

No. 94530-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Appellants.

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APPENDIX TO  
BRIEF OF RESPONDENT SOUND TRANSIT

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**TRANSIT WAY AGREEMENT BETWEEN THE CITY OF BELLEVUE AND  
THE CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY FOR  
THE EAST LINK PROJECT**

This TRANSIT WAY AGREEMENT (“Agreement”), effective this day of November, 2011, is entered into between the CITY OF BELLEVUE, a Washington municipal corporation (“City”), and the CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY (“Sound Transit”), a regional transit authority. For and in consideration of the mutual covenants contained herein, the City and Sound Transit do hereby agree as follows regarding the Sound Transit East Link Project.

**RECITALS**

**WHEREAS**, The City is a non-charter optional municipal code city incorporated under the laws of the State of Washington, with authority to enact laws and enter into agreements to promote the health, safety and welfare of its citizens and for other lawful purposes;

**WHEREAS**, Sound Transit is a regional transit authority created pursuant to chapters 81.104 and 81.112 RCW with all powers necessary to implement a high capacity transit system within its boundaries in King, Pierce, and Snohomish Counties, and Sound Transit is implementing the East Link Project pursuant to its statutory authority and the voter approved Sound Transit 2 plan;

**WHEREAS**, on November 4, 2008, Central Puget Sound area voters approved the Sound Transit 2 plan, a package of transit improvements and expansions including increased bus service, increased commuter rail service, an expansion of link light rail, and improved access to transportation facilities and Sound Transit is implementing the East Link Project pursuant to its statutory authority described above and the voter approved Sound Transit 2 plan;

**WHEREAS**, the expansion of link light rail approved in the Sound Transit 2 plan includes an expansion of light rail from Downtown Seattle to Mercer Island, downtown Bellevue, and the Overlake Transit Center with stations serving Mercer Island, South Bellevue, downtown Bellevue, Bel-Red and Overlake areas;

**WHEREAS**, both before and since the public vote on Sound Transit 2, Bellevue has been engaged in extensive planning efforts for deploying light rail, including but not limited to the Bel-Red Plan, the Light Rail Best Practices Report and amendments to its Comprehensive Plan;

**WHEREAS**, segments of the East Link Project will be constructed and operated within Bellevue, with associated impacts and benefits for residents, businesses and visitors to Bellevue;

**WHEREAS**, the parties recognize the mutual benefits of a tunnel alignment through downtown Bellevue, including that such an alignment maximizes the ability of

Sound Transit's high capacity light rail system to meet long-term regional transportation needs, increases run-time predictability and light rail operational performance, while avoiding additional congestion on downtown streets and impacts to the homes and businesses in downtown Bellevue;

**WHEREAS**, since the public vote on Sound Transit 2, Bellevue and Sound Transit have cooperated in efforts to identify and develop a financially feasible tunnel route through Downtown Bellevue;

**WHEREAS**, the parties' cooperative efforts have resulted in a shorter, less expensive tunnel alternative than the alternatives originally identified in the DEIS, known as the C9T alternative;

**WHEREAS**, Bellevue has demonstrated a willingness to cooperate and partner with Sound Transit in order to make the C9T affordable by reducing Sound Transit's project costs through Bellevue or by undertaking projects that reduce costs or add value to the project;

**WHEREAS**, on April 23, 2010, the City and Sound Transit entered into a Term Sheet which provided a general framework regarding the City's funding contributions and commitments for the East Link Project if the C9T tunnel alternative were to be ultimately selected by the Sound Transit Board as a component of the East Link Project;

**WHEREAS**, on July 28, 2011, the Sound Transit Board selected the alignment and station locations for construction of the East Link Project from downtown Seattle to the cities of Mercer Island, Bellevue and Redmond as set forth in Sound Transit Resolution R2011-10, incorporated by reference herein, and which includes the C9T tunnel alternative;

**WHEREAS**, on August 10, 2011, the City and Sound Transit entered into another Term Sheet which further defined the City's funding contributions and commitments and called for the parties to enter into good-faith negotiations to produce a binding umbrella MOU on or before October 25, 2011, unless extended by the parties, which addresses at least the following issues: (a) C9T tunnel funding, (b) project cost updating, cost reconciliation, and risk and benefit sharing procedures, (c) use of City right-of-way and associated terms and conditions, (d) a description of the applicable City codes and regulations and potential regulatory changes, and (e) design modifications to the project scope;

**WHEREAS**, the City has identified potential City Requested Modifications to portions of the alignment selected by the Sound Transit Board as described in Sound Transit Resolution No. R2011-10, dated July 28, 2011, which modifications would seek to address impacts to the surrounding neighborhoods through design options to avoid or minimize noise, visual and transportation system impacts, particularly in the B Segment and any additional environmental review of these modifications will occur as described in this MOU;

**WHEREAS**, the City owns and operates public rights-of-way, utilities, parks and other infrastructure and improvements within the City, that will be impacted by certain Project improvements. The City is responsible for managing streets and rights-of-way and public utilities within its jurisdiction for a variety of uses and public benefits, including public safety. The parties intend to enter into a separate Transit Way Agreement which will provide for Sound Transit's temporary and long term use of City right-of-way;

**WHEREAS**, the City is responsible for administering state and local land use laws and development regulations that will apply to planning, design, development and operation of the Project. Such development regulations and land use laws, including but not limited to the Growth Management Act ("GMA"), Shoreline Management Act ("SMA") and SEPA, grant the City authority to exercise its land use powers in review of permits related to the Project and nothing herein is intended to waive such authority;

**WHEREAS**, the Growth Management Act (RCW 36.70A) provides that regional transportation facilities are essential public facilities and the Project is an essential public facility;

**WHEREAS**, the parties have a joint interest in serving Bellevue, the eastside and the Puget Sound region with high quality, convenient public transit, and the Project has the potential to provide a reliable, high frequency transportation option for Bellevue residents and regional commuters, and to benefit the eastside and Bellevue residents and workers by linking to multiple destinations in the region;

**WHEREAS**, the parties have a joint interest in ensuring that the Project incorporates design and mitigation measures appropriate to its impacts and represents a high-quality investment for taxpayers, the City and Sound Transit;

**WHEREAS**, the parties anticipate that additional agreements may be necessary to ensure successful completion of the Project; and

**WHEREAS**, the parties desire to cooperatively identify design modifications for the Project, develop a protocol for sharing information in a timely manner and at stages of the Project appropriate to ensure adequate consideration of issues identified by either party, develop communication and decision making standards that maximize transparency and efficiency in decision making, and build effective cooperation between the parties.

**NOW THEREFORE**, in consideration of mutual promises and covenants contained herein, the Parties agree to the terms and conditions as follows:

## 1.0 DEFINITIONS

For purposes of this Agreement, the following terms, phrases, words, and their derivations shall have the meaning given herein where capitalized; words not defined herein shall have their ordinary and common meaning. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the context requires. The words “shall” and “will” are mandatory and the word “may” is permissive. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision. References to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

- 1.1 Memorandum of Understanding. “Memorandum of Understanding” or “MOU,” means the Memorandum of Understanding approved by appropriate action of the City and of Sound Transit, contemporaneously with this Agreement.
- 1.2 City. “City” means the City of Bellevue and any successor or assignee following an assignment that is permitted under this Agreement.
- 1.3 Emergency. “Emergency” means, except as otherwise provided, a sudden, unexpected occurrence or set of circumstances demanding immediate action in order to prevent and/or avoid an imminent threat to public health or safety, public or private property, or to prevent and/or avoid serious environmental degradation.
- 1.4 Final Right-of-Way Plans. “Final Right-of-Way Plans” means City and Sound Transit approved prints, or mutually acceptable electronic media, showing in detail the proposed construction and specifications of the Light Rail Transit System, including alignment drawings showing exact limits of the Light Rail Transitway mathematically tied to existing City monumentation.
- 1.5 Liability. “Liability” means all loss, damage, cost, expense (including costs of investigation and attorneys’ and expert witness fees and expenses at arbitration, trial or appeal and without institution of arbitration or suit), claims and demands of whatever kind or nature, including those arising under the Federal Employers Liability Act, arising out or relating to this Agreement or occurring on or relating to the Light Rail Transit System described herein.
- 1.6 Light Rail Transit Facility. “Light Rail Transit Facility” means a structure, rail track, equipment, maintenance base or other improvement of a Light Rail Transit System, including but not limited to ventilation structures, traction power substations, utilities serving the Light Rail Transit System, Light Rail Transit

stations and related passenger amenities, bus layover and inter-modal passenger transfer facilities, park-and-ride lots, and transit station access facilities.

- 1.7 Light Rail Transit System. “Light Rail Transit System” means a public rail transit line that operates at grade level or above or below grade level, and that provides high-capacity, regional transit service owned or operated by a regional transit authority authorized under chapter 81.112 RCW. A Light Rail Transit System may be designed to share a street right-of-way although it may also use a separate right-of-way.
- 1.8 Light Rail Transit Way. “Light Rail Transit Way” means the areas of the Public Rights-of-Way occupied by Sound Transit for its Light Rail Transit System after construction pursuant to this Agreement, as shown on the record drawings of the Final Right-of-Way Plans approved by the City and on file with the City Clerk.
- 1.9 Parties. “Parties” means the City of Bellevue and Sound Transit.
- 1.10 Passenger. “Passenger” means any person who is not an employee or agent of Sound Transit, and who is using any Sound Transit Light Rail Transit System Facility.
- 1.11 Project. “Project” means the segments of the light rail system in the City of Bellevue as described in the MOU incorporated by reference herein.
- 1.12 Public Rights-of-Way. “Public Rights-of-Way” means all public streets and property granted or reserved for, or dedicated to, public use for street purposes, together with public property granted or reserved for, or dedicated to, public use for walkways, sidewalks, bikeways and horse trails, whether improved or unimproved, including the air rights, sub-surface rights and easements related thereto
- 1.13 Routine Maintenance and Operation. “Routine Maintenance and Operation” means Sound Transit’s maintenance and operation of the Light Rail Transit System that does not require (i) the excavation of materials that would alter or disturb the Public Right-of-Way; (ii) closure or other modifications of the Public Right-of-Way in a way that impedes the flow of pedestrian or vehicular traffic, or (iii) the use of heavy machinery within fifty (50) feet of or upon the Public Right-of-Way.
- 1.14 Sound Transit. “Sound Transit” means the Central Puget Sound Regional Transit Authority, and any other entity to the extent such entity, as permitted under this Agreement, is exercising any rights to operate the Light Rail Transit System over any portion of the Light Rail Transit Way pursuant to a specific written grant of such rights by Sound Transit.

- 1.15 Third Party. “Third Party” means any person other than the City or an employee of the City and any person other than Sound Transit or an employee of Sound Transit.

## **2.0 COOPERATION AND GOOD FAITH EFFORTS**

- 2.1 The Parties understand and agree that the process described in this Agreement depends upon timely and open communication and cooperation between the Parties. In this regard, communication of issues, changes, or problems that arise in the acquisitions, in identifying the parcels or property rights to be transferred, or with any aspect of the performance of terms of this Agreement should occur as early as possible in the process, and not wait for explicit due dates or deadlines. Each party agrees to work cooperatively and in good faith toward resolution of any such issues in a manner that ensures adequate time for each party to work through issues.
- 2.2 The Parties acknowledge that this Agreement contemplates the execution and delivery of a number of future documents, instruments, and permits, the final form and contents of which are not presently determined. The Parties agree to provide the necessary resources and to work in good faith to diligently and timely develop the final form and contents of such documents, instruments and permits.

## **3.0 PERMITS**

- 3.1 Sound Transit, at its sole cost and expense, shall (i) secure and maintain in effect, all federal, state, and local permits and licenses required for the construction, operation and maintenance of the Light Rail Transit System, including, without limitation, crossing, zoning, building, health, environmental, Right-of-Way Use and communication permits and licenses, and (ii) indemnify the City against payment of the costs thereof and against any fines or penalties that may be levied for failure to procure, or to comply with, such permits or licenses, as well as any remedial costs incurred by the City in curing any such failures.
- 3.2 The City shall not hinder Sound Transit’s attempts to secure, obtain, and maintain, at Sound Transit’s sole cost and expense, any permits, licenses or approvals of other governmental agencies or authorities, or of any necessary Third Parties, for the use of any structures or facilities consistent with the cooperative goals outlined in the MOU and this Agreement. Nothing in this Section is intended to prevent the City’s participation in the review procedures of such other governmental agencies or authorities to the fullest extent provided by law, including commenting on impacts and mitigation, so long as such comments are consistent with the Project Description, as modified by the City Requested Modifications described in the MOU.

- 3.3 Nothing in this Agreement shall be deemed a waiver of the City's regulatory authority nor a predetermination of the compliance of the Project with applicable codes and regulations.
- 3.4 Sound Transit's design and construction of the Project is subject to a financial assistance contract between Sound Transit and the Federal Transit Administration ("FTA"). Both parties recognize that the FTA may request a change to this Agreement to comply with its funding requirements. The Parties agree to consider any such request in good faith.

#### **4.0 LIGHT RAIL TRANSITWAY**

- 4.1 a) The City hereby grants in accordance with this Agreement to Sound Transit, its successors and assigns, a non-exclusive use of portions of the Public Right-of-Way, the general location of which is described and depicted on Exhibit "A," and the general profile of which is described and depicted on Exhibit "B," both attached and incorporated herein. The general location and profile, shown on Exhibit A and B and as the same may be amended pursuant to the MOU and this Agreement, together shall be known as a Light Rail Transit Way. Upon adoption of the City Requested Modifications as described in the MOU, Exhibits A and B shall be amended as appropriate. This grant is for the purpose of enabling Sound Transit to construct, operate, maintain, and own a Light Rail Transit System and the Light Rail Transit Facilities in the Light Rail Transit Way in accordance with the terms and conditions of this Agreement.
- b) The City's Transportation Director and Sound Transit's Executive Director of Design Engineering Construction Management may, from time to time, jointly revise and modify Exhibits "A" and "B" to conform to the Final Construction Plans and the Final Right-of-Way Plans as long as the revisions are, in their professional judgment, within the scope and intent of Exhibit "A." Upon completion of construction of the Light Rail Transit System and Light Rail Facilities, the approved As-Built Final Right-of-Way Plans and Final Construction Plans shall be filed with the City Clerk.
- c) Sound Transit expressly agrees that it will construct, operate and maintain the Light Rail Transit System in compliance with this Agreement and all applicable City permits, ordinances and state and federal laws.
- 4.2 The non-exclusive use of the Light Rail Transit Way granted herein is solely for the purpose of, construction, maintenance, operation, and ownership of the Light Rail Transit System detailed in the Final Construction Plans and for no other purpose. Sound Transit intends, and shall have the right to use the Light Rail Transit Way solely for Light Rail Transit System uses. Subsequent to construction of the Light Rail Transit Facilities authorized in accordance with the approved building permit plans, the Final Right-of-Way Plans, and any other necessary approvals, Sound Transit shall not construct any additions or

expansions to the Light Rail Transit System on or along the Light Rail Transit Way without the City's written consent, including but not limited to all necessary permits and approvals. Notwithstanding the foregoing, nothing contained herein shall prevent Sound Transit from replacing Light Rail Transit Facilities or equipment existing after construction after first obtaining any necessary permits or other authorization from the City.

- 4.3 Sound Transit understands and agrees that during the normal course of Light Rail Transit Way use, the City may engage in construction, maintenance, demolition, leasing, licensing, permitting, and similar activities that have the potential to cause interruption to the Light Rail Transit System. Sound Transit understands and agrees that such activities may be caused, from time to time, by reasons including but not limited to: (1) traffic conditions; (2) public safety; (3) construction of facilities which constitute permissible uses of the Public Rights-of-Way; (4) repair of facilities which constitute permissible uses of the Public Rights-of-Way (including resurfacing or widening); (5) change of grade to facilities within the Public Rights-of-Way; (6) response to emergencies and natural disasters; and (7) construction, installation, maintenance, or repair of sewers, drains, water pipes, power lines, signal lines, traffic control devices, tracks, communications systems, public works, public facilities or improvements, or any other utilities. The City acknowledges that Sound Transit has a formal procedure referred to as a "Track Access Permit" and agrees to address in the standard operating procedures referenced in Section 6.4 coordination with Sound Transit on access to the Light Rail Transit Way. At a minimum, the City agrees to exercise its reasonable best efforts to provide written notice to Sound Transit of such activities within the Light Rail Transit Way, to the extent they are permitted or controlled by the City, at least forty-eight (48) hours prior to commencement of the work, unless an Emergency exists as defined herein or as defined in the City's Right-of-Way Use code, now or as hereafter amended. The City shall further exercise its reasonable best efforts to ensure that any such activities done by or for the City shall be undertaken in a manner that avoids or minimizes, to the extent practical given the nature of the activities and resources available, disruption to operation of the Light Rail Transit System.
- 4.4 Sound Transit understands that the rights granted herein are non-exclusive. The City shall have the right to grant other non-exclusive uses or occupancies of the Light Rail Transit Way. The City agrees that such uses or occupancies shall not unreasonably impair the ability of Sound Transit to operate and maintain the Light Rail Transit System.
- 4.5 This Agreement does not authorize the provision of any services by Sound Transit other than services strictly related to the operation and maintenance of the Light Rail Transit System. Sound Transit's use of the Light Rail Transit Way for anything other than a Light Rail Transit System shall require written permission or permits from the City.

- 4.6 Unless otherwise provided in this Agreement or in other City project approvals or agreements, Sound Transit shall own all tracks and other Light Rail Transit Facilities on the Light Rail Transit Way. Nothing in this Agreement, however, shall be construed as granting to Sound Transit any interest or right in the Light Rail Transit Way or the non-Light Rail Transit System improvements on the Light Rail Transit Way other than the rights expressly provided herein.
- 4.7 No rights shall pass to Sound Transit by implication. Without limiting the foregoing, by way of example and not limitation, this Agreement shall not include or be a substitute for:
- (a) Any other permit or authorization required for the privilege of transacting and carrying on a business within the City that may be required by the ordinances and laws of the City; or
  - (b) Any permit, agreement or authorization required in connection with operations on or in public streets or property, including by way of example and not limitation, Right-of-Way Use permits; or
  - (c) Any permits or agreements for occupying any other property of the City to which access is not specifically granted by this Agreement.
- 4.8 This Agreement shall not be read to diminish or in any way affect the authority of the City to control and charge for the use of its water, storm, solid waste and wastewater utilities. In the event that Sound Transit desires to use such facilities, Sound Transit must obtain any necessary permits and approvals as required by the City, which shall not be unreasonably withheld.
- 4.9 In the event that Sound Transit acquires real property that the Parties agree should be transferred to the City for Public Right-of-Way, such real property shall be transferred to the City pursuant to the procedures provided in Bellevue City Code without further compensation from the City.
- 4.10 After the City's standard maintenance bond period has expired, the City shall maintain all landscaping and stormwater improvements (including but not limited to rain gardens) associated with the Project and located in the Public Rights-of-Way, to the extent so provided in a subsequent future agreement between the parties.

## **5.0 PLAN REVIEW AND CONSTRUCTION**

- 5.1 Sound Transit shall obtain approval from the City for construction of the Project through submittal of the appropriate applications as described in this Agreement, Bellevue City Code, and subsequent agreements prior to any such work commencing. Final Construction Plans must be accompanied by Final Right-of-

Way Plans. Prior to advertisement of the first Project construction contract by Sound Transit, Sound Transit shall submit a Construction Mitigation Plan, which may be developed through the MOU Collaborative Design Process, to the City for its review and approval, and such Plan shall be reviewed, conditioned and approved or denied in accordance with the City's codes and regulations, and consistent with any applicable agreement between the parties regarding the Plan or contents of the Plan.

- 5.3 As promptly as possible, but in no event later than six (6) months after each segment of the Light Rail Transit System is "finalized" under its respective Right-of-Way Use permit, Sound Transit shall furnish to the City record drawings of the Final Construction Plans and Final Right-of-Way Plans showing the as-built condition. These record drawings shall be provided in paper and associated electronic AUTOCADD format.
- 5.4 During construction of the Light Rail Transit System, Sound Transit may utilize and fence portions of the Public Right-of-Way for the temporary storage of construction equipment and materials subject to conditions and provided that such use has been approved through Right-of-Way Use permits issued pursuant to Bellevue City Code.
- 5.5 The Parties recognize that the Light Rail Transit System is a public transportation improvement. The Parties will cooperate by notifying any conflicting non-City owned utilities and private utilities to relocate when necessary at such utilities' expense, to the extent provided by law, city franchise or city right-of-way use agreement. Such notification shall be consistent with applicable franchise, agreements and other provisions in existence regarding the process for requesting and requiring relocation, including the timing of requests and information provided to such utilities to support the relocation request. Sound Transit agrees that it will coordinate with all utilities to minimize utility relocation costs and related construction, and will negotiate with non-City owned utilities on relocation costs and cost allocation. Sound Transit shall fully indemnify and hold harmless the City from any claim or lawsuit and undertake the defense of any litigation directed at the City arising from such relocation to accommodate the construction of the Light Rail Transit System. The City shall cooperate with Sound Transit in the defense of any such claim.

Except as otherwise provided herein or in the MOU, Sound Transit shall pay for any relocation or protection of City-owned utilities that the City determines is necessary due to construction or operation of the Light Rail Transit System. The specific allocation of costs of such relocation or protection shall be as set forth in the MOU.

- 5.6 Sound Transit, at Sound Transit's sole cost and expense, shall furnish all materials, parts, components, equipment and structures necessary to construct and operate the Light Rail Transit System, or any part thereof, in accordance with this Agreement. Any and all work by Sound Transit shall be done in a good and

workmanlike manner, in conformity with all applicable engineering, safety, and other statutes, laws, ordinances, regulations, rules, codes, orders, permits, approvals or specifications of any public body or authority having jurisdiction.

- 5.7 All facilities and installations must meet or exceed applicable specifications of the City and be in compliance with all existing federal, state, and local laws, ordinances and regulations.
- 5.8 During any work of any character by Sound Transit at locations of the Light Rail Transit Facilities, and in accordance with the Final Construction Plans, Sound Transit shall support the tracks and roadbed of the Light Rail Transit System, the Light Rail Transit Way and the Public Rights of Way in such a manner as is necessary for the safe operation of the Light Rail Transit System and ordinary use of the Public Right-of-Way.
- 5.9 If, during construction, there is an Emergency the Light Rail Transit System creates, or contributes to, an imminent danger to health, safety, or property that Sound Transit is unable to immediately address, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the Light Rail Transit System without prior notice, and Sound Transit shall pay for costs incurred by the City. The City shall provide notice of such Emergency or other danger to Sound Transit as soon as practicable, taking into consideration the nature and complexity of the Emergency or other imminent danger.
- 5.11 Sound Transit shall promptly repair any and all Public Right-of-Way and public property that is disturbed or damaged during the construction of its Light Rail Transit System to the same condition as existing prior to construction or as required under any applicable permit. In the event Sound Transit does not comply with the foregoing requirement, the City may, upon seven calendar days' advance notice to Sound Transit, take actions to restore the Public Right-of-Way or public property at Sound Transit's sole cost and expense.
- 5.12 Sound Transit's design and construction of the Project is subject to a financial assistance contract between Sound Transit and the FTA. Both parties recognize that the FTA may request a change to this Agreement to comply with its funding requirements. The Parties agree to consider any such request in good faith.

## **6.0 ENTRY NOTICE**

- 6.1 Sound Transit, its employees and agents shall have access to the Public Right-of-Way in connection with Sound Transit's construction, operation, and maintenance of the Light Rail Transit System as is reasonably necessary in accordance with this Agreement and permit conditions established under Right-of-Way Use permits issued for each construction segment; provided, however, except to the extent expressly provided in this Agreement, this right of access shall not be deemed to require the City to take any actions or expend any funds

to enable such persons to exercise such rights of access, and provided further that such access may not unreasonably interfere with or disrupt, other than in ways approved in advance by the City by permit, the use of the Light Rail Transit Way by the City or Third Parties in and along the Light Rail Transit Way.

- 6.2 During construction, Sound Transit shall provide the City at least 48-hours advance written notice before initial entry upon any portion of the Public Right-of-Way for construction purposes.
- 6.3 After completion of construction of the Project, any entry by Sound Transit onto the Public Rights-of-Way that is not pursuant to the Routine Maintenance and Operation of the Light Rail Transit System or for purposes relating to an Emergency shall require (i) advance written notice from Sound Transit to the City not less than ten (10) days prior to Sound Transit's planned entry, with notice to specify the purpose of the entry; and (ii) an approved City Right-of-Way Use permit, which approval shall not be unreasonably withheld, conditioned or delayed, taking into account the nature of the proposed entry.
- 6.4 In order to maintain safe and efficient operations of the Light Rail Transit Facilities, the Parties shall jointly develop standard operating procedures for the City's entry and access to Light Rail Transit Facilities before commencement of Project construction.

## **7.0 OPERATION, MAINTENANCE, AND REPAIR IN STREETS AND RIGHTS-OF-WAY**

- 7.1 Sound Transit shall operate, maintain, and repair its Light Rail Transit System in compliance with all federal, state, and local laws, ordinances, and regulations and practices affecting such system, which includes, by way of example and not limitation, the obligation to operate, maintain, and repair in accordance with the applicable provisions of Bellevue City Code and standards. In addition, the operation, maintenance, and repair shall be performed in a manner consistent with industry standards, with any agreed "standard operating procedures" developed by the parties pursuant to Section 6.4 above, and in such a manner as to minimize disruption to other users of the Public Rights-of-Way. Sound Transit shall exercise reasonable care in the performance of all its activities and shall use industry accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public or to property.
- 7.2 Sound Transit personnel may enter the Light Rail Transit Way for Routine Maintenance and Operation without notice to the City. Maintenance and operations activities that are outside of the Light Rail Transit Way or impact the Public Rights-of-Way shall require permit approval by the City, which approval

shall not be unreasonably withheld or delayed, taking into account the nature of the proposed entry.

- 7.3 Except in cases of Emergency or Routine Maintenance and Operation, Sound Transit's operation, maintenance, or repair of its Light Rail Transit System shall not commence until all required permits have been properly applied for and obtained from the proper City officials and, unless otherwise agreed to by the City, all required associated fees paid, including, but not limited to the costs of permit application review and inspection.
- 7.4 In the event of an Emergency that interrupts or significantly disrupts operation of the Light Rail Transit System and for purposes of taking immediate corrective action, Sound Transit personnel may enter the Public Rights-of-Way as long as such entry is for the sole purpose of addressing the Emergency. Verbal or telephonic notice of the location and manner in which entry is required shall be given to the City's Right-of-Way Use Division immediately upon notice of the Emergency. Written notice via a Right-of-Way Use Permit, including plans for any necessary work required to follow-up on the Emergency action taken shall be provided to the City as soon as is reasonable following the initial Emergency action.
- 7.5 Sound Transit shall promptly repair any and all Public Right-of-Way or other public property that is disturbed or damaged during the operation, maintenance, or repair of its Light Rail Transit System. Public property and Public Right-of-Way must be restored to the same condition as before the disturbance or damage occurred or in accordance with the terms and conditions of any permit issued for the operation, maintenance or repair that resulted in the disturbance or damage.
- 7.6 The City shall have no responsibility for inspecting, maintaining, servicing or repairing any trains or other equipment used by Sound Transit as part of the Light Rail Transit System, but all such equipment shall at all times comply with applicable federal, state, and local governmental requirements.
- 7.7 In the event of an Emergency, or where the Light Rail Transit System creates, or is contributing to, an imminent danger to health, safety, or property that Sound Transit is unable to immediately address, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the Light Rail Transit System without prior notice, and Sound Transit shall pay to the City the cost of any such action undertaken by the City. The City shall provide notice of such danger as soon as practicable thereafter, taking into consideration the nature and complexity of the Emergency or other imminent danger.
- 7.8 If identified and agreed in a future agreement between the parties, upon final acceptance by the City, the City shall assume all maintenance responsibilities for all betterments and improvements to Public Rights-of-Way dedicated to the

City. Until such final acceptance, any betterments and improvements remain the sole responsibility of Sound Transit.

- 7.9 Sound Transit shall, on the request of any third party holding a valid Right-of-Way use or other appropriate permit by a governmental authority, temporarily raise or lower its wires to permit moving of buildings or other loads. Sound Transit may require that the expense of such temporary removal or raising or lowering of wires be paid in advance by the requesting third party

## **8.0 FACILITY LOCATION SIGNS**

- 8.1 Sound Transit, at its sole cost, expense and risk, shall furnish, erect and thereafter maintain signs showing the location of all Sound Transit facilities. Signs shall be in conformance with applicable requirements of Bellevue City Code and Sound Transit shall obtain all necessary permits and approvals for such signage prior to installation.

## **9.0 LIABILITY, INDEMNIFICATION**

- 9.1 Sound Transit shall indemnify, defend, and hold the City harmless from any and all claims, demands, suits, actions, damages, recoveries, judgments, costs, or expenses (including, without limitation, attorneys' fees) arising or growing out of or in connection with or related to, either directly or indirectly, the design, construction, maintenance, operation, repair, removal, occupancy, and use of the Light Rail Transit System in the Light Rail Transit Way, except to the extent such claims arise from the sole or partial negligence, errors or omissions of the City, its employees, servants, and agents.
- 9.2 Consistent with Sound Transit's indemnification obligations herein, the City shall give Sound Transit prompt notice of any claims directly affecting Sound Transit about which the City has received formal notification. Sound Transit shall promptly assume responsibility for the claim or undertake the defense of any litigation on behalf of the City. The City shall cooperate fully with Sound Transit in the defense of any claim associated with this Agreement. The City shall not settle any claim associated with this agreement directly affecting Sound Transit without the prior written consent of Sound Transit, which consent shall not be unreasonably withheld.
- 9.3 Sound Transit expressly assumes potential liability for actions brought by Sound Transit's employees and agents against the City and, solely for the purpose of this indemnification, expressly waives any immunity under the Industrial Insurance Law, Title 51 RCW. Sound Transit acknowledges that this waiver was entered into pursuant to the provisions of RCW 4.24.115 and was the subject of mutual negotiation.

- 9.4 The indemnification obligations provided in this Section shall survive termination of this Agreement.

## **10.0 INSURANCE**

- 10.1 Sound Transit shall maintain, throughout the term of this Agreement and for six (6) years after its termination, an appropriate program of insurance, self-insurance, or any combination thereof in amounts and types sufficient to satisfy its liabilities. When commercial insurance is utilized, Sound Transit shall secure and maintain in effect insurance adequate to protect the City against claims or lawsuits that may arise as a result of the design, construction, operation, maintenance, repair, removal, occupancy, or use of the Light Rail Transit System in the Light Rail Transit Way, including, without limitation: (i) commercial general liability insurance; (ii) workers' compensation insurance (to the extent required by law); (iii) employer's liability insurance; (iv) auto liability coverage for Any auto); (v) environmental liability insurance; and, (vii) during the construction phase, builder's risk.
- 10.2 Sound Transit shall carry such insurance with insurers who are licensed to do business in the State of Washington or self-insure or participate in an insurance pool or pools at levels of coverage or with reserves adequate, in the reasonable judgment of Sound Transit, to protect Sound Transit and the City against loss, and as are ordinarily carried by municipal or privately owned entities engaged in the operation of systems comparable to the Light Rail Transit System. Sound Transit shall also require any contractors or subcontractors working on the Light Rail Transit System in the Light Rail Transit Way to maintain insurance as noted herein and to name the City as an additional insured on their commercial general liability, auto liability, environmental liability. Sound Transit shall also either require any professional services consultants, subconsultants, contractors or subcontractors working on the Light Rail Transit System project to carry appropriate levels of Professional Liability insurance coverage during the course of design, engineering, and construction or Sound Transit may itself acquire such insurance or self-insure the work.
- 10.3 Sound Transit shall file with the City's Risk Manager on an annual basis proof of an appropriate program of insurance, self-insurance, or any combination thereof in amounts and types sufficient to satisfy its liabilities. When commercial insurance is utilized, Sound Transit shall provide the City's Risk Manager with Certificates of Insurance reflecting evidence of the required insurance, naming the City as an additional insured where appropriate, to evidence continued coverage during the term of this Agreement and for six (6) years after its termination. The certificates shall contain a provision that coverage shall not be canceled until at least thirty (30) days' prior written notice has been given to the City.

- 10.4 If Sound Transit fails to maintain the required insurance, the City may order Sound Transit to stop constructing or operating the Light Rail Transit System in the Light Rail Transit Way until the required insurance is obtained.
- 10.5 On City projects impacting the Light Rail Transit Way, the City shall require any contractors or subcontractors to maintain insurance as required by the City in its standard contracts, and to name Sound Transit as an additional insured on their required insurance. The City shall also either require any professional services consultants, subconsultants, contractors or subcontractors working on City projects impacting the Light Rail Transit Way to carry appropriate levels of Professional Liability insurance coverage during the course of design, engineering, and construction or the City may itself acquire such insurance or self-insure the work.

#### **11.0 LIENS**

- 11.1 The Light Rail Transit Way and Light Rail Transit Facilities are not subject to a claim of lien. In the event that any City property becomes subject to any claims for mechanics', artisans' or materialmen's liens, or other encumbrances chargeable to or through Sound Transit that Sound Transit does not contest in good faith, Sound Transit shall promptly, and in any event within thirty (30) days, cause such lien claim or encumbrance to be discharged or released of record (by payment, posting of bond, court deposit or other means), without cost to the City, and shall indemnify the City against all costs and expenses (including attorneys' fees) incurred in discharging and releasing such claim of lien or encumbrance. If any such claim or encumbrance is not so discharged and released, the City may pay or secure the release or discharge thereof at the expense of Sound Transit after first giving Sound Transit five (5) business days' advance notice of its intention to do so. The City shall use its reasonable best efforts to keep Sound Transit's facilities free of all liens that may adversely affect the Light Rail Transit System.
- 11.2 Nothing herein shall preclude Sound Transit's or the City's contest of a claim for lien or other encumbrance chargeable to or through Sound Transit or the City, or of a contract or action upon which the same arose.
- 11.3 Nothing in this Agreement shall be deemed to give, and the City hereby expressly waives, any claim of ownership in and to any part or the whole of the Light Rail Transit Facilities except as may be otherwise provided herein.

## 12.0 DISPUTE RESOLUTION

- 12.1 The parties agree that neither party shall take or join any action in any judicial or administrative forum to challenge actions of the other party associated with this Agreement or the Project, except as set forth herein.
- 12.2 Any disputes or questions of interpretation of this Agreement that may arise between Sound Transit and the City shall be governed under the dispute resolution provisions in this Section. The Parties agree that cooperation and communication are essential to resolving issues efficiently. The Parties agree to exercise their best efforts to resolve any disputes that may arise through this dispute resolution process.
- 12.3 The Parties agree to use their best efforts to prevent and resolve potential sources of conflict at the lowest level.
- 12.4 The Parties agree to use their best efforts to resolve disputes arising out of or related to this Agreement using good faith negotiations by engaging in the following dispute escalation process should any such disputes arise:
- (a) Level One - Sound Transit's Designated Representative and the City's Designated Representative shall meet to discuss and attempt to resolve the dispute in a timely manner. If they cannot resolve the dispute within fourteen (14) calendar days after referral of that dispute to Level One, either party may refer the dispute to Level Two.
  - (b) Level Two - Sound Transit's Executive Director of Design, Engineering and Construction Management and the City's Transportation Director shall meet to discuss and attempt to resolve the dispute, in a timely manner. If they cannot resolve the dispute within fourteen (14) business days after referral of that dispute to Level Two, either party may refer the dispute to Level Three.
  - (c) Level Three - Sound Transit's Chief Executive Officer or Designee and the City Manager or Designee shall meet to discuss and attempt to resolve the dispute in a timely manner.
- 12.5 Except as otherwise specified in this Agreement, in the event the dispute is not resolved at Level Three within fourteen (14) calendar days after referral of that dispute to Level Three, the Parties are free to file suit, seek any available legal remedy, or agree to alternative dispute resolution methods such as mediation. At all times prior to resolution of the dispute, the Parties shall continue to perform any undisputed obligations and make any undisputed required payments under this Agreement in the same manner and under the same terms as existed prior to the dispute. Notwithstanding anything in this Agreement to the contrary, neither party has an obligation to agree to refer the dispute to mediation or other form of

dispute resolution following completion of Level Three of the process described herein. Such agreement may be withheld for any reason or no reason.

### **13.0 DEFAULT**

- 13.1 No party shall be in default under this Agreement unless it has failed to perform under this Agreement for a period of thirty (30) calendar days after written notice of default from the other party. Each notice of default shall specify the nature of the alleged default and the manner in which the default may be cured satisfactorily. If the nature of the alleged default is such that it cannot be reasonably cured within the thirty (30) day period, then commencement of the cure within such time period and the diligent prosecution to completion of the cure shall be deemed a cure; provided that in no event shall a cure take longer than ninety (90) days to complete without mutual written consent. Any dispute regarding the existence of a default or appropriate cure shall be handled as provided in Section 12.

### **14.0 REMEDIES; ENFORCEMENT**

- 14.1 The Parties reserve the right to exercise any and all of the following remedies, singly or in combination, and consistent with the dispute resolution and default sections of this Agreement, in the event the other violates any provision of this MOU:
- (a) Commencing an action at law for monetary damages;
  - (b) Commencing an action for equitable or other relief;
  - (c) Seeking specific performance of any provision that reasonably lends itself to such remedy, and
  - (d) The prevailing party, or substantially prevailing party if no one party prevails entirely, shall be entitled to reasonable attorney fees and costs.
- 14.2 Remedies are cumulative; the exercise of one shall not foreclose the exercise of others.
- 14.3 Neither party shall be relieved of any of its obligations to comply promptly with any provision of this Agreement by reason of any failure by the other party to enforce prompt compliance, and such failure to enforce shall not constitute a waiver of rights or acquiescence in the other party's conduct.

### **15.0 TERM; TERMINATION**

- 15.1 This Agreement shall be effective as of the date the last party signs. Unless sooner terminated pursuant to the terms hereof, this Agreement shall remain in

effect for so long as the Light Rail Transit Way is used for light rail public transportation purposes consistent with all permits and approvals. In the event that the City terminates the MOU pursuant to Section 14.2 of the MOU, all portions of the grant under Section 4.0 above that are inconsistent with the City Requested Design modifications described in Section 5.4 of the MOU shall not be effective and this Agreement shall automatically terminate as to such portions of the Public Right of Way; the remainder of the grant shall remain in effect.

- 15.2 Upon termination of this Agreement, Sound Transit agrees to prepare, execute and deliver to the City all documentation necessary to evidence termination of this Agreement or portion thereof so terminated. No such termination, however, shall relieve the parties of obligations accrued and unsatisfied at such termination.
- 15.3 Upon the cessation of use of the Light Rail Transit Way for the Light Rail Transit System, to the extent any portion of it remaining in the Public Right-of-Way or on any other public property is not removed by Sound Transit, the City, as expressed by ordinance, may deem it abandoned and it shall become the property of the City. If the City does not desire such ownership, Sound Transit shall remove any remaining portion of the Light Rail Transit System at its sole cost.
- 15.4 Sound Transit shall file a written removal plan with the City no later than sixty (60) calendar days following the date of the receipt of any orders directing removal, or any consent to removal, describing the work that will be performed, the manner in which it will be performed, and a schedule for removal by location. The removal plan shall be subject to approval and regulation by the City. The affected property shall be restored to as good or better condition than existed immediately prior to removal.

## **16.0 COVENANTS AND WARRANTIES**

- 16.1 By execution of this Agreement, the City warrants:
- (a) That the City has the full right and authority to enter into and perform this Agreement, and that by entering into or performing this Agreement the City is not in violation of any law, regulation or agreement by which it is bound or to which it is bound or to which it is subject; and
  - (b) That the execution, delivery and performance of this Agreement by the City has been duly authorized by all requisite corporate action, that the signatories for the City hereto are authorized to sign this Agreement, and that, upon approval by the City, the joinder or consent of any other party, including a court or trustee or referee, is not necessary to make valid and effective the execution, delivery and performance of this Agreement.

