

CASENOTES

In re Puget Sound Power and Light Company: Eminent Domain by Corporations Reevaluated

In the case of *In re Puget Sound Power and Light Co.*,¹ the Washington Court of Appeals rejected the arbitrary and capricious standard of judicial review for determinations of public use² and necessity³ by private corporations in eminent domain proceedings.⁴ Recognizing that deferential judicial review is

1. 28 Wash. App. 615, 625 P.2d 723 (1981), *appeal denied*, 95 Wash. 2d 1026 (1981).

2. Eminent domain is the sovereign power to condemn private property for a public use. 1 NICHOLS, EMINENT DOMAIN § 1.11 (rev. 3d ed. 1981). Accordingly, for a valid exercise of eminent domain authority, the contemplated use for which the acquisition is sought must be public. The Washington statute expressly requires the public use element in all eminent domain proceedings. *See infra* notes 4, 9. Additionally, the Washington constitution makes the public use of a proposed acquisition a judicial question. WASH. CONST. art. I, § 16, amend. 9. *See infra* note 34.

3. The necessity issue arises in a variety of contexts in eminent domain proceedings. The two broad necessity issues that most frequently arise are the necessity of the project and the necessity of the particular property. When the necessity of the project is challenged, Washington courts examine the relationship between the public interest and the proposed project, but tend to dilute the definition of necessity to accommodate projects that are not absolutely or immediately essential for the public interest. *See, e.g.*, *State v. Superior Court*, 70 Wash. 2d 630, 424 P.2d 913 (1967) (reasonable public need for monorail satisfies requirement of necessity); *Steilacoom v. Thompson*, 69 Wash. 2d 705, 419 P.2d 989 (1966) (condemnation for sewer necessary despite fact that danger of contamination uncertain); *City of Tacoma v. Welcker*, 65 Wash. 2d 677, 399 P.2d 330 (1965) (immediate need not required for project to protect city's water supply from contamination).

When the necessity of the particular property is an issue, courts examine the relationship between the project and the condemnee's land. For example, the issue in *Puget* was whether the Jauch property was necessary for the project contemplated by Puget Sound Power and Light (PPL) in light of another alternative. *See infra* text accompanying notes 10-16. The necessity of the particular property may also be challenged on the basis that the condemnor seeks an excessive amount. *See generally* 1 NICHOLS, EMINENT DOMAIN § 4.11 (rev. 3d ed. 1981).

4. In *King County v. Farr*, 7 Wash. App. 600, 501 P.2d 612 (1972), the Washington Court of Appeals described the general procedure followed in all condemnations: "A condemnation action consists of three phases: (1) adjudication of public use and necessity, (2) determination of damages to be awarded to the owner and (3) payment of the amount of the award and entry into possession." *Id.* at 602, 501 P.2d at 615. This note considers only the first phase of the proceedings in depth. Condemnors initiate this phase by filing a condemnation petition in superior court. *See infra* note 11.

inappropriate when the condemner is a private entity, the court held that due process requires a private condemner to prove public use and necessity by a preponderance of the evidence.⁵ Although the court correctly shifted the burden of proof to the condemner, the court could have grounded its decision in the Washington procedural statute governing corporate condemnation⁶ and avoided the constitutional question. Despite misleading case law,⁷ the wording of the corporate condemnation statute⁸ differs significantly from statutes governing public entities.⁹

The court's role in adjudicating public use and necessity is set out in separate statutes for each entity authorized to exercise the power of eminent domain. WASH. REV. CODE § 8.20.070 (1981) governs the trial court's role in corporate eminent domain proceedings.

Adjudication of public use or private way of necessity. At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is, for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing that a jury be summoned, or called, in the manner provided by law, to ascertain the compensation which shall be made for the land, real estate, premises or other property sought to be appropriated, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law.

5. *Puget*, 28 Wash. App. at 619-20, 625 P.2d at 725.

6. WASH. REV. CODE § 8.20.070 (1981). *See supra* note 4.

7. *See infra* notes 54-66 and accompanying text.

8. *See supra* note 4.

9. WASH. REV. CODE § 8.04.070 (1981) (eminent domain by state).

Hearing—Order adjudicating public use. At the time and place appointed for hearing the petition, . . . if the court . . . is . . . satisfied by competent proof that the contemplated use for which the lands . . . are sought to be appropriated is really necessary for the public use of the state, it shall make and enter an order . . . adjudicating that the contemplated use for which the lands . . . are sought to be appropriated is really a public use of the state.

WASH. REV. CODE § 8.08.040 (1981) (eminent domain by counties).

