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SUPREME COURT OF THE STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III
CAUSE NUMBER 27370-9-III

UNION ELEVATOR & WAREHOUSE COMPANY, INC., a
Washington corporation,

Respondent,

v.

STATE OF WASHINGTON, by and through the Washington State
Department of Transportation,

Petitioner.

**RESPONDENT UNION ELEVATOR'S
SUPPLEMENTAL BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDENT	1
II. ISSUES PRESENTED FOR REVIEW	1
III. RE-STATEMENT OF THE CASE	1
IV. ARGUMENT	4
A. The Legislature's Waiver of Sovereign Immunity In Order To Reduce The Impacts of the Exercise of Eminent Domain Is Well Established	6
1. The Waiver Is Implied From the Eminent Domain Chapter	6
2. Landowners Are Entitled to Broad Protections	7
B. The Waiver of Sovereign Immunity May Be Implied Based Upon A Statutory Scheme and Surrounding Circumstances	11
V. CONCLUSION.....	13

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<u>Doric Co. v. King</u> , 59 Wn.2d 741 (1962)	12
<u>Fosbre v. State</u> , 76 Wn.2d 255, 456 P.2d 335 (1969)	9
<u>Hyde v. Wellpinit Sch. Dist. No. 49</u> , 32 Wn.App. 465, 472 (1982).....	11, 12, 13
<u>In Re Anacortes</u> , 81 Wn.2d 166, 169 (1972)	6, 9
<u>Sintra, Inc. v. City of Seattle</u> , 131 Wn.2d 640, 656 (1997).....	7, 9, 10
<u>Smoke v. City of Seattle</u> , 132 Wn.2d 214, 228 (1997)	11
<u>State v. Costich</u> , 117 Wn. App. 491, 499 (2003), rev'd on other grounds, 152 Wn.2d 463 (2004)	7
<u>State v. Hallauer</u> , 28 Wn. App. 453, 455 (1981)	9
<u>State v. Lange</u> , 86 Wn.2d 585, 589, 547 P.2d 282 (1979)	8
<u>Swartout v. Spokane</u> , 21 Wn. App. 665 (1978)	12
<u>Union Elevator III</u> , 152 Wn. App. 199 (2009)	4, 6, 9
<u>Union Elevator II v. State</u> , 144 Wn. App. 593 (May 15, 2008) 1, 2, 3, 8, 10	
<u>Union Elevator I v. State</u> , 96 Wn. App. 288 (1999)	1
Statutes	
RCW 8.04 <u>et seq.</u>	9
RCW 8.26 <u>et seq.</u>	8
RCW 8.26.010	10
RCW 8.26.010(1)(a)	5, 6, 8, 12
RCW 8.28 <u>et seq.</u>	9
RCW 8.28.040	6
WAC 468-100-207(7)	3

I. IDENTITY OF RESPONDENT

Union Elevator & Warehouse Company, Inc., a Washington Corporation, offers this Supplemental Brief.

II. ISSUES PRESENTED FOR REVIEW

1. When a Washington citizen has property taken by eminent domain and is wrongfully denied relocation assistance is he/she entitled to interest on the funds improperly withheld?
2. Under Washington law, can it be implied that the State waived its sovereign immunity?

III. RE-STATEMENT OF THE CASE

WSDOT ignored its obligations to provide just compensation and relocation assistance to Union Elevator and forced Union Elevator to seek relief through the judicial system. See Union Elevator v. State, 96 Wn. App. 288 (1999) (“Union Elevator I”) and Union Elevator v. State, 144 Wn. App. 593 (May 15, 2008) (“Union Elevator II”). In 1996, WSDOT eliminated access to Union Elevator’s East Lind Facility. Union Elevator requested WSDOT provide compensation and/or assistance for the amounts Union Elevator would incur for a replacement facility. CP 56. However, WSDOT took the unsupportable position that Union Elevator was not entitled to either

compensation or relocation assistance. Yet, Union Elevator was “forced to relocate its East Ling grain elevator after a Washington State Department of Transportation (DOT) highway project permanently closed Union Elevator’s main access road, effectively putting the elevator out of business.” Union Elevator II, 144 Wn.App. at 597. Union Elevator had to use its own funds to construct a replacement grain elevator, including the purchase of substitute equipment. Id. at 598. Because of financial constraints, Union Elevator could only afford to build a replacement facility one-half (1/2) the size of the East Lind facility. Id. Below is a brief overview of the fourteen years it took for Union Elevator to obtain the relocation assistance that should have been offered¹ in 1996 and provided in 1998 when the substitute equipment was purchased.

