

No. 94255-2

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CENTRAL PUGET SOUND REGIONAL TRANSIT  
AUTHORITY, a regional transit authority, dba SOUND TRANSIT,

Respondent,

v.

WR-SRI 120TH NORTH LLC, a Delaware  
limited liability company; et al.,

Appellants.

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REPLY BRIEF OF APPELLANT THE CITY OF SEATTLE

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A. INTRODUCTION

If the Legislature wants to grant one agency authority to condemn public property devoted to a public use, it can and does do so expressly, by specifically identifying “public” property, “state-owned” lands, or some other signifier that leaves no room for debate.

The Legislature did not grant such express authority to Sound Transit. Both this Court’s rule requiring strict construction of condemnation statutes and the prior public use doctrine prohibit Sound Transit from condemning Seattle’s property, which will destroy public use of a vital electrical transmission corridor.

B. REPLY ON STATEMENT OF THE CASE

Sound Transit claims in its statement of the case that its authorizing statute empowers it to condemn public property. Br. of Resp’t at 3. This assertion is one of the central legal arguments in the context of this appeal. As such, it violates this Court’s rule requiring Sound Transit to refrain from argument in its statement of the case. RAP 10.3(a)(5).

In its opening brief, Seattle explained how Sound Transit’s condemnation will destroy Seattle’s ability to operate and maintain the Transmission Line and sever the Transmission Line Corridor. Br. of Appellant at 6-7. It also pointed out that in the trial court, Sound Transit offered no evidence, expert or otherwise, to support the contention that its

condemnation is compatible with Seattle's existing public use.

In its statement of the case, Sound Transit points to nothing in the record to contradict Seattle's undisputed expert evidence. Br. of Resp't at 3-9. It also does not rely on any of the trial court's findings of fact, presumably because the trial court did *not* make any finding that the condemnation will not destroy Seattle's prior use. CP 3128-32.

Later, in its argument section, Sound Transit halfheartedly avers that Seattle's use will not be destroyed, but it cites to no competent evidence in support of this assertion. Br. of Resp't at 26. Instead, it cites to *briefing*, not evidence. *Id.*<sup>1</sup>

Sound Transit says that it "engaged in lengthy discussions" with Seattle "hoping that the two public entities could reach a negotiated resolution without the need for litigation." Br. of Resp't at 4-5. However, the witness it relies upon, Larry J. Smith, admits that it "negotiated" with Seattle only *after* it filed its condemnation action. CP 1060. To suggest that it sought to resolve the issue without litigation is misleading, as it commenced litigation and then presented its terms.

Sound Transit's "discussions" with Seattle should be viewed in light of the fact that Sound Transit simply does not believe Seattle's

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<sup>1</sup> Sound Transit cynically attempts to use Seattle's argument regarding the necessity of the condemnation as "evidence" of compatibility of uses. Br. of Resp't at 26. This issue will be addressed in the argument section regarding the prior public use doctrine, *infra*.

evidence that its condemnation will destroy the Transmission Line Corridor. Br. of Resp't at 26.

C. SUMMARY OF ARGUMENT

Use of the general term “all” is not a grant of express authority to condemn public property, particularly in the context of a statute outlining a general grant of authority, not just condemnation authority. Condemnation that destroys or severely impairs a public use also must be expressly granted by the Legislature; the Legislature alone is empowered to choose one public use over another.

D. ARGUMENT

- (1) Use of the General Term “All” Is Not a Grant of Express Authority to Condemn Public Property, Particularly in the Context of a Statute Outlining a General Grant of Authority, Not Just Condemnation Authority

It its opening brief, Seattle argued that Sound Transit does not have express statutory authority to condemn public property. Br. of Appellant at 11-23. It recited the long history of case law requiring eminent domain authority to be strictly construed, and requiring that Courts must rule against condemnation of public property unless such authority is expressly granted. *Id.* It noted that the Legislature specifically rejected an amendment to Sound Transit’s authorizing statute that would abandon this black-letter judicial rule requiring strict construction. *Id.*

Sound Transit first responds by arguing that the plain meaning of the term “all” in the phrase “all lands, rights of way, property, equipment, and accessories” includes public property. Br. of Resp’t at 10. It claims that the word “all” is an “express delegation of the power to condemn publicly owned, as well as privately owned property.” *Id.*

The suggestion that use of the word “all” is an express grant of authority to condemn public property is untenable. The word “all” is not an express identification of public property, and this Court has rejected such vague language as insufficient. *King Cty. v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966).

