

## **EMINENT DOMAIN – THE BASICS**

**Washington State Association of  
Municipal Attorneys**

**Spring Conference  
Stevenson, Washington**

**May 3, 2001**

**P. Stephen DiJulio  
Foster Pepper & Shefelman PLLC  
1111 Third Avenue, Suite 3400  
Seattle, Washington**

**Susan Delanty Jones  
Preston Gates & Ellis LLP  
701 Fifth Avenue, Suite 5000  
Seattle, Washington**

## EMINENT DOMAIN – THE BASICS

### I. Introduction

- A. Eminent Domain: the taking of private property for a public purpose.

“Private property shall not be taken for private use . . . . No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner . . . .” Washington State Constitution, article 1, § 16 (9<sup>th</sup> amendment).

- B. Eminent domain usually refers to the formal power, through a statutory judicial process grounded in the constitution, to take private property for a public use. *See, e.g.*, chapters 8.04, 8.08, 8.12, 8.16 RCW. In such a case, the governmental authority (and in specific situations, a private corporation, chapter 8.20 RCW), brings an action in the superior court, seeking a judgment allowing it to take title to or use of private property.
- C. “Just compensation” has been variously defined. A good working definition is “the fair cash market value of the property being acquired, together with the damages to the remaining property, if any, after offsetting special benefits, if

any, with consideration given to the highest and best use to which the property can be devoted; also assuming that neither the seller nor the buyer is under an obligation to buy or sell.” Sinnett, *Eminent Domain*, Real Property Deskbook, ch. 74 (Washington State Bar Association, 1996)

## II. The Power to Condemn

- A. The United States - - inherent power of the sovereign. *Kohl v. United States*, 91 U.S. 367 (1875).
- B. State of Washington - - inherent power of the sovereign. The power is not granted by the state Constitution, but is *limited* by it. *State ex. rel. Eastvold v. Yelle*, 46 Wn.2d 166, 279 P.2d 645 (1955). Thus, the state may exercise its inherent power to condemn, but because of Constitutional restrictions, it must pay “just compensation” prior to the taking and it must permit a jury trial to establish the amount of compensation. Wash. Const. Art. 1, § 16 (amend. 9).
- C. Cities - - No inherent power; it is delegated by the state. Chapter 8.12 RCW

## III. What Kinds of Property Interests May Be Taken: “Full” and “Partial” Takings

- A. Ownership (title) to Property
- B. Use of Property
  - 1. Easements: permanent and temporary  
(See attached briefs, at Appendix 4)
  - 2. Access Rights

3. “Light and Air”
4. Lateral Support (e.g., cut and fill slopes)
5. Abutting Owners – rights of ingress and egress

#### IV. Nature of Proceedings in Eminent Domain

“The various statutes relating to eminent domain are codified in Title 8, RCW. Such proceedings are entirely statutory and are neither actions at law nor suits in equity, and *the statutes are mandatory.*” *In re Southwest Suburban Sewer District*, 61 Wn.2d 199, 377 P.2d 431 (1963). Because of the specialized nature of condemnation proceedings, the issues considered by the court are limited to those relevant under the statutes. *Roberts v. The Port of Seattle*, 46 Wn.2d 509, 282 P.2d 821 (1955).

#### V. Major Steps in an Eminent Domain Lawsuit

##### A. Preliminary Steps

1. Real Property Acquisition Policy. See Chapter 8.26 RCW. A city should avoid any argument that it has failed to comply with the requirements of the state directed policies. RCW 8.26.180 states that every acquiring agency (including cities) shall, “to the greatest extent practicable, be guided by ...” the policies of the Act.

2. The easiest way to comply with the acquisition policies of Chapter 8.26 RCW is through clear assignment of responsibilities to members of the acquisition team, and through a firm schedule under which various steps of the condemnation action are to be taken. The local government should avoid “quick take” pressures, when possible. The

interest on deficient payments is at 12 percent, far in excess of market.

3. SEPA. Actions by a city to acquire real property are categorically exempt from SEPA. RCW 43.21 C .110 (1) (a); WAC 197-11-800 (5).

B. Authorization by the Condemning Authority

1. Ordinance. RCW 8.12.050, .060. See sample at Appendix 1.

C. Petition in Eminent Domain

1. Must name as defendants all “persons having any interest” in the property, RCW 8.12.060; a “party holding a recorded contract for the purchase of land,” *State v. Wenatchee Valley Holding Co.*, 169 Wash. 535, 14 P.2d 51 (1932); a tenant with an option to purchase, *Spokane School District No. 81 v. Parzybok*, 96 Wn.2d 95, 633 P.2d 1324 (1981). *But see Port of Grays Harbor v. Bankruptcy Estate of Roderick Timber Co.*, 73 Wn. App. 334, 869 P.2d 417 – (naming trustee in bankruptcy as defendant renders unnecessary the joinder of the nominal bankrupt; stockholders of bankrupt corporation have no interest in property).

2. Must describe the property to be appropriated “with reasonable certainty.” 8.12.060.

3. A certified copy of the ordinance authorizing the taking must be attached to the petition. RCW 8.12.060. See Appendix 2 for form of petition and summons.

D. Public Use and Necessity Hearing

Is the property being taken for a *public* use? This threshold question must be answered before the case proceeds, and a pretrial hearing on the question is ordinarily scheduled shortly after the filing of the petition. In deciding whether to issue an order of public use and necessity, the court must consider three interrelated questions. *In re City of Seattle*, 104 Wn.2d 621, 707 P.2d 1348 (1985)

1. Is the proposed use “really” a public use?
  - a. Wash. Const. Art. I, § 16 (private property may be condemned only for a public use); *In re City of Seattle*, 104 Wn.2d 621, 707 P.2d 1348 (1985) (property to be condemned may only be used for public purposes); *In re Port of Seattle*, 80 Wn.2d 392, 396, 495 P.2d 327 (1972) (condemnation of land for airport cargo facilities was for a public purpose and therefore constituted a public use); *In re Port of Grays Harbor*, 30 Wn. App. 855, 861, 638 P.2d 633 (1982) (“where the object sought to be accomplished is for a public purpose,” land may be condemned for port facilities that will be leased to private parties).
  - b. The determination of whether a particular use of land constitutes a public purpose for which property may be condemned is a pure question of law to be decided exclusively by the court. Const. Art. I, § 16; *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965); RCW 8.12.090. The court will give weight to the legislative or municipal decision that the use is public, but will make its own independent determination. *Tacoma v. Welcker*, 65 Wn.2d at 685; *see also City of Des*

*Moines v. Hemenway*, 73 Wn.2d 130, 437 P.2d 171 (1968); *Miller v. City of Tacoma*, 61 Wn.2d 374, 378-P.2d464 (1963); *Hogue v. Port of Seattle*, 54 Wn.2d 799, 341 P.2d 171 (1959).

c. How do the courts decide a use is “really public”?

The words "public use" are neither abstractly nor historically capable of complete definition. The words must be applied to the facts of each case in light of current conditions . . . .

Perhaps the best approach to the question is to be found in the following passage from *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 A. 834:

. . . On the contrary, definition has been left, as indeed it must be, to the varying circumstances and situations which arise, with special reference to the social and economic background of the period in which the particular problem presents itself for consideration.

*Miller v. City of Tacoma*, 61 Wn.2d 374, 384, 378 P.2d 464 (1963), quoting, *Carstens v. P.U.D. No. 1*, 8 Wn.2d 136, 142, 111 P.2d 583 (1941), cert. den. 314 U.S. 667, 62 S.Ct. 128 (1941).

2. Does the public interest require the use?

- a. “The word "necessary," when used in or in connection with eminent domain statutes, means reasonable necessity, under the circumstances of the particular case. It does not mean absolute, or indispensable, or immediate need, but rather its meaning is interwoven with the concept of public use

and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement. *Reasonable necessity for use in a reasonable time is all that is required.*”

*Tacoma v. Welcker*, 65 Wn.2d at 683-84 (emphasis added; citations omitted).

- b. The legislature’s or municipality’s determination that the project is necessary is almost conclusive. To overturn such a finding, a challenger must show proof of “actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.” *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965).

3. Is this particular property really necessary to accomplish the public use?

- a. The legislative or municipal body’s determination on this question is also conclusive in the absence of a showing of fraud. .” *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965).
- b. The availability of alternate sites for the project is irrelevant. *Town of Medical Lake v. Brown*, 63 Wn.2d 41, 45, 385 P.2d 387 (1963). See Appendix 4 for sample briefs (challenge to fee acquisition rejected by court).

E. “Quick Take” - - Stipulation for Immediate Use and Possession



1. Basic rule in Washington: Condemnor may not take possession of the owner's property before (1) a judgment fixing just compensation and (2) a final decree transferring title after payment are entered. *State v. Calkins*, 54 Wn.2d 521, 342 P.2d 620 (1959); *Public Utility District No. 1 v. Washington Water Power Co.*, 43 Wn.2d 639, 262 P.2d 979 (1953).
2. The condemnor may not take possession of the property before the final decrees are entered, unless the property owner stipulates to "immediate use and possession." RCW 8.25.070.
3. Time limits for agreeing to stipulate are critical, because they affect the defendants' rights to an award of attorney fees. The property owner must stipulate to surrender possession and use within 30 days of the condemnor's written offer to stipulate OR within 15 days of entry of the order of public use and necessity, whichever is later. RCW 8.25.070(3). Failure to abide by these time limitations will result in a denial of attorney fees to which the defendants would otherwise be entitled. *Everett v. Weborg*, 39 Wn.App. 10, 691 P.2d 242 (1984) (agreement to stipulate 203 days after city's offer and 37 days after entry of order of public use and necessity too late).
4. If the condemning authority does not seek immediate possession and use, attorney fee rules will be allowable under the rules set out in RCW 8.25.070, .075.
5. If parties have stipulated, the condemning authority will be entitled to take possession upon depositing the amount of its offer into the registry of the court. RCW 8.04.090; RCW 8.25.070(3). See Appendix 3 for sample letter and form of stipulation.

