

SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, a
municipal corporation,

No. 82192-5

Plaintiff/Respondent,

STATEMENT OF GROUNDS
FOR DIRECT REVIEW

v.

ALBERT HEGLUND, JR., AND
HELENE HEGLUND, husband
and wife; WEST MARINE
FINANCE COMPANY, INC.;
WEST MARINE PRODUCTS,
INC.; A HEGLUND JR. DBA A
H PROPERTIES; and KING
COUNTY, a subdivision of the
state of Washington,

Respondents/Appellants.

FILED
OCT 10 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

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SUPREME COURT
STATE OF WASHINGTON
2008 OCT 10 P 3:03
BY RONALD R. CARPENTER

I. NATURE OF CASE, DECISION &
IDENTITY OF PARTIES

Condemnee/Appellant West Marine Products, Inc. ("West Marine") seek direct review of the Findings and Order of Public Necessity and Use and Setting Discovery Deadlines entered by the King County Superior Court on September 22, 2008 ("Order"). A copy of the Notice of Appeal from the Order is attached hereto as Appendix A to which a copy of the Order is attached. The condemning authority is the City of Seattle ("City").

II. ISSUES PRESENTED FOR REVIEW

While there are several issues presented by this appeal, the following issue triggers RAP 4.2.¹ Whether it is necessary for a condemning authority to identify the source and terms and conditions of private financing for a project before the trial court can made a determination of the project's public use and necessity.

III. GROUNDS FOR DIRECT REVIEW

A. FACTS

1. Substantive Facts

The property involved in this matter is commonly known as 1000 Mercer Street ("Property") and is owned by Albert and Helene Heglund ("Heglund"). West Marine is the tenant on the property with a leasehold interest. The Property is located in the South Lake Union Neighborhood of Seattle.

On September 24, 2007, the Seattle City Council passed an ordinance authorizing the use of eminent domain to acquire the Property (and other properties) for the Mercer Corridor Project ("2007 Ordinance"). Appendix B. Relative to financing for the

¹ By submitting this Statement of Grounds for Direct Review, West Marine reserves its rights to submit assignments of error and other issues in its Appellant's Brief as required by RAP 10.3(a)(3). This reservation is based on the fact that some commentators have suggested that there is an apparent conflict between the provisions of RAP 4.2(c)(2) and RAP 10.3(a)(3). WSBA, WASHINGTON APPELLATE PRACTICE HANDBOOK, §9.3, pp. 9-8 to 9-9 (1993).

acquisition and related expenses, the 2007 Ordinance stated that funding would come from "funds appropriated, or to be appropriated, for such purposes in connection with the project."

On May 12, 2008, the City Council passed an ordinance relating to certain capital activities of the City's Department of Transportation ("2008 Ordinance"), which stated:

WHEREAS, the revised finance plan for the Mercer Corridor Project leaves a funding gap of \$88 million in currently unsecured funding anticipated from private participation and state and federal sources; ...

Appendix C. The 2008 Ordinance also recited:

WHEREAS, the City Council intends to consider future appropriation authority for the Mercer Corridor Project in the context of whether substantial progress is made toward closing this funding gap; ...

Appendix C. The Council then imposed a list of requirements for the Mayor's office to satisfy before additional appropriations would be made as follows, in part:

Section 4. Future appropriation authority related to the Mercer Corridor Project will not be granted until the City Council has had the opportunity to evaluate the Executive's progress toward closing the existing funding gap. To inform this evaluation, the Executive will provide the following information to the City Council:

1. A fully revised financing plan for both the Spokane St. Viaduct Project and Mercer Corridor Project that includes:

- (c) Documentation of anticipated revenues and supporting information from **specific sources of funding that the Executive has characterized as "private participation"** in their April 2008 financing plan for the Mercer Corridor Project. These sources should total the equivalent of \$36.2 million in funding for the project or reductions or off-sets in private participation funding realized through real estate acquisition for right of way needs; ...
- (f) A contingency plan that identifies proposed alternative funding sources in the event that either project fails to secure all anticipated revenues.

(Emphasis added.) Appendix C.

It is unquestioned that private money will finance a significant portion of the Mercer Corridor Project.

2. Procedural Facts

Despite the funding gap and the unknown or undisclosed private participation in the Project, the City initiated this action on August 15, 2008. On September 22, 2008, the King County Superior Court granted the City's motion on public use and necessity. This appeal followed. A transcript of the hearing is attached as Appendix D.

B. ARGUMENT

RAP 2.2(4) provides that orders of public use and necessity are appealable as a matter of right. RAP 4.2 provides that direct review of a trial court decision by this Court is proper when a law is unconstitutional, when there are conflicting decisions in the body of Washington law or when there is a fundamental and urgent issue of broad public import which requires prompt and ultimate determination. RAP 4.2(a)(2), (3) and (4).

As is shown below, not only is this a Constitutional matter and one of significant public interest, but there is an inconsistency in the decisions of the courts of this state regarding judicial scrutiny of public/private partnerships in projects where eminent domain is exercised.

1. Summary of the Argument

At issue here is private participation and funding in a public project. Here, the City, which has an \$88 million funding shortfall for the Mercer Corridor Project (45.5% of the entire project) and wishes to use private funding to make up a significant portion of that difference. The final amount of the private participation and its terms and benefits to the private parties has not been determined. Rather, the City is still negotiating with those as of yet unidentified

parties. RP 15. Relying on *Stellacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966), the City's position is that because this is a transportation project the existence of private participation is irrelevant. Further, the City contends that the particulars of private participation need not be disclosed prior to the judicial determination of public use and necessity.

West Marine disagrees. Beginning with *In re City of Seattle*, 96 Wn.2d 616, 625, 638 P.2d 549 (1981) ("*Westlake I*"), this Court imposed a balancing test on public-private partnerships in public projects and thus began a change in the analysis applicable to the question of public use and necessity. This Court further refined the required balancing test in *In re: City of Seattle*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985) ("*Westlake II*") and *State ex rel Convention Center v. Evans*, 136 Wn.2d 811, 818, 966 P.2d 1252 (1998) ("*Convention Center*"). In the *Convention Center* case, this Court specifically stated:

This court has not previously enumerated factors to consider when determining whether a public use is truly necessary, but some relevant considerations are **the dollar contribution of the private party**, the percentage of public versus private use, and whether the private use is occurring in an architectural surplus of usable space.

Id. at 823. Despite this clear language, the trial court and the City both contend that private money participation is irrelevant. RP 34, 42-43.

The purpose of the balancing test is to ensure that private participation in a public project does not outweigh the public component. The private component must be incidental to the public component otherwise the exercise of eminent domain for such a project is unconstitutional. *Convention Center v. Evans*, 136 Wn.2d at 817. No case in Washington has required actual physical occupation by a private party as the sole deciding factor in the public use and necessity analysis. Rather, it is one of many factors to be considered. *Convention Center*, at 823.

Until the private participation in this project is finally determined and disclosed, the balancing test cannot be employed as there is no way to determine whether the private component is incidental to the public component.

2. Constitutional Provisions & Additional Standards

Section 1 of Article 16 of the Washington Constitution governs the powers of eminent domain in the State and provides in relevant part:

No private property shall be taken or damaged for public or private use without just compensation having been first made, ... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public....

CONST. Art. 1, §16. When a property is subject to the powers of condemnation, Washington courts apply a three-part test in evaluating whether the action is proper:

For a proposed condemnation to be lawful, the State must prove that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose.

Convention Center, 136 Wn.2d at 818; *Westlake II*, 104 Wn.2d at 623; *Westlake II*, 96 Wn.2d at 625. When analyzing public use, this Court has stated:

The words "public use" are neither abstractly nor historically capable of complete definition. 'Public use' and 'necessary' cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter.

King County v. Theilman, 59 Wn.2d 586, 595, 369 P.2d 503 (1962).

Further, the Court of Appeals has noted:

A trial court should not put on blinders, as it were, to the project as a whole in adjudicating public use and necessity for the condemnation of various component parts of the project. ... It is only by considering the project as a whole that a court can properly adjudicate

whether a component parcel is being condemned for a truly public use.

In re: City of Lynnwood, 118 Wn. App. 674, 682, 77 P.32d 378 (2003). Finally, the determination of what is a public use as against a private use is a judicial question, *i.e.*, a question of law. CONST. ART. 1, §16; *Des Moines v. Hemenway*, 73 Wn.2d 130, 138-39, 437 P.2d 171 (1968).

3. As The Source and Scope of Private Participation Has Not Been Identified, The Question Of Public Use Cannot Be Answered

Here, the City argued, and the trial court agreed, that *Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966) is the controlling authority. In *Steilacoom*, this Court was asked to decide whether a condemnation for a sewer line which benefitted an adjoining property met the requirements of a public use and necessity argument. There, the city received private funds for the project from the adjoining property owner based on a contract between them. The specifics of the agreement were known. *Id.* at 710. This Court concluded that the private participation in the sewer project was not improper and that the requirements of public use and necessity were met.

In addition to arguing that the balancing test could not be employed, West Marine relied on *King County v. Theilman*, 59 Wn.2d 586, 369 P.3d 503 (1962), for the proposition that not all transportation projects pass the public use and necessity analysis. In *Theilman*, this Court decided the propriety of King County's exercise of the power of eminent domain for the construction of a roadway. There, the power of eminent domain was used to condemn Mr. Theilman's property for a road to provide additional street access to an adjoining property owned by a development company. The adjoining property already had access to a public roadway. *Theilman*, 59 Wn.2d at 588-89. The evidence also showed that King County did not have any funds budgeted for the project for the acquisition of the property or construction of the project. *Id.* at 596. Further, there was no evidence of any physical occupation of the roadway by the private party contributor. This Court concluded that the project failed the necessity analysis and acknowledged that the constitutional safeguards required a case-by-case approach. *Id.* at 595.

The City also claimed that because there would not be private physical use of any of the property obtained in this eminent domain action, that the specifics of the private participation were

irrelevant. RP 39-40. This is not the law in the State of Washington as acknowledged by Division One in *In re: City of Lynnwood*, 118 Wn. App. 674, 687, 77 P.32d 378 (2003), where the court concluded that a private financing mechanism was incidental to the public use and thus proper. *Id* at 687. Again, as in *Theilman*, there was no evidence in *Lynnwood* that the private party contributors would physically occupy any of the property subject to eminent domain but the details of the project financing were known and were critical to the court's analysis of public use and necessity. Clearly, a challenge based on the private party contribution to public use and necessity is relevant and proper.

4. The City's Contention that the Private Participation Need Not Be Disclosed Violates the Public Policy of This State

The City argued that because this is a transportation project, the amount of private participation is irrelevant to these proceedings. This position raises the specter of a closed government, which is contrary to the laws of Washington that secure an open government. The City's position runs afoul of this important public policy as set forth in the Public Records Act:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants

the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. *See also* RCW 42.56.904 ("The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources"); *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 223, 951 P.2d 357 (1998) ("purpose of the PDA is to keep the public informed so it can control and monitor the government's functioning"). "The PDA reflects the belief that the public should have full access to information concerning the working of the government." *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). The purpose of the PDA is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them. RCW 42.17.251.²

The City's position, and the trial court's endorsement of it, is troubling. It is the City's contention that even though it does not have full public funding of the project and must therefore look to private resources, the source of the funding and its specifics are irrelevant and need not be disclosed prior to a judicial determination

² In 2005, RCW 42.17.251 was recodified as RCW 42.56.030.

of public use and necessity. It also contends that such issues are not properly brought within the context of a public use and necessity challenge but is subject to scrutiny at some other time. In fact, the City argued that after the Property was condemned, a condemnee could go back to the legislature to complain. RP 41.

Frankly, when private money is a part of a public project for which the power of eminent domain is used, those in possession of the property and the property owner have a right, as a matter of common sense, if not a constitutional basis, to know who is contributing the money to the Project and what that person is getting for their contribution. To withhold this information prior to a determination of public use and necessity is to cause irreparable harm to the possessor and owner, as in the circumstances in this case, and raise the possibility that West Marine (and the Heglunds) will be divested of their property without a proper judicial inquiry into the City's arrangement with private contributors. Such divestment could even occur where the terms of the private contribution was later determined to be unlawful. In such a circumstance, the harm is irreparable. Challenging the propriety of such a private arrangement in the circumstances presented here is a proper and necessary exercise of a property owner's Constitutional rights.

IV. CONCLUSION

For the above stated reasons, direct review is warranted.

Dated this 10th day of October, 2008.

THE LAW OFFICE OF CATHERINE C. CLARK, PLLC

By: 
Catherine C. Clark, WSBA 21231
John Bagley, WSBA 31552
Attorneys for Respondent

APPENDIX A

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE CITY OF SEATTLE, a municipal
corporation,

Plaintiff,

vs.