16.2 By execution of this Agreement, Sound Transit warrants:

- (a) That Sound Transit has full right and authority to enter into and perform this Agreement in accordance with the terms hereof, and by entering into or performing under this Agreement, Sound Transit is not in violation of any of its agency governance rules, or any law, regulation or agreement by which it is bound or to which it is subject; and
- (b) That the execution, delivery and performance of this Agreement by Sound Transit has been duly authorized by all requisite Board action, that the signatories for Sound Transit hereto are authorized to sign this Agreement, and that the joinder or consent of any other party, including a court or trustee or referee, is not necessary to make valid and effective the execution, delivery and performance of this Agreement.

**17.0 RECORDINGS, TAXES AND OTHER CHARGES**

17.1 Sound Transit shall pay all transfer taxes, documentary stamps, recording costs or fees, or any similar expense in connection with the recording or filing of any permits that may be granted hereunder. Sound Transit further agrees that if it is determined by any federal, state, or local governmental authority that the sale, acquisition, license, grant, transfer, or disposition of any part or portion of the Light Rail Transit Facilities or rights herein described requires the payment of any tax, levy, excise, assessment, or charges (including, without limitation, property, sales or use tax) under any statute, regulation, or rule, Sound Transit shall pay the same, plus any penalty and/or interest thereon, directly to said taxing authority and shall hold the City harmless therefrom. Sound Transit shall pay all taxes, levies, excises, assessments, or charges, including any penalties and/or interest thereon, levied or assessed on the Light Rail Transit Facilities, or on account of their existence or use (including increases attributable to such existence or use, and excluding taxes based on the income of the City), and shall indemnify the City against payment thereof. Sound Transit shall have the right to claim, and the City shall reasonably cooperate with Sound Transit in the prosecution of any such claim for refund, rebate, reduction or abatement of such tax(es); provided, however, that such obligation to cooperate shall not apply to claims for refunds, rebates, reduction or abatement of such taxes levied by the City, which such claims shall be processed in accordance with City codes and regulations.

17.2 The City may, in its sole discretion and without obligation, pay any tax, levy, excise, assessment or charge, plus any penalty and/or interest thereon, imposed upon Sound Transit for which Sound Transit is obligated pursuant to this Section if Sound Transit does not pay such tax, levy, excise, assessment, or charge when due. Sound Transit shall reimburse the City for any such payment made pursuant to the previous sentence, plus interest at the prime rate per annum, as published in the Wall Street Journal.

## **18.0 ASSIGNABILITY**

- 18.1 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors or assignees. No assignment hereof or sublease shall be valid for any purpose without the prior written consent of the other party, and any attempt by one party to assign or license the rights or obligations hereunder without prior written consent will give the other party the right, at its written election, immediately to terminate this Agreement or take any other lesser action with respect thereto. The above requirement for consent shall not apply to (i) any governmental entity merger, consolidation, or reorganization, whether voluntary or involuntary, or (ii) a sublease or assignment of this Agreement (in whole or in part) to a governmental entity; provided, however, that no sublease or assignment under (i) or (ii) shall be permitted to a governmental entity not operating, constructing or maintaining a Light Rail Transit System on behalf of Sound Transit, and provided further that no unconsented assignment shall relieve Sound Transit of its obligations and liabilities under this Agreement.
- 18.2 Either party hereto may assign any monetary receivables due them under this Agreement; provided, however, such assignment shall not relieve the assignor of any of its rights or obligations under this Agreement.
- 18.3 Neither this Agreement nor any term or provision hereof, or any inclusion by reference, shall be construed as being for the benefit of any party not a signatory hereto.

## **19.0 DESIGNATED REPRESENTATIVES**

- 19.1 To promote effective intergovernmental cooperation and efficiencies, each party shall designate a representative (“Designated Representative”) who shall be responsible for coordination of communications between the parties and shall act as the point of contact for each party. The Designated Representatives shall communicate regularly to discuss the status of the tasks to be performed, identify upcoming Project decisions and any information or input necessary to inform those decisions, and to resolve any issues or disputes related to the Project, consistent with Section 12.
- 19.2 Communication of issues, changes, or problems that may arise with any aspect of the Project should occur as early as possible in the process, and not wait for specific due dates or deadlines. The Designated Representatives shall use reasonable efforts to provide up-to-date and best available information to the other party promptly after such information is obtained or developed.
- 19.3 Each Designated Representative is also responsible for coordinating the input and work of its agency, consultants, and staff as it relates to the objectives of this Agreement. The Parties reserve the right to change Designated Representatives, by written notice to the other party during the term of this Agreement. Each

party's Designated Representative is identified in Exhibit "C," attached and incorporated herein.

## **20.0 NOTICE**

- 20.1 Unless otherwise provided herein, all notices and communications concerning this Agreement shall be in writing and addressed to the Designated Representative. Any party at any time by written notice to the other party may designate a different address or person to which such notice or communication shall be given.
- 20.2 Unless otherwise provided herein, all notices shall be either: (i) delivered in person, (ii) deposited postage prepaid in the certified mails of the United States, return receipt requested, (iii) delivered by a nationally recognized overnight or same-day courier service that obtains receipts, or (iv) delivered electronically to the other party's Designated Representative as listed herein. However, notice under Section 15.0, Termination, must be delivered in person or by certified mail, return receipt requested.

## **21.0 GENERAL PROVISIONS**

- 21.1 The Parties shall not unreasonably withhold requests for information, approvals or consents provided for in this Agreement; provided, however, that approvals or consents required to be given by vote of the Sound Transit Board or Bellevue City Council are recognized to be legislative actions. The Parties agree to take further actions and execute further documents, either jointly or within their respective powers and authority, to implement the intent of this Agreement provided, however, that where such actions or documents required must be first approved by vote of the Sound Transit Board or Bellevue City Council, such actions are recognized to be legislative actions. The City and Sound Transit agree to work cooperatively with each other to achieve the mutually agreeable goals as set forth in this Agreement.
- 21.2 This Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of Washington. Venue for any action under this Agreement shall be King County, Washington.
- 21.3 This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the City and Sound Transit.
- 21.4 Time is of the essence in every provision of this Agreement. Unless otherwise set forth in this Agreement, the reference to "days" shall mean calendar days. If any time for action occurs on a weekend or legal holiday, then the time period shall be extended automatically to the next business day.

- 21.5 This Agreement is made and entered into for the sole protection and benefit of the Parties hereto and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.
- 21.6 No joint venture or partnership is formed as a result of this Agreement. No employees, agents or subcontractors of one party shall be deemed, or represent themselves to be, employees of any other party.
- 21.7 This Agreement has been reviewed and revised by legal counsel for all parties and no presumption or rule that ambiguity shall be construed against the party drafting the document shall apply to the interpretation or enforcement of this Agreement. The Parties intend this Agreement to be interpreted to the full extent authorized by applicable law.
- 21.8 Each Party shall be responsible for its own costs, including legal fees, incurred in negotiating or finalizing this Agreement, unless otherwise agreed in writing by the Parties.
- 21.9 The Parties shall not be deemed in default with provisions of this Agreement where performance was rendered impossible by war or riots, civil disturbances, floods or other natural catastrophes beyond its control; the unforeseeable unavailability of labor or materials; or labor stoppages or slow-downs, or power outages exceeding back-up power supplies. This Agreement shall not be revoked or a party penalized for such noncompliance, provided that such party takes immediate and diligent steps to bring itself back into compliance and to comply as soon as practicable under the circumstances without unduly endangering the health, safety, and integrity of both parties' employees or property, or the health, safety, and integrity of the public, Public Right-of-Way, public property, or private property.
- 21.10 This Agreement may be amended only by a written instrument executed by each of the Parties hereto.
- 21.11 This Agreement constitutes the entire agreement of the Parties with respect to the subject matters of this Agreement, and supersedes any and all prior negotiations (oral and written), understandings and agreements with respect hereto.
- 21.12 Section headings are intended as information only, and shall not be construed with the substance of the section they caption.
- 21.13 In construction of this Agreement, words used in the singular shall include the plural and the plural the singular, and "or" is used in the inclusive sense, in all cases where such meanings would be appropriate.

21.14 This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all counterparts together shall constitute but one and the same instrument.

**22.0 SEVERABILITY**

22.1 In case any term of this Agreement shall be held invalid, illegal or unenforceable in whole or in part, neither the validity of the remaining part of such term nor the validity of the remaining terms of this Agreement shall in any way be affected thereby.

**IN WITNESS WHEREOF**, each of the parties has executed this Agreement by having its authorized representative affix his/her name in the appropriate space below:

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY (SOUND TRANSIT)      THE CITY OF BELLEVUE

By: Joan M. Earl  
Joan M. Earl, Chief Executive Officer  
Date: November 21, 2011

By: Steven R. Sarkozy  
Steven R. Sarkozy, City Manager  
Date: November 15, 2011

Authorized by Motion No. 2011-77

Authorized by <sup>Res</sup> Ordinance 8322

Approved as to form:  
By: Stephen G. Sheehy  
Stephen G. Sheehy, Legal Counsel  
DESMOND L. BROWN

Approved as to form:  
By: Mary Kate Berens  
Mary Kate Berens, Deputy City Attorney

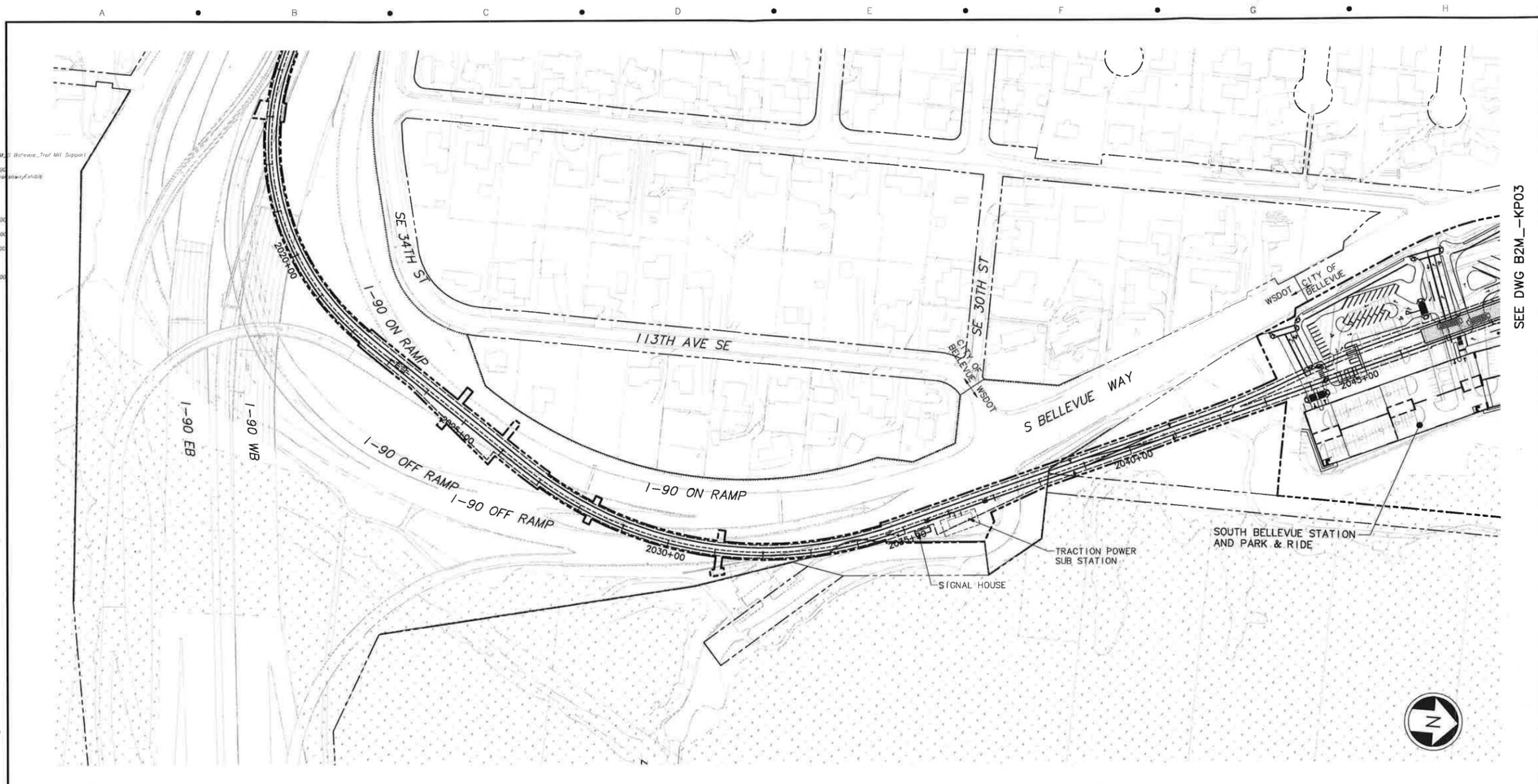
Exhibit List:

- Exhibit A - Transit Way Description
- Exhibit B - General Description of Light Rail Alignment, Station, and Facilities Locations
- Exhibit C - Designated Representatives

# EXHIBIT A

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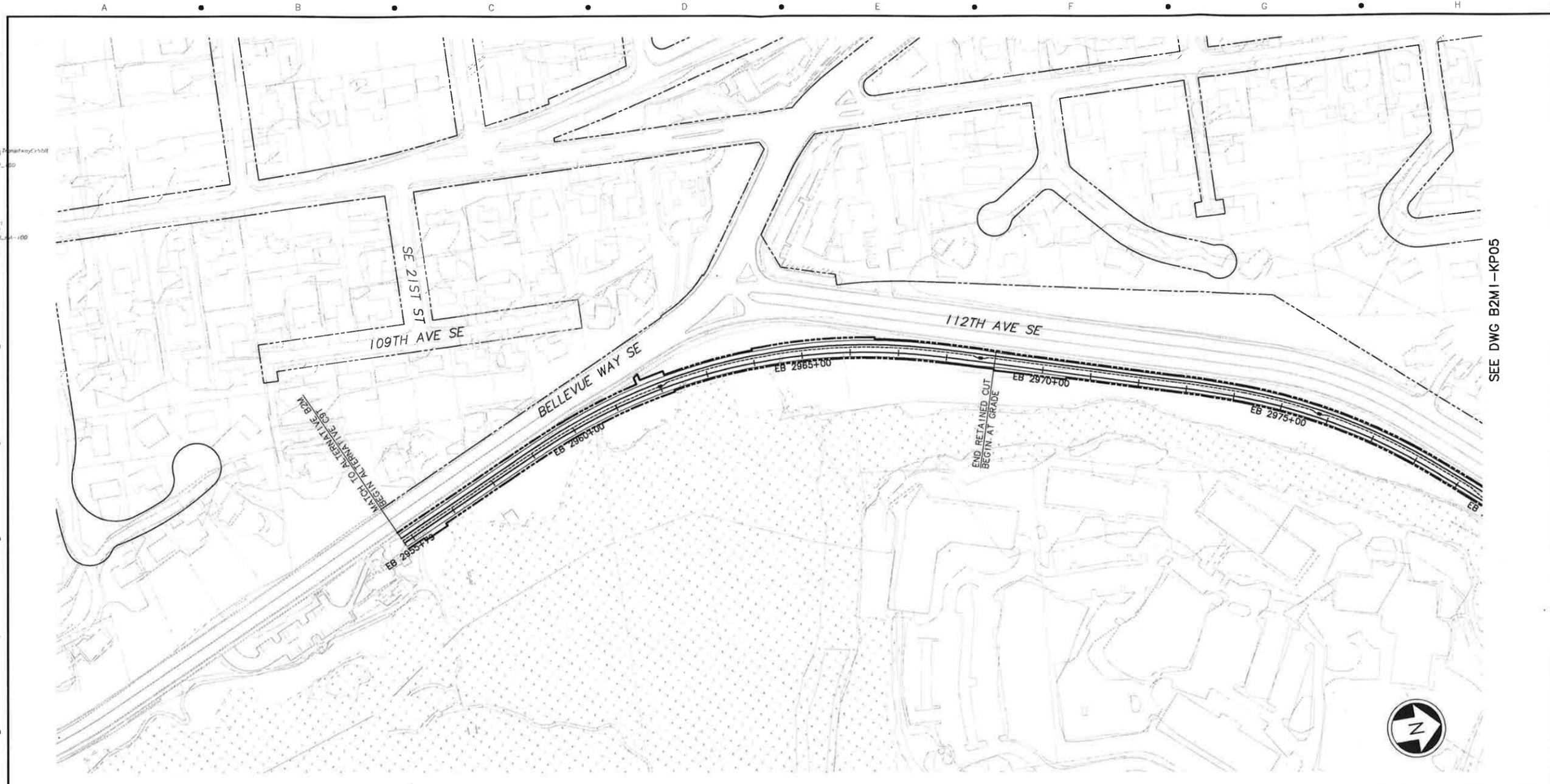


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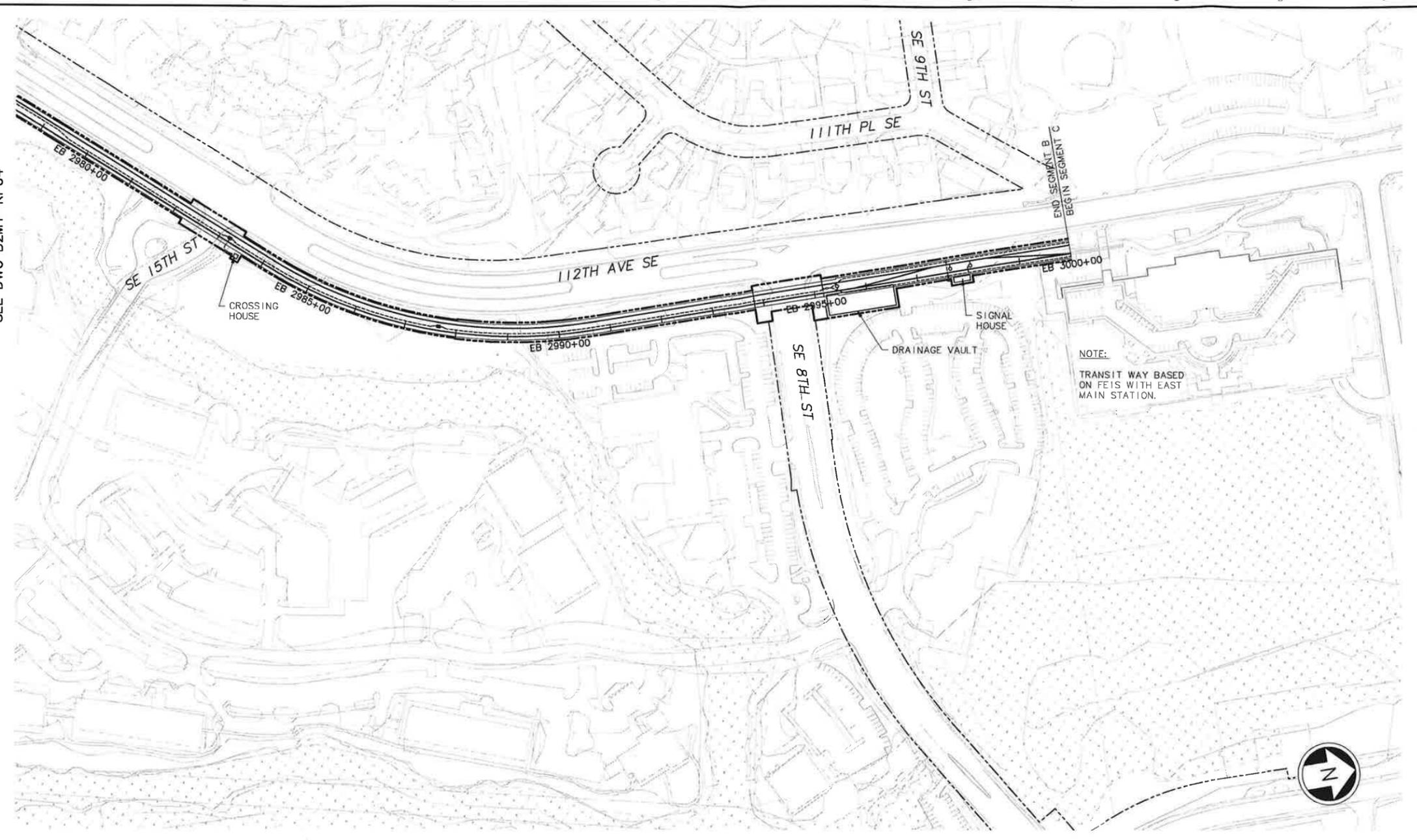
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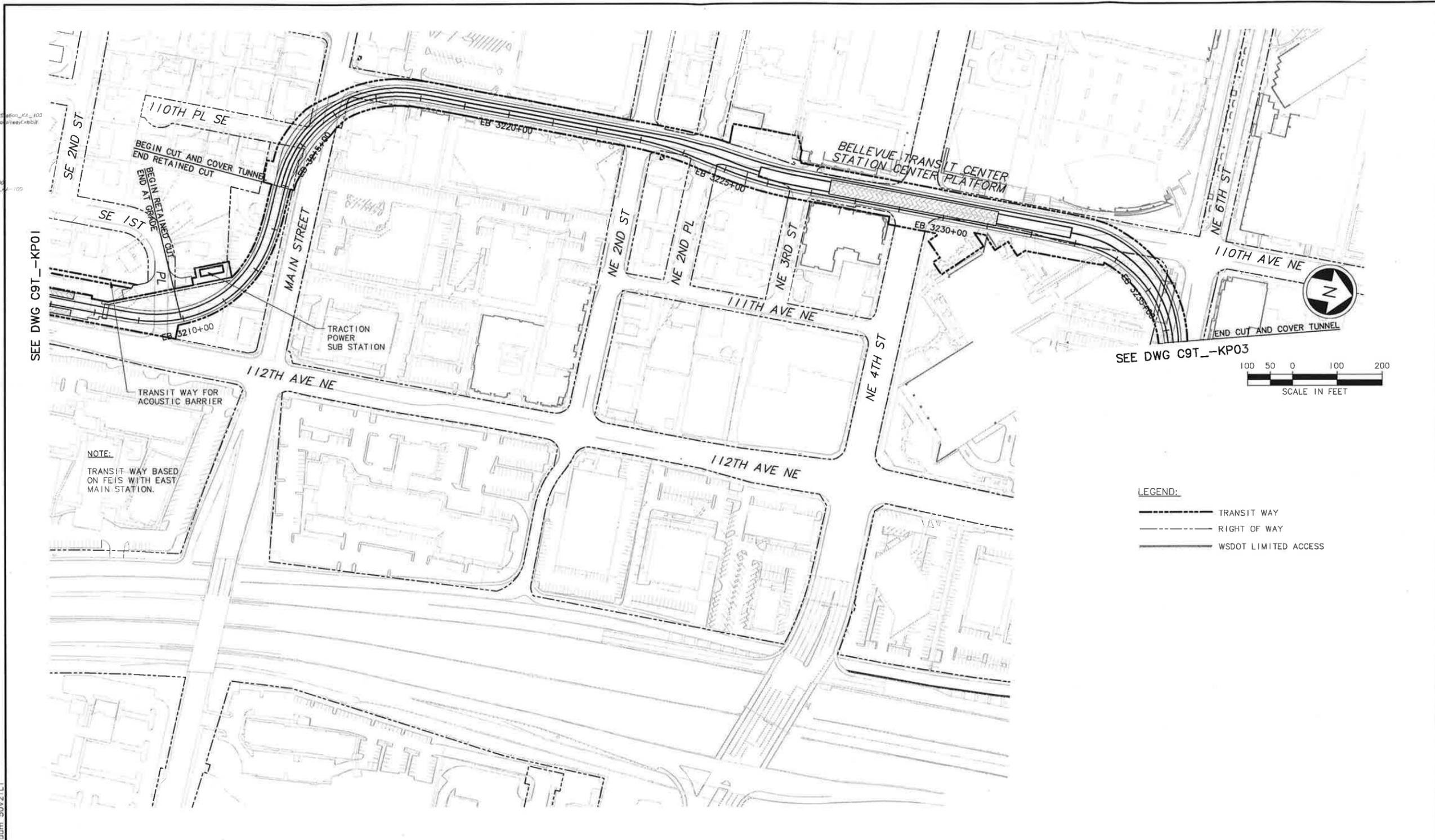
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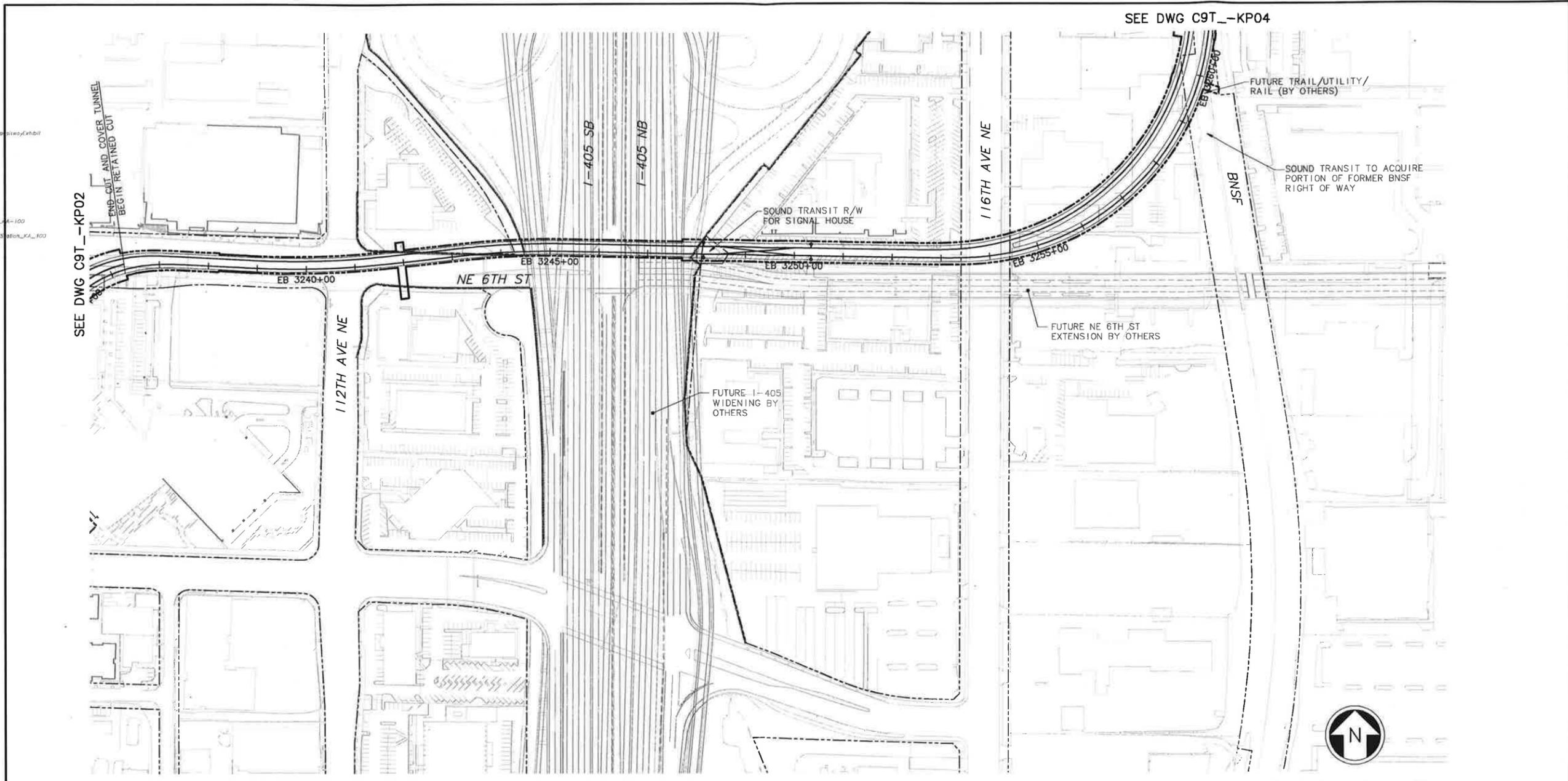
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**EAST CORRIDOR**  
**SEGMENT C - ALT C9T (PREFERRED)**  
 TRANSIT WAY EXHIBIT  
 (BASED ON PE PLANS FINAL SUBMITTAL  
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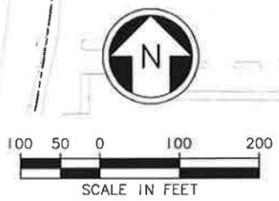
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**EAST CORRIDOR**  
 SEGMENT C - ALT C9T (PREFERRED)  
 TRANSIT WAY EXHIBIT  
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 TRANSIT WAY EXHIBIT  
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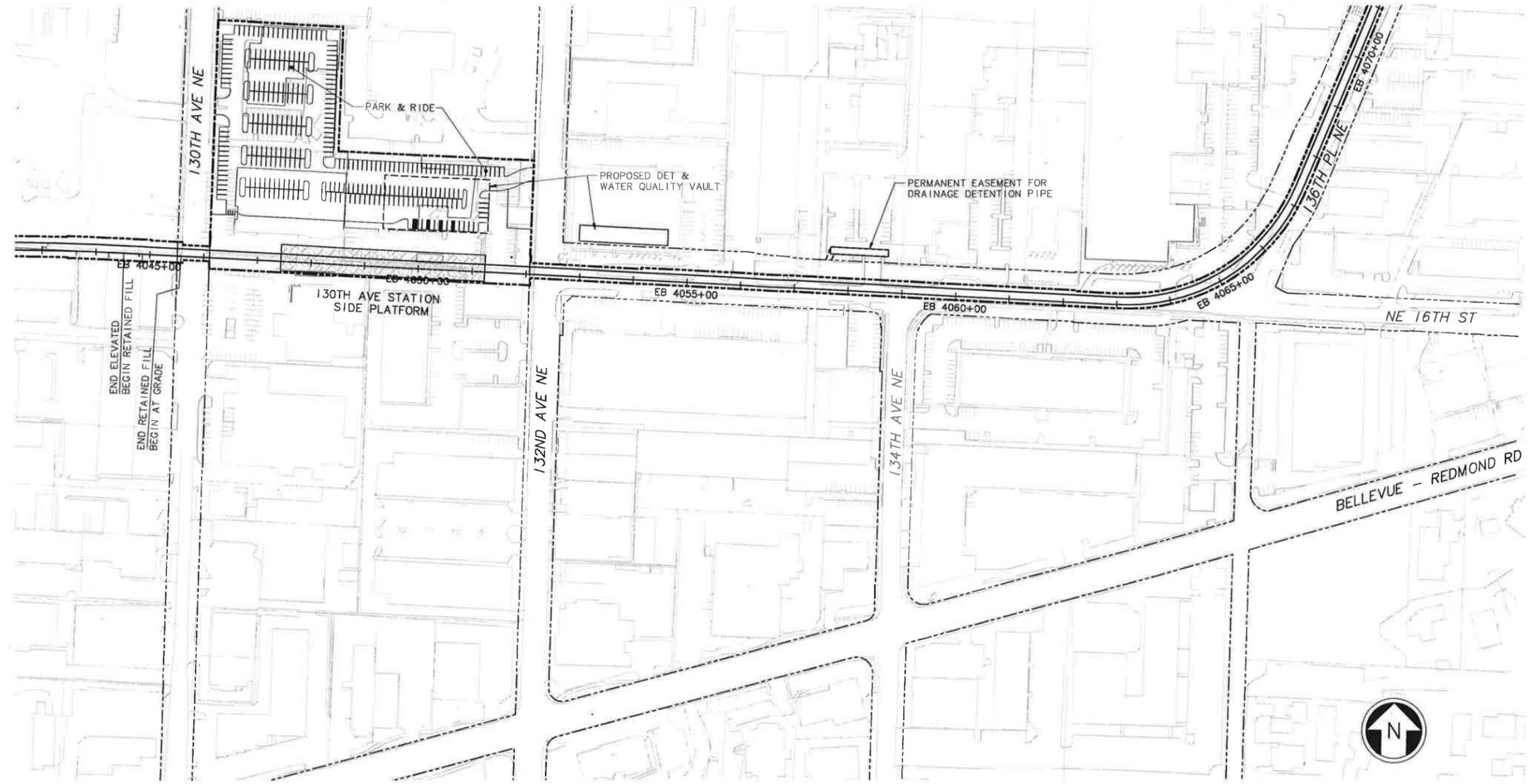
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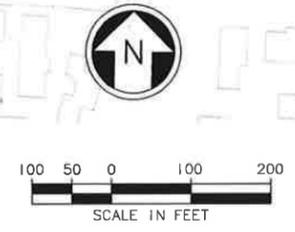
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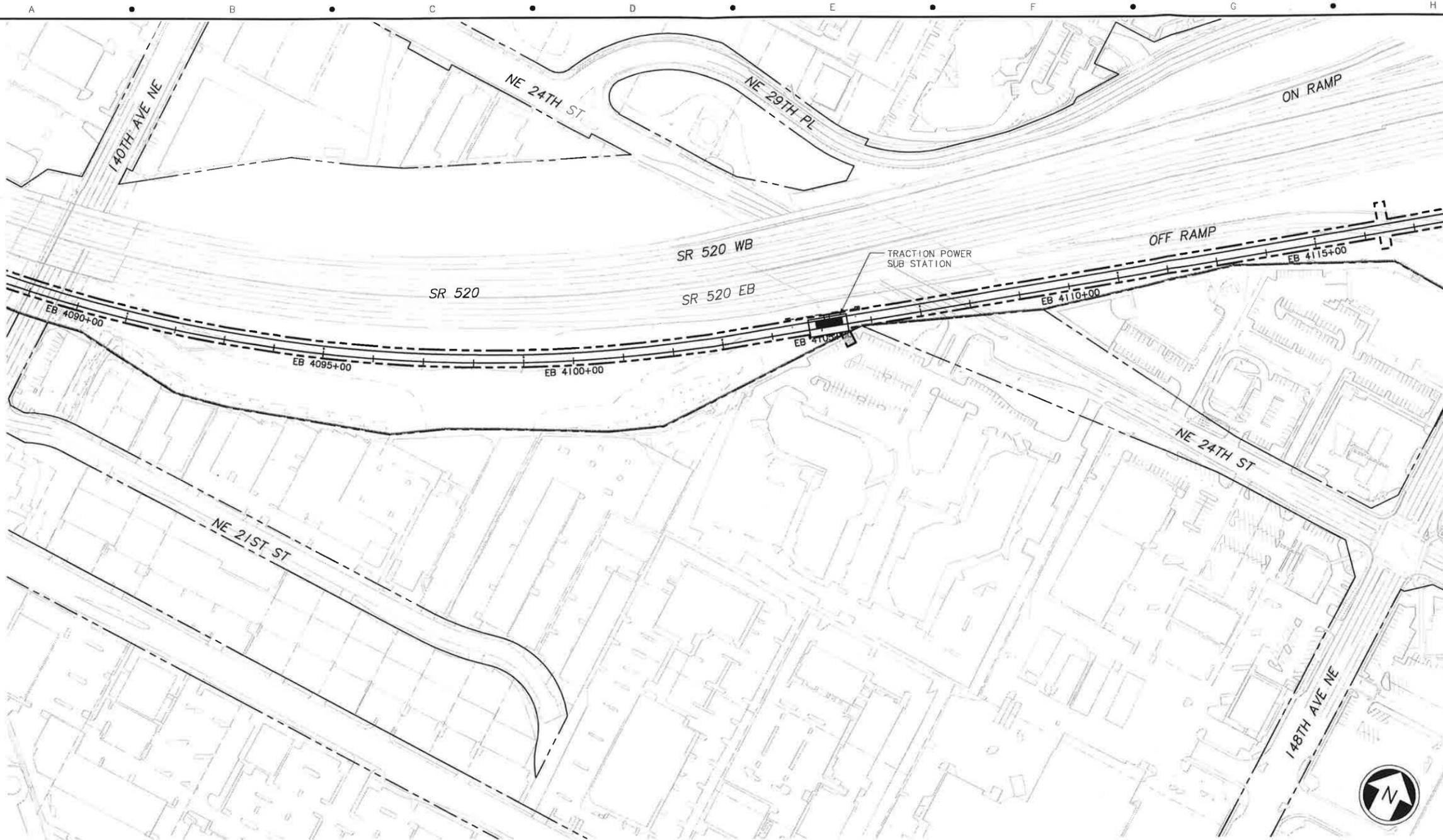
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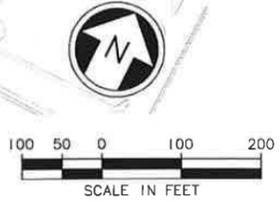
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## **EXHIBIT B**

## Exhibit B: General Description of Light Rail Alignment, Station Locations, and Facilities

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### Segment B: South Bellevue (I-90 to SE 6<sup>th</sup> Street)

#### Route:

Elevated Structure from I-90 to north of the South Bellevue Park-and-Ride on the east side of S Bellevue Way

Retained cut from north of the South Bellevue Park-and-Ride to north of the intersection of S Bellevue Way and 112<sup>th</sup> Ave SE on the east side of S Bellevue Way and 112<sup>th</sup> Ave SE. The retained cut is lidded in front of the Winters House and at the driveway to the Winters House parking lot

At-grade from north of the intersection of S Bellevue Way and 112<sup>th</sup> Ave SE to SE 6<sup>th</sup> Street on the east side of 112<sup>th</sup> Ave SE and at-grade crossings at SE 15<sup>th</sup> Street and SE 8<sup>th</sup> Street

#### Station/Facility Locations:

South Bellevue Station (elevated) and park-and-ride structure at the South Bellevue Park-and-Ride

Traction power substation and signal house on east side of Bellevue Way at SE 30<sup>th</sup> Street

### Segment C: Downtown Bellevue (SE 6<sup>th</sup> Street to BNSF Railway Corridor)

#### Route:

At grade crossing from the east to west side of 112<sup>th</sup> Ave SE at SE 6<sup>th</sup> Street, at-grade from SE 6<sup>th</sup> Street turning west onto the south side of Main Street from the west side of 112<sup>th</sup> Ave SE

Tunnel portal on south side of Main Street, west of 112<sup>th</sup> Ave SE

Tunnel from west of 112<sup>th</sup> Ave SE to NE 6<sup>th</sup> Street under Main Street, 110<sup>th</sup> Ave NE, and NE 6<sup>th</sup> Street

Tunnel portal in the center of NE 6<sup>th</sup> Street, west of 112<sup>th</sup> Ave NE

Elevated structure crossing from center to the north side of NE 6<sup>th</sup> Street, from west of 112<sup>th</sup> Ave NE to the BNSF Railway Corridor, crossing over 112<sup>th</sup> Ave NE, I-405, 116<sup>th</sup> Ave NE, and NE 8<sup>th</sup> Street

#### Station/Facility Locations:

East Main Station (at-grade) on the west side of 112<sup>th</sup> Ave SE south of Main Street

Bellevue Transit Center Station (tunnel) under 110<sup>th</sup> Ave NE south of NE 6<sup>th</sup> Street with entrances on the City Hall property and on the west side of 110<sup>th</sup> north of NE 2<sup>nd</sup> Place

Hospital Station (elevated) in the BNSF Railway Corridor north of NE 8<sup>th</sup> Street

Traction power substation near the southwest corner of Main Street and 112<sup>th</sup> Ave SE

Signal House on east side of I-405 north of future extension of NE 6<sup>th</sup> Street

**Segment D: Downtown Bellevue to Overlake Transit Center (BNSF Railway Corridor to 148<sup>th</sup> Ave NE)**

Route:

Elevated Structure from the Hospital Station, transitioning to at-grade in the BNSF Railway Corridor

Retained cut from east of the BNSF Railway Corridor to west of the West Tributary of Kelsey Creek, crossing under 120<sup>th</sup> Ave NE and 124<sup>th</sup> Ave NE

Elevated from east of 124<sup>th</sup> Ave NE to west of 130<sup>th</sup> Ave NE, crossing over the West Tributary of Kelsey Creek

At-grade from west of 130<sup>th</sup> Ave NE to SR 520 west of 140<sup>th</sup> Ave NE, at-grade crossings at 130<sup>th</sup> Ave NE, 132<sup>nd</sup> Ave NE, 134<sup>th</sup> Ave NE, 136<sup>th</sup> Ave NE, and NE 20<sup>th</sup> Ave

Elevated along the south side of SR 520 from west of 140<sup>th</sup> Ave NE to 148<sup>th</sup> Ave NE (Bellevue City Limits).

