101023-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

No. 82377-9-I
COURT OF APPEALS, DIVISION I

CITY OF SEATTLE,

Petitioner,

v.

BALLARD TERMINAL RAILROAD CO., L.L.C.,

Respondent.

CITY OF SEATTLE'S PETITION FOR REVIEW

ANN DAVISON
Seattle City Attorney
Patrick Downs,
WSBA No. 25276
Assistant City Attorney
SEATTLE CITY
ATTORNEY'S OFFICE
701 Fifth Avenue, #2050
Seattle, WA 98104-7097
Patrick.downs@seattle.gov

Clara Park,
WSBA No. 52255
Tadas A. Kisielius,
WSBA No. 28734
VAN NESS FELDMAN LLP
1191 Second Avenue, #1800
Seattle, WA 98101-2996
cpark@vnf.com;
tak@vnf.com

Attorneys for Petitioner City of Seattle

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I. INTRODUCTION

This appeal concerns the City of Seattle's ("City") efforts to construct the "Missing Link," the 1.4-mile gap of the Burke-Gilman Trail ("Trail") in the Ballard neighborhood. Twenty-five years ago, after months of protracted negotiations, the City and Ballard Terminal Railroad Company, L.L.C. ("BTRC") executed two contracts—the Operating Agreement and the Franchise—by which the City granted BTRC the right to operate the Ballard Line in City streets rent-free for thirty years, and in exchange, preserved the City's rights to complete the Trail and construct the Missing Link. Both contracts contained terms that obligated BTRC to relocate its rail facilities as needed to accommodate Trail construction.

In its decision, Division I recognized the City's undisputed and long-held intent to complete the Missing Link, but incorrectly concluded that neither contract preserved the City's right to require BTRC to relocate its facilities to accommodate the Missing Link's construction. Division I's rulings regarding

both contracts merit review because they are incorrect, conflict with precedent, and create ambiguity on issues of substantial public interest.

First, Division I ruled that the Franchise cannot require BTRC to accommodate the Missing Link based on the incorrect conclusion that federal law categorically preempts any enforcement of BTRC's contractual obligations to relocate its facilities. The Court's erroneous decision rested on an incorrect and expansive interpretation of the type of railroad "construction" activities that are the subject of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101, *et seq.* Section 10501(b) of the ICCTA gives the federal Surface Transportation Board ("STB") exclusive jurisdiction over elements of rail transportation, including "construction," rules, routes, services, abandonment, and mergers and acquisitions of rail carriers and facilities. The sections following section 10501 specifically define the STB's jurisdiction over these matters, including section 10901, which

defines the STB's jurisdiction over "construction." For nearly 100 years, the United States Supreme Court, the federal Courts of Appeals, and the STB and its predecessor entity have consistently construed the STB's jurisdiction over "construction" under section 10501 by reference to section 10901, consistent with canons of statutory interpretation. These precedents establish that the STB has exclusive jurisdiction over "construction" of rail line extensions or additions extending into new markets but does not have exclusive jurisdiction over all other construction activities, including minor relocations of rail facilities like those that are the subject of the Franchise.

Yet Division I refused to consider section 10901 or federal precedent and instead applied a broad layperson's understanding of the term "construction." Division I failed to adequately defer to federal precedent, particularly to the STB as the agency charged with implementing the ICCTA. Additionally, it created a new rule broadening the reach of preemption. If the decision remains as binding or persuasive precedent, it will likely negate

relocation rights throughout this state—a fundamental, common law right critical to constructing public improvements—and will likely negate other valuable contract rights.

Second, Division I's ruling that the Operating Agreement did not preserve the City's right to require BTRC to accommodate the Missing Link's construction ignored the "well-settled principle that written instruments contemporaneously executed as part of the same transaction will be considered and construed as one transaction." *Kruger v. Horton*, 106 Wn.2d 738, 742, 725 P.2d 417 (1986). Contrary to this principle, Division I reached fundamentally inconsistent interpretations of the Operating Agreement and the Franchise. Disregarding the Franchise and other extrinsic evidence, the decision concluded that the Operating Agreement failed to preserve the City's rights to construct the Missing Link. This Court's review is needed to clarify the analytical framework for interpreting contemporaneous agreements.

II. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

The City of Seattle petitions for review of the Published Opinion of Division I of the Court of Appeals, *City of Seattle v. Ballard Terminal R.R. Co.., L.L.C.*, No. 82377-9-I, 2022 WL 1535692 (Wash. Ct. App. May 16, 2022) ("Op."), which is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. The ICCTA, under sections 10501(b) and 10901 and as confirmed by federal precedent, provides the STB with exclusive jurisdiction to issue certificates to permit the "construction" of rail line extensions or additional rail lines extending into new markets. Does the ICCTA's authority over such "construction" categorically preempt the railroad's contractual franchise agreement that requires the railroad to relocate a portion of its existing line to accommodate trail construction?

2. It is undisputed that the Operating Agreement and the Franchise were contemporaneous contracts executed to fulfill the parties' intent of completing the Trail. Can the Operating Agreement be construed in a manner that frustrates that intent by eliminating a fundamental right to the Trail's completion?

IV. STATEMENT OF THE CASE

Division I's opinion sets forth the basic outline of the facts and procedure in this case. Op. at 2–7. However, certain points bear emphasis, particularly the facts relating to the relationship between the Operating Agreement and the Franchise.

The critical facts are as follows:

- In 1978, the City opened the first portions of the Trail over an abandoned rail line acquired from Burlington Northern Santa Fe Railway Company ("BNSF").[1] CP 141–42.
- Over the following years, consistent with BNSF and the City's joint intent to complete the Trail, BNSF continued to abandon its rail lines for Trail development. CP 148–49.
- In the late 1990s, BNSF announced its intent to abandon the Ballard Line, and BTRC and the City conducted protracted negotiations to address the line's future. These negotiations resulted in the Operating Agreement and the Franchise. CP 154–55.
- The Operating Agreement and the Franchise govern the entirety of BTRC's operations and gave BTRC a 30-year right to operate and use City streets rent-free. CP 154–55.

[1] "BNSF" is used herein to refer to the present-day Burlington Northern Santa Fe Railway and to its predecessor, Burlington Northern Railroad Company, which existed in 1971.

- It is undisputed that the parties intended to complete construction of the Trail, including the Missing Link. Op. at 14.

- When the parties executed the two contracts, the City had not yet determined a final route for the Missing Link. *Id.*

- The Operating Agreement and the Franchise contained parallel terms that gave the City broad and flexible rights to construct trails and other public improvements and contemplated the possibility of Trail construction near or along the Ballard Line. The Operating Agreement included the following terms:

    - The City's "right to require [BTRC] to relocate its track in order to accommodate trail construction," and the requirement that BTRC "shall promptly move its track at [the City's] written request" (CP 175);

    - BTRC's obligation to "not engage in construction of rail or rail-related facilities which interfere with the trail to be constructed on the premises" (CP 175); and

    - The City's agreement that new trail facilities constructed along or near the Ballard Line shall comply with applicable regulations regarding separation from the centerline of rail facilities (CP 173).

