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SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR LANE; JOHN ALLERTON; and KENNETH GOROHOFF,

Appellants,

v.

PORT OF SEATTLE; KING COUNTY; BNSF RAILWAY COMPANY;
GNP RLY, INC.; and CITY OF REDMOND,

Respondents.

APPELLANTS' BRIEF

David F. Jurca, WSBA #2015
Bradley H. Bagshaw, WSBA #11729
Colette M. Kostelec, WSBA #37151
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144

Attorneys for Appellants Arthur Lane,
John Allerton and Kenneth Gorohoff

ORIGINAL

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I. INTRODUCTION

The Port of Seattle is not a general government empowered to do whatever it thinks will be in the best interest of the people. It is a special purpose municipal corporation, with limited powers that must be construed narrowly – “if there is doubt as to whether a power is granted, it must be denied.” *Port of Seattle v. Wash. Utils. & Transp. Comm’n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979) (holding that Port lacks authority to provide airporter service).

This case is about whether the Port of Seattle had authority to purchase the “northern portion” of the Eastside Rail Corridor, a defunct rail line east of Lake Washington that extends into Snohomish County. *See* App. A (Map). The Port’s authority to acquire rail lines (and anything else) comes from the legislature as expressed in statutes setting forth the extent of that authority. Contrary to the trial court’s reasoning, the Port’s authority does not spring forth from the Port’s self-generated “mission statement.”

In 1917, only six years after port districts were authorized by statute, this Court struck down the Port of Seattle’s first attempt to acquire a rail line.¹ At issue then was a belt line railway that encircled the Port’s Elliott Bay docks. Since then, the legislature has passed two statutes

¹ *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 559, 166 P. 780 (1917).

authorizing ports to acquire rail lines. In 1961 the legislature authorized ports to acquire belt line railways; in 1980 the legislature authorized ports to acquire rail lines needed to move freight to and from port facilities.²

In December 2009, the Port paid BNSF Railway Company \$81,449,000 to buy the “northern portion” of the Eastside Rail Corridor.³ Initially, the Port attempted to rely on the 1961 and 1980 statutes as authority for that purchase. But the Corridor did not meet the definition of a belt line railway nor was it to be used to move the Port’s freight, so the purchase was not authorized by either of those statutes. *See* n. 2, *supra*. So then, the Port claimed that the purchase was instead authorized by its self-generated “mission statement,” which says the Port’s mission is to “invest public resources to advance trade and commerce, promote industrial growth, stimulate economic development and create jobs.” CP 1391 (Yoshitani Decl. at ¶ 8). But the legislature never extended such broad and vague authority to port districts; it has limited the Port’s authority to stimulate economic development and create jobs to “programs for job training . . . associated with port tenants, customers, and local economic development related to port activities.” RCW 53.08.245.

² *See* Laws of 1961, ch. 128, § 1, codified as the last sentence of RCW 53.08.020, and Laws of 1980, ch. 110, § 2, codified as RCW 53.08.290.

³ BNSF donated the “southern portion” of the Corridor to the Port. The appellant taxpayers do not challenge the Port’s acceptance of the donation; they challenge only the Port’s purchase of the “northern portion” of the Corridor.

Since the Port lacked authority to acquire the Corridor, the trial court should have held the purchase *ultra vires*, but it did not. Instead, relying in large part on the original 1911 authorizing statute, the same statute that almost 100 years ago this Court held did *not* authorize ports to acquire rail lines, the trial court ruled that the Port had the necessary authority and granted summary judgment to the Port.

The appellants (plaintiffs below) are taxpayers who reside in King County and pay taxes to the Port. They ask this Court to reverse the trial court. This case presents a clear example of a municipal corporation exceeding the limits placed on its authority by the legislature. Beginning in 1917 and on a number of occasions since, this Court has held that the authority granted to port districts must be narrowly construed to conform to the legislature's intent that port districts are authorized to do only those things necessary to accomplish the limited tasks assigned to them.⁴ Over the years, the Port of Seattle has repeatedly overreached that authority, and it has done so again in its acquisition of the Eastside Rail Corridor. Appellants ask this Court to rein in the Port once more, and force it to live within the authority granted it by the legislature.

⁴ The scope of the power granted a port "must be examined critically, carefully, and strictly, and not with a disposition to strain the grant to find the power." *Huggins, supra*, 97 Wash. at 555.

II. ASSIGNMENT OF ERROR

The trial court erred by granting defendants' motions for summary judgment and denying the taxpayers' motion for partial summary judgment, and in so doing holding that the Port had authority to acquire the Eastside Rail Corridor. Three issues pertain to this assignment of error:

1. Is the Port's purchase of the northern portion of the Corridor authorized by RCW 53.08.010, which grants a port the authority to acquire facilities "necessary for its purposes," even though other statutes specifically address a port's authority to acquire rail lines, and even though this Court has previously held that this statute does not authorize the Port's acquisition of a rail line?

2. Is the Port's purchase of the northern portion of the Corridor authorized by RCW 53.08.290, which grants a port the authority to acquire freight rail lines "in connection with the operation of facilities and improvements of the district," even though the Port is not operating the line in connection with the Port's harbor facilities, its airport, or any of its other facilities or improvements?

3. Is the Port's purchase of the northern portion of the Corridor authorized by RCW 53.08.020, which grants a port the authority to acquire a "belt line railway," even though the Corridor is not a belt line but rather a local branch line that encircles nothing?

III. STATEMENT OF THE CASE

A. Rail Lines That Serve the Port of Seattle

Washington's main north-south rail line (the "Mainline") runs along the Puget Sound shoreline north of Seattle and parallels I-5 south of Seattle. *See* App. B (Map); CP 232-33 (Statewide Rail Capacity and System Needs Study). The Mainline connects the Port's harbor facilities to the three east-west interstate rail corridors that cross the Cascades enroute to the Midwest. *Id.*

Rail traffic from the Port reaches the northernmost of those lines by taking the Mainline north to Everett and then travelling east over Stevens Pass. *See* App. B. The Stevens Pass line is the only east-west interstate line connected to the Eastside Rail Corridor, and it is already congested – it operates at 123% of practical capacity. CP 212. Rail traffic from the Port reaches the second east-west line by heading south from the Port on the Mainline to Auburn and then travelling east over Stampede Pass. *See* App. B. The Stampede Pass line operates at 60 percent of practical capacity. CP 213. Rail traffic from the Port reaches the final east-west line by going south on the Mainline to Vancouver, Washington, and then east through the Columbia River Gorge. *See* App. B. The Columbia River Gorge line operates at 70 percent of practical capacity. CP 213. The Port's harbor facilities were well connected to each of these lines prior to

the Port's acquisition of the Corridor, and remain well connected to each of them today. *See* App. B. Collectively, these lines carry all of the Port's interstate rail traffic. *Id.* None of that traffic travels on the Eastside Rail Corridor for any part of its journey.⁵

B. The Eastside Rail Corridor

The Eastside Rail Corridor is a narrow, single-track line that was constructed in the 1880s by the Northern Pacific Railway, a BNSF predecessor. CP 442-43 (Johnson Dep at 35-36); *see* CP 679-83 (Connections PowerPoint at 9-14). BNSF used the Corridor primarily to haul local freight for the few businesses located on the line, and maintained it at a low level appropriate to intermittent local freight use. CP 98 (BNSF's Ans'r to 1st Am. Compl. at ¶ 20).

In January 1997, when mudslides temporarily closed the Mainline between Seattle and Everett, BNSF attempted to use the Corridor as a backup route to the Stevens Pass line, but the experiment was an utter failure – one of only two trains it sent up the line derailed and “dumped some containers down [a] ravine.” CP 504-05 (BNSF's Ans'r to Interr. 8); CP 438 (Johnson Dep at 22). Subsequently, the condition of the line

⁵ Before the Port acquired it, the Eastside Rail Corridor was severed at Wilburton, south of Bellevue, by the removal of an overpass and six-tenths of a mile of rail. CP 126-27 (Port's Ans'r to 1st Am. Complaint at ¶ 43), *see* CP 759-60 (PSRC Report at 18-19). The cut at Wilburton makes it impossible for rail traffic from the Port to reach the interstate rail system via the Eastside Rail Corridor.

deteriorated further, and by 2003, due to the difficult geometry of the Corridor, the poor condition of the tracks, and the suburban environment that by then surrounded much of the line, BNSF was unable to run trains faster than 10 miles per hour on some parts of the line, and it could run them no faster than 25 miles per hour on any part of the line. CP 728-29 (BNSF Memo at 2-3); CP 426-28 (Johnson Dep at 10-12).

At that point, BNSF determined that the Corridor was no longer economically viable for freight use and decided to sell it. CP 98 (BNSF's Ans'r to 1st Am. Compl. at ¶ 21). Before reaching this conclusion, BNSF specifically considered whether it should keep the Corridor as a backup if calamity rendered the Mainline unusable between the Port and Everett.⁶ BNSF concluded that the Corridor was not useful as a backup to the Mainline because of the line's grade, its curvature, its many road crossings, its overall condition and the risk of derailment. CP 730 (BNSF Memo at 4); CP 437-38 (Johnson Dep. at 21-22). The railroad concluded that if the Mainline was shut down between Seattle and Everett, the line across the Cascades at Stampede Pass and the line through the Columbia River Gorge would adequately handle any traffic that needed to be rerouted. CP 437-38 (Johnson Dep. at 21-22). It also concluded that the

⁶ This was one of the unsupported rationales conjured up during the course of this litigation by the Port in an attempt to justify the purchase. CP 508-09 (Port Ans'r to Interr. 2), *see discussion infra* Part IV.D.3.c.

best way to handle future increased freight traffic would be to increase the height of the Stampede Pass tunnel by 18 inches so it could handle double-stacked shipping containers, thereby greatly increasing the capacity of the Stampede Pass line. CP 444 (*id.* at 38).

C. The Puget Sound Regional Council's Study of the Corridor

In early 2006, in response to BNSF's offer to sell the Corridor, the PSRC⁷ formed the "BNSF Corridor Advisory Committee" consisting of representatives of jurisdictions in the vicinity of the Corridor, transportation interests, and potential Corridor users. CP 742 (PSRC Report at 1). The Port's Regional Transportation Manager, Geraldine Poor, was appointed as one of the committee members. *See* CP 738 (PSRC Report at i). Representatives of BNSF, Redmond, WSDOT and others were appointed as well, and King County Councilmember Julia Patterson chaired the committee. *Id.* The committee had a budget of \$600,000 and it retained a consulting firm, HDR Associates, Inc., to do extensive technical work. CP 388 (Creighton Dep. at 25).

The committee considered five different "scenarios" of possible

⁷ The Puget Sound Regional Council is a regional planning agency with specific responsibilities under federal and state law for transportation planning, economic development and growth management. PSRC helps local governments and transportation agencies plan for the future of our region by addressing issues that go beyond the boundaries of any individual city or county. Membership of PSRC includes central Puget Sound counties (King, Pierce, Snohomish and Kitsap), cities and towns, ports, tribes, transit agencies, and the state. *See* PSRC website, <http://www.psrc.org>.

uses for the Corridor, one of which (“Scenario 3 – Trail with Increased Rail”) was using the Corridor as a backup route to move freight between the Port and the interstate rail system.⁸ At the first meeting of the committee in March 2006, Jerome Johnson, who managed the sale of the line for BNSF, told the committee that “the rail line has very challenging geometry and does not lend itself to serving as a viable by-pass.” CP 1083 (Minutes at 2). At the committee’s next meeting two months later, the Manager of WSDOT’s Freight Rail Division informed the committee that the state did not consider the Corridor to be a strategic freight rail corridor. CP 791 (PSRC Report at 50). She explained: “Stampede Pass is a far better example of a strategic corridor . . . [R]aising [the] height of [the] tunnel to allow double-stacked trains . . . would enable a net increase in movement of . . . transcontinental rail traffic.” *Id.*

At the next meeting in September 2006, HDR reported on its study of the potential environmental, traffic and economic impacts of the scenarios under consideration. CP 793-95 (*id.* at 52-54). It concluded that making the Corridor suitable as a backup to the Mainline would be difficult and expensive.⁹

⁸ The others were: 1. Trail-Only; 2. Trail with Current Rail (includes Dinner Train); 4. Trail with Commuter Rail; and 5. Trail with High Capacity Transit. CP 1091-92 (Minutes at 1-2).