## F. Trial

### 1. Jury.

Either side is entitled to a jury to determine the sole issue at trial: the just compensation to be paid for the property. RCW 8.04.110; 8.08.050; 8.12.190; 8.16.080.

### 2. Pretrial Discovery

- a. Discovery is allowed as in other civil actions - - depositions, interrogatories, exchange of documents.
- b. Court may order parties to exchange appraisal information, with the assurance that there were will “mutual, reciprocal and contemporaneous disclosures of similar information between the parties.” RCW 8.25.120.

### 3. Viewing the Property

The jury will usually be given the opportunity to view the property to be taken. The “view” is not evidence, but rather an aid to understand the evidence. *In re City of Seattle*, 49 Wn.2d 247, 299 P.2d 843 (1956).

### 4. Date of Valuation

Typically, the property rights subject to the exercise of eminent domain are valued as of the date of trial. *State v. Williams*, 68 Wn.2d

946, 416 P.2d 350 (1966). This rule has arguably been modified when its application would be “unfair in light of the particular circumstances” of the government’s action. *Lange v. State*, 86 Wn.2d 585, 591, 547 P.2d 282 (1976).

In *Lange*, the State spent five years in surveying, planning and other steps before finally taking possession of the property for a highway project. Under the circumstances of that case, the court found as a “direct consequence of the State’s action . . .” the marketability of the land was substantially impaired. The property owner was therefor entitled to claim an earlier valuation date for purposes of the trial. In *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 898 P.2d 275 (1995), the Court distinguished *Lange*, and summarized that decision’s limited application, as follows:

For the time of valuation to be advanced, marketability must be substantially impaired and the condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. Further, the owner must have taken active steps to accomplish this purpose. A property owner who purchased land or took steps to market it in contemplation of the condemnation could not insulate himself from a later general decline in market values and benefit from the holding in this case.

*Equitable Capital*, at 216 (citing *Lange*).

The *Lange* test for valuation at a date in advance of trial was summarized by a New Jersey Supreme Court decision in the following formula:

- (1) the marketability must be substantially impaired; (2)
- the condemning authority must have evidenced an

unequivocal intention to take the property; (3) the special use of the land by the owner must be acquiring or holding the property for the subsequent development and sale; and (4) the owner must have taken active steps to accomplish this purpose.

*Township of West Windsor v. Nierenberg*, 150 N.J. 111, 142, 695 P.2d 1344 (1997).

## 5. Testimony

- a. Expert witnesses. The most commonly-used experts at trial are property appraisers, who must be acquainted with values in the vicinity of the land in question. *In re City of Seattle*, 57 Wash. 290, 106 P. 901 (1910). A local realtor, thoroughly familiar with values in the neighborhood, may also be qualified to testify. *See Pacific Northwest Pipeline Corp. v. Myers*, 50 Wn.2d 288, 311 P.2d 655 (1957) (witnesses with some knowledge may testify, even if not strictly experts).
- b. Non-expert witnesses. Owners and neighbors residing in the immediate area of the property to be acquired may testify. *State v. Wilson*, 6 Wn.App.443, 493 P.2d 1252 (1972).

## 6. Jury Instructions.

Washington Pattern Jury Instructions, WPI 150 through 151.15, are to be used in direct eminent domain trials. The WPIs are a helpful summary of the principles of just compensation.

## VI. Inverse Condemnation

A. Definition “An action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the [eminent domain] power.” *Martin v. Port of Seattle*, 64 Wn.2d 309, 391 P.2d 540, *cert. denied* 85 S. Ct. 701 (1964). *Brazil v. City of Auburn*, 93 Wn.2d 484, 490, 610 P.2d 909 (1980).

B. Types of Cases Generally, inverse condemnation cases can be divided into two forms: “traditional” takings cases and “regulatory” takings cases. The peculiarities of Washington practice in this area of law is left to other presentations.

### C. Consolidation of Claims

In the condemnation setting, property owners often will claim other damages to property. The argument is that the government’s actions have affected a taking of property prior to the actual initiation of the condemnation action or possession by government. This issue was squarely presented in *Pelley v. King County*, 63 Wash. App. 638, 821 P.2d 536 (1991).

In *Pelley*, King County had initiated condemnation proceedings to acquire a portion of *Pelley’s* property. While that proceeding was pending, the Pelleys (respondents in the condemnation action) filed a complaint asserting claims for inverse condemnation of that same piece of property. Pelleys also asserted claims of nuisance and outrage against the County. In response, King County filed a Motion for Summary Judgment, resulting in the dismissal of the second action.

On appeal, the court addressed whether or not the Pelleys could maintain a separate action asserting property-related claims, while a condemnation action with respect to the same property was pending. The court held that “[I]n a condemnation proceeding, jurisdiction over all damages to the property resides in the condemnation.” *Pelley*, 63 Wash. App. at 641 (citing *State v. Shain*, 2 Wash. App. 656, 660, 469 P.2d 214 (1970)). (Trial court in a condemnation action “acquire[s] jurisdiction of that action and all matters arising therefrom.”) The court further emphasized that

[O]nce a condemnation proceeding is begun, that proceeding is the only forum in which to determine damages. The proper forum for resolution of these issues is the trial court during the valuation phase of the condemnation proceeding. Any grievance which the Pelleys may have with the county must be resolved there.

*Pelley*, 63 Wash. App. At 642.

## VII. Attorneys’ Fees in Condemnation Cases

- A. Attorney fees are available in some, but not all, circumstances in eminent domain cases.
- B. In addition to just compensation for the taking, the condemnor must pay the owner an amount not to exceed \$750.00 for the owner’s appraisal fees. RCW 8.25.020.
- C. The condemnor must pay attorney fees IF
  - 1. No written settlement offer was served at least 30 days prior to the beginning of trial; AND

2. The judgment exceeds by ten percent or more the highest written settlement offer served 30 days before trial. RCW 8.25.070.

D. The owner or other interested parties will forfeit any right to attorney fees if they were not willing to agree to immediate possession of the property by the condemnor within 30 days of a written request for possession (or 15 days after entry of an order of public use and necessity, whichever is later). RCW 8.25.070(3).

E. Attorney fees are available if the court determines that the property cannot be acquired under the law or if the condemnor abandons the condemnation. RCW 8.25.075(1). In the case of abandonment, however, fees incurred prior to the filing of the petition in eminent domain are not reimbursable. *Port of Grays Harbor v. Citifor, Inc.*, 123 Wn.2d 610, 869 P.2d 1018 (1994).

ORDINANCE NO. 2539

AN ORDINANCE Of the City of Anacortes, Washington, providing for the acquisition of certain properties for the improvement of the Water Utility, a system of supply and distribution facilities for conveying into and through the City of Anacortes and to City customers a supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution; providing for the condemnation, appropriation, taking and damaging of land and other property rights necessary therefore; all located within Sections 2, 7, 11, 12 and 18, Township 34 North, Range 2 East, W.M., in Skagit County, Washington. [In re Anacortes Water Transmission Facilities]

THE CITY OF ANACORTES, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section I. Recitals

1.1 The City of Anacortes ("City") operates the largest municipally-owned water supply, transmission, and distribution system ("System" or "Water Utility") in Skagit County. The Water Utility provides the entire domestic water needs for the oil refineries, the Town of LaConner, the City of Oak Harbor, the City of Anacortes and portions of Fidalgo Island, as well as providing service to Skagit County Public Utility District in several areas of Skagit County.

1.2 The System's water treatment plant, which was completed in 1970, is located on the Skagit River near the City of Mount Vernon and has a capacity in excess of 33 million gallons per day. The utility has over 100 miles of combined transmission and distribution lines.

1.3 The City, following planning and study, has determined to construct a new 36-inch water transmission main and to improve its System through the intertie of its transmission mains and the relocation and reconstruction of sections its existing 36-inch water transmission main.



1.4 The public use and necessity require that the property and property rights herein identified be condemned, appropriated and taken for public use by the Water Utility for such purposes as it may now or hereafter declare in the public interest.

Section 2. Public Use And Necessity

2.1 The public convenience, use and necessity demand that the real property described in Appendix A hereto in Skagit County, Washington be and the same is hereby condemned for the improvement of the City Water Utility, a system of supply, transmission, and distribution facilities for conveying into and through the City of Anacortes and to City customers a supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution.

2.2 In the condemnation of the described property described for the improvement of the Water Utility, and for general municipal purposes, the City shall acquire the fee interest and such easement interest in property as so generally and particularly described in Appendix A,

Section 3. Property for Public Use – Just Compensation. All lands, rights, privileges and other property lying within the limits of the lots, blocks and tracts of land described in Appendix A hereof are hereby condemned, appropriated, taken and damaged for the purpose of improving the Water Utility and other public use, and all lands, rights, privileges and other properties are to be taken, damaged and appropriated only after just compensation has been made, or paid into court, for the owners thereof in a manner provided by law.

Section 4. Study Survey. The Public Works Department, in consultation with the City Attorney, may conduct such necessary studies and surveys to identify alternative routes for the possible relocation and reconstruction of City's existing water transmission mains in the vicinity of SR-20 and the Swinomish Channel.

Section 5.     Reservation. Nothing in this ordinance limits the City in its identification and acquisition of property and property rights necessary for its Utility purposes. The City reserves the right to acquire other or different properties for the Water Utility.

