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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,

and

CITY OF SEATTLE, SEATTLE CITY LIGHT,  
a Washington municipal corporation,

Appellant,

and

SAFEWAY INC., a Delaware corporation, et al.,

Respondents.

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REPLY BRIEF OF APPELLANT THE CITY OF SEATTLE

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A. INTRODUCTION

Sound Transit does not have the statutory authority to condemn public property nor does it have the authority to condemn property for the widening of a general purpose roadway. This case is about an attempt by Sound Transit to exceed the scope of its condemnation authority to condemn portions of a publicly owned electrical transmission easement owned by Seattle.<sup>1</sup> This case is also about an attempt by Sound Transit to expand its narrow condemnation authority through a deal with the City of Bellevue whereby Sound Transit agreed to condemn property for a separate and previously planned Bellevue project to widen a general purpose roadway.

This case is not about an attempt by Seattle to halt or delay Sound Transit's work. Seattle has a duty to preserve important electrical transmission infrastructure. Further, the two public interests are not mutually exclusive, Sound Transit could proceed with its light rail project if it limited its condemnation to property that is actually necessary for its project (not Bellevue's road widening project) and coordinated its efforts with Seattle – both of which are mandated by its authorizing statutes, RCW 81.104 et seq. and 81.112 et seq.

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<sup>1</sup> Sound Transit seeks to diminish Seattle's home rule charter status by referencing Seattle City Light, a city agency, in its brief. Seattle is the correct party.

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. *Id.* at 9.

In its statement of the case, Sound Transit cannot point to any evidence or findings contradicting Seattle's expert. Br. of Resp't at 3-9. Notably, the trial court did *not* enter any express findings or conclusions on the prior public use doctrine. CP 496-500.

Later, in its argument section, Sound Transit avers that Seattle's use will not be destroyed, but it cites to no relevant evidence in support of this assertion. Br. of Resp't at 37. Instead, it cites to "briefing" and self-

servicing “assurances” that do not relate to compatibility. *Id.*<sup>2</sup>

Sound Transit acknowledges that it negotiated and entered into a series of agreements with Bellevue regarding the acquisition of property for its light rail crossing of 124<sup>th</sup> Avenue, and that those negotiations did not include Seattle, which has owned major easements for its Transmission Line Corridor for over one hundred years. Br. of Resp’t at 3-6. Sound Transit further concedes that the nature and scope of the property it would condemn came about through “extensive consultation and collaboration with the City of Bellevue.” *Id.* at 6.

Sound Transit does not explain why 124<sup>th</sup> Avenue needs to be widened for Sound Transit’s light rail project. To the contrary, Sound Transit admits that its “responsibility” for acquiring property for Bellevue’s road widening project stems solely because it promised the property to Bellevue for its own project. *Id.* at 5-6. In other words, because Sound Transit agreed to give Bellevue Seattle’s property for “automotive rights of way,” that agreement renders Seattle’s property “necessary” to light rail.

Sound Transit misleads this Court when it says that it “engaged in lengthy discussions” with Seattle “hoping that the two public entities

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<sup>2</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*.

could reach a negotiated resolution without the need for litigation.” Br. of Resp’t at 7. Sound Transit cites CP 355 and 363-67 in support of this proposition. *Id.* CP 355 is the declaration of Sound Transit’s lawyer Larry Smith, which merely states that “since” Sound Transit filed its condemnation action in April 2016, Sound Transit has “made known” to Seattle that it intends to “restore” the easement at some later date. CP 363-67 is the declaration of Marian Arakelayan. She works for Bellevue, not Sound Transit. CP 363. And Arakelayan merely states that Bellevue made Seattle aware of its transportation corridor plans. CP 364-65. She does not say that she disclosed Bellevue’s plan to have Sound Transit condemn Seattle’s easement to give to Bellevue for road-widening. To suggest that Sound Transit sought to resolve the issue without litigation, or that Seattle did not act in good faith with respect to Sound Transit’s secret condemnation plans prior to litigation, is a misrepresentation of the record.

Sound Transit also misrepresents discussions after the condemnation actions commenced. Br. of Resp’t at 12. Sound Transit states that Seattle “has refused to work with Sound Transit to describe the taking in terms that take both parties’ future needs into account,” citing CP 366. Again, CP 366 is a page in the declaration of Arakelayan, an employee of Bellevue. And nothing on that page constitutes testimony that Seattle has “refused to work with” Sound Transit. CP 366.

