69157-1

No. ~~86894-8~~
69157-1

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR LANE, JOHN ALLERTON and KENNETH GOROHOFF,

Appellants,

v.

PORT OF SEATTLE; KING COUNTY; BNSF RAILWAY COMPANY; and CITY OF REDMOND,

Respondents.

BRIEF OF RESPONDENT PORT OF SEATTLE

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I. INTRODUCTION

The trial court correctly granted summary judgment for Respondent Port of Seattle because, as a matter of law, the acquisition of the Eastside Rail Corridor ("ERC" or "Corridor") fell within the Port's statutory authority. The purchase was authorized because:

- The portion of the ERC within the Port district is a "rail facility" used for shipment of freight. The portion in Snohomish County was "reasonably necessary" to connect that facility to the interstate railroad system, as the Port Commission found in Resolution 3639. *See* RCW 53.08.290.[1]
- The ERC acquisition was determined by the Port to be "necessary" for its purposes, including movement of freight by rail, other transportation purposes, and economic development programs. *See* RCW 53.08.010; 53.08.245.
- The undisputed evidence is that the ERC, which currently connects King County industries to an interstate rail line, is a "belt line railway." *See* RCW 53.08.020.
- The Port deliberated the ERC acquisition during a four-year period before the unanimous passage of Resolution 3639 in August 2010.

Appellants insist that the Port can acquire only those rail facilities that are physically connected to the Port's harbor or airport facilities and are involved in moving intermodal freight. But the plain language of the RCW 53.08.290, which is only one of several statutes authorizing the ERC acquisition, entitles a port district to acquire <u>any</u> rail facility within its

[1] The Port always has relied primarily on its statutory authority for the Corridor's acquisition. The Port's mission statement is consistent with that authority.

boundaries. It also allows the Port to acquire rail facilities outside of the district if the Port finds that it needs those extraterritorial facilities to connect facilities within the district to the interstate rail system, which the Port did here.

The trial court correctly held that the Port's determination that the ERC acquisition was reasonably necessary under RCW 53.08.290 was a quasi-legislative decision entitled to substantial deference:

> A declaration of necessity by a legislative body is generally "'conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.'" . . . .Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" This is a very deferential standard. The legislature has granted broad authority to port districts to determine the means by which it carries out its public purposes.[2]

The same deference is owed to the Port Commission's conclusion that acquisition of the ERC was "necessary" to the Port's purposes under RCW 53.08.010.

Appellants for the first time argue "constructive fraud," but this assertion is meritless in view of the record before the trial court. Just because three individuals[3] (who failed to participate in the public process

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[2] *See* Order on Cross Mots. for S.J. [hereinafter "Order"] at 14-15, Dec. 9, 2011 (designated as Supplemental Clerk's Papers ("SCP")) (citations omitted).

[3] The trial court declined to certify a class in this case, due to support for the ERC purchase by a majority of the Port's taxpayers. *See* discussion *infra*.

when the Port was deliberating the ERC purchase, and admit they knew nothing about the existing use of the northern part of the ERC for the movement of freight by rail) disagree with the elected Port Commissioners' decision, they are not entitled to a plenary "veto" over that decision.

II. ISSUES FOR APPEAL

1. Was the Port's acquisition of the ERC authorized by RCW 53.08.290, where the statute plainly authorized the Port to acquire "rail services, equipment, and facilities" inside the Port district, and, in Resolution 3639, the Port Commission made the finding required by .290 in order to acquire rail facilities outside the district, *i.e.*, that the latter were reasonably necessary to link the rail facilities in the district to an interstate railroad system?

2. Was the Port's acquisition of the Corridor authorized by RCW 53.08.010, which provides that a port district can acquire "all lands and property necessary for its purposes," when the undisputed evidence is that the Port deemed the purchase necessary to preserve an intact rail corridor for transportation uses including the movement of freight, and also necessary to economic development of the region?

3. Was the Port's acquisition of the Corridor authorized by RCW 53.08.020, under which a port district can "purchase and operate

belt line railways," where the undisputed evidence is that the northern portion of the ERC is operated as a belt line railway?

4. Was the Port's acquisition of the "Redmond Spur" portion of the ERC authorized by RCW 53.08.010 and RCW 53.08.245, where the former authorizes the Port to purchase property necessary for its purposes, and the latter authorizes the Port to "engage in economic development programs," and the language in .245 that Appellants argue limits Port authority was added to the statute after the ERC acquisition closed?

5. Does the court lack jurisdiction to hear this appeal because Appellants seek a refund of "taxes unlawfully imposed on them" but failed to pay those taxes under protest as required by RCW 84.68.020?

III. STATEMENT OF THE CASE

A. Background Regarding the Corridor.

The Corridor is a 42-mile rail line running through parts of King and Snohomish Counties. It extends north from milepost 5.0 in the City of Renton, King County, to milepost 38.4 in the City of Snohomish, Snohomish County. The "Redmond Spur" branches east off the main portion of the ERC near the City of Woodinville, and extends south about seven miles to the City of Redmond.

The portion of the Corridor between milepost 5.0 in Renton and milepost 23.45 is referred to as the "Southern Portion." It is all within

King County. Appellants do not challenge acquisition of the Southern Portion[4] although it was an indivisible part of the overall ERC acquisition.

The rest of the Corridor, from mileposts 23.45 to 38.4, plus the Redmond Spur, is referred to as the "Northern Portion." The Redmond Spur plus part of the Northern Portion (from milepost 23.45 north to the County line) is located in King County, and the rest of the Northern Portion is in Snohomish County.

Northern Pacific Railway, predecessor to Burlington Northern Santa Fe ("BNSF"), initially developed the Corridor. A substantial part of the Corridor, formerly known as the "Lake Washington Belt Line," provided freight service to communities along the east side of King County for nearly a century.[5] The Northern Portion still is operated as a "belt line," serving businesses in the Woodinville area of King County.[6]

In 2003, BNSF announced its intention to sell the Corridor. BNSF recognized, however, that there would be continued need for freight rail

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[4] Appellants' main complaint about the Port's acquisition of the ERC originally was that it would be used for "the granddaddy of all trails." Appellants, however, were unaware that it was the Southern Portion – not included in their lawsuit – that would be used as a trail, and they admitted at their depositions that they did not know that the Northern Portion was being used to transport freight by rail. CP 2393; 2890; 2905-06; 2915-16; 2921-23; 2946-47. In any event, the trail use of the Southern Portion is necessary under the "Rails to Trails Act," 16 U.S.C. § 1247(d), to preserve the Corridor for future railway use; otherwise the title to portions of the ERC could revert to neighboring landowners.

[5] CP 2385-89; 2402-03.

[6] CP 1160; 1402.

services on the Northern Portion.[7]

BNSF offered public entities the first opportunity to acquire the Corridor. If a public entity did not acquire the Corridor, BNSF intended to sell pieces of the Corridor to adjacent property owners and land developers.[8] The parts of the Corridor for which BNSF did not hold fee ownership could revert to the ownership of adjacent landowners when rail service was abandoned. If this happened, the region would lose forever a 42-mile transportation corridor through densely-populated communities on the fast-growing east side of Lake Washington.

B. The PSRC Recommends Preservation of the Corridor.[9]

After BNSF announced its intended divestment, the Puget Sound Regional Council ("PSRC") formed an advisory committee to study potential uses of the Corridor.[10] The PSRC issued a report in May 2007.[11] The report emphasized the importance of keeping the Corridor intact for

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[7] CP 2963-64.

[8] CP 2796-97

[9] In their Brief, Appellants argue that numerous entities "diametrically opposed" the ERC acquisition and issued "well-supported findings and conclusions" in support of that opposition. Br. of Appellants at 44-45. Appellants, however, fail to cite to evidence of any such "findings and conclusions" other than in the PSRC Report, with which Port Commissioners disagreed. In fact, numerous entities supported the Port's acquisition of the ERC. CP 1158-60; 2389-90; 2540-99.

[10] The Port did not actively participate on the advisory committee. Because of the Port's interest in the Corridor, the one Port employee who did attend abstained from voting on the PSRC's recommendations about the Corridor, and offered no opinion about the Corridor's uses or viability. CP 1163.

[11] CP 735-1015.

future transportation purposes, concluding that the Corridor "should be publicly acquired and preserved for a number of important current and future regional transportation purposes."[12] Significantly, the report recommended that the Northern Portion between Woodinville and the City of Snohomish – the subject of Appellants' challenge – should "[c]ontinue rail use for viable existing freight shipping businesses."[13]

Appellants point to a statement from an employee of the Washington Department of Transportation ("WSDOT"), referenced in the PSRC Report, to the effect that the Corridor was "not a strategic regional or state freight rail corridor."[14] But as the trial court observed,

> the undisputed evidence is that the Port commissioners did not agree with the conclusions reached by the PSRC and felt they needed to take a longer-term view of the region's transportation needs. The commissioners articulated rational reasons for their conclusions that the ERC was a rail line worth preserving for this region. RCW 47.76.240(4) provides that local jurisdictions may implement rail service preservation projects in the absence of state participation. The fact that WSDOT chose not to expend state funds to acquire the ERC does not make the Port's decision to do so arbitrary or capricious.[15]

Port Commissioners testified that they considered the PSRC

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[12] CP 2391; 2621 (emphasis added).

