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 the Montlake Community Club, Appellants, v. STATE OF WASHINGTON, Respondent.	STATE OF WASHINGTON'S REPLY IN SUPPORT OF ITS MOTION TO ACCELERATE REVIEW

I. INTRODUCTION

The Appellants' Petition for Review and the State's Motion to Accelerate Review are already set for consideration by a department of this Court on October 2, 2018. Those should remain as scheduled. The State opposes the Petition for Review. However, should the Petition for Review be granted, the Court should grant the State's Motion to Accelerate Review as well.

The State of Washington (State or WSDOT) has presented to this Court undisputed evidence that delay in this case results in increased risk to public safety and considerable additional project costs. Montlake LLC

and Stelter Montlake LLC (Appellants or Montlake Owners) agree that this Court should accelerate review so long as it is consolidated with their separately filed Motion for Discretionary Review of a discovery issue. However, because this Court has set this case for consideration on October 2, 2018, consolidating it with the new Motion for Discretionary Review could unnecessarily delay the resolution of all issues in this case. Therefore, this Court should consider the Petition for Review along with the State's Motion to Accelerate Review on October 2, 2018, without consolidating this case with Appellants' newly filed motion.

Appellants filed a separate Motion for Discretionary Review on September 10, 2018 of the trial court's order to compel discovery, but this Court has already set the Petition for Review of the Court of Appeals' opinion on the State's Order Adjudicating Public Use and Necessity for consideration on October 2, 2018. Unless this Court asks the parties to brief these new motions before October 2, 2018, consolidation will delay this Court's consideration of the Petition for Review. But, that delay is not necessary; if this Court denies Appellants' Petition for Review, their newly filed motion regarding discovery is moot. Consolidation in this circumstance would not further judicial economy. Accordingly, by making their agreement regarding accelerated review contingent upon

consolidation, Appellants in effect have once again sought to delay the disposition of this case.

Furthermore, Appellants have not provided this Court with any legal grounds against accelerated review absent consolidation, nor have they set forth any factual basis that consolidation would result in judicial economy. They will not be prejudiced by this Court's consideration of the Petition for Review on October 2, 2018 on its own, so that the parties can then turn their attention to Appellants' newest appeal.

II. COUNTER-STATEMENT OF PROCEDURAL HISTORY

On May 16, 2017, the State brought this condemnation proceeding and filed a Motion for an Order Adjudicating Public Use and Necessity (OAPU) three days later. CP at 1798-1807. On June 12, 2017, Appellants sought to delay the OAPU hearing by filing a Motion for Oral Argument and Live Witness Testimony and Cross-Examination at Hearing on WSDOT's Motion for an Order of Public Use and Necessity and Motion for CR 16 Discovery and Case Schedule Conference. CP at 1856-71. WSDOT objected to the unnecessary delay of the OAPU hearing but agreed to Appellants' request for live testimony at the hearing. CP at 1945-57. The trial court authorized Montlake Owners to propound written discovery and depose WSDOT's witnesses to prepare their allegations of

arbitrary and capricious conduct by WSDOT in selecting the Montlake Properties for condemnation.[1] RP, June 30, 2017.

At the OAPU hearing on August 11, 2017, WSDOT presented Denise Cieri, Deputy Program Administrator for the SR 520 Program. RP 88:10–11, Aug. 11, 2017. On September 6, 2017, the trial court entered its Findings of Fact and Conclusions of Law and Order Adjudicating Public Use and Necessity. CP at 3474-89. Two days later, Appellants filed their appeal of the trial court's order finding public use and necessity. CP at 3498-3523.

On September 28, 2017, WSDOT served an Amended CR 34 Request for Entry onto Land for Inspection for the purposes of inspecting the potential for contamination of the Montlake Properties. Appendix at 1. When Appellants objected, the State moved to compel entry onto the Montlake Properties, which the trial court granted on October 19, 2017, ruling that it had authority to enforce its own decisions because the Appellants had not sought a stay of the trial court proceedings as required. Appendix at 4. On December 4, 2017, Appellants filed a Motion for Discretionary Review to the Court of Appeals of the order to compel discovery. Appendix at 7.

[1] On July 11, 2017, the State filed a Motion for Early Trial Date. CP at 2821-25. That motion remains on the trial court docket pending the outcome of this appeal.

On November 13, 2017 (over three weeks after the order to compel was issued), Appellants filed a notice for a supersedeas stay of the OAPU and Order to Compel, which the trial court granted on December 7, 2017. Appendix at 35. On December 14, 2017, Appellants filed an Emergency Motion to Review Supersedeas Decision and Grant Stay with the Court of Appeals. Appendix at 38. On January 19, 2018, the Court of Appeals granted Appellants' requested stay of the order to compel. Appendix at 59.

On April 30, 2018, the Court of Appeals issued its Unpublished Opinion in this matter. Appendix at 61. On May 2, 2018, the Court of Appeals Court Administrator Johnson issued a letter ruling that Appellants' motions for discretionary review regarding the discovery issue were moot. Appendix at 85. On June 1, 2018, Appellants filed a Motion to Modify Ruling of Commissioner. Appendix at 88. On August 13, 2018, the Court of Appeals granted Appellants' motion and ruled that the discovery issue was not mooted by its decision affirming public use and necessity, but also concluding that there was no demonstration the trial court lacked authority or committed probable error in entering the order compelling discovery. Appendix at 119. Appellants now seek review of this decision, aside from its Petition for Review of the Court of Appeals decision affirming the trial court's OAPU in the underlying condemnation action.

III. ARGUMENT

A. Should Review Be Granted, This Court Should Accelerate Review To Serve the Ends of Justice Because Public Safety and Public Finances Are at Risk

The State has presented evidence that delay in this case results in considerable public expense and increases risk to public safety. The condemnation case is integral to a $400 million construction project to rebuild the aging West Approach Bridge and Montlake Interchange, and is the next step in constructing the $4.6 billion program. The project will upgrade bridges that are vulnerable to earthquakes and relieve transportation congestion.

Appellants do not dispute these facts and concede that accelerated review is appropriate in this case if it is consolidated with their separate Motion for Discretionary Review of the trial court's discovery rulings. Appellants Montlake LLC and Stelter Montlake LLC's Response to State of Washington's Motion to Accelerate Review at 1. Thus, all parties agree that this case presents a circumstance "when it is necessary for the court to act swiftly, particularly in matters relating to affairs of the state or local government, or when irreparable harm to a party would result from delay." 3 Karl B. Tegland, *Washington Practice: Rules Practice* RAP 18.12 (8th Ed. 2017).

RAP 18.12 provides for accelerated review to promote accelerated disposition under RAP 1.2(c) and 18.8(a). Accelerated review is proper when "an act must be done in a particular case in order to serve the ends of justice . . . ." RAP 18.8(a). The undisputed evidence before this Court indicates the ends of justice are served by accelerating review of this case to avoid delaying a large public works project at considerable public expense and increased risk to public safety. The Appellants have cited no evidence to the contrary. Therefore, the State's Motion to Accelerate Review should be granted.

The Appellants' request to consolidate this case with their request for review of discovery orders is premature. This Court has set a date for consideration of Appellants' Petition for Review and the State's Motion to Accelerate Review for October 2, 2018, and it should proceed accordingly in order to avoid potentially unnecessary delay in resolving this case. The basis for Appellants' request to review the trial court's discovery order is the fact that this Court is currently reviewing their Petition for Review. If this Court denies review, then the basis for Appellants' objection to discovery vanishes and the parties can proceed to prepare for the trial on just compensation. On the other hand, if this Court accepts review of the OAPU, Appellants' Motion to Consolidate is not moot on its face, but the OAPU appeal and the discovery order appeal (while borne of the same

underlying condemnation action) still present distinct factual and legal issues that may well be best considered separately, as the State will further elaborate in its answer to Appellants' Motion to Consolidate.

The Rules of Appellate Procedure allow for consolidation of two or more cases "if consolidation would save time and expense and provide for a fair review of the cases." RAP 3.3(b). The policy of RAP 3.3(b) will be best served by taking these appeals in logical order, and resolving the pending Petition for Review of the OAPU prior to considering consolidation.

IV. CONCLUSION

Appellants have not presented any arguments or evidence to controvert the State's Motion for Accelerated Review, therefore, should the Court grant the Petition for Review, the State's Motion to Accelerate Review should be granted. Accelerated review of the Petition for Review will avoid the State having to delay upgrading vulnerable bridge structures

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as well as incurring considerable additional expenses in bringing this vital public works project to fruition.

RESPECTFULLY SUBMITTED this 12th day of September, 2018.

ROBERT W. FERGUSON
Attorney General

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CERTIFICATE OF SERVICE

I, Melissa J. Calahan, 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 State of Washington's Reply in Support of Its Motion To Accelerate 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 12th day of September 2018, at Olympia, Washington.

s/ Melissa Calahan

MELISSA J. CALAHAN, Legal Assistant

STATE OF WASHINGTON'S
REPLY IN SUPPORT OF ITS MOTION TO ACCELERATE REVIEW
APPENDIX

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THE HONORABLE VERONICA ALICEA-GALVAN

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Petitioner,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; SCOTT IVERSON & BTF ENTERPRISES, INC. dba Montlake Boulevard Market; HORST KIESSLING, dba Hop in Christmas Trees; ANGELA ROSE STERLING dba Montlake Espresso; STC FIVE LLC, a Delaware limited liability company; CROWN CASTLE USA, INC., a Pennsylvania corporation; GLOBAL SIGNAL ACQUISITIONS III LLC, a Delaware limited liability company; NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company; SEATTLE SMSA LIMITED PARTNERSHIP, a Delaware limited partnership dba Verizon Wireless; SPRINT SPECTRUM L.P., a Delaware limited partnership; T-MOBILE USA, INC.; and KING COUNTY,

Respondents.

NO. 17-2-12389-7 SEA

STATE OF WASHINGTON'S AMENDED CR 34 REQUEST FOR ENTRY ONTO LAND FOR INSPECTION

Appendix at 001

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1. Pursuant to RCW 47.01.170 and Superior Court Civil Rule (CR) 34, the State of Washington (State) hereby amends their request for entry onto the Montlake properties that are the subject of this condemnation case, including all improvements thereon, for purposes of inspecting, measuring, surveying, photographing, testing, and/or sampling the Montlake properties, entry into the structures located on the Montlake properties, to include the Montlake Market and Gas Station, for purposes of inspecting for ground contamination and the condition of the Montlake Market and Gas Station.

2. The State hereby requests entry for six inspections to be conducted on the Montlake properties consisting of holes being bored that will range from six (6) to twelve (12) inches in diameter and to a maximum depth of 70 feet. Each inspection will take one night per boring, pending any equipment issues in the field. Attached as Exhibit A to this amended request for entry is a diagram identifying the approximate locations for the six inspections, subject to field adjustment.

The Montlake properties will not suffer adverse impacts caused by the six inspections. Drill cuttings resulting from the subject properties' inspections will be collected and disposed of in accordance with applicable laws and regulations. Bore holes will be backfilled with bentonite to within two (2) feet of the ground surface and the remaining top two (2) feet will be backfilled with crushed rock. Bore holes conducted in paved surfaces will be patched with quick set cement concrete.

Entry onto the property for the first overnight inspection is requested for November 15, 2017 at 10:00 p.m. and until 6:00 a.m. the following day, and continuing day-to-day from the hours of 10:00 p.m. until 6:00 a.m. the following day, until November 30, 2017 at 6:00 a.m., unless entry for inspection is permitted earlier than requested.

Unloading of the drill rig/equipment on the Montlake properties is also requested. The drill rig/equipment will be removed from the Montlake properties when not in operation between the hours of 6:00 a.m. to 10:00 p.m. during the inspection period.

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3. In addition to the six inspections referenced in paragraph 2 above, a separate and distinct inspection of the Montlake properties is requested involving WSDOT personnel visually inspecting the structures located on the properties, the Montlake Market and Gas Station, both interior and exterior, and documenting with pictures and field notebooks the site conditions, potential environmental impacts and/or potential sources from past and/or present hazardous material releases and/or storage.

The interior and exterior review will also include verifying for the presence of asbestos-containing materials (ACM), lead-containing paint (LCP), and polychlorinated biphenyls (PCBs) and/or mercury containing equipment, and identify the number and location of proposed samples.

There will be no ground disturbance or soil, water, and asbestos sampling conducted within this requested entry for inspection. This inspection of the structures located on the properties will take approximately eight (8) hours and can be conducted during the day or night. Unless otherwise agreed to by the parties, this inspection is requested to occur on November 16, 2017 beginning at 8:00 a.m. and continuing until 12:00 p.m., and then resuming at 1:00 p.m. and concluding at 5:00 p.m.

The State reserves the right to seek further inspections consistent with RCW 47.01.170 and CR 34.

DATED this 28th day of September 2017.

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Appendix at 003

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THE HONORABLE VERONICA ALICEA-GALVAN

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Petitioner,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; SCOTT IVERSON & BTF ENTERPRISES, INC. dba Montlake Boulevard Market; HORST KIESSLING, dba Hop in Christmas Trees; ANGELA ROSE STERLING dba Montlake Espresso; STC FIVE LLC, a Delaware limited liability company; CROWN CASTLE USA, INC., a Pennsylvania corporation; GLOBAL SIGNAL ACQUISITIONS III LLC, a Delaware limited liability company; NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company; SEATTLE SMSA LIMITED PARTNERSHIP, a Delaware limited partnership dba Verizon Wireless; SPRINT SPECTRUM L.P., a Delaware limited partnership; T-MOBILE USA, INC.; and KING COUNTY,

Respondents.

NO. 17-2-12389-7 SEA

ORDER ON STATE'S MOTION TO COMPEL CR 34 ENTRY ONTO LAND FOR INSPECTION

Appendix at 004

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THIS MATTER came before the Court on the State of Washington's Motion to Compel Amended CR 34 Request for Entry onto Land for Inspection, and the Court having considered the pleadings and filings herein:

No stay has been issued in this case. Rules on Appeal 7.2(c) states:

> In a civil case, except to the extent enforcement of a judgment or decision has been stayed as provided in rules 8.1 or 8.3, the trial court ***has the authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court. Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgement or decision is stayed as provided in Rules 8.1 or 8.3.***

Therefore, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Petitioner's Motion to Compel Amended CR 34 Request for Entry Onto Land for Inspection is GRANTED.

2. Respondents shall permit Washington State Department of Transportation representatives entry as identified in the Amended State of Washington's Amended CR 34 Request for Entry Onto Land for Inspection dated September 29, 2017. Failure to do so shall result in sanctions and reasonable attorney fees pursuant to CR 37 upon a motion by the State of Washington.

DATED 10/19/2017

JUDGE VERONICA ALICEA-GALVAN

Presented by:

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Appendix at 005

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No. 77644-4

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation;

Petitioners.