Station/Facility Locations:

120<sup>th</sup> Station (retained cut, subject to funding agreement with the property owner) between 120<sup>th</sup> Ave NE and 124<sup>th</sup> Ave NE

130<sup>th</sup> Station (at-grade) and park-and-ride lot between 130<sup>th</sup> Ave NE and 132<sup>nd</sup> Ave NE

Traction power substation near the 120<sup>th</sup> Station

Traction power substation underneath the elevated guideway at NE 24<sup>th</sup> Street

Storage tracks for trains in the former BNSF corridor north of NE 12<sup>th</sup> Street with a light maintenance facility on the east side of the former BNSF corridor

**EXHIBIT C**

Exhibit C: Designated Representatives

Sound Transit

Don Billen,  
401 S Jackson Street  
Seattle, WA 98104-2826  
Phone (206) 398-5002  
Fax (206) 398-5217  
don.billen@soundtransit.org

City of Bellevue

Bernard Van de Kamp, Regional Project Manager  
450 110<sup>th</sup> Ave NE  
Bellevue, WA 98006  
Phone (425) 452-6459  
Fax (425) 452-5272  
bvandekamp@bellevuewa.gov

SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL	)	No. 16-2-06769-7 SEA
TRANSIT AUTHORITY, a regional transit	)	
authority, dba SOUND TRANSIT,	)	ORDER DENYING CITY OF SEATTLE'S
	)	MOTION FOR SUMMARY JUDGMENT
Petitioner,	)	
	)	
vs.	)	Tax Parcel No. 282505-9204
	)	
ANN SEENA JACOBSEN, who also appears of	)	
record as ANN SEENA VERACRUZ,	)	
individually and as trustee for THE ANN	)	
SEENA JACOBSEN LIVING TRUST DATED	)	
APRIL 4, 2002, et al.,	)	
	)	
Respondents.	)	

THIS MATTER came regularly before the Court on Intervenor-Respondent City of Seattle's Motion for Summary Judgment (the "Motion"). The Court has reviewed the pleadings filed in support of and in opposition to the Motion and the files and records herein and is otherwise fully advised in the premises.

Accordingly, it is hereby **ORDERED** that:

Intervenor-Respondent City of Seattle's Motion for Summary Judgment is **DENIED**.

DONE IN OPEN COURT this 20<sup>th</sup> day of December, 2016.

\_\_\_\_\_  
JUDGE KEN SCHUBERT

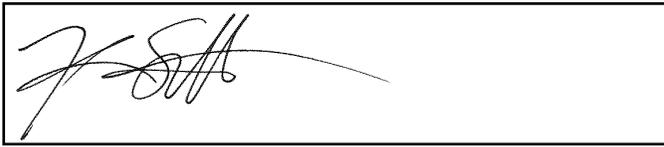
**Presented by:**

MILLER NASH GRAHAM & DUNN LLP

By /s/ Jeffrey A. Beaver  
Jeffrey A. Beaver, WSBA# 16091  
Connor M. O'Brien, WSBA# 40484  
Attorneys for Petitioner Sound Transit

King County Superior Court  
Judicial Electronic Signature Page

Case Number: 16-2-06769-7  
Case Title: CENTRAL PUGET SOUND REGIONAL TRANSIT  
AUTHORITY VS JACOBSEN ET AL  
Document Title: ORDER DENYING SEATTLE'S MSJ  
Signed by: Ken Schubert  
Date: 12/20/2016 10:22:14 AM

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Judge/Commissioner: Ken Schubert

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O=KCDJA, CN="Ken  
Schubert:rumaiXr44hGoUkM4YYhwmw=="

Page 3 of 3

No. 94065-7

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SUPREME COURT  
OF THE STATE OF WASHINGTON

---

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,

Petitioner,

ANN SEENA JACOBSEN, who also appears of record as  
ANN SEENA VERACRUZ, individually and as trustee for  
THE ANN SEENA JACOBSEN LIVING TRUST DATED  
APRIL 4, 2002; ASSURITY LIFE INSURANCE COMPANY,  
a Nebraska company f/k/a WOODMEN ACCIDENT AND LIFE  
COMPANY; SAFEWAY INC., a Delaware corporation;  
CENTURYLINK, INC., a Louisiana corporation;  
PUGET SOUND ENERGY, INC., a Washington corporation;  
CITY OF BELLEVUE, a Washington municipal corporation;  
KING COUNTY, a Washington municipal corporation; and  
ALL UNKNOWN OWNERS and UNKNOWN TENANTS,

Respondents.

---

THE CITY OF SEATTLE'S  
MOTION FOR DISCRETIONARY REVIEW

---

Russell S. King, WSBA #27815  
Kelly Stone, WSBA #45129  
Seattle City Attorney's Office  
701 Fifth Avenue, Suite 2050  
Seattle, WA 98104-7097  
(206) 682-8200

Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Petitioner City of Seattle

A. IDENTITY OF MOVING PARTY

The City of Seattle (“Seattle”) asks for the review of the decision designated in Part B.

B. DECISION

The trial court denied Seattle’s motion for summary judgment, in which Seattle requested a ruling as a matter of law that the Central Puget Sound Regional Transit Authority (“Sound Transit”), a special purpose governmental entity, could not exercise its power of eminent domain to take the property of Seattle, a general purpose local government. The order denying summary judgment was entered on December 20, 2016.

C. ISSUE PRESENTED FOR REVIEW

Where a regional transit authority like Sound Transit, a special purpose unit of local government, is given the power of eminent domain by statute, does RCW 81.112.080(2) authorize it to condemn the property of a general purpose home rule chartered local municipal corporation like Seattle where that statute is silent on conferring such power upon the regional transit authority?

D. STATEMENT OF THE CASE

(1) Factual Background

Sound Transit seeks to condemn portions of an electrical transmission line easement owned by Seattle located within the corporate limits of the City of Bellevue. Seattle opposes Sound Transit’s effort to do so because that easement is part of a vital electrical transmission line

corridor running 100 miles and connecting Seattle City Light's Skagit River hydroelectric dams to a substation in Maple Valley. The corridor is also an integral part of a larger, regional electrical transmission line system that runs from Canada to California.

By its Petition in Eminent Domain (the "Petition") filed in this action, Sound Transit is seeking to condemn portions of a parcel of real property adjacent to 124<sup>th</sup> Avenue in the City of Bellevue bearing the tax parcel number of 282505-9204 (the "Jacobsen Property"). App. at 7. Seattle has an easement over portions of the Jacobsen Property for the "construction, operation, and maintenance of an electrical transmission system" (the "Transmission Line Easement"). App. at 33-34, 38. Seattle acquired the Transmission Line Easement in 1927, and, per the terms of the easement, Seattle has the right to run electrical transmission lines over the Jacobsen Property, and to construct a transmission line tower and related facilities on the property. *Id.* The Transmission Line Easement does not contain any limitations on the voltage of the transmission line Seattle can run over the property, or on the size, type, or location of the transmission line tower that it can construct on the property. *Id.*

The Transmission Line Easement is part of a series of similar easements and fee parcels that form a contiguous corridor running for 100 miles from Seattle's hydroelectric generating facilities located on the

Skagit River down to Seattle's Maple Valley electrical substation ("Transmission Line Corridor"). App. at 34. In the vicinity of the Jacobsen Property, 124<sup>th</sup> Avenue runs in a roughly north/south orientation, and the Transmission Line Corridor runs on both sides of the road. *Id.* Seattle currently operates a 230-kilovolt transmission line within the Transmission Line Corridor that runs parallel to 124<sup>th</sup> Avenue. *Id.* Near the Jacobsen Property, the existing transmission line is on the west side of 124<sup>th</sup> Avenue. *Id.* The existing electrical transmission line and the Transmission Line Corridor are integral parts of a larger, regional electrical transmission line system that runs from Canada to California. *Id.*

For various operational and safety reasons, electrical transmission lines are typically constructed in uniform configurations running in straight lines and, where applicable, in parallel to existing lines. App. at 34. On the Jacobsen Property, the Transmission Line Easement covers an area running 85 feet to the east of the center line of 124<sup>th</sup> Ave. NE along the full length of the property's frontage on that road. *Id.* The western 30' of the Transmission Line Easement on the Jacobsen Property is currently occupied by the right of way for 124<sup>th</sup> Avenue pursuant to a 1970 consent agreement between Seattle and the City of Bellevue. App. at 40.

As reflected in Exhibit 2 to the Petition, App. at 14, the property interests that Sound Transit is seeking to condemn include a strip of property running along the length of 124<sup>th</sup> Avenue NE that Sound Transit seeks to take in fee simple absolute (the “Fee Simple Tract”).<sup>1</sup> (Page 16 of the Appendix to this motion contains an enlargement of a portion of a map filed with the Petition that shows the areas along 124<sup>th</sup> Avenue that Sound Transit is seeking to condemn.) The Fee Simple Tract is the cross-hatched area labeled “COB Fee Take.” As reflected in Exhibits 3-10 to the Petition, App. at 42-113, Sound Transit is also seeking to condemn a series of permanent and temporary wall, water line, drainage, and construction easements across the Jacobsen Property (the “Miscellaneous Easements”). As reflected in the map that was submitted as part of Exhibit 2 to the Petition, the Fee Simple Tract that Sound Transit seeks to condemn is entirely within the Transmission Line Easement. App. at 14. The Miscellaneous Easements that Sound Transit seeks to condemn overlap the Transmission Line Easement in its entirety. *Id.*

Sound Transit is constructing a perpendicular light rail line crossing of 124<sup>th</sup> Avenue. App. at 14. In the vicinity of the Jacobsen Property, 124<sup>th</sup> Avenue is currently a two-lane road, and a portion of the

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<sup>1</sup> While the referenced map was submitted as part of Exhibit 2 to the Petition, it also bears the heading “EXHIBIT ‘C.’”

property being condemned on the Jacobsen Property will be used by the City of Bellevue to permanently widen 124<sup>th</sup> Avenue to add one or more travel lanes. App. at 2, 18-19, 21-22, 24. The widening of 124<sup>th</sup> Avenue in the vicinity of the Jacobsen Property is part of a larger project to widen that road from Northrup Way to NE 14<sup>th</sup> Street. App. at 18-19, 21-22, 24.

Thus, Sound Transit proposed to take Seattle's property for its own purposes – construction of its light rail line – but also to take a sufficient portion of Seattle's easement to allow Bellevue to widen 124<sup>th</sup> Avenue. Sound Transit's proposed taking of property for Bellevue's street modification does not directly implicate its light rail line, the focus of its statutory authority in RCW 81.112.080(2).

(2) Procedural Background

Sound Transit originally named Seattle as a party when it filed this action in the King County Superior Court but, after Seattle filed a response to Sound Transit's motion to adjudicate public use and necessity, Sound Transit voluntarily dismissed Seattle. Following Seattle's voluntary dismissal, Sound Transit then obtained an order and judgment adjudicating public use and necessity for its more limited proposed condemnation on April 29, 2016. That order provides that Sound Transit is taking the property being condemned "subject to the City of Seattle's existing real property interests" and that "the entry of [the] order and judgment had no

effect on the City of Seattle’s existing real property interests in the condemned property.”

Given its persistent concern that its property rights were not being adequately protected, Seattle intervened in the condemnation proceedings in June 2016. At some point thereafter, Sound Transit changed its previous decision to avoid affecting Seattle’s property interest by its condemnation effort and took the position that it intended to condemn Seattle’s property interests. Despite taking that position, Sound Transit never filed anything with the trial court describing the precise nature of the scope of its proposed condemnation of Seattle property.

Ultimately, Seattle filed a motion for summary judgment as to Sound Transit’s authority to take its property at issue here. Sound Transit sought an order declaring that its now broader proposed condemnation was for public use and necessity. The trial court, the Honorable Kenneth Schubert, entered an order of public use and necessity supported by findings and conclusions. Seattle appealed that decision to the Court of Appeals. The trial court also denied Seattle’s motion for summary judgment. Seattle seeks direct discretionary review of that decision.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED<sup>2</sup>

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<sup>2</sup> This Court is fully familiar with the RAP 2.3(b) criteria. Seattle seeks review of a denial of summary judgment. It was entitled to judgment here as a matter of law.

(1) The Trial Court Obviously or Probably Erred in Failing to Apply Long-Standing Precedent Requiring Strict Construction of Statutes Granting Condemnation Authority

This is a straightforward issue of statutory interpretation resolved below on summary judgment, and reviewed de novo by this Court. Our Supreme Court has clearly articulated the principles governing the interpretation of a statute.<sup>3</sup>

The trial court ruled here that Sound Transit, special purpose entity, could exercise the power of eminent domain over property committed to a public use by a first class city. This ruling was obvious or probable error, because (1) Sound Transit's limited statutory authority does not grant it power to condemn Seattle's property currently in public use and (2) Sound Transit's limited statutory authority does not grant it the power to condemn Seattle's property to give to Bellevue so that Bellevue may widen its road.

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CR 56(c).

<sup>3</sup> The primary goal of statutory interpretation is to carry out legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington, this analysis begins by looking at the words of the statute. "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the courts' role. *Cerillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006). If, however, the language of the statute is ambiguous, courts must then construe the statutory language. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993).

(a) The Statute Granting Sound Transit Condemnation Authority Must Be Strictly Construed and Does Not Grant Sound Transit the Power to Condemn Seattle’s Property

The power of eminent domain is an inherent attribute of the State’s sovereignty. *Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 565, 151 P.3d 176 (2007). It is limited by the constitution and must be exercised under lawful procedures. *Id.* Statutes that delegate the State’s sovereign power of eminent domain to its political subdivisions, like a municipal corporation or a special purpose district, are to be strictly construed. When publicly-owned property is involved, the authority to condemn such property must be conveyed in express or necessarily implied terms. *King Cty. v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016, 1018 (1966) (“such power must be given in express terms or by necessary implication; that the power of eminent domain is one of the attributes of sovereignty; and that lands belonging to a State cannot be taken under a general grant of power made by the legislature”). This is true regardless of whether publicly-owned property is currently in public use. *King County*, 68 Wn.2d at 692 (In the absence of “express or necessarily implied legislative authorization” King County was not authorized to condemn property owned by Seattle “regardless of

the use to which that property [was] being put;”); *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 538, 342 P.3d 308 (2015).

In fact, when one political entity attempts to condemn property held by another entity, the rule of strict construction of condemnation statutes applies “with even more force” than in cases involving condemnation of private property. *State v. Superior Court of Chelan Cty.*, 36 Wash. 381, 385, 78 P. 1011 (1904), *superseded by statute on other grounds*, *City of Seattle v. State*, 54 Wn.2d 139, 145, 338 P.2d 126 (1959).

If, after strictly construing a condemnation statute, the condemning entity lacks authority to condemn the property at issue, the petition for eminent domain must be dismissed. *King County*, 68 Wn.2d at 694. The question of public use and necessity is irrelevant, because the entity is without power to condemn the lands at issue. *Chelan Cty.*, 36 Wash. at 386.

Broadly-worded condemnation powers, without specificity as to the property of other sovereigns, are insufficient to grant authority to condemn such property. In *King County*, the County as condemning entity filed an eminent domain petition to condemn property owned by Seattle but located in King County. *King County*, 68 Wn.2d at 689. The statute granting counties condemnation powers was broadly worded, and stated that “[e]very county is hereby authorized and empowered to

condemn land and property within the county for public use.” RCW 8.08.010. The statute was silent as to whether counties had authority to condemn public property, or property owned by a city. This Court affirmed the dismissal of the County’s petition, stating that the broadly worded statute provided *no express or necessarily implied authority* for counties to acquire properties owned by a state or subdivision, regardless of how the property was being used. *King County*, 68 Wn.2d at 691-92.

*King County* controls here, and the trial court committed obvious or probable error in failing to apply this Court’s long-standing authority to the statutory language in question and dismissing Sound Transit’s petition. The statute upon which Sound Transit is relying does not grant it the express or necessarily implied authority to condemn Seattle’s property at issue. It provides in relevant part:

An authority shall have the following powers in addition to the general powers granted by this chapter:

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 including surface, underground, or overhead railways, tramways, busways, buses, bus sets, entrained and linked buses, ferries, or other means of local transportation except taxis, and including escalators, moving sidewalks, personal rapid transit systems or other people-moving systems, passenger terminal and parking facilities and properties, and such other facilities and properties as may be necessary for passenger, vehicular, and vessel access to and from

such people-moving systems, terminal and parking facilities and properties, together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems. ...

Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities. Such agencies are hereby authorized to convey or lease such facilities to an authority or to contract for their joint use on such terms as may be fixed by agreement between the agency and the authority.

RCW 81.112.080.

The statute does not grant Sound Transit specific authority to condemn the property of other political subdivisions. Sound Transit may generally condemn “lands, rights of way, and properties” necessary for high capacity transportation systems. This language is the same general broad authority that in *King County*, was fatal to a county’s claimed right to condemn property of a city.

Furthermore, by requiring Sound Transit to seek *permission* to acquire “public transportation facilities and properties” from other political subdivisions the Legislature impliedly *denied* Sound Transit condemnation power over other types of property. If Sound Transit already had general condemnation authority over all of the property of

other political subdivisions, such authority would directly conflict with the requirement to seek permission to acquire certain categories of property.

The trial court's interpretation of Sound Transit's statutory authority here is obvious or probable error.

(b) Sound Transit Does Not Have Authority to Condemn Seattle's Property So That Bellevue May Widen Its Road

The trial court's ruling regarding Sound Transit's authority is obviously erroneous on a second ground. The trial court concluded that Sound Transit had authority to condemn Seattle's property to allow Bellevue to widen a road.

Sound Transit may not condemn Seattle's property for the purpose of allowing Bellevue to widen its road. In addition to being limited to private property, Sound Transit's condemnation authority is limited to property "necessary for such high capacity transportation systems" as the entity seeks to build. RCW 81.112.080(2). This Court has concluded that "necessary" means "INDISPENSABLE" or "[a]bsolutely required" or "[n]eeded to bring about a certain effect or result." *Thurston Cty. v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002) (approving of strict interpretation of the term and quoting Webster's II New College

Dictionary 731 (1999)).<sup>4</sup> “High capacity transportation systems” are systems “of public transportation services within an urbanized region operating principally on exclusive rights of way, and the supporting services and facilities necessary to implement such a system....” RCW 81.104.015(2).<sup>5</sup>

Widening 124<sup>th</sup> Avenue is not “necessary” for construction of the light rail project. Sound Transit has no statutory authority to condemn Seattle’s property to widen another municipality’s general purpose roadway, likely as part of a political deal between Sound Transit and Bellevue as to light rail in that community. The trial court obviously erred in concluding otherwise.

Because the trial court’s decision is obvious error, or at the very least probable error, the first elements of RAP 2.3(b)(1) and (2) are both met here.

(2) The Trial Court’s Decision Impacts Future Trial Court Proceedings

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<sup>4</sup> Although this Court has permitted a more relaxed definition of “necessary” when applying eminent domain statutes to private property, *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330, 335 (1965), such relaxation would be inappropriate in this context given this Court’s admonition to apply strict construction “with even more force” when the land sought to be condemned is already publicly held. *Chelan Cty.*, 36 Wash. at 385.

<sup>5</sup> RCW 81.104.015(2) is a related statute to RCW 81.112.080, and thus it is appropriate to consider its definition of this specialized term. See *Washington State Dep’t of Revenue v. Fed. Deposit Ins. Corp.*, 190 Wn. App. 150, 162, 359 P.3d 913 (2015).

(a) The Error Renders Further Proceedings Useless, Including Both the Trial and Seattle's Current Direct Appeal from the Finding of Public Use and Necessity

The second element of RAP 2.3(b)(1) is that the obvious error renders further proceedings useless.

The quintessential error rendering further proceedings useless is one where the correct decision will end the proceedings entirely. *See, e.g., Bennett v. Dalton*, 120 Wn. App. 74, 77, 84 P.3d 265 (2004) (trial court erroneously concluded statute of limitations was tolled; Court of Appeals granted discretionary review and reversed, resulting in summary judgment being granted).

This second element is met here because the trial court's error renders useless both the scheduled trial on just compensation *and* the current direct appeal of the trial court's ruling on public use and necessity. Further proceedings are useless because Sound Transit's petition should have been dismissed on the ground it lacked statutory authority to condemn the property that is the subject of the petition. *King County*, 68 Wn.2d at 691-92. This Court can reverse and put the entire proceeding to an end.

(b) The Error Alters the Status Quo Because Sound Transit Will Continue Condemning Other Property During the Years It Will Take to Conduct a Trial and Appeal as of Right

Even if this Court agrees only that the trial court committed probable error, review is still warranted under RAP 2.3(b)(2). The trial court's order substantially limits Seattle's freedom to act in future condemnation actions that Sound Transit will undoubtedly seek, given its new, erroneously granted authority. This is borne out by the fact that, on January 17, 2017, Sound Transit filed a new action to condemn property on the east side of 124<sup>th</sup> Avenue to take additional portions of Seattle's Transmission Line Corridor. In that case, Seattle is currently litigating the question of whether the trial court's erroneous decision here carries preclusive effect. If it does, Seattle's ability to protect its property rights will be greatly diminished. Given the size and scope of the ongoing light rail project and the length of time a trial and subsequent appeal as of right, Seattle should be permitted to have review of this issue now.

Subsection (b)(2) has been interpreted as applying only to decisions that have immediate effect outside the courtroom, and not to orders that merely alter the status of the litigation itself or limit a party's freedom to act in the conduct of the litigation. *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), *review denied*, 182 Wn.2d 1008

(2015); Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545–46 (1986); Judge Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 Seattle U. L. Rev. 91, 92 (2014).

When a governmental entity faces an erroneous trial court order that will be applied to prohibit that entity from defending itself in other litigation, the Court of Appeals has concluded that the second element of RAP 2.3(b)(2) is met. *Ravsten v. Dep't of Labor & Indus.*, 72 Wn. App. 124, 129, 865 P.2d 1 (1993), *review denied*, 123 Wn.2d 1030 (1994). In *Ravsten*, there was a dispute over the percentage share of attorney fees and costs to be paid by the Department of Labor and Industries to an industrial insurance claimant. *Ravsten*, 72 Wn. App. at 129. The claimant asserted that in certain circumstances, the Department could be ordered to pay more than 100% of the attorney fees incurred. *Id.* The superior court ordered remand to the Board of Industrial Insurance Appeals for the taking of new evidence on the matter. However, the Court of Appeals granted discretionary review on the legal issue of whether the Department could ever be ordered to pay more than 100% of the attorney fees and costs actually incurred. *Id.* The Court noted that review was warranted because

until the issue was resolved, the superior court's order "substantially limit[ed] the Department's freedom to act and to determine its proportionate share of attorney fees and costs in other third party recovery cases until the issue [was] decided." *Id.*<sup>6</sup>

The order at issue is having immediate effects outside the courtroom, in other litigation brought by Sound Transit. Sound Transit's light rail development continues, and Sound Transit is seeking to condemn more of Seattle's property in that effort. In response to Seattle's legal arguments regarding its condemnation authority, Sound Transit is arguing that the order constitutes collateral estoppel. Seattle will be constrained by the trial court's ruling until that ruling is reversed. This Court should grant review and resolve the matter to return to Seattle its sovereign power, which has been eviscerated by the trial court's error.

#### F. CONCLUSION

This Court should grant discretionary review. RAP 2.3(b)(1)-(2).

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<sup>6</sup> Apart from this more traditional analysis, the trial court's decision has profound implications beyond this case. Absent immediate review by this Court of Sound Transit's statutory condemnation authority, it will be emboldened to take the property of other local governments, both special and general purpose, without any check on its conduct, to facilitate its expansive light rail plans. This Court can properly take judicial notice of the fact that Proposition 3 was enacted by the voters infusing Sound Transit with \$54 billion to advance its expansion plans. <http://www.king5.com/news/politics/massive-puget-sound-transit-expansion-poised-to-pass/350239164>.

DATED this 21 day of February, 2017.

Respectfully submitted,



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*h/h*

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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

Petitioner,

v.

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

Respondent,

v.

ANN SEENA JACOBSEN, who also appears of  
record as ANN SEENA VERACRUZ,  
individually and as trustee for THE ANN SEENA  
JACOBSEN LIVING TRUST DATED APRIL 4,  
2002; ASSURITY LIFE INSURANCE  
COMPANY, a Nebraska company f/k/a  
WOODMEN ACCIDENT AND LIFE  
COMPANY; SAFEWAY INC., a Delaware  
corporation; CENTURLINK, INC., a Louisiana  
corporation; PUGET SOUND ENERGY, INC., a  
Washington corporation; CITY OF BELLEVUE,  
a Washington municipal corporation; KING  
COUNTY, a Washington municipal corporation;  
and ALL UNKNOWN OWNERS and  
UNKNOWN TENANTS, Respondents.,

Respondent.

NO. 94065-7

RULING DENYING DIRECT  
DISCRETIONARY REVIEW

The city of Seattle seeks direct discretionary review of a superior court  
order denying the city's motion for summary judgment in an action by the Central

*751/6*

Puget Sound Regional Transit Authority (Sound Transit) to condemn a parcel of land within the boundaries of the city of Bellevue for Sound Transit's east link light rail line. The property sought to be condemned is part of a city of Seattle easement that Seattle City Light uses to transmit electricity through power lines from its Skagit River hydroelectric generating facilities. For reasons discussed below, the motion for direct discretionary review is denied.

In 2008 voters approved Sound Transit's plan to extend its light rail system to eastward suburbs of the city of Seattle, including the city of Bellevue. In 2011 Sound Transit adopted a resolution selecting the route the line would take and the location of its stations. At one point the line crosses 124th Avenue Northeast in Bellevue. That same year Sound Transit and the city of Bellevue entered into a memorandum of understanding and transit way agreement recognizing that the track for the light rail line would run in a retained cut under 124th Avenue. The city of Bellevue had longstanding plans to widen the street, and the memorandum of understanding showed a to-be-constructed bridge elevating the roadway above the light rail line. In 2015 Sound Transit and the city of Bellevue entered into an amended memorandum agreeing that the retained cut under 124th Avenue required constructing a new bridge to span the cut. Under the agreements, Sound Transit was to condemn the property necessary for the construction of the bridge and the widening of 124th Avenue at that point, and the city was to construct the bridge and would own and control it.

Meanwhile, Sound Transit passed a resolution authorizing condemnation proceedings to acquire all property necessary for the east link. The 124th Avenue bridge construction and widening project requires the use of a portion of the city of Seattle's electrical transmission easement, which runs along both sides of 124th. In March 2016 Sound Transit filed a petition in eminent domain seeking to acquire the

property at issue in this case, and in November 2016 it filed a motion for an order and judgment adjudicating public use and necessity. The city opposed the motion and also moved for summary judgment, arguing as to both matters that Sound Transit lacked statutory authority to condemn public property and lacked authority in particular to condemn the land it sought because it was not necessary for the light rail project.

The superior court issued separate orders on December 20, 2016, one denying the city's motion for summary judgment and one entering findings of fact and conclusions of law and a judgment of public use and necessity. In its findings and conclusions, the court determined that Sound Transit had authority to condemn public property generally and to condemn property within the city's transmission line easement in particular, and that the property sought was necessary for the project. The city quickly filed a notice of appeal to Division One of the Court of Appeals challenging the judgment of public use and necessity. Subsequently, on January 19, 2017, the superior court entered a revised judgment of public use and necessity.<sup>1</sup> On that same date, the city filed a motion in this court for direct discretionary review of the order denying the city's motion for summary judgment. That motion is now before me for determination.

In seeking discretionary review of the superior court's order denying summary judgment, the city relies on two of the criteria for review: (1) that the superior court committed obvious error that renders further proceedings useless, and (2) that the court committed probable error that substantially alters the status quo or substantially limits the freedom of a party to act. RAP 2.3(b)(1) and 2.3(b)(2). Although the parties devote the bulk of their arguments to whether the superior court obviously or probably erred, I need not address that issue because the city does not

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<sup>1</sup> The revised judgment altered a conclusion of law originally stating that construction, operation, and maintenance of electrical transmission systems is not a public use, having it read instead that an electrical transmission system is a proprietary, not a governmental, function of the city.

show that the cited criteria are otherwise satisfied. First, further proceedings plainly are not rendered “useless” by the superior court’s denial of summary judgment, since the court at the same time issued its judgment of public use and necessity, and that judgment is currently on appeal, where the same challenges to Sound Transit’s authority will be addressed and presumably resolved.<sup>2</sup> I am aware, as the city urges, that discretionary review of an order denying summary judgment may be appropriate where correcting the claimed error would prevent useless litigation. *See, e.g., Douchette v. Bethel Sch. Dist.* 403, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991); *Hartley v. State*, 103 Wn.2d 768, 774, 398 P.2d 77 (1985). But here the claimed error, the correction of which would put an end to further proceedings, is already before the Court of Appeals on direct appeal, as indicated. While it is true that if this court grants review it could bring these proceedings effectively to an end if it reverses the superior court, the same can be said of the appeal. Whether that appeal remains in the Court of Appeals or is transferred to this court (which the city says it will seek to do when the appellate briefing is complete), this matter can ultimately be resolved by that appeal. The appeal was filed first and is already proceeding on an accelerated basis with a more complete record. The city suggests that this court would resolve the matter more quickly, but there is no certainty it would do so. Under the circumstances, I am not persuaded that this court should open a second avenue of review of the same legal issues in the same eminent domain proceeding.<sup>3</sup>

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<sup>2</sup> In its response to Sound Transit’s petition for a judgment of public use and necessity, the city listed as an issue whether the petition should be denied “where Sound Transit does not have the statutory authority to condemn public property or the specific property involved in this condemnation action.” In its judgment of public use and necessity, the superior court concluded as a matter of law that Sound Transit “is authorized by statute to condemn public land, including public land already in public use, for [Sound Transit]’s Project,” and that its authority “extends to the property and property interests held by the City of Seattle for use in connection with its electrical transmission system.” Further, the court determined the property was necessary to the light rail project. The city argues these same issues in this motion for discretionary review.

<sup>3</sup> I note that the city has filed an appeal directly in this court in another eminent domain proceeding in which it challenges Sound Transit’s condemnation authority. *Cent.*

Nor does the superior court's order alter the status quo or substantially limit the freedom of a party to act. This criterion is not satisfied where "a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit." *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), *review denied*, 182 Wn.2d 1008 (2015); *see* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546 (1986). The city urges that the superior court's order limits its ability to protect its property interests in future condemnation actions brought by Sound Transit, and that the order may be given preclusive effect in such actions. But the challenged order does not alone, or even primarily, have that effect. The primary effect on the city's rights in relation to the issues it raises flows from the judgment of public use and necessity, which is now on appeal. The city is therefore in the same position with respect to protecting its interests regardless of whether this court grants direct discretionary review.

Judicial policy generally disfavors discretionary review of interlocutory orders to avoid piecemeal review. *See Hartley*, 103 Wn.2d at 773; *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). To permit fragmentary review would delay the administration of justice to the detriment of litigants and impose an unnecessary burden on appellate courts. *Crosthwaite v. Crosthwaite*, 56 Wn.2d 838, 844, 358 P.2d 978 (1960). Interlocutory review is therefore available only in those rare instances where the claimed error is obvious or probable with defined effects on the usefulness of further court proceedings or on the status quo or the parties' freedom to act. *See Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). Here,

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*Puget Sound Reg'l Transit Auth. v. WR-SRI 120th North LLC*, No. 94255-2. But that appeal is in its very preliminary stages, and it will be some time before the court decides whether to retain it.

direct appeal is available, and has been invoked on an accelerated basis, to review the claimed errors underlying the superior court's approval of Sound Transit's condemnation of the city's property interest. The city does not show that a parallel discretionary review proceeding addressing the same issues is justified. My conclusion that discretionary review is not warranted under RAP 2.3(b) makes it unnecessary to decide whether direct review would be appropriate under RAP 4.2.<sup>4</sup>

The motion for direct discretionary review is denied.

  
DEPUTY COMMISSIONER

March 31, 2017

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<sup>4</sup> Since it is not necessary to decide whether direct review would be appropriate, I necessarily offer no view on that point, and this ruling is without prejudice to any motion a party may file to transfer the pending appeal to this court.

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

*The Court of Appeals*  
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January 10, 2017

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**Page 1 of 2**

Page 2 of 2

Case No. 76252-4-I, Seattle v. Sound Transit

January 10, 2017

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CASE #: 76252-4-I

Central Puget Sound Regional Transit Authority, Respondent v. City of Seattle, Petitioner

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on January 6, 2017, regarding respondent's motion for accelerated disposition:

"The February/March term has been set. The motion to accelerate is granted in part. This case will be set on the next available calendar after the Brief of Respondent has been filed."

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

emp

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KING COUNTY  
SUPERIOR COURT

The Honorable Barbara Linde  
Noting Date: April 14, 2017  
(Without Oral Argument)  
Moving Party: Respondent City of Seattle

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

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

Petitioner,

v.

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

Respondents.

No. 16-2-09223-3 SEA

~~PROPOSED~~

~~GRANTING~~ DENYING  
ORDER GRANTING THE CITY OF  
SEATTLE'S MOTION FOR  
RECONSIDERATION AND VACATING  
ORDER AND JUDGMENT  
ADJUDICATING PUBLIC USE AND  
NECESSITY AS TO THE CITY OF  
SEATTLE

Tax Parcel Nos. 109910-0100 and  
109910-0101

This matter comes before the Court on City of Seattle's Motion for Reconsideration. The  
Court has reviewed and considered the following:

1. City of Seattle's Motion for Reconsideration;
2. The pleadings and documents on file with the Court; and
3. \_\_\_\_\_

Having considered the above and ~~finding that good cause exists to grant Respondent City of  
Seattle's motion~~, the Court hereby ORDERS as follows:

~~ORDER GRANTING THE CITY OF SEATTLE'S  
MOTION FOR RECONSIDERATION AND  
VACATING ORDER AND JUDGMENT  
ADJUDICATING PUBLIC USE AND NECESSITY  
AS TO THE CITY OF SEATTLE - 1~~ DENYING

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DENIED (initials)

1. The City of Seattle's Motion for Reconsideration is ~~GRANTED~~; and

2. This Court's March 27, 2017 Order and Judgment Adjudicating Public Use and  
Necessity as to The City of Seattle ~~is VACATED~~. *remains unchanged.* (initials)

DATED this 14 day of April, 2017.



The Honorable Barbara Linde

Presented by:

PETER S. HOLMES  
Seattle City Attorney

By: \_\_\_\_\_  
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*Attorneys for Respondent The City of Seattle*

(initials) DENYING  
ORDER ~~GRANTING~~ THE CITY OF SEATTLE'S  
MOTION FOR RECONSIDERATION AND  
VACATING ORDER AND JUDGMENT  
ADJUDICATING PUBLIC USE AND NECESSITY  
AS TO THE CITY OF SEATTLE - 2

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

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

Petitioner,

v.

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

Respondents.

No. 16-2-09223-3 SEA

Tax Parcel Nos. 109910-0100 and 109910-0101

NOTICE OF APPEAL TO  
SUPREME COURT OF THE  
STATE OF WASHINGTON

Respondent City of Seattle seeks review by the Supreme Court of the Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity as to the City of Seattle, entered on March 27, 2017, and the Order Denying the City of Seattle's Motion for Reconsideration and Vacating Order and Judgment Adjudicating Public Use and Necessity As to the City of Seattle, entered on April 14, 2017. Copies of the orders are attached here.

DATED this 19th day of April, 2017.

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No. 94406-7

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SUPREME COURT  
OF THE STATE OF WASHINGTON

---

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

Respondent,

v.

SAFEWAY INC., a Delaware corporation, et al,

Petitioners.

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THE CITY OF SEATTLE'S  
STATEMENT OF GROUNDS  
FOR DIRECT REVIEW

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A. INTRODUCTION

The City of Seattle (“Seattle”) and the Central Puget Sound Regional Transit Authority (“Sound Transit”) are in an ongoing dispute over Sound Transit’s statutory authority to condemn Seattle’s electrical transmission corridor easement. Sound Transit wants to condemn significant portions of the easement in order to build light rail and to allow Bellevue to widen a road. However, the condemnation will destroy the current public use of the property and sever a major electrical corridor spanning 100 miles of western Washington. Seattle has already appealed three trial court orders in several condemnation actions concluding Sound Transit does have the authority to do this.

Seattle has now appealed the fourth order related to this issue, and seeks direct review. The trial court has determined that Sound Transit, a special purpose governmental entity, could exercise its power of eminent domain. The condemnation will destroy the public use of the property for electrical transmission, severing the corridor. In making its decision, trial court entered an order of public use and necessity, from which Seattle has filed a notice of appeal to this Court.<sup>1</sup> The court’s decision involves an

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<sup>1</sup> Seattle has appealed one public use and necessity decision as of right (RAP 2.2(a)(4)), to the Court of Appeals in Cause No. 76252-4-I and has sought direct review of two others in Supreme Court Cause Nos. 94065-7 and 94255-2. A significant issue in those cases is the trial court’s decision that Sound Transit had the statutory authority to condemn the same Seattle right of way at issue here. Upon the completion of the briefing

issue of first impression on the interpretation of the scope of RCW 81.112.080(2).

Direct review is appropriate in this case under RAP 4.2(a)(4) because the case involves a matter of significant public importance, addressing the power of subordinate units of government in Washington to take the property of general purpose governments. This Court's review is necessary to vindicate the powers of general purpose governments. If the trial court's decision is permitted to stand, it will have widespread and adverse effects on every city and county government in Washington. Their property, both inside and outside the municipal corporate limits, will be placed at risk of being taken by subordinate units of government, without express direction by the Legislature that such subordinate units of government are authorized to do so.

#### B. ISSUES PRESENTED FOR REVIEW

1. Where a regional transit authority like Sound Transit, a special purpose unit of local government, is given the power of eminent domain by statute, does RCW 81.112.080(2) authorize it to condemn the property of a general purpose home rule chartered local municipal corporation like Seattle where that statute is silent on conferring such power upon the regional transit authority?
2. Does RCW 81.112.080(2) authorize Sound Transit to condemn Seattle's property for the purposes of Bellevue's road widening project?

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in that case, Seattle will move to transfer the Court of Appeals case to this Court pursuant to RAP 4.4.

Statement of Grounds  
for Direct Review - 2

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3. Does the prior public use doctrine prohibit Sound Transit from condemning Seattle's property when that action will destroy its prior existing public use for electrical transmission?

#### C. NATURE OF CASE AND DECISION

The property at issue is the fourth parcel of Seattle property that Sound Transit has sought to condemn in recent months. The property contains portions of an electrical transmission line easement owned by Seattle that is located within the corporate limits of the city of Bellevue. There is currently a 230 kV electrical transmission line on the property (within the transmission line easement) that will be compromised by the condemnation of the property. Due to the extinguishment of its easement rights over the property that will result from the condemnation, Seattle will have no legal right to operate the transmission line over the property.

