69157-1

No. ~~86094-8~~ 69157-1

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' REPLY BRIEF

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I. INTRODUCTION

The respondents have filed four briefs. The briefs of the Port, the County and Redmond argue that ports are authorized to purchase rail lines wherever located, even if they have nothing to do with port operations or moving cargo to or from port facilities, as a means of promoting economic development. The brief of BNSF argues that rescission would be unfair and is not an appropriate remedy because it is too late to unring the bell. All of those arguments lack merit.

The fact of the matter is that the Port had no real need or desire to own or operate the Eastside Rail Corridor, because the Corridor has nothing to do with the Port's business. The Port acquired the Corridor not in furtherance of the Port's business but to facilitate King County's acquisition of the Corridor for use as a recreational trail. The Port was not authorized to acquire the Corridor for that purpose.

The relief sought by the appellant taxpayers would help everyone achieve their real objectives. The donated southern portion of the Corridor would remain in the Port's hands for King County's use as a trail, and BNSF would continue to enjoy the substantial tax deduction it claims for that donation. Ownership of the northern portion would temporarily revert to BNSF, which does not want to own it, so BNSF would turn around and resell it to the parties who do want it, including Redmond, which would

simply pay BNSF the same $10 million for the portion within city limits that it previously paid to the Port (and which would be refunded to Redmond upon rescission of the Port's unauthorized purchase from BNSF). As a practical matter, Redmond's continued use of the Spur for civic improvements would be unaffected. The Port would get the $81 million purchase price back, to be used for legitimate Port purposes, thereby benefiting all Port taxpayers.

Perhaps most importantly, the public interest would be served by reminding everyone that special purpose governmental entities like the Port must comply with legal restrictions on their powers.

II. ARGUMENT

A. The Purchase Was Not Authorized by RCW 53.08.290.

1. The Corridor is not used to move cargo to or from Port facilities.

The Port and the County argue that RCW 53.08.290 gives the Port unconditional authority to acquire any rail lines anywhere within King County, regardless of whether the rail has anything to do with Port operations or is used for moving freight to or from Port facilities. To make that argument they take the italicized portion (as quoted below) of the second sentence of the statute out of context and look at it in isolation, and they disregard the Legislature's own explanation of the statute's purpose. The taxpayers, in contrast, argue that the second sentence must be read in

context, in conjunction with the first sentence, and in light of the explicit legislative expression of the statute's purpose.

RCW 53.08.290 provides, in relevant part:

> 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: . . . *A port district may . . . 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; . . .

RCW 53.08.290 (underlining and italics added).

The two sentences were enacted together as section 2 of chapter 110, Laws of 1980. In section 1 of chapter 110, the Legislature stated the purpose of the statute:

> 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(1) (emphasis added).[1] The purpose statement

[1] The third section of chapter 110 grants port districts certain powers to operate watercraft. Laws 1980, ch. 110, § 3. The Port argues that the taxpayers' interpretation of the statement of purpose is "nonsensical" because it cannot sensibly be applied to section 3. Port Br. at 29, n. 80. But the Port has failed to read the entire purpose statement. Part

explains that the acquisition of rail facilities is to be "for the movement of such cargo," and the cargo movement referred to is "intermodal movement of interstate and foreign cargo" that is "in connection with the operation of facilities and improvements of the district," as described in section 2 of Chapter 110 (*i.e.,* in RCW 53.08.290). Thus, by its own explicit statement, the Legislature intended that statute to authorize acquisition of rail facilities needed for the intermodal movement of interstate and foreign cargo "in connection with the operation of facilities and improvements of the district."

The Port and the County urge the Court to ignore the Legislature's statement of purpose. They make several arguments to that effect. None has merit.

First, the County argues that "the most grammatical reading" of RCW 53.08.290 is to read the two sentences of the statute as separate and independent grants of authority. County Brief at 31.[2] This overly simplistic approach to statutory construction is not the law today, and it probably never was. The statute must be read as a whole — no one

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(1) of the purpose statement (quoted above and relied on by the taxpayers) deals only with section 2 of the statute, the section that is relevant here. Part (2) of the purpose statement sets forth the legislature's purpose in enacting section 3. It reads: "(2) Provide authority for port districts to assist in development of the recreation-tourism industry by acquiring and operating certain watercraft in limited areas." Laws of 1980, ch.110, § 1(2).

[2] The Port makes the same argument based on the grammar of the statute, but it focuses on the proviso clauses of the two sentences. Port Br. at 31.

sentence should be read in isolation. *See, e.g., Dep't of Ecology v. Campbell & Gwinn,* 146 Wn.2d 1, 11-12, 43 P.2d 4 (2002) (plain meaning is "discerned from all that the Legislature has said in the statute and related statutes").[3] The rule urged by the County is not even supported by the principal case upon which it relies, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). In that case the U.S. Supreme Court rejected "the most natural grammatical reading" of a statute because the context demonstrated that Congress had intended a different meaning. 513 U.S. at 68, 79.

Second, the County argues that the legislative statement of purpose should be disregarded because the second sentence of RCW 53.08.290 (standing alone) is unambiguous. County Br. at 32-33. But "an enacted statement of legislative purpose is included in a plain reading of a statute." *G-P Gypsum Corp. v. Dep't. of Revenue,* 169 Wn.2d 304, 310, 237 P.3d 256 (2010), *citing C.J.C. v. Corp. of Catholic Bishop,* 138 Wn.2d 699,

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[3] This Court quoted with approval 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000) (extracts from R. Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by Prosecuting Entities Other than the United States: The Plain Meaning Rule Revisited,* 33 Hastings L.J. 187 (1981)): "In the past, the plain meaning rule rested on theories of language and meaning, now discredited, which held that words have inherent or fixed meanings. These theories are unnecessary to the plain meaning rule, however, if the rule is interpreted to direct a court to construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legislature on the face of the statute. So defined, the plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context." *Campbell & Gwinn,* 149 Wn.2d at 11 (emphasis added).

712-14, 985 P.2d 262 (1999) (a statute's "plain meaning" should be discerned from all that the Legislature has said in the statute and related statutes, including a statement of purpose as expressed in the legislative enactment). While the statement of purpose may not by itself have operative force, it cannot be ignored. It is part of the enacted law:

> Where the legislature prefaces an enactment with a statement of purpose . . . that declaration, although without operative force in itself, nevertheless serves as an important guide in understanding the intended effect of operative sections. Thus, we look to the prefatory section to explicate the extent of authority intended to be delegated by [the statute] . . .