[13] As discussed *infra*, the Northern Portion is being used for freight shipping in a manner that is consistent with the PSRC advisory committee's recommendations.

[14] WSDOT – with a different timing horizon, funding availability, and public mandate – simply indicated that that agency did not intend to invest in the ERC under RCW 47.06A, which authorizes WSDOT to invest in certain rail corridors if it chooses to do so.

[15] Order at 16 (*See* Supp. Clerk's Papers).

committee's statement that the ERC was not a "strategic" freight rail Corridor but disagreed with the conclusion.[16] The Port must take a longer-term view of regional transportation needs, and consider such things as evolving trade patterns.[17] The PSRC statement does not bind the Port.

Commissioner Gael Tarleton summarized the Port's position regarding the PSRC's "non-strategic" reference:

> [W]hile I respect the fact that in 2007, the Puget Sound Regional Council came out with a study and came up with a conclusion, I am not bound by that conclusion. . . . I didn't feel it was as informative to me as the more recent competitive studies we've done and the more recent economic impact analyses that have been produced and the more recent competitive environment that we're dealing with[,] with this recession. So I – there were many more pieces of information that were more relevant to me at this point in the decision.[18]

Likewise, Commission John Creighton testified:

> I've read those conclusions and understand them, although, I mean, never say never. [D]epending on, you know, future land use in this region and . . . natural disasters . . ., if global warming really will have an impact on sea levels and

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[16] Port Commissioners considered freight rail and other transportation uses as well as possible uses necessitated by natural or manmade disasters and climate change, and other factors that the PSRC would not have considered. *See, e.g.*, CP 2765-66; 2789; 2833-35; 2845-48; *see also* CP 1130-31; 1135-36; 1143-45; 2161-63; 1406-11; 2140-45.

[17] *See, e.g.*, CP 2763-68; 2789; 2795-96; 2831-39; *see also* CP 1135-36; 1143-44; 2162-63. The Port was not the only entity that took this longer-term view. Other entities such as GNP, Eastside Rail Now, and the Cascadia Institute disagreed with the PSRC's conclusions. *See* CP 1158-60; 2389-90; 2540-99.

[18] CP 2839; *see also* 2162-63; 2820-24. Appellants claim that Commissioner Tarleton "forgot" the PSRC report, but they ignore her testimony to the contrary. She reviewed the PSRC study in 2008, shortly before her deposition, and was aware of the study when she voted in favor of Resolution 3639. CP 2162.

> flooding of the coast, . . . I think there were a lot of factors that weren't considered in that [PSRC] study . . . .[19]

The PSRC also noted that improvements would have to be made in the Corridor for it to become a viable substitute for BNSF's existing mainline. The only evidence, however, is that the cost would be comparable to the cost of other major regional transportation projects, and would be justifiable if and when the need arises to develop a supplemental or alternative rail route in the Puget Sound region.[20] It is appropriate for the Port to invest funds based on anticipated future needs. *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").

C. The Port's Deliberations about Acquiring the Corridor and Passage of Resolution 3639.

In 2005, King County emerged as a potential buyer of the ERC, and began negotiating with BNSF. In 2006, the County approached the Port about joining in the purchase. The transaction went through several iterations. Ultimately, following assurances from other regional and government entities that they would contribute towards the purchase price, the Port decided to make the initial purchase of the ERC on its own.[21]

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[19] CP 2789.

[20] *See, e.g.*, CP 1143-44; 1408; 2139-40, 2145-47.

[21] CP 1397.

The Port Commission thoroughly deliberated the ERC acquisition, and passed three separate resolutions before authorizing the purchase of the entire Corridor.[22] Although Appellants contend that the Commissioners were uninformed about the Corridor purchase, the record is to the contrary. The Port engaged in an extensive public process. The Commission held fourteen public meetings in which the ERC acquisition was addressed.[23] The Port also hosted numerous forums in which the acquisition was debated. These included five "open houses" during 2008 in Snohomish, Woodinville, Bellevue, Kirkland, and Renton, the communities most affected by the Corridor.[24] Dozens of constituents and entities offered their views regarding the Corridor acquisition.[25] Appellants failed to participate in <u>any</u> of these public activities, and made no effort to voice any objections to the Port's acquisition of the Corridor.[26]

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[22] CP 1403. On November 2, 2007, the Port Commission first authorized the Port's CEO to execute a Memorandum of Understanding regarding the acquisition. CP 1843-46. On December 11, 2007, the Commission authorized the CEO to execute all documents necessary to acquire the Corridor at an estimated cost of $107 million, and operate the northern freight segment. CP 1847-73. On, May 12, 2008, the Commission authorized the CEO to execute all agreements necessary to complete the Corridor's acquisition. CP 1874-88.

[23] CP 2160; 2168-2325.

[24] CP 1395.

[25] Among others, the Port received comments and testimony from representatives of the PSRC, the Cascade Bicycle Club, the Cascade Center, All Aboard, GNP Railway, Eastside Rail Now, Eastside Trail Advocates, Transportation Choices Coalition, Truth in Taxation, the City of Bellevue, the Snohomish County Council, the Washington State Transportation Commission, and the King County Council. CP 1395.

[26] Appellants are remarkably uninformed about why they even filed this lawsuit. As one

On August 3, 2010, the Port Commission adopted Resolution 3639, making the findings required by RCW 53.08.290:

> The Port's acquisition of the portion of the [Eastside Rail] Corridor between the City of Woodinville and the City of Snohomish is reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system.[27]

The Port enacted the Resolution after purchasing the Corridor, in order to cure a procedural oversight. The Resolution "ratified and confirmed" the Port's "acts made consistent with the authority and prior to the effective date of this ordinance."[28]

As Port CEO Tay Yoshitani testified, "it [Resolution 3639] should have been done probably at the time of the acquisition, there was an oversight and so we followed it up with an appropriate action."[29] Commissioner Tarleton testified: "[I]t is my understanding that it [the Resolution] should have been part of the closure document," and the only reason the Resolution requirement was not addressed earlier was "because it was overlooked."[30]

Appellants complain that the Port spent only "eight minutes"

Appellant testified, he "did nothing other than sign [his] name as a plaintiff in this lawsuit." CP 2393; 2924.

[27] CP 1403; 1417-19.

[28] CP 1403; 1417-19.

[29] CP 2752; *see also* CP 1403.

[30] CP 2817-18; *see also* CP 2163.

deliberating Resolution 3639, but they ignore the four years of deliberations the Port engaged in before its passage, and the three previous resolutions.[31] Although the Port had two new commissioners in 2010 – Robert Holland and Thomas Albro – both were sufficiently informed at the time of the Resolution, having received prior briefings about the ERC acquisition.[32]

D. The Purchase of the Corridor in One Transaction, Subject to the Federal "Rails-to-Trails" Act.

In May 2008, the Port, King County, and BNSF entered into an agreement for the Port to acquire the Corridor.[33] The parties closed the purchase on December 21, 2009, and memorialized it in two agreements. Under a "Purchase and Sale Agreement," the Port acquired the Northern Portion. Under a "Donation Agreement," BNSF donated the Southern Portion to the Port.

Appellants seek to rescind only part of the overall transaction – the Northern Portion. But the Port acquired the entire Corridor in a single

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[31] CP 1134; 1140-41; 1403; 2160; 2168-325.

[32] Mr. Albro and Mr. Holland were familiar with the ERC and its uses as a result of their election campaigns and dealings at the Port. For example, Commission President Creighton testified that he had "a number of conversations with both of them" before the vote was taken on Resolution 3639. CP 2792-93; 2856-58; 2862-67; *see also* CP 1128-31; 1148-51.

[33] CP 1398. Although the original purchase price was $107 million, by the time the Port closed the acquisition a year later in November 2009, Mr. Yoshitani had negotiated the purchase price down to $81 million, lower than either BNSF's appraisal of $455 million or the County's first appraisal at $105 million. CP 1399; 2391; 2629; 2633; *see also* CP 2392-93; 2805; 2875-78; (describing Mr. Yoshitani's negotiations as "brilliant").

transaction for which the Port paid $81 million. BNSF never offered to sell the Northern Portion by itself or transfer only the Southern Portion. Port CEO Tay Yoshitani testified that the Port acquired "the entire corridor for 81 million bucks. That was the deal."[34] He rejected Appellants' suggestion that the Port paid only for the Northern Portion:

> The basis of the transaction was that we would pay $81 million for the entire corridor. How it got – the valuation, the allocation was something that was not important to us, but it was important to BN[SF] so we were willing to accommodate whatever they wanted to modify the allocation of the value. That was not our decision, it was theirs.[35]

The "Purchase and Sale Agreement" and the "Donation Agreement," were closed on the same date as a single, interdependent transaction:

> Each party's obligation to Close is conditioned upon the simultaneous Closing on the conveyance of the South Rail Line [North Rail Line] by BNSF consistent with the terms of the South Agreement [North Agreement].[36]

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[34] CP 2756-57; *see also* CP 1398-99.