⁹ For example, enabling two-way service on the line for the long trains needed to backup the Mainline would require the construction of five 1.5 mile long sidings in locations that

Based on the foregoing, the PSRC Committee voted *unanimously* at the September 2006 meeting to reject the option of using the Corridor to backup the Mainline. CP 1110 (Minutes at 1-8). The final report of the Committee summed up its conclusion as follows:

[O]ne of the purposes of this study was to examine the opportunity to utilize this corridor as a strategic regional or state rail corridor to serve future demands for freight rail traffic and/or to serve as a redundant corridor if unfortunate natural or manmade circumstances rendered the BNSF mainline along Puget Sound (between Seattle and Everett) inoperable for an extended period of time. This study found that this eastside BNSF corridor is *not relevant* to serve such strategic or redundant needs . . .

CP 805 (PSRC Report at 64) (emphasis added).¹⁰ The Committee listed five reasons why the Corridor was not a suitable backup to the Mainline:

- without major investments in reconstruction of the Corridor it was incapable of handling double stacked containers needed to replace Mainline traffic;
- to upgrade the Corridor to serve as a backup would cost in excess of several hundred million dollars, and even then the geometry of the Corridor would not permit trains to run fast enough to replace more than half the Mainline traffic;

did not block any road crossings. CP 776, 793-95 (*id.* at 35, 52-54). This would mean acquiring additional rights of way and performing extensive environmental mitigation. CP 781, 793-95 (*id.* at 40, 52-54). The consultant estimated that improving the Corridor as a backup line “could potentially cost over \$200 million, not including likely needed mitigation, drainage, special rail control signalization, and additional right-of-way costs.” CP 785 (*id.* at 44).

¹⁰ The Advisory Committee’s recommendations were subsequently adopted by the Transportation Policy Board of the PSRC, by its Executive Board and by its General Assembly. CP 1041 (2/8/07 Minutes at 5a-8); CP 1058-59 (2/22/07 Minutes at 7a-14); CP 804 (PSRC Report at 63).

- adding the needed improvements would have “highly negative impacts on the adjacent environment, adjacent local land uses, and the community population along the corridor”;
- the Corridor feeds only the Stevens Pass line which is already at capacity, so investing in the Corridor would not lead to any net expanded freight rail capacity when the Mainline is operable; and
- it would be far preferable for the region to expend scarce dollars improving the Stampede Pass Line, which would increase net rail capacity as well as serve as a redundant line if disaster should befall the Mainline.

Id.

D. Rail Traffic on the Corridor

For purposes of this case, it is useful to consider the Corridor to be divided into three segments: the Renton-to-Woodinville segment; the Woodinville-to-Snohomish segment; and the Redmond Spur, running from Woodinville to a dead end in Redmond. *See* App. A (Map); Ex. G (Map of Spur).¹¹ At one time, it would have been possible for rail traffic to travel from the Port’s facilities on Elliott Bay to Renton, then along the Corridor to Woodinville, Snohomish, and then onto the Stevens Pass line. But by the time the Port acquired the Corridor this was no longer possible. In 2008, six-tenths of a mile of rails and an overpass crossing I-405 were removed from the Corridor south of Bellevue (the “Wilburton cut”) to

¹¹ The Woodinville-to-Snohomish segment plus the Redmond Spur are collectively referred to as “the northern portion” of the Corridor, and the Renton-to-Woodinville segment is referred to as “the southern portion” of the Corridor.

allow expansion of I-405. CP 126-27 (Port's Ans'r to 1st Am. Complaint at ¶ 43); *see* CP 759-60 (PSRC Report at 18-19).

By the time of the Port's acquisition, all freight traffic had ceased on the Corridor except for intermittent local traffic on the Woodinville-to-Snohomish segment, which is mostly in Snohomish County. CP 278, 308 (Grad Sept. Decl. at ¶ 3 & Ex. B); App A. The freight volume shipped on this segment was only 283 rail cars in all of 2010. CP 280 (Grad Sept. Decl. at ¶ 9). This traffic was inbound only, and most of it came in from out-of-state to Snohomish County businesses: only one King County business, Bluelinx Corporation, continued to use the line in any significant way. It received only 61 rail cars in 2010. CP 280, 281-82 (Grad Sept. Decl. at ¶¶ 8, 9, 12). No freight at all moves on the Redmond Spur. CP 278, 308 (Grad Sept. Decl. at ¶ 3 & Ex. B).

E. The Port's Purchase

King County wanted to acquire the Corridor to turn the southern portion of the line, the part from Renton to Woodinville, into what former County Executive Ron Sims called the "granddaddy of all trails." CP 678 (Creighton Dep. at 47-48); CP 393-94 (Connections PowerPoint at 8).

The Port became involved in the transaction because the County could not finance the purchase, but the Port could – it could raise taxes without a vote of the people:

The reason I'm here, the reason the Port is involved in this deal is because the Port has money . . . and King County doesn't. . . . [W]e collect taxes in King County and we have the right to raise the property tax without a vote, up to a pretty high level, and that makes us [the Port] a really attractive Partner in a transaction like this.

CP 499 (Port Commissioner Alec Fiskén).¹²

The Port's plans for the Corridor were the same as the County's, to use it as a trail and potentially for future commuter transit:

This corridor can become a spectacular new trail that our children, and our children's children will enjoy. . . . This corridor could, one day, become part of a high-capacity rail system. When – and if – the citizens of this region decide they want transit here, the corridor will be available. . . .

CP 702 (Port Commissioner Bob Edwards).

The initial plan was for the Port to acquire the Corridor and swap it for the County's Boeing Field, which would give the Port the power to prevent airlines from abandoning Sea-Tac for Boeing Field, as Southwest Airlines had threatened to do the previous year.¹³ See CP 674-85

(Connections PowerPoint at 4, 15). In an e-mail to all Port employees

¹² Former Port Commissioner Lloyd Hara wrote that "King County doesn't have the money to buy the BNSF right of way" but the "Port does have unused taxing authority, and could raise property taxes to finance the deal." CP 639. Port Commissioner John Creighton said: "We view ourselves as bridge financiers, so to speak. We're holding the corridor now, but if Sound Transit determines it can make use of the corridor, we would like to sell it to Sound Transit, get our money out, and invest in our core business." CP 398 (Creighton Dep. at 103).

¹³ At the County's urging, Southwest Airlines had threatened to move from the Port's Sea-Tac Airport to County-owned Boeing Field. Sims said: "We were predatory. We saw a nice little airline over at Sea-Tac and said, hey, we could get you a better deal." CP 484 (10/26/06 *Seattle P-I* article at 2). The Port's motivation for swapping Boeing Field for the Corridor was to prevent similar "mutinies" from occurring in the future. *Id.*

announcing this plan, Port CEO Mic Dinsmore wrote: “The county would acquire BNSF’s little-used rail right-of-way east of Lake Washington for use as a recreational trail.” CP 581 (10/25/06 e-mail). County Executive Sims said that the purchase “would help King County concentrate on a regional parks and trail system like none other in the nation.” CP 511-12 (10/25/06 News Release at 1-2). Confirming the Corridor’s unsuitability for freight mobility, Sims said: “The rail line . . . is no longer viable as a freight corridor. In fact, it only carries 900 cars a year [many fewer by the time the acquisition closed]. By comparison, the main Seattle line carries 500,000.” CP 515 (2/26/07 Sims Speech at 1).

However, by the fall of 2007 the Port had decided it did not want to own Boeing Field – it was a potential environmental headache – so the deal was restructured. *See e.g.* CP 694 (3/15/07 Creighton email); CP 698-700 (Nov. 2007 MOU). The new plan was for the Port to purchase and retain ownership of the Corridor; the County would get an easement from the Port to develop the trail. CP 698-700 (Nov. 2007 MOU).

The Port was concerned that it might be forced to waste its money replacing the rails that had been removed at the “Wilburton cut” if someone later demanded the right to run freight trains in the southern portion of the Corridor. The Port CEO, Tay Yoshitani, explained this concern in an e-mail to the Port Commissioners:

[We] must comply with what is known as the “rail to trail statute.” This statute would compel us to make the corridor available for freight purposes if someone could make a legitimate case for needing it . . . and we would likely have to put freight tracks in. . . . Since rail is not regulated, we think we can set and justify a rate that would make it totally uneconomical for anyone to request freight tracks. . . .

CP 696 (Yoshitani e-mail to Port Commissioners).¹⁴

On May 12, 2008, the Port Commissioners voted to move forward with the transaction. CP 2343-45 (5/12/08 minutes). The resolution was presented by Port General Counsel Craig Watson:

We want to maintain the rail bank status of the corridor which in essence preserves the rail corridor as a rail corridor even though there is no rail service on the southern section, and this is primarily to defend against any competing property rights that may exist along the corridor so that we may have a continuous uninterrupted corridor for purposes of transit and the dual use of recreational trail use.

CP 287 (5/12/08 Transcript at 4).

The parties formalized the transfer in two separate agreements: (1) a purchase and sale agreement, in which the Port agreed to pay BNSF approximately \$107 million to purchase the northern portion of the Corridor (consisting of the Woodinville-to-Snohomish segment and the Redmond Spur), and (2) a donation agreement, in which BNSF agreed to

¹⁴ The “rail to trail statute” referred to by Mr. Yoshitani is the federal rail banking statute, 16 U.S.C. § 1247(d), which allows rail lines to be used for trails without property held via rail easement reverting to the fee holder, provided the trail is subject to reinstatement as a rail line should it ever be needed as such; hence Mr. Yoshitani’s concern that the Port could be forced to reinstall rails for freight use.

donate the Renton-to-Woodinville segment to the Port. CP 586-609 (Purchase & Sale Agmt.); CP 611-32 (Donation Agmt.).

Over the next eighteen months the parties entered into a series of amendments to extend the closing date. In November 2009, the Port negotiated a reduction of the purchase price for the northern portion. *See* CP 708-09 (Yoshitani 11/2/09 to Rose). On December 18, 2009, the acquisition closed. The Port paid BNSF \$81,449,000 for the northern portion (the Woodinville-to-Snohomish segment plus the Redmond Spur), and BNSF donated the southern portion (the Renton-to-Woodinville segment) to the Port for no consideration.¹⁵ BNSF claimed an income tax deduction of \$326,161,990 for its charitable donation of the southern portion.¹⁶ CP 96 (BNSF's Ans'r to 1st Am. Compl. at ¶¶ 2-3).

At closing, the County received an easement to develop its “granddaddy of all trails” in the southern portion of the Corridor, and BNSF gave an easement to short line operator GNP RLY, Inc. to run local

¹⁵ BNSF and the Port both confirm that the Port paid nothing for the southern portion of the Corridor: “BNSF admits that it received no goods, services or other consideration from the Port for its donation of the Southern Portion.” CP 100 (BNSF's Ans'r to 1st Am. Compl. at ¶ 35); *see* CP 125 (Port's Ans'r to 1st Am. Compl. at ¶ 35); *see also* CP 706 (IRS Charitable Contribution Receipt signed by Port CEO Yoshitani affirming that no goods or services were supplied to BNSF in return for its donation of the southern portion of the Corridor).

