NO. 96179-4

SUPREME COURT OF THE STATE OF WASHINGTON

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; T-MOBILE USA; and MONTLAKE COMMUNITY CLUB, Appellants, v. STATE OF WASHINGTON, Respondent.	STATE OF WASHINGTON'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

I. INTRODUCTION

This is a condemnation action. The Washington State Department of Transportation (WSDOT) is seeking to acquire real property owned or leased by Appellants in support of the State Route (SR) 520 Bridge Replacement and HOV Program (Program), also referenced as the "Rest of the West," the final stage of a multi-million dollar public works project to replace vulnerable bridges and reduce traffic congestion along the SR 520 transportation corridor. Following a hearing to determine public use and necessity, the trial court found that the Montlake Properties (Properties) are needed for a public use. The Court of Appeals affirmed.

Appellants' Motion for Discretionary Review does not show that the Court of Appeals' decision is in conflict with case law, nor does it raise a significant question of law or involve a substantial public interest. Instead, it assigns error where none exists: 1) RCW 43.21C.150 does not require a State Environment Policy Act (SEPA) Environmental Impact Statement (EIS) where an adequate National Environmental Policy Act (NEPA) EIS has been previously prepared; and 2) WSDOT's alleged failure to follow discretionary guidelines contained in its Right-of-Way Manual does not prove that its decision to condemn the Properties was arbitrary and capricious. The superior court and Court of Appeals considered these issues in light of substantial evidence presented by WSDOT in support of its motion for an order on public use and necessity, and both courts ruled WSDOT made a proper determination. Appellants' Motion for Discretionary Review should be denied.

II. STATEMENT OF THE CASE

While constructing the first stages of the SR 520 program and refining its designs for the remaining stages (including Rest of the West), WSDOT made changes to the design that differed from the selected alternative described in the NEPA final EIS and Record of Decision (ROD). RP 104:16–105:8, Aug. 11, 2017. This is not unusual, because during initial design stages, when the final EIS and ROD are developed, the designs are

"half a percent to maybe up to five percent" complete. RP 104:16-105:8, Aug. 11, 2017. This level of design provides the basis for environmental studies like the 2011 ROD and final EIS done for the SR 520 program.[1] As designs evolve after the final EIS and ROD are complete, project changes are analyzed through the re-evaluation process established by the Federal Highway Administration (FHWA) to determine whether the changes require a supplemental EIS. It is this process which produced the October 2016 NEPA Re-evaluation (Re-evaluation) that analyzed the acquisition of the Properties. When a design-build project like the SR 520 project is ready for bidding, engineering designs are typically 15 to 30 percent complete when the work is handed over to the design-builder. *Id*.

When the final EIS and ROD were prepared, there was no indication that WSDOT would need to acquire the Properties to complete the project, but later design changes required WSDOT to acquire them. Exhibit (Ex.) 14 at 37. When WSDOT and the Properties' owners could not reach an agreement on the sale of the Properties, WSDOT filed a condemnation petition. CP at 1798-1801. In contesting WSDOT's Motion for an Order

[1] Both NEPA and SEPA require environmental analysis to be completed early in project development. *See* WAC 197-11-055(2) ("The lead agency shall prepare its threshold determination and Environmental Impact Statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.") *see also* 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the earliest possible time . . . .").

Adjudicating Public Use and Necessity, Appellants sought (and received) discovery as approved by the trial court. CP at 2818-19; Ex. 247; Ex. 248. At the hearing on public use and necessity, WSDOT called Denise Cieri, Deputy Program Administrator for the SR 520 program, as a witness. RP 88:10–11, Aug. 11, 2017. Ms. Cieri is in charge of the engineering team that decided on the design refinements that require the Properties. RP 89:25–90:2, Aug. 11, 2017. She identified five distinct project needs for the Properties:

(1) non-motorized transportation facilities located on or adjacent to the Properties. RP 107:22–109:13, Aug. 11, 2017;

(2) The need to move Montlake Boulevard traffic onto the Properties when reconstructing the boulevard. RP 161:2–163:9, Aug. 11, 2017;

(3) The need to shift Montlake Boulevard traffic onto the Properties when replacing a City of Seattle (City) waterline located immediately east of the Properties. RP 151:19–153:8, Aug. 11, 2017;

(4) Limited areas available during this construction phase for staging areas and the unique value of the Properties to provide needed staging areas. RP 169:17–176:10, Aug. 11, 2017); and

(5) The effects to the Properties that arise from the existence of a large 9-foot diameter sewer line located immediately north of the Properties. RP 141:23–142:22 and 147:4–148:17, Aug. 11, 2017.

