

NO. 70855-4-I

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

FILED
APR 10 11 48 AM '05
E

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.

RESPONDENT'S BRIEF

Michael R. Kenyon
WSBA No. 15802
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent
City of Bellevue

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RE-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR	2
III.	RE-STATEMENT OF THE CASE	2
	A. Procedural Background.....	2
	B. Factual Background	3
	1. The Street Project.....	3
	2. The City’s Public Process.....	6
	3. 2006 Discussions Regarding Proposed Development Agreement Between the City and Best Buy’s Landlord	8
	4. Five-Lane and Four-Lane Alternatives.....	8
	5. Negotiations Among Best Buy, Its Landlord, and the City.....	11
	6. Best Buy’s Delay Strategy	12
IV.	ARGUMENT.....	13
	A. Standard of Review.....	13
	1. Public Use	14
	2. Public Necessity.....	15
	B. The City Council Properly Adopted Its Five-Lane “Preferred Alternative”. The City Council Has Never Adopted a Four Lane Design	17

1. Best Buy’s Disagreement with the City Council’s Choice Is Irrelevant.....	18
2. The City Specifically Considered a Number of Alternative Routes for the NE 4th Street Extension, Including Alternatives Proposed by Best Buy	21
C. Best Buy – Not Its Landlord – Alone Controls Its Lease	24
D. Negotiations Among the City, Best Buy, and the Landlord Are Required by Law	27
E. Best Buy’s Unsuccessful SEPA/Writ Petitions Have No Bearing on This Petition in Eminent Domain.....	28
F. The Petitions Provide Far More Than a “Reasonably Accurate Description” of the Take Property.....	29
G. The Trial Court Properly Exercised Its Discretion in Denying Best Buy’s Request for Testimony at the Use and Necessity Motion	31
1. No Relevant Factual Disputes Existed.....	31
2. No Credibility Issues Existed	31
V. CONCLUSION.....	33

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Cent. Puget Sound Reg'l Transit Auth. v. Miller</i> ("Sound Transit"), 156 Wn.2d 403, 128 P.3d 588 (2006).....	13, 18 – 19, 26, 29
<i>City of Blaine v. Feldstein</i> , 129 Wn. App. 73, 117 P.3d 1169 (2005).....	31
<i>Deaconess Hospital v. Highway Commission</i> , 66 Wn.2d 378, 403 P.2d 54 (1965).....	16 – 17, 24
<i>Dexter Horton Bldg. Co. v. King County</i> , 10 Wn.2d 186, 116 P.2d 507 (1941).....	19
<i>Green v. McAllister</i> , 103 Wn. App. 452, 14 P.3d 795 (2000).....	19, 27
<i>HTK Management, L.L.C. v. Seattle Popular Monorail</i> <i>Authority</i> ("Seattle Monorail"), 155 Wn.2d 612, 121 P.3d 1166 (2005).....	13, 15, 24
<i>In re Estate of Marks</i> , 91 Wn. App. 325, 957 P.2d 235, <i>review denied</i> , 136 Wn.2d 1031, 972 P.2d 466 (1998)	19
<i>In Re Petition of City of Bellevue</i> , 62 Wn.2d 458, 383 P. 2d 286 (1963).....	26
<i>In re Petition of City of Seattle</i> , 104 Wn.2d 621, 707 P.2d 1348 (1985).....	14
<i>In re Petition of Port of Grays Harbor</i> , 30 Wn. App. 855, 638 P.2d 633 (1982).....	26
<i>Marino Prop. Co. v. Port of Seattle</i> , 88 Wn.2d 822, 567 P.2d 1125 (1977).....	14
<i>Miller v. City of Tacoma</i> , 61 Wn.2d 374, 378 P.2d 464 (1963).....	20

<i>Smith v. Hollenbeck</i> , 48 Wn.2d 461, 294 P.2d 921 (1956).....	23
<i>State v. Brannan</i> , 85 Wn.2d 64, 530 P.2d 322 (1975).....	17
<i>State v. Burch</i> , 7 Wn. App. 657, 501 P.2d 1239 (1972)	23
<i>State ex rel. Schroeder v. Superior Court of Adams County</i> , 29 Wash. 1, 69 P. 366 (1902)	14 - 15
<i>State ex rel Washington Water Power Company v. Superior Court</i> , 8 Wn.2d 122, 111 P.2d 557 (1941)	29
<i>State ex rel. Wash. State Convention & Trade Ctr. v. Evans</i> , 136 Wn.2d 811, 966 P.2d 1252 (1998).....	17, 27
<i>Tacoma v. Welcker</i> , 65 Wn.2d 677, 399 P.2d 330 (1965).....	13 – 16, 18, 24

REGULATIONS AND RULES

Revised Code of Washington (“RCW”) 8.12.030	14
RCW 8.12.090	28
RCW 8.26.180(1).....	27
RCW 42.30.060	29
RCW 42.30.060(1).....	25

I. INTRODUCTION

After years of public involvement and consideration of various alternative street designs and alignments – including those put forth or supported by Best Buy itself – the Bellevue City Council made its considered determination to construct Phase 2 of the NE 4th Street Extension Project (“Project”) over portions of properties (the “Take Property”) owned by Respondents HD Development of Maryland, Inc. (“Home Depot”) and 457 120th Avenue, LLC (“Principal Group”). Best Buy leases its property from Principal Group. Neither property owner opposed the adjudication of public use and necessity before the trial court.

