

STATE OF WASHINGTON
SKAMANIA COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Petitioner,

vs.

GENE E. STONE and JANICE E. STONE,
husband and wife; TIMBER COMMUNITY
BANK; and SKAMANIA COUNTY

Respondents.

NO. 08-2-00097-6

STATE'S MOTION FOR ORDER
ADJUDICATING PUBLIC USE AND
NECESSITY

I. MOTION

The State of Washington, Petitioner, moves the Court for an order declaring that the property sought by the condemnation petition is really necessary for a public use. This motion is made pursuant to RCW 8.04.070. The State of Washington submits the Declaration of Christopher M. Tams, Project Engineer, in support of the motion. A proposed order adjudicating public use and necessity is also attached.

II. STATEMENT OF FACTS

This is an eminent domain proceeding filed pursuant to RCW 8.04. The property and property rights sought will be used for the improvement of a state highway. In this case, the Washington State Department of Transportation ("WSDOT") has established plans to improve safety and mobility on State Route 14 ("SR 14") by realigning several curves, improving a passing shoulder for slow-moving trucks, and adding turn lanes.

1 The WSDOT has proposed a new alignment of SR 14 and completed preliminary right of
 2 way plan sheets that depict the proposed alignment and additional property required to build and
 3 operate the project. The WSDOT has determined that the property and property rights described
 4 in the condemnation petition are necessary for the highway project. As depicted on the
 5 preliminary right of way plans, which are attached to the Declaration of Christopher M. Tams,
 6 Mr. and Mrs. Stone own a 13.30 acre parcel. The WSDOT's title search showed that Mr. and
 7 Mrs. Stone held the sole right to possession of the property.

8 The proposed alignment of SR 14 travels through the Stone parcel between mileposts
 9 24.10 and 24.60. To determine whether the proposed alignment is feasible, the WSDOT must
 10 gather data and information on the soil and groundwater conditions and any historic, cultural, or
 11 archaeological resources. The geotechnical exploration will include drilling two boreholes up to
 12 six inches in diameter and to depths of approximately 100 feet. Piezometers, which are used to
 13 monitor groundwater levels, will be installed in the boreholes and measurements will be taken
 14 monthly. The archaeological exploration involves shovel tests 50 centimeters (cm) in diameter
 15 and up to 50 cm in depth. Augurs may be used to probe deeper in areas where deeply buried sites
 16 may be found. For all holes drilled or dug, the WSDOT will use native material to refill and
 17 cover the excavation. The WSDOT intends to acquire the temporary right to enter the property
 18 and conduct these investigations for up to three years.

19 III. ISSUES PRESENTED

20 A. Requirements for an Order Adjudicating Public Use and Necessity

21 Before issuing an order adjudicating public use and necessity, the trial court must
 22 affirmatively answer the following three interrelated questions: (1) whether the proposed use is
 23 really a public use; (2) whether the public interest requires the use; and (3) whether the property is
 24 really necessary to facilitate the public use. *State v. Dawes*, 66 Wn.2d 578, 404 P.2d 20 (1965);
 25 *State ex rel. Sternoff v. Superior Court for King County*, 52 Wn.2d 282, 325 P.2d 300 (1958).
 26

IV. AUTHORITY

The following sections provide some background regarding WSDOT's condemnation authority and addresses issues that often arise when WSDOT seeks an order adjudicating public use.

A. Introduction

A condemnation action has three phases: (1) adjudication of public use and necessity, (2) determination of just compensation, and (3) payment of just compensation and transfer of title and possession. *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 377 P.2d 425 (1963). This case is in the first phase and the State of Washington is asking here that this Court enter an order declaring that the property sought is really necessary for a public use. See RCW 8.04.070.

1. The Department of Transportation Has Broad Authority to Condemn Private Property.

Provided that it complies with constitutional limits,¹ the Legislature may determine the time, manner, occasion and method by which the power of eminent domain is exercised. *State v. Superior Court for Pierce County*, 86 Wash. 155, 162, 149 P. 652 (1915). The Legislature must ordinarily authorize state agencies to condemn property for a particular purpose. *Petition of City of Seattle*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985).