Hearing—Order adjudicating public use. At the time and place appointed for hearing said petition, . . . if the court or judge thereof . . . shall be . . . satisfied by competent proof that the contemplated use for which the lands . . . sought to be appropriated is a public use of the county, the court or judge thereof may make and enter an order adjudicating that the contemplated use is really a public use of the county

WASH. REV. CODE § 8.12.090 (1981) (eminent domain by cities).

Waiver of jury—Adjudication of public use—Procedure. . . . Whenever an

Courts should interpret the statute for corporations to require strict judicial supervision of the eminent domain actions of private entities.

Puget Sound Power and Light Company (PPL), a private utility,¹⁰ attempted to purchase an easement for an electrical transmission line across Kenneth and Carolyn Jauch's property. When the Jauchs refused to sell, PPL filed a condemnation petition¹¹ in superior court pursuant to the statute for corporate eminent domain.¹² At the hearing,¹³ the Jauchs argued that PPL could place the new power lines across the road where PPL already had franchise rights.¹⁴ PPL contended the condemnation was necessary because of safety factors, engineering practices, and cost.¹⁵ After inspecting both sites, the trial court found that PPL's determination of public use and necessity was

attempt is made to take private property, for a use alleged to be public under authority of this chapter, the question whether the contemplated use be really public shall be a judicial question and shall be determined as such by the court before inquiry is had into the question of compensation to be made.

WASH. REV. CODE § 8.16.050 (1981) (eminent domain by school districts).

Hearing—Finding of necessity—Setting for trial. At the time and place appointed for the hearing of such petition, . . . if the court . . . shall . . . find that such real estate sought to be taken is required and necessary for the purposes of a schoolhouse site, . . . the court shall make an order reciting such findings

10. Although privately financed, PPL is an electric company as defined by WASH. REV. CODE § 80.04.010 (1981). As such, it is granted eminent domain authority by WASH. REV. CODE § 80.32.060 (1981). Public service corporations are subject to regulation by the state through the Utilities and Transportation Commission, but the Commission has no supervisory power over corporate eminent domain actions.

11. WASH. REV. CODE § 8.20.010 (1981) sets out the contents required in a petition for condemnation when the condemnor is a private corporation. The property sought must be described with reasonable certainty, the interested parties must be identified; and the purpose for the acquisition must be set forth. WASH. REV. CODE § 8.20.070 (1981) describes the trial court's role once the proceeding has been initiated by the condemnor's petition. *See supra* note 4.

12. *See supra* note 4.

13. The appellate courts call the proceeding a public use and necessity hearing more often than a trial. The hearing precedes a jury trial on the issue of compensation which is the second phase of the condemnation proceedings. *See supra* note 4.

14. PPL had franchise rights across the road from the Jauch property pursuant to WASH. REV. CODE § 80.32.010 (1981).

15. PPL wished to place a transmission pole for power lines on the Jauch property as part of a project to increase the power supply in the area. PPL experts claimed the existing pole across the street was not adequate to support the new transmission lines. PPL preferred using the Jauch property because it would eliminate a potentially dangerous angle in the lines. Furthermore, PPL claimed that soil studies would be required to determine whether the soil across the road could support a new pole, thereby increasing the cost of the project. Brief for Respondent at 7-11, *Puget*, 28 Wash. App. 615, 625 P.2d 723 (1981).

not arbitrary and capricious¹⁶ and entered a condemnation decree in favor of the utility. The Jauchs appealed, contending that the trial court erroneously applied the arbitrary and capricious standard of review to PPL's determination of necessity.

The Washington Court of Appeals¹⁷ recognized that courts traditionally review a determination of necessity deferentially because of the legislative nature of the determination.¹⁸ Courts have uniformly characterized condemnation decisions as legislative because eminent domain is an inherent sovereign power¹⁹ limited only by express constitutional provisions.²⁰ Additionally, a condemnor is better qualified than a court to make technical decisions regarding the necessity and location of a public project. Although the doctrine of separation of powers limits judicial interference with legislative functions,²¹ due process requires that legislative acts be rationally related to a legitimate public purpose.²² Deferential review ensures, without encroaching on

16. An objection to the standard of review was not raised in the trial court proceeding. The Jauchs argued that PPL's choice of their property was arbitrary and capricious. *Id.* at 16.

17. The Washington Supreme Court denied PPL's petition for review. *In re Puget Sound Power & Light*, 95 Wash. 2d 1026 (1981).

18. *Puget*, 28 Wash. App. at 618, 625 P.2d at 725.

19. Most courts endorse the theory that eminent domain is an inherent attribute of sovereignty. *See, e.g.*, *State v. King County*, 74 Wash. 2d 673, 675, 446 P.2d 193, 195 (1968); *City of Tacoma v. Welcker*, 65 Wash. 2d 677, 683, 399 P.2d 330, 334 (1965); 1 NICHOLS, EMINENT DOMAIN § 1.14(2) (rev. 3d ed. 1981).

