

Case No. 70855-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CITY OF BELLEVUE,

Respondent,

v.

BEST BUY STORES, LP,

Appellant,

and

**HD DEVELOPMENT OF MARYLAND, INC.; HOME DEPOT
USA, INC.; 457 120TH AVENUE NE, LLC; PUGET SOUND
ENERGY, INC.; and KING COUNTY,**

Other Parties.

Appellant's Reply Brief

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I. INTRODUCTION

The Respondent's brief focuses the issue before this court: Is the taking of Best Buy's leasehold property for a fifth lane excessive and therefore not a "public necessity" where it is undisputed that four lanes will satisfy the City's public use for the extension of NE 4th Street to facilitate traffic flows that are projected in the absence of speculative future private redevelopment of the Best Buy parcel? In other words, can the City take a greater portion of Best Buy's leasehold on the speculation that at some future date private parties may acquire Best Buy's and other parcels and redevelop the properties in a way that increases traffic flow on NE 4th Street to the point where a fifth lane becomes necessary? The record shows that the taking of the portion of Best Buy's property for a fifth lane is in reality a taking to facilitate a future private speculative use, not a necessary public use.

The City of Bellevue is taking more property than needed for NE 4th Street to carry the projected traffic flow in order to foster the dreams of speculative private redevelopment, dreams that will not mature prior to 2043, the term of Best Buy's leasehold.¹

¹ Best Buy's lease allows Best Buy to occupy the property through 2043, 13 years past the City's 2030 planning horizon. CP 906. As long as Best Buy continues to operate its retail store through the end of its leasehold, four lanes will adequately carry the traffic flows on NE 4th Street.

The City's argument that it has unfettered discretion to take private property to build a road to whatever number of lanes it chooses, City Brief at p. 17, regardless of the City's actual traffic and transportation needs, is repugnant to the concept of eminent domain that limits the City's taking power to those takings for "public use and necessity". Whether the City makes this facetious argument in jest or hyperbole, the fact that the City's Transportation Department's analysis shows that a 4-lane road will satisfy current and projected traffic on NE 4th Street through the City's 2030 planning horizon establishes that a fifth lane is excessive to the City's needs for public uses.

While a legislative determination of "necessity" is given great deference by the courts, such deference is not unlimited and the standard of review is not just a judicial rubber stamp -- especially where the City Council adopts an ordinance on a consent agenda without any substantive discussion or consideration of objections. The City cannot take private property to build a five-lane road where the taking of private property is greater than is reasonably necessary for the four-lanes that will satisfy the public use of carrying the traffic that the City anticipates. Moreover, IF after the termination of Best Buy's leasehold the property is ever redeveloped, the City can require the redeveloper to dedicate right of way for, and build, a fifth lane if the redevelopment increases traffic flow on

NE 4th Street in a way that substantiates a need and public use for a fifth lane.² The superior court's order of public use and necessity should be reversed.

II. ARGUMENT

A. **Under *King County v. Theilman*, the City Cannot Take Private Property Simply to Support Private and Speculative Redevelopment by Best Buy's Landlord**

The City's Brief fails to address the analogous case of *King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962). In *Theilman*, the County decided to condemn private property for a public road in order to benefit a neighboring developer. While the *Theilman* Court recognized the rules that a determination of necessity by a legislative body is deemed "conclusive, in the absence of actual fraud or such arbitrary or capricious conduct as would amount to constructive fraud," and that a public road typically satisfies the "public use" element, the Court noted that rules must be applied to the facts of each case. *Id.* at 595; *see generally Swinomish Indian Tribal Community v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 436 n.8, 166 P.3d 1198 (2007) (noting that even the very deferential "arbitrary and capricious" standard of review is not to be used

² *See Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), which set forth a two-prong "essential nexus" and "rough proportionality" test to determine whether a development condition is valid or violates the Takings Clause as an uncompensated taking. *See also* Best Buy's Opening Brief at p. 24 and Verbatim Report of Proceedings at 52:6-18.

as a “rubber stamp”). The Court in *Theilman* held that the effect of the County’s condemnation in that case was to allow a neighboring land developer to take private property for a private use, and therefore the road project did not satisfy the public use and necessity tests. *Id.* at 595-96.