ALBERT HEGLUND, JR., AND HELENE
HEGLUND, husband and wife; WEST
MARINE FINANCE COMPANY, INC.;
WEST MARINE PRODUCTS, INC.; A
HEGLUND JR. DBA A H PROPERTIES; and
KING COUNTY, a subdivision of the state of
Washington,

Respondents.

No. 08-2-27604-0 SEA

NOTICE OF APPEAL TO
WASHINGTON STATE SUPREME
COURT

(Clerk's Action Required)

Respondents West Marine Products, Inc, and West Marine Finance Company, Inc. seek
direct review by the Washington State Supreme Court of the Findings and Order of Public

Notice of Appeal to Washington Supreme
Court - 1

LAW OFFICE OF
CATHERINE C. CLARK PLLC
701 5th Avenue, Suite 4785, Seattle, WA 98104
Phone: (206) 838-2528 Facsimile: (206) 374-3003

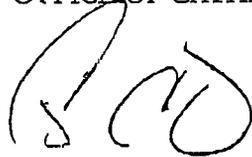
A

Necessity and Use and Setting Discovery Deadlines that was entered by Judge John P. Erlick on
1 September 22, 2008. A copy of the Findings and Order is attached to this Notice as Exhibit A.

2 Counsel for Plaintiff City of Seattle is: William G. McGillan (WSBA No. 6018), Sr.
3 Assistant City Attorney, City of Seattle, 600 Fourth Avenue, 4th Floor, PO Box 94769, Seattle,
4 WA 98124-4769; Telephone: (206) 684-8200.
5

6 DATED this 24th day of September, 2008

7 LAW OFFICE OF CATHERINE C. CLARK PLLC

8 

9 By: _____
10 Catherine C. Clark, WSBA 21231
11 John Bagley, WSBA 31552
12 Attorneys for Respondent West Marine, Inc.

The Honorable John P. Erlick

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CITY OF SEATTLE, a municipal corporation,)

Plaintiff,)

No. 08-2-27604-0 SEA

vs.)

FINDINGS AND ORDER OF PUBLIC
NECESSITY AND USE AND SETTING
DISCOVERY DEADLINES

ALBERT HEGLUND, JR., and HELENE)
HEGLUND, husband and wife; WEST)
MARINE FINANCE COMPANY, INC.;)
WEST MARINE, INC.; WEST MARINE)
PRODUCTS, INC.; A. HEGLUND JR. DBA A)
H PROPERTIES; and KING COUNTY, a)
subdivision of the state of Washington,)

Respondents.)

The City of Seattle applied to this court for determination of public use and necessity and determination of its compliance with notice requirements prescribed by law, in regard to the land sought to be acquired by the City in this domain action and Respondents Heglund and West Marine having filed opposition pleadings and having made opposing arguments and Respondent King County having *not responded*. Based upon the pleadings, recitals contained in City of Seattle Ordinance 122505 and 122686, and the City's litigation guarantee, the Court makes the following findings:

FINDINGS AND ORDER OF PUBLIC NECESSITY AND USE AND SETTING DISCOVERY DEADLINES - 1

ORIGINAL

Thomas A. Carr
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1
2 1. The court finds that the pleadings in support of its motion demonstrate satisfactory
3 proof of service of the City of Seattle's Petition in Eminent Domain and notice of this hearing on all
4 parties requiring notice of these proceedings.

5 2. The court finds that Albert Heglund, Jr., and Helene Heglund are the property
6 owners, and that there are no owners or persons entitled to notice who are not named in this action.

7 3. The court further finds that prior to the adoption by final action of the Seattle City
8 Council of Ordinance 122505 granting the authority to the City to condemn the real property and
9 other interests which are the subject of this action, the City gave notice of the final action as
10 required by RCW 8.25.290.

11 4. The court finds that the City's adoption of its Ordinance is entitled to great deference
12 by the court and is conclusive absent the presence of actual or constructive fraud and that
13 Respondents have the burden of proof as to the same.

14 5. The court further finds that Respondents have not met their burden of proof and that
15 there is no evidence that the Ordinance was adopted as a result of actual or constructive fraud.

16 5. The court further finds that the City has complied has fully complied with its
17 obligation under RCW 8.25.290, to notify all persons identified on the Tax Rolls of King County
18 Washington as having an ownership interest in the property prior to adoption of its ordinance
19 authorizing this action, by certified mailing and publication.

ORDER**IT IS NOW THEREFORE ORDERED**

21
22 1. That public use and necessity exists for the City to condemn, take and damage the
23 property which is the subject of this action and that the City's ordinance authorizing this action was

FINDINGS AND ORDER OF PUBLIC NECESSITY AND USE AND
SETTING DISCOVERY DEADLINES - 2

Thomas A. Carr
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

ORIGINAL

1 adopted in a lawful manner; and

2 2. That a trial shall be had to determine the just compensation to be paid by the City for
3 the rights acquired herein; and

4 3. The parties shall follow the case schedule issued by the Clerk of the Superior Court
5 of King County Washington, except that ^{a-1} the same is modified as follows: *by the IC Judge, Judge*

6 *Jim Rogers, or as stipulated to by the parties*
7 a. All written discovery shall be completed at least 90 days prior to the date of trial.

8 b. All deposition testimony except expert witnesses and appraisers shall be taken at
9 least 75 days prior to the trial date.

10 c. The parties shall exchange equivalent appraisal information as set forth in RCW
11 8.25.120 and disclose expert witnesses including appraisers at least 60 days prior to trial.

12 d. The parties shall engage in alternative dispute resolution by mediation, not later than
13 50 days prior to the trial date.

14 e. In the event that mediation does not succeed, the deposition of expert witness,
15 including appraisers that the parties intend to call as witnesses at trial, will occur at least 40 days
16 before the trial date.

17 DATED this 22nd day of September, 2008.

18 *John P. Erlick*
19 _____
20 JUDGE JOHN P. ERLICK

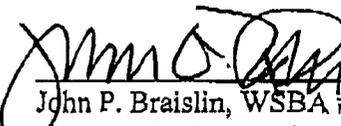
21 PRESENTED BY:

22 THOMAS A. CARR
23 Seattle City Attorney

24 By: *[Signature]*
25 _____
26 William G. McGillin, WSBA #6018
27 Sr. Assistant City Attorney
28 Attorneys for Petitioner The City of Seattle

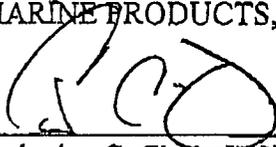
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NOTICE OF PRESENTATION WAIVED

ALBERT HEGLUND, JR., AND HELENE
HEGLUND AND A. HEGLUND JR. DBA A H PROPERTIES

By: 
John P. Braislin, WSBA #396
Attorney for Respondent Albert Heglund, Jr., and Helene
Heglund and A. Heglund JR. DBA A H Properties

~~APPROVED FOR ENTRY~~
NOTICE OF PRESENTATION WAIVED;

WEST MARINE FINANCE COMPANY, INC.
WEST MARINE, INC.
WEST MARINE PRODUCTS, INC.

By: 
Catherine C. Clark, WSBA #21231
Attorney for Respondent, West Marine Entities

APPROVED FOR ENTRY,
NOTICE OF PRESENTATION WAIVED:

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
Margaret Pahl, WSBA # 19019
Senior Deputy Prosecuting Attorney
Attorneys for King County

APPENDIX B

Fay Alexander:fa
SDOT Mercer Corridor Project ORD
July 2, 2007
V#7

ORDINANCE 122505

1
2 AN ORDINANCE relating to the Mercer Corridor Project; authorizing the Director of
3 Transportation to acquire all of the property rights necessary for reconstructing the
4 existing Mercer Street/Valley Street couplet with a widened two-way Mercer Street and a
5 reduction of lanes on Valley Street between Interstate 5 (I-5) and Dexter Avenue; and
6 authorizing acquisition of real property rights within the area bounded by Aloha Street on
7 the north and Republican Street on the south through negotiation and use of eminent
8 domain (condemnation); and authorizing payment of all other costs associated with the
9 acquisition.

10 WHEREAS, the South Lake Union Neighborhood Plan, developed in 1999, envisions a
11 community characterized by a pervasive friendly ambience, variety of open spaces, and
12 an aesthetically pleasing, safe neighborhood embracing dynamic opportunities for people
13 to work, live and recreate with the greatest ease of mobility for all travel modes; and

14 WHEREAS, the Seattle City Council adopted Resolution 30610 in 2003 setting forth priorities to
15 support redevelopment of the South Lake Union area including making transportation
16 improvements to reconnect the South Lake Union street grid and promoting connections
17 with downtown and the Seattle Center, and promoting pedestrian-oriented improvements;
18 and

19 WHEREAS, in Resolution 30610, the Seattle City Council affirmed its commitment to support
20 the redevelopment of the South Lake Union area as the region's most competitive location
21 for biotech and high-tech research and manufacturing; and

22 WHEREAS, the Seattle City Council adopted Resolution 30714 in 2004, recommending a two-
23 way Mercer Boulevard and narrowed Valley Street be developed, subject to a Full NEPA
24 Environmental Assessment; and

25 WHEREAS, replacing the existing Mercer Street/Valley Street couplet with a widened two-way
26 Mercer Street would provide more direct access to and from I-5, and Mercer Street would
27 be widened approximately sixty (60) feet primarily to the north, and Valley Street would
28 be reduced to a two-lane street with turn lanes, parking and bicycle lanes in each
direction; and

WHEREAS, pedestrian and bicycle circulation would be improved by widening sidewalks and
removing barriers caused by the existing couplet, providing additional crossings of
Mercer and Valley Streets; and

WHEREAS, Council and Executive have worked together to agree upon performance
improvements for a two-way Mercer Street and narrowed Valley Street; NOW,
THEREFORE,

EXHIBIT B



Fay Alexander:fa
SDOT Mercer Corridor Project ORD
July 2, 2007
V#7

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Public convenience and necessity require that real property interests generally shown on Attachments A and B of this Ordinance, situated in the City of Seattle, County of King, State of Washington, together with all rights, privileges and other property pertaining thereto, be acquired for transportation and related purposes through negotiations and use of eminent domain (condemnation) if necessary, in connection with reconstructing the existing Mercer Street/Valley Street couplet with a widened two-way Mercer Street and a narrowed two lane Valley Street located at the south end of Lake Union bordered by Aloha Street on the north and Republican Street on the south, Dexter Avenue on the west side, and I-5 on the east.

Section 2. The Director of Transportation or her designee is authorized, on behalf of the City of Seattle, to determine which portions and interests of those properties shown on Attachments A and B are necessary to this project and to negotiate and enter into written agreements for and acquire, after payment of just compensation, such real property interests as are necessary for the project and to accept and record deeds and other written instruments on behalf of the City of Seattle by attaching to the instrument the Director's written acceptance thereof, and recording the same. The property or real property interests acquired shall be accepted for transportation and general municipal purposes and placed under the jurisdiction of the Seattle Department of Transportation. The cost of the acquisitions including purchase price and transaction costs, together with relocation benefits to the extent required by law, shall be paid



Fay Alexander:fa
SDOT Mercer Corridor Project ORD
July 2, 2007
V#7

1 from the funds appropriated, or to be appropriated, for such purposes in connection with the
2 project.

3 Section 3. The City Attorney is authorized to commence and prosecute proceedings in
4 the manner provided by law to condemn, take, damage, and appropriate in fee simple the lands
5 and other property interests determined by the Director of Transportation or her designee to be
6 necessary to the project, provided said lands, rights, and privileges, and other property are to be
7 appropriated and taken only after just compensation has been made or paid into court for the
8 owners thereof, in the manner provided by law; and to stipulate for the purpose of minimizing
9 damages.
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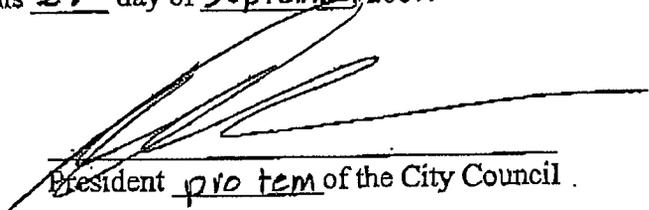
12 Section 4. Any act consistent with the authority and prior to the effective date of the
13 ordinance, including, without limitation, acceptance of a grant of possession and use, is hereby
14 approved and accepted.
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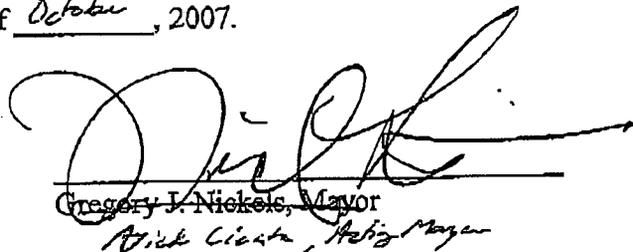
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SDOT Mercer Corridor Project ORD
July 2, 2007
V#7

Section 5. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

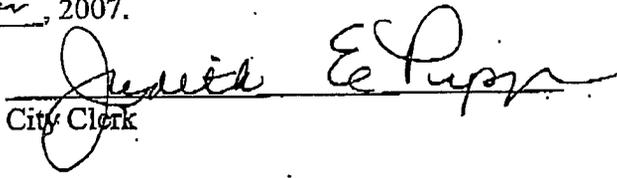
Passed by the City Council the 24th day of September, 2007, and signed by me in open session in authentication of its passage this 24th day of September, 2007.