[35] CP 2773; *see also* CP 2757. King County's appraiser concurred with Mr. Yoshitani's testimony: "If all of [the purchase price] was put on a certain portion and the rest was donated, that – that doesn't change what the Port was willing to pay for the whole thing." CP 2108. The parties' "Memorandum of Understanding" in November 2007 describes the Port's agreement to purchase the Corridor for $103 million and to allocate the purchase price to the Northern Portion and for BNSF to donate the Southern Portion. CP 2392; 2746-47. Although not executed, the MOU illustrates the parties' contemporaneous expectations.

[36] CP 1398; 1459; 1530. Each agreement refers to the other nearly a dozen times, including provisions entitling the parties to terminate the other agreement if certain conditions were not met.

The transaction was conditioned on the Surface Transportation Board's approval of "railbank" status for portions of the Corridor, with King County as the sponsor.[37] Throughout the negotiations, the Port had made it clear that if it acquired the Corridor, it intended to preserve the entire Corridor for future transportation uses.[38] For that portion of the Corridor not currently used as a freight corridor (the Southern Portion and Redmond Spur), the parties agreed to "rail bank" the line under 16 U.S.C. §1247(d), with interim use as a trail, subject to restoration or reconstruction for railroad purposes, all as required by the statute to prevent abandonment of the railroad right-of-way.[39]

The parties agreed that the Northern Portion, north of milepost 23.8, would not be railbanked, but instead would continue as an active freight railway. The Port entered into an agreement with GNP Railway, Inc. ("GNP") to continue short-line freight operations on the Northern Portion except for the Redmond Spur.[40]

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[37] On the same date, the County and the Port executed an "Interlocal Agreement." The parties agreed the Port would continue using the Northern Portion for freight service, and place the Southern Portion into "railbanked status" under the "Rails to Trails Act," 16 U.S.C. § 1247(d). The County assumed the responsibility to develop and maintain the railbanked Southern Portion. *See* CP 1398; 1579-89.

[38] The Port also insisted that the existing rails in the Southern Portion remain as a physical reflection of the ultimate purpose for the Corridor's acquisition.

[39] For instance, if the Surface Transportation Board later were to receive and approve an application to construct and operate a rail line over the right-of-way, it would vacate the interim trail use. *See* 49 C.F.R. 1152.29(c)(3).

[40] CP 1400; 1412; 1890-1943. Those freight operations have continued ever since. CP

E. The Corridor's Use as an Active Freight Rail Line, and Potential Future Uses as a Transportation Corridor.

GNP currently operates freight service on the Northern Portion. Thomas Payne, GNP's CEO, testified that GNP serves businesses within King County, and he expects increased use of the Northern Portion as an active rail corridor benefiting King County businesses.[41] In its 18 months operating on the Northern Portion, GNP increased its shipments.[42]

Beyond the current freight rail use, the Port mainly acquired the Corridor to preserve it as an irreplaceable regional transportation corridor.[43] As the BNSF main rail line experiences increasing capacity demands, and the I-5 and I-405 transportation corridors become ever more congested, the Corridor may be required to supplement these other transportation corridors.[44]

Preserving the entire Corridor helps the Port respond to increased competition from other ports and changing trade patterns, by providing another rail route to access the interstate railroad system from a part of the

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1154-55; 1400, 1411-12.

[41] CP 1155-58.

[42] CP 1156.

[43] *See, e.g.,* CP 1406-08; 2141-45.

[44] Appellants make much of WSDOT's removal of the "Wilburton Crossing" to expand I-405. But the crossing can be reconnected at any time. CP 1159; 2766; 2968-69. The Port owns the former bridge footings and adjacent land. The cost to reconnect the line could readily be accommodated as part of a plan to reactivate the entire Corridor. *See* CP 2767-68; *see also* CP 1159; 1404.

region not currently well-served by rail connections – the East Side.[45] As Mr. Yoshitani testified:

> Because of the importance of the transportation corridors in the Puget Sound region, preserving and improving existing corridors is vital. The Port has an interest in virtually all of the transportation corridors in King County and the Puget Sound region. The ERC has the capacity to become part of an integrated system to move people and freight, creating jobs and enhancing trade opportunities throughout the State and beyond.

Mr. Yoshitani testified about the role that the Corridor could play in meeting the region's freight transportation needs:

> The Port views the ERC as an important option for increasing future capacity as existing transportation corridors become more stressed. For example, the ERC could serve as a major corridor for future north-south freight and/or passenger service. If light rail or other rail transportation were developed to use the ERC, the Corridor would reduce the need for passengers to rely on north-south transportation routes such as I-405 or I-5, freeing up capacity on those routes for freight transportation. Alternatively, the ERC could be developed to serve as a dedicated through-route for truck traffic.[46]

The Port Commissioners testified that the Corridor was important to allow the Port to meet future transportation needs. Commissioner John Creighton explained that the "real driving rationale for acquisition of the corridor was potential future uses and making sure that the corridor was

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[45] CP 1130-31; 1135; 1144; 1150-51; 1408-09; 2142-44; 2161-62.

[46] CP 1407; *see also* CP 1158-60; 2389; 2546.

preserved for future generations."[47] He foresaw

> a multitude of uses for the ERC in addition to its current use as an active freight corridor. By acquiring the ERC, the Port improves the flexibility of its transportation system; provides for the possibility of moving freight on an alternative rail route; and increases north-south pass-through capacity.[48]

He saw the Port's acquisition as consistent with the Port's role as "an agency that's focused on transportation infrastructure."[49]

The Corridor adds to the "resiliency" of the region's transportation corridors.[50] Commissioner Tarleton testified:

> Every move we can make today to ensure that we can have freight mobility throughout our county, our region, and our state ensures – for the future, not just for today – ensures that we can handle changes in the patterns of global trade and commerce in ways that other states and other ports may not be able to. . . .
>
> Every time we create resilient – what I call resilience in the network – alternatives, backups, future capabilities that we have access to – it causes our competitors, whether they're in Canada or in southern California or now on the East Coast . . . to think twice about whether they can go head to head with us and win.[51]

Commissioner William Bryant testified:

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[47] CP 2798.

[48] CP 1143.

[49] CP 2799.

[50] CP 1136; 1144; 1409-11; 2145; 2161-62.

[51] CP 2822-23; *see also* CP 2161-62.

> The ultimate use may not be apparent at the time[,] but we need to preserve [the Corridor] so that we have future transportation and freight options, and preserving a connection to an interstate rail line is a critical option that must be preserved.[52]

The Port's Former Strategic Planning Manager, Burr Stewart, compared the Port's long-term investment in the Corridor to the Port's pioneering decision in the 1940s to build Sea-Tac Airport, and in the 1960s to invest in the "containerization" of the Port's cargo facilities:

> The Port's recent acquisition of the [ERC] is well within the type of strategic investments that the Port previously has made . . . No one knows what the future portends, which is exactly why the Port's acquisition of the ERC, including that portion of the ERC within Snohomish County, is critically important . . . [T]he Port must ensure it has the tools available to adapt to [a variety of future] trends. The ERC is one such tool.[53]

Appellants attempt to second guess the "reasonable necessity" for the Port's purchase by selectively quoting from sources such as the PSRC advisory committee report. Appellants' view is ill-informed and short-sighted. It also distorts the PSRC committee's actual findings, which include a unanimous finding that the entire Corridor should be preserved

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[52] CP 2848.

[53] CP 2136-41. The Port's Regional Transportation Manager, Geraldine Poor, echoed Mr. Stewart's comments, comparing the Corridor acquisition to the Port's decision to build a third runway at Sea-Tac: "[T]he nature of the Port is to make these long-term investments, like a huge investment in the third runway at SeaTac Airport. . . . So it's not unheard of for us to do these, do major infrastructure investments to meet the needs and protect the Port's mission . . . [t]o foster economic growth through trade and transportation investments." CP 2970.

for "current and future regional transportation purposes," and recommended that the Northern Portion of the ERC – the subject of the Appellants' challenge – should "[c]ontinue rail use for viable existing freight shipping businesses."

F. Contributions of Other Regional Partners Reduced the Port's Investment.

Since the Port acquired the ERC over two years ago, its regional partners have substantially contributed towards the Port's $81 million outlay pursuant to their earlier agreements. In June 2010, the City of Redmond paid the Port $10 million to purchase 3.9 miles of the Redmond Spur. Redmond is using the Spur for regional light rail and utility improvements, and to redevelop its downtown – all critical to the economic development of Redmond and the region.[54] In December 2010, Puget Sound Energy ("PSE") paid the Port $13.8 million for a utility easement along the length of the ERC.[55] In April 2012, Sound Transit paid the Port $13.8 million for a transportation easement in the Southern

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[54] CP 1400-01; 1631-69. Redmond already has invested millions in the Spur, having constructed a stormwater trunk line to serve its downtown, and prepared extensive development plans to accommodate light rail and reconnect its downtown area. The City's redevelopment of the Spur is vital to the City's economic growth. CP 2349, 2351-56.