MOTION FOR DISCRETIONARY REVIEW

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CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

This motion for discretionary review involves an overreaching discovery motion that the State of Washington Department of Transportation ("WSDOT") filed concerning property in Montlake that WSDOT seeks to condemn for SR 520 improvements. With an appeal on the public use and necessity of taking the property pending (No. 77359-3-1), the trial court granted WSDOT's motion to permit over two weeks of invasive drilling and testing in aid of valuation of the property, without property rights or compensation. Petitioners request that this Court grant review and reverse. The trial court misunderstood the settled, separate stages of an eminent domain proceeding, and made a clear procedural error. Further, the discovery is an unconstitutional taking of property that WSDOT does not yet own, has not paid for, and is unreasonable in scope.

Review is proper under RAP 2.3(b) because the trial court's decision was erroneous, substantially alters the status quo, and substantially limits the ability of Petitioners to act. It is also related to the issues presented in the pending appeal. Petitioners respectfully request that this Court grant Petitioners' motion for discretionary review and reverse the trial court's order compelling discovery.

II. IDENTITY OF PETITIONERS

Petitioners Montlake LLC and Stelter Montlake LLC ("Owners"), and BTF Enterprises, Inc. ("Tenant"), ask this Court to accept review of the decision designated in Part III of this motion.

III. DECISION

Petitioners seek review of the following decision entered by the trial court on October 19, 2017:

> Order Granting the State's Motion to Compel CR 34 Entry Onto Land For Inspection, dated October 19, 2017 (hereinafter "Compel Order").

The Compel Order permits invasive subsurface boring, site inspection and testing, and occupation over a two-week period, before a final determination on public use and necessity has occurred, and without compensation. As a result, review now is appropriate and necessary. RAP 2.3(b). A copy of the Compel Order is attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

A. Does a trial court have jurisdiction under RAP 7.2 to order discovery on valuation issues in a condemnation case while an order on public use and necessity is pending on appeal?

B. Does the Compel Order requiring Petitioners to submit to over two weeks of WSDOT's use and occupancy of their properties for subsurface boring, comprehensive site inspection and testing, without

compensation, exceed the scope of inspection authorized under RCW 47.01.170 and Civil Rule 26(b)(1), and amount to a taking?

V. STATEMENT OF THE CASE

A. The Trial Court Issues An Order on Public Use and Necessity

WSDOT wants to condemn three separate, contiguous lots for its SR 520 Rest of the West Project (the "Montlake Properties"). Together, they are a small commercial district at the southwest corner of Montlake Boulevard and SR 520 consisting of a small grocery store, a gas station and a parking lot.

After a two-day hearing in August 2017, the trial court granted WSDOT's motion on public use and necessity on September 6. Petitioners appealed the trial court's order on September 8. That appeal is pending before this Court (No. 77359-3-1).[1]

B. WSDOT Seeks Invasive Testing for Valuation Purposes

After the hearing but before the trial court ruled, on August 17, WSDOT requested entry to the Montlake Properties "for purposes of inspecting, measuring, surveying, photographing, testing, and/or sampling the property, for purposes of evaluating the impacts of the State's project on the subject property." Appendix B at 2. The request sought access from

[1] The background for this proceeding is fully set forth in the appeal pending before this Court on public use and necessity, No. 77359-3-1.

September 15th through the 25th from 10:00 p.m. until 6:00 a.m. each day. *Id.* On September 6, the Tenant objected to the request. Appendix I (Owners' Opposition to State's Response to Stay), at 2. On September 18, the Owners objected to the testing at least until Petitioners' appeal of the order on public use and necessity is finally resolved. *Id.*

On September 20, WSDOT served an Amended CR 34 Request for Entry Onto Land For Inspection. Appendix C (State's Amended Request for Entry). The Amended Request expanded on the scope and duration of WSDOT's original Request, requesting that WSDOT be permitted to enter the properties for over two weeks, eight hours per day, from November 15th through the 30th, "for purposes of inspecting, measuring, surveying, photographing, testing, and/or sampling the Montlake properties, entry into the structures located on the Montlake properties, to include the Montlake Market and Gas Station, for purposes of inspecting for ground contamination and the condition of the Montlake Market and Gas Station." Appendix C at 2-3.

WSDOT's proposed subsurface boring would require cutting through paved surfaces, drilling through soil and bedrock beneath the site, removing samples from the bored holes, and filling the holes with bentonite, crushed rock, and re-paving. *Id.* The holes would be six to twelve inches in diameter and up to 70 feet in depth. *Id.* WSDOT also

requested that it be permitted to unload and store drill rigs and equipment on the properties during the drilling periods. *Id.*

In addition to subsurface boring, WSDOT requested permission to conduct a "separate and distinct inspection" of the interior and exterior of the structures on the properties, and examining the site conditions, including taking samples to verify the presence of "asbestos containing materials (ACM), lead-containing paint (LCP), and polychlorinated biphenyls (PCBs) and/or mercury containing equipment." *Id.* at 3.

WSDOT requested these investigations for the sole purpose of obtaining valuation evidence relevant to just compensation. Appendix D (State Motion to Compel), at 3, 6-7.

On October 10, WSDOT moved to compel entry. Appendix D. Petitioners objected that the trial court did not have jurisdiction to authorize the requested discovery under RAP 7.2, and that during an eminent domain proceeding, a trial court cannot authorize discovery on valuation before a final determination of public use and necessity. Appendix E. Petitioners also argued that WSDOT's demand for more than two weeks of uncompensated use and occupancy of the properties for equipment storage, subsurface boring and other testing would be an unconstitutional taking and violate the scope of reasonable discovery under Civil Rule 26(b)(1). *Id*.

On October 19, 2017, the trial court summarily granted WSDOT's motion to compel as follows:

> No stay has been issued in this case. Rules on Appeal 7.2(c) states:
>
> In a civil case, except to the extent enforcement of a judgment or decision has been stayed as provided in rule 8.1 or 8.3, the trial court ***has the authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court. Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3***.

Appendix A at 2 (emphasis by Court). The trial court did not address or expressly rule (1) whether a trial court has jurisdiction to compel valuation discovery while its order on public use and necessity is on appeal; (2) whether more than two weeks of occupancy, subsurface boring and other invasive testing without property rights or compensation is an unconstitutional taking; or (3) whether WSDOT's discovery exceeds the bounds of reasonableness under Civil Rule 26(b)(1).[2]

[2] Following the trial court's order granting WSDOT's motion to compel, on November 13, Owners filed notice of a supersedeas stay pursuant to RAP 8.1, staying trial court proceedings. Appendix G. In its reply in support of its original motion to compel, WSDOT argued that if Owners desired to stay discovery pending appeal, they should file a supersedeas stay pursuant to RAP 8.1. Appendix F at 2-3, 7. After Owners filed their stay pursuant to RAP 8.1, WSDOT opposed the stay, arguing that a stay under RAP 8.1 is inapplicable in this case and should not be permitted, and even requested sanctions against the Owners for obtaining a stay. Appendix H. Because of the stay, WSDOT has not conducted its

VI. ARGUMENT IN SUPPORT OF REVIEW

The Compel Order is erroneous, substantially alters the status quo, and limits Petitioners' freedom to act. *See* RAP 2.3(b)(2). Discovery orders are a proper subject of discretionary review. *See, e.g.*, *Lurus v. Bristol Labs.*, 89 Wn.2d 632, 633, 574 P.2d 391 (1978).

The Court should accept review because (1) under RAP 7.2, the trial court did not have the authority to compel discovery related to valuation (the second phase of a condemnation proceeding) while Petitioners' public use and necessity appeal is pending; and (2) the trial court erred in compelling Petitioners to submit to more than two weeks of uncompensated property use by WSDOT for invasive testing—the nature, scope and duration, without any existing property rights or compensation, (a) is an unconstitutional taking and (b) exceeds the reasonable scope of discovery under Civil Rule 26(b)(1).

Review is warranted under RAP 2.3(b)(2) because the trial court erroneously violated RAP 7.2 by issuing the Compel Order, and because WSDOT's testing would irreparably damage Petitioners' business and properties without just compensation, all before the final decision on public use and necessity has occurred. If Petitioners prevail in their public

desired subsurface drilling and site inspection. The trial court has not yet ruled on WSDOT's stay opposition.

use and necessity appeal, the discovery the Court has compelled will be irrelevant to WSDOT, but will have damaged Petitioners. The Compel Order both limits Petitioners' ability to act and disrupts the status quo pending appeal.

A. The Trial Court Did Not Have Jurisdiction to Order Discovery

The trial court erred by issuing the Compel Order under RAP 7.2. A trial court may not enter an order compelling valuation discovery until a final decision on public use and necessity occurs.

1. The trial court did not have the authority to order discovery under RAP 7.2

RAP 7.2 sets forth trial court jurisdiction after review is accepted by an appellate court. *Spivey v. City of Bellevue*, 369 P.3d 147, 148 (Wash. 2016), *opinion after grant of review*, 187 Wn.2d 716, 389 P.3d 504 (2017). Under RAP 7.2(a), "[a]fter review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule." This authority is limited to "ministerial actions." *State v. Korum*, 120 Wn. App. 686, 720, 86 P.3d 166 (2004), *rev'd other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006). Where a trial court acts beyond its jurisdictional authority under RAP 7.2, its orders are invalid.[3]

[3] *Clallam Cty. Deputy Sheriff's Guild v. Bd. of Clallam Cty. Comm'rs*, 92 Wn.2d 844, 853, 601 P.2d 943 (1979) ("Except for the limited circumstances outlined in RAP 7.2(b)-(j), the trial court has no

RAP 7.2 does not authorize a trial court to compel a party's submission to entry of land under Civil Rule 34 while an appeal is pending. Rather, the only *discovery* authorized under RAP 7.2 is set forth in subsection (k), which permits a trial court to allow perpetuation of testimony under Civil Rule 27. Thus, Washington courts strike trial court orders on discovery motions while an appeal is pending. For example, in *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000), while the case was on appeal, the trial court granted a protective order limiting the disclosure of discovery. *Id.* at 367 n. 82. On discretionary review, this Court vacated the order because "the trial court decided a matter pending on appeal in violation of RAP 7.2." *Id.* at 376. Likewise, in *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009), the appellants filed a motion for stay of proceedings pending appeal, which the Court of Appeals Commissioner granted because "the trial court lacked authority under RAP 7.2 to engage in further discovery or pretrial motion practice in the suits subject to this appeal." *Id.* at 823-24.

authority to act after a notice of appeal is filed.") (reversing order on motion for binding arbitration during appeal because "the trial court had no authority to hear or grant the motion"); *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 445, 423 P.2d 624 (1967); *Fairview Lumber Co. v. Makos*, 44 Wn.2d 131, 134, 265 P.2d 837 (1954) (after an appeal jurisdiction is transferred to the appellate court and "the trial court is deprived of jurisdiction of the subject matter of the cause"); *In re Marriage of Hughes*, 128 Wn. App. 650, 654, 116 P.3d 1042 (2005) (striking trial court memorandum opinion issued after appeal).

The trial court exceeded its authority under RAP 7.2 by compelling submission to discovery while the case is on appeal, and its Compel Order should be stricken as invalid.

2. RAP 7.2(c) precludes a trial court from compelling discovery on valuation in an eminent domain proceeding while an order adjudicating public use and necessity is on appeal

The trial court's order also reflects a mistaken conclusion that by granting WSDOT's motion to compel, the trial court was appropriately "enforcing" the public use and necessity order under RAP 7.2(c).

RAP 7.2(c) allows a trial court to "enforce" a "judgment or decision" of the trial court unless stayed pursuant to RAP 8.1 or 8.3. However, the trial court did not issue a decision compelling WSDOT's requested valuation discovery *prior* to Petitioners' appeal and therefore there was nothing for the trial court to enforce that would allow it to authorize discovery.

Moreover, the trial court could not "enforce" the decision on public use and necessity under RAP 7.2(c) to order discovery on valuation, because a final determination on public use and necessity is required before an inquiry into valuation is permissible. Each phase of a condemnation proceeding is separate and distinct and "is a condition precedent to the entry of the subsequent judgment." *Pub. Util. Dist. No. 1*

of Chelan Cty. v. Wash. Water Power Co., 43 Wn.2d 639, 641, 262 P.2d 976 (1953) (a completed action of eminent domain requires the entry of three separate and distinct judgments during the course of the proceeding—public use and necessity, valuation, and transfer of title). The process is entirely constitutional, statutory, and mandatory. *Pelley v. King Cy.*, 63 Wn. App. 638, 641, 821 P.2d 536 (1991); WASH. CONST., Art. I, Section 16 (Amend. 9); RCW 8.04.070, .080; *see also* RCW 8.12.090.

Before the trial court can begin the valuation stage of an eminent domain proceeding, a determination on public use and necessity must be made final, including the exhaustion of all appeals. *State ex rel. Wash. v. Allerdice*, 101 Wn. App. 25, 31, 1 P.3d 595 (2000) ("An [order on public use and necessity] entered by the trial court is interlocutory and appealable as a matter of right. *Therefore, an [order on public use and necessity] cannot be legally effective until the appeal is resolved*.") (emphasis added). Because an order on public use and necessity is not legally effective until the appeal is resolved, the subsequent phases of condemnation—valuation and transfer of title—must await resolution of the appeal.

Therefore, RAP 7.2 did not allow the trial court to enter an order compelling Petitioners to submit to WSDOT's "inquiry" into valuation while the first phase of this condemnation case is on interlocutory appeal.

Public use is a threshold judicial question "and shall be determined as such by the court *before* inquiry is had into the question of compensation to be made." RCW 8.12.090 (emphasis added). "After the public use and necessity judgment is entered and *final* . . . the sole remaining issue is the 'compensation and damages to be paid.'" *Pelley*, 63 Wn. App. at 641 (emphasis added). Public use and necessity must be decided "before there is a justiciable issue as to severance damages." *In re SW Suburban Sewer Dist.*, 61 Wn.2d 199, 201-04, 377 P.2d 431 (1963). A judgment is not final until "all litigation on the merits ends," including all appeals. *In re Skylstad*, 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007). "An appeal from a judgment entered in the trial court is not final until it is affirmed and the case mandated." *Woodcraft Const., Inc. v. Hamilton*, 56 Wn. App. 885, 888, 786 P.2d 307 (1990).

The sole purpose of WSDOT's proposed subsurface boring and site inspection is to "assess the value of the land." Appendix D at 3, 6-7. If Petitioners' appeal is successful, WSDOT will have no basis whatsoever to conduct valuation discovery about the Montlake Properties. WSDOT's discovery would impose significant and irreparable burdens on Petitioners when WSDOT's right to take the properties at issue has not yet been established and is subject to the pending interlocutory appeal of right under RAP 2.2(4).