Other courts subscribe to the theory that the state ultimately owns all property within its boundaries. According to this theory, individuals hold title subject to the state's reserved right to exercise its ownership. 1 NICHOLS, EMINENT DOMAIN § 1.13 (rev. 3d ed. 1981).

20. As an inherent attribute of sovereignty, the power of eminent domain is not dependent upon a constitutional grant; however, constitutional provisions limit the potentially absolute power. Both the federal and state constitutions contain constraints which prohibit taking private property for a public use without just compensation. U.S. CONST. amend. V; WASH. CONST. art. I, § 16, amend. 9. *See also supra* note 2.

In addition, eminent domain must be exercised within the constraints imposed by due process. U.S. CONST. amend. V, XIV, § 1; WASH. CONST. art. I, § 3. For a discussion of the substantive implications of due process in eminent domain proceedings, see *infra* notes 21-23 and accompanying text. Procedural due process also affects condemnations. *See infra* text accompanying notes 38-48.

21. The doctrine of separation of powers requires courts to defer to legislative acts. *In re Salary of Juvenile Director*, 87 Wash. 2d 232, 237, 552 P.2d 163, 170 (1976).

22. For a discussion of substantive due process as a source of judicial power to review legislative decisions in eminent domain proceedings, see Comment, *Abusive Exercises of the Power of Eminent Domain: Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200, 220-24 (1968). *See also* 1 NICHOLS, EMINENT DOMAIN § 4.9 (rev. 3d ed. 1981).

The requirement of due process of law relates to the substance of any leg-

legislative prerogatives, that legislative decisions meet minimum standards of substantive due process.²³

A private corporation is not a legislative decisionmaker entitled to judicial deference. While most authorities conclude that a legislative delegation of eminent domain power includes a grant of discretion to determine the necessity of the taking,²⁴ under the *Puget* court's analysis, the legislative source of power does not determine the character of the grantee's decision. The *Puget* court looked behind the decision's traditional legislative label and examined the character of the decisionmaker. Unlike a private corporation, the state or public condemnor exercises discretion as a public representative²⁵ in condemning land for a public project. Theoretically, public officials have no self interest in the ultimate governmental decision reached. In addition, the ballot box imposes political constraints on public decisionmakers. Washington's Open Public Meetings Act²⁶ further mandates that

islatve enactment as well as to the procedure and forms adopted for carrying it into effect.

When applied to substantive rights it is interpreted to mean that the government does not have the legal power to deprive a person of property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to constitute an arbitrary exercise of governmental power.

Id. (footnotes omitted).

23. Judicial review is a proper check on legislative functions in a system of checks and balances. Judicial authority to declare legislative acts unconstitutional is an example of direct control of one branch of government over another. W. GWYN, *THE MEANING OF SEPARATION OF POWERS* 110 (1965).

24. 1 NICHOLS, *EMINENT DOMAIN* § 3.1(2) (rev. 3d ed. 1981).

25. The *Puget* court recognized that a legislative decision contemplates public input in the decisionmaking process:

A governmental body exercising the power of eminent domain is required, either by the nature of the legislative process or by express statutory directive, to make its decision in a public forum where objections by affected citizens may be heard. The superior court adjudicating the public use and necessity of a governmental entity's eminent domain decision therefore has the benefit of both agency expertise and public discussion. Thus, the arbitrary and capricious standard of review is justifiable.

Puget, 28 Wash. App. at 619, 625 P.2d at 725.

26. WASH. REV. CODE § 42.30.030 (1981) requires: "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." The policy of the Open Public Meetings Act is expressly stated in WASH. REV. CODE § 42.30.010 (1981).

Legislative declaration. The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of

meetings of the governing body of any public agency be open to public attendance. These safeguards justify deferential review of the eminent domain decisions of public entities.

PPL's decisionmakers, on the other hand, represent the interests of the corporation. They are not required to be responsive to the public's concerns during the decisionmaking process,²⁷ nor have they been accountable to the public for their condemnation decisions through the political process. Judicial review, therefore, is the only safeguard against abusive exercises of eminent domain power when the condemnor is a private corporation.

When judicial review is the only safeguard against oppressive exercises of eminent domain power, the arbitrary and capricious standard of review is inappropriate. The arbitrary and capricious standard places the burden of proof on the condemnee.²⁸ Without proof of actual or constructive fraud in the condemnor's determination of necessity, the standard precludes a court from denying a condemnation petition.²⁹ The condemnor's decision is, therefore, conclusive in most cases.³⁰

this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This statute does not apply to private corporations. As the *Puget* court noted, PPL's decision to exercise its power of eminent domain was made in private. *Puget*, 28 Wash. App. at 619, 625 P.2d at 725.