¹⁶ In 2003, BNSF hoped to sell the part of the Corridor north of Bellevue for \$20 million. CP 729 (BNSF Memo at 3). The County's appraiser valued the whole Corridor, southern and northern portions combined, at \$105 million in November 2006, before the real estate crash of 2008-09. CP 714 (Appraisal at 2).

freight rail service from Woodinville to Snohomish. CP 521-36 (Multipurpose Easement); CP 538-58 (Freight Rail Easement).¹⁷ In the Multipurpose Easement the Port and the County expressed their mutual intent that the southern portion of the Corridor and the Redmond Spur would be used for purposes “other than interstate freight service.” CP 522 (Multipurpose Easement at ¶ 4).

In the year after closing, the Port sold the part of the Redmond Spur that lies within the city limits to the City of Redmond, and it sold Puget Sound Energy certain easements throughout the Corridor.¹⁸ *See* CP 1397-98 (Yoshitani Decl. at ¶ 29). King County, Sound Transit and the City of Kirkland have expressed interest in acquiring other parts of the Corridor, and the Port is eager to sell them as much of the Corridor as it can unload.¹⁹ *Id.*

F. Port Commission Hearings

From time to time beginning in 2006, the Port Commission

¹⁷ After a little more than a year of trying to make a viable business out of carrying freight on the Woodinville-to-Snohomish segment of the Corridor, GNP went bankrupt. The bankruptcy court granted relief from the automatic stay to allow this case to proceed. CP 4788-89 (3/25/11 Order).

¹⁸ The purchase and sale agreements for both of those sales refer to this litigation and provide a procedure for unwinding those transactions if the Port’s acquisition of the Corridor from BNSF is determined to have been *ultra vires*. *See* CP 571 (Redmond Agmt. at ¶ 6.2); and CP 490, 496 (PSE Agmt at ¶ 5.4 & Ex. D thereto).

¹⁹ Kirkland’s interest became public during the pendency of this appeal. *See* http://seattletimes.nwsources.com/html/localnews/20117786443_triplett19m.html (last visited on Apr. 4, 2012) (“Kirkland city manager stumps for trail project along old rail line”), hard copy at App. C.

considered the potential acquisition of the Corridor at Commission meetings; however, prior to the purchase, it never put on its meeting agenda the issue of whether the Port needed the Corridor to move its freight. *See* CP 2169-2325 (Minutes of Port meetings). The Commission only took evidence bearing on freight use once, on December 11, 2007, when Charlie Howard of the PSRC spoke briefly about that agency's extensive study of the uses to which the Corridor could be put. Consistent with the findings of the PSRC, he told the Commission that "[s]outh of Woodinville, the study concluded that continued freight shipment is not feasible." CP 4577 (12/11/07 Transcript at 3).

The appellant taxpayers did not appear before the Commission. However, in January 2008, appellant Arthur Lane asked the State Auditor to investigate whether the Port had statutory authority to enter into this transaction. CP 4810 (1/22/08 Lane/Okeson letter to Sonntag).²⁰ Later that same year Mr. Lane, through counsel, wrote the Attorney General asking him to step in and restrain the Port from acquiring the Corridor. CP 4812-13 (7/9/08 Jurca letter to McKenna). Neither the Auditor nor the Attorney

²⁰ Mr. Lane wrote to the Auditor that:

The proposed acquisition of this rail corridor, regardless of whether it is to be leased to King County for use as a public access trail or is used for a commuter rail line unrelated to port operations and facilities, appears to not provide any lawful benefit to the Port and exceeds its authority under State law.

Id.

General acted on Mr. Lane's request. CP 4815-16 (8/13/08 Hart letter to Jurca).²¹

G. Resolution 3639

The taxpayers filed this lawsuit on July 15, 2010 seeking rescission of the Port's unauthorized purchase of the northern portion of the Corridor (consisting of the Woodinville-to-Snohomish segment and the Redmond Spur). *See* CP 1-33 (Complaint). The taxpayers do not challenge the Port's acceptance of BNSF's gift of the southern portion of the Corridor. Granting relief to the taxpayers will not interfere with the County's construction of a trail from Renton to Woodinville.

On August 3, 2010, about three weeks after the complaint was filed, the Port Commission adopted Resolution 3639. CP 636 (Res. 3639); CP 1 (Complaint at 1 (filed 7/15/10)). It stated:

The Port's acquisition of the portion of the Corridor between the City of Woodinville and the City of Snohomish is reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system.

CP 636 (Res. 3639 at §1). Resolution 3639 was passed in reaction to the

²¹ Although Mr. Lane did not know it at the time, by January 2008 the State Auditor had already questioned the Port's authority to purchase the Corridor. *See* CP 4373 (Grad Supp. Decl. at ¶ 42); CP 4794-95 (Dec. 2007 SAO/Anglin-Port email exchange); CP 4797-98 (12/6/07 Watson email to SAO/Anglin). Selectively quoting RCW 53.08.290, the Port's General Counsel assured the Auditor of the Port's authority; but he did not disclose the clauses in the statute that required a finding of necessity, or that limited a port's authority to purchase rail lines to only those used in connection with other Port facilities. CP 4797-98 (12/6/07 Watson email to SAO/Anglin).

filing of the complaint, which pointed out that the Port had failed to comply with RCW 53.08.290. CP 11-12 (Complaint at ¶¶ 49, 52). That statute permits a port to purchase a rail line outside its jurisdiction *only if* the port commission has found by resolution that the rail line was “reasonably necessary” to link rail facilities within the district to the interstate rail system. RCW 53.08.290. The Woodinville-to-Snohomish segment of the Corridor is almost entirely outside the port district, which is coterminous with King County. CP 1391 (Yoshitani Decl. at ¶ 7); App. A (Map).

The Commission’s hearing on Resolution 3639 took less than eight minutes, and almost a third of that time was spent going through the steps necessary for the Commission to rush through a first reading, a second reading and a final passage of the resolution, all in one meeting. CP 164-65 (Grad Aug. Decl. at ¶ 2). No testimony or documents were introduced in support of the finding of necessity, and only one member of the public spoke (for less than two minutes), primarily to thank the Commissioners for acquiring the Corridor. CP 167-72 (8/3/10 Transcript).

Since no evidence was presented relevant to the finding of necessity, the Commissioners had widely varying knowledge of the facts pertaining to it. Commissioner Rob Holland, new to the Commission in 2010, was unaware that the PSRC had ever even studied the uses to which

the Corridor could be put. CP 414-15 (Holland Dep. at 29-30).²² Commissioner Gael Tarleton joined the Commission in 2008, too late to hear PSRC's Charlie Howard tell the Commission that the PSRC had concluded that continued use of the Corridor south of Woodinville for freight was "not feasible." Although Commissioner Tarleton testified that she had reviewed the PSRC study when she first joined the Commission, she admitted that by the time she voted on Resolution 3639 she had forgotten about the PSRC's conclusion that the southern part of the Corridor was not suitable for freight rail. CP 466-68 (Tarleton Dep. at 31-33).

Commissioner Creighton, on the other hand, the only one of the five Commissioners who served on the Commission from the beginning of the Corridor discussions in 2006 through the after-the-fact adoption of Resolution 3639 in 2010, admitted that the northern portion of the Corridor was not needed to connect the Port's harbor facilities or Sea-Tac Airport to the interstate freight rail system:

Q. . . . Would you agree with me that it is not necessary to acquire the northern portion of the line to connect the harbor facilities of the Port to the interstate rail system?

A. That's correct.

²² On January 1, 2010, after the sale had closed, Rob Holland and Tom Albro joined the Port Commission, replacing Patricia Davis and Lloyd Hara. CP 1127 (Albro Decl. at ¶ 2); CP 412 (Holland Dep. at 6).¶

* * *

Q. [And] it's not necessary to acquire the northern portion of the line to connect to the airport and to the interstate freight system, rail system?

A. Yes.

CP 389-92 (Creighton Dep. at 43-46). Nevertheless, Commissioner Creighton joined his less well-informed colleagues and voted for Resolution 3639. He did so because he misunderstood what the law required: he thought all he had to find was that the Woodinville-to-Snohomish segment linked part of King County (Woodinville in this instance) to the interstate rail system. *See* CP 1140 (Creighton Decl. at ¶ 8).²³ However, properly construed, the statute required a finding that the segment linked *Port facilities* to the interstate rail system. *See* discussion *infra* Part IV.D.1.a.

H. Summary Judgment

The taxpayers sought a declaration that the Port's purchase of the northern portion of the Corridor was *ultra vires* and the return of the purchase price to the Port. CP 93 (1st Am. Complaint at ¶ 17). On cross-motions for summary judgment,²⁴ the trial court granted defendants'

²³ All of the other Commissioners had the same erroneous understanding of the legal requirement that Commissioner Creighton had. CP 1129 (Albro Decl. at ¶8); CP 1133-34 (Bryant Decl. at ¶ 6-7); CP 1149 (Holland Decl. at ¶ 8); CP 2159 (Tarleton Decl. at ¶ 9).

²⁴ The taxpayers moved for partial summary judgment seeking a declaration that the purchase was *ultra vires* and seeking an order rescinding the purchase and returning the purchase price to the Port. CP 173-200 (Taxpayers' motion). All defendants, except GNP,

motions, denied the taxpayers' motion, and dismissed the taxpayers' claims with prejudice. CP 4917-39 (Opinion).²⁵

The trial court rejected the taxpayers' claim that RCW 53.08.290 limited the Port to acquiring rail lines only if they were needed to transport cargo to or from the Port's harbor facilities, its airport, or other Port facilities, holding instead that the Port could acquire any rail line that facilitated the movement of intermodal cargo, regardless of whether the line supported Port operations. CP 4926-27 (Opinion at 10-11).

The trial court excused the failure of the Port Commission to timely pass the resolution of "reasonable necessity" required by RCW 53.08.290, holding that the statute did not require the Commission to make the finding *before* the Port bought the Corridor. CP 4935 (*id.* at 19).

The trial court agreed with the taxpayers that RCW 53.08.290 did not authorize the Port's purchase of the Redmond Spur because the Port did not acquire the Spur for the purpose of transporting cargo. CP 4928 (*id.* at 12). Nevertheless, the court held that the Port was authorized to acquire the Spur by RCW 53.08.010, which allows a port to acquire land

cross-moved for summary judgment seeking dismissal of the action. CP 2099-2132 (Port); CP 2064-98 (County); CP 2326-39 (Redmond); CP 1164-90 (BNSF).

²⁵ The trial court filed its summary judgment ruling on December 9, 2011, and it entered final judgment on December 23, 2011. CP 4937 (Order), CP 4913 (Judgment). The taxpayers filed a timely notice of appeal on January 6, 2012. CP 4908-10 (Notice of Appeal).

within its boundaries that is “necessary for its purposes.” CP 4928-29 (*id.* at 12-13). The court held that buying the Redmond Spur was necessary because it was consistent with the Port’s purposes as expressed in its self-generated “mission statement,” which were to “invest public resources to advance trade and commerce, promote industrial growth, stimulate economic development and create jobs.” CP 4929 (*id.* at 13).

The trial court also held that whether the northern portion of the Corridor was a belt line railway was an issue of fact that did not need to be adjudicated because the court had found the purchase to be authorized by RCW 53.08.010 and .290. CP 4929 (*id.* at 13, n. 5).

IV. ARGUMENT

A. Standard of Review

“The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party.” *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002) (citations omitted).

