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No. 94530-6

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

v.

STERNOFF L.P., a Washington limited partnership, et al.,

Appellants.

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.¹ 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.

¹ 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

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 competent evidence to support the contention that its condemnation is compatible with Seattle's existing public use. *Id.* at 9. Notably, the trial court did *not* enter any express findings or conclusions on the compatibility of the two projects or the prior public use doctrine. CP 1232-37.

Sound Transit does not offer any competing facts in its statement of the case. Instead, in its argument section, Sound Transit references a hypothetical transmission line design that Sound Transit contends Seattle could build in the portions of the Transmission Line Easement that would remain after the condemnation. Br. of Resp't at 39. This hypothetical design is postulated by Paul Ferrier, a civil engineer and project manager who has no electrical engineering experience and no experience building electrical transmission corridors. CP 1057-58.² Ferrier's "evidence" consists of hypothesizing that a completely different technology might be

² In his declaration, Mr. Ferrier describes his experience with electrical transmission lines as follows: "I also have experience consulting on projects that involve engineering issues relating to electrical transmission systems." CP 1057.

able to be squeezed in to even the narrowest remaining portions of the easement. CP 1058-59. Ferrier claims that Seattle can build a “widely accepted” monopole with braced pole insulators. *Id.*

The fatal flaw in Sound Transit’s hypothetical is that it ignores the aerial easement it is condemning. Sound Transit’s petition makes clear it is taking all of the property free and clear of Seattle’s interests, thereby fully extinguishing the easement on the ground and in the air in the take areas. CP 7. Thus, even if Seattle could conjure some narrower version of a transmission tower to squeeze into the ground easement, the towers in the air will not meet clearance requirements for the massive electrical transmission line Seattle needs. CP 916.

Also, regardless of whatever hypothetical alternate technology Sound Transit wants to foist on Seattle, Sound Transit’s taking *fully bisects* the easement at two points. CP 129. This is reflected in the maps attached to the Petition that show a fee take area running the full width of the easement at the southern boundary of the property and a second take area, for an access easement, towards the north boundary. CP 33. John Bresnahan confirmed this fact in his declaration, and Sound Transit has no evidence to contradict it. CP 915. Even Sound Transit’s hypothetical alternate technology that would purportedly allow Seattle to build a narrower transmission line cannot traverse the bisected portions of the

easement where Seattle would have no legal right to locate or operate a transmission line.

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 124th 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 3-7. 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 124th 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, according to Sound Transit, 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 could reach a negotiated resolution without the need for litigation." Br. of

Resp't at 8. This statement is unsupported by the record, and specifically by Sound Transit's reference to CP 988. That page is from 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 988. There is no evidence that Sound Transit negotiated with Seattle in good faith before filing litigation to condemn Seattle's easement.

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 998-99. This citation is from the declaration of Marina Arakelayan, who works for Bellevue, not Sound Transit. And nothing in the cited pages constitutes testimony that Seattle has "refused to work with" Sound Transit. CP 998-99.

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 38-39.

Sound Transit admits that it engaged in a long, collaborative process with Bellevue and reached a negotiated agreement. Br. of Resp't at 4-7. 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 property in public use 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 10-20. 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 14. 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 15.

The suggestion that the Legislature meant to imply public property

by using the term “all” contradicts black-letter condemnation law. 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. v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966); *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 the rich body of authority commanding that the right to condemn public property must be express, 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.

The term "all" used in the relevant portion of RCW 81.112.080, modifies "property" or "land." The word "property" in condemnation statutes means "private property." *King Cty.*, 68 Wn.2d at 690. Therefore, under Washington law, "all property" in the statute means "all *private* property."

Not only must the right to condemn public property be express, this Court has repeatedly explained what an express statutory grant of such power looks like. In an express authorization, the Legislature modifies 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 14-21. 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 21.

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).³ 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 respondents there were private companies, not public entities. *Newell*, 77 Wash. at 197.⁴

The *Newell* court examined the condemnation authority of the King County Waterway District, a special purpose district formed under a

³ 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).

⁴ 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).