[55] CP 1400-01; 1944-2063. PSE had 180 natural gas, electric distribution, and transmission crossings of the Corridor. PSE received the crossings through revocable permits with escalating costs and decreasing terms. The permanent easements allow PSE to avoid acquiring larger rights of way and easements from private property owners when planning new crossings. The ERC crossings also ensure that, for the long-term, PSE can provide secure, reliable utility service to its customers. CP 2391; 2738-39.

Portion and the Redmond Spur, plus a fee interest in one mile of the Corridor in Bellevue for the East Link light rail route. That same month, the Port sold an interest in a short section of the Southern Portion to the City of Kirkland for $5 million. Finally, King County has agreed to pay the Port $15 million to purchase the Southern Portion and to obtain an easement in part of the Northern Portion.[56] When the County's transaction closes, the Port expects its total outlay to be approximately $23 million to secure the entire Corridor, if not less.[57]

Contrary to Appellants' assertions, the granting of easements and sales of portions of the ERC have no effect on the Port's future ability to use the entire Corridor as a freight railway or transportation corridor. Each of the agreements granting rights to the Port's regional partners includes a provision requiring compliance with the federal railbanking statute, meaning ownership is subject to future rail use.[58]

G. Procedural History.

Appellants filed this lawsuit in July 2010, after the transaction closed. Appellants challenged only the legality of the Port's acquisition of

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[56] CP 1401; 1670-1839.

[57] Another entity, Cascade Water Alliance, also has expressed an interest in buying a utility easement in the Corridor. This would further reduce the Port's investment. CP 1401. The Port's final out-of-pocket cost to acquire the Corridor will be a small fraction of the $455 million that BNSF's appraisal estimated as the Corridor's value.

[58] CP 1582-83; 1601-03; 1633, 1636; 1674; 1947.

the Northern Portion.

Appellants originally sought class certification of all Port (*i.e.*, King County) taxpayers. The Port offered evidence demonstrating that King County residents overwhelmingly supported the Port's acquisition of the ERC, and disagreed with Appellants' lawsuit.[59] The trial court denied certification, concluding that "this case is not the type that is appropriate for class certification because of the conflict that exists between the named plaintiffs and those whom they wish to represent."[60] The court, for example,

> found persuasive the City of Redmond's presentation that there is a direct conflict between the taxpayer residents of the City of Redmond and the taxpayer residents who the plaintiffs wish to represent.[61]

Appellants did not identify the trial court's denial of their class certification motion as an error on appeal.

The parties subsequently filed cross-motions for summary judgment regarding the Port's authority to acquire the Northern Portion.[62] The Court heard extensive oral argument at a half-day hearing.[63]

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[59] Decl. of Alex Evans ¶ 15 (designated as SCP).

[60] RP (10/6/11) 58:25 - 59:4.

[61] RP (10/6/11) 59:10-14.

[62] CP 1164-90; 2064-98; 2099-132; 2326-39.

[63] RP (11/18/11) 1-149.

Three weeks later, the Court issued a 21-page written ruling.[64] The Court rejected Appellants' position that RCW 53.08.290 authorized ports to acquire only rail lines physically connected to a port's airport or other port facilities. It reasoned:

> The better interpretation of the "in connection with" clause [in RCW 53.08.290] is one that comports with ordinary and common understanding of the words used. One action taken "in connection with" another action merely means that the two actions have some relation or association. The Court concludes that the legislature's use of the phrase "in connection with the operation of facilities and improvements of the district" means nothing more than that the Port may concurrently operate rail facilities and any of its other facilities for the purpose of facilitating the intermodal movement of interstate or foreign cargo. The Court rejects any interpretation of RCW 53.08.290 that would restrict rail line acquisitions to only those with a physical connection to pre-existing port facilities or those that allow a port to take cargo in or out of a pre-existing port wharf or airport.[65]

The Court also rejected Appellants' argument that the Port did not use the Northern Portion for intermodal cargo (the undisputed evidence is to the contrary), holding that the requirements of RCW 53.08.290 were met:

> [Appellants'] interpretation assumes that the intermodal part of the cargo move must occur within the Port's boundaries. GNP is currently moving freight on the Northern Segment to local businesses within King County. This cargo travels across the country from the Midwest on BNSF's interstate railroad. This cargo has to be delivered to BNSF's rail facilities somehow and it could be delivered

[64] Order at 1 – 21 (*See* Supp. Clerk's Papers).

[65] Order at 11 (*See* Supp. Clerk's Papers).

> via truck, ship (on the Great Lakes) or another rail line. There appears to be no dispute of fact that the Northern Segment is currently a part of a larger system of the intermodal movement of cargo.[66]

Finally, the trial court properly deferred to the Port's legislative determination that the acquisition of the Corridor was reasonably necessary under RCW 53.08.290. The court reasoned:

> Whether the acquisition of the Northern Segment is a 'necessary activity' is for the Port to decide, and not for this Court to second-guess . . . . The Port and its elected commissioners are in a much better position than this Court to make this type of needs-assessment. If voters disagree with the Port, they have the ability to express their disapproval at the ballot box.[67]

IV. ARGUMENT

A. Standard of Review.

The appellate court reviews the superior court's summary judgment rulings *de novo*. *TracFone Wireless, Inc. v. Department of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). The Court must ignore Appellants' allegations that are unsupported by the record. Argumentative assertions without a factual basis cannot create a genuine issue of material fact. *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 536, 871 P.2d 601 (1994).

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[66] Although the superior court held that RCW 53.08.290 did not expressly authorize the Port to acquire the Redmond Spur, it held that because the Spur was entirely within the Port's district, the Port had authority under RCW 53.08.010.

[67] Order at 18 (*See* Supp. Clerk's Papers).

In evaluating the Port's authority, the Court must defer to the Port's quasi-legislative determinations, including those identifying the necessity for a particular action.

> A declaration of necessity by the appropriate legislative or administrative authority will be deemed conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.

State v. Brannan, 85 Wn.2d 64, 68, 530 P.2d 322 (1975). Appellants bear the burden of proving either fraud or constructive fraud. *In re Port of Seattle*, 80 Wn.2d 392, 398, 495 P.2d 327 (1972) (Port of Seattle's determination of necessity held conclusive).

Determining whether conduct is arbitrary and capricious involves an interpretation of the legal significance of evidentiary facts and is a conclusion of law. *State v. Hutch*, 30 Wn. App. 28, 35, 631 P.2d 1014 (1981). As long as the Port acted honestly, with due deliberation, within the scope of its statutory and constitutional functions, and not arbitrarily, capriciously, or unreasonably, the Port's decisions and actions should be upheld. *Central Puget Sound Rg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 419, 128 P.3d 588 (2006). Appellants established no genuine issues of material fact with regard to any of those considerations.

B. The Legislature Has Authorized Port Districts to Engage in a Wide Array of Economic Development Activities.

Appellants attempt to narrowly circumscribe a port's ability to

acquire a rail line to those lines physically involved with moving intermodal freight (which they would limit to containers) from a ship or airplane. But the Port's statutory authority is much broader. Since the Legislature adopted the Port District Act in 1911, it has repeatedly amended the Act to expand port districts' authority to include a wide range of transportation and economic activities under RCW 53.08.010, .020, .245, and .290.

The Port of Seattle was formed in 1911. Today, the Port is involved in a wide array of statutorily-authorized activities that could not have been anticipated a hundred years ago. King County's voters initially created the Port to preserve public ownership of Seattle's deep-water port.[68] Since then, County voters have expanded the Port's role to embrace activities generating a level of economic activity greater than that of Microsoft.[69] The Port now owns and operates one of the largest cargo and passenger seaports in the United States (including two busy cruise ship terminals); Sea-Tac Airport; the Fisherman's Terminal in Seattle, home of the North Pacific fishing fleet; thousands of square feet of first-class public marinas and conference facilities; one of the busiest grain

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[68] Ironically, the County's residents formed the Port in part to reduce the control of national railroads over the region's economic development. The Port's acquisition of the Corridor serves a similar purpose by providing an alternative transportation route to those offered by the only two national railroads that serve the region.

[69] CP 1391-93; 2136-40.

terminals in the state; a "necklace" of parks around Elliott Bay; and approximately four thousand acres of industrial and commercial property.[70] The Port also has invested extensively in transportation infrastructure throughout King County, including contributing to the Seattle viaduct replacement and a freight corridor in southeast King County.[71]

Consistent with the Port's statutory authority, Port CEO Tay Yoshitani testified that the Port's mandate is "economic development primarily through the movement of cargo and passengers" throughout King County.[72] Similarly, Commissioner John Creighton testified that the Port's mission is "to build development, economic and transportation assets within King County for the region," not necessarily physically linked to the harbor or Sea-Tac Airport.[73]

The Legislature's expansion of port authority includes the right to acquire and own rail lines and rail corridors. Today, at least half a dozen Washington ports own, operate, or have invested in rail lines and corridors.[74] The ports use these rail lines for a variety of purposes,

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[70] CP 1391.

[71] CP 1408; 2139-40.

[72] CP 2761-62.

[73] CP 2787; *see also* CP 1391-94; 2136-40; 2392; 2855; 2970.

