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SUPERIOR COURT OF WASHINGTON FOR *[INSERT NAME OF COUNTY]* COUNTY

IN THE MATTER OF THE PETITION OF the  
City OF *[INSERT NAME OF CITY]*, TO  
ACQUIRE BY CONDEMNATION CERTAIN  
REAL PROPERTY FOR PUBLIC USE AS  
AUTHORIZED BY ORDINANCE NO.  
*[INSERT NUMBER OF ORDINANCE  
AUTHORIZING CONDEMNATION]*

*[In re City of \_\_\_\_\_]*

Honorable \_\_\_\_\_

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

MEMORANDUM IN SUPPORT OF  
ORDER ON PUBLIC USE AND  
NECESSITY

Hearing Date: \_\_\_\_\_

**1. INTRODUCTION**

**1.1. Nature of the Project**

In this eminent domain proceeding, Petitioner, the City of \_\_\_\_\_ (“City”), is acquiring certain property and property rights for the purpose of constructing the *[insert name of project]* Project, which includes all segments of the Project and related facilities. The property at issue in this case, as described more particularly in Exhibit A to the Petition for Condemnation, is located at *[insert address of subject property]* in \_\_\_\_\_, Washington (“Property”).

Respondents have already stipulated to public use. But, one respondent asks the Court to substitute its judgment for that of the legislative authority. The law does not support the respondent’s position.

Testimony will be offered at the hearing to demonstrate the facts set forth in this introductory section. The Project will construct a *[insert description of project]* on the

1 Property. Because a final design for the Project has not yet been approved by the City, the  
2 precise size of the footprint for the Project also has not yet been determined.

3 The Project will serve *[insert description of how the public will be served by the*  
4 *Project]*. For example, *[insert specific example of how project will function, if applicable]*.

5 In any case, regardless of the ultimate size of the Project footprint, the City needs the  
6 entire Property *indefinitely* for *[insert basis for need]*, and other public purposes associated  
7 with the Project. Hence, the City Council has determined that acquisition of the fee interest in  
8 the Property was reasonably necessary and required for the construction, operation and  
9 maintenance of the Project and for related *[insert additional basis for need as appropriate]*.

### 10 **1.2. The Parties**

11 The City is a Washington municipal corporation organized under Title \_\_\_ RCW. The  
12 City is represented by \_\_\_\_\_ of \_\_\_\_\_. Respondents *[insert*  
13 *names of property owners]* are the fee owners of the Property and are represented by  
14 \_\_\_\_\_ of \_\_\_\_\_. Respondent *[insert names of tenant, if applicable]* is  
15 a commercial tenant in possession of a portion of the Property and is represented by  
16 \_\_\_\_\_ of \_\_\_\_\_.

### 17 **1.3. Procedural History**

18 On \_\_\_\_\_ the City Council duly adopted Ordinance No. \_\_\_\_\_, which  
19 authorizes the condemnation of the Property that is the subject of this action. The City filed this  
20 condemnation action on \_\_\_\_\_ and filed its Original Notice of Hearing on Public  
21 Use and Necessity on \_\_\_\_\_.

22 On \_\_\_\_\_, this Court entered a Stipulation and Order Related to Public Use  
23 and Necessity and for Preliminary Possession and Use between City and Respondents. This  
24 Stipulation and Order gives City (1) a fee interest in and permanent ownership in the portion of  
25 the Property determined by the Court to be needed for the Project and (2) the right to use and  
26 occupy the entire Property until the completion of the Project.

1 The Project requires the acquisition of certain real property for the construction of  
2 \_\_\_\_\_ facilities. Construction of the Project is scheduled to begin by the  
3 end of the year \_\_\_\_\_. In order to meet the Project’s construction schedule, many properties  
4 may be cleared and ready for construction by the end of the year \_\_\_\_\_. This schedule requires  
5 that the Property be available for demolition and clearing. To prepare for construction to begin  
6 by the end of the year \_\_\_\_\_, the potential contractor for the Project is to have access to  
7 any and all properties for purposes of demolition, clearing and construction consistent with the  
8 contract. The City Council plans to make the final decision regarding the contract award later  
9 this \_\_\_\_\_.