The trial court’s construction of statutes authorizing the Port to acquire rail lines is a question of law reviewed *de novo*. *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 433, 256 P.3d 295 (2011). Strict construction is required: “[I]f there is doubt as to whether a

power is granted, it must be denied.” *Port of Seattle*, 92 Wn.2d at 794-95. Construction of Resolution 3639 is also a question of law reviewed *de novo*. *Hook v. Lincoln County Noxious Weed Control Bd.*, ___ Wn. App. ___, 269 P.3d 1056, 1061 (2012) (“rules of statutory construction apply equally to ordinances and to state statutes”).²⁶

The adequacy of the Port’s factual finding of necessity is reviewed under the arbitrary and capricious standard. *Westside Hilltop Survival Comm. v. King County*, 96 Wn.2d 171, 176, 634 P.2d 862 (1981).

B. The Port Has Limited Authority to Acquire Rail Lines.

Ports are “place[s] to or from which goods may be shipped.”

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1767 (1993). When first authorized in 1911, port districts were limited to owning and operating harbor facilities for the docking, loading and unloading of ships. Back then, their authority to own rail facilities was limited to “rail . . . transfer and terminal facilities” ancillary to the loading and unloading of those ships. Laws of 1911, ch. 92, § 1. Early on, when the Port of Seattle challenged the limits of this authority by attempting to build a belt line railway around its harbor facilities, this Court held it had no authority to

²⁶ The Port legislates by resolution, rather than by ordinance, so its resolutions are to be reviewed as ordinances. CP 1434 (Port of Seattle Bylaws, Art. VIII, §1) (“All matters, which in the judgment of the Commission, are of a legislative character shall be embodied in the form of resolutions”); *Port of Edmonds v. Northwest Fur Breeders Co-op., Inc.*, 63 Wn. App. 159, 165-66, 816 P.2d 1268 (1991) (resolutions passed by port district are the equivalent of ordinances passed by cities).

do so. *Huggins*, 97 Wash. at 559.

Over the years, ports were granted the additional authority to own and operate airports and industrial parks. *See* RCW 53.04.010 (harbors and airports); RCW 53.25.040 (industrial parks). As the role of ports expanded, so did the specific powers granted them by the legislature – but the legislature has never given ports general governmental powers.

The current statute authorizing ports to acquire facilities is a list of the specific powers a port needs to perform its core functions – operating harbor facilities, airports, and industrial parks. *See* RCW 53.08.020, reproduced at App. D. The only rail facilities authorized by this statute are “rail and motor vehicle transfer and terminal facilities” and “belt line railways.” The Port does not contend that the Corridor is a “transfer and terminal facility.” It does argue that it is a “belt line railway,” but that argument is clearly misplaced. *See* discussion *infra* Part IV.E.

In addition to RCW 53.08.020, a number of specific statutes give a port the authority to perform tasks ancillary to one of its three core functions.²⁷ Only one, RCW 53.08.290, authorizes a port to acquire a rail

²⁷ *See e.g.* RCW 53.08.240 (exercise of powers with other governments, limited to powers “necessary for their purposes”); RCW 53.08.245 (“programs for job training . . . associated with port tenants, customers, and local economic development related to port activities”); RCW 53.08.260 (construction of public park and recreation facilities “necessary to more fully utilize boat landings, harbors, wharves and piers, air, land, and water passenger and transfer terminals, waterways, and other port facilities”); RCW 53.08.330 (construct or repair or upgrade roads that “serve port facilities”).

line that is not a belt line. If the Port has authority to buy the northern portion of the Corridor, it must be found in that statute. However, before turning to an examination of that statute, this brief will discuss the trial court's holding that RCW 53.08.010 authorized the purchase of the Redmond Spur.

C. The Purchase Was Not Authorized by RCW 53.08.010.

The trial court did not find authority for the Port's purchase of the Redmond Spur in RCW 53.08.020 (authorizing acquisition of "belt line railways") or in RCW 53.08.290 (authorizing rail lines needed to move the port's intermodal interstate and foreign freight). Instead, the trial court relied upon RCW 53.08.010, which grants a port district authority to "acquire . . . all lands, property, property rights, leases, or easements necessary for its purposes." The "purposes" for which the trial court found the Redmond Spur "necessary" were those the Port put into its "mission statement": "to invest public resources to advance trade and commerce, promote industrial growth, stimulate industrial development and create jobs." CP 4929 (Opinion at 13).

The trial court's holding that RCW 53.08.010 authorizes the Port's purchase of the Redmond Spur ignores this Court's decision in *Huggins*. The "necessary for its purposes" provision has been part of the law since 1911. *See* Laws of 1911, ch. 92 at § 4. But in 1917 this Court held in

Huggins that the Port had no statutory authority to acquire rail. 97 Wash. at 559. *Huggins* controls: RCW 53.08.010 did not authorize the Port to acquire rail in 1917, and it does not authorize it today.

Since 1917, the legislature has enacted very specific statutes authorizing port ownership of belt line railways and rail lines that serve a port's intermodal traffic. See RCW 53.08.020, .290. These statutes, not RCW 53.08.010, control on the issue of whether a port has authority to purchase a rail line: "[W]here there is a conflict between one statutory provision which deals with a subject in a general way and another provision which deals with the same subject in a specific manner, the latter will prevail." *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 447, 536 P.2d 157 (1975).

The trial court did not specifically explain *how* buying the Redmond Spur furthered the Port's mission to advance trade and commerce. Perhaps it thought that bicyclists riding on the Spur trail would stop to buy ice cream, bottled water, or a new inner tube to repair a flat, and thereby stimulate commerce and create jobs. But clearly the legislature did not intend for ports to have such broad authority. On the contrary, it set strict limits when it granted ports the authority to create jobs and foster economic development, just as it set strict limits for acquiring rail lines. See RCW 53.08.245 (granting ports authority to

operate “programs for job training . . . *associated with port tenants, customers, and local economic development related to port activities*”) (emphasis supplied).

The legislature has not given ports *carte blanche* to buy any rail line that might foster economic development in some vague or tenuous way. A port has authority to acquire a rail line only if the purchase meets the criteria set forth in one of the statutes specifically intended to provide for a port’s acquisition of rail lines.

D. The Purchase Was Not Authorized by RCW 53.08.290.

1. Limitations contained in the statute

- a) RCW 53.08.290 grants a port the authority to acquire rail only if it is needed for the movement of intermodal interstate or foreign cargo to or from port facilities.

In separate sentences, RCW 53.08.290 gives a port district (i) the authority “in connection with the operation of facilities and improvements of the district . . . [to] perform all necessary activities related to the intermodal movement of interstate and foreign cargo” and (ii) the authority to “acquire, construct, purchase, lease, contract for, provide and operate rail services, equipment, and facilities.” *See* App. E.

Reading the second sentence in isolation, the Port argued below that it had unrestricted authority to acquire any rail facilities within the port district for any purpose. But this reading is flatly contradicted by the

enacting legislation. The sentences excerpted above are part of section 2 of chapter 110, Laws of 1980. *See* App. F. In section 1 of chapter 110, the legislature states unambiguously that the two sentences are interrelated:

The purpose of this act is to: (1) Clarify existing law as to the authority of port districts to perform *certain cargo movement activities* and to contract for or otherwise provide facilities for rail service *for the movement of such cargo*.

Laws of 1980, ch.110, § 1 (emphasis added).²⁸ The rail lines authorized by RCW 53.08.290 may be acquired only if they are needed for the “intermodal movement” of “interstate and foreign cargo . . . in connection with the operation of facilities and improvements of the district.”

The trial court agreed with this reading of RCW 53.08.290. CP 4926-28 (Opinion at 10-12).²⁹ However, it then read the requirement that a port use the rail line “in connection with the operation of facilities and improvements of the district” out of the statute: the trial court held that this clause meant only that a port had to operate a line acquired under RCW 53.08.290 “concurrently” with other facilities owned by the port district. CP 4926-27 (*id.* at 10-11). In other words, the trial court held that the “in connection with” language required only a temporal connection,

²⁸ Section 3, the final section of chapter 110, grants port districts certain powers to operate watercraft. The second clause of section 1 states the purpose of section 3 and is not relevant here.

²⁹ The trial court’s conclusion was bolstered by the Port’s “conce[ssion] that RCW 53.08.290 authorizes the acquisition of rail lines for cargo, not commuters.” CP 4926 (Opinion at 10); *see* RP 70-73 (Port counsel’s concession at summary judgment hearing).

which is no connection at all.

The Port operates its Elliott Bay harbor facilities around the clock, so any movement of cargo anywhere else in the world will be done “in connection with” the operation of the Port’s harbor facilities – if all that clause means is that the activities are done “concurrently.” The trial court’s interpretation of the “in connection with” language renders it a nullity. That interpretation should be rejected because courts “should . . . avoid statutory interpretations that would render a portion of the statute superfluous or meaningless.” *Rivas v. Overlake Hosp. Medical Center*, 164 Wn.2d 261, 272, 169 P.3d 753 (2008).

Instead of ignoring the language used by the legislature, the trial court should have given the words their ordinary meaning. *King County v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000) (courts “begin statutory interpretation with the ordinary meaning of the words”). “Connection” means “the act of connecting: a coming into or being put in contact.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 481 (1993). The natural meaning of using a rail line “in connection with” the facilities of a port is that the two are “connected” or “put in contact,” so that they can be used together to move cargo. This reading is also consistent with the statutory scheme of assigning a port district the core function of running a port, and giving it

authority to do other things only to the extent those other things support the core function. *See e.g. Port of Seattle*, 92 Wn.2d at 794-95 (“If there is doubt as to whether a power is granted, it must be denied.”).

- b) RCW 53.08.290 grants a port the authority to acquire rail outside its district only if it finds by resolution enacted before the purchase that the acquisition is reasonably necessary to link port facilities with the interstate rail system.

In 1978 this Court held that a port district was not authorized to own or operate *any* property outside the district because the legislature had organized ports solely for the purpose of making improvements “within the district.” *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767-68, 575 P.2d 713 (1978); *see* RCW 53.04.010. In 1981, the legislature amended RCW 53.08.290 to grant a narrow exception to this prohibition, by authorizing a port to own rail facilities outside the district but *only if* the port commissioners found by resolution that the extraterritorial rail facilities were “reasonably necessary to link the rail . . . facilities within the port district to an interstate railroad system.” Laws of 1981, ch. 47. The “in connection with” language of the statute applies to all rail acquired under authority of the statute, so, pursuant to this amendment, the Port had authority to acquire the Snohomish County portion of the Corridor *only if* it was “reasonably necessary” to link the Port’s Elliott Bay dock facilities or Sea-Tac Airport to the interstate rail system.

The Port purchased the northern portion of the Corridor without making the finding of necessity required by the statute. The trial court excused the Port's failure by construing the statutory language to hold that the Port did not need to make the finding on which its authority was premised *before* making the purchase. CP 4935-36 (Opinion at 19-20). The trial court's reasoning defies common sense.

By requiring the finding to be made by resolution, the legislature was requiring a public process, a process where the issue of the Port's need for the line would be put on the agenda, where evidence for and against it could be introduced, where interested members of the public could weigh in, and where the need for the rail line could be intelligently debated by Commissioners fully informed by the relevant facts.³⁰

This process was subverted here when the money was spent first, and the spending was blessed later. By putting the cart before the horse, the Port deprived the public of its say on the issue of need. The inevitable result of holding the hearing after the sale was that the hearing became an exercise in rubber stamping a purchase already made – eight minutes of sweet nothings that were all form and no substance. The Port

³⁰ The Public Disclosure Act stipulates that an agency must hold a public hearing to adopt a resolution, otherwise the resolution is void. RCW 42.30.060(1). The purpose of this requirement is so the people remain informed and “may retain control over the instruments they have created.” RCW 42.30.010.