Best Buy’s opposition to public use and public necessity is misplaced. This is a public street project – there is no more “public” use than that of a new public street, and Best Buy does not seriously contest public use. Rather, Best Buy challenges public necessity, arguing that the City Council wrongly decided to construct a five-lane street, rather than a four-lane street that would have less impact on its store. The very fact that the City Council did fully consider multiple competing alternatives before making its final decision, however, is sufficient by itself to overcome any hint of the actual or constructive fraud that Best Buy must establish in order to defeat a finding of public necessity.

The Court should affirm the trial court's Findings of Fact and Conclusions of Law Adjudicating Public Use and Necessity. This appeal should be rejected. The Project should be constructed.

II. RE-STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Does the Project - a new public street - constitute a public "use"?

B. After years of comprehensive public input and involvement analyzing numerous alternative routes for the Project – including specific and detailed consideration of alternatives proposed or supported by Best Buy itself - the Bellevue City Council declared a portion of Best Buy's leasehold to be "necessary" to construct the Project. Best Buy prefers a different alternative. In the absence of actual fraud or arbitrary and capricious conduct amounting to constructive fraud, is the City Council's selection "deemed conclusive" on the court?

III. RE-STATEMENT OF THE CASE

A. Procedural Background.

The City of Bellevue ("the City") agrees with the procedural history of the case set forth in the Appellant's Brief at pages 11 – 14.

B. Factual Background.

1. The Street Project.

The Project is the subject of the two Petitions in Eminent Domain consolidated in this appeal, and affects portions of what are commonly known as the Home Depot site (King County Parcel No. 332505-9007) and the Best Buy site (King County Parcel No. 332505-9213). CP 147.

The Take Property identified in the petitions consists of a small portion of the Home Depot site and a larger portion of the Best Buy site adjoining to the north, together with associated easements. *Id.* The petitions were authorized by the City Council's adoption of Ordinance No. 6098 on February 4, 2013. CP 301 - 307. In Ordinance No. 6098, the City Council specifically declared the Take Property to be "necessary" for the purposes set forth in the ordinance. CP 302.

The Take Property is legally described, and pictorially depicted, in attachments to Ordinance No. 6098. CP 304 – 307. The Project will result in the construction of a new segment of NE 4th Street, a public street that will extend generally along the property line dividing the Home Depot site from the Best Buy site.¹

¹ The Home Depot store is depicted on CP 155, and the southern edge of the Best Buy store is visible at the left edge of CP 155, under "Photographer: King County GIS."

The Project includes the (a) extension of NE 4th Street as a new five-lane arterial public street eastward from the eastern boundary of the BNSF railway corridor to 120th Avenue NE; (b) installation of bike lanes; and (c) related construction or addition of curb, gutter and sidewalk, retaining walls, traffic signals, illumination, landscaping, irrigation, storm drainage and detention, and other utility infrastructure. CP 147 – 148.

The Project is one piece of a larger project known as the “Mobility and Infrastructure (M&I) Initiative.” The City Council developed and implemented the M&I Initiative in order to address growth and planned development in the Downtown Bellevue, Bel-Red (the area generally around the common border between the cities of Bellevue and Redmond), and Wilburton areas. CP 148.

The Project is included within the “Wilburton Connections” component of the M&I Initiative, which is the area generally south of NE 8th Street. In addition to the new improvements to be constructed as part of the Project, the M&I Initiative includes a comprehensive network of numerous other public improvements for vehicle traffic, pedestrians, and bicyclists including construction of NE 4th Street westward from the eastern boundary of the BNSF Railway corridor connecting with 116th Avenue NE (Phase 1 of the Project), as well as similar improvements along 120th Avenue NE from NE 4th Street northward to NE 8th Street,

and then further northward of NE 8th Street for approximately sixteen blocks (extending almost to SR 520). The M&I Initiative also includes similar, additional improvements to segments of NE 6th Street, NE 15th Street, NE 16th Street, and 124th Avenue NE. All of the listed streets or avenues are public rights-of-way. CP 156 (the Project is depicted in the lower right-hand corner).

As described in the City of Bellevue's adopted Capital Investment Program for fiscal years 2011 – 2017:

The NE 4th Street Extension Project is one of a number of high priority transportation investments that make up the Mobility and Infrastructure (M&I) Initiative. The M&I Initiative was formed to address recent growth and planned development in the Downtown Bellevue, Bel-Red, and Wilburton areas. The NE 4th Street Extension Project in association with a widened and improved 120th Avenue NE, the planned extension of NE 6th Street, the planned NE 15th/16th Street multi-modal corridor, and improvements to 124th Avenue NE will support increased connectivity between Downtown Bellevue, Wilburton, the new Bel-Red transit-oriented-development node, and the Overlake regional growth center. The new route will provide an alternate to and relieve congestion at key intersections including NE 8th Street at 112th Avenue NE and NE 8th Street at 116th Avenue NE. Improvements will enhance travel time and mobility options for passenger cars, transit, freight, pedestrians and bicycles.

CP 148 – 149.

2. The City's Public Process.

Before undertaking the Project, the City Council reviewed considerable community input and undertook substantial community involvement over a period of more than four years related to the M&I Initiative and the Wilburton Connections component, including the Project. These community input and involvement measures included multiple community meetings, multiple City Council meetings, and the resulting consideration of several different alternative design concepts for the projects included within the M&I Initiative, specifically including alternative design concepts for the Project. CP 148 - 149.

In particular, with respect to the City's community input and involvement processes:

(a) The City conducted three "Open Houses" in 2010, all of which were advertised in local media and on the City's web site;

(b) Announcements about the Open Houses were sent to over 4,000 addresses in the surrounding areas, including all property owners and tenants. Those unable to attend the public events were kept informed through newsletters, press releases and a "Wilburton Connections" web site;

(c) Multiple meetings with property owners and tenants (specifically including Best Buy, Home Depot, and others) were conducted during the four-year period; and

(d) Elements of the Project, including various design concepts and various street alignment alternatives, were discussed at numerous open public meetings of the City Council during the four-year period including almost thirty separate City Council meetings. CP 149 – 150.