President pro tem of the City Council

Approved by me this 3 day of October, 2007.


Gregory J. Nickels, Mayor
Rich Lichte, Acting Mayor

Filed by me this 4 day of October, 2007.


City Clerk

(Seal)

Attachment A – Mercer Corridor Project: Preliminary Right-of-Way / Properties Affected

Description Map

Attachment B – Contact List for Properties Affected (Preliminary)



APPENDIX C



City of Seattle Legislative Information Service

Information updated as of October 10, 2008 9:32 AM

Council Bill Number: 116161
Ordinance Number: 122686

AN ORDINANCE relating to financing certain capital activities of Seattle Department of Transportation; increasing appropriations to the Department of Transportation in the 2008 Budget; and amending the 2008-2013 Capital Improvement Program; all by a three-fourths vote of the City Council.

Date introduced/referred: March 24, 2008
Date passed: May 12, 2008
Status: Passed as Amended
Vote: 8-1 (No: Licata)
Date of Mayor's signature: May 20, 2008
(about the signature date)

Note: Spokane Street Viaduct, South Lander Street Grade Separation, and Mercer Corridor Funding

Committee: Transportation
Sponsor: DRAGO

Index Terms: BUDGET, CAPITAL-IMPROVEMENT-PROGRAM, INDUSTRIAL-DISTRICT, SOUTH-LAKE-UNION, FUNDS, STREETS, PAVING, STREET-CONSTRUCTION, DOWNTOWN, VIADUCTS, TRANSPORTATION-PLANNING, CENTRAL-WATERFRONT

References/Related Documents: Related: Ord 122232, 122191, 122192

Text

ORDINANCE

AN ORDINANCE relating to financing certain capital activities of Seattle Department of Transportation; increasing appropriations to the Department of Transportation in the 2008 Budget; and amending the 2008-2013 Capital Improvement Program; all by a three-fourths vote of the City Council.



WHEREAS, Ordinance 122232 authorized a vote on a property tax levy for transportation improvements that was approved by the voters in November 2006, Ordinance 122191 imposed an employee hours tax for transportation purposes, Ordinance 122192 imposed a commercial parking tax for transportation purposes, and Resolution 30915 collectively referred to these referenced funding sources and the transportation improvements for which the collected revenues will be used as the "Bridging the Gap" (BTG) transportation funding package; and

WHEREAS, the Mayor has proposed and the City Council has approved a 2008 Budget and 2008-2013 Capital Improvement Program that includes the S Lander St. Grade Separation project; and

WHEREAS, the Mayor has proposed and the City Council has approved a 2008 Budget and 2008-2013 Capital Improvement Program that includes the Spokane St. Viaduct project; and

WHEREAS, the Mayor has proposed and the City Council has approved a 2008 Budget and 2008-2013 Capital Improvement Program that includes the Mercer Corridor Project; and

WHEREAS, due to the failure of Proposition 1, the roads and transit proposal, on the November 2007 ballot, the 2008 Budget and 2008-2013 Capital Improvement Program do not include Regional Transportation Investment District (RTID) revenue, RTID-backed bonds, BTG revenue, or BTG-backed bonds for the S Lander St. Grade Separation project, the Spokane St. Viaduct project, and the Mercer Corridor Project; and

WHEREAS, it is in the City's best interest to fund and continue implementation of the Spokane St. Viaduct at this time, prior to initiation of the Alaskan Way Viaduct (AWV) replacement project because this project will help lessen the negative impact of the AWV replacement project during construction; and

WHEREAS, the City Council intends to give limited funding and approval to continue implementation of the Mercer Corridor Project at this time until demonstrated progress is made towards securing state, federal, and private funding; and

WHEREAS, the City Council agrees with the Executive proposal to not move forward with the S Lander St. Grade Separation project at this time; and

WHEREAS, the Department of Transportation has developed a revised finance plan for the Spokane St. Viaduct and the Mercer Corridor Project that does not include RTID revenue or RTID-backed bonds; and

WHEREAS, the revised finance plan for the Spokane St. Viaduct leaves a funding gap of \$40 million in currently unsecured funding anticipated from state and federal sources; and

WHEREAS, the revised finance plan for the Mercer Corridor Project leaves a funding gap of \$88 million in currently unsecured funding anticipated from private participation and state and federal sources; and

WHEREAS, it is the City's intention to work with WSDOT to create a 2-way Mercer Corridor from Dexter west to Elliott and 15th, and the Council supports that intention as our preference as we move forward with this additional project on the Mercer Corridor; and

WHEREAS, the City Council intends to consider future appropriation authority for the Mercer Corridor Project in the context of whether substantial progress is made toward closing this funding gap, NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. In order to pay for necessary capital costs and expenses incurred, or to be incurred, but for which insufficient appropriations were made, the appropriations for the following in the 2008 Budget are increased from the fund shown, as follows:

Fund	Department	Budget Control	Level Amount
Transportation Operating Fund (10310)	Seattle Department of Transportation	Major Projects (19002)	\$25,664,000
Transportation Operating Fund (10310)	Seattle Department of Transportation	General Expense (18002)	\$1,537,000

Section 2. The 2008-2013 Adopted Capital Improvement Program is hereby amended as shown in Exhibit A with respect to those projects or programs included in Exhibit A.

Section 3. In accordance with RCW 35.32A.060, the foregoing appropriations are made to meet actual necessary expenditures of the City for which insufficient appropriations have been made due to causes which could not reasonably have been foreseen at the time of the making of the 2008 Budget.

Section 4. Future appropriation authority related to the Mercer Corridor Project will not be granted until the City Council has had the opportunity to evaluate the Executive's progress toward closing the existing funding gap. To inform this evaluation, the

Executive will provide the following information to the City Council:

1. A fully revised financing plan for both the Spokane St. Viaduct Project and Mercer Corridor Project that includes:

- (a) Revised schedule for anticipated revenues and expenditures; and
- (b) Updated project cost estimates based on 100% design and further value engineering analysis; and
- (c) Documentation of anticipated revenues and supporting information from specific sources of funding that the Executive has characterized as "private participation" in their April 2008 financing plan for the Mercer Corridor Project. These sources should total the equivalent of \$36.2 million in funding for the project or reductions or off-sets in project costs. This documentation should verify the actual level of private participation funding realized through real estate acquisition for right of way needs; and
- (d) Documentation of secured revenues or supporting information demonstrating substantial progress toward securing funding in the amounts shown in the Executive's April 2008 financing plan for the Spokane St. Viaduct Project and Mercer Corridor Project from the following sources:
 - (i) State or regional funding from the Washington State Department of Transportation, King County Department of Transportation, Freight Mobility Strategic Investment Board and Transportation Improvement Board for both projects; and
 - (ii) Federal funding from the Puget Sound Regional Council's distribution of the region's Surface Transportation / Congestion Management & Air Quality (STP/CMAQ) funds, annual earmark appropriations, Safe, Accountable, Flexible, Efficient Transportation Equity Act; A Legacy for Users (SAFETEA-LU) Reauthorization earmarks, and other federal grant sources.
 - (iii) A revised assessment of potential sources for grant and partner agency funding and an updated schedule for anticipated revenues from the sources of funding noted in (i) and (ii) above; and
 - (e) An assessment of potential need for interim financing in the event external revenues are not secured according to the project schedule; and
 - (f) A contingency plan that identifies proposed alternative funding sources in the event that either project fails to secure all anticipated revenues.

2. Documentation of completed environmental review, including but not limited to the National Environmental Policy Act (NEPA) Environmental Assessment (EA), technical reports & memoranda, and Finding of No Significant Impacts (FONSI).

Section 5. This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by a three-fourths vote of all the members of the City Council the _____ day of _____, 2008, and signed by me in open session in authentication of its passage this

_____ day of _____, 2008.

President _____ of the City Council

Approved by me this _____ day of _____, 2008.

Gregory J. Nickels, Mayor

Filed by me this _____ day of _____, 2008.

City Clerk

(Seal)

Exhibit A: 2008-2013 Capital Improvement Program Amendments

Dorinda Costa/dc & Michael Fong/mf

Council - SDOT 2008 BTG Major Projects Reprogramming Ordinance

May 6, 2008

Version #5

Exhibit A: 2008-2013 Capital Improvement Program Amendments:

Mercer Corridor Project

BCL/Program Name: Major Projects
 BCL/Program Code: 19002
 Project Type: New Facility
 Start Date: 1st Quarter 1999
 Project ID: TC365500
 End Date: ~~4th Quarter 2010~~ 2nd Quarter 2012
 Location: Mercer St/Fairview Ave N/Dexter Ave N
 Neighborhood Plan: South Lake Union
 Neighborhood Plan Matrix: Multiple
 Neighborhood District: Lake Union
 Urban Village: In more than one Urban Village

This project, part of the Bridging the Gap funding package, implements a comprehensive package of transportation improvements in the Mercer Corridor in South Lake Union. Improvements include, but are not limited to, a widened two-way Mercer St., improved pedestrian safety and access to Lake Union Park, and enhanced neighborhood circulation for all modes. The project aims to use existing street capacity more efficiently and enhance all modes of travel, including pedestrian mobility. Council has granted limited approval of the project through 2008 appropriation authority to complete design, environment review and begin property acquisition for right-of-way needs. Appropriations beyond 2008 for this project are subject to Council approval and depend on the Executive's response to Section 4 of Council Bill 116161.

	LTD	2007	2008	2009	2010	2011	2012	2013	Total
Revenue Sources									
2002B LTGO Bond	400	0	0	0	0	0	0	0	400
2003 LTGO Bond	600	0	0	0	0	0	0	0	600
2005 LTGO Bond	1,912	0	0	0	0	0	0	0	1,912
2006 LTGO Bond	891	1,609	0	0	0	0	0	0	2,500
2008 Multipurpose LTGO Bond Fund	0	3,241	0	0	0	0	0	0	3,241
Real Estate Excise Tax II	361	0	0	0	0	0	0	0	361
South Lake Union Property Sale Proceeds	50	0	0	0	0	0	0	0	50
Transportation Bond Funds	4,560	0	0	0	0	0	0	0	4,560
Federal Grant Funds	1,866	0	1,866						
General Subfund Revenues	164	12	18	0	0	0	0	0	194
State Gas Taxes - Arterial City Street Fund	576	208	0	0	0	0	0	0	784
State Gas Taxes - City Street Fund	200	0	0	0	0	0	0	0	200
Transportation Funding Package - Parking Tax	0	2,912	0	0	0	0	0	0	2,912
Federal Grant Funds	1,866	0	0	5,000	5,000	6,000	2,500	0	20,366
Private Partnerships	0	0	1450	12,800	6,000	6,000	10,000	0	36,250
State Grant Funds	0	0	0	2,500	2,500	2,500	700	0	8,200

WSDOT	0	0	0	12,500	12,500	0	0	0	25,000
City Light Fund Revenues	0	0	0	5,000	5,000	10,000	0	0	20,000
Drainage and Wastewater Rates	0	0	0	2,000	2,000	2,000	0	0	6,000
Transportation Funding Package	0	0	0	38,933	5,100	6,000	0	0	51,033
Bonds									
2007 LTGO Bond Fund	0	0	12,583	3,717	0	0	0	0	16,300
Project Total:	11,580	7,982	14,051	82,450	39,100	32,500	13,200	0	200,863

Fund Appropriations/Allocations
 Cumulative Reserve Subfund - Real 361 0 0 0 0 0 0 0 0 361
 Estate Excise Tax II Subaccount

Cumulative Reserve Subfund - 50 0 0 0 0 0 0 0 0 50
 South Lake Union Property
 Proceeds Subaccount
~~Transportation Operating Fund 11,169 7,982 14,051 82,450 39,100 32,500 13,200 0 0 19,169~~
 Transportation Operating Fund 11,169 7,982 14,051 82,450 39,100 32,500 13,200 0 0 200,452
 Appropriations Total* ~~11,580 7,982 14,051 82,450 39,100 32,500 13,200 0 0 19,580~~
 Appropriations Total* 11,580 7,982 14,051 82,450 39,100 32,500 13,200 0 0 200,863
 Spending Plan 11,580 4,483 17,550 82,450 39,100 32,500 13,200 0 0 200,863
 O & M Costs (Savings) . 0 0 0 0 0 0 0 0 0 0

Spokane St. Viaduct

BCL/Program Name: Major Projects

BCL/Program Code: 19002

Project Type: Improved Facility

Start Date: 2nd Quarter 1994

Project ID: TC364800

End Date: ~~4th Quarter 2010~~
 2nd Quarter 2011

Location: S Spokane St/6th Ave S/E Marginal Wy S

Neighborhood Plan: Morgan Junction (NOCA)

Neighborhood Plan Matrix: Multiple

Neighborhood District: In more than one District

Urban Village: Duwamish

This project, part of the Bridging the Gap funding package, builds a new structure that will be parallel and connected to the existing one, and will widen the existing viaduct by about 41 feet. The project also includes construction of new ramps at First Avenue South and an eastbound Fourth Ave. off-ramp. ~~Phase 1 activities include, but are not limited to widening from east of First Avenue South west to the~~ ~~terminus at the Harbor Island off-ramps and construction of the new ramps at First Avenue S. Phase 2 activities include, but are not limited to widening the structure from First Avenue South to the I-5 interchange, the eastern terminus of the project. Phase 3 activities include construction of the Fourth Ave. off-ramp.~~ This multi-phased project improves the safety of the Spokane Street Viaduct through the addition of shoulders, a wider median, and a westbound "weave-lane."

