No. 056710-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF BURIEN, a municipal corporation,

Respondent,

v.

STROBEL FAMILY INVESTMENTS, a Washington limited liability corporation, successor in interest to STROBEL FAMILY LIMITED PARTNERSHIP, a limited partnership,

Petitioner,

and

MEAL MAKERS, INC., a Washington corporation, PUGET SOUND EDUCATIONAL SERVICE DISTRICT; and KING COUNTY,

Respondents.

STROBEL FAMILY INVESTMENTS' PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Strobel Family Investments (the "Strobel Family") asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its unpublished opinion on June 12, 2006. A copy of the decision is in the Appendix at pages A-2 through A-10. The Court of Appeals filed an order denying the Strobel Family's motion for reconsideration on July 21, 2006. A copy of that order is in the Appendix at page A-11.

C. ISSUES PRESENTED FOR REVIEW

1. Under this Court's precedent, is a court obligated to hold a condemnation "necessary" even when that condemnation "may be unnecessary and unreasonable as to be oppressive and [an] abuse of power"?

2. Where a condemning authority reserves the right to transfer condemned property to a private entity, does a finding of public use violate article I, section 16 of the Washington Constitution?

D. STATEMENT OF THE CASE

This case concerns whether a city and its developer may condemn private property even where the court finds that the condemnation "may

be unnecessary and unreasonable as to be oppressive and [an] abuse of power." CP 399. The City of Burien condemned the Strobel Family's property, including the Meal Makers restaurant building, for a "Town Square" development project. Because the City and its developer did not believe the property's current use as a family-style, diner restaurant fit their "vision" for the project, CP 399, the city manager instructed his staff to make "damn sure" a road went through the building. CP 432, 433. The City subsequently condemned the property for reasons best described by the trial court:

> So this decision, it can be summarized as follows, you won't sell and you don't fit our vision, so we're going to put a street right through your property and condemn it.

CP 398-99. Even though the court found that the condemnation might be "oppressive" and an "abuse of power," CP 399, it concluded that current Washington case law required it to hold the condemnation "necessary" to achieve the City's public use

1. The City Makes "Damn Sure" A Road Goes Through The Strobel Family's Property

In 1997, the City of Burien ("Burien" or "City") adopted a comprehensive plan that included the "goal" of "develop[ing] . . . a town square." CP 30. The City formed a steering group, which produced a "Preferred Conceptual Alternative" — a preferred plan for the "Town

Square" project — in December 2002. CP 66, 94. Although the area covered included the Strobel Family's property, the Preferred Conceptual Alternative did not specifically indicate what was to become of the property. CP 103.

The City subsequently selected Urban Partners, LLC ("Urban Partners"), as its developer. In April 2004, Urban Partners presented its "Development Concept," its vision for the Town Square project, to the City. CP 114-20. The Development Concept departed from the Preferred Conceptual Alternative in several respects. Among other things, it called for: (1) a mixed residential/retail building on or near the Strobel Family's property; and (2) a street grid system within the Town Square site. CP 118, 119.

Specifically, the Development Concept proposed inserting SW 151st Street, to run east-west through the square, and 5th Avenue SW, to run north-south. *Id.*; CP 283, 284. Although there was no formal survey completed at this point, the "loop" intersection of the proposed streets appeared to be near, but not necessarily on, the Strobel Family's property. CP 118.

Around this time, the city asked Urban Partners to approach the Strobel Family about selling its property. CP 271-72. The Strobel Family preferred to keep its property and, to that end, tried to work cooperatively

with the City, offering to remodel it so the density and design would be compatible with the rest of Town Square. *Cf.* CP 130.

The City and Urban Partners, however, wanted the property. CP 404; *see also* CP 130; 273. In that light, City Manager Gary Long instructed his staff, during a September 2004 meeting, "to make damn sure" SW 151st Street went through the restaurant on the property. CP 432, 433. Larry Fetter, the former director of parks and recreation, recounted the meeting:

> Q So when Gary Long said put 151st here, was he just simply referring to 151st being there to satisfy the grid design?
> A No.
> Q What was he trying to say or what did he say?
> A He said that 151st, that we, the city, needed to make damn sure that that road went where it is . . . .
>
> . . . .
>
> Q When you say Gary Long said to make damn sure it went in this location, was he saying something more than just going through the property in general?
> A He was referring to the orientation of the road relative to the building, the structure.
> Q So Gary Long said to make sure that the orientation of 151st went through the Meal Makers Restaurant building?
> A The building, yes.
>
> . . . .
>
> Q [Y]ou're saying Gary Long's instructions were to try to design 151st so that it would go through the building?
> A Not try. He was very insistent about the placement of 151st.
> Q And when you say he was insistent about it, he was insisting that it would go through the building?
> A Correct.