After receiving all the testimony and declarations from the parties, reviewing their supporting briefs, and considering motions, the trial court found that the Properties are needed for a public use. CP at 3474-89. In addition to finding that the project needs identified by Ms. Cieri were sufficient for establishing public use and necessity, the trial court found that these "[i]terations of project design are not evidence of arbitrary or capricious conduct amounting to constructive fraud on the part of WSDOT in selecting the Properties for condemnation." CP at 3484.[2]

NEPA accommodates the changes inherent in design-build projects by setting forth a process for determining whether changes to a federally-funded project like the SR 520 program are so significant that they require a supplemental EIS. 23 C.F.R. § 771.129. As it did for other design changes, WSDOT prepared a NEPA Re-evaluation in October 2016 that analyzed the environmental impacts associated with WSDOT's acquisition of the Properties. Ex. 18.

[2] In the trial court and Court of Appeals, Appellants claimed WSDOT's condemnation decision amounted to constructive fraud. Both the trial court and Court of Appeals rejected that claim and Appellants have not renewed the claim in their Motion for Discretionary Review.

The Re-evaluation was signed by representatives of both WSDOT and the FHWA and concluded that the design-build changes necessitating the condemnation of the Properties did not require a supplemental NEPA EIS. *Id.* Under federal law, a Re-evaluation is a final federal agency action that must be appealed to United States District Court. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005). Regarding NEPA compliance issues, Congress has implicitly confined jurisdiction to the federal courts. NEPA does not contain its own appeal provisions; rather, federal agency NEPA decisions are reviewable as final federal agency actions under the Federal Administrative Procedure Act. 5 U.S.C. § 551. The trial court ruled that it lacked subject matter jurisdiction to review the federal question of NEPA compliance, and that a necessary and indispensable party, FHWA, could not be joined in state court. CP at 3485. The trial court also ruled that a SEPA EIS was not required because a NEPA EIS was prepared for the SR 520 Program. CP at 3492-93.

The record contradicts Appellants' assertion that acquisition of the Properties creates "an obvious substantial change" to the 2011 NEPA EIS and 2016 Re-evaluation. App. Mot. Discretionary Review at 13. In fact, the 2016 NEPA Re-evaluation specifically determined that there were no new significant adverse environmental impacts. Ex. 18 at 8-9. Appellants argued that WSDOT did not consider the impacts of increased traffic congestion

on the community, but the Court of Appeals disagreed, observing both that, "WSDOT did consider how traffic congestion could affect community members' ability to access other markets" and that the record did not show a measurable increase in congestion. *Montlake, LLC*, slip op. at 8-9.

Similarly, the record does not support Appellants' assertion that acquisition of the Properties will create a cell service "dead zone" after the cell towers are removed. App. Mot. Discretionary Review at 4. On the contrary, the trial court found, "[Appellants] have failed to show that condemnation of the Montlake Properties inevitably will result in a loss of cell phone service to the general public. Specifically, T-Mobile USA, Inc. provided only evidence of current status of WSDOT's relocation efforts, which are still ongoing. Therefore, the Court finds this evidence to be insufficient to show arbitrary or capricious conduct amounting to constructive fraud by WSDOT in seeking condemnation of the Montlake Properties." CP at 3483.

The record also contradicts Appellants' assertion that WSDOT did not undertake additional environmental review before choosing the Properties for condemnation. App. Mot. Discretionary Review at 5. Rather, the record shows that WSDOT conducted considerable environmental reviews in addition to the NEPA process. The SR 520 Program has been the subject of extensive environmental review and community involvement

going back nearly 20 years. Ex. 17 at 2-3. The portion of that environmental review that relates to the Montlake neighborhood addressed: (1) transportation concerns, including non-motorized transportation; (2) effects on historic properties; (3) recreational resources; (4) noise and air quality; and (5) visual impacts. Ex. 17 at 78-79. Ms. Cieri testified at length regarding the City's design process, in which WSDOT worked with the City and SR 520 neighborhoods to develop design refinements for the Montlake Phase of the project that addressed City and community concerns. Ms. Cieri testified that alternatives to acquiring the Properties would have impacts on and/or require acquisitions of single-family homes in the adjoining neighborhood. RP 228:13–25, Aug. 11, 2017. As she pointed out, this is a densely developed urban neighborhood with few options for the needed highway and interchange expansion, and there was no option that would not impact some property owners. RP 228:13–25, Aug. 11, 2017.