For over 125 years, this Court has started with a presumption *against* condemnation of public property, and demanded strict construction and express language to overcome that presumption. *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 538, 342 P.3d 308 (2015); *King Cty.*, 68 Wn.2d at 690; *State v. Superior Court of Chelan Cty.*, 36 Wash. 381, 385, 78 P. 1011 (1904); *Seattle & Montana Ry. Co. v. State*, 7 Wash. 150, 34 P. 551 (1893).

From this rich body of authority, Sound Transit attempts to distinguish only one case: *King County*. Br. of Resp’t at 13-15. It argues that the condemnation statute at issue in *King County*, unlike the statute at issue here, did not use the word “all.” *Id.* at 13. It agrees that *King*

*County* holds a statute authorizing condemnation of “property” is only a general grant of authority, but argues that modifying “property” with “all” constitutes an express grant of authority to condemn public property. *Id.* at 14-15.

The statute at issue in *King County*, RCW 8.08.010 provides “every county is hereby authorized . . . to condemn land and property within the county for public use; whenever the board of county commissioners deems it necessary for county purposes to acquire such land, . . . or other property.” The Court in that case held that the Legislature’s use of the terms “land” and “property” in the statute only conveyed the power to condemn private property.

From a purely grammatical standpoint, the term “all” used in the relevant portion of RCW 81.112.080, is an adjective that modifies “property” or “land.” Per *King County*, in the condemnation context, “property” and “land” mean *private* property and land. Ergo, “all property and land” means “all private property and land.”

There is no support in the *King County* case, or any case, for the notion that the phrase “all property” constitutes a specific and express grant of public property condemnation power. On the contrary, our Supreme Court has repeatedly noted that to expressly delegate power to condemn public land, the Legislature must modify the term “property”

with the term “public,” “state-owned,” “school lands” or other language specifically identifying the type of public property that may be condemned. *King Cty.*, 68 Wn.2d at 691; *Pub. Util. Dist. No. 1*, 182 Wn.2d at 537-38.

In its opening brief, Seattle cited examples of how, as our Supreme Court repeatedly has instructed it to do, the Legislature uses the modifier “public” when it is expressly granting the right to condemn public property. Br. of Appellant at 20-22. Seattle explained how the term “express” means that the Legislature specifically identifies public property as falling within the condemnation power. *Id.*, citing RCW 47.52.050, RCW 53.34.170, RCW 54.16.050.

Notably, Sound Transit makes no attempt to address these examples in its response. It simply proclaims that use of the term “all” expressly encompasses public property, because it does not specifically *exclude* public property. Br. of Resp’t at 10-18.

Sound Transit also does not respond to Seattle’s argument that the legislative history affirms that the Legislature was aware of and approved strict judicial construction of Sound Transit’s authorizing statute. Br. of Appellant at 22-23. Despite this, the Legislature did not expressly use the word “public” in allegedly conveying to Sound Transit the power to condemn municipal or other public lands.

Instead, Sound Transit maintains that the Legislature conveyed this power impliedly, by using the general term “all.” This is simply insufficient.

Sound Transit next responds that a reference to “rights of way” implies publicly-owned property, because “rights of way are routinely owned by the state or one of its political subdivisions.” *Id.* at 10.

The argument that rights of way are “routinely” owned by public entities, and thus the Legislature mentioned “rights of way” as a back-door grant of authority to condemn all public property, is disingenuous. All types of property, including rights of way, can be owned publicly or privately by individuals or corporations. *State v. Gilliam*, 163 Wash. 111, 113, 300 P. 173 (1931); *Luckkart v. Dir. Gen. of Railroads*, 116 Wash. 690, 691, 200 P. 564 (1921); *Carlson v. Mock*, 104 Wash. 691, 692, 176 P. 2 (1918); *Williams Place, LLC v. State ex rel. Dep’t of Transp.*, 187 Wn. App. 67, 94, 348 P.3d 797 (2015), *review denied sub nom. Williams Place, LLC v. State of Washington, Dep’t of Transp.*, 184 Wn.2d 1005, 357 P.3d 666 (2015). Identification of “rights of way” as one of the types of property to be condemned provides no express or implied grant of authority over public lands.