Sound Transit's suggestion that Seattle somehow has been uncooperative should be viewed in light of the fact that Sound Transit (1) has no evidence that it disclosed its condemnation plans to Seattle before filing this action, (2) has no evidence that it has attempted to preserve a functioning Transmission Line Corridor, and (3) does not believe Seattle's uncontroverted evidence that condemnation will destroy the Transmission Line Corridor. Br. of Resp't at 37.

Sound Transit admits that it engaged in a long, collaborative process with Bellevue and reached a negotiated agreement. Br. of Resp't at 6-7. Sound Transit gave no such consideration to Seattle, and the record reflects that fact.

#### C. SUMMARY OF ARGUMENT

Use of the term "all property" in a statute conveying condemnation authority is not an express grant of authority to condemn public property. It does not use the word "public" to modify "property," nor does it identify what specific types of public property are subject to condemnation.

Sound Transit cannot expand its statutory condemnation authority to include the authority to condemn property for a separate road widening project through a contract with Bellevue. Sound Transit's unsupported public policy assertions about needing to accommodate Bellevue's road plans ring hollow in the face of its total lack of concern about public

electrical transmission needs. 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. Seattle emphasizes its status as a Home Rule Charter City in response to Sound Transit's dismissive suggestion that it is the superior municipal power in the region empowered to take and all public property for light rail.

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

In its opening brief, Seattle argued that Sound Transit does not have express statutory authority to condemn public property. Br. of Appellant at 11-24. 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 any and all public property. Br. of Resp’t at 13. It claims that the word “all” is an “express delegation of the power to condemn publicly owned, as well as privately owned property.” *Id.* at 14.

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 19-21. It argues that the condemnation statute at issue in *King County*, unlike the statute at issue here, did not use the word “all.” *Id.* It agrees that a statute authorizing condemnation of “property” is not express, but argues that

modifying “property” with “all” constitutes an express grant of authority to condemn public property. *Id.*

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, this 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 this 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’s silence on this point is notable.

Sound Transit responds in a footnote 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 Resp’t at 20 n.10. Sound Transit argues that despite the Legislature’s awareness that condemnation statutes are strictly construed, the Legislature conveyed the power to condemn public property impliedly, by using the general term “all.” *Id.* This response is contrary to law.

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 20.

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).<sup>3</sup> 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 21-22. It argues *Newell* holds the word “all” in a grant of condemnation authority to be an express Legislative grant of authority to condemn public land. *Id.*

There are serious flaws in Sound Transit’s reliance on *Newell*: (1) the central question was whether a state-mandated *water commission* necessarily had authority to condemn state-owed *water*; and (2) the

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<sup>3</sup> See also, *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 Wash., Dep’t of Transp.*, 184 Wn.2d 1005, 357 P.3d 666 (2015).

respondents there were private companies, not public entities. *Newell*, 77 Wash. at 197.<sup>4</sup>

The *Newell* court examined the condemnation authority of the King County Waterway District, 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. *Id.* at 192. The Commission’s authority included the right to condemn private property, “Provided further, that the said board of 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.

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<sup>4</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).

*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 express or necessarily implied 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 a *water* commission. *Id.* To say that a water commission had no authority to condemn riverbanks and beds, but not the water within them, would be illogical.<sup>5</sup>

In the face of numerous cases strictly construing condemnation statutes in the context of competing municipal authorities, *Newell* is inapposite. 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 any and all property owned by the state, counties, cities, and all

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<sup>5</sup> *Newell* is also inapplicable because the private parties in *Newell* did not the property at issue, the water.

other municipal entities. This is not “express” authority.

Further undermining Sound Transit’s argument, RCW 81.112.080 does not expressly provide that Sound Transit has the authority 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 holds a condemnation statute must expressly state that the authority has the power to condemn property held in a governmental capacity. *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>6</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>6</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 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 by the courts based on 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 22-24. 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 22.

