>
> > There is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. Formerly, the tendency was to restrict the recovery to such matters as were susceptible of having attached to them an exact pecuniary value, but it is now generally held that **[***12]** the uncertainty which **[*561]** prevents a recovery is *uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. …*
> >
> > The damages must be susceptible of ascertainment in some manner other than by mere speculation, conjecture, or surmise and by reference to some definite standard, *such as market value, established experience, or direct inference from* known circumstances. (Italics ours.)

Gaasland Co., 42 Wn.2d at 713 (alteration in original) (quoting 15 AM. JUR. *Damages* § 23, at 414-16 (1938)).

[10] ¶17 The owners assert that they are entitled to an award of damages because they were deprived of the exclusive use of the street end property during the pendency of the appeal.[6] They are correct.

¶18 Regarding the *fact* of damage, the owners presented undisputed **[***13]** evidence that, as a result of the City's supersession of the trial court's judgment, against the owners' will, the owners were denied the exclusive use of their real property while the public was allowed to continue using the street end property as a public beach. The City concedes this point but argues that, because the owners could use the beach in concert with other members of the public during the appeal period, the

[6] Their claim was more detailed in the trial court, where they claimed that they were damaged by the "inability to own, possess, improve, landscape, and incorporate the property into their residential use of their lots."

owners suffered neither actual damage nor compensable loss. The City could not be more wrong.

[11] ¶19 The City's argument ignores that "[t]he very essence of the nature of property is the right to its exclusive use." Olwell v. Nye & Nissen Co., 26 Wn.2d 282, 286, 173 P.2d 652 (1946); *accord* Guimont v. Clarke, 121 Wn.2d 586, 608, 854 P.2d 1 (1993) (fundamental attributes of ownership include "the right to possess, exclude others [from], or dispose of property"). Stated differently, "the right to exclude **[*562]** others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)*.

[12] ¶20 Respecting the paramount right to exclude others, Washington courts compensate the loss of exclusive possession under a variety of legal theories. *See, e.g.*, Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 692-93, 709 P.2d 782 (1985) (trespass claim for airborne pollution that "invaded the plaintiff's interest in the exclusive possession of his property"); Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 11, 548 P.2d 1085 (1976) (inverse **[***14]** condemnation based on noise pollution); Kuhr v. City of Seattle, 15 Wn.2d 501, 504, 131 P.2d 168 (1942) (where encroachment interferes with owner's right to exclusive use and enjoyment, "we think it of little moment what the theory of the injured party's cause of action may be"). Moreover, courts assess damages for even minimal interference with an owner's right of exclusive use and possession. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 422, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (owner entitled to compensation for television company's installation **[**240]** of "'cable slightly less than one-half inch in diameter and of approximately 30 feet in length'" above roof of apartment building) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 135, 423 N.E.2d 320 (1981)).

¶21 The City's argument—that only the loss of the use of private property *altogether*, and not just the loss of exclusive use, is compensable—ignores this established law. Furthermore, the City's assertion that the right to the exclusive use of property is not, in itself, of value rings hollow given that the City derives income from leasing comparable waterfront street end properties to abutting property owners so that they may use the property exclusively.

[13] ¶22 Regarding the *amount* of damages, the owners propose to quantify their damages using the rental value of **[*563]** the street end property, as calculated using the City's own formula for renting comparable properties. **[***15]** This is an unremarkable proposition, as rental value is a well-established measure of damages where a party has been deprived of ownership rights. *See* Colby v. Phillips, 29 Wn.2d 821, 824, 189 P.2d 982 (1948) (rental value awarded as offset against the purchase price for defendant's delay in conveying title); Brown v. Pierce County, 28 Wash. 345, 352, 68 P. 872 (1902) (damages for a property owner's lost

possession and use of real property measured by the "'fair and reasonable rental value of that property for the purpose for which it was taken and used'"); *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 427-28, 10 P.3d 417 (2000)* (measure of recovery for a contractor's unfinished or defective construction of a home); *accord Woodworth v. Nw. Mut. Life Ins. Co., 185 U.S. 354, 363, 22 S. Ct. 676, 46 L. Ed. 945 (1902)* (appellant who superseded a lower court judgment awarding property to owner liable to the owner, who was kept out of possession, for property's "rents and profits"); 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 5.8(2), at 788 (2d ed. 1993) ("When [a] trespasser's presence is substantial enough to count as a possession, or even as temporary use, damages for the invasion can be measured by rental value of the land during the period of the trespass. … Rental value is also an appropriate measure for temporary takings under eminent domain powers, that is, for taking the land for a limited period of time. The rental market value of the land in these cases represents **[***16]** the value of possession or use." (footnote omitted)); *RESTATEMENT (SECOND) OF CONTRACTS § 348(1)* (AM. LAW INST. 1981) (if breach delays the use of property and the loss of value to the injured party is not proved with reasonable certainty, owner may recover damages based on the rental value of the property). *See generally* V. Woerner, Annotation, *Measure and Amount of Damages Recoverable under Supersedeas Bond in Action Involving Recovery or Possession of Real Estate*, 9 A.L.R. 3d 330 (1966).