Sound Transit relies on *Newell v. Loeb*, 77 Wash. 182, 137 P. 811 (1913) for its argument that “all” is a specific and express grant of

authority to condemn public property. Br. of Resp't at 15-16. It argues that *Newell* holds the inclusion of the word “all” in a grant of condemnation authority and is an express Legislative grant of authority to condemn land owned by a state or a political subdivision. *Id.*

There are several flaws in Sound Transit's reliance on *Newell*: (1) the respondents there were private companies, not public entities, (2) the body with condemnation authority was a legislatively-created water commission, and the question was whether condemning water being put to public use was necessarily within its authority; and (3) the public property at issue – water – was owned by the state, not by another municipal entity. *Newell*, 77 Wash. at 197.<sup>2</sup> The King County Waterway District was a special purpose district formed under a mandate from the State for “the construction and maintenance of commercial waterways.” *State v. Abraham*, 64 Wash. 621, 622, 117 P. 501 (1911). Navigable waterways, and the water within them, are state-owned property under the Washington constitution. *Id.* at 192. The Commission's authority included the right to condemn private property, “Provided further, that the said board of

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<sup>2</sup> The parties listed as challenging the water commission's condemnation authority are listed as: Puget Sound Traction, Light & Power Company, the Seattle Electric Company, Boston Safe Deposit & Trust Company, and Old Colony Trust Company. *Newell*, 77 Wash. at 197. This Court can take judicial notice of the fact that although some of these might sound like municipal entities, these were private companies. See, e.g., <http://www.historylink.org/File/2318> (Puget Sound Traction, & Light & Power); <http://www.seattle.gov/light/history/brief.asp> (Seattle Electric Company).

commissioners shall have the power to acquire by purchase all the property necessary to make the improvements herein provided for.” *Id.* at 199.

In fulfilling its mandate, the Commission wanted to cut a straighter and deeper channel for the Duwamish river to aid commercial shipping. *Newell*, 77 Wash. at 187-88. Doing so would direct the flow of water away from a privately-owned electrical plant on the existing riverbank. *Id.* at 197-98. The plant used the nearby cold water to cool its machines. *Id.* at 198. The State did not intervene in the action. The private companies argued that they were putting the water in the river to a public use of generating electricity. *Id.* at 198-99. They claimed that property being put to a public use could not be put to another public use without an express or necessarily implied grant of authority from the Legislature. *Id.* at 199.

Unsurprisingly, the *Newell* court concluded that the authority to condemn state-owned water within navigable waterways was necessarily implied in the mandate of the Commission, because its sole purpose was to construct and maintain commercial waterways. *Id.* To say that a water commission had no authority to condemn riverbanks and beds, but not the water within them, regardless of whether the water was in public use,

would be illogical.<sup>3</sup>

In the face of numerous cases strictly construing condemnation statutes in the context of competing municipal authorities, *Newell* is inapposite. Here, Sound Transit is suggesting that the condemnation of any public property it sees fit is necessarily implied in the term “all,” meaning all public property everywhere within its boundaries and devoted to any other public purpose. But the term “all” in *Newell* encompassed a very narrow category of property – commercial waterways – that were for the most part state-owned at the outset. The Legislature in *Newell* specifically delegated its own control over commercial waterways to the Commission, including its own power to condemn. Sound Transit is suggesting that the Legislature, by authorizing Sound Transit to condemn “all” property, authorized it to condemn property owned by other municipal entities. This runs contrary to the very notion of “express” authority.

Further undermining Sound Transit’s argument is the fact that, even if the RCW 81.112.080 is deemed to convey the power to condemn public property, Sound Transit’s condemnation still fails because the statute does not expressly provide that Sound Transit has the authority

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<sup>3</sup> *Newell* is also inapplicable because the private parties in *Newell* did not the property at issue, the water.

condemn public property held in a governmental capacity by a municipal corporation, which is what is at issue in this case. *Pub. Util. Dist. No. 1*, 182 Wn. 2d at 536. That case provides:

When a political subdivision seeks to condemn state land held by the state in its governmental capacity, statutory authorization to condemn the particular *type* of land is not sufficient. Not only does the power to condemn a particular type of land need to be statutorily given, but the power to condemn such lands when they are held in the state's governmental capacity must be as well.