27. The *Puget* court was concerned with the lack of public involvement in the decisionmaking process.

Conversely, when a public service corporation exercises its eminent domain powers, it is not required to hold any hearings, or to provide any means for public involvement prior to the commencement of judicial proceedings. Thus, the basis for the "arbitrary and capricious" standard—the existence of a legislative process—is not present.

Puget, 28 Wash. App. at 619, 625 P.2d at 725.

28. *Hove v. Port of Seattle*, 80 Wash. 2d 392, 398, 495 P.2d 327, 331 (1972) (condemnee has burden of showing willful and unreasoned action amounting to actual or constructive fraud); *Town of Medical Lake v. Brown*, 63 Wash. 2d 41, 45, 385 P.2d 387, 389 (1963) (condemnee claiming lack of necessity for taking her land for construction of sewage lagoon has burden of proving that town council's determination of necessity was fraudulent).

29. A court will defer to the discretion of the condemnor even when there are other alternatives and the reviewing court disagrees with the condemnor's choice. *Miller v. City of Tacoma*, 61 Wash. 2d 374, 390, 378 P.2d 464, 474 (1963).

30. Washington courts only occasionally find arbitrary and capricious conduct

In *Puget*, for example, the Jauchs raised a serious question about the necessity of condemning their property³¹ but were unable to overcome the strong presumption in favor of PPL provided by the deferential standard. Effective judicial review protecting landowners against unnecessary condemnation, is prevented by this strong presumption in favor of the condemnor.

In addition, arbitrary and capricious review is inappropriate because limited judicial review presumes the existence of a record for the trial court to review.³² When a public entity exercises eminent domain power, a legislative or administrative proceeding³³ generally precedes the superior court hearing. Corpo-

amounting to constructive fraud. *See, e.g., King County v. Theilman*, 59 Wash. 2d 586, 369 P.2d 503 (1962). In *Theilman*, there was evidence that the county instituted condemnation proceedings at the request of a private developer who was unsuccessful in his own attempt to purchase property from the condemnee. Since the county had no funds set aside to build the road, and since there was evidence that the developer had agreed to pay the compensation, the court found that the action of the Board of County Commissioners was sufficiently arbitrary and capricious to amount to constructive fraud.

31. The Jauchs claimed that PPL's choice of their property was based on the mistaken belief that PPL had franchise rights over it. PPL's evidence, the Jauchs claimed, was merely an after-the-fact rationalization for its decision. The Jauchs also introduced evidence that the soil across the road was suitable for a new pole, that it was common practice for PPL to construct lines at an angle, and that the increase in cost to replace the old pole was insignificant. Brief for Appellant at 17-22, *Puget*, 28 Wash. App. 615, 625 P.2d 723 (1981).

32. The *Puget* court noted in a footnote that judicial review of an administrative or legislative act for arbitrary and capricious conduct generally means that the court restricts itself to the record before the agency. *Id.* at 618 n.2, 625 P.2d at 725 n.2.

33. As the *Puget* court noted, a city must condemn by ordinance. WASH. REV. CODE § 8.12.040 (1981) requires: "When the corporate authorities of any such city shall desire to condemn land or any other property, or damage the same, for any purpose authorized by this chapter, such city shall provide therefor by ordinance."

Similarly, the necessity for a condemnation is a legislative question when a county exercises its delegated eminent domain authority. WASH. REV. CODE § 8.08.010 (1981) authorizes counties to condemn land whenever the board of county commissioners deems it necessary for county purposes to acquire such land.

Any determination of necessity made by a governmental entity is arguably legislative. *See Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex.), *aff'd mem.*, 419 U.S. 1042 (1974). In *Joiner*, the condemnees claimed that the city of Dallas acted administratively rather than legislatively, and therefore, the due process clause of the fourteenth amendment guaranteed them a right to participate in the decisionmaking process. The court held that,

[t]he decision to appropriate private property is not, however, a minor ministerial function. The power of eminent domain, whether exercised by the state legislature or a municipal corporation, is a unique sovereign right fundamental to the performance of governmental responsibilities. This power is essentially and fundamentally legislative, and its character cannot be changed by switching the labels under which it is pursued.

Id. at 771.

rate condemners, on the other hand, make their decisions privately and are not required to compile a record for review. In a private condemnation, the trial court functions as a fact-finder, considering evidence for and against condemnation, and cannot properly be characterized as a reviewing body.

Because a private corporation is not a legislative decisionmaker, and because there is no proceeding prior to superior court action, limited judicial review is not justified. A private condemner should be required to prove public use³⁴ and necessity by a preponderance of the evidence.