10 **1.4. Other Proceedings Before the \_\_\_\_\_ County Superior Court**

11 The Court may take judicial notice that the \_\_\_\_\_ County Superior Court has  
12 entered an Order on Public Use and Necessity in every case the City has presented. Here is the  
13 current list:

- 14 (1) *[if the condemnation is part of a large project where severa parcels are being*  
15 *condemned, it may be helpful to list the other cases where the court has already*  
*allowed the condemnation to move forward]*

16 **2. RELIEF REQUESTED**

17 The City requests the entry of an Order Adjudicating Public Use and Necessity for the  
18 Project and related Project purposes.

19 **3. STATEMENT OF ISSUE**

20 Is the construction of a *[insert description of what is to be built]* a “public use” and are  
21 the property rights sought to be acquired herein reasonably necessary for and required by the  
22 purposes of the Project? The issue of just compensation for the taking of property is to be  
23 determined at a later trial.

24 **4. EVIDENCE RELIED UPON**

25 The City relies upon the records and files in this matter to date, Ordinance No. \_\_\_\_\_,  
26 the testimony (as necessary) to be given at the hearing, the exhibits to be offered at the hearing,

1 and the records and files in the City’s other condemnation actions pending or completed before  
2 the \_\_\_\_\_ County Superior Court.

## 3 **5. AUTHORITY**

### 4 **5.1 Condemnation Power**

5 RCW 8.12.\_\_\_\_ specifically authorizes the City to condemn land and other property for  
6 any “public use.” The Washington Supreme Court has developed a three-part test to evaluate  
7 condemnation cases. For a proposed condemnation to be lawful, a condemning authority must  
8 show that (1) the use is public, (2) the public interest requires it, and (3) the property  
9 appropriated is necessary for that purpose. *State ex rel. Washington State Convention & Trade*  
10 *Center v. Evans*, 136 Wn.2d 811, 816-17, 966 P.2d 1252 (1998); *In re City of Seattle*, 96 Wn.2d  
11 616, 625, 638 P.2d 549 (1981). The first of these issues is solely judicial; the latter two are  
12 legislative questions. *State v. Bank of California*, 5 Wn. App. 861, 865, 491 P.2d 697 (1971);  
13 *State ex rel. Sternoff v. Superior Court*, 52 Wn.2d 282, 290, 325 P.2d 300 (1958).

### 14 **5.2 Public Use and Necessity Distinguished**

15 The question whether a particular use is a “public use” is judicial in nature. Washington  
16 Constitution, article I, Section 16 (amendment 9). However, the Constitution’s deferral to the  
17 judiciary of the question of public use “does not preclude the legislative prerogative of declaring  
18 a public use in the first instance.” *Miller v. City of Tacoma*, 61 Wn.2d 374, 383-84, 378 P.2d  
19 464 (1963). The legislative declaration is entitled to great weight. *Hogue v. Port of Seattle*, 54  
20 Wn.2d 799, 817, 341 P.2d 171 (1959). The determination of “public necessity” for a particular  
21 improvement is a legislative question. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d  
22 330 (1965).

### 23 **5.3 Public Use – A Judicial Determination**

24 The specific plans for improvements following an eminent domain action have no  
25 bearing on the entry of an order of public use (such plans relate to damages, which are  
26 determined subsequent to an adjudication of public use and necessity). *State ex rel. Agee v.*

1 *Superior Court of King County*, 58 Wn.2d 838, 840, 365 P.2d 16 (1961). The Court’s approval  
2 of public use requires only that the property condemned be put to the use designated therein and  
3 determined to be public. *Id.*

4 Here, there can be no question that the acquisition of property for the purpose of  
5 constructing \_\_\_\_\_ facilities is for a public use. *[If appropriate, add that*  
6 *respondents have previously so stipulated.]* Thus, the City has established that the property it  
7 seeks to condemn in this action – to construct \_\_\_\_\_ facilities – is sought for a  
8 public use.