Hartman v. Wash. State Game Comm'n, 85 Wn.2d 176, 179, 532 P.2d 614 (1975) (citations omitted). In some cases, as here, the "statement of purpose in the act is the primary insight into the intent of the legislature." *Anderson v. O'Brien,* 84 Wn.2d 64, 67, 524 P.2d 390 (1974); *accord, Moore v. Moore,* 20 Wn. App. 909, 913, 583 P.2d 1249 (1978).[4]

Third, both the Port and the County look to skimpy legislative history for support, but it is not appropriate to draw inferences from snippets of legislative history when the meaning of legislation can be ascertained from the express words used by the whole Legislature in the

[4] The County cites *Bunch v. McGraw Residential Ctr.,* 159 Wn. App. 852, 864, 248 P.3d 565 (2011), *rev'd on other grounds,* 174 Wn.2d 425, 275 P.3d 1119 (2012), for the proposition that a court cannot use a legislative statement of intent to contradict the plain language of a statute, but that case is readily distinguishable. Here, there is no contradiction between the legislative statement of purpose and the operative language of the statute. The statement of purpose explains the interaction of the two sentences of RCW 53.08.290; it does not contradict the language used in either of them.

statute and in related statutes. *Campbell & Gwinn, supra,* 146 Wn.2d at 12. In any event, "[l]egislative history, at best, must be viewed with some caution." *City of Seattle v. Williams,* 128 Wn.2d 341, 354 n.14, 908 P.2d 359 (1995).[5] In *Williams,* this Court disregarded the legislative history being offered because it came from the journal of just one chamber, the state senate, as does the history offered by the County here. *See* County Br. at 33. The history offered by the Port is even more suspect: it is the ambiguous statement of a single legislator, the most unreliable history of all. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832 P.2d 1303 (1992) (spurning reliance on the statement of one senator because "one legislator's views do not necessarily mirror that of the Legislature").

The Port relies on a statement of Senator Morrison, who opined that the bill under consideration would allow the Port of Pend Oreille to acquire rail lines. *See* Port Br. at 30, n. 81, *citing* 1980 Senate Journal at 359 (CP 2602). The Port asks this Court to infer from Senator Morrison's statement that the Legislature did not intend to link the powers granted in the two sentences of the statute, but instead intended to permit ports to purchase rail lines even if they do not serve port-owned facilities. The

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[5] The *Williams* court quoted with approval Justice Scalia's scathing attack on the use of legislative history: "Reference to legislative history is the 'last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction.'" *Id. (quoting United States v. Thompson/Center Arms Co.,* 504 U.S. 505, 521, 112 S.Ct. 2101, 119 L.Ed.2d 308 (1992) (Scalia, J. concurring)).

validity of that inference depends on three speculative assumptions: first, that Senator Morrison believed that the Port of Pend Oreille intended to use its line for freight traffic that did not serve port facilities (if, indeed, that is what the Port of Pend Oreille intended at the time); second, that the other legislators in the Senate (who may or may not have heard his statement) as well as those in the House (who certainly did not hear the senator's statement) agreed with his statement; and third, that all those other legislators believed that the Port of Pend Oreille intended to use its line for traffic that did not serve port facilities. There is no reason for this Court to base its interpretation of the statute on so flimsy a foundation.

The legislative history offered by the County is, if anything, even less illuminating. The County argues that the Legislature indicated it was providing two kinds of authority, rather than one, based on its use of the conjunction "and" in the statement of purpose, and from this it contends that the second kind (rail acquisition) must be independent of the first (cargo movement). County Br. at 33. In support of this argument, the County quotes the legislative statement of purpose but it very misleadingly *truncates the quote*, omitting the critical last phrase ("for the movement of such cargo") that shows that the two sentences are indeed interrelated. *Id.* Of course, the Court must read the whole statement of purpose, not just the truncated part the County quotes.

the King County segment of the Corridor to the interstate rail system. Port Br. at 32. The Port in effect argues that it is authorized to acquire the entire Eastside Rail Corridor because, once the southern portion is acquired and becomes a "facility" of the Port, operation of the northern portion is necessarily done "in connection with" operation of the southern portion. Port Br. at 32. This approach would, of course, eliminate the statutory "in connection with" requirement altogether, because no rail line occupies just one spot on the ground. Under the Port's tautology, it could acquire *any* rail line because it could always operate one end of the line "in connection with" the other end.

The County makes a particularly misleading argument when it claims that the Port was authorized to acquire the northern portion of the Corridor because freight still runs on part of it, and because it serves "Port businesses." County Br. at 29. That argument is premised on the County's misleading use of the phrase "Port businesses." The County is referring to businesses located within the geographic boundaries of the Port district (*i.e.,* within King County), but it calls them "Port businesses" in an apparent effort to give the reader the impression that those businesses are Port facilities. But it is undisputed that no portion of the Corridor is used to move cargo to or from the Port itself, *i.e.*, to or from Port facilities. In fact, there is only one business in King County that uses the northern

portion of the Corridor for the movement of cargo. That one business is Bluelinx Corp., a privately-owned lumber distributor in Woodinville that receives about one freight car per week over Stevens Pass and down the northern portion of the Corridor. CP 4363-64 (Grad Supp. Dec. at ¶12). Bluelinx is located within the Port's geographical district, but it is not a "facility or improvement" of the Port district.

2. The after-the-fact adoption of Resolution 3639 was arbitrary and capricious and did not satisfy the statutory requirement.

In 1981, the Legislature amended RCW 53.08.290 to allow a port to acquire a rail line outside the port's geographic district. Laws of 1981, ch. 47. Prior to this amendment, a port had no authority to acquire or operate any rail facilities (or, indeed, any other facilities) outside its district. *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767-68, 575 P.2d 713 (1978) (holding that ports had no power to own or operate facilities outside their districts because the Legislature authorized ports solely for the purpose of performing certain functions "within the district," *see* RCW 58.04.010). The Legislature attached a condition to this new authority — a port could acquire an out-of-district rail line only if the port's commission *found by resolution* that the extraterritorial line was "reasonably necessary" to link the facilities of the port to the interstate rail system. RCW 53.08.290 (proviso).

The obvious intent of this exception to the general rule that a port may not operate outside its district was to allow a port to acquire a rail line if (but only if) there was no other reasonable way to get cargo landed at the port onto the interstate rail system (or vice versa). This is a narrow exception to the general rule that ports may not operate outside their jurisdictions. It is not "general authority" to acquire rail lines wherever they may lie and for whatever purpose.

The Port and the County have several excuses for the Port's failure to comply with the requirement set forth in the proviso clause. First, the Port argues that the Legislature did not mean to require a port to pass its resolution of need *before* it closed the deal. If this were true, it would trivialize the requirement that a port find *by resolution* that the acquisition was needed. Surely if one is allowed to buy something only if it is needed, the assessment of need must precede the purchase.

Second, the Port intimates that it did assess need in advance of the purchase, arguing that its failure to incorporate that assessment in a resolution was an inconsequential "oversight." *See* Port Br. at 11. Its only support for the contention that it made a pre-purchase assessment of need is its claim that it engaged in a "robust public process" that addressed the acquisition of the Corridor "at least 14 different times in public Commission meetings." Port Br. at 40. It infers that the Commissioners

must have discussed the supposed need to acquire the northern portion of the Corridor in order to link Port facilities to interstate rail because they talked about the Corridor so much.