In addition to this environmental review process, WSDOT held a "final action meeting" pursuant to RCW 8.25.290 before initiating the condemnation action. At this meeting, Appellants presented the same arguments of adverse impacts from demolishing the market, including an expert's analysis of traffic impacts due to the market closure, as it later made to the trial court and Court of Appeals. Ex. 248; Ex. 8. WSDOT assigned a team of engineers and lawyers to review the Properties' objections and

materials. RP 187:16–188:16, Aug. 11, 2017. Only after considering the Properties' objections did WSDOT then select the Properties for condemnation. RP 133:9–16, Aug. 11, 2017.

The record shows that the trial court specifically rejected Appellants' claim that their input was only "pro forma" and not considered by WSDOT. App. Mot. Discretionary Review at 6. In fact, WSDOT did meaningfully consider the effects on local market shoppers before selecting the Properties for condemnation. "Again, we recognized that this was a property that was highly valued by the community and would not be taken well by the community if we had an effect to it." RP 128:17–20, Aug. 11, 2017. Specifically, WSDOT engineers considered increased travel times to alternative gas stations and markets if those businesses closed. Ex. 248 at 111:9-112:3. "[I]t was recognized that if this market weren't available for local people to access that there were other markets, such as Mont's a couple of blocks away, and other markets further than that that are in the vicinity of this neighborhood." Ex. 248 at 111:24-112:3. "But in the balance of all of the information that was presented I think it's just one very small piece of the puzzle." Ex. 248 at 111:17-19. Ms. Cieri testified that there are currently 58,000 daily trips on Montlake Boulevard. RP 153:22-24, Aug. 11, 2017. Appellants presented evidence to the trial court that closing the market to neighborhood pedestrian customers would

create up to approximately 800 new vehicle trips per day. WSDOT presented evidence that it had considered the Appellants' evidence of increased traffic, but when considered in light of the final EIS traffic study, the amount of increased traffic suggested by Appellants was not even measurable. The final EIS compared traffic in 2008 with traffic in 2030. Given those traffic levels, 800 vehicles would constitute approximately a 1.38 percent change in traffic volume. The ROD notes that a traffic increase of five percent "could result in measurable operational changes." Ex. 17 at 70. Prediction of traffic volumes over 20 years into the future is simply not precise enough to conclude that a difference of 1.38 percent is accurate, perceptible, or even outside of a margin of error. Ex. 17 at 68; Ex. 14 at 5.1-2. The trial court considered this evidence and found that:

> WSDOT received objections with supporting materials from Respondents, Montlake LLC and Stelter Montlake LLC. The Court finds Ms. Denise Cieri's testimony that WSDOT considered Respondents objections from both a technical and a legal analysis to be credible. Respondents have failed to present sufficient evidence to show that WSDOT did not consider their objections or review the materials presented to WSDOT at the Final Agency Action meeting on March 30, 2017.

CP at 3480.

On April 30, 2018, the Court of Appeals reviewed the evidence in detail and issued an unpublished opinion affirming the trial court's finding of public use and necessity. App. Mot. Discretionary Review, Appendix

(App.) 1. It applied this Court's decision in *State v. Brannan*, 85 Wn.2d 64, 530 P.2d 322 (1975), in reviewing the trial court's analysis of the environmental impact of the SR 520 program as it relates to this condemnation action. App. 1. The Court of Appeals subsequently denied Appellants' motion for reconsideration and motion to publish the unpublished opinion. *Id.*

III. ISSUES PRESENTED

1. Is the unpublished opinion consistent with settled case law in holding that RCW 43.21C.150 does not require an agency to prepare a separate SEPA EIS if a valid NEPA EIS has already been prepared under NEPA?

2. Does the unpublished opinion correctly hold that WSDOT's decision not to follow a discretionary guideline in its policy manual was insufficient evidence to find arbitrary and capricious conduct by a condemning authority that would undermine the trial court's finding of public use and necessity?

IV. ARGUMENT

A. Standard of Review

A motion for discretionary review must show that the decision below "conflicts with a decision of this court or another division of the Court of Appeals; that it presents a significant question of constitutional

interest; or that it presents an issue of substantial public interest that should be decided by this court." RAP 13.4(b); *In re: Coats*, 173 Wn.2d 123, 132-33, 267 P.3d 324 (2011) (citing RAP 13.4(b)). Because none of these required criteria are met here, Appellants' motion for discretionary review should be denied.