Section 6.     Funding. The entire cost of the improvement and acquisition provided for by this ordinance shall be paid from the Water Utility Fund, or from such general funds of the City of Anacortes as may be provided by law.

Section 7.     Prosecution. The City Attorney, and any Special Assistant City Attorneys, be and they are hereby authorized and directed to begin and prosecute the actions and proceedings in the manner provided by law to condemn, take, damage and appropriate the lands and other property necessary to carry out the provisions of this ordinance. In conducting said condemnation proceedings, the Office of the City Attorney is hereby authorized to enter into stipulations for the purpose of minimizing damages.

Section 8.     Effective Date. This ordinance shall take effect and be in force five (5) days from and after its passage, approval and publication as provided by law.

  
DEAN MAXWELL, MAYOR

ATTEST:

  
GEORGE A. KHITAJIAN, CLERK-TREASURER

APPROVED AS TO FORM:

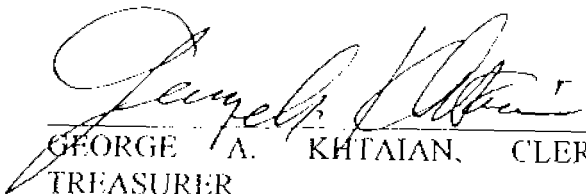
  
IAN MUNCE, CITY ATTORNEY

PASSED the 7<sup>th</sup> day of August, 2000

APPROVED the 7<sup>th</sup> day of August, 2000.

PUBLISHED the 16<sup>th</sup> day of August, 2000.

I hereby certify that this is a true copy of Ordinance No. 3539, passed by the City Council of the City of Anacortes, Washington, and approved by the Mayor of the City of Anacortes as hereon indicated.

  
GEORGE A. KHTANIAN, CLERK-  
TREASURER

8-11-00

Description for Fee Parcel

A strip of land of variable width in Lots "K" and "L" of the "Plat of Portions of the R. E. Whitney Estate" (Volume 26 of Deeds, page 461, Records of Skagit County, Washington), encompassing portions of Section 11 and Section 12, Township 34 North, Range 2 East of the Willamette Meridian, Skagit County, Washington; said strip being more particularly described as follows:

BEGINNING at the intersection of the northerly boundary of said Lot "K" and the southerly right-of-way line of SR 536 (currently SR 20), March Point Road to Fredonia;  
THENCE running in a generally easterly direction along, southerly of, and contiguous with said southerly right-of-way line to Middle Slough and the TERMINUS of said strip; the width of said strip being 65.00 feet between the northerly boundary of Lot "K" and a point on the southerly right-of-way line of SR 536 (SR 20) opposite Highway Engineer's Station 457+00 of Center Line Survey thereof; and the width of said strip being 50.00 feet from thence easterly to its TERMINUS;

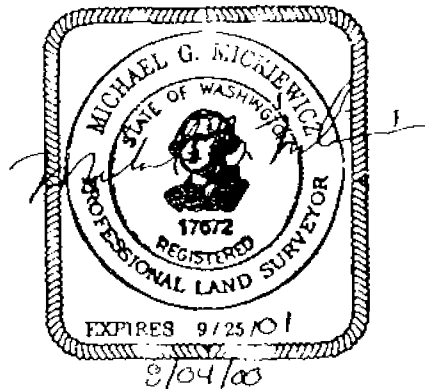
The sidelines of said strip being shortened or extended to intersect each other and adjacent boundaries.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width along, southerly of, and contiguous with the Fee Parcel herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\legals\knudsonfp.doc\mgm



August 4, 2000  
File No. 22-97-037-003-01

Description for Fee Parcel

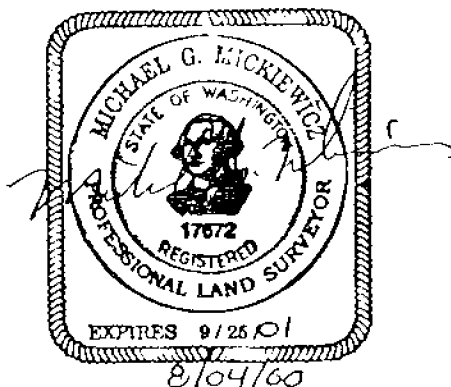
The north 50.00 feet of that portion of Lot 2 of Short Plat No. 96-053 (Book 12 of Short Plats, pages 111 & 112, under Auditor's File No. 9606180031, Records of Skagit County, Washington) adjacent to the southerly right-of-way line of State Highway 20, as measured perpendicularly from said southerly right-of-way line, in Section 7, Township 34 North, Range 3 East of the Willamette Meridian, Skagit County, Washington.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width along, southerly of, and contiguous with the Fee Parcel herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\legals\jungfp.doc\mgm



August 4, 2000  
File No. 22-97-037-003-01

Description for Fee Parcel

A strip of land 50.00 feet in width in portions of Section 12, Township 34 North, Range 2 East, and Section 7, Township 34 North, Range 3 East of the Willamette Meridian, Skagit County, Washington; said strip being more particularly described as follows:

BEGINNING at the intersection of Middle Slough and the southerly right-of-way line of SR 536 (currently SR 20), March Point Road to Fredonia;  
THENCE running in a generally easterly direction along, southerly of, and contiguous with said southerly right-of-way line to Telegraph Slough, and the TERMINUS of said strip;

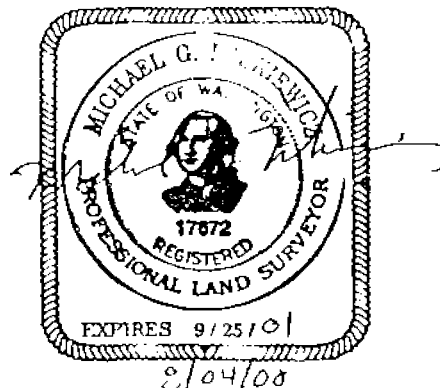
The sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width along, southerly of, and contiguous with the Fee Parcel herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries; and excepting herefrom the area between lines perpendicular to the southerly line of said Fee Parcel opposite Highway Engineer's Stations 479+52.05 and 483+69.11 of the Center Line Survey of said SR 536 (currently SR 20).

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\bellfp.doc\mgm



August 4, 2000  
File No. 22-97-037-003-01

Description for Fee Parcel

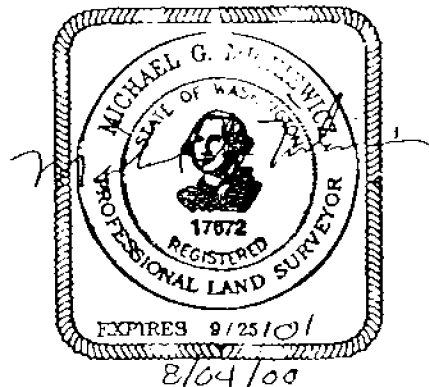
The north 32.00 feet of the east 61.00 feet of the northwest quarter of the northeast quarter of Section 18, Township 34 North, Range 3 East of the Willamette Meridian, Skagit County, Washington; less county road right-of-way.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width along, contiguous with, and south and west of the Fee Parcel herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\legals\brandfp.doc\mgm





August 4, 2000  
File No. 22-97-037-003-01

Description for Permanent Easement

A strip of land in the northeast quarter of the southwest quarter of Section 7, Township 34 North, Range 3 East of the Willamette Meridian, Skagit County, Washington; said strip being 50.00 feet in width, 25.00 feet on each side of the following described center line:

BEGINNING at a point on the west line of said northeast quarter of the southwest quarter, which is 145.00 feet opposite and southerly of Center Line Survey of SR 536 (currently SR20), March Point Road to Fredonia;

THENCE parallel to said Center Line Survey S 73°51'56" E (record S 75°50'01" E) for a distance of 805.12 feet to a point 145.00 feet opposite and southerly of Highway Engineer's Station 111+84.73;

THENCE south for a distance of 865.22 feet to the south line of said northeast quarter of the southwest quarter;

The sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width along, contiguous with, and south and west of the permanent easement herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\legals\dybfestfp\mgm



August 4, 2000  
File No. 22-97-037-003-01

Description for Fee Parcel

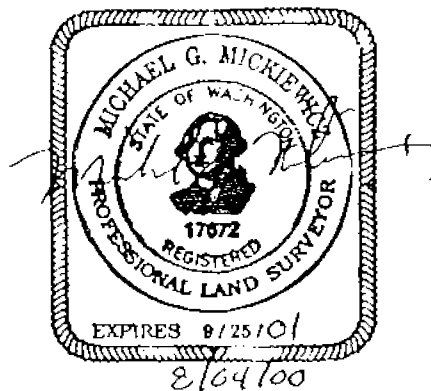
The north 50.00 feet of Lot 1 of Short Plat No. 96-053 (Book 12 of Short Plats, pages 111 & 112, under Auditor's File No. 9606180031, Records of Skagit County, Washington), as measured perpendicularly from the southerly right-of-way line of State Highway 20, in Section 7, Township 34 North, Range 3 East of the Willamette Meridian, Skagit County, Washington.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width along, southerly of, and contiguous with the Fee Parcel herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\legals\beanerfp.doc\ngm



August 4, 2000  
File No. 22-97-037-003-01

Description for Fee Parcel

A strip of land in the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of Section 7, Township 34 North, Range 3 East of the Willamette Meridian, Skagit County, Washington; said strip being 50.00 feet in width, 25.00 feet on each side of the following described center line:

COMMENCING at a point which is 145.00 feet opposite and southerly of Highway Engineer's Station 103+79.61 of Center Line Survey of SR 536 (currently SR 20), March Point Road to Fredonia;  
THENCE parallel to said Center Line Survey S 73°51'56" E (record S 75°50'01" E) for a distance of 805.12 feet to a point 145.00 feet opposite and southerly of Station 111+84.73;  
THENCE south for a distance of 865.22 feet to a point on the north line of said southeast quarter of southwest quarter; said point being the beginning of this center line;  
THENCE south a distance of 25.00 feet to a point which is offset 25.00 feet southerly from the north line of said southeast quarter of southwest quarter;  
THENCE parallel with said north line S 89°26'11" E for a distance of 514.22 feet;  
THENCE parallel with and 25.00 feet offset southerly from the north line of the southwest quarter of southeast quarter of said Section 7, S 88°58'14" E for a distance of 1254.78 feet;  
THENCE S 00°34'06" W for a distance of 1316.53 feet;  
THENCE S 89°25'17" E 36.67 feet and the TERMINUS of this center line;

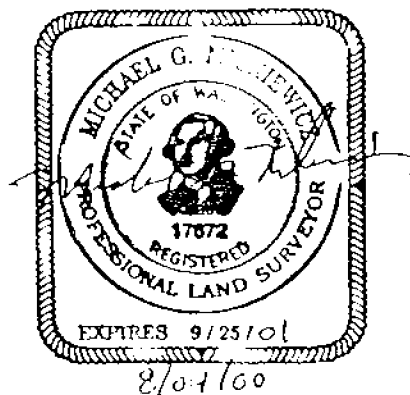
The sidelines of said strip to be shortened or extended to intersect adjacent boundaries; and less any portion of said strip within the right-of-way of the county road known as LaConner-Whitney Road.

Description for Temporary Construction Easement

A strip of land 30.00 feet in width, along, contiguous with, and south and west of the Fee Parcel herein described; the sidelines of said strip being shortened or extended to intersect adjacent boundaries.

Reid Middleton, Inc.  
728 134th Street SW, Suite 200  
Everett, WA 98204  
(425) 741-3800

ram\22sv\anacort\legals\ballfp.doc\mgm



1  
2  
3  
4  
5  
6  
7 SUPERIOR COURT OF WASHINGTON IN AND FOR \_\_\_\_\_ COUNTY

8 \_\_\_\_\_,  
9 Petitioner,

No. \_\_\_\_\_

10 v.

SUMMONS ON PETITION IN  
EMINENT DOMAIN

11 \_\_\_\_\_,  
12 Respondent.

13 THE STATE OF WASHINGTON, TO: \_\_\_\_\_

14 A lawsuit has been started against you in the above-entitled court by petitioner  
15 a copy of which is served upon you with this summons.

16 \_\_\_\_\_ will present its petition in eminent domain to the Superior  
17 Court of the State of Washington in and for \_\_\_\_\_ County, in \_\_\_\_\_  
Washington, at the hour of \_\_\_\_\_ a.m./p.m. on \_\_\_\_\_, 20\_\_\_\_. This  
18 petition seeks to condemn land, property and property rights as described in  
\_\_\_\_\_’s \_\_\_\_\_, which is attached as Exhibit \_\_\_\_ to the  
19 petition and which is incorporated by reference. At that time and place, \_\_\_\_\_ will  
20 seek an order adjudicating the public use and necessity of the land, property and property rights  
for the purpose set forth in \_\_\_\_\_’s \_\_\_\_\_.

21 You are hereby notified that the determination of a public use is a judicial one, and at the  
22 time and place indicated above, you may appear and resist that determination. After the  
23 determination by the court that this project is for a public use, \_\_\_\_\_ will ask the  
court to set a date for determination of just compensation to be paid to each of the property  
owners for the taking or damaging of the land, property and property rights.

24 You are required to file a notice of appearance and serve it on the undersigned within  
25 20 days, or within 60 days after service if served outside the state of Washington, or an order of  
26 default can be entered against you. If you wish to seek the advice of an attorney in this matter,  
you should do so promptly so that your appearance, if any, may be served on time.

SUMMONS ON PETITION IN EMINENT DOMAIN - 1

1        THIS SUMMONS is issued pursuant to Rule 4 of the Superior Court Civil Rules of the  
2 State of Washington.

3        DATED this \_\_\_\_ day of \_\_\_\_\_, 2001.

4 \_\_\_\_\_

5 \_\_\_\_\_

6 Attorneys for City/Petitioner

1  
2  
3  
4  
5  
6  
7 SUPERIOR COURT OF WASHINGTON IN AND FOR \_\_\_\_\_ COUNTY

8 \_\_\_\_\_,  
9 Petitioner,

No. \_\_\_\_\_

10 v.

PETITION IN EMINENT DOMAIN

11 \_\_\_\_\_,  
12 Respondent.

13 The petitioner, \_\_\_\_\_ ("City"), brings this action in eminent  
14 domain pursuant to Chapter 8.12 RCW and [e.g. RCW 35.23.311] to condemn certain property  
15 for the construction of \_\_\_\_\_.

16 1. City is a municipal corporation organized under the laws of the State of  
17 Washington.

18 2. City is duly authorized by \_\_\_\_\_ and 8.12.030 to exercise  
19 the power of eminent domain to condemn and damage land and other property rights for the  
20 purpose of constructing, developing, maintaining and operating, among other things,  
21 \_\_\_\_\_.

22 3. \_\_\_\_\_ of \_\_\_\_\_ has selected a site  
23 located generally \_\_\_\_\_ of the existing \_\_\_\_\_ property  
24 to develop \_\_\_\_\_ for \_\_\_\_\_ known as the  
25 "\_\_\_\_\_."

26  
PETITION IN EMINENT DOMAIN - 1

1           4.     On \_\_\_\_\_, 20\_\_\_\_, City duly enacted Ordinance No. \_\_\_\_\_, entitled  
2     \_\_\_\_\_ [quote title] \_\_\_\_\_. The Ordinance declares that the \_\_\_\_\_ is a  
3     public use and purpose, and that there is a public necessity for the construction of the  
4     \_\_\_\_\_. A true and correct copy of the Ordinance is attached as  
5     Exhibit \_\_\_\_\_.

6           5.     In the Ordinance, the City has also determined that the following property ("the  
7     Property"), situate in the county of \_\_\_\_\_, state of Washington, is necessary for the  
8     construction of \_\_\_\_\_:

9           **[Property description]**

10          6.     Owner(s) of record of the Property are identified as follows (collectively,  
11     "respondents").

12          7.     So far as is known to City, or appearing from the records in the office of the  
13     \_\_\_\_\_ County Auditor, respondents \_\_\_\_\_, and \_\_\_\_\_ County may  
14     claim an interest in the Property.

15          8.     City is entitled to acquire the Property in fee simple by the power of eminent  
16     domain.

17          WHEREFORE, \_\_\_\_\_ requests the following relief from the court:

18          1.     That the court set this matter for hearing to determine whether the Property is  
19     being acquired for a public use and is necessary for that use.

20          2.     That the court, at that hearing, enter a decree of public use and necessity  
21     determining that the Property is being acquired for a public use and that the Property is  
22     necessary for that use.

23          3.     That the court set the matter for trial on the matter of the just compensation to be  
24     paid for the Property.

25          4.     Upon payment into the court of the amounts so awarded, the court enter a decree  
26     of appropriation of the Property, vesting legal title to it in City.

PETITION IN EMINENT DOMAIN - 2

5. For such other relief as the court may deem just and equitable.

DATED this \_\_\_\_ day of \_\_\_\_\_, 200\_.

Attorneys for City



\_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: \_\_\_\_\_

Dear \_\_\_\_\_:

As you know, we represent \_\_\_\_\_ [City] \_\_\_\_\_ in this condemnation action. City requests that your clients stipulate to City's immediate possession and use of the property that is the subject of this action. You may agree by signing the enclosed stipulation and order and returning it to us. If you so stipulate, City will deposit the sum of \$\_\_\_\_\_, representing the amount of its current offer, into the registry of the court, as set forth in the proposed order.

For your information, we expect that City will not be depositing the funds and taking possession of the property until approximately \_\_\_\_\_, 20\_\_\_\_. However, you must sign and return the enclosed stipulation within 30 days of the date of this letter, or within 15 days of the date of entry of an order of public use and necessity, whichever is later. For your information, the hearing for an order of public use and necessity is scheduled for \_\_\_\_\_, 20\_\_\_\_, and we expect the order of public use to be entered on that date.

If you fail to comply with these dates, your clients will lose any right they might have to recover their attorneys' fees in this lawsuit. RCW 8.25.070(3).

Very truly yours,

\_\_\_\_\_

By: \_\_\_\_\_  
\_\_\_\_\_

Enclosure

cc: \_\_\_\_\_ (w/o enc.)  
All Parties (w/enc.)

1  
2  
3  
4  
5  
6  
7 SUPERIOR COURT OF WASHINGTON IN AND FOR \_\_\_\_\_ COUNTY

8 \_\_\_\_\_,  
9 Petitioner,

No. \_\_\_\_\_

10 v.

STIPULATION AND AGREED  
ORDER GRANTING IMMEDIATE  
POSSESSION AND USE

11 \_\_\_\_\_,  
12 Respondent.

13 IT IS STIPULATED by petitioner, \_\_\_\_\_ [City] \_\_\_\_\_, and respondents that the  
14 following order may be entered.

15 ORDER

16 IT IS ORDERED that at such time as the amount of City's offer to purchase the  
17 property, currently \$ \_\_\_\_\_, is paid into the registry of the court by City, City shall have  
18 and be awarded and granted immediate possession and use of the land, property and property  
19 rights belonging to the respondents that are being condemned in this action, particularly  
20 described as:

21 **[Property Description]**

22 IT IS FURTHER ORDERED that \_\_\_\_\_ will deposit the funds into  
23 the registry of the court on or before \_\_\_\_\_, 20\_\_ and will take possession of the  
24 property on \_\_\_\_\_, 20\_\_.