But we do not have to guess at what happened in those meetings — it is part of the record. While the Port Commission did discuss the desirability of the Corridor as a bike trail, the Corridor's possible future use as a commuter rail corridor, and the changing terms of the proposed deal, the Commissioners *never* discussed whether the Port needed the Corridor to move the Port's freight, and *never* put this issue on the agenda for any of the meetings it relies on. CP 2169-2325 (Minutes of Port meetings). Although the Commissioners never discussed the subject, in a 2007 meeting the head of the PSRC told the Commission that the Corridor would make a fine bike trail and might someday be useful for commuter rail, but that it was *not* feasible to use the southern portion of the Corridor to ship freight. CP 4577 (12/11/07 Tr. at 3).[7]

In their opening brief, the taxpayers pointed out that no assessment of freight need was made in any of the 14 commission meetings relied on by respondents. Appellants' Br. at 44. In 156 pages of briefing, the respondents have not cited one *scintilla* of evidence to contradict the

[7] Of course, the Corridor could not be used to move cargo between Port facilities and the interstate rail system without shipping the freight over the southern portion of the Corridor. *See* map submitted as Appendix A to taxpayers' opening brief.

taxpayers' contention. Their silence confirms that there is no such evidence. The Port did not make the finding required by the Legislature in a timely fashion, and contrary to what the Port and the County now claim, the Port Commission did not make such a finding indirectly or impliedly in any of the 14 Commission meetings the Port relies so heavily upon. The Port Commissioners entirely ignored the subject of whether the Corridor was needed in order to link Port facilities with the interstate rail system until *after* the Port made the purchase and *after* it was sued in this case.[8] The post-purchase finding made by Resolution 3639 after this lawsuit was filed was too late; and because it was made without consideration of the relevant evidence, it was arbitrary and capricious.

Third, both the Port and the County misread *South Tacoma Way, LLC v. State,* 169 Wn.2d 118, 233 P.3d 871 (2010). The Port quotes out of context this Court's statement that *ultra vires* acts are those "performed with no legal authority" in situations where "no power to act existed, even when proper procedural requirements are followed." 169 Wn.2d at 123, *see* Port Br. at 38-39. This Court did not hold that a government was free to ignore legislatively mandated procedural requirements; it did not overrule *Jones v. City of Centralia,* 157 Wash. 194, 222-23, 289 P. 3

[8] And then they spent only eight minutes on the issue, passing a pro forma resolution unsupported by any assessment of the underlying facts. CP 167-72.

perform the act in question, the failure to comply with a procedural requirement renders the act *ultra vires* if the failure went to the policy behind the legislative enactment.

The County concedes that the legislative policy underlying the requirement of a commission resolution in the "extraterritorial" proviso in RCW 53.08.290 was to force the commission to go through the public process of assessing need in the open hearings required for passage of a resolution. County Br. at 43. But then the County waives its hands and points vaguely to the 14 commission meetings that generally discussed the acquisition of the Corridor as proof that the public process was undertaken here. *Id.* But the subject of the supposed need for the Corridor to link Port facilities to the interstate rail system was never on the agenda and was never discussed at any of those meetings. The conceded legislative policy of requiring an open discussion of that issue was not met here.

3. The Port's contrived rationale that it needs the Corridor as an emergency backup to move freight amounts to constructive fraud.

The taxpayers argued in their opening brief that the Port's claim in this litigation that it needed the Corridor as an emergency backup to the Puget Sound Mainline amounted to constructive fraud. Appellants' Br. at 46-48. The County urges the Court to disregard this argument on the ground that the taxpayers did not make it below. County Br. at 48. The

County's contention is misleading. The taxpayers alleged in their complaint and argued in the trial court that the Port acted arbitrarily and capriciously in purchasing the northern portion of the Corridor without authority and without considering the evidence as to whether it was needed for any legitimate purpose of the Port. It was the County, who in response to the taxpayers' claim that the Port acted arbitrarily, first used the words "constructive fraud." It argued that the arbitrary and capricious nature of the Port's conduct was irrelevant unless it amounted to constructive fraud. CP 2090. In response to the County's trial court argument, the taxpayers show on this appeal that the Port's contrived claim that it needed the Corridor to back-up the Mainline in the event of an emergency does indeed amount to constructive fraud.

Constructive fraud is not actual fraud; it does not require that the party committing the fraud be morally wrong:

> Conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud is constructive fraud. *Dexter Horton Bldg. Co. v. King County,* 10 Wash.2d 186, 191, 116 P.2d 507 (1941). Breach of a legal or equitable duty, *irrespective of moral guilt,* is "fraudulent because of its tendency to deceive others or violate confidence." BLACK'S LAW DICTIONARY 314 (6th ed. 1990).

Green v. McAllister, 103 Wn. App. 452, 467-68, 14 P.3d 795 (2000) (emphasis in original). Constructively fraudulent conduct has a tendency

to deceive. The Port's contention, made for purposes of this litigation, that it needed the Corridor to back-up the Mainline fits that bill.

Contrary to the County's contention that the taxpayers "cherry-picked" "inadmissible statements from Commissioners" to prove constructive fraud, County Br. at 48, the record below is full to overflowing with admissions from the Commissioners, in their own words, that they were acquiring a bicycle trail and possible commuter corridor, but not a back-up freight line. *See, e.g.,* CP 639 (Hara); CP 652 (Bryant); CP 659 (Tarleton); CP 677-83 (*Connections* PowerPoint); CP 696 (Yoshitani); CP 702 (Edwards). It is the respondents who have had to scour the record to find the one or two e-mails in a record spanning four years and thousands of documents where a Port Commissioner even mentioned the possibility of freight use.

And if more were needed, the "cherries" that top off the taxpayers' evidence can be found in the Commissioners' declarations prepared by their own counsel and in their sworn deposition testimony taken in this lawsuit. In their declarations the Commissioners could not bring themselves to say that use of the Corridor as an emergency backup was more than a mere possibility. CP 1143 (Creighton Decl. at ¶ 17); CP 1130-31 (Albro Decl. at ¶ 15). And in his deposition, Commissioner Creighton conceded that the Corridor was *not* needed to move freight between Port

facilities and the interstate rail system. CP 389-92 (Dep. at 43-46). A "mere possibility" does not meet the "reasonably necessary" standard.

The respondents do not explain or distinguish these damning admissions. Claiming that the Port bought the Corridor because it needed it as a backup to the Mainline has the "tendency to deceive others or violate confidence." It amounts to constructive fraud. *See Green v. McAllister,* 103 Wn. App. at 467-68.

B. The Purchase Was Not Authorized by RCW 53.08.010 and 53.08.245 as a Means of Promoting Economic Development.

The Port contends that the purchase of the northern portion of the Corridor was authorized by RCW 53.08.010, which grants a port district authority to "acquire . . . all lands, property, property rights, leases, or easements necessary for its purposes."[9] Port Br. at 32-35. On appeal the Port does not rely, as the trial court did (*see* CP 4929, tr. court ruling at 13), on the Port's self-generated "mission statement" for the "purposes" needed to invoke this statute. Instead, the Port (as well as the County and Redmond) rely principally on RCW 53.08.245, which states that "[i]t shall be in the public purpose for all port districts to engage in economic development programs."[10]

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[9] Like the trial court, the County and Redmond contend only that the purchase of the Redmond Spur is authorized by this provision. County Br. at 37, Redmond Br. at 9-18.

[10] The statute does not define "economic development programs."

