

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
12/13/2019 3:37 PM  
BY SUSAN L. CARLSON  
CLERK

No. 97410-1

---

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

RANDOLPH PETERSON, a taxpayer resident; JASON MOUNT, an individual; JAMES SUMMEY, an individual; PEGGI DOGGETT, an individual; JENNIFER HARTSFIELD, an individual; and MANDI OUKROP, an individual,

Petitioners,

v.

PORT OF BENTON, a Washington port district,

Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant,

and

UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation,

Intervenor Plaintiff,

and

BNSF RAILWAY COMPANY, a Delaware corporation,

Respondent.

---

PETITIONERS' SUPPLEMENTAL BRIEF

---

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Petitioners

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii-iv
A. INTRODUCTION .....	1
B. STATEMENT OF THE CASE.....	2
C. ARGUMENT .....	5
(1) <u>BNSF/UP Rent-Free Usage of Public Tracks in Perpetuity Violated Article VIII, § 7</u> .....	5
(a) <u>Article VIII, § 7 Was Created to Prohibit Government Gifts or Loans to Railroads</u> .....	5
(b) <u>This Court Applies a Two-Step Analysis in Gift Cases</u> .....	7
(2) <u>The Only Issue for this Court Here Is Donative Intent</u> .....	11
(3) <u>There Was a Question of Fact as to Donative Intent under Article VIII, § 7 under the Facts Here</u> .....	12
(a) <u>The Port Intended to Give the Railroads the Use of the Tracks Without Any Charge Forever</u> .....	13
(b) <u>The Actual Consideration Received by the Port from the Railroads for Their Perpetual Use of the Tracks Was Grossly Inadequate</u> .....	15
D. CONCLUSION.....	25
Appendix	

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Adams v. University of Washington</i> , 106 Wn.2d 312, 722 P.2d 74 (1986).....	5, 9, 10, 12
<i>Buckerfield’s Ltd. v. B.C. Goose &amp; Duck Farm Ltd.</i> , 9 Wn. App. 220, 511 P.2d 1360 (1973).....	13
<i>Casa del Rey v. Hart</i> , 110 Wn.2d 65, 750 P.2d 261 (1988) .....	13
<i>City of Tacoma v. Taxpayers of City of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	8, 9, 10, 12
<i>CLEAN v. City of Spokane</i> , 133 Wn.2d 455, 947 P.2d 1169 (1997), <i>cert. denied</i> , 525 U.S. 812 (1998).....	<i>passim</i>
<i>Elcon Const., Inc. v. Eastern Wash. Univ.</i> , 174 Wn.2d 157, 273 P.3d 965 (2012).....	2
<i>In re Limited Tax General Obligation Bonds of City of Edmonds</i> , 162 Wn. App. 513, 256 P.3d 1242 (2011).....	5
<i>King Cty. v. Taxpayers of King Cty.</i> , 133 Wn.2d 584, 949 P.2d 1260 (1997), <i>cert. denied</i> , 523 U.S. 1076 (1998).....	7
<i>Lassila v. City of Wenatchee</i> , 89 Wn.2d 804, 576 P.2d 54 (1978).....	7, 23
<i>Matter of Estate of Little</i> , 106 Wn.2d 269, 721 P.2d 950 (1986).....	13
<i>Miebach v. Colasurdo</i> , 102 Wn.2d 170, 685 P.2d 1074 (1984).....	13
<i>Port of Longview, Cowlitz Cty. v. Taxpayers of Port of Longview, Cowlitz Cty.</i> , 85 Wn.2d 216, 527 P.2d 263, 533 P.2d 128 (1975) .....	7, 22
<i>Rauch v. Chapman</i> , 16 Wash. 568, 48 Pac. 253 (1897) .....	6
<i>State ex rel. Graham v. City of Olympia</i> , 80 Wn.2d 672, 497 P.2d 924 (1972).....	6
<u>Federal Cases</u>	
<i>BNSF Ry. Co. v. Tri-City &amp; Olympia Ry. Co. LLC</i> , 835 F. Supp. 2d 1056 (E.D. Wash. 2011).....	3, 14

<i>United States ex rel. Peterson v. Port of Benton County, et al.</i> , No. 2:17-cv-191-TOR (E.D. Wash.).....	24
---	----

Constitutions

Wash. Const. art. VIII, § 5 .....	5, 11, 16
Wash. Const. art. VIII, § 7 .....	<i>passim</i>
Wash. Const. art. XII, § 13 .....	7
Wash. Const. art. XII, § 14 .....	7
Wash. Const. art. XII, § 15 .....	7
Wash. Const. art. XII, § 16 .....	7
Wash. Const. art. XII, § 17 .....	7
Wash. Const. art. XII, § 18 .....	6, 7
Wash. Const. art. XII, § 20 .....	7