Revenue Sources	LTD	2007	2008	2009	2010	2011	2012	2013	Total
2008 Multipurpose LIGO Bond Fund	0	4,742	0	0	0	0	0	0	4,742
Real Estate Excise Tax II	1,362	102	0	0	0	0	0	0	1,464
City Light Fund Revenues	52	315	100	0	0	0	0	0	467
Drainage and Wastewater Rates	45	531	0	0	0	0	0	0	576
Federal Grant Funds	10,780	4,110	9,840	5,300	0	0	0	0	30,030
General Subfund Revenues	3,890	0	9	0	0	0	0	0	3,899
Port of Seattle Funds	0	1,200	0	500	1,700	0	0	0	3,400
Private Funding/Donations	0	0	0	0	2,250	0	0	0	2,250
Public Works Trust Fund	456	0	0	0	0	0	0	0	456
Proceeds									
State Gas Taxes - Arterial City Street Fund	401	199	0	0	0	0	0	0	600
State Grant Funds	750	625	9,825	14,500	0	0	0	0	25,750
Federal Grant Funds	10,780	4,110	7,913	10,300	1,927	0	0	0	35,030
State Grant Funds	750	625	0	375	13,600	10,400	0	0	25,750
King County Metro	0	0	0	5,000	2,500	0	0	0	10,000
WSDOT	0	0	23,433	6,567	10,000	0	0	0	50,000
Transportation Funding Package - Bonds	0	0	0	12,042	32,808	0	0	0	44,850
Project Total:	17,736	11,824	19,824	30,300	3,950	0	0	0	73,634
Project Total:	17,736	11,824	31,455	34,784	64,785	22,900	0	0	183,484

Fund Appropriations/Allocations	Cumulative Reserve Subfund	Real	2007	2008	2009	2010	2011	2012	2013	Total
Estate Excise Tax II Subaccount	1,362	102	0	0	0	0	0	0	0	1,464
Transportation-Operating Fund	16,374	11,722	19,824	20,300	3,950	0	0	0	0	73,170
Transportation Operating Fund	16,374	11,722	31,455	34,784	64,785	22,900	0	0	0	182,020
Appropriations Total*	17,736	11,824	19,824	30,300	3,950	0	0	0	0	73,634
Appropriations Total*	17,736	11,824	31,455	34,784	64,785	22,900	0	0	0	184,484
O & M Costs (Savings)										
Spending Plan		5,678	34,770	24,500	3,950	0	0	0	0	55,000
Spending Plan		2,970	40,309	34,784	64,785	22,900	0	0	0	165,784

S Lander St. Grade Separation

BCL/Program Name: Mobility-Capital
 BCL/Program Code: 19003

Project Type: New Facility
 Start Date: 1st Quarter 2001

Project ID: TC366150
 End Date: 4th Quarter 2011
 To Be Determined

Location: S Lander St/1st Ave S/4th Ave S

Neighborhood Plan: Duwamish

Neighborhood Plan Matrix: TP-2

Neighborhood District: Greater Duwamish

Urban Village: Not in an Urban Village

This project develops a grade separation of the S Lander St. roadway and the Burlington Northern mainline railroad tracks between First Ave. S and Fourth Ave. S. Previously, City staff evaluated traffic conditions and identified an initial design concept. During the preliminary engineering phase of the project, a consultant conducted a Type, Size and Location study to develop more detailed plans and cost estimates. The project design recommenced in November of 2006, and in January of 2007, survey, geotechnical and scoping of the design work began. The project was put on hold in March 2008 until further funding becomes available.

LTD	2007	2008	2009	2010	2011	2012	2013	Total
Revenue Sources								
2008 Multipurpose LTGO Bond Fund	0	9,533	0	0	0	0	0	9,533
Federal Grant Funds	100	0	0	0	0	0	0	100
Port of Seattle Funds	0	0	3,1150	0	0	0	0	3,1150
Private Funding/Donations	0	0	1,3350	0	0	0	0	1,3350
State Gas Taxes - Arterial City Street Fund	14	46	0	0	0	0	0	60
State Gas Taxes - City Street Fund	125	0	0	0	0	0	0	125
Vehicle Licensing Fees	35	0	0	0	0	0	0	35
Project Total:	274	9,579	4,450	0	0	0	0	14,203
Project Total:	274	9,579	0	0	0	0	0	9,853
Fund Appropriations/Allocations								
Transportation Operating Fund	274	9,579	0	0	0	0	0	14,203
Transportation Operating Fund	274	9,579	0	0	0	0	0	9,853
Appropriations Total*	274	9,579	4,450	0	0	0	0	14,203
Appropriations Total*	274	9,579	0	0	0	0	0	9,853
O & M Costs (Savings)	0	0	0	0	0	0	0	0
Transportation								

*This detail is for information only. Funds are appropriated in the budget at the Budget Control Level. Amounts in thousands of dollars.

May 7, 2008
 version #4
 t
 Fiscal Note

APPENDIX D

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

4	CITY OF SEATTLE, a municipal corporation,)	Case No.
5)	08-2-27604-0
6	Plaintiff)	SEA
7	vs.)	
8	ALBERT HEGLUND, JR., and HELENE HEGLUND,)	
9	husband and wife; WEST MARINE FINANCE)	
10	COMPANY, INC.; WEST MARINE INC.; WEST)	
11	MARINE PRODUCTS, INC.; A. HEGLUND JR. DBA)	
12	A H PROPERTIES; and KING COUNTY, a)	
13	subdivision of the State of Washington,)	
14	Respondents.)	

PUBLIC USE AND NECESSITY HEARING
BEFORE THE HONORABLE JUDGE JOHN P. ERLICK
September 22, 2008

Recorded Proceedings Transcribed by:
Tammy M. Breed, CCR
CCR No. 3098
Job No. 79880

1 APPEARANCES

2
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8 (206) 292-9988

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10 For Defendant West Marine:

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17
18 For Plaintiff City of Seattle:

19 WILLIAM G. MCGILLIN, ESQ.
20 Sr. Assistant City Attorney
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22 Seattle, Washinton 98124-4769
23 (206) 684-8200
24
25

1 BE IT REMEMBERED that on Monday,
2 September 22, 2008, at 2:00 p.m., the following proceedings
3 were had, to wit:

4
5 <<<<<< >>>>>>

6
7 JUDGE ERLICK: We are on the record in
8 the matter of the City of Seattle verses Heglund, West Marine
9 in King County. This is a -- this is King County Cause No.
10 08-2-27604-0 SEA. This is the City's Public Use and
11 Necessity Hearing.

12 If I could have counsel identify themselves for the
13 record. Why don't we begin on my right, your left, with
14 Mr. Nelson.

15 MR. NELSON: Your Honor, James Nelson
16 from Betts Patterson along with Johns Brazlin (phonetic) for
17 the Hegland defendants.

18 JUDGE ERLICK: Thank you.

19 MR. MCGILLIN: Good afternoon, your
20 Honor, Bill McGillin, City of Seattle City Attorneys Office.

21 MS. CLARK: Good afternoon, your Honor.
22 Katherine Clark from my own firm with Jim Able (phonetic) for
23 West Marine and Mr. John Bagley from my office.

24 JUDGE ERLICK: Very good. Thank you,
25 Counsel.

1 All right, Counsel, I've read all the materials, and
2 why don't we take -- let's say we'll start with 20 minutes
3 per side. And "per side" means the Hegland and West Marine
4 get to share their time. And this is the city's application
5 for public use and necessity, so we'll begin with Mr.
6 McGillin.

7 MR. MCGILLIN: Thank you, your Honor.
8 Your Honor, this is the City's motion for a finding of public
9 use and necessity. The project involves the improvement of
10 an existing public roadway known as Mercer Street and
11 adjoining streets all as described in the City's ordinance,
12 122505, which was adopted in September of -- or rather
13 October of 2007 and became effective after that day.

14 The legislative findings are that the project is a
15 public use, that it represents a project that is -- will have
16 public interests, that it is necessary.

17 As the court is aware, the law in the State of
18 Washington is that the determinations of the legislative
19 body, when there is a legislative body, are given great
20 deference. And absent a showing of fraud or arbitrary or
21 capricious conduct on the part of the adopting quary
22 (phonetic), those determinations will not be overturned.

23 There are a number of different types of condemnation
24 actions that will be brought. This is in the category of a
25 condemnation for public purposes civically enumerated as a

1 power under the statute, and that is roadway purposes as
2 found in 8.12.030.

3 Therefore, there can be no dispute that a roadway
4 project is a public use. The only way that that
5 determination really can be touched is if there is a showing
6 of fraud, either constructive or actual, and that is the law.
7 The mere presence of public fund -- or private funding in a
8 private (sic) project, absent some other evidence of a
9 private use, is not evidence sufficient to challenge the
10 determination or to permit the finding that the project is,
11 in fact, not a public use.

12 JUDGE ERLICK: Did you just misspeak,
13 Counsel? You said, "private funding in a private project."
14 Did you mean --

15 Mr. MCGILLIN: Private funding, public
16 project.

17 JUDGE ERLICK: Private. That's what I
18 thought you meant. That's understood.

19 MR. MCGILLIN: The -- there are some
20 instances where the courts have taken inquiry into whether or
21 not there is a private use when there's a private use present
22 and whether the private use so overwhelms the public use as
23 to make it, in fact, a private use of a --

24 JUDGE ERLICK: That's the West Lake
25 Center case?

1 MR. MCGILLIN: West Lake Center. The
2 inquiry was also made in the Convention Center case. It was
3 also made in the Lynnwood (phonetic) case.

4 And it is our contention that those are different
5 specie than a road that will end up being a publically-owned
6 road and a publically-owned right-of-way. It's already on an
7 existing right-of-way and adjoining an existing public
8 right-of-way.

9 JUDGE ERLICK: So this project, there's
10 two components to it, as I understand, that effect the
11 property owners. Part of it is referred to as a "temporary
12 construction easement"?

13 MR. MCGILLIN: That is correct.

14 JUDGE ERLICK: And part of it is a fee
15 simple?

16 MR. MCGILLIN: That is correct.

17 JUDGE ERLICK: All right.

18 MR. MCGILLIN: And the parcel that is
19 owned by the Heglunds and leased to West Marine is a little
20 bit over 14,000 square feet. The City requires about 8,000
21 plus for the widening of the road because the road is
22 widening about 60 to 70 feet, and a temporary construction
23 easement over the remaining, roughly, 6,000 square feet
24 during the project.

25 And the purpose for the construction easement as it

1 sounds is the use that will occur during the building of the
2 project. And the City is requesting that there be a
3 determination of public use and necessity and that this
4 matter then proceed to trial on the questions related to just
5 compensation for the rights that the City is acquiring.

6 JUDGE ERLICK: And would that include any
7 value to the leasehold of West Marine?

8 MR. MCGILLIN: Your Honor, I -- I have --
9 have thought about that question. And in the typical case
10 they -- interests of the fee owner represent the whole of the
11 estate. And when the City acquires that estate, it acquires
12 subordinate interests. And it is between the owner of the
13 fee and the owner of any subordinate interest to contest over
14 that apportionment, if you will.