There are three major flaws with respondents' arguments. First, the Legislature has passed very specific statutes that detail when a port may acquire rail; those specific statutes are not superseded by the generic policy expressed in RCW 53.08.245.[11] Second, this Court has already held that the "necessary for its purposes" language of RCW 53.08.010 does not authorize a port to acquire rail facilities that have not been authorized by a more specific statute. *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 559, 166 P. 780 (1917). And third, RCW 53.08.245 declares that economic development programs are a "public purpose," not a "port" purpose. The obvious intent of this legislative declaration was merely to address the requirements of Wash. Const. Art. 7, § 1 (taxes may only be levied for a "public purpose"), and Art. 8, § 8 (ports' use of public funds for industrial development and trade promotion "in such manner as may be prescribed by the legislature" shall be deemed to be for a "public purpose"), and to satisfy the "public purpose" requirement for eminent domain proceedings.

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[11] The respondents point out that it was not until 2010 (after the Port acquired the Corridor) that the Legislature amended RCW 53.08.245 to give ports authority to provide economic development support (in the form of job training and placement programs), if such programs "are related to port activities." That amendment was requested by the Port after the State Auditor issued a finding that the Port did not have authority to provide financial support to "Port Jobs," a private non-profit organization. *See* SAO Performance Audit, Report No. 1004635, dated December 13, 2010 at 21 ("The Port also lacked legal authority to purchase some of the services provided by Port Jobs, although in 2010, the Legislature revised state law to allow some of these activities"), *available at* http://www.sao.wa.gov/auditreports/auditreportfiles/ ar1004635.pdf (last visited 7/30/12). Thus, the Auditor recognized that prior to the 2010 amendments the law required that such economic development support must be related to port activities, and by the 2010 amendments the Legislature confirmed that requirement.

It was not intended to authorize port districts to engage in economic development programs unrelated to legitimate port activities.

The Legislature has authorized a port to acquire rail facilities in three specific situations: (i) when needed to move interstate and foreign intermodal cargo in connection with port facilities (RCW 53.08.290); (ii) for belt line railways (RCW 53.08.020); and (iii) for rail transfer and terminal facilities (RCW 53.08.020). To this list the Port would add a fourth category: allowing a port to acquire rail facilities whenever they are "necessary" to an "economic development program." This cannot have been the intent of the Legislature, because every rail line can be said to be part of an "economic development program." Why would the Legislature specifically authorize "belt line railways" in particular, if every rail line, whether belt line or not, were authorized? Why would the Legislature authorize acquisition of "rail transfer and terminal facilities" in particular, if acquisition of every kind of rail facility were authorized, regardless of whether it was a rail transfer and terminal facility? Why would the Legislature authorize acquisition of rail facilities used for moving interstate and foreign intermodal cargo in connection with port facilities, in particular, if acquisition of all rail lines were authorized, regardless of whether the rail lines are used for movement of port cargo?

This issue is governed by two familiar rules of statutory

interpretation: "A specific statute will supersede a general statute when both apply," *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n,* 123 Wn.2d 621, 630, 869 P.2d 1034 (1994), *citing Gen. Tel. Co. of Northwest, Inc. v. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 464, 706 P.2d 625 (1985); and "*expressio unius est exclusio alterius*." *Adams v. King County,* 164 Wn.2d 640, 650, 192 P.3d 891 (2008) ("This court recognizes that '[o]missions are deemed to be exclusions'" (*quoting In re Det. of Williams,* 147 Wn.2d 476, 491, 55 P.3d 597 (2002) ("Under *expressio unius est exclusio alterius*, . . . to express one thing in a statute implies the exclusion of the other")).

The only sensible way to read these statues is to follow these well established rules and hold that a port may acquire rail facilities only when it is authorized to do so by the statutes specifically dealing with rail facilities. That is how the Court dealt with the issue of the Port's authority to acquire rail 95 years ago in *State ex rel. Huggins v. Bridges*, *supra*, when the statutes governing port districts were newer and simpler. Then, the only rail facilities that a port district was specifically allowed to acquire were rail transfer and terminal facilities, but the relevant statute still contained the "necessary for its purposes" provision that the Port relies on today. *See* Laws of 1911, ch. 92 at § 1 (now RCW 53.04.010) and § 4 (now RCW 53.08.010). Yet, this Court found the Port had no

authority to build a belt line railway around the Port's docks, even though such a line could easily have been held to be "necessary for the Port's purpose" of operating dock facilities.

Similarly, in 1979 this Court was faced with the question of whether the Port had authority to operate an airporter service to and from the Port's Sea-Tac Airport. *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wn.2d 789, 597 P.2d 383 (1979). Although in that case the airporter service had a close connection to airport operations, this Court held that the Port had no authority to operate it because "if there is doubt as to whether a power is granted, it must be denied." *Id.*, 92 Wn.2d at 794-95.

The Port cannot use RCW 53.08.010 and .245 to do an end run around the statutes that specifically govern the Port's authority to acquire rail facilities. If the Port lacks authority to acquire the Corridor under the statutes that deal specifically with acquisition of rail facilities, then it lacks authority to acquire the Corridor under the much more general statute dealing with economic development.

C. The Purchase Was Not Authorized by RCW 47.76.240.

The County argues that the purchase of the Corridor was authorized by RCW 47.76.240(4), which says, in part, "[l]ocal jurisdictions may implement rail service preservation projects in the

absence of state participation." *See* County Br. 39-40.[12] The County's interpretation of this general prescription would improperly overwhelm the closely drawn rules for rail purchases set out in RCW 53.08.020 and .290, just as respondents' arguments based on RCW 53.08.245 would; it should be rejected for the same reason. *See* Part B, above.

The sentence quoted above was one subsection of a fifty-eight-section session law adopted in 1990.[13] "Ports" were not added to RCW 47.76.240 until 1995.[14] The Final Bill Report[15] for the 1995 amendment shows that the Legislature's intent was to address the problem of "lack of rail capacity at port terminals" and "to allow rail assistance projects at port-to-rail facilities."[16]

RCW 47.76.240(4) must be read in harmony with RCW Chapter 53.08 and with the legislative intent as expressed in the Final Bill Report.

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[12] At the summary judgment hearing, the Port's attorney expressly declined to argue that RCW 47.76.240 supplied authority for the Port's acquisition of the Corridor. RP 45.

[13] Laws of 1990, ch. 43. Only Part I of that law dealt with rail freight preservation. The remaining parts addressed high occupancy (passenger) vehicle traffic, systems and funding.

[14] *See* Laws of 1995, ch. 380: "Sec. 5. RCW 47.76.240 and 1993 c 224 s 3 are each amended to read as follows: The state, counties, local communities, ports, railroads, labor, and shippers all benefit from continuation of rail service and should participate in its preservation. . ."

[15] For the Court's convenience, the Final Bill Report for SB 5655 (1995) is provided as Appendix A.

[16] The 1995 law also amended RCW 47.76.220 to provide that the state's rail plan should "identify and evaluate port-to-rail access and congestion issues" and amended RCW 47.76.250 to include "constructing railroad improvements to mitigate port access" to the list of projects which could be funded from the state's essential rail assistance account.