[74] CP 2148-51.

ranging from recreation and tourism, to accommodating future trade growth and maintaining a port's competitiveness.[75]

C. The Port Was Authorized to Acquire the Corridor under RCW 53.08.290, Including the Part Outside the Port District.

The Port was authorized to acquire the Corridor, including the portion in Snohomish County, under RCW 53.08.290.[76] The statute states:

> In addition to the other powers under this chapter, a port district, in connection with the operation of facilities and improvements of the district, may perform all necessary activities related to the intermodal movement of interstate and foreign cargo: PROVIDED, That nothing contained herein shall authorize a port district to engage in the transportation of commodities by motor vehicle for compensation outside the boundaries of the port district. A port district may, by itself or in conjunction with public or private entities, acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities inside or outside the port district: PROVIDED, That such authority may only be exercised outside the boundaries of the port district if such extraterritorial rail services, equipment, or facilities are found, by resolution of the commission of the port district exercising such authority, to be reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system; however, if such extraterritorial rail services, equipment, or facilities are in or are to be located in one or more other port districts, the commission of such other port district or

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[75] CP 2151.

[76] Appellants claim that RCW 53.08.290 "control[s] on the issue of whether a port has authority to purchase a rail line" and that the other statutes, including .010, .020 and .245, are inapplicable. In fact, the statutes are consistent and should be read together to effectuate the Legislature's intent. *City of Union Gap v. Department of Ecology*, 148 Wn. App. 519, 531, 195 P.3d 580 (2008).

> districts must consent by resolution to the proposed plan of the originating port district which consent shall not be unreasonably withheld: PROVIDED FURTHER, That no port district shall engage in the manufacturer of rail cars for use off port property.

(emphasis added).

Section .290 does not limit a port's acquisition of a rail facility to those physically linked with the Port's existing harbor and airport facilities, nor to facilities that handle "intermodal" movement of cargo as Appellants define it.[77] Appellants' argument to the contrary is unsupported by the statute or the legislative history. RCW 53.08.290 contains two independent provisions, each addressing a different subject. The first sentence, ending with the "motor vehicle" proviso, confers on ports the general authority to engage in any activities relating to the intermodal movement of cargo. Only that provision contains the "intermodal" and "in connection with" language.

The second sentence addresses a port's acquisition of rail lines inside or outside a port district, and adds the requirement for a port commission resolution authorizing purchase of lines outside the Port

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[77] Appellants' argument assumes that "intermodal" refers to moving containerized cargo from a seaport or airport. But "intermodal" merely refers to the use of different transportation modes. WSDOT's Freight Systems Division defines "intermodal" as using "different types of transportation modes to move freight shipments and people, *i.e.*, ships, trains, buses, and trucks." *See* www.wsdot.wa.gov/Freight/Rail/terms.htm. As the trial court held, the freight traffic currently moved on the Northern Portion of the Corridor is intermodal freight. Order at 12 (*See* Supp. Clerk's Papers).

district. It does not refer to "intermodal" cargo, nor any particular use.

RCW 53.08.290, as codified, resulted from the passage of two separate Acts – one in 1980 and the second in 1981. In 1980, the Legislature enacted the statute that became the first part of Section 290.[78] That Act, entitled "An Act Relating to port districts; providing for facilities by port districts for the movement of freight and passengers,"[79] contained two provisions. The first provision authorized a port to perform all necessary activities relating to the intermodal movement of cargo, and the second provision granted ports general authority to acquire rail lines, with no limitations of any sort.[80] That second provision was intended to allow ports to acquire and use rail lines that were being abandoned by national railroads such as the Chicago, Milwaukee, St. Paul and Pacific

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[78] The Act was to "[c]larify existing law as to the authority of port districts to perform certain cargo activities and to contract for or otherwise provide facilities for rail service for the movement of such cargo . . . ." Laws of 1980, ch. 110.

[79] The statute's caption refers to "Intermodal Cargo Movement," but the code reviser generated that caption; it does not change the meaning of the law. *State v. Cooley*, 53 Wn. App. 163, 166, 765 P.2d 1327 (1989) (code reviser's "captions cannot change the meaning of the enactments . . . ."); *see also* RCW 1.08.015(2)(l) (code reviser may provide new captions provided that it does not change "the meaning of any such law").

[80] Laws of 1980, ch. 110. Appellants' assertion that "intermodal" applies to the entire statute also makes no sense in light of another portion of the 1980 Act, which authorized a port to operate passenger-carrying vessels on interstate navigable rivers and intrastate waters of adjoining states (*i.e.*, the Columbia River). Laws of 1980, ch. 110 § 3. If the Court engrafted "intermodal" onto the statute as Appellants advocate, a port could not operate a passenger boat unless it was "intermodal," a nonsensical result.

Appellants rely on *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 575 P.2d 713 (1978), but that case involved a challenge to a port's financing of a facility outside the district. The Court noted in *Keeler* that "[t]he Port has cited nothing which would allow it to expand the operation outside the physical boundaries of the Port." *Id.* at 768. Here, RCW 53.08.290 provides the "extraterritorial" authority.

Railroad ("the Milwaukee Road").[81]

A year later, in 1981, the Legislature amended the statute to address a port's acquisition of rail facilities outside of its district. That Act added the current proviso requiring a resolution finding the extraterritorial lines "reasonably necessary to link the rail . . . facilities within the port district to an interstate railroad system."[82] The Legislature repeatedly referred to the amendment as "extending authority of port districts to operate rail lines."[83] The Legislative Journal describes the Act's impetus:

> Port districts have general authority to operate railroad systems for the movement of interstate and foreign cargo. Several port districts had opportunities to acquire rail facilities from defunct lines but needed specific authority to operate across district boundaries.[84]

The Legislature again did not impose any requirement that the rail lines be used only for "intermodal" purposes, or that the rail line be "in connection

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[81] 1980 Senate Journal at 358. During legislative proceedings on the Act, the Legislature rejected a proposed amendment that would have barred ports from "purchas[ing] any railroad tracks located on property not owned by the port district." *See* 1980 Senate Journal at 359. The Act was intended to authorize the purchase of rail lines; there was no requirement that the facilities be used for "intermodal" purposes or be "connected with" other port facilities. *Id.* For example, the legislature acknowledged that the Act allowed the Port of Pend Oreille to acquire a defunct railway. *Id.* The Port of Pend Oreille, created exclusively to acquire the railway, uses the rail line to carry lumber and newsprint, and for excursion trains. CP 2149. The Port of Pend Oreille does not have a "seaport" and does not handle "intermodal" cargo in the way Appellants suggest is required.

[82] Laws of 1981, ch. 47.

[83] *See, e.g.*, 1981 House Journal at 363, 407, 443 (emphasis added).

[84] 1981 Legislative Journal at 12 (emphasis added).

with" other port facilities.[85] Since the statute's adoption, many ports have acquired and operated rail lines not physically connected to seaports or airports (including rail lines outside their jurisdictions), which do not handle "intermodal" cargo as Appellants define it.[86]

Appellants claim that their interpretation of .290 is supported by the "purpose" statement in the 1980 act. But that "purpose" neither refers to "intermodal" uses, nor requires that rail lines be physically connected to an airport or harbor facility.

Appellants' interpretation also disregards the statutory structure. The provision addressing a port's authority to perform intermodal activities is separated from the remainder of the statute by a "proviso" clause that deals with the transportation of commodities by motor vehicle. The provision authorizing a port to acquire rail lines has different "proviso" clauses. The two provisions clearly are independent, with different scope and effect. Moreover, Appellants' interpretation, reading "intermodal" into the second sentence, would make that sentence surplus, because the first sentence of the statute already gives the Port full authority to perform all necessary activities related to intermodal cargo.

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[85] The Code Reviser entitled the 1981 Act "Port Districts – Extraterritorial Rail Service."

[86] CP 2148-51; *see also* CP 1154. For instance, the Port of Columbia County operates a rail line that extends outside of its jurisdiction to haul wheat, seed, farm machinery, and fertilizer. CP 2149.

But even if the Court were to adopt Appellants' interpretation, the Northern Segment that is within the Port district itself is a "facility" currently used to transport "intermodal" cargo, and the Snohomish County section — necessary to link the King County Segment to an interstate rail line — is being used "in connection with" the operation of that facility.[87]

D. The Port Was Authorized to Acquire the Corridor Within King County Under RCW 53.08.010 as Property "Necessary for Its Purposes," and for "Economic Development Programs" Under RCW 53.08.245.

RCW 53.08.010 broadly authorizes the Port to "acquire by purchase, for cash . . . all lands, property, property rights, leases, or easements necessary for its purposes . . . ." RCW 53.08.010. The Corridor indisputably is "lands [and] property," consisting of a contiguous parcel of land of approximately 150 feet in width and 42 miles in length.