. . . .

Q And do you recall precisely what those words were?
A Yes.
Q What were those words?
A We need to make damn sure it goes through Meal Makers, referring to 151st.

CP 432-33.[1]

A few weeks later, on October 18, 2004, the City Council adopted Resolution 201, which included a site plan for the Town Square project. CP 121-23. Pursuant to City Manager Long's demand, the site plan appeared to place the "loop" intersection of SW 151st Street and 5th Avenue SW in the vicinity of the Strobel Family's property. CP 123.

A subsequent survey, however, revealed that the road layout in the site plan would, at most, impact only a very small corner of the Strobel Family's property. CP 259, 262, 285. Contrary to City Manager Long's instruction, SW 151st Street would *not* go through — or even touch — the restaurant building itself. *Id.*

The City then decided that the curvature of the planned "loop" intersection of SW 151st Street and 5th Avenue SW did not have a large

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[1] Although the director of public works disputed portions of Mr. Fetter's account, *see* CP 422, the trial court accepted Mr. Fetter's account as true, as it was required to do in resolving the case on summary judgment with the City as moving party. *See* CP 397 ("[F]rom the deposition of Larry Fetter, the former parks director, the city manager directed the staff to align Southwest 151st through the Meal Makers restaurant."); *see also* CP 398. This Court must do the same. *See McClarty v. Totem Elec.*, __ Wn.2d __, 137 P.3d 844, 847 (2006).

enough turning radius. CP 288, 418.[2] The director of public works began working with Urban Partners' architect to develop new street layouts, with the instruction that "we should establish the alignment of the [right of way] *on the Strobel property* so that this information can be available for discussions with the Strobels." CP 441, 419-20 (emphasis added).

Although the director and architect had multiple options for street layout — including at least one that would have *avoided* the Strobel Family's property, CP 420[3] — they presented only one option to the City Council. Consistent with the director's instruction to "establish the alignment of the [right of way] on the Strobel property," and with the city manager's instruction to make "damn sure" SW 151st goes through the restaurant building, the option presented was the one with the greatest impact on the Strobel Family's property: a layout placing SW 151st Street directly through Meal Makers. CP 419, 259, 263, 331.

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[2] Specifically, the City maintained that a 100-foot turning radius was necessitated by applicable road standards. *See* CP 316 ("The modification to the street layout was required by traffic-engineering standards . . . and not as some wild-eyed conspiracy to 'get' Strobel."). But the City's own evidence demonstrates that a lower radius would have been acceptable. *E.g.*, CP 329. Moreover, neither the trial court nor the Court of Appeals even acknowledged the turning radius issue.

[3] The director of public works claims he rejected this option because it would have impacted another property owned by Puget Sound Educational Services District ("PSESD"). According to the director, PSESD was "envisioned to be a partner with the city" and "desire[d] to be within town square and maintain that property." CP 420. Within a few months, however, PSESD had sold the property to the City. CP 26.

The City Council adopted this revised site plan as Resolution 208 CP 259, 124-27, and, on February 7, 2005, passed Ordinance No. 426, authorizing the city attorney "to commence condemnation proceedings" against the Strobel Family's property. CP 144-47. According to the ordinance, the property was "necessary" for "municipal street improvement, municipal parking, and municipal parks purposes." CP 145. But despite the ordinance's suggestion that *all* of the property was necessary, the City has since conceded that there will be some residual and that it has "not made a final determination of what's going to happen with" the residual. CP 269. The City has further conceded that that the residual might be used "for future private development." CP 268.