Additionally, as part of City's community involvement process, City Staff and the City Council expressly considered design concepts and street alignment alternatives proposed by Best Buy itself. At least twenty meetings occurred between City representatives and Best Buy representatives to discuss Best Buy's concerns, including its design and street alignment proposals. CP 150.

City Staff and City Councilmembers also received at least seven lengthy and detailed letters from Best Buy, in which Best Buy continued to express its concerns regarding the Project and continued to advocate for its preferred street design and alignment. CP 157 – 201.

Another result of the community input and involvement processes undertaken by the City and the City Council was the preparation in August 2011 of an Alternatives Analysis Report regarding all of the projects affecting the NE 4th Street/120th Avenue NE Corridor. CP 202 - 300.

The Alternatives Analysis Report specifically considers various design and alignment alternatives for the Project. CP 241 - 260.

3. 2006 Discussions Regarding Proposed Development Agreement Between the City and Best Buy's Landlord.

In 2006, representatives of Best Buy's landlord initiated discussions with the City regarding execution of a development agreement affecting the Best Buy parcel and multiple other parcels on and around the Project route. CP 623 – 628. As part of those discussions, the landlord asked the City “to commit to condemn Best Buy and Home Depot property (if necessary to acquire the ROW). [Landlord] will pay City costs.” CP 626 (box 2.b). The City never made that commitment. As Best Buy acknowledges, “The City considered the Landlord's proposal; however, the City declined to use its condemnation power in order to assist the Landlord in acquiring Best Buy's leasehold.” CP 383 (lines 43 – 45). The record here contains no evidence that the City Council ever executed a development agreement with the landlord.

4. Five-Lane and Four-Lane Alternatives.

After many years of public participation and involvement, and consideration of many competing alternative street alignments, the City Council made its decision. The City Council chose a five-lane configuration. CP 149 – 150; 577 - 584. As reflected in an April 4, 2011

Management Brief prepared for the Mayor and City Council, the City Council's "preferred alternative":

impacted the least number of parcels, allowed for the ability to modify the existing [Best Buy] structure for continued retail use, was the least overall cost compared to other alternatives considered at the time, was compatible with the Wilburton Village land use vision, and the community preferred the location where NE 4th would intersect with 120th Avenue NE.

CP 578. The City Council's preferred alternative does impact the Best Buy building, and City Staff accordingly committed to "continue to work with Best Buy, The Principal Group, Mutual Materials, and the School District on the alternative that addresses potential impacts to the Best Buy building." CP 579.

Following through on its commitment, Capital Projects Manager Nancy LaCombe (CP 147) wrote to Best Buy on January 12, 2012 about a "very preliminary alternative" with "a lot of items still needing to be fleshed out" that, if implemented, could allow for a street alignment that would "not impact the Best Buy building structure." CP 882. The feasibility of this "very preliminary alternative" depended on the willingness of the adjoining property owner, Burlington Northern Santa Fe Railroad ("BNSF"), to sell its property to Bellevue, which could then use that property to replace parking lost at both Best Buy and Home Depot as

a result of construction of the Project. Id. The record here contains no evidence of a property sale by BNSF to Bellevue.²

A month later, at the City Council meeting on February 13, 2012, Assistant Director of Capital Program Services Ron Kessack provided an update regarding this potential alternative design. The alternative would eliminate one westbound lane in front of Best Buy. CP 561. When questioned by a Councilmember whether the narrower, proposed four-lane street would affect its “functionality,” Mr. Kessack responded, “[T]hat is one of the analyses that we have to do.” Id. Mr. Kessack further indicated that the City would have to “do more traffic analysis work on that.” CP 562.

In response to another Councilmember’s question whether the street would have more functionality if the narrower, four-lane design was not implemented and the City continued with its selected five-lane design, Mr. Kessack responded, “[T]here’s more wiggle room, certainly.” CP 562 – 563. Mr. Kessack concluded, “[W]e do want to run more numbers on it,” and that the City was “trying to find that . . . sweet spot,” or that “win-win that everyone’s looking for.” CP 563 – 564. The record here contains no evidence that the City Council ever adopted this alternative four-lane design.

² BNSF sold the property to King County.

5. Negotiations Among Best Buy, Its Landlord, and the City.

In May 2012, Best Buy proposed a different four-lane alternative. The City agreed to consider it. CP 796, 799; *see generally* CP 796 – 801. Implementation of material portions of Best Buy’s four-lane proposal required the consent of its landlord. Best Buy accordingly corresponded with its landlord on that very topic. CP 425 - 431. The landlord’s response emphasized its commitment to retaining Best Buy as its “valued tenant.” CP 425. The landlord further “remain[ed] committed to retaining Best Buy as a tenant.” CP 431.

By then, discussions and negotiations among the City, Best Buy, and the landlord had been occurring for four years. CP 796. The City faced grant funding and other important deadlines and – most importantly - wanted to build the new street. Accordingly, the City in May 2012 gave Best Buy and the landlord a deadline by which to provide information necessary for the City to timely consider Best Buy’s proposed four-lane alternative. CP 797. In doing so, the City continued working with Best Buy and the landlord into August 2012, and committed to:

consider the feasibility of the 4-lane alternative proposed by Best Buy as long as the details can be agreed upon and the property owner consents as necessary. We encourage Best Buy to move quickly to finalize those details and to obtain the owner’s consent as our deadline for final

design is October 1, 2012.