- The Franchise mirrored the Operating Agreement and contained the following terms:

    - The City's reservation of the right to "construct all public improvements (*including trails*) . . . across, underneath or above the tracks" (CP 243 (emphasis added));

- The City's right to "full and complete right of access to any space occupied by such tracks and to all of said franchise right-of-way, together with the right to open and excavate the ground beneath said tracks, or within said franchise right-of-way, for all purposes of construction, maintenance, repair, operation and inspection" of any trails or public improvements (CP 243);

- BTRC's agreement that it "shall, at its own cost and expense, remove, *relocate*, support, reinforce said tracks as necessary, provide flagging, and shall also furnish an authorized agent" to supervise the removal or relocation of tracks, also at BTRC's own cost and expense (CP 244 (emphasis added)); and

- The City's right to change the grade of any streets, and BTRC's agreement to "waive any and all damages that it may sustain on account of having to readjust its tracks by reason of such change of grade" (CP 244).

Division I concluded that while the Operating Agreement reserved the rights to build two ends of the Trail, the Operating Agreement left the City with no recourse to close the Missing Link in the middle. The decision also concluded that although the Franchise did provide the City with rights to construct the Missing Link, the ICCTA preempts the City's enforcement of those rights. The City respectfully seeks this Court's de novo review of that decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Standards of Review.

Issues of statutory interpretation and preemption are reviewed de novo. *Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 853, 861, 10 P.3d 1079 (2000). "There is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption." *Inlandboatmen's Union of the Pac. v. Dep't of Transp.*, 119 Wn.2d 697, 702, 836 P.2d 823 (1992).

The statute at issue is the ICCTA, which is administered by the STB. The STB's interpretations of ambiguous provisions of ICCTA are entitled to "great weight." *City of Woodinville v. Eastside Cmty. Rail, LLC*, No. 82660-3-I, 2022 WL 1615552 at *4 (Wash. Ct. App. May 23, 2022).

Summary judgment rulings on contract interpretation are reviewed de novo. *Moeller v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 133, 140, 229 P.3d 857, (2010), *aff'd*, 173 Wn.2d 264, 267 P.3d 998 (2011).

B. Division I's analysis of categorical preemption conflicts with appellate and federal decisions.

1. Division I failed to give deference to federal decisions analyzing categorical preemption.

The STB "was authorized by Congress to administer 49 U.S.C. § 10501 and is therefore uniquely qualified to determine whether state law should be preempted by 49 U.S.C. § 10501." *City of Woodinville*, 2022 WL 1615552 at *4 (quoting *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008)) (brackets and quotation marks omitted). In *City of Woodinville*, Division I recognized that, although STB decisions are not binding, the court "would be remiss to ignore the STB's explicit and consistent holdings" on preemption issues. *Id*. This deference is consistent with Washington courts' consistent practice of according "great weight" to an agency's interpretation of an ambiguous statute within the agency's expertise. *Id.*

Rather than applying and deferring to the STB and other federal authorities, the Court of Appeals below ignored case law, first developed by the Supreme Court of the United States and

applied by the STB's statutory predecessor, the Interstate Commerce Commission ("ICC"),[2] the STB, and federal courts. That case law construes the STB's exclusive jurisdiction over "construction" by reading 49 U.S.C §§ 10501 and 10901 together. Instead, as discussed below, the Court of Appeals interpreted section 10501 in isolation, without reference to the ICCTA's overall statutory scheme, and broadened the scope of categorical preemption[3] contrary to the "strong presumption" against preemption. This approach fails to give proper weight to and creates a fundamental conflict with federal and Washington appellate decisions that warrants this Court's correction.

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[2] The ICC regulated railroad transportation before the STB's creation. In December 1995, Congress adopted the ICCTA, which abolished the ICC and transferred certain of its functions to the newly created STB.

[3] Courts and the Board use the terms categorical, express, and facial preemption interchangeably. *See Franks Inv. Co. LLC v. Union Pac. R.R. Co*., 593 F.3d 404, 408–11 (5th Cir. 2010). For consistency, this brief will refer to categorical preemption.

2. Division I's decision creates ambiguity for lower courts.

Under rules of statutory construction, each provision of a statute should be read together with related provisions to determine the legislative intent underlying the entire statutory scheme. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). Statutes on the same subject "will be read as complementary, instead of in conflict with each other." *Id.* Here, 49 U.S.C. §§ 10501 and 10901 relate to the STB's jurisdiction over "construction" and should be read together.

49 U.S.C. § 10501 provides that the STB has exclusive jurisdiction over "(1) transportation by rail carriers . . . ; and (2) the construction, acquisition, operation . . . [of] tracks, or facilities[.]" The ICCTA does not define "construction," but the meaning of "construction" in section 10501(b) is informed by section 10901, which further details the scope of the STB's jurisdiction and regulation over railroad construction or operation. 49 U.S.C. § 10901 states that STB authorization is required to "construct an *extension* to any . . . railroad line[]" or

to "construct an *additional* railroad line." By incorporating the meaning of "construction" used in section 10901, for almost 100 years, the U.S. Supreme Court, lower courts, the ICC, and the STB have consistently interpreted "construction" as applied in section 10501 as referring only to activity that enables a carrier to enter a new market.

The United States Supreme Court first explored the extent of exclusive federal jurisdiction over "construction" in *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331 (1924), where the Court opined that "*mere relocation* of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination" would not fall within the jurisdiction of the ICC. *Id.* At 345 (emphasis added). Two years later, the Court crystallized this interpretation in *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co*. ("*Texas & Pacific*"), 270 U.S. 266, 277–78 (1926), when it held that Congress's concern and intent to regulate railroad "construction" only

applied "where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier." *Id.* at 277–78. Accordingly, only construction of extensions into new markets were subject to the ICC's jurisdiction. *Id.*; *see also Detroit/Wayne Cnty. Port Auth. v. ICC*, 59 F.3d 1314, 1316–17 (D.C. Cir. 1995) (applying *Texas & Pacific* and affirming the ICC's conclusion that it lacked jurisdiction over relocation of existing facilities within an existing market).