1. **July 2, 1996** – WSDOT refused to provide any assistance for the relocation. (“I have heard that your hope was the DOT could help in the cost of your new facility”). CP 56.

¹ WSDOT never offered any of the advisory services required by Washington and Federal law.

2. **May 21, 2001** – Based on the inverse condemnation verdict, Union Elevator submitted a formal claim for relocation assistance. CP 57.

3. **June 13, 2001** – WSDOT denied Union Elevator's relocation claim without providing any specific basis for the determination. WAC 468-100-207(7). WSDOT incorrectly claimed Union Elevator was not entitled to any relocation assistance. Summary judgment was granted to Union Elevator on this issue.

4. **August 10, 2005** – After losing the Adjudicative hearing, WSDOT petitioned the head of the agency for review. WSDOT failed to timely review the Proposed Decision and Order.² It was more than a year after the Proposed Decision that WSDOT finally issued an arbitrary and self-serving Final Order. CP 31-49.

5. When that Final Order was reviewed, the Court of Appeals held that Union Elevator was entitled to the final \$235,000 in relocation assistance it requested based on the purchase of substitute equipment in 1998. Union Elevator II, 144 Wn. App. at 607-608.

² Indeed, from the start WSDOT ignored its statutory obligation to provide assistance in an expeditious manner. Thus, it has been more than a decade since Union Elevator was displaced.

Union Elevator paid for the relocation in 1998. Thus, WSDOT's refusal to provide the required assistance deprived Union Elevator of the use of \$235,000 from the date the claim was formally made (May 21, 2001) until the reimbursement was made as ordered (July 10, 2008)³. Interest at 12% on these funds totals \$201,416.82. Therefore, by wrongfully delaying payment, WSDOT had the use of the funds and benefited in an amount nearly equivalent to Union Elevator's claim!

Based on Washington law, the Court of Appeals correctly held that Union Elevator's request for interest should have been granted in order to make Union Elevator whole as a result of having its property taken. Union Elevator III, 152 Wn.App. 199 (2009).

IV. ARGUMENT

ACCOUNTABILITY, FAIRNESS, EQUITY and JUSTICE.

Without action, these words become hollow and meaningless. The Court of Appeals decision properly took action and effectuated the Legislature's intent to provide justice for citizens who are forced to

³ In reality, Union Elevator lost the use of those funds in 1998. However, before it could present its claim, it had to pursue the inverse condemnation action to establish the taking.

move as a result of public projects. The Legislature directed that citizens who had their property taken for a public purpose and are forced to move be provided "*fair and equitable treatment*". RCW 8.26.010(1)(a). Nonetheless, WSDOT asks this Court to render that direction meaningless by claiming it does not have to pay interest on funds wrongfully withheld. However, the Court of Appeals correctly analyzed the Legislature's intent and WSDOT's actions to correctly determine that there has at least been an implied waiver of sovereign immunity with regard to interest on relocation assistance that is wrongfully withheld.

Now, WSDOT asks this Court to overturn that decision and hold that WSDOT is not accountable to Union Elevator or landowners forced to move to allow the construction of public projects. If WSDOT's argument succeeds, Union Elevator and future landowners will not be treated in a "*fair*" or "*equitable*" manner. To deny Union Elevator interest on funds that were wrongfully withheld would be unjust and contrary to Washington law, the facts of this case, and the Legislature's directive.

A. **The Legislature's Waiver of Sovereign Immunity In Order To Reduce The Impacts of the Exercise of Eminent Domain Is Well Established.**

1. **The Waiver Is Implied From the Eminent Domain Chapter.**

The Court of Appeals correctly applied the facts, the history and purpose of the Relocation Act, and the language of the Eminent Domain Chapter to determine that interest should be provided when relocation assistance is wrongfully withheld. Union Elevator III, 152 Wn.App. 199 (2009). Specifically, the Court of Appeals correctly harmonized RCW 8.28.040 with the mandate of RCW 8.26.010(1)(a). Notably, this Court has also previously held that RCW 8.28.040 goes beyond its language and represents a broad waiver of sovereign immunity with regard to interest.