The Strobel Family then had its own architect develop an alternative site plan that would preserve the Meal Makers building but still achieve the City's objectives for the Town Square project. CP 260, 264. The Strobel Family presented this plan to the City and Urban Partners for their consideration. Urban Partners responded that "the blocks we contemplate acquiring . . . do not accommodate the scale and configuration of the existing Meal Makers restaurant," and insisted that "we simply can not do [the] project if it has to include [the] Meal Makers

building." CP 306, 407, 404. In this light, the City commenced condemnation proceedings in June 2005.[4]

2. The Trial Court Concludes That The Condemnation "May Be So Unnecessary And Unreasonable As To Be Oppressive And [An] Abuse Of Power" But Nevertheless Holds It "Necessary"

On August 5, 2005, the trial court held a summary judgment hearing on the "public use" and "necessity" requirements for the City's condemnation of the Strobel Family's property. The court dispensed with the "public use" issue in relatively short order but discussed the "necessity" issue at length.[5]

The court recognized that the real motivation behind the condemnation was elimination of a property that the City felt was not upscale enough to fit its "vision" for Town Square:

> This case is somewhat problematic, because it's unique, as all cases are, but there is no prior case law directly on point as to some of the issues. Although it's never said in the record straight out anywhere, it's implied, and I get the feeling . . . that the city and Urban Partners in regard to the Town Square *just feel that Meal Makers is inconsistent with their vision of what should happen there. I think they feel it would be akin to having a Denny's restaurant next to the capitol building in Olympia.*

[4] Shortly after filing the condemnation action, the City executed a development agreement with Urban Partners. Because of the uncertainties involved in this litigation, the City omitted the Strobel Family's property from the agreement. CP 271.

[5] Regarding "public use," the court simply said, "There's no doubt that the Strobel property will be used for a street, a park, and/or parking. They are a public use, and so this Court finds that the public use element is satisfied." CP 396.

CP 396-97 (emphasis added).

The court recognized that the Strobel Family's property was not truly "necessary" for the City's project. It accepted that the property was deliberately targeted by the city manager, who "directed the staff to align Southwest 151st through the Meal Makers restaurant." CP 397. It even found that "the alignment of Southwest 151st could have been easily accomplished without [a]ffecting the Meal Makers restaurant or the Strobel property" (or with, at most, a "de minimis" impact). CP 397. Finally, the court offered this very candid assessment of the City's decision to condemn the property:

> So this decision, it can be summarized as follows, you won't sell and you don't fit our vision, so we're going to put a street right through your property and condemn it.

CP 398-99.

Despite such evidence that condemnation of the Strobel Family's property was not, in any reasonable sense, "necessary," the court felt it had no choice but to hold it was. The court felt its hands were tied by Washington law that defers to a condemning authority's determination that a particular property is necessary for a public use. As the court explained, the condemnor's determination "is deemed conclusive . . . unless there's proof of actual fraud or such arbitrary and capricious

conduct that . . . would amount to fraud." CP 397. The court reluctantly concluded that the condemnation was neither fraudulent nor arbitrary and capricious; to the contrary, it was "well thought out." CP 398.

The court did, however, note that Washington law once allowed for more searching judicial review — for "bad faith, . . . oppression, or . . . abuse of . . . power" — but that this standard "does not appear to be the current state of the law." *State ex rel. Postal Tel.-Cable Co. v. Super. Ct. of Grant County*, 64 Wash. 189, 194, 116 P. 855 (1911); CP 398, 399. The court opined that the City's conduct might well "be unnecessary and unreasonable as to be oppressive and abuse of power." CP 399. As the court put it, "there may be genuine issues as to material fact in those areas, if that is the state of the law." CP 399. But the court again added, "I don't feel that that's the state of the law," and consequently held the condemnation of the Strobel Family's property "necessary." CP 399.

3. The Court of Appeals Affirms But Disregards The Improper Motivations That Even The Trial Court Recognized

The Court of Appeals affirmed but, in a remarkable departure from the trial court, insisted there were "[n]o improper considerations" on the City's part. App. A-9. In fact, the Court of Appeals did not even acknowledge the instruction from the city manager to make "damn sure" SW 151st Street went through Meal Makers or the instruction from the

director of public works to ensure that the right of way is "align[ed] . . . on the Strobel property." CP 432, 433, 441.