In *Puget*, the trial court received evidence for and against condemnation of the Jauch property. Both sides presented expert testimony.³⁵ The trial judge inspected the Jauch property and the alternative site.³⁶ Equipped with this evidence, the trial

34. Despite a constitutional mandate making public use a judicial question, see *supra* note 2, the Washington courts also tend to defer to the condemner's decision regarding public use. See, e.g., *Miller v. City of Tacoma*, 61 Wash. 2d 374, 384, 378 P.2d 464, 470 (1963). For a discussion of how the *Miller* court treated the question of public use, see Comment, *Inverse Condemnation in Washington State: A Survey of Judicial History Defining Public Rights in Private Property*, 16 GONZ. L. REV. 385 (1981).

For better or worse, *Miller* effectively emasculated portions of the state constitution. In holding that legislative determinations are "entitled to great weight," and in proceeding to give such declarations not only great, but conclusive weight absent a showing of irrationality, it would appear that the court resolved that the constitutional prescription requiring independent judicial appraisal of public use "without regard to any legislative assertion" was no longer controlling.

Id. at 393-94 (footnotes omitted).

A recent decision, however, indicates that Washington courts might be less deferential to condemners' public use assertions. *In re City of Seattle*, 96 Wash. 2d 616, 638 P.2d 549 (1981).

The acquisition of land through eminent domain proceedings must be for a public use. Under the constitutional provision, the question whether a proposed acquisition is for such a use is a judicial question, although a legislative determination will be accorded great weight. Here, there has been no legislative pronouncement on the subject. Still the declaration of the City Council to the effect that the project was required for the health, safety, convenience, and welfare of the public and that the property to be acquired was for a public use is also entitled to respect. However, the evidence which was presented to the trial court did not substantiate the city's declaration.

Id. at 624-25, 638 P.2d at 554-55.

This case indicates that, at least, "legislative" determinations of public use are no longer entitled to the conclusive weight they have traditionally enjoyed. After *Puget*, private determinations of public use enjoy no weight at all but must be demonstrated by a preponderance of the evidence. This is appropriate not only because of the constitutional mandate, but because corporate accountability has historically been lacking in eminent domain actions. See *supra* text accompanying notes 25-27.

35. See *supra* notes 15, 31.

36. *Puget*, 28 Wash. App. at 616, 625 P.2d at 723.

court was fully capable of making a determination based on the weight of the evidence. PPL's determination of necessity was entitled to consideration as expert testimony rather than as a conclusive presumption. The court of appeals, therefore, properly remanded the case for findings on whether PPL demonstrated public use and necessity by a preponderance of the evidence.³⁷

Although the *Puget* court correctly rejected the arbitrary and capricious standard of review, the court based its reasoning on an unusual and inadequately explained application of due process principles.³⁸ The court suggested that deferential review of PPL's preliminary determinations violated due process because there was no prior opportunity for the Jauchs to be heard.

The *Puget* court cites two Washington cases for its due process holdings.³⁹ These impoundment and seizure cases both apply procedural due process principles derived from the fourteenth amendment of the federal Constitution. Generally, due process requires a meaningful hearing appropriate to the circumstances prior to any significant deprivation of property.⁴⁰ When it invoked due process principles derived from criminal procedure cases, however, the *Puget* court failed to recognize that eminent domain is a unique area of the law.

Eminent domain case law is uniform in holding that due process does not require a hearing on the issue of necessity.⁴¹

37. *Id.* at 620, 625 P.2d at 725.

38. The court stated:

The decision of PPL, a non-governmental agency, to exercise its power of eminent domain was made privately. There can be no meaningful review of its action when judicial scrutiny is limited by the arbitrary and capricious standard. Clothing the processes of such a private corporation with the mantle of the legislative process, without the semblance of notice and opportunity to be heard, does not conform to our concept of due process.

Id. at 618, 625 P.2d at 725.

39. *Everett v. Slade*, 83 Wash. 2d 80, 515 P.2d 1295 (1973); *Reilly v. State*, 18 Wash. App. 245, 566 P.2d 1283 (1977).

40. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

41. *Rindge Co. v. City of Los Angeles*, 262 U.S. 700 (1923); *Bragg v. Weaver*, 251 U.S. 57 (1919). *See also* 1 NICHOLS, EMINENT DOMAIN § 4.11(1) (rev. 3d ed. 1981): The real reason of the rule is simple enough; the courts have no power to revise any enactment of the legislature unless it violates some clause of the constitution. The constitutions of the great majority of the states contain no provision prohibiting the taking of land for public use except for necessary or economi-

Determination of necessity is a legislative decision⁴³ and procedural due process principles are inapplicable to legislative acts or decisions.⁴³ Because courts have not traditionally distinguished between public and private condemning entities,⁴⁴ no precedent supports a due process analysis based on the condemnor's identity.⁴⁵

The *Puget* court distinguished between public and private

cally expedient undertakings, or unless the work can be done in no other way, nor was it the practice when the state constitutions were adopted to require a judicial hearing upon the question of necessity in eminent domain cases, so that it can be plausibly argued that such a hearing is essential to due process of law.