The Port determined that acquisition of the Corridor was necessary for its purposes, whether for continued use as a freight rail corridor; for other transportation purposes; to sell to its regional partners; or simply to preserve and enhance the trade and economic opportunities inherent in a 42-mile transportation corridor. Regardless, the Port had authority to

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[87] Appellants erroneously argue that the superior court defined "in connection with" as a "temporal" connection, meaning "at the same time." *See* Br. of Appellants at 30-31 ("[T]he trial court held that the 'in connection with' language required only a temporal connection."). Instead, the trial court held that the "in connection with" language "means nothing more than that the Port may concurrently operate rail facilities and any of its other facilities for the purpose of facilitating the intermodal movement of interstate and foreign cargo." Order at 11 (*See* Supp. Clerk's Papers).

make the purchase under RCW 53.08.010. *See Asotin County Port Dist. v. Clarkston Cmty. Corp.*, 73 Wn.2d 72, 436 P.2d 470 (1968) (port's decision to condemn land for future development of port facilities deemed "necessary" under RCW 53.08.010).[88]

Appellants criticize the trial court's conclusion that RCW 53.08.010 authorized the Port's acquisition of the Redmond Spur. But the Spur indisputably is "land" or "property" purchased for the Port's purposes, including the purpose of selling it to the City of Redmond for economic development.[89]

Acquisition of the Spur (indeed, all of the ERC within King County) for economic development was authorized by RCW 53.08.245, which stated at the time of the ERC acquisition:

> It shall be in the public purpose for all port districts to engage in economic development programs. In addition, port districts may contract with nonprofit corporations in furtherance of this and other acts relating to economic development.

Appellants argue that under that statute, the Port may operate only

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[88] The Port also has authority under other statutes. *See, e.g.*, RCW 39.89.050 (ports may make "public improvements" including "parks and recreation areas," and engage in "historic preservation activit[ies]" such as acquiring property for purposes of historic preservation); RCW 53.04.010(1) (ports can establish rail transfer facilities and "other commercial transportation improvements"); RCW 53.08.020 (ports can purchase rail transfer facilities and make "improvements relating to industrial and manufacturing activities within the district").

[89] The Corridor was not for sale without the Redmond Spur, just like the Northern Portion was not offered by BNSF without the Southern Portion. CP 1398-99.

"programs for job training associated with port tenants, customers, and local economic development related to port activities."[90] But the language on which Appellants rely was added to the statute in 2010 as a separate section, after the Port purchased the ERC, and is irrelevant to the Port's authority in 2009.

Appellants claim that the 1917 decision of *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 166 P. 780 (1917), "controls," precluding the application of RCW 53.08.010 to the acquisition of rail lines. But the question presented by *Huggins* was whether the Port could properly construct and operate a belt line as a common carrier. The case does not address the Port's authority to purchase rail property and to contract with an independent operator, nor its authority to engage in economic development under RCW 53.08.245.

The Legislature has acknowledged that acquisition of railroad properties for development and other uses such as those by Redmond is in the "public interest of the state," RCW 64.04.180,[91] and that "the state, counties, local communities, ports, railroads, labor, and shippers all

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[90] *See* Br. of Appellants at 2, 28-29.

[91] That statute provides: "It is in the public interest of the state of Washington that such properties [referring to railroad 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.

benefit from continuation of rail service and should participate in its preservation." RCW 47.76.240. Under RCW 53.08.010, the Port had authority to acquire the Corridor within King County, including the Redmond Spur.

E. The Port Was Authorized to Acquire the Corridor Under RCW 53.08.020 as a Belt Line Railway.

The Port also had authority to acquire the ERC as a "belt line railway." RCW 53.08.020 provides that "[a] port district may also construct, purchase and operate belt line railways . . ." The Legislature added the authority for ports to acquire belt line railroads in 1961, several decades after the Supreme Court decided *Huggins*, 97 Wash. 553.

The trial court in this case held that issues of fact precluded summary judgment on the issue of whether the Northern Portion was a belt line railway. The court's holding is incorrect because Appellants did not offer <u>any</u> evidence to dispute the Port's evidence that the entire Corridor, including the Northern Portion, was a belt line. The Court may affirm the superior court's summary judgment on any alternative ground.[92] *Bock v. State*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978).

GNP, a short-line railway, operates the Northern Portion as a "belt

[92] If the court does not affirm the superior court's judgment in favor of the Port, no basis exist to enter judgment for Appellants on the "belt-line" issue. At a minimum, disputed material issues of fact would require remand to the trial court.

line," transporting freight from the main rail line to the companies it serves.[93] Thomas Payne, a former railroad engineer, current operator on the Northern Portion, and "founder" of Canada's short-line railway industry, testified that "the term 'belt line railway' is frequently used to describe a short line railroad such as that operated by GNP on the ERC."[94] In fact, BNSF's predecessor, Northern Pacific, named the portion of the Corridor between Renton and Woodinville the "Lake Washington Belt Line."[95]

The phrase "belt line railway" has a broad meaning and refers to any "transportation system partially or wholly surrounding a city, terminal, district, or port," which connects local industrial facilities to regional or national rail lines.[96] In *Huggins*, the Court described a "belt line" as "carrying freight to and from industrial plants, warehouses, piers, docks, and terminals" as a common carrier. 97 Wash. at 555. It is "designed to serve numerous industrial plants, docks, piers, and

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[93] CP 1160; 1402.

[94] CP 1160 (emphasis added). Mr. Payne also is a member of the "Canadian Railway Hall of Fame." CP 1153.

[95] CP 1402; 2385-89; 2394-2539. Appellants argue that only the Southern Portion was known as the "Lake Washington Belt Line." But the Lake Washington Belt Line also encompassed the Northern Portion that is the focus of Appellants' lawsuit. CP 2385-88; 2394-2505.

[96] RANDOM HOUSE DICTIONARY (2012), *available at dictionary.reference.com/browse/belt+line*; RAILWAY AGE'S COMPREHENSIVE RAILROAD DICTIONARY (1992) ("belt-line" is a "short line railroad operating within and/or around a city; usually organized to be a pickup, deliver and transfer service facility for trunk lines and industrial plants."); *see also* CP 1160.

terminals." *Id.* at 557-58. *See also* 99 Wash. Att'y Gen. Op. (1955) (describing belt line as a "rail system to be used for the transfer of commodities between industries and line haul railroads"). The California Supreme Court in *City of Oakland v. American Dredging Co.*, 44 P.2d 309, 311 (Cal. 1935), described the phrase "belt line railroad" as generally referring to any track "several miles in length" whose function is to "take up freight from different industries along its route and transfer such freight to the main line railroad . . . ." *Id.* at 310-11.[97]

These authorities make it clear that the Corridor is a belt line railway, with the Northern Portion currently operated as one. As the opinions in *Huggins* and *City of Oakland* illustrate, a belt line is not limited to a railway that "circles a place." Instead, belt line refers to any relatively short railroad that services local businesses and connects to a main rail line. In any event, the Corridor does circle a place.[98]

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[97] Other courts have found that railways similar to the Corridor are "belt lines." *See, e.g., State ex rel. Sumner v. Toledo Ry. & Terminal Co.*, 1 Ohio C.C. (n.s.) 513, 523-24 (Ohio Cir. Ct. 1903) (railway described as belt line when its purpose was to carry freight from one railroad to another and from various city establishments to the different railroads); *Chicago G.W.R. Co. v. Jesse*, 82 N.W.2d 227, 230 (Minn. 1957) (railway was a "beltline" where it ran from a main track, traveled through a large area of land, and reconnected to main track).

[98] The Southern Portion loops around Lake Washington. The Northern Portion also goes around Lake Washington, the cities of Kenmore and Bothell, and the urban areas of Snohomish County. It connects businesses along the route to BNSF's main line, allowing for the transportation of freight to and from those businesses.

F. Resolution 3639 Authorized the Corridor's Acquisition, Which Was Neither "Ultra Vires" Nor "Arbitrary and Capricious."

Appellants argue that the Port's acquisition of the ERC was *ultra vires* because of the timing of Resolution 3639. But as the trial court observed, RCW 53.08.290 – in contrast to other statutes – does not require the Port to pass a resolution before it acts.[99] When the Port discovered its procedural oversight, it promptly enacted Resolution 3639.

"[W]here a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defects by reenactment with the proper formalities." *Henry v. Town of Oakville*, 30 Wn. App. 240, 246-47, 633 P.2d 892 (1981) (ordinance can be ratified where it originally was passed without proper notice).[100] The Port's failure to adopt the resolution prior to the ERC acquisition was a procedural oversight that the Port cured.

Appellants' *ultra vires* argument depends on a finding that the Port had no authority to acquire the Corridor in the first instance – a burden they cannot meet. In *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010), the Court defined *ultra vires* acts as those acts

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[99] The trial court contrasted RCW 53.08.290 with a number of other statutes that do require a resolution prior to the act in question. *See* Order at 19-20 (*See* Supp. Clerk's Papers)

[100] *See also Pierce County v. State of Wash.*, 159 Wn.2d 16, 148 P.3d 1002 (2006) (voter ratification not required for Sound Transit's formation because subsequent statutory amendments retroactively removed the requirement).