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.* This Court recited several statutes that gave Seattle express authority for various activities. *Id.* at 633-34. The Court concluded that, read together, the multiple statutes reflected an express grant:

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. The *Devonshire* Court concluded that the City was specifically authorized to condemn certain *private* property interests in connection with a specific project, based on multiple express statutes. That case says nothing about whether Sound Transit has the authority to condemn all

*public* property as it contends here.<sup>7</sup>

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>8</sup>

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 20-21. 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

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<sup>7</sup> Although it is not relevant to the resolution of *Devonshire*, it is notable that one of the condemnation statutes referenced in it 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 language is what express authority to condemn public lands looks like. Sound Transit has no such express grant here.

<sup>8</sup> The general assertion that the Legislature believed Sound Transit cannot fulfill 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.

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, 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, in a specific discussion of 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, but 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 25-27. Seattle explained that agencies may not bring a

condemnation within the ambit of its statutory authority merely by declaring it to be so. *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 24-28. 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 when Sound Transit admits that its condemnation is for "automotive rights of way" (Br. of Resp't at 7) rather than light rail. *Id.*

Sound Transit cannot take this question of statutory interpretation from the courts *solely* by making an administrative declaration, without evidence. Sound Transit is required to submit evidence to prove that its condemnation of the property at issue is "necessary" under its enabling statute. In this case, it must show that the condemnation is "necessary for a high capacity transportation system" as required by RCW 81.112.080, or whether it can rely solely on its board's resolution to prove necessity.

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. 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 the County’s resolution declaring that its condemnation was in support of a United State project, without more, 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.*

Sound Transit cannot satisfy its burden to show that its condemnation is authorized by its enabling statute by relying solely on the resolution. It must present actual evidence. *Id.*

*Miller* does not assist Sound Transit. Neither *Miller* nor any of the cases upon which it relies states that a condemnor may determine the meaning of a statute. Those cases analyze 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.

Sound Transit argues that the condemnation is necessary so that Sound Transit may build a bridge to convey automobile traffic over the light rail corridor. Br. of Resp’t at 29-30. However, building a bridge is not solely the issue. A bridge over the existing roadway might or might not interfere with Seattle’s easement. But Sound Transit is condemning much more property than would facilitate that purpose, including property to allow Bellevue to widen its road and to build a wider bridge to accommodate the wider road.<sup>9</sup>

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, 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

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<sup>9</sup> Sound Transit makes the specious argument that Seattle is “actually complaining about the width of the bridge,” and that the bridge will only be wider because Bellevue’s roads will be wider. Br. of Resp’t at 30. This circular logic ignores that Bellevue will only be able to widen its road because Sound Transit is taking Seattle’s easement and giving it to Bellevue.

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 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 25. This Court should reverse the trial court's conclusion regarding public use and necessity because condemning property for Bellevue's roadways is beyond its statutory authority.

Also, 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. *See King Cty.*, 68 Wn.2d at 693. 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 and the public use and necessity fraud standard does not come into play. *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).

Sound Transit complains that its position in this and other condemnation litigation between the parties is being unfairly maligned. Br. of Resp’t at 33. Sound Transit rejects as “hyperbole” and “apocalyptic” the notion that, according to its claim of the right to condemn any and all public property, it could condemn the Capitol Building, water treatment facilities, Highway 99, or any other publicly owned land. *Id.* Sound Transit avers that such hypotheticals are “unmoored from the facts of this case.”

What Sound Transit fails to recognize is that the rule that the term “all” in a condemnation statute encompasses all public property will be applied in cases other than the one at bar. Whether Sound Transit *wants* to condemn other vital public facilities is irrelevant, the question is whether it

has the *authority* to do so.

Further, the Court must consider that adopting Sound Transit's argument that the use of the phrase "all ... property" in its statute means that it has the authority to condemn all private *and* public property would have far reaching disruptive consequences, and could set up clashes between a multitude of public agencies and municipal and quasi-municipal corporations that are governed by statutes that authorize them to acquire "any" or "all" property. For example, if the Court were to adopt Sound Transit's argument, mosquito control districts would be authorized to condemn state and city owned property. RCW 17.28.160. Health districts would be empowered to condemn, state, city, and any other public property. RCW 70.46.100. And, an irrigation district could condemn the state capital building. RCW 87.03.140. In short, adopting Sound Transit's argument would create an open season on publicly owned property in this state, where, as confirmed by the paucity of appellate opinions on the subject, the condemnation of public property is rarely undertaken, and to the contrary, public entities coordinate on the siting and construction of their respective infrastructure projects.