In another departure from the trial court, the Court of Appeals did not acknowledge, much less apply or attempt to distinguish, the precedent from this Court that allows a more searching review of a condemning authority's necessity determination. Instead, it simply reiterated the "actual fraud" or "constructive fraud" standard and, in this light, held the condemnation necessary. App. A-6 n.5, A-8.[6]

The Strobel Family moved for reconsideration. In a three-sentence order, the Court of Appeals denied the motion. A-11.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the criteria governing acceptance of review by the Supreme Court. This case involves an issue of substantial public interest that is also a significant question of law under the Washington Constitution: Is a condemnation "necessary" to achieve a public use when the government's actions in condemning the property are unnecessary and unreasonable to the point of being an abuse of power? In other words, do eminent domain statutes and the Washington Constitution permit the

[6] Strangely, and without explanation, the Court of Appeals ended its discussion by claiming that "under the circumstances of all the alternatives" available to the City, "the restaurant building would be demolished." App. A-9. This unsubstantiated statement flatly contravenes the trial court's conclusion that "the alignment of Southwest 151st could have been easily accomplished without [a]ffecting the Meal Makers restaurant or the Strobel property." CP 397.

government to condemn property unnecessarily, act unreasonably and oppressively, and abuse its power? *See* RAP 13.4(b)(3), (4).[7]

In that regard, review is also appropriate because the decision of the Court of Appeals conflicts with this Court's decision in *Postal Telegraph-Cable* and its progeny, which allow a court to review a condemning authority's necessity determination for "bad faith, . . . oppression, or . . . abuse of . . . power." *Postal Telegraph-Cable*, 64 Wash. at 194; RAP 13.4(b)(1). The trial court opined that *Postal Telegraph-Cable* "does not appear to be the current state of the law" even though it has never been overruled, and the Court of Appeals simply ignored it.

Finally, review is required to resolve a separate but related issue of substantial public interest and significant question of law under the Washington Constitution: Where a condemning authority reserves the right to transfer condemned property to a private entity, does a finding of public use violate article I, section 16 of the Washington Constitution? *See* RAP 13.4(b)(3), (4).

[7] The issue is one of Washington constitutional law because the necessity of the condemned property must be established in order "to meet the requirement of article I, section 16." *In re Petition of City of Seattle (Westlake II)*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985).

1. A Condemnation Is Not "Necessary" When Undertaken To Eliminate Property That Does Not Fit The Condemnor's "Vision"

Under Washington law, "[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 Mgmt., L.L.C. v. Seattle Popular Monorail Auth. (Monorail)*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005) (emphasis added). Although the "[t]he latter two findings are generally subsumed under the definition of 'necessity,'" they are nevertheless "separate" inquiries. *Westlake II*, 104 Wn.2d at 623. In this case, it is the final inquiry that is primarily in play: whether the Strobel Family's property is necessary for the Town Square project.

"In the condemnation context, necessary means reasonable necessity under the circumstances." *Cent. Puget Sound Reg'l Transit Auth. v. Miller (Sound Transit)*, 156 Wn.2d 403, 411, 128 P.3d 588 (2006) (internal quotation marks and citations omitted). This case asks whether that standard means anything. The Strobel Family's property was not "necessary" under any reasonable understanding of that term. Rather, the City deliberately targeted the property, making "damn sure" a road went through it, because its current use as a family-style, diner restaurant did not fit the City's "vision" for the Town Square project. CP 432, 433, 399.

As the trial court explained, the property simply was not upscale enough for the City's liking: "the city and Urban Partners . . . feel it would be akin to having a Denny's restaurant next to the capitol building." CP 397. But even though the trial court was convinced the condemnation might be "oppressive" and an "abuse of power," it felt Washington law compelled a finding that the condemnation was "necessary." CP 399.

This is not the law. "Necessity" requires that the condemned property be reasonably necessary *for the purported public use.* Here, the trial court determined that the purported public use "could have been easily accomplished *without* [a]ffecting the Meal Makers restaurant or the Strobel property." CP 397 (emphasis added). A rule that treats condemnations to eliminate property that is not sufficiently upscale as "necessary" will open wide the doors to eminent domain abuse. So long as the condemnor can manufacture a fig leaf of public use, it will have free rein to place that use right on top of — or, in this case, right through — the "undesirable" property, regardless of whether such placement is in any sense reasonably necessary.

This Court should accept review to prevent such abuse. The issue is not one this Court has previously addressed but is one that must be resolved. To make clear that condemnations will not be tolerated when

undertaken to eliminate property the condemnor does not consider worthwhile, this Court should accept review.