15 From the City's point of view, the position of the
16 lessee is that of the subordinate interest owner. And even
17 though the City is taking fee and a temporary construction
18 interest, whatever rights to just compensation there is, flow
19 to the superior title interest, namely the Heglunds.

20 And if there is an interest that the subordinate owner
21 has, it impairs in that value that is paid as -- determined
22 as and paid as just compensation for the rights that are
23 acquired.

24 JUDGE ERLICK: What's your authority for
25 those?

1 MR. MCGILLIN: As I say, I have not -- I
2 have considered it; I have not finally researched that issue.
3 But that has been the -- the position that the City has taken
4 in the past. I don't have the case citations.

5 JUDGE ERLICK: Is there authority for
6 that?

7 MR. MCGILLIN: I do not know. I will do
8 the research prior to trial, but we're not at that stage.
9 We're at the public use and necessity stage. I will say that
10 in the time that I've been doing this for the City, which is
11 approximately ten years now, I have not had this issue before
12 a court as to whether the taking of the temporary
13 construction easement gives somehow a different set of rights
14 to a lease holder.

15 I have, however, had leasehold cases. And in the
16 leasehold cases that I have had where we are acquiring a fee
17 and no remainder, in those cases the compensation goes into
18 the registry of the court in one lump sum. And then there's
19 contest between the property owner and the tenant.

20 JUDGE ERLICK: Where is the -- where's
21 the leasehold interest in relationship to the temporary
22 construction easement?

23 MR. MCGILLIN: The building has to come
24 down. There is a concrete building that sits on the
25 property.

1 JUDGE ERLICK: Right.

2 MR. MCGILLIN: And the building will have
3 to come down in order for the City to do the project. It's
4 not something that can remain.

5 JUDGE ERLICK: But where is the building
6 with respect to the contemporary construction easement versus
7 the widening of Mercer?

8 MR. MCGILLIN: It sits --

9 JUDGE ERLICK: Oh, I see where it is.

10 MR. MCGILLIN: The building sits almost
11 entirely on the property.

12 JUDGE ERLICK: Oh, I see. It's almost
13 the entire property.

14 MR. MCGILLIN: Yes, yes.

15 JUDGE ERLICK: Okay. I see.

16 MR. MCGILLIN: There will, essentially,
17 be no property on which the leaseholder tenant can operate
18 during the period of construction.

19 And those issues, again, are just compensation issues
20 because the taking is necessary to this project and would
21 require that the finder at the time of trial determine the
22 value of those rights and determine how much is required for
23 full just compensation and then would determine -- after it's
24 determined, that lump sum, then determine any apportionment.
25 And there is case law on that. There is case law -- I

1 believe the cases I've seen go back to the early 1900s. And
2 they all uniformly say the same thing. There is one finding.
3 And subsequently then there is a determination as to any
4 distribution.

5 There are even early cases in which lessees were not
6 given notice of the proceedings and then were allowed to come
7 and come in and contest the compensation from the 19-teens,
8 1920s.

9 The current law in the State of Washington with regard
10 to notice of the adoption of the ordinance itself requires
11 that only the owners of record be given notice of that.
12 However, we gave notice.

13 JUDGE ERLICK: My understanding of the
14 financing of this is that it's 88 -- an \$88 million shortfall
15 currently. And it's projected that 36.2 million of that
16 would come from private funding; is that correct?

17 MR. MCGILLIN: Yes.

18 JUDGE ERLICK: All right.

19 MR. MCGILLIN: What --

20 JUDGE ERLICK: Go ahead.

21 MR. MCGILLIN: I'm sorry.

22 JUDGE ERLICK: What would happen to this
23 project if it were not funded?

24 MR. MCGILLIN: It would not be built.

25 JUDGE ERLICK: So what would happen to

1 the subject property?

2 MR. MCGILLIN: The subject property would
3 be owned by the City of Seattle if it pays just compensation
4 and is put in title. And this is not something that is new
5 or unique. It occurred during the Monorail. It occurred
6 during Sound Transit's -- some of Sound Transit's
7 acquisitions, but most distinctly the Monorail. And there
8 the court said that, that is not an issue for the trial court
9 to resolve.

10 JUDGE ERLICK: I thought that on the
11 Monorail when it was being undone or unwound --

12 MR. MCGILLIN: Uh-huh.

13 JUDGE ERLICK: -- that the former land
14 owners got first dibs on acquisition.

15 MR. MCGILLIN: I don't think that was as
16 a result of the court ruling. I think that was a result of
17 the Monorail -- sensitivity to the issue. I do not recall
18 that it was a court ruling. But even if -- even if the
19 courts were to take a position on that and determine that it
20 must, in fact, be offered first to the former owner, that
21 would be something that would be new. It would be a
22 departure from existing law.

23 There have been bills presented in the last four or
24 five years on a couple of occasions that suggested that
25 property acquisitions give the property owner options for a

1 period of term to come back and buy back, but those have not
2 passed. And there has been, I think, a great deal of concern
3 that -- especially in projects where there has to be a
4 significant assemblage over a period of time, that having
5 that kind of situation hang over the acquiring agency would
6 not be something that is desirable. It can have -- it can
7 have monetary effects to the public and those things.

8 JUDGE ERLICK: Explain that to me in more
9 detail.

10 MR. MCGILLIN: Well, if we were to take,
11 for example, property purchased within the Seattle area on
12 January 1st of 2008 and then available at a surplus property
13 sometime in the year 2010, there would be some presumption,
14 at least, that the value of the property has changed.

15 JUDGE ERLICK: Oh, I see.

16 MR. MCGILLIN: At least that would be the
17 going-in assumption. And the public has really the gain, if
18 any gain has occurred. And then how -- you get into issues
19 of how you value that right over the point -- over the period
20 of time that the property owner does not have title and how
21 much, if anything, would the just compensation -- of just --
22 and how you would project that from the time of the
23 acquisition to the point in time where the property then gets
24 reconveyed.

25 Those are the kinds of problems, I think, that the

1 legislature wrestled with a bit when those kinds of pieces of
2 legislation came up.

3 JUDGE ERLICK: Why is the City proceeding
4 with a condemnation action or public use and necessity action
5 prior to funding?

6 MR. MCGILLIN: We have funding.

7 JUDGE ERLICK: Well, you have partial
8 funding.

9 MR. MCGILLIN: We do. And the funding
10 expressly provides for the acquisition of real property. It
11 expressly authorizes it.

12 JUDGE ERLICK: I understand that. You
13 have funding for the acquisition, but there's not sufficient
14 funding for the project itself to go forward as envisioned.
15 And, I mean, I think the Monorail is a good example where
16 there is all this acquisition. Businesses were forced out of
17 business --

18 MR. MCGILLIN: Uh-huh.

19 JUDGE ERLICK: -- and then the project
20 goes away.

21 Now, that was a little bit different. That was a --
22 multiple votes of the citizenry. But in this instance, what
23 happens if the -- we go through the public use and necessity
24 for West Marine and whatever other businesses are along that
25 route -- I think there's a Texaco or something there. I

1 don't know.

2 MR. MCGILLIN: Well, there are --

3 JUDGE ERLICK: There's a lot of
4 businesses.

5 MR. MCGILLIN: There's a now-closed
6 Unical station. There's a Shell station.

7 JUDGE ERLICK: Right.

8 MR. MCGILLIN: There's a food company
9 that, by the way, has either relocated or is in the process
10 of being relocated as part of this project.

11 JUDGE ERLICK: So, I guess the question
12 is: Why is the City here now, as opposed to getting the
13 funding and then going through this process?

14 MR. MCGILLIN: It is here doing this
15 because we need the properties acquired as part of the
16 process in moving forward in the acquisition. The private
17 funding source is not going to be in until the right-of-way,
18 if you will, is either certified or darn-near certified.

19 And right-of-way certification cannot occur until all
20 the properties have been acquired and all of the properties
21 are vacant and the right-of-way itself is then approved by
22 the Washington State Department of Transportation.

23 So, you have to start somewhere, and we have started
24 with the Heglund property because we need that property and
25 we are authorized and we have the funding for that property.

1 We have funding for other properties that we are in offer and
2 negotiation on, as we made an offer to the Heglunds
3 previously. And we will then move to the next phase.

4 So this is not -- this is something that is -- I
5 suppose, for want of a better way to describe it, it's a
6 linear process, and it's moving toward the funding. And as
7 you saw in the declaration of the project manager, Angela
8 Brady, we have funding this year. There is funding in the
9 proposed 2009 budget. And the intention is to move --

10 JUDGE ERLICK: That's public --

11 MR. MCGILLIN: -- forward.

12 JUDGE ERLICK: -- funding, correct?

13 MR. MCGILLIN: Yes.

14 JUDGE ERLICK: So what's the commitment
15 on the private side?

16 MR. MCGILLIN: Well, the commitment on
17 the private side is in negotiation, and it is a precondition
18 to the authorization to construct, not to the authorization
19 to acquire property for the project and --

20 JUDGE ERLICK: But then you end up
21 exactly the same place the Monorail was where you've acquired
22 all this property without a project.

23 MR. MCGILLIN: But that happens. And it
24 has happened. And I'm not -- I'm not here -- I'm not here to
25 be the bad guy beating up on people. It has happened before.

1 The law permits it. We have that authorization to go
2 forward, and we're legally entitled to do so and have the
3 money to acquire this property. It is not infrequent that,
4 particularly in right-of-way projects, that parcels are
5 acquired seriatim. And that there is not a restriction on
6 the acquisition that if you get to the other end of the line
7 and your project falls apart, you now have to sell all the
8 property back or give it back. But that is what the law is.
9 And legislature could change that, but it has not done so.

10 JUDGE ERLICK: Mr. McGillin, I'm going to
11 give you an opportunity to reply after I hear from Ms. Clark
12 and Mr. Nelson.

13 MR. MCGILLIN: Thank you.

14 JUDGE ERLICK: Thank you.

15 Ms. Clark, are you up next?

16 MS. CLARK: Thank you, your Honor. Good
17 afternoon. Your Honor, again I'm Katherine Clark on behalf
18 of West Marine, and I think there's also an entity named
19 "West Marine Finance Company," which my understanding --

20 JUDGE ERLICK: Right.

21 MS. CLARK: -- has been subsumed by West
22 Marine Products. So we'll just call everybody "West Marine"
23 in this one.

24 I'm going to get down to the question that you asked
25 three or four times: What happens to this property if this

1 project is not funded and HTK Management and Ment (phonetic)
2 and Monorail case says, it's out on the public market as
3 surplus property. And it seems to me that is the underlying
4 problem in this case, is that this case -- Monorail has
5 raised the point that when we are condemning property under
6 the auspicious of public use and necessity, there is almost a
7 higher standard placed because we're not only displacing
8 business owners, such as West Marine, but property owners
9 such as the Heglunds.

10 It would be sold on the public -- in the public
11 marketplace, and my client would be out of business and
12 Mr. Heglund would be divested. To answer your question,
13 sure, quickly.

14 I'm going to go to the declaration of Angela Brady.

15 JUDGE ERLICK: Let me grab that if I can.

16 MS. CLARK: That was submitted on Friday
17 morning. It's late submitted and we could have made a
18 motion --

19 JUDGE ERLICK: This is the reply?

20 MS. CLARK: Yes.

21 JUDGE ERLICK: All right.

22 MR. MCGILLIN: I believe, your Honor, if
23 I may -- and I don't want to interrupt. But I believe it was
24 submitted on -- before noon on Thursday as required. But if
25 that's the case that it was submitted on Friday, I'm not

1 aware of it.

2 MS. CLARK: Oh, no. My point is it came
3 in the reply. It's not in the moving papers.

4 JUDGE ERLICK: Correct.

5 MS. CLARK: And you could strike it, but
6 we're going to ask you to take a look at it and consider some
7 things about this declaration. The first is that Ms. Brady
8 does not designate herself as a speaking agent for the City.
9 That is the city counsel and the mayor. And while Ms. Brady
10 does have some interesting information regarding the project,
11 the mayor and the city counsel are the people who have spoken
12 in the 2007 and 2008 ordinances. There are paragraphs, I
13 believe, six and seven and eight and nine that talk about
14 where the City is --

15 JUDGE ERLICK: Uh-huh.

16 MS. CLARK: -- in it's design process and
17 how much money it has spent. And frankly, that's all
18 irrelevant for your -- consider today. It doesn't matter.
19 What does matter is whether or not this is a public use, the
20 public interest requires it, and whether or not the property
21 is reasonably necessary.

22 And paragraph ten, which I think is probably the most
23 important paragraph of Ms. Brady's declaration, it says: The
24 City believes that the project construction qualifies for
25 state and federal money, and some of the improvements may be

1 paid by property owners located adjacent to the building
2 (sic). Those are -- that is speculation.