Although the Supreme Court's decisions applied a predecessor statute to the ICCTA, that distinction makes no difference here. The STB, interpreting the ICCTA, has cited and applied the *Texas & Pacific* test to determine whether railroad construction projects fall within its exclusive jurisdiction. For example, in *Union Pac. Railroad Co.—Pet. for Declaratory Order—Rehab. Of Mo.-Kan.-Tex. Railroad between Jude & Ogden Junction, Tex*. 3 S.T.B. 646, 1998 WL 525587 (STB Aug. 19, 1998), the Board "declare[d] that it does not have jurisdiction

over" a railroad's addition of a 16.7-mile mainline that did not extend into new markets. *Id.* at *4; *see also Valley Feed Co. v. Greater Shenandoah Valley Dev. Co. d/b/a Shenandoah Valley R.R. Co.*, STB 41068, 1998 WL 857071, at *7 (STB Nov. 30, 1998) (applying *Texas & Pacific* and concluding that construction activities were non-jurisdictional); *CSX Transp., Inc.—Pet. for Declaratory Order*, No. FD 33388 (Sub-101), 2008 WL 3971091, at *5 (STB Aug. 26, 2008) (declining to preempt or regulate construction of multi-building complex over and adjacent to rail line).

Interpreting 49 U.S.C. §§ 10501 and 10901 together is not only consistent with federal precedent but also with the ICCTA's statutory scheme. 49 U.S.C. § 10501 generally establishes the STB's exclusive jurisdiction over matters such as rates, classifications, rules, practices, and the acquisition, abandonment, or discontinuance of facilities. The subsequent sections specifically define the scope of the STB's jurisdiction over these activities. 49 U.S.C. Chapter 107 discusses the STB's

jurisdiction over rates, classifications, rules, and practices. 49 U.S.C. §§ 11321 to 11328 discusses the STB's jurisdiction over mergers and acquisition of carriers or facilities. 49 U.S.C. §§ 10903 to 10905 discusses the STB's jurisdiction over the abandonment or discontinuance of rail lines. Specific statutes prevail over general statutes. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 701, 335 P.3d 416 (2014). The statutes that follow section 10501 and that specifically define the STB's jurisdiction prevail over section 10501's general jurisdiction provisions. These specific grants of authority to the STB recognize that it oversees the economic regulation of railroads; a new line of railroad, or an extension of an existing line, may implicate those grants of authority, but a mere relocation of an existing line within the same market does not implicate those grants of authority.

Division I's decision correctly recognized that "[t]he cases to which Seattle cites indicate that the STB['s] authorization is not required for the relocation of tracks." Op. at 11. But what

Division I failed to recognize is that categorical preemption arises from the STB's exclusive jurisdiction over an action or operation. *Franks Inv. Co. LLC v. Union Pac. R.R. Co*., 593 F.3d 404, 408–10 (5th Cir. 2010) (discussing preemption based on the scope of the STB's exclusive jurisdiction). In other words, Division I's acknowledgment that STB authorization is not required for the minor relocation of tracks in this matter is also determinative of the question of categorical preemption. The STB's consistent rulings that it has no authority to regulate or otherwise exercise jurisdiction over track relocations within an existing market means that such track relocations are not subject to the STB's exclusive jurisdiction, and that actions affecting such relocations are, therefore, not categorically preempted by the ICCTA.

To be clear, this conclusion does not mean that a party could relocate a railroad's tracks anywhere it pleases. A second

type of preemption, "as applied" preemption,[4] applies when an action is not categorically preempted under the ICCTA but has the effect of preventing or "unreasonably interfering" with railroad transportation. *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (internal quotation marks omitted). The STB and the courts analyze "as applied" preemption when the regulatory action at question warrants a fact-specific analysis. *Id.* at 541–42 (concluding that state statutes requiring railroads to construct or pay for and maintain pedestrian railroad crossings were not unreasonably burdensome and not preempted, categorically or as applied); *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 679–80 (7th Cir. 2011) (concluding that condemnation actions require an "as applied" analysis, not a categorical analysis, because each action requires a fact-specific analysis of the case and specific property). Track relocation requires a fact-specific "as applied"

[4] "As applied" preemption is also referred to as implied preemption. *Franks Inv.*, 593 F.3d at 413.

analysis—relocating five feet of track has a different effect than relocating five miles of track—and the failure to apply that analysis here conflicts with established federal precedent.[5]

In sum, there is at least a fact question as to whether track relocation is preempted as applied. Division I's resolution of this issue as a matter of law conflicts with precedent and creates ambiguity about the application and breadth of categorical preemption, and thus merits review by this Court. RAP 13.4(b).

C. Division I's interpretation of this Court's decision in *City of Seattle v. Burlington Northern Railroad Co.* merits review.

As Division I recognized, Washington case law characterizes franchises as contracts and applies contract interpretation rules to them. Op. at 9–10. Division I also acknowledged that federal and STB decisions have concluded that a railroad's voluntary agreements or contracts are not subject

[5] There is no dispute that "as applied" preemption, which requires fact-finding, was not before the lower court on summary judgment. Op. at 11.

to preemption. *Id.* Contracts are not preempted because they reflect the railroad's determination that the contracted terms and conditions do not unreasonably burden railroad transportation, and 49 U.S.C. § 10501 was not intended to shield a railroad from its own commitments. *Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12, 17 (1st Cir. 2003) (citing the STB's treatment of a railroad's agreement to conditions imposed by local agency as "reflecting the carrier's own determination that the condition is reasonable"); *Twp. of Woodbridge v. Consol. Rail Corp., Inc*., 5 S.T.B. 336, 2000 WL 1771044 (STB Nov. 28, 2000). Notwithstanding these principles, and without considering the undisputed facts regarding the months-long negotiations leading up to this Franchise, Division I concluded the subject Franchise was categorically preempted, citing *City of Seattle v. Burlington Northern Railroad Co*. ("*BNSF*"), 145 Wn.2d 661, 41 P.3d 1169 (2002).

Although this Court concluded that preemption applied to a franchise in *BNSF*, Division I's interpretation of that case

merits review for several reasons. First, Division I construed this Court's decision as creating a bright-line rule that franchises can never be deemed voluntary contracts for purposes of preemption (or for purposes of contemporaneous contract interpretation, as discussed in Section E below). This case exemplifies why such a bright-line rule is inappropriate. As referenced in Division I's decision, this Franchise emerged from months of negotiations involving multiple parties and multiple agreements, including the Operating Agreement. Op. at 2–5. In exchange for BTRC's commitment to relocate its tracks to accommodate the Trail, the Franchise gave BTRC the valuable right to use and operate in City streets rent-free for thirty years. CP 241. Division I's reading of *BNSF* creates an overly simplistic rule that fails to give effect to the complexity and breadth of franchise agreements.