That easement is part of a vital electrical transmission line corridor running 100 miles and connecting Seattle City Light's Skagit River hydroelectric dams to a substation in Maple Valley. The corridor is also an integral part of a larger, regional electrical transmission line system that runs from Canada to California.

In addition to seeking to condemn property for its light rail line, Sound Transit is also seeking to condemn portions of Seattle's easement in order to give the property to Bellevue to widen a road. The vast majority

of the property being condemned is for the road project and will never be used by Sound Transit for its light rail line.<sup>2</sup> Seattle's existing 230 kV transmission line is located within the 45-foot wide portion of its transmission line easements on the west side of the 124<sup>th</sup> Avenue right of way in Bellevue. Appendix at 3, 7. At the southern end of the take area, Sound Transit is condemning, taking in fee simple, and extinguishing all of Seattle's easement rights over 30.51 feet of the 45-foot wide easement. *Id.* at 3. As a result, there will be insufficient space within the remaining portion of the easement for Seattle to locate any high voltage transmission line because of the mandatory clearances that must be maintained around such lines. *Id.* at 3-4. The condemnation will render the easement unusable for its intended purpose of housing a high voltage transmission line. *Id.*

Because Sound Transit's condemnation will destroy the use of the property for electrical transmission, Seattle intervened in this matter. Sound Transit sought an order declaring that its proposed condemnation was for public use and necessity. The trial court, the Honorable Barbara Linde, entered an order of public use and necessity supported by findings

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<sup>2</sup> Per Exhibit 1 to the trial court's order, the "Sound Transit Fee Acquisition Area" for the perpendicular rail crossing of 124<sup>th</sup> Avenue is approximately 605 square feet, and the "City of Bellevue Fee Acquisition Area" for the street widening, which runs down the full 800+ linear feet of the property's frontage on 124<sup>th</sup> Avenue, is 11,312 square feet.

and conclusions. For the reasons stated below, Seattle has appealed that decision directly to this Court.

D. REASONS WHY DIRECT REVIEW SHOULD BE GRANTED

This case involves an issue of first impression on whether Sound Transit's specific eminent domain authority in RCW 81.112.080(2) can be exercised against the property of a general purpose local government like a city or county. As this is a matter capable of repetition in future cases, this is precisely the type of issue on which this Court grants direct review of under RAP 4.2(a). Direct review by this Court is appropriate to establish the appropriate public policy as to the authority of local governments to exercise the power of eminent domain.

Direct review is also warranted because it is the most efficient and rapid way to resolve Seattle's multiple challenges surrounding this important issue. There are now four matters on appeal involving this issue that can be resolved by this Court in a single opinion. Sound Transit has demonstrated that it will continue condemning and destroying the easement until this Court issues a ruling clarifying Sound Transit's condemnation authority. The multiple matters now on appeal should be accepted by this Court, consolidated, and resolved efficiently.

(1) Direct Review Is Warranted Because This Case Involves Fundamental Questions of Governmental Authority and Vital Public Interest that This Court Will Ultimately Resolve; Time Is of the Essence

Several key contextual principles documenting the public significance of the present controversy warrant direct review by this Court. First, general purpose local governments like cities and counties have a special constitutional status in Washington. Wash. Const. art. I, § 10. Seattle is a home rule charter city. As such, the charters of such home rule governments confer upon them “complete local self-government in municipal affairs.” *Bussell v. Gill*, 58 Wash. 468, 473, 108 Pac. 1080 (1910). Decisions of a home rule local government like Seattle are ultimately the product of a directly elected Council and Mayor. By contrast, Sound Transit is a special purpose unit of local government that does not have a directly elected leadership and is governed largely by unelected administrators; it does not enjoy the same constitutional status for its decision making. Moreover, Seattle is a general purpose unit of Washington local government with broad responsibilities under its charter. By contrast, Sound Transit’s power is focused only on transportation. In this sense, it is no different than the numerous special purpose units of government in Washington that address the operation of ports, schools, or public utilities.

Sound Transit essentially contends, and the trial court agreed, that despite the absence of express authority in RCW 81.112.080 authorizing Sound Transit to condemn the property of other political subdivisions of the State, its transportation plans took precedence over the public decisions of home rule chartered local governments like Seattle, and the use of property to implement such decisions. Again, no statute prioritizes Sound Transit's public actions over those of Seattle, other cities, King County, or all other special purpose districts.

Second, the power of eminent domain is an attribute of the State's sovereignty. Wash. Const. art. I, § 16; *Public Util. Dist. No. 2 of Grant Cty. v. N. American Foreign Trade Zone Industries LLC*, 159 Wn.2d 555, 565, 151 P.3d 176 (2007). The State may delegate that authority to local governments, but when it does, statutes delegating the authority must be *strictly construed. Id.*

Third, with regard to efforts by one government to condemn the property of another, this Court has long vigilantly acted to ensure the Legislature actually conferred such authority on the condemning government. *State v. Superior Court of Chelan Cty.*, 36 Wash. 381, 385, 78 Pac. 1011, 1012 (1904) ("Since the rule prevails that condemnation statutes must be strictly construed as far as they relate to the taking of private property, it follows with even more force that the same rule must

apply where the lands of the sovereign are sought to be taken”),  
*superseded by statute on other grounds, City of Seattle v. State*, 54 Wn.2d  
139, 145, 338 P.2d 126, 129 (1959); *see also, Pub. Util. Dist. No. 1 of  
Okanogan Cty. v. State*, 182 Wn.2d 519, 536, 342 P.3d 308, 316 (2015)  
(when interpreting a statute that is being relied on to support the  
condemnation of state land “[n]ot only does the power to condemn a  
particular type of land need to be statutorily given, but the power to  
condemn such lands when they are held in the state’s governmental  
capacity must be as well”).<sup>3</sup> Special purpose units of government like a  
regional transit authority, for example, have no authority to condemn the  
property of the State itself, or general purpose units of government created  
by the Legislature, *without specific legislative authorization*. It has long  
been clear that a municipality may not condemn state-owned lands without  
clear, express statutory authority. *City of Tacoma v. Taxpayers of  
Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 567 (1957); *P.U.D. No. 1 of  
Okanogan Cty.*, 182 Wn.2d at 536-37.

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<sup>3</sup> While this Court addressed property held in a governmental capacity in *P.U.D. No. 1*, it makes no difference that Seattle’s property here was arguably property held in a proprietary capacity. The core principle – express legislative authorization to condemn the property of a government – has long applied with equal force to such property. *Seattle & Montana Ry. Co. v. State*, 7 Wash. 150, 152, 34 Pac. 551 (1893) (railroad could not condemn state tideland property; Court observed that absent such a restriction, the railroad could take the land on which the Capitol is located for a depot and shops).

While the Court of Appeals is certainly capable of resolving these issues initially, Sound Transit is moving forward with its development, which will destroy the use of the property at issue. The public interests at stake and the issues involved mean that regardless of the outcome, one party will petition this Court for review. These issues can only finally be resolved at this Court, and it makes sense to shorten the timeline and have this Court review the issues now to remove the uncertainty for the governments at issue, as well as the citizens they serve.

(2) Direct Review Is Warranted Because Sound Transit Lacks Statutory Authority to Condemn the Property at Issue

Turning to the specific statute at issue here, the trial court erred by failing to strictly scrutinize the condemnation authority afforded Sound Transit. The court should have focused on the plain language of RCW 81.112.110.<sup>4</sup> See Appendix at 1.

By its plain, unambiguous language, RCW 81.112.080(2) confers eminent domain authority on Sound Transit, but that authority is limited in

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<sup>4</sup> This is required by this Court's approach to statutory interpretation. The core requirement of this Court's statutory interpretation regimen is that courts must execute the intent of the Legislature by implementing the plain language of a statute. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9-10. If the language of the statute is plain, that ends the courts' role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006). Here, the plain language of RCW 81.112.080 controls.

scope. That statute does not *anywhere* explicitly state that Sound Transit may take the property of other units of local government generally, nor the property of general purpose government units specifically. This is a prioritization decision that must rest with the Legislature, not Sound Transit.

Under this Court’s precedents, including cases involving first-class cities, one local government cannot condemn the property of another *without express legislative authorization to do so*. *E.g., King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966) (County could not condemn Seattle’s property “in the absence of express or necessarily implied legislative authorization”). No such express statutory authority is present here.<sup>5</sup> Nor is such expansive authority fairly implied from the language of RCW 81.112.080(2), strictly construed as this Court has directed. Because the Legislature used the word “all” in RCW 81.112.080(2), that does not somehow extend Sound Transit’s condemnation power to property of other governments. In *King County*, this Court rejected a similar contention that a general statutory grant of

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<sup>5</sup> By contrast, the statute at issue in *P.U.D. No. 1 of Okanogan Cty.*, expressly authorized condemnation of other governmental properties. *See also*, RCW 47.52.050 (state transportation condemnation authority); RCW 53.34.170 (port districts); RCW 54.16.050 (PUDs).

eminent domain power as to “property” or “any property” included the right to condemn other governments’ property. *Id.* at 690.

Moreover, the language in RCW 81.112.080(2) that requires Sound Transit to obtain permission from other governments to acquire their transportation property or facilities fairly implies that the Legislature denied Sound Transit the right to condemn the property of other governments when its authority on its core function was so constricted.

Finally, nothing in RCW 81.112.080 gave Sound Transit the authority to condemn Seattle’s property to facilitate Bellevue’s planned expansion of 124<sup>th</sup> Avenue.

This case is one for this Court. While this Court has never definitively interpreted the criteria for review under RAP 4.2(a) generally or RAP 4.2(a)(4) specifically, this case involves a fundamental and urgent issue of broad public importance meriting ultimate resolution by this Court. It is a case of first impression for the interpretation of RCW 81.112.080 (even though the trial court’s interpretation of that statute is obvious or probable error in light of this Court’s principles for condemnation statutes). As such, review is merited.<sup>6</sup> Indeed, this Court

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<sup>6</sup> This Court has frequently concluded that issues of first impression qualify for direct review under RAP 4.2(a). *See, e.g., In re Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011) (use of guardianship fees for advocacy activities); *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city’s response to a public records request was a proper claim of exemption

has granted direct review of first-impression matters of statutory interpretation. *E.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (interpretation of 1981 tort reform legislation). This is a classic instance of a dispute between local governments over the scope of their powers, the type of case this Court takes to definitively identify and delineate the respective powers of those governments,<sup>7</sup> an issue of broad public importance, particularly where Sound Transit's conduct here is so fully capable of repetition. Finally, this issue impacts public resources. This Court grants direct review in cases affecting public resources.<sup>8</sup>

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sufficient to trigger the applicable statute of limitations); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (constitutionality of random drug testing of student athletes); *King Co. v. Central Puget Sound Growth Mgmt. Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000) (recreational use of land in areas designated under GMA for agricultural purposes); *e.g.*, *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 411-12, 899 P.2d 787 (1995) (interpretation of insurance policy excluding government-owned vehicles from the definition of underinsured motor vehicles); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 846, 758 P.2d 968 (1988) (legality of exculpatory clause required of student athletes as a prerequisite to student participation in certain school-related activities); *State v. Gunwall*, 106 Wn.2d 54, 56, 720 P.2d 808 (1986) (admissibility of evidence obtained from a pen register). *See also*, *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014) (court granted review under RAP 13.5 on whether decision on duty to defend should await insurer's discovery on policy defenses).

<sup>7</sup> The Court has granted direct review when a public agency's authority is involved. *See, e.g.*, *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 913 P.2d 375 (1996) (contract dispute between county and professional football team over construction of new football stadium); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) (State authority regarding dangerous roadway).

<sup>8</sup> This Court routinely grants direct review in cases involving issues of public finance. *E.g.*, *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (funding of common school education in Washington); *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005) (MVET levied by Sound Transit and Seattle monorail). This Court has also directly reviewed issues of a local government's

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Ultimately, it makes very little sense, when public funds and public projects are at issue, for a case to be first heard by the Court of Appeals. The added delay and expense to taxpayers is needless when this Court can readily avoid both by granting direct review on a question that undoubtedly will be ultimately resolved by this Court in any event.

(3) Direct Review Is Warranted Because the Condemnation Threatens a Vital Existing Public Use of the Property, and the Trial Court's Decision Does Not Engage In Prior Public Use Analysis

There is also a vital and immediate public interest in resolving whether the prior public use doctrine allows a major electrical transmission corridor to be destroyed in favor of use for public transportation. This is not an academic or parochial question. It potentially impacts every citizen in western Washington in the very near future.

When a use proposed by the condemnor “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.” *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 539, 342 P.3d 308 (2015).

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condemnation authority. *In re City of Seattle, supra; HTK Mgmt. LLC v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005).

Statement of Grounds  
for Direct Review - 13

Talmadge/Fitzpatrick/Tribe  
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Sound Transit cannot dispute that the City's prior use of this property is a public use. The generation and transmission of electrical power has long been recognized as a public use by this Court. *Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cty.*, 8 Wn.2d 136, 143, 111 P.2d 583 (1941), citing *State ex rel. Washington Water Power Co. v. Superior Court for Grant Cty.*, 8 Wn.2d 122, 111 P.2d 577 (1941).

Sound Transit's proposed condemnation would render the easement unusable for an electrical transmission line. Appendix at 4. It would effectively sever the transmission line corridor and destroy this prior public use of the property. *Id.*

Because Sound Transit's proposed use of the condemned property is incompatible with – and would destroy – the transmission line easement, its condemnation is barred by the prior public use doctrine.

As with the question of Sound Transit's statutory authority, the prior public use issue is a legal question that this Court must ultimately resolve. Time is of the essence, as Sound Transit continues to condemn more public property without authority, and threatens to sever a vital electrical transmission corridor.

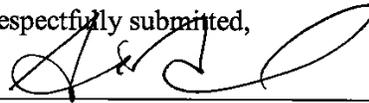
#### E. CONCLUSION

This controversy has an immediate impact on the public interest, and requires this Court's ultimate resolution of the eminent domain

authority of special purpose local governments like Sound Transit. The issue affects not only Seattle, but other Washington cities and counties as well. This Court should grant direct discretionary review. RAP 2.3(b); RAP 4.2(a).

DATED this 8<sup>th</sup> day of May, 2017.

Respectfully submitted,



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Statement of Grounds  
for Direct Review - 15

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No. 94406-7

WASHINGTON STATE SUPREME COURT

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

Respondent,

v.

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

Petitioners.

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ANSWER TO THE CITY OF SEATTLE'S  
STATEMENT OF GROUNDS  
FOR DIRECT REVIEW

---

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## **I. NATURE OF THE CASE AND DECISION**

The trial court correctly ruled that Sound Transit's eminent domain statute allowed it to acquire property within a portion of City Light's electrical transmission line easement, and that the prior public use doctrine does not prohibit the condemnation. The resulting Order and Judgment Adjudicating Public Use and Necessity ("PU&N Judgment") is entirely unremarkable in its application of law to fact.

This matter concerns one of four properties along Sound Transit's future East Link light rail line that are subject to City Light's electrical transmission easement. The four properties are located in the City of Bellevue at the intersection of 124th Avenue NE and the East Link line.<sup>1</sup> Sound Transit successfully moved for entry of an order and judgment adjudicating public use and necessity as to each of the four properties. City Light claimed in its opposition to the PU&N Judgment that Sound

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<sup>1</sup> The other properties are the subject of these pending cases: *Central Puget Sound Reg'l Transit Auth. v. Ann Seena Jacobsen, et al.*, Cause No. 16-2-06769-7 SEA ("*Jacobsen*"), which is pending in the Court of Appeals under Cause No. 76252-4-1; *Central Puget Sound Reg'l Transit Auth. v. WR-SRI 120TH North LLC, et al.*, Cause No. 17-2-00988-1 SEA ("*Spring District*"), which is the subject of a pending motion for direct review to this Court, No. 94255-2; and *Central Puget Sound Reg'l Transit Auth. v. Sternoff, et al.*, Cause No. 16-2-08800-7 SEA ("*Sternoff*"), in which the trial court's public use and necessity order as to the property owner was affirmed by the Court of Appeals under Cause No. 75372-0-I, with review denied by this Court on February 8, 2017, No. 93913-6, and the trial court's public use and necessity order as to City Light was entered on April 19, 2017.

Transit did not have the statutory authority to condemn publicly owned property, that Sound Transit's condemnation of City Light's easement was prohibited by the prior public use doctrine, and that Sound Transit was improperly acting for the City of Bellevue. App. 4-5, 11-12. The trial court correctly rejected those arguments and issued the PU&N Judgment from which City Light now seeks direct review. App. 16-20.

The argument that Sound Transit cannot condemn public property contradicts the plain statutory language and undermines the concept of a "regional transit authority." City Light's related contention that the prior public use doctrine precludes Sound Transit's condemnation of portions of its easement ignores the specifics of Sound Transit's project and decades of case law. And City Light's argument that Sound Transit cannot condemn property for the City of Bellevue misrepresents the facts and is identical to the property owner's argument in *Sternoff*, which was previously rejected by the Court of Appeals, with review denied by this Court. App. 21.

City Light's request for direct review of the PU&N Judgment should be denied for both policy and procedural reasons. Direct review would open an unnecessary, duplicative avenue of review of the same

issue—Sound Transit's authority to condemn portions of City Light's easement along 124th Avenue NE—currently on accelerated review with the Court of Appeals in *Jacobsen*, Cause No. 76252-4-1.<sup>2</sup> City Light's request should also be denied because City Light cannot establish a fundamental and urgent issue of broad public import necessary for acceptance of direct review under RAP 4.2(a)(4).

## **II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Sound Transit's enabling statute gives it broad authority to take "all" property necessary to construct and operate a regional transit system. Does City Light's status as a public utility prevent Sound Transit from condemning portions of City Light's easement to construct and operate its regional light rail project?

2. The prior public use doctrine allows condemnation of publicly owned land already devoted to a public use when the proposed use is compatible with the prior public use. Competing public uses are compatible unless the proposed public use will destroy the existing use or interfere with it to an extent tantamount to destruction. Does the prior public use doctrine prohibit Sound Transit from condemning City Light's

---

<sup>2</sup> City Light filed its brief with the Court of Appeals on May 18, 2017.

property when Sound Transit's project will not destroy City Light's existing use?

3. An agency's project design, construction plans, and designation of property as necessary for the project are conclusive unless the opposing party proves arbitrary and capricious conduct amounting to constructive fraud. Sound Transit's project includes a bridge where 124th Avenue NE will cross the light rail line, designed to accommodate the City of Bellevue's plans to widen 124th Avenue NE. Is the trial court's determination that property needed for the bridge is necessary for Sound Transit's project supported by substantial evidence?

### **III. ANSWER TO GROUNDS FOR DIRECT REVIEW**

#### **A. Accepting Direct Review Would Create Piecemeal Review of the Same Legal Issues Currently on Accelerated Review With the Court of Appeals.**

The trial court, rejecting City Light's arguments to the contrary, correctly ruled that Sound Transit has the authority to condemn city-owned property and the prior public use doctrine does not bar the condemnation. City Light was similarly unsuccessful on these same arguments in opposition to Sound Transit's motions for public use and necessity in the *Jacobsen*, *Spring District*, and *Sternoff* cases, which

involved the same Sound Transit project and the same City Light easement. App. 26-28, 34-36, 40-42. The trial courts also rejected City Light's contention that Sound Transit was improperly condemning portions of the easement for the City of Bellevue. *Id.*

In *Jacobsen*, City Light filed and the trial court also denied a motion for summary judgment dismissing the condemnation for the same reasons ("SJ Denial"). App. 43-45. City Light appealed the PU&N judgment to the Court of Appeals under Cause No. 76252-4-1, and also sought direct discretionary review from this Court of the SJ Denial. App. 46-56, 57-64. On March 31, 2017, this Court denied City Light's petition for direct discretionary review of the SJ Denial because it did not want to open a parallel avenue of review of the same legal issues pending in the Court of Appeals. App. 65-70. By requesting direct review in this case (and in *Spring District*, No. 94255-2) of the same legal issues currently on accelerated appeal in *Jacobsen*, City Light again seeks duplicative, parallel review.

City Light's request should be denied because there is a case further along in the appellate process that will settle the same legal issues between the parties. There is no need for separate direct review of the

PU&N Judgment in this case where a single round of briefs addressing the merits of the same issues in *Jacobsen* will resolve the relevant issues.<sup>3</sup>

**B. City Light Fails to Establish a Basis for Direct Review.**

City Light has failed to establish a basis for direct review. A party may obtain direct review of a trial court decision only if it establishes one of the six grounds listed in RAP 4.2(a). City Light argues only one ground, RAP 4.2(a)(4): "a fundamental and urgent issue of broad public importance meriting ultimate resolution by this Court." City Light fails to demonstrate, however, that its request for direct review is so fundamental and urgent as to require this Court's immediate attention. As a result, the standard for direct review is not met.

City Light wrongly characterizes this case as a vital, pervasive dispute about government powers. The issue here is not nearly so structural, nor so broad. First, this is not a clash of government entities or governmental functions. It is a dispute about a city-owned public utility

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<sup>3</sup> In its Statement of Grounds for Direct Review, City Light suggests that all matters on appeal should be accepted by this Court, consolidated, and resolved "efficiently." See Statement of Grounds for Direct Review at 5. At this time, Sound Transit opposes such consolidation because (1) City Light has not formally submitted a proper motion to consolidate the actions, (2) City Light has not moved for direct review of the *Jacobsen* PU&N Judgment, and (3) Sound Transit fears these maneuvers will further delay Sound Transit's project and thwart the progress that has already been made towards accelerated resolution these issues at the Court of Appeals.

easement on property located outside both the city boundaries and the utility's service area. The subject property, located in the City of Bellevue, is subject to an easement held by City Light in a proprietary capacity. *See Washington Public Power Supply System v. General Electric Company*, 113 Wn.2d 288, 301, 778 P.2d 1047 (1989) (electrical transmission is a proprietary, not governmental, function). Second, these disputes affect only the four properties at the intersection of the East Link light rail line and City Light's 124th Avenue NE transmission corridor.

Moreover, as discussed in more detail below, the PU&N Judgment in this case represents a basic application of the statute's plain language and well established case law. Indeed, Sound Transit's authorizing statute has been consistently interpreted by four different trial courts as authorizing Sound Transit to condemn city-owned property.<sup>4</sup> App. 19-20, 26-28, 34-36, 40-42.

City Light incorrectly asserts that its request for direct review meets the RAP 4.2(a)(4) standard because the scope of Sound Transit's eminent domain authority is an issue of "first impression." First, the rule does not allow direct review merely because a case may raise an issue of

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<sup>4</sup> *See* FN 1, above.

first impression. Second, the cases cited by City Light are distinguishable and do not apply here. *See* Statement of Grounds for Direct Review 11-13. Those cases involve broad questions of public importance or significant constitutional disputes, not a statutory construction issue that impacts four particular properties. This case does not merit direct review simply because no prior appellate case addresses City Light's specific arguments.

**C. The Trial Court Properly Decided the Substantive Issues.**

City Light spends the bulk of its briefing arguing the merits. RCW 81.112.080(2) authorizes Sound Transit to condemn "all" property and rights of way necessary for its transit system and supporting facilities. The trial courts, which have unanimously interpreted this statute to allow Sound Transit to condemn City Light's easements, and ruled the condemnations necessary for Sound Transit's project, are right. Sound Transit briefly addresses these substantive issues below.

1. Sound Transit has the authority to condemn City Light property.

The trial court correctly ruled Sound Transit has statutory authority to condemn publicly owned property. Statutory analysis "always begins with the plain language of the statute." *Rest. Dev., Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). On its face, RCW 81.112.080

specifically authorizes Sound Transit to condemn "all lands, rights-of-way, [and] property necessary for such high capacity transportation systems" (emphasis added). The word "all" distinguishes Sound Transit's condemnation authority from the county-condemnation statute addressed in the case City Light relies on, *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966). And in *Newell v. Loeb*, 77 Wash. 182, 200, 137 P. 811 (1913), this Court held that the legislature's use of the word "all" in a condemnation statute conferred the power to condemn property devoted to a public use.

Considering the statute as a whole compels the same conclusion.<sup>5</sup> RCW 81.112.080 expressly references "rights-of-way" in its grant of condemnation authority. Because "rights-of-way" are routinely publicly owned,<sup>6</sup> it would not make sense for the Legislature to expressly grant condemnation rights over "all ... rights-of-way" if it intended to limit the condemnation authority to only private property.

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<sup>5</sup> "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

<sup>6</sup> See, e.g., RCW 47.04.040; RCW 47.14.010; RCW 47.24.030; RCW 47.28.020; RCW 47.30.030; RCW 47.32.010 (all referring to publicly owned "rights-of-way").

In addition, the statute contains an exception that proves the rule. The statute explicitly excludes from Sound Transit's condemnation power municipally-owned property and facilities already used for public transportation; these may be acquired or used only by consent.

"Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities." RCW 81.112.080

This statutory limitation on Sound Transit's right to condemn publicly owned property already used for public transportation is necessary only because the statute otherwise grants Sound Transit the power to condemn "all" property, including property that is publicly owned. Unlike City Light's proposed construction, this gives effect to all the words in the statute and makes sense: if property is already being used for public transportation, the use of that property for a regional transportation system should be collaborative.

Finally, City Light simply ignores the long line of cases that hold condemnation statutes cannot be construed to defeat the purpose of the

grant.<sup>7</sup> Although "statutes which delegate the state's sovereign power of eminent domain to its political subdivisions are to be strictly construed," the power may be conferred "by necessary implication;" "a statutory grant of such power is not to be so strictly construed as to thwart or defeat an apparent legislative intent or objective." *Devonshire*, 70 Wn.2d at 633 (citing *Welcker*, 65 Wn.2d 677).

Here, City Light would have this Court construe Sound Transit's condemnation authority so strictly as to defeat the purpose of the grant—to enable Sound Transit to design, construct, and operate a comprehensive regional public transportation facility. RCW 81.112.080; *see also* RCW 81.112.010 (statutory purpose). Regional transit authorities building a regional transit system through dense urban areas must be able to condemn publicly owned property to achieve this statutory purpose. Otherwise, every public right of way, public building, public installation, or public property interest would be a potential dead end.

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<sup>7</sup> *See, e.g. City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965); *State ex rel. Devonshire v. King County*, 70 Wn.2d 630, 633, 424 P.2d 913 (1967); *HTK Management, LLC v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 622, 121 P.3d 1166 (2005).

2. The prior public use doctrine does not prohibit condemnation of City Light's property.

City Light's argument that the prior public use doctrine prohibits this condemnation action is similarly misplaced. It ignores the specifics of Sound Transit's project and misapplies the compatibility test invoking the doctrine's protections.

Sound Transit's project is compatible with City Light's use of its easement. See *Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 538-39, 342 P.3d 308 (2015) (competing public uses are incompatible when the proposed public use will destroy the existing use or interfere with it to such an extent as is tantamount to destruction). In this condemnation action, Sound Transit's project takes a small area west of 124th Avenue NE. To the extent this requires reconfiguration of City Light's transmission line at an increased cost, that cost does not destroy City Light's easement or interfere to an extent tantamount to destruction.<sup>8</sup>

Moreover, Sound Transit has consistently assured City Light that Sound Transit's project will not destroy or substantially interfere with City

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<sup>8</sup> The remedy for any restrictions on use or increased costs resulting from Sound Transit's acquisition is found in the just compensation phase of the proceedings, when damages to the remainder caused by the taking are determined, but such damages are irrelevant at this time. See *State v. McDonald*, 98 Wn.2d 521, 525-26, 656 P.2d 1043 (1983) (where only part of a single tract of land is taken, the measure of damages is fair market value of the land taken, together with damages to the land not taken).

Light's use of its easements along 124th Avenue NE. App. 71-72. At the conclusion of Sound Transit's project, City Light will still own a substantial electrical utility easement that it may utilize according to its stated purpose. The two uses are thus compatible.

3. The proposed condemnation is necessary for the East Link project.

Finally, City Light argues briefly that Sound Transit's enabling statute does not allow it to "condemn Seattle's property to facilitate Bellevue's planned expansion of 124th Avenue." Statement of Grounds for Direct Review at 11. This characterization—that Sound Transit is condemning the property on behalf of a third party in an attempt to do an end run around the condemnation process—badly misstates the facts of this case, the East Link project, and Sound Transit's collaboration with the City of Bellevue.

The record does not support City Light's claim that Sound Transit is condemning property for the City of Bellevue. On the contrary, the 124th Avenue NE bridge over the light rail trackway is an integral part of Sound Transit's East Link project. App. at 86. The bridge is well within RCW 81.104.015(2) definition of a "high capacity transportation system," which expressly includes "supporting services and facilities." And it is not

underhanded or impermissible for Sound Transit to design its bridge to accommodate the City of Bellevue's longstanding plans to widen the arterial. Indeed, the owner in *Sternoff* made exactly the same argument City Light is making here, appealed the trial court's necessity finding, which was affirmed, and its Petition for Review to this Court was denied. *Id.*

#### IV. CONCLUSION

Direct review should be denied because reviewing the PU&N Judgment in this case would duplicate appellate proceedings in *Jacobsen* already pending in the Court of Appeals under accelerated review. In addition, City Light exaggerates the nature and scope of the issues presented. This action concerns one of four properties where Sound Transit's project impacts a portion of City Light's proprietary electrical transmission easement, which runs along 124th Avenue NE in Bellevue. It does not affect any governmental function and does not raise "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination," RAP 4.2(a)(4). To the contrary, the resolution of this matter is based on a straightforward reading of plain statutory language, and the trial courts that have considered the issue have

unanimously and consistently ruled that the statute grants Sound Transit the authority to condemn publicly owned property in general, and the prior public use doctrine does not prevent Sound Transit's condemnation of the City Light easement interests at issue. As to the argument that Sound Transit is condemning property for the City of Bellevue, the Court of Appeals has already rejected that same argument and this Court denied the owner's Petition for Review.

DATED this 22<sup>nd</sup> day of May, 2017.

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August 2, 2017

**LETTER SENT BY E-MAIL ONLY**

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Re: Supreme Court No. 94406-7 - Central Puget Sound Regional Transit Authority v. Safeway  
Inc., et al.  
King County Superior Court No. 16-2-09223-3 SEA

Counsel:

The following notation ruling was entered on this date by the Supreme Court Deputy Clerk in  
the above referenced case:

SECOND MOTION FOR EXTENSION OF TIME TO FILE BRIEF OF  
APPELLANT

**"Motion granted. The Appellant's brief should be served and  
filed by August 14, 2017."**

Sincerely,

Erin L. Lennon  
Supreme Court Deputy Clerk

ELL:kms



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The Honorable Mariane Spearman

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

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

Petitioner,

v.

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

Respondents.

No. 17-2-00988-1 SEA

NOTICE OF APPEAL TO  
THE WASHINGTON  
SUPREME COURT

Tax Parcel Nos. 067100-0000, 067100-0020,  
067100-0030, 067100-0040, 067100-0060,  
793330-0000, 793330-0030, and 793330-  
0050

Respondent City of Seattle seeks review by the Supreme Court of the Findings of Fact,  
Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity as to Respondent  
City of Seattle entered on February 13, 2017. A copy of that order is attached hereto.

DATED this 10th day of March, 2017.

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No. 94255-2

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Petitioners.

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THE CITY OF SEATTLE'S  
STATEMENT OF GROUNDS  
FOR DIRECT REVIEW

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A. INTRODUCTION

The City of Seattle (“Seattle”) and the Central Puget Sound Regional Transit Authority (“Sound Transit”) are in an ongoing dispute over Sound Transit’s statutory authority to condemn Seattle’s electrical transmission corridor easement. Sound Transit wants to condemn significant portions of the easement in order to build light rail. However, the condemnation will destroy the current public use of the property and sever a major electrical corridor spanning 100 miles of Western Washington. Seattle has already appealed two trial court orders concluding Sound Transit does have the authority to do this.

Seattle has now appealed the third order related to this issue, and seeks direct review. With respect to a different piece of property in the same electrical transmission corridor, the trial court has determined that Sound Transit, a special purpose governmental entity, could exercise its power of eminent domain. The condemnation will destroy the public use of the property for electrical transmission, severing the corridor. In making its decision, trial court entered an order of public use and necessity, from which Seattle has filed a notice of appeal to this Court.<sup>1</sup>

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<sup>1</sup> Seattle appealed the trial court’s public use and necessity decision as of right (RAP 2.2(a)(4)), to the Court of Appeals in Cause No. 76252-4-I. A significant issue in that case will be the trial court’s decision that Sound Transit had the statutory authority to condemn Seattle’s right of way at issue here. Upon the completion of the briefing in that case, Seattle will move to transfer that case to this Court pursuant to RAP 4.4.

The court's decision involves an issue of first impression on the interpretation of the scope of RCW 81.112.080(2).

Direct review is appropriate in this case under RAP 4.2(a)(4) because the case involves a matter of significant public importance, addressing the power of subordinate units of government in Washington to take the property of general purpose governments. This Court's review is necessary to vindicate the powers of general purpose governments. If the trial court's decision is permitted to stand, it will have widespread and adverse effects on every city and county government in Washington. Their property, both inside and outside the municipal corporate limits, will be placed at risk of being taken by subordinate units of government, without express direction by the Legislature that such subordinate units of government are authorized to do so.

#### B. ISSUES PRESENTED FOR REVIEW

1. Where a regional transit authority like Sound Transit, a special purpose unit of local government, is given the power of eminent domain by statute, does RCW 81.112.080(2) authorize it to condemn the property of a general purpose home rule chartered local municipal corporation like Seattle where that statute is silent on conferring such power upon the regional transit authority?
2. Does the prior public use doctrine prohibit Sound Transit from condemning Seattle's property when that action will destroy its prior existing public use for electrical transmission?

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C. NATURE OF CASE AND DECISION

The property at issue is the second parcel of Seattle property that Sound Transit has sought to condemn in recent months. The property contains portions of an electrical transmission line easement owned by Seattle that is located within the corporate limits of the city of Bellevue. There is currently a 230 kV electrical transmission line on the property (within the transmission line easement) that will be compromised by the condemnation of the property. Because Seattle will not have easement rights over the property, Seattle will have no legal right to operate the transmission line over the property.

That easement is part of a vital electrical transmission line corridor running 100 miles and connecting Seattle City Light's Skagit River hydroelectric dams to a substation in Maple Valley. The corridor is also an integral part of a larger, regional electrical transmission line system that runs from Canada to California.

Sound Transit first sought to condemn portions of Seattle's easement in order to give the property to Bellevue to widen a road. Seattle appealed the trial court's partial summary judgment and public use and necessity ("PUN") rulings on the grounds that Sound Transit lacked statutory authority to condemn the property at issue.

Sound Transit now seeks to condemn a different portion of the same easement property. It will destroy the use of the property for electrical transmission. Based on a concern that its property interests were not being adequately protected, Seattle intervened in this matter. Sound Transit sought an order declaring that its proposed condemnation was for public use and necessity. The trial court, the Honorable Mariane Spearman, entered an order of public use and necessity supported by findings and conclusions. For the reasons stated below, Seattle has appealed that decision directly to this Court.<sup>2</sup>

D. REASONS WHY DIRECT REVIEW SHOULD BE GRANTED

This case involves an issue of first impression on whether Sound Transit's specific eminent domain authority in RCW 81.112.080(2) can be exercised against the property of a general purpose local government like a city or county. As this is a matter capable of repetition in future cases, this is precisely the type of issue on which this Court grants direct review of under RAP 4.2(a). Direct review by this Court is appropriate to establish the appropriate public policy as to the authority of local governments to exercise the power of eminent domain.

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<sup>2</sup> Regarding Sound Transit's prior condemnation, Seattle has filed a notice of appeal to the Court of Appeals from the trial court's PUN order, and is seeking direct discretionary review from the trial court's order granting Sound Transit partial summary judgment on the issue of the scope of its statutory authority.

Direct review is also warranted because it is the most efficient and rapid way to resolve Seattle's multiple challenges surrounding this important issue. There are now three matters on appeal involving this issue that can be resolved by this Court in a single opinion. Sound Transit has demonstrated that it will continue condemning and destroying the easement until this Court issues a ruling clarifying Sound Transit's condemnation authority. The multiple matters now on appeal should be accepted by this Court, consolidated, and resolved efficiently.

(1) Direct Review Is Warranted Because This Case Involves Fundamental Questions of Governmental Authority and Vital Public Interest that This Court Will Ultimately Resolve; Time Is of the Essence

Several key contextual principles documenting the public significance of the present controversy warrant direct review by this Court. First, general purpose local governments like cities and counties have a special constitutional status in Washington. Wash. Const. art. I, § 10. Seattle is a home rule charter city. As such, the charters of such home rule governments confer upon them "complete local self-government in municipal affairs." *Bussell v. Gill*, 58 Wash. 468, 473, 108 Pac. 1080 (1910). Decisions of a home rule local government like Seattle are ultimately the product of a directly elected Council and Mayor. By contrast, Sound Transit is a special purpose unit of local government that

does not have a directly elected leadership and is governed largely by unelected administrators; it does not enjoy the same constitutional status for its decision making. Moreover, Seattle is a general purpose unit of Washington local government with broad responsibilities under its charter. By contrast, Sound Transit's power is focused only on transportation. In this sense, it is no different than the numerous special purpose units of government in Washington that address the operation of ports, schools, or public utilities.

Sound Transit essentially contends, and the trial court agreed, despite the absence of express authority in RCW 81.112.080 authorizing Sound Transit to condemn the property of other political subdivisions of the State, that its transportation plans took precedence over the public decision, and the use of property to implement it, of home rule chartered local governments like Seattle. Again, no statute prioritizes Sound Transit's public actions over those of Seattle, other cities, King County, or all other special purpose districts.

Second, the power of eminent domain is an attribute of the State's sovereignty. Wash. Const. art. I, § 16; *Public. Util. Dist. No. 2 of Grant Cty. v. N. American Foreign Trade Zone Industries LLC*, 159 Wn.2d 555, 565, 151 P.3d 176 (2007). The State may delegate that authority to local

governments, but when it does, statutes delegating the authority must be *strictly construed. Id.*

Finally, with regard to efforts by one government to condemn the property of another, this Court has long vigilantly acted to ensure the Legislature actually conferred such authority on the condemning government. *State v. Superior Court of Chelan Cty.*, 36 Wash. 381, 385, 78 Pac. 1011, 1012 (1904) (“Since the rule prevails that condemnation statutes must be strictly construed as far as they relate to the taking of private property, it follows with even more force that the same rule must apply where the lands of the sovereign are sought to be taken.”), *superseded by statute on other grounds, City of Seattle v. State*, 54 Wn.2d 139, 145, 338 P.2d 126, 129 (1959); *see also, Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 536, 342 P.3d 308, 316 (2015) (When interpreting a statute that is being relied on to support the condemnation of state land “[n]ot only does the power to condemn a particular type of land need to be statutorily given, but the power to condemn such lands when they are held in the state’s governmental capacity must be as well.”).<sup>3</sup> Special purpose units of government like a

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<sup>3</sup> While this Court addressed property held in a governmental capacity in *P.U.D. No. 1*, it makes no difference that Seattle’s property here was arguably property held in a proprietary capacity. The core principle – express legislative authorization to condemn the property of a government – has long applied with equal force to such property. *Seattle & Montana Ry. Co. v. State*, 7 Wash. 150, 152, 34 Pac. 551 (1893)

regional transit authority, for example, have no authority to condemn the property of the State itself, or general purpose units of government created by the Legislature, *without specific legislative authorization*. It has long been clear that a municipality may not condemn state-owned lands without clear, express statutory authority. *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 567 (1957); *P.U.D. No. 1 of Okanogan Cty.*, 182 Wn.2d at 536-37.

While the Court of Appeals is certainly capable of resolving these issues initially, time is of the essence because Sound Transit is moving forward with its development, which will destroy the use of the property at issue. Knowing that these issues can only finally be resolved at this Court, it makes sense to shorten the timeline and have this Court review the issues now to remove the uncertainty for the governments at issue, as well as the citizens they serve.