3 JUDGE ERLICK: Located adjacent to the
4 roadway, you mean?

5 MS. CLARK: Right. So first, that's
6 speculation.

7 Second, if you look at the 2008 and the 2007
8 ordinances, they never say anything about adjacent property
9 owners. Ms. Brady is the only one that says anything about
10 that. The 2007 ordinance says that money will be
11 appropriated at some point in the future. And the 2008
12 ordinance, which we have cited the relevant provisions of in
13 our brief at page five, talks about the mayor or the
14 executive coming up with the specific sources of funding.

15 JUDGE ERLICK: Uh-huh.

16 MS. CLARK: That's page five, your Honor,
17 or Mr. Bagdy's (phonetic) affidavit, Exhibit A.

18 More particularly, it says: These sources should total
19 the equivalent of 36.2 million in funding for the project or
20 reductions or offsets in private participation funding
21 realized through real estate acquisition for right-of-way
22 needs.

23 I honestly don't know what that means, but it's
24 certainly not talking about adjacent property owners or an
25 LID or special assessment.

1 We noticed also that these particular ordinances do not
2 comply with RCW 8.12.040 that requires the ordinance to
3 identify the funding sources and requires that an LID be
4 identified. That certainly is not in the 2008 ordinance, nor
5 is it in the 2007 ordinance. We note that our --

6 JUDGE ERLICK: Well, you could have
7 adjacent property owners contribute without forming an LID,
8 couldn't you?

9 MS. CLARK: And that would raise on this
10 instance and this case, private participation.

11 JUDGE ERLICK: Which there's no
12 prescription against. You can have private participation as
13 they did in the Convention Center case.

14 MS. CLARK: Most definitely you can, your
15 Honor. But in that case and in every other case, including
16 my case, the City of Lynnwood, we knew what it was. And we
17 don't know what it was -- what it is here today.

18 JUDGE ERLICK: Well, don't -- my
19 understanding is that the degree of private participation is
20 irrelevant so long as the money is used for public purpose.
21 In other words, if we know that this is a widening of
22 Mercer --

23 MS. CLARK: Yes.

24 JUDGE ERLICK: -- and its right-of-way,
25 does it matter how much private funding goes into that, so

1 long as it's used for transportation purposes, which is prima
2 fascia, public use, with the exception of that one strange
3 case with the roadway that fit into the private --

4 MS. CLARK: The Tillman (phonetic) case?

5 JUDGE ERLICK: The Tillman case. Thank
6 you.

7 MS. CLARK: Your Honor, I'm not sure I
8 would agree with that, and this is why: If I give you
9 \$36.2 million -- and I don't have that kind of money to give
10 you. But if I did, I would expect something for it, wouldn't
11 I?

12 JUDGE ERLICK: I would expect it be
13 brought before the judicial conduct committee for exhibiting
14 \$36.2 million.

15 (Laughter.)

16 MS. CLARK: But the point is, is that the
17 notion that this is just \$36 million coming from some
18 identified -- unidentified private source that is used solely
19 for transportation money and nothing goes back the other way,
20 I'm sorry, I just don't buy. There is no evidence here that
21 that's exactly what's going to happen. And that's the
22 problem with where we are now. We don't know. We don't know
23 if it's just \$36.2 million.

24 What we do know is that there is \$88 million and
25 there's a shortfall. A portion of that is federal and state

1 money, and some of that is acknowledged as 36.2. I get to
2 know what that is before they throw West Marine out. That's
3 simple. I cannot do my job, frankly, right now because I
4 can't look at the Convention Center case and West Lake I and
5 II and Lynnwood and even the Monorail case that requires me
6 to do this balancing test until I know what it's going to be.

7 And the only question -- the question is not only
8 money, it's what is the deal? What am I getting for it? If
9 this was an LID, I wouldn't be here. But we don't even know
10 that it's that yet.

11 JUDGE ERLICK: Well, I understand what
12 you're saying, in terms of West Lake and in terms of
13 Convention Center. Both of which had -- neither of which was
14 a transportation project and both of which had a significant
15 private component to it. West Lake to the degree that it was
16 not approved. Convention Center went the other way because
17 it was primarily a convention facility --

18 MS. CLARK: Right.

19 JUDGE ERLICK: -- is what the supreme
20 court found. But here there's -- I mean, the project itself
21 that's to be funded, is a transportation project. You're
22 absolutely correct. We don't know where that funding is
23 going to come from and if there is a quid pro quo, which I
24 assume would be your concern. But right now the condemnation
25 is clearly for a court or -- and -- there's no evidence

1 otherwise that it's going to be anything -- I mean, the
2 design studies, everything --

3 MS. CLARK: What --

4 JUDGE ERLICK: -- I looked at indicate
5 that this property would be used for a widening of Mercer,
6 which would be -- by definition be a public use and the
7 right-of-way; and then, of course, the temporary construction
8 easement.

9 MS. CLARK: And I appreciate that, your
10 Honor. And I bring you back to the Tillman case which says
11 that not all roadway projects are transportation projects
12 just get through public use and necessity --

13 JUDGE ERLICK: Well, that was an easy one
14 because it was roadway going to private property. Here we
15 have widening of Mercer.

16 MS. CLARK: Actually, your Honor, I think
17 what that was, was roadway that was going to connect into a
18 roadway structure of a subdivision that was being developed
19 by whatever the developer's name was in question.

20 JUDGE ERLICK: Right.

21 MS. CLARK: There was a map in the case
22 itself. What he was trying to do was create a network of
23 roads through his subdivision, which presumably were
24 dedicated to the public within the plat.

25 It was not access to private property. He had access

1 to the street roadway with -- by other means. He just wanted
2 another road to hook into his road structure. And if you
3 look at that case, you'll see the map I'm talking about. So
4 it wasn't just access to his private property, he just wanted
5 a better road structure. That's why I cited it.

6 I mean, if you think I didn't think very hard about
7 creating this particular opposition, I did. It -- it doesn't
8 seem to me that where we have such a huge chunk of money
9 coming from an unknown private source, that it's appropriate
10 to go forward just yet.

11 Now, is it possible that in a couple of months after
12 the mayor makes his speech next month and the city counsel
13 fully considers this, that there would be money in place and
14 it would pass constitutional muster? Absolutely. That is an
15 absolute possibility.

16 JUDGE ERLICK: Are you stating that it
17 has to be either entirely publically funded or it has to be
18 publically funded and the source of private funds has to be
19 identified?

20 MS. CLARK: Yes. It's the latter, Your
21 Honor, not the former. I --

22 JUDGE ERLICK: All right. So let's just
23 take a hypothetical that we'll just throw out and -- Volcan
24 (phonetic) is known to finance it.

25 MS. CLARK: Okay.

1 JUDGE ERLICK: Now where does that get
2 you?

3 MS. CLARK: Then I get to look at the
4 City's entire relationship with Volcan as demonstrated in the
5 entire South Lake Union neighborhood. The Mercer Mens
6 (phonetic) project is only one portion of the development of
7 the South Lake Union neighborhood. And if there are all
8 kinds of back-room deals going on, which this is a part of
9 it, then that would all come into the public use and
10 necessity analysis.

11 It seems to me that unless and until we know what it
12 is, we can't really decide whether or not this is arbitrary
13 and capricious. And that's why we put it in our brief that
14 way.

15 One of the City's arguments is there's an implied
16 argument that we're saying, that this is never going to be
17 built, so don't do this. I'm not saying that today. I'm
18 saying today that I just don't know whether or not this is
19 proper or not right now.

20 Could they cure these defects next week? Sure. Doubt
21 it. Probably won't cure them, if they have a chance to,
22 until December. But the point is we're kind of putting the
23 cart before the horse here. That's why we'd ask you to
24 dismiss it and have the City reinitiate it.

25 JUDGE ERLICK: Well, you certainly make a

1 persuasive argument in that regard. On the other hand, you
2 run into the cart and the horse problem.

3 MS. CLARK: And I hear -- you know, I
4 listen to Mr. McGillin's assessment that this is the way we
5 always do it down at the Department of Transportation.

6 JUDGE ERLICK: No, I don't care how they
7 always do it.

8 MS. CLARK: Okay.

9 JUDGE ERLICK: What I do care about is
10 if, in fact, the funding is dependent upon having the
11 property and the right-of-way. In other words, whoever is
12 going to come up with \$36.2 million -- we've already agreed
13 it's not going to be you --

14 MS. CLARK: Or you.

15 JUDGE ERLICK: Or me, for that matter.
16 -- is going to want to know that the City has that property
17 before they come up with that money. So I understand --

18 MS. CLARK: And --

19 JUDGE ERLICK: -- what you're saying,
20 which is: Well, wait a minute, before you take our property,
21 we want to see the \$36.2 million. That's (inaudible)
22 problem.

23 MS. CLARK: I appreciate that, your
24 Honor, and I understand that that might be a practical
25 problem, but that's not part of the constitutional analysis.

1 Just because because that's what the rules and regulations
2 are that may or may not be set forth by the Department of
3 Transportation, either within the City or the state or even
4 the federal government, does not change your analysis under
5 the constitution.

6 JUDGE ERLICK: What -- what is -- what
7 are you relying on for the proposition that the funding
8 source has to be specifically identified?

9 MS. CLARK: There is nothing, your Honor.
10 Frankly, this is a new case. This is cutting edge public use
11 and necessity. But it's seems to me that if the Convention
12 Center says I have to balance, West Lake II says I have to
13 balance -- West Lake I found no public use and necessity.
14 And if you look at the Lynnwood case, what happened in
15 Lynnwood was Video Only had a corner of the property, and the
16 public facilities district had acquired a whole bunch of
17 property that was a --

18 JUDGE ERLICK: Right.

19 MS. CLARK: -- that was a shopping
20 center. Well, we knew what it was in that case. We knew
21 what it was in Convention Center. We knew what it was in
22 West Lake II. We knew what it was in West Lake I. We knew
23 what it was in Tillman. Every single one of those cases, the
24 private source of money was identified.

25 So to answer your question: What's my authority? The

1 entire body of law on this in Washington State, although it
2 doesn't specifically say you have to identify it.

3 JUDGE ERLICK: But -- but what we knew in
4 West Lake and we knew in Convention Center and what we know
5 in Mercer Street -- we knew in West Lake that there was going
6 to be a bunch of retail shops --

7 MS. CLARK: Right.

8 JUDGE ERLICK: -- and a park.

9 MS. CLARK: Right. "Architectural
10 surplusage," I believe is the word.

11 JUDGE ERLICK: We knew in the West Lake
12 Center there was going to be a bunch of retail shops --

13 MS. CLARK: Uh-huh.

14 JUDGE ERLICK: I'm sorry, I mean -- West
15 Lake. I meant Convention Center. There was going to be the
16 retail shops and there was going to be large -- the large
17 convention hall --

18 MS. CLARK: Uh-huh.

19 JUDGE ERLICK: -- which they said was
20 more public than private. They said West Lake was more
21 private than public, architectural surplusage. They did the
22 weighing.

23 Here the project doesn't call for anything -- I mean,
24 we know what the project is -- what the proposed project is.
25 It's the widening of Mercer. It's the whole -- it's the bike

1 trails and all that over on Valley. So we -- I understand
2 what your concern is. Your concern is that somebody pays
3 \$36.2 million, they're --

4 MS. CLARK: Right.

5 JUDGE ERLICK: -- going to want quid pro
6 quo.

7 MS. CLARK: Darn right.

8 JUDGE ERLICK: But -- and that may be
9 true. Assuming you're right, what he wants is a bridge of
10 some sort so that goes from the Hutch (phonetic) Center over
11 to -- I don't know

12 MS. CLARK: Bridge to nowhere perhaps?

13 JUDGE ERLICK: Bridge to nowhere.

14 But even if that were true, I don't see how that is
15 going to change the inquiry here --

16 MS. CLARK: Let me --

17 JUDGE ERLICK: -- which is --

18 MS. CLARK: Uh-huh.

19 JUDGE ERLICK: -- narrowly, is the
20 Heglund property going to be used for a transportation
21 corridor?

22 MS. CLARK: If you -- here's my retort to
23 that, your Honor. Public use and necessity under Tillman,
24 you do not describe it with scalpelic precision -- and I
25 practiced how to say that.

1 (Laughter.)

2 JUDGE ERLICK: I read that quote, by the
3 way.

4 MS. CLARK: I went "whoa."

5 But I would direct you to two cases. One, back to
6 Tillman. Again, that was a transportation project that the
7 supreme court said was purely for private uses, even though
8 on its face it looked like it was public.