Therefore, the trial court committed an obvious error. It lacked jurisdiction to grant WSDOT's motion to compel. Its decision should be reversed.

B. The Nature and Scope of WSDOT's Discovery Compelled by the Trial Court Is an Unconstitutional Taking and Exceeds the Reasonable Bounds of Discovery

In addition to the clear jurisdictional error, the ordered discovery is invasive, burdensome, unreasonable, and an unconstitutional taking, and the trial court completely failed to consider or address those arguments.

1. RCW 47.01.170 does not authorize subsurface drilling, and WSDOT's proposed inspection and subsurface drilling is an unconstitutional taking

The Washington Constitution does not permit a taking before just compensation is paid. "No private property shall be taken or damaged for public or private use without just compensation." WASH. CONST., Art. I, Section 16 (Amend. 9); *Conger v. Pierce Cty.*, 116 Wash. 27, 34-35, 198 P. 377 (1921) ("[O]ur Constitution expressly forbids the taking or damaging of private property for public use, except upon just compensation first made.").

The statute cited by WSDOT in its Request, RCW 47.01.170, does not grant WSDOT the authority to commit a taking without just compensation and should not be so construed. RCW 47.01.170 provides WSDOT "the right to enter upon any land, real estate, or premises in this

state, whether public or private, for purposes of making examinations, locations, surveys, and appraisals for highway purposes."

Although Washington courts do not appear to have addressed whether this statute can be used as authority to commit a taking without just compensation, other courts have determined that the type of subsurface inspection sought by WSDOT without permission, property rights, or compensation is a taking. For example, in *Missouri Highway & Transportation Commission v. Eilers*, 729 S.W.2d 471 (Mo. Ct. App. 1987), in conjunction with a state highway construction project, the state sought to conduct pre-condemnation subsurface soil testing on private property. The property owner refused, arguing that the subsurface testing was a taking. *Id.* at 472. The Missouri right of access statute authorized "surveys" but made no mention of subsurface testing. *Id.* The court held that "eminent domain statutes must be strictly construed" and that "drilling holes and taking rock cores are not activities ordinarily within the ambit of a survey." *Id.* at 473.

Likewise, in *National Compressed Steel Corporation v. Unified Government of Wyandotte County/Kansas City*, 272 Kan. 1239, 38 P.3d 723 (2002), a county initiated eminent domain proceedings and moved for an order to allow entry upon the property to perform "extensive environmental testing," including drilling several soil borings. *Id.* at 1241-

42. The trial court granted the motion, before the county acquired any interest in the property or paid compensation. *Id.* at 1241. On appeal, the Kansas Supreme Court held that the Kansas statute allowing a prospective condemner to "enter upon the land and make examinations, surveys and maps thereof" (K.S.A. 26-512) did not authorize subsurface activities, like the subsurface drilling sought by WSDOT in this case:

> The power of eminent domain must be exercised in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right. The power of eminent domain may be exercised only on the occasion and in the mode and manner prescribed by the legislature. Statutes conferring and circumscribing the power of eminent domain must be strictly construed.
>
> [S]ubsoil testing is beyond the scope of the examination authorized by K.S.A. 26-512. Therefore, we reverse the district court's denial of National's petition for injunction.

Id. at 1255. Other states have reached similar conclusions.[4]

[4] *See, e.g.*, *Burlington N. & Santa Fe. Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001) (investigations and subsurface tests proposed by a railroad amounted to a temporary taking and exceeded activities authorized by the eminent domain statute governing a condemner's entry upon land); *Cty. of Kane v. Elmhurst Nat. Bank*, 111 Ill. App. 3d 292, 443 N.E.2d 1149 (1982) (denying county request to conduct soil surveys prior to condemnation because such surveys "involve substantial and not merely incidental disruption and damage to the landowners' property" and amounted to a taking); *Ind. State Hwy. Comm'n v. Ziliak*, 428 N.E.2d 275 (Ind. App. 1981) (affirming denial of request by condemning agency to conduct an intensive archaeological survey prior to condemnation

Washington's eminent domain statutes are also strictly construed. *HTK Mgmt., LLC v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 622, 121 P.3d 1166 (2005). RCW 47.01.170 contains no express authority for WSDOT to conduct 70-foot subsurface borings over a period of more than two weeks. Notably, in its reply, WSDOT made no attempt to argue that RCW 47.01.170 or any other statute expressly authorizes subsurface drilling. Rather, they simply treated more than two weeks of possession and use of property for subsurface drilling as routine discovery under Civil Rule 34. Appendix F at 4-5.

WSDOT argued on reply that at least some of the cases above from other jurisdictions are inapplicable because the attempted taking occurred prior to the initiation of formal condemnation proceedings. *Id.* at 3-4. But WSDOT ignores the fundamental holding in those cases that the type of subsurface drilling at issue is an unconstitutional taking because no compensation has been paid. Here, WSDOT has conceded on a number of

proceedings); *Hicks v. Texas Mun. Power Agency*, 548 S.W.2d 949, 955-56 (Tex. Civ. App. 1977) (agency's power to conduct pre-condemnation site inspection did not include the right to "conduct core drilling operations"); *Mackie v. Mayor & Com'rs of Town of Elktown*, 265 Md. 410, 415-23, 290 A.2d 500 (1972) (reversing trial court's allowance of pre-condemnation geological core drilling). *Compare Prop. Reserve, Inc. v. Super. Ct.*, 1 Cal.5th 151, 167, 175, 375 P.3d 887 (2016) (authorizing precondemnation geological testing under California law which requires the payment of compensation prior to testing and where the state statute expressly permitted "borings").

occasions that even though an order on public use and necessity has been entered, it still has no property rights whatsoever. *See, e.g.*, Appendix H at 7. Thus, whether the desired subsurface drilling occurs before or after the initiation of condemnation proceedings is irrelevant because in either scenario, the subsurface drilling is unconstitutional where WSDOT has no property rights to use and possess the property and compensation for the two weeks of use has not been paid. And contrary to WSDOT's suggestion, discovery cannot be used to circumvent the right of property owners to be protected from unconstitutional takings.

RCW 47.01.170 does not provide WSDOT with authorization to conduct invasive subsurface drilling and site occupation, and the trial court erroneously authorized an unconstitutional taking.

2. The trial court erred by granting WSDOT's motion because the request is unreasonable and unduly burdensome under Civil Rule 26

Discovery, including inspections of land and property, cannot be "unduly burdensome." Civil Rule 26(b)(1)(C). Here, the trial court authorized WSDOT to occupy the properties for more than two weeks, for eight hours each day, to drill subsurface holes "from six (6) to twelve (12) inches in diameter and to a maximum depth of 70 feet" where it would remove soil and other materials from the Montlake Properties, and conduct other "distinct" testing and inspections and equipment storage.

Appendix C at 2. Despite WSDOT's assertion that the properties "will not suffer adverse impacts caused by the six inspections," the subsurface boring would require cutting through paved surfaces using heavy equipment such as drilling machines. Appendix C at 2-3. The drilling would also produce drilling cuttings and other waste. *Id.* Heavy equipment would be stored on site. *Id.*

WSDOT promises to backfill the holes with bentonite, crushed rock, and concrete (*id.*), but WSDOT cannot deny that both the subsurface and surface of the Montlake Properties will be irreparably altered by WSDOT's drilling. Moreover, WSDOT concedes that the results of the testing could lead to complications or "exigencies," which would increase the harm, time, and burden placed upon Petitioners. *See* Appendix E at 11.

The case cited by WSDOT in support of its motion, *Gillett v. Conner*, 132 Wn. App. 818, 133 P.3d 960 (2006), actually underscores how a property inspection like the one proposed by WSDOT can be a significant burden on the property owner. In that case, a property owner sued his neighbor under a nuisance theory and moved for an order allowing it to "inspect, measure, photograph, test and sample" the neighboring property, which the trial court granted. *Id.* at 821. On appeal, in relying on federal authorities, this Court observed that there is greater scrutiny of the necessity of entry onto land, as opposed to producing

documents. *Id.* at 824 (citations omitted). This Court reversed the trial court and ordered a more careful assessment as to whether a physical inspection was necessary and what restrictions should be placed on such an inspection under Civil Rule 26. *Id.* at 825.

There is no evidence that the trial court conducted a careful assessment of the necessity of the intrusion. The trial court summarily granted the motion and failed to assess any of the Civil Rule 26(b)(1) factors. Those factors are particularly relevant since, if Petitioners' appeal as of right is successful, WSDOT's desired testing will be completely irrelevant and WSDOT will have no basis whatsoever to enter the properties, but Petitioners will still have been damaged. *See Pulcino v. Fed. Ex. Corp.*, 94 Wn. App. 413, 426-27, 94 P.2d 522 (1999) (denying motion to compel since CR 26(b)(1) "allows the court to limit discovery").

WSDOT's demands for use and occupancy of the properties will be disruptive to the Tenant's business operations. As the Tenant explained, WSDOT's occupancy of the Montlake properties for several weeks of invasive and extensive testing, sampling, inspecting, and subsurface drilling will disrupt the businesses on the properties in a "meaningful way," as customers will be inconvenienced and sales will be lost. Appendix E, Baker Decl. ¶¶ 3-5. The trial court failed to even mention

these concerns in its Compel Order and therefore, it erred in granting WSDOT's motion to compel.

VII. CONCLUSION

Petitioners respectfully request that the Court reverse the Superior Court's Order Granting the State of Washington's Motion to Compel, strike the order pursuant to RAP 7.2, and prohibit WSDOT's requested two week invasive testing proposal unless and until WSDOT has acquired and paid for property rights to so use and possess the properties.

RESPECTFULLY SUBMITTED this 4th day of December, 2017.

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THE HONORABLE VERONICA ALICEA-GALVAN

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Petitioner,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; SCOTT IVERSON & BTF ENTERPRISES, INC. dba Montlake Boulevard Market; HORST KIESSLING, dba Hop in Christmas Trees; ANGELA ROSE STERLING dba Montlake Espresso; STC FIVE LLC, a Delaware limited liability company; CROWN CASTLE USA, INC., a Pennsylvania corporation; GLOBAL SIGNAL ACQUISITIONS III LLC, a Delaware limited liability company; NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company; SEATTLE SMSA LIMITED PARTNERSHIP, a Delaware limited partnership dba Verizon Wireless; SPRINT SPECTRUM L.P., a Delaware limited partnership; T-MOBILE USA, INC.; and KING COUNTY,

Respondents.

NO. 17-2-12389-7 SEA

ORDER ON SUPERSEDEAS AND CR 37 SANCTIONS

This matter came before the Court upon Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1, the State's Response to Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1 and Motion for CR 37 Sanctions, and the Court after considering these pleadings, along with the records and materials filed by the parties, and being fully advised, now therefore

IT IS ORDERED, ADJUDGED, AND DECREED:

1. Respondent Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1(b)(2) is with respect to the Order Adjudicating Public Use and Necessity is GRANTED. Trial on just compensation will be stayed.

2. Respondent Owners' Notice of Supersedeas Stay Pursuant to RAP 8.1(b)(2) with respect to the Order to Compel is GRANTED. The Court finds that the parties are not prohibited from conducting discovery in this matter in order to prepare for trial on just compensation.

3. The Court finds that Respondent Owners' posted bond of $5,000.00 is insufficient. Respondent Owners are ordered to post an additional bond of $1,000,000 forthwith.

4. The State's Motion for CR 37 Sanctions is DENIED.

DATED this 7th of December, 2017

JUDGE VERONICA ALICEA GALVAN
DEPT. 21

Presented by:

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No. 77644-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation, Petitioners.	EMERGENCY MOTION TO REVIEW SUPERSEDEAS DECISION AND GRANT STAY UNDER RAP 8.1(b)(3) AND RAP 8.3

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CASES

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OTHER AUTHORITIES

I. IDENTITY OF MOVING PARTY

Petitioners are owners of real property in Montlake that contains the longstanding Montlake Market and a gas station. The Washington State Department of Transportation ("WSDOT") has sought to condemn the properties and demolish those businesses as part of construction related to SR 520. Currently, Petitioners (hereinafter "Owners") are appellants in two matters before the Court. The first is Case No. 77359-3-1, which is the Owners' appeal after the trial court's order that WSDOT's plans satisfy public use and necessity. The second is Case No. 77644-4, which is the Owners' motion for discretionary review of the trial court's granting of WSDOT's motion to compel entry onto the properties for extensive subsurface drilling and site inspection following the trial court's order on use and necessity, even though the order on public use and necessity is pending on appeal, and even though WSDOT does not own the properties and has not paid any compensation for it.

As relevant here, the Owners sought a stay of the order on public use and necessity and posted bond. The trial court required an additional bond amount of $1 million. The order compelling entry is plainly unlawful and the bond amount is utterly arbitrary. Everything should have been stayed pending the appeal, which has been set on an extremely expedited

schedule already. The Owners seek relief as to the additional bond amount and when drilling may start.

II. STATEMENT OF RELIEF REQUESTED

1. Pursuant to RAP 8.1(h), the Owners ask the Court to review the trial court's Order on Supersedeas dated December 7, 2017 ("Bond Order"). The trial court abused its discretion by ordering the Owners to pay an additional $1 million bond to stay proceedings pending this Court's review of the merits of the trial court's order on public use and necessity. There is no legal or factual support for the $1 million amount in the Bond Order. An appropriate bond should compensate WSDOT for damages from rescheduling their drilling, which the Owners have already posted.

2. Pursuant to RAP 8.1(b)(3) and RAP 8.3, the Owners ask the Court to (1) stay the Owners' obligation under RAP 8.1(e) to post the additional $1 million bond pending a determination by this Court and (2) stay enforcement of the trial court's order granting WSDOT's motion to compel pending the motion for discretionary review before this Court, without requiring an additional bond in excess of the amount already posted by the Owners.

III. EMERGENCY REVIEW IS WARRANTED

Pursuant to RAP 17.4(b), the Owners respectfully request that the Court review this motion on an expedited basis because of the requirement under RAP 8.1(e) that the Owners post an additional $1 million bond within seven days of the trial court's decision ordering an additional bond. If the motion is decided in the normal course, the Owners could lose their supersedeas stay under RAP 8.1(b) and WSDOT could enter the properties to conduct subsurface drilling, inspection and site occupation. On December 14 at approximately 2:10 p.m., WSDOT was informed of the pending motion by email and was provided a courtesy copy. Declaration of David S. Steele In Support of Emergency Motion to Review Supersedeas, at ¶ 2.

IV. FACTS RELEVANT TO MOTION

A. The Trial Court Issues An Order on Public Use and Necessity

WSDOT seeks to condemn three separate, contiguous lots (the "Montlake Properties") for its SR 520 Rest of the West Project. Together, the Montlake Properties form a small commercial district at the southwest corner of Montlake Boulevard and SR 520 consisting of a small grocery store, a gas station, and a parking lot. After a hearing in August 2017, the trial court granted WSDOT's motion on public use and necessity on September 6. The Owners and respondent tenant BTF Enterprises, Inc.