(2) Direct Review Is Warranted Because Sound Transit Lacks Statutory Authority to Condemn the Property at Issue

Turning to the specific statute at issue here, the trial court erred by failing to strictly scrutinize the condemnation authority afforded Sound

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(railroad could not condemn state tideland property; Court observed that absent such a restriction, the railroad could take the land on which the Capitol is located for a depot and shops).

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Transit. The court should have focused on the plain language of RCW 81.112.110.<sup>4</sup> See Appendix.

By its plain, unambiguous language, RCW 81.112.080(2) confers eminent domain authority on Sound Transit, but that authority is limited in scope. That statute affords Sound Transit condemnation authority no greater than that afforded to first-class cities. Assuming that the statute addresses the substantive scope of Sound Transit's powers as opposed to the procedures for condemnation, as Seattle argued below, RCW 81.112.080(2) does not *anywhere* explicitly state that Sound Transit may take the property of other units of local government generally, nor the property of general purpose government units specifically.<sup>5</sup> This is a

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<sup>4</sup> This is required by this Court's approach to statutory interpretation. The core requirement of this Court's statutory interpretation regimen is that courts must execute the intent of the Legislature by implementing the plain language of a statute. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Campbell & Gwinn, L.L.C.*, 146 Wn.2d at 9-10. If the language of the statute is plain, that ends the courts role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006). Here, the plain language of RCW 81.112.080 controls.

<sup>5</sup> RCW 35.22.280 states in pertinent part:

Any city of the first class shall have power:

...

(3) To control the finances and property of the corporation, and to acquire, by purchase or otherwise, such lands and other property as may be necessary for any part of the corporate uses provided for by its charter, and to dispose of any such property as the interests of the corporation may, from time to time, require;

prioritization decision that must rest with the Legislature, not Sound Transit.

Under this Court’s precedents, including cases involving first-class cities, one local government cannot condemn the property of another *without express legislative authorization to do so*. *E.g., King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966) (County could not condemn Seattle’s property “in the absence of express or necessarily implied legislative authorization”). No such express statutory authority is present here.<sup>6</sup> Nor is such expansive authority fairly implied from the language of RCW 81.112.080(2), strictly construed as this Court has directed. Because the Legislature used the word “all” in RCW 81.112.080(2), that does not somehow extend Sound Transit’s

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...

(6) To purchase or appropriate private property within or without its corporate limits, for its corporate uses, upon making just compensation to the owners thereof, and to institute and maintain such proceedings as may be authorized by the general laws of the state for the appropriation of private property for public use;

This Court has held that a first-class city’s eminent domain power must be expressly authorized by the Legislature, as a municipality has no inherent eminent domain power, *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965), and such delegated statutory authority must be strictly construed. *In re City of Seattle*, 96 Wn.2d 616, 629, 636 P.2d 549 (1981).

<sup>6</sup> By contrast, the statute at issue in *P.U.D. No. 1 of Okanogan Cty.*, expressly authorized condemnation of other governmental properties. *See also*, RCW 47.52.050 (state transportation condemnation authority); RCW 53.34.170 (port districts); RCW 54.16.050 (PUDs).

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condemnation power to property of other governments. In *King County*, this Court rejected a similar contention that a general statutory grant of eminent domain power as to “property” or “any property” included the right to condemn other governments’ property. *Id.* at 690.

Moreover, the language in RCW 81.112.080(2) that requires Sound Transit to obtain permission from other governments to acquire their transportation property or facilities fairly implies that the Legislature denied Sound Transit the right to condemn the property of other governments when its authority on its core function was so constricted.

This case is one for this Court. While this Court has never definitively interpreted the criteria for review under RAP 4.2(a) generally or RAP 4.2(a)(4) specifically, this case involves a fundamental and urgent issue of broad public importance meriting ultimate resolution by this Court. It is a case of first impression for the interpretation of RCW 81.112.080 (even though the trial court’s interpretation of that statute is obvious or probable error in light of this Court’s principles for condemnation statutes). As such, review is merited.<sup>7</sup> Indeed, this Court

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<sup>7</sup> This Court has frequently concluded that issues of first impression qualify for direct review under RAP 4.2(a). *See, e.g., In re Guardianship of Lamb*, 173 Wn.2d 173, 265 P.3d 876 (2011) (use of guardianship fees for advocacy activities); *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city’s response to a public records request was a proper claim of exemption sufficient to trigger the applicable statute of limitations); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (constitutionality of random drug testing of student athletes); *King Co. v. Central Puget Sound Growth Mgmt. Hearings Board*,

has granted direct review of first-impression matters of statutory interpretation. *E.g.*, *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (interpretation of 1981 tort reform legislation). This is a classic instance of a dispute between local governments over the scope of their powers, the type of case this Court takes to definitively identify and delineate the respective powers of those governments,<sup>8</sup> an issue of broad public importance, particularly where Sound Transit's conduct here is so fully capable of repetition. Finally, this issue impacts public resources. This Court grants direct review in cases affecting public resources.<sup>9</sup>

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142 Wn.2d 543, 14 P.3d 133 (2000) (recreational use of land in areas designated under GMA for agricultural purposes); *e.g.*, *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 411-12, 899 P.2d 787 (1995) (interpretation of insurance policy excluding government-owned vehicles from the definition of underinsured motor vehicles); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 846, 758 P.2d 968 (1988) (legality of exculpatory clause required of student athletes as a prerequisite to student participation in certain school-related activities); *State v. Gunwall*, 106 Wn.2d 54, 56, 720 P.2d 808 (1986) (admissibility of evidence obtained from a pen register). *See also*, *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014) (court granted review under RAP 13.5 on whether decision on duty to defend should await insurer's discovery on policy defenses).

<sup>8</sup> The Court has granted direct review when a public agency's authority is involved. *See, e.g.*, *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 913 P.2d 375 (1996) (contract dispute between county and professional football team over construction of new football stadium); *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) (State authority regarding dangerous roadway).

<sup>9</sup> This Court routinely grants direct review in cases involving issues of public finance. *E.g.*, *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (funding of common school education in Washington); *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005) (MVET levied by Sound Transit and Seattle monorail). This Court has also directly reviewed issues of a local government's condemnation authority. *In re City of Seattle, supra*; *HTK Mgmt. LLC v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005).

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Ultimately, it makes very little sense, when public funds and public projects are at issue, for a case to be first heard by the Court of Appeals. The added delay and expense to taxpayers is needless when this Court can readily avoid both by granting direct review on a question that undoubtedly will be ultimately resolved by this Court in any event.

(3) Direct Review Is Warranted Because the Condemnation Threatens a Vital Existing Public Use of the Property

There is also a vital and immediate public interest in resolving whether the prior public use doctrine allows a major electrical transmission corridor to be destroyed in favor of use for public transportation. This is not an academic or parochial question. It potentially impacts every citizen in Western Washington in the very near future.

When a use proposed by the condemnor “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.” *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 539, 342 P.3d 308 (2015).

Sound Transit cannot dispute that the City’s prior use of this property is a public use. The generation and transmission of electrical

power has long been recognized as a public use by this Court. *Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cty.*, 8 Wn.2d 136, 143, 111 P.2d 583 (1941), citing *State ex rel. Washington Water Power Co. v. Superior Court for Grant Cty.*, 8 Wn.2d 122, 111 P.2d 577 (1941).

Sound Transit's proposed condemnation would render the easement unusable for an electrical transmission line. Appendix at 10. It would effectively sever the transmission line corridor and destroy this prior public use of the property. *Id.*

Because Sound Transit's proposed use of the condemned property is incompatible with – and would destroy – the transmission line easement, its condemnation is barred by the prior public use doctrine.

As with the question of Sound Transit's statutory authority, the prior public use issue is a legal question that this Court must ultimately resolve. Time is of the essence, as Sound Transit continues to condemn more public property without authority, and threatens to sever a vital electrical transmission corridor.

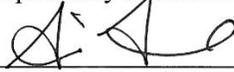
#### E. CONCLUSION

This controversy has an immediate impact on the public interest, and requires this Court's ultimate resolution of the eminent domain authority of special purpose local governments like Sound Transit. The issue affects not only Seattle, but other Washington cities and counties as

well. This Court should grant direct discretionary review. RAP 2.3(b);  
RAP 4.2(a).

DATED this 21<sup>st</sup> day of March, 2017.

Respectfully submitted,



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No. 94255-2

WASHINGTON STATE SUPREME COURT

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

Respondent,

v.

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

Petitioners.

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SOUND TRANSIT'S ANSWER TO THE CITY OF SEATTLE'S  
STATEMENT OF GROUNDS FOR DIRECT REVIEW

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## NATURE OF THE CASE AND DECISION

The trial court correctly ruled in this case that Sound Transit's statutory eminent domain authority allowed it to acquire property within a portion of Petitioner City Light's ("City Light") electrical transmission line easement, and that the prior public use doctrine does not prohibit the condemnation. The resulting Order and Judgment Adjudicating Public Use and Necessity in this condemnation action ("PU&N Judgment") is entirely unremarkable in its application of Sound Transit's statutory authority to condemn portions of City Light's easement.

This matter concerns one of the four properties along Sound Transit's East Link light rail line that are subject to City Light's electrical transmission easement. The four properties are located in the City of Bellevue at the intersection of 124th Avenue NE and the future East Link line that will bring light rail to Bellevue. Sound Transit moved for entry of an order and judgment adjudicating public use and necessity in each of the four condemnation actions. The motion was granted by the trial court in

three of them and is pending in the fourth.<sup>1</sup> *Central Puget Sound Reg'l Transit Auth. v. Ann Seena Jacobsen, et al.*, Cause No. 16-2-06769-7 SEA ("*Jacobsen*"), was the first of the four where the trial court entered a PU&N Judgment; this case is the second.

In this matter, City Light contests the trial court's PU&N Judgment. City Light claimed in its opposition to the PU&N Judgment that Sound Transit did not have the statutory authority to condemn publicly owned property, and that Sound Transit's condemnation of City Light's easement was prohibited by the prior public use doctrine. App. 4-6, 14-18. The trial court rejected both arguments and issued the PU&N Judgment from which City Light now seeks direct review. App. 24-29.

City Light's substantive arguments fail. The argument that Sound Transit cannot condemn public property contradicts the plain statutory language and undermines the concept of a "regional transit authority." Furthermore, City Light's related contention that the prior public use doctrine precludes Sound Transit's condemnation of portions of its

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<sup>1</sup> Order and Judgment Adjudicating Public Use and Necessity in: *Central Puget Sound Reg'l Transit Auth. v. WR-SRI 120TH North LLC, et al.*, Cause No. 17-2-00988-1 SEA (the subject case also referenced as Cause No. 94255-2); *Central Puget Sound Reg'l Transit Auth. v. Ann Seena Jacobsen, et al.*, Cause No. 16-2-06769-7 SEA (also referenced as Cause No. 76252-4-1); and *Central Puget Sound Reg'l Transit Auth. v. Safeway Inc., et al.*, Cause No. 16-2-09223-3 SEA. The PU&N motion is pending in *Central Puget Sound Reg'l Transit Auth. v. Sternoff, et al.*, Cause No. 16-2-08800-7 SEA.

easement ignores the specifics of Sound Transit's project and decades of case law.

Additionally, City Light's request for direct review of the PU&N Judgment should be denied for both policy and procedural reasons. Direct review of this matter would open an unnecessary, duplicative avenue of review of the same issue—Sound Transit's authority to condemn portions of City Light's easement along 124th Avenue NE—currently on accelerated review with the Court of Appeals in *Jacobsen*, Cause No. 76252-4-1. City Light's request should also be denied because City Light cannot establish a fundamental and urgent issue of broad public import necessary for acceptance of direct review under RAP 4.2(a)(4).

#### RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Sound Transit's enabling statute gives it broad authority to take "all" property necessary to construct and operate a regional transit system. Does City Light's status as a public utility prevent Sound Transit from condemning portions of City Light's easement to construct and operate its regional light rail project?

2. The prior public use doctrine allows the condemnation of publicly owned land already devoted to a public use when the proposed

use is compatible with the prior public use. Competing public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to such an extent as is tantamount to destruction. Does the prior public use doctrine prohibit Sound Transit from condemning City Light's property when Sound Transit's project will not destroy City Light's existing use of its easement on the subject property?

ANSWER TO GROUNDS FOR DIRECT REVIEW

**A. Accepting direct review of this matter would create piecemeal review of the same legal issues that are currently on accelerated review with the Court of Appeals.**

The trial court, rejecting City Light's arguments to the contrary, correctly ruled that Sound Transit has the authority to condemn city-owned property and the prior public use doctrine does not bar Sound Transit's condemnation of City Light's easement. City Light was similarly unsuccessful on these same arguments in opposition to Sound Transit's motion for public use and necessity in the *Jacobsen* case, which involved the same Sound Transit project and the same City Light easement. App. 35-38; 41-43; 55-59. The trial courts in both matters rejected City's Light's arguments, finding that Sound Transit has the authority to

condemn city-owned property and that the prior public use doctrine does not bar Sound Transit's condemnation of City Light's easement. App. 24-29, 35. In *Jacobsen*, the trial court also denied City Light's motion for summary judgment for the same reasons ("SJ Denial"). App. 70-73, 83-85.

In *Jacobsen*, City Light then appealed the PU&N judgment to the Court of Appeals under Cause No. 76252-4-1, and also sought direct discretionary review from this Court of the summary judgment denial. App. 86-90. On March 31, 2017, this Court denied City Light's petition for direct discretionary review of the *Jacobsen* summary judgment denial, stating that it did not want to open a parallel avenue of review of the same legal issues on appeal at the Court of Appeals. App. 91-96. Here, by requesting direct review in this case of the same legal issues currently on accelerated appeal in *Jacobsen*, City Light again seeks duplicative, parallel review of the same legal issues.

In order to keep its East Link light rail project on time and on budget to bring light rail to Bellevue, Sound Transit has an urgent need for possession of the subject property (the "Parcel"), including the portions subject to City Light's electrical transmission line easement. *See* App 97-102. The Court of Appeals has granted Sound Transit's motion for

accelerated review of the *Jacobsen* PU&N judgment. App. 107-108. City Light's Opening Brief on Appeal in *Jacobsen* is due on May 4, 2017. Review of the *Jacobsen* PU&N Judgment under an accelerated schedule (already approved by the Court of Appeals) will address all of the legal issues contested by City Light in this case. If this Court were to accept direct review of this matter, the legal issues involved would be subject to duplicative review at varying appellate levels, causing unnecessary briefing and delay in the administration of justice, imposing needless burdens on the courts and the parties, and unduly expending public funds.

City Light's request should be denied where, as here, there is a case further along in the appellate process that will settle the same legal issues between the parties. There is no need for separate direct review of the PU&N Judgment in this case where a single round of briefs addressing the merits of the same issues in *Jacobsen* will resolve all relevant issues.<sup>2</sup>

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<sup>2</sup> In its Statement of Grounds for Direct Review, City Light suggests that all matters on appeal should be accepted by this Court, consolidated, and resolved "efficiently." See Statement of Grounds for Direct Review at 5. At this time, Sound Transit opposes such consolidation because (1) City Light has not formally submitted a proper motion to consolidate the actions, (2) City Light has not moved for direct review of the *Jacobsen* PU&N Judgment, and (3) Sound Transit fears these maneuvers will further delay Sound Transit's project and thwart the progress that has already been made towards accelerated resolution these issues at the Court of Appeals.

**B. City Light fails to establish a basis for direct review.**

City Light has failed to establish a sufficient basis for direct review. A party may obtain direct review of a trial court decision only if it establishes one of the six grounds listed in RAP 4.2(a). City Light argues only one ground: “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination,” RAP 4.2(a)(4). City Light fails to demonstrate, however, that its request for direct review is so fundamental and urgent as to require this Court's immediate attention. As a result, the standard for direct review is not met.

City Light wrongly characterizes this case as a vital dispute about the inherent powers of a special purpose governmental entity over a general purpose unit of government. The issue here is not nearly so broad as City Light asserts. First, this is not a clash of governmental entities. It is a dispute about property owned by a public utility outside the boundaries the municipality that the utility serves. The subject property located in the City of Bellevue is owned in a proprietary capacity to support the City of Seattle’s publicly owned utility, Seattle City Light. *Washington Public Power Supply System v. General Electric Company*, 113 Wn.2d 288, 301, 778 P.2d 1047 (1989). Second, we are only talking

about the four properties at the intersection of the East Link light rail line and 124th Avenue NE, where City Light's transmission corridor runs.

Moreover, as will be discussed in more detail below, the PU&N Judgment in this case represents a basic application of the statute's plain language and well established case law. Indeed, Sound Transit's authorizing statute has been consistently interpreted by four different trial courts as authorizing Sound Transit to condemn city-owned property.<sup>3</sup> App. 24-29; 30-38; 103-05; 108-12.

City Light incorrectly asserts that its request for direct review meets the RAP 4.2(a)(4) standard because the scope of Sound Transit's eminent domain authority is an issue of "first impression." Notably, the rule does not provide for direct review solely because an issue may be one of first impression. Moreover, the cases cited by City Light for this proposition are distinguishable and do not apply to the issues raised by City Light in this case. Those cases involve broad questions of public importance or significant constitutional disputes, not the construction of the statutory authority to condemn property on four particular parcels. *See*

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<sup>3</sup> *See* FN 1, above. A fourth trial court previously upheld Sound Transit's right to condemn other city-owned property for an unrelated project in *Central Puget Sound Reg'l Transit Auth. v. City of Renton*, Cause No. 02-2-21757-5KNT. App. 103-105.

Statement of Grounds for Direct Review 11-12. Here, the result is governed by a straightforward application of statutory authority to condemn “all” property necessary for Sound Transit’s project. This case does not merit direct review simply because no prior party has raised the argument City Light is making here.

**C. The substantive issues presented here for direct review have been properly decided by the trial court.**

City Light spends the bulk of its briefing discussing the merits of its arguments that were rejected by the trial courts. To the extent those substantive arguments are relevant to whether this matter meets the criteria for review under RAP 4.2(a)(4), Sound Transit reasserts that all of the trial courts have been unanimous in their interpretation of Sound Transit’s condemnation statute and have each affirmed Sound Transit’s authority to condemn City Light’s easements, and under the clear statute at issue, they are right.

**(1) Sound Transit has the authority to Condemn City Light property.**

The trial court correctly ruled Sound Transit has statutory authority to condemn publicly owned property, including City Light’s easement.

RCW 81.112.080(2) authorizes Sound Transit to condemn "all" property and rights of way necessary for its transit system and supporting facilities. Other portions of the same statute confirm that "all" property includes public property. In addition, RTAs building a regional transit system through dense urban areas must be able, and are authorized by this statute, to condemn publicly owned property (except for property already used for public transportation), to achieve the statutory purpose: a "regional" transit system.

Sound Transit's authority is given by the statute's plain language. Statutory analysis "always begins with the plain language of the statute." *Rest. Dev., Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). On its face, RCW 81.112.080 specifically authorizes Sound Transit to condemn "all lands, rights-of-way, [and] property necessary for such high capacity transportation systems." (emphasis added). The word "all," in itself, distinguishes Sound Transit's condemnation authority from the county-condemnation statute addressed in the case relied on by City Light, *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966). And in *Newell v. Loeb*, 77 Wash. 182, 200, 137 P. 811 (1913), this Court

held that the legislature's use of the word "all" in a condemnation statute conferred the power to condemn property devoted to a public use.

Considering the statute as a whole compels the same conclusion.<sup>4</sup> RCW 81.112.080 expressly references "rights-of-way" in its grant of condemnation authority. Because "rights-of-way" are routinely publicly owned,<sup>5</sup> it would not make sense for the Legislature to expressly grant condemnation rights over "all ... rights-of-way" if it intended to limit the condemnation authority to only private property.

The inclusion in this statute of an exception to Sound Transit's power to condemn publicly owned property further confirms Sound Transit's power to condemn all other publicly owned property. This statute contains an explicit exclusion for municipally-owned property and facilities already used for public transportation, which may be acquired only by consent.

"Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation

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<sup>4</sup> "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

<sup>5</sup> See, e.g., RCW 47.04.040; RCW 47.14.010; RCW 47.24.030; RCW 47.28.020; RCW 47.30.030; RCW 47.32.010 (all referring to publicly owned "rights-of-way").

may be acquired or used by an authority only with the consent of the agency owning such facilities." RCW 81.112.080

This statutory limitation on Sound Transit's right to condemn publicly owned public transportation properties is necessary and included in the statute only because the statute otherwise grants Sound Transit the power to condemn all other publicly owned property. This gives effect to all the words in the statute and makes sense: to implement a regional transportation system, condemnation is authorized for all property, public and private, unless the property is already being used by another municipality to provide public transportation.

Finally, City Light simply ignores the long line of cases that hold condemnation statutes cannot be construed to defeat the purpose of the condemnation authority grant.<sup>6</sup> Although "statutes which delegate the state's sovereign power of eminent domain to its political subdivisions are to be strictly construed," the power may be conferred "in express terms or by necessary implication;" "a statutory grant of such power is not to be so strictly construed as to thwart or defeat an apparent

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<sup>6</sup> See, e.g. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965); *State ex rel. Devonshire v. King County*, 70 Wn.2d 630, 633, 424 P.2d 913 (1967); *HTK Management, LLC v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 622, 121 P.3d 1166 (2005).

legislative intent or objective." *Devonshire*, 70 Wn.2d at 633 (citing *Welcker*, 65 Wn.2d 677).

Here, City Light would have this Court construe Sound Transit's condemnation authority so strictly as to defeat the purpose of the grant—to enable Sound Transit to design, construct, and operate a comprehensive regional public transportation facility. RCW 81.112.080; *see also* RCW 81.112.010.<sup>7</sup>

**(2) The Prior Public Use Doctrine does not Prohibit**

**Condemnation of City Light's Property**

City Light's argument that the prior public use doctrine prohibits this condemnation action is similarly misplaced. It ignores the specifics of Sound Transit's project and misapplies the compatibility test invoking the doctrine's protections.

Sound Transit's project is compatible with City Light's use of its easement. *See Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519 538-39, 342 P.3d 308 (2015) (citing 1A NICHOLS ON EMINENT DOMAIN § 2.17 at 2-58 (Julius L. Sackman ed., 3d ed. 2006))

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<sup>7</sup> Examination of a statute encompasses "the language of the statute *and related statutes* to determine whether plain statutory language shows the intended meaning of the statute in question." *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 612, 146 P.3d 914 (2006) (emphasis in original).

(competing public uses are incompatible when the proposed public use will destroy the existing use or interfere with it to such an extent as is tantamount to destruction). In this condemnation action, Sound Transit's project takes a small area west of 124th Avenue NE around which City Light would be free to design an alternative configuration consistent with its remainder easement. To the extent such reconfiguration work comes at increased costs, such costs do not destroy City Light's easements on the property, nor do they interfere with them to such an extent as is tantamount to destruction.<sup>8</sup>

Moreover, Sound Transit has consistently assured City Light that Sound Transit's project will not destroy or substantially interfere with City Light's use of its easements along 124th Avenue NE. App. 113-18. At the conclusion of Sound Transit's project, City Light will still own a substantial electrical utility easement that it may utilize according to its stated purpose. The two uses are thus compatible.

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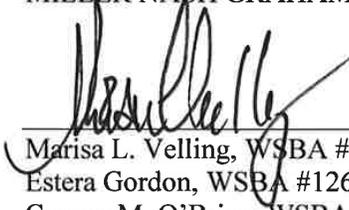
<sup>8</sup> The remedy for any restrictions on use or increased costs resulting from Sound Transit's acquisition is found in the just compensation phase of the proceedings, when damages to the remainder caused by the taking are determined, but such damages are irrelevant at this time. *See State v. McDonald*, 98 Wn.2d 521, 525-26, 656 P.2d 1043 (1983) (where only part of a single tract of land is taken, the measure of damages is fair market value of the land taken, together with damages to the land not taken).

## CONCLUSION

Direct review should be denied because reviewing the PU&N Judgment in this case would duplicate appellate proceedings in *Jacobsen* already pending in the Court of Appeals under accelerated review. In addition, City Light grossly exaggerates the scope of the issue presented. This action is one of four that impact a portion of City Light's proprietary electrical transmission easement, which runs along 124th Avenue NE in Bellevue. It does not impact any governmental function and does not raise "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination," RAP 4.2(a)(4). To the contrary, the resolution of this matter is based on a straightforward reading of plain statutory language, and the trial courts that have considered the issue have unanimously and consistently ruled that the statute grants Sound Transit the authority to condemn publicly owned property in general, and the easement interests at issue here.

DATED this 10th day of April, 2017.

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No. 94255-2

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondent,

and

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

Appellants.

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BRIEF OF APPELLANT THE CITY OF SEATTLE

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## A. INTRODUCTION

The power of eminent domain – the forcible taking of property – is a sovereign state power. A local municipal entity may only take property that the Legislature has expressly granted it authority to take. When condemnation power is wielded against other public entities, Washington courts are mindful that the property at stake is owned collectively by citizens. Such a taking is only permissible if the power to take public property is expressly stated or necessarily implied in the entity’s condemnation statute. Even then, property already dedicated to public use may not be taken if the condemnation is incompatible with the existing public use.

The Central Puget Sound Regional Transit Authority (“Sound Transit”) claims that it has the authority to condemn an electrical transmission line easement that is owned by The City of Seattle (“Seattle”) and located in the City of Bellevue (“Bellevue”) on which Seattle operates an electrical transmission line. Seattle’s electrical transmission easement and its transmission line are significant parts of a larger electrical transmission corridor and system.

Sound Transit’s eminent domain authorization statute grants Sound Transit limited condemnation authority, and it does not confer express authority upon Sound Transit to condemn public property. The

transmission line easement, and the transmission line corridor of which it is a part, are currently being put to a recognized public use: the transmission of electricity from Seattle-owned generation facilities to the city of Seattle. Sound Transit's taking of the transmission line easement is barred because it is incompatible with Seattle's continued public use of the easement, and would effectively destroy the easement by rendering it unusable for its intended purpose.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in making finding of fact 5.
2. The trial court erred in making finding of fact 7.
3. The trial court erred in making finding of fact 8.
4. The trial court erred in making finding of fact 9.
5. The trial court erred in entering conclusion of law 3.
6. The trial court erred in entering conclusion of law 4.
7. The trial court erred in entering conclusion of law 6.
8. The trial court erred in entering conclusion of law 8.
9. The trial court erred in entering conclusion of law 9.
10. The trial court erred in entering conclusion of law 10.
11. The trial court erred in entering its February 13, 2017 order and judgment adjudicating public use and necessity regarding City of Seattle property interests.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in concluding that Sound Transit had statutory authority to take Seattle’s property where its condemnation statute does not expressly grant the power to condemn public property? (Assignments of Error 1-11)

2. Did the trial court err in finding that Sound Transit had the statutory authority to condemn Seattle’s aerial easement rights 48 or more feet above grade when it only has authority to condemn property “necessary” for building high-capacity transit and it is building the light rail at or below grade? (Assignments of Error 1-11)

3. Did the trial court err in finding public use and necessity where Sound Transit’s intended use of the property it seeks to condemn is incompatible with the existing public use of Seattle’s transmission line easement and would destroy the easement and sever the transmission line corridor? (Assignments of Error 1-11)

4. Did the trial court err in refusing to apply the prior public use doctrine to prohibit the condemnation? (Assignments of Error 1-11)

C. STATEMENT OF THE CASE

(1) Sound Transit Is Seeking to Condemn Portions of a Seattle-owned Electrical Transmission Line Easement

By its petition in eminent domain (the “Petition”) filed in this action, Sound Transit seeks to condemn portions of an electrical transmission line easement (“Transmission Line Easement”) owned by Seattle that is located within Bellevue’s corporate limits for the purpose of building a light rail line. CP 1075. Seattle operates a high-voltage 230 kV

transmission line (“Transmission Line”) within the easement. CP 1044. The Transmission Line Easement and Transmission Line are part of an important electrical transmission line corridor running 100 miles and connecting Seattle City Light’s Skagit River hydroelectric dams to a substation in Maple Valley (“Transmission Line Corridor”). *Id.* The corridor is also an integral part of a larger, regional electrical transmission line system that runs from Canada to California. *Id.*

The parcel of real property that is the subject of this action, on and over which the Transmission Line Easement and Transmission Line run, is on the east side of 124<sup>th</sup> Avenue NE in the City of Bellevue (the “WR-SRI Property”). CP 1077-78.<sup>1</sup> Sound Transit seeks to build the light rail line on the WR-SRI Property in a “retained cut” configuration. CP 1060, 1063. That means that it will be constructed at or below grade. *Id.*

The Transmission Line Easement and Transmission Line run in a north-south direction along the full length of the eastern boundary of the property being condemned. CP 1072. The light rail line Sound Transit is building is to run perpendicular to 124<sup>th</sup> Avenue and the Transmission

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<sup>1</sup> This case is but one part of Sound Transit’s efforts to condemn four properties. Trial courts have entered orders of public use and necessity not only in the present case, but in *Central Puget Sound Reg’l Transit Auth. v. Ann Seena Jacobson, et al.* (Cause No. 16-2-06769-7 SEA), *Central Puget Sound Reg’l Transit Auth. v. Safeway, Inc.* (Cause No. 17-2-09223-3 SEA), and *Central Puget Sound Reg’l Transit Auth. v. Sternoff* (Cause No. 16-2-08800-7 SEA).

Line Easement, and will pass underneath the Transmission Line. CP 1045.

The Transmission Line is supported by a series of lattice towers and monopole structures. CP 1072. The nearest support structure to the area being condemned is a lattice tower located approximately 65 feet to the north of the area being taken in fee simple. *Id.* In the vicinity of the proposed take area, the Transmission Line wires are 48 feet above grade. *Id.*

(2) Sound Transit Seeks to Extinguish All of Seattle’s Rights Over Portions of the Transmission Line Easement on the WR-SRI Property

The property Sound Transit seeks to condemn includes a portion of the Transmission Line Easement that is being taken in fee simple (“Fee Simple Area”) and adjacent areas being taken for permanent (“Permanent Easements Areas”) and temporary easements (“Temporary Easement Areas”). CP 3131.

The Fee Simple Area Sound Transit seeks to condemn protrudes into the Transmission Line Easement approximately 15 feet. CP 1072. Per Exhibit 4-4 to the Petition, the Permanent Easement Areas Sound Transit is seeking to condemn property consisting of a series of “setback, wall drain, wall loading, and access easements” (“Permanent Easements”). These easements extend for 30 feet on either side of the Fee Simple Area

and run the full width of the Transmission Line Easement on the WR-SRI Property. CP 128. The Temporary Easement Areas Sound Transit seeks to condemn include a number of temporary construction easements that overlap with the entire portion of the Transmission Line Easement on the WR-SRI Property. CP 415-16. The prayer for relief section of the Petition asks the trial court to convey title to all of the property being condemned to Sound Transit “free and clear of any right, title and interests of all Respondents,” which would effectively extinguish all of Seattle’s easement rights over the Fee Simple Area, the Temporary Easement Area, and the Permanent Easement Area. CP 6.

The loss of either one or both of the Fee Simple Area or the Permanent Easement Area would make it impossible for Seattle to continue to operate and maintain the existing Transmission Line. The extinguishment of Seattle’s easements rights in the Fee Simple Area, which protrudes into the Transmission Line Easement, would limit Seattle’s ability to access the overhead wires and its existing transmission tower 65 feet to the north. CP 1072-73. More importantly, due to the inability to maintain required clearances, the take of the Fee Simple Area would prevent Seattle from being able to operate a 230 kV line in the easement. *Id.* The loss of easement rights over the Permanent Easement Area, which run the full width of the Transmission Line Easement on the

WR-SRI Property, would mean that Seattle would no longer have the legal right to operate and maintain any overhead wires in the easement, which would effectively sever the Transmission Line and Transmission Line Corridor and render them useless. *Id.*

(3) Procedural History

This condemnation action is one of four actions that Sound Transit has filed in order to condemn property for its perpendicular light rail crossing of 124<sup>th</sup> Avenue in Bellevue. In the condemnation action for the property to the east of the property at issue in this case, referred to as the Jacobsen Property, the trial court, Judge Schubert, granted Sound Transit's motion for public use and necessity for that property and denied Seattle's motion for summary judgment. CP 1060. Those orders are currently on appeal. *Id.*

In this action, Seattle submitted evidence that Sound Transit's condemnation and the resulting extinguishment of Seattle's easement rights in the Transmission Line Easement was incompatible with the continued operation of the Transmission Line and would sever and render useless the important Transmission Line Corridor. CP 1072-73. Despite filing two separate reply briefs in support of its motion, Sound Transit

submitted no contrary evidence.<sup>2</sup> Nonetheless, the trial court, the Honorable Mariane Spearman, entered an order of public use and necessity containing its findings and conclusions. CP 3128-33. Seattle appealed that decision directly to this Court. CP 3125-35.<sup>3</sup>

#### D. SUMMARY OF ARGUMENT

Before the trial court could properly consider whether Sound Transit had shown public use and necessity, it was obliged to determine whether Sound Transit had the authority to condemn the property in question. Sound Transit did not have that authority.

Eminent domain authority is strictly construed. The Legislature has not expressly conferred authority upon Sound Transit, a special purpose unit of government, to condemn any public property, let alone property owned by a general purpose unit of government like Seattle.

Not only does Sound Transit lack statutory authority to condemn public property in general, it lacks authority to condemn *any* property that is not necessary to its purpose of building high-capacity transit.

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<sup>2</sup> Sound Transit unilaterally afforded itself the advantage of filing two replies by re-noting the hearing on its motion after it received Seattle's opposition. CP 1099. Despite this, Sound Transit submitted no evidence that would support a finding by the trial court that its condemnation was compatible with the Seattle's continued use of the Transmission Line Easement to operate and maintain the Transmission Line.

<sup>3</sup> Seattle has also sought direct review of the public use and necessity orders in King County Cause No. 16-2-08807 SEA (Supreme Court Cause No. 94530-6), and King County Cause No. 16-2-09223-3 SEA (Supreme Court Cause No. 94406-7).

Condemning Seattle's aerial easement rights to maintain and operate wires 48 feet or more above grade is not necessary to build light rail at or below grade.

Finally, 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 – Seattle's use of the easement to operate and maintain the Transmission Line, which is part of its Electrical Transmission Corridor connecting the City to its Skagit River hydroelectric-generating dams. Sound Transit's taking would extinguish all of Seattle's easement rights over a substantial portion of the easement thereby preventing Seattle from continuing to operate the existing Transmission Line, rendering the Transmission Line Easement effectively useless, and severing the Transmission Line Corridor. Such a result bars a finding of public use and necessity.

E. ARGUMENT<sup>4</sup>

(1) Applicable Principles of Constitutional and Statutory Interpretation

The power of eminent domain resides in our state Constitution. The eminent domain provision is a restriction on power, not a grant.

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<sup>4</sup> As this action turns on the correct interpretation of a statute, the standard of review is *de novo*. *State v. Azpitarte*, 140 Wn.2d 138, 140–41, 995 P.2d 31 (2000).

*Miller v. City of Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963). A municipal corporation does not have the inherent power of eminent domain. It may exercise such power only when it is expressly so authorized by the state legislature. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965).

In analyzing statutory provisions, this Court employs well-developed construction principles and tools. The primary goal of statutory interpretation is to carry out legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington, this analysis begins by looking at the words of the statute. "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself." *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). In deriving the plain meaning of the words used in a statute, courts must look to all that the Legislature has said in the statute and related statutes on the subject. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If, using this analysis, the language of the statute is plain, that ends the courts' role. *Cerillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006). If, however, the language of the statute is ambiguous, courts must then construe the statutory language. A statute is ambiguous if it is subject

to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993).

In construing an ambiguous statute, a court may consider its legislative history and the circumstances surrounding its enactment to arrive at the Legislature's intent. *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003); *City of Seattle v. Fuller*, 177 Wn.2d 263, 269-70, 300 P.3d 340 (2013).

(2) Background of Eminent Domain in Washington

Both the federal and state constitutions place limitations on a government's power to take private property by eminent domain. However, the Washington Constitution provides greater limitations than its federal counterpart in that it provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made ...” Wash. Const. art. I, § 16.

Because eminent domain is an attribute of state sovereignty, when the Legislature delegates such power to one of its political subdivisions that power is *narrowly construed*. *Welcker*, 65 Wn.2d at 683. Our Supreme Court has long held that the power of local governments to condemn is narrow. “A municipal corporation’s power to condemn is delegated to it by the legislature and must be conferred in express terms or necessarily implied. Statutes which delegate the State’s sovereign power

of eminent domain to its political subdivisions are to be strictly construed.” *In re City of Seattle*, 96 Wn.2d 616, 629, 638 P.2d 549 (1981); *State ex rel. Attorney General v. Superior Court of Chelan Cty.*, 36 Wash. 381, 385, 78 P. 1011 (1904). Such an interpretation is consistent with the general principle that article I, § 16 of the Washington Constitution relating to eminent domain is meant to protect property rights. *State v. J.C. Corey*, 59 Wn.2d 98, 100, 366 P.2d 185 (1961).

When publicly-owned property is being condemned, the authority to condemn such property must be conveyed in express or necessarily implied terms. *King Cty. v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966) (“such power must be given in express terms or by necessary implication; that the power of eminent domain is one of the attributes of sovereignty; and that lands belonging to a State cannot be taken under a general grant of power made by the legislature”). This is true regardless of whether publicly-owned property is currently in public use. *Id.* at 692 (in the absence of “express or necessarily implied legislative authorization” King County was not authorized to condemn property owned by Seattle “regardless of the use to which that property [was] being put”); *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d 519, 538, 342 P.3d 308 (2015).

In fact, when one political entity attempts to condemn property held by another such entity, the rule of strict construction of condemnation statutes applies “with even more force” than in cases involving condemnation of private property. *Superior Court of Chelan Cty.*, 36 Wash. at 385.

If, after strictly construing a condemnation statute, the condemning entity lacks authority to condemn the property at issue, the petition for eminent domain must be dismissed. *King Cty.*, 68 Wn.2d at 694. The question of public use and necessity is irrelevant, because the entity is without power to condemn the lands at issue. *Superior Court of Chelan Cty.*, 36 Wash. at 386.

Broadly-worded condemnation powers, without specificity as to the property of other sovereigns, are interpreted to authorize condemnation only of private property. *Seattle & Montana Ry. Co. v. State*, 7 Wash. 150, 34 Pac. 551 (1893). In *Montana Ry.*, the Supreme Court rejected the view that a railroad had the authority to condemn state-owned tide lands, even though the condemnation statute gave railroads the sweeping power to “appropriate so much of said land, real estate, or premises as may be necessary” for building their lines, including across or along any

waterway. *Montana Ry.*, 7 Wash. at 551.<sup>5</sup> The *Montana Ry.* court stated that the authority to condemn state-owned property must be expressly granted. *Id.* at 550. It held that the railroads' eminent domain authority "must be construed, as are all such acts, as have regard only to the taking of private property, unless there is express or clearly implied authority to extend them further." *Id.* It rejected with derision the implication of the railroads' argument, *i.e.*, that a condemnation statute granting railroads power to condemn "any" land would permit that railroad to "take the entire 10 acres upon which the state capitol stands for a depot and shops." *Id.* at 552.

In *King Cty.*, the County as condemning entity filed an eminent domain petition to condemn property owned by Seattle but located in King County. *King Cty.*, 68 Wn.2d at 689. The statute granting counties condemnation powers was broadly worded, and stated that "[e]very county is hereby authorized and empowered to condemn land and property within the county for public use." RCW 8.08.010. The statute was silent as to whether counties had authority to condemn public property, or property owned by a city. The Court affirmed the dismissal of the County's petition, stating that the broadly worded statute provided *no express or*

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<sup>5</sup> The statute at issue in that case, Gen. St. §§ 1569, 1570; Code Proc. tit. 18, c. 5, is appended hereto. Appendix at 4. Sound Transit's claim of unlimited, open-ended authority to condemn public property for its light rail line here is based on similar language.

