

Property Owners Look Out: The Train Is Coming

*Natalie Crane**

“Government condemners are notorious for simply paying as little as they can get away with, recognizing, correctly, that most small landowners lack the wherewithal to fight back.”¹

CONTENTS

INTRODUCTION.....	817
I. WHO IS AFFECTED?	819
II. WHAT IS EMINENT DOMAIN AND HOW DOES IT WORK?	820
III. FLOATING EASEMENTS	823
IV. ACHIEVING JUST COMPENSATION FOR A PHASED CONSTRUCTION EASEMENT	825
<i>A. Adequate Notice</i>	826
<i>B. Fluctuating Compensation Scheme</i>	827
<i>C. Full Taking Requirement</i>	828
V. WHAT IS THE “PROJECT INFLUENCE RULE”?.....	829
VI. WHAT IS THE SOLUTION?	833
CONCLUSION	835

INTRODUCTION

In 1992, the Washington legislature passed Wash. Rev. Code 81.112.010, which recognized the need for a “high capacity transportation system.”² With this statute and the express authority granted in Wash. Rev. Code 81.112.080, the legislature granted populous Washington counties

* J.D. Candidate, Seattle University School of Law. I would like to sincerely thank Stephen Crane, Kinnon Williams, and Steve Price for their generous insight, feedback, and expertise.

1. James Burling, *Private Property for the Politically Powerful*, 6 BRIGHAM-KANNER PROP. RTS. CONF. J. 179, 204 (2017).

2. WASH. REV. CODE § 81.112.010 (1992).

the ability to implement a high-capacity transportation system that would best address their needs.³ In 2018, the Washington Supreme Court held that these statutes give Sound Transit sweeping rights to condemn and take property as needed for the construction of the light rail, even if owned by another political entity.⁴

In 1996, the Washington legislature created Sound Transit and implemented its first regional transit project.⁵ This initial project included plans to build a light rail from Seattle-Tacoma International Airport (Sea-Tac) to the University of Washington and necessary transit facilities.⁶ Currently, Sound Transit 2 is in place, which extends light rail service north of Seattle to Lynnwood, east to Mercer Island, Bellevue, and Redmond, and further south of Sea-Tac Airport.⁷ Sound Transit 3 further extends plans to complete a 116-mile system with additional major extensions.⁸

With active high-reaching, multi-county plans, Sound Transit has greatly relied on its authority of eminent domain and condemnation under the Washington State Constitution, U.S. Constitution, and Wash. Rev. Code 81.112.080(2) to achieve these plans.⁹ Eminent domain is an important and useful governmental tool that allows states and municipalities to invigorate their communities with increased infrastructure and public utilities by taking private property.¹⁰ Further, eminent domain prevents private property owners from leveraging the value of their property to render public projects financially unfeasible.¹¹

Over 4 million people currently live in the Puget Sound area, and about 6 million people are expected to reside in the area by 2050.¹² Additionally, Seattle renters faced a 71.2% increase in rent prices from 2010 to 2019.¹³ This data supports the need for much of the congested

3. *Id.*

4. *See generally* Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC, 422 P.3d 891 (2018).

5. *History of Voter-Approved Plans*, SOUND TRANSIT, <https://www.soundtransit.org/system-expansion/building-system/history-voter-approved-plans> [<https://perma.cc/4VB8-ZDSC>].

6. *Id.*

7. *Id.*

8. *Id.*

9. Interview with Kinnon Williams, noted attorney, author, and speaker on eminent domain, in Seattle, Wash. (Feb. 4, 2020).

10. *See generally* Eddie A. Perez, *The Importance of Eminent Domain in Community Development Projects*, 29 W. NEW ENG. L. REV. 109 (2006).

11. *Id.* at 110–11.

12. Kinnon W. Williams, *Washington Eminent Domain Law in a Rapidly Changing Region*, KING CNTY. BAR ASS'N BAR BULL., May 2019, at 1, 1.

13. Becca Savransky, *Seattle Renters Have Spent \$80 Billion on Rent Throughout the Decade; \$10.1 Billion in 2019 Alone*, SEATTLE P-I (Dec. 18, 2019),

Seattle population to move outward and commute into the city for work. The implementation of a 116-mile system and other efforts to increase public transportation makes this need achievable and affordable.

This Comment focuses on the issue of just compensation in eminent domain; specifically, unique questions of compensation in cases where Sound Transit is the condemner. The first issue is the unaccounted for costs and burdens associated with a phased construction easement for which a property owner is not justly compensated. The second issue is Sound Transit's overreliance on the project influence rule to determine the fair market value of a property as significantly lower than its true value.

This Comment will address who is affected by Sound Transit's eminent domain powers, how eminent domain works, the meaning and assessment of just compensation, and the two specific issues of just compensation that have arisen from Sound Transit's use of eminent domain.

I. WHO IS AFFECTED?

Eminent domain issues impact everyone, and receiving—or not receiving—just compensation can have enormous financial implications for property owners.¹⁴ In 2019, the homeownership rate among Americans was approximately 65%, but homeowners are not the only people who can be affected by eminent domain.¹⁵ Industrial property owners, rental property owners, and renters themselves could be forced to vacate their property with little notice.¹⁶ In the case of a partial taking or phased construction easement, property owners who use their property for income will also be temporarily prevented from occupying, renovating, or performing other income-making activities on their property.¹⁷ If nothing else, everyone is affected because their tax dollars go towards the municipality or state that is purchasing the condemned property and building the project.