CP 532 (first “bullet” point).³ The record here contains no evidence that Best Buy and the landlord ever reached an agreement.

6. Best Buy’s Delay Strategy.

Best Buy representatives have indicated on multiple occasions that Best Buy will appeal all permit decisions and approvals necessary to construct the Project in order to delay the Project, including the potential loss of grant funding. Delay can cause the City to lose portions of its state and federal grant funding for the Project. CP 151; CP 170,⁴ 163. On this record, Best Buy has already filed three unsuccessful appeals before the Hearing Examiner, two unsuccessful motions for reconsideration before the Hearing Examiner, and a Land Use Petition in King County Superior Court. CP 309 – 310, 726 - 753.⁵

³ Larry Smith, counsel to the landlord, also received a copy of the letter. CP 534.

⁴ Best Buy wrote to the City Council: “While the City’s proposed SEPA and NEPA documents have not yet been released for public scrutiny, based on the other information the City has made available, and the processes the City has followed, we are confident that they are subject to *challenge in several different forums*. If forced to do so, Best Buy will make use of staff’s errors in conducting environmental review, and the *City will not only lose its September NE 4th grant, but its March 120th grant, and quite likely its second NE 4th grant* that must be obligated by December 2014. *The road projects will be delayed even further.*” (Emphases added.)

⁵ Subsequent to the entry of Judge Downing’s orders at issue in this appeal, Best Buy filed a second Land Use Petition in King County Superior Court. See, Declaration of Edward Lin in Support of Best Buy’s Answer to Bellevue’s Motion for Accelerated Review at 1 – 2, ¶¶ 3 – 6, filed in this appeal on November 12, 2013.

IV. ARGUMENT

The Petitions at issue here involve the taking of property for use as a new public street. Few uses are more clearly “public” than public streets and related improvements (e.g., sidewalks, bike lanes, storm water drainage, etc.). The adjudication of public use in this case is self-defining.

After years of comprehensive public involvement and review of multiple alternative designs and alignments for the Project, including designs and alignments proposed or supported by Best Buy itself, the City Council made its considered decision. The City Council’s decision is reflected in Ordinance No. 6098, which expressly declares that the Take Property is necessary for the Project. In the absence of actual or constructive fraud, the City Council’s decision of public necessity “will, by the courts, be deemed conclusive.”⁶

A. Standard of Review.

A decree of public use and necessity is entered when (1) the use is really public; (2) public interests require it; and (3) the property in question is necessary to facilitate the public use. *Cent. Puget Sound Reg’l Transit Auth. v. Miller* (“*Sound Transit*”), 156 Wn.2d 403, 418-20, 128 P.3d 588 (2006); *HTK Management, L.L.C. v. Seattle Popular Monorail Authority* (“*Seattle Monorail*”), 155 Wn.2d 612, 629, 121 P.3d 1166

⁶ *Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).

(2005). Despite what appears to be a three-part test, “The latter two findings are generally subsumed under the definition of [public] ‘necessity.’” *In re Petition of City of Seattle*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985).

1. Public Use.

Under Art. I, § 16 of the Washington State Constitution, the determination of public use is a judicial question:

Under the provisions of Const. Art. 1, § 16 (amendment 9) and our interpretation thereof, the issue of whether a proposed acquisition be really for a public use is solely a judicial question, although a legislative declaration thereof will be accorded great weight. . . . On the other hand, the issue of whether the contemplated acquisition is necessary to carry out the proposed public use presents a legislative question, and a declaration of necessity by the appropriate legislative body will, by the courts, be deemed conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.

Welcker, 65 Wn.2d at 684. The City has express statutory authority to condemn private property “for streets, avenues, . . . and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley, or highway,” RCW 8.12.030. Use of property for a street or highway is necessarily public. *State ex rel. Schroeder v.*

Superior Court of Adams County, 29 Wash. 1, 4-5, 69 P. 366, 367-68 (1902).

In this case, the Take Property will unquestionably be put to the public use of a new public street and related improvements. CP 147 - 148.

2. Public Necessity.

Once public use is judicially determined, the Court must next confirm the City Council's determination that the Take Property is "necessary" to construct the public use. By adoption of Ordinance No. 6098, the City Council authorized acquisition of the Take Property by eminent domain, and specifically declared the Take Property to be "necessary" for the Project. CP 151, 302 (Sec. 2).

The City Council's determination of public necessity here is a:

legislative question, and a declaration of necessity by the appropriate legislative body will, by the courts, be deemed conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.

Welcker, 65 Wn.2d at 684; *see also*, *Seattle Monorail*, 155 Wn.2d at 629.

Best Buy bears a heavy burden to prove the fraud necessary to upset the City Council's determination of public necessity. In condemnation cases, public necessity means only:

reasonable necessity, under the circumstances of a particular case. It does

not mean absolute, or indispensable, or immediate need, but rather its meaning is interwoven with the concept of public use and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement Reasonable necessity for use in a reasonable time is all that is required.

Welcker, 65 Wn.2d at 683-84. Decisions as to reasonable necessity are the province of the City Council, and “will not be set aside or molested by the courts” in the absence of fraud or arbitrary and capricious conduct.

Deaconess Hospital v. Highway Commission, 66 Wn.2d 378, 405, 403 P.2d 54 (1965). As the Washington Supreme Court sensibly reasoned:

Once the purpose for which the lands are taken has been adjudged to be public, the kind and type of roadway, the route to be followed, [and] the design and engineering details, become the subject of administrative decision.

...