#### 9 **5.4 Public Necessity – A Legislative Determination**

10 The concept of necessity is closely connected to the concept of public use, but it does  
11 not mean absolute, immediate or indispensable need. *City of Tacoma v. Welcker*, 65 Wn.2d at  
12 683. The word “necessary” when used in connection with eminent domain statutes means  
13 reasonably necessary under the circumstances of the particular case. *Id.* at 864. Public  
14 necessity “embraces the right of the public to expect and demand the service and facilities to be  
15 provided by a proposed acquisition or improvement.” *Id.* Necessity is deemed conclusive by  
16 the courts when found to exist by the appropriate legislative body, absent proof of actual fraud  
17 or such arbitrary and capricious action as would constitute constructive fraud. *State v. Brannan*,  
18 85 Wn.2d 64, 68, 530 P.2d 322 (1975); *City of Tacoma v. Welcker*, 65 Wn.2d at 684. Selection  
19 of a site or location for a given improvement is, likewise, a legislative question. *State ex rel.*  
20 *Hunter v. Superior Court for Snohomish County*, 34 Wn.2d 214, 219-20, 208 P.2d 866 (1949).  
21 With respect to the Project, the location, design and engineering details are administrative and  
22 legislative in nature. *State v. Brannan, supra.*

23 Here, the City, through the proper exercise of its legislative authority, has declared that  
24 public necessity and convenience require the acquisition of the subject property for the Project.  
25 See Ordinance No. \_\_\_\_\_, attached as Exhibit A to the Petition for Condemnation. Further,  
26 the City has determined that the land and property rights sought by the City in this

1 condemnation action are those reasonably necessary and required for the construction, operation  
2 and maintenance of the Project and for related *[insert additional basis for need, e.g.*  
3 *construction staging]*. The City Ordinance and the testimony to be presented to this Court are  
4 conclusive on the Court, absent proof of fraud. Without any proof of fraud, the City's  
5 determination of necessity is "conclusive" and is entitled to the deference of this Court. *In re*  
6 *Port of Seattle*, 35 Wn. App. at 791.

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

11 *In re Puget Power*, 28 Wn. App. at 725 (emphasis supplied). Respondents cannot demonstrate  
12 fraud or constructive fraud.

13 Because both public use and necessity are clearly shown in this case, and because there  
14 is no evidence or proof of fraud or constructive fraud, the Court should find that the Project and  
15 related Project uses constitute a public use and that the Property is necessary for and required by  
16 that public use. *In re Port of Seattle*, 80 Wn.2d 392, 398-99, 495 P.2d 327 (1972).

### 17 **5.5 The City's Legislative Decision Regarding Necessity Is Controlling, Not** 18 **Respondents' Determination of Necessity.**

19 The determination of necessity in a condemnation action is solely a decision of the  
20 appropriate legislative body – in this case the City. Respondents essentially contend that they  
21 should be allowed to decide what portion of the Property is necessary for the Project, rather than  
22 the City. There are two major flaws in Respondents' arguments.

23 *[If applicable add the following arguments, or other arguments depending upon the*  
24 *facts of the case.]* First, Respondents' proposal is economically unsound because it would  
25 require the City to pay more than fair market value for the Property. Because taxpayer money is  
26 involved, the City simply cannot consent to pay more than fair market value for the real  
property it acquires for Project facilities. Second, Respondents ignore the fact that the entire

1 Property was identified by the City Council as necessary for a public use. The fact that the City  
2 has yet to determine precisely how it will use the entire Property does not change the fact that  
3 the appropriate legislative body has deemed the entirety of the Property to be necessary for a  
4 public use.

5 5.5.1 Economic Considerations [*Again, use this argument as applicable. It*  
6 *will not be applicable in all cases.*]

7 Respondents argue that the City should not take the Property in its entirety, but rather  
8 take approximately half of the Property in fee and the other half as a temporary construction  
9 easement. In this scenario, the City would be required to pay Respondents just compensation  
10 for half of the Property in fee, plus a percentage of the fee value each year for approximately ten  
11 years to use the other half of the Property for construction and staging purposes. Further, the  
12 City would remain liable to Respondents for any damage to the remainder of the Property  
13 caused by the partial take. *See, e.g. RCW 8.12.190.* These sums would certainly amount to  
14 more than the fair market value of the entire Property in fee. *See, e.g., State v. Larson, 54*  
15 *Wn.2d 86, 87, 338 P.2d 135 (1959)* (defining “fair market value” for condemnation purposes).  
16 Just as a property owner is entitled to fair market value of its property, a condemning authority  
17 is not required to pay more than fair market value for that property. Therefore, Respondents  
18 proposition is economically unsound.