Because of the potential to affect all individuals who rely on steady housing or an income from their property, people should be aware of the

<https://www.seattlepi.com/seattlenews/article/80-billion-That-s-how-much-Seattle-renters-have-14913455.php> [<https://perma.cc/YH2J-8JGF>].

14. See generally James J. Kelly, Jr., “*We Shall Not Be Moved*”: *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN’S L. REV. 923 (2006).

15. Press Release, U.S. Census Bureau, Q. Residential Vacancies and Homeownership in the Fourth Quarter 2019 (Jan. 30, 2020) (on file with institution).

16. Telephone Interview with Kinnon Williams, noted attorney, author, and speaker on eminent domain (Jan. 20, 2020).

17. Kurtis A. Kemper, Annotation, *Elements and Measure of Compensation in Eminent Domain Proceeding for Temporary Taking of Property*, 49 A.L.R. 6th 205 §§ 18–19 (2009).

issues surrounding just compensation and how a condemner may value their property differently than they would themselves. Additionally, as taxpayers we should strive to seek fair compensation for both private property owners and the government. However, we do not want our tax dollars going towards properties valued far in excess of the market rate. Nor do we want to set a precedent of the government paying well below the market rate, especially should we find our own property on the receiving end of condemnation.

II. WHAT IS EMINENT DOMAIN AND HOW DOES IT WORK?

Eminent domain refers to the government's power to take private property and convert it to public use.¹⁸ Eminent domain and condemnation may refer to a full taking or a partial taking of interests in real property.¹⁹ Contained within a partial taking may also be the condemnation of an easement that the government needs in order to implement the public project.²⁰

Eminent domain is considered to be an inherent right based in state sovereignty, but it is also expressly authorized in the United States Constitution.²¹ Under the Fifth Amendment, the eminent domain clause states that private property shall not "be taken for public use, without just compensation."²² However, that clause is merely considered to limit the inherent power of the sovereignty by requiring that certain conditions and measures of compensation are met.²³ The inheritability of the federal powers of eminent domain has been contested, but state governments' inherent right to eminent domain is well-settled law.²⁴ Washington's eminent domain authority is found in the Washington State Constitution, Art. I, § 16 (Amend. 9) and holds that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made"²⁵

Eminent domain actions in Washington start on a legislative level—where the condemning authority may be a city, county, or state—which

18. See *Cowlitz County v. Martin*, 177 P.3d 102, 104 (Wash. Ct. App. 2008).

19. See generally Abraham Bell & Gideon Parchomovsky, *Partial Takings*, 117 COLUM. L. REV. 2043 (2017).

20. J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 357 (2d ed. 1995).

21. Kinnon W. Williams, *Eminent Domain*, in WASHINGTON REAL PROPERTY DESKBOOK 13-1, 13-9 (4th ed. 2016).

22. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation").

23. Williams, *supra* note 21.

24. See generally *id.*

25. WASH. CONST. art. I, § 16.

announces to the public that their private property may be taken by the government to serve a public use.²⁶ Following this notification, the legislature will hold a hearing where the requisite “public use” and “necessity” attributes of the project are discussed.²⁷ If the questions of public use and necessity are answered affirmatively, the property owner will then be notified of that determination and will receive an offer of just compensation.²⁸ If the property owner disagrees with the government’s valuation of just compensation and negotiations are unsuccessful, the government then has the power to condemn the property.²⁹ In a condemnation action, a finder of fact will determine the appropriate just compensation.³⁰ Further, the court will be charged with establishing that public use and necessity do indeed exist.³¹ If the court does find that public use and necessity exist, it can award possession of the property to the government.³²

A property owner who has their property condemned is not required to deliver possession to the government if they choose to challenge it.³³ However, in Washington, a property owner who grants possession without challenge will generally receive three benefits: (1) quicker payment because a condemning authority is required to deposit into the registry of the court the determined value of the property prior to taking possession;³⁴ (2) entitlement to interest on the value of the property determined at the initial valuation and the amount later determined by the fact finder in a condemnation action;³⁵ and (3) attorney fees if the fact finder determines that just compensation is ten percent or more than the condemning authority’s offer if made thirty or more days prior to trial.³⁶ For these reasons, a financially disadvantaged property owner is greatly incentivized to hand over possession of their property quickly rather than hold out and potentially lose even more money during condemnation proceedings and any arising challenges.