*Id.* (italics in original) (emphasis added).

Here, because Seattle's Transmission Line Easement is dedicated to and being used for a public purpose, the transmission of electricity, the property is being held in a governmental capacity.<sup>4</sup> *State v. Superior Court for Jefferson Cty.*, 91 Wash. 454, 459, 157 P. 1097, 1099 (1916) (property that is dedicated for a public purpose (even if not presently used for that purpose) is held in a governmental capacity and is not subject to condemnation absent express authority). Accordingly, in order for Sound Transit to have the authority to condemn Seattle's easement, RCW 81.112.080 must expressly provide that Sound Transit has both the authority to condemn public property *and* the authority to condemn such

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<sup>4</sup> The written Transmission Line Easement provides that Seattle acquired and was granted a "perpetual easement for the construction, operation and maintenance of an electric transmission system" which is a public use. CP 1072, 1076. *Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cty.*, 8 Wn.2d 136, 143, 111 P.2d 583, *cert. denied*, 314 U.S. 667 (1941) ("The generation and distribution of electric power has long been recognized as a public use by this court.").

property when it is held in a government capacity – it does neither – and thus the condemnation fails. *See Pub. Util. Dist. No. 1*, 182 Wn. 2d at 536.

The gravamen of the cases cited by Seattle is that the Legislature, in addressing the condemnation authority of one of its political subdivisions, must actually state in words in the statutory grant of such authority that the political subdivision may take the property of other political subdivisions of the State. The prioritization of one public service, or one political subdivision over another is for the Legislature to decide expressly, and not to be divined by the courts from vague statutory language.

Sound Transit then contends that the inability to condemn non-transportation public property would “defeat the purpose of the granted condemnation authority.” Br. of Resp’t at 16-18. In other words, Sound Transit suggests it would be impossible to build a regional transit system without the power to condemn property that is already dedicated to electrical transmission, public parks, or other public uses besides transportation. *Id.* In support, it cites *State ex rel. Devonshire v. Superior Court*, 70 Wn.2d 630, 635, 424 P.2d 913 (1967). *Id.* at 16.

One problem with Sound Transit’s reliance on *Devonshire* is that it again involves the condemnation of private, not public, property.

*Devonshire*, 70 Wn.2d at 635. The Court was not considering the issue presented here. The issue in *Devonshire* was whether Seattle had authority to condemn private property for use in connection with the monorail system constructed in connection with the 1962 World's Fair. *Id.* at 633. The parties opposing the condemnation did not object to the condemnation of the monorail system itself, but rather, argued that the City was operating outside of its authority when it sought to condemn properties necessary to operate the system because it did not have express authority to condemn for monorail systems. *Id.* Our Supreme Court recited several statutes giving Seattle authority to participate in the world's fair, for which the monorail was to be built, and allowing Seattle to make use of the grounds and facilities of the fair after its conclusion. *Id.* at 634. The Court also referenced statutes granting Seattle express authority to establish a civic center and to condemn private property for public purposes, and express authority to condemn public property for the purpose of constructing and maintaining streets and appurtenances. *Id.* at 633-34. The Court concluded that, read together, the multiple statutes reflected that:

The legislature not only envisioned that the city of Seattle could and probably would acquire the existing monorail system as an adjunct to the Century 21 Exposition grounds, but also that the legislature intended, if such acquisition came about, that the city would be vested with the power to

purchase or condemn, if required, such private easements or property as were appurtenant to and necessary to the continued maintenance, operation, and control of the system in conjunction with the civic center.

*Id.* at 635. Given the unique circumstances the Court was faced with in *Devonshire*, which ultimately led the Court to conclude that the City was specifically authorized to condemn certain *private* property interests in connection with a specific project, the case says nothing about whether Sound Transit has the authority to condemn all *public* property as it contends here.

And although it is not relevant to the resolution of the case, it is notable that one of the condemnation statutes referenced in *Devonshire* expressly empowered Seattle to “condemn land and property, *including state, county, and school lands and property* for streets, avenues, alleys...”. *Devonshire*, 70 Wn.2d at 635 (emphasis added). This is how the Legislature drafts statutes conveying express authority to condemn public lands. That statute demonstrates precisely the kind of express condemnation authority over public lands that Sound Transit lacks here.