*necessarily implied authority* for counties to acquire properties owned by a state or subdivision, regardless of how the property was being used. *King Cty.*, 68 Wn.2d at 691-92.

Stated another way, it is the Legislature that must establish priorities of use of public lands as between its political subdivisions demanding their use.<sup>6</sup>

(3) Sound Transit Lacks the Authority to Condemn Seattle’s Property Under RCW 81.112.080 Because the Statute Does Not Expressly Grant Sound Transit Authority to Condemn Public Property

Before reaching the question of public use and necessity , the trial court was first obligated to determine whether Sound Transit had the authority to exercise the power of eminent domain over Seattle’s property.<sup>7</sup> The trial court here erred in concluding that Sound Transit had such authority under RCW 81.112.080.

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<sup>6</sup> Thus, it is not for Sound Transit to say that its light rail system is more important than Seattle’s electrical transmission corridor. That is a decision for the Legislature.

<sup>7</sup> *Superior Court of Chelan Cty.*, 36 Wash. at 386 (“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.”). Sound Transit had the burden of proof to show that its condemnation is authorized by statute. *See Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 566, 151 P.3d 176, 181 (2007) (“[a]lthough a state entity bears the burden of proving public use and necessity in the judicial condemnation process, the challenger bears the burden of proof that the notice of a public hearing to authorize condemnation was defective.”); *King Cty.*, 68 Wn.2d at 693 (finding that a condemnation proceeding could not proceed where the condemning entity failed to put forward sufficient evidence to show that the condemnation was authorized by statute).

The scope of condemnation authority delegated through RCW 81.112.080 has never been judicially construed in an appellate opinion.<sup>8</sup> The statute provides, in relevant part, that Sound Transit may “acquire by...condemnation...all lands, rights of way, property, equipment, and accessories necessary for such high-capacity transit systems.” RCW 81.112.080(2).

(a) Supreme Court Precedent Construing Almost Identical Language Controls; The Lack of Express or Necessarily Implied Authority to Condemn Public Land Ends the Inquiry

The trial court concluded that the language of RCW 81.112.080 granted Sound Transit the authority to condemn public as well as private property, but such an interpretation of similarly broad language was rejected by our Supreme Court in *King Cty.* There, King County sought to condemn property owned by Seattle.<sup>9</sup> *King Cty.*, 68 Wn.2d at 690. The statutory grant of authority to King County at issue was incredibly broad, much more broad than Sound Transit’s limited authority here:

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<sup>8</sup> In *Central Puget Sound Reg’l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), the Supreme Court addressed Sound Transit’s condemnation procedures. The Court did not specifically address the scope of Sound Transit’s condemnation power under RCW 81.112.080. The dissent there, however, reaffirmed that eminent domain authority for municipal corporations emanates from express legislative delegation and such authority is strictly construed. *Id.* at 428 (J. Johnson, J. dissenting).

<sup>9</sup> This is not to suggest that Sound Transit has the same condemnation authority afforded to King County, Seattle, or any other first-class city.

Every county is hereby authorized and empowered 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, real estate, premises or other property...

RCW 8.08.010. King County argued that this broad language constituted a grant of authority to acquire “all property,” both publicly and privately held.<sup>10</sup> *Id.* at 690.

Our Supreme Court disagreed with King County’s claim that a general grant of condemnation powers over property purportedly “necessary for county purposes” constituted authority to condemn the property of another municipal corporation. *Id.* at 692. The Court explained that in order for one municipal corporation to have the authority to condemn the property of another, the Legislature must grant it express or necessarily implied powers to condemn the property of the State or any of its subdivisions. *Id.* Because the statute at issue was only a general grant of condemnation authority, the Supreme Court affirmed summary judgment dismissal of King County’s condemnation action against Seattle. *Id.* at 694.

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<sup>10</sup> Notably, the property at issue in *King Cty.* was *not*, as here, devoted to a public use. *King Cty.*, 68 Wn.2d at 692. Thus, one would assume that King County’s argument for condemnation in that case was stronger than the argument here, where Seattle’s property *does* have a public use. However, the Supreme Court still denied King County’s petition on the grounds that it lacked express statutory authority to condemn *any* property owned by Seattle. *King Cty.*, 68 Wn.2d at 692.

Under RCW 81.112.080, Sound Transit may generally condemn “lands, rights of way, and properties” necessary for high capacity transportation systems. RCW 81.112.080 nowhere grants Sound Transit the express or necessarily implied authority to condemn public property. *See* Appendix at 2-3. The statute does not grant Sound Transit specific authority to condemn any property of another political subdivision, let alone city-owned property being put to an existing public use. Thus, according to long-standing Supreme Court precedent, the statute grants Sound Transit authority to condemn private property only.

Just as when King County attempted to condemn Seattle’s property without express authorization, here the trial court should have denied Sound Transit’s motion for public use and necessity and dismissed its Petition.

(b) Sound Transit’s Eminent Domain Statute Grants It Narrow Condemnation Authority

While Sound Transit’s authorizing statute provides that Sound Transit may take property in the “manner” of a first-class city, this refers to the *procedural* mechanism for bringing an eminent domain action, and it does not grant Sound Transit the same condemnation authority as a city.<sup>11</sup> As a result, Sound Transit does not have the authority to generally

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<sup>11</sup> The Legislature presumably included this provision because it was necessary

condemn property for any public purpose, as a first class city does.<sup>12</sup>

Instead, Sound Transit may only take property “necessary” for its purpose of building high-capacity transit. RCW 81.112.080.<sup>13</sup>

The Legislature even denied Sound Transit the power to condemn the *transportation* property of other governments, despite the fact that transportation is within Sound Transit’s declared legislative purpose:

Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation *may be acquired or used by an authority only with the consent of the agency owning such facilities*. Such agencies are hereby authorized to convey or lease such facilities to an authority or to contract for their joint use on such terms as may be fixed by agreement between the agency and the authority.

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for the statute’s validity. To be valid a statute conveying the power to condemn “must confer not only the power to condemn but must ‘prescribe the method by which it is to be done’.” *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 622, 121 P.3d 1166 (2005). Thus the Legislature afforded Sound Transit the same procedural condemnation *mechanism* as a first-class city, but not the same authority.

However, even if the scope of Sound Transit’s eminent domain power *were* equivalent to that of a first-class city, Sound Transit would still have no authority to condemn the property of a first-class city like Seattle. *King Cty.*, 68 Wn.2d at 692. RCW 8.12.030 states as to cities generally that have authority to condemn certain property of the State, counties, and school districts. Nowhere does that statute afford cities the right to condemn property of other cities. *See* Appendix at 1. Thus, under the same rule applied in *King Cty.*, condemnation authority would be denied. Similarly, RCW 35.22.280 is silent on the power of first-class cities to condemn the property of any other governmental units. *Id.*

<sup>12</sup> Under RCW 8.12.030, cities like Seattle have the authority to condemn property for a long laundry list of purposes, plus “any other public use.”

<sup>13</sup> The argument that this particular property is not “necessary” to Sound Transit’s project – and thus Sound Transit lacks authority to condemn it – is addressed *infra* section (4).

RCW 81.112.080 (emphasis added).

Because the Legislature refused to give Sound Transit power to condemn transportation property from other political subdivisions, it is illogical to suggest the Legislature granted Sound Transit such power over *other* types of public property. If the Legislature found Sound Transit's light rail purpose to be so paramount that it allowed Sound Transit to condemn all public property dedicated to other public purposes, then surely it would have found that purpose important enough to allow condemnation of other *transportation*-related property. The more logical conclusion is that Legislature intended to deny Sound Transit condemnation power over all public property, and allow Sound Transit to acquire transportation property only by permission.

(c) Comparing the Statute at Issue to Similar Statutes and Reviewing Its Legislative History Affirms that Seattle's Position Is Correct

Seattle's position is only bolstered by comparing Sound Transit's eminent domain statute to other statutes that *do* expressly authorize the condemnation of public property. As our Supreme Court has recently noted, when trying to understand the meaning of a statute it is useful to compare the language of that statute to the language of other statutes addressing similar subjects. *State v. Larson*, 184 Wn.2d 843, 851, 365

P.3d 740, 744 (2015). The *Larson* court was comparing the language of various statutes involving crimes committed with tools to ascertain scope of the statute at issue. *Id.* It concluded that because the language of the statute at issue was different from the language in similar statutes, the Legislature meant to distinguish that crime from crimes that otherwise seemed similar. *Id.* at 853. It then concluded, based on this statutory comparison, that the language of the statute before it was narrow in scope. *Id.* at 854.

The Legislature has enacted many condemnation statutes granting express authority to condemn public property. The statute granting highway departments authority to condemn property provides for condemnation of “private *or public* property...”. RCW 47.52.050 (emphasis added). The statute granting condemnation authority to port districts provides for condemnation of “any *public* and private property...”. RCW 53.34.170 (emphasis added). The statute granting condemnation authority to public utility districts provides for condemnation of “any *public* and private property...”. RCW 54.16.050.

The Legislature knows how to enact condemnation statutes containing express authority to condemn public property. It knows that this Court will strictly construe condemnation statutes, and that simply saying “property” or “all property” will not suffice to grant authority to

condemn public property. Thus, given the difference in the language of RCW 81.112.080 and the numerous statutes that expressly grant the power the condemn “public property,” this Court should conclude that, by enacted RCW 81.112.080 as written, the Legislature did not intend to grant Sound Transit the authority to condemn Seattle’s property. *Larson*, 184 Wn.2d at 854.

Legislative history also supports Seattle’s strict reading here, as opposed to Sound Transit’s request for a liberal reading. The Legislature was aware when it drafted Sound Transit's condemnation authority that this Court would strictly construe it, as it does with all other condemnation statutes. Sound Transit was created by the Legislature in 1992. The original authorization bill was House Bill 2610. It contained condemnation authority in section 109 that closely resembles RCW 81.112.080. However, it is critical to note that the legislation originally contained the following “liberal construction” section *which was later deleted in the Senate*:

NEW SECTION. Sec. 108. LIBERAL CONSTRUCTION. The rule of strict construction shall have no application to this chapter, but the same shall be liberally construed in all respects in order to carry out the purposes and objects for which this chapter is intended.

This “liberal construction” proposal was *defeated* in Senate Bill Report ESSB 2610, and was not part of the final legislation. Laws of 1992, ch. 101.

Simply put, Section 108 of HB 2610 would have overturned the rule of strict construction as to Sound Transit’s condemnation power. The Legislature refused to overturn that touchstone to construction of local government condemnation statutes.

Strictly construed, RCW 81.112.080 does not expressly grant Sound Transit the power to take *any* public property, let alone the property of a first-class city like Seattle. Accordingly, this Court can only conclude that Sound Transit lacks the authority to condemn the property at issue here.

- (4) It Is Not Necessary for Sound Transit to Condemn Seattle’s Aerial Easement to Build Light Rail At or Below Grade, Thus Sound Transit Does Not Have Statutory Authority to Condemn that Portion of Seattle’s Easement

The Legislature not only deprived Sound Transit of express authority to condemn Seattle’s property, it also limited Sound Transit to condemnation authority to property “necessary for such high capacity transportation systems” it seeks to build. RCW 81.112.080(2). In connection with eminent domain statutes, this Court has held that “necessary” means “reasonable necessity, under the circumstances of the

particular case.” *Welcker*, 65 Wn.2d at 683; *see also*, *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 156, 377 P.2d 425 (1963) (necessity means reasonable necessity under the circumstances). “High capacity transportation systems” are systems “of public transportation services within an urbanized region operating principally on exclusive rights of way, and the supporting services and facilities necessary to implement such a system....” RCW 81.104.015(2).<sup>14</sup>

Aerial easement rights are separable from other property rights. Rights above the surface—At common law, 2 Tiffany Real Prop. § 583 (3d ed.). They may be necessary to build an elevated train system such as a monorail, or, as here, to construct electrical transmission lines. *State ex rel. Devonshire v. Superior Court*, 70 Wn.2d 630, 632, 424 P.2d 913, 915 (1967).

Sound Transit has not separated its petition to take Seattle’s property into the surface right easement and the aerial easement. The order extinguishes all of Seattle’s property rights over those portions of the subject property being taken in fee simple and for permanent easements. CP 1072-73. This includes aerial rights, which would

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<sup>14</sup> RCW 81.104.015(2) is a related statute to RCW 81.112.080, and thus it is appropriate to consider its definition of this specialized term. *See Wash. State Dep’t of Revenue v. Fed. Deposit Ins. Corp.*, 190 Wn. App. 150, 162, 359 P.3d 913 (2015).

preclude Seattle from operating and maintaining the aerial transmission lines. *Id.*

Seattle argued below that these aerial rights were not “necessary” for building light rail, and thus outside of Sound Transit’s limited authority granted in RCW 81.112.080(2). CP 1050-53. Seattle explained that a permanent taking of its aerial rights at 48+ feet above grade, where the existing Transmission Line wires are located, were not necessary to build a light rail line on the ground. *Id.* at 1050.

Despite bearing the burden of proof to show that the condemnation was authorized by statute, Sound Transit made *no response* to the trial court on the issue of Seattle’s aerial easement rights.<sup>15</sup> It did not explain how, on a factual basis, the taking of these aerial rights is “necessary” for building its light rail at or below grade, as Sound Transit plans. CP 1139-43.

Instead, Sound Transit relied on *Central Puget Sound Reg’l Transit Auth. v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006) to argue that it was sufficient for Sound Transit to show that its condemnation was “necessary to accomplish a public goal.” CP 1141. Sound Transit’s reliance on

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<sup>15</sup> Sound Transit is not entitled to any deference on the question of whether the condemnation it is pursuing is authorized by its statute, and it cannot legislatively declare that its efforts are legal. *King Cty.*, 68 Wn.2d at 693 (“the county cannot bring the action within the ambit of [the statue purportedly granting it condemnation power], merely by legislatively declaring the fact.”).

*Miller* is misplaced because that case does not address the scope of condemnation authority granted to Sound Transit by RCW 81.112.080(2). Instead, that case involved the question of whether the condemnation in question was necessary for a public use. *Id.* at 403.

Sound Transit does not have the authority to condemn property for all public uses.<sup>16</sup> Under RCW 81.112.080(2) it can only condemn property that is necessary for its high capacity transportation system. The question of whether the property being condemned was necessary for the light rail system that Sound Transit was seeking to build was not before the Court in *Miller*. Thus, that case does not support Sound Transit's contention that it is sufficient to show that its condemnation was necessary for any public purpose. Instead, Sound Transit must show that the property it is condemning is necessary for its light rail system. In this case, Sound Transit failed to make any showing that the condemnation of the aerial easement rights extended 48+ feet in the air was necessary for its at grade light rail line.

Based on the explicit wording of RCW 81.112.080, Sound Transit has no statutory authority to condemn the aerial portion of Seattle's

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<sup>16</sup> Some condemnation statutes do authorize condemnation for all public uses. For example, the statute giving cities condemnation power, RCW 8.12.040, authorizes such entities to condemn property for a long list of specific uses plus "any other public use." And, the statute giving counties condemnation authority, RCW 8.08.010, provides that counties are authorized to condemn land and property "for public use." Sound Transit's statute, RCW 81.112.080, lacks any such broad grant of authority.

Transmission Line Easement. It is not “necessary” to the construction of light rail.

(5) The Prior Public Use Doctrine Prohibits Sound Transit’s Condemnation Because It Would Destroy Seattle’s Public Use of the Property

Even if Sound Transit has the authority to condemn public property, it is barred from doing so under the prior public use doctrine if its “proposed use will either destroy the existing use or interfere with it to such an extent as is tantamount to destruction.” *Pub. Util. Dist. No. 1 of Okanogan Cty.*, 182 Wn.2d at 538-39. The trial court here erred in implicitly finding that Seattle’s electrical transmission corridor would not be disrupted by Sound Transit’s taking. CP 3128-33.<sup>17</sup>

(a) The Prior Public Use Doctrine Applies

Washington law provides that the generation and distribution of electricity, and the acquisition of property for those purposes, are public uses. In *Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cty.*, 8 Wn.2d 136, 143, 111 P.2d 583 (1941), the Washington State Supreme Court held:

The generation and distribution of electric power has long been recognized as a public use by this court.

Further, the Supreme Court has held:

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<sup>17</sup> The finding is implicit because, astonishingly, the trial court made no findings regarding Seattle’s well-developed factual record demonstrating that the taking here will sever the corridor.

The very nature of the business of furnishing electric energy determines that the use to which the condemned property is to be put is a public one. Under our present way of living, electricity is essentially necessary in order to enable our citizens to carry on their every day activities and pursue their accustomed manner of living.

*State ex rel. Wash. Water Power Co. v. Superior Court*, 8 Wn.2d 122, 132–33, 111 P.2d 577, 582 (1941).

These cases are consistent with the long line of cases that have held that the acquisition of property for the purposes generating and distributing electricity is a public use. *State ex rel. Nw. Elec. Co. v. Superior Court In & For Clark Cty.*, 28 Wn.2d 476, 483, 183 P.2d 802 (1947) (“We have uniformly held that the acquisition of properties by a public utility district, for the purpose of furnishing electricity to the public, is a public use.”); *Brady v. City of Tacoma*, 145 Wash. 351, 356, 259 P. 1089, 1091 (1927) (“Under modern conditions the city’s plant is just as much a necessity to the community as is a railroad, and the production and distribution of electricity is a public use.”); *Pub. Util. Dist. No. 1 of Chelan Cty. v. Wash. Water Power Co.*, 43 Wn.2d 639, 643, 262 P.2d 976, 979 (1953) (“The appropriation of water and facilities for the generation of electrical power, to be sold to the public generally by an entity entitled by statute so to do, is a public use.”).

Here, Seattle acquired the Transmission Line Easement for the purposes of constructing, operating, and maintaining an electrical transmission system on and over the WR-SRI Property, and it has retained that easement as part of its larger Transmission Line Corridor connecting the City to its electrical generating facilities in the Skagit Valley for the past 90 years.

(b) Sound Transit's Condemnation Would Render the Transmission Line Easement Unusable for Its Intended Purpose, Destroying the Prior Public Use

If it were allowed to stand, Sound Transit's condemnation would extinguish Seattle's rights in the Transmission Line Easement, make it impossible for Seattle to continue to operate the Transmission Line, and sever the Transmission Corridor. CP 1072-73.

The Petition makes clear that Sound Transit's condemnation would result in the extinguishment of all of Seattle's rights in the Transmission Line Easement over the Fee Simple Area and the Permanent Easement Areas on the WR-SRI Property. In the prayer for relief section, Sound Transit asks that all the property being condemned be conveyed to Sound Transit "free and clear of any right, title and interests of all Respondents," which would effectively extinguish all of Seattle's easement rights over the property being condemned. CP 6.

Sound Transit's extinguishment of Seattle's rights over the Fee Simple Area would make it impossible for Seattle to continue to operate the Transmission Line over the WR-SRI Property because there would be insufficient room left in the remaining portions of the Transmission Line Easement to accommodate a high voltage transmission line. CP 1072-73. The loss of easement rights over the Permanent Easement Areas, which run the full width of the easement, would deprive Seattle of the legal right to operate or maintain a transmission line over the WR-SRI Property, and would effectively sever the Transmission Line Corridor. *Id.*

(c) Sound Transit Submitted No Evidence that Its Condemnation Was Compatible With Seattle's Prior Public Use And, Instead, Relied Solely on an Erroneous Legal Argument

Sound Transit made *no evidentiary response* to the trial court on the issue of prior public use. CP 1139-43. It did not explain how, on a factual basis, the taking of all of Seattle's easement rights over the areas in question was compatible with Seattle's continued operation of the Transmission Line or continued use of the Transmission Line Easement for its intended purpose. *Id.*

Rather than provide evidence, Sound Transit relied on *State v. Superior Court of Jefferson Cty.*, 91 Wash. 454, 459 (1916), to erroneously argue that a party that has the authority to condemn public

property always has the power to condemn property held in a proprietary capacity and, thus, the prior public use doctrine does not apply to this case. Even assuming the Seattle-owned property being condemned in this case is proprietary, which Seattle does not concede, Sound Transit's argument was incorrect.

*State v. Superior Court of Jefferson Cty.* does not stand for the proposition that Sound Transit has asserted, *i.e.* that an entity that has the power to condemn public property always has the authority to condemn public property held in a proprietary capacity, nor has any reported Washington case cited it for that proposition. Moreover, as recently as 2015 the Washington Supreme Court confirmed that the prior public use doctrine applies when publicly-owned, proprietary property is being condemned. Specifically, in *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wn.2d at 542, the Court approvingly analyzed its prior decision in *City of Tacoma v. State*, and recognized that the property in that case, a fish hatchery, was proprietary and that “[b]ecause the fish hatchery was clearly a present public use, [the Supreme Court] then engaged in a prior public use analysis.” *Id.* In fact, the Court went even further and observed that the prior public use doctrine applies to all property in public use – even if the property is not publicly-owned. *Id.* at 540 (“The prior public use doctrine balances competing public uses and *applies regardless*

*of whether the property is state owned.”). (emphasis added).* Accordingly, as Seattle’s use of the Transmission Line Easement to distribute electric power is a public use,<sup>18</sup> the prior public use doctrine applies to Sound Transit’s condemnation regardless whether the property is held by Seattle in its proprietary capacity.

Sound Transit’s assertion that the prior public use doctrine does not apply to cases where publicly-owned proprietary property is being condemned is contrary to binding Supreme Court authority. To the extent that assertion was a basis for the trial court’s rejection of Seattle’s argument on the prior public use doctrine and its decision to grant Sound Transit’s motion on public use and necessity, the Order should be reversed.

(6) Home Rule Charter Cities Have a Constitutional Status; Protecting their Property Rights Is an Important Public Policy

Washington courts are wise to demand strict construction of condemnation statutes, particularly when the public property at issue is owned by a home rule charter general purpose unit of government like Seattle. General purpose local governments like cities and counties have a special constitutional status in Washington. Wash. Const. art. I, § 10.

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<sup>18</sup> See *Carstens*, 8 Wn.2d at 143 (“The generation and distribution of electric power has long been recognized as a public use by this court.”).

Seattle is a home rule charter city; a general purpose unit of government with broad responsibilities under its charter. *State ex rel. Swan v. Jones*, 47 Wn.2d 718, 728, 289 P.2d 982 (1955). The charters of home rule governments confer upon them “complete local self-government in municipal affairs.” *Bussell v. Gill*, 58 Wash. 468, 473, 108 P. 1080 (1910). Decisions of a home rule local government like Seattle are ultimately the product of a directly elected Council and Mayor.

Sound Transit, on the other hand, is a special purpose unit of local government with limited powers. *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 788, 357 P.3d 1040 (2015). It does not have a directly elected leadership; it is governed largely by unelected administrators. Special purpose districts are limited in their powers “to those necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation.” *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wn.2d 789, 794–95, 597 P.2d 383 (1979). Sound Transit’s power is focused solely on high-capacity transit. Its power is just as limited as that conferred on other special purpose units of government in Washington that address the operation of ports, schools, or public utilities. *Id.*

Ultimately, as these entities are all political subdivisions of the State, it is for *the Legislature*, not the court like the trial court here, to

prescribe the relative importance of the governmental unit and the function it performs. The Legislature did not expressly determine *anywhere* that the decisions of Sound Transit, a special purpose government, should trump the decisions of a home rule charter city or that a transit system was more important than a city's electrical utility.

The trial court's implicit determination that Sound Transit's operation of a transit system is more important than Seattle's operation of an electrical utility and an electrical transmission system, CP 1492, ignores the constitutional dimension of Seattle as a home rule charter city as well as misunderstanding of the fundamental differences between a general purpose unit of local government and the narrower, parochial focus of a special purpose unit of government.

#### F. CONCLUSION

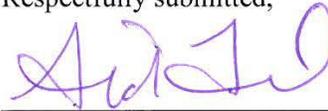
The trial court erred in concluding that Sound Transit, a special purpose government, had the authority to condemn the property of Seattle, a general purpose government, in the absence of express legislative authority to do so.

Moreover, under the prior public use doctrine, Sound Transit's condemnation will interfere with or destroy Seattle's existing public use of the property being condemned.

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 13<sup>d</sup> day of June, 2017.

Respectfully submitted,



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# APPENDIX

RCW 8.12.030:

Every city and town and each unclassified city and town within the state of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys, highways, bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls, jails, and other public buildings, and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley, or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley, or highway, or for the construction of slopes or retaining walls for cuts and fills upon real property abutting on any street, avenue, alley, or highway now ordered to be, or such as shall hereafter be ordered to be opened, extended, altered, straightened or graded, or for the purpose of draining swamps, marshes, tidelands, tide flats or ponds, or filling the same, within the limits of such city, and to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards, hospitals, pesthouses, drains and sewers, garbage crematories and destructors and dumping grounds for the destruction, deposit or burial of dead animals, manure, dung, rubbish, and other offal, and for aqueducts, reservoirs, pumping stations and other structures for conveying into and through such city a supply of freshwater, and for the purpose of protecting such supply of freshwater from pollution, and to condemn land and other property and damage the same for such and for any other public use after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter.

RCW 35.22.280:

Any city of the first class shall have power:

....

(3) To control the finances and property of the corporation, and to acquire, by purchase or otherwise, such lands and other property as may be necessary for any part of the corporate uses provided for by its charter, and to dispose of any such property as the interests of the corporation may, from time to time, require;

....

(6) To purchase or appropriate private property within or without its corporate limits, for its corporate uses, upon making just compensation to the owners thereof, and to institute and maintain such proceedings as may be authorized by the general laws of the state for the appropriation of private property for public use;

RCW 81.112.080:

An authority shall have the following powers in addition to the general powers granted by this chapter:

...

(2) 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 including surface, underground, or overhead railways, tramways, busways, buses, bus sets, entrained and linked buses, ferries, or other means of local transportation except taxis, and including escalators, moving sidewalks, personal rapid transit systems or other people-moving systems, passenger terminal and parking facilities and properties, and such other facilities and properties as may be necessary for passenger, vehicular, and vessel access to and from such people-moving systems, terminal and parking facilities and properties, together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems. When developing specifications for high capacity transportation system operating equipment, an authority shall take into account efforts to establish or sustain a domestic manufacturing capacity for such equipment. The right of eminent domain shall be exercised by an authority in the same manner and by the same procedure as or may be provided by law for cities of the first class, except insofar as such laws may be inconsistent with the provisions of this chapter. Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities. Such agencies are hereby authorized to convey or lease such facilities to an authority or to contract for their joint

use on such terms as may be fixed by agreement between the agency and the authority.

The facilities and properties of an authority whose vehicles will operate primarily within the rights-of-way of public streets, roads, or highways, may be acquired, developed, and operated without the corridor and design hearings that are required by RCW 35.58.273 for mass transit facilities operating on a separate right-of-way;

THE  
GENERAL STATUTES AND CODES

OF THE  
STATE OF WASHINGTON.

ARRANGED AND ANNOTATED BY

WILLIAM LAIR HILL,  
CODE COMMISSIONER OF THE STATE OF WASHINGTON.

VOL. I.  
GENERAL STATUTES.

SAN FRANCISCO:  
BANCROFT-WHITNEY COMPANY,  
LAW PUBLISHERS AND LAW BOOKSELLERS.  
1891.

CHAPTER V.

PROVISIONS SPECIALLY APPLICABLE TO RAILWAY AND OTHER ROAD COMPANIES, AND CANAL COMPANIES.

- § 1569. Entry upon lands for purposes of surveys, etc.
- § 1570. Extent of right to appropriate lands for corporate uses.
- § 1571. Power to cross, intersect, join, and unite railways.
- § 1572. Power and duty of railroad companies along watercourses, roads, etc.
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- § 1574. Appropriation of public roads, streets alleys, etc., when.
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- § 1587. Corporations conveying water authorized to appropriate lands.

*Entry upon lands for purpose of surveys; etc.*

§ 1569. A corporation organized for the construction of any railway, macadamized road, plank road, clay road, canal, or bridge shall have a right to enter upon any land, real estate, or premises, between the termini thereof, for the purpose of examining, locating, and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby. [February 1, 1838, § 1. In effect immediately.]

*Extent of right to appropriate lands for corporate uses.*

§ 1570. Such corporation may appropriate so much of said land, real estate, or premises as may be necessary for the line of such road or canal, or the site of such bridge, not exceeding two hundred feet in width, besides a sufficient quantity thereof for toll-houses, work-shops, materials for construction, a right of way over adjacent lands or premises, to enable such corporation to construct and prepare its road, canal, or bridge, and to make proper drains; and in the case of a railroad, to appropriate sufficient quantity of such lands, real estate, or premises, in addition to that before specified in this section, for the necessary side-tracks, depots, and water stations, and the right to conduct water thereto by aqueduct; compensation therefor to be made to the owner thereof, irrespective of any increased value thereof by reason of the proposed improvement by such corporation, in the manner provided by law; and provided further, that if such corporation locate the bed of

such railroad or canal upon any portion of the track now occupied by any established territorial or county road, said corporation shall be responsible to the county commissioners of said county or counties in which said territorial or county road so appropriated is located, for all expenses incurred by said county or counties, in relocating and opening the portion of said road so appropriated. [February 1, 1888, § 2. *In effect immediately.*]

As to the mode of proceeding to appropriate land, see Chapter VI. of Title IX. of the Code of Procedure.

*Power to cross, intersect, join, and unite railways.*

§ 1571. Every corporation formed under this chapter for the construction of a railroad shall have the power to cross, intersect, join, and unite its railway with any other railway before constructed at any point in its route, and upon the grounds of such other railway company, with the necessary turn-outs, sidings, switches, and other conveniences in furtherance of the objects of its connections, and every corporation whose railway is or shall be hereafter intersected by any new railway shall unite with the corporation owning such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road. [February 1, 1888, § 3. *In effect immediately.*]

"This chapter" is chapter 187 of the Code Chapter V. of Title XVIII. of General Statute of 1881, the provisions of which, as modified by subsequent legislation, are embodied in section to said chapter.

*Power and duty of railroad corporation along watercourses, roads, etc.*

§ 1572. Every corporation formed under the laws of this state for the construction of railroads shall possess the power to construct its railway across, along, or upon any river, stream of water, watercourse, plank road, turnpike, or canal, which the route of such railway shall intersect or touch; but such corporation shall restore the river, stream, watercourse, plank road, or turnpike thus intersected or touched to its former state as near as may be, and pay any damages caused by such construction; provided, that the construction of any railway by such corporation along, across, or upon any of the navigable rivers or waters of this state shall be in such manner as to not interfere with, impede, or obstruct the navigation thereof. [February 1, 1888, § 3. *In effect immediately.*]

*Change of grade or location of road or canal.*

§ 1573. [2457.] Any corporation may change the grade or location of its road or canal, not departing from the general route specified in

the articles of incorporation to public travel, or or unsubstantial grounds causes, and for the same right to enter sary lands and material of such road or canal

*Appropriation of public road.*  
§ 1574. [2458.]

location of any road public road, street, of county commissioner alley, or public corporation limits of a the corporation conditions upon w occupied by such corporation agree thereon, such may be necessary said road.

As to mode of proceeding to appropriate property, see Chapter V. of Title IX. of the Code of Procedure. No court known as "territorial" existed in the territory

*Appropriation of municipal road.*  
§ 1575. [2459.]

appropriate any section, if the same incorporated or not, such particular road, street the local authority thereof shall desire to make such decision such corporation thereto.

*May collect tolls on private roads.*  
§ 1576. [2460.]

taken by a private parties mentioned in time of General Statute and charge and consent to by such appropriated with

DECLARATION OF SERVICE

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

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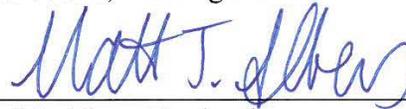
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Original e-filed with:  
Washington Supreme Court  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 23, 2017 at Seattle, Washington.



\_\_\_\_\_  
Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

DECLARATION

No. 94255-2

WASHINGTON STATE SUPREME COURT

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

Respondent,

and

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

Appellants.

---

BRIEF OF RESPONDENT SOUND TRANSIT

---

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## **I. INTRODUCTION**

This is an eminent domain action. Respondent Sound Transit is condemning certain interests in property located at 1121 124<sup>th</sup> Avenue Northeast, in Bellevue, Washington for the East Link Extension of its Link light rail project, which will bring light rail to Bellevue. The light rail trackway will be constructed to run along and through the northern end of the property.

The property is bordered on the east by 124<sup>th</sup> Ave NE. Appellant, Seattle City Light (“City Light”), holds a power line easement (the “Easement”) that is part of an easement corridor that runs along 124<sup>th</sup> Ave NE, bisecting the City of Bellevue, in the area of the property. City Light claims that as a public entity holding an interest in property located in Bellevue, it has the right to block the East Link Extension.

The trial court disagreed and entered Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity as to Respondent City of Seattle on February 13, 2017 (the “PU&N Judgment”). The PU&N Judgment held that Sound Transit had statutory authority to condemn public property, and found that the property was necessary for the project.

Sound Transit requests that the Court affirm the PU&N Judgment.

## **II. RESTATEMENT OF ISSUES PRESENTED**

1. Sound Transit's enabling statute grants it broad eminent domain authority to acquire "all" property necessary to construct and operate a regional transit system. Does City Light's status as a public entity prevent Sound Transit from condemning portions of City Light's Easement to construct and operate its regional light rail project?

2. An agency's determination that property is necessary for a public use does not require absolute, indispensable, or immediate need and is conclusive unless the party opposing condemnation shows the determination was arbitrary and capricious, amounting to constructive fraud. The trial court found Sound Transit's necessity determination was not arbitrary and capricious amounting to constructive fraud. Has City Light shown grounds to reverse the Trial Court's necessity finding?

3. The prior public use doctrine allows condemnation of public property whose current use is compatible with or inferior to the proposed use. Competing public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to an extent tantamount to destruction. Does the prior public use doctrine prohibit the condemnation when Sound Transit's project will not destroy City Light's existing easement use?

### **III. STATEMENT OF THE CASE**

#### **A. SOUND TRANSIT AUTHORIZING LEGISLATION**

Sound Transit is a Regional Transit Authority under RCW chapters 81.104 and 81.112. CP 9. RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows 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 ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems." By granting Sound Transit the power to condemn "all" property necessary for its high capacity transportation system, the legislature vested Sound Transit with the power to condemn public, as well as private, land to construct, operate and maintain, its project.

#### **B. RESOLUTION R2013-21 TO ACQUIRE PROPERTY FOR EAST LINK**

In September 2013, Sound Transit passed Resolution R2013-21, which authorized condemnation proceedings to "acquire all, or any portion" of the property that is the subject of this eminent domain action (the "Parcel") "for the purpose of constructing, owning, and operating a

permanent location of the East Link Extension and light rail guideway."

CP 11.

City Light's interest in the Parcel is an electrical transmission line easement running along the east side of the Parcel, which is part of an easement corridor that runs north and south, and spans both the east and west sides of 124<sup>th</sup> Avenue NE. CP 1043. The portion of the easement corridor along the east side of the Parcel (west of 124<sup>th</sup> Avenue NE) (the "Easement") is currently utilized for a 230 kV electrical transmission system. CP 1043.

### **C. PROCEDURAL HISTORY**

In this action, filed on January 17, 2017, Sound Transit seeks to condemn portions of the Parcel for the location, construction, operation, and maintenance of the East Link Extension. CP 2. The Petition states that in order to permanently locate, construct, operate and maintain the East Link Extension and its related facilities, Sound Transit must condemn certain property rights, and enumerates the property interests to be taken, which are all within the property identified as necessary for the East Link Extension to Sound Transit's Link light rails system in R2013-21. CP 2-3.

Sound Transit engaged in lengthy discussions with City Light regarding its transmission line easements along 124<sup>th</sup> Ave NE and the light rail project, hoping that the two public entities could reach a negotiated

resolution without the need for litigation. CP 1060.<sup>1</sup> After filing its Petition in Eminent Domain, Sound Transit moved for an order and judgment of public use and necessity regarding City Light's Easement. CP 1106-1115. City Light opposed the motion, contending that Sound Transit “lacks the statutory authority to condemn property owned by Seattle.” CP 1242. After extensive briefing and submissions of written evidence, the trial court entered the PU&N Judgment, which found that Sound Transit has authority to condemn publicly owned property, including City Light's Easement, and that the Easement was necessary for the East Link Extension. CP 1276-1281.

City Light immediately filed a Notice of Appeal from the PU&N Judgment. CP 3125-3127. Shortly thereafter, City Light filed its Statement of Grounds for Direct Review with this Court, and Sound Transit answered. City Light’s request for direct review remains pending, and the parties have proceeded to brief the issues on the merits.

#### **D. RELATED CASES**

In addition to this case, City Light and Sound Transit are litigating four related cases, each involving a parcel at the same Bellevue intersection as the Parcel, each involving the same City Light easement corridor, and each raising the same issues.

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<sup>1</sup> See Declaration of Larry J. Smith, *infra* n.2.

1. *The Jacobsen Case*

In *Sound Transit v. Ann Senna Jacobsen, et al.*, King County Cause No. 16-2-06769-7 SEA (“*Jacobsen*”), City Light opposed Sound Transit’s Motion for Public Use and Necessity on the same grounds it raises here: that Sound Transit lacked authority to condemn public property, that the proposed condemnation would render City Light’s Easement unusable, and that the property interests sought in condemnation were not strictly “necessary” for the East Link Extension. In *Jacobsen*, City Light also challenged Sound Transit’s authority to condemn City Light property in a motion for summary judgment. On January 19, 2017, the trial court entered a revised order finding public use and necessity as to City Light’s Easement interest,<sup>2</sup> and on December 20, 2016 denied City Light’s motion for summary judgment. Appx. at 3-14. City Light then appealed the PU&N judgment to the Court of Appeals under Cause No. 76252-4-1, and also sought direct discretionary review of the summary judgment denial. Appx. at 15-36. On March 31, 2017, this Court denied City Light’s petition for direct discretionary review of the *Jacobsen* summary judgment denial. Appx. at 37-42. On January 10, 2017 the

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<sup>2</sup> In *Jacobsen*, Sound Transit filed the Declaration of Larry J. Smith in Support of Petitioner’s Reply in Support of Motion for Order and Judgment Adjudicating Public Use and Necessity - City of Seattle, which affirmed Sound Transit’s commitment to work with City Light to preserve its easement interests where possible. *Sound Transit v. Jacobsen*, King County Cause No. 16-2-06769-7 SEA, Dec. 8, 2016, Appx. at 2.

Court of Appeals granted Sound Transit’s motion for accelerated review of the Jacobsen PU&N judgment. Appx. at 43-44. City Light’s opening brief was submitted to the Court of Appeals on May 18, 2017, and Sound Transit’s response brief was submitted to the court on June 19, 2017. On July 19, City Light filed its reply and the parties now await an expedited oral argument setting.

2. The Sternoff Case

In *Sound Transit v. Sternoff L.P.*, King County Cause

No. 16-2-0880-7 SEA (“*Sternoff*”), City Light opposed Sound Transit’s Motion for Public Use and Necessity on the same grounds.<sup>3</sup> On April 19, 2017, the trial court entered an order finding public use and necessity as to City Light’s Easement interest. Appx. at 45-50. On May 18, 2017, City Light filed a Notice of Appeal to the Supreme Court of Washington of the trial court’s PU&N Judgment. Appx. at 51-54. City Light’s Statement of Grounds for Direct Review and Sound Transit’s answer have been filed. The request for direct review remains pending.

