69157-1

NO. ~~[illegible]~~ 69157-1

IN THE 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.

RESPONDENT KING COUNTY'S BRIEF ON APPEAL

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I. INTRODUCTION

In 1983, Congress established "the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use."[1] Shortly after enactment of this federal "railbanking" legislation, the Washington Legislature followed suit, finding that:

> Railroad properties, including but not limited to rights-of-way, land held in fee and used for railroad operations, bridges, tunnels, and other facilities, are declared to be suitable for public use upon cessation of railroad operations on the properties. It is in the public interest of the state of Washington that such properties retain their character as public utility and transportation corridors, and that they may be made available for public uses including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation.[2]

The Eastside Rail Corridor ("Corridor") is precisely the sort of property contemplated by federal railbanking law and state laws mandating rail preservation. As early as 2007, a Port of Seattle Commissioner expressed interest in the Corridor's preservation:

> I'd rather have [the Eastside Rail Corridor] purchased by a public agency then [sic] sold into private ownership, because both the Port of Seattle and King County need that rail access for future transportation usage – supporting cargo handling expansion, supporting commuter rail, and providing space for bicycle corridors on the eastside.[3]

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[1] 16 U.S.C. § 1247(d), enacted by Pub. L. No. 98-11, Title II, § 208, 97 Stat. 48 (1983).

[2] RCW 64.04.180, enacted by Laws of 1984, ch. 143, § 22.

[3] CP 3375 (Manville Decl., Ex. KC 19 at PORT-E_09749).

The part of the Corridor primarily at issue is an operating freight line. The Port sought to acquire and preserve that part, and the rest of the Corridor, "for long-term freight rail use which . . . the Port and many businesses that depend on trade in our state need to thrive."[4] There is ample evidence that the Port may need the Corridor in the future to support freight mobility, including intermodal freight.[5]

To serve this long term use and to prevent the Corridor from being lost to private development, the Port had to acquire it now – intact – as contemplated by the federal railbanking and state rail preservation statutes. King County served a necessary role in this rail preservation program by agreeing to serve as the interim trail user – a necessary precondition to railbanking.[6]

In acquiring the segment running from Woodinville to Snohomish, the Port preserved an operating freight line used to deliver freight from out-of-state shippers to Port district businesses. And the Port has sold various interests in other parts of the Corridor to regional partners (subject to easements needed to maintain railbanking), reducing the Port's net cost to approximately $23 million. Thus the Port has, in return for a relatively

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[4] CP 3581 (Manville Decl., Ex. KC 45 at PORT-E_31289).

[5] *See infra* notes 30, 31.

[6] CP 1446, 1448 (Yoshitani Decl., Ex. 8 at 1, 3); CP 1517, 1519, (Yoshitani Decl., Ex. 9 at 1, 3); CP 1580-84 (Yoshitani Decl., Ex. 10 at 1-5); CP 1591-1630 (Yoshitani Decl., Ex. 11); CP 3630-38 (Manville Decl., Ex. 50); 16 U.S.C. § 1247(d) ; *National Trails System Act and Railroad Rights-of-Way (Final Rule)*, 2012 WL 1498609, at *2-3 (S.T.B. Apr. 25, 2012).

modest investment, acquired an active freight line serving current Port district customers, and has preserved the entire Corridor for possible future reactivation as a freight line.

Lane's argument not only ignores the vital public interests and statutory mandates served by the acquisition of the Corridor, but also assumes an antiquated vision of the Port's authority. For the last thirty years, port districts have had the power to acquire and operate "rail services, equipment and facilities inside or outside the port district." RCW 53.08.290. The Legislature has instructed port districts to participate in the preservation of rail service. RCW 47.76.240.

The Legislature also has given the Port broad authority to "acquire any land within its boundaries which it deems 'necessary for its purposes,' including land for which the Port may have no specific plan."[7] Port districts may acquire and operate a wide range of "commercial transportation" facilities. RCW 53.04.010. The Port acquired the Corridor in service of its statutory charge to support cargo movement and economic development in its district. *E.g.*, RCW 53.04.010(1); RCW 53.08.010, .020, .043, .240; .245, .260, .290, .330, .340, .370, .400; RCW 53.34.010; RCW 47.76.240.

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[7] CP 4929; RCW 53.08.010.

This is consistent with the Legislature's increasingly-expansive use of port districts. For instance, the inland Port of Pend Oreille County was created solely to acquire a rail line.[8] RCW 53.04.015 even authorizes port facilities *where there is no water* appropriate for harbor improvements. Other wide-ranging powers of port districts are set forth at RCW 53.08.020, .043, .240, .340 and .370.[9]

Lane argues that the Port purported to create its own authority in its mission statement, and that the trial court's decision was based on this fallacy. This is false. The Port consistently and correctly has demonstrated that it had authority to acquire the Corridor based on RCW 53.08.010, .020 and .290, and other statutory sources.[10] The trial court correctly understood that the Port of Seattle had all the authority it needed to acquire the Eastside Rail Corridor as part of a major intergovernmental effort lasting years and serving various complementary public purposes, all as mandated by both state and federal legislation.

II. STATEMENT OF THE CASE

On May 12, 2008, BNSF, the Port and King County executed documents that would convey the entire Corridor to the Port for about

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[8] CP 2149 (Stewart Decl. at ¶ 46).

[9] *See also* CP 1393-94 (Yoshitani Decl. at ¶¶ 17-18).

[10] CP 4797-98 (Supp. Grad Decl., Ex. 56) (December 6, 2007 email from Port's General Counsel articulating bases for Port's authority to acquire Corridor).

$107 million.[11] Because railbanking requires an interim trail manager and trail use, the Port and King County also signed an interlocal agreement authorizing the County to be the interim trail user of the Corridor's southern portion and the Redmond spur.[12] Under this agreement the rails would remain in place, and interstate freight rail service could be restored in the future.[13] The sale closed on December 18, 2009, after Port CEO Tay Yoshitani negotiated the purchase price down to $81 million.[14]

A. Background regarding the Corridor.

The Eastside Rail Corridor was constructed over 100 years ago as a freight bypass around Seattle.[15] For most of its life, the Corridor was part of a mainline running north to Sumas, near the Canadian border, and on to a connection with the Canadian Pacific Railway.[16] Construction of the southern part of the Corridor began in 1890, when the Northern Pacific Railroad and the Seattle Lake Shore & Eastern Railroad jointly began

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[11] CP 586-609 (Bagshaw Decl., Ex. 2); CP 611-33 (Bagshaw Decl., Ex. 3).

[12] CP 3587-617 (Manville Decl., Ex. KC 47).

[13] CP 3588, 3591, 3602-08 (Manville Decl., Ex. KC 47 at 2, 5, attached unsigned easement at 6-12). *See also* CP 1597-603 (Yoshitani Decl., Ex. 11 at 7-13).

[14] CP 1399 (Yoshitani Decl. at ¶ 33); CP 3620-21 (Manville Decl., Ex. KC 48); CP 3623-28 (Manville Decl., Ex. KC 49). Lane asserts that the Port paid $81 million for only the northern portion of the Corridor, consisting of the King County operating freight line, the Snohomish County connection, and the Redmond spur. (Lane's Brief at 2, 16.) This is incorrect. CP 2108-09 (Port's Cross-Motion for SJ at 3:5-4:10). As Port CEO Tay Yoshitani testified at deposition, the Port acquired "the entire corridor for 81 million bucks. That was the deal." CP 2756-57 (Yoshitani Dep. at 12:21-13:3). *See also* CP 1398-400 (Yoshitani Decl. at ¶¶ 31-35).

[15] CP 2986, 2989 (Manville Decl., Ex. KC 1 at 147, 159); CP 2995, 2997 (Manville Decl., Ex. KC 2 at 142, 199); CP 3005 (Manville Decl., Ex. KC 3 at 11-14).

[16] CP 2997 (Manville Decl., Ex. KC 2 at 199); CP 3006 (Manville Decl., Ex. KC 3 at 12-13); CP 777 (Markley Decl., Ex. A at 36).

developing 20 miles of track referred to as the Lake Washington Belt Line.[17] The track from Renton to Woodinville was renovated and completed in 1904.[18] The Belt Line diverted freight around Seattle.[19]

The Corridor remained in operation as a throughway until the early 1980s, when its classification was downgraded.[20] Over time, it became less profitable for its owner, BNSF Railway Company, as BNSF – like all of its large competitors – shifted toward an exclusive "hook and haul" strategy for moving freight.[21] In the fall of 2003, BNSF disclosed that it wished to divest itself of the Corridor from milepost 5.0 in Renton to milepost 38.25 in the City of Snohomish.[22] The portion of the Corridor running from Woodinville to Snohomish, although no longer as profitable as BNSF wanted, remains in use as an operating freight line. This part of the Corridor is best understood as two segments:

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[17] CP 2986 (Manville Decl., Ex. KC 1 at 147); CP 2995 (Manville Decl., Ex. KC 2 at 142); CP 3005 (Manville Decl., Ex. KC 3 at 11-14).

[18] CP 2989 (Manville Decl., Ex. KC 1 at 159); CP 2997 (Manville Decl., Ex. KC 2 at 199).

[19] CP 2989 (Manville Decl., Ex. KC 1 at 159); CP 2997 (Manville Decl., Ex. KC 2 at 199); CP 3006 (Manville Decl., Ex. KC 3 at 13).