Here, the City has acknowledged that a four-lane alternative is feasible and that the fifth lane is only necessary if the Best Buy parcel and others, including the adjacent School District bus parking lot, are redeveloped.³ The City’s Brief at pages 27-28 notes that property negotiations are required by law under RCW 8.26.180(1) and suggests that offers by the City to proceed with the 4-lane alternative were simply part of legally-required negotiations. However, the City is not required to negotiate for less property than it really needs - nor is it entitled to condemn more property than it really needs if the “carrot” of taking only what it actually needs does not succeed in securing a settlement from the potential condemnee. The fact that the City repeatedly offered to build the four-lane alternative so long as Best Buy satisfied various conditions set forth by the City⁴ further demonstrates that a fifth lane is not “reasonably necessary”. The effect of taking the fifth lane from the Best Buy parcel is

³ See City of Bellevue’s Joint Hearing Brief, Hearing Examiner Case No. AAD 12-45 (Nov. 2, 2012), at p. 23, attached as Attachment E to the Declaration of E. Lin (CP 614).

⁴ See Decl. M. Moseley ¶¶ 15-16 (CP 911), Decl. B. Stuckey ¶18 (CP 453) and Att. 3 (letter from N. LaCombe to Best Buy) (CP 532-35), Decl. of E. Lin ¶ 22 (CP 554) and Att. S (CP 796-806).

to take Best Buy's leasehold interests in order to create additional pressure on Best Buy in support of its Landlord's private redevelopment plans. Under the holding in *Theilman*, 59 Wn.2d at 595-96, such a taking of private property for private development is not a taking for "public use and necessity".

B. Best Buy's Related Pending SEPA/Writ Petition (the "SEPA/Writ Appeal")

In a related land use appeal and writ proceeding currently pending before this Court (King County Superior Court Case No. 13-2-06072-8 SEA; Court of Appeals case number not yet assigned), Best Buy has challenged (i) the City's environmental review for the project under the State Environmental Policy Act, ch. 43.21C RCW ("SEPA"), (ii) the City's issuance, to itself, of a critical areas permit for the NE 4th Street Extension (the NE 4th Street, as currently proposed, will cross-over and impact steep slope critical areas adjacent to the Best Buy store site), and (iii) the City's Ordinance No. 6098, the same condemnation ordinance at issue in this appeal. *See* Att. O to Lin Decl. (CP 726-754).

A superior court trial/review hearing of the SEPA/Writ Petition occurred on December 9, 2013. On December 13, 2013, the superior court denied Best Buy's appeal. On January 13, 2014, Best Buy filed a notice of appeal of the superior court's decision. If Best Buy prevails before this Court on its appeal in any of those challenges, it would likely make this

appeal moot.⁵ The Council's legislative findings of public use and necessity at issue in this appeal would be in violation of SEPA if this Court invalidates the environmental review and would be arbitrary and capricious if the critical areas permit required for the NE 4th Street Extension is reversed (there is no necessity for the take property if the road cannot be built as currently proposed). In addition, if the condemnation ordinance at issue in both cases (Ordinance No. 6098) is invalidated, then the superior court's adjudication of public use and necessity, which relied upon and granted deference to the legislative findings in Ordinance No. 6098, must be invalidated.

Thus, the outcome of the SEPA/Writ Appeal may well be relevant to the issues in this appeal or make it moot. Consolidation of the cases may be appropriate under RAP 3.3(b), which provides "The appellate court, on its own initiative or on motion of a party, may order the consolidation of cases or the separation of cases for the purpose of review. A party should move to consolidate two or more cases if consolidation

⁵ Best Buy is not "collaterally attacking" the petitions in eminent domain at issue here, as the City contends in its Brief on page 29. In *State v. Brannan*, 85 Wn.2d 64, 74, 530 P.2d 322 (1975), the court held that the adequacy of an environmental impact statement was subject to judicial review upon a petition for review or certiorari and could not be raised collaterally in a condemnation proceeding because it was not appealed through the appropriate channel. Here, Best Buy timely appealed the City's condemnation ordinance and the City's environmental determination under the State Environmental Policy Act through the appropriate statutory and constitutional review procedures. The fact that the two cases are factually and legally intertwined does not mean that the claims raised in one case are collateral attacks on the other case, but instead suggests that consolidation of the cases may be appropriate.

would save time and expense and provide for a fair review of the cases.”