[*564]

¶23 Nevertheless, the City contends that rental value is an unreasonable basis for an award of damages in this case. The City advances two arguments in this regard.[7] Both are unavailing.

¶24 First, the City asserts that rental value is an inappropriate measure in this case because the owners neither could have nor intended to actually rent the street end property. In advancing this claim, the City misapprehends the owner's purpose in proposing rental value as the measure of damages. The owners do not argue that they intended to rent the property, in whole or in part, or that they would have been bound by the City's methodology for **[***17]** determining the rent they could charge if they did. Rather, their claim is that the City's own methodology for calculating the rental value of comparable properties is a "reasonable basis for estimating [their] loss." This is so because it provides a close approximation of the value of the owners' temporary loss of the exclusive use of their property due to the City's supersession.

[14] ¶25 Second, the City complains that it did not have notice that the owners would seek to recover damages based on the property's rental value. In advancing this claim, the City ignores that there is no requirement that such notice be given. As the dissent in *Norco* long ago noted, with some distress:

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[7] The City sets its argument forth in five parts. However, parts one through four all concern the owners' intent or ability to rent the street end property.

> **[**241]** I question Norco's ability to seek delay damages when King County had no notice that delay damages would be sought. I recognize, however, that our court rules currently do not provide a mechanism by which entities not required to post bonds may be apprised that delay damages will be sought. Parties posting supersedeas bonds have notice of potential delay damages when an additional amount for delay damages is actually required to be posted.

106 Wn.2d at 297-98 (GOODLOE, J., concurring in part, dissenting in part). To the extent that the **[***18]** circumstance **[*565]** described by Justice GOODLOE constituted a problem, neither the legislature, by statute, nor the Supreme Court, by rule, has deemed it to be a problem in need of a solution.

¶26 Accepting rental value as a reasonable basis for calculating damages for temporary loss of use and occupancy of real property, the owners established their particular damages using the City's own methodology for computing the rental value of waterfront street end properties it owns.[8] Seattle Ordinance 123611 establishes the rental value of these waterfront street ends by (1) determining the per square foot assessed value of the abutting privately owned lot, (2) multiplying that per square foot value times the square footage of the street end, (3) multiplying that value by a "demand probability factor," and (4) multiplying that value by a City standard rate of return to arrive at an annual rental fee.[9] Applying this methodology to the facts herein, the owners reached a figure of approximately $3,600 per month.[10] The supersedeas was in effect for approximately 20.7 months.[11] Therefore, the total proposed damages were $74,520.[12] **[*566]**

[15] ¶27 Generally, "[a] trier of fact has discretion to award damages which are within the range of relevant evidence." *Mason v. Mortg. Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990)*. Herein, because the City chose not to provide an alternative,[13] the evidence supports only one damage calculation—$74,520. This figure is the effective "range" of possible damage

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[8] The City owns 149 waterfront street ends, many of which are leased to adjoining private **[***19]** owners by annual permits.

[9] This is technically the permitting cost, not the rental cost. At oral argument, the City stated that the cost to lease the property would have been greater. Wash. Court of Appeals oral argument, *Holmquist v. King County*, No. 73335-4-I (Jan. 7, 2016), at 17 min., 20 sec. (on file with court).

[10] The owners elected to round the actual figure down to this value from $3,601.90. Br. of Appellant at 14-15.

[11] The owners established the time frame by counting from the date of the judgment quieting title, May 23, 2013, to the date of the mandate, February 13, 2015. Wash. Court of Appeals oral argument, *supra, at 19* min., 35 sec. This calculation was unopposed.

[12] The owners also contended that they were entitled to "additional damages" equal to the "substantial governmental benefits [received by the City] by physically appropriating [their] property as a public beach." But the dollar amount that results from an application of the City's rental formula represents the trade-off between the public's use of a given property and private use of the same property. Given that this formula is the basis for the owner's proposed damage award, the City's use of the property as a public beach and the owners' inability to exclude others from using the property are opposite sides of the same coin. We reject the owners' attempt to double count **[***20]** damages resulting from the denial of their exclusive use of the property pending appellate review.

[13] The City conceded at oral argument that it had a full opportunity to present another measure of damages but chose to argue, instead—and erroneously—that its supersession caused no damage. Wash. Court of Appeals oral argument, *supra, at 8* min., 30 sec.

awards.

¶28 Reversed and remanded to the superior court for entry of a supplemental judgment awarding damages in the amount of $74,520.

APPELWICK and LAU, JJ., concur.

References

Washington Rules of Court Annotated (LexisNexis ed.)

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APPENDIX F

Cited Statutes

- RCW 8.25.290
- RCW 42.30.020
- RCW 42.30.910
- RCW 42.36.010
- RCW 42.36.030

RCW 8.25.290

Condemnation final actions—Notice required—"Final action" defined.