[20] CP 777 (Markley Decl., Ex. A at 36).

[21] CP 3032-33 (Manville Decl., Ex. KC 4 at 10:20-11:13); CP 3085-86 (Manville Decl., Ex. KC 5 at 2-2 – 2-3); CP 777 (Markley Decl., Ex. A at 36); CP 214-15, CP 235-36 (Sawtell Decl., Att. at 4-5, 25-26); CP 759 (Markley Decl., Ex. A at 18). "Hook and haul" refers to the practice of having other entities, like ports or short-line railroad operators, prepare trains for runs of 500 miles or more. CP 3085 (Manville Decl., Ex. KC 5 at 2-2).

[22] CP 3034-35 (Manville Decl., Ex. KC 4 at 24:10-25:12); CP 750 (Markley Decl., Ex. A at 9).

- The King County operating freight line – The northern portion of the Corridor begins in Woodinville, in King County, as an operating freight line serving Port district businesses receiving freight from out-of-state shippers. (*See* blue segment marked on Appendix A.) This segment plainly is a rail facility within the Port district.

- The Snohomish County interstate rail connection (the "Snohomish County connection") – This segment is the primary subject of Lane's claims. It is an operating freight line running from the King County line north to Snohomish, where it connects to the interstate rail system. (*See* yellow segment marked on Appendix A.) It is the *only* practical way to connect the King County operating freight line to interstate rail.

B. The Port and King County work to acquire the Corridor.

1. The PSRC recommends public acquisition of the Corridor.

When BNSF made its announcement, the Washington State Department of Transportation asked the Puget Sound Regional Council ("PSRC") to determine whether the Corridor should be placed in public ownership.[23] The PSRC recommended railbanking any segments that did not continue in active freight use – which is exactly the approach that the region, led by the Port, eventually followed.

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[23] CP 750 (Markley Decl., Ex. A at 9).

In June 2004, the PSRC recommended to BNSF that the Corridor be "preserve[d] . . . for future transportation uses."[24] In February 2007, the PSRC'S Transportation Policy Board and Executive Board adopted a report and recommendations developed by the CAC.[25] In May 2007, the PSRC issued a final report that stressed the importance of "assur[ing] that any segments of this corridor that do not continue in freight rail operations be rail banked under federal legal provisions in order *to enable the region to reconsider options for rail transportation* in the medium to long-term time periods. . . . The Advisory Committee agreed that *this 'preservation' intent could also be applied to potential future demands/need for freight rail, should such arise*" (emphasis added).[26]

2. The Port partners with King County to acquire the Corridor in order to preserve it for rail use and to foster trade and economic development.

While the PSRC deliberated, the Port and King County began to discuss partnering to acquire the Corridor. A wealth of evidence from the ensuing years of negotiations demonstrates the Port's commitment to preserving the Corridor to support future freight mobility. King County

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[24] *Id.*

[25] CP 751, 804 (Markey Decl., Ex. A at 10, 63).

[26] CP 804 (Markey Decl., Ex. A at 63) (emphasis added). The PSRC's conclusions reflected contemporaneous public sentiment that the Corridor should be in public ownership and preserved for rail use. That sentiment has not waned. *See* Trial Court Dkts. 70, 71, 74-76 (declarations filed by King County in opposition to Plaintiffs' Motion for Class Certification). These declarations were not included in Lane's designation of clerk's papers, but were included in a supplemental designation of clerk's papers that King County filed in the trial court and this Court on June 7, 2012, prior to the filing of this brief.

cited some of this evidence in its submissions below.[27] Lane (who accuses the Port of failing to "consider[ ] the relevant facts" in deciding to purchase the Corridor, Lane's Brief at 41) ignores this evidence, spinning a one-sided yarn about the Port's motivations for acquiring the Corridor that is demonstrably at odds with the record.

After exploring alternatives, the Port decided to buy the Corridor and to allow King County to use the southern portion and part of the Redmond spur for a trail.[28] The Port did so because it understood the value of owning and controlling the Corridor, to ensure that the Corridor would remain available for passenger rail use and, in Cmr. Creighton's words, be "preserve[d] . . . as an intact freight rail corridor" – notwithstanding its projected near-term use as a trail.[29]

Lane argues that the Port only bought the Corridor because it could afford to. (Lane's Brief at 12-13.) In fact, from the beginning, the Port was concerned about the preservation of the Corridor for possible cargo and transportation uses. Cmr. Tarleton's August 14, 2007 email, quoted at the bottom of p. 1, *supra*, says exactly this. Cmr. Creighton echoed this explanation in a November 12, 2007 email:

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[27] CP 2074-76 (King County's Cross-Motion for SJ at 6:10-8:11).

[28] CP 3354-56 (Manville Decl., Ex. KC 14); CP 3358-59 (Manville Decl., Ex. KC 15); CP 3361-64 (Manville Decl., Ex. KC 16); CP 3366-68 (Manville Decl., Ex. KC 17).

[29] CP 3370 (Manville Decl., Ex. KC 18).

> [T]he preservation of an intact potential future transportation corridor on the Eastside is a once-in-a-lifetime opportunity, of substantial value to the east side of King County. . . . To the extent we can facilitate transit options to get people off the road, I believe that that can only help freight mobility. . . .
>
> In addition, I've talked with some freight people who believe that the BNSF is acting precipitously in giving up the corridor as it would provide an insurance policy in case the main line goes down, so I also believe that warehousing the corridor for future potential freight use, while less likely, should not be dismissed either.[30]

Throughout the 2007 – 2008 negotiations, the Port steadfastly maintained that rail use of the Corridor – including future freight use – had to be paramount. The Port demonstrated throughout that it was committed to preserving the Corridor for future freight rail use, and negotiated hard with precisely that use in mind.[31] Cmr. Creighton confirmed the Port's commitment to this vision in remarks delivered on May 6, 2008:

> We believe that the Port's $107 million investment in the corridor is in keeping with our core mission to develop strategic economic and transportation assets for King County. Without our investment, the corridor would likely have been fragmented and sold to private developers – and

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[30] CP 3377 (Manville Decl., Ex. KC 20). *See also* CP 3385-88 (Manville Decl., Ex. KC 21 at 8:17-11:5); CP 3396-97 (Manville Decl., KC 22 at 17:7-18:17); CP 3308-09 (Manville Decl., Ex. KC 9 at 13:6-14:21); CP 3361-62 (Manville Decl., Ex. KC 16); CP 3366 (Manville Decl., Ex. KC 17); CP 3405-06 (Manville Decl., Ex. KC 23); CP 3408 (Manville Decl., Ex. KC 24); CP 3412 (Manville Decl., Ex. KC 25, Att. at 2).

[31] *Id. See also* CP 3343-46 (Manville Decl., Ex. KC 13 at 64:22-65:1, 66:14-67:21); CP 3313-14 (Manville Decl., Ex. KC 9 at 93:24-94:22); CP 3425-45 (Manville Decl., Exs. KC 26-32); CP 3454 (Manville Decl., Ex. KC 33 at KC-LANE014590); CP 3469 (Manville Decl., Ex. KC 34 at 5, ¶ 2.2.2); CP 3485 (Manville Decl., Ex. KC 35 at 4); CP 3489-96 (Manville Decl., Exs. KC 36-39); CP 3504-07 (Manville Decl., Ex. KC 41); CP 3513 (Manville Decl., Ex. KC 42 at 5); CP 3522-23 (Manville Decl., Ex. KC 43 at 6-7, ¶ 2.2.2); CP 3546-47 (Manville Decl., Ex. KC 44 at 7-8, ¶ 2.2.2).

> an unbroken transportation corridor in the heart of the Puget Sound region would have been lost. We are investing in the corridor for long-term freight rail use which . . . the Port and many businesses that depend on trade in our state need to thrive.[32]

C. Two segments of the Corridor were railbanked.

"Railbanking" is designed to allow a region to preserve a rail corridor that currently is underutilized but may serve in the future as part of the national rail system. 16 U.S.C. § 1247(d); *National Trails System Act*, 2012 WL 1498609, at *2-3; *Caldwell v. United States*, 57 Fed. Cl. 193, 194 (Fed. Cl. 2003). When a railroad right-of-way is railbanked, it becomes available for trail use subject to reactivation for freight transit. 16 U.S.C. § 1247(d); 49 C.F.R. §§ 1152.29(c)(2) , (d)(2).

"A railbanked line is not abandoned, but rather remains *part of the national rail system*, albeit temporarily unused for railroad operations." *National Trails System Act*, 2012 WL 1498609, at *3 (emphasis added). Once a rail corridor is placed in railbanked status, it is always possible that future needs will require reactivation of the right-of-way for freight service. Railbanking was created to maintain unused railroad rights-of-way for potential for future rail use. *E.g., Preseault v. Interstate*

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[32] CP 3581 (Manville Decl., Ex. KC 45 at PORT-E_31289). None of the statements by Port representatives that Lane quotes in his brief show that the Port bought the Corridor to advance unauthorized purposes. Lane has taken the statements at issue out of context and has misrepresented their meaning and import. *See* CP 2076 (King County's Cross-Motion for SJ at 8 n. 6).

Commerce Comm'n, 494 U.S. 1, 6, 110 S. Ct. 914, 108 L. Ed.2d 1 (1990) ("the Amendments to the Trails Act . . . authorize the ICC to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails").