25  
26  
STIPULATION AND AGREED ORDER GRANTING  
IMMEDIATE POSSESSION AND USE - 1

1 IT IS FURTHER ORDERED that if the parties proceed to settlement or to a trial for the  
2 determination of just compensation, the date of valuation of the property shall be the date  
3 \_\_\_\_\_ obtains immediate possession of the property.

4 IT IS FURTHER ORDERED that if the amount of any final judgment of just  
5 compensation awarded at trial, or any settlement reached by the parties, exceeds the amount  
6 paid into the registry of the court, the City may satisfy the terms of such judgment or settlement  
7 by paying the excess into the registry of the court, together with interest thereon at the statutory  
8 rate from the date the City deposits the funds described above. If the amount of any final  
9 judgment of just compensation awarded at trial or any settlement reached by the parties does not  
10 exceed the amount paid into the registry of the court, the respondents shall remit the excess to  
11 the City. Nothing in this Order shall prevent the City from seeking an order awarding it interest  
12 on any excess amount remitted to it by respondents.

13 IT IS FURTHER ORDERED that upon deposit of the funds into the registry of the court  
14 by \_\_\_\_\_, the sum deposited shall be promptly disbursed from the registry of  
15 the court upon further order of the court, and all valid outstanding taxes and all valid liens and  
16 encumbrances, including assessments, shall be paid by respondents.

17 DONE IN OPEN COURT THIS \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

18  
19 \_\_\_\_\_  
JUDGE/Court Commissioner

20 Presented by:

21 \_\_\_\_\_

22  
23 By: \_\_\_\_\_

24 Attorneys for Petitioner, \_\_\_\_\_

25  
26  
STIPULATION AND AGREED ORDER GRANTING  
IMMEDIATE POSSESSION AND USE - 2

1 Approved as to Form; and,  
2 Stipulation for Entry:

3 [OWNER'S LAW FIRM]

4 By: \_\_\_\_\_

5 Attorneys for Respondent  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

STIPULATION AND AGREED ORDER GRANTING  
IMMEDIATE POSSESSION AND USE - 3

1  
2  
3  
4  
5  
6 SUPERIOR COURT OF WASHINGTON IN AND FOR SKAGIT CITY

7 In the Matter of the Petition of the City of  
8 Anacortes to acquire by condemnation certain  
9 property and property rights for the improvement  
10 of the City's Water Utility, water supply and  
distribution facilities, as contemplated by City of  
Anacortes Ordinance No. 2539

No. 00-2-01183-3

CITY OF ANACORTES' MEMORANDUM  
IN SUPPORT OF ORDER ON PUBLIC  
USE AND NECESSITY

11 Petitioner, the City of Anacortes, (the "City"), respectfully submits this memorandum in  
12 support of an order from the Court adjudicating that the object and use for which the City is acquiring  
13 property and property rights in this case is a public object and a public use and that the acquisition of  
14 the property sought by the City is necessary to that public use.

15 **I. INTRODUCTION**

16 **1.1. The Need for Improvements to City's Water System**

17 As stated in the City's Petition for Condemnation ("Petition"), the object and use for which  
18 the property and property rights are sought by the City is a public object and a public use, i.e.,  
19 acquisition of real property to enable the City to construct and improve a system of supply and  
20 distribution facilities for conveying into and through the City of Anacortes and to City customers a  
21 supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution.

22 The City operates the largest water supply and distribution system ("System" or "Water  
23 Utility") in Skagit County. The Water Utility provides the entire domestic water needs for the Marsh  
24 Point oil refineries (both domestic and process water), the Town of LaConner, Swinomish Tribe, the  
25 City of Oak Harbor, Whidbey Island Naval Air Station, the City of Anacortes and portions of Fidalgo  
26

1 Island, as well as providing service to Skagit County Public Utility District in several areas of Skagit  
2 County. The System's water treatment plant, which was completed in 1970, is located on the Skagit  
3 River near the City of Mount Vernon and has a capacity in excess of 33 million gallons per day. The  
4 City has been pumping the System water supply from the Skagit River and across the Skagit Valley  
5 and Swinomish Channel for over 70 years. The City has over 100 miles of combined transmission  
6 and distribution lines. *See* Petition at 1-2.

7 **1.2. The City Council Found that the Improvements Were Necessary and that**  
8 **Acquisition of the Property Was For a Public Purpose and a Public Use.**

9 Following planning and study, the City determined to construct a new 36-inch water  
10 distribution main and to improve its System through the intertie of its distribution mains and the  
11 relocation and reconstruction of sections of its existing 36-inch water distribution main, in accordance  
12 with the specifications set forth in City Ordinance No. 2539 (the "Ordinance"). A copy of the  
13 Ordinance was filed with the Petition, and is attached to this memorandum as Exhibit A to facilitate  
14 the Court's reference. Under the Ordinance, the City Council has determined that certain properties  
15 and property rights be condemned, appropriated, taken and damaged for the improvement of the  
16 System, as provided in the Ordinance. *See* Exhibit A at 2.

17 The properties at issue in this proceeding are the first section (or "reach") of the City's  
18 replacement of its old 24-inch waterline. That waterline, constructed in the 1920's, is being replaced  
19 with a new 36-inch transmission main. *See* Waterline Location Evaluation Study at 1-1  
20 (Montgomery Watson 1996) ("Study"), attached as Exhibit F to the Declaration of Patricia  
21 Sneeringer. The three reaches of the waterline replacement project are depicted in Study Figure 5-1  
22 (the "Recommended Alternative" route), a copy of which is attached to this memorandum as Exhibit  
23 B.

24 As is outlined in the Petition, it is necessary that the City acquire title to the real property  
25 identified in the Ordinance in order to make and maintain the improvements to the Water Utility. The  
26

1 City seeks adjudication of public use and necessity for the taking or damaging of the property or  
2 property rights sought in this proceeding.

3 **2. REQUESTED RELIEF**

4 The City requests entry of an order of public use and necessity, identifying the Utility's  
5 planned construction of a new 36-inch water distribution main and planned improvements to its  
6 System through the intertie of its distribution mains and the relocation and reconstruction of sections  
7 of its existing 36-inch water distribution main as being required by public use and necessity as  
8 described in the Ordinance.

9 **3. STATEMENT OF ISSUE**

10 Is the construction of the improvements to the Utility's System as described more fully in the  
11 Ordinance and in the Petition a public use and is the property to be acquired pursuant to the Petition  
12 reasonably necessary for the purposes of those improvements?

13 The issue of just compensation for the taking of property for the construction of the  
14 improvements to the System is to be determined at a later trial.

15 **4. AUTHORITY**

16 **4.1. The Court Exercises a Limited Role In a Condemnation Proceeding**

17 In Arnold v. Melani, 75 Wn.2d 143, 449 P.2d 800 (1969) (en banc), Washington's Supreme  
18 Court summarized the fundamental legal basis for the power of eminent domain: "Eminent domain,  
19 the subject matter of Const. Art. 1, § 16 (Amendment 9) is an inherent power of the sovereign, which  
20 in no way depends upon the state constitution for its existence." *Id.* at 151 (internal citations  
21 omitted).

22 When the City acquires property through eminent domain, it is exercising this same sovereign  
23 power of the State, delegated to the City by the Legislature. See RCW 8.12.030 (authorizing  
24 condemnation by cities). Under Washington law, the exercise of this power is only limited by the  
25 constitutional requirements "that just compensation be made . . . and that the contemplated use be a  
26

1 public one.” State ex rel. Bremerton Bridge Co. v. Superior Court For Kitsap County, 194 Wn. 7, 18,  
2 76 P.2d 990 (1938). Apart from the adjudication of these two issues, and apart from assuring that the  
3 power of eminent domain is exercised in accord with statutory requirements, the Court has no  
4 jurisdiction in a condemnation proceeding.

5 The necessity of taking land and public use decided by public administrative  
6 authorities empowered so to act is *binding on the courts* in the absence of some  
7 showing of actual fraud or such arbitrary and capricious conduct as would amount to  
8 constructive fraud.

9 Id. at 19 (emphasis supplied). Respondents’ own authority supports this same conclusion. King  
10 County v. Burhen, 29 Wn. App. 497, 499, 628 P.2d 1341 (1981) (cited by Respondents at 7-8 of their  
11 Brief) (“A declaration by the appropriate legislative body that the contemplated acquisition is  
12 necessary to carry out the proposed use will be deemed conclusive by the courts absent actual fraud  
13 or such arbitrary and capricious conduct as would amount to constructive fraud.”)

14 The reason for judicial deference to the condemning authority’s determination of necessity  
15 and its decision to initiate condemnation proceedings is found in the separation of powers, which  
16 “may be the most important principle of government.” Snider v. Board of County Commissioners, 85  
17 Wn. App. 371, 378, 932 P.2d 704 (1997) (citing Washington State Motorcycle Dealers Ass’n v. State,  
18 111 Wn.2d 667, 674-75, 763 P.2d 442 (1988)).

19 The essence of the doctrine is that the functions of each branch of government should  
20 be inviolate to prevent the accumulation of power into one branch of government and  
21 unbalancing the powers of government . . . . The power of eminent domain is a core  
22 function of the legislative branch of government not the judiciary. There may be  
23 overlapping responsibilities in the functions of government. This does not, however,  
24 permit one branch of government to usurp, encroach upon, or impair the power of  
25 another branch. The legislative power of eminent domain, in the context of this case,  
26 should remain inviolate securely within the core functions of the [condemning  
authority].