42. See *supra* text accompanying notes 18-20.

43. The Supreme Court indicated that procedural due process principles were inapplicable to legislative questions in eminent domain proceedings in *Bragg v. Weaver*, 251 U.S. 57 (1919).

Where the intended use is public, the necessity and expediency of the taking may be determined by such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.

Id. at 58.

44. *Bragg* is a good example of how courts indiscriminately label the necessity for a particular condemnation as a legislative decision. The condemnor in *Bragg* was a governmental entity, but the court emphasized that necessity is always a legislative question. *Id.*

45. There is one tenuous indication that such an analysis may be appropriate. In *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex.) (construing TEX. REV. CIV. STAT. ANN. arts. 3264-71 (Vernon 1974)), *aff'd mem.*, 419 U.S. 1042 (1974), the Supreme Court summarily affirmed a district court decision sustaining the constitutionality of a Texas eminent domain statute. In *Joiner*, the condemnee contended that concepts of due process had expanded significantly in favor of property owners in recent years and that the procedural safeguards articulated in *Bragg*, 251 U.S. at 57, were inadequate under a "modern" due process analysis. Based on this reasoning, the condemnee challenged the Texas statute because it did not provide a hearing on the issue of necessity. However, the court distinguished eminent domain cases from creditors' rights cases, on the basis that eminent domain is pursued for a public purpose, whereas creditors generally have a selfish interest in the outcome of the litigation. Accordingly, the district court stated: "[W]e believe the power of eminent domain to be unique and distinct from any alleged right of possession arising from debtor-creditor relationships and decline to apply the due process standard created by *Sniadach* and its progeny to the sovereign power." *Joiner*, 380 F. Supp. at 774.

The condemnor in *Joiner* was a municipality, however, and the court indicated in a footnote that the same analysis might not apply to private delegees of the sovereign power. The court said:

In the case at bar, the condemnor is a municipal corporation explicitly delegated the power of eminent domain by the legislature under Article 608/e. We do not have an allegation that the power of eminent domain has been delegated to a private corporation which has an interest in the condemnation proceeding.

Id. at 774 n.20.

condemnors and recognized that additional procedural protection is appropriate when the condemnor is a private corporation. Since a private corporation is not a public representative and lacks public accountability, PPL's determination that the Jauch property was necessary was not functionally a legislative decision.⁴⁶ The decision was, however, a substantial step towards depriving the Jauchs of the unencumbered use of their property. Therefore, if properly invoked, procedural due process may conceivably require judicial supervision to insure that the determination of necessity is made on a principled basis.⁴⁷

The arbitrary and capricious standard of review with its strong presumption of validity in favor of the condemnor does not afford landowners much procedural protection when the condemnor is a private corporation.⁴⁸ A preponderance of the evidence burden of proof, on the other hand, provides a more meaningful public use and necessity hearing.

Although the *Puget* court's due process analysis provides needed protection to condemnees, the decision could have been based on Washington's eminent domain statutes.⁴⁹ Avoiding the difficulties of the constitutional issue would have been prudent for several reasons. The *Puget* court did not state which constitution it was relying on for its due process holding. If the court was applying federal constitutional due process, its analysis may conflict with United States Supreme Court cases holding that due process does not require a hearing on the issue of necessity.⁵⁰ The court might have relied on the state constitution's due process clause,⁵¹ or even common law notions of due pro-

46. See *supra* notes 24-27 and accompanying text.

47. Washington courts have indicated a willingness to view some land use decisions functionally rather than formally. Zoning decisions are traditionally labeled legislative, and consequently only reviewed under the arbitrary and capricious standard. In *Smith v. Skagit County*, 75 Wash. 2d 715, 453 P.2d 832 (1969), the court applied procedural due process principles to a rezoning decision because hearings were statutorily required.

In other cases the courts have recognized that rezoning decisions, as opposed to the original enactment of a zoning scheme, are more adjudicatory than legislative in nature, and have applied a strict standard of substantive review. *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wash. 2d 201, 634 P.2d 853 (1981); *Parkridge v. City of Seattle*, 89 Wash. 2d 454, 573 P.2d 359 (1978).

48. See *supra* notes 28-33 and accompanying text.

49. See *supra* notes 4, 9.

50. See *supra* note 41.

51. WASH. CONST. art. I, § 3 provides: "No person shall be deprived of life, liberty, or property without due process of law."