Although the courts may well determine from the evidence whether a project is for the public benefit, convenience or necessity, they are not trained or equipped to pick the better route, much less design and engineer the project. Thus, the rule that leaves these decisions to the administrative agencies is a sensible one consistent with the idea that the public’s business be carried out with reasonable efficiency and dispatch by those possessing the superior talents to accomplish the public purposes.

*Id.*⁷

B. The City Council Properly Adopted Its Five-Lane “Preferred Alternative”. The City Council Has Never Adopted a Four Lane Design.

Only the City Council – not Ron Kessack or any other individual City staff member – has the authority to select and approve the final street design. The City Council did so after undertaking a comprehensive and lengthy public process, selecting a five-lane alternative that impacts the Best Buy and Home Depot properties. The City Council could have reasonably selected another five-lane alternative that impacted different or additional property owners, or it could have selected one of the various proposed four-lane alternatives. It could have selected a six-lane alternative. Or even a two- or three-lane alternative. *See, e.g.*, CP 623 (§ “1” near bottom of page). After lengthy and involved consideration, the City Council made its choice. Best Buy simply disagrees with that choice.

⁷ *See also, State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 823, 966 P.2d 1252 (1998) (“Out of respect for our coordinate branches of government, judicial review is deferential.”); *State v. Brannan*, 85 Wn.2d 64, 68, 530 P.2d 322 (1975) (“When it comes to such discretionary details as the particular land chosen, the amount of land needed, or the kinds of legal interests in that land that are necessary for the project, . . . the condemnor’s judgment on these matters will be overturned only if there is “proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.”)

The fundamental flaw in Best Buy's argument is its misplaced insistence that public "necessity" equates to "minimum necessary."⁸ If that were the case, the City could only build a two-lane street. In eminent domain, "public necessity" means something far different than "minimum necessary." As the state Supreme Court has repeatedly instructed, "public necessity" means "reasonable necessity, under the circumstances of a particular case. It does not mean absolute, or indispensable, or immediate need, Reasonable necessity for use in a reasonable time is all that is required." *See, e.g., Welcker*, 65 Wn.2d at 683-84.

1. Best Buy's Disagreement with the City Council's Choice Is Irrelevant.

In *Sound Transit*, the Washington Supreme Court emphatically laid to rest Best Buy's arguments here. The *Sound Transit* Court considered the contention that "a nearby site would be better suited for the project and that condemnation is not necessary." *Sound Transit*, 156 Wn.2d at 421. The Court concluded:

But a particular condemnation is necessary as long as it appropriately facilitates a public use. [Citation omitted.] Put another way, when there is a reasonable connection

⁸ Best Buy's argument would also lead to the nonsensical result that a new city street should be built only to handle *current* traffic demand. Rather than taking a short-sighted approach, the City Council here approved a street design that accommodates both current and future traffic demand, thereby eliminating the disruption to local businesses and motorists that would again result from street construction in that same location in coming years in order to increase capacity to meet that future demand.

between the public use and the actual property, this element is satisfied. It need not be the best or only way to accomplish a public goal. This court has explicitly held already that the ‘mere showing’ that another location is just as reasonable does not make the selection arbitrary and capricious. [Citation omitted.]

. . . We have already ruled that site selection is essentially a legislative question, not a judicial one. . . . Expert testimony from [a landscape architect], who believed another site was better suited for the transit station, is not a basis for reversing the legislative decision that condemnation was necessary.

Id.

The City Council selected its preferred alternative. Best Buy disagrees with the City Council, and prefers another alternative. Best Buy’s simple disagreement, however, falls well short of meeting the standard necessary to satisfy the applicable legal hurdle of actual or constructive fraud.

Constructive fraud is conduct that is not actually fraudulent, but that has all the consequences and legal effects of actual fraud. *Green v. McAllister*, 103 Wn. App. 452, 467-468, 14 P.3d 795 (2000) (citing *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 191, 116 P.2d 507 (1941)). Constructive fraud is the failure to perform an obligation by some “interested or sinister motive,” rather than by an honest mistake. *Green*, 103 Wn. App. at 468; *In re Estate of Marks*, 91 Wn. App. 325,

336, 957 P.2d 235, *review denied*, 136 Wn.2d 1031, 972 P.2d 466 (1998).

No proof of constructive fraud exists.

Even if “arbitrary and capricious” was the applicable standard necessary to overturn the City Council’s declaration of public necessity, Best Buy’s opposition here still lands well short. Conduct is arbitrary and capricious only when it can be said to constitute “willful and unreasoning action, without consideration and regard for facts or circumstances.”

Miller v. City of Tacoma, 61 Wn.2d 374, 390, 378 P.2d 464 (1963).

Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Id.

Here, Best Buy simply prefers a street alignment different than the alignment ultimately selected by the City Council after years of public involvement from affected property owners and others, specifically including Best Buy. In other words - by definition - “there is room for two opinions,” one held by the City Council and the other held by Best Buy. In that situation, the City Council’s decision cannot be arbitrary and capricious.

2. The City Specifically Considered a Number of Alternative Routes for the NE 4th Street Extension, Including Alternatives Proposed by Best Buy.

The record here more than amply demonstrates the City's commitment to a robust public process and involvement, specifically including repeated consideration of Best Buy's particular requests. CP 149 - 151.

Included within the City's public process was the preparation in August 2011 of the Alternatives Evaluation and Screening Technical Report ("Alternatives Analysis") for the NE 4th Street/120th Avenue NE Corridor Project. The specific purpose of the Alternatives Analysis is to:

[d]ocument the decision-making process relating to the development of the proposed project. This report describes the project purpose and need, alternatives considered for the 1.65-mile corridor, as well as screening methodology. Engineering concepts were prepared for the project alternatives, including several different configuration concepts for major intersections along the corridor. A wide variety of screening criteria were used to evaluate the alternatives. In the end, a preferred alternative was identified and selected for the project corridor.