2. The Court Of Appeals Decision Conflicts With This Court's Decision in *Postal Telegraph-Cable* And Its Progeny

Both the Court of Appeals and trial court applied the common formulation of the standard governing judicial review of necessity determinations, reviewing only for actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud. App. A-6 n.5, A-8; CP 397-98. Both failed to apply valid precedent from this Court that allows broader review — for "evidence of bad faith, . . . oppression, or . . . abuse of . . . power" — in certain circumstances. As this Court explained in *Postal Telegraph-Cable*, although the condemning authority has "the right in the first instance to select the land which . . . is most expedient for the enterprise,"

> *the court* [has] the power to determine whether specific land proposed to be taken is necessary in view of the general location, *and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection.*

Postal Telegraph-Cable, 64 Wash. at 194-95 (emphasis added).

The trial court acknowledged and discussed *Postal Telegraph-Cable* but reluctantly concluded, "I don't feel that that's the state of the law. It does not appear to be the current state of the law." CP 399. Were

it the state of the law, the court opined that condemnation of the Strobel Family's property "may be unnecessary and unreasonable as to be oppressive and abuse of power." CP 399. As the court explained, "there may be genuine issues as to material fact in those areas, if that is the state of the law." CP 399.

Notwithstanding the trial court's conclusion that *Postal Telegraph-Cable* is not good law, and despite the fact that the Court of Appeals did not even acknowledge the basis for debate, *Postal Telegraph-Cable's* "bad faith, . . . oppression, or . . . abuse of . . . power" standard has never been overruled.[8] To the contrary, it has been cited and relied upon since its adoption. Indeed, as recently as 1988, then-Judge Alexander joined an opinion that applied *Postal Telegraph-Cable* in striking down a finding of necessity. *See Wagle v. Williamson*, 51 Wash. App. 312, 754 P.2d 684 (1988). That opinion adopted the *Postal Telegraph-Cable* standard whole cloth:

> In Washington, the general rule is that . . . *the court is vested with the power to determine whether specific land proposed to be taken is necessary*, in view of the general location, together with the burdens and benefits to the respective properties *and then finally to determine the*

[8] In the trial court and Court of Appeals, the City attempted to distinguish *Postal Telegraph-Cable* and its more searching review of necessity determinations on the ground that *Postal Telegraph-Cable* involved a partial, rather than total, take. *See* CP 374; Br. Of Resp't at 36-40. It is, to say the least, curious to suggest that the condemnation of *all* a person's property should receive less scrutiny than the condemnation of only a portion.

> *question of necessity for taking such specific land when there is evidence of bad faith, oppression or an abuse of power in the selection.*

Id. at 315 (emphasis added).[9]

Postal Telegraph-Cable's standard captures the type of improperly motivated condemnation that occurred in this case. Indeed, a long line of cases — including the recent decisions in *Monorail* and *Sound Transit* — recognizes that improper motivation may defeat the alleged "necessity" of a condemnation. *See Sound Transit*, 156 Wn.2d at 418 (recognizing that condemnation may not be necessary if it was "motivated by improper considerations"); *Monorail*, 155 Wn.2d at 638 n.21 (suggesting that "an unconstitutional improper motive" would defeat necessity).[10]

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[9] Lest the City attempt to distinguish *Wagle* or *Postal Telegraph-Cable* on the ground that they involved condemnation actions initiated by private entities, *Postal Telegraph-Cable's* necessity standard applies to government-initiated condemnations as well. *E.g.*, *State v. Super. Ct. of Yakima County*, 128 Wash. 79, 84-85, 222 P. 208 (1924); *State v. Super. Ct. in and for Grant County*, 112 Wash. 34, 38, 191 P. 416 (1920); *see also State ex rel. Sternoff v. Super. Ct. for King County*, 52 Wn.2d 282, 294, 325 P.2d 300 (1958) (applying *State v. Super. Ct. of Yakima County*). Moreover, it is well established that the procedure governing an exercise of eminent domain — including, specifically, the requirement of "proving 'necessity' to the satisfaction of the court" — is the same for all entities that posses the power. *King County v. Theilman*, 59 Wn.2d 586, 594, 369 P.2d 503 (1962).