The Court has suggested that when there are multiple appeals with the same facts and interrelated legal issues, the parties should “consolidate their cases in order to receive a comprehensive decision that best uses judicial resources.” *Skagit County v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 321 n.13, 253 P.3d 1135 (2011); *see also Mueller v. Miller*, 82 Wn. App. 236, 917 P.2d 604 (1996) (court consolidated an appeal of a quiet title action related to a sheriff’s sale of property with an appeal of a denial of a motion to intervene in the prior collection action to challenge the sheriff’s sale); *Nielsen v. Employment Sec. Dept. of State*, 93 Wn. App. 21, 966 P.2d 399 (1998) (cases involving identical issues of law appropriate for consolidation for purposes of Court’s opinion).

Here, the SEPA/Writ Petition has been appealed to this Court. The relevant facts in both appeals will be the same because both involve the NE 4th Street Extension and the City’s processes and decision-making supporting that project and the legal issues in the appeals are also intertwined.

C. The Ordinance and Petition Do Not Reasonably Describe the Scope of the Easement Interests to be Acquired.

In addition to taking “excess” property by taking the fifth lane, the City could also take excess property by not defining the scope of the easement rights it intends to acquire. Courts look at the express language

of an easement to determine its scope. *See Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). Here, the City proposes to acquire a “Temporary Construction Easement”, CP 950, 963, 965, but there is no description of the length or the terms and conditions of the “temporary” easement. For example, it is unclear if the length is proposed for 1-year, 2-years, or longer. Also, it is not clear if the City proposed to have exclusive use of the easement area or whether Best Buy will be able to concurrently use it for such purposes as access to the remainder of the Best Buy leased property. Outside of the condemnation process, the City’s documentation shows that the portions of the Best Buy store outside of the right of way need not be demolished.⁶ Yet, the City’s “temporary easement” depiction shows the City taking a substantial, additional, portion of the Best Buy building. CP 965. Best Buy asked the superior court to require a more definite statement of the City on these points. Without this information, it is not possible to determine the true effect of the City’s taking on Best Buy’s property rights, and it is impossible to determine whether the scope of the easements is “reasonably necessary” for the City’s intended purposes. Part of the purpose of describing the

⁶ *See, e.g.*, Stuckey Decl. ¶¶ 19-20 (CP 454-55) and Att. 4 to Stuckey Decl. (CP 536-37), showing different impacts to Best Buy building depending on whether the NE 4th Extension is built as a 4 or 5-lane road; *see also* Exh. F to LaCombe Decl. (CP 248, 258), describing the impact to the Best Buy building from the City’s chosen alignment for the proposed NE 4th Extension.

property interests to be taken is so that a condemnee can assess the damages and prepare for the trial on just compensation. Without more information from the City regarding the scope of the easements it proposes to take, Best Buy cannot properly assess the extent of the damages that it will incur, nor properly plan for its use of the remaining property during and following the City's taking.

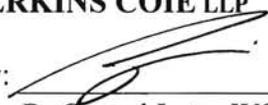
A more definite and corrected statement of the scope of the easements the City proposes to should have been included in the Petitions. The superior court erred in concluding that the City provided a reasonably accurate description of the property it intends to acquire when the City did not include the length, terms or conditions for those easements.

III. CONCLUSION

Best Buy respectfully requests that the superior court's Findings of Fact and Conclusions of Law Adjudicating Public Use and Necessity dated August 7, 2013 and Order Re: FFCL on Public Use and Necessity dated August 7, 2013 be reversed. The City's taking of right of way for a 5-lane road rather than a 4-lane one under the facts and circumstances is arbitrary and capricious and an abuse of the City's constitutional authority. Best Buy also respectfully requests that the City be required to provide a more detailed and corrected statement of the easement interests it proposes to acquire, limitations on the City's exercise of those rights, and their schedule and duration pursuant to RCW 8.12.060.

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Appellant's Reply Brief

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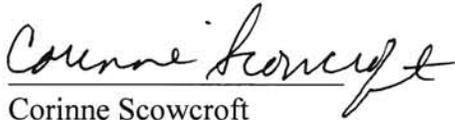
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