The statute allows ports to "implement rail service preservation projects" only for rail they have properly acquired under RCW 53.08, *i.e.*, only for belt line railways, rail transfer or terminal facilities that serve (or once served) port facilities and for rail used in connection with port facilities for the transportation of foreign or interstate intermodal traffic (or formerly so used). It does not allow ports to acquire an abandoned rail line that never served the port (the Redmond Spur) and it certainly does not allow the Port to acquire a little-used but still active rail line that has nothing to do with the Port (the Woodinville-to-Snohomish segment) on the theory that it might abandon that line one day.

D. The Northern Portion of the Corridor Is Not a "Belt Line Railway," and Its Purchase Was Not Authorized by RCW 53.08.020.

Relying principally on the declaration of Thomas Payne, the CEO of bankrupt respondent GNP RLY, Inc., the Port argues that the northern portion of the Corridor is a belt line railway. But what the Legislature meant by a "belt line railway" in RCW 53.08.020 is not an issue controlled by the biased opinion of one of the litigants in a lawsuit. The meaning of a term used by the Legislature in a statute is controlled by the plain meaning of the words used, and "[i]n the absence of a statutory definition, [this Court] will give the term its plain and ordinary meaning ascertained from a standard dictionary." *State v. Sullivan,* 143 Wn.2d 162,

175, 19 P.3d 1012 (2001) (citations omitted).

The dictionary 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). Mr. Payne does not take serious issue with this definition. On the contrary, in his declaration, he states: "the phrase [belt line railway] generally refers to a railroad of relatively modest length, *typically surrounding all or part of an urban area*, and used to access various terminals, industries, and warehouses along the line." CP 1160 (Payne Decl. at ¶ 24) (emphasis supplied).

But without further explanation, Mr. Payne gives us his personal opinion, which the Port relies upon here: "I consider and have always viewed the ERC as a belt line railway." CP 1160 (*id.* at ¶ 25). Mr. Payne does not explain why he views the Corridor to be a belt line even though it does not (to use his words) "surround all or part of an urban area," other than to state that the southern portion of the Corridor was once part of the Lake Washington Belt Line that circled the Lake. *Id.* But this bit of history is not relevant here because neither the Redmond Spur nor the Woodinville-to-Snohomish segment of the Corridor was ever part of the Lake Washington Belt Line; only the southern portion of the Corridor was

once part of that belt line. CP 2386, 2422 (Thomsen Decl. at ¶ 5 and Ex. 4); *see also* CP 4455-46 (1907 map).

Just as the Port would like to read the words "in connection with" out of RCW 53.08.290, so that it can acquire rail lines that do not serve Port facilities, it also would like to read the word "belt" out of the language of RCW 53.08.020 that authorizes the Port to acquire belt line railways. But the Port must live with the language the Legislature has given it. A belt line is like a belt; it circles a place, and the meaning of the words used by the Legislature is not altered by Thomas Payne's personal opinion. The Woodinville-to-Snohomish segment and the Redmond Spur circle nothing. They are not belt lines.

E. The Appellants Are Not Seeking Tax Refunds, and the Port's Argument Regarding Failure to Pay Taxes Under Protest Is Moot.

The Port, citing RCW 84.68.020, argues that the appellants do not have standing to seek a refund of taxes assessed by the Port, which were used to purchase the northern portion of the Corridor, because the appellants did not pay their property taxes under protest. Port Br. at 48-49. The Port neglects to mention that the appellant taxpayers conceded below that they would not seek individual tax refunds, thus making this argument moot. CP 4318-19. Instead, the appellants are seeking declaratory relief and rescission of the unauthorized purchase, including return of the

purchase money to the Port from BNSF. The appellants and all other Port taxpayers will benefit as a result of the refunded money being available for legitimate Port purposes, since it will be unnecessary for the Port to generate that same revenue through future assessment of taxes. Since the appellants are not seeking individual tax refunds, their failure to pay taxes to the Port under protest is irrelevant, and the Port's argument on this point is moot.[17]

F. Rescission Is an Appropriate Remedy.

The trial court granted defendants summary judgment and thus never reached the issue of remedy. The only question now before the Court on this appeal is whether the Port was authorized to purchase the northern portion of the Corridor. If this Court reverses on that question, it should remand to the trial court to consider the appropriate remedy, including rescission.

1. Rescission is not an "all-or-nothing" remedy.

BNSF cites *Yount v. Indianola Beach Estates, Inc.*, 63 Wn.2d 519,

[17] Although they are not seeking individual tax refunds, the taxpayers clearly have standing to seek declaratory relief and rescission. *See, e.g., Boyles v. Whatcom County Superior Court,* 103 Wn.2d 610, 614, 694 P.2d 27 (1985) ("The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government"); *Barnett v. Lincoln,* 162 Wash. 613, 623, 299 P. 392 (1931) (every taxpayer is presumed to be injured when municipal corporation enters into illegal or ultra vires contract); *Mincks* v. *City of Everett,* 4 Wn. App. 68, 73, 480 P.2d 230 (1971) (same); *Jones v. City of Centralia,* 157 Wash. 194, 203-04, 289 P. 3 (1930) (taxpayers have standing to sue to prevent unlawful diversion of money in municipal fund).

387 P.2d 975 (1964), for the proposition that sometimes rescission of a contract is impossible because it "is like trying to unring a bell." Of course, it is always impossible to completely unring a bell. As this Court noted in *Yount*, rescission is an equitable remedy in which the parties are placed *in status quo* insofar as it is practical to do so. "Rescission contemplates full restoration of the parties to their position before the contract has been made. But the important qualification in the foregoing rule – *so far as practicable or possible* – must be noted." *Yount,* 63 Wn.2d at 525 (emphasis in original).[18] Although this Court affirmed the trial court's decision not to grant rescission in *Yount*, that case did not involve an *ultra vires* act by a municipal corporation that was absolutely void *ab initio,*[19] and the Court approved an alternative remedy which adequately protected rights of innocent third-parties. Unwinding an illegal transaction may be difficult, but that simply requires the Court to use its broad equitable powers to craft the most feasible remedy, keeping foremost in mind that allowing an *ultra vires* governmental act to stand would be

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[18] Despite the complexity of the real estate transactions in *Yount*, the Court affirmed the trial court's alternative equitable remedies, one of which was for the original buyers to reimburse the subsequent purchaser for its investment with reconveyance of all of the properties to the original buyers, which the Court deemed "a different but equally equitable remedy – a remedy consonant with its equitable powers to do justice to all parties." 63 Wn.2d at 525-26.

[19] None of the cases cited by BNSF involved an *ultra vires* act of a government. An *ultra vires* act of a government is void *ab initio. Chehalis Cnty. v. Hutcheson*, 21 Wash. 82, 85, 57 P. 341 (1899); *see also Osborne, Tremper & Co. v. King Cnty.*,76 Wash. 277, 291, 136 P. 138 (1913), and *State v. Town of Newport*, 70 Wash. 286, 294, 126 P. 637 (1912).

injurious to the public interest:

> The municipal corporation cannot in any manner bind itself by any contract which is beyond the scope of its powers, or foreign to the purposes for which it was created, or which is forbidden by law, or against public policy; all persons contracting with the corporation are deemed to know its limitations in these respects. A contrary doctrine would be fraught with danger. *It is better that the innocent contracting party suffer from the municipality's mistakes than to adopt rules which, through improper combination or collusion, could be detrimental or injurious to the public.*

10 Eugene McQuillin, *Municipal Corporations* §29:4 (3d ed. 2009 rev. vol.) at 322-24 (emphasis added). That has been the law in Washington for almost 120 years. "In common with universal authority, [this court has held] that, wherever a person enters into a contract with an agent of a municipal corporation, he must, *at his peril*, ascertain the extent of such agent's authority, and, if he fails to do so, *he alone must suffer the consequences*." *State v. City of Pullman*, 23 Wash. 583, 591, 63 P. 265 (1900) (emphasis added), *citing Arnott v. City of Spokane*, 6 Wash. 442, 33 P. 1063 (1893); *see also Bennett v. Grays Harbor Cnty.*, 15 Wn.2d 331, 343-44, 130 P.2d 1041 (1942), and cases cited in n.19, *supra*.