Id. at 378-79.

27 All of this is not to say that the Court has no role to play in an eminent domain proceeding.  
28 As has already been noted, the judiciary has the specific role of adjudicating public use and necessity  
29 and assuring that just compensation is paid. In re Puget Power & Light Co., 28 Wn. App. 615, 617-



1 18, 625 P.2d 723 (1981) (outlining bases for making such determinations). Furthermore, the Court  
2 has a duty to assure that the exercise of the power of eminent domain conforms to the statutory limits  
3 on the delegation and use of that power. In re Petition of Port of Seattle, 35 Wn. App. 785, 792, 670  
4 P.2d 663 (1983)

5 However, a [condemning authority's] determination of necessity, that is, does the  
6 public interest require it and is the property to be acquired necessary to accomplish a  
7 public use, is a legislative, as opposed to a judicial question. (Citations omitted).  
Such a legislative determination is conclusive unless a challenger is able to prove  
actual or constructive fraud.

8 *Id.* at 791.

9 The Respondents contend that the City has acted arbitrarily and capriciously in seeking fee  
10 title instead of an easement, and that the City's decision to do so constitutes constructive fraud. See  
11 Respondents Brief at 4-5. As is elaborated below, both of these arguments are entirely without merit.

12 What is critical, however, is that, without any proof of fraud, the City's determination of  
13 necessity, i.e., its decision as to whether or not to initiate condemnation proceedings, is "conclusive"  
14 and must be deferred to by this Court. In re Port of Seattle, 35 Wn. App. at 791.

15 This deference to the condemnor's decision regarding necessity has its root in the  
16 concept of eminent domain itself. The power to assert eminent domain rights is an  
attribute of state sovereignty exercised through the legislature *and is thus subject to*  
17 *judicial review only to determine whether the State exceeded its lawful authority.*

18 In re Puget Power, 28 Wn. App. at 725 (emphasis supplied).

19 In addition, Respondents' contention that the City may not acquire property for "other  
20 municipal purposes" is completely misplaced. As is shown below, in addition to providing authority  
21 for condemning property for the purpose of making improvements to water systems, RCW 8.12.030  
22 allows the City to acquire property by eminent domain for "any other public use." Furthermore, the  
23 Supreme Court has been clear that, once public use has been shown, the details of the ultimate use to  
24 be made of the property acquired is a decision specifically delegated to the City:

25 Once the purpose for which the lands are taken has been adjudged to be public, the  
26 kind and type of roadway, the route to be followed, the design and engineering  
details become the subject in administrative decision, and these decisions will not

1       be set aside or molested by the courts unless shown to have been arrived at without  
2       statutory authority or by bad faith or fraud, or capriciously and arbitrarily.  
3       State v. Brannan, 85 Wn.2d 64, 67-68, 530 P.2d 322 (1975); accord In re Port of Grays Harbor  
4       County, 30 Wn. App. 855, 863-64, 638 P.2d 633 (1982) ("The absence of specific plans for this  
5       projected use neither makes the plan speculative nor does it demonstrate lack of public necessity.  
6       The law requires only a reasonable necessity for the use within a reasonable time.")

#### 7       **4.2.     City Condemnation Authority**

8       RCW 8.12.030 specifically authorizes a City to:

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

29      (Emphasis supplied).

#### 30      **4.3.     Public Use and Necessity.**

31      RCW 8.04.070 requires that a proposed condemnation be necessary for the public use. The  
32      Washington Supreme Court has developed a three-part test to evaluate eminent domain cases. For a  
33      proposed condemnation to be lawful, the condemning authority must prove that: (1) the use is public  
34      ("municipal purposes"); (2) the public interest requires it; and (3) the property appropriated is  
35      necessary for that purpose. State ex rel. Washington State Convention and Trade Center v. Evans,

1 136 Wn.2d 811, 816-17, 966 P.2d 1252 (1998); In re City of Seattle, 96 Wn.2d 616, 625, 638 P.2d  
2 549 (1981).

#### 3 **4.3.1. Public Use and Necessity Distinguished.**

4 The question whether a particular use is a "public use" is judicial in nature. Washington  
5 Constitution, article I, Section 16 (amendment 9). However, the Constitution's deferral to the  
6 judiciary of the question of public use "does not preclude the legislative prerogative of declaring a  
7 public use in the first instance." Miller v. City of Tacoma, 61 Wn.2d 374, 383-384, 378 P.2d 464  
8 (1963). The legislature's declaration is entitled to great weight. Hogue v. Port of Seattle, 54 Wn.2d  
9 799, 817, 341 P.2d 171 (1959). The determination of "public necessity" for a particular improvement  
10 is a legislative question. City of Tacoma v. Welcker, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).

#### 11 **4.3.2. Public Use**

12 The specifics of the City's waterline project have no bearing on the order of public use;  
13 project plans relate to damages determined subsequent to an adjudication of public use and necessity.  
14 State ex rel. Agee v. Superior Court of King City, 58 Wn.2d 838, 840, 365 P.2d 16 (1961). The  
15 Court's approval of public use requires only that the property condemned be put to the use designated  
16 therein and determined to be public. Id. Here, there can be no question that the acquisition property  
17 for improvement to the Utility's System is for a public use. See RCW 8.12.030 (cited above).

#### 18 **4.3.3. Public Necessity**

19 The concept of necessity is closely connected to the concept of public use, but it does not  
20 mean absolute, immediate or indispensable need. King City v. Theilman, 59 Wn.2d 586, 594, 369  
21 P.2d 503 (1962). Public necessity "embraces the right of the public to expect and demand the service  
22 and facilities to be provided by a proposed acquisition or improvement." City of Tacoma v. Welcker,  
23 65 Wn.2d at 684.

24 The determination of necessity in a given instance is a legislative determination. Necessity is  
25 deemed conclusive by the courts when found to exist by the appropriate legislative body, absent proof  
26

1 of actual fraud or such arbitrary and capricious action as would constitute constructive fraud.  
2 Brannan, 85 Wn.2d at 68; City of Tacoma v. Welcker, 65 Wn.2d at 684.

3 Selection of a site or location for a given improvement is, likewise, a legislative question.  
4 State ex rel. Hunter v. Superior Court for Snohomish City, 34 Wn.2d 214, 219-220, 208 P.2d 866  
5 (1949). With respect to the waterline project described in attached Ordinance, the specific type of  
6 improvement, its location, the design and engineering details are administrative and legislative in  
7 nature. State v. Brannan, 85 Wn.2d at 68 (quoted above at 5-6) (while court may have selected  
8 different route, it will not substitute judgment for legislative authority).

9 The City, through the proper exercise of its legislative authority, has declared that public  
10 necessity and convenience require the acquisition of the Respondents' property. This declaration is  
11 conclusive on the Court, absent proof of fraud.

12 **4.4. The City's Decision to Acquire Fee Title Rather Than an Easement Does Not**  
13 **Constitute Constructive Fraud.**

14 Respondents urge the Court to overturn the City's legislative determination to acquire fee  
15 title, or the route that the City has selected for the construction of the pipeline, claiming that these  
16 decisions constitute bad faith, arbitrary and capricious conduct and amount to constructive fraud. See  
17 Respondents' Brief at 4-7. To the contrary, as is noted above, site selection, route selection and other  
18 logistical determinations are legislative questions, upon which judicial deference is required. State ex  
19 rel. Hunter, 34 Wn.2d at 219-220; Brannan, 85 Wn.2d at 68.

20 Respondents' contention that the City's determination to acquire fee title when "an easement  
21 is all that is necessary for construction of a waterline" is also misplaced, since "questions concerning  
22 whether an acquisition is necessary to carry out a proposed public use are *legislative*." Evans, 136  
23 Wn.2d at 823 (emphasis supplied).

24 Respondents' own authority supports this same proposition: see City of Des Moines v.  
25 Hemenway, 73 Wn.2d 130, 138, 437 P.2d 171 (1968) (cited by Respondents in their Brief at 2 and 4)  
26 ("[Q]uestions concerning whether a particular acquisition is necessary to carry out a proposed public

1 use are legislative, . . . [and are] *conclusive* in the absence of proof of actual fraud or such arbitrary  
2 and capricious conduct as would constitute constructive fraud.” (Emphasis supplied).

3 The Des Moines case illustrates this principle perfectly, especially in light of Respondents’  
4 efforts to argue (without offer of proof) constructive fraud or arbitrary and capricious conduct. In  
5 Des Moines, just as in this case, the respondents opposed the City of Des Moines’ efforts to condemn  
6 land for the construction of a marina, contending that a small city of (at that time) 3,518 people had  
7 no need to condemn 80% of the tidelands located within the city limits and two parcels outside the  
8 city limits for the purpose of constructing a marina to house 885 boats. However, similar to the  
9 instant case, the respondents in Des Moines made no showing of actual or constructive fraud.

10 Responding to this argument, the Supreme Court used language that is directly applicable to  
11 this case:

12 The word ‘necessary,’ as used in connection with eminent domain statutes, means  
13 reasonable necessity under the circumstances. It does not mean immediate, absolute,  
14 or indispensable need, but rather considers the right of the public to expect or  
15 demand that certain services be provided.

16 Despite its finding that 90 per cent of the space in the proposed marina would be  
17 used by nonresidents, the trial court stated in its oral opinion that construction of the  
18 marina would be of substantial benefit to the residents of the city. It seems clear that  
19 the trial court’s findings, as amplified by its oral opinion, do not support its  
20 conclusion that petitioner acted in an arbitrary and capricious manner in seeking to  
21 condemn respondents’ tidelands for a marina. Consequently, the trial court erred in  
22 refusing to enter a decree of public use and necessity as to property situated within  
23 petitioner’s corporate limits.