Finally, Sound Transit argues that it may freely condemn Seattle's property to give to any other entity for any use. Br. of Resp't at 34-35. Sound Transit cites *City of Bellevue v. Pine Forest Properties, Inc.*, 185

Wn. App. 244, 254, 340 P.3d 938, 943 (2014) and *State v. Slater*, 51 Wn.2d 271, 272, 317 P.2d 519, 520 (1957) in support.<sup>10</sup> *Id.*

Neither *Pine Forest* nor *Slater* authorizes a public entity to condemn property expressly for the purpose of gifting it directly to another public entity for a project unconnected with the condemnor's statutory authority. In *Slater*, the state sought to condemn land to build a highway, which it had authority to do. It then executed an agreement with Chelan County wherein the County would "accept and maintain" a portion of the highway. This Court expressly noted that there was "no evidence of" an agreement to "convey[]" the highway to the county. *Slater*, 51 Wn.2d at 272. In *Pine Forest*, the City of Bellevue condemned a parcel of property that it planned to use and also to allow Sound Transit to use. *Pine Forest*, 185 Wn. App. at 249. The City of Bellevue had authority to condemn property for its own use. *Id.* at 249. The Court of Appeals affirmed the trial court's conclusion that the City was permitted to allow Sound Transit to *use* property that the City itself had authority to condemn for its own purposes. *Id.*

Here, Sound Transit is taking Seattle's property to give to Bellevue in fee simple for the purpose of permanently widening its road. CP 33,

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<sup>10</sup> Sound Transit also cites *Petition of Port of Seattle*, 80 Wn.2d 392, 396, 495 P.2d 327, 330 (1972). Br. of Resp't at 34. However, that case simply states that public facilities may be leased to private enterprise. *Port of Seattle*, 80 Wn.2d at 396. That unremarkable proposition is irrelevant to this case.

998; Br. of Resp't at 5. The issue is not another entity's temporary "use" or maintenance of property condemned by an entity with that express authority.

(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 28-32. 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 35. 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 36-38.

Sound Transit's compatibility claims rests on two false premises. First, it claims that there is "evidence" they taking would not destroy the

corridor. *Id.* Second, it deceptively focuses its argument on whether the light rail project itself will interfere, when it has already admitted that it is taking property for more than just installation of light rail. *Id.*

With respect to Sound Transit’s “evidence” of compatibility, it has none. Seattle submitted expert testimony that the taking here will destroy the corridor and make it impossible to continue operating the Transmission Line. CP 285-86. Sound Transit submitted *no contrary evidence*. Instead, on appeal, Sound Transit points to (1) argument by Seattle’s counsel that the taking is unwarranted and (2) a declaration from someone who is not an expert in electrical transmission lines that Sound Transit has “assured” Seattle its use will not interfere. Br. of Resp’t at 37. This is not evidence of compatibility.

Sound Transit’s failure to cite evidence is a concession that the trial court erred in concluding the condemnation is compatible with the existing, vital public use of the Transmission Line Corridor.

With respect Sound Transit’s claim that it believes “its project” will not interfere with the Transmission Line Corridor, that is not the legal standard this Court applies. As Sound Transit *admits*, the issue is whether the *taking* will interfere with the prior use. Br. of Resp’t at 36-37, citing *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911).

Per the Petition in Eminent Domain, Sound Transit is seeking to take title to the condemned property “free and clear of any right, title and interest of all Respondents.” CP 4. Accordingly, Sound Transit’s condemnation will fully extinguish Seattle’s easement rights over a substantial portion of the Transmission Line Corridor. The Court must assume that Sound Transit does indeed intend to do what its petition says, and it cannot consider any vague “assurances” from Sound Transit that it will seek to lessen the impact on Seattle’s easement and thereby avoid the effects of the Prior Public Use Doctrine. *See State v. Smith*, 25 Wn.2d 540, 544, 171 P.2d 853, 855 (1946) (“Where there is no agreement between the parties-there was none in the case at bar-the condemnor must take the rights which he seeks to appropriate absolutely and unconditionally, and he must make full compensation for what he takes”). The conflict between Sound Transit’s condemnation and Seattle’s existing public use is entirely the result of Sound Transit’s actions and decisions. Sound Transit designed its light rail line and undercrossing of 124<sup>th</sup> Avenue in a way the conflicted with Seattle’s existing and obvious use of the Transmission Line Corridor for the purpose of operating a high voltage transmission line (by choosing a retained-cut rather than tunnel configuration). It promised in the agreement with Bellevue to condemn property so that Bellevue could significantly widen a road that passes

over, but otherwise has no connection with, the light rail line Sound Transit is planning on building, and it did so despite the fact that almost all of the property for the road widening project was within Seattle's easement area. And, Sound Transit drafted the Petition so that the condemnation would result in the full extinguishment of all of Seattle's easement rights.