None of the parties here would be seriously disadvantaged by rescission of the Port's purchase of the northern portion of the Corridor. However, to the extent anyone must be left in a less-than-ideal position after rescission, it should be the parties who knowingly entered into an

illegal contract with the Port, not the Port's taxpayers (and not the public interest in requiring governments to obey the rule of law). Rescission of the purchase and sale agreement for the northern portion would be neither inordinately difficult nor inequitable, nor would it require rescission of the Donation Agreement for the southern portion of the Corridor.

2. The Port's purchase of the northern portion of the Corridor was a separate transaction from BNSF's donation of the southern portion.

BNSF repeatedly states that the transfers of the northern and southern portions of the Corridor were part of a "single" transaction and that the Court cannot rescind one without the other. That is contradicted by the fact that the parties purposely executed the transfers through two different contracts which expressly provided that the transactions were separate.[20] It is true that the transactions closed on the same day and that the obligation to close on one was conditioned upon closing of the other,[21] and that many of the provisions in the two agreements are parallel, but that only begs the question as to why the parties chose to use two separate agreements for the two transactions. The answer is obvious: in order to

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[20] *See* Purchase and Sale Agreement, Recital F, noting that the southern portion is the subject of "a separate Donation Agreement between the Port, County and BNSF, and is not the subject of this Agreement" (CP 586 (PSA at 1)) (emphasis added); Donation Agreement, Recital F, noting that the northern portion is the subject of "a separate Purchase and Sale Agreement between the Port, County and BNSF, and is not the subject of this Agreement"(CP 611 (Donation Agreement at 1)) (emphasis added).

[21] CP 599 and 624 (§ 8.2(b) of each agreement).

support its $326 million tax deduction for the donation, BNSF had to demonstrate that the transfer of the southern portion was made for no consideration. BNSF cannot keep the benefit of that donation and now argue that it really transferred the entire Corridor for $81 million. Likewise, the Port's certification to the Internal Revenue Service that it paid nothing for the southern portion is inconsistent with an argument that it always knew it was paying $81 million for the entire Corridor.[22] The Port and BNSF should be estopped from now claiming that their representations to the IRS and the STB were false and that the two separate transactions were really one.

Even if the parties themselves had not expressly provided in the agreements that they were two separate contracts, the same conclusion would be reached under well-settled law:

> when the subject of a contract of sale consists of several different articles, and there is an apportionment of the purchase price to each, the contract is severable. But when two or more articles are sold together for a gross sum, or the purchase price is not apportioned to the different articles, the contract is entire.

Bariel v. Tuinstra, 45 Wn.2d 513, 521, 276 P.2d 569 (1954) (quoting *Darst v. Meduna*, 15 Wn.2d 293, 296, 130 P.2d 361 (1942)). Here, the

[22] BNSF and the Port also formally represented to the Surface Transportation Board that the Port's purchase of the northern portion and BNSF's donation of the southern portion were entirely separate transactions. The separate STB proceedings are summarized in the table at CP 4336 (copy attached hereto as Appendix B).

Port and BNSF apportioned the purchase price between the northern portion ($81.5 million) and southern portion ($0). The mere fact that the two transactions closed together on the same day does not make them a single transaction, where the parties have expressly provided that they were separate transactions for separate prices in separate contracts.[23]

Nor does the fact that each agreement provided that the parties' *obligation* to proceed with the closing was conditioned on the simultaneous closing of the other transaction change this result. If prior to closing BNSF had acknowledged the Port's lack of authority to purchase the northern portion of the Corridor, BNSF could have chosen to proceed with the donation of the southern portion, even if it was not *obligated* to do so. BNSF might well have done so in order to claim its $326 million tax deduction for the donation of the southern portion.

Notwithstanding the arguments it made in its brief, BNSF has carefully avoided saying that it wants the southern portion back if the sale of the northern portion is rescinded. BNSF has *not* filed a contingent

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[23] As further evidence that the $81.5 million paid by the Port to BNSF was only for the northern portion and not for the entire Corridor, under the "seventh amendment" to the northern purchase agreement, which reduced the purchase price from $107 million to $81.5 million, the Port agreed to split with BNSF any profit, up to $25 million, from a subsequent sale of the northern portion, in order to allow BNSF to recoup some of the reduction in the purchase price. CP 3624 (Seventh Amendment to PSA at p. 2, § 6). If the purchase price had been for the entire Corridor rather than just the northern portion, there is no logical reason why a subsequent sale by the Port of the southern portion should not have also triggered a splitting of those sale proceeds – yet there is no such profit-splitting provision for the southern portion.

cross-claim asking for the southern portion back in the event the Port's purchase of the northern portion is rescinded. *See* CP 95-108 (BNSF Answer). BNSF's formal pleading posture in this litigation indicates that it considers its donation of the southern portion (and the substantial tax deduction resulting from that donation) to be a done deal no matter what action is taken on the taxpayers' rescission claim as to the northern portion. Since BNSF has not sought to rescind the donation of the southern portion if the Port's purchase of the northern portion is rescinded, its argument that neither transaction can be rescinded because the two transactions are intertwined is disingenuous.

3. Rescinding the purchase of the northern portion would be neither difficult nor inequitable.

BNSF contends that rescission would be inequitable because it cannot be restored to its pre-transaction position. None of the arguments made in support of that contention are persuasive.

First, BNSF now says it would be unfair if it were required to regain ownership of the northern portion of the Corridor without being able to run freight on the line due to its transfer of a freight easement to GNP. But that is exactly the pre-transfer status quo. In the Purchase and Sale Agreement between BNSF and the Port, BNSF reserved a freight

easement on the northern portion.[24] At closing, BNSF transferred its freight easement directly to GNP.[25] The Port was not a party to that transfer, and BNSF cannot be heard to complain now that it would be unfair to make it live up to a situation of its own making. In any event, BNSF has already made it abundantly clear that it no longer wants to run freight on the northern portion or any other portion of the Corridor, which is why it wanted to abandon the line in the first place.[26]

Second, although GNP entered into an Operations and Maintenance Agreement with the Port, the Port has no obligations under that Agreement; the obligations are all on the part of GNP, and it is a simple matter to substitute BNSF for the Port as the beneficiary of those obligations. CP 2677-2705 (O&M Agreement). Since it would be unnecessary to rescind the Freight Easement or the O&M Agreement, STB jurisdiction would not be implicated in rescission of the Purchase and Sale Agreement.[27]

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[24] *See* CP 586, 588 (PSA at Recital B and definition of Reserved Freight Easement); CP 2527-39 (Quit Claim Deed, Woodinville North Freight Portion).