24 Des Moines, 73 Wn.2d at 140 (reversing trial court’s refusal to enter order of public use and  
25 necessity).

26 The Court may take judicial notice of the City’s ongoing dispute over easement rights held by  
the City for a different water transmission main. City of Anacortes v. Kenneth Gaungsman, et al.,  
Skagit County Cause No. 99-2-00899-8. The City will present evidence that the cost and risk to the  
Water Utility associated with that disputed easement was a legitimate consideration in the City’s  
legislative determination to acquire fee interests for its new water transmission line.

1 Respondents have argued that the City's legislative determinations (contained in the  
2 Ordinance) amount to arbitrary and capricious conduct and/or constructive fraud. See Respondents'  
3 Brief at 4-7. But they have identified no proof to substantiate that contention. Instead, Respondents  
4 simply base their claims on their dissatisfaction with the City's route for the pipeline or the fact that  
5 the City chose to acquire fee title rather than an easement. But, as the Supreme Court made clear in  
6 Eyans, those decisions are legislative decisions and, without actual proof of fraud, the Court must  
7 defer to those legislative acts.

8 **4.5. The City Complied With Both SEPA and the SMA and Considered Alternatives**

9 **4.5.1. Respondents' Failure to Raise Their Arguments During the SEPA and**  
10 **SMA Process Forecloses them from Raising Those Arguments at This**  
11 **Time.**

12 Actions by a municipality to acquire real property are categorically exempt from SEPA.  
13 RCW 43.21C.110(1)(a); WAC 197-11-800(5). Notwithstanding this fact, the City went through  
14 SEPA and sought and obtained a Special Use Permit and a Shoreline Substantial Development  
15 Conditional Use Variance Permit. Respondents are well aware of these facts, having referenced  
16 certain permits in their own Brief. See Respondents' Brief at 5.

17 The fact that the City has gone through the SEPA process and obtained a SMA permit without  
18 any appeal from Respondents means that Respondents are now foreclosed from asserting many of  
19 their claims, particularly the "Ecological and public impacts" that they outline at pp. 8-9 of their  
20 Brief. And once again, the City can cite no better authority for this proposition than Respondents'  
21 own case: King County v. Burhen, 29 Wn. App. 497, 628 P.2d 1341 (1981) (cited by Respondents at  
22 pp. 7-8 of their Brief).

23 The City has already pointed out that the King County opinion stands for the proposition that  
24 a declaration of necessity by a condemning authority is deemed conclusive. See above at 4. But the  
25 case also stands for the proposition that parties which fail to raise environmental concerns during the  
26

1 SEPA process or the SMA process "cannot collaterally attack those proceedings at the public use and  
2 necessity hearing stage." *Id.* at 499.

3 The property owner does not allege that notice of the administrative proceedings  
4 was deficient or that administrative review of environmental concerns was  
5 inadequate. Thus, *Brannan* leads us to the conclusion that if the property owner  
6 wished to introduce evidence of the environmental impact of the project, he was  
required to do so at the administrative level and not at the hearing on the application  
for an order adjudicating public use and necessity. To do so is an impermissible  
collateral attack upon the prior administrative determination.

7 *King County*, 29 Wn. App. at 500 (citations omitted). This opinion is on all fours with the instant  
8 case and forecloses Respondents from arguing (as they do at pp. 7-8) that the "environmental impact"  
9 of the project should prevent the Court from entering an order of public use and necessity.

10 **4.5.2. The City Considered Alternatives and Obtained Sign-off on the Project**  
11 **from All Agencies With Jurisdiction.**

12 Irrespective of the procedural defects of Respondents' argument and the fact that the Court is  
13 to defer to the City's selection of the route for the project, the fact is that the City considered  
14 alternatives to the route it ultimately selected. Here again, evidence placed in the record before the  
15 Court by *Respondents* demonstrates this consideration. The Waterline Location Evaluation Study,  
16 attached to the Sneeringer Declaration as Exhibit F, contains an entire section (Section 2), which is  
17 devoted to nothing but the identification and consideration of alternative routes for the pipeline, and  
the impacts of those various alternatives.

18 In addition, at the hearing on public use and necessity, the City will present evidence that all  
19 state and federal agencies (including the Corps of Engineers applying the Endangered Species Act)  
20 have examined the City's proposal and signed off on the City's approach.

21 Finally, with respect to Respondents' claim that the pipeline route will cut off access to the  
22 Beaners and Bells (see Respondents Brief at 5:13), the City will maintain (and hereby stipulates that  
23 it will maintain) Respondents' access to their property and the City will grant necessary easements to  
24 preserve existing access rights. *City of Seattle v. Faucet*, 123 Wn. 613, 212 P. 1085 (1923);  
25  
26

1 Richardson v. City of Seattle, 97 Wn. 37, 166 P. 639 (1917) (City may stipulate to limit the rights  
2 taken).

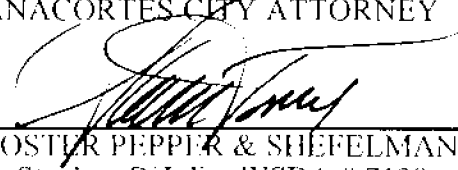
3 **5. CONCLUSION**

4 The Court plays a limited role in a condemnation proceeding adjudicating just compensation  
5 and public use and necessity. With respect to public use and necessity, in the absence of evidence of  
6 fraud, arbitrary or capricious conduct, the City's determinations as to public use and necessity are  
7 deemed conclusive and binding on the Court. While Respondents have argued that the City's actions  
8 were arbitrary and capricious or amounted to constructive fraud, they have identified no evidence to  
9 substantiate their contentions. In the absence of such evidence, under Washington law (including that  
10 cited to the Court by Respondents themselves) the Court is to defer to the City's determinations on  
11 public use and necessity, including the route for the pipeline and the amount property taken and the  
12 City's determination to take fee title as opposed to an easement.

13 For the reasons set forth above, the City respectfully requests that the Court enter an order  
14 adjudicating that the City's acquisition of property and property rights for the purposes outlined in the  
15 Ordinance and the Petition be declared a public use and that acquisition of the property and property  
16 rights sought by the City is necessary to effect that public use.

17 Respectfully submitted this 1<sup>st</sup> day of November, 2000.

18 Ian Munce, WSBA #21527  
19 ANACORTES CITY ATTORNEY

20   
21 FOSTER PEPPER & SHEFELMAN PLLC  
22 P. Stephen DiJulio, WSBA # 7139  
23 Steven G. Jones, WSBA #19334  
24 Special Deputy City Attorneys  
25  
26



SUPERIOR COURT OF WASHINGTON IN AND FOR SKAGIT CITY

In the Matter of the Petition of the City of  
Anacortes to acquire by condemnation certain  
property and property rights for the improvement  
of the City's Water Utility, water supply and  
distribution facilities, as contemplated by City of  
Anacortes Ordinance No. 2539

No. 00-2-01183-3

CITY OF ANACORTES' SUBMISSION OF  
SUPPLEMENTAL AUTHORITY IN  
SUPPORT OF ORDER ON PUBLIC USE  
AND NECESSITY

Petitioner, the City of Anacortes, (the "City"), respectfully submits this memorandum in support of its request for an order from the Court adjudicating that the object and use for which the City is acquiring property and property rights in this case is a public object and a public use and that the acquisition of the property sought by the City is necessary to that public use. This memorandum supplements the City's previously submitted Memorandum In Support of Order on Public Use and Necessity ("City's Opening Memorandum"), and provides additional relevant authority supporting the Court's entry of an Order on Public Use and Necessity.

**1. Supplemental Authority Regarding City's Decision to Take Fee Interest Rather Than Easement**

Respondents have asserted that the City's decision to take a fee interest in property rather than an easement provides justification for the Court to refrain from entering an order of public use and necessity. Washington law is directly to the contrary.

The case of In re Port of Grays Harbor, 30 Wn. App. 855, 638 P.2d 633 (1982), addressed precisely this question and rejected Respondents' position. In that case the Port of Grays Harbor sought to acquire property through eminent domain for the disposal of dredged spoils taken from the Chehalis River. Using the same argument as has been advanced in this case, respondents in In re Port

1 of Grays Harbor contended that the Port did not need to acquire a fee interest in the property sought,  
2 but that an easement would be sufficient. Addressing the question, the Court of Appeals held that  
3 deference was due to the legislative authority seeking to condemn property, and that even were the  
4 court to disagree with the condemning authority on the type of property interest to be taken, that mere  
5 difference of opinion was not sufficient to find the condemning authority's decision arbitrary or  
6 capricious:

7       Whether a legitimate public use should be accomplished by acquisition of an  
8       easement rather than a fee is a question on which reasonable minds can differ. Given  
9       the expense involved in diking the land and the Port's long-range plans for  
10      development of the property, the legislative choice is not arbitrary or capricious  
11      choice simply because a reviewing court would select a different option. (Citations  
12      omitted). The legislature under constitutional authority has granted broad authority to  
13      port districts to determine the means by which it carries out its public purpose.

14      30 Wn. App. at 863.

15       Similarly here, the City has made a determination that acquisition of an easement over the  
16      Respondents' property is insufficient to satisfy the City's needs for this essential public utility. The  
17      City Council made this decision based on the City's past experience with problems arising when the  
18      City attempted to do utility maintenance within property where it held only an easement and the  
19      owner of the dominant estate objected to the City's actions. Based on this experience and the  
20      thousands of dollars of legal fees and costs that the City has incurred in connection with this situation,  
21      the City Council reasonably concluded that it would acquire a fee interest for the pipeline corridor.