Other Authorities

Dominic Gates, <i>Tax incentives lucrative to job-slashing Boeing, annual filing shows</i> , <i>The News Tribune</i> , September 28, 2018, <a href="https://www.thenewstribune.com/news/local/article219199605.html">https://www.thenewstribune.com/news/local/article219199605.html</a> (last visited Nov. 13, 2019) .....	23
Eric Boehm, <i>Wisconsin’s Massive Foxconn Boondoggle Is Getting Worse</i> , <a href="https://reason.com/2019/10/24/wisconsins-massive-foxconn-boondoggle-is-getting-worse/">https://reason.com/2019/10/24/wisconsins-massive-foxconn-boondoggle-is-getting-worse/</a> (last visited Nov. 13, 2019).....	23
<a href="https://portofbenton.com/tricities/wp-content/uploads/2019/06/Minutes_5-8-19.pdf">https://portofbenton.com/tricities/wp-content/uploads/2019/06/Minutes_5-8-19.pdf</a> (last visited Nov. 13, 2019).....	17
Patricia Cohen, Natalie Kitroeff, Monica Davey, <i>Foxconn Reconsidering Plans for a Wisconsin Factory Heralded by Trump</i> , <i>The New York Times</i> , January 30, 2019, <a href="https://www.nytimes.com/2019/01/30/business/foxconn-factory-wisconsin.html">https://www.nytimes.com/2019/01/30/business/foxconn-factory-wisconsin.html</a> (last visited Nov. 13, 2019).....	23
Paul Shukovsky, <i>Boeing’s \$8.7 Billion Washington State Tax Break Under Scrutiny</i> , <a href="https://news.bloombergtax.com/daily-tax-report-state/boeings-8-7-billion-washington-state-tax-break-under-scrutiny">https://news.bloombergtax.com/daily-tax-report-state/boeings-8-7-billion-washington-state-tax-break-under-scrutiny</a> (last visited Nov. 13, 2019) .....	23
Robert F. Utter, Hugh D. Spitzer, <i>The Washington Constitution: A Reference Guide</i> (Greenwood Press 2002).....	6

A. INTRODUCTION

Petitioners Peterson, Mount, Summey, Doggett, Hartsfield, and Oukrop are Port of Benton (“Port”) taxpayers (“taxpayers”).<sup>1</sup>

Article VIII, § 7 of the Washington Constitution was enacted to forestall the gift or loan of public funds, a profound political problem in the late Nineteenth Century. The Framers were deeply concerned about the effects on the public purse of granting subsidies to commercial enterprises, primarily railroads. This case involves the Port’s decision to allow the Burlington Northern Santa Fe Railway Company (“BNSF”) and now the Union Pacific (“UP”) to use public railroad tracks without the payment of any rent or fee for that usage or track maintenance, despite the wear and tear caused by BNSF/UP trains on that track. The Port’s taxpayers will be forced to pay for that wear and tear. There is no future terminal point for the railroads’ rent-free track usage.

The trial court erred in dismissing the taxpayers’ action in which they alleged that the Port violated article VIII, § 7 of our Constitution by favoring BNSF/UP like no other lessee with whom the Port contracted.

This Court should vindicate the restrictions set forth in the Washington Constitution on the ability of local governments to permit free

---

<sup>1</sup> The Port/BNSF personalized their argument throughout their answer to the taxpayers’ petition for review as to Randolph Peterson, hoping to focus on him, rather than their unconstitutional conduct. This Court can readily see through such a tactic.

use of public property in the guise of “economic development” and to favor selected private commercial entities at the expense of taxpayers and the public purse.

B. STATEMENT OF THE CASE

Division I’s opinion correctly set forth the basic outline of the facts and procedure in this case. Op. at 2-5. However, certain points of fact bear emphasis, the most prominent of which relate to Division I’s apparent confusion of the consideration received by the Port for the transfer of property from the federal government with the puny “consideration” received by the Port from BNSF/UP for the rent-free use of tracks in perpetuity.

Taken in a light most favorable to the taxpayers as the non-moving parties on summary judgment, *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012), the critical facts here are:<sup>2</sup>

- The railroads’ predecessors each paid the federal government \$50,000 to construct the tracks at issue here. Op. at 1-2;<sup>3</sup>

---

<sup>2</sup> Peterson provided a comprehensive description of those facts below. CP 1282-1304.

<sup>3</sup> The initial agreement provided that upon completion of the 5.4 miles of rail line, and the payment of one half of \$100,000 by the railroads, “The [AEC] shall own said [railroad tracks] but [the railroad companies] shall be entitled during the term of this agreement to use [the tracks] ... free of rental or any other charge.” CP 28, 41-42. The Port received that property subject to the 1947 and 1961 agreements between the AEC and the railroads regarding those tracks. Those agreements were not perpetual, but rather were in the nature of revocable permits, conferring upon DOE, and now the Port, the right to terminate the agreements with the railroads for the free use of the tracks upon six

- In 1998, the federal government transferred land in Tri-Cities and 16 miles of track to the Port. Op. at 2;
- Apart from a promised \$50,000 payment, BNSF has never paid the Port rent for use of the public railroad tracks at issue here. Reply br. at 2;
- The Port became subject to Washington constitutional obligations like article VIII, § 7 when it received the tracks from the United States Department of Energy (“DOE”);<sup>4</sup>
- Under their constitutional analysis, the railroads will *never* have to pay the Port for track usage in perpetuity;
- The Port, in fact, knew that the railroads had an obligation to pay for track usage, going so far as to force UP to pay fees under threat of contract termination in 2000. Op. at 8; Appellants br. at 24;
- While the Port was obligated under its deal with the federal government to devote all lease payments and other revenues derived from the railroads to cover maintenance, it has *never* complied with that obligation. Appellants br. at 6 n.8;
- In 2000, the Port leased the tracks to the Tri-City Railroad Company LLC (“TCRY”). Op. at 2-