"performed with no legal authority," in situations where "no power to act existed, even where proper procedural requirements are followed." *Id.* at 123 (emphasis added). An act is not *ultra vires* if the entity is "generally authorized" to perform the act in question.[101]

The Port had the general authority to act under .010 (authority to acquire "all lands, property"); .020 (authority to acquire belt line); .245 (economic development); and .290 (authority to acquire "rail services, equipment, and facilities inside or outside the port district"). The .290 proviso requiring a resolution is an exception to the Port's general authority under these statutes: "Provisos operate as limitations upon or exceptions to the general terms of the statute to which they are appended and as such, generally, should be strictly construed with any doubt to be resolved in favor of the general provisions . . . ." *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974).

Appellants' argument that the failure to make the finding before acquisition of the Corridor "strikes at the heart" of the statute's policy is specious.[102] The required finding was made. Appellants argue that the

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[101] The Court in *South Tacoma* relied on *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1121 (1976). *Haslund* defined an *ultra vires* act as "one performed without any authority to act on the subject," where the "subject matter is wholly beyond the scope of the municipal corporation's powers." *Id.* at 622. The ERC purchase was not "wholly beyond" the Port's powers in light of .010, .020, .245 and .290.

[102] A public policy does exist here: it is to enable ports to "acquire rail facilities from defunct lines." 1981 Legislative Journal at 12; *see also* RCW 47.76.200, .240; 64.04.180.

Port did not "carefully consider its need for rail in a public hearing before the acquisition," but the undisputed record is the Port's acquisition of the Corridor was addressed at least 14 different times in public Commission meetings; that the Commission considered input from interested members of the public; and that it thoroughly debated the purchase. The Port's robust public process was a far cry from the "subversion" that Appellants assert.[103]

Adoption of Resolution 3639 was not arbitrary and capricious. Where a municipal corporation's actions come within the purpose and object of its enabling statute and no express limitations apply, "this court leaves the choice of means used in operating the [corporation] to the discretion of municipal authorities. We limit judicial review . . . to whether the particular contract or action was arbitrary or capricious, or unreasonable." *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 695, 743 P.2d 793 (1987) (emphasis in original); *see also Branson v. Port of Seattle*, 152 Wn.2d 862, 871-72, 101 P.3d 67 (2004) (refusing to narrowly construe the means a municipal entity uses to carry out its power).

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[103] Appellants cite *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982), but in that case the defendant conceded that the State acted illegally by barring logging without preparing a required Environmental Impact Statement, *i.e.*, the parties agreed that the State had acted without authority. There, the State had not engaged in any curative, retroactive act.

Arbitrary and capricious action is "willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). The arbitrary and capricious standard is "very narrow"; "[w]here there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Id.*

Appellants also argue that the Port acted arbitrarily and capriciously in enacting Resolution 3639 because the Commission allegedly did not consider the PSRC study regarding the alleged unsuitability of the Corridor as a freight rail (or other transportation) corridor. Those assertions are contrary to the undisputed record, and, even if true, would be inadequate to establish arbitrary and capricious conduct as a matter of law.

Commissioners Bryant, Creighton, and Tarleton (a Commission majority) all testified that they were aware of the PSRC report.[104] As Commissioner Tarleton explained, the Commission — which had a longer-term perspective and considered more factors — simply disagreed

[104] Commissioner Bryant, a member of PSRC's Executive Committee, testified that he was aware of the Report, but believed it was "important to ensure that we preserve (the Corridor) for future transportation uses . . . ." CP 2845-48. Commissioner Creighton was on PSRC's Transportation Policy Board and knew of the study. CP 2793. Commissioner Tarleton testified she knew about the study when she first joined the Commission. CP 2162; 2831.

with the PSRC conclusion about the Corridor as a "strategic" rail corridor.[105] Other parties concurred with the Port regarding the ERC's significance.[106] It is not the Court's place to second guess the Commission's conclusion.

There is no evidence in this case that the Port engaged in "willful and unreasoning action, without consideration and in disregard of facts and circumstances." The undisputed record is to the contrary. The three individual Appellants may disagree with the Commissioners' unanimous judgment, but their remedy is through the ballot box.

G. The Court Should Defer to the Port's Determination that Acquisition of the Corridor was Necessary.

As the trial court held, the Port's finding of "necessity" was a quasi-legislative determination entitled to deference. Such a determination generally is "conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud." *PUD No. 2. v. N. Am. Free Trade Zone*, 159 Wn.2d 555, 575-76, 151 P.3d 176 (2007). Appellants failed to create a genuine issue of material fact regarding arbitrary and capricious conduct, fraud, or constructive fraud.

"Necessary" within the context of RCW 53.08.010 (port may

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[105] CP 2832-35.

[106] *See, e.g.*, CP 1158-60; 2389-90; 2540-99.

purchase "all lands [and] property . . . necessary for its purposes") means "reasonable necessity, under the circumstances of the particular case."

> ["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.

Asotin County, 73 Wn.2d at 75; *see also HTK Mgmt., LLC v. The Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 636 n.19, 121 P.3d 1166 (2005) ("necessity" does not require showing that acquisition of property was "absolutely necessary or indispensable").[107]

The Port's legislative 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."

> When reasonable minds can differ, courts will not disturb the legislative body's decision that necessity exists so long as it was reached "honestly, fairly, and upon due consideration" of the facts and circumstances. The decision may be unwise, but it is still a decision for the legislative body to make, not this court.

Central Puget Sound, 156 Wn.2d at 417-18 (emphasis added).

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[107] Appellants argue that *State ex rel. Schleif v. Superior Court of Okanogan County*, 119 Wash. 372, 205 P. 1046 (1992), defines "reasonable necessity" as no "other practical or feasible way," but they fail to acknowledge the limited context in which the term was used. *Schleif* involved condemnation of an easement by necessity. Because there was no practicable or feasible way out of the property other than via the easement, the court found a "reasonable necessity" to condemn the private right-of-way. The case clearly does not define "reasonable necessity" in the context of RCW 53.08.290 or 53.08.010.

In *Central Puget Sound,* the Court upheld Sound Transit's determination of "necessity" even though the agency may have relied on erroneous beliefs in acquiring property for a park-and-ride. The Court refused to second guess Sound Transit's decision without a showing of "actual fraud or arbitrary and capricious conduct amounting to constructive fraud," which was not made. 165 Wn.2d at 418 n.5; *see also City of Des Moines v. Hemenway,* 73 Wn.2d 130, 140, 437 P.2d 171 (1968) ("Necessary" means "reasonable necessity under the circumstances"; city did not act arbitrarily and capriciously in condemning property for marina, although the marina benefited nonresidents).

Likewise, as a matter of law, the Port established "reasonable necessity" for purposes of RCW 53.08.290. The Court may take judicial notice of the fact that acquisition of the portion within Snohomish County was "reasonably necessary" to link the portion in King County to the interstate railroad system. ER 201.

In addition, "reasonable necessity" may take into account future anticipated uses and needs.[108] In *Welcker,* 65 Wn.2d 677, the Court upheld the City's decision to acquire land contiguous to the Green River to protect the city's water supply, although no immediate or foreseeable

[108] Appellants rely on a dictionary definition of "necessary" in arguing that it means "absolutely required" or "essential." But "necessary" is modified in RCW 53.08.290 by the qualifier "reasonably," which means an action that is "sensible" or "not immoderate."

threat existed and other measures (such as enforcing the pollution laws) could protect the water. The Court reasoned that "[r]easonable necessity for use in a reasonable time is all that is required." *Id.* at 684.

> We agree with the city . . . . Such an agency cannot await the onset of an epidemic before acting . . . . The fact that the water now being supplied by the city is potable and does not exceed tolerable contamination levels, or that such contamination as presently exists cannot be traced to the usage of the lands here involved, in nowise detracts from the wisdom of present necessity of providing reasonable safeguards against a reasonably realistic and foreseeable future danger of contamination. A "stitch in time" has never been considered capricious.

Id. at 685-86 (emphasis added); *see also In re Port of Grays Harbor*, 30 Wn. App. 855, 863-65, 638 P.2d 633 (1982) (acquiring gravel pit "necessary" although property was larger than required, no plans for development existed, and port was motivated to stifle competition).

Appellants now assert for the first time that the Port's representation that it needs the Corridor to move freight amounts to constructive fraud. Appellants rely on out-of-context statements, selectively omitting portions that would make it clear that the statements are not referring to the Northern Portion at all, but to the Southern Portion that is not involved in this action. The Port owns and will continue to own the Northern Portion as an active working rail line serving customers in King County. Appellants ignore this fact. Plaintiffs also ignore the fact

that any trail use of the ERC (the Southern Portion and Redmond Spur) is required by the federal "Rails to Trails Act," 16 U.S.C. § 1247(d), to prevent abandonment of the right-of-way for railway purposes.

Appellants refer to a statement by former Commissioner Bob Edwards regarding the use of the Corridor for a bicycle trail. The statement, however, refers only to the Southern Portion whose acquisition was not challenged by Appellants. Commissioner Edwards also refers to the ERC as a "tremendous opportunity" for "economic development" as "part of a high-capacity rail system."