("Tenant") appealed the trial court's order on September 8. That appeal is pending before the Court in Case No. 77359-3-1 and the briefing in that case fully sets forth the background to this proceeding.

B. WSDOT Seeks Invasive Testing for Valuation Purposes

On August 17—after the hearing on public use and necessity but before the trial court had issued its decision—WSDOT requested entry onto the Montlake Properties "for purposes of inspecting, measuring, surveying, photographing, testing, and/or sampling the property, [and] for purposes of evaluating the impacts of the State's project on the subject property." Mot. Disc. Rev., App. B at 2.[1] WSDOT requested expansive access: September 15 through September 25 from 10:00 p.m. until 6:00 a.m. each day. *Id.* The Owners and Tenant each objected to the access and testing. *Id.*, App. I at 2.

On September 20, WSDOT served an Amended Civil Rule 34 Request for Entry Onto Land For Inspection. *Id.*, App. C. The amended request expanded the scope and duration of WSDOT's original request: WSDOT sought entry to the Montlake Properties for over two weeks, from November 15 through November 30, for eight hours per day, for subsurface boring. *Id.* WSDOT's proposed subsurface boring would

[1] The Appendices for this section were included with the motion for discretionary review filed on December 4, 2017, and are included as Appendix 4 to this motion.

require cutting through paved surfaces, drilling through soil and bedrock beneath the site, removing samples from the bored holes, and filling the holes with bentonite, crushed rock, and re-paving. *Id.* The holes would be six to twelve inches in diameter and up to 70 feet in depth. WSDOT also requested that it be permitted to unload and store drill rigs and equipment on the properties during the drilling periods. *Id.*

In addition to subsurface boring, WSDOT requested permission to conduct a "separate and distinct inspection" of the interior and exterior of the structures on the properties, and examining the site conditions, including taking samples to verify the presence of "asbestos containing materials (ACM), lead-containing paint (LCP), and polychlorinated biphenyls (PCBs) and/or mercury containing equipment." *Id.*

WSDOT requested these investigations for the sole purpose of obtaining valuation evidence relevant to just compensation. *Id.*, App. D, at 3, 6-7.

On October 10, WSDOT moved to compel entry. *Id.*, App. D. The Owners and Tenant objected that the trial court did not have jurisdiction to authorize the requested discovery under RAP 7.2, and that during an eminent domain proceeding, a trial court cannot authorize discovery on valuation before a final determination of public use and necessity. *Id.*, App. E. The Owners and Tenant also argued that WSDOT's demand for

more than two weeks of uncompensated use and occupancy of the properties for equipment storage, subsurface boring and other testing would be an unconstitutional taking and violate the scope of discovery under Civil Rule 26(b)(1). *Id.*

On October 19, the trial court summarily granted WSDOT's motion to compel ("Compel Order"). *Id.*, App. A at 2. Following the Compel Order, on November 13, the Owners filed notice of a supersedeas stay pursuant to RAP 8.1 by posting a $5,000 bond. Appendix 1. On November 20, WSDOT responded to the Owners' notice of supersedeas stay arguing that the bond amount should be "between $12.7 million to $26.4 million dollars." Appendix 2 at 11. On November 29, the Owners objected to WSDOT's proposed bond amount. Appendix 3. On December 4, the Owners and Tenant filed a motion for discretionary review before this Court asking that the Court reverse the Compel Order (Case No. 77644-4). Appendix 4. On December 7, the trial court granted the Owners' supersedeas stay but ordered that the Owners post an additional $1 million bond. Appendix 5.

V. GROUNDS FOR RELIEF AND ARGUMENT

The trial court's requirement of an additional $1 million bond was an abuse of discretion because there is no evidence in the record justifying this amount and because the trial court erroneously applied the applicable

law. In addition, pursuant to RAP 8.1(b)(3) and RAP 8.3, the equities warrant a stay of the Bond Order pending review and a stay of the Compel Order pending a determination on the motion for discretionary review.

A. The Trial Court Abused Its Discretion By Requiring An Additional $1 Million Bond

This Court reviews a trial court's supersedeas bond decision for abuse of discretion. *IBEW Health & Welfare Tr. of Sw. Wash. v. Rutherford*, 195 Wn. App. 863, 866, 381 P.3d 1221, 1223 (2016). Under that standard, a reviewing court will find error when the trial court's decision (1) adopts a view that no reasonable person would take; (2) rests on facts unsupported in the record and is based on untenable grounds; or (3) applies the wrong legal standard or rules for untenable reasons. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal citations omitted). Here, the trial court abused its discretion in setting an additional $1 million bond because it did not provide any explanation of the amount, did not support that amount with any record evidence, and based its determination on an erroneous application of the law.

1. The trial court did not provide any explanation or rationale justifying the Bond Order

At the outset, it is impossible to ascertain the basis of the Bond Order because there is no explanation by the trial court justifying its ordered bond amount. *See Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704,

707-11, 592 P.2d 631 (1979) (trial courts must provide findings sufficient to "inform the appellate court, on material issues, what questions were decided by the trial court, and the manner in which they were decided") (internal citations omitted); *HTK Mgmt., L.L.C. v. Rokan Partners*, 139 Wn. App. 772, 783, 162 P.3d 1147 (2007) (ordering remand where the trial court failed to provide adequate rationale explaining an attorneys' fee award). Under RAP 8.1(e), when a party objects to the sufficiency of a bond, the trial court must make a determination as to whether the bond amount is inadequate. Because the trial court provided no explanation or rationale supporting its determination (*see* Appendix 5), its decision was an abuse of discretion as it is impossible for the Owners to understand the basis for the bond amount.

As it stands, $1 million is simply an arbitrary amount as neither party asked for a $1 million bond or provided any evidence supporting a $1 million bond. Indeed, in its opposition to the Owners' supersedeas bond, WSDOT took an even more extreme position arguing that because of the alleged delays associated with the Owners' appeal on public use and necessity, that its damages are between $12.7 million to $26.4 million. Appendix 2 at 10-11. As the trial court apparently agreed, WSDOT's position lacks merit.

The Owners are not legally obligated to compensate WSDOT for all conceivable cost increases WSDOT might attribute to the Owners' appeal as a matter of right under RAP 2.2(4). Appendix 3 at 11-12. WSDOT cannot claim damages because it is unable to move forward on a project it does not yet have legal authority to pursue because of timely legal challenges. Indeed, the steps to a condemnation proceeding are a necessary part of the acquisition process. *Pub. Util. Dist. No. 1 of Chelan Cty. v. Wash. Water Power Co.*, 43 Wn.2d 639, 641, 262 P.2d 976 (1953). The process is entirely constitutional, statutory, and mandatory. Wash. Const., Art. I, Section 16 (Amend. 9); RCW 8.04.070, .080; *Pelley v. King Cy.*, 63 Wn. App. 638, 641, 821 P.2d 536 (1991); *see also* RCW 8.12.090. Under RAP 7.2, the trial court cannot even conduct a trial on valuation or formally transfer title until after a final decision on public use and necessity occurs. Thus, any milestones set by WSDOT for the SR 520 project that may require modification due to the appeal have no bearing on the Owners and do not trump their rights, nor can WSDOT claim damages stemming such schedule modifications. Appendix 3 at 11-12.

If the trial court based its $1 million bond on a portion or percentage of the costs stemming from the alleged delays claimed by WSDOT from the appeal (which is impossible to tell), this would effectively be punishing the Owners for exercising their appeal rights and

would act as a practical bar against all such stays. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995) ("The imposition of a penalty for the exercise of a defendant's legal rights violates due process."). Accordingly, if the trial court somehow based its Bond Order on the above, it constituted an abuse of discretion and should be reversed.

In sum, there is no factual basis supporting the trial court's determination that a $1 million bond is appropriate and therefore its decision was an abuse of discretion and should be reversed.

2. The Bond Order appears to be based on an erroneous application of the law

RAP 8.1(c)(2) sets forth the general standard for a supersedeas bond associated with a stay of a decision affecting real property:

> The supersedeas amount shall be the amount of any money judgment, plus interest likely to accrue during the pendency of appeal and attorney fees, costs and expenses likely to be awarded on appeal entered by the trial court plus the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review. Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review.

In requiring an additional $1 million bond, there is no indication that the trial court complied with RAP 8.1(c)(2). To comply with RAP 8.1(c)(2), the trial court would ordinarily need to demonstrate that $1 million is "equal to the reasonable value of the use of the property during review." As explained above, there is no evidence in the record supporting such a determination as neither party offered evidence that the reasonable value of the use of the Montlake Properties during review is $1 million.

In any event, calculating the value of the bond based on the value of the property during the duration of the appeal is inappropriate here. Appendix 3 at 9-10. This is not a case where the prevailing party has rights to real property and is being deprived of those rights because of an appeal. *See, e.g.*, *Norco Cons., Inc. v. King Cty.*, 106 Wn.2d 290, 721 P.2d 511 (1986) (developer entitled to damages where denied ability to develop its property because of illegal delays by King County). Here, as WSDOT concedes, it has no property rights in the Montlake Properties. The purpose of a supersedeas bond is to preserve the status quo between the parties. *Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 498 (2017) (citations omitted). The trial court's exorbitant bond disrupts the status quo because instead of requiring WSDOT to compensate the Owners for occupying and using their property, the Bond Order improperly requires the Owners to post a

$1 million bond to preserve their own property rights—effectively flipping the parties' rights on their head.

Further, WSDOT cannot claim damages for being denied the ability to conduct discovery on the Montlake Properties because it has no right to enter and access the Montlake Properties during the pendency of the appeal on public use and necessity. Appendix 3 at 11-12. Until a final determination on public use and necessity has been made, the trial court does not have jurisdiction to authorize discovery on the next stage of an eminent domain proceeding. *Pub. Util. Dist. No. 1 of Chelan Cty.*, 43 Wn.2d at 641 (a completed action of eminent domain requires the entry of three separate and distinct judgments during the course of the proceeding—public use and necessity, valuation, and transfer of title); *State ex rel. Wash. v. Allerdice*, 101 Wn. App. 25, 31, 1 P.3d 595 (2000) ("An [order on public use and necessity] entered by the trial court is interlocutory and appealable as a matter of right. *Therefore, an [order on public use and necessity] cannot be legally effective until the appeal is resolved*.") (emphasis added). The court abused its discretion by ordering an unreasonable bond where there are no compensable losses associated with WSDOT simply being unable to conduct its desired subsurface drilling, inspection, and site occupation when it has no right to do so.

At most, if the trial court were to impose a bond requirement based on the value of the use of the property, the value would be based on the duration of WSDOT's desired occupation of the properties, which for fifteen days of rent would be $34,109.59. Appendix 3 at 10. However, given that WSDOT has no rights in the properties, the $5,000 bond posted by the Owners as an estimate of the costs WSDOT would incur as relating to the mobilization and demobilization of its drilling operations is a more appropriate estimation of the actual damages incurred by WSDOT and the Owners request that the Court enter this amount.[2] Appendix 3 at 10.

Regardless, there is no legal basis supporting the Bond Order and it grossly exceeds even a reasonable range of what the bond should be and thereby constitutes an abuse of discretion.

B. A Stay of Trial Court Proceedings Is Appropriate Pending Review By This Court Under RAP 8.1(b)(3) and RAP 8.3

Pursuant to RAP 8.1(b)(3) and RAP 8.3, the Owners request that this Court issue two stays pending review by this Court: First, under RAP 8.1(e), if a trial court determines that an additional bond amount is required, the party seeking the stay must post the supplemental bond

[2] WSDOT maintains that its actual damages for rescheduling the testing are actually around $35,000. If the Court agrees with this amount, the Owners would be willing to post this amount, secured by the Montlake Properties pursuant to RAP 8.1(c)(2) ("If the property at issue has value, the property itself may fully or partially secure any loss and the court may determine that no additional security need be filed or may reduce the supersedeas amount accordingly."). Appendix 3 at 10.

within seven days of the court's order requiring the additional security. Here, the trial court issued the Bond Order on December 7 meaning the Owners would be required to post the $1 million bond by December 14. Accordingly, the Owners request that the Court stay proceedings pending its determination on the Bond Order. Second, the Owners request that this Court stay enforcement of the trial court's Compel Order pending a determination of the motion for discretionary review as to whether the trial court had the authority to authorize WSDOT's subsurface drilling and over two-week site occupation.

Together, RAP 8.1(b)(3) and RAP 8.3 authorize this Court to stay enforcement of an order on terms that are just. As RAP 8.3 provides, "the appellate court has authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party." Stays pending appeal are appropriate when "the issue presented by the appeal is debatable and . . . [if] a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation." *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). As this Court explained in *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 716 P.2d 956 (1986):

> In actual application of this theory, courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the

> appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit. . . . Consideration of the equities of the situation may also require conditioning the stay on the posting of a bond or the provision for some other form of security.

Id. at 291-92. Here, under either RAP 8.1(b)(3) or RAP 8.3, the equities warrant a stay of both the Bond Order and the Compel Order until a determination by this Court occurs.

As to the Bond Order, requiring the Owners to post a $1 million bond would be entirely unnecessary if this Court determines that the trial court abused its discretion in ordering this amount. And, WSDOT cannot claim any injury by not having the bond amount posted now, pending a determination by this Court. Under RAP 8.1(b)(3) and RAP 8.3, a stay of the Bond Order is appropriate, pending review.

As to the Compel Order, as set forth in the motion for discretionary review, without property rights and without the payment of just compensation to the Owners, the Compel Order grants WSDOT the right to conduct invasive subsurface drilling and an over two-week site occupation to conduct other testing and inspections. As stated in the motion for discretionary review, the Compel Order (1) is procedurally improper under RAP 7.2 because trial courts do not have the authority

pending appeal to issue discovery orders; (2) exceeds the authority granted to WSDOT in RCW 47.01.170 as the statute does not authorize invasive subsurface drilling; (3) amounts to an impermissible taking without just compensation; and (4) exceeds the bounds of reasonable discovery under Civil Rule 26(b). Appendix 4. These are significant jurisdictional questions, some of which may be issues of first impression under Washington law.

The Owners and Tenant have each testified how WSDOT's desired testing will harm the properties and the businesses. *Id.* at 3-5, 17-19. If this Court reverses the order on public use and necessity, WSDOT will have no basis whatsoever to enter the properties or conduct its desired testing, yet the Owners and Tenant will have been unnecessarily harmed by the invasive testing and site occupation. *Id.* at 19. In order to evaluate whether WSDOT's site entry impermissibly violates the Owners' and Tenant's rights *before* entry, the equities weigh in favor of staying the Compel Order pending a determination as to its validity. Considering a hearing on the motion for discretionary review is set for January 19, 2018, any harm to WSDOT is negligible, particularly considering the burden on the Owners and Tenant.