RCW 8.28.040, providing for interest in all eminent domain proceedings, appears on its face to apply only to postjudgment interest awards. We have, however, modified this interest rule to apply when interest must commence at an earlier date by virtue of earlier possession. See In re Anacortes, 81 Wn.2d at 169. We hold RCW 8.28.040 also applies in regulatory takings actions and should guide the trial court's award of interest unless a party proves by presenting evidence that the statute does not afford just compensation.

Sintra v. Seattle, 131 Wn.2d 640, 657 (1997)(emphasis added). Like the Sintra Court, the Court of Appeals correctly considered the entire statutory scheme relating to the exercise of the power of eminent domain to determine the implication that the Legislature intended to waive sovereign immunity with regard to relocation assistance. Indeed, the Legislature's stated purpose of providing for the "*fair and equitable treatment of persons displaced*" to "*minimize the hardship of displacement*" so displaced citizens would not suffer "*disproportionate injuries*" would be meaningless if interest was not allowed on relocation assistance that is wrongfully withheld for more than seven years.

2. Landowners Are Entitled to Broad Protections.

The Court of Appeals decision is also consistent with the broad protections provided to citizens who have their property and businesses impacted through the State's use of eminent domain. "*The power of eminent domain is strictly construed against the government.*" State v. Costich, 117 Wn. App. 491, 499 (2003), rev'd on other grounds, 152 Wn.2d 463 (2004). The legislative intent behind Washington's eminent domain statutes is to make whole citizens who have their property taken

by the Government. State v. Lange, 86 Wn.2d 585, 589, 547 P.2d 282 (1979). (“[A] condemnee is entitled to be put in the same position monetarily as he would have occupied had his property not been taken”). To accomplish this, the Legislature placed statutes in the eminent domain chapter requiring relocation assistance for citizens who have their property taken by the government. RCW 8.26 et seq. The purpose of the Relocation Assistance Act is to “*establish a uniform policy of fair and equitable treatment of persons displaced...and to minimize the hardship of displacement on such persons.*” RCW 8.26.010(1)(a); Union Elevator II, 144 Wn. App. at 602. The relocation assistance statutes provide additional damages to citizens who have their property taken by eminent domain. This includes the right to be reimbursed for certain moving expenses. See RCW 8.26 et seq.

As the Union Elevator II Court pointed out, it has been recognized that “*Congress indicated a willingness to depart from traditional methods of evaluating property because such methods result in inequitable treatment for many people displaced by public action.*” Union Elevator II, 144 Wn. App. at 607. In order to further these goals, the Legislature waived the State’s sovereign immunity by specifically

including relocation assistance as part of Washington's Eminent Domain Law and interest is necessary to provide landowners a complete remedy. See RCW 8.04 et seq. - RCW 8.28 et seq. See also In Re Anacortes, 81 Wn.2d 166, 169 (1972)(Condemning authority is liable for interest once it takes possession); State v. Hallauer, 28 Wn.App. 453, 455 (1981); and Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 656 (1997).

In Sintra, the Supreme Court explained that sovereign immunity does not protect the government from the award of interest in eminent domain cases.

The City correctly points out that municipalities are generally immune from prejudgment interest. See Fosbre v. State, 76 Wn.2d 255, 456 P.2d 335 (1969). Here, however, the interest awarded is not prejudgment interest. The interest awarded is part of the damages and is required as part of the just compensation. Therefore, we dispense with the City's immunity argument.

Sintra, 131 Wn.2d at 657 (emphasis added). The Court of Appeals confirmed that relocation assistance was intended to address damages beyond just compensation that is suffered by landowners when private property is taken. See Union Elevator III, 152 Wn. App. at 205 ("...the

amount of compensation to be made and the amount of damages arising from the taking...”). Here, like Sintra, interest is an extension of the damages WSDOT caused by taking Union Elevator’s property. The Legislature specifically added moving expenses as a category of eminent domain damages in order to make citizens who have their property taken whole. RCW 8.26.010. See e.g. Union Elevator II, 144 Wn. App. at 607 (“...such methods result in inequitable treatment for many people displaced by public action”).

WSDOT chose to withhold reimbursement from Union Elevator for seven years for expenses Union Elevator paid to obtain substitute equipment at its replacement facility. Thus, Union Elevator was deprived of the use of its funds for seven years. CP 322. These were funds that Union Elevator could have put to a beneficial use during that time. Sintra, 131 Wn.2d at 656 (“We assume a person who received the money value of his or her property as of the date of the taking has a beneficial use available for these funds.”). As a result, the interest at issue is “not an award of prejudgment interest on a liquidated sum in the traditional sense, but is a measure of the rate of return on the property’s owner’s money had there been no delay in payment.” Id.