19 5.5.2 Practical Considerations [*Again, use this argument as applicable. It will*  
20 *not be applicable in all cases.*]

21 Respondents assert that less than half of the Property will be used for the \_\_\_\_\_ and the  
22 City will only use the remainder of the Property temporarily. *See Respondents’ Opposition to*  
23 *Public Use and Necessity (“Respondents’ Opposition”)* at \_\_\_\_\_. However, because the City  
24 has yet to approve the final design for the \_\_\_\_\_ Project, the precise size of the footprint  
25 for the \_\_\_\_\_ Project has not yet been determined. Further, [*insert other applicable*  
26

1 arguments] \_\_\_\_\_. For example, a portion of the Property may be used for  
2 \_\_\_\_\_.

3 Respondents argue that the City's legislative determinations (contained in the  
4 Ordinance) amount to arbitrary and capricious conduct and/or constructive fraud. But they have  
5 identified no proof to substantiate that contention. Respondents contend that the City's actions  
6 are fraudulent because the City has \_\_\_\_\_. However, the fact that the City has  
7 \_\_\_\_\_ is not evidence of fraud. Therefore, Respondents' argument  
8 does not change the fact that the City Council (the appropriate legislative body) has determined  
9 that the entire Property is necessary for a public use. As the Supreme Court made clear in  
10 *Evans*, those decisions are *legislative decisions* and, without actual proof of fraud, the Court  
11 must defer to those *legislative acts*.

#### 12 **5.6 The City's Decision to Acquire Fee Title is Consistent With Washington** 13 **Law.**

14 Under Washington law, the decision to acquire a fee interest rather than an easement will  
15 not support a finding of either fraud or constructive fraud. *Cf. State ex rel. Hunter v. Superior Court*  
16 *for Snohomish City*, 34 Wn.2d 214, 219-220, 208 P.2d 866 (1949) (selection of a site or location for  
17 a given improvement is, likewise, a legislative question). Respondents' assertion that the City's  
18 decision to take a fee interest in property (rather than an easement) provides justification for the  
19 Court to refrain from entering an order of public use and necessity is therefore without merit.  
20 Washington law is directly to the contrary.

21 The court in *In re Port of Grays Harbor*, 30 Wn. App. 855, 638 P.2d 633 (1982),  
22 addressed precisely this question and rejected Respondents' position. In that case, the Port of  
23 Grays Harbor sought to acquire property through eminent domain for the disposal of dredged  
24 spoils taken from the Chehalis River. Using the same argument as has been advanced in this  
25 case, respondents in *Port of Grays Harbor* contended that the Port did not need to acquire a fee  
26 interest in the property sought, but that an easement would be sufficient. Addressing the



1 question, the Court of Appeals held that deference was due to the legislative authority seeking  
2 to condemn property, and that even were the court to disagree with the condemning authority on  
3 the type of property interest to be taken, mere difference of opinion was not sufficient to find  
4 the condemning authority's decision to be arbitrary or capricious:

5 **Whether a legitimate public use should be accomplished by acquisition of an  
6 easement rather than a fee is a question on which reasonable minds can differ.**

7 Given the expense involved in diking the land and the Port's long-range plans for  
8 development of the property, the legislative choice is not an arbitrary or capricious  
9 choice simply because a reviewing court would select a different option. (Citations  
10 omitted). The legislature under constitutional authority has granted broad authority  
11 to port districts to determine the means by which it carries out its public purpose.

12 30 Wn. App. at 863 (emphasis added).

13 Here, the City has made a determination that acquisition of an easement over the Property is  
14 insufficient to satisfy the public use needs for this \_\_\_\_\_. The City's decision to  
15 acquire a fee interest rather than an easement is completely within the "broad authority" granted to  
16 the City by the Legislature.

17 Respondents' attempt to distinguish *Port of Grays Harbor* fails. Respondents argue that,  
18 because the Port in *Grays Harbor* had a "general long-range plan" for the "Remainder  
19 Property," the logic from that case does not apply here. See Respondents' Opposition at \_\_\_\_.  
20 Also, Respondents argue that the long-term development plans in *Grays Harbor* fit within the  
21 Port's broad statutory authority and that the City has no such authority. *Id.* First, as outlined  
22 above, the City's long range plan for the Property is to provide a key \_\_\_\_\_  
23 function, which includes \_\_\_\_\_. This general plan fits exactly within the City's  
24 statutory authority in RCW\_\_\_\_\_:

25 [insert appropriate citation from RCW]

26 Therefore, as outlined in this statute, the City has broad authority, like the Port in *Grays  
Harbor*, to develop land for \_\_\_\_\_-related purposes. This is exactly what the City  
Council has done in deeming the entirety of the Property necessary for a public use.