9 And then you look at Lynnwood, there was no allegation
10 anywhere.

11 JUDGE ERLICK: That wasn't
12 transportation.

13 MS. CLARK: It wasn't transportation, but
14 if we come back to transportation being a public use and the
15 City's claim is that it has to be some sort of physical
16 occupation by the public -- it's in their briefing -- I would
17 disagree and say if you look at Lynnwood, irrespective of
18 whether or not it's a transportation project, that there was
19 no allegation that there was going to be a private use of the
20 Video Only project. And my argument to that was: Well, you
21 have to look at the project as a whole.

22 JUDGE ERLICK: Uh-huh.

23 MS. CLARK: Yeah, well, the project as a
24 whole here is South Lake Union. There are all kinds of these
25 going on. And I get to know -- I can't put into the record

1 here because I'm not sure I would get it in under relevance,
2 but I get to know where this money is coming from and what
3 people get for it, irrespective of whether or not on its face
4 it's a transportation project or not.

5 That's my 15 minutes, your Honor.

6 JUDGE ERLICK: Thank you, counsel.

7 MR. NELSON: I didn't mean to interrupt
8 if you want to --

9 JUDGE ERLICK: No, that's fine. I'll
10 hear from you, Mr. Nelson.

11 MR. NELSON: I'd like to come with this
12 at a slightly different angle.

13 JUDGE ERLICK: Okay.

14 MR. NELSON: I think we're done with the
15 court concepts now, so I really don't need more than five
16 minutes.

17 I think in the beginning, at least in my understanding,
18 Mr. McGillin conflated a couple of principles, and I think
19 it's important.

20 JUDGE ERLICK: Use and necessity?

21 MR. NELSON: Yes, exactly.

22 MR. NELSON: We are talking about
23 arbitrary, capricious, clear, cogent (phonetic), convincing.
24 That's on the necessity side.

25 But on the use side, it's a purely -- it's a question

1 of law for the court. And I believe in his own brief he says
2 at page -- in the application on page 2: The City will
3 demonstrate by a preponderance of the evidence that the
4 acquisition is for a public use.

5 And I think that was correct. And I think that we just
6 -- these concepts are hard to separate. But I believe we're
7 on a preponderance standard here in which the City bears the
8 burden on the issue of public use.

9 JUDGE ERLICK: I think that's probably
10 correct.

11 MR. NELSON: That's my first point.

12 My second point --

13 JUDGE ERLICK: The City does have the
14 burden, although there's a question as to whether there are
15 presumptions with respect to that burden. The two
16 presumptions being: One, there is deference to the
17 legislative authority, in this case the city counsel.

18 And secondly, that there is a presumption with respect
19 to transportation is presumptively for the public use. And
20 that's from the Puget Sound -- Central Puget Sound Authority.

21 MR. NELSON: Those are out there, though
22 I'm not -- it seems like they get an awful lot of mileage out
23 of this legislative presumption because they get arbitrary
24 and capricious over here, and then they get Amry (phonetic)
25 over here too.

1 JUDGE ERLICK: Well, arbitrary and
2 capricious is the -- is the --

3 MR. NELSON: Necessity --

4 JUDGE ERLICK: Is the -- and is the
5 opposing party's burden to show that it's either fraudulent
6 or that it is arbitrary capricious in order to overcome the
7 presumption. That's my understanding of the law.

8 MR. NELSON: Okay. I'm not -- I don't
9 want to be overnecessitating. I can't win over there.

10 JUDGE ERLICK: You want to go over use.

11 MR. NELSON: I've learned more about the
12 private component of this project in court here today than I
13 learned in the City's papers. It isn't there, other than to
14 say we need 36.2 million. But we learned some really
15 important things today. We learned, number one, that the
16 project doesn't go forward -- that the private money doesn't
17 come in until we get basically construction permits, it
18 sounds like to me, the right-of-way dedication.

19 JUDGE ERLICK: I don't think that's -- I
20 don't think that's a construction permit. That has to do
21 with the -- that's -- have to do with condemnations.

22 MR. NELSON: Anyway, I learned that
23 today. And my point -- then Mr. McGillin went on to say that
24 the negotiations are going on about this private --

25 JUDGE ERLICK: With -- with the other

1 land owners, I believe he said. That's what I heard.

2 MR. NELSON: My sense was that the
3 negotiation was with the private --

4 JUDGE ERLICK: Oh, oh, oh. Yes.

5 MR. NELSON: -- money was going -- is
6 ongoing.

7 JUDGE ERLICK: Yes, that's my
8 understanding as well.

9 MR. NELSON: Okay. Let's take -- let's
10 play with that concept a little bit.

11 JUDGE ERLICK: All right.

12 MR. NELSON: If I'm right --

13 JUDGE ERLICK: Uh-huh.

14 MR. NELSON: -- then you, the Court, are
15 the sentinel between takings for -- to guard against taking
16 for private purposes and that when there is a private
17 component of a -- of a taking, that there has to be a
18 balancing to show that the purpose is predominantly
19 primarily public, and that any private portion is incidental.
20 Then I believe you cannot do that job here.

21 JUDGE ERLICK: Well, you -- you're -- now
22 you're doing the conflation because you can't confuse private
23 participation with private use. Those are two different
24 concepts. Private participation is irrelevant --

25 MR. NELSON: I understand.

1 JUDGE ERLICK: -- if used for a public
2 use.

3 MR. NELSON: Like the Steilacoom case?

4 JUDGE ERLICK: Like the Steilacoom case,
5 exactly.

6 MR. NELSON: I agree.

7 But in every case if you start with Theilman
8 (phonetic), you go up to Steilacoom, you go up to West Lake,
9 and you go to Convention Center, in each case there was an
10 articulated thing that could be analyzed. And even though
11 they don't talk about weighing, they're weighing back in
12 Thilman.

13 JUDGE ERLICK: Uh-huh.

14 MR. NELSON: They're saying this is just
15 a road for a developer --

16 JUDGE ERLICK: Right.

17 MR. NELSON: -- who isn't denied access
18 to his property. It's predominantly private.

19 In West Lake, you know you're going to build a mall.
20 That sounds private. And we are able to -- the court was
21 able to devesent. And in this case, it's under negotiation.

22 You know, we don't know -- and I don't mean to be too
23 extreme, but we don't know that this isn't a transportation
24 project, a road right over to Paul Allen's slip for his
25 yacht. We can't know that.

1 JUDGE ERLICK: If he parked it in front
2 of the freeway, you might be right.

3 MR. NELSON: Well, I mean it could be
4 over in Lake Union. The point --

5 JUDGE ERLICK: We know -- we know where
6 the -- I mean, that would be incidental. I mean, if he wants
7 to put his yacht there, that's fine. But the point is: We
8 all know what Mercer is like. And -- and -- and this is a
9 project that's been studied and studied and studied and
10 restudied by the City for a decade plus now, and we know
11 exactly what the proposal is.

12 I mean, it's not as though they're saying, well, we
13 just want to put a road in there. We have the South Lake
14 Union Transportation study, and it tells you, you know, where
15 the road's going to go, what it's going to accomplish, what
16 the projected vehicles per hour are or what you have. There
17 is some debate whether it's going to ultimately be a benefit
18 or not, but I -- I think that it's -- it's the City's best
19 projection on improving a bad system.

20 So -- I mean, we know what the project is. Now,
21 Ms. Clark raises some very interesting issues from my
22 perspective, which is: Typically when somebody gives a bunch
23 of money, they get something back for it.

24 MR. NELSON: More than 18 percent of the
25 funding for the project. We're talking about the missing

1 funding -- 18 -- or thirty-two point -- 36.2 over 200 is over
2 18 percent.

3 JUDGE ERLICK: We know that this area is
4 being developed. There's no question about it. We know that
5 as it is now, it is -- from a transportation standpoint, it
6 is a mess. Now, if it is improved, that would have some
7 indirect and perhaps directly beneficial results for the
8 adjacent land owners. But that still doesn't -- I mean, I --
9 I don't see where the balancing would go in this project,
10 given that it's intended to widen what is an existing
11 thoroughfare right now created to --

12 MR. NELSON: And that's just the point,
13 it's under negotiation what the -- what the balancing -- what
14 you would compare to what. We don't even know. And that's
15 where I think the real defect is here.

16 In Thielman, Steilacoom, West Lake, and Convention
17 Center there is incredibly precise detail about what was
18 balanced against what. And I don't think we can afford -- I
19 mean, I don't think constitutionally you can say: Okay, I
20 know it can't be much.

21 JUDGE ERLICK: Your concern is that there
22 is going to be something given to the private investor.

23 MR. NELSON: That gives me something to
24 talk about that I don't know about here today. I'm --

25 JUDGE ERLICK: It's going to avert what's

1 essentially, from my perspective, a public project to a
2 predominantly private project.

3 MR. NELSON: Thilman was a road project
4 and the City -- or the county came in and argued for the
5 City. I can't -- I think it was -- public use. It's a road.
6 And the court said: Well, let's look at the road.

7 JUDGE ERLICK: Well, I've looked at the
8 road. The road goes from the Seattle Center or Fifth Avenue
9 North to --

10 MR. NELSON: Exactly. You know what's on
11 this side of the scale absolutely perfectly, but you don't
12 have any idea and they haven't told you what's on this side
13 of the scale. And you're saying, I can't conceive of
14 anything that would be important enough.

15 But we're in a world of burdens of proof and
16 constitutions. They've got to tell us what's on this side of
17 the scale, and they haven't done that. It's a black box.
18 And they, for some reason, want to leave us there.

19 I think the reason is because it's under negotiation.
20 We don't know what the private benefit, if any, is going to
21 be. We don't have an affidavit saying there is no private
22 benefit, period. They didn't put that in. They didn't put
23 anything about their burden of proof in their moving papers
24 and their -- their affidavit from
25 Ms. Brady wasn't in strict reply, but it still doesn't do

1 what it needs to do. It doesn't say that there is no private
2 benefit, such that you don't have to balance.

3 And now we know in court that the reason we don't know
4 is it's still under negotiation. They haven't filled up
5 their box. They haven't met their burden of proof.

6 JUDGE ERLICK: Thank you, Mr. Nelson.

7 Mr. McGillin.

8 MR. MCGILLIN: Thank you. Cases cited in
9 our reply to the motion -- by the way, our motion went
10 forward with the ordinance, which is the legislative findings
11 and the support and the rationale. And the legislative
12 determination was that the cost of acquisition including
13 purchase price and transaction costs, together with
14 relocation benefits to the extent required by law, shall be
15 paid from funds appropriated or to be appropriated for such
16 purposes in connection with the project.

17 When that was challenged in the response to our motion,
18 we filed the declaration of Ms. Brady, which discusses the
19 sources of funding, the present funding, etcetera.

20 I -- I will go back to one of the themes that we tried
21 to remain consistent on in our reply, and that is the court
22 in the Convention Center case is very clear, it is private
23 use, not private benefit, that is the key. And merely
24 showing private benefit for participation is not enough.
25 That is the law.

1 The speculation about whether somebody may or may not
2 at some point in the future be in a position where there is a
3 question as to the publicness of their participation, is for
4 a separate challenge and could be challenged at that time.
5 That may or may not come to pass and the specter of it raised
6 by Mr. Heglund and West Marine is not evidence. It is
7 speculation. It is not evidence.

8 And where we are in terms of the law at this point in
9 time is the original ordinance that authorizes condemnation
10 says you have to have budget to do it. We have budget do it.
11 The ordinance that has been quoted as the source of the
12 concern is a budgeting ordinance that authorizes and
13 appropriates and shifts funding and cautions that the
14 remaining funding will have to come in and be established.
15 But it expressly authorizes the continued appropriation of
16 property. Expressly authorizes it.

17 In the -- the issues related to how the City goes about
18 developing the rest of the budget are not issues that this
19 court needs to decide. The Mercer case that is cited at page
20 4 of our memorandum says -- or stands for the proposition
21 that evidence to the school district's ability to pay the
22 condemnation award, should it elect to proceed, was not
23 material for a hearing on public use and necessity. It's
24 right at the top of page 4. And that's still good law in
25 this state.

1 JUDGE ERLICK: Well, they're not
2 questioning the funding, per se, but rather the funding from
3 a private source that they intimate may change the complexion
4 of the project and convert it from what appears right now to
5 be primarily for public use to more of a private use. And
6 that that's when the weighing has to occur.

7 MR. MCGILLIN: I would agree that that is
8 the law, but that is not where we are at this point in time.
9 And were that to be the case if there were, in fact, a
10 private use of the property that is acquired for this
11 right-of-way, if there were, in fact, evidence of that, then
12 that's subject to challenge in that portion of this project.

13 They could go to the legislature and they can say:
14 This crossed the line. It is no longer a public use. You're
15 committing or permitting or using public monies -- public
16 power, etcetera, etcetera, for private use, and they can
17 challenge that there.