Second, as the STB and other courts have consistently recognized, important policy considerations underlie the exemption of contracts from preemption. As the STB concluded,

the STB's exclusive jurisdiction and preemption doctrines were not intended to allow a railroad to evade the commitments that it voluntarily accepted. *Twp. of Woodbridge*, 5 S.T.B. 336. This rule has been applied not only to railroads' contracts with private parties (*e.g.*, *PCS Phosphate Co., Inc. v. Norfolk S. Corp*., 559 F.3d 212, 218–21 (4th Cir. 2009)), but also to contracts with municipalities. *Twp. of Woodbridge*, 5 S.T.B. 336; *Boston & Maine Corp.*, 330 F.3d 12. And this rule has been so well-established and consistently applied that during the briefing below, BTRC never identified a single case in which a court or the STB applied categorical preemption to release a railroad from a contractual obligation. Division I's decision creates ambiguity regarding the applicability of preemption to franchises and other contracts and merits review.

In contrast, *BNSF* did not involve a negotiated franchise, as is the case here. Rather, it involved the City's unilateral adoption of local regulations in the Seattle Municipal Code that specifically governed all railroads' switching and blocking

activities, which this Court found to be expressly preempted under the ICCTA and the Federal Railroad Safety Act, 49 U.S.C. § 20106. *BNSF,* 145 Wn. 2d at 668–71. Although the Court discussed a franchise, that discussion was limited to concluding that the franchise did not save the preempted overbroad local regulations. *Id.* at 673. Moreover, unlike the subject Franchise, the franchise in *BNSF* was executed before the ICCTA's adoption, and thus the parties could not and did not contemplate the ICCTA's preemptive effect. *Cf. Boston & Maine Corp*., 330 F.3d at 15–17; *Twp. of Woodbridge*, 2000 WL 1771044 at *3 (addressing contracts voluntarily executed after the ICCTA's adoption). *BNSF* is distinguishable, does not control here, and, therefore, the Court of Appeals did not properly rely on it below.

D. This Petition involves issues of substantial public interest that should be determined by this Court.

The ability to relocate franchise facilities, particularly to accommodate public improvements, is an important right commonly imposed and invoked in franchises with railroads and other parties. This right is so fundamental that, under common

law, grantees of a franchise bear a duty to relocate their facilities at their own expense. *Gen. Tel. Co. of Nw., Inc. v. City of Bothell*, 105 Wn.2d 579, 583, 716 P.2d 879 (1986); *see generally* 12 McQuillin Mun. Corp. § 34:93 (3d ed.). Accordingly, the right to relocate or modify railroad facilities is not unique to this specific Franchise but exists in other railroad franchises as well. CP 2466–67 (1903 railroad franchise), CP 2485 (1997 railroad franchise).

Division I's application of categorical preemption has broad effects. If applied as binding or persuasive precedent, the decision could deprive all governments in this state of the right to exercise any relocation rights under any franchise agreement with any railroad. And because Division I applied a categorical preemption analysis, not an "as applied" analysis, affected governments in this state will no longer have any rights to relocate even an inch of track, no matter how important the project may be to the public or how inconsequential the impacts to the railroad.

Further, Division I's decision effectively created a new standard for applying categorical preemption—one that takes the broadest possible interpretation of a provision while ignoring other provisions evincing a more specific and limited statutory scheme. This standard erodes the "strong presumption" against preemption in this state, *Inlandboatmen's Union of the Pacific*, 119 Wn.2d at 702, and opens the door for challengers to argue that other rights and regulations are categorically preempted in other contexts. If, like the right to relocate under a franchise, other rights are preempted, such decisions will upend the expectations of governments who value and rely on such rights.

In sum, the ramifications of Division I's decision extend well beyond this case and merit review. RAP 13.4(b)(4).

E. Division I's contract interpretation approach conflicts with other appellate decisions.

"In Washington it is a well-settled principle that written instruments contemporaneously executed as part of the same transaction will be considered and construed as one transaction." *Kruger v. Horton*, 106 Wn.2d 738, 742, 725 P.2d 417 (1986)

(citing cases). Each document "assist[s] in determining the meaning intended to be expressed" by the other document. *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 868, 413 P.3d 619 (2018). This contract interpretation principle is particularly instructive and applicable when an ambiguity exists, and the ambiguity can be resolved by looking to contemporaneous documents that reveal the parties' plans and intent. *Id.* at 869–71 (resolving ambiguity in quitclaim deed by incorporating terms from a contemporaneous easement grant); *Standring v. Mooney*, 14 Wn.2d 220, 229–31, 127 P.2d 401 (1942) (construing property deed and contract as part of a larger plan to subsequently reconvey the property).

Division I declined to apply this contract interpretation principle to the Operating Agreement and the Franchise because the case law involves two contracts, and it determined that the Franchise was not a contract for purposes of applying this principle. Op. at 16. In so ruling, Division I disregarded the established rule that franchises are contracts to which contract

interpretation rules apply. *Burns v. City of Seattle*, 161 Wn.2d 129, 142, 164 P.3d 475 (2007). Even if this Court concluded that a franchise could be preempted in *BNSF*, *BNSF* did not suggest that the Court was overturning the rule that franchises are contracts subject to contract interpretation rules. Even if a particular franchise provision is deemed preempted, as a contractual provision, it may be used to inform the interpretation of other contractual provisions that are not subject to preemption, as discussed above. Division I's decision merits review because it creates ambiguity and conflicts with appellate decisions regarding the contractual nature of franchises. RAP 13.4(b)(1), (2).

Division I's decision also conflicts with appellate decisions requiring consistent and harmonized interpretations of contemporaneous agreements. Division I concluded that, even if the contracts were read together, the Operating Agreement could be read as excluding the right to relocate tracks, notwithstanding the Franchise's terms. As discussed above, the ability to relocate

facilities to accommodate public improvements is a key right in public contracts. There is no dispute that the parties intended to complete the entire Burke-Gilman Trail along a to-be-determined route that could necessitate relocating portions of BTRC's track in the future. Op. at 14. And there is no dispute that the Operating Agreement and the Franchise were contemporaneous agreements intended to govern the railroad's operations for the entire 30-year term. CP 179, 241. Division I's interpretation of the Operating Agreement concluded that the City reserved the rights to build two ends of the Trail but left itself with no rights and no recourse to close the gap in the middle. This reading is fundamentally contradictory with the Franchise and the underlying context and creates an absurd result. *Cf. Eurick v. Pemco Ins. Co*., 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (contracts are read to avoid absurd results). Division I's strained application of the rule requiring consistent and harmonious contract interpretation conflicts with other appellate decisions and merits review. RAP 13.4(b)(1), (2).

VI. CONCLUSION

For the reasons stated in this Petition, the City respectfully asks the Court to accept review of the Court of Appeals' decision.

Respectfully submitted this 15th day of June, 2022.

