

## Eminent Domain Law: Recent WA Ruling Gives Substantial Deference to Condemning Authority

*In its October 20, 2005, decision in the Sinking Ship garage case, HTK Management, L.L.C. v. Seattle Popular Monorail Authority, \_\_\_ Wn.2d \_\_\_, 2005 WL 2709354, the Washington Supreme Court reemphasized that where property is being condemned for a public purpose, substantial deference is owed to a condemning authority's determination as to "the type and extent of property interests" necessary to fulfill that purpose. The Court specifically held that condemnation of fee simple title, rather than a time-limited property interest (e.g., a construction easement), can be reasonably necessary even if the property's planned public use may not go on "forever." In addition, the Court recognized that in deciding to condemn fee simple title, a condemnor may permissibly take into account whether doing so will be less expensive than the cost of condemning a lesser property interest combined with likely damages.*

Under Washington law, eminent domain cases are evaluated under a three part test: "[f]or a proposed condemnation to be lawful, the condemning authority must prove that

- (1) the use is really public,
- (2) the public interest requires it, and
- (3) the property appropriated is necessary for that purpose."

*HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, \_\_\_ Wn.2d \_\_\_, 2005 WL 2709354 at \*8.

The Washington Supreme Court's recent opinion emphasizes that the first and third prongs of the test are different, and that the condemning authority's determinations regarding those issues – "public use" vs. "necessity" – are subject to different standards of judicial review. *Id.* While a legislative declaration of public use is entitled to "great weight," it is not dispositive and the question of whether a use is really public is a judicial one. *Id.* By contrast, courts' review of a condemnor's determination of necessity is less exacting, as "[a] declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud." *Id.*

### **LESS EXACTING STANDARD OF JUDICIAL REVIEW APPLIES WHERE ENTIRE PROPERTY IS NEEDED FOR PUBLIC USE, EVEN IF PLANNED PUBLIC USE WILL NOT BE FOREVER**

In *HTK Management*, it was undisputed that a portion of the property condemned was needed for a permanent public use, as the site of a planned monorail station. It was also undisputed that the remainder of the property would be needed for construction purposes while the monorail station was being built. But there was evidence that once construction was complete, the remainder of the property outside the "footprint" of the station proper might be sold to private parties. The condemnee argued that because of the possibility that the property outside the station "footprint" might be sold to private parties, the court was required to determine whether that part of the property was being taken for a "public use," applying the first – and more exacting – standard of judicial review.

The Court disagreed and reaffirmed long-standing precedent that legislative determinations "as to the type and extent of property interest necessary to carry out the public purpose" are properly reviewed under the third, less exacting, prong of the test. 2005 WL 2709354 at \*9. In deciding to apply this less

exacting standard of review, the Court emphasized two related facts: first, that the entire property would be put to a public use for a substantial period of time; and, second, that there was no guarantee that any portion of the property would be sold or leased to private parties. *Id.* at \*10. The Court held that those two facts distinguished the condemnation of the property outside the monorail station "footprint" from the condemnation in *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811 (1998), where – because part of the condemned Convention Center property was subject to a certain and immediate private use – the Court reviewed both the claimed "public use" and the "necessity" of the taking. The Court's decision in *HTK Management* thus establishes what standard of review applies – the less exacting one of "reasonable necessity" – so long as a condemnor will use an entire property for public purposes for a significant period of time, even if that public use will not necessarily go on "forever." *Id.* at \*11.

#### **CONDEMNOR MAY TAKE COST INTO ACCOUNT IN CHOOSING TO CONDEMN FEE SIMPLE TITLE RATHER THAN LESSER PROPERTY INTEREST**

In holding that condemnation of fee simple title to the entire Sinking Ship garage property was reasonably necessary for the public use in question (public transportation), the Court emphasized three facts: (1) the condemnor needed to use the entire property for a substantial period of time for construction purposes; (2) there was a possible need to use the entire property in perpetuity; and (3) testimony was undisputed that the cost of a temporary construction easement, when combined with likely damages, could eclipse the cost of a fee interest, a fact that the Court called "significant." 2005 WL 2709354 at \*12-13. The Court thus affirmed condemnors' discretion to condemn fee simple title to property rather than a time-limited property interest (like a construction easement), even if the property might not be needed for public use "forever." Moreover, the Court expressly acknowledged that in deciding what amount and extent of property interests to condemn, a condemnor can permissibly take into account the relative costs of condemning different property interests. *Cf. id.* at \*11 (noting that, in evaluating necessity, "[c]ourts will consider costs of the project as a relevant factor").