Indeed, there is authority for the proposition that state courts can interpret state constitutional provisions as more protective of individual rights than parallel federal pro-

cess,⁵² but it did not have the benefit of authority for these positions either. In addition, traditional jurisprudential theory recognizes a preference for resolving issues on more narrow statutory grounds because of the precedential effect broad constitutional holdings may have.⁵³

The court could have avoided the constitutional question by engaging in a comprehensive analysis of Washington eminent domain procedural statutes. The Washington legislature apparently recognized the differences between public and private condemning entities and provided separate and distinct procedures for each entity authorized to exercise the power of eminent domain. The corporate eminent domain statute explicitly requires proof that the contemplated use is a public use, that the project is in furtherance of the public interest, and that the particular property sought is necessary.⁵⁴ In contrast, the procedural statutes for public entities generally only require competent proof that the acquisition is sought for a public use.⁵⁵ These statutes do not require proof that the particular property is necessary⁵⁶ for the contemplated use. The legislature indicated,

visions. *Alderwood Assocs. v. Washington Environmental Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980). The *Simpson* court noted that this is particularly appropriate where the state provision differs from the federal provision. *Id.* at 177, 622 P.2d at 1203. However, the federal and Washington state due process clauses are virtually identical.

52. Common law procedural due process has been relied upon by Washington courts in formulating "the appearance of fairness" doctrine which requires unbiased legislative decisions and fair hearings in land-use proceedings. *See, e.g., City of Bellevue v. Boundary Review Bd.*, 90 Wash. 2d 856, 863, 586 P.2d 470, 475 (1978).

53. *State v. Hall*, 95 Wash. 2d 536, 539, 627 P.2d 101, 103 (1981) ("A reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case."); *City of Kirkland v. Steen*, 68 Wash. 2d 804, 809, 416 P.2d 80, 83 (1966) ("It is a basic rule of judicial restraint that the issue of the constitutionality of a statute will not be passed upon if the case can be decided without reaching that issue.").

54. WASH. REV. CODE § 8.20.070 (1981). *See supra* note 4.

55. The statute giving eminent domain to school districts is the only other statute that explicitly requires a showing of necessity. WASH. REV. CODE § 8.16.050 (1981).

56. The word "necessity" does not even appear in the statutes for county or municipal eminent domain. *See supra* note 9. The statute for state condemnations does contain the word "necessary." The wording of the statute, when read closely, however, only requires that the use is necessarily a public use. "[I]f the court . . . is further satisfied by competent proof that the contemplated use for which the lands, real estate, premises or other property are sought to be appropriated is really necessary for the public use of the state . . ." WASH. REV. CODE § 8.04.070 (1981) (emphasis added). WASH. REV. CODE § 8.04.070 (1981) sets out the contents of a judicial decree in state condemnations. The statute further supports the conclusion that the legislature's concern was only that the use was necessarily a public use. The statute states: "It is hereby ordered, adjudged, and decreed: 1. That the contemplated use for which the lands, premises, and other property

therefore, that private corporations should not be granted the same discretion as public entities, and that private eminent domain actions⁵⁷ are only justified when the condemnor proves that both the project and the particular property are necessary.

The Washington courts have failed to recognize the crucial differences between the statutes. The Washington Supreme Court began confusing the eminent domain procedural statutes in *State ex rel. Bremerton Bridge Co. v. Superior Court*.⁵⁸ The *Bremerton* court mistakenly applied the requirements of the corporate procedural statute to a state eminent domain proceeding. The court stated that "three prerequisites to an adjudication of public use are recognized: (1) that the use is really a public use; (2) that the public interest requires it; and (3) that the property appropriated is necessary for the purpose."⁵⁹ But the statute governing state condemnations requires only that the use is necessarily a public use.⁶⁰ The *Bremerton* court, by relying on case law construing the statute for corporations,⁶¹ imposed additional requirements on a governmental condemnor.

Washington courts have carelessly applied the requirements of the corporate condemnation statute to governmental condemnations ever since *Bremerton*. The three-pronged analysis now extends to state,⁶² county,⁶³ municipal,⁶⁴ and school district emi-

hereinafter described are sought to be appropriated herein *is really and necessarily a public use* of the state of Washington, . . ." *Id.* (emphasis added).

57. The statute for corporate condemnation includes the procedure for condemning private ways of necessity as well. WASH. REV. CODE § 8.20.070 (1981). See *supra* note 4. Perhaps this is an indication that the legislature determined that there is an element of private use in corporate condemnations which would require a strong showing of necessity in order to be justified.

58. 194 Wash. 7, 76 P.2d 990 (1938).

59. *Id.* at 18, 76 P.2d at 995.