VAN NESS FELDMAN LLP

I certify that this document contains 4,762 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

ANN DAVISON
Seattle City Attorney

/s/ Patrick Downs
Patrick Downs, WSBA No. 25276
Assistant City Attorney

VAN NESS FELDMAN LLP

/s/ Clara Park
Clara Park, WSBA No. 52255
Tadas A. Kisielius, WSBA No. 28734

Attorneys for Petitioner City of Seattle

CERTIFICATE OF SERVICE

I certify that I e-filed the City of Seattle's Petition for Review through Washington State Court's Secure Access web portal to be served on all parties or their counsel of record on the date below as indicated.

City of Seattle

Patrick Downs
Seattle City Attorney
Patrick.downs@seattle.gov
-and-
Clara Park
Dale N. Johnson
Tadas A. Kisielius
VAN NESS FELDMAN
cpark@vnf.com; dnj@vnf.com;
tak@vnf.com

Ballard Terminal Railroad Co.

Patrick J. Schneider
FOSTER PEPPER PLLC
Pat.schneider@foster.com

Joshua C. Allen Brower
BROWER LAW PS
josh@browerlawps.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this this 15th day of June, 2022, at Seattle, WA.

/s/ Amanda Kleiss
Amanda Kleiss, Legal Assistant

APPENDIX A

FILED
5/16/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, Appellant/Cross-Respondent, v. BALLARD TERMINAL RAILROAD COMPANY., L.L.C. Respondent/Cross-Appellant.	No. 82377-9-I DIVISION ONE PUBLISHED OPINION

SMITH, A.C.J. — This appeal concerns the City of Seattle's efforts to construct the missing link, a 1.4-mile gap in the Ballard area of the Burke-Gilman Trail. Seattle sued the Ballard Terminal Railroad Company (BTRC) to require it to relocate a portion of its tracks to enable the trail's construction. Seattle claims BTRC is required to do so under both the 1997 operating agreement between the parties and the franchise ordinance issued by Seattle shortly thereafter, and appeals the superior court's summary judgment rulings that (1) the provision of the franchise ordinance that requires BTRC to relocate its tracks is preempted by the federal Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. §§ 10101-16106, and (2) the operating agreement does not require BTRC to move its tracks in the missing link area. BTRC cross-appeals, contending that the court erred by denying its claim for damages and attorney fees under Washington's anti-SLAPP[1] statute, RCW 4.25.510. Because the

[1] Strategic Lawsuit Against Public Participation.

franchise ordinance is a federally-preempted local regulation regarding the route and construction of a railroad, the operating agreement only required BTRC to relocate its tracks to cooperate with the construction of the trail outside the missing link area, and Seattle's suit is not the type of action addressed by the anti-SLAPP statute, we affirm on all counts.

FACTS

The Burke-Gilman Trail is a regional bicycle and pedestrian trail that runs from Golden Gardens Park in Seattle to the Sammamish River Trail in Bothell, except for the missing link at issue here—a gap between the Hiram M. Chittenden Locks (Ballard Locks) and 11th Avenue NW in the Ballard neighborhood of Seattle. Seattle opened the first portions of the Burke-Gilman Trail in 1978 on a portion of abandoned rail line it had acquired from the Burlington Northern Railroad Company. In 1988, Burlington Northern and Seattle signed a "Joint Statement of Principles" expressing their shared long-term goal to establish a "continuous and permanent linear corridor along selected railroad rights-of-way to complete the Burke-Gilman Trail and other urban trails" while also continuing to support rail-served business along these rights of way. Burlington Northern continued to abandon portions of its rail lines and Seattle continued to convert these portions into trails.

In the late 1990s, Burlington Northern announced its intent to abandon the Ballard Line, a 2.6-mile railroad line serving shippers in Ballard. In 1996, the

Seattle City Council adopted Resolution 29474,[2] endorsing a preferred plan for the development of the Burke-Gilman Trail in the area of the Ballard line, with the preferred route traveling along the railroad from 8th Avenue NW to 11th Avenue NW, leaving the tracks and continuing up 11th Avenue NW to NW Leary Way and NW Market Street, and then returning to the line west of the Ballard Locks.

Meanwhile, some of the shippers who had been served by the Ballard Line formed the Ballard Terminal Railroad Company (BTRC). BTRC entered negotiations with Seattle with the goal of preserving rail service even as Seattle pursued acquiring the corridor to develop the final portions of the Burke-Gilman Trail.

On September 14, 1997, as a result of these negotiations, BTRC and Sea Lion Railroad (SLR), a non-profit acting as Seattle's proxy, entered into the operating agreement. The operating agreement described its purpose as preserving the Ballard Line "intact for rail use, trail use, and other compatible public purposes." It explained the parties' plan for SLR to seek authorization from the Surface Transportation Board (STB) to railbank[3] the line, for SLR to transfer the underlying real estate and assign the operating agreement to Seattle, and for BTRC to then seek authorization from the STB to continue operating the railroad.

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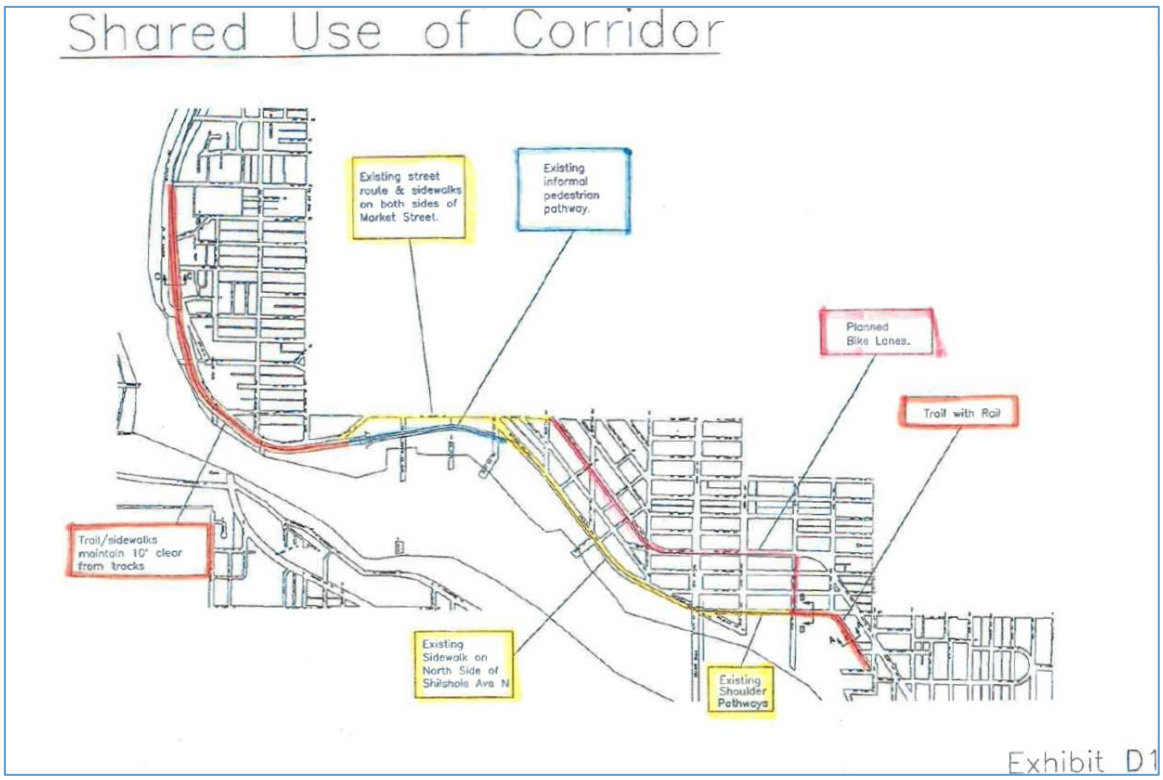
[2] http://clerk.seattle.gov/~archives/Resolutions/Resn_29474.pdf [https://perma.cc/NYR5-UTFJ].