(1) The condemnor must provide notice as required by this section before:

(a) A state agency or other entity subject to chapter **8.04** RCW takes a final action to authorize the condemnation of a specific property;

(b) A county or other entity subject to chapter **8.08** RCW takes a final action deeming a specific property to be "for county purposes" as provided in RCW **8.08.010**;

(c) A city or town or other entity subject to chapter **8.12** RCW takes a final action authorizing condemnation as provided in RCW **8.12.040**;

(d) A school district or other entity subject to chapter **8.16** RCW takes a final action selecting property for condemnation as provided in RCW **8.16.010**;

(e) Any other corporation authorized to condemn property takes a final action to authorize condemnation as provided in RCW **8.20.010**; or

(f) Any other entity subject to chapter **8.04**, 8.08, 8.12, 8.16, or **8.20** RCW takes any final action to authorize the condemnation of a specific property.

(2)(a)(i) Notice of the planned final action shall be mailed by certified mail to each and every property owner of record as indicated on the tax rolls of the county to the address provided on such tax rolls, for each property potentially subject to condemnation, at least fifteen days before the final action. If no address is provided for a property on the tax rolls of the county, the potential condemnor shall conduct a diligent inquiry for the address for each and every property owner of record and send the notice to that address. In case the property sought to be appropriated is school or county land, such notice shall be mailed to the auditor of the county in which the property sought to be acquired and appropriated is situated.

(ii) The notice must contain a general description of the property such as an address, lot number, or parcel number and specify that condemnation of the property will be considered during the final action. The notice must also describe the date, time, and location of the final action at which the potential condemnor will decide whether or not to authorize the condemnation of the property.

(iii) Mailing of the certified letter to the proper addressee or addressees is deemed to be sufficient notice under this subsection (2)(a).

(b)(i) Notice of a planned final action described in subsection (1) of this section shall also be given by publication in the legal newspaper with the largest circulation in the jurisdiction where such property is located once a week for two successive weeks before the final action. A second publication must also be given in the legal newspaper routinely used by the potential condemnor, where such newspaper does not also have the largest circulation in the jurisdiction. Proof of circulation shall be established by publisher's affidavit filed with the potential condemnor. Such publication shall be deemed sufficient notice in lieu of a certified letter for each property owner of record for the property whose address is unknown and cannot be ascertained after a diligent inquiry.

(ii) The notice published under this subsection (2)(b) shall contain the same information as is required under (a) of this subsection.

(3) In a condemnation action subject to this section in which a condemnee alleges insufficient notice under this section, the court may determine whether the condemnor made a diligent attempt to provide sufficient notice and issue a finding on the sufficiency of the notice. Lack of sufficient notice under this section shall render the subsequent proceedings void as to the person improperly notified, but the subsequent proceedings shall not be void as to all persons or parties having been notified as provided in this section, either by publication or otherwise. A potential condemnor may cure insufficient notice under this section by providing an additional sufficient notice prior to taking a new final action, and filing a new petition if one was previously filed, for condemnation for the property owner of record who received insufficient notice. In such a case, RCW **8.12.530** shall not apply and a subsequent proceeding may be filed sooner than one year after discontinuance.

(4)(a) For potential condemnors subject to chapter **42.30** RCW, the open public meetings act, "final action" has the same meaning as that provided in RCW **42.30.020**.

(b) For state agencies not subject to chapter **42.30** RCW, the office of the attorney general shall publish procedures that define "final action" for state agencies to ensure that property owners of record are provided with notice and opportunity for comment before the agency makes a final decision to authorize the condemnation of specific property.

(c) For all other entities subject to chapter 68, Laws of 2007, "final action" means a public meeting at which the entity informs potentially affected property owners of record about the scope and reasons for a potential condemnation action. A meeting must be held in each county where property being considered for condemnation is located. The meeting must be open to the public and conducted by a duly authorized representative of the entity.

[**2007 c 68 § 1.**]

RCW 42.30.020

Definitions.

As used in this chapter unless the context indicates otherwise:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

(2) "Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

[**1985 c 366 § 1; 1983 c 155 § 1; 1982 1st ex.s. c 43 § 10; 1971 ex.s. c 250 § 2.**]

NOTES:

Severability—Savings—1982 1st ex.s. c 43: See notes following RCW **43.52.374**.

RCW 42.30.910

Construction—1971 ex.s. c 250.

The purposes of this chapter are hereby declared remedial and shall be liberally construed.

[**1971 ex.s. c 250 § 18.**]

RCW 42.36.010

Local land use decisions.

Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding. Quasi-judicial actions do not include the legislative actions adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

[**1982 c 229 § 1.**]

RCW 42.36.030

Legislative action of local executive or legislative officials.

No legislative action taken by a local legislative body, its members, or local executive officials shall be invalidated by an application of the appearance of fairness doctrine.

[**1982 c 229 § 3.**]

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