60. See *supra* note 56.

61. The *Bremerton* court cited two earlier cases involving condemnations by private corporations. *State ex rel. Oregon-Washington Ry. & Nav. Co. v. Superior Court*, 155 Wash. 651, 286 P. 33 (1930); *State ex rel. Puget Sound Power & Light Co. v. Superior Court*, 133 Wash. 308, 233 P. 651 (1925).

62. *State ex rel. Sternoff v. Superior Court*, 52 Wash. 2d 282, 290, 325 P.2d 300, 305-06 (1958) (most often cited as authority for three-pronged analysis); *State v. Bank of California*, 5 Wash. App. 861, 864, 491 P.2d 697, 699 (1971).

The *State v. Bank of California* court recognized the confusion in a footnote and said:

There appears to be some confusion in the cases as to whether the leading case of *State ex rel. Sternoff v. Superior Court*, *supra*, was interpreting RCW 8.20.070, relating to condemnation by corporations . . . , or RCW 8.04.070, relating to condemnations by the state. . . . RCW 8.04.070 is the applicable statute in our case.

ment domain actions. The courts, however, are not scrutinizing the actions of public entities more carefully than they are required to by statute.⁶⁵ Although the courts purport to examine the necessity of the particular property, they defer to the condemnor's determination in the absence of fraud.⁶⁶ The additional requirements of the statute governing corporate eminent domain have, therefore, become meaningless. The arbitrary and capricious standard of review, though, is adequate for governmental condemnors' determinations of necessity because the public entity statutes do not contain explicit requirements of necessity.

Deference to the condemnor's determinations of necessity, appropriate in governmental condemnations, should not be carried over to proper applications of the corporate eminent domain statute. Indeed, the differences between the statutes governing public and private eminent domain provide a sound basis for the *Puget* court's holding that a private condemnor must prove public use and necessity. The statute requires that the trial court be satisfied by competent proof that the contemplated use is a public use, that the public interest requires the project, and that the particular property is necessary. The legislature made these judicial questions by including them in the statute. Under the statute, PPL must prove that the transmission of electrical power is a public use,⁶⁷ that the public interest

....
 Even though the 3-pronged test in *State ex rel. Sternoff v. Superior Court, supra*, more closely resembles the language of RCW 8.20.070, we feel the procedural determinations enunciated in that case apply to all authorities empowered to exercise eminent domain. Most cases have cited the three requirements without distinguishing between the statutes.

Id. at 864-65 n.3, 491 P.2d at 699 n.3 (citations omitted).

The court justifies application of the three-part test to governmental condemnations by simply citing cases that have failed to properly distinguish between the statutes. The court seems to have said that there has been confusion, but the confusion is proper because the result is proper. This reasoning only perpetuated the poor statutory construction that contributed to the *Puget* court's ambiguous analysis.

63. *King County v. Theilman*, 59 Wash. 2d 586, 593, 369 P.2d 503, 506 (1962).

64. *City of Des Moines v. Hemenway*, 73 Wash. 2d 130, 138, 437 P.2d 171, 176 (1968).

65. *State ex rel. Tacoma School Dist. No. 10 v. Stojack*, 53 Wash. 2d 55, 330 P.2d 567 (1958).

66. *See supra* note 29 and accompanying text.

67. It is well established that the transmission of electrical power is a public use. *See, e.g.*, *P.U.D. No. 1 v. Washington Water Power Co.*, 43 Wash. 2d 639, 643, 262 P.2d 976, 979 (1953); *State ex rel. Washington Water Power Co. v. Superior Court*, 8 Wash. 2d 122, 133, 111 P.2d 577, 582 (1941).

required PPL to undertake the project, and that the Jauch property in particular was necessary for the project. Instead of basing its decision on "notions of due process," the *Puget* court could have recognized the differences between the eminent domain statutes and grounded its decision in the statute provided by the legislature.

The Washington Court of Appeals, in *In re Puget Sound Power and Light Co.*, recognized that the legislative nature of condemnors' eminent domain decisions is the basis for judicial deference to preliminary determinations of public use and necessity. A legislative decision, however, presumes not only a discretionary policy choice, but a decisionmaking body responsive to the public's concerns. A private corporation's condemnation decisions, therefore, cannot be characterized as legislative. Strict judicial supervision is appropriate because a private corporation is not accountable to the public for its exercises of eminent domain power.

Additionally, deferential judicial review is inappropriate when there is no record compiled for review prior to superior court proceedings. The court, therefore, properly imposed a preponderance of the evidence burden of proof on private corporations in eminent domain proceedings. The court could have avoided the due process issue by grounding its decision in the procedural statute governing corporate condemnation. Admittedly, the court would have had to deal with a history of misinterpretation of the eminent domain statutes. Considering the court's ambiguous due process analysis, however, a statutory approach that finally recognized the differences between the statutes would have been a wiser course.

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