Finally, because WSDOT has no rights to the Montlake Properties, the Owners request that should the Court grant a stay of the Bond Order

and the Compel Order pending the motion for discretionary review, that no bond or security be entered beyond the $5,000 already posted by the Owners.

VI. CONCLUSION

For the reasons set forth above, the Owners respectfully request that this Court reverse the trial court's requirement of an additional $1 million bond as well as stay enforcement of the Bond Order and the Compel Order pending review by this Court.

Respectfully submitted this 14th day of December, 2017.

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CASE #: 77644-4-I
State of Washington, Respondent v. Montlake LLC and Stelter Montlake LLC, Petitioners

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on January 19, 2018:

As discussed at oral argument today, supplemental briefing is warranted to address the question of whether any bond is required and the meaning/applicability of RCW 8.04.150. The briefs are limited to five pages and are due February 2, 2018.

The temporary stay remains in place.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation; T-MOBILE USA, INC., MONTLAKE COMMUNITY CLUB, Appellants, SCOTT IVERSON & BTF ENTERPRISES, INC. dba Montlake Boulevard Market; HORST KIESSLING, dba Hop in Christmas Trees; ANGELA ROSE STERLING dba Montlake Espresso; STC FIVE LLC, a Delaware limited liability company; CROWN CASTLE USA, INC., a Pennsylvania corporation; GLOBAL SIGNAL ACQUISITIONS III LLC, a Delaware limited liability company; NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company; SEATTLE SMSA LIMITED PARTNERSHIP, a Delaware limited partnership dba Verizon Wireless; SPRINT SPECTRUM L.P., a Delaware limited partnership; and KING COUNTY, Defendants.	No. 77359-3-I DIVISION ONE UNPUBLISHED OPINION FILED: April 30, 2018

LEACH, J. — The Montlake Community Club (MCC) and the owners and lessees of three lots (Montlake) appeal the trial court's order of public use and necessity and two related orders. They challenge the adequacy of the project's environmental assessment, the necessity of taking these three lots, compliance with legislative direction, and the authority of the individual who selected these properties for taking. Because substantial evidence supports the trial court's factual findings and those findings support its legal conclusions, we affirm.

FACTS

In 2006, the legislature provided the Washington State Department of Transportation (WSDOT) with directions for several "Mega-Projects," including the SR 520 Bridge Replacement and HOV[1] Program ("Project").[2] This Project involves the replacement of a floating bridge across Lake Washington spanning from Medina to Montlake. WSDOT divided the project into segments and named the final construction segment the Rest of the West. It extends from the Montlake area to I-5.

As the first step of a two-step process to construct the Rest of the West, WSDOT will build the Montlake Phase. This extends from the floating bridge

[1] High occupancy vehicle lane.

[2] RCW 47.01.380, .390, former .405. The legislature repealed former RCW 47.01.405 in 2017. LAWS OF 2017, 3d Spec. Sess., ch. 25 § 39. Former RCW 47.01.405 required the office of financial management to hire a mediator to develop an SR 520 project impact plan. It required the mediator to provide periodic reports to the joint transportation committee and the governor and submit a final project plan by December 1, 2008.

structure to the Montlake neighborhood. This case involves WSDOT's effort to condemn three lots located in a small commercial district at the southwest corner of Montlake Boulevard and SR 520: the Montlake 76 Gas Station with T-Mobile's wireless facility located on the roof, the Montlake Boulevard Market (Market), and a vacant parking lot ("Properties").

The Project requires that WSDOT work in cooperation with the Federal Highway Administration (FHWA). To comply with the National Environmental Policy Act (NEPA),[3] and the Washington State Environmental Policy Act (SEPA),[4] FHWA published the Final Environmental Impact Statement (FEIS) for the Project in June 2011. In August 2011, FHWA issued its Record of Decision (ROD) describing the Project's Selected Alternative.

During construction, WSDOT made design changes that differed from the Selected Alternative. These changes included WSDOT's decision to acquire, but not condemn, the Properties. Federal regulations interpreting NEPA require that an agency provide a supplemental environmental impact statement (EIS) whenever it makes changes that would result in "significant environmental impacts" not evaluated in the FEIS.[5]

In October 2016, FHWA and WSDOT prepared a Reevaluation incorporating the design changes. Because the Reevaluation concluded that

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[3] 42 U.S.C. § 4321.
[4] Ch. 43.21C RCW.
[5] 23 C.F.R. § 771.130(a)(1).

these changes would not result in significant environmental impacts not evaluated in the FEIS, WSDOT and FHWA did not issue a supplemental EIS. Neither Montlake nor MCC contests the sufficiency of any NEPA required document, including the Reevaluation.

On May 16, 2017, WSDOT filed a lawsuit seeking to condemn the Properties. On May 19, 2017, it filed a motion for an order adjudicating public use and necessity (PUN). In June 2017, Montlake asked for oral argument and live witness testimony with cross-examination at the hearing on WSDOT's PUN motion. In July 2017, the trial court granted MCC's request to intervene. After a hearing, the trial court granted WSDOT's PUN motion and entered two related orders addressing an environmental issue and the authority of the program administrator. Montlake and MCC appeal all three orders.

ANALYSIS

"The power of eminent domain is an inherent attribute of sovereignty."[6] Our state constitution limits this power and requires that a court decide if the contemplated use is really public.[7] The condemning authority bears the burden of proving public use and necessity.[8] It must prove (1) the use of the

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[6] 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).

[7] Miller v. City of Tacoma, 61 Wn.2d 374, 382-83, 378, P.2d 464 (1963).

[8] NAFTZI, 159 Wn.2d at 566.

appropriated property is public, (2) the public interest requires this public use, and (3) condemning the property is necessary for the public interest.[9]

The need for the property does not have to be "absolute, or indispensable, or immediate" but must be "[r]easonabl[y] necess[ary] for use in a reasonable time."[10] "A declaration of necessity by a legislative body is 'conclusive'" unless the challenger meets its burden to show "'proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.'"[11] "'To establish constructive fraud [the challenger] must show willful and unreasoned action without consideration and regard for facts or circumstances.'"[12]

Here, Montlake and MCC challenge the trial court's decision that condemnation of the Properties is reasonably necessary for the construction of the Project on four grounds:

1. The trial court and WSDOT did not adequately consider the environmental impacts of the Project;
2. Taking the Properties is not reasonably necessary to build the Project;

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[9] HTK Mgmt., LLC v. Seattle Popular Monorail Auth., 155 Wn. 2d 612, 629, 121 P.3d 1166 (2005).

[10] City of Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).

[11] NAFTZI, 159 Wn.2d at 575-76 (quoting Seattle Popular Monorail Auth., 155 Wn.2d at 629).

[12] Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wn.2d 403, 437, 128 P.3d 588 (2006) (quoting In re Port of Seattle, 80 Wn.2d 392, 398, 495 P.2d 327 (1972)).

3. The Secretary of Transportation improperly delegated authority to select the Properties for condemnation; and
4. WSDOT did not satisfy the Mega-Project requirements established by RCW 47.01.380, RCW 47.01.390, and former RCW 47.01.405 (2007).

The legislature delegated to WSDOT the power to determine which limited access rights it needs to acquire, by condemnation or otherwise, to construct and maintain state highways.[13] WSDOT's determination of necessity is therefore conclusive unless Montlake or MCC proves that it was fraudulent or arbitrary and capricious amounting to constructive fraud.

The trial court upheld WSDOT's necessity determination and determined that its condemnation decision was not arbitrary and capricious to the point of constructive fraud. We review Montlake's and MCC's challenges to the trial court's findings to determine whether substantial evidence supports them.[14] We view substantial evidence in the light most favorable to the respondent.[15] "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."[16] We accept unchallenged findings

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[13] RCW 47.12.010.
[14] Petters v. Williamson & Assocs., Inc., 151 Wn. App. 154, 163, 210 P.3d 1048 (2009).
[15] NAFTZI, 159 Wn.2d at 576.
[16] Petters, 151 Wn. App. at 163.

of fact as true on appeal.[17] We review questions of law and the trial court's conclusions of law de novo.[18]

The Trial Court Adequately Assessed the Environmental Impact of the Project

A. WSDOT's Consideration of the Project's Environmental Impacts Does Not Show That Its Condemnation Decision Was Arbitrary and Capricious Amounting to Constructive Fraud

Both Montlake and MCC claim that WSDOT did not give due consideration to the environmental impacts of the Properties' condemnation, making its condemnation determination arbitrary and capricious amounting to constructive fraud. They rely on State v. Brannan,[19] where our Supreme Court stated that whether the condemning authority gave "due consideration" to the environmental impacts of the project is "relevant" to whether it acted "fraudulently or so arbitrarily and capriciously as to amount to constructive fraud." Brannan explained that the condemning authority should view the impact on the environment "from the standpoint of the entire project and not on a segment-by-segment basis."[20] This inquiry is independent of whether the condemning authority satisfied its obligations under NEPA and SEPA.[21]

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[17] The-Anh Nguyen v. City of Seattle, 179 Wn. App. 155, 163, 317 P.3d 518 (2014).

[18] Nguyen, 179 Wn. App. at 163, 172.

[19] 85 Wn.2d 64, 75, 530 P.2d 322 (1975).

[20] Brannan, 85 Wn.2d at 75.

[21] Brannan, 85 Wn.2d at 74-75 (explaining that even though the parties could not raise collaterally the sufficiency of the EIS in the current condemnation proceeding, the lower court could consider whether the condemning authority gave due consideration to the environmental effects of the project).

As a preliminary matter, Montlake and MCC claim that the NEPA Reevaluation standing alone does not show that WSDOT gave due consideration to the condemnation's environmental impacts. They note that although the Reevaluation concluded that the revised project plans would not cause significant adverse environmental impacts beyond those evaluated in the FEIS, it only considered closing the Gas Station and limiting access to the Market. The Reevaluation did not consider whether any additional environmental impacts caused by condemning the Market would require a supplemental EIS. When FHWA and WSDOT issued the Reevaluation, WSDOT had decided only to acquire the Properties as opposed to condemn them. Although the Reevaluation provides evidence that WSDOT considered the environmental impacts of the Project as a whole, it does not show that it considered the specific impacts of the Properties' condemnation.

MCC asserts that substantial evidence does not support the trial court's findings that WSDOT adequately considered the Project's environmental impacts, which support its conclusion that WSDOT's condemnation decision was not arbitrary and capricious amounting to constructive fraud. We disagree.

First, MCC claims that WSDOT failed to evaluate the transit-related impacts of the Market's closure. But WSDOT did consider how increased traffic congestion could affect community members' ability to access other markets.

Denise Cieri, deputy program administrator for the Project, testified that there are 58,000 daily trips on Montlake Boulevard. When asked if WSDOT considered that closing the Market might add up to 800 new vehicle trips per day on Montlake Boulevard, Cieri stated in her deposition, "I think it was recognized that if [Montlake] [M]arket 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." Thus, WSDOT considered the issue. In addition, consistent with the State's position, 800 more vehicles would produce a 1.38 percent increase in traffic on Montlake Boulevard. The ROD states that only a traffic increase of 5 percent or more could result in measureable changes. WSDOT's failure to consider a nonmeasurable increase in congestion on Montlake Boulevard does not undermine the trial court's findings.

Second, MCC claims that substantial evidence does not support the trial court's finding that "WSDOT fully considered the adverse impacts to Montlake neighborhood residents upon closure of the Montlake Market, and balanced these impacts with the public's need to reduce traffic congestion through the SR 520 corridor." But, as the State claims, WSDOT did consider how the Market's closure would impact the community and, consistent with Brannan, extensively considered the environmental impacts of the Project as a whole.

Cieri testified about WSDOT's awareness of the community's strong opposition to its condemnation decision. She explained, "[R]ather than impact a historic neighborhood on the other side of the road, it makes more sense to have an additional impact to this property. Impacting a historic neighborhood would be extraordinarily difficult, as well as require quite a lot of environmental evaluation." WSDOT also balanced the desires of Montlake residents to keep their walking-distance market with the ability of the nonmotorized community to access more streamlined transportation facilities. WSDOT and counsel from the Office of the Attorney General reviewed the Properties' owners' objections to the condemnation before selecting the Properties for condemnation. Cieri also explained WSDOT's need to accommodate the 58,000 daily trips on Montlake Boulevard during construction.

Further, the Project as a whole has undergone significant environmental review. The federal district court upheld the adequacy of the over 1,000-page FEIS detailing the environmental impacts of the Project.[22] Cieri also testified about the Seattle design process in which WSDOT worked with the City and SR 520 neighborhoods to address City and community concerns. WSDOT's consideration of the environmental impacts of both condemning the Properties

[22] Coal. for a Sustainable 520 v. U.S. Dep't of Transp., 881 F. Supp. 2d 1243, 1258-59 (W.D. Wash. 2012) (court order) (upholding the validity of the FEIS and the ROD and rejecting challengers' claims that the FEIS did not adequately analyze the adverse environmental impacts or consider alternatives).

and of the entire project support the trial court's findings that WSDOT considered the adverse impacts to the Montlake neighborhood of the Market's closure and did not select the Properties in an arbitrary and capricious manner amounting to constructive fraud.

In addition to MCC's arguments, Montlake contends that WSDOT's condemnation decision was arbitrary and capricious because it ignored policies that it could have relied on to reduce the potential environmental impacts of the Project. First, it claims that WSDOT did not follow its Design-Build Guidebook. But unlike administrative rules and formally promulgated agency regulations, internal policies do not have the force of law unless they are the equivalent of liability-creating administrative rules.[23] Here, because WSDOT did not formulate its policies in the Guidebook in response to legislative delegation, these policies do not have the force of law.[24] WSDOT's failure to follow its Guidebook does not undermine the trial court's findings.

Second, Montlake claims that WSDOT ignored the Project's stated purposes in the ROD. The Project's purposes includes improved mobility for people and goods from Seattle to Redmond, cost efficiency, and minimized impacts on affected neighborhoods and the environment. Although WSDOT is

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[23] Joyce v. Dep't of Corr., 155 Wn.2d 306, 323, 119 P.3d 825 (2005).

[24] Joyce, 155 Wn.2d at 323 (holding that "because the Department [of Corrections'] policy directives are not promulgated pursuant to legislative delegation, they do not have the force of law").

not required to satisfy every enumerated purpose in the ROD, the above discussion illustrates that WSDOT has acted consistently with the Project's stated purpose. Montlake does not show that WSDOT's condemnation decision was arbitrary and capricious because it allegedly ignored select policies.