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. *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.⁵

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. In contrast, Sound Transit is suggesting here 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 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

⁵ *Newell* is also inapplicable because the private parties in *Newell* did not have any ownership interests in the property at issue, the water. *Newell*, 77 Wash. at 202 (“We are of the opinion, therefore, that the court properly excluded evidence tending to show the cost or the necessity for obtaining water at some other place and obtaining rights of way therefor, because the appellants have no interest in the waters of the navigable river which they can enforce against the state or its agency.”).

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.⁶ *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 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

⁶ 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.”).

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 23-24. 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 23.

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.⁷

There is also a logical flaw in Sound Transit’s suggestion that

⁷ 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.

without the power to condemn public property, Sound Transit cannot fulfill its purpose. Sound Transit's condemnation statute specifically states that public transportation facilities may *not* be condemned. If the Legislature believed Sound Transit could not fulfill its transportation mandate unless it had the power to condemn "all" public property, then surely it would have given Sound Transit authority to condemn that public property that is actually germane to its purpose.

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.⁸

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 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.*

Sound Transit's argument might make sense if RCW 81.112.080 was solely a condemnation statute, but it is not. The statute generally

⁸ 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 substantial 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 23-26. 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 25-26. It also claims that as an agency, it has the power to declare any property "necessary" without any evidence other than its own pronouncements in resolutions and contracts. *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 though Sound Transit's own contracts reveal that most of Seattle's property will be given to Bellevue for road-widening. *Id.*

Sound Transit cannot take this question of statutory interpretation from the courts *solely* by making an administrative declaration or private contract, 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. *King Cty.*, 68 Wn.2d at 690.

In *King Cty.*, 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 ... 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.*

Here, as in *King Cty.*, 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 31-32. 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 roadrunning for over 500 feet to the north of the light rail crossing. CP 33.

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 as expressed in its authorizing legislation, 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 easement is "necessary" to its high capacity transportation project. It simply relies on its own general declaration to that effect in its resolution. 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 at 32-35, 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).

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.⁹ *Id.*

Neither *Pine Forest* nor *Slater* authorizes a public entity to condemn property expressly for the purpose of transferring it directly to another public entity for a project unconnected with the condemnor's statutory authority. Further, neither of those cases allows a public entity to expand the scope of its condemnation authority via an agreement with another public entity. 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 for transportation purposes that it planned to use and

⁹ 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.

also to allow Sound Transit to use. *Pine Forest*, 185 Wn. App. 249. The City of Bellevue had authority to condemn property for transportation uses and for its own use. *Id.* at 249.¹⁰ 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 transfer to Bellevue in fee simple for the purpose of permanently widening its road. CP 33, 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

¹⁰ In an unchallenged conclusion of law, the trial court found that Bellevue was “authorized to exercise its eminent domain power for purposes of transportation and to allow Sound Transit to use its property to construct a light rail system.” *Pine Forest*, 185 Wn. App. 244. The question whether Bellevue was operating within its condemnation authority when it condemned property for the purpose of Sound Transit’s light rail line was not raised in the Court of Appeals.

Skagit River hydroelectric-generating dams. Br. of Appellant at 26-29. Seattle noted that Sound Transit's taking would extinguish all of Seattle's rights over a substantial portion of the easement and render it 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 36-39. Sound Transit's compatibility claims rests on two false premises. First, it claims that Seattle's use of the corridor is only "speculative." It claims that Seattle must demonstrate a "reasonable expectation of future needs and a bona fide intention of using it for such purposes within a reasonable time." *Id.* at 37.¹¹ Second, it claims that there is "evidence" the taking would not destroy the corridor. *Id.* at 39.

Seattle has met the standard Sound Transit cites. A second high-capacity transmission line to accommodate a fast-growing region is not a "speculative" use. It is specific and in fact exists on the other side of the

¹¹ Sound Transit deceptively states that Seattle "does not have any defined future plans to use the easement," citing CP 998. That page from the declaration of its project manager states here understanding Seattle has no "current" plans to construct a transmission system in the corridor. CP 998. Having no "current" plans in place is not the same as planning to use the easement in the "future," which Seattle has stated will become necessary in the future due to regional growth. CP 915.

exact same corridor. The rapidly growing Puget Sound population will need to have electricity, and there is nowhere else to build a new corridor. CP 915. Seattle is *obligated* by the Growth Management Act to plan for electrical transmission line capacity. RCW 36.70A.035(3), 070(4); *see also*, James A. Holtkamp & Mark A. Davidson, *Transmission Siting in the Western United States: Getting Green Electrons to Market*, 46 Idaho L. Rev. 379, 419 (2010).