B. Appellants' Motion is Procedurally Deficient

Many of the Appellants' assertions are contrary to the evidence contained in the record. See App. 1 at 6-10. Appellants have failed to comply with the rules of procedure by not providing appropriate references to the record in support of their factual statements. RAP 13.4(c)(6). This Court has declined to consider facts received in briefs but not supported by the record. *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007). Accordingly, because all of Appellants' claims rely upon assertions of fact not supported by citations to the record, this Court should decline to consider those facts and deny the Motion for Discretionary Review.

C. SEPA Does Not Apply To This Condemnation Action; the Court of Appeals' Analysis of the Relationship Between NEPA and SEPA, Although Dictum, Is Consistent with Precedent

SEPA compliance is not required in an eminent domain action by a state agency. *State v. Brannan*, 85 Wn.2d 64, 73-74, 530 P.2d 322 (1975); *Petition of Port of Grays Harbor*, 30 Wn. App. 855, 865, 638 P.2d 633

(1982). WAC 197-11-800(5) categorically exempts the purchase or acquisition of any right to real property by an agency from the threshold determination and EIS requirements of SEPA. *Marino Property Co. v. Port of Seattle*, 88 Wn.2d 822, 830-31, 567 P.2d 1125 (1977) (citing former WAC 197-10-170); *State v. Hutch*, 30 Wn. App. 28, 40, 631 P.2d 1014 (1981) (same). In deciding whether an order adjudicating public use was properly granted, it does not matter whether the agency prepared an EIS under NEPA or SEPA. The condemnation action is exempt.

Consequently, the Court of Appeals' discussion regarding NEPA and SEPA is nonbinding dicta. *State v. Hummel*, 165 Wn. App. 749, 765, 266 P.3d 269 (2012) (statements made in the decision that are "wholly incidental" to the basic decision are dicta and do not create binding authority). Nevertheless, the Court of Appeals' analysis of the relationship between NEPA and SEPA is consistent with this Court's holdings in *State v. Brannan*, 85 Wn.2d 64, 530 P.2d 322 (1975), and *Boss v. Dep't of Transp*., 113 Wn. App. 543, 550, 54 P.3d 207 (2002). It is not an "incorrect and inappropriately expansive holding that the NEPA review discharged SEPA requirements" as alleged by Appellants. App. Mot. Discretionary Review at 2. Rather, it holds that under RCW 43.21C.150 "a project does not need a SEPA EIS when it has an EIS that satisfies NEPA," and concludes that "[b]ecause a federal district court upheld the validity of the

[final EIS] under NEPA and the sufficiency of the [final EIS] was not at issue," the trial court correctly decided that SEPA did not apply to WSDOT's public use and necessity motion. *Montlake, LLC*, slip op. at 12-13.

Neither WSDOT, the trial court, nor the Court of Appeals have stated that NEPA "pre-empts" SEPA, as Appellants have claimed. Rather, the Court of Appeals' decision applies a provision of SEPA, which by its plain language does not require a separate SEPA EIS when a NEPA EIS has been prepared. RCW 43.21C.150. The result here is the same as in *Boss*, 113 Wn. App. at 553, which concluded that because "the NEPA/SEPA EIS was prepared before DOT issued its final project approval, RCW 43.21C.150 exempts the EIS from further review under SEPA." There is no conflict with this case law, nor is there a need to argue that NEPA pre-empts SEPA.

The primary case Appellants rely on, *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.3d 190 (2010), is not on point. *Magnoli*a is not an eminent domain case; it involved a purchase of land by a municipal corporation (the City of Seattle) from another governmental entity (specifically, the United States) and whether the City's decision to approve a specific construction project on that land was a "project action" under SEPA. *Id.* at 308. The City of Seattle had

approved a plan regarding the future use of the land, but had not yet prepared an EIS to support its planned action, having concluded that the plan was a preliminary step and that environmental review would be completed at a later time. *Id.* at 310. The Court of Appeals held that the approval of the construction project was a "project action" subject to SEPA review. *Id.* at 313-18. The City argued in the alternative that NEPA pre-empted SEPA, a position that the Court of Appeals also rejected. *Id*. at 318. The facts of the *Magnolia* case are not analogous to the present case and do not support Appellants' argument.

The Court of Appeals' analysis is consistent with case law. Appellants cite no case law contradicting the Court of Appeals' conclusion that RCW 43.21C.150 permits a valid NEPA EIS to fulfill SEPA's requirements for an EIS.

D. The Court of Appeals' Conclusion That WSDOT Permissibly Departed From Its Design-Build Guidebook Does Not Conflict With Precedent

The Court of Appeals did not hold, as alleged by Appellants, that failure to follow an agency's guidelines could never be used as evidence to show arbitrary or capricious conduct. Rather, it held that under the facts of this case, WSDOT's alleged failure to adopt a discretionary guideline was not sufficient evidence to undermine the trial court's findings of public use and necessity.