B. The Trial Court Correctly Found That SEPA Did Not Apply to the State's PUN Motion

Montlake challenges the trial court's conclusion that SEPA did not apply to WSDOT's PUN motion. SEPA requires state agencies to include in every proposal for "major actions significantly affecting the quality of the environment, a detailed statement . . . on . . . the environmental impact of the proposed action [and] any adverse environmental effects which cannot be avoided" among other environmental-related factors.[25] But RCW 43.21C.135 allows an agency that prepares an "adequate detailed statement" that satisfies NEPA to use it in lieu of the EIS that SEPA requires and exempts the agency from satisfying SEPA's requirements.[26] This means that a project does not need a SEPA EIS when it has an EIS that satisfies NEPA. Because a federal district court upheld the validity of the FEIS under NEPA[27] and the sufficiency of the FEIS was not at

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[25] RCW 43.21C.030(2)(c)(i), (ii).

[26] RCW 43.21C.150; Boss v. Dep't of Transp., 113 Wn. App. 543, 550, 54 P.3d 207 (2002); see also Coal. for a Sustainable 520, 881 F. Supp. 2d at 1260 ("Washington courts have held that an EIS which is sufficient to meet NEPA may also be used to satisfy SEPA requirements as long as notice provisions have been met.").

[27] Coal. for a Sustainable 520, 881 F. Supp. 2d at 1261-62.

issue, the trial court correctly decided that SEPA did not apply to WSDOT's PUN motion.

C. The Trial Court Did Not Abuse Its Discretion by Making Select Evidentiary Rulings Related to the Environmental Impacts of the Project

MCC also challenges the trial court's decision to exclude nontransit-related evidence of the condemnation's environmental impacts and testimony from Cieri about whether the Reevaluation was subject to independent review. We review evidentiary challenges for an abuse of discretion.[28] "A trial court's decision on excluding evidence will be reversed only where it was based on untenable grounds or reasons."[29]

First, MCC asserts that the trial court should have allowed evidence of nontransit-related impacts because this evidence was relevant to whether WSDOT acted arbitrarily and capriciously. Because the portion of the record that MCC cites does not show that it offered this evidence, we decline to review this claim.

Second, MCC claims that whether a person or entity independent of WSDOT had reviewed the Reevaluation was relevant to whether WSDOT's decision to condemn the Properties was arbitrary and capricious because it inadequately assessed environmental impacts. But a court could reasonably

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[28] Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 766, 389 P.3d 517 (2017).

[29] Taylor, 187 Wn.2d at 766.

view this information as irrelevant because the sufficiency of the Reevaluation was not at issue. We thus reject MCC's evidentiary challenges.

WSDOT Established That Condemnation of the Properties Was Necessary

Montlake asserts that substantial evidence does not support the trial court's findings that condemnation of the Properties is necessary for construction of the Montlake Phase and that WSDOT's necessity determination is not arbitrary and capricious to the point of constructive fraud. We disagree.

As another preliminary matter, Montlake did not support its assignments of error to findings 1.18 through 1.21 with legal argument in its opening brief and thus waived these claims. "An appellate court will not consider a claim of error that a party fails to support with legal argument in [its] opening brief."[30] Findings of fact 1.18 through 1.21 state that WSDOT introduced evidence establishing that it needed to condemn the Properties to construct a shared-use bicycle and pedestrian path for the public, to integrate highway grade changes into the surrounding streets and adjacent properties, and to provide necessary right-of-way for the design-builder to shift traffic during construction of the new Montlake Boulevard, its approach to the Interchange/SR 520 Bridge, and the new 54-inch waterline to the east of Montlake Boulevard. Because Montlake does not provide

[30] Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845, 347 P.3d 487 (2015) (citing Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 486, 334 P.3d 1120 (2014)); RAP 10.3(a)(6).

legal argument in its opening brief to support its challenges to these findings, it has waived these claims.

A. Substantial Evidence Supports That Condemning the Properties Is Necessary To Complete the Montlake Phase

Montlake challenges the sufficiency of the evidence supporting the trial court's finding that WSDOT established its need to condemn the Properties by showing condemnation would reduce the financial risk associated with potential relocation of the King County combined sewer line. Montlake claims that because Cieri testified that relocation of the sewer is "highly unlikely," taking the Properties to accommodate the sewer relocation is not reasonably necessary for use in a reasonable period of time and is thus unnecessary. Montlake, however, does not address WSDOT's need for the Properties to reduce the project's financial risk in the event that WSDOT does not need to relocate the sewer or the numerous reasonably necessary uses for the Properties Cieri described in her testimony.

Consistent with the State's argument, regardless of whether WSDOT determines that it must actually replace the sewer line, it must acquire the Properties to construct the Project designs and accommodate the surrounding community in a cost effective manner; Cieri testified that if WSDOT were unable to acquire the Properties there would not be "enough right-of-way to have a buildable project." First, if WSDOT needs to replace the sewer line located north

of the Properties, Cieri testified that it would need to dig a pit where the gas station is currently located and make an access drive on what is the Market's parking lot. Alternatively, if WSDOT does not replace the sewer pipe, it will use the "protect-in-place" method, which requires that WSDOT "build around it and do[es]n't harm it." As a result, the Properties would not be at grade with the surrounding SR 520 ramps and Montlake Boulevard, which means WSDOT would need to raise the Properties to the new grade.

Further, Cieri described the need to condemn the Properties to improve nonmotorized transportation routes and provide pedestrians and bicyclists a more direct route from the Properties to the Portage Bay area. She stated that through the Seattle design process WSDOT learned that the nonmotorized community prioritizes accessibility and "those attractive routes." In addition, Cieri explained that when WSDOT reconstructs the portion of Montlake Boulevard next to the Properties, it would need to shift traffic onto the Properties to provide sufficient workspace for the contractor and accommodate the large volume of traffic. She stated that construction of the new City waterline located east of the Properties would also necessitate the shifting of traffic onto the Properties.

In addition to providing a more direct route for the nonmotorized community and shifting traffic, Cieri explained that WSDOT needs to use the Properties as a staging area. She explained that Montlake is a historic

neighborhood and a heavily built-up area where very little empty land remains. She characterized the Properties as valuable for staging because they are flat, have access to highway on- and off-ramps and the streets on all sides, and easily allow trucks to move in and out. Even if WSDOT obtained the Montlake Properties for staging, Cieri testified that she could not guarantee that she would not need more property for staging. Cieri's testimony supports the trial court's findings that condemning the Properties is necessary to allow WSDOT to complete the Project.

B. Substantial Evidence Supports That WSDOT's Necessity Determination Was Not Arbitrary and Capricious Amounting to Constructive Fraud

Montlake also challenges the sufficiency of the evidence supporting the trial court's findings that WSDOT's condemnation decision was not arbitrary and capricious amounting to constructive fraud. Montlake contends that WSDOT's condemnation decision constitutes constructive fraud for three reasons: WSDOT allegedly improperly used the larger parcel analysis in selecting the Properties for condemnation, it allegedly did not follow its Right of Way Manual ("Manual"), and it changed its position about its need for the Properties for staging.

1. Larger Parcel Analysis

First, Montlake claims that the trial court erred in holding that WSDOT's use of "larger parcel" analysis to select the Properties for condemnation was not proof of arbitrary and capricious conduct. Montlake asserts that "larger parcel"

analysis is a just compensation concept that WSDOT cannot use to avoid establishing an individual need for each of the three parcels that comprise the Properties. Montlake also claims that WSDOT's larger parcel analysis is legally and factually flawed because the Properties do not constitute a "larger parcel."[31] "Larger parcel" analysis is, in fact, used to determine just compensation.[32] But Montlake does not cite legal authority to support its proposition that an agency cannot consider the cost of the property when making a condemnation determination. In fact, a condemning authority should consider the cost of condemnation in a project funded by taxpayer dollars.

In HTK Management, LLC v. Seattle Popular Monorail Authority,[33] our Supreme Court explained that an agency may consider the cost of a temporary versus a permanent acquisition when making the decision to condemn: "It is significant [when] cost of the temporary construction easement combined with likely cost of damages due to a ground lessee could eclipse the cost of a fee interest." Because larger parcel analysis informs an agency's evaluation of the cost of the properties at issue, a court could reasonably interpret its application as relevant to an agency's condemnation decision as the trial court did here.

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[31] State v. McDonald, 98 Wn.2d 521, 526-27, 656 P.2d 1043 (1983) (requiring unity of ownership, unity of use, and contiguity to establish a single tract for purposes of compensation).

[32] McDonald, 98 Wn.2d at 526-27.

[33] 155 Wn. 2d 612, 638, 121 P.3d 1166 (2005).

2. Right of Way Manual

Next, Montlake asserts that WSDOT's alleged failure to follow its Manual amounted to constructive fraud. But consistent with the State's argument, Montlake mistakes the Manual's discretionary guidelines for mandatory procedures. As discussed above, because WSDOT did not formulate its internal policies in response to legislative delegation, these policies do not have the force of law.[34] WSDOT's alleged failure to follow its Manual does not prove that its condemnation decision was arbitrary and capricious.

3. Iterative Design Changes

Last, Montlake claims that WSDOT's condemnation decision was arbitrary and capricious because WSDOT changed its position about its need to use the Properties for staging. During a public presentation in December 2016, WSDOT stated that it would not need the Properties for staging. Later, it justified selecting the Properties for condemnation, in part, by claiming that it did need the Properties for staging. The trial court found, however, that "[i]terations of project design are not evidence of arbitrary or capricious conduct amounting to constructive fraud." Because Montlake does not challenge this finding, it is true on appeal.[35] In addition, Cieri testified that during the initial stages of the design process when the ROD is developed, designs are only "half a percent to maybe

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[34] Joyce, 155 Wn.2d at 323.
[35] Nguyen, 179 Wn. App. at 163.

up to five percent" complete. Cieri stated that when she gives a project like the SR 520 Project to the design-builder, the design is typically only fifteen to thirty percent complete. Because design changes are an expected part of the process, a trial court could reasonably conclude that WSDOT's changed staging needs did not show that its condemnation decision was arbitrary and capricious.

The Mega-Project Requirements Do Not Prevent WSDOT from Condemning the Properties

Montlake asserts that the trial court's order failed to enforce the legislature's "Mega-Project"-specific requirements under RCW 47.01.380, RCW 47.01.390, and former RCW 47.01.405. But because chapter 47.01 RCW does not provide a private cause of action, we reject this claim. To determine whether to imply a cause of action, a court must address the following issues: "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation."[36] To determine the legislative purpose of multiple statutes, a court should construe together statutes that relate to the same subject matter.[37]

RCW 47.01.380, RCW 72.01.390, and former RCW 47.01.405 direct WSDOT to mitigate the impacts of the Project and comply with NEPA. The

[36] Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990).
[37] Beach v. Bd. of Adjustment, 73 Wn.2d 343, 346, 438 P.2d 617 (1968).

statutes require WSDOT to report to the joint transportation committee and to the governor.[38] So WSDOT has a duty to the legislature and to the governor. But because these statutes do not explicitly or implicitly communicate that the legislature intended individuals to have a right to enforce WSDOT's compliance with the statutory requirements, chapter 47.01 RCW does not provide Montlake with a private right of enforcement. We thus decline to review the merits of Montlake's assignment of error to the trial court's conclusion that WSDOT complied with all relevant statutory mandates.

Secretary Millar Did Not Improperly Redelegate His Condemnation Power to Program Administrator Meredith

Montlake asserts that the legislature gave only the secretary of transportation eminent domain power, and Secretary Roger Millar acted outside the scope of WSDOT's statutory condemnation authority when he allowed Mega-Project Program Administrator Julie Meredith to decide to condemn the Properties. We disagree.

Neither party challenges the trial court's finding that Meredith made the final decision to seek condemnation of the Properties. So we accept this finding as true on appeal. Montlake cites State v. King County[39] to support its claim that

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[38] RCW 47.01.390; former RCW 47.01.405.

[39] 74 Wn.2d 673, 676, 446 P.2d 193 (1968) (holding that the state board did not impermissibly delegate its eminent domain power but, instead, properly delegated to the local board the day-to-day ministerial control of the community college district subject to its supervision).

the redelegation of eminent domain powers is generally invalid. But the issue in King County was whether the Washington State Board for Community College Education had improperly delegated its condemnation power to a local board of trustees of a community college without legislative authorization.[40] Here, the legislature explicitly authorizes the secretary to delegate his powers as he deems necessary. Although RCW 47.12.010 delegates to the secretary the power to select properties for condemnation,[41] RCW 47.01.101(3) gives the secretary the authority to "delegate any powers, duties, and functions to . . . any officer or employee of the department as deemed necessary to administer the department efficiently."

A 2015 executive order issued by the previous secretary delegated to the "Mega-Project Administrators" the "authority to approve any and all contracts and documents pertaining to [her] organizations' assigned program areas." Secretary Millar stated that he met with Meredith on a biweekly basis to discuss the Project and "concurred in [Meredith's] assessment of the need for the [Montlake] property and also . . . determined the State should acquire the entire parcel." Millar acted within the scope of the plain language of RCW 47.01.101(3) by delegating to Meredith the power to make decisions, including condemnation

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[40] King County, 74 Wn.2d at 674-75, 677.

[41] "[I]n such action the selection of the lands or interests in land by the secretary of transportation shall, in the absence of bad faith, arbitrary, capricious, or fraudulent action, be conclusive."

decisions, related to the Project. Thus, Montlake has not shown that Millar improperly redelegated his eminent domain power.

Montlake also asserts that this court should not grant "legislative deference" to Meredith's condemnation decision. Montlake does not define "legislative deference" and cites as its only supporting authority In re Petition of Puget Sound Power & Light Co.,[42] which does not substantiate its claim. When a party does not support its assertions with authority, a reviewing court assumes that it has found none.[43] We decline to consider this issue.

ATTORNEY FEES

Montlake requests attorney and expert witness fees under RCW 8.25.070. RCW 8.25.070 requires that a court award reasonable attorney and expert witness fees in select circumstances involving a just compensation determination or stipulation by the condemnee to an order of immediate possession by the condemnor. Because this case concerns neither of these circumstances, we decline to award Montlake attorney or expert witness fees.

CONCLUSION

Substantial evidence supports WSDOT's necessity determination and that its condemnation decision was not arbitrary and capricious amounting to

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[42] 28 Wn. App. 615, 619, 625 P.2d 723 (1981) (explaining that a governmental body exercising its power of eminent domain must make its decision in a public forum where affected citizens have an opportunity to object).

[43] State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

constructive fraud. Montlake did not show that Secretary Millar improperly redelegated his condemnation authority to Program Administrator Meredith. We affirm.

Leach, J.

WE CONCUR:

Spearman, J.