Two segments of the Corridor, both lying entirely within the boundaries of King County and the Port district, were railbanked:

- The southern portion – The entire southern portion, marked in red on Appendix A, is subject to a trail easement in favor of King County. Lane does not challenge the acquisition of the southern portion.
- The Redmond spur – The Redmond spur, marked in green on Appendix A, runs from Woodinville to and through Redmond. It is subject to a trail easement in favor of King County. The Port, King County, the City of Redmond, and others have agreed that the Redmond spur may be used for freight in the future.[33]

[33] CP 1437-41 (Yoshitani Decl., Ex. 6); CP 1580-90 (Yoshitani Decl., Ex. 10); CP 1591-630 (Yoshitani Decl., Ex. 11); CP 3630-38 (Manville Decl., Ex. KC 50); CP 1632-69 (Yoshitani Decl., Ex. 12).

D. Current uses and disposition of the Corridor.

The King County operating freight line and the Snohomish County connection. The northern portion of the Corridor remains an active freight line with trackage in King County.[34] Port district businesses use the line today, and traffic is expected to increase in the future.[35]

The Redmond spur. Lane asserts that "[t]he Port bought the Redmond Spur with the intent of turning part of it over to King County and part of it over to the City of Redmond for use as a trail and for possible future use as a commuter rail corridor." (Lane's Brief at 34.) This is inaccurate. First, it was always understood (and Redmond expressly agreed) that its acquisition of the portion of the Redmond spur between approximately mileposts 3.4 and 7.3 would be subject to the requirements of the federal railbanking statute, and thus that freight rail use of the entire spur could potentially be reestablished at any time.[36] Second, subject to the requirements of the railbanking statute, it was always Redmond's express intention to develop this southernmost portion of the spur into a system of pedestrian, transit and business connections called the Redmond Central Connector.[37] Redmond intended thereby to

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[34] CP 1400, 1411-12 (Yoshitani Decl. at ¶¶ 35, 74-75); CP 1154-56 (Payne Decl. at ¶¶ 7-12); CP 3643-45, 3648-70 (KC 51, answer to Interrogatory No. 3, responses to Requests for Production Nos. 1, 2, and attachments).

[35] *Id.*

[36] *See supra* note 33.

[37] CP 2347-56 (Odle Decl.).

catalyze substantial economic growth and development in and around its downtown core.[38] As Robert Odle, Redmond's Director of Planning and Community Development explained in a declaration filed in the trial court:

> The City expects up to 50,000 users a month will use the Connector during peak seasons. Ultimately, the Connector will become a year-round destination that attracts users to local businesses and cultural attractions. Redevelopment of the Redmond Spur – by bringing tens of thousands more people to Downtown Redmond – will be an economic benefit to all Downtown businesses and a key element to growing a sustainable urban center in Redmond by making significant aesthetic improvements in Downtown; increasing access to trails, parks and art; improving transportation alternatives; encouraging the development of a variety of dining, shopping, recreating, working, and living options; enhancing the environment through stormwater and park projects; and spurring economic growth.[39]

Since acquiring part of the Redmond spur from the Port for $10 million in June 2012, Redmond has moved forward with its multimillion dollar plan for urban development and economic growth.[40]

Other parts of the Corridor. In addition to Redmond, other local government agencies and utilities have agreed to act as "regional partners . . . to share in the cost of acquiring" the Corridor.[41] The partners have made or agreed to make payments for various interests in the Corridor – all subordinate to the trail use easement needed to support railbanking, and

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[38] *Id.*

[39] CP 2351 (Odle Decl. at ¶ 13).

[40] CP 2348, 2350-56 (Odle Decl. at ¶¶ 2, 10-27).

[41] CP 3672 (Manville Decl., Ex. KC 52 at ¶ (C)).

subordinate to the potential for freight reactivation – that will reduce the Port's net cost of buying it to approximately $23 million.[42] As of last December, discussions with other possible partners (including the City of Kirkland and the Cascade Water Alliance) were ongoing.[43] The regional partners are depending on the underlying transaction not being unwound.[44]

E. Future freight use of the Corridor.

At some point in the future, the Corridor may well play an important role in supporting freight mobility within the Port district – and the region. Lane disputes this, asserting that (1) entities other than the Port determined that the Corridor was not a suitable backup to the Puget Sound Mainline (Lane's Brief at 7-10); and (2) the Corridor could not be useful because it connects only to the Stevens Pass line (Lane's Brief at 56, 11). These arguments are incorrect.

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[42] CP 1400-01, 1632-839 (Yoshitani Decl. at ¶¶ 36-38, Exs. 12-15). Because the Corridor will still be railbanked after all the Port's transactions with its regional partners have been consummated, Lane is wrong to argue that the Port undercuts its authority by conveying interests in the Corridor to its partners (Lane's Brief at 17, 48) is. The Corridor will remain subject to reactivation for rail purposes. *See supra* Section C.

[43] CP 1400-01, 1632-839 (Yoshitani Decl. at ¶¶ 36-38, Exs. 12-15).

[44] *E.g.*, Trial Court Dkt. 80 (Declaration of Carolyn J. Hope in Opposition to Plaintiffs' Motion for Class Certification). This declaration was not included in Lane's designation of clerk's papers, but was included in a supplemental designation of clerk's papers that King County filed in the trial court and this Court on June 7, 2012, prior to the filing of this brief. Lane's assertion that the purchase and sale agreements for the Port's sale of interests in the Corridor to Redmond and Puget Sound Energy "provide a procedure for unwinding those transactions if the Port's acquisition of the Corridor from BNSF is determined to have been *ultra vires*" (Lane's Brief at 17 n.18) is overly simplistic. The procedures set forth in the referenced agreements are skeletal and plainly were not intended to account for all possible contingencies. Lane's unsupported contention that "[g]ranting relief to the taxpayers will not interfere with the County's construction of a trail from Renton to Woodinville" (Lane's Brief at 19) thus provides no comfort.

The Corridor as backup. The Port may very well need the Corridor as a backup to the Mainline. A natural or manmade disaster will likely render the Puget Sound Mainline between Seattle and Everett impassable for an extended period at some point. Traffic on the line passes through a 1.3-mile tunnel under the City of Seattle that was built over 100 years ago and is vulnerable to fires and other disasters.[45] Earthquakes threaten trackage in potential liquefaction areas.[46] Mudslides along the Puget Sound Mainline are common.[47] And global warming presents a host of risks – including inundation of entire sections of track by rising sea level and damage caused by increasing storm activity.[48] If the Mainline fails, the Corridor could be an important alternate freight route, which could be developed in advance to ensure its availability.[49]

Lane mischaracterizes the record about the determinations of other entities. BNSF determined only that the Corridor was no longer economically viable for *BNSF* to operate for freight use. BNSF's

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[45] CP 1409 (Yoshitani Decl. at ¶ 66); CP 4266-72 (KC 57); CP 4274-75 (KC 58).

[46] CP 1409 (Yoshitani Decl. at ¶ 66); CP 4277-79 (KC 59).

[47] CP 1409 (Yoshitani Decl. at ¶ 66); CP 508-09 (Bagshaw Decl., Ex. K, Port's answer to Interrogatory No. 2); CP 4281-89 (KC 60).

[48] CP 3790-92 (KC 53 at 112-14).

[49] CP 1409-10 (Yoshitani Decl. at ¶¶ 66-69); CP 2145 (Stewart Decl. at ¶ 35). The Corridor also may in the future be useful merely to expand North-South capacity. The Mainline has choke points and is subject to frequent stoppages. CP 213 (Sawtell Decl., Att. at 3). *See also* CP 212, 233 (Sawtell Decl., Att. at 2, 23); CP 4014-15 (Manville Decl., Ex. KC 54 at 83-84); CP 4138-39 (KC 55 at 13-14, A-6-7); 4207-08 (KC 56 at 29-30). This congestion is projected to increase over the next twenty years and beyond. CP 4073-74 (KC 54 at 142-43).

investment priorities are driven by its hook-and-haul business model and by national-level needs and competition, and in recent years it has focused its western U.S. investments on the lucrative Southern California rail market.[50] The fact that BNSF did not want the Corridor does not mean the rail line could never be operated cost effectively.[51]

Nor did the PSRC "find[ ] that the Corridor was obsolete for purposes of freight movement" as Lane argues. (Lane's Brief at 47.) To the contrary, the PSRC concluded that freight use should continue on the northern portion, and that those portions of the Corridor not currently devoted to active freight use should be railbanked to preserve all possible future rail uses, including freight use.[52] And, in any event, the PSRC's determinations do not bind the Port.

In large measure, both the PSRC and BNSF simply determined that, in the short term, the Corridor is not cost-effective as a freight line. Lane's argument ignores the long term vision of railbanking and rail preservation. Rail service reactivation always is a remote possibility when

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[50] CP 215, 238 (Sawtell Decl., Att at 5, 28); CP 4014, 4057-59 (KC 54 at 83, 126-28); CP 4254-56 (KC 56 at 76-78).

[51] Washington's rail network includes almost 30 local short-line operations that play a critical role in the state's economy and mostly use previously abandoned trackage. CP 3928, 4081 (KC 54 at ES-3, 150); CP 225 (Sawtell Decl., Att. at 15); CP 1153-54 (Payne Decl. at ¶¶ 4-6). A short-line operator could well use the Corridor profitably. *Id. See also* CP 1158-60 (Payne Decl. at ¶¶ 17-23).