[3] "Railbanking" permits an owner of a railroad to convert the line into a recreational trail while preserving the right of way for future possible reactivation of rail service. See 16 U.S.C. § 1247(d).

The operating agreement provided that the parties "agree that the trail . . . and railroad shall be constructed within the areas indicated in Exhibit D in all portions of the premises which are not in street right of way." Exhibit D showed a map of the planned trail and line, corresponding to the route Seattle endorsed in Resolution 29474. The portion of the premises which is in street right-of-way is the stretch between 11th Avenue NW and the Locks, which today is the missing link of the Burke-Gilman Trail.



The operating agreement also gave Seattle "the right to require [BTRC] to relocate its track in order to accommodate trail construction in accordance with this Agreement; provided, however that a continuous track on the premises shall be provided unless [BTRC] consents otherwise" and required BTRC to "promptly move its track at [Seattle's] written request to accommodate the construction of

trail facilities." Furthermore, it provided that Seattle would "undertake[ ] to provide [BTRC] with 120 days notice, and a subsequent opportunity to consult, prior to [Seattle's] presentation of a request for initial authorization or financing for an extension of the Burke-Gilman Trail in the area between 11th Avenue [NW] and the Locks within the premises."

Shortly after the parties executed the operating agreement, Seattle passed Ordinance 118734 (franchise ordinance), which granted BTRC the right to operate the railroad along the Ballard Line for 30 years. Section 4 of the franchise ordinance reserved for Seattle the "full and complete right of access to any space occupied by [the Ballard Line] tracks and to all of said franchise right-of-way" and the right to excavate the ground within the right-of-way "for all purposes of construction, maintenance, repair, operation and inspection of any public utilities and public improvements." It provided that "[i]n all cases involving a possibility of such interference, or removal of lateral support or excavation beneath the tracks . . . [BTRC] shall, at its own cost and expense, remove, relocate, support, reinforce said tracks as necessary."

SLR assigned the operating agreement to Seattle in December 1998. In 2001, Seattle adopted Resolution 30408, noting that the existing plan for the Burke-Gilman section between 11th Avenue NW and the Locks was unlikely to meet Seattle's goals of creating safe bicycle and pedestrian travel while also minimizing impacts to adjacent businesses. The resolution directed a work team to investigate alternate routes, "including the publicly owned railbanked right of

way." Seattle eventually decided to move forward with constructing the missing link along the railroad right-of-way, and prepared an Environmental Impact Statement for this purpose.[4]

In December 2018, BTRC petitioned the STB seeking a declaratory order prohibiting Seattle from moving forward with its plan. Seattle responded that BTRC's claims were about a contract dispute over the operating agreement and should be heard by a state court. The STB stayed its decision "pending a decision from the state court resolving the City's contract action" and noted that "[i]ssues involving federal preemption can be decided either by the Board or the courts in the first instance."

Seattle then initiated a complaint in King County Superior Court, seeking "[a]n order for specific performance of all of BTRC's obligations under the Operating Agreement and Franchise, including but not limited to cooperating with the Trail's construction," a declaration of its rights under the operating agreement and franchise ordinance, and "[a]n injunction enjoining BTRC from taking any further action to preclude, prohibit, or interfere with the Missing Link's construction." BTRC responded that, among other defenses, it was immune from liability under Washington's anti-SLAPP statute. The court issued a series of summary judgment orders, concluding that the operating agreement did not give Seattle the right to require a relocation of BTRC's tracks in the missing link area

[4] The City's Environmental Impact Statement has been the subject of other recent litigation. Martin Luther King, Jr. County Labor Council of Wash. v. City of Seattle, No. 79543-1-I (Wash. Ct. App. Mar. 29, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/795431.pdf.

and that the franchise ordinance did purport to give Seattle this right but that this provision was preempted by federal law. The court also denied BTRC's motion for damages and attorney fees under the anti-SLAPP statute. Seattle appeals and BTRC cross-appeals.

ANALYSIS

Standard of Review

"Summary judgment is appropriate where there is no genuine issue as to any material fact, so the moving party is entitled to judgment as a matter of law." Meyers v. Ferndale Sch. Dist., 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). "We view the facts and reasonable inferences in the light most favorable to the nonmoving party." Meyers, 197 Wn.2d at 287. "We review rulings on summary judgment and issues of statutory interpretation de novo." Am. Legion Post No. 149 v. Dep't of Health, 164 Wn.2d 570, 584, 192 P.3d 306 (2008).

Preemption of Franchise Ordinance

Seattle challenges the trial court's conclusion that enforcement of the franchise ordinance is preempted by the ICCTA, contending that the franchise was a voluntary agreement and did not regulate the construction of rail lines. We disagree.

"Under the preemption doctrine, states are deemed powerless to apply their own law due to restraints deliberately imposed by federal legislation." Alverado v. Wash. Pub. Power Supply Sys., 111 Wn.2d 424, 430-31, 759 P.2d 427 (1988).

> Federal preemption is required when Congress conveys an intent to preempt local law by: (1) "express preemption", where congress

> explicitly defines the extent to which its enactments preempt laws; (2) "field preemption", where local law regulates conduct in an area the federal government intended to exclusively occupy; and (3) "conflict preemption", where it is impossible to comply with both local and federal law.

City of Seattle v. Burlington N. R.R. Co., 145 Wn.2d 661, 667, 41 P.3d 1169 (2002) (quoting S. Pac. Transp. Co. v. Pub. Util. Comm'n, 9 F.3d 807, 810 (9th Cir. 1993)). In addition to state law, federal preemption also applies to local ordinances. Burlington, 145 Wn.2d at 668.