The general principle that condemnation authority should be construed so as to fulfill its purpose cannot defeat the specific principle that when it comes to public property, the authority *must* be express.<sup>5</sup>

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<sup>5</sup> The general assertion that the Legislature believed Sound Transit cannot fulfill

Sound Transit argues that a subsection of RCW 81.112.080 – the provision requiring the consent of public agencies to acquire or use their transportation facilities and properties – supports its position. Br. of Resp’t at 11-13. It argues that if it does not have the power to condemn all public property, then the provision requiring it to get consent to acquire public transportation property would be superfluous. *Id.* It suggests that the entirety of the statute leads to the conclusion that the Legislature granted it the power to condemn all public property *except* publicly-owned transportation facilities. *Id.*

Sound Transit’s argument might make sense if RCW 81.112.080 was solely a condemnation statute, but it is not. The statute generally empowers Sound Transit with respect to private *and* public property in many varied areas. The statute empowers Sound Transit to “acquire by *purchase, condemnation, gift, or grant and to lease, construct, add to, improve, replace, repair, maintain, operate, and regulate* the use of high capacity transportation facilities and properties within authority boundaries...”. RCW 81.112.080 (emphasis added). These many varied powers are applied to numerous kinds of identified facilities such as “railways, tramways, busways, buses, bus sets, entrained and linked buses,

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its public transportation mission without the power to condemn publicly-owned property dedicated to other public uses is also undercut by the Legislature’s decision requiring Sound Transit to acquire by negotiation – not condemnation – transportation related facilities owned by other municipal entities. RCW 81.112.080.

ferries, or other means of local transportation... including escalators, moving sidewalks, personal rapid transit systems or other people-moving systems...”. These facilities may be publicly or privately owned, but Sound Transit nevertheless has authority to purchase, lease, regulate, and operate them.

However, when it comes to Sound Transit’s condemnation authority, the Legislature then clarified that when it comes to the public facilities, its *condemnation* power does not apply. It must negotiate.

It is illogical to suggest that the Legislature saw Sound Transit’s transportation mission as *so paramount* to all other public missions that it granted condemnation authority as to public property devoted to electricity, roads, schools, courthouses and the like, but deny it as to public transportation facilities.

The logical conclusion is that RCW 81.112.080 grants Sound Transit great and varied authority with respect to public and private property, when it comes to condemnation, its powers extend only to private property.

Sound Transit simply does not have the express authority to condemn public property that it claims. The only time the word “public” is used in its authorizing statute is in a clause forbidding the condemnation of public transportation facilities. The Legislature did not grant Sound

Transit the statutory authority to condemn public property dedicated to electrical transmission, streets, parks, railways, fire stations, or any other purpose. When it comes to public property, Sound Transit must negotiate with public entities whose property it seeks to acquire.

(2) Sound Transit May Not Simply Declare the Scope of Its Own Statutory Authority

Seattle argued in its opening brief that, at the least, Sound Transit has exceeded its statutory condemnation authority by condemning property that is not “necessary” to constructing light rail and that the relevant question before the Court is whether Sound Transit has proven that its condemnation is “necessary for a high capacity transportation system” and not whether it is “necessary for a public use.” Br. of Appellant at 23-26. Seattle explained that agencies may not bring a condemnation within the ambit of its statutory authority merely by legislative declaration. *Id.* at 25 n.15. Seattle noted that Sound Transit’s project is perpendicular to the Transmission Line and below-grade, and Sound Transit has presented no evidence that condemnation of Seattle’s aerial easement is necessary to its project aside from its own legislative declaration. *Id.*

Sound Transit responds that condemnation law is an exception to the black-letter rule that courts, not administrative agencies, declare the

scope of their own statutory authority. Br. of Resp't at 18-25. It also claims that as an agency, it has the power to declare any property "necessary" without any evidence to support the declaration. *Id.* It cites in support of this assertion *Central Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), upon which it also relied below. *Id.* Sound Transit argues that this Court must defer to Sound Transit's legislative declaration of necessity even without any evidence. *Id.*