[52] CP 748-49 (Markley Decl., Ex. A at 7-8).

railbanking is used, because a corridor would not be proposed for railbanking if there was a short term need for rail service on the line.

Connecting to Stevens Pass. Capacity through Stevens Pass is not as constrained as Lane argues; it could be substantially increased through a variety of measures – including longer trains, improved tunnel ventilation, or directional running of trains (westbound from Spokane to Everett and eastbound from Auburn to Pasco).[53] With such measures, the Everett-Spokane Mainline could have capacity for decades.[54]

The other East-West lines have less future capacity than Lane suggests. The Vancouver-Pasco Mainline is projected to be at or near 100 percent of capacity within the next 20 years, even assuming improvements are made.[55] Although capacity at Stampede Pass could be increased, even with the tunnel's roof "crowned" (but without directional running), demand on the Auburn-Pasco Mainline could exceed capacity by 2017 – far *earlier* than the Everett-Spokane Mainline.[56]

In sum, the connection to Stevens Pass, and hence the Corridor, has much more utility than Lane suggests.

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[53] CP 4059-61, 4076-78 (KC 54 at 128-30, 145-47); CP 4245-46 (KC 56 at 67-68). If trains are run directionally, then two-way service will be unnecessary on the Corridor, and the sidings referenced at pp. 9-10 n.9 of Lane's brief will not be required.

[54] CP 4075-78 (KC 54 at 144-47).

[55] CP 213, 233 (Sawtell Decl., Att. at 3, 23); CP 4064 (KC 54 at 133).

[56] CP 4077, 4080 (KC 54 at 146, 149).

F. The Port Commission's hearings and Resolution 3639.

The Port Commission deliberated and took public input regarding the Corridor for nearly four years, held over a dozen public meetings about the proposed acquisition, and on three occasions authorized the Port's CEO to proceed with the transaction.[57] The Commissioners did not fail to "look" at Lane's favored evidence. The Commissioners were very familiar with that evidence.[58] After due consideration, the Commission concluded that the Port should acquire the Corridor for current and future rail freight and other transportation purposes.[59]

The Commission also specifically considered whether the Port needed the Corridor to link Port facilities to the interstate rail system. *First,* as several Commissioners and CEO Tay Yoshitani testified at deposition and in declarations, and as the Commissioners recognized when they approved Resolution 3639, the Snohomish County connection is currently needed to link the freight portion of the Corridor in King County

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[57] CP 2114-16 (Port's Cross-Motion for SJ at 9:16-11:4, 18:9-25); CP 1141 (Creighton Decl. at ¶¶ 9-10); CP 2160, 2169-2325 (Tarleton Decl. at ¶ 11, Exhs. 2-15); CP 1395, 1403 (Yoshitani Decl. at ¶¶ 20-21, 44).

[58] For example, Cmr. Tarleton confirmed in her declaration that, contrary to Lane's contention (in their brief at 21 and 45) she had not "forgotten" the PSRC study. CP 2162-63 (Tarleton Decl. at ¶¶ 18-20.) She considered it in 2008, but understood that she was "not bound by the reasoning of an advisory committee of the PSRC." She considered other factors also, and decided that "the Port's acquisition of the ERC was appropriate." CP 2162-63 (Tarleton Decl. at ¶ 20). *See also* CP 1145 (Creighton Decl. at ¶¶ 21-22).

[59] CP 2114-16 (Port's Cross-Motion for SJ at 9:16-11:4, 18:9-25); CP 2074-76 (King County's Cross-Motion for SJ at 6:10-8:11).

to the interstate rail system.[60] *Second,* the record establishes that the Port considered the possibility that the Corridor could be needed in the future to connect Port facilities like the harbor or the airport to interstate rail.[61] This possible future use was a factor in the Port's decision to acquire the Corridor.[62]

G. The trial court's summary judgment order.

In a 21-page opinion issued on December 12, 2011,[63] Judge Beth Andrus denied Lane's motion for partial summary judgment, granted respondents' motions for summary judgment, and dismissed Lane's claims. Judge Andrus held that the Port's acquisition of the King County operating freight line and the Snohomish County connection were authorized by RCW 53.08.290.[64] Although she concluded that RCW 53.08.290 only empowered the Port to acquire these segments for cargo, not commuters, she noted that it was undisputed that the King County

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[60] CP 2111 (Port's Cross-Motion for SJ at 6:11-15); CP 1140, 1141-42 (Creighton Decl. at ¶¶ 8, 12); CP 2160 (Tarleton Decl. at ¶ 12); CP 1129 (Albro Decl. at ¶¶ 8-9); CP 1403-05, 1415, 1421, 1423 (Yoshitani Decl. at ¶¶ 45-48, Exhs. 1, 3, 4).

[61] CP 2112-16, 2123 (Port's Cross-Motion for SJ at 7:4-11:4, 18:9-25); CP 2074-76 (King County's Cross-Motion for SJ at 6:10-8:11); CP 1141, 1142-44 (Creighton Decl. at ¶¶ 9, 15-18); CP 2160, 2161-62 (Tarleton Decl. at ¶¶ 11, 13-17); CP 1395, 1405-11 (Yoshitani Decl. at ¶¶ 20-21, 49-73); CP 4575-677 (Grad Suppl. Decl., Exhs. 34-38).

[62] CP 2074-76 (King County's Cross-Motion for SJ at 6:10-8:11); CP 2112-14 (Port's Cross-Motion for SJ at 7:4-9:15).

[63] CP 4917-39.

[64] CP 4926-28, 4937.

operating freight line and the Snohomish County connection were being used to move cargo.[65]

Judge Andrus upheld the Port's acquisition of the Redmond spur under RCW 53.08.010, which she properly characterized as "grant[ing] ports broad discretion to promote trade and commerce by acquiring and developing land."[66] Contrary to Lane's repeated mischaracterizations (Lane's Brief at 1, 2, 24, 27), Judge Andrus did *not* hold that the Port's authority to acquire the Redmond spur "sprang forth" from its mission statement. She grounded her ruling in the grant of authority conferred by RCW 53.08.010.[67] "Given the record before the Court," she held, "it was reasonable for the port commissioners to conclude that purchasing the Redmond Spur would advance trade and commerce, promote industrial growth and sti[m]ulate economic development, and was thus 'necessary for its purposes' under RCW 53.08.010."[68]

Judge Andrus devoted most of the remainder of her opinion to a detailed and well-reasoned analysis of why the Port's necessity determination and enactment of Resolution 3639 were lawful.[69]

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[65] CP 4926, 4928.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] CP 4929-37.

III. ARGUMENT

The Port of Seattle had clear authority, based on the plain language of RCW 53.08.290, to acquire all of the rail facilities at issue because (a) the rail facilities within the Port district – the King County operating freight line and the Redmond spur – are rail facilities within King County, and the statute gives the Port unlimited authority to acquire rail facilities within the Port district, and (b) the Snohomish County connection was reasonably necessary to connect those facilities to interstate rail because there is no other practical way to connect them to interstate system.

Lane's argument to the contrary rests on faulty premises. Lane argues that ports have extremely narrow powers, and that *Huggins*[70] established a general prohibition on the acquisition of rail lines. Lane argues that ports only may exercise powers expressly enumerated in statutes and, based on a convoluted and unsupported interpretation of RCW 53.08.290, that the Port lacks authority to acquire rail facilities within the district (notwithstanding the express language of the statute).

Each of these premises is false. As we demonstrate in Section A, Title 53 gives the Port broad authority, and *Huggins* does not purport to create a general rule against the acquisition of rail properties. Section B shows that RCW 53.08.290 gives the Port the unconditional authority to

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[70] *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 166 P. 780 (1917).

acquire rail facilities within King County, and that Lane has invented the restrictions on this authority that he asks this Court to read into the statute. Section C demonstrates that acquisition of the Snohomish County connection was reasonably necessary (to connect the King County rail facilities to the interstate system), and also that the acquisition of the King County facilities was reasonably necessary to proper and legislatively-established Port purposes, and thus a real property acquisition authorized by RCW 53.08.010. Section D explains that the Port was authorized by RCW 47.76.240 to acquire the Corridor in order to railbank it. Section E shows that, given the Port's substantive authority, Lane's procedural arguments fail.

A. Title 53 gives the Port broad authority.

Over the course of a century, the Legislature has steadily expanded port purposes and authority. RCW 53.04.010 states some of the purposes of Port districts; others have been added over time:

> Port districts are hereby authorized to be established in the various counties of the state for the purposes of acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, *and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements*.

RCW 53.04.010(1) (emphasis added). Although Lane asserts that port districts have certain "core functions" and that other functions are "ancillary," this is an invention found neither in the text of this statute nor in the cases. In fact, the statues that empower port districts afford equal dignity to historical port functions and to the more recent additions."[71]

RCW 53.08.020 provides additional powers for the acquisition and operation of various kinds of facilities:

> A port district may construct, condemn, purchase, acquire, add to, maintain, conduct, and operate . . . any combination of such transfer and terminal facilities, commercial transportation, transfer, handling, storage and terminal facilities, and improvements relating to industrial and manufacturing activities within the district, and in connection with the operation of the facilities and improvements of the district, it may perform all customary services including the handling, weighing, measuring and reconditioning of all commodities received. . . . A port district may also construct, purchase and operate belt line railways, but shall not acquire the same by condemnation.