Therefore, the Court of Appeals decision to award interest in this case should be upheld.

B. The Waiver of Sovereign Immunity May Be Implied Based Upon A Statutory Scheme and Surrounding Circumstances.

While recognizing that the waiver of sovereign immunity may be implied, WSDOT incorrectly suggests that an implied waiver can only occur if there is “*an authorized contract*”. (WSDOT’s Petition for Review, p. 8). However, that is not accurate. Indeed, this Court has held the waiver of sovereign immunity may be based on a statutory scheme.

Although the City protests RCW 64.40 lacks an express waiver of sovereign immunity from postjudgment interest, by consenting to suit for damages from land use decisions the city impliedly waived immunity from the liabilities attendant to such claims.

Smoke v. City of Seattle, 132 Wn.2d 214, 228 (1997). Furthermore, the waiver of sovereign immunity has been implied based on factual scenarios beyond an express contractual relationship. See e.g. Smoke, 132 Wn.2d at 228 (implied from statutory scheme); Hyde v. Wellpinit Sch. Dist., 32 Wn. App. 465, 472 (1982)(interest allowed based on implication of statutory language); Swartout v. Spokane, 21 Wn. App.

665 (1978)(interest allowed where funds illegally withheld); and Doric Co. v. King, 59 Wn.2d 741 (1962)(interest allowed when excise tax paid under protest).

Like those cases, this case is one where all of the facts indicate that the State has waived sovereign immunity. First, it is undisputed that the Legislature's intent in adopting the relocation assistance statutes was to supplement the damages recoverable in order to make displaced citizens whole when they are forced to move from their property to allow construction of public projects. RCW 8.26.010(1)(a).

Second, Union Elevator was forced to expend funds which it was legally entitled to have reimbursed in order to obtain substitute equipment to continue operating. That reimbursement was wrongfully withheld for more than 7 years. As a result, this case is similar to Swartout and Doric where interest was allowed on taxes that were wrongfully required to be paid. Supra. Indeed, those cases seem to imply that the waiver of sovereign immunity was implied as a result of an equitable analysis. See also Hyde v. Wellpinit Sch. Dist. No. 49, 32 Wn.App. 465, 472 (1982) ("*The District has had the use of Mr. Hyde's compensation for 2 years. During our present-day inflationary spiral,*

the payment of interest for the use of one's money is common, necessitous and in this instance, legally necessary."). Like Hyde, an award of the reimbursement without an award of interest on funds withheld for seven (7) years would not place Union Elevator in as good a position as it would have been if WSDOT had paid the assistance owed. Hyde, 32 Wn. App. at 471; Infra.

Finally, based on the broad purpose of relocation assistance, WSDOT fails to explain why the waiver should not be implied. WSDOT does not dispute that the waiver is properly implied to allow interest for the contractors that build public projects. Consequently, it makes sense that the State also intended to waive sovereign immunity for claims by the very citizens who are forced to move as a result of the project. To find otherwise would not be fair, equitable or just. Instead, it would result in Union Elevator bearing "*the burden of the state's highway project*".

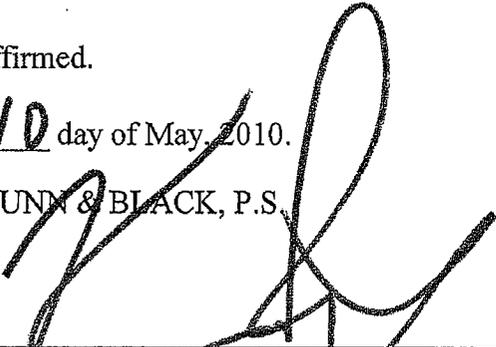
V. CONCLUSION

WSDOT asks this Court to overturn a well reasoned decision by the Court of Appeals that holds WSDOT accountable for wrongfully withholding assistance for the last seven years. If this Court were to

adopt the narrow interpretation suggested by WSDOT and reverse the Court of Appeals, the Legislature's intent will be undermined and WSDOT will be provided an incentive to deny and delay future relocation assistance claims as it has with Union Elevator since at worse it will merely have to pay the claim amount without interest. Consequently, Union Elevator respectfully requests that the Court of Appeals decision be affirmed.