The ICCTA provides that the STB's jurisdiction over "(1) transportation by rail carriers . . . and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive." 49 U.S.C. § 10501(b). This section "expressly preempts any state law remedies with respect to the routes and services of Board-regulated rail carriers." CSX Transp., Inc., 2005 WL 1024490, at *2 (U.S. Surface Transp. Bd. May 3, 2005); see also Port of Seattle v. Pollution Control Hr'gs Bd., 151 Wn.2d 568, 587, 90 P.3d 659 (2004) (An agency's interpretation of an ambiguous statute that falls within the agency's expertise is accorded great weight if it does not conflict with the language of the statute). Because such remedies "by a state or local body would directly conflict with exclusive federal regulation of railroads, . . . the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself." CSX Transp., 2005 WL 1024490, at *3 (citation omitted). However, "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,'

i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation while permitting the continued application of laws having a more remote or incidental effect on rail transportation." Florida E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) (alterations in original) (quoting BLACK'S LAW DICTIONARY 1286 (6th ed.1990)). "There is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption." Inlandboatmen's Union of the Pac. v. Dep't of Transp., 119 Wn.2d 697, 702, 836 P.2d 823 (1992) (footnote omitted).

Here, Section 4 of the franchise ordinance reserved for Seattle the "full and complete right of access to any space occupied by [the Ballard Line] tracks and to all of said franchise right-of-way." It provided that "[i]n all cases involving a possibility of such interference, or removal of lateral support or excavation beneath the tracks . . . [BTRC] shall, at its own cost and expense, remove, relocate, support, reinforce said tracks as necessary." This section requires BTRC to reroute its tracks upon notice from Seattle. Therefore, it is a local law remedy "with respect to the routes and services of [a] Board-regulated rail carrier[ ]," and is accordingly preempted by the ICCTA. CSX Transp., 2005 WL 1024490, at *2.

Seattle disagrees and contends that the franchise is a voluntary agreement and therefore is not subject to the preemption claim. It is true that voluntary agreements are not necessarily subject to preemption, Twp. of

Woodbridge v. Consol. Rail Corp., 5 S.T.B. 336 2000 WL 177104, at *3 (2000), and that case law often characterized franchises as contracts and applies contract interpretation rules to them, Burns v. City of Seattle, 161 Wn.2d 129, 142, 164 P.3d 475 (2007). However, our Supreme Court has explicitly noted that in the context of railroad regulation, a franchise ordinance, "[l]ike any state law, . . . is subject to Congressional preemption." Burlington, 145 Wn.2d 661, at 41. Seattle's argument therefore fails.

Seattle also contends that the STB's exclusive jurisdiction over the "construction" of tracks under 49 U.S.C. § 10501(b) does not apply to the relocation of tracks at issue here. However, to make this argument, Seattle looks to 49 U.S.C. § 10901(a), which provides that

> A person may--
>
> (1) construct an extension to any of its railroad lines;
>
> (2) construct an additional railroad line;
>
> (3) provide transportation over, or by means of, an extended or additional railroad line; or
>
> (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,
>
> only if the Board issues a certificate authorizing such activity.

This section does not attempt to define "construction" or to limit the definition of "construct" to extensions or additional lines, but instead simply declares that Board authorization is required for those categories of construction. Neither Seattle nor BTRC is seeking a certificate to authorize the relocation of tracks—instead, Seattle is seeking to use its governmental authority to require BTRC to relocate its tracks. This is the kind of local regulation that is not permitted by

49 U.S.C. § 10501(b). See also H.R. REP. NO. 104-311, at 95-96, reprinted in 1995 U.S.C.C.A.N. 793, 808 ("[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation."). The cases to which Seattle cites indicate that the STB authorization is not required for the relocation of tracks. However, they do not establish that Seattle may use its governmental authority to require this relocation. See Detroit/Wayne County Port Auth. v. I.C.C., 59 F.3d 1314, 1317 (D.C. Cir. 1995) (establishing that "a relocation or an improvement to an existing line that does not extend into new territory is not an extension or addition under section 10901(a)."). Accordingly, we are not persuaded.[5]

Interpretation of Operating Agreement

Seattle contends the trial court erred when it concluded that the operating agreement did not give Seattle the right to require BTRC to move its tracks in the area of the missing link. It contends that the court's interpretation was not supported by the language of the operating agreement, was contradicted by

[5] Seattle also contends that the superior court improperly analyzed the categorical preemption claim as an "as applied" claim and made factual assessments about the effect of Seattle's proposal on BTRC. Seattle is correct that an as-applied preemption claim involves questions of fact, including about the impact of the relocation on the railroad, that the parties agreed were not before the court on summary judgment. However, because our review is de novo and there is no dispute of material fact relevant to our determination that the franchise is categorically preempted, we need not address this issue.

extrinsic evidence showing Seattle's intent to construct the missing link, and erroneously conflicted with the franchise ordinance's language. We disagree.

"Washington courts follow the objective manifestation theory of contracts." Pelly v. Panasyuk, 2 Wn. App. 2d 848, 865, 413 P.3d 619 (2018). "Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The "subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used," which are generally given their ordinary, usual, and popular meaning. Id. at 504. "Interpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective." Grey v. Leach, 158 Wn. App. 837, 850, 244 P.3d 970 (2010).

Furthermore, Washington courts apply the context rule, under which "extrinsic evidence is admissible to ascertain the intent of the parties in entering into a contract and the meaning of the words used in the instrument." Pelly, 2 Wn. App. 2d at 866.

> The court may consider extrinsic evidence concerning (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties.

Id. "Extrinsic evidence is not admissible to show 'a party's unilateral or subjective intent as to the meaning of a contract word or term'; to show an intent

'independent of the instrument'; or to 'vary, contradict, or modify the written word.' " Id. (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999)).

Here, the plain language of the operating agreement does not require BTRC to relocate its tracks in the missing link portion of the Ballard Line. Seattle concedes that "Exhibit D controlled the location of the 'Trail' north and south of the Missing Link area, where the Ballard Line is not in the City's street right-of-way, but that the Operating Agreement did *not* define or restrict the Trail's location" where the missing link is located. The operating agreement's grant of Seattle's "right to require [BTRC] to relocate its track in order to accommodate trail construction in accordance with this Agreement" should therefore be read as being limited to those locations where the operating agreement defined the trail's location. Without this limitation, the language "in accordance with this Agreement" would essentially have no effect, because Seattle would be entitled to require track relocations that were not provided for in the operating agreement. We avoid this interpretation because it results in language in the contract being rendered meaningless. Grey, 158 Wn. App. 850.