CP 209; *see* CP 151, 241 - 260.

In particular, the City conducted a technical workshop to consider possible street alignments in November 2009. As a result of that technical

workshop, “seven conceptual alternative alignments were carried forward to assess the viability of various design options.” CP 243. Three alternatives were rejected. Two of those were rejected due to “substantial impacts on existing businesses, especially Best Buy.” CP 244 (final bullet point).

The City conducted a second technical workshop in January 2010, after which the remaining four alternatives were further evaluated by means of discussions with affected property owners “to share current conceptual alignments and obtain the property owner’s input.” CP 253. As a result, “Alternative #4 clearly rated the highest” and was accordingly approved by the City Council. *Id.*

Even so, the City continued to seek public comment and involvement, and held additional public “open house” meetings regarding the City Council’s preferred alternative. As a result, “further refinements of Alternative #4 were considered based on stakeholder input,” specifically including reduced impacts to the Best Buy store. CP 256 (Section 5.2.4, especially “Alternative #8” and “Alternative #9”). Alternatives #8 and #9 “use the same alignment,” which alignment was “derived from minor adjustments to the Alternative #4 alignment.” CP 260. The City Council accordingly decided to “proceed with design using the alignment included in both Alternatives #8 and #9.” *Id.*

Best Buy's complaint here is remarkably similar to the unsuccessful argument raised by a property owner in *State v. Burch*, 7 Wn. App. 657, 659-660, 501 P.2d 1239 (1972), citing *Smith v. Hollenbeck*, 48 Wn.2d 461, 294 P.2d 921 (1956). In *Burch*, and like Best Buy here, the owner asserted that the state's refusal to accept the owner's claimed preferred alignment for an extension of SR 516 constituted arbitrary and capricious conduct sufficient to successfully resist a finding of public necessity. In response, the State, like Bellevue here, carefully explained the considered basis for its selected alignment. The Court concluded, "Action, when exercised honestly, fairly, and upon due consideration is not arbitrary and capricious, even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached." *Id.*

The Bellevue City Council has declared by ordinance that the Take Property is "necessary" for the public use of public streets and related public improvements. Best Buy disagrees. Rather than constituting actual or constructive fraud, however, the City Council's conduct constitutes precisely the type of thoughtful, inclusive, and comprehensive analysis that the public should expect from its elected officials. The record is devoid of any evidence to the contrary. The City will indisputably use the Take Property for the public use of a public street. This decision was

reached “honestly, fairly, and upon due consideration” of facts and circumstances. *Seattle Monorail*, 155 Wn.2d at 635 (citing *Welcker*, 65 Wn.2d at 684-85); *Deaconess*, 66 Wn.2d at 406.

Overwhelming evidence exists to prove that the City Council carefully considered multiple alternative street alignments and the related issues raised by many members of the community, including Best Buy. No evidence exists - none - of actual or constructive fraud by the City in selecting the final street design and alignment.

Best Buy itself has participated in numerous public meetings and discussions with the City on the proposed extension over the past several years, and has delivered to the City Council at least seven detailed letters outlining its position. CP 149 – 151, 157 – 201. Best Buy has indicated on numerous occasions, including within its letters dated March 7, 2011 and March 5, 2012 (CP 163 – 171), that unless the City offers a solution acceptable to Best Buy, it will take steps to delay the Project and threaten City grant funding. While Best Buy has in fact kept its promise to delay the Project (CP 151, 308 – 311), it does so without a meritorious legal basis.

C. Best Buy – Not Its Landlord – Alone Controls Its Lease.

At pages 20 – 24 of Appellant’s Brief, Best Buy suggests that the

City has conspired with Best Buy's landlord to take Best Buy's lease,⁹ apparently for the private benefit and use of the landlord.¹⁰ Best Buy offers no proof, and no proof exists in this record. If the City Council had approved any such deal, it would have occurred in the light of day at an open public meeting. If it had occurred otherwise, it would be "null and void." RCW 42.30.060(1).

Best Buy – not its landlord, and certainly not the City - has sole control over whether, and when, to break its lease (CP 456 – 502). Under Section 19:

In the event less than all of the Leased Premises is taken or condemned for a public or quasi-public use and the portion of the Leased Premises which is not taken may be reasonably suitable for the purposes of Tenant by repair or restoration, this Lease will not terminate.

CP 475. Consistent with Section 19 of the lease, Best Buy has unequivocally asserted its right to its leasehold through 2043, further declaring that it has "no plans to redevelop the property for any use other than as a Best Buy store retail use." CP 451; Appellant's Brief at 23. In other words, Best Buy will remain in its current leased location for at least

⁹ "The effect of taking the fifth lane from the Best Buy Parcel is to take Best Buy's 30-year leasehold interests in order to support its Landlord's and KG's private redevelopment plans." Appellant's Brief at 21.

¹⁰ "[Fifth] lane is not needed absent a speculative private redevelopment (by Best Buy's landlord) that would violate Best Buy's lease rights." Appellant's Brief at 20.

thirty more years.

As analyzed above, the City Council's selection of its preferred five-lane alternative for the Project easily withstands challenge based on public "necessity", and would do so even if, as Best Buy asserts, the City and Principal Group had been conspiring to break Best Buy's lease:

Even if the decision was partially motivated by improper considerations, it will not be vacated so long as "the proposed condemnation demonstrates a genuine need . . . and the condemnor in fact intends to use the property for the avowed purpose."

Sound Transit, at 418 (citing *In re Petition of Port of Grays Harbor*, 30 Wn. App. 855, 864, 638 P.2d 633 (1982)).