The Legislature has granted the WSDOT broad power to condemn property for many purposes. See, e.g., RCW 47.01.260(3) (authorizing WSDOT to acquire property); RCW 47.04.080 (authorizing condemnation for interstate and intergovernmental projects); RCW 47.12.010 (authorizing condemnation for state highway right-of-way, drainage facilities, site distance enhancement, visual or sound buffers, sand pits, gravel pits, borrow pits, stone

¹ The condemnation power is an inherent aspect of state sovereignty. The Washington State Constitution does not grant the power of eminent domain. Instead, the Fourteenth Amendment to the United States Constitution and the Ninth Amendment (article I, section 16) to the Washington State Constitution limit state government's inherent power to condemn property. These constitutional restrictions require that the state only condemn property necessary for a "public use" and only after "just compensation" is paid.

1 quarries, maintenance camps, rest areas, structure sites and any other highway purpose);
 2 RCW 47.12.150 (authorizing condemnation to relocate displaced governmental or public utility
 3 facilities); RCW 47.52.050 and RCW 47.52.105 (authorizing condemnation for limited access
 4 facilities).

5 Unless preempted by the Legislature, the WSDOT is authorized to select state highway
 6 routes. RCW 47.28.010. In addition, the WSDOT is authorized to "exercise all the powers and
 7 perform all the duties necessary, convenient, or incidental to the planning, locating, [and]
 8 designing" of state highways. RCW 47.01.260(1). State Route 14 is a state highway route. See
 9 RCW 47.17.075.

10 **2. Is the Proposed Use Really a Public Use Required by the Public Interest?**

11 The issue of whether a proposed use is really a public use is solely a judicial question,
 12 although a legislative declaration should be accorded great weight. *Tacoma v. Welcker*, 65 Wn.2d
 13 677, 684, 399 P.2d 330 (1965); *Hogue v. Port of Seattle*, 54 Wn.2d 799, 817, 341 P.2d 171
 14 (1959). The Washington State Supreme Court ruled long ago that a public highway, available for
 15 the use of all that come on it, is a public use of the land, which is required by the public interest.
 16 E.g. *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 156, 377 P.2d 425 (1963); *State ex rel.*
 17 *Agee v. Superior Court*, 58 Wn.2d 838, 365 P.2d 16 (1961). The "jurisdictional fact" needed to
 18 support an order of public use in this case is simply that a public highway is projected for the land
 19 sought. *Lange*, 61 Wn.2d at 156.

20 As the Supreme Court stated in *State v. Dawes*, 66 Wn.2d at 583:

21 It is beyond dispute that the use of land for highway purposes is a
 22 public one and that public interest requires the construction,
 23 operation, and maintenance of highways.

24 **3. Is the Subject Property Really Necessary to Facilitate the Public Use?**

25 The concept of a "public use" is different from the concept of "public necessity."
 26 *Tacoma*, 65 Wn.2d at 683. "Necessary" in the eminent domain context means reasonable

1 necessity under the circumstances of the particular case. *State ex rel. Lange, supra*, at 156. It
 2 does not mean absolute, indispensable or immediate necessity. *Tacoma v. Welcker*, 65 Wn.2d
 3 677, 684, 399 P.2d 330 (1965). A condemning authority is not required to set forth the precise
 4 reasons for the necessity of taking particular land. *See State Parks & Recreation Commission v.*
 5 *Schluneger*, 3 Wn. App. 536, 538, 475 P.2d 916 (1970) *review denied*, 78 Wn.2d 996 (1971).

6 The specific construction plans for a highway in a condemnation suit have no bearing on
 7 the order adjudicating public use. The jurisdictional fact needed to support an order of public use
 8 is simply that a public highway is projected for the land. *State ex rel. Agee v. Superior Court*, 58
 9 Wn.2d 838, 365 P.2d 16 (1961); *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 156, 377
 10 P.2d 425 (1963). Therefore, an alleged lack of specific construction plans and the uncertainty of
 11 the date on which public use is to commence does not foreclose a finding of "public necessity."
 12 *Lange*, 61 Wn.2d at 158-59.

13 In any event, it is important to distinguish between "public use" and "public necessity"
 14 because the trial court must apply different standards to each:

15 . . . the issue of whether the contemplated acquisition is necessary
 16 to carry out the proposed public use presents a legislative question,
 17 a declaration of necessity by the appropriate legislative body will,
 18 by the courts, be deemed conclusive, in the absence of proof of
 actual fraud or such arbitrary and capricious conduct as would
 amount to constructive fraud.

19 (Footnotes omitted.) *State v. Bank of California*, 5 Wn. App. 861, 865-66, 491 P.2d 697 (1971).