In making this argument, Sound Transit is intentionally confusing "necessary for a high capacity transportation system," which is the standard in the statute giving Sound Transit condemnation authority, RCW 81.112.080, with "necessary for a public purpose," which is the general public use and necessity standard. Sound Transit incorrectly frames the issue as a dispute over two different definitions of the term "necessity." Br. of Resp't at 19. That is not the issue, Seattle concedes that, in the context of the condemnation, the term "necessity" means "reasonable necessity under the circumstances."<sup>6</sup> The actual issue here is whether Sound Transit is required to submit evidence to prove that its condemnation is authorized by its statute, which in this case means to show that the condemnation is "necessary for a high capacity transportation

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<sup>6</sup> *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330, 335 (1965).

system” as required by RCW 81.112.080, or whether it can rely solely on its board’s resolution that the condemnation is authorized.

The cases cited by Sound Transit show that a condemning party may be able to satisfy the requirement to show that its condemnation is “necessary for a public use” through a legislative declaration to that effect, but they do not stand for the proposition that such a declaration is sufficient to show that a condemnation is authorized by its statute. On the latter issue a condemnor cannot rely solely on a legislative declaration – it must have evidence.

This is illustrated by *King Cty.*, 68 Wn.2d at 690. In that case, this Court held that the statute granting counties condemnation authority, RCW 8.08.030, did not grant counties the authority to condemn property owned by cities. To avoid this result, King County also argued that it had the authority to do so under another statute, RCW 8.08.090. That statute provided:

Every county in this state is ... authorized and empowered by and through its board of county commissioners whenever said board shall judge it to be clearly for the general welfare and benefit of the people of the county ... to condemn and appropriate ... such lands, properties, rights and interests ... whenever the government of the United States or of this state is intending or proposing the construction, operation or maintenance of any public work situated or to be situated wholly or partly within such county... no property shall be exempt from such condemnation, appropriation or disposition by reason of the

same having been or being dedicated, appropriated or otherwise reduced or held to public use.

RCW 8.08.090 (emphasis added).

King County argued it had the authority to condemn Seattle's property under this statute because it was acting in aid of a federal project. *Id.* at 692-93. The only evidence that the County submitted to support its claim was a resolution of the County council. *Id.* at 693. This Court held that that was insufficient for the County to meet its burden. *Id.* Specifically, the Court held "the statute cannot apply under the facts of the instant case, as the record does not show that this eminent domain action was brought to aid in a definitive governmental undertaking to build or operate a public work" and that "the county cannot bring the action within the ambit of [the statute], merely by legislatively declaring the fact." *Id.* Like the county in *King County*, here, by relying solely the resolution of its board, Sound Transit has failed to show that its condemnation is authorized by its statute.

Ultimately, while Sound Transit may be able to satisfy its burden to show that its condemnation is necessary for a public purpose by reference to the resolution of its board, it cannot satisfy its burden to show that the condemnation is authorized by the its statute because it is necessary for a high capacity transportation system by relying solely on

the resolution.

A review of *Miller* reveals the analytical flaw in this approach. Neither *Miller* nor any of the cases upon which it relies states that a condemnor may determine the meaning of a statute. They are analyzing the agency's factual decisionmaking process, which is accorded more deference. In fact, *Miller* does not address the statutory language of RCW 81.112.080 or whether the condemnation was "necessary for a high capacity transportation system" as required by the statute at all. To the contrary, the Court was focused solely on whether Sound Transit had established the "public necessity" element of the "public use and necessity" standard. *Id.* at 592-93. Also, *Miller* does not address the unusual situation presented here, where Sound Transit has presented no evidence of necessity outside its own resolution declaring it to be so.

To the extent that this Court's authority may suggest that an agency may declare the scope of its own statutory authority by administrative fiat, particularly in the total absence of any evidence of necessity, such authority is harmful and contrary to the fundamental principles of separation of powers. Courts do not defer to agencies regarding the scope of their authority. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045 (1994). Any such rule, if it exists, should be modified to distinguish between factual determinations of necessity

based on evidence, and judicial analysis of an agency's claim regarding the meaning of the word "necessary" within an agency's authorizing statute.

This Court is empowered to decide whether condemning Seattle's easement is "necessary" to Sound Transit's project. Sound Transit has offered no evidence to support a conclusion that Seattle's aerial easement is "necessary" to its high capacity transportation project. It simply relies on its own general declaration to that effect in its resolution. Br. of Resp't at 21. This Court should reverse the trial court's conclusion regarding public use and necessity.