RCW 53.08.020. Much of the language in RCW 53.08.020 dates to the original enactment in 1911. Laws of 1911, ch. 92, § 4. The Legislature expanded port authority in the 1960s, Laws of 1961, ch. 126, § 1; Laws of 1963, ch. 147, and specifically gave them the power to acquire and operate "belt line railways" and "commercial transportation, transfer, handling, storage and terminal facilities," Laws of 1963, ch. 147, § 3.

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[71] Laws of 1963, ch. 147, § 1, amending RCW 53.04.010.

In the 1980s, with the successive enactment of laws now codified in RCW 53.08.290, the Legislature gave ports still more power to (a) perform activities related to intermodal freight, and (b) to acquire rail facilities. Among other things, RCW 53.08.290 now gives port districts express, unequivocal, and unlimited authority to acquire rail facilities within the port district, granting the power to "acquire, . . . provide, and operate rail services, equipment and facilities inside or outside the port district." The first sentence of the statute gives ports the power to perform "all necessary activities" related to intermodal freight:

> In addition to the other powers under this chapter, a port district, in connection with the operation of facilities and improvements of the district, may perform all necessary activities related to the intermodal movement of interstate and foreign cargo: PROVIDED, That nothing contained herein shall authorize a port district to engage in the transportation of commodities by motor vehicle for compensation outside the boundaries of the port district.

RCW 53.08.290. The second sentence of the statute gives ports unlimited power to acquire rail facilities within their district, as well as rail facilities outside their district (provided that the facilities outside the district are reasonably necessary to link to interstate rail):

> A port district may, by itself or in conjunction with public or private entities, acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities inside or outside the port district: PROVIDED, That such authority may only be exercised outside the boundaries of the port district if such extraterritorial rail services, equipment, or facilities are

> found, by resolution of the commission of the port district exercising such authority, to be reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system; . . . .

RCW 53.08.290. Each of the two sentences has its own separate proviso clause. The sentences of RCW 53.08.290 are limited in two different ways, emphasizing the distinctness of the two parts of the statute and the independence of their grants of authority. *Caughey v. Employment Sec. Dep't*, 81 Wn.2d 597, 602, 503 P.2d 460 (1972) ("where no contrary intention appears in a statute, relative and qualifying words and phrases refer to the last antecedent").

The Legislature also has given port districts a strikingly broad and diverse collection of powers in addition to those outlined above. The following examples – just a fraction of the powers the Legislature has granted ports – are illustrative. Ports have the power to construct public park and recreation facilities "necessary to more fully utilize boat landings, harbors, wharves and piers, air, land, and water passenger and transfer terminals, waterways, and other port facilities." RCW 53.08.260. They have the power to construct, repair, or upgrade roads that "serve[ ] port facilities." RCW 53.08.330. Ports can contract with "any city, town, or county for the purpose of exercising any powers of a community renewal agency." RCW 53.08.400. They can build toll bridges and tunnels, RCW 53.34.010; and rural port districts can build, buy and

operate telecommunications facilities, RCW 53.08.370. The Legislature says that it is a "public purpose for all port districts to engage in economic development programs." RCW 53.08.245. And, strikingly, the Legislature has expressly stated that ports should participate in the preservation of rail service. RCW 47.76.240. In sum, over the years, and in many different ways, the Legislature has made it clear that Washington ports are to serve as engines of economic development in their districts.

Huggins does not create a special rule to the contrary. Lane claims that this Court held in *Huggins* that "the Port had no statutory authority to acquire rail." This argument misrepresents the case. In *Huggins*, the Port commission adopted a resolution providing for the construction and operation of a belt line railway. 97 Wash. at 554. This Court stated as follows the only question to be resolved:

> Respondents maintain that the port commission is without power to construct or operate railways as a common carrier. This proposition is controverted by appellants, and *that is the only question for solution in this case.*

Id. at 555 (emphasis added) .

Thus the only question was whether the Port had the power to build and operate a railway, and the question was posed decades before the Legislature gave ports exactly that authority. The Court reviewed the more limited precursors to both RCW 53.04.010 and 53.08.020, and concluded that "the Legislature did not intend that the port commission

should enter upon the business of constructing, operating, and maintaining railways. . . ." *Huggins*, 97 Wash. at 557-58.

Huggins manifestly does *not* support Lane's sweeping assertion that "RCW 53.08.010 did not authorize the Port to acquire rail in 1917, and it does not authorize it today." (Lane's Brief at 28.) *Huggins* held only that, under the then-existing statute, the Port could not build and operate a railway. The statute has changed and the issue here is different. The express language of the statute now gives the Port unlimited power to acquire rail facilities within its district. *Huggins* does not establish a framework for the analysis of subsequent legislation giving ports authority to acquire rail facilities, and it does not suggest that the Legislature should not be taken at its word when it expressly expands port authority.

B. The Port has unconditional authority to purchase rail facilities within the Port district, that is, in King County.

The Port unquestionably had express statutory authority to acquire the rail facilities at issue that are inside King County – that is, inside the Port district. The plain language of the second sentence of RCW 53.08.290 expressly gives the Port unlimited authority to "acquire . . . rail . . . facilities" *inside* its district; the limitation that is the primary subject of this lawsuit applies only to the acquisition of rail facilities *outside* of the port district. On its face, this language gave the Port authority to acquire both the King County operating freight line and the Redmond spur.

1. The Port had unquestionable authority to acquire the King County operating freight line.

The northern portion of the Corridor begins in King County, in the City of Woodinville.[72] It is undisputed that the northern portion currently is used by Port businesses as an operating freight railroad.[73] The King County operating freight line is a rail facility within the district, and hence the Port had express statutory authority to acquire it. RCW 53.08.290.

2. RCW 53.08.290 gave the Port clear authority to acquire the Redmond spur.

The Redmond spur lies entirely within King County. Lane's primary argument, which relates to Port acquisitions of rail facilities *outside* King County, has nothing to do with the Redmond spur. The Port had express and unlimited statutory authority to acquire the Redmond spur as a rail facility within the district. RCW 53.08.290.

RCW 64.04.180 states that "[r]ailroad properties, including but not limited to *rights-of-way*, land held in fee and used for railroad operations, bridges, tunnels, and other *facilities*, are declared to be suitable for public use upon cessation of railroad operations on the properties." (Emphasis added.) The Redmond spur is undeniably a railroad right-of-way, and hence one of the types of railroad "facilities," in the language of RCW 64.04.180, that are suitable for public use "upon cessation of railroad

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[72] CP 78 (First Amended Complaint at ¶ 2).
[73] *Supra* p. 13.

operations on the properties." This usage shows that the Legislature designates railroad rail rights-of-way as rail facilities, even if not used for railroad operations. The Redmond spur is a "rail facilit[y]," as the Legislature has used the term in RCW 53.08.290, even if unused for railroad operations.

In fact however, the Redmond spur is available for direct service to freight movement today. In December 2009, the Port acquired the Redmond spur as a 7.3 mile rail corridor with rails intact. GNP still has the right to use the Redmond spur as an "excursion spur" from MP 0.0 to MP 2.5, and has the right to use the portion between MP 0.0 and MP 1.0 for "head and tail operations" directly supporting rail freight activities on the northern portion of the Corridor.[74]

The Redmond spur undeniably is and always was a rail facility, and it is undisputed that it is entirely within the Port district. The Port had the unlimited authority to acquire the Redmond spur pursuant to RCW 53.08.290, and no resolution finding reasonable necessity was required.

3. Lane misinterprets RCW 53.08.290.

In order to negate the clear authority explained above, Lane fabricates a limitation not found in the text, arguing that RCW 53.08.290 only gives ports authority to acquire rail facilities that are physically "in

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[74] CP 4691-94 (Supplemental Grad Decl., Ex. 43 at 2-5 ¶¶ 1.6, 1.7, 2.1, 2.2, 2.8).

contact" with the Port's docks and wharves. (Lane's Brief at 30-32.) Lane's argument ignores the statutory language and the legislative history.

The goal of statutory interpretation is to discern and implement the legislature's intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In interpreting a statute, the court looks first to its plain language. *Id.* If the plain language of the statute is unambiguous, then the court's inquiry is at an end, and the statute must be enforced in accordance with its plain meaning. *Id.* The court applies basic rules of grammar to determine a statute's plain meaning. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 839, 215 P.3d 166 (2009).

Lane argues that the second sentence of RCW 53.08.290, on authority to acquire rail facilities, is modified by the first sentence, on authority to perform activities necessary for "intermodal" transportation of interstate cargo. But the rules of grammar require two separate sentences to be read as independent grants of authority that do not modify or limit each other.

The "most natural grammatical reading" is one in which two independent clauses or sentences in a statute are read separately. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 115 S. Ct. 464, 130 L. Ed.2d 372 (1994). *Accord Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 83, 96 S. Ct. 2831, 49 L. Ed.2d 788 (1976)

(limitation in second sentence of statute did not modify or limit the duty imposed in the first sentence); *United States v. Mottolo*, 605 F.Supp. 898, 903 (D. N.H., 1985) (under rules of grammar and punctuation independent clauses in statute should not be read to modify or limit each other).[75]

If the legislature had intended the Port's authority to acquire rail facilities to be limited to facilities "in contact" with docks and wharves (Lane's Brief at 31), it would have used those words in the second sentence. The structure of RCW 53.08.290 requires that the second sentence be read as an independent grant of authority that is not limited or modified by the first.