26. Williams, *supra* note 21, at 13–4.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 13–16.

Just compensation in an eminent domain action is determined by an assessment of the fair market value of the property.³⁷ Fair market value is defined as

[T]he amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed seller, willing but not obliged to sell it would accept, taking into consideration all uses to which the property is adapted and might in reason be applied.³⁸

While many factors may be considered, the following have been commonly applied in determining the fair market value in an eminent domain case: sales of similar property; the property's rental value; and the replacement cost minus any depreciation.³⁹

A fair market value assessment varies depending on whether the government needs to acquire the entirety of the property or only part.⁴⁰ If the government needs to acquire only a portion of the property or acquire the property for only a limited amount of time, it may seek a partial or incomplete taking.⁴¹ A partial taking leaves the property owner the remaining portion of the property that was not taken by the eminent domain action.⁴²

In Washington, fair market value of a partial taking is measured by “the difference between the fair market value of the entire property before the acquisition and the fair market value of the property remaining after the acquisition.”⁴³ Alternatively, the fair market value may be “measured by the fair market value of the property and property rights acquired before the acquisition plus any damages caused by such acquisition to the remaining property after the acquisition.”⁴⁴

Courts have additionally recognized the government's duty to mitigate damages—both physical damages to the property and financial damages to the market value—that arise specifically from a partial taking action.⁴⁵ The official comment to this jury instruction asserts that “[c]osts of rehabilitation or repair are not usually the measure of compensation;

37. Paige Boldt, *Condemning Fair Market Value: An Appraisal of Eminent Domain's "Just Compensation,"* 1 TEX. A&M J. PROP. L. 131, 132 (2012).

38. *State v. Wilson*, 493 P.2d 1252, 1255 (Wash. Ct. App. 1972).

39. *Id.*

40. *See generally* Bell & Parchomovsky, *supra* note 19, at 2045.

41. *Id.*

42. *Id.*

43. WASH. SUP. CT. COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL WPI 150.06 (7th ed. 2019).

44. *Id.* This is also known as the “special benefit rule.”

45. Williams, *supra* note 21, at 13.6(3).

evidence of such cost is to be considered only as a factor in arriving at market value.”⁴⁶ In practice, this means that if the condemner assesses the cost to mitigate or cure the resulting damage to be greater than the loss of the fair market value, it will likely be fixed. If it is the other way around, however, it will not make financial sense for the condemner to fix the property.⁴⁷

III. FLOATING EASEMENTS

A floating easement refers to a particular type of easement “defined in general terms, without a definite location or description”⁴⁸ In other words, a floating easement may refer to an easement that is not fixed in time, scope, or location. For example, if the government needs to install a sewage line across a piece of property but has not yet determined the precise location on that piece of property, it may seek a floating easement on that property. This will allow the government to utilize the property in the later determined precise location.

The Sound Transit project has used this concept in a way not seen before in this region.⁴⁹ Sound Transit has relied upon floating construction easements because of certain cost-saving measures that require substantial flexibility.⁵⁰ For example, Sound Transit saves a substantial amount of money by awarding a “design–build” contract.⁵¹ Design–build for Sound Transit means that it knows where the light rail stations will be located and the areas it will pass through, but it leaves the intricacies of the project mostly up to the actual builders.⁵² The builders then have the discretion for timing, materials used, and methodology.⁵³ Sound Transit then saves on the other end by imposing a floating easement on a property owner, which gives the contractor the necessary flexibility to implement a design–build.⁵⁴

Steven P. Price, MAI, CRE, advocates for the use of the term “phased construction easements” when applied to Sound Transit’s use of temporary floating easements to accommodate the practice of a design–

46. WASH. SUP. CT. COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS–CIVIL WPI 151.08 (7th ed. 2019).

47. Williams, *supra* note 21, at 13.6(3).

48. Sunnyside Valley Irrigation Dist. v. Dickie, 73 P.3d 369, 372 (Wash. 2003).

49. Telephone interview with Kinnon, *supra* note 16.

50. *Id.*

51. *Id.*

52. *Id.*; see also Steven Price, Presentation at the 10th Annual Cutting-Edge Issues in Condemnation Seminar (Sept. 11, 2020).

53. Price, *supra* note 52.

54. *Id.*

build project.⁵⁵ Price advocates for this distinction, as the term floating easements have historically been used to describe an easement that may change in location—not time.⁵⁶ Because of the uniqueness in the manner that Sound Transit is utilizing temporary floating easements—and the potential verbosity (temporary, floating, construction easements) required to be precise as to the several distinct characteristics of these easements—I will adopt the phased construction easement terminology.⁵⁷

When Sound Transit imposes a phased construction easement on a property owner, it will inform the property owner that at some point in the next five years Sound Transit will need to occupy the property for a full year in order to complete that portion of the project.⁵⁸ Sound Transit will give the property owner limited (sometimes only two weeks' notice) that the active period of the easement will begin.⁵⁹ The floating easement then becomes fixed for the duration of the construction.⁶⁰ Further, the property owner may be prohibited from certain renovations or changes to their property because those changes may impact the phased construction easement.⁶¹ Sound Transit does compensate the property owner for the easement, but mainly for the one-year period that it is actively in use.⁶² Therefore, property owners are not compensated for their inability to fully use their property or for the lack of housing security the property owner or their renters may face.⁶³ Additionally, this arrangement may put property owners technically in breach of local tenant laws, which require landlords to give tenants ninety days of notice of eviction, and only in certain cases is that time period limited to sixty days.⁶⁴

Although the data for the fair market value of such an arrangement simply does not exist, Sound Transit continues to make offers of what it deems just compensation for the phased construction easement. Sound Transit argues that its compensation of owners for use during active periods of the construction easement is typical for what it is required to

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*; Bates McKee, Presentation at the 10th Annual Cutting-Edge Issues in Condemnation Seminar (Sept. 11, 2020).

59. Bates McKee, Presentation at the 10th Annual Cutting-Edge Issues in Condemnation Seminar (Sept. 11, 2020); *see also* E-mail from Steven Price, MAI, CRE, to author (Mar. 9, 2021, 2:55 PM PST) (on file with author).