Finally, and even though no agreement of any kind exists between the City and the landlord regarding development or redevelopment of the Best Buy-leased property, a city may property exercise its eminent domain authority even though private property owners will be benefited. "That someone is benefited by street improvements is hardly unusual." *In Re Petition of City of Bellevue*, 62 Wn.2d 458, 459, 383 P. 2d 286 (1963). Moreover, the text of Article 1, Section 16 of the Washington Constitution:

does not create a blanket prohibition on the private use of land condemned by the State. As long as the property was condemned for the public use, it may also be put to a private

use that is merely incidental to that public use.

Evans, 136 Wn.2d at 817.

D. Negotiations Among the City, Best Buy, and the Landlord Are Required by Law.

Best Buy next argues that the City's negotiations with Best Buy and its landlord amount to constructive fraud.¹¹ Constructive fraud is the failure to perform an obligation by some "interested or sinister motive," rather than by an honest mistake. *Green*, at 468. Rather than constructively fraudulent conduct, however, the City's negotiations with Best Buy and its landlord are required by the plain terms of state statute.

Under RCW 8.26.180(1), the City "shall, to the greatest extent practicable . . . make every reasonable effort to acquire expeditiously real property by negotiation."

The City did so. In addition to negotiating with the landlord, the City of course also engaged in even more detailed and extensive negotiations with Best Buy, meeting at least twenty times between January 2010 and June 2013. CP 150.

Best Buy actively participated in the negotiations with its landlord and the City. In March 2012, Best Buy specifically urged the City Council to "allow Best Buy, the Principal Group [the landlord], and Home

¹¹ Appellant's Brief at 21.

Depot time to work together regarding this [proposed four lane] realignment, rather than rush to make yet another bad decision on misinformation.” CP 170. Best Buy even went one step further, admonishing the City Council to “tell staff to leave it up to Best Buy and Home Depot to figure out for themselves how to fix any problems the City’s decision causes.” CP 171.

The City patiently waited. Another year passed, and Best Buy still had not reached the promised agreement with either its landlord or its neighbor, Home Depot. More than three years after beginning negotiations with Best Buy in January 2010 (CP 150), the City Council adopted the condemnation ordinance in February 2013. CP 303.

E. Best Buy’s Unsuccessful SEPA/Writ Petitions Have No Bearing on this Petition in Eminent Domain.

The City acknowledges the existence of Best Buy’s other pending unsuccessful SEPA and writ challenges, but considers them to be only an integral part of Best Buy’s long-standing and uninterrupted strategy of delay. *See generally*, CP 151, 308 - 311.

This appeal should proceed on an expedited basis. Under RCW 8.12.090, “Proceedings under this chapter [eminent domain by cities] shall have precedence of all cases in court except criminal cases.”

Best Buy's collateral attack on these petitions in eminent domain is improper. Best Buy concedes as much. CP 391, 404, 407. As the state Supreme Court put it, "We note in passing that questions of public use and necessity are not subject to the State Environmental Policy Act." *Sound Transit*, 156 Wn.2d at 421, citing *Marino Prop. Co. v. Port of Seattle*, 88 Wn.2d 822, 830-31, 567 P.2d 1125 (1977).

Best Buy argues for consolidation in this Court of this appeal and its potential appeal of the trial court's order dismissing its SEPA and writ challenges.¹² When and if Best Buy appeals that order, the question of consolidation can be properly addressed.

F. The Petitions Provide Far More Than a "Reasonably Accurate Description" of the Take Property.

The City easily satisfies its burden under RCW 8.12.060, which requires only that a petition in eminent domain provide a "reasonably accurate description" of the Take Property. "It is not necessary that the [City] outline in definite detail the entire plan of operation . . . To do so would, in many cases, be impractical, and in others impossible." *State ex rel Washington Water Power Company v. Superior Court*, 8 Wn.2d 122, 127-28, 111 P.2d 557 (1941).

¹² The Hon. William Downing denied Best Buy's SEPA and writ challenges by order dated December 13, 2013. That order will become of record in this Court under a forthcoming Status Report of the parties, required by the terms of Commissioner Mary Neel's notation ruling entered on November 20, 2013, and reflected in Court Administrator/Clerk Richard D. Johnson's letter to the parties dated November 21, 2013.

The petitions at issue here include both legal descriptions and also right-of-way exhibits pictorially depicting the full extent of the Take Property in far greater than “reasonably accurate” detail. CP 5, 13 – 16.

Best Buy’s real complaint is not the accuracy of the description of the Take Property in the petitions, but rather its concern about the impact on its store caused by the actual construction of the Project (e.g., site access, construction during holiday season, etc.). But Best Buy’s argument fails to comprehend a fundamental tenet of eminent domain – in the absence of a negotiated agreement, private property rights are taken, not negotiated, upon the payment of just compensation.

Construction of the Project begins only after the City acquires title to the Take Property after entry of the Decree of Appropriation, or upon the earlier grant of immediate possession and use. Neither has occurred to date. Until then, Best Buy is free to continue to negotiate with the City regarding construction concessions. Absent successful negotiations, the City will acquire the easement rights described in the petitions and construct the street without construction concessions. Either way, however, resolution of those issues has nothing to do with the accuracy of the description of the Take Property.

G. The Trial Court Properly Exercised Its Discretion in Denying Best Buy's Request for Testimony at the Use and Necessity Motion.

A trial court has full discretion in determining the manner in which to conduct a motion to adjudicate public use and necessity. *City of Blaine v. Feldstein*, 129 Wn. App. 73, 76, 117 P.3d 1169 (2005). "If there are no relevant factual disputes or credibility issues and the record is sufficient to fully inform the court, the case may be properly resolved without a testimonial hearing." *Id.* Judge Downing properly exercised his discretion below in denying Best Buy's request for a testimonial hearing.