Commissioners admitted as much themselves, saying in their declarations that making the finding of necessity was a mere “procedural step,” a dotting of the *i*'s and crossing of the *t*'s. *See* CP 1137 (Bryant Decl. at ¶ 19); CP 1145-46 (Creighton Decl. at ¶ 24); CP 1151 (Holland Decl. at ¶ 17); CP 2163 (Tarleton Decl. at ¶ 22).

For it to have any meaning, the legislative finding of necessity mandated by RCW 53.08.290 must take place *before* the rail line is purchased. The legislature could hardly have intended otherwise.

2. The purchase of the Redmond Spur was not authorized by RCW 53.08.290.

The Port bought the Redmond Spur with the intent of turning part of it over to King County and part of it over to the City of Redmond for use as a trail and for possible future use as a commuter rail corridor.³¹ CP 1397-98 (Yoshitani Decl. at ¶ 28-30); CP 522 (Multipurpose Easement at ¶ 4). The Spur has no utility for freight rail, not even in an emergency. If the Mainline north of the Port were to disappear in a tsunami tomorrow, and the Port elected to spend the hundreds of millions of dollars and the years required to improve the Corridor so that it could carry some portion of the rail traffic that now goes up the Mainline, the Redmond Spur would

³¹ The City of Redmond purchased the part of the Spur within city limits six months after the Port acquired it from BNSF. CP 567-79 (Redmond P&S Agmt). The County planned to buy the rest but it has been unable to finance the purchase, so the Port continues to own part of the Spur.

not carry any of that traffic – it runs only from Redmond to Woodinville.
See App. G (Spur Map).

Since the Redmond Spur was not acquired for the purpose of moving cargo, the trial court correctly held that the Port lacked authority under RCW 53.08.290 to buy it.³²

3. The purchase of the Woodinville-to-Snohomish segment was not authorized by RCW 53.08.290.

Nearly fifty years ago, this Court set out the “principal standards” by which non-judicial findings are to be judged:

By what tests should the court gauge administrative decisions? Here are the principal standards: Did the agency proceed in accordance with and pursuant to constitutional and statutory powers? Were the agency’s motives honest and intended to benefit the public? . . . Did the administrative agency give notice, where notice is due, and hear evidence where hearings are indicated? Did the agency make its decision on facts and evidence? Were its actions in the last analysis rational, that is, based upon a reasonable choice supported by facts and evidence?

Deaconess Hosp. v. Wash. State Highway Comm’n, 66 Wn.2d 378, 405-06, 403 P.2d 54 (1965). The Port’s acquisition of the Woodinville-to-Snohomish segment of the Corridor falls far short of meeting these standards.

³² As discussed above, the trial court erroneously held that the Port had authority to purchase the Redmond Spur under RCW 53.08.010, based on the Port’s self-generated “mission statement.” *See* Part IV.C, *supra*.

- a) The Commission failed to make the required statutory finding of necessity.

The Port's failure to make the finding of necessity upon which its authority is premised renders the purchase of the Woodinville-to-Snohomish segment *ultra vires*. This Court recently examined the circumstances under which a government's failure to follow a statutorily required procedure will render the government's action *ultra vires*. *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010). At issue was the State's sale of surplus property to an abutting landowner. 169 Wn.2d at 120. A second abutting landowner claimed the sale was *ultra vires* because the State had failed to notify him of the pending sale. *Id.* at 121. The relevant statute required notification of all abutting landowners, and an auction if two or more expressed interest. *Id.*

This Court held that a government's failure to follow a required statutory procedure will render its action *ultra vires* unless: (1) the government was "generally authorized" to act, and (2) the State's "procedural failure [did not] contravene the policy underlying the statute." *Id.* at 124. Only if both reasons apply will a government be authorized to act despite its failure to comply with a statutory mandate. *See South Tacoma Way*, 169 Wn.2d at 126 (discussing *Noel v. Cole*, 98 Wn.2d 375, 378-79, 655 P.2d 245 (1982)).

Neither of the conditions exonerating government non-compliance with a statutory mandate is present here. First, the Port is not “generally authorized” to buy rail lines: it may buy rail lines only if it needs them to move interstate and foreign cargo to or from its facilities, and it may buy extraterritorial lines only if it also needs them to link its facilities with the interstate rail system. RCW 53.08.290. Its authority is tightly constrained, with all doubts resolved against the existence of the authority. *Port of Seattle*, 92 Wn.2d at 794-95. Unlike the plenary authority the State has to sell surplus property at issue in *South Tacoma Way*, the Port has no “general authority” to acquire rail lines.

Second, the Port’s failure to make the finding of necessity strikes at the heart of the policy behind the statute – that a port carefully consider its need for rail in a public hearing before the acquisition. RCW 53.08.290. In *South Tacoma Way*, the policy behind the statute, to prevent collusive sales, was not at issue; no party had alleged collusion there.

Noel is an example of a case where the government had general authority to act (Department of Natural Resources making a timber sale) but acted without following the required procedure (by failing to prepare an EIS). 98 Wn.2d at 380. DNR’s failure to follow procedure rendered the timber sale *ultra vires* because the procedural failure went to the policy behind the EIS requirement:

In *Noel*, we emphasized the policy underlying SEPA, that “presently unquantified environmental amenities and values will be given appropriate consideration in decision making.” [citation omitted] The State, in making its sale, not only failed to comply with SEPA’s requirement for an EIS, it also failed to act in accordance with the policy underlying SEPA . . .

South Tacoma Way, 169 Wn.2d at 126. The policy underlying RCW 53.08.290’s requirement that a port find necessity by resolution is to ensure that its need for the Corridor “be given appropriate consideration in decision making.” The failure of the Port Commission to make the required finding of necessity undermined this policy, just as DNR’s failure to prepare an EIS in *Noel* undermined the policy behind SEPA.

The Port’s purchase of the northern portion of the Corridor without complying with the requirement that it make a finding of necessity meant that the purchase was *ultra vires*. Consequently, the contract to purchase was void, and the Port’s after-the-fact resolution did not bring it back to life. *Jones v. City of Centralia*, 157 Wash. 194, 222-23, 289 P. 3 (1930) (contracts entered into by city that were void due to improper procedure were not revived when city later followed the proper procedure); 10A Eugene McQuillin, *Municipal Corporations* § 29:108 (3d ed. 2009) (“Contracts which a municipal corporation is not permitted legally to enter are not subject to ratification . . .”).

- b) Properly construed, Resolution 3639 did not make the finding required by RCW 53.08.290.

It is evident from the Port Commissioners' declarations that even with the tardy enactment of Resolution 3639 they did not find what the law required them to find. Each Commissioner believed that all the legislature required him or her to find was that the Snohomish County part of the line linked some portion of King County with the interstate system. Since it was self-evident that the northern part of the line connected Woodinville with the Stevens Pass line, their decision was easy, or so they thought. CP 1129 (Albro Decl., ¶ 8); CP 1133-34 (Bryant Decl. at ¶ 6-7); CP 1140 (Creighton Decl. at ¶ 8); CP 1149 (Holland Decl. at ¶ 8); CP 2159 (Tarleton Decl. at ¶ 9). Here is how Commissioner John Creighton explained it in his declaration:

It is clear (as can be seen from any map depicting the ERC) that the portion of the ERC within King County is connected to the interstate railroad system by the portion of the ERC located in Snohomish County. The Snohomish County portion is not only "reasonably necessary," but in fact is required to connect the ERC within the Port District to the interstate rail system. . . . When I voted on Resolution 3639, I was well aware of the need to acquire the entire ERC, including the portion within Snohomish County, in order to connect the portion of the ERC within King County to the interstate railway system.

CP 1140 (Creighton Decl. at ¶ 8). In other words, the Commissioners found that the Port needed to purchase the Woodinville-to-Snohomish segment to connect its southern end in Woodinville to interstate rail, even

though there was no connection to the Port's harbor facilities or to Sea-Tac Airport, and even though the freight moving over that segment had nothing to do with the Port.

Resolution 3639 should be construed in accordance with the intention of the Commissioners as revealed in the sworn statements of each and every one of them, and it should then be disregarded because it does not contain the finding that the legislature required the Commission to make. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) ("Our fundamental objective when interpreting a statute is to 'discern and implement the intent of the legislature.'" (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003))).

Had the Commissioners correctly understood the law, they might well have reached a different conclusion. Commissioner Creighton admitted in his deposition that he knew the Corridor was not needed to link the Port's harbor facilities or its airport with the interstate rail system. CP 389-92 (Creighton Dep. at 43-46).

- c) The Corridor was not needed to backup the Mainline.

In an interrogatory answer, the Port claimed it needed the Woodinville-to-Snohomish segment of the Corridor (along with the now-severed southern portion of the Corridor) to backup the Mainline. CP 508-

09 (Port Ans'r to Interr. 2). The essence of the argument is that there might someday be a great calamity on the Mainline north of Seattle – a tsunami or a massive earthquake – and if that were to happen the line from Renton to Snohomish could be pressed into service to transport freight between the Port's harbor facilities and the interstate rail system via Stevens Pass.

This is precisely the use that was studied and rejected by BNSF, WSDOT and the PRSC. They found that improving the line for this purpose would take years, cost hundreds of millions of dollars, cause substantial environmental harm, and ultimately succeed in replacing only half the lost capacity. They concluded that this would be a waste of funds that would be much better spent raising the tunnel roof on the Stampede Pass line, which would satisfy any need to backup the Mainline and would provide new interstate rail capacity.

It is arbitrary and capricious for the Port to reach a conclusion contrary to the conclusion reached by the PSRC, WSDOT and BNSF *without* considering the relevant facts. *See* discussion *infra* Part IV.D.3.d. But there is a more fundamental defect in the Port's argument. Even if the Commissioners had determined after rational deliberation that the Port could potentially use the Corridor as a backup, that potential use is insufficient to establish reasonable necessity.

The legislature did not define the words “reasonably necessary” in RCW 53.08.290.³³ One indication of legislative intent can be found in the law developed for condemning an easement of necessity, law that was well-developed when the legislature enacted RCW 53.08.290 in 1980. “Reasonable necessity” in that context means no “other practical or feasible way out.” *State ex rel. Schleif v. Superior Court of Okanogan County*, 119 Wash. 372, 373, 205 P. 1046 (1922).

The Port’s calamity rationale does not meet this standard. If disaster were to strike the Mainline north of Seattle, the Port would be unable to get its freight to the Stevens Pass line, but it would still have routes open through Stampede Pass and through the Columbia River Gorge; both would remain “practical” or “feasible” ways out. And the Port and BNSF would have multiple ways to replace the lost capacity through Stevens Pass. The first option would be to rebuild the Mainline, which is what BNSF did the last time the Mainline was damaged by mudslides. The second would be to raise the tunnel roof at Stampede Pass – the choice that the PSRC felt would be best after its thorough study, and that BNSF and WSDOT thought would be best, too. The third would be to improve the Corridor, which would involve replacing all the tracks, constructing a

³³ The dictionary definition of “necessary” is “absolutely required,” “essential” or “indispensible.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1510 (1993).

new bridge over I-405, adding five 1.5 mile long sidings, buying new land for the sidings, buying back any parts of the Corridor sold to Sound Transit, King County and Kirkland, and getting permits from Renton, Bellevue, Kirkland and Woodinville to run mile-long freight trains at high speed through the back yards of suburbia.

Given the highly speculative nature of the prospect of ever using the Corridor for that purpose, it is no surprise that the declarations submitted by the Port Commissioners in this litigation show that at best they thought it was only “possible” that the Port might make use of the Corridor to backup the Mainline. For example, Commissioner Creighton said that acquiring the Corridor “provides for the *possibility* of moving freight on an alternative route.” CP 1143 (Creighton Decl. at ¶ 17) (emphasis supplied). Commissioner Albro said: “there are hundreds of *possible* uses for the Corridor . . . providing an alternative if the existing main transportation corridors were to become unavailable [is one] . . .” CP 1130-31 (Albo Decl. at ¶ 15) (emphasis supplied). Similarly, the trial court concluded that using the Corridor to backup the Mainline was at best a “theoretical possibility.” CP 4934 (Opinion at 18).