Lane also argues that the language of Laws of 1980, ch. 110, § 1 trumps the statute's plain language. This is incorrect as a matter of law. "'[A] court cannot use a statement of [legislative] intent to contradict the plain language of a statute.'" *Bunch v. McGraw Residential Ctr.*, 159 Wn. App. 852, 864, 248 P.3d 565 (2011), *reversed on other grounds*, ____ Wn.2d ____, 275 P.3d 1119 (2012), *quoting Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 198, 72 P.3d 1122 (2003) (alteration in original).

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[75] The federal circuits have considered a similar question in construing 8 U.S.C. §1151(b)(2)(A)(i), and have held that separate sentences do not qualify each other. *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006) ("[w]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Lockhart v. Napolitano*, 573 F.3d 251, 256 (6th Cir. 2009) ("'[t]he grammatical structure of this statute suggests that the second sentence stands independent of the first and does not qualify the general definition of spouse'") (*quoting Freeman*, 444 F.3d at 1041 n.1).

The second sentence of RCW 53.08.290 is plain on its face, and "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)

Even if the statutory language were ambiguous, the legislative history of the statute supports the Port's authority to purchase the rail facilities at issue here. The authority of the Port to purchase rail facilities under RCW 53.08.290 was first granted in 1980 under a law that gave the Port unlimited power to acquire rail facilities in its district. The law repeatedly was referred to as an act "*[i]ncreasing* port districts' authority to operate facilities for the movement of freight and passengers." 1980 Senate Journal 348, 358 (emphasis added). Although the original act contained the same two clauses that it does today, one regarding intermodal movement of cargo and one regarding the acquisition of rail facilities, the legislature consistently referred to these clauses as two separate grants of authority. The stated purpose of the act was to "clarify existing law as to the authority of port districts to perform certain cargo movement activities *and* contract for or otherwise provide facilities for rail service. . . ." Laws of 1980, ch. 110, § 2 (emphasis added).

Importantly, the legislature rejected efforts to bar port districts from "purchas[ing] any railroad tracks located on property not owned by the port district." 1980 Senate Journal 358. The resulting act allowed ports to acquire rail facilities that would not be used for transporting freight from docks and wharves owned by the port. Nowhere in the legislative history regarding port authority to acquire rail facilities is there any suggestion that port authority is limited to rail facilities used to move freight from docks and wharves to interstate rail.

In sum, there is no statutory basis for Lane's argument that the Port may only acquire rail lines "in contact" with docks and wharves. The Port has unlimited authority to acquire rail lines within its district.

C. The Port has broad authority to acquire reasonably necessary rail facilities.

1. Implied powers and reasonable necessity.

The Port has not only those powers expressly granted in the enactments of the Legislature, but also the powers "necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purpose of the corporation." *E.g., Christie v. Port of Olympia*, 27 Wn.2d 534, 546, 194 P.2d 294 (1947) (power to enter into contracts with longshoremen implied in Port's power to operate wharves, docks, etc.), quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89 (4th ed.

1890); *see also State ex rel. Hill v. Bridges*, 87 Wash. 260, 262, 151 P. 490 (1915) (Port of Seattle had implied power to spend money to operate a fish, cold storage and ice manufacturing plant – notwithstanding argument that grants of authority to ports must be strictly construed and lack of any express statutory authority on ice, freezing, or processing fish).

When it comes to the acquisition of real property, the doctrine of reasonable necessity enhances the Port's express statutory authority. Our ports always have had the authority to acquire all property necessary for their purposes. RCW 53.08.010 ("[a] port district may acquire by purchase . . . or by condemnation, or both, all lands, property, property rights, leases, or easements necessary for its purposes . . .") "Necessary" within the context of RCW 53.08.010 means "reasonable necessity, under the circumstances of the particular case." *Asotin County Port Dist. v. Clarkston Community Corp.*, 73 Wn.2d 72, 75, 436 P.2d 470 (1968) (citation omitted).

> It [the word "necessary"] does not mean absolute, or indispensable, or immediate need, but rather its meaning is interwoven with the concept of public use and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement.

Id. (citations omitted). *See also In re Petition of Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 636 n. 19, 121 P.3d 1166 (2005) ("'Necessity' requires only that the condemning authority show that the

condemned property was 'reasonably necessary' for the public use, not that it was absolutely necessary or indispensable"); *In re Petition of Port of Grays Harbor*, 30 Wn. App. 855, 861-64, 638 P.2d 633 (1982) ("Even though a power is not given in specific words, it may be implied if its existence is reasonably necessary to effect the purpose of the condemning authority"); *City of Des Moines v. Hemenway*, 73 Wn.2d 130, 140, 437 P.2d 171 (1968) ("Necessary" means "reasonable necessity under the circumstances").[76] *See also State ex rel. Hunter v. Superior Court*, 34 Wn.2d 214, 220-221, 208 P.2d 866 (1949) (statute authorizing fire protection districts to exercise the right of eminent domain for "any of the purposes of its organization" implied power to condemn land for training firemen).

2. The Snohomish County connection is the only practical way to connect the King County operating line to interstate rail, so the Port had authority to acquire it.

It was reasonably necessary for the Port to purchase the Snohomish County segment of the northern portion in order to link the King County rail facilities to interstate rail. As a practical matter, there is no other way to connect the Woodinville rail facilities in King County to the interstate

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[76] The only case Lane cites on these issues is distinguishable. *See State ex rel. Schleif v. Superior Court*, 119 Wash. 372, 205 P. 1046 (1922). The case concerned a private way of necessity, a situation presenting policy considerations quite different from those at issue here. Further, more recent cases cast doubt the no "other practicable or feasible way out" formulation. *E.g., Brown v. McAnally*, 97 Wn.2d 360, 367, 644 P.2d 1153 (1982) (private way of necessity must be "reasonably necessary under the facts of the case"). Lane is wrong to argue that "reasonably necessary" means "strictly necessary."

rail system. Admittedly the Port eventually could connect the Woodinville rail facilities to interstate rail via a southern route through Renton and beyond.[77] But reasonably necessary is not the same thing as strictly necessary; the Snohomish County connection need not have been the only possible connection to interstate rail in order to meet the "reasonably necessary" test.

3. Acquisition of the Redmond spur was "reasonably necessary" to multiple statutory Port purposes and, hence, proper pursuant to RCW 53.08.010.

The trial court concluded that "it was reasonable for the port commissioners to conclude that purchasing the Redmond Spur would advance trade and commerce, promote industrial growth and stimulate economic development, and thus 'necessary for its purposes' under RCW 53.08.010." (Trial Court Opinion at 13.) Lane argues that these purposes were bootstrapped from the Port's mission statement, but this is misleading. In fact, the advancement of trade and commerce, the promotion of industrial growth, and the stimulation of economic development all are proper port purposes authorized by the Legislature:

- RCW 53.08.245 provides, in express and unequivocal terms, that "[i]t shall be in the public purpose for all port districts to engage in economic development programs."

[77] At present, the rail line is discontinuous at Wilburton, but the Port owns the fee interest and could rebuild and re-establish the line there if and when it proves necessary to do so. CP 1404 (Yoshitani Dep. at ¶ 47); CP 1517-78 (Yoshitani Decl., Ex. 9).

- RCW 53.08.020 provides that ports may acquire "commercial transportation, transfer, handling, storage and terminal facilities, and improvements relating to industrial and manufacturing activities within the district."

- RCW 53.08.255 provides that "[a]ny port district in this state, acting through its commission, has power to expend moneys and conduct promotion of resources and facilities in the district or general area by advertising, publicizing, or otherwise distributing information to attract visitors and encourage tourist expansion."

It is undisputed that the Port acquired the Redmond spur with the full understanding that the City of Redmond sought to purchase a portion of it from the Port, and that Redmond's intent was to use the Redmond spur as a vital part of Redmond's economic development program. (*See* pp. 13-14, *supra.*)

In addition, the Legislature has instructed port districts to participate in rail preservation projects. RCW 47.76.240 makes rail preservation a proper port purpose, and thus RCW 53.08.010 authorized the acquisition of the Redmond spur (and for that matter the entire Corridor), as reasonably necessary to effectuate this legislative purpose. The rail preservation laws also operate as an independent grant of authority supporting the acquisition of the Corridor.

D. The Port has authority to preserve rail.

The entire Redmond spur, and the southern portion, have been railbanked, preserving the Corridor for future use as a rail facility under federal law.[78] The Legislature has determined that, on cessation of railroad operations on railroad rights-of-way and other rail facilities:

> It is in the public interest of the state of Washington that such properties retain their character as public utility and transportation corridors, and that they may be made available for public uses including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation.

RCW 64.04.180. Therefore the Legislature has instructed port districts to participate in the preservation of rail service:

> The state, counties, local communities, *ports*, railroads, labor, and shippers *all benefit from continuation of rail service and should participate in its preservation.* Lines that provide benefits to the state and local jurisdictions, such as avoided roadway costs, reduced traffic congestion, economic development potential, environmental protection, and safety, should be assisted through the joint efforts of the state, local jurisdictions, and the private sector.