Section 10(i) of the operating agreement, which provides that Seattle will "undertake[ ] to provide [BTRC] with 120 days notice . . . prior to [Seattle's] presentation of a request for initial authorization . . . for an extension of the Burke-Gilman Trail in the area between 11th Avenue [NW] and the Locks within the premises," does not require a different result. This language contemplates

the possibility that Seattle would pursue building the missing link on Shilshole Avenue NW, as it is doing today. However, it provides only for notice and an opportunity to consult, and does not establish that Seattle has the right to build the trail there. In fact, the special provision for notice about plans to construct on Shilshole Avenue NW supports an interpretation that the requirement that BTRC move its tracks to accommodate construction did not extend to construction of the missing link in that location. Therefore, an objective reading of the operating agreement does not require BTRC to relocate its tracks in the missing link area.

Seattle disagrees and points to contextual evidence, such as the "Joint Statement of Principles", that the Burke-Gilman Trail's "completion was a long-held, critical goal to the City." BTRC does not contest this, but points to other evidence that at the time the parties entered the operating agreement, Seattle was planning a different route for the missing link. For instance, it points to the November 1996 resolution, in which the Seattle City Council stated its support for the "preferred alternative" of the route going up to NW Leary Way and NW Market Street that was depicted in Exhibit D to the operating agreement. Together, the contextual information establishes that (1) Seattle intended to complete the Burke-Gilman Trail, (2) at the time of contracting, its plan for the missing link route involved diverting the trail up to NW Leary Way and NW Market Street, and (3) this plan was not finalized or set in stone and was subject to change. This context is consistent with our interpretation of the operating agreement.

Moreover, other evidence indicates that the operating agreement was not intended to authorize construction of the trail on Shilshole Avenue NW. Most significantly, Exhibit H to the operating agreement was an agreed draft letter to the Washington State Department of Transportation seeking grant funds. The letter described the purpose of the agreement between the parties as "permit[ting] the continuation of rail service through a new shortline railroad (BTRC), while at the same time allowing extension of the Burke-Gilman Trail from Eighth Avenue [NW] to [11th] Avenue [NW] and north of the Government Locks." This description specifically excludes the construction of the missing link, which runs between 11th Avenue NW and the Locks. Similarly, Exhibit K to the operating agreement, a memorandum of understanding between Seattle and SLR dated two weeks before the operating agreement was signed, provided that after SLR acquired the line, Seattle would "have a right of entry to perform such surveys and preliminary studies as are reasonable and appropriate to expedite construction of additions to the Burke-Gilman west of the Government Locks and between 8th Avenue [NW] and 11th Avenue [NW]." This evidence indicates that the parties intended that Seattle could require BTRC to relocate its tracks east and west of, but not within, the missing link portion of the line. Seattle's interpretation of the operating agreement is not supported.

Finally, Seattle contends that this reading conflicts with the franchise ordinance, and that the operating agreement and franchise ordinance must be

read harmoniously.[6] "In Washington it is a well-settled principle that written instruments contemporaneously executed as part of the same transaction will be considered and construed as one transaction." Kruger v. Horton, 106 Wn.2d 738, 742, 725 P.2d 417 (1986). "Whether two separate agreements are part of the same transaction depends on the intent of the parties as demonstrated by the agreements." Pelly, 2 Wn. App. 2d at 868.

> '[T]he terms of agreement may be expressed in two or more separate documents, some of these containing promises and statements as to consideration, and others, such as deeds, . . . embodying performances agreed upon rather than a statement of terms to be performed. In every such case, these documents should be interpreted together, each one assisting in determining the meaning intended to be expressed by the others.'

Id. (alterations in original) (quoting Kelley v. Tonda, 198 Wn. App. 303, 311-12, 393 P.3d 824 (2017)).

Here, although the operating agreement and franchise ordinance are related to the same transaction, the terms of the franchise ordinance may not be read into the operating agreement. Seattle's argument that we must interpret the franchise ordinance and operating agreement together relies on case law involving two contracts. Seattle cites no case suggesting that the terms of a preempted ordinance should be read into a valid contract. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no

[6] BTRC contends that we should not consider this argument because Seattle did not raise it below. However, Seattle did contend that the franchise ordinance's provisions were consistent with the operating agreement and supported its interpretation below. Furthermore, while RAP 2.5(a) empowers this court to "refuse to review any claim of error which was not raised in the trial court," it does not go so far as to say a party may not refine its reasoning behind a claim of error.

authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.") Furthermore, even if the franchise ordinance may " 'assist[ ] in determining the meaning intended to be expressed by' " the operating agreement, Pelly, 2 Wn. App. 2d at 868 (quoting Kelley, 198 Wn. App. at 311-12), the terms that give Seattle the unequivocal right to make BTRC relocate its tracks are part of the franchise ordinance, not the operating agreement. Contrary to Seattle's argument, it is not a contradictory reading of the two documents to note that the franchise ordinance states something that the operating agreement does not. Therefore, the franchise ordinance's provisions do not require a different reading of the operating agreement.

Anti-SLAPP Claim

Finally, BTRC contends that the court erred by denying its claim for attorney fees and damages under Washington's anti-SLAPP statute. Because Seattle's suit is not an action to which the statute applies, we disagree.

RCW 4.24.510 provides that "[a] person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization." "A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory

damages of ten thousand dollars." RCW 4.24.510. These damages may be denied if the court finds that the complaint or information was communicated in bad faith. RCW 4.24.510.

It is " 'the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies.' " Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 72, 316 P.3d 1119 (2014) (emphasis in original) (quoting Martinez v. Metabolife Intern., Inc., 113 Cal. App. 4th 181, 188 (Cal. App. 2003)); see also Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d 1104, 1110-11 (W.D. Wash. 2010) ("[T]he act underlying the plaintiff's cause, or the act which forms the basis for the plaintiff's cause of action, must itself have been an act in furtherance of the right of free speech."). Furthermore, the purpose of this statute is to "protect individuals who make good-faith reports to appropriate governmental bodies" because "the threat of a civil action for damages can act as a deterrent to citizens who wish to report information" to these bodies. RCW 4.24.500. Therefore, the term "civil liability" in RCW 4.24.510 should be "construed within the context of the statute's intent and purpose to mean a civil action for damages." Emmerson v. Weilep, 126 Wn. App. 930, 937, 110 P.3d 214 (2005).

BTRC is not entitled to recover under the anti-SLAPP statute because Seattle did not sue for damages, as required under Emmerson. BTRC contends that the language in RCW 4.24.500 should not affect our reading of RCW 4.24.510 because "policy statements do not give rise to enforceable rights

and duties." Bailey v. State, 147 Wn. App. 251, 263, 191 P.3d 1285 (2008). However, it cites no authority overruling the holding of Emmerson. Therefore, we conclude that BTRC is not entitled to damages or fees under the anti-SLAPP statute.

We affirm.

Smith, A.C.J.

WE CONCUR:

Mann, J.

Dwyer, J.

VAN NESS FELDMAN LLP

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