That something is “theoretically possible” does not make it “reasonably necessary.” The Port had the authority to acquire the Woodinville-to-Snohomish segment only if it was *reasonably necessary* to

link the Port with the interstate rail system. RCW 53.08.290. That grant of authority, especially when construed narrowly, does not authorize the Port to purchase a rail line to guard against every theoretical possibility.

- d) The adoption of Resolution 3639 was arbitrary and capricious.

“A governmental decision is arbitrary and capricious if it is willful and unreasoning action in disregard of facts and circumstances.”

Norquest/RCA-W Bitter Lake P'ship v. City of Seattle, 72 Wn. App. 467, 476, 865 P.2d 18 (1994) (citation omitted); *see also Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179 (1997) (“conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious . . .”). If Resolution 3639 is construed as a finding that the Woodinville-to-Snohomish segment is needed to link the Port with the interstate rail system, it is an arbitrary and capricious finding.

No competent evidence relevant to that issue was presented, either at the Commission meeting when Resolution 3639 was adopted or at any other meeting of the Commission.³⁴ The finding was made without considering the diametrically opposed findings and conclusions of: 1) the

³⁴ Several times in 2008 (two years before Resolution 3639 was adopted), representatives of a group called “Eastside Rail Now” expressed their opinion that the Port should acquire the Corridor for freight redundancy purposes, but they never explained their qualifications for so opining, or why the Corridor was needed for that purpose despite the other rail lines feeding the Port, or how the Corridor could be used for freight in light of the difficulties pointed out by the PSRC study and BNSF. *See* CP 4611-12 (4/8/08 Transcript); CP 4637-41 (5/6/08 Transcript); CP 4664-66 (5/12/08 Transcript).

PSRC Advisory Committee; 2) the PSRC Transportation Policy Board; 3) the PSRC Executive Committee; 4) the PSRC General Assembly; 5) WSDOT; and 6) BNSF. No evidence was presented to the Port Commission at any time that contradicted the well-supported findings and conclusions of those organizations.

Since no evidence was presented, some of the Commissioners were ignorant of the relevant facts: Rob Holland was unaware that the PSRC had ever even studied the Corridor, and by August 2010 Gael Tarleton had forgotten that the study had concluded the Corridor was not a feasible backup to the Mainline. CP 414-15 (Holland Dep. at 29-30); CP 466-68 (Tarleton Dep. at 31-33).

The Court need not look far to see what the legislature intended when it required a port to make a finding of necessity before buying a rail line outside its district: when handed a similar task, the PSRC hired experts, gathered evidence and thoughtfully deliberated in six public meetings over the course of a year, and then decided the Corridor was not even *relevant* as a potential backup for the Mainline. CP 742-40 (PSRC Report at 1-8). The Port's eight-minute hearing pales by comparison. The Port Commission did not make a valid finding on August 3, 2010, because it did not even consider the relevant evidence. The conclusory resolution that resulted was adopted arbitrarily and capriciously. It is a nullity.

- e) The Port's representation that it needs the Corridor to move its freight in an emergency amounts to constructive fraud.

Before this lawsuit was filed, the Port freely admitted that it was acquiring the Corridor as a bicycle trail that might someday be used for commuter rail: "This corridor can become a spectacular new trail that our children, and our children's children will enjoy." CP 702 (Commissioner Bob Edwards). "The county would acquire BNSF's little-used rail right-of-way east of Lake Washington for use as a recreational trail." CP 581 (10/25/06 Port CEO Mic Dinsmore).

Before this lawsuit was filed, Commissioner Bill Bryant told the Muni League that acquiring the Corridor was a "legacy project" of the "Mic Dinsmore - Ron Sims era" and it was "inconsistent with the Port's core mission." CP 652 (Port Memo re: 6/23/09 meeting with Muni League at 4). Commissioner Gael Tarleton said that the Port's ready access to taxpayer funds resulted in "political pressure" to finance the acquisition, even though it was "outside the mission." CP 659 (Summary of 11/18/08 meeting of "Funding Policy and Strategy Expert Panel" at 4).

Before this lawsuit was filed, Commissioner Alec Fiskien said: "the Port is involved in this deal because . . . we have the right to raise the property tax without a vote." CP 499 (3/26/07 remarks to Georgetown Comm. Council). Port Commissioner John Creighton said: "We view

ourselves as bridge financiers, so to speak. We're holding the corridor now, but if Sound Transit determines it can make use of the corridor, we would like to sell it to Sound Transit, get our money out, and invest in our core business." CP 398 (Creighton Dep. at 103).

Before this lawsuit was filed, Commissioner John Creighton and former Commissioners Bob Edwards, Lloyd Hara and Pat Davis all sat on PSRC committees that voted to endorse the PSRC's finding that the Corridor was obsolete for purposes of freight movement. CP 1044 (2/8/07 Minutes at 5a-11); CP 1046 (2/22/07 Minutes at 7a-1); CP 1062-80 (PSRC 2007 Roster). Commissioner Edwards said: "Experts who have looked at the rail line say it's no longer viable as a freight route. That's why BNSF wants to sell the corridor. The railroad knows their business better than anyone." CP 702 (6/13/07 Bob Edwards e-mail to Lloyd Hara).

Before this lawsuit was filed, the Port acknowledged that real freight mobility improvement lay in raising the tunnel roof at Stampede Pass, just as the PSRC had found: "the parties agree that clear-cutting the railroad tunnel at Stampede Pass, Washington, is vital to improving the competitiveness of the region and the Port." CP 562 (Feb. 2007 MOU at 2, ¶2).

Before this lawsuit was filed, the Port was concerned it might be forced to improve the Corridor so it could handle freight rail, and it

proceeded with the acquisition only after it became convinced it could “set and justify a rate that would make it totally uneconomical for anyone to request freight tracks.” CP 696 (Yoshitani to Commissioners).

Only *after* this lawsuit was filed did the Port change its tune and claim that it needed the Corridor to move its freight if calamity struck the Mainline north of the Port. CP 508-09 (Port Ans’r to Interr. 2). And even now, while making that assertion in court, the Port has been putting the lie to it by selling off the Corridor it claims so much to need, piece by piece, to anyone willing to buy. CP 1397-98 (Yoshitani Decl. at ¶ 29 (Redmond, Sound Transit, King County)); App. C (Kirkland).

The Port has not met the standards set out in *Deaconess*:

Were the [Port’s] motives honest . . . Did the [Port] make its decision on facts and evidence? Were its actions in the last analysis rational, that is, based upon a reasonable choice supported by facts and evidence?

66 Wn.2d at 405-06. The Port acquired the Corridor because it had access to taxpayer money that it chose to use to help cash-strapped King County construct its “granddaddy of all trails.” Saying otherwise, just to win a lawsuit, amounts to constructive fraud.

E. The Northern Portion of the Corridor Is Not a “Belt Line Railway.”

The trial court erroneously held that the issue of whether the northern portion of the Corridor was a belt line railway was an issue of fact that could not be resolved on summary judgment. CP 4929 (Opinion

at 13, n. 5). The Court should address this issue now to avoid an unnecessary trial on remand.

In 1961, the legislature gave ports the authority to purchase belt line railways. Laws of 1961, ch. 128, § 1, RCW 53.08.020. The legislature did not define “belt line railway” in the statute, so the words are to be “given their ordinary meaning.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010). The definition of a belt line railway is: “a railroad going wholly or partly around a city for the interchange of traffic between trunk lines or for handling traffic to off-trunkline terminals,” or “a transport line that makes a fairly complete circuit (as around a city).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 202 (1993). Just as a belt circles a waist, a belt line railway circles a place.

One hundred years ago, the *southern* portion of the Corridor connected up with what is now Seattle’s Burke-Gilman Trail to become part of the “Lake Washington Belt Line” that went, consistent with the dictionary definition, *around* Lake Washington. CP 2386, 2422 (Thomsen Decl. at ¶ 5 and Ex. 4); *see also* CP 4455-46 (1907 map).

But neither the Redmond Spur nor the Woodinville-to-Snohomish segment of the Corridor, the only parts of the Corridor at issue here, were ever any part of this or any other belt line railway, and they are certainly

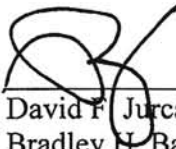

not part of one today. Neither the Spur nor the Woodinville-to-Snohomish segment circle anything, nor does either of them serve as an interchange for trunk lines or terminals. As a matter of law, the northern portion of the Corridor is not a “belt line railway,” and it was error for the trial court to hold that a factual hearing will be necessary to resolve that issue.

V. CONCLUSION

The Port had no authority to buy either the Redmond Spur or the Woodinville-to-Snohomish segment of the Corridor. The Court should reverse the judgment, and direct the trial court on remand to (i) enter partial summary judgment for the taxpayers holding that the Port’s purchase of the northern portion of the Corridor was *ultra vires* and (ii) determine appropriate remedies for the taxpayers, including rescission of the purchase and return of the purchase money to the Port.

Respectfully submitted this 6th day of April, 2012.

HELSELL FETTERMAN LLP

By  
David F. Jurca, WSBA #2015
Bradley H. Bagshaw, WSBA #11729
Colette M. Kostelec, WSBA #37151
Attorneys for Arthur Lane, John Allerton
and Kenneth Gorohoff

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Lane v. Port of Seattle, et al., I did on the date listed below, (1) cause to be filed with this Court Appellants' Statement of Grounds for Direct Review; and (2) to be delivered via electronic mail and U.S. Mail to Timothy Leyh, Randall Thomsen, David Bruce, Duncan Manville, Paul Lawrence, Gregory Wong, Maurice Brimmage, Jr., Lacy Lawrence, Lori Bemis and James Haney, who are counsel of record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: April 6, 2012.