The trial court's conclusion that WSDOT's Design-Build Guidebook (Guidebook) and Right of Way Manual do not have the force of law is not in conflict with settled case law. *Montlake, LLC,* slip op. at 11, (citing *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005) (holding that policy directives not promulgated pursuant to legislative delegation do not have force of law)); *see also Id.* slip op. at 19.

The question underlying this issue pertains ultimately to the timing of WSDOT's acquisition of the Properties. Appellants assert that WSDOT did not comply with the Guidebook because it acquired the Properties before contracting with a design-builder for the relevant part of the project—even though they admit that the Guidebook "allows" (but does not require) WSDOT to wait until after contracting with a design-builder to acquire property. *See* Motion at 12 n.4. The trial court resolved the issue by simply applying the correct legal standard that the property must be reasonably necessary in a reasonable time. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965). Here, WSDOT determined that it needed to acquire the Properties prior to contracting, and supported its determination on the record. The fact that its Guidebook provides the option of doing so later does not make its decision arbitrary and capricious.

The unpublished case cited by Appellants, *Esses Daman Family, LLC v. Pollution Control Hearings Bd.*, 200 Wn. App. 1021,

2017 WL 3476785 (2017), is not on point. In *Esses*, the Court of Appeals reversed the Board's misinterpretation of an agency guideline after the Board used the agency manual as evidence to support its decision. *Id*. at n.4. Even though the manual was evidence and not applicable law, the Court of Appeals applied the laws of statutory construction to derive its meaning and evaluate whether it was appropriate evidence.

Similarly, in this case, the Guidebook was *evidence*. There was no argument presented by Appellants about how the trial court interpreted the language in the Guidebook, or about how it should have been interpreted. In their brief to the Court of Appeals, Appellants characterized the Guidebook as including an "*option allowing* WSDOT to postpone property acquisition." Appellants' Op. Br. at 37 (emphasis added). They did so again in their Motion for Discretionary Review, as noted above. Motion at 12 n.4. They understand and concede that the Guidebook is discretionary, not mandatory.

Thus, the only thing this case has in common with the unpublished opinion in *Esses* is that both involved the use of agency manuals or guidelines as evidence. *Esses* does not support Appellants' argument that failure to follow an internal agency manual outlining discretionary procedures is *per se* evidence of arbitrary and capricious conduct amounting to fraud or constructive fraud. *See, e.g., HTK Mgmt. v. Seattle Popular*

Monorail Auth., 155 Wn.2d 612, 629, 121 P.3d 1166, 1175 (2005) ("A declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.")

E. The Motion for Discretionary Review Does Not Raise Any Significant Questions of Law or Issues Involving a Substantial Public Interest

As shown above, the decision below does not raise a significant question of law and is not otherwise in conflict with settled case law. Nor does it involve the potential to affect proceedings in the lower courts, since the questions of law determined by the Court of Appeals are unpublished and limited to the facts of this case. Appellants have not demonstrated that the Court of Appeals decision, "has the potential to affect a number of proceedings in the lower courts" or that this Court's review is necessary to "avoid unnecessary litigation and confusion on a common issue." *In re: Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016) (mem.) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)).

The public interest exception has not been used in statutory or regulatory cases that are limited on their facts. *See, e.g., Harvest House Restaurant, Inc. v. Lynden*, 102 Wn.2d 369, 685 P.2d 600 (1984) (ordinance limiting sale of liquor only one existing in the state); *Tri–State Constr. Co. v. Seattle*, 14 Wn. App. 476, 478–79, 543 P.2d 353 (1975) (specific statute

authorizing Seattle to award public contracts in contravention of city charter when required by federal development programs.)

V. CONCLUSION

Appellants do not cite any law or refer to any portion of the record that supports their position. The decision below is a straightforward interpretation of Washington statutes and case law that rejects Appellants' arguments and does not conflict with settled case law. Appellants' motion for discretionary review does not raise any important questions of law or substantial public interest meriting this Court's attention. The Motion should be denied.

RESPECTFULLY SUBMITTED this 23rd day of August 2018.

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CERTIFICATE OF SERVICE

I, Sarah A. Smith, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day true copies of the Response to Appellants' Motion for Discretionary Review and this Certificate of Service were served on the following parties as indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of August 2018, at Olympia, Washington.

s/ Sarah A. Smith

SARAH A. SMITH, Legal Assistant

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

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