Finally, contrary to Sound Transit's argument, Seattle does not need to prove fraud, it need only show that the condemnation is not authorized by statute. This is because, if Sound Transit does not have the authority to condemn the property in question, there is no need for the Court to consider public use and necessity. *See Petition of City of Seattle*, 96 Wn.2d 616, 627-28, 638 P.2d 549 (1981) (Court upheld trial court's finding on declaratory judgment action that city's attempted condemnation was not authorized by statute even though "the motives of the city council are not questioned, and the court found as a fact that the City did not act arbitrarily, capriciously or fraudulently in planning this project"); *State v. Superior Court of Chelan Cty.*, 36 Wash. 381, 386, 78 P. 1011, 1013

(1904) (“In view of the fact that this corporation has not the power, in any event, to condemn the lands sought, it becomes unnecessary to discuss the question as to whether the use sought to be made of the lands is a private or public one.”), *superseded by statute on other grounds*, *City of Seattle v. State*, 54 Wn.2d 139, 145, 338 P.2d 126, 129 (1959).

(3) The Prior Public Use Doctrine Applies; Sound Transit Offers Only Speculation and Conjecture that the Uses Are Compatible and Seattle Offers Expert Testimony that They Are Not

Seattle argued in its opening brief that even if Sound Transit has authority to condemn Seattle’s property, it may not exercise that authority here because Sound Transit’s condemnation would destroy an existing prior public use: the Transmission Corridor connecting the City to its Skagit River hydroelectric-generating dams. Br. of Appellant at 27-30. Seattle noted that Sound Transit’s taking would extinguish all of Seattle’s easement rights over a substantial portion of the easement and render the easement effectively useless. Thus, the trial court erred in granting Sound Transit’s request to condemn Seattle’s property. *Id.*

Sound Transit concedes that Seattle’s use is public, and thus the prior public use doctrine applies here. Br. of Resp’t at 25. However, it asserts that its use is “compatible” with Seattle’s use, and thus it does not violate the doctrine by taking the property. *Id.* at 25-28. Sound Transit

admits that, in response to Seattle's expert declaration stating that its taking will sever the easement, it has submitted no contrary evidence. Instead, it relies on (1) argument from Seattle's briefing and (2) a declaration of Seattle's trial counsel describing the light rail as being in a "retained cut" configuration. *Id.* at 26. It does not explain how this is evidence of compatibility, since Sound Transit is condemning Seattle's aerial easement as well as the easement on the ground.

Sound Transit has thus conceded that the record contains *no* evidence that its condemnation is compatible with the existing, vital public use of the Transmission Line Corridor. Seattle presented an expert declaration stating that the uses are not compatible:

The extinguishment of Seattle's ground and aerial easement rights [over the area being condemned in fee simple]...would limit Seattle's ability to access its existing transmission tower that is 65 feet to the north. Further, the extinguishment of Seattle's easement rights in this area would prevent Seattle from being able to operate the existing overhead wires in their current configuration, and...Seattle would not be able to operate a 230kV line within the easement because, when required clearances are accounted for, there would not be sufficient room within the easement to relocate the wires. The loss of those same easement rights [over the area being condemned for permanent easements] would mean that Seattle would no longer have the legal right to operate and maintain any overhead wires, which would effectively sever the Transmission Line and render it useless.

CP 1072-73.

In response to this unrefuted evidence, Sound Transit engages in sheer speculation that there is some mysterious, unidentified other type of electrical transmission system that Seattle can use. Sound Transit's counsel, arguing in a brief, assert that Seattle can simply find some new technology that *will* be "compatible" with Sound Transit's use. *Id.* Apparently, Sound Transit's counsel believes Seattle should simply dismantle that section of the corridor and replace it with some other transmission line infrastructure of some other unidentified voltage type and configuration that might have maintenance and clearance needs compatible with its taking.

Although it should go without saying, Sound Transit's speculation and bald assertions are not evidence. *Viking Equip. Co. v. Minneapolis-Moline Co.*, 61 Wn.2d 755, 760, 380 P.2d 469, 472 (1963), *State v. Donahue*, 105 Wn. App. 67, 79, 18 P.3d 608, 615, *review denied*, 144 Wn.2d 1010 (2001). The musings of its counsel are insufficient to overcome Seattle's unrefuted expert testimony.