KYNA GONZALEZ

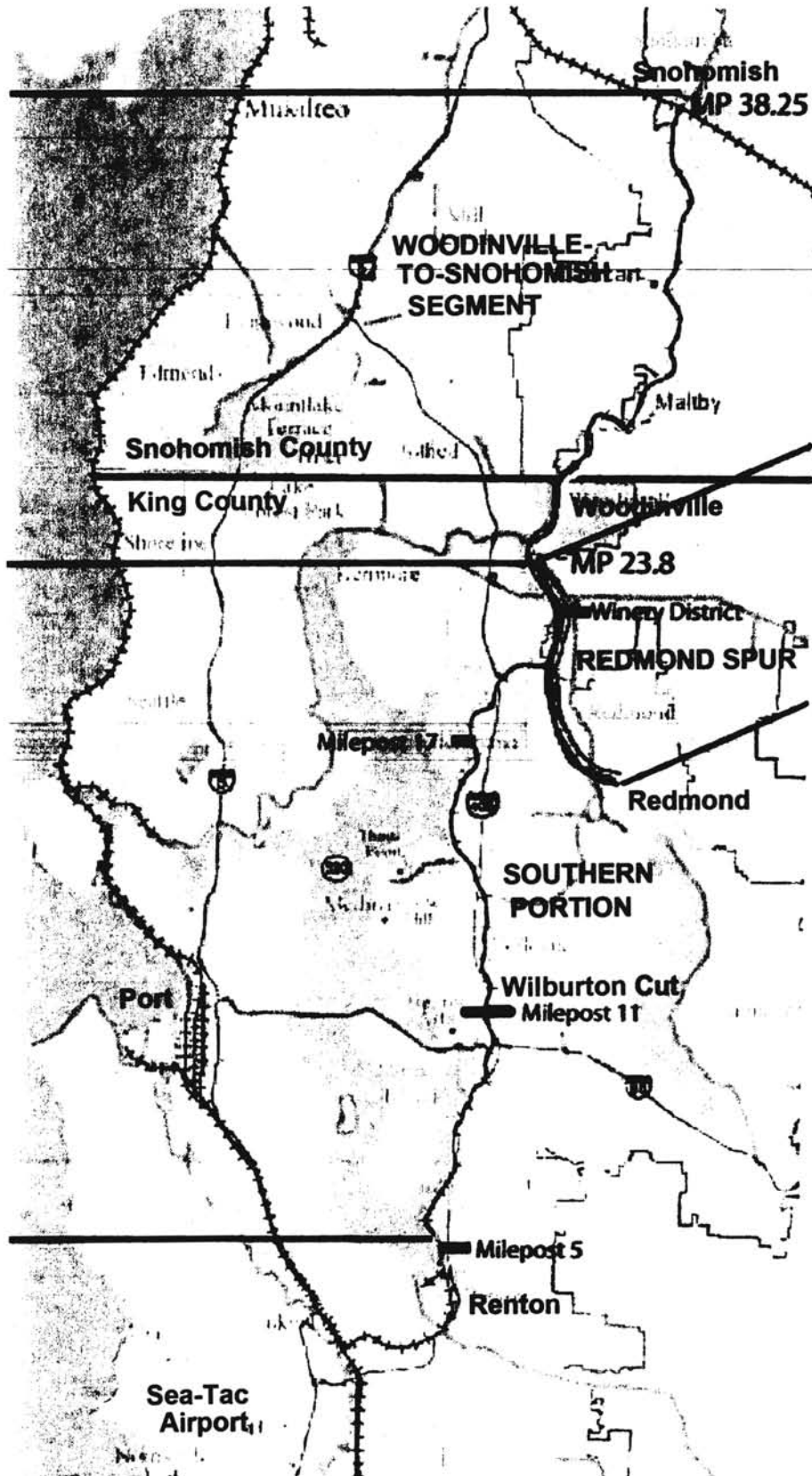
ORIGINAL

Lane v. Port of Seattle, et al.,
Supreme Court Cause No. 86894-8

APPENDICES
TO APPELLANTS' BRIEF

- A. Map of the Eastside Rail Corridor
- B. Map of Rail Lines in Western Washington
- C. *Seattle Times* Article dated March 21, 2012
- D. RCW 53.08.020
- E. RCW 53.08.290
- F. Chapter 110, Laws of 1980
- G. Map of the Redmond Spur

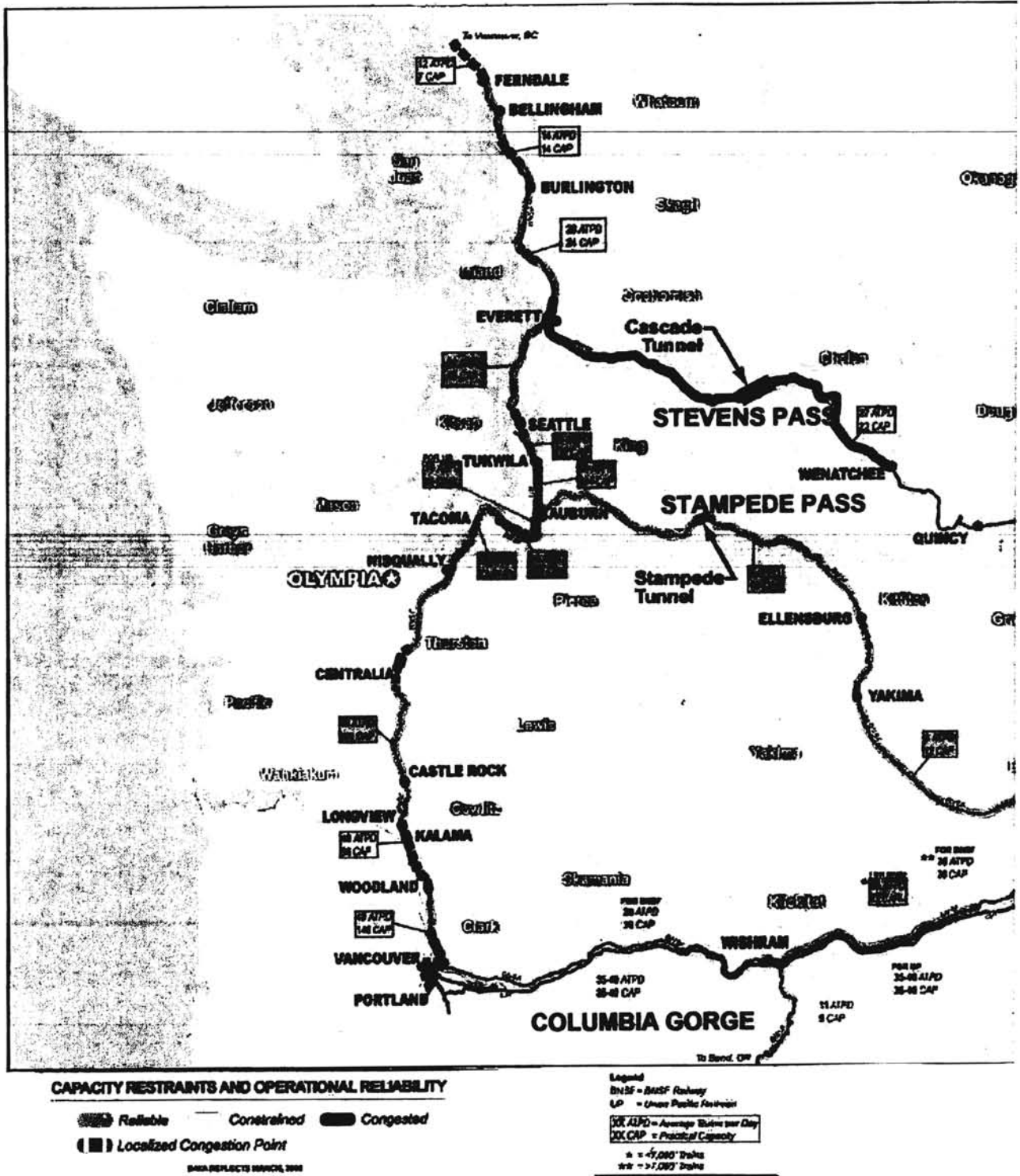
APPENDIX A



Adapted from CP 583 (Dep. Ex. 1)

APPENDIX B

Figure 3. Washington State Rail System: Mainline Capacities, 2006



Adapted from CP 232 (Statewide Rail Capacity and System Needs Study, Figure 3)

The Seattle Times

Winner of Eight Pulitzer Prizes

APPENDIX C

Local News

Originally published March 18, 2012 at 7:38 PM | Page modified March 18, 2012 at 7:38 PM

Kirkland city manager stumps for trail project along old rail line

Kirkland's city manager has been instrumental in bringing about what he hopes will one day be a world-class park, paved trail and transit line in Kirkland.

By Keith Ervin

Seattle Times staff reporter



Standing on a railroad tie on a hillside in Kirkland, City Manager Kurt Triplett sees more than tired old tracks and weeds near a sprawling parking lot.

He sees a 100-foot-wide open space that will someday be a linear park, paved trail and a mass-transit line all rolled into one.

And because the Eastside Rail Corridor connects a key Highway 520 park-and-ride with a Google campus and the city's future economic center, Totem Lake, Triplett also sees it as a tool to grow and attract businesses.

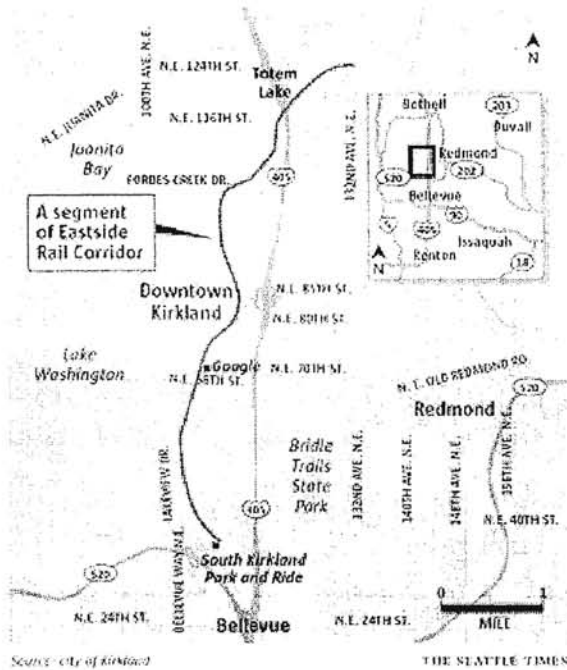
At Triplett's urging, the Kirkland City Council has authorized the purchase of 5 3/4 miles of the corridor in a \$5 million deal scheduled to close next month with the Port of Seattle.

The council is now considering whether to ask voters to fund a hard-gravel trail to serve walkers and mountain bikers.

For Triplett, Kirkland's acquisition of the former BNSF Railway line — "our

New taxes for Kirkland trail?

The Kirkland City Council may ask voters to approve a levy for park projects including a 5.5-mile biking and hiking trail on the Eastside Rail Corridor.



equivalent of the Louisiana Purchase" — is a chance to expand public use of a 42-mile rail line he spent years as a King County official trying to bring into public ownership.

Triplett recently showed off a section of the trail above Carillon Point with a majestic view of Lake Washington and Seattle. He calls it the trail's "front porch" and sees it as one of a number of future public gathering places along the rail line.

"That's our goal here," he said, "to have something that is truly world class, not just a Burke-Gilman Trail."

Triplett began working on a regional deal seven years ago and helped broker the Port's purchase of the corridor, backed by King County's promise to buy most of the southern portion.

The deal envisioned continuing freight operations between Woodinville and Snohomish, and eventually both a trail and light-rail line connecting Redmond, Woodinville, Kirkland, Bellevue and

Renton.

But "eventually" seemed too long to Triplett and a Kirkland park-funding advisory committee, which is urging the City Council to ask voters in November to make a gravel trail the centerpiece of a parks-levy package next fall.

Whether Kirkland funds trail construction through a levy, Triplett believes the city can find a way to begin moving hikers, bikers and commuters along the route, and to encourage trail and transit uses outside Kirkland.

Job interview

When Triplett was interviewed by Kirkland City Council members two years ago for the city manager post, he said, "Whether you guys hire me or not, you should talk to the Port about buying the corridor."

It was a message that resonated with council members, who had talked for years — but come up with no real plan — about someday building a "BNSF Trail" or "Cross-Kirkland Trail."

Triplett's suggestion excited Councilmember Amy Walen, who said she shared the same goal but had been discouraged by more veteran members. "Nobody was energized or had the connections or skills that it takes to make a deal like this happen. Kurt had these skills," she said. ...

"He went to work and made it happen."

Few people knew as much about the politics and economics of the corridor as Triplett, who as chief of staff to then-King County Executive Ron Sims was immersed in a four-year effort to acquire the land from BNSF Railway and build "the granddaddy of trails."

Under one scheme that ultimately died, the Port would have bought the corridor, swapped it for county-owned Boeing Field, and paid for a paved trail from Renton to Snohomish.

After Sims resigned in 2009 to take a job in the Obama administration, Triplett succeeded him and helped engineer the Port's \$81 million purchase of the corridor.

King County agreed to buy most of the land south of Woodinville from the Port, but hasn't yet completed the deal. Redmond has bought a 3 1/2-mile segment

Sung Yang, County Executive Dow Constantine's chief of staff, said the county and the Port are making good progress toward a land sale.

Strategic location

The south end of Kirkland's purchase is adjacent to a planned parking garage at the South Kirkland Park and Ride, where a transit-oriented development will bring 250 multistory homes and shops.