RCW 47.76.240 (emphasis added). The statute expressly provides that "[l]ocal jurisdictions may implement rail service preservation projects in the absence of state participation." RCW 47.76.240(4). The statutory references to rail preservation projects plainly refer to railbanking; the Final Bill Report on Senate Bill 5655, which was enacted in 1995, adding

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[78] See p. 12, *supra*.

ports to the list of entities instructed to participate in rail preservation, notes that the freight rail program (the subject of the act) "has had two primary areas of emphasis: rail banking and rail assistance." The Report goes on to explain the mechanics of railbanking, and to note circumstances under which various types of funds are available. The Legislature intended to instruct ports to participate in railbanking projects. The record shows the Port contemplated that the purchase of the Redmond spur would support the preservation of the line through the establishment of a trail easement and railbanking.[79]

Lane's argument ignores these legislative mandates and pretends that the Port's statutory authority is contingent upon current, as opposed to future rail use. This is incorrect. Nothing in any of the applicable statutes suggests that port districts are limited to acquiring rail corridors that are presently being used to move freight. To the contrary, the only reasonable reading of the statute gives port districts the flexibility to engage in strategic planning and to seize current opportunities that may support future rail mobility. *Cf.*, *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965) ("[r]easonable necessity for use in a reasonable time is all that is required.") This is particularly true where rail preservation is one of the purposes of the acquisition, because rail preservation and

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[79] *See supra* pp. 12-14.

railbanking are only used to preserve for possible use rights-of-way not currently needed for freight operations. Lane's argument ignores the entire structure and purpose of railbanking and rail preservation.

E. Lane's procedural arguments fail.

1. Given the Port's clear authority, the timing of the Port's resolution is irrelevant.

Lane claims that the Port lacked authority to acquire the Snohomish County connection because the Port did not pass its resolution until after the fact. This is incorrect because, so long as a municipality in fact had the authority to perform the act in question, it may cure a procedural infirmity after the fact. *South Tacoma Way, LLC v. State,* 169 Wn.2d 118, 233 P.3d 871 (2010). In *South Tacoma Way,* the Supreme Court distinguished between municipal acts *ultra vires* – those made beyond a municipality's statutory authority – and acts within a municipality's power that merely "suffer from some procedural irregularity." *Id.* at 122-24. Although acts "performed with no legal authority . . . cannot be validated by later ratification," those merely exercised through unauthorized procedural means may later be ratified and thereby adopted by a municipality. *Id.* at 123-24.

In *South Tacoma Way,* the plaintiff sought to void as *ultra vires* the state's sale of a surplus rail line, on grounds that the state had not complied with RCW 47.12.063(2)(g), which requires that owners of

abutting property be given notice of any such sales. *Id.* at 121. This Court held, despite the fact that the state had failed to provide the required notice, that the sale of the rail line was not *ultra vires* because the state possessed authority to sell surplus property. *Id.* at 124. *South Tacoma Way* establishes that a failure to follow procedural requirements does not void the Port's purchase of the Corridor.[80] The Port did not exceed its power to act and had authority over the subject matter.

The cases Lane cites do not require a contrary result. *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982), does not support the proposition that the Port's action was void. In *Noel,* an environmental group obtained an injunction against a Department of Natural Resources ("DNR") timber sale due to the lack of an environmental impact statement ("EIS"). *Id.* at 378. On appeal, the DNR and timber buyer conceded the EIS requirement – and, hence, the predicate for the *ultra vires* determination. *Id.* at 380 and n. 2. Here, in contrast, the Port had plain statutory authority to acquire the Snohomish County connection – it just failed to timely confirm that

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[80] There are numerous examples where the Legislature has provided that property transfers are void for failure to follow statutory procedures. These include RCW 80.12.030 (sale, lease or assignment of public utility company property void if made without commission approval); RCW 39.33.020 (government disposal of surplus property subject to being declared invalid if hearing and notice procedures not followed); RCW 39.36.020 and .040 (government contracts made in violation of limitations on indebtedness statutes "shall be absolutely void"); and RCW 28B.20.382 (sale or long-term lease of university tract land "shall be null and void" unless approved by legislative act). RCW 53.08.290 does not contain an analogous bar. The Court should not read into the statute an intent to void decisions undertaken prior to formal resolution. No such intent was expressed by the Legislature.

authority in a resolution – and the Port and the County certainly do not concede a lack of authority.

In *South Tacoma Way*, this Court considered and limited *Noel*. The Court distinguished *Noel* because the DNR's sale "not only failed to comply with SEPA's requirement for an EIS, it also failed to act in accordance with the policy underlying SEPA," 169 Wn.2d at 126 – that is, the policy of "'insur[ing] that presently unquantified environmental amenities and values will be given appropriate consideration in decision making.'" *Noel*, 98 Wn.2d at 380, *quoting* RCW 43.21C.030(2)(b). The failure to give notice to abutting owners in *South Tacoma Way* did not violate the policy underlying the procedural requirement, and therefore *Noel* was distinguishable.

Similarly, the procedural error here does not violate the policy underlying the resolution required by RCW 53.08.290. Presumably the underlying policy is to ensure that the process of acquiring an extraterritorial rail line is considered and public. The process here was public; it went on for years and was the subject of media coverage and numerous public hearings. Under these circumstances, the Port's procedural error was of the type properly cured by a later ratification.[81]

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[81] Nor does *Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3 (1930), support Lane's position; *Jones* actually held that a later vote successfully ratified an earlier vote that was void due to procedural irregularity. *Id.* at 213-15, 221. The *Jones* Court held that where the power exists to undertake a municipal project, such power cannot be defeated by a

Lane argues that, unlike the State in *South Tacoma Way*, the Port committed a substantive statutory violation, because although the State has "plenary authority . . . to sell surplus property," the Port is not "generally authorized" to buy rail lines under RCW 53.08.290. (Lane's Brief at 37.) But the State's authority to sell land is not "plenary": it is circumscribed by, among other things, Section 11 of the federal Enabling Act of 1889, 25 U.S. Stat., ch. 180, p. 180; the Washington State Constitution; and various statutes, including RCW 47.12.063, at issue in *South Tacoma Way*. The DOT in *South Tacoma Way* had no more "general authority" to act than the Port did here.

Lane also fails to distinguish *South Tacoma Way* by arguing that the alleged procedural error here "strikes at the heart of the policy behind the statute." *South Tacoma Way* does limit *Noel*, holding that only violations that are substantively *ultra vires* – meaning those "that contravene the policy behind the statutes" – cannot be validated by later ratification. *South Tacoma Way*, 169 Wn.2d at 123-126. But there is no reason to accept Lane's assertion that strictly limiting the Port's authority is the core policy of RCW 53.08.290; to the contrary, the statute's purpose was to *increase* the power of port districts to acquire rail facilities. 1980

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claim of procedural irregularity. *Id.* "The court distinguishes those cases in which it was held that a municipality was proceeding absolutely without authority from those in which it appeared that a city was proceeding within its powers but in an irregular manner." *Id.* at 214. *Jones* repeatedly reiterates the position that procedural irregularity does not void an action where the acting body has the power to undertake action. *Id.* at 213-21.

Senate Journal 348, 358. And even if Lane were right about the statute's policy, Lane does not show why this procedural step implicates the policy "at the heart" of the statute; if just asserting this could make it so, then *all* statutory procedural requirements would implicate the core policy of their statutes, erasing the distinction outlined by the Court in *South Tacoma Way*. The statute says nothing about the timing of the resolution, and it does not void an acquisition made prior to a resolution.

Lane is wrong to compare this case to *Noel*, and to compare RCW 53.08.290 to SEPA. Lane ignores SEPA's unique nature. SEPA's procedures *are* its substance, and the failure of a government agency to prepare an EIS does strike at the heart of that statute. *Noel* is nothing like this case, which involves an inadvertent alleged procedural omission with no bearing on whether the Port had the authority to acquire the Corridor.

2. This Court should give deference to the Port Commission's legislative determination of reasonable necessity.

In adopting Resolution No. 3639, the Port Commission determined that the Port's acquisition of the Snohomish County connection "is reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system."[82] Lane asks the Court to look behind the face of the Resolution, arguing that the Port

[82] CP 1418 (Yoshitani Decl., Ex. 2).

Commission did not consider enough material to support the Resolution that it passed, or that it did not properly weigh the available evidence, or that the true motives of the Commission or the Commissioners (shown, Lane asserts, in various statements of Commissioners) were something other than what appears on the face of the Resolution.

These arguments are misguided. If a legislative act is lawful on its face, this Court presumes that the facts warrant the legislation, limits its review to the face of the ordinance, and does not inquire into the motives of the legislators except in cases of actual fraud. *See generally*, 5 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 16:90 (3d ed. 2004); *see also, e.g., Wood v. City of Seattle*, 23 Wash. 1, 18-19 (1900).

The Port Commission is the Port's legislative body. *E.g., Automobile Drivers & Demonstrators Union Local No. 882 v. Department of Ret. Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979). In voting upon and enacting Resolution No. 3639, the Port's democratically-elected Commission exercised its legislative power. *State ex rel. Harlin v. Superior Court*, 139 Wash. 282, 291, 247 P. 4 (1926) (city ordinance for purchase of street car system was legislative action), *overruled on other grounds, State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 494 P.2d 990 (1972).