1           **5.7 The City’s Decision To Acquire Fee Title Rather Than an Easement Does**  
2           **Not Constitute Constructive Fraud.**

3           Respondents would like to retain a fee interest in at least a portion of the Property, and  
4 so urge the Court to overturn the City’s legislative determination to acquire the Property in fee.  
5 However, as noted above, site selection, route selection and other logistical determinations are  
6 legislative questions, for which judicial deference is required. *State ex rel. Hunter*, 34 Wn.2d at  
7 219-20; *Brannan*, 85 Wn.2d at 68.

8           Respondents’ challenge to the City’s determination to acquire fee title is misplaced because  
9 “questions concerning whether an acquisition is necessary to carry out a proposed public use are  
10 **legislative.**” *Evans*, 136 Wn.2d at 823 (emphasis supplied); *see also City of Des Moines v.*  
11 *Hemenway*, 73 Wn.2d 130, 138, 437 P.2d 171 (1968) (“[Q]uestions concerning whether a particular  
12 acquisition is necessary to carry out a proposed public use are legislative, . . . [and are] **conclusive** in  
13 the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute  
14 constructive fraud.” (Emphasis supplied).

15           The *Des Moines* case is instructive on this point. In *Des Moines*, the respondents opposed  
16 the City of Des Moines’ efforts to condemn land for the construction of a marina, contending that a  
17 small city of (at that time) 3,518 people had no need to condemn 80% of the tidelands located within  
18 the city limits and two parcels outside the city limits for the purpose of constructing a marina to  
19 house 885 boats. However, similar to the instant case, the respondents in *Des Moines* made no  
20 showing of actual or constructive fraud.

21           The Supreme Court responded with language that is directly applicable to this case:

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

24           . . .

25           Despite its finding that 90 per cent of the space in the proposed marina would be  
26 used by nonresidents, the trial court stated in its oral opinion that construction of  
the marina would be of substantial benefit to the residents of the city. It seems  
clear that the trial court’s findings, as amplified by its oral opinion, do not  
support its conclusion that petitioner acted in an arbitrary and capricious manner

1 in seeking to condemn respondents' tidelands for a marina. Consequently, the  
2 trial court erred in refusing to enter a decree of public use and necessity as to  
property situated within petitioner's corporate limits.

3 *Des Moines*, 73 Wn.2d at 140 (reversing trial court's refusal to enter order of public use and  
4 necessity) (emphasis added).

5 If needed, the City will present evidence that the long term use of the Property and the  
6 cost and risk to the City associated with the acquisition of an easement was a legitimate  
7 consideration in the City's legislative determination to acquire the fee interest for the  
8 \_\_\_\_\_ Project.

9 **6. CONCLUSION**

10 The only issues before the Court are whether the use to be made of the subject property  
11 is a public use, and whether the property is reasonably necessary for the purposes for which it is  
12 sought. The records and files in this condemnation action and the evidence to be presented at  
13 the hearing clearly demonstrate that the construction of the \_\_\_\_\_ Project is for a public  
14 use and the property sought herein is necessary for the construction of the \_\_\_\_\_ Project.

15 With respect to necessity, Respondents have identified no evidence to support an  
16 argument that the City's actions were either fraudulent or constituted such arbitrary and  
17 capricious action as would amount to constructive fraud. In the absence of such evidence, under  
18 Washington law the Court must defer to the City's determinations on necessity, including the  
19 amount of property taken and the City's determination to take fee title as opposed to an  
20 easement.

21 The City requests that the Court enter a further order adjudicating that the City's  
22 acquisition of the entirety of the Property for the purposes outlined in the Ordinance and the  
23 Petition be declared a public use and that acquisition of the Property is necessary and required  
24 to effect that public use.

25 RESPECTFULLY SUBMITTED this \_\_\_\_th day of \_\_\_\_\_ 20\_\_\_\_.

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CITY OF \_\_\_\_\_

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\_\_\_\_\_, WSBA No. \_\_\_\_  
City Attorney