22       The City's decision to acquire a fee interest rather than an easement is completely within the  
23      "broad authority" granted to the City Council by the Legislature. Accordingly, the Respondents'  
24      position on this point is entirely without merit, since under Washington law, the decision to acquire a  
25      fee interest rather than an easement will not support a finding of either constructive fraud or that the  
26      City's actions were arbitrary and capricious. Cf. State ex rel. Hunter v. Superior Court for  
Snohomish City, 34 Wn.2d 214, 219-220, 208 P.2d 866 (1949) (selection of a site or location for a  
given improvement is, likewise, a legislative question).

1           **2. Supplemental Authority In Opposition to Respondents' Contention that the**  
2           **City's Decisions Regarding the Location of the Corridor and Type of Property**  
3           **Interest To Be Taken Amount to Constructive Fraud.**

4           In their memorandum in opposition to the entry of the Order on Public Use and Necessity,  
5           Respondents have urged the Court to overturn the City's legislative determination to acquire fee title,  
6           and the City's determination of the route selected for the construction of the pipeline, claiming that  
7           these decisions constitute bad faith, arbitrary and capricious conduct and amount to constructive  
8           fraud. See Respondents' Brief at 4-7. To the contrary, as is noted above and as is elaborated in detail  
9           in the City's Opening Memorandum, site selection, route selection and other logistical determinations  
10          are legislative questions, upon which judicial deference is required. State ex rel. Hunter, supra, 34  
11          Wn.2d at 219-220; State v. Brannan, 85 Wn.2d 64, 67-68, 530 P.2d 322 (1975) (while court may  
12          have selected different route, it will not substitute judgment for legislative authority).

13          Likewise, as was noted above, Respondents' contention that the City's determination to  
14          acquire fee title when "an easement is all that is necessary for construction of a waterline" is also  
15          misplaced, since "questions concerning whether an acquisition is necessary to carry out a proposed  
16          public use are *legislative*." State ex rel. Washington State Convention and Trade Center v. Evans,  
17          136 Wn.2d 811, 823, 966 P.2d 1252 (1998) (emphasis supplied).

18          The Washington Supreme Court directly rejected Respondents' argument many years ago in  
19          the case of Spokane v. Merriam, 80 Wn. 222, 141 P. 358 (1914). In that case, when the City of  
20          Spokane sought to acquire property for a public park after being authorized to do so by passage of a  
21          bond issue, the trial court refused to enter an order holding that the purpose for which the property  
22          was sought was a public use and that public necessity required acquisition of the property, in the  
23          absence of City ordinances specifically stating such findings.<sup>1</sup>

24          On review, the Supreme Court reversed. In doing so, it specifically addressed the argument  
25          asserted by Respondents in *this* case, that the City's decision as to siting of the pipeline corridor or  
26          the type of property interest taken are arbitrary and capricious or amount to constructive fraud:

<sup>1</sup> No similar contention can be made in this case, since such findings are contained in Ordinance No. 2359.

1 In the absence of any allegation or proof of fraud, the courts will presume that this,  
2 the most formal, solemn and authoritative declaration of which the corporate entity is  
3 capable, was based upon all of the antecedent executive, administrative and quasi-  
4 judicial investigation, consideration and determination prescribed by the charter of by  
5 law. It is this final corporate declaration, the ordinance, which alone is required by  
6 the state in prescribing the procedure, to be set out in the petition invoking and setting  
7 in motion the exercise of the power of eminent domain by the city.

80 Wn. at 234.

6 The first sentence of the passage quoted above applies directly in the instant case.  
7 Respondents have offered no direct proof of fraud, but instead have contended that, because they  
8 disagree with the City's determination as to site and type of property interest, the City has engaged in  
9 "constructive fraud" and that the City's actions are arbitrary and capricious. The holding of Merriam  
10 squarely rejects this position, and is in accord with subsequent pronouncements by Washington's  
11 courts, including authority cited by Respondents themselves: see, e.g., State ex rel. Hunter, 34 Wn.2d  
12 at 219-220; Brannan, 85 Wn.2d at 68, both cited above and in the City's Opening Memorandum and  
13 City of Des Moines v. Hemenway, 73 Wn.2d 130, 138, 437 P.2d 171 (1968) (cited by Respondents in  
14 their Brief at 2 and 4) ("[Q]uestions concerning whether a particular acquisition is necessary to carry  
15 out a proposed public use are legislative, . . . [and are] *conclusive* in the absence of proof of actual  
16 fraud or such arbitrary and capricious conduct as would constitute constructive fraud." (Emphasis  
17 supplied). The City has outlined the holding of the Des Moines case in detail in its Opening  
18 Memorandum at pp. 8-9.

19 Without an offer of any proof to substantiate them, Respondents' contentions of arbitrary  
20 and capricious conduct and constructive fraud must be rejected. As the Supreme Court made clear in  
21 Merriam, and as the subsequent decisions in Evans, Brannan and Hunter made clear, arguments based  
22 solely on Respondents' own dissatisfaction with the City's route for the pipeline or the fact that the  
23 City chose to acquire fee title rather than an easement are untenable. As the decisions cited above  
24 demonstrate, the City Council's determinations on such issues are legislative decisions and, without  
25 actual proof of fraud, the Court must defer to those legislative acts.

1           **3.     Impermissibility of Collateral Attack Using SEPA.**

2           Respondents' counsel has asserted that another basis for attacking the City's acquisition of  
3 property in this action may be an assertion that the City's representations when it obtained permits for  
4 the pipeline or during SEPA proceedings were at odds with the representations made in the Ordinance  
5 or in other communications with Respondents. Here again, such an attack is contrary to Washington  
6 law. The Court of Appeals rejected precisely this type of an argument in In re Port of Grays Harbor,  
7 cited above. In that case, the trial court allowed the respondents to assert a collateral attack on the  
8 Port's efforts to acquire property grounded on SEPA. On review, the Court of Appeals reversed this  
9 decision, noting that:

10           condemnation proceedings have been effectively removed from SEPA's ambit by  
11 WAC 197-10-170. This regulation provides for "categorical exemptions"  
12 governmental activities which are exempted from the threshold determination and  
13 EIS requirements of SEPA. Included in these exempted actions is the purchase or  
14 acquisition of any right to real property by an agency. WAC 197-10-170(9)(a). Thus  
15 condemnation of real property, being acquisition of rights to the condemned property,  
16 is exempt from the provisions of SEPA. (Citations omitted).

17           In re Port of Grays Harbor, 30 Wn. App. at 865.

18           The holding in In re Port of Grays Harbor is consistent with the Washington Supreme Court's  
19 earlier decision in Marino Property v. Port of Seattle, 88 Wn.2d 822, 567 P.2d 1125 (1977). In  
20 Marino Property, the Supreme Court held that acquisition of property by condemnation was  
21 categorically exempt from SEPA under WAC 197-10-170(9)(a), and clearly distinguished between  
22 the right to acquire property by condemnation (which is not subject to SEPA) and the right to go  
23 forward with planned improvements (which may involve SEPA). 88 Wn.2d at 830-31.

24           The opinion in In re Port of Grays Harbor stated this same position as follows: "[E]ven if we  
25 assume the Port violated the requirements of SEPA, condemnation proceedings are not the proper  
26 setting for a review of the Port's actions." 30 Wn. App. at 865. "The proper place to raise the issues  
of the environmental impact of the Port's project is at the administrative level and not at the hearing

1 on the application for public use and necessity. To hold otherwise would be to allow an  
2 impermissible collateral attack on the prior administrative determination.” *Id.* at 866.

3 The Respondents should not be allowed to raise complaints regarding the City’s acquisition of  
4 the pipeline corridor based on SEPA or based on allegations that representations made in prior  
5 administrative proceedings are at odds with those made in this action. As both the Court of Appeals  
6 and the Supreme Court have made clear, acquisition of property by condemnation is categorically  
7 exempt from SEPA, and any attack on representations during administrative proceedings or permit  
8 hearings is impermissible in a hearing on public use and necessity.

9 **4. Conclusion.**

10 Most of the points made in this Supplemental Memorandum are outlined in more detail in the  
11 City’s Opening Memorandum. Given the length of time that has elapsed since the initial hearing on  
12 Public Use and Necessity, the City respectfully requests that the Court re-review that memorandum  
13 along with this Supplemental Memorandum in anticipation of the hearing on January 5.

14 With respect to public use and necessity, in the absence of evidence of fraud, arbitrary or  
15 capricious conduct, the City’s determinations as to public use and necessity are deemed conclusive  
16 and binding on the Court. Respondents have identified no evidence to substantiate their contentions  
17 that the City’s actions were arbitrary and capricious or amounted to constructive fraud. In the  
18 absence of such evidence, under Washington law (including that cited to the Court by Respondents  
19 themselves) the Court is to defer to the City’s determinations on public use and necessity, including  
20 the route for the pipeline, the amount property taken and the City’s determination to take fee title as  
21 opposed to an easement.

1 For the reasons set forth above and in the City's Opening Memorandum, the City respectfully  
2 requests that the Court enter an order adjudicating that the City's acquisition of property and property  
3 rights for the purposes outlined in the Ordinance and the Petition be declared a public use and that  
4 acquisition of the property and property rights sought by the City is necessary to effect that public  
5 use.

6 Respectfully submitted this 2<sup>nd</sup> day of January, 2001.

7 Ian Munce, WSBA #21527  
8 ANACORTES CITY ATTORNEY

9 

10 FOSTER PEPPER & SHEFELMAN PLLC  
11 P. Stephen DiJulio, WSBA # 7139  
12 Steven G. Jones, WSBA #19334  
13 Special Deputy City Attorneys  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26