1. No Relevant Factual Disputes Existed.

The City Council selected one route. Best Buy lobbied for another. The facts are not in dispute, and were easily and fully put before the trial court by the sworn declarations of the witnesses for the City and Best Buy. CP 146 – 307 (Nancy LaCombe), CP 308 – 377 (Monica Buck), CP 450 – 541 (Brendon Stuckey), CP 411 – 432 (Gerard Lutz), CP 905 – 922 (Melissa Moseley), CP 433 – 499 (William Popp), and CP 548 – 826 (Edward Lin).

2. No Credibility Issues Existed.

Prior to the trial court's consideration of the City's motion to adjudicate public use and necessity, Best Buy had already taken full advantage of ten days of testimonial hearings in which it questioned

multiple members of City staff and offered its own lay and expert testimony about the Project. CP 309 (¶ 4(B)), 310 (¶ 4(E)). As a result, Best Buy indicated its intent to offer into evidence (a) a presentation to the City Council at an open public meeting by Ron Kessack, the Assistant Director of the Transportation Department, generally indicating that Best Buy's preferred alternative might have been feasible, (b) testimony of Brandon Stuckey, a Best Buy employee, indicating that Best Buy's preferred alternative would have less impact on the operation of the Best Buy store, and (c) testimony of and a report prepared by Bill Popp, Best Buy's transportation consulting engineer. CP 383 ("Relief Requested").

No credibility issues exist, and particularly not with Mr. Kessack – indeed, rather than challenging the credibility of Mr. Kessack's presentation, Best Buy needed it to be *true*.

It *is* true that Best Buy's preferred route might have been feasible, and the City did not argue otherwise. The City Council simply did not choose that route; rather, the City Council chose a different, feasible route. The City certainly did not argue or believe that either Mr. Stuckey or Mr. Popp would offer false or non-credible testimony. Their true testimony, however, would again merely have supported the selection of a street alignment other than the one chosen by the City Council.

Best Buy fully incorporated the testimony it desired from its proposed testimonial witnesses, Mr. Stuckey and Mr. Popp, within the declarations and exhibits filed with Best Buy's Opposition to the City's Motion for Public Use and Necessity. If Best Buy had needed more from either of them, Best Buy easily could have included lengthier or additional declarations. Best Buy likewise fully incorporated Mr. Kessack's presentation to the City Council within its opposition declarations. CP 549, 557 - 564.

V. CONCLUSION

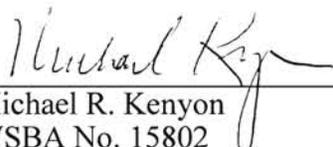
This is not a close case. While Bellevue appreciates that Best Buy is frustrated by the City Council's decision to build the Project, a tenant's frustration is not the applicable legal standard. Without exception, the taking of private property for use as a public street constitutes a public use.

After years of thoughtful and comprehensive review, including consideration of alternatives proposed or supported by Best Buy itself, the City Council likewise declared the Take Property to be necessary to construct the NE 4th Street Extension Project. Consistent with long- and well-established legal precedent, the City Council's determination of public necessity binds this Court due to the complete and utter absence of actual or constructive fraud.

The City of Bellevue respectfully requests that the Court affirm the trial court's Findings of Fact and Conclusions of Law Adjudicating Public Use and Necessity.

RESPECTFULLY SUBMITTED this 19 day of December, 2013.

KENYON DISEND, PLLC

By 

Michael R. Kenyon
WSBA No. 15802
Attorneys for Respondent
City of Bellevue

DECLARATION OF SERVICE

I, Margaret Starkey, declare and state that:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 19th day of December, 2013, I served a true copy of the foregoing *Respondent's Brief* on the following counsel of record using the method of service indicated below:

***Attorneys for Best Buy Stores,
LP:***

R. Gerard Lutz
Edward C. Lin
Perkins Coie, LLP
The PSE Building
10885 NE Fourth Street, Suite
700
Bellevue, WA 98004-5579

- First Class, U.S. Mail, Postage
Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: JLutz@perkinscoie.com;
ELin@perkinscoie.com

***Attorneys for HD Development
of Maryland, Inc., and Home
Depot USA, Inc.:***

Glenn J. Amster
Kantor Taylor Nelson Evatt &
Decina
901 Fifth Avenue, Suite 4000
Seattle, WA 98164

- First Class, U.S. Mail, Postage
Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail:
Gamster@kantortaylor.com

Attorneys for King County:

Margaret A. Pahl
Sr. Deputy Prosecuting Attorney
Civil Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104

- First Class, U.S. Mail, Postage
Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail:
Peggy.pahl@kingcounty.gov
lebryna.tamaela@kingcounty.gov

***Attorneys for 457 –
120th Avenue NE, LLC:***

Marisa V. Lindell
Larry J. Smith
Graham & Dunn, PC
Pier 70 – 2801 Alaskan Way
– Suite 300
Seattle, WA 98121

- First Class, U.S. Mail, Postage
Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: lsmith@grahamdunn.com
mlindell@grahamdunn.com

***Attorneys for Respondent
Puget Sound Energy, Inc.:***

Courtney L. Seim
Riddell Williams P.S.
1001 Fourth Avenue, Suite
4500
Seattle, WA 98154-1192

- First Class, U.S. Mail, Postage
Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail: cseim@riddellwilliams.com

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

DATED this 19th day of December, 2013, at Issaquah,
Washington.


Margaret C. Starkey