The idea that Seattle's planned use is "speculative" because Seattle does not know the precise date it will begin construction is specious. It has presented a specific, non-speculative use for this valuable property that it has wisely preserved for future growth planning needs.

With respect to Sound Transit's "evidence" of compatibility, it has none. Seattle submitted qualified expert testimony that the taking here will destroy the corridor and make it impossible to continue operating the Transmission Line. CP 914-15. Sound Transit points to a declaration from someone who is not an expert in electrical transmission lines that a completely different type of transmission line could be squeezed into the remaining easement. Br. of Resp't at 37.

Sound Transit's project manager's suggestion of a new "monopole" design ignores the fact that Sound Transit is also condemning Seattle's aerial easement. The fact that a single pole might fit into the

remaining easement is useless if the top of the towers and the wires strung between the towers cannot fit within it, because of the necessity of maintaining required clearances for these highly dangerous lines. CP 916. Sound Transit's project manager's suggestion also fails to account for the fact that the extinguishment of Seattle's easement rights over the full width of the easement in two separate locations would make it impossible for Seattle to run transmission lines over the property that connect with the property to the north and the south.

Also, 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. CP 914-16. Specifically, Seattle's expert 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)." *Id.*

Sound Transit's suggestion that *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911) supports its position here is incorrect. Br. of Resp't at 36-37. *Roberts* was decided based on evidence, not conjecture. 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.

Finally, Sound Transit states that even if Seattle’s public use will be destroyed, the prior public use doctrine does not apply because Sound Transit’s use is “superior.” Br. of Resp’t at 40-42.¹² It cites *Pub. Util. Dist. No. 1* in support of the trial court’s ostensible authority to conduct this analysis. *Id.* at 39-40.

Determining which public use is more pressing – supplying electricity or supplying high-capacity transit and a wider general purpose roadway – is a legislative decision, not a judicial one. *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

¹² Of course, Sound Transit’s claim that the electrical transmission corridor on the east side of 124th Avenue is disposable because it does not currently have a transmission line installed on it does not apply to the west side of 124th Avenue. Yet it claims the power to condemn both easements.

necessary implication to do so.” *Id.* The statement in *Pub. Util. Dist. No. 1* about “competing interests” is dicta, and the case it relies upon involved “public service corporations,” not property held in a governmental capacity by a municipal entity and devoted to a public use. *State v. Chehalis Boom Co.*, 82 Wash. 509, 514, 144 P. 719, 721 (1914).

Neither Sound Transit nor the courts are empowered to decide that the citizens of Washington need light rail more than they need electricity.¹³ *Nowhere* in its general grant of authority to build light rail did the Legislature delegate to Sound Transit or this Court the power to decide that its public project is superior to other public necessities.

Sound Transit’s “superior use” argument also cannot be applied to Bellevue’s road-widening project. Even if this Court believes that regional light rail is superior to a large electricity transmission corridor, Sound Transit makes no argument that Bellevue’s desire to widen a short stretch of a surface street is also superior to the provision of electricity for an entire urban region.

(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

¹³ For purposes of examining Sound Transit’s “superiority” of public use argument, this Court must assume that (1) the transmission corridor will be used to build electrical capacity, (2) Sound Transit’s taking will destroy the electrical corridor, and (3) that the Legislature clearly intended such a result when it granted Sound Transit limited condemnation powers in a statute granting it general authority.

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 31-33. It stated that such cities have broad powers, and their elected leaders and institutions serve the public interest. *Id.*

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 43-44. 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.*

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 1st day of November, 2017.

Respectfully submitted,



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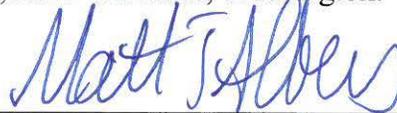
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 1, 2017 at Seattle, Washington.



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