Appelwick, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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CASE #: 77644-4-I
State of Washington, Respondent v. Montlake LLC and Stelter Montlake LLC, Petitioners

Counsel:

The following ruling by Commissioner Mary Neel of the Court was entered on May 1, 2018, lifting stay and dismissing review:

This matter involves an eminent domain proceeding regarding three contiguous parcels of property (market, gas station, and parking lot) located on Montlake Blvd. near the SR 520 Interchange. The Washington State Department of Transportation (WSDOT) sought to condemn the property as part of a road and bridge construction project. In August 2017, the trial court granted WSDOT's request and issued an order of public use and necessity (OAPU). The property owners appealed in No. 77359-3-I.

Meanwhile WSDOT sought entry onto the property to inspect, measure, survey, photograph and conduct testing/sampling for the purpose of obtaining valuation evidence relevant to just compensation/damages. The owners objected. In October 2017, the trial court granted WSDOT's motion to compel. In November 2017, the owners sought discretionary review and posted a supersedeas bond of $5,000. After briefing, the trial court ordered the owners to post a bond of $1 million. The owners objected. See RAP 8.1(h).

In February 2018 I heard argument on the property owners' motion for discretionary review and their motion objecting to the order on supersedeas. At that point the appeal of the OAPU in No. 77359-3-I was set for consideration before a panel within a few days. Accordingly, I stayed review of the trial court orders pending a decision in No. 77359-3-I.

On April 30, 2018, in No. 77359-3-I a panel of this court affirmed the OAPU. In view of the decision, the issues raised in the owners' motion for discretionary review and the objection to the supersedeas pending review in this court are now moot. Accordingly, the stay is lifted and review is dismissed.

Therefore, it is

ORDERED that review in this matter is dismissed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

No. 77644-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE LLC, a Washington limited liability company; BTF ENTERPRISES, INC., a Washington corporation;

Appellants.

MONTLAKE LLC, STELTER MONTLAKE LLC, AND BTF ENTERPRISES, INC. MOTION TO MODIFY RULING OF COMMISSIONER

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CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Following this Court's decision affirming the trial court's public use and necessity order ("OAPU") in Case No. 77359-3-I, the Commissioner dismissed as moot the Owners' objections to WSDOT's attempt to enter the Montlake Properties for invasive soil drilling and site occupation and the trial court's requirement that the Owners obtain a stay to prevent WSDOT from entering the properties by posting a $1 million bond. The issues are not moot, and this Court should correct the trial court's errors to prevent the unfair procedural confusion that occurred here from harming other property owners in the future.

The trial court made multiple procedural errors that remain at issue. First, the trial court treated its OAPU ruling as "final" even though RCW 8.04.070 plainly says that it is not "final" if appellate review is sought, and the binding authority of *Allerdice* holds that a trial court's OAPU is not legally effective until appellate review concludes. Second, the trial court incorrectly compelled valuation "discovery" to prepare for a just compensation trial prior to a final determination of OAPU. Third, the trial court imposed an extraordinary bond ($1 million) to stay that discovery during the Owners' appeal, to compensate WSDOT for loss of its purported right to enter and take property *before* a final OAPU, *before*

a determination of just compensation, and *before* WSDOT has paid a penny for the property, all without consent of the Owners.

WSDOT can only take possession of property over a property owner's objection—and when a bond might otherwise be required—is *after* payment of just compensation, and then only "*after* the amount of said award shall have been paid into court." RCW 8.04.150 (emphasis added). WSDOT cannot cite a single condemnation case where the State has been allowed to enter and take property at this stage of the proceedings, nor a case requiring the property owner to post a bond to stay testing (i.e., exclude others) during appeal, and even worse, to reimburse the State for "construction delay costs" that arise from the Owners' timely exercise of due process rights. Everything should have been stayed pending the OAPU appeal and there should have been no bond required.

The Commissioner erred by concluding that these issues are moot. The OAPU remains on appeal, and thus the trial court's $1 million bond requirement is not moot, nor is the trial court's implicit conclusion that the Owners could be liable for the State's potential construction cost increases due to the appeal. Moreover, also not moot is the trial court's mandate that the Owners submit to WSDOT's invasive sixteen-day possession and use of the property for testing, which is a taking and exceeds the scope of discovery permitted by statute, caselaw, and the Civil Rules.

The Owners' ongoing substantive rights are impacted by the Commissioner's failure to address these issues and thus they cannot be moot. The Owners request that the Commissioner's ruling be modified to address the merits, and that the trial court's orders be vacated for lack of jurisdiction and because they amount to a taking, exceed discovery, or in the alternative, because the bond amount is unjust and unwarranted.

II. IDENTITY OF THE MOVING PARTY

Appellants Montlake LLC, Stelter Montlake LLC, and BTF Enterprises, Inc. (collectively, the "Owners") seek the relief requested in Part III, Statement of Relief Sought.

III. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 17.7, the Owners respectfully request that the Court modify and set aside the Commissioner's May 2, 2018 ruling that the issues raised in the Owners' motion for discretionary review and motion objecting to the trial court's supersedeas order are moot.[1]

Instead, the Owners request that this Court address the issues raised in the motions, including determining:

[1] A copy of the Commissioner's May 2, 2018 ruling is attached as Appendix A. All other citations to the record are provided in the Owners' prior briefing.

1. That the trial court's order compelling the Owners to submit to sixteen days of occupancy and testing be reversed because the trial court lacked jurisdiction to compel discovery pending review;

2. That the trial court's order compelling that discovery be reversed because it is an uncompensated and unconstitutional taking and exceeds the permissible scope of discovery under Civil Rule 26(b)(1);

3. That the $1 million supersedeas bond is arbitrary, unjust, and unwarranted, and should be reversed; and

4. That the Court continue to stay the Owners' obligation under RAP 8.1(e) to post the additional $1 million bond pending a determination of all of these issues by this Court.

IV. FACTUAL BACKGROUND RELEVANT TO MOTION

A. WSDOT Demands Access to the Montlake Properties to Conduct Invasive Drilling and Site Inspections Prior to the OAPU Going Final After an Appeal

On September 6, 2018, the trial court granted WSDOT's motion for an OAPU authorizing WSDOT to condemn three separate but contiguous lots (the "Montlake Properties") owned or leased by the Owners. On September 8, the Owners appealed the trial court's OAPU. That matter is currently before this Court in Case No. 77359-3-I, where the Owners' motions for reconsideration and to publish are pending.

Prior to the trial court's OAPU, WSDOT requested entry onto the Montlake Properties "for purposes of inspecting, measuring, surveying, photographing, testing, and/or sampling the property, [and] for purposes of evaluating the impacts of the State's project on the subject property." Mot. Disc. Rev., App. B at 2. WSDOT requested expansive access: testing from September 15-25 from 10:00 p.m. until 6:00 a.m. each day. *Id.* The Owners objected to the access and testing. *Id.*, App. I at 2.

On September 20, WSDOT served an amended request for entry. *Id.*, App. C. The amended request expanded the scope of WSDOT's original request: WSDOT now sought entry to the Montlake Properties for sixteen days, from November 15-30, for eight hours per day, for subsurface boring. *Id.* at 2. WSDOT's proposed subsurface boring would require cutting through paved surfaces, drilling through soil and bedrock, removing samples from the holes, and filling the holes with bentonite, crushed rock, and re-paving. *Id.* The holes would be six to twelve inches in diameter and up to 70 feet in depth. *Id.* WSDOT also requested that it be permitted to unload and store drill rigs and equipment on the properties for those sixteen days. *Id.* In addition, WSDOT requested permission to conduct a "separate and distinct inspection" of the structures on the properties, and examining the site conditions, including taking samples. *Id.* at 3. WSDOT concedes these investigations are for the sole purpose of

obtaining valuation evidence relevant to just compensation. *Id.*, App. D, at 3, 6-7. WSDOT did not offer compensation, nor did the Owners consent.

On October 10, WSDOT moved to compel the site entry and testing. *Id.*, App. D. The Owners objected that the trial court did not have jurisdiction to grant the motion under RAP 7.2, and that during an eminent domain proceeding, a trial court cannot authorize discovery on valuation before an OAPU appeal is final. *Id.*, App. E. The Owners also argued that WSDOT's demand would be a taking and violates the scope of discovery under Civil Rule 26(b)(1). *Id.* On October 19, the trial court summarily granted WSDOT's motion to compel ("Compel Order"). *Id.*, App. A at 2.

B. The Owners Obtain a Supersedeas Stay and File a Motion for Discretionary Review of the Trial Court's Order Compelling WSDOT's Site Entry

Following the Compel Order, on November 13, the Owners filed notice of a supersedeas stay pursuant to RAP 8.1 by posting a $5,000 bond. Emer. Mot. to Rev. Supersedeas, App. 1. On November 20, WSDOT responded to the supersedeas stay arguing that the bond should be "between $12.7 million to $26.4 million dollars" as compensation for alleged project delays due to the OAPU appeal. *Id.*, App. 2 at 11.

On December 4, the Owners filed a motion for discretionary review before this Court asking that the Court reverse the Compel Order because the trial court failed to address or expressly rule (1) whether the

trial court had jurisdiction to compel valuation discovery while an OAPU is on appeal; (2) whether more than two weeks of occupancy, subsurface boring and other invasive testing without property rights or compensation is an unconstitutional taking; and (3) whether WSDOT's discovery exceeds the permissible scope of discovery under Civil Rule 26(b)(1).

On December 7, without citing any factual basis in the record, the trial court ordered that the Owners post an additional $1 million bond to maintain the supersedeas stay of WSDOT's site entry and drilling ("Bond Order"). *Id.*, App 5. On December 14, the Owners filed an emergency motion for review of the Bond Order and to stay enforcement of the trial court's order pending the motion for discretionary review.

C. Commissioner Hearing and Initial Decision

On January 19, 2018, the Commissioner heard argument addressing both the Owners' emergency motion and the motion for discretionary review. During argument, the Commissioner indicated that only this Court could rule on the bond requirement. Mot. for Recon. at 21.

On May 2, the Commissioner issued a decision stating that in view of this Court's April 30 order in Case No. 77359-3-I, affirming the OAPU, that "the issues raised in the owners' motion for discretionary review and the objection to the supersedeas pending review in this court are now moot. Accordingly, the stay is lifted and review is dismissed." The

Commissioner did not address the trial court's $1 million bond. Nor did the Commissioner address whether the trial court had jurisdiction to (a) compel the Owners to submit to invasive drilling and site occupation while their appeal was pending, to (b) order such submission without WSDOT first paying just compensation, or (c) whether the Compel Order exceeds the scope of discovery permitted by the Civil Rules or statute.

V. STATEMENT OF THE GROUNDS FOR RELIEF

The Owners respectfully request that this Court modify the Commissioner's ruling that the case is moot. A case is not moot if the court's resolution of an issue will affect the substantive rights of the parties before the court. *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cty.*, 96 Wn.2d 201, 214, 634 P.2d 853 (1981). The motion for discretionary review is not moot because the rights of the Owners are directly impacted by the Commissioner's failure to address the issues in the motion. The Compel Order should never have been issued because the trial court lacked jurisdiction to compel valuation discovery while an OAPU is on appeal. Moreover, WSDOT's demand for site occupancy and use constitutes a taking and exceeds the permissible bounds of discovery. Likewise, the emergency motion challenging the bond amount is not moot because the case is still on appeal, pending this Court's decision on the Owners' motion for reconsideration and a potential petition for review.

A. The Motion for Discretionary Review Is Not Moot

In the motion for discretionary review, the Owners argued that the Court should accept review because (1) under RAP 7.2, the trial court did not have the authority to compel discovery related to valuation while the OAPU appeal is pending; and (2) the trial court erred in compelling WSDOT's uncompensated property use for invasive testing and inspections without any property rights because it is a taking and exceeds the permissible scope of discovery. These issues directly affect the Owners' ongoing substantive rights and are not moot.

1. The trial court still does not have jurisdiction to compel drilling and testing while the OAPU is on appeal

Review remains warranted under RAP 2.3(b)(2) because the trial court exceeded the scope of its limited jurisdiction under RAP 7.2 by issuing the Compel Order after the OAPU had been appealed. Under RAP 7.2(a), "[a]fter review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule." This authority is limited to "ministerial actions," *State v. Korum*, 120 Wn. App. 686, 720, 86 P.3d 166 (2004), *rev'd other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006), and the Compel Order was invalid under RAP 7.2.

Moreover, the trial court could not "enforce" the decision on OAPU under RAP 7.2(c) to order discovery on valuation because a final determination on OAPU is required before an inquiry into valuation is

permissible. Public use and necessity must be decided "before there is a justiciable issue as to severance damages." *In re SW Suburban Sewer Dist.*, 61 Wn.2d 199, 201-04, 377 P.2d 431 (1963). Each phase of a condemnation proceeding is separate and distinct and "is a condition precedent to the entry of the subsequent judgment." *Pub. Util. Dist. No. 1 of Chelan Cty. v. Wash. Water Power Co.*, 43 Wn.2d 639, 641, 262 P.2d 976 (1953) (eminent domain requires three separate and distinct judgments—public use and necessity, valuation, and transfer of title). This process is constitutional, statutory, and mandatory. *Pelley v. King Cty.*, 63 Wn. App. 638, 641, 821 P.2d 536 (1991); WASH. CONST., Art. I, Section 16 (Amend. 9); RCW 8.04.070, .080; *see also* RCW 8.12.090.

Before the trial court can begin the valuation stage of an eminent domain proceeding, a determination on public use and necessity must be final, including the exhaustion of all appeals. *State ex rel. Wash. v. Allerdice*, 101 Wn. App. 25, 31, 1 P.3d 595 (2000) ("An [OAPU] entered by the trial court is interlocutory and appealable as a matter of right. *Therefore, an [OAPU] cannot be legally effective until the appeal is resolved*.") (emphasis added). A judgment is not final until "all litigation on the merits ends," including all appeals. *In re Skylstad*, 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007); *Woodcraft Const., Inc. v. Hamilton*, 56 Wn. App. 885, 888, 786 P.2d 307 (1990) ("An appeal from a judgment entered

in the trial court is not final until it is affirmed and the case mandated."). Until an OAPU appeal is final, the subsequent phases to condemnation—valuation and title transfer—must await resolution of the appeal.

RAP 7.2 does not allow the trial court to enter an order compelling the Owners to submit to WSDOT's invasive, sixteen-day "inquiry" into valuation during the OAPU appeal. The Commissioner never addressed this issue, which was an error, and the status of the trial court's order compelling testing remains at issue as long as the OAPU is on appeal and is not moot. Accordingly, the Owners request that this Court modify the Commissioner's ruling and determine that the Compel Order was invalid from the start because the trial court lacked jurisdiction to issue the order and neither the supersedeas stay or a bond should ever have been required.