Sound Transit cites two cases in support of its compatibility claim. Br. of Resp't at 25-26. It discusses *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911) and *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922).

However, those cases were decided based on evidence, not

conjecture or the amateur electrical engineering theories of lawyers. In *Roberts*, this Court reviewed the evidence, which showed that the property at issue was not in public use at all, and that the remaining property would benefit from the building of a road on it. *Roberts*, 63 Wash. at 576. Likewise, in *City of Tacoma*, this Court based its decision on its reading of the “testimony” and the “evidence disclosed by the record.” *City of Tacoma*, 121 Wash. at 453. That evidence and testimony showed diverting some water from a river that flowed by a distant fish hatchery would not damage the hatchery, and would at times actually benefit the hatchery. *Id.*

Sound Transit has presented absolutely no evidence to support its bald assertions and speculation that its use is “compatible” with Seattle’s use. As this Court stated in *City of Tacoma*, Seattle’s unrefuted evidence that the uses are not compatible ends the inquiry. *City of Tacoma*, 121 Wash. at 453. The trial court erred in failing to conclude that Sound Transit’s taking is barred by the prior public use doctrine.

- (4) Seattle Emphasizes Its Status as a Home Rule Charter City in Response to Sound Transit’s Dismissive Suggestion that It Is the Predominant Municipal Power in the Region and Is Empowered to Take Any and All Public Property for Light Rail

In its opening brief, Seattle noted that it is a home rule charter city with a special constitutional status in Washington. Br. of Appellant at 35.

It stated that such cities have broad powers, and their elected leaders and institutions serve the public interest.

Sound Transit takes umbrage at Seattle's suggestion that its status as a home rule charter city is relevant here. Br. of Resp't at 28-29. It argues, without supporting authority, that there has been some legislative declaration that light rail is more important than regional electricity. It simply cites RCW 81.112.080 in which, among other powers, the Legislature granted it condemnation authority over "all" property. *Id.* Sound Transit compares Seattle to its "enthusiastic partner" Bellevue, and suggests that Seattle is not being sufficiently compliant with Sound Transit's demands.

Seattle does not point out its home rule charter status to suggest that it is superior to Sound Transit. It only does so in response to Sound Transit's repeated suggestions in this case that it is the paramount power in the Puget Sound region, with the superior public mission to whose demands all other public agencies must accede.

There is no legislative declaration prioritizing light rail over electricity. This kind of prioritization *must* be expressly declared by the Legislature; it is not the purview of one municipal authority. Determining which public use is more pressing – supplying electricity or supplying high-capacity transit and a wider general purpose roadway – is a

legislative decision. *Pub. Util. Dist. No. 1*, 182 Wn.2d at 544. This Court made it quite clear in *Pub. Util. Dist. No. 1* that a public use cannot be destroyed “absent express authorization or necessary implication to do so.” *Id.*

Sound Transit’s attitude is prevalent in the record and in its briefing. Most notably, its claim of authority to condemn vital public property relies almost exclusively on cases involving the condemnation of private property. It has ignored Seattle’s serious concerns and condemned its property without prior negotiation. It has failed to acknowledge the rights and concerns of Seattle and those citizens throughout the region who rely on Seattle’s continued public use of the property.

#### E. CONCLUSION

Use of the term “all” is not an express authorization to condemn public property. The trial court erred in concluding that Sound Transit had the authority to condemn the property of Seattle in the absence of express legislative authority to do so.

Moreover, it is undisputed in the record that Sound Transit’s use will destroy the existing public use of the property for electrical transmission. Under the prior public use doctrine, Sound Transit may not condemn the property at issue.

The trial court’s order and judgment on public use and necessity

should be reversed and vacated. Costs on appeal should be awarded to Seattle.

DATED this 5<sup>th</sup> day of October, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Reply Brief to Appellant*** in Supreme Court Cause No. 94255-2 to the following:

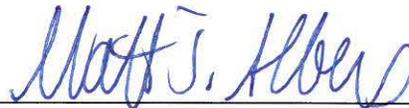
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 5, 2017 at Seattle, Washington.



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