Appellants also refer to alleged statements of Commissioners Bill Bryant and Gael Tarleton in which they purportedly told the Municipal League that acquisition of the ERC was a "legacy project," "inconsistent with the Port's core mission." But the statements are taken out of context. The Corridor purchase went through numerous iterations. As Commissioner Bryant testified, "the transaction I was referring to at the meeting was not the transaction that the Port ultimately entered into."[109]

Appellants mention a comment from former Commissioner Alec Fisken that the Port was involved because it has the "right to raise property tax without a vote," and Commissioner John Creighton's reference to the Port as a "bridge financier." Appellants refer to the

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[109] CP 1136-37.

statements out of context,[110] but neither statement contradicts the Port Commissioners' conclusion that purchase of the ERC was necessary. The Port can raise and use property taxes to engage in any authorized activities. The Port's preservation of an irreplaceable transportation corridor, and the sales of portions to other public entities for economic development and other uses, is hardly "constructive fraud."

The Port Commission, after years of study, deliberation, and public input, decided that acquiring the Corridor was reasonably necessary to the Port's purposes including fostering economic development in King County. Acquiring the portion of the Corridor in Snohomish County not only was "reasonably necessary," but required to link that portion within King County (a facility in its own right) to the interstate railroad system.[111] The portion within King County included the Southern Portion, part of the Northern Portion, and the Redmond Spur.

The Port Commissioners determined that the Corridor was reasonably necessary to ensure that transportation corridors existed that would enable the Port to respond to evolving economic conditions, trade patterns, and competitive demands. The Port also determined the ERC

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[110] *See* CP 1144 (Commissioner Creighton took the view that "the Port should initially purchase the entire ERC and then sell various interests to other regional partners to decrease the Port's financial outlay," thus limiting the Port's net expenditures in order to position the Port to "handle a down economy."

[111] *See* CP 1129; 1133-34; 1140; 1149; 1403-05; 2159.

acquisition was reasonably necessary to ensure that an existing and active freight railway used by King County businesses could continue to access the interstate rail system. Purchase of the entire Corridor was a "stitch in time" to keep the 42-mile-long parcel intact for freight, transportation, and other uses. Because as a matter of law Appellants have not (and cannot) establish constructive fraud, the Port Commissioners' determination of necessity is conclusive.

H. The Court Lacks Jurisdiction Because Appellants Failed to Pay the Alleged "Illegal Taxes" Under Protest.

The Court lacks jurisdiction to hear a taxpayer challenge to property taxes when the taxes have not been paid under protest. Appellants seek reimbursement of "the full amount of all taxes unlawfully imposed" for the Port's purchase of the Corridor, but they concede that they failed to pay the taxes under protest. RCW 84.68.020 states in part:

> In all cases of the levy of taxes for public revenue which are deemed unlawful . . . by the person . . . whose property is taxed, such person . . . may pay such tax . . . deemed unlawful, under written protest setting forth all of the grounds upon which such tax is claimed to be unlawful. . . ; and thereupon the person . . . . so paying, . . . may bring an action in the superior court . . . against the . . . . municipality by whose officers the same was collected, to recover such tax, or any portion thereof, so paid under protest . . . .[112]

[112] RCW 84.68.070 states in pertinent part: "Except as permitted by RCW 84.68.010 through 84.68.070 and chapter 84.69 RCW, no action shall ever be brought or defense interposed attacking the validity of any tax, or any portion of any tax . . . ."

"Payment under protest" is a precondition to bringing a lawsuit for a refund of taxes. *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 695, 790 P.2d 149 (1990) ("[T]he protest requirement is a jurisdictional prerequisite."); *see also Sundquist Homes, Inc. v. Snohomish County*, 276 F. Supp. 2d 1123 (W.D. Wash. 2003) (holding that a developer who failed to pay impact fees under protest was precluded by RCW 84.68.020 from seeking a refund).

At the trial court, Appellants tried to avoid the jurisdictional bar by claiming that they dispute the "use" of the tax and not its "collection." But the statute makes no such distinction. The statute requires payment under protest for taxes "deemed unlawful." Appellants are seeking a refund for taxes "to pay for the illegal purchase transaction," and admit they never paid any such taxes under protest.[113]

V. CONCLUSION

For the above stated reasons, the court should affirm the trial court's summary judgment in favor of the Respondent Port of Seattle, and its dismissal of the Appellants' claims.

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[113] CP 2883-84; 2193-94; 2934; *see also* CP 92.

Respectfully submitted this 7th day of June, 2012.

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By _____

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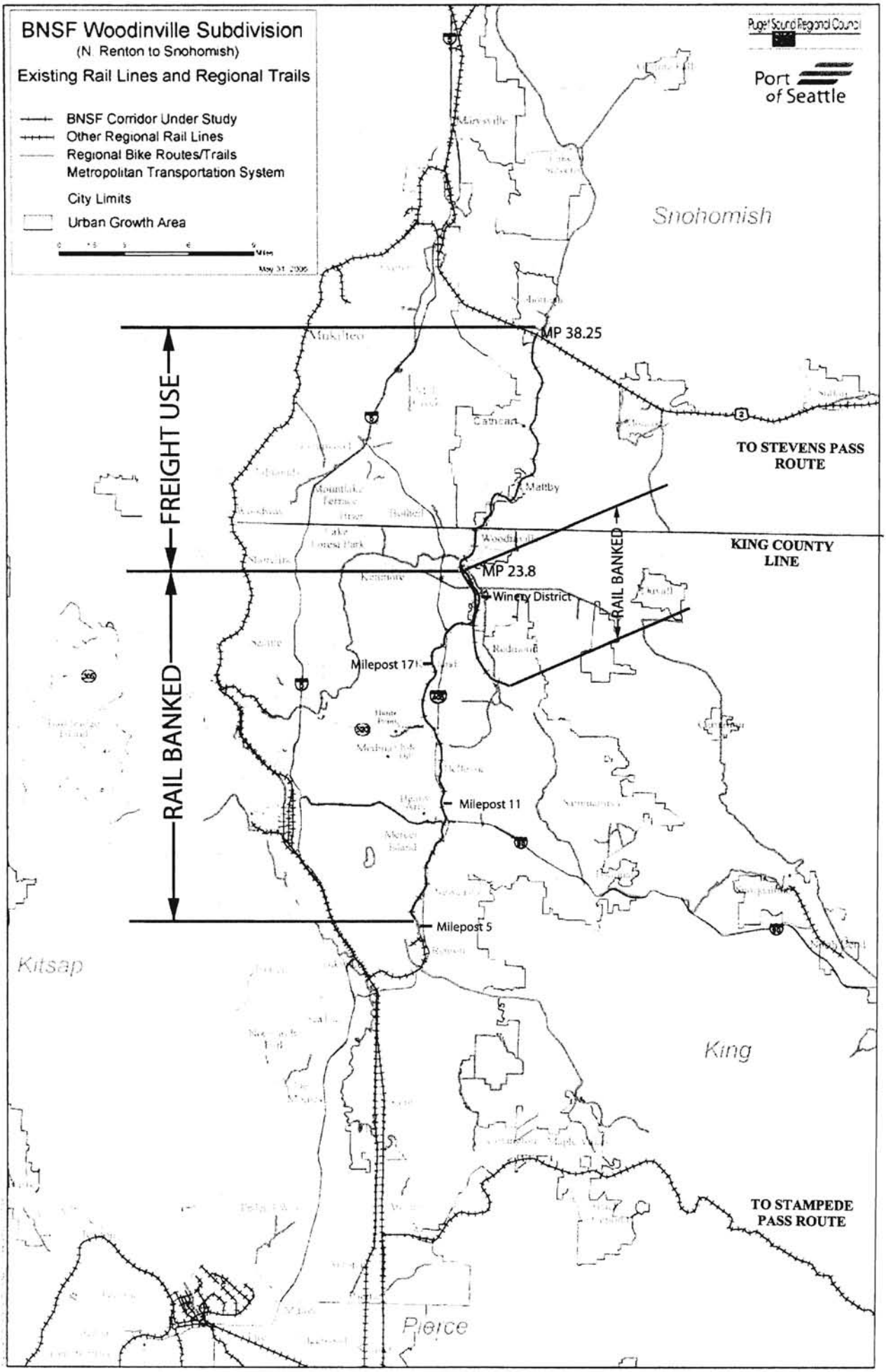
APPENDIX


BNSF Woodinville Subdivision
(N. Renton to Snohomish)
Existing Rail Lines and Regional Trails
BNSF Corridor Under Study
Other Regional Rail Lines
Regional Bike Routes/Trails
Metropolitan Transportation System
City Limits
Urban Growth Area
May 31, 2006
Puget Sound Regional Council
Port of Seattle
Snohomish
King
Kitsap
Pierce
MP 38.25
FREIGHT USE
TO STEVENS PASS ROUTE
KING COUNTY LINE
MP 23.8
Winery District
RAIL BANKED
RAIL BANKED
Milepost 17
Milepost 11
Milepost 5
TO STAMPEDE PASS ROUTE

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Dear Clerk: We are attaching the Brief of Respondent Port of Seattle, along with our Certificate of Service in the above-referenced matter. We are also providing you with a copy of our Supplemental Designation of Clerk's Papers, which we filed in King County Superior Court this morning. Thank you.

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