18 To come to a public use and necessity hearing where the
19 clear evidence is that it is a road project on an existing
20 roadway for which there is authority to condemn and budget to
21 acquire the property and say there might be this whole
22 specter of things out there that we would all like to know
23 about this project before this court can decide public use
24 and necessity is contrary to the law in the State of
25 Washington.

1 The courts have even gone so far as to say, it is not
2 even necessary that the project be designed. When it is for
3 roadway purposes and the legislature has decided that it is
4 necessary, that's a public use, and it is necessary, then
5 that determination of necessity is and should be what
6 governs, absent a showing of fraud.

7 And we meet our burden when we bring in the legislative
8 determination. We meet our burden when we show the court
9 that this is, in fact, a road project. They have the burden
10 of showing that it is not, in fact, a road project. And they
11 -- they have not met that burden.

12 JUDGE ERLICK: But what the property
13 owners are contending is not just whether the Heglund
14 property would be used for public purpose or public use, but
15 whether ultimately the entire project would be used for
16 public use.

17 MR. MCGILLIN: Uh-huh.

18 JUDGE ERLICK: And that we don't -- we
19 can't know that unless and until we know what the final
20 project is going to look like after the private funder has
21 completed negotiations with the City.

22 MR. MCGILLIN: I understand their
23 contention, and I submit that is a -- a defense of this
24 action that simply isn't recognized in law. And that this --

25 JUDGE ERLICK: There's a -- there's --

1 weighing is recognized in the law.

2 MR. MCGILLIN: Only when there is a
3 showing of public use -- or private use, and there is no
4 showing of private use when what we have -- what is designed
5 and what we have shown in the legislation and attached to the
6 City's ordinance is a private property surrounding what is,
7 in fact, a public use.

8 The fact that there are private properties lying along
9 the roadside should not tip the balance one way or the other.
10 They -- they -- they truly don't --

11 JUDGE ERLICK: Well, there will be
12 incidental benefit.

13 MR. MCGILLIN: -- tip the balance. They
14 don't make it a private use.

15 JUDGE ERLICK: Mr. McGillin, thank you.

16 MR. MCGILLIN: Thank you.

17 JUDGE ERLICK: We'll take about a seven
18 or eight minute recess, and then the Court will render its
19 decision. Thank you. Court will be in recess.

20 (A recess was taken.)

21 THE BAILIFF: Please rise.

22 THE CLERK: Court is back in session.

23 JUDGE ERLICK: Please be seated. We're
24 back on the record in the matter of City of Seattle versus
25 Heglund, West Marine, et al. This matter is before the Court

1 on the City's application for determination of public use and
2 necessity. The Court has reviewed the submissions of the
3 parties and has heard the argument of counsel, renders the
4 following decision:

5 RCW 8.04.070 requires that a proposed condemnation be
6 necessary for the public use. Our courts have developed a
7 three-part test to evaluate eminent domain cases. For a
8 proposed condemnation to be lawful, the state must prove
9 that: One, the use is public. Two, the public interest
10 requires it. And three, the property appropriated was
11 necessary for that purpose.

12 In re, City of Seattle, 96 Wn. 2d 616, 1981 case,
13 citing King County versus Thielman, 59 Wn. 2d 586, a 1962
14 case.

15 First while the determination of public use is for the
16 courts, the Washington Supreme Court has explicitly stated
17 that it will show great deference to legislative
18 determinations.

19 City of Des Moines versus Hemingway (phonetic) 73 Wn.
20 2d 139.

21 More over, the condemnation of private property for
22 public transportation is within the state's eminent domain
23 power and almost categorically a public use.

24 State versus -- State Exrel Devenshire (phonetics)
25 versus Superior Court for King County, 70 Wn. 2d 630, a 1967

1 case relating to the condemnation of private property for the
2 1962 Expo Monorail, which was determined to be a public use.

3 Also cited central path -- Central Puget Sound Regional
4 Transit Authority versus Miller, 156 Wn. 2d 403 at 411 A, a
5 2006 Supreme Court case.

6 Contrary to the property owner's assertions in this
7 case, private funding alone of a public project does not
8 necessarily corrupt the public nature of that project.
9 Property owners here cannot cite authority to support their
10 argument that private contribution to project's expenses
11 defeats the exercise of eminent domain.

12 On the contrary in the Town of Steilacoom versus
13 Thompson, 69 Wn. 2d 705, the Washington Supreme Court
14 affirmed a finding of public use and necessity where a
15 private developer advanced funds for condemnation awards and
16 financed a public sewer extending to his development.

17 Private funding of a public project alone is not
18 sufficient to defeat the City's exercise of the power of
19 eminent domain. In light of the deference given to the
20 legislative body, in this case the Seattle City Counsel, and
21 given the absence of evidence that either the Heglund
22 property or the South Lake Union Transportation project as a
23 whole is primarily to be used for private use, this court
24 concludes, the City has met its burden with respect to the
25 public use of this property.

1 Turning now to the necessity component of the
2 three-part test. Whether condemnation is necessary is
3 largely a question for the legislative body of the
4 jurisdiction or government agency seeking condemnation.
5 Hemingway 73, a Wn. 2d at 139. A legislative body's
6 declaration of necessity, quote, is conclusive in the absence
7 of proof of actual fraud or such arbitrary and capricious
8 conduct as would constitute constructive fraud, end quote.

9 Also from the Hemingway case, citing City of Tacoma
10 versus Welker (phonetic), 65 Wn. 2d 677.

11 In the condemnation context, necessary means, quote,
12 reasonable necessity under the circumstances.

13 State Ex Rail (phonetic) versus Superior Court, 61 Wn.
14 2d 153, a 1963 case.

15 It does not mean immediate absolute or indispensable
16 need. Also from the same case, Lang versus Superior Court.
17 Typically challenges to necessity are raised when arguably
18 excess land is seized or when condemnation is for a disguised
19 private use.

20 Washington State Convention and Trade Center versus
21 Evans, 136 Wn. 2d, 811, 1998 case. Holding the condemnation
22 of property needed for the Convention Center expansion was
23 lawful, even though an incidental private use would ensue.

24 Out of respect for our coordinate branches of
25 government, judicial review is deferential, also from the

1 Washington State Convention case.

2 Additionally, when it comes to such discretionary
3 details as to the particular land chosen, the amount of land
4 needed, or the kinds of legal interests in that land that are
5 necessary for the project, many Washington decisions have
6 said that the condemnor's -- in this case the City of
7 Seattle's -- judgment on these matters will be overturned
8 only if there is, quote, proof of actual fraud or such
9 arbitrary and capricious conduct as would amount to
10 constructive fraud, end quote.

11 Central Puget Sound Regional Transit Authority versus
12 Miller 156 Wn. 2d, 403 at 411.

13 This court is sympathetic to the plight of the property
14 owner in this instance. With private funding uncommitted and
15 still under negotiations, is there a risk that this overtly
16 public project will be converted to private use? This
17 speculative concern does not rise to the level of showing
18 fraud or arbitrary and capricious conduct.

19 The City through its South Lake Union Transportation
20 study, its other evidence and declarations has carried its
21 burden of showing both public use and necessity. And this
22 has not been overcome with the necessary proof to overturn
23 legislative judgment of the City of Seattle with respect to
24 this transportation project.

25 Accordingly, the City's application to declare public

1 use and necessity with respect to the Heglund, the West
2 Marine property is granted. Court will enter an appropriate
3 order to that regard.

4 Mr. McGillin, do you have a proposed order?

5 MR. MCGILLIN: I have a proposed order,
6 your Honor.

7 JUDGE ERLICK: All right. And if you
8 would, please, present that to counsel for their review at
9 this time.

10 And Mr. McGillin do you have any questions?

11 MR. MCGILLIN: I have no questions, your
12 Honor.

13 JUDGE ERLICK: Ms. Clark.

14 MS. CLARK: No, your Honor. Thank you.

15 JUDGE ERLICK: You're welcome.

16 Mr. Nelson.

17 MR. NELSON: None, your Honor.

18 MR. MCGILLIN: May I approach, your
19 Honor?

20 JUDGE ERLICK: Yes, you may.

21 MR. MCGILLIN: Your Honor, this is the
22 original. Would you also require a working copy --

23 JUDGE ERLICK: No.

24 MR. MCGILLIN: -- for your records?

25 JUDGE ERLICK: King County didn't weigh

1 in, did it?

2 MR. MCGILLIN: No.

3 MS. CLARK: No, they didn't.

4 MR. MCGILLIN: That's why I left that
5 blank.

6 JUDGE ERLICK: Okay.

7 MR. MCGILLIN: I was not sure. I did not
8 see the --

9 JUDGE ERLICK: I didn't see anything
10 either. I'll put in there that they did not -- having not
11 responded.

12 Yes, Ms. Clark.

13 MS. CLARK: Your Honor, paragraph three
14 relates to a scheduling order.

15 JUDGE ERLICK: Yes.

16 MS. CLARK: I am not in a position to be
17 agreeing to dates certain. I'd rather have a look at my
18 calendar. And I'm not sure it's appropriate in your order
19 today.

20 JUDGE ERLICK: If --

21 MS. CLARK: I'm certainly happy to
22 discuss a separate stipulation regarding such dates, but I
23 would suggest that paragraph three be deleted in its
24 entirety.

25 JUDGE ERLICK: All right. Do we --

1 Does this set a trial date?

2 MS. CLARK: It does not, your Honor, but
3 it sets certain discovery deadlines and appraisal
4 information. And I flat out need to talk to my client and
5 the court order. And I just don't think it's appropriate in
6 an issue or order on public use and necessity.

7 JUDGE ERLICK: I think the appraisal -- I
8 think some of this is statutorily mandated.

9 MS. CLARK: Some of it is. I agree. But
10 not all of it is.

11 JUDGE ERLICK: Okay. Well, I didn't
12 realize this until yesterday, as I was reviewing some of
13 this, that this is actually Judge Roger's case. So he's --
14 you're going to try the -- the value issues before Judge
15 Rodgers but --

16 Mr. McGillin.

17 MR. MCGILLIN: If I might be heard, I
18 believe the -- your department raised the question why this
19 is noted for --

20 JUDGE ERLICK: Right.

21 MR. MCGILLIN: -- this department. And
22 the reason is, before we file, we don't know --

23 JUDGE ERLICK: Right.

24 MR. MCGILLIN: -- and so we address it to
25 presiding.

1 This is -- what is proposed in paragraph three of the
2 order is intended to set outside deadlines, not specific
3 dates. And the reason for doing so is because there is
4 mandatory ADR, we do not want to put the parties at risk of
5 losing the ability to depose witnesses who may not need to be
6 deposed. It's up to each party to decide, for example, until
7 after ADR has (inaudible), witnesses who are experts or
8 appraisers -- the actual exchange of appraisal, equivalent
9 appraisal information. And that term is from the statute,
10 "equivalent appraisal information."

11 JUDGE ERLICK: Right.

12 MR. MCGILLIN: Is so that that occurs
13 timely in reference to the ADR deadline.

14 The written discovery deadline is so that -- such that
15 parties can reasonably obtain such discovery as they need in
16 order to do, among other things, get ready for ADR and also
17 to advise their appraiser.

18 To the extent that these proposed additional scheduling
19 deadlines would impose a hardship on opposing counsel or
20 their clients, I -- I think it would be appropriate at that
21 time to request relief. But as these are sort of outside
22 deadlines that are more unique to condemnation cases, that it
23 might be appropriate to have them in there.

24 If the court wishes to refer this to Judge Rogers,
25 we're glad to take that order up there. But we have -- this

1 is our proposed schedule from early -- from the middle of
2 August. And we've heard nothing to suggest that this imposes
3 a burden.

4 JUDGE ERLICK: Mr. Nelson, do you have a
5 position on this?

6 MR. NELSON: I don't, your Honor.

7 JUDGE ERLICK: Ms. Clark.

8 MS. CLARK: I just hope you can
9 appropriate an order on public use and necessity, your Honor.
10 And I don't think I should have to come to this court to get
11 a change in date on something that I just don't think is
12 appropriate and included in the order.

13 JUDGE ERLICK: All right. What I will do
14 is -- Mr. McGillin, why don't you separately file a motion
15 with Judge Rogers.

16 MR. MCGILLIN: I can do that.

17 MS. CLARK: Or we could do it by
18 stipulation.

19 JUDGE ERLICK: Or you could do it by
20 stipulation.

21 MS. CLARK: I'm happy to, just not in
22 this order.

23 JUDGE ERLICK: Either way. And that's
24 fine. And I understand Ms. Clark's concern, which is she may
25 agree to this, but doesn't want to be boxed in right at the