[25] CP 2642-70 (Freight Easement Sale Agreement and attached Legal Description and form of Quit Claim Deed).

[26] BNSF questions plaintiffs' motive for naming GNP in this lawsuit, but that was simply a jurisdictional requirement under RCW 7.24.010.

[27] The STB expressly noted that although the situation created by the parties here was different from the "more typical" case where a railroad retains the common carrier rights and obligations and transfers the assets, "the principle is the same: as long as the transferor retains, or the third-party transferee obtains, the common carrier rights and obligations along with sufficient contractual rights to meet those obligations, the acquisition of the right-of-way is not a transaction requiring Board authorization." CP

Third, although rescission would require BNSF to reimburse the Port for the $81 million paid for the northern portion, BNSF itself admits that it has a choice as to how to address the implications of its thirteen like-kind §1031 exchanges. The return of the northern portion of the Corridor to BNSF would ordinarily constitute a transfer such that gain or loss would be recognized. I.R.C. § 1001(a). However, I.R.C. § 1038(a) governs a similar situation where property that was transferred in a tax deferred transaction is later reacquired due to no fault of the seller. This situation is commonly encountered where a home is sold and gain is not recognized under I.R.C. § 121 (sale of a principal residence), and then the property is reacquired because the buyer subsequently defaults on the purchase payments.

That is similar to the situation that would exist here, where the northern portion sale proceeds were used to buy like kind properties for a tax-deferred exchange under § 1031, but then BNSF later reacquires the northern portion by virtue of court-ordered rescission. The result, by analogy, would be that no gain or loss would be recognized upon

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1294-95. BNSF argues that rescission of the purchase agreement would necessarily require rescission of the O&M Agreement between the Port and GNP because those "contractual rights" would be impaired. As shown above, that is simply untrue. Regardless, the STB decision also contemplated an early termination of the O&M Agreement and only required Board approval in such a situation if the third-party "abandon[ed] or discontinue[d] operations over the Line." CP 1296 (*id.* at 5). No party has suggested that that would be the case.

reacquisition. I.R.C. § 1038(b)(1). After rescission, should BNSF decide to dispose of any of the thirteen properties, the basis would likely be the price paid at the time BNSF purchased them. Should BNSF later decide to sell the northern portion of the Corridor to a legitimate buyer, it can either enter into another I.R.C. § 1031 exchange or transfer the property in a fully taxable transaction. In any event, these are mere income tax concerns (again, entirely created by BNSF itself) and in no way control the ultimate disposition of the property at issue. The purchase and sale of the other properties would be unaffected by rescinding the purchase transaction for the northern portion of the Corridor.

BNSF also attempts to argue that other parties may be left in a worse position as a result of rescission, but there is absolutely no support for the notion that the Port (or its taxpayers) would be worse off. The third parties entering into various deals with the Port subsequent to its purchase of the northern portion were all on notice of this litigation, and have addressed the consequences of rescission in their various contracts.[28] Similarly, BNSF's argument that King County's agreements to develop a trail system over the southern portion of the Corridor would be adversely affected by rescission of the Port's purchase of the northern portion is

[28] *See* CP 1636 (Real Estate Purchase and Sale Agreement between Port and City of Redmond at p. 5, § 6.2); CP 1680-81 (Draft Agreement between the Port and Sound Transit at p. 9-10, § 10.2)).

completely baseless. STB approval of the transfer of the residual common carrier rights to King County occurred in proceedings brought by King County to the STB, separate and distinct from the STB's consideration of the Port's acquisition.

Likewise, the Trail Use Agreement consummating the rail banking was between the County and BNSF; the Port was not a party to that agreement, and whether the Port or BNSF is the underlying property owner does not impact that Agreement or the STB's approval of the rail banking. In terms of rail banking, the STB has pointed out that:

> It is also well settled that the Board's role in rail banking/interim trail use is essentially ministerial. That is, the Board only looks to see if the trail sponsor meets the statutory and regulatory requirements to be a trail sponsor, that the railroad agrees to trail use, and that nothing occurs that would preclude a railroad's right to reassert control over the ROW at some future time to revive rail service.[29]

As noted by BNSF, the taxpayers filed a Motion for Relief from Stay in GNP's on-going bankruptcy proceeding. Given that all of the main parties to this litigation are outside of bankruptcy and that the debtor

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[29] CP 4784 (Grad Supp. Decl., Ex. 52 at 3). Further confirmation that STB involvement is not required for rescission of the Port's purchase agreement is the fact that STB approval was neither sought nor given for the Port's purported sale of a portion of the Redmond Spur to the City of Redmond. CP 4372 (Grad Supp. Decl., ¶ 39). The sale from the Port to the City resulted in a purported transfer of the underlying property in exactly the same way that the requested rescission would result in a transfer of the entire northern portion of the Corridor back to BNSF. Rescission will not impact King County's common carrier rights and obligations (or GNP's rights) and will not require STB approval, which is exactly how the parties treated the Port-Redmond transfer (or the Port-PSE and draft Port-Sound Transit transfers).

(GNP) was fully able to protect any interest in the asset at issue, there was adequate cause for terminating the stay, so the bankruptcy court granted that relief. Although lifting of a stay is not equivalent to abandonment of the property from the bankruptcy estate, the bankruptcy court gives up exclusive jurisdiction to the property when it grants relief from stay. *Catalano v. C.I.R.*, 279 F.3d 682, 686-87 (9th Cir. 2002). As a result of the bankruptcy court's granting the taxpayers' motion for relief from the bankruptcy stay, GNP's freight easement over the northern portion of the Corridor is *not* an asset under the sole jurisdiction of the bankruptcy court. Therefore, even if GNP's interest in that easement were somehow affected by rescission of the Port's purchase (which it is not), this Court (or the trial court on remand) has jurisdiction to rescind that purchase agreement. The bankruptcy court would not have to provide pre-approval for transfer of the Port's interest in the northern portion back to BNSF.

In sum, rescission is the most appropriate remedy as a result of the Port's *ultra vires* purchase of the northern portion of the Corridor. Any potential "inequities" resulting from rescission affect only BNSF and are the result of BNSF's own actions. Moreover, upon rescission BNSF would regain ownership of the northern portion of the Corridor, which BNSF's own appraisal says was worth over $100 million (CP 4818-27), so it hardly seems unfair for BNSF to be required to return the $81 million

purchase price to the Port. In any event, rescission of the Port's purchase of the northern portion would still allow BNSF to claim its $326 million tax deduction for donating the southern portion, so its cries of "unfair" are doubly disingenuous.

III. CONCLUSION

The Port had no authority to buy either the Redmond Spur or the Woodinville-to-Snohomish segment of the Corridor (which together constitute the northern portion of the Corridor). The Court should reverse the trial court's summary judgment order, and should 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 8th day of August, 2012.

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By _____
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APPENDIX A

FINAL BILL REPORT

SB 5655

PARTIAL VETO
C 380 L 95
Synopsis as Enacted

Brief Description: Revising state freight rail service programs.