60. *Sunnyside Valley Irrigation Dist. v. Dickie*, 73 P.3d 369, 372–73 (Wash. 2003).

61. *Id.*

62. *See generally* Steven Price, Presentation at the 10th Annual Cutting-Edge Issues in Condemnation Seminar (Sept. 11, 2020).

63. *Id.*

64. *Id.*; SEATTLE, WASH., MUN. CODE § 22.206.160(C)(1)(f) (2021).

compensate—asserting that this easement should be seen as a utility easement.⁶⁵ WSDOT also notes that

In the valuation of temporary easements with a floating active occupancy component, it is necessary to consider the impacts of the entire duration of the easement as well as the impacts during the active occupancy period. That is not to say that the impacts will necessarily be consistent over the duration; however, they could be.⁶⁶

J.D. Eaton finds that damages that result from temporary easements are the value of the property for the period that it is a “fixed easement,” usually based on rental information for a similar property.⁶⁷

However, Sound Transit’s unique phased construction easement creates a serious issue in valuation because there is no comparable market data for the level of uncertainty property owners are forced to accept over the five-year period.⁶⁸ Determining fair market value for such a flexible easement is challenging, and the predicted value of how Sound Transit’s contractors will utilize the property versus how they end up using it may change, as is the nature of the design–build model.⁶⁹ For example, the appraiser may rely upon the predicted construction schedule in their valuation, which is subject to change. In short, severely limiting a property owner’s use of their own land for an extended period of time, with a lot of uncertainty and flexibility, should require Sound Transit to compensate far more than what is current practice.⁷⁰

IV. ACHIEVING JUST COMPENSATION FOR A PHASED CONSTRUCTION EASEMENT

Several different approaches should be employed to give just compensation to property owners who find themselves subject to a phased construction easement. First, the method of compensation may remain similar, but the notification period should be increased when the easement is to become fixed. Second, there should be a fluctuating compensation system depending on how the easement is being used, if at all. Third, the government should be required to execute a full taking if the partial taking

65. Interview with Williams, *supra* note 9.

66. Memorandum from Jessica Stokesberry, Appraisal Program Manager, Washington State Department of Transportation, on Floating Temporary Easement Valuation (May 6, 2019) (on file with institution).

67. EATON, *supra* note 20.

68. Steven Price, Presentation at the 10th Annual Cutting-Edge Issues in Condemnation Seminar (Sept. 11, 2020).

69. *Id.*

70. *Id.*

and partial taking compensation is determined to be too cumbersome on the property owner.

A. Adequate Notice

Currently, Sound Transit can give property owners as little as two weeks' notice that the floating construction easement will be fixed for a period of up to one year.⁷¹ Washington municipalities, Seattle in particular, have codes that dictate tenants' rights.⁷² Washington requires a tenant to receive at least twenty days' written notice if a landlord is terminating their month-to-month tenancy.⁷³ For a lease for a specified period of time, the lease is terminated at the end of that period.⁷⁴ Of course, a change in property ownership, such as condemnation resulting in the government ownership of the property, can also cause a lease to be void.⁷⁵

Whether a property owner is residing in their property or using it as a rental property, the notification Sound Transit gives should, at a minimum, comply with Washington's statutes and municipal codes. Even though there are strong protections for residential and commercial tenants through relocation rather than eminent domain, including relocation awards,⁷⁶ the issue of uncertainty remains. While compliance with applicable tenant laws by itself will not entirely fix the issue of just compensation, this solution is more just. In a city or area facing consistent and substantial increases in rental prices,⁷⁷ a broken lease can have significant financial injury to owners and landlords.⁷⁸ Further, tenants face substantial hardship and detriment when forced out of a living

71. Email from Steven Price to author, *supra* note 59.

72. See generally Nw. Just. Project, *Your Rights as a Tenant in Washington State*, WASH. L. HELP (Nov. 11, 2020), <https://www.washingtonlawhelp.org/resource/your-rights-as-a-tenant-in-washington> [<https://perma.cc/KBV6-9DKG>].

73. WASH. REV. CODE § 59.18.200 (2019).

74. WASH. REV. CODE § 59.18.220 (2019).

75. *Eviction: An Overview*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/eviction> [<https://perma.cc/KB3W-HTLM>].

76. A.J. Johnson, *Uniform Relocation Act Requirements*, A.J. JOHNSON CONSULTING SERVS., INC. (Aug. 2, 2014), <https://www.ajjcs.net/paper/main/2014/08/02/uniform-relocation-act-requirements/> [<https://perma.cc/RG3F-UEA6>].

77. Mike Rosenberg, *After Brief Slowdown, Seattle-Area Rents Surge Back Up Again; When Will It End?*, SEATTLE TIMES (Mar. 27, 2017), <https://www.seattletimes.com/business/real-estate/after-brief-slowdown-seattle-area-rents-surge-back-up-again-when-will-it-end/> [<https://perma.cc/2A5J-Q96J>]; Heidi Groover, *Seattle Rents Tick Back Up After Months of Free Fall*, SEATTLE TIMES (Feb. 25, 2021), <https://www.seattletimes.com/business/real-estate/seattle-rents-tick-back-up-after-months-of-free-fall/> [<https://perma.cc/F4TS-QG8R>].