20 In the context of a public road project, WSDOT's administrative and engineering
 21 determinations are entitled to substantial judicial deference. Our Supreme Court provided a
 22 comprehensive statement of a trial court's role in determining whether property is necessary for a
 23 state highway in *Deaconess Hospital v. Washington State Highway Comm'n.*, 66 Wn.2d 378, 405,
 24 403 P.2d 54 (1965):

25 Once the purpose for which the lands are taken has been adjudged to
 26 be public, the kind and type of roadway, the route to be followed, the
 design and engineering details become the subject of administrative

1 decision. These decisions will not be set aside or molested by the
2 courts unless shown to have been arrived at without statutory
authority or by bad faith or fraud, or capriciously or arbitrarily.

3 Although the courts may well determine from the evidence
4 whether a project is for the public benefit, convenience or
5 necessity, they are not trained or equipped to pick the better route,
6 much less design and engineer the project. Thus, the rule that
7 leaves these decisions to the administrative agencies is a sensible
8 one consistent with the idea that the public's business be carried
out with reasonable efficiency and dispatch by those possessing the
superior talents to accomplish the public purposes.

...

9 That the courts may have reached a decision, made a choice or a
10 conclusion different from that of the administrative agency or
taken wiser or more sensible action, does not empower them to do
so.

11 In other words, to successfully oppose a finding of "public necessity," the property owner
12 must prove that the WSDOT's property selection process involved actual or constructive fraud or
13 that the decision was arbitrary and capricious. *Town of Medical Lake v. Brown*, 63 Wn.2d 41, 44,
14 385 P.2d 387 (1963). Such a property owner has a very high burden of proof.

15 In *Webster v. Romano Engineering Corp.*, 178 Wash. 118, 34 P.2d 428 (1934), the
16 Supreme Court outlined nine requirements which must be present to support a finding of fraud:

17 (1) a representation of an existing fact; (2) its materiality; (3) its
18 falsity; (4) the speaker's knowledge of its falsity or ignorance of its
19 truth; (5) his intent that it should be acted on by the person to whom
it is made; (6) ignorance of its falsity on the part of the person to
whom it is made; (7) the latter's reliance on the truth of the
representation; (8) his right to rely upon it; (9) his consequent
damage.

21 (*Id.* at 120 - 121).

22 Alternatively, arbitrary and capricious conduct is willful and unreasoning action taken
23 without consideration and regard for the facts and circumstances. *Lillions v. Gibbs*, 47 Wn.2d
24 629, 289 P.2d 203 (1955). Agency action, when exercised honestly, fairly and upon due
25 consideration, is not arbitrary and capricious, even though there may be room for a difference
26 of opinion on the course to follow, or a belief by the reviewing authority that an erroneous

1 conclusion has been reached. *Smith v. Hollenbeck*, 48 Wn.2d 461, 294 P.2d 921 (1956);
2 *Tacoma v. Welcker*, 65 Wn.2d at 677. The property owner has not alleged fraudulent or
3 arbitrary and capricious conduct.

4
5 **V. CONCLUSION**

6 The filing of this condemnation action by the State of Washington, the preliminary right of
7 way plans showing the Department of Transportation's selection of property needed for a state
8 highway, and the declaration of the project engineer is sufficient to support an order adjudicating
9 public use and necessity. The State of Washington respectfully requests that the Court enter the
10 order.

11 **DATED** this 22nd day of May, 2008.

12 **ROBERT M. MCKENNA**
13 Attorney General

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15 **JEFFREY R. ERWIN, WSBA # 34079**
16 Assistant Attorney General
17 Attorney for Petitioner State of Washington
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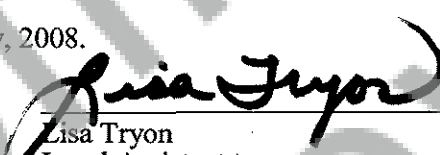
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22 day of May, 2008.



Lisa Tryon
Legal Assistant to
JEFFREY R. ERWIN
Assistant Attorney General

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DECLARATION OF SIGNATURE BY:

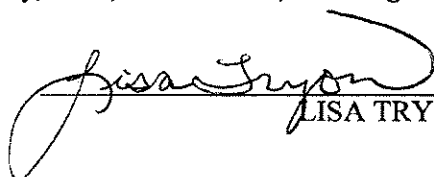
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I, Lisa Tryon, declare under penalty of perjury under the laws of the state of Washington, that the two page document attached to this Declaration is a complete and legible E-Mail document that I have examined personally, and was received by me via E-Mail (lisat1@atg.wa.gov) at the following address:

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DATED this 22nd day of May, 2008, in Tumwater, Washington.


LISA TRYON

DECLARATION OF SIGNATURE BY:
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