DATED this 10 day of May, 2010.

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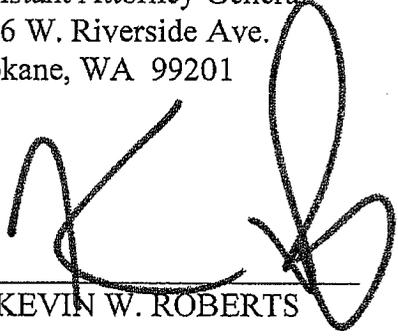
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RCW 8.26.010

Purposes and scope.

(1) The purposes of this chapter are:

(a) To establish a uniform policy for the fair and equitable treatment of persons displaced as a direct result of public works programs of the state and local governments in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons;

(b) To encourage and expedite the acquisition of real property for public works programs by agreements with owners, to reduce litigation and relieve congestion in the courts, to assure consistent treatment for owners affected by state and local programs, and to promote public confidence in state and local land acquisition practices.

(2) Notwithstanding the provisions and limitations of this chapter requiring a local public agency to comply with the provisions of this chapter, the governing body of any local public agency may elect not to comply with the provisions of RCW 8.26.035 through 8.26.115 in connection with a program or project not receiving federal financial assistance. Any person who has the authority to acquire property by eminent domain under state law may elect not to comply with RCW 8.26.180 through 8.26.200 in connection with a program or project not receiving federal financial assistance.

(3) Any determination by the head of a state agency or local public agency administering a program or project as to payments under this chapter is subject to review pursuant to chapter 34.05 RCW; otherwise, no provision of this chapter may be construed to give any person a cause of action in any court.

(4) Nothing in this chapter may be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately before March 16, 1988.

[1988 c 90 § 1; 1971 ex.s. c 240 § 1.]

RCW 8.28.040

**Interest on verdict fixed — Suspension
during pendency of appeal.**

Whenever in any eminent domain proceeding, heretofore or hereafter instituted for the taking or damaging of private property, a verdict shall have been returned by the jury, or by the court if the case be tried without a jury, fixing the amount to be paid as compensation for the property so to be taken or damaged, such verdict shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020 from the date of its entry to the date of payment thereof: PROVIDED, That the running of such interest shall be suspended, and such interest shall not accrue, for any period of time during which the entry of final judgment in such proceeding shall have been delayed solely by the pendency of an appeal taken in such proceeding.

[1984 c 129 § 2; 1943 c 28 § 1; Rem. Supp. 1943 § 936-4.]

General requirements — Claims for relocation payments.

(1) **Documentation:** Any claim for a relocation payment shall be supported by such documentation as may be reasonably required to support expenses incurred, such as, bills, certified prices, appraisals, or other evidence of such expenses. Payment for a low cost or uncomplicated move may be made without documentation of actual costs when payment is limited to the amount of the lowest acceptable bid or estimate obtained by the agency. A displaced person must be provided reasonable assistance necessary to complete and file any required claim for payment.

(2) **Expeditious payments:** The agency shall review claims in an expeditious manner. The claimant shall be promptly notified as to any additional documentation that is required to support the claim. Payment for a claim shall be made as soon as feasible following receipt of sufficient documentation to support the claim.

(3) **Advance payments:** If a person demonstrates the need for an advance relocation payment in order to avoid or reduce a hardship, the agency shall issue the payment, subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished.

(4) Time for filing:

(a) All claims for a relocation payment shall be filed with the agency within eighteen months after:

(i) For tenants, the date of displacement;

(ii) For owners, the date of displacement or the date of the final payment for the acquisition of the real property, whichever is later.

(b) This time period shall be waived by the agency for good cause.

(5) **Notice of denial of claim:** If the agency disapproves all or part of a payment claimed or refuses to consider the claim on its merits because of untimely filing or other grounds, it shall promptly notify the claimant in writing of its determination, the basis for its determination, and the procedures for appealing that determination.

(6) **No waiver of relocation assistance:** A displacing agency shall not propose or request that a displaced person waive his or her rights or entitlements to relocation assistance and benefits provided by the Uniform Act and this regulation.

(7) **Expenditure of payments:** Payments, provided pursuant to this part, shall not be considered to constitute federal financial assistance. Accordingly, this part does not apply to the expenditure of such payments by, or for, a displaced person.