78. See generally Jay M. Zitter, Annotation, *Validity, Construction, and Effect of Statute or Lease Provision Expressly Governing Rights and Compensation of Lessee Upon Condemnation of Leased Property*, 22 A.L.R. 5th 327 § 63 (1994).

arrangement that has a favorable rental price, location, and layout for the needs of the occupant.⁷⁹

In 2019, Washington's house of representatives and senate proposed two bills that would increase the notification period for tenants and make evictions harder for landlords to effectuate.⁸⁰ The staff summary referred to inflexible eviction policies as a major source of housing instability in Washington.⁸¹ Additionally, the staff commented on a need to keep people in their homes in order to mitigate the homelessness crisis that Seattle faces.⁸² These comments specifically refer to a tenant facing a very short-notice eviction because of a failure to pay rent,⁸³ but these comments should also be considered applicable to any short-notice rental termination for any reason, including eminent domain takings. Two weeks cannot be considered a sufficient amount of time for a property owner or a renter to find appropriate and affordable housing arrangements and move to that new location.⁸⁴ Even with compensation from the government to the property owner for their hardships, the short notification period leaves everyone stressed in dealing with the extraordinarily competitive buyer and renters market of the greater Seattle area.⁸⁵ The solutions proposed in this Comment attempt to create a compensation scheme that properly compensates the level of uncertainty involved in a phased construction easement.

B. Fluctuating Compensation Scheme

The second approach I advocate for is a fluctuating compensation scheme that accounts for the hardships of having a potential phased construction easement become fixed with short notice at any time within a five-year period. Valuating the phased construction easement is complex because there is no market data for an easement this complex and

79. *Id.*

80. John Triplett, *Washington State Bill Would Make Washington Evictions Harder for Landlords*, RENTAL HOUS. J. (Feb. 11, 2019), <https://rentalhousingjournal.com/washington-state-bill-would-make-washington-evictions-harder-for-landlords/> [<https://perma.cc/P6HV-5CNW>].

81. *Id.*

82. *Id.*

83. *Id.*

84. See Mike Rosenberg, *How to Buy a Home in the Seattle Area: A Survival Guide*, SEATTLE TIMES (May 16, 2018), <https://projects.seattletimes.com/2018/how-to-buy-a-home/> [<https://perma.cc/WSF4-KKFF>] (“[T]he average buyer will tour dozens of houses, lose to higher bids about three to five times, and pursue a house for six months to a year before finally getting a home. Many buyers likened the process to a full-time job.”).

85. *Seattle Home Values*, ZILLOW, <https://www.zillow.com/seattle-wa/home-values/> [<https://perma.cc/6FPJ-DYM9>].

flexible.⁸⁶ The property owner who is also a landlord can continue to rent out the property as they had before.⁸⁷ The property owner who lives on the property can continue to live there.⁸⁸ The government is not “occupying” or “possessing” the property in the traditional sense.⁸⁹ However, the government has the power and authority of the phased construction easement to utilize the property to effectuate the property at a moment’s notice.⁹⁰

Just compensation for a floating temporary construction easement should compensate for the damages resulting from the short notification period. A value should be appraised and assigned for an expedited move-out and an expedited rental search. A determination of fair market value for such services may be helpful in an assessment. Additionally, an assessment is appropriate because the expeditious search and move-out are only necessary because of the short notification period Sound Transit is able to give.⁹¹

Sound Transit will advocate for continued short notification periods because they are necessary for the design–build project that results in significant cost-saving for Sound Transit—and therefore taxpayers.⁹² While this could be a fair argument from a government entity, which Sound Transit is not, it does not change the requirements of just compensation for those that are affected by the government’s exercise of eminent domain. Further, Sound Transit considers the notification period to be the eminent domain action itself, and the notice of the active period of the easement was given when the five-year phased construction easement was imposed. However, this argument relies on extraordinarily flexible property owners. Under this argument, property owners who are renting their property may be forced to forego a year’s worth of rental income in order to avoid passing on the burden of a short-notice eviction to their tenants.

C. Full Taking Requirement

The third proposal is to require the government to exercise a full taking rather than a partial taking with a floating construction easement. This proposal is the most extreme proposal because it would be the most

86. Price, *supra* note 52.

87. Interview with Williams, *supra* note 9.

88. *Id.*

89. *Id.*

90. EATON, *supra* note 20.

91. See generally Price, *supra* note 52.

92. Interview with Williams, *supra* note 9.

expensive for the government to execute. However, it may not actually be that much more expensive than the properly assessed just compensation proposed above because the uncertainty of the arrangement should be assessed with a much higher value. Property owners who use their property as a source of income by renting it out potentially face the loss of an entire five years of rental income if they are unable to find unreasonably flexible renters who know that they could face a very short-notice termination of their lease. This loss of income and stability implies that the compensation would have to be great to be justly compensated for these damages. A full taking would at least provide more stability and more notice for the property owner and their renters. Of course, this approach is arguably counterintuitive in the Seattle area. The Seattle area is experiencing a homelessness crisis,⁹³ and requiring the government to execute a full taking, potentially transforming an apartment building into mass transit, is just another way in which housing becomes frustratingly scarce.