Sponsors: Senators Rasmussen and Sellar.

Senate Committee on Transportation
House Committee on Transportation

Background: Current Freight Rail Program. The state's freight rail program is responsible for preparing federally-mandated rail planning, providing technical assistance to port and rail districts, shortline operators and other entities, and distributing federal and state funds in the form of loans and grants.

To date, the program has had two primary areas of emphasis: rail banking and rail assistance.

Rail banking occurs where a rail line is proposed to be abandoned by its owner. If the line is found to be essential to the state's rail system, and if a benefit/cost analysis shows that the state will receive benefits in excess of the cost of acquiring the line, the state may assist local organizations (such as port districts, county public works departments, rail districts, etc.) in acquiring the line, or it may acquire the line on its own. If acquired under this abandonment procedure, the new owner must use the rail right-of-way for a transportation purpose. Most commonly, these railroad rights-of-way are converted to interim use as a recreational trail.

The purpose of rail banking is to keep the right-of-way intact for future restoration and use as an operating railroad line. A recent example is Burlington-Northern's Stampede Pass rail line, which has been out of service since the 1980's. A portion of this line was rail banked to keep the corridor intact. Recently, Burlington-Northern has announced that it may reopen its Stampede Pass line, providing a third rail passage over the Cascade Mountains.

The rail banking program is supported by state and federal moneys from the Essential Rail Banking Account. Local financial participation is required to the extent that it is available.

Freight rail assistance is available from the state to entities wishing to restore rail operations on a line, or to keep existing operations economically viable, thus avoiding the possibility of rail abandonment.

This program is directed at assisting freight operations on light density lines. Moneys from the state Freight Rail Assistance Account can be used to acquire, rebuild, or rehabilitate the rail lines, equipment, and transloading facilities. Projects with a demonstrated level of financial commitment, from either the private sector or the public sector, are given preference for state loans and/or grants.

Changes in Industry Affecting Freight Rail Program. Since 1970, the state has lost about 40 percent of its rail lines to abandonment. Many of the abandoned lines were not economically viable due to the decrease in freight rail traffic.

It now appears that the freight rail industry is emerging from a long period of non-investment in its infrastructure to a period of renewed interest in upgrading its rail lines and facilities. This is in response to an enormous upturn in the demand for moving goods via freight rail.

As freight rail traffic continues to increase, there are serious rail capacity constraints on the two large mainlines in Washington (Burlington-Northern and Union Pacific). Mainline congestion is exacerbated by at least two factors: (1) the lack of rail capacity at port terminals, and (2) the congestion at the two routes over the Cascade mountains (along Columbia River to Pasco, and at the Cascade Tunnel over Stevens Pass).

Freight Rail Policy Advisory Committee Study. This past interim, a Freight Rail Policy Advisory Committee was convened by the Washington State Department of Transportation as part of its multimodal state transportation planning process.

The committee recommended a number of changes, including changes to the state freight rail program. The primary recommendations were aimed at responding to the new market conditions and rail system constraints by modifying the state's freight rail program to allow for rail assistance at port facilities and at select portions of the railroad mainline.

Summary: The state's freight rail program is modified to allow rail assistance projects at port-to-rail facilities and on select portions of the mainline.

The Department of Transportation evaluates and monitors rail commodity flows and traffic types to ensure that the program is responsive to the changing freight rail environment.

The Department of Transportation must consult with the Washington State Freight Rail Policy Advisory Committee, established under statute, in evaluating rail corridors and projects.

The department is directed to develop criteria for prioritizing freight rail projects.

The Essential Rail Banking and Essential Rail Assistance Accounts are merged into one account. The department must first seek federal STP funds for rail corridor preservation projects. State funds can be used to construct or rehabilitate loading facilities, but no state funds may be provided to private railroad companies or private property owners in the form of outright grants.

APPENDIX B

Proceeding	Petitioner (Request)	STB Decision Date - Title	Description
STB Finance Docket No. 35128	Port (Acquisition Exemption)	10/27/2008 - Decision	Grants Port's motion that Port's acquisition of Woodinville-to-Snohomish section of northern portion of Corridor did not require STB approval
STB Docket No. AB-6 (Sub-No. 463X)	BNSF (Abandonment Exemption) King County (Notice of Interim Trail Use)	10/27/2008 – Decision and Notice of Interim Trail Use or Abandonment	Approves abandonment and rail banking (upon consummation of trail use agreement between BNSF and King County) of Redmond Spur
STB Docket No. AB-6 (Sub-No. 464X)	BNSF (Abandonment Exemption) King County (Notice of Interim Trail Use)	10/27/2008 – Decision and Notice of Interim Trail Use or Abandonment	Approves abandonment and rail banking (upon consummation of trail use agreement between BNSF and King County) of Renton-to-Wilburton section of southern portion of Corridor
STB Docket No. AB-6 (Sub-No. 465X)	BNSF (Abandonment Exemption) King County (Notice of Interim Trail Use)	11/28/2008 – Decision and Notice of Interim Trail Use or Abandonment	Approves abandonment and rail banking (upon consummation of trail use agreement between BNSF and King County) of Wilburton-to-Woodinville section of southern portion of Corridor
STB Finance Docket No. 35213	GNP (Acquisition and Operation Exemption)	2/13/2009 – Notice of Exemption	Approves GNP's request to acquire and operate exclusive freight rail easement on northern portion of Corridor (except Redmond Spur)
STB Finance Docket No. 35148	King County (Acquisition Exemption)	9/18/2009 - Decision	Approves acquisition by King County from BNSF of "residual common carrier rights and obligations" over rail banked sections of Corridor

In their petitions to the STB, both BNSF and the Port described the purchase and sale of the northern

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CERTIFICATE OF SERVICE

I, KATHERINE M. STEWART, hereby declare as follows, under penalty of perjury under the laws of the State of Washington:

1. I am over 21 years of age and am competent to testify, and I make the following statements based upon my personal knowledge and belief.

2. On the date listed below, I caused the foregoing Appellants' Reply Brief to be filed with the Court and to be sent to counsel for the parties in the following manner:

Timothy G. Leyh
Randall Thomsen
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Subject: RE: Lane, et al. v. Port of Seattle, et al.; Supreme Court of Washington Case No. 86894-8

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Subject: Lane, et al. v. Port of Seattle, et al.; Supreme Court of Washington Case No. 86894-8

Dear Clerk of the Court,

Attached please find the following for filing in the below referenced matter:

1. Appellants' Motion for Leave to File Over-Length Reply Brief with Certificate of Service; and

2. Appellants' Reply Brief with Certificate of Service.

please file in the following case:

Case: Lane, et al. v. Port of Seattle, et al.

Case No. 86894-8

Name, Phone number, Bar number and Email address of Counsel Filing: David F. Jurca, WSBA No. 2015; Bradley H. Bagshaw, WSBA No. 11729; (206) 292-1144; djurca@helsell.com and bbagshaw@helsell.com.

Please do not hesitate to contact me should you have any questions or concerns. Thank you.

Katherine M. Stewart

Katherine M. Stewart | Helsell Fetterman LLP
Legal Secretary to Scott E. Collins, David F. Jurca,