> A *legislative body's determination of necessity is conclusive* unless there is proof of *actual fraud* or *arbitrary*

> *and capricious conduct amounting to constructive fraud* or the government fails to abide by the clear dictates of the law.

Central Puget Sound Regional Transit Authority v. Miller, 156 Wn.2d 403, 417, 128 P.3d 588 (2006) (emphasis added).[83] These rules are "more than mere rules of judicial convenience. They establish the line of demarcation between legislative and judicial functions." *E.g., Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 27, 586 P.2d 860 (1978).

The *Wood* case is both venerable and apposite. There the plaintiffs sought to enjoin Seattle's grant, via legislative action, of a street railway franchise. 23 Wash. at 10. Among other things, the plaintiffs alleged fraud in the grant of the franchise. *Id.* at 19. The Supreme Court refused to look beyond the face of the ordinance:

> If an ordinance be lawful on its face – if it be passed in due form of law, and be within the scope of the powers of the council – the courts will usually presume it to be what upon its face it purports to be, and determine its validity from its prescribed terms, rather than by instituting an inquiry into the motives of the members of the council which passed it, or into the motives of those who prove its beneficiaries. Indeed, if the power to declare an ordinance which is valid upon its face invalid . . . . rests with the courts at all, it does so only in those cases where actual fraud is shown.

Id. at 18-19.

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[83] Some cases, like *Central Puget Sound*, use language like "arbitrary and capricious." But the standard they apply – inquiring as to whether or not there was fraud or constructive fraud – is a far cry from the arbitrary and capricious standard applied in other contexts, for example, in judicial review of agency proceedings pursuant to the Washington Administrative Procedure Act, *see* RCW 34.05.570. Washington courts reviewing legislative actions like this one apply the deferential standard described here, as required by the separation of powers doctrine. Lane provides no authority supporting the more searching arbitrary and capricious standard that they advocate.

In an argument never presented to the trial court, Lane now alleges constructive fraud. (Lane's Brief at 48.) This Court should not even consider this new issue. *Olson v Siverling*, 52 Wash. App. 221, 230, 758 P.2d 991 (1988) ("Legal theories not raised in a timely fashion before the trial court will not be considered for the first time on appeal."). And, in any event, the argument is incorrect. Lane assembles a cherry-picked collection of inadmissible statements from Commissioners and suggests that a constructive fraud requires this Court to second-guess the Commission because the Port in litigation has provided more complete briefing on the sources of its lawful authority than found in the statements of some Commissioners.

This argument ignores the actual evidence in the record. Lane cannot dispute that the Commission deliberated and took public input regarding the Corridor for nearly four years, held over a dozen public meetings about the proposed acquisition, and on three occasions authorized its CEO to proceed.[84] The Commissioners were very familiar with the record and did not ignore it.[85] The contemporaneous record

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[84] CP 2114-16, 2123 (Port's Cross-Motion for SJ at 9:16-11:4, 18:1-17); CP 1141 (Creighton Decl. at ¶¶ 9-10); CP 2160, 2169-325 (Tarleton Decl. at ¶ 11, Exs. 2-15); CP 1395, 1403 (Yoshitani Decl. at ¶¶ 20-21, 44).

[85] For example, Comr. Tarleton confirmed in her declaration that she had not "forgotten" the PSRC study. CP 2162-62 (Tarleton Decl. at ¶¶ 18-20). She considered it in 2008, but understood that she was "not bound by the reasoning of an advisory committee of the PSRC." CP 2162 (Tarleton Decl. at ¶ 20). She considered other factors also, and decided

shows that, after due consideration, the Commission concluded that the Port should acquire the Corridor for current and future rail freight and other transportation purposes.[86] (*See generally, supra*, pp. 19-20.)

IV. CONCLUSION

For all of the reasons set forth above, as well as those argued by the other respondents, King County respectfully requests that this Court affirm the trial court's summary judgment in favor of respondents, and the dismissal of Lane's claims.

DATED: June 7, 2012.

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By: _____
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that "the Port's acquisition of the ERC was appropriate." *Id. See also* CP 1145 (Creighton Decl. at ¶¶ 21-22).

[86] CP 2114-16, 2123 (Port's Cross-Motion for SJ at 9:16-11:4, 18:1-17); CP 2074-76 (King County's Cross-Motion for SJ at 6:10-8:11).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a true and correct copy of the attached document to be served via email/PDF and U.S. Mail on the following parties:

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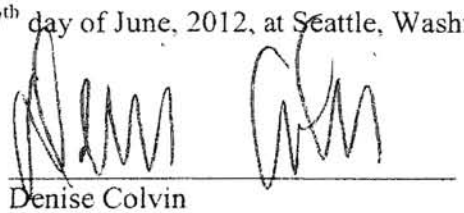
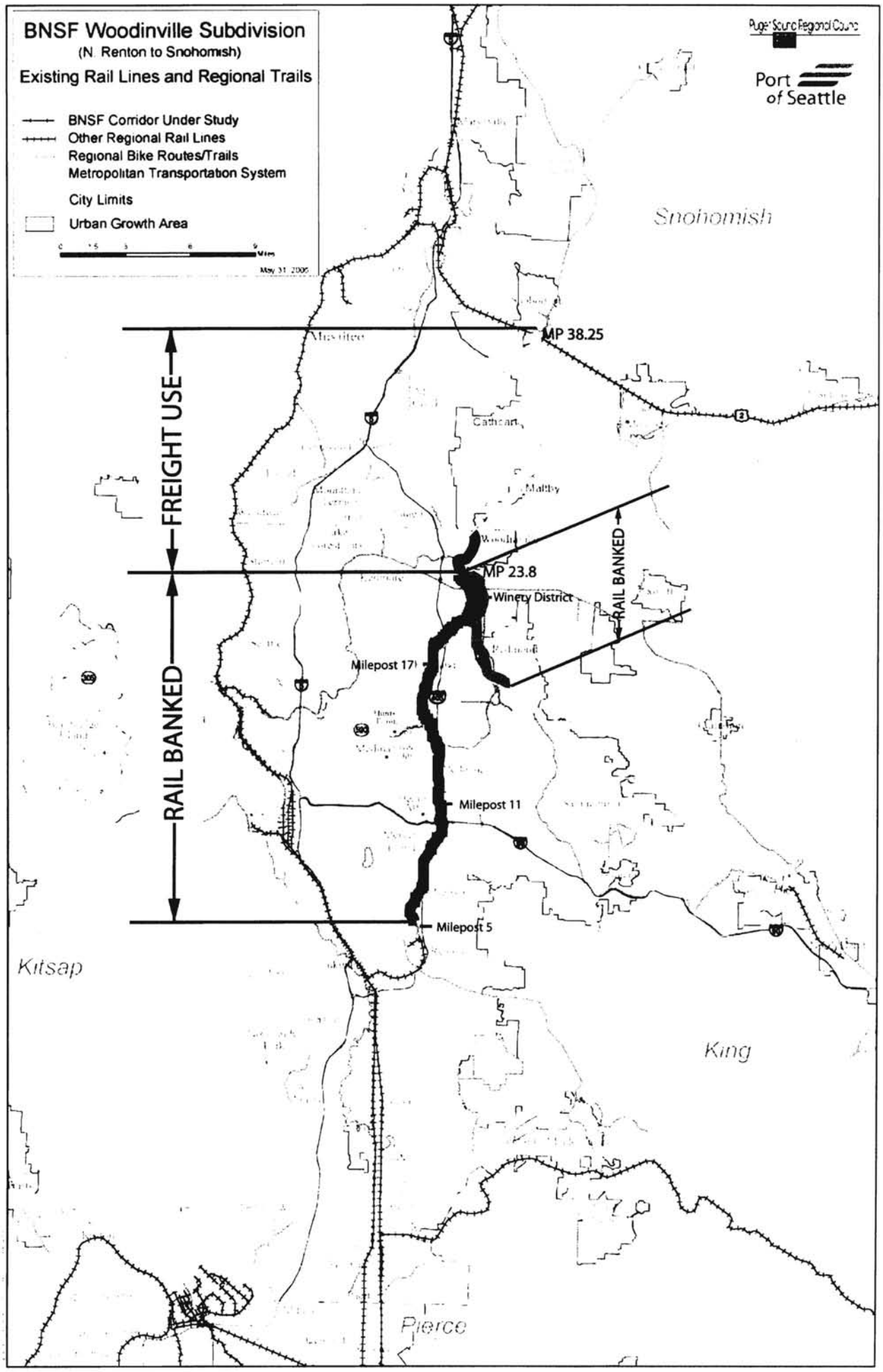
DATED this 7th day of June, 2012, at Seattle, Washington.



Denise Colvin

APPENDIX A


BNSF Woodinville Subdivision
(N. Renton to Snohomish)
Existing Rail Lines and Regional Trails
BNSF Corridor Under Study
Other Regional Rail Lines
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Metropolitan Transportation System
City Limits
Urban Growth Area
May 31, 2005
Puget Sound Regional Council
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Attached please find:

1. Respondent King County's Brief on Appeal;
    a. Appendix A; and
    b. Certificate of Service.

These documents will be served on the parties via U.S. Mail.

Thank you,

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