[10] *See also Deaconess Hosp. v. Wash. State Highway Comm'n*, 66 Wn.2d 378, 405, 403 P.2d 54 (1965) (allowing inquiry into whether "the agency's motives [were] honest and intended to benefit the public" and "free of any purpose to oppress or injure"); *State ex rel. Tacoma Sch. Dist. No. 10, Pierce County v. Stojack*, 53 Wn.2d 55, 64, 330 P.2d 567 (1958) (noting that "the action of a public agency or a municipal corporation having the right of eminent domain in selecting land for a public use" may be "controlled by the courts . . . for . . . improper motives."). *But see Apostle v. Seattle*, 70 Wn.2d 59, 62, 422 P.2d 289 (1966) (noting that the "impelling motives" involved in a blight condemnation were not material if the area was "in fact" blighted). *Sound Transit* suggests, in *dicta*, that a necessity determination that is only "*partially* motivated by

If ever there were a troubling example of bad faith, abuse of power, or oppression in the exercise of eminent domain, it is the deliberate targeting and condemnation of a diner-style, family restaurant simply because it does not fit a city's "vision" for a new up-scale development. The Court of Appeals ignored the issue by simply ignoring this Court's decision in *Postal Telegraph-Cable*. Review is therefore appropriate under RAP 13.4(b)(1).[11]

3. Where The Condemning Authority Reserves The Right To Transfer Condemned Property To A Private Entity, The Condemnation Is Not For A Public Use

The record indicates that, despite the wording of the condemnation ordinance, the City has not ruled out transferring property residual to any legitimate public use to a private entity, Urban Partners. CP 268-69. The Court of Appeals held that, despite the Strobel Family's arguments that the City had not identified a public use associated with all the property declared "necessary" to the public use, the "current state of the law" permits the government to condemn as much property as it likes and

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improper considerations" may be upheld in certain circumstances. *Sound Transit*, 156 Wn.2d at 418 (omission in original; emphasis added; internal quotation marks and citations omitted). Here, however, the improper consideration was *the* reason for the condemnation. CP 398-99.

[11] Even under the standard that the Court of Appeals applied, however, condemning undesirable property for the very purpose of eliminating it surely amounts to "arbitrary and capricious conduct as would amount to constructive fraud." App. A-8 (citation omitted); *see also* App. A-6 n.5. If for no other reason, this Court should accept review to establish as much.

transfer at least some of that property to private entities. *See* App. A-7-8 (citing *Monorail,* 155 Wn. at 633-34). While it did not state so expressly, the Court of Appeals decision is essentially that *Monorail* grants the government the ability to condemn as much property as it wants for as long as it wants so long as some aspect of the project contains a public use. In short, the Court of Appeals decision holds that the prohibition on "private takings" in article I, section 16 of the Washington Constitution applies only when the property condemned is transferred *in its entirety* to private entities. Under this reasoning, if the government condemns 1% of a piece of property and devotes it to a public use, its decision to take an additional 99% will not be disturbed by the courts absent evidence of fraud or constructive fraud.

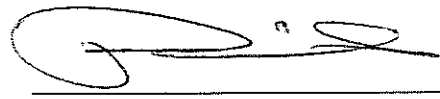
If this is the case, then the Court of Appeals has determined that article I, section 16 is "not the current state of the law." This Court should grant review to clearly indicate whether the *Monorail* case means there is no constitutional restriction on the government's ability to condemn property and transfer it to private entities so long as there is some aspect of public use in the condemnation and the government has not lied about its intent — that is, it has not committed fraud or constructive fraud. This is a significant question of law under the Washington Constitution, and review is therefore appropriate. RAP 13.4(b)(3), (4).

F. CONCLUSION

The Strobel Family has suffered condemnation simply because the City of Burien and its developer did not believe a family-style restaurant fit their "vision" for development. Using the eminent domain power for the very purpose of eliminating what the condemnor deems an undesirable property is an abuse of that power, is constitutionally proscribed, and is contrary to this Court's established precedent. This Court should therefore grant review for the purpose of reversing the summary "public use and necessity" adjudication entered in the City's favor.[12]

RESPECTFULLY submitted this 21st day of August 2006.

INSTITUTE FOR JUSTICE
Washington Chapter



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[12] The Strobel Family preserves its right to recover costs and attorney fees, including those incurred for this and the previous appeal, in the event it prevails in defending against the condemnation. *See* RCW 8.25.075(1); RAP 18.1; *Cascade Sewer Dist. v. King County*, 56 Wash. App. 446, 450, 783 P.2d 1113 (1989).