3. The Safeway Case

In *Sound Transit v. Safeway Inc.*, King County Cause No. 16-2-09223-3 SEA (“*Safeway*”), City Light opposed Sound Transit’s Motion

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<sup>3</sup> The *Sternoff* property owner had previously challenged Sound Transit’s condemnation on necessity grounds. The trial court’s ruling finding public use and necessity as to the owner was affirmed by the Court of Appeals, No. 75372-0-I (Nov. 7, 2016). The Supreme Court denied Sternoff’s petition for review, No. 93913-6 (Feb. 8, 2017).

for Public Use and Necessity on the same grounds. On March 27, 2017, the trial court entered an order finding public use and necessity as to City Light's Easement interest. Appx. at 55-59. City Light promptly moved for reconsideration, which the trial court denied on April 14, 2017. Appx. at 60-61. On April 19, 2017, City Light appealed the trial court's PU&N Judgment to the Supreme Court of Washington. Appx. at 62-63. City Light filed its Statement of Grounds for Direct Review on May 8, 2017. Appx. at 64-79. Sound Transit filed its answer on May 22, 2017. Appx. at 80-99. The request for direct review remains pending.

4. The Spring District Cases

In addition to this case, Sound Transit filed another action for condemnation of a different set of property interests on the subject parcel. *Sound Transit v. WR-SRI 120th North LLC*, King County Cause No. 17-2-12144-4 SEA ("*Spring District II*").<sup>4</sup> Sound Transit has filed a Motion for Public Use and Necessity in that case, and City Light has opposed the motion on the same grounds it has argued in the previous cases. Appx. at 100-111, 112-131. The motion has yet to be decided by the trial court.

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<sup>4</sup> Sound Transit filed separate condemnation actions because of anticipated valuation issues relating to the property rights being taken in this case, *Spring District I*, where the light rail station will be located, and because Sound Transit was able to obtain from the Spring District property owner a pre-condemnation Administrative Possession and Use Agreement with respect to the owner's property interests at issue in the other case, *Spring District II*. Filing the two matters separately also provided Sound Transit with the most flexibility for the Project Schedule. Appx. at 136-37.

In each of these cases except for *Spring District II*, which is awaiting a public use and necessity ruling, the trial court has rejected City Light's arguments, ruled that Sound Transit is authorized to condemn public property, and found that City Light's Easement interests are necessary for the East Link Extension.

#### **IV. ARGUMENT**

##### **A. SOUND TRANSIT'S ENABLING STATUTE GRANTS IT AUTHORITY TO CONDEMN PUBLIC PROPERTY**

The trial court correctly ruled that Sound Transit has statutory authority to condemn publicly owned property, including City Light's Easement. RCW 81.112.080(2) authorizes Sound Transit to condemn "all" property and rights of way necessary for its transit system and supporting facilities. The plain meaning of the word "all" includes public property, and other portions of the same statute confirm that "all" property includes public property. In addition, regional transit authorities building a regional transit system through dense urban areas must be able to condemn publicly owned property to achieve the statutory purpose: a "regional" transit system.

RCW 81.112.080(2) grants Sound Transit broad condemnation authority to support high capacity transportation facilities such as light rail lines. It allows 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 ... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems.”

Statutory analysis "always begins with the plain language of the statute." *Rest. Dev., Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). On its face, RCW 81.112.080 specifically authorizes Sound Transit to condemn "all lands, rights-of-way, [and] property necessary for such high capacity transportation systems." [emphasis added]. The word "all" represents an express delegation of the power to condemn publicly owned, as well as privately owned property. That is, the legislature expressly refused to limit a Regional Transit Authority's power to condemn based on the nature or ownership of the land or property to be acquired.

Additionally, the statute expressly references "rights-of-way" in its grant of condemnation authority. Because rights-of-way are routinely owned by the state or one of its political subdivisions, the legislature must have intended "all lands, rights-of-way, [and] property" to mean and include publicly owned land. It would not make sense for the legislature to expressly grant condemnation rights over "all ... rights-of-way" if it intended to limit the condemnation authority to only private property.

Finally, the remainder of the statute assumes and confirms that the power to condemn publicly owned property exists. RCW 81.112.080 contains an explicit exclusion for certain types of public property. Certain public property and facilities already used for public transportation may be acquired only by consent. The statute reads, in relevant part:

Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities.

RCW 81.112.080.

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P. 2d 736 (1988)). If Sound Transit did not have the power to condemn publicly owned property, there would be no reason to specifically exclude public property already devoted to public transportation. The exclusion itself would be superfluous, meaningless, and unnecessary if Regional Transit Authorities lacked the power to condemn other public property, including other property owned by cities. Thus, the only interpretation that gives meaning to all the statutory

language is that Sound Transit is authorized to condemn city property so long as that city property is not a public transportation facility or public transportation property.

And this makes sense, because the purpose of the Regional Transit Authority statute is to provide for a single entity to plan, develop, operate, and fund a multicounty, high capacity transportation system. *See* RCW 81.112.010. Those "services must be carefully integrated and coordinated with public transportation services currently provided." *Id.* Thus, when a public agency is already using property for public transportation, that property may be acquired or used by a Regional Transit Authority only with the agency's consent. RCW 81.112.080.

City Light claims this reference to public transportation properties is a limited grant of authority to acquire public property, not an exception to the power to acquire "all" property. But the plain language of the clause shows it is an exception, not a grant. The statute provides that publicly owned public transportation facilities and properties "may be acquired or used by an authority only with the consent of the agency owning such facilities." RCW 81.112.080. The word "only" would not be used if the clause were a grant. It is a word of limitation, and shows that absent the clause Sound Transit would have authority to acquire those facilities "by purchase, condemnation, gift, or grant and to lease" under

the prior grant of authority to acquire “all” property. Thus, the exception proves the general rule: that Sound Transit has the broad authority to condemn all property it needs to build its projects, even if the property is publicly owned.

In its brief, City Light asserts that RCW 81.112.080 is silent as to whether Sound Transit is authorized to condemn property owned by cities or other public entities and that such silence means that the statute only delegates power to condemn private property. However, the statute is not silent. The word "all," in itself, distinguishes Sound Transit's condemnation authority from the county-condemnation statute addressed in the case relied on by City Light, *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966).

In that case, King County sought to condemn a 60-foot right-of-way from an existing road owned by the City of Seattle. The City filed a motion for summary judgment, arguing that King County lacked specific statutory authority to condemn property owned by another municipal corporation. The Washington Supreme Court agreed, based on the language of the authorizing statute, which provides: "[e]very county is hereby authorized and empowered to condemn land and property within the county for public use." RCW 8.08.010. The Court held that this language did not provide "an express or necessarily implied legislative

authority for counties to condemn the property or rights of the state or any of its subdivisions." *King County*, 68 Wn.2d at 691-92.

But King County's general authority to condemn for public use within municipal limits is much different from the authorization given to RTAs.

First, unlike the authorizing statute in *King County*, RCW 81.112.080 expressly states that as a regional transit authority, Sound Transit has the power to condemn "all lands, rights-of-way, [and] property necessary for such high capacity transportation systems." RCW 81.112.080 [emphasis added]. Second, Sound Transit's authorizing statute provides context regarding the type of property that it is authorized to condemn, demonstrating the legislature's intent to grant Sound Transit the authority to condemn public property. Notably, the statute explicitly authorizes Sound Transit to condemn rights of way, which are routinely property of the state or its political subdivisions. And finally, RCW 81.112.080 specifically precludes Sound Transit from condemning public transportation property owned by cities or other public entities. This exception to Sound Transit's condemnation power would not be necessary unless Sound Transit would otherwise have had that power.

In contrast, the authorizing statute in *King County* contained neither the express authority to condemn "all" property, nor other

references to the condemnation of public property, nor an exception for certain types of public property. The distinctions between the statutes at issue demonstrate why the result here must be different from the result the Supreme Court reached in *King County*.

And the Supreme Court's ruling in *Newell v. Loeb*, 77 Wash. 182, 200, 137 P. 811 (1913), supports this conclusion. In *Newell*, the commissioners of a waterway district sought a right of way to straighten and deepen the Duwamish River. *Id.* at 188. The appellants in the case included the Puget Sound Traction, Light & Power Company and Seattle Electric Company, which owned and operated a steam electrical plant along the river that required a heavy flow of cold water from the river to produce electricity. *Id.* at 197. The water commissioners' project included a dam that would divert the river water away from the electrical plant, requiring a costly pipeline to procure the necessary water. *Id.* at 198. Puget Sound Traction, Light & Power Company argued that it was using the waters of the river for a public use, and the water commission's eminent domain statute did not authorize the condemnation of property already devoted to a public use. *Id.* Like RCW 81.112.080, the commission's eminent domain statute authorized the condemnation of "all" necessary and needed property to improve the waterways. *Id.* at 199. Acknowledging that property devoted to a public use could not be taken

for another public use without express or necessarily implied legislative authority, the Washington Supreme Court held the commission's eminent domain statute conferred the power to take land already devoted to a public use, holding that the use of the word "all" conferred the power "to acquire, either by purchase or condemnation as the commission may see fit, all necessary and needed rights of way." *Id.* at 200.

Likewise, RCW 81.112.080 grants Sound Transit authority to acquire "all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems. RCW 81.112.080(2) [emphasis added]. Thus, under *Newell*, Sound Transit's statute confers the authority to condemn both public and private property, including property already in public use, to effectuate the statutory purpose.

Finally, City Light simply ignores the long line of cases that hold condemnation statutes cannot be construed to defeat the purpose of the granted condemnation authority. Although "statutes which delegate the state's sovereign power of eminent domain to its political subdivisions are to be strictly construed," the power may be conferred "in express terms or by necessary implication;" "a statutory grant of such power is not to be so strictly construed as to thwart or defeat an apparent legislative intent or objective." *State ex rel. Devonshire v. King County*, 70 Wn.2d 630, 633,

424 P.2d 913 (1967) (citing *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965)). The Washington Supreme Court articulated the standard for statutory construction in the condemnation context in

*State ex rel. Hunter v. Superior Court for Snohomish County*:

"statutes relating to eminent domain are strictly construed, but it is not necessary that such statutes cover in minute detail everything which may be done in order to carry out their purposes. Even though a power may not be expressly given in specific words, if its existence is reasonably necessary in order to effectuate the purposes intended, such power may be implied."

34 Wn.2d 214, 217, 208 P.2d 866 (1949) [emphasis added]. *See also* *Petition of Port of Grays Harbor*, 30 Wn. App. 855, 861-862, 638 P.2d 633 (1982) (citing *State ex rel. Hunter*). Thus, in addition to the condemnation powers expressly conferred, Sound Transit has the authority to condemn public property because that power is "reasonably necessary" in order to effectuate the regional transit authority enabling statute.

The purpose of the Regional Transit Authority statute is to provide for a single entity to plan, develop, operate, and fund a multicounty, high capacity transportation system. *See* RCW 81.112.010. Given the nature of a regional public transportation system, which by definition must span and connect numerous local jurisdictions and cross or abut thousands of properties, including public rights of way, the power to condemn public property is "reasonably necessary" to effectuate the statutory purpose.

Here, City Light would have this Court construe Sound Transit's condemnation authority so strictly as to defeat the purpose of the grant—to enable Sound Transit to design, construct, and operate a comprehensive regional public transportation facility. RCW 81.112.080; see also RCW 81.112.010.

**B. CITY LIGHT'S EASEMENT IS NECESSARY FOR THE PROJECT**

City Light argues that the property rights Sound Transit seeks cannot be condemned because they are not “necessary” for the East Link Extension. Specifically, City Light argues that Sound Transit cannot condemn aerial easement rights over the Parcel, claiming: “a permanent taking of [City Light’s] aerial rights at 48+ feet above grade, where the existing Transmission Line wires are located, were not necessary to build a light rail line on the ground.” City Light Opening Brief at 25. In City Light’s view, Sound Transit must satisfy a purported statutory standard that every property it condemns is literally indispensable. This, however, flies in the face of Washington condemnation precedent.

*Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 128 P.3d 588 (2006), addressed the “necessity” standard in the public use and necessity context while considering Sound Transit’s statutory power of condemnation. The Washington Supreme Court explained that in the first instance it is up to the condemnor to determine

what property is necessary for the project: “Once a state agency with the power of eminent domain has made the initial determination that condemnation is necessary, the matter moves into court for a three-stage proceeding.” *Id.* at 410. *Miller* also analyzed the “necessity” requirement in the court proceeding, holding “a particular condemnation is necessary so long as it appropriately facilitates a public use.” *Id.* at 421. Sound Transit’s public use is construction of a high capacity transportation system. CP 4. *Miller* affirms that under RCW 81.112.080, Sound Transit is authorized to condemn for this purpose even if taking that particular property is not “the best and only way to accomplish a public goal.” *Id.*

In its opening brief, City Light attempts to draw a distinction between the necessity standard articulated in *Miller* and the necessity standard applicable to this case. Opening Brief 25-26. City Light claims that whether the property is necessary for a public use and whether the property is necessary for Sound Transit’s high capacity transportation system are separate questions, with separate definitions of necessity. *Id.* City Light, however, fails to point to any authority whatsoever supporting this distinction. That is because no such distinction exists under Washington law.

Necessity has a very specific, well established meaning in eminent domain law. It does not mean the project could not exist without the

property; rather, it means that the property has been selected for and will actually support a designated public use. *E.g., Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC (NAFTZI)*, 159 Wn.2d 555, 576 ¶ 40, 151 P.3d 176 (2007) (necessity exists if the project fulfills a "genuine need" and "condemnor in fact intends to use the property for the avowed purpose") [internal quotations omitted]. "[A] particular condemnation is necessary as long as it appropriately facilitates a public use." *Sound Transit v. Miller*, 156 Wn.2d at 421 ¶ 36. "Put another way, when there is a reasonable connection between the public use and the actual property, this [necessity] element is satisfied." *Id.*

"Since the turn of the century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings." *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 631 ¶ 42, 121 P.3d 1166 (2005). An agency's determination that property is necessary for a public use is conclusive unless the party opposing condemnation shows the determination was arbitrary and capricious, amounting to constructive fraud. *Welcker*, 65 Wn.2d at 684. Thus, Washington's comprehensive body of decisions analyzing what is required to show "necessity" in condemnation proceedings establishes a very different standard from the

"indispensable" standard City Light argues here. There is no reason to believe that when the legislature used the word "necessary" to describe Sound Transit's condemnation authority it meant something different from the longstanding Washington authority about what "necessary" means in the condemnation context.

Sound Transit determined that each of the properties along the light rail alignment was necessary for the project, and authorized acquisition by purchase or condemnation of "all or any portion" of those properties. CP 11. Resolution R2013-21, which authorized the take, specifically determined that the Parcel was "necessary for the construction and permanent location of the East Link Project," and that the acquisition was "for the light rail construction, operation and maintenance in the Bel-Red Corridor of Bellevue between 120th Ave NE and 148th Ave NE." CP 10.

Based on that evidence, the trial court found that the construction of Sound Transit's East Link Extension will serve a public purpose, is necessary for the public interest, and that the property interests in the Parcel, consisting of the fee simple land and easements being acquired in this condemnation action, are necessary for this purpose. CP 1910. Additionally, the trial court found that there was no fraud, actual or

constructive, no abuse of power, bad faith, or arbitrary and capricious conduct by Sound Transit. *Id.*

The trial court's findings are reviewed under the substantial evidence test. *City of Bellevue v. Pine Forest Properties, Inc.* (hereafter, "*Pine Forest*"), 185 Wn. App. 244, 263-64 ¶¶ 52-53, 340 P.3d 938 (2014), *rev. denied*, 183 Wn.2d 1016 (2015). In *Pine Forest*, the property owner requested the court to review the public use and necessity findings *de novo*. But because "the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings," the court rejected that argument and held the substantial evidence standard of review applied. *Id.* at 264 ¶ 53. The same is true here.

Under the substantial evidence test, the evidence is viewed in the light most favorable to the respondent on appeal. *NAFTZI*, 159 Wn.2d at 576 ¶ 41. Substantial evidence supports a finding if, "viewed in the light most favorable to the respondent," it "would persuade a fair-minded, rational person" that the finding is true. *Miller*, 156 Wn.2d at 419 ¶ 29, [internal quotations omitted]. Thus, to succeed on appeal based on an argument that its Easement is not "necessary" for Sound Transit's project, City Light must demonstrate that the only conclusion a "fair-minded,

rational person" could draw from the evidence is that Sound Transit engaged in arbitrary and capricious conduct amounting to constructive fraud when it determined the Parcel was necessary for its project. This argument fails based on the evidence and the longstanding Washington law discussed below.

Sound Transit's necessity determination was not arbitrary and capricious or fraudulent. As an initial matter, although City Light has challenged whether the aerial rights of its Easement are necessary for Sound Transit's project, City Light has never alleged or put forth any evidence suggesting that Sound Transit's necessity determination was arbitrary and capricious amounting to actual or constructive fraud. And the record is clear that City Light has never challenged Sound Transit's necessity determination on the only grounds upon which a necessity determination may be contested. For this reason alone, the trial court's necessity finding must stand.

Additionally, Sound Transit's legislative determination that the Parcel was necessary for the East Link Extension is, in itself, substantial evidence to support the trial court's necessity finding. *See, e.g., NAFTZI*, 159 Wn.2d at 577 ¶ 42. (board resolution identifying public purpose and selecting property to accomplish that purpose was sufficient); *City of Seattle v. Loutsis Inc. Co., Inc.* (hereafter, "*Loutsis*"), 16 Wn. App. 158,

167, 554 P.2d 379 (1976) (“determination of necessity was for the City to make”); *King County v. Olson*, 7 Wn. App. 614, 619-20, 501 P.2d 188 (1972) (substantial evidence supported necessity of take when agency presented overall plans for park and showed “that open space land within the proposed park area had been selected for acquisition”).

Moreover, as the cases show, demonstrating fraud, bad faith, or arbitrary and capricious conduct is a heavy burden (that City Light has failed to meet). For example, in *In re Port of Seattle*, the owner challenged the Port's necessity determination, claiming it was arbitrary and capricious because "the plans for the use of the property to be acquired are not specific." 80 Wn.2d 392, 398, 495 P.2d 327 (1972). The court rejected the argument. First, the court noted there was a specific public use—air cargo facilities—designated for the property. *Id.* At 398-99. Second, the court held that the lack of "specific or detailed plans for the facilities to be constructed" is insufficient to establish arbitrary and capricious decision-making amounting to the constructive fraud. *Id.*

As in *Port of Seattle*, the designated public use here is clear: "construction, operation, and permanent location of the East Link Extension." CP 11, §§ 3, 4. There is but one necessity standard in the context of eminent domain proceedings and the trial court correctly applied that standard when it found that the subject property, including

City Light's Easement, was necessary for Sound Transit's project.

Because City Light failed to show arbitrary and capricious conduct amounting to constructive fraud, Sound Transit's necessity determination was conclusive, and the trial court's necessity finding must be affirmed.

**C. THE PRIOR PUBLIC USE DOCTRINE PERMITS THIS CONDEMNATION**

The prior public use doctrine is implicated when a condemnor seeks to condemn publicly owned land that is already devoted to a public use. *See Public Utility District No. 1 of Okanogan County v. State*, 182 Wn.2d 519, 538-40 ¶ 31, 342 P.3d 308 (2015) ("*Okanogan County*"). Under the prior public use doctrine, the condemnor always has the power to condemn such land for a new use compatible with the prior public use. *Id.* Public uses are compatible when the proposed public use will not destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Id.* at 538-40 ¶ 31 (citing 1A NICHOLS ON EMINENT DOMAIN § 2.17 at 2-58 (Julius L. Sackman ed., 3d ed. 2006)).

In *Roberts v. City of Seattle*, the City of Seattle sought to condemn a 30-foot strip of school property in order to widen a road. 62 Wash. 573, 116 P. 25 (1911). The Washington Supreme Court held that the City could condemn the land even though it had previously been devoted to a public use (education) because there was no indication that the school presently used the land and there was nothing to indicate that taking the land would

impair the school's use of the remaining property. 62 Wash. At 576.

Similarly, in *City of Tacoma v. State*, the court permitted the diversion of river water presently devoted to a public use as a fish hatchery because the proposed diversion did not destroy or critically interfere with such use. 121 Wash. 448, 453, 209 P. 700 (1922).

In this matter, the two public uses are compatible because Sound Transit's public use (high capacity transportation system) does not destroy or interfere with City Light's transmission line over the Parcel. As City Light rightly points out in its briefing to both the trial court and this court, it is "inconceivable" that Sound Transit's project will interfere with City Light's existing electrical transmission wires which will hang some 48+ feet above Sound Transit's light rail line. CP 1050, 1060. City Light's own argument regarding the "necessity" of condemning City Light's aerial easement rights concedes that Sound Transit's use is compatible with City Light's existing public use<sup>5</sup>. Sound Transit's project will be built beneath City Light's transmission system and does not interfere or conflict with its transmission line across the Parcel. The uses are therefore compatible.

To condemn property previously devoted to a public use for a new use that is incompatible with the existing use, requires that the condemnor

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<sup>5</sup> See Russell King Declaration in Support of City of Seattle's Opposition to Petitioner's Motion for Public Use and Necessity and accompanying exhibit, displaying Sound Transit's train built in a "retained cut" configuration. CP 1060, 1063.

have the power to do so either by express statutory language or necessary implication. *Id.* at 539 ¶ 31. Once express or implied statutory authority to condemn a competing public use is established, the court engages in a balancing test to determine the superiority of rights between the competing public uses. *Id.* at 543 ¶ 39.

Here, even if Sound Transit's project called for the destruction of City Light's current transmission line configuration, City Light would be free to design an alternative configuration consistent with its remainder easement. Sound Transit's project takes only a small area west of 124<sup>th</sup> Avenue NE. The evidence City Light presented to the trial court claims only that there would not be room in the portion of its Easement remaining after Sound Transit's taking to run a 230 kV transmission system. CP 1073. But there is no evidence that City Light's ability to use the remainder easement for ANY electrical transmission system will be destroyed. The compatibility test outlined by the courts asks whether the proposed use will destroy the existing use or interfere with it to such an extent as is tantamount to destruction. *Okanogan County*, 182 Wn.2d at 538-39 ¶ 31. If not, the use is compatible. *Id.* Thus, even if Sound Transit's use would require City Light to reconfigure its transmission line, the prior public use doctrine would not bar the condemnation. Instead,

costs associated with the reconfiguration would be a factor in determining City Light's just compensation<sup>6</sup>

At the conclusion of Sound Transit's project, City Light will still be able to operate its existing transmission system across the Parcel, and will continue to own a substantial electrical utility easement that it may utilize according to its stated purpose. The two uses are thus compatible, and the prior public use doctrine does not bar the condemnation.

**D. SEATTLE'S STATUS AS A HOME RULE CHARTER CITY IS IRRELEVANT TO THIS LAWSUIT**

City Light's final argument, which was not raised in the trial court, is that Seattle's status as a home rule charter city grants it "complete local self-government in municipal affairs." Opening Brief at 33. Because Seattle's charter grants it a special status, City Light argues, it is superior to limited-purpose agencies like Sound Transit. But other than a high-level overview of the rights of home rule charter cities, City Light provides no case law or analysis supporting this contention. Its argument fails for two reasons.

First, the Parcel at issue in this case is not located in Seattle. It is located in Bellevue, which has been an enthusiastic partner of Sound Transit during the planning and construction of the East Link Extension to

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<sup>6</sup> See *State v. McDonald*, 98 Wn.2d 521, 525-26, 656 P.2d 1043 (1983) (where only part of a single tract of land is taken, the measure of damages is fair market value of the land taken, together with damages to the land not taken).

the Link light rail. Although Seattle may have substantial power over activities within its own borders under its home rule charter, City Light has provided no authority suggesting that such power can be extended beyond Seattle's borders to block a condemnation in another jurisdiction.

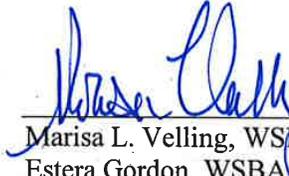
Second, as City Light itself points out, "it is for *the Legislature . . .* to prescribe the relative importance of the governmental unit and the function it performs." Opening Brief at 36 [emphasis added]. City Light is correct. Indeed, the Washington Legislature did just that when it passed Sound Transit's enabling statute and gave Sound Transit permission to condemn "all lands, right-of-way, [and] property necessary for such high capacity transportation systems." RCW 81.112.080 [emphasis added]; *see also* Section IV.A, *supra*. Washington law is clear that "Home rule charter provisions are subordinate to state law." *Washam v. Sonntag*, 74 Wn. App. 504, 509, 874 P.2d 188 (1994). Even if Seattle's charter allowed City Light to bar the acquisition of land outside Seattle's borders, Seattle's authority is subordinate to that granted to Sound Transit by the Legislature. Sound Transit is limited by its statute to what it can condemn for (high capacity transportation). But it was expressly granted broad statutory authority in terms of who it can condemn from (all lands necessary for its purpose). Seattle's status as a home rule charter city is irrelevant to these proceedings.

**V. CONCLUSION**

For the reasons stated above, the trial court committed no error in concluding that Sound Transit has the statutory authority to condemn City Light's Easement and that there is public use and necessity for the condemned Easement. Sound Transit requests that this Court affirm the trial court's Order and Judgment Adjudicating Public Use and Necessity.

DATED this 24<sup>th</sup> day of July, 2017.

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4849-5407-3931.4

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**THE SUPREME COURT**  
STATE OF WASHINGTON



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August 17, 2017

**LETTER SENT BY E-MAIL ONLY**

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Page 2  
No. 94255-2  
August 17, 2017

Re: Supreme Court No. 94255-2 - Central Puget Sound Regional Transit Authority, et al v.  
WR-SRI 120TH NORTH LLC, et al  
King County Superior Court No. 17-2-00988-1 SEA

Counsel:

The following notation ruling was entered on August 17, 2017, by the Supreme Court Clerk  
in the above referenced case:

MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF OF  
APPELLANT

**“Motion granted. The Appellant's reply brief should be served  
and filed by October 6, 2017.”**

Sincerely,



Susan L. Carlson  
Supreme Court Clerk

SLC:kms

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The Honorable Jeffrey Ramsdell  
Noting Date: May 31, 2017  
(Without Oral Argument)  
Moving Party: Petitioner Sound Transit

SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, dba SOUND TRANSIT,	)	No. 17-2-12144-4 SEA
Petitioner,	)	PETITIONER'S MOTION FOR ORDER AND JUDGMENT ADJUDICATING PUBLIC USE AND NECESSITY
vs.	)	
WR-SRI 120TH NORTH LLC, a Delaware limited liability company; et. al.,	)	Tax Parcel Nos. 067100-0000, 067100-0020, 067100-0030, 067100-0040, and 067100-0060
Respondents.	)	

**I. RELIEF REQUESTED**

Petitioner, Central Puget Sound Regional Transit Authority, dba Sound Transit's ("Petitioner") moves the Court for an order and judgment adjudicating public use and necessity as to Respondents named in this action.

**II. STATEMENT OF FACTS**

Public Use and Necessity: This is a condemnation action. On November 5, 1996, November 4, 2008, and November 8, 2016, voters approved local funding to implement a regional high-capacity transit system for the Central Puget Sound region ("Sound Move, ST2, and ST3"). See, Declaration of Tom Wilson filed in support of this motion ("Wilson Decl."). In part, Sound Move, ST2, and ST3 provide for the implementation of a high-capacity light rail service and transit improvements. They further provide for the construction, operation,

PETITIONER'S MOTION FOR ORDER  
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4847-7286-5863.1

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1 maintenance and permanent location of an electric light rail project (“Link light rail”) connecting  
2 some of the state’s largest employment and education centers, highest density residential areas,  
3 and highest regional transit ridership areas. Wilson Decl. Link light rail is being expanded from  
4 downtown Seattle to Mercer Island, South Bellevue, downtown Bellevue, Bel-Red, and Overlake  
5 (the “East Link Extension” or the “Project”). Certain real property and real property rights must  
6 be acquired for purposes of locating, constructing, maintaining, and operating the East Link  
7 Extension. *Id.*

8 In order to construct the Project, certain real property and real property rights are  
9 necessary for the City of Bellevue’s Bel-Red Transportation Improvements, which includes  
10 widening 124th Ave NE. *Id.* As part of the agreement to expand light rail to Bellevue,  
11 Petitioner and the City of Bellevue entered into a Memorandum of Understanding for  
12 Intergovernmental Cooperation for the East Link Project which requires certain real property and  
13 real property rights for the 124th Ave NE project. *Id.*

14 On September 26, 2013, by Petitioner’s Resolution No. R2013-21 (the “Resolution”), the  
15 Sound Transit Board of Directors (the “Board”) authorized the condemnation, taking, damaging,  
16 and appropriation of certain lands, properties and property rights determined by the Board to be  
17 necessary for the construction, operation, and maintenance of the East Link Extension. *Id.* A  
18 copy of the Resolution is attached as Exhibit 1 to the Amended Petition in Eminent Domain on  
19 file in this condemnation action, which Exhibit is incorporated here by this reference.

20 Petitioner and the City of Bellevue entered into certain agreements with regard to  
21 construction of the East Link Extension. *Id.* These provide for interlocal cooperation in order to  
22 ensure, among other things, that the East Link Extension segments within the City of Bellevue  
23 are: (a) constructed in accordance with City of Bellevue codes, development standards and  
24 permitting requirements; and (b) delivered in an efficient and cost effective manner (“Project  
25 Development Conditions”). *Id.* Construction of the East Link Extension segments in the City of  
26 Bellevue requires compliance with the Project Development Conditions, which, among other

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1 things, require acquisition of portions of the Parcel for associated public improvements  
2 including, but not limited to, right-of-way improvements. *Id.*

3 Notice has been given by way of the Petition that modifications to the East Link  
4 Extension design (the "Project Design") may occur in connection with Petitioner's chosen  
5 construction delivery method, Project Development Conditions, mitigation of damages, or  
6 otherwise and any such modifications are necessary to the East Link Extension. *Id.* It is  
7 intended that the impact from such modifications, if any, as to the portions of the Parcel being  
8 acquired will be captured as part of the parties' respective value conclusions and just  
9 compensation. *Id.* These modifications are not an abandonment or material modification of the  
10 East Link Extension. Wilson Decl. To facilitate Respondents' preparation of their case,  
11 Petitioner will, upon request, provide notice of the current status of the Design as it relates to the  
12 Parcel. *Id.*

13 By adoption of the Resolution, the Board resolved the East Link Extension to be a public  
14 use for a public purpose. *Id.* By adoption of the Resolution, the Board also resolved that: (a)  
15 such land, property and property rights identified in the Resolution are necessary for the location,  
16 construction, operation and maintenance of the East Link Extension; and (b) the public health,  
17 safety, necessity, convenience and welfare demands and requires that such land, property and  
18 property rights be immediately acquired to locate, construct, operate and maintain the East Link  
19 Extension. *Id.* The Board's finding of necessity implicitly includes a finding of necessity for  
20 the taking of that portion of the land, property and property rights identified in the Resolution  
21 required for construction of the East Link Extension in conformance with the Project Design and  
22 with the local permitting jurisdiction's codes, development standards and permitting  
23 requirements imposed as conditions to construction of the East Link Extension. *Id.*

24 Included as part of the property determined by the Board to be necessary for the East  
25 Link Extension is real property in which the Respondents hold an interest, identified as King  
26

PETITIONER'S MOTION FOR ORDER  
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1 County Tax Parcel Nos. 067100-0000, 067100-0020, 067100-0030, 067100-0040, and 067100-  
2 0060 (the "Parcels"). *Id.*

3 With this action, Petitioner seeks to appropriate portions of the Parcels required for the  
4 East Link Extension. The Parcels to be acquired herein are substantially as follows:

- 5 1. The permanent taking of a portion of the Parcels for a permanent wall easement,  
6 substantially as described, depicted, and provided for in **Exhibit 1** of the Findings  
7 of Fact, Conclusions of Law and Order and Judgment Adjudicating Public Use  
8 and Necessity filed herewith ("Proposed Order");
- 9 2. The permanent taking of a portion of the Parcels for a permanent sidewalk and  
10 utility easement, substantially as described, depicted, and provided for in **Exhibit**  
11 **2** to the Proposed Order; and
- 12 3. The temporary taking of a portion of the Parcels for a temporary construction  
13 easement, substantially as described, depicted, and provided for in **Exhibit 3** to  
14 the Proposed Order.

15 Exhibits 1-3 to the Proposed Order are incorporated here by this reference and the real  
16 property and real property interests described therein are hereinafter collectively referred to as  
17 the "Condemned Property."

18 By adoption of the Resolution, the Board resolved that: (a) the Condemned Property is  
19 necessary for the location, construction, operation and maintenance of the East Link Extension;  
20 and (b) public health, safety, necessity, convenience and welfare demand the Condemned  
21 Property be acquired by condemnation for the location, construction, operation and maintenance  
22 of the East Link Extension. Wilson Decl. The Board's finding of necessity with regard to the  
23 Condemned Property implicitly includes a finding of necessity for the taking of that portion of  
24 the Condemned Property required for construction of the East Link Extension in conformance  
25 with the Project Design and with the Project Development Conditions imposed as conditions to  
26 construction of the East Link Extension. *Id.*

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1            Notice of Final Action: Before taking final action to adopt Resolution R2013-21, which  
2 authorizes condemnation of the subject property, Petitioner mailed and published notice as  
3 required under RCW 8.25.290. See, Declaration of Mike Bulzomi Regarding Notice of Final  
4 Action (“Bulzomi Decl.”) attached as Exhibit A to the Declaration of Jeffrey A. Beaver  
5 Regarding Notice of Final Action and In Support of Petitioner’s Motion for Public Use and  
6 Necessity, which Declaration is filed herewith (“Beaver Decl.”). Specifically, on September 10,  
7 2013, which was at least 15 days before the September 26, 2013 Board meeting at which  
8 Petitioner proposed to take final action authorizing the acquisition of the subject property  
9 through condemnation, Petitioner mailed a notice of its intent to take final action (the “Mail  
10 Notice”) by certified mail to each and every property owner of record as indicated on the tax  
11 rolls of the county to the address provided on such tax rolls for the subject property. Bulzomi  
12 Decl. Attached as Exhibit 1 to the Bulzomi Decl. is a true and correct copy of the Mail Notice  
13 with Certified Mail Receipt. The Mail Notice included a general description of the subject  
14 property including its address and tax parcel number and indicated that the Resolution  
15 authorizing condemnation of the subject property would be considered and potentially adopted  
16 during the Board meeting. *Id.* The Mail Notices gave the date, time and location of the Board  
17 meeting. *Id.*

18            In addition, Petitioner also published a notice of its intent to take final action authorizing  
19 the acquisition of the subject property through condemnation (the “Publication Notice”). *Id.*  
20 The Publication Notice described the subject property by its tax parcel numbers or address and  
21 indicated that the Board would determine at the meetings whether or not to adopt resolutions  
22 authorizing Petitioner to condemn the subject property. *Id.* The Publication Notice gave the  
23 date, time and location of the Board meeting. *Id.* The Publication Notice was published in *The*  
24 *Seattle Times*, being the legal newspaper with the largest circulation in the jurisdiction where the  
25 subject property is located, once a week for two consecutive weeks before the date of the  
26 September 26, 2013 Board meeting. *Id.* *The Seattle Times* is also the legal newspaper routinely

PETITIONER’S MOTION FOR ORDER  
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1 used by Petitioner. Attached as Exhibit 2 to the Bulzomi Decl. are true copies of the Affidavit of  
2 Publication evidencing the dates of publication in *The Seattle Times*. *Id.* Proof of circulation as  
3 established by publisher's affidavit is on file with Petitioner. *Id.*

4 Public Use and Necessity Determination as to Respondent WR-SRI 120th North LLC.

5 On December 22, 2016, James A. Pierre, Vice President of property owner WR-SRI 120th North  
6 LLC, signed an agreement granting Sound Transit possession and use of Parcel 067100-0000  
7 (the "Agreement"). The Agreement was recorded in King County under Recording No. 2017-  
8 0103001574 on January 3, 2017, and is attached as Exhibit 5 to the Petition in Eminent Domain  
9 on file herein. Pursuant to the Agreement, WR-SRI 120th North LLC surrendered and conveyed  
10 to Sound Transit possession and use of the Condemned Property in accordance with the terms  
11 and conditions and described, depicted, and provided for in the Agreement. In the Agreement,  
12 WR-SRI 120th North LLC also acknowledged and agreed that the Project is for a public purpose  
13 and that there is public use and necessity for Sound Transit's acquisition of the Condemned  
14 Property. Further, WR-SRI 120th North LLC agreed to the entry of an order and judgment  
15 adjudicating public use and necessity that is the subject of this motion.

16 Public Use and Necessity Determination as to Respondent City of Seattle ("City Light").

17 The subject property is one of four properties located at what will be the intersection of the East  
18 Link light rail trackway and 12th Avenue NE in Bellevue, WA. City Light holds easements for  
19 the construction, operation, and maintenance of an electrical transmission system on the  
20 properties bordering the eastern and western sides of 124th Ave NE, including the subject  
21 property. City Light currently owns and operates an electrical transmission line that runs along  
22 the west side of 124th Ave NE. The easements that are the subject of this condemnation action  
23 run below this transmission system, and Sound Transit intends to preserve City Light's rights  
24 along the west side of 124th Ave NE so as to not disrupt City Light's continued use of its existing  
25 transmission line. *See* Declaration of Larry Smith filed herewith. City Light has contested

26 Sound Transit's right to condemn its easement along 124th Ave NE in all four of the

PETITIONER'S MOTION FOR ORDER  
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1 condemnation matters Sound Transit has initiated concerning properties along 124th Ave NE.  
2 Each of the four trial courts that has heard City Light's arguments has affirmed Sound Transit's  
3 authority to condemn City Light's easement, and each has granted Sound Transit's motion for  
4 public use and necessity.<sup>1</sup> City Light has appealed these trial court rulings, which are currently at  
5 various stages of appellate review at the Court of Appeals and Washington Supreme Court.<sup>2</sup>

6 **III. STATEMENT OF THE ISSUES**

- 7 A. Whether Petitioner is authorized to bring and maintain this condemnation action;  
8 and  
9 B. Whether Petitioner's Motion should be granted and an Order and Judgment  
10 Adjudicating Public Use and Necessity entered by this Court.

11 **IV. EVIDENCE RELIED UPON**

12 The files and records on file herein and the testimony to be adduced at the hearing, if any,  
13 including the Declaration of Tom Wilson, the Declaration of Jeffrey A. Beaver, the Declaration  
14 of Larry J. Smith, and the Declaration of Mike Bulzomi, together with exhibits thereto, filed in  
15 support of this Motion, which declarations are incorporated here by this reference.

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<sup>1</sup> See Revised Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and  
21 Necessity re City of Seattle Property Interests, *Sound Transit v. Jacobsen*, King County No. 16-2-06769-7  
22 SEA (Dec. 19, 2016); Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use  
23 and Necessity re City of Seattle, *Sound Transit v. WR-SRI 120th North LLC*, King County No. 17-2-00988-  
24 1 SEA (Feb. 13, 2017); Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public  
25 Use and Necessity as to the City of Seattle, *Sound Transit v. Safeway Inc.*, King County No. 16-2-09223-3  
26 SEA (March 27, 2017); and Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating  
Public Use and Necessity as to the City of Seattle, *Sound Transit v. Sternoff L.P.*, King County No. 16-2-  
08800-7 SEA (April 19, 2017) attached hereto as Exhibits B-D to the Beaver Decl.

<sup>2</sup> Seattle has appealed the Revised Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public  
Use and Necessity re City of Seattle in the *Jacobsen* case. That appeal is still pending at the Washington Court of  
Appeals. City Light also appealed the public use and necessity determinations in the *WR-SRI 120th North* and  
*Safeway Inc.* cases to the Washington Supreme Court.