2. Even if the appeal were resolved, the Compel Order amounts to a taking and exceeds the bounds of permissible discovery

By compelling the Owners to submit to drilling, site inspections, and occupation before just compensation is paid, the Compel Order amounts to a taking, which the Commissioner should have disallowed and is not moot. Washington does not permit the type of use and occupation of a property authorized by the trial court before just compensation is paid: "No private property shall be taken or damaged for public or private use without just compensation." WASH. CONST., Art. I, Section 16 (Amend.

9); *Conger v. Pierce Cty.*, 116 Wash. 27, 34-35, 198 P. 377 (1921) ("[O]ur Constitution expressly forbids the taking or damaging of private property for public use, except upon just compensation first made.").

Washington courts have consistently recognized that "the right to possess, *to exclude others*, or to dispose of property" are "fundamental attribute[s] of property ownership." *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993) (emphasis added). Indeed, "[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." *Tapio Inv. Co. I v. State by & through the Dep't of Transp.*, 196 Wn. App. 528, 539-40, 384 P.3d 600 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 331 (2017) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)). Anything which destroys the unrestricted right of use, enjoyment and disposal of property destroys the property itself. *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960) (citations omitted), *overruled on other grounds Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). In *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), the Supreme Court compared the takings clauses between the U.S. Constitution and the Washington Constitution and observed that a significant difference in Washington is, before a taking, "compensation must *first* be made." *Id.* at 357 (emphasis added).

What WSDOT seeks to do is the clearest and most basic form of taking without consent or compensation. The Owners still own the Montlake Properties. WSDOT concedes that it has no property rights whatsoever in the Montlake Properties. WSDOT seeks to drill 70-foot holes on the properties to remove samples while occupying the properties for over two weeks which will interrupt and harm business operations. Mot. Disc. Rev. at 19. WSDOT concedes further that its drilling will "damage" the properties. Resp. to Mot. Disc. Rev. at 11. That is a taking.

When confronted with the same type of site entry and drilling sought by WSDOT, courts in other jurisdictions have found a taking. *See* Mot. Disc. Rev. at 14-15. WSDOT has suggested that those cases are different because the inspections were initiated before condemnation proceedings began. But that makes no difference for a takings analysis. As in this case, there was a taking because the government had no property rights and no compensation had been paid. *Id.* at 16-17. WSDOT's initiation of a condemnation does not suddenly provide WSDOT with the authority to take private property and do what it wants to it. Washington is not a "quick take state," and WSDOT is not entitled to use or possession until just compensation is paid, except as provided in RCW 8.25.070.

At this stage of the case, there has been no final determination that WSDOT can even condemn the Montlake Properties, let alone "damage"

them in an attempt to prematurely value them. The Owners are under no obligation to surrender their property so WSDOT can conduct invasive drilling on property it *might* someday have rights to. The Commissioner erred in determining that these issues are now moot, particularly when the OAPU appeal is still pending, and WSDOT is actively pursuing use, occupancy, and testing without the Owners' consent, and regardless of the Owners' decision whether to stipulate to such use under RCW 8.25.070.

Likewise, the Commissioner also failed to rule on whether the Compel Order subjects the Owners to impermissible discovery, which is not moot either. Inspections of land and property cannot be "unduly burdensome." Civil Rule 26(b)(1)(C). Here, the trial court authorized WSDOT to conduct active drilling and testing operations on the properties for more than two weeks, for eight hours each day, to drill 70-foot subsurface holes, and conduct other "distinct" testing and inspections. Mot. Disc. Rev., App. C at 2-3. It further authorized WSDOT to store large equipment on (i.e., occupy) the properties during the other sixteen hours a day when it is not conducting active operations. *Id.* Despite WSDOT's assertion that the properties "will not suffer adverse impacts caused by the six inspections," the subsurface boring would require cutting through paved surfaces using heavy equipment such as drilling machines. *Id*. The drilling would also produce drilling cuttings and other

waste. *Id.* WSDOT promises to backfill the holes with bentonite, crushed rock, and concrete (*id.*), but WSDOT cannot deny that both the subsurface and surface of the Montlake Properties will be irreparably altered by WSDOT's drilling. Indeed, WSDOT concedes that the testing could lead to complications or "exigencies," which would increase the harm, time of occupancy and use, and burdens upon the Owners. *See id.*, App. E at 11.

In *Gillett v. Conner*, 132 Wn. App. 818, 133 P.3d 960 (2006), the trial court granted a motion to compel inspection of a property. *Id.* at 821. On appeal, this Court observed that there is greater scrutiny of the necessity of entry onto land, as opposed to producing documents and reversed the trial court, ordering a more careful assessment as to whether a physical inspection was necessary and what restrictions should be placed on such an inspection under Civil Rule 26. *Id.* at 824-25.

There is no evidence that the trial court conducted a careful assessment of the necessity of the intrusion. The trial court summarily granted the motion and failed to assess any of the Civil Rule 26(b)(1) factors. Those factors are particularly relevant since, if the Owners' appeal is ultimately successful, WSDOT's desired testing will be completely irrelevant and WSDOT will have no basis whatsoever to enter the properties, but the Owners will still have been damaged. *See Pulcino v. Fed. Ex. Corp.*, 94 Wn. App. 413, 426-27, 94 P.2d 522 (1999) (denying

motion to compel since CR 26(b)(1) "allows the court to limit discovery"). Moreover, the recent legislative direction that WSDOT "ensure to the maximum extent practicable that the building housing any grocery store or market . . . be preserved" could render elements of WSDOT's proposed use and inspection of the properties irrelevant and even moot itself, as could WSDOT's new environmental review. Mot. for Recons. at 5.

But even if the Owners' OAPU appeal is unsuccessful, WSDOT's drilling will damage the Montlake Properties. WSDOT's occupancy and use will result in lost revenues from at least the gas station operations, and the testing, sampling and storage will burden and financially damage the Owners. Applying the balancing required by Civil Rule 26(b)(1)(C), the extent and duration of WSDOT's drilling and site occupation is not justified. This Court's decision affirming OAPU does not moot whether WSDOT's requested site entry, occupancy and use is appropriate. The Commissioner erred in failing to address these issues.

B. The Emergency Motion is Not Moot; the Owners Should Not Be Required to Post a $1 Million Bond to Stay Testing While the Case Remains on Appeal

The Commissioner also erred in determining that the issues raised by the emergency motion were moot following this Court's decision affirming the OAPU. The issues are not moot because the Court's decision is under reconsideration and may be subject to a petition for review before

a mandate issues. Under RAP 8.1(b), "[a]ny party to a review proceeding has the right to stay enforcement of a money judgment or a decision affective real, personal or intellectual property pending review." Until the OAPU appeal is fully resolved, the Owners are entitled to stay the trial court proceedings. Thus, the trial court's determination that a $1 million bond is required to stay the proceedings remains at issue, and the Commissioner erred in determining the issue of the bond amount is moot.

The emergency motion requested that the Commissioner review the Bond Order, because the trial court abused its discretion (and exceeded its jurisdiction) by ordering the Owners to pay an exorbitant $1 million bond to prevent WSDOT from conducting invasive subsurface drilling on the Owners' property, while this Court's OAPU review was pending. Neither party advocated for a bond amount even close to $1 million and the trial court provided no explanation, citation to the record, or legal basis in support of the $1 million bond. *See Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707-11, 592 P.2d 631 (1979) (trial courts must provide findings sufficient to "inform the appellate court, on material issues, what questions were decided by the trial court, and the manner in which they were decided") (internal citations omitted).

Moreover, there is also no indication that the trial court complied with RAP 8.1(c)(2) in requiring an additional $1 million bond.

To comply with RAP 8.1(c)(2), the trial court would ordinarily need to demonstrate that $1 million is "equal to the reasonable value of the use of the property during review." There is no evidence in the record supporting a determination that the reasonable value of WSDOT's testing and use during appeal would be $1 million.

In any event, basing the bond on the value of WSDOT's use of the property during the duration of the OAPU appeal is inappropriate. Emer. Mot. to Rev. Supersedeas, App. 3 at 9-10. This is not a case where the prevailing party has rights to real property and is being deprived of those rights because of an appeal. *Compare Norco Cons., Inc. v. King Cty.*, 106 Wn.2d 290, 721 P.2d 511 (1986) (developer entitled to damages where denied ability to develop its property because of illegal delays by King County). The purpose of a supersedeas bond is to preserve the status quo between the parties. *Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016), *review denied*, 187 Wn.2d 1011, 388 P.3d 498 (2017) (citations omitted). The trial court's exorbitant bond disrupts the status quo because instead of requiring WSDOT to compensate the Owners for occupying and using *WSDOT's property* as would by typical in a bond scenario (and is also constitutionally required to avoid an unconstitutional taking), the Bond Order improperly requires the Owners to post a $1 million bond to preserve *their own property rights* pending final resolution of OAPU,

payment of just compensation and transfer of title—effectively flipping the parties' rights on their heads.

At most, "the reasonable value of the use of the property during review," would be based on the duration of WSDOT's occupation of the properties, which for sixteen days of rent would be $34,109.59 using the State's appraisal. Emer. Mot. to Rev. Supersedeas, App. 3 at 10. However, given that WSDOT has no rights in the properties, the $5,000 bond posted by the Owners as an estimate of the costs WSDOT would incur as relating to the mobilization and demobilization of its drilling operations is a more appropriate estimation of the actual damages incurred by WSDOT.[2] *Id.*

Since the case remains on appeal, a stay remains necessary and is not moot. The Commissioner erred by not addressing these issues, and the Owners request that the Court do so now and reverse the Bond Order.

C. The Court Should Address the Issues Raised in the Motions Because They Are a Matter of Substantial Public Interest

Finally, the Court should address the issues raised in the motions because they raise critical issues of a substantial public interest. *See State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015). The trial court's

[2] WSDOT maintains that its actual damages for rescheduling the testing are about $35,000. If the Court agrees with this amount, the Owners are willing to post this amount, and that it be secured by the Montlake Properties pursuant to RAP 8.1(c)(2). Emer. Mot. to Rev. Supersedeas, App. 3 at 10.

requirement that for a property owner to preserve his property from a taking, while he exercises his due process rights to appeal an OAPU order, he must obtain a stay and post a burdensome bond, conflicts with the Washington Constitution, the statutory scheme in Chapter 8.04 RCW, and established caselaw. "The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or regulations, and matters that are sufficiently important to the appellate court," and is warranted here to correct the trial court's repeated errors of law from recurrence. *Id.*

VI. CONCLUSION

The Owners respectfully request that the Court modify the Commissioner's ruling as not moot and hold that the trial court lacked jurisdiction to compel submission to WSDOT's testing, that the proposed use and occupancy without consent or just compensation is a taking, that such testing exceeds the scope of discovery authorized by the Civil Rules or statute, and that the trial court's exorbitant bond requirement is arbitrary, unwarranted and unfair. The Owners further request that this Court address its resolution of this Motion to Modify in its ruling on the Owners' motion for reconsideration.

RESPECTFULLY SUBMITTED this 1st day of June 2018.

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APPENDIX A

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CASE #: 77644-4-I
State of Washington, Respondent v. Montlake LLC and Stelter Montlake LLC, Petitioners

Counsel:

The following ruling by Commissioner Mary Neel of the Court was entered on May 1, 2018, lifting stay and dismissing review:

This matter involves an eminent domain proceeding regarding three contiguous parcels of property (market, gas station, and parking lot) located on Montlake Blvd. near the SR 520 Interchange. The Washington State Department of Transportation (WSDOT) sought to condemn the property as part of a road and bridge construction project. In August 2017, the trial court granted WSDOT's request and issued an order of public use and necessity (OAPU). The property owners appealed in No. 77359-3-I.

Meanwhile WSDOT sought entry onto the property to inspect, measure, survey, photograph and conduct testing/sampling for the purpose of obtaining valuation evidence relevant to just compensation/damages. The owners objected. In October 2017, the trial court granted WSDOT's motion to compel. In November 2017, the owners sought discretionary review and posted a supersedeas bond of $5,000. After briefing, the trial court ordered the owners to post a bond of $1 million. The owners objected. See RAP 8.1(h).

In February 2018 I heard argument on the property owners' motion for discretionary review and their motion objecting to the order on supersedeas. At that point the appeal of the OAPU in No. 77359-3-I was set for consideration before a panel within a few days. Accordingly, I stayed review of the trial court orders pending a decision in No. 77359-3-I.

On April 30, 2018, in No. 77359-3-I a panel of this court affirmed the OAPU. In view of the decision, the issues raised in the owners' motion for discretionary review and the objection to the supersedeas pending review in this court are now moot. Accordingly, the stay is lifted and review is dismissed.

Therefore, it is

ORDERED that review in this matter is dismissed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MONTLAKE LLC, a Washington limited liability company; STELTER MONTLAKE, LLC, a Washington limited liability company, BTF ENTERPRISES, INC., a Washington corporation, Petitioners. SCOTT IVERSON, dba Montlake Boulevard Market; HORST KIESSLING, DBA Hop in Christmas Trees, ANGELA ROSE STERLING, dba Montlake Espresso; STC FIVE LLC, a Delaware limited liability company; CROWN CASTLE USA, INC., a Pennsylvania Corporation; GLOBAL SIGNAL ACQUISITION III LLC, a Delaware limited liability company; NEW CINGULAR WIRELESS PCS, LLC, a Delaware limited liability company, SEATTLE SMSA LIMITED PARTNERSHIP, a Delaware limited partnership dba Verizon Wireless; SPRINT SPECTRUM L.P., a Delaware limited partnership; T-MOBILE USA, INC.; and KING COUNTY, Owners.	No. 77644-4-I ORDER GRANTING MOTION TO MODIFY IN PART

Petitioners Montlake LLC et al. have moved to modify the commissioner's May 1, 2018 ruling determining that their motion for discretionary review and objection to supersedeas were moot and dismissing review. Respondent State of Washington, Department of Transportation, filed an answer. We have considered the matter under RAP 17.7 and RAP 8.1(h) and and agree with petitioners that the matter is not moot. We therefore grant the motion to modify in part and consider petitioners' motion for discretionary review and objection to supersedeas.

We conclude petitioners have failed to demonstrate the trial court lacked authority or committed probable error in entering the order compelling discovery. See RAP 2.3(b)(2). Accordingly, the motion for discretionary review is denied. We also deny petitioners' objection to the order requiring an additional supersedeas bond of $1 million. The commissioner's ruling lifting the stay remains unaffected.

Now, therefore, it is hereby

ORDERED that the motion to modify is granted in part. It is further

ORDERED that the motion for discretionary review and the objection to supersedeas are both denied.

Done this 13th day of August, 2018.

Leach, J.

Mann, J.

Appelwick, J.

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

September 12, 2018 - 4:08 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96179-4
Appellate Court Case Title:	State of Washington v. Montlake LLC, et al.
Superior Court Case Number:	17-2-12389-7

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