Apparently recognizing the lack of evidence to support its position, Sound Transit then engages in sheer speculation that there is some mysterious, unidentified other type of electrical transmission system that Seattle can use in the remaining easement. Br. of Resp't at 37-38. Sound Transit's counsel, arguing in an appellate brief, asserts 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.

In making its argument regarding the hypothetical alternative electrical transmission line Sound Transit distorts the evidence before the trial court by arguing that Seattle "claims only that there would not be room in the portion of the Easement remaining after Sound Transit's

taking to run a 230 kV transmission system.” Br. of Resp’t at 36. In fact, the evidence submitted by Seattle in the trial court was that the narrowing of the easement that would result from the condemnation would make it impossible for Seattle to locate any high voltage transmission lines within the remaining portions of the easement. Specifically, in his declaration, Seattle’s Senior Real Property Agent, John Bresnahan, stated that the narrowing would result in there being “insufficient room within the easement areas to locate a high voltage transmission line (in particular when mandatory clearances are taken into account).” CP 285-86.

In making this argument Sound Transit also misapplies the law on the Prior Public Use Doctrine. That doctrine provides that a condemnation is barred if it is incompatible with the “existing” public use. *Pub. Util. Dist. No. 1*, 182 Wn.2d at 539 (“The ‘general rule is that when the proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied unless the legislature has authorized the acquisition either expressly or by necessary implication’.” (citation omitted)). The “existing” public use here is Seattle’s operation of a 230 kV transmission line. As Sound Transit’s condemnation is, at a minimum, incompatible with Seattle’s continued operation of that transmission line, it is irrelevant that Seattle could possibly use the easement to operate some other sort of

transmission line. Although it should go without saying, Sound Transit's speculation, distortions, 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.

Also, the suggestion that *Roberts* supports Sound Transit's position here is incorrect. Br. of Resp't at 36-37. *Roberts* was 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, that the taking itself was small, and that that the remaining property actually would benefit from the building of a road on it. *Roberts*, 63 Wash. at 576.

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 v. State*, 121 Wash. 448, 209 P. 700 (1922), 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 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 32-34. 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 39-40. It argues that Seattle’s constitutional powers are only applicable “within its own borders.” It again cites RCW 81.112.080, its authorization statute, to suggest that its own power is superior. *Id.* Sound Transit compares Seattle to its “enthusiastic partner” Bellevue, and suggests that Seattle is not being sufficiently compliant with Sound Transit’s demands. *Id.*

First, 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 the Legislature has granted Sound Transit ultimate public power in the Puget Sound region, and that it is an agency to whose authority all other public agencies are legally obliged to accede.

Second, Sound Transit mistakenly suggests that Seattle’s authority is somehow lessened because its property is not “within its own borders.” Sound Transit asks Seattle for authority on this subject. It should consult *City of Bellevue v. Painter*, 58 Wn. App. 839, 843, 795 P.2d 174 (1990). In that case, the Court of Appeals noted that Bellevue, a “code city” adopted under RCW ch. 35A, had the power to condemn property outside its borders despite an express grant of statutory authority to do so. *Painter*, 58 Wn. App. at 839.

Seattle, unlike Sound Transit, is not restricted to only those condemnation powers expressly delegated to it. *Id.* at 843. On the contrary, it has “the broadest powers available under the Constitution unless expressly denied by statute.” *Id.*

It is undisputed that there has been 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 agency. 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 21<sup>st</sup> day of October, 2017.

Respectfully submitted,



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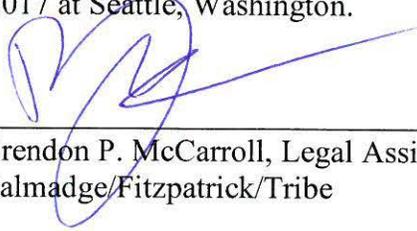
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 27, 2017 at Seattle, Washington.

  
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