PETITIONER'S MOTION FOR ORDER  
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V. AUTHORITY

A. PETITIONER IS AUTHORIZED TO BRING AND MAINTAIN THIS CONDEMNATION ACTION.

Petitioner undertook diligent efforts to provide the notice required pursuant to RCW 8.25.290 prior to taking final action authorizing this condemnation action. This condemnation action is brought by Petitioner pursuant to an express legislative delegation of the power to condemn.

1. **Notice of Final Action:** Pursuant to RCW 8.25.290(1), the condemnor must provide notice before it takes final action authorizing a condemnation action. The notice is to be given by certified mail to the taxpayer of record at the address on the county tax rolls and to be published. RCW 8.25.290(2). As described above, Petitioner timely mailed and published notice before taking final action to authorize the condemnation of the Condemned Property. Petitioner’s efforts should be found to constitute sufficient notice under RCW 8.25.290.

2. **Express Legislative Delegation of Power to Condemn:** This condemnation action is brought by Petitioner pursuant to an express legislative delegation of the power to condemn. Specifically, Petitioner is authorized to condemn all lands, rights of way, property, equipment, and accessories necessary for the construction, operation, maintenance and location of a high-capacity regional mass transportation system pursuant to the procedures established for condemnation by cities of the first class. This authority is set forth in RCW 81.112.080, which provides, in relevant part, as follows:

An authority shall have the following powers in addition to the general powers granted by this chapter: . . . (2) to acquire by purchase, condemnation, gift or grant . . . high-capacity transportation facilities and properties within authority boundaries . . . and such other facilities and properties as may be necessary . . . together with all lands, rights of way, property, equipment, and accessories necessary for such high-capacity transportation systems . . . . The right of eminent domain shall be exercised by an authority in the same manner and by the same procedure as or may be provided by law for cities of the first class, except insofar as such laws may be inconsistent with the provisions of this chapter . . . .

PETITIONER’S MOTION FOR ORDER AND JUDGMENT ADJUDICATING PUBLIC USE AND NECESSITY -- 8  
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1 RCW 81.112.080.

2 Sound Transit anticipates that City Light will dispute Sound Transit's authority to  
3 condemn City Light's property interest on the Parcel (an electrical transmission line  
4 easement) on the grounds that Sound Transit's enabling statute does not explicitly enable  
5 it to condemn property owned by another public entity. City Light has raised these  
6 objections to Sound Transit's condemnation authority in four cases thus far, each  
7 involving property abutting the same intersection as the Parcels in this case. In all four  
8 cases, this trial court rejected City Light's arguments and made a finding of public use  
9 and necessity in favor of Sound Transit. *See* the public use and necessity orders attached  
10 as Exhibits B-D to the Beaver Decl.

11 **B. PETITIONER'S MOTION SHOULD BE GRANTED AND AN ORDER AND**  
12 **JUDGMENT ADJUDICATING PUBLIC USE AND NECESSITY ENTERED BY**  
13 **THIS COURT.**

14 The exercise of a statutory right of eminent domain by condemnation occurs in three  
15 phases: (a) adjudication of public use and necessity; (b) determination of just compensation to  
16 be awarded to the owner; and (c) payment of just compensation and transfer of title. *Mercer*  
17 *Island School District v. Scalzo, Inc.*, 54 Wn.2d 539, 540, 342 P.2d 225 (1959); *Des Moines v.*  
18 *Hemenway*, 73 Wn.2d 130, 138, 437 P.2d 171 (1968).

19 This Motion addresses only the first of the three phases – the adjudication of public use  
20 and necessity. In order to enter a decree of public use and necessity, this Court must find that:  
21 (1) the use is really a public use; (2) the public interest requires it; and (3) the property to be  
22 appropriated is necessary for that use. *Des Moines*, 73 Wn.2d at 138.

23 1. **Public Use:** The issue of whether the proposed acquisition is actually for a public  
24 use is a judicial question.

25 Eminent Domain. Private property shall not be taken for private use . . .  
26 [w]hensoever an attempt is made to take private property for a use alleged to be  
public, the question of whether a contemplated use be really public shall be a  
judicial question . . . .

PETITIONER'S MOTION FOR ORDER  
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1 Const. Art. 1 §16 (amend. IX). In addition, RCW 8.12.090 specifically states that the issue of  
2 public use in condemnations by cities of the first class is a judicial question.

3 Whenever an attempt is made to take private property, for a use alleged to be  
4 public under authority of this chapter, the question whether the contemplated use  
5 be really public shall be a judicial question and shall be determined as such by the  
6 court before inquiry is had into the question of compensation to be made.

6 RCW 8.12.090.<sup>3</sup>

7 However, the Court shall give a legislative determination of public use great weight. *Des*  
8 *Moines v. Hemenway*, 73 Wn.2d at 133; *Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330  
9 (1965). Public transportation has long been recognized as a public use within the contemplation  
10 of the power of eminent domain. *State ex rel. Devonshire v. Superior Court for King County*, 70  
11 Wn.2d 630, 636, 424 P.2d 913 (1967) (citing *State ex rel. McIntosh v. Superior Court for Pacific*  
12 *County*, 56 Wash. 214, 105 Pac. 637 (1909), *cert. denied*, 389 U.S. 1023 (1967)).

13 In this case, Petitioner's evidence shows that the Condemned Property, which is being  
14 condemned in order to permanently locate, construct, operate and maintain the Project, is being  
15 acquired for a public use – a regional high-capacity mass transportation system as authorized by  
16 the State Constitution and the legislature. It should be noted that the specific plans for the  
17 Condemned Property are not relevant in adjudicating the public use and necessity of a  
18 condemnation action. *See State ex rel. Agee v. Superior Court for King County*, 58 Wn.2d 838,  
19 365 P.2d 16 (1961). Certification of public use requires only that the property condemned be put  
20 to the use designated therein and determined to be public. *Id.*

21 2. **Public Interest and Public Necessity:** In contrast to public use, the issues of  
22 public interest and public necessity are solely legislative. *See State ex rel. Sternoff v. Superior*  
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24 <sup>3</sup> RCW 8.12.090 does not require a testimonial evidentiary hearing before the issue of public use and necessity may  
25 be adjudicated. *Blaine v. Feldstein*, 129 Wn. App. 73, 76, 117 P.3d 1169 (2005). Rather, the statute requires that  
26 the same procedures used in "other civil actions" be used. *Id.* In other civil actions, such evidentiary hearings are at  
the discretion of the trial court and are typically used only if there are relevant factual or credibility issues that  
require such a hearing. *Id.*

PETITIONER'S MOTION FOR ORDER  
AND JUDGMENT ADJUDICATING  
PUBLIC USE AND NECESSITY -- 10  
4847-7286-5863.1

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1 *Court for King County*, 52 Wn.2d 282, 325 P.2d 300 (1958). “Necessity” means reasonable  
2 necessity under the circumstances. *Des Moines*, 73 Wn.2d at 133. “It does not mean immediate,  
3 absolute or indispensable need, but rather considers the right of the public to expect or demand  
4 that certain services be provided.” *Des Moines* at 140 (citing *Tacoma v. Welcker*, 65 Wn.2d 677,  
5 399 P.2d 330 (1965); *In re Port of Seattle*, 66 Wn.2d 598, 404 P.2d 25 (1965)). It encompasses  
6 “reasonable anticipation of future needs.” *State ex rel. Hunter v. Superior Court for Snohomish*  
7 *County*, 34 Wn.2d 214, 216, 208 P.2d 866 (1949).

8 A declaration by the appropriate legislative body that the proposed acquisition is in the  
9 public interest and necessary to accomplish a public purpose, “will, by the courts, be deemed  
10 conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as  
11 would amount to constructive fraud.” *Welcker*, 65 Wn.2d at 684; *In re Port of Seattle*, 80 Wn.2d  
12 392, 495 P.2d 327 (1972)(*emphasis added*); see also *State ex rel. Dungan v. Superior Court for*  
13 *Grant County*, 46 Wn.2d 219, 279 P.2d 918 (1955) (holding that in condemnation proceedings  
14 brought by cities, the court is bound by the legislative determination of the city council that  
15 taking or damaging certain land is necessary for the contemplated project). Moreover, selection  
16 of a specific site for the proposed use is also a legislative question. The legislature’s  
17 determination is deemed conclusive unless proved to have been done without statutory authority,  
18 in bad faith, as an abuse of power, or in an arbitrary and capricious manner. *State ex rel.*  
19 *Hunter*, 34 Wn.2d at 216.

20 The objector has the burden of proving fraud or constructive fraud. *In re Port of Grays*  
21 *Harbor*, 30 Wn. App. 855, 862, 638 P.2d 633 (1982), *review denied*, 97 Wn.2d 1010 (1982).  
22 Arbitrary and capricious is “willful and unreasoning action without consideration and regard for  
23 the facts and circumstances.” *Welcker*, 65 Wn.2d at 683-85. The fact that there is room for two  
24 opinions does not make the legislative action arbitrary and capricious if it is “exercised honestly,  
25 fairly, and upon due consideration,” even where a belief may exist that an erroneous conclusion  
26 has been reached. *Miller v. Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963).

PETITIONER’S MOTION FOR ORDER  
AND JUDGMENT ADJUDICATING  
PUBLIC USE AND NECESSITY -- 11  
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The Honorable Jeffrey Ramsdell  
Noting Date: May 31, 2017  
(Without Oral Argument)  
Moving Party: Petitioner Sound Transit

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

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

Petitioner,

v.

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

Respondents.

No. 17-2-12144-4 SEA

CITY OF SEATTLE’S OPPOSITION TO  
PETITIONER’S MOTION FOR ORDER  
AND JUDGMENT ADJUDICATING  
PUBLIC USE AND NECESSITY

**Oral Argument Requested**

Tax Parcel Nos. 067100-0000, 067100-0020,  
067100-0030, 067100-0040 and 067100-0060

**I. Relief Requested**

Through this condemnation action, Central Puget Sound Regional Transit Authority (“Sound Transit”) is seeking to condemn property within an existing Seattle-owned easement and directly underneath a Seattle-owned high voltage transmission line. The condemnation, and the extinguishment of Seattle’s easements rights that would result, would destroy and render unusable the nearly 90-year old easement and make it impossible for Seattle to continue to operate the transmission line.

Given the importance of the infrastructure at risk Seattle is compelled to oppose Sound Transit’s condemnation. The Court should deny Sound Transit’s motion because Sound Transit does not have the statutory authority condemn public property and because the property it is seeking

to condemn is not necessary for Sound Transit’s light rail system and thus it falls outside of Sound Transit’s condemnation authority. The motion should also be denied because Sound Transit’s condemnation is barred by the Prior Public Use Doctrine, which prohibits the condemnation of property currently being used for a public purpose if the condemnation is incompatible with the existing use.

Finally, this opposition is only preliminary response by Seattle. As referenced in Seattle’s motion for a continuance, Seattle needs an opportunity to conduct some reasonable, focused discovery in order to fully respond to the issues raised in Sound Transit’s motion.

## **II. Statement of Facts**

### **A. Background**

By its petition in eminent domain (the “Petition”) filed in this action, Sound Transit seeks to condemn portions of a parcel of real property adjacent to 124<sup>th</sup> Avenue NE in the City of Bellevue identified by the above-referenced tax parcel numbers (“Subject Property”). Even though Sound Transit is seeking to only condemn temporary construction easements and sidewalk and wall easements, as reflected in the prayer for relief section of the Petition, it is nonetheless seeking to fully extinguish Seattle’s easement rights over the property being condemned by having the title in all property being condemned conveyed to it “free and clear of any right, title and interest of” of all respondents, including Seattle.

### **B. Seattle Owns a Transmission Line Easement over the Property Sound Transit Seeks to Condemn.**

In 1931 Seattle acquired an easement over the Subject Property for the construction, operation, and maintenance of an electrical transmission line system (“Transmission Line Easement”). Declaration of John Bresnahan (“Bresnahan Decl.”) at ¶2. Ex. A. Per the terms of

the Transmission Line Easement, Seattle has the right to operate electrical transmission lines over the Jacobsen Property, and to construct and maintain a transmission line tower and related facilities on the property. *Id.* The Transmission Line Easement does not contain any limitations on the voltage of the transmission line Seattle can run over the property, or on the size, type, or location of the transmission line tower that it can construct on the property. *Id.*

The Transmission Line Easement is part of a series of similar easements and fee parcels that run contiguously for 100 miles from generating facilities on the Skagit River to a Maple Valley substation. (“Transmission Line Corridor”) *Id.* at ¶ 3. The Transmission Line Corridor is also an integral part of a larger, regional electrical transmission line system that runs from Canada to California. *Id.* For most of its length, the Transmission Line Corridor is approximately 150 feet wide and is intended to accommodate two high voltage transmission lines. *Id.* The corridor was established before the City of Bellevue was incorporated, and Seattle undertakes regular efforts to protect and preserve the corridor from development encroachments so that it can continue to serve its intended purpose. *Id.*

**C. Seattle Operates a 230 kV Electrical Transmission Line over the Property That Sound Transit’s Seeks to Condemn.<sup>1</sup>**

Seattle operates a dual circuit 230 kV transmission line (“Transmission Line”) within the Transmission Line Easement. *Id.* at ¶4. The Transmission Line is an important part of Seattle’s electrical transmission system and is particularly important because it allows Seattle to have a direct electrical transmission connection to a sub-station and distribution system in the southern part of the city, thereby bypassing a bottleneck in electrical transmission capacity in the north part of Seattle. *Id.*

<sup>1</sup> In Seattle’s electrical transmission system, any line over 115 kV (or 115,000 volts) is considered a high voltage transmission line. Bresnahan Decl., at ¶ 3.

In the vicinity of the Subject Property, the Transmission Line runs along the east side of 124th Avenue, and is supported by a series of lattice towers and monopole structures. *Id.* at ¶ 5. The Transmission Line runs over the full north-south length of the Subject Property. *Id.* The Transmission Line wires are 48 feet above grade and the nearest support structure to the area being condemned is a lattice tower located approximately 65 feet to the north. *Id.* For safety reasons, the minimum clearance needed for a 230 kV line is 23.7 feet in every direction. *Id.*

**D. Because Sound Transit Seeks to Extinguish all of Seattle’s Easement Rights Over The Property It Seeks to Condemn, Sound Transit’s Condemnation is Incompatible with Seattle’s Continued use of the Transmission Line Easement and Operation of the Transmission Line.**

The Transmission Line Easement, like most other such easements owed by Seattle, includes both aerial and ground easement rights. *Id.* at ¶ 6. Sound Transit’s condemnation affects a substantial portion of the Transmission Line Easement on the Subject Property. Bresnahan Decl., at ¶ 7. The temporary construction easement Sound Transit seeks to condemn covers the full width of the easement on the northern part of the Subject Property. *Id.* The sidewalk easement Sound Transit seeks to condemn runs down the center the Transmission Line Easement, directly under the Transmission Line, for most of the north-south length of the Subject Property. *Id.*

The extinguishment of Seattle’s easement rights over the portions of the Subject Property that Sound Transit seeks to condemn, would destroy the Transmission Line Easement and render it unusable for its intended purpose because it would be impossible for Seattle to continue to legally operate the Transmission Line over the Subject Property. Bresnahan Decl., at ¶ 8. This, in turn, would result in a break in the 100+ mile Transmission Line Corridor connecting the City with its hydroelectric facilities on the Skagit River, thereby rendering the corridor unusable for its intended purpose. *Id.*

Seattle has previously accommodated surface-level structures such as roads and sidewalks within other transmission line easements within its system subject to the execution of appropriate easement or consent agreements that allow both uses to safely coexist. *Id.* at 9. It could likely have done so here, but for Sound Transit’s quest to fully extinguish Seattle’s easement rights, which would render the Transmission Line Easement unusable. *Id.* Despite submitting declarations on a number of occasions describing its intent to restore sufficient easement rights to Seattle so that it can continue to operate the Transmission Line, Sound Transit has never transmitted a written proposal describing what rights it is willing to convey or preserve nor has it identified any conditions or terms it would require Seattle to submit to in order to get its easement rights back. King Decl., at ¶ 2.

**E. In this Action Sound Transit is Condemning Property for a Bellevue Road Widening Project - not its Light Rail Project.**

Sound Transit is constructing a retained-cut, perpendicular light rail line crossing underneath 124<sup>th</sup> Avenue NE. King Decl., at ¶ 3. As part of a separate project, Bellevue is widening and improving 124<sup>th</sup> Avenue to add one or more travel lanes. The widening of 124<sup>th</sup> Avenue NE in the vicinity of the Subject Property is part of a larger project to widen that road between Northrup Way to NE 14<sup>th</sup> Street in connection with the redevelopment of the Spring District section of Bellevue. *Id.*

The fact that the two projects are separate is confirmed in multiple agreements between Sound Transit and Bellevue. In a May 6, 2015, Cost Sharing Agreement those parties acknowledged that the Bellevue road widening project is not required for the construction of the light rail line, but rather, is “necessitated as a result of the City’s CIP [Capital Investment Program].” *Id.* at Ex. B.

**F. Sound Transit Voluntarily Agreed To Condemn Property for Bellevue - It Was Not Forced or Required to do so by any “Development Conditions.”**

In its motion Sound Transit falsely claims that its condemnation of property for Bellevue's project is required by unspecified "Project Development Conditions." In fact, Sound Transit and Bellevue negotiated an arrangement whereby Sound Transit would condemn property for Bellevue. Sound Transit touted its "extensive consultation and collaboration" with Bellevue in previous briefing to the Supreme Court. King Decl., Ex. C. Specifically, it claimed that it "engaged in extensive consultation and collaboration with the City of Bellevue about the final project alignment, design, and construction process. This culminated in an Amended and Restated Umbrella Memorandum of Understanding (the "Amended MOU") and related agreements executed in May 2015." *Id.* In the above-reference Cost Sharing Agreement, Sound Transit and Bellevue acknowledged that they agreed to coordinate in order to "improve efficiencies and reduce costs" not because Bellevue imposed any requirements on Sound Transit. King Decl., Ex. B.

All of this flies in the face of Sound Transit's current claim that the property it is seeking to condemn for Bellevue's separate project is "necessary" for Sound Transit's project because of some unidentified "Project Development Conditions."

#### **G. Procedural History**

This is the fifth lawsuit Sound Transit has brought to condemn property for these two projects. The prior four lawsuits are on appeal. This suit is unique in that it is the first time that Sound Transit is seeking to condemn property solely for the Bellevue road widening project.

Although it has taken the position that it is being forced to acquire the property for the Bellevue road widening project because of conditions imposed by Bellevue, Sound Transit has steadfastly refused to provide any communications between it and Bellevue that would support that contention. King Decl. at ¶ 6. Further, Sound Transit has contended that the acquisition of the

property for Bellevue is necessary to accommodate the perpendicular light rail crossing of 124<sup>th</sup> Avenue. *Id.* At the same time, Sound Transit has refused to produce any documents that support the supposed necessity, including but not limited to, any alternative designs that it considered that would have allowed construction of the light rail line without the widening of the road. *Id.* In conjunction with this opposition, Seattle has filed a motion for a continuance to afford it time to conduct discovery to obtain, inter alia, this information and documents regarding the purported necessity of the acquisition of property for Bellevue's road widening project. *Id.*

### **III. Statement of Issues**

1) Whether, given that Sound Transit lacks the statutory authority to condemn any public property including property owned by a city such as Seattle, this Court should deny Sound Transit's Motion;

2) Whether, given that Sound Transit lacks the statutory authority to condemn property solely for the benefit of Bellevue's road widening project that is not necessary for its light rail project, this Court should deny Sound Transit's Motion;

3) Whether, given that Sound Transit's condemnation of the Transmission Line Easement would make it impossible for Seattle to continue to operate the Transmission Line and render the easement unusable for its intended public purpose, this Court should deny Sound Transit's Motion based on the Prior Public Use Doctrine.

### **IV. Evidence Relied Upon**

This opposition is based on the Declarations of John Bresnahan and Russell King and pleadings and records on file in this matter.

## V. Authority

### A. Sound Transit's Motion For Public Use And Necessity Should Be Denied Because Sound Transit Does Not Have Statutory Authority To Condemn The Transmission Line Easement.

#### 1. A Party's Power To Condemn Is Limited By The Statute Delegating It Condemnation Authority.

An entity's authority to condemn is defined and limited by the scope of the condemnation power delegated to it by statute. *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wash. 2d 519, 534, 342 P.3d 308, 315 (2015) (“States may delegate [condemnation] powers to municipal corporations and political subdivisions, but such delegated authority extends only so far as statutorily authorized.”). Statutes that delegate the State's sovereign power of eminent domain to its political subdivisions are to be strictly construed. *Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wash.2d 555, 565, 151 P.3d 176 (2007); *King County v. City of Seattle*, 68 Wash. 2d 688, 690, 414 P.2d 1016, 1018 (1966); *Spokane Airports v. RMA, Inc.*, 149 Wash. App. 930, 940, 206 P.3d 364, 369 (2009).

#### 2. When A Party Seeks To Condemn Property That It Does Not Have Statutory Authority To Condemn, It Is Not Entitled To An Order On Public Use And Necessity As To That Property.

Where a condemning entity seeks to condemn property that it is not authorized by statute to condemn, the petition for eminent domain should be dismissed as to that property. *King County*, 68 Wash. 2d at 694. This is true regardless of whether the condemning party can establish public use and necessity. *Id.* at 692 (Petition in eminent domain was properly dismissed on summary judgment where court held that King County lacked statutory authority to condemn property owned by the City of Seattle). In effect, if the condemning party is not authorized to condemn the property, then it cannot establish public use and necessity. *See 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 Wash. 2d 139, 145, 338 P.2d 126, 129 (1959)).

**3. As the Condemning Party, Sound Transit has the Burden of Proof to Show that its Condemnation is Authorized by Statute.**

Sound Transit had the burden of proof to show that its condemnation is authorized by statute. *See Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wn.2d 555, 566, 151 P.3d 176, 181 (2007) (“*Foreign Trade Zone*”) (“[a]lthough a state entity bears the burden of proving public use and necessity in the judicial condemnation process, the challenger bears the burden of proof that the notice of a public hearing to authorize condemnation was defective.”); *King Cty. v. City of Seattle*, 68 Wn.2d 688, 693, 414 P.2d 1016, 1020 (1966) (finding that a condemnation proceeding could not proceed where the condemning entity failed to put forward sufficient evidence to show that the condemnation was authorized by statute).

**B. The Statute Granting Sound Transit Condemnation Power Does Not Authorize Sound Transit to Condemn Public Property Owned By Cities.**

The statute granting Sound Transit condemnation authority, RCW 81.112.080, grants Sound Transit limited condemnation authority as follows:

An authority shall have the following powers in addition to the general powers granted by this chapter:

\*\*\*

(2) 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... together with all lands, rights-of-way, property, equipment, and accessories necessary for such high capacity transportation systems.

\*\*\*

Public transportation facilities and properties which are owned by any city, county, county transportation authority, public transportation benefit area, or metropolitan municipal corporation may be acquired or used by an authority only with the consent of the agency owning such facilities.

RCW 81.112.080 (emphasis added).<sup>2</sup>

Read together, these two sections provide that, under RCW 81.112.080, Sound Transit can acquire or condemn property that is either: 1) a private or public transportation facility or property, provided that Sound Transit can only purchase or use an existing public transportation facility with the consent of the public owner; or 2) necessary for a high capacity transportation system. The Seattle-owned property Sound Transit seeks to condemn here is not a private or public “transportation facility or property” - it is an easement for an electrical transmission line.

Accordingly the first category does not apply.

**1. RCW 81.112.080 Does Not Contain An Express Grant Of Authority To Condemn Public Property.**

As to the second category, property necessary for a high capacity transportation system, RCW 81.112.080, is silent as to whether Sound Transit is authorized to condemn that type of property when it is owned by cities or other public entities. It is a bedrock principle of

<sup>2</sup> The statute also dictates that Sound Transit is to follow the same procedures followed by Cities when condemning property. Similar language is found in other statutes delegating condemnation authority to other types of entities, and it is interpreted as specifying the rules and procedures that the condemning authority must follow rather than expanding on the explicit grant of condemnation authority found elsewhere in the statute. *See Pub. Util. Dist. No. 2 of Grant Cty. v. N. Am. Foreign Trade Zone Indus., LLC*, 159 Wash. 2d 555, 567, n.12, 151 P.3d 176, 182 (2007).

condemnation law that, where a statute delegates condemnation power but is silent as to whether the delegation includes the power to condemn public property, the statute will be construed as only delegating the power to condemn private property. *King County. v. City of Seattle*, 68 Wash. 2d 688, 691, 414 P.2d 1016, 1018 (1966) (“[o]ur eminent domain act, as applied to railroads, must be construed, as are all such acts, as having regard only to the taking of private property, unless there is either express or clearly implied authority to extend them further.”) (citation omitted); *Seattle & Montana Ry. Co. v. State*, 7 Wash. 150, 34 Pac. 551 (1893) (Supreme Court rejected the view that a railroad had the authority to condemn state lands where a statute gave such railroads the sweeping power to “enter upon any land” and acquire “so much of said land ... as may be necessary” for the railroad). As Sound Transit’s authority to condemn property “extend[s] only as far as statutorily authorized” and statutes “which delegate the condemnation power of the state to its political subdivisions are strictly construed,” this silence is fatal to Sound Transit’s effort to condemn the Transmission Line Easement. *King County*, 68 Wash. 2d at 690 (King County was not authorized to condemn property owned by a city “in the absence of express or necessarily implied legislative authorization” regardless whether the city’s property was devoted to a public use).<sup>3</sup>

**2. The Legislature Does not use Language such as that Found in RCW 81.112.080 to Convey the Power to Condemn Public Property.**

The Legislature has enacted many condemnation statutes granting the authority to condemn public property. The statute granting highway departments authority to condemn property provides for condemnation of “private or public property...”. RCW 47.52.050 (emphasis added). The

<sup>3</sup> There is no basis for the Court to find that the power to condemn public property is necessarily implied in the statute, and doing so would be contrary to the requirement that such statutes be strictly construed.

statute granting condemnation authority to port districts provides for condemnation of “any public and private property...”. RCW 53.34.170 (emphasis added). The statute granting condemnation authority to public utility districts provides for condemnation of “any public and private property...”. RCW 54.16.050. The Legislature knows how to enact condemnation statutes containing express authority to condemn public property. It knows that this Court will strictly construe condemnation statutes, and that simply saying “property” or “all property” will not suffice to grant authority to condemn public property. Thus, given the difference in the language of RCW 81.112.080 and the numerous statutes that expressly grant the power to condemn “public property,” this Court should conclude that, by enacting RCW 81.112.080 as written, the Legislature did not intend to and did not grant Sound Transit the authority to condemn Seattle’s property. *See State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740, 744 (2015) (when trying to understand the meaning of a statute it is useful to compare the language of that statute to the language of other statutes addressing similar subjects).<sup>4</sup>

**D. Sound Transit Does Not Have The Authority To Condemn Aerial Rights Or Sidewalk Easements That Are Not Necessary For The Construction Of The Below Grade Light Rail System It Is Building.**

Under RCW 81.112.080, Sound Transit only has the authority to condemn property that is necessary for its “high capacity transportation system.” The term “high capacity transportation system” is not defined in RCW 81.112.080 but, it is defined in a related statute, RCW 81.104.015(2), as:

a system of public transportation services within an urbanized region operating principally on exclusive rights-of-way, and the supporting services and facilities necessary to implement such a system, including interim express services and high

<sup>4</sup> The undersigned counsel was unable to find a single Washington statute that has been interpreted as conveying the power to condemn public property that did not include language such as “public property” or the description of the specific types of public property that can be condemned (i.e. “state, county, and school lands”).

occupancy vehicle lanes, which taken as a whole, provides a substantially higher level of passenger capacity, speed, and service frequency than traditional public transportation systems operating principally in general purpose roadways.

RCW 81.104.015(2)(emphasis added).<sup>5</sup>

Through this action, Sound Transit is seeking to extinguish all of Seattle’s easement rights on and over the affected property – this includes the aerial easement rights that Seattle relies on to operate and maintain its Transmission Line. It also seeks to condemn easements for sidewalks. All of this property is being condemned for the benefit of Bellevue and none of it is, strictly speaking, necessary for Sound Transit’s project.<sup>6</sup>

The light rail line that Sound Transit is building on the subject property will be built in a “retained cut” configuration. King Decl., ¶ 5, Ex. A. That means that it will be constructed at or below grade. Under these circumstances, it is inconceivable that Sound Transit needs to condemn all of Seattle’s aerial easement rights over the property in question. Specifically, it is inconceivable that Sound Transit needs to condemn aerial rights that extend to 48+ feet above grade (where the existing Transmission Line wires are located) in order to build a below grade rail line.

The sidewalks that will be built on the easement being condemned by Sound Transit are part of Bellevue’s road widening project. They are not connected to any part of the light rail project. The sidewalks run north south and the nearest Sound Transit station is being constructed more than 600 feet to the west.

As the aerial easement rights and sidewalk easements are not necessary for Sound Transit’s

<sup>5</sup> It is appropriate for the Court to consider related statutes when it is determining the legislature’s intent regarding the meaning of a term in a statute. See *Washington State Dep’t of Revenue v. Fed. Deposit Ins. Corp.*, 190 Wash. App. 150, 162, 359 P.3d 913, 917 (2015)

<sup>6</sup> In connection with eminent domain statutes, “necessary” means “reasonable necessity, under the circumstances of the particular case.” *City of Tacoma v. Welcker*, 65 Wash. 2d 677, 683, 399 P.2d 330, 335 (1965).

light rail system, RCW 81.112.080, does not grant Sound Transit the authority to condemn those property rights. Further, as Sound Transit has failed to satisfy its burden to prove that the property it is seeking to condemn is necessary for its project, and thus within its condemnation authority, its motion for public use and necessity should be denied. *See King County*, 68 Wash. 2d at 692-93; *City of Des Moines v. Hemenway*, 73 Wash. 2d 130, 138, 437 P.2d 171, 176 (1968) (in case involving condemnation for a marina, even though condemnation for such use was deemed to be a public use, case was properly dismissed as to properties outside the city limits because the statute delegating condemnation power to third class cities did not authorize such cities to condemn property outside of their city limits).

**E. Sound Transit Has the Burden to Prove that its Condemnation is Necessary for its Light Rail System and thus Authorized by RCW 81.112.080 – It is Not Entitled To Any Presumptions to that Effect.**

Whether property being condemned is “necessary” for the purposes of determining public use and necessity is a separate question from whether the property being condemned is among the types of the property that the condemning entity has authority to condemn. On the former, the legislative body's declaration of necessity is entitled to judicial deference and is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud.<sup>7</sup> But, the latter question, whether the property being condemned is within the condemning entity's statutory condemnation power, is a judicial question and the legislative body is not entitled to such deference. *King County*, 68 Wash. 2d at 693 (“the county cannot bring the action within the ambit of [the statute purportedly granting it condemnation power], merely by

<sup>7</sup> *See City of Bellevue v. Pine Forest Properties, Inc*, 185 Wash. App. 244, 260, 340 P.3d 938, 946 (2014) (City was entitled to presumption that its determination of necessity was valid (absent fraud or constructive fraud) where it was condemning private property for a public transportation purpose – i.e. something that was clearly within the city's condemnation authority under RCW 8.12.030 – there was no question about whether City was authorized to condemn the property in question)

legislatively declaring the fact.”).

Specifically to this case, Sound Transit is not entitled to any deference on the question of whether the property is “necessary for a high capacity transportation system” and thus authorized by RCW 81.112.080 – that is for the Court to decide. It has to prove that is the case – and it has failed to do so.<sup>8</sup>

King County informs this issue. In that case, the condemning party, the County, argued that it was entitled to condemn the property in question, a road owned by Seattle, under authority purportedly granted to it by RCW 08.08.090. *King County*, 68 Wash. 2d at 692. According to the County, that statute authorized the County to condemn property owned by a city if the condemnation was done in “aid of a definitive government undertaking to build or operate a public work.” *Id.* at 694. The only evidence that King County submitted to support its claim that the condemnation was in support of such an undertaking was a resolution passed by the county council so stating – it presented no evidence of the existence of a “government undertaking” or of any nexus between the county’s condemnation and any such an undertaking. The Supreme Court held that that evidence was insufficient to show that the condemnation action was in fact authorized by the statute. Specifically, the Court held “the county cannot bring the action within the ambit of [the statute purportedly granting it condemnation power], merely by legislatively declaring the fact.” *Id.* at 693. Based on that holding, the Court upheld the dismissal of the County’s petition in eminent domain on summary judgement. *Id.*

<sup>8</sup> Contrary to any suggestion for Sound Transit, the Court of Appeal’s unpublished opinion in the *Sternoff* matter did not resolve the issue of whether Sound Transit’s condemnation of property in this case is necessary for Sound Transit’s project. In addition to the fact that this case involves property interests completely different from those at issue in *Sternoff*, the issue of Sound Transit’s statutory authority to condemn property was not resolved by the Court of Appeals’ unpublished decision in *Sternoff* as that issue was not raised in the case. Further, the Court of Appeals expressly stated in its unpublished opinion that the decision in that case did not affect Seattle’s property rights.

Here, the only “evidence” that Sound Transit submitted with its Motion for Public Use and Necessity to show that the property it is seeking to condemn is necessary for its light rail crossing is the resolution of the Sound Transit board and the discredited claim that Sound Transit was required to condemn the property due to “Project Development Conditions.” And, Seattle has submitted evidence, in the form of the agreements between Sound Transit and Bellevue, that shows that Sound Transit voluntarily undertook to condemn the property in question and was not forced to do so. King Decl., Exs. \_\_ and \_\_.<sup>9</sup>

Under the circumstances, the evidence submitted by Sound Transit insufficient for the Court to conclude that Sound Transit has the statutory authority to condemn all of the property it is seeking to condemnation, and Sound Transit’s Motion for Public Use and Necessity Should be therefore be denied. *Id.*

**F. Sound Transit Cannot Expand its Condemnation Authority via an Agreement with Bellevue.**

Sound Transit does not have the authority to condemn public property or property solely for Bellevue’s project, and it cannot expand its condemnation authority through agreements with Bellevue. Condemnation actions must be brought in the name of the party with the authority to condemn the property in question, and condemnation authority cannot be expanded, sold, or delegated via contract. *See Spokane Airports v. RMA, Inc.*, 149 Wash. App. 930, 941, 206 P.3d 364, 370 (2009) (“The City and the County did not have authority to delegate their power to condemn to Spokane Airports.”).

If Bellevue needs to condemn property for its sidewalks it needs to file a condemnation action. This is not an academic or abstract issue. Bellevue and Sound Transit have materially

<sup>9</sup> Through discovery Seattle expects to uncover additional evidence that the condemnation of property for Bellevue’s road widening project is not necessary for Sound Transit’s project.

different condemnation authority conveyed to them under completely different statutes.<sup>10</sup>

Further, in order for Bellevue to condemn Seattle's property, it would need to pass an ordinance after appropriate notice and an open hearing to give the residents of Bellevue an opportunity to weigh in. All of this was circumvented by the arrangement between Bellevue and Sound Transit whereby Sound Transit agreed to condemn property for Bellevue.

**G. Sound Transit's Condemnation Of Seattle's Property Rights Is Barred By The Prior Public Use Doctrine.**

Even if the Court concludes that Sound Transit has authority to condemn public property, including city-owned property, and that the condemnation of property for sidewalks is necessary for Sound Transit's below-grade light rail line, the Court should deny Sound Transit's motion because its condemnation of the specific property as issue in this case is barred by the Prior Public Use Doctrine because it "will either destroy the existing [public] use or interfere with it to such an extent as is tantamount to destruction" *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 182 Wash. 2d 519, 538–39, 342 P.3d 308, 317–18 (2015)(citation omitted); A.S. Klein, Annotation, *Power of Eminent Domain as between State and Subdivision or Agency Thereof, or as between Different Subdivisions or Agencies Themselves*, 35 A.L.R.3d 1293, 1305 (1971).

Here, the condemnation and extinguishment of Seattle's easement rights over the Subject Property is incompatible with Seattle's continued prior public use of the Transmission Line Easement, and will make it impossible for Seattle to operate the current 230 kV transmission line or

<sup>10</sup> Sound Transit's condemnation authority comes from RCW 81.112.080, and Bellevue's condemnation authority comes from RCW 8.12.030 and RCW 35.22.280. It's worth noting that, although the issue is not implicated here because Sound Transit is the condemning party, Bellevue likely lacks the statutory authority to condemn Seattle's property. See 1959 Op. Att'y Gen. No. 69 (RCW 8.12.030 "cannot be construed as granting the power to condemn property of a city or town by another city" because the statute does not list city-owned property as one of the types of property that cities are authorized to condemn.). Bellevue's condemnation would also likely be barred by the Prior Public Use Doctrine.

any transmission line over the property.<sup>11</sup> Bresnahan Decl., at ¶4

Sound Transit presents no evidence that its condemnation is compatible with Seattle's use of the Transmission Line Easement nor could it because the effect of the condemnation would be to extinguish all of Seattle's easement rights over the full width of the easement. Without aerial easements rights over the property being condemned, Seattle could not legally operate a transmission line within the easement. *Id.* As a result, it would be impossible for Seattle to use the Transmission Line Easement for its intended public purpose.

Instead of providing any evidence of compatibility Sound Transit attempts to avoid the bar presented by Prior Public Use Doctrine by professing an "intention to restore" some of Seattle's easement rights through a "residual transmission line easement" so that Seattle can continue to operate the Transmission Line.<sup>12</sup> No matter how sincere such an intent is, it offers Seattle no protection whatsoever nor does it have any bearing on the Court's legal determination of whether Sound Transit's condemnation is barred by the Prior Public Use Doctrine. As an initial matter, Sound Transit relies solely on the expression of its intention - it does not point to any written proposal or offer that it has made to Seattle that would protect Seattle's interests - nor could it because Sound Transit has never made any such proposal. More importantly, Sound Transit's expression of intent has no legal significance because, if the Court grants Sound Transit's motion for public use and necessity, it will set in motion a process that will inevitably lead to the extinguishment of Seattle's aerial easement rights, subject only to Sound Transit paying just compensation to Seattle. Once that process has started, Sound Transit will have no obligation to

<sup>11</sup> Seattle's operation of the Transmission Line is a public use. *In Carstens v. Pub. Util. Dist. No. 1 of Lincoln Cty.*, 8 Wash. 2d 136, 143, 111 P.2d 583 (1941) ("[t]he generation and distribution of electric power has long been recognized as a public use by this court.").

<sup>12</sup> This intention is expressed in paragraph 3 of the Declaration of Larry Smith filed with Sound Transit's motion.

convey back to Seattle the easement rights required for it to continue to operate the Transmission Line nor would the Court be in a position to ensure that happened or that Sound Transit lives up to its professed “intent” to preserve the Transmission Line.

Sound Transit could have avoided its condemnation being barred by the Prior Public Use Doctrine. Had it limited its condemnation to only those areas and rights that it actually needs for its project and not sought to completely and unnecessarily extinguish Seattle’s nearly 90-year-old easement rights, Seattle could likely have tolerated the planned construction activities and sidewalks within its Transmission Line Easement. But, instead of doing that, Sound Transit filed a petition in eminent domain that asks for title in all property being condemned, including the property being condemned for temporary construction easements and for sidewalk easements, to be conveyed to it “free and clear of any right, title and interest of” of Seattle. As a result, the condemnation would destroy the Transmission Line Easement and make it impossible for Seattle to continue to operate the Transmission Line within the easement, an outcome that is prohibited by the Prior Public Use Doctrine.

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## VI. Conclusion

Based on the foregoing, and the other pleadings and papers on file with this Court in this matter, The City of Seattle respectfully requests that this Court deny Sound Transit's Motion for Public Use and Necessity.

DATED this 26<sup>th</sup> Day of May, 2017.

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*The above signed attorney certifies that this memorandum*  
*contains 5,382 words in compliance with KCLCR 7*  
*(5)(B)(vi)*

**MILLER NASH GRAHAM & DUNN**

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