The tracks go right past Google's growing campus south of downtown and end up at Totem Lake, which has been designated as a future high-density urban center.

Google urged the City Council in December to buy the rail corridor, and Triplett believes its interest shows it would also encourage high-tech employers to locate and stay in Kirkland.

He believes it would be used by future University of Washington students, Google and Evergreen Hospital employees and others seeking to avoid traffic congestion and freeway tolls.

Triplett is hopeful major employers will contribute to development of the corridor, but for now the only funding proposals on the table involve tax dollars.

The city is buying the property with \$1 million of surface-water utility reserves and a \$4 million loan from city utilities. The loan could be repaid through deferral of other capital projects, a voter-approved levy or councilmanic bonds.

A 50-member Park Funding Exploratory Committee has proposed installing a \$3 million hard-gravel trail as part of a broader capital levy, but not to include loan repayment in the ballot measure.

Dissenting committee member Santos Contreras called the corridor "a jewel" but said citizens should be asked to pay for its purchase before a trail is built.

Member Bonnie McLeod doesn't think a case has been made for buying the rail corridor. "Do I want a cool trail going through our community? Absolutely," she said. "I was adamant that it remain available for public transit and not just turn into recreation, but why does no other city along the route feel the need to own it? Why do we?"

Keith Ervin: 206-464-2105 or kervin@seattletimes.com

APPENDIX D

RCW 53.08.020

Acquisition and operation of facilities.

A port district may construct, condemn, purchase, acquire, add to, maintain, conduct, and operate sea walls, jetties, piers, wharves, docks, boat landings, and other harbor improvements, warehouses, storehouses, elevators, grain-bins, cold storage plants, terminal icing plants, bunkers, oil tanks, ferries, canals, locks, tidal basins, bridges, subways, tramways, cableways, conveyors, administration buildings, fishing terminals, together with modern appliances and buildings for the economical handling, packaging, storing, and transporting of freight and handling of passenger traffic, rail and motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, and any combination of such transfer and terminal facilities, commercial transportation, transfer, handling, storage and terminal facilities, and improvements relating to industrial and manufacturing activities within the district, and in connection with the operation of the facilities and improvements of the district, it may perform all customary services including the handling, weighing, measuring and reconditioning of all commodities received. A port district may also construct, condemn, purchase, acquire, add to and maintain facilities for the freezing or processing of goods, agricultural products, meats or perishable commodities. A port district may also construct, purchase and operate belt line railways, but shall not acquire the same by condemnation.

[1963 c 147 § 3; 1961 c 126 § 1; 1955 c 65 § 3. Prior: 1953 c 171 § 2; 1943 c 166 § 2, part; 1921 c 183 § 1, part; 1917 c 125 § 1, part; 1913 c 62 § 4, part; 1911 c 92 § 4, part; Rem. Supp. 1943 § 9692, part.]

Notes:

Severability -- 1961 c 126: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected."
[1961 c 126 § 2.]

Essential rail assistance account, distribution of moneys to port districts: RCW 47.76.250.

Source: <http://apps.leg.wa.gov/rcw/default.aspx?cite=53.08.020>

APPENDIX D

APPENDIX E

RCW 53.08.290

Intermodal movement of interstate and foreign cargo — Restrictions.

In addition to the other powers under this chapter, a port district, in connection with the operation of facilities and improvements of the district, may perform all necessary activities related to the intermodal movement of interstate and foreign cargo: PROVIDED, That nothing contained herein shall authorize a port district to engage in the transportation of commodities by motor vehicle for compensation outside the boundaries of the port district. A port district may, by itself or in conjunction with public or private entities, acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities inside or outside the port district: PROVIDED, That such authority may only be exercised outside the boundaries of the port district if such extraterritorial rail services, equipment, or facilities are found, by resolution of the commission of the port district exercising such authority, to be reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system; however, if such extraterritorial rail services, equipment, or facilities are in or are to be located in one or more other port districts, the commission of such other port district or districts must consent by resolution to the proposed plan of the originating port district which consent shall not be unreasonably withheld: PROVIDED FURTHER, That no port district shall engage in the manufacture of rail cars for use off port property.

[1981 c 47 § 1; 1980 c 110 § 2.]

Notes:

Purpose -- 1980 c 110: "The purpose of this act is to:

(1) Clarify existing law as to the authority of port districts to perform certain cargo movement activities and to contract for or otherwise provide facilities for rail service for the movement of such cargo; and

(2) Provide authority for port districts to assist in development of the recreation-tourism industry by acquiring and operating certain watercraft in limited areas." [1980 c 110 § 1.]

Source: <http://apps.leg.wa.gov/rcw/default.aspx?cite=53.08.290#>

APPENDIX E

Any person or persons, firm or corporation, or the agent of any person or persons, firm or corporation, who denies or interferes with admittance to or enjoyment of the public facilities enumerated in RCW 70.84.010, or otherwise interferes with the rights of a totally or partially blind or hearing impaired person as set forth in RCW 70.84.010 shall be guilty of a misdemeanor.

Sec. 8. Section 9, chapter 141, Laws of 1969 and RCW 70.84.080 are each amended to read as follows:

In accordance with the policy set forth in RCW 70.84.010, the blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled shall be employed in the state service, in the service of the political subdivisions of the state, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

Passed the Senate February 26, 1980.

Passed the House February 19, 1980.

Approved by the Governor March 10, 1980.

Filed in Office of Secretary of State March 10, 1980.

CHAPTER 110

[Engrossed Senate Bill No. 3422]

PORT DISTRICTS—INTERMODAL CARGO MOVEMENT, WATERCRAFT OPERATING AUTHORITY

AN ACT Relating to port districts; providing for facilities by port districts for the movement of freight and passengers; adding new sections to chapter 53.08 RCW; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The purpose of this act is to:

- (1) Clarify existing law as to the authority of port districts to perform certain cargo movement activities and to contract for or otherwise provide facilities for rail service for the movement of such cargo; and
- (2) Provide authority for port districts to assist in development of the recreation-tourism industry by acquiring and operating certain watercraft in limited areas.

NEW SECTION. Sec. 2. There is added to chapter 53.08 RCW a new section to read as follows:

In addition to the other powers under this chapter, a port district, in connection with the operation of facilities and improvements of the district, may perform all necessary activities related to the intermodal movement of interstate and foreign cargo: PROVIDED, That nothing contained herein

shall authorize a port district to engage in the transportation of commodities by motor vehicle for compensation outside the boundaries of the port district. A port district may, by itself or in conjunction with public or private entities, acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities: PROVIDED, That no port district shall engage in the manufacture of rail cars for use off port property.

NEW SECTION. Sec. 3. There is added to chapter 53.08 RCW a new section to read as follows:

A port district may acquire, lease, construct, purchase, maintain, and operate passenger carrying vessels on interstate navigable rivers of the state and intrastate waters of adjoining states. Service provided shall be under terms, conditions, and rates to be fixed and approved by the port commission. Operation of such vessels shall be subject to applicable state and federal laws pertaining to such service.

Passed the Senate February 22, 1980.

Passed the House February 18, 1980.

Approved by the Governor March 10, 1980.

Filed in Office of Secretary of State March 10, 1980.

CHAPTER 111

[Senate Bill No. 3474]

LANDOWNERS' LIABILITY—INJURIES TO FIREWOOD CUTTERS

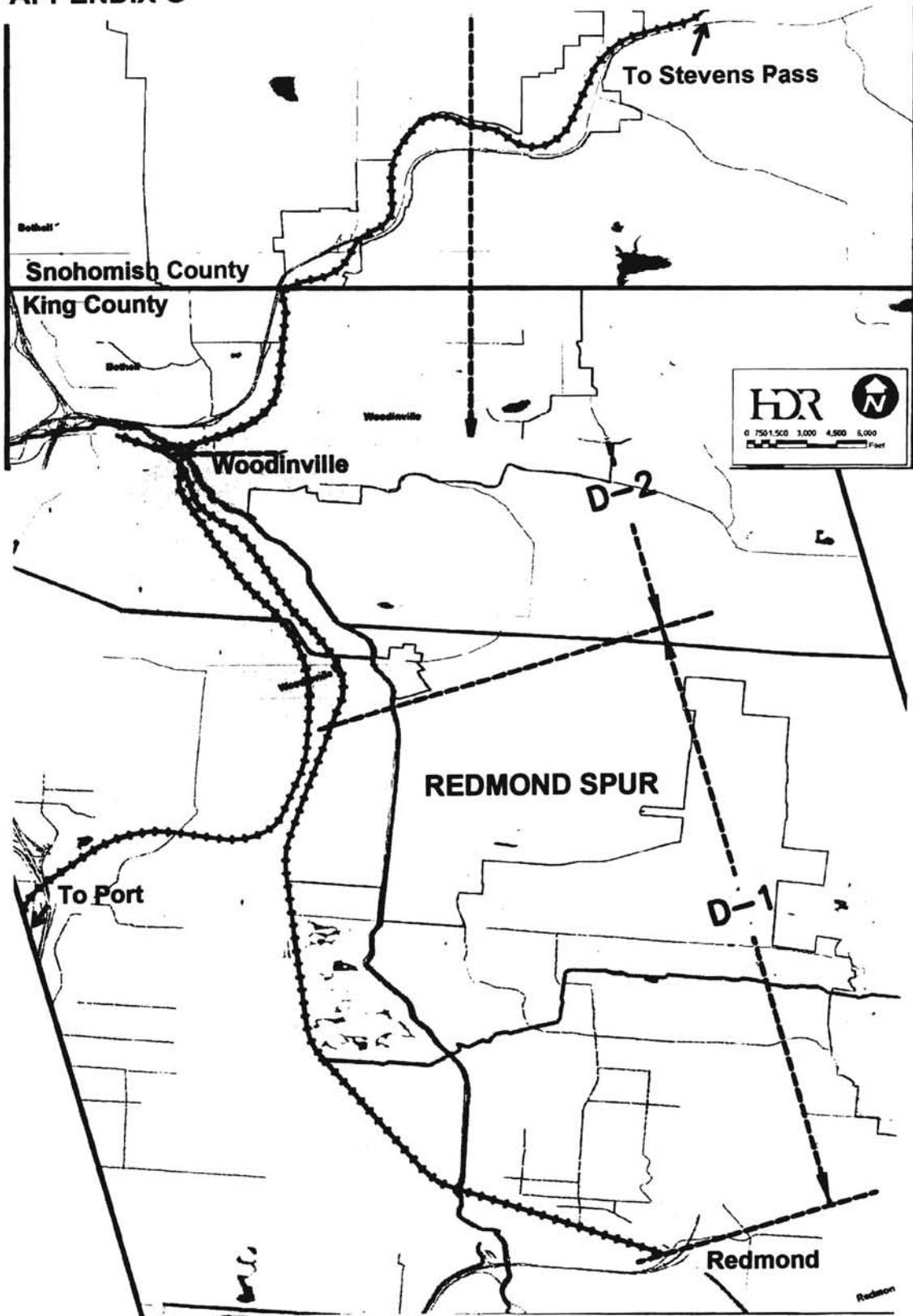
AN ACT Relating to natural resources; and amending section 2, chapter 216, Laws of 1967 as last amended by section 1, chapter 53, Laws of 1979 and RCW 4.24.210.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2, chapter 216, Laws of 1967 as last amended by section 1, chapter 53, Laws of 1979 and RCW 4.24.210 are each amended to read as follows:

Any public or private landowners or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users: PROVIDED, That any public or private landowner, or others in lawful possession and control of the land,

APPENDIX G



Adapted from CP 816-817 (PSRC Final Report at Appendix A, Maps of Segments C and D)