Alternatively, a temporary full taking in the form of the more common temporary construction easement would be appropriate. Of course, Sound Transit would likely argue that this is wasteful because it only needs the property for a one-year period within the five-year period of the prior floating temporary construction easement. Such an assertion is true and has merit, but balancing justice between the government and the affected property owners and tenants would show that a temporary or permanent full taking, and compensation for such a taking, would be more appropriate than potentially five full years of housing insecurity. Further, because there is a general lack of market data on such a flexible easement, there is value in transforming the arrangement to one that has clearer market data available for assessment: a total sale.

Without reliable market data on an easement with extreme flexibility, like the phased construction easement utilized by Sound Transit, property owners will be left feeling undercompensated.

V. WHAT IS THE “PROJECT INFLUENCE RULE”?

Another just compensation issue that affects condemned property owners, especially in the greater Seattle area, is the project influence rule. When a property’s value is being assessed for purposes of determining just compensation, the government will disregard any increase or decrease in value that is attributable to the project that is requiring the property to be

93. Vernal Coleman, *#SeaHomeless: What You Need to Know About Seattle’s Continuing Crisis*, SEATTLE TIMES (June 28, 2017), <https://www.seattletimes.com/seattle-news/seahomeless-what-you-need-to-know-about-seattles-continuing-crisis/> [<https://perma.cc/4WCC-2SN6>].

condemned.⁹⁴ This principle is referred to as the project influence rule.⁹⁵ Under this rule the fair market value of the property is calculated as if the project improvements for which condemnation is sought have not yet occurred unless an enhancement in value is brought about by economic factors other than the proposed improvement.⁹⁶

In the greater Seattle area, the project influence rule is highly relevant to property owners who have been condemned by Sound Transit. While being in the proximity of a high-capacity transit system adds to property value, property all throughout the Seattle area has grown independently at an enormous rate in the past several years.⁹⁷ Sound Transit often seeks to attribute increases in property value primarily to the construction of the light rail.⁹⁸ A common example is a property that has recently been rezoned from single-family residential to multi-family residential. Sound Transit often seeks to reject the argument that the rezone occurred for a variety of reasons, not just the transit project.⁹⁹

The project influence rule is problematic for property owners for several reasons. For starters, it allows the government to ignore factors that impact the value of the property solely on the basis of the purported influence of the project.¹⁰⁰ Next, it leaves unanswered the question of when the condemner has become sufficiently committed to the location and has obtained the funding required for the proposed project. This raises the issue of certainty of whether a particular private property should be deemed within the scope of the project.¹⁰¹ Finally, the resources of the condemning entity are vastly greater than the typical property owner whose property is being taken, which results in an unequal playing field that effectively restricts the opportunity to challenge potential misuse of the project influence rule.¹⁰²

94. WASH. REV. CODE § 8.26.180(3) (2011).

95. *See generally* Pierce County *ex rel.* Bellingham v. Duffy, 176 P. 670 (Wash. 1918); Enoch v. Spokane Falls & N. Ry. Co., 33 P. 966 (Wash. 1893); Lange v. State, 547 P.2d 282 (Wash. 1976); United States v. Miller, 317 U.S. 369 (1943).

96. H. Dixon Montague & George R. Murphy, *The "Scope" of the Project Influence Rule*, 2 A.L.I.-A.B.A. 377 (2007). *See generally* Saratoga Fire Prot. Dist. v. Hackett, 118 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002).

97. Chris Morris, *Seattle Is the Hottest Real Estate Market in the Country—by Far*, BUS. INSIDER (Sept. 28, 2017), <https://www.businessinsider.com/seattle-is-the-hottest-real-estate-market-in-the-country-2017-9> [<https://perma.cc/PVA3-AXYE>].

98. Interview with Stephen Crane, Partner, Crane Dunham, in Seattle, Wash. (Feb. 15, 2020).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See generally* Burling, *supra* note 1, at 180. (“[T]here is also a critical reality to the nature of government that is common to all forms of government not run by angels: those in power take

The economic injustice ever present in eminent domain actions is highlighted by the inequity in bargaining power between the condemning entity and the property owner. Sound Transit has tried to offset this by providing homeowners facing condemnation with up to \$7,500 in reimbursement of legal fees, up to \$5,000 for appraisal, and up to \$2,500 for accounting.¹⁰³ However, homeowners are only reimbursed these fees if they agree to settle any pending litigation.¹⁰⁴ Even more, many eminent domain actions that have occurred with Sound Transit have exceeded these reimbursable amounts.¹⁰⁵ Homeowners without the resources to engage in a lengthy legal battle with the government—nearly all property owners—are greatly incentivized to settle and potentially be compensated less than the value of their property.

Two recent cases demonstrate why the project influence rule can have such a negative impact on the valuation of property in the greater Seattle area. Both of these cases regard properties in Shoreline, along the route of the Seattle–Lynnwood rail line. In the first case, the City of Shoreline rezoned a property owner’s land from single-family residential to multi-family residential years before Sound Transit identified the rail route or secured the funding to build.¹⁰⁶ Nonetheless, Sound Transit refused to pay the value of the property, contending that the enhanced value of the rezone was caused by the project’s influence.

Another case involving Sound Transit and a homeowner was settled at mediation (due to the confidentiality requirements of mediation, this case is not named).¹⁰⁷ In that case, the City of Shoreline rezoned the homeowner’s property to a multi-family residence.¹⁰⁸ The property owner obtained an expert opinion that the property would have been rezoned even if Sound Transit’s project had never even been proposed because of Washington’s Growth Management Act, which requires increased density through upzoning (changing the zoning to allow for taller or more dense buildings) at locations suitable for either buses or trains.¹⁰⁹ At mediation, Sound Transit argued that the reason the City of Shoreline upzoned the property was due to Sound Transit’s proposal to build a line through

advantage of those who are not. And in the context of eminent domain, the advantage taken is often private property.”).

103. See *Sound Transit’s Real Property Acquisitions and Relocation Policy, Procedures and Guidelines*, SOUND TRANSIT 21 (Nov. 2017), <https://www.soundtransit.org/sites/default/files/real-property-acquisition-relocation-policy-procedures-guidelines.pdf> [<https://perma.cc/M9JF-YMRH>].

104. *Id.* at 20–21.

105. Interview with Crane, *supra* note 98.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Shoreline to Lynnwood from Seattle.¹¹⁰ The property owner, in this case, lost nearly \$1 million because of Sound Transit's condemnation and use of the project influence rule to diminish the fair market value of the property by half at the time of mediation.¹¹¹

In a similar case, *Sound Transit v. Maxwell*,¹¹² the dispute went to trial and was heard by a jury. The jury found that the valuation was approximately half of the property owner's appraised value.¹¹³ Again, Sound Transit argued that the project caused the rezoning.¹¹⁴ Nevertheless, the jury returned a verdict upholding Sound Transit's aggressive use of the project influence rule.¹¹⁵ The jury instructions provided by the court provide extremely helpful insight in analyzing why the jury returned such a starkly diminished valuation of the property from the respondent's assessment of the fair market value. Instruction No. 5 read:

Just compensation means the fair market value of the property. You are to consider, as part of the property, such improvements as have become permanently attached to the property and that affect its value. The fair market value is measured as of June 1, 2018. You are not to consider any reduction or increase in the fair market value of the property caused by Sound Transit's project.¹¹⁶

Instruction No. 12 read:

You are to value the property in view of uses permitted under present zoning unless you determine that the present zoning was caused by the project for which the property is being acquired. If you determine that the present zoning was caused by the project, you are to value the property in view of uses permitted or that with a reasonable probability would have been permitted under zoning unaffected by Sound Transit's project.¹¹⁷

These jury instructions failed to take into account that rezoning, particularly in greatly expanding urban areas like the greater-Seattle area, happens for a variety of reasons.¹¹⁸ The instructions suggest to the jury that

110. *Id.*

111. *Id.*

112. *Sound Transit v. Maxwell*, No. 17-2-30042-0 SEA (King Cnty. Super. Ct. Dec. 12, 2018).

113. *Id.*

114. *Id.*

115. *Id.*

116. Instructions to the Jury at 8, *Sound Transit v. Maxwell*, No. 17-2-30042-0 SEA (King Cnty. Super. Ct. Dec. 12, 2018).

117. *Id.* at 15.

118. See Josh Cohen, *Council Approves a Taller, Denser Seattle. What Does That Mean for Housing?*, CROSSCUT (Mar. 18, 2019), <https://crosscut.com/2019/03/council-approves-taller-denser-seattle-what-does-mean-housing> [https://perma.cc/E84M-MWQD]; Mike Rosenberg, *Why Are*

the Sound Transit project was the only possible cause of the rezoning or that the rezoning was done with no regard to the project at all. Neither of those options are realistic.

The two properties in the case settled at mediation and *Maxwell* stand a short forty-blocks away from each other¹¹⁹ but set a clear precedent for Sound Transit to argue that any increase in value of properties along its eventual train route can be successfully attributed to Sound Transit, ignoring that the Washington State Growth Management Act¹²⁰ requires the upzoning regardless of any eventual light rail build.

VI. WHAT IS THE SOLUTION?

Current Washington State Pattern Civil Jury Instruction 150.06 states: “In determining the fair market value of the [*property*] [and] [*property rights*], you are not to consider any reduction or increase in the fair market value of the property, before the acquisition, caused by (name of agency’s) project.”¹²¹ This instruction is insufficient, especially in those areas along the I-5 corridor that will be impacted¹²² but have been rapidly changing in many ways independent from Sound Transit’s proposed project.

In searching for a solution to the insufficient and seemingly unjust project influence rule, a lesson can be taken from one of the developments in the era of tort-reform—the transition from contributory negligence to comparative negligence.¹²³ The older contributory negligence approach presented a complete bar to damages if the plaintiff at issue was even minimally, e.g., one percent (1%), at fault.¹²⁴ The newer approach, adopted by most states today, allows the jury to weigh specific factors for what the

Seattle-Area Home Prices So High?, SEATTLE TIMES (Apr. 17, 2018), <https://www.seattletimes.com/business/real-estate/why-are-seattle-area-home-prices-so-high/> [<https://perma.cc/JP2C-QDXV>] [hereinafter *Seattle-Area Home Prices So High*].

119. Interview with Crane, *supra* note 98; Sound Transit v. Maxwell, No. 17-2-30042-0 SEA (King Cnty. Super. Ct. Dec. 12, 2018).

120. *Growth Management Act*, MUN. RSCH. & SERVS. CTR., <http://mrsc.org/Home/Explore-Topics/Planning/General-Planning-and-Growth-Management/Comprehensive-Planning-Growth-Management.aspx> [<https://perma.cc/3HXL-VDE6>]; WASH. REV. CODE § 36.70A.010 et seq. (1990).

121. WASH. SUP. CT. COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL WPI 150.06 (7th ed. 2019) (alteration in original) (emphasis added).

122. See generally SOUND TRANSIT, NORTH CORRIDOR TRANSIT PROJECT ALTERNATIVES ANALYSIS REPORT: SUMMARY, https://www.soundtransit.org/sites/default/files/documents/pdf/projects/North_hct/AA_2011_09/Summary.pdf [<https://perma.cc/7ES9-4VU5>].

123. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 200 n.2 (1990).

124. *Id.*

proper measurement of damages should be after taking into account all allegations of fault from each party.¹²⁵ The jury will receive an instruction setting forth the legal effect of multiple proximate causes when both sides raise complex theories of multiple causation or claim that the negligence of the other party was the proximate cause of the accident.¹²⁶

In a similar way, the Revised Code of Washington (RCW) and jury instructions should be amended to reflect the reality that multiple factors typically influence a particular property value. Similarly, lessons can be gleaned from the way in which juries are instructed to find one proximate cause in civil cases when more than one proximate cause of an event may exist.¹²⁷ Various courts in other jurisdictions have identified several nonexclusive factors relevant to the determination of whether a particular parcel was probably within “the scope of the project.”¹²⁸ Such factors include the following:

- (1) the foreseeability of any change in the outer taking line and of the particular tract falling within the ambit of such a change;
- (2) the length of time between the original acquisition and the later taking;
- (3) the government’s representations concerning the finality of the project as originally announced;
- (4) whether the claimant or the general public know that the subject was to be included in the public project;
- (5) whether the original plans for the project definitively included the subject property; and
- (6) the physical location of the subject property in relation to the project.¹²⁹

The RCW and the Washington Pattern Jury Instructions should explicitly lay out the above and other relevant factors to allow the jury or

125. See *Comparative & Contributory Negligence*, JUSTIA, <https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence/> [<https://perma.cc/GHC9-3W4B>].

126. *Goucher v. J.R. Simplot Co.*, 709 P.2d 774, 782 (Wash. 1985); *Brashear v. Puget Sound Power & Light Co.*, 667 P.2d 78, 80 (Wash. 1983).

127. WASH. SUP. CT. COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL WPI 15.01.01 (7th ed. 2019); *Schnall v. AT&T Wireless Servs. Inc.*, 259 P.3d 129, 137 (Wash. 2011) (approving use of this jury instruction).

128. *United States v. 62.17 Acres of Land, More or Less*, 538 F.2d 670, 678 (5th Cir. 1976); *Baylin v. State Rds. Comm’n*, 475 A.2d 1155, 1162–64 (Md. 1984); *Mattice v. State*, 391 N.Y.S.2d 271, 274–75 (N.Y. Ct. Cl. 1976).

129. *Montague & Murphy*, *supra* note 96, at 384.

fact finder to more fairly examine the issue of whether an increased valuation was proximately caused by light rail plans alone or as a result of multiple other potential factors.

CONCLUSION

Property owners in the Seattle-area should beware: the train is coming, and it will condemn the property that finds itself in the train's tracks. It is important to acknowledge the fact that in a general sense, the implementation of a mass transit system in Seattle is much needed and arguably overdue. The creation of new infrastructure in a rapidly growing region is inevitable and beneficial to the community as a whole. To obtain the property necessary for its construction, Sound Transit has had to establish that the light rail system is necessary and for public use. While all of this may be true, one cannot ignore the fact that the project can have, and has had, devastating effects on homeowners who lose the true value of their homes. This Comment focuses on the issue of just compensation.

Just compensation is the fair market value of the property but can be difficult to assess when Sound Transit relies on unusual easements, like the phased construction easement or when it relies on doctrines like the project influence rule to significantly undervalue a condemned property.

The floating construction easement presents two main issues: (1) the short notification period conflicts with state and local law and presents an extreme hardship to the residents of the subject property, and (2) it does not properly compensate the property owner and residents for the instability imposed by the nature of this easement. The solutions I present in this Comment attempt to remedy both of those issues by either increasing the notification period to be in compliance with state and local laws or to properly compensate for the failure to do so.

The project influence rule is a rational concept, which asserts that any increase or decrease in property value directly resulting from the proposed government project should not factor into the compensation to the property owner.¹³⁰ The issue arises when a jurisdiction, like the greater Seattle-area, is experiencing a rapid increase in property values for a variety of reasons.¹³¹ The great influx of persons joining the region has demanded that primarily residential neighborhoods be upzoned to increase the availability of housing for all of the region's residents. While Sound Transit's project may play a role in the valuation, the fact finder is not given the opportunity to explicitly examine all of those factors. The RCW

130. *Id.* at 380.

131. *Seattle-Area Home Prices So High*, *supra* note 118.

and jury instructions must be amended in a manner analogous to tort-reform on the allocation of fault, which would allow the fact finder to examine a variety of factors impacting a property's value.

The issue of just compensation and property valuation affects everyone. As property owners, as renters, or as taxpayers, Washington residents should be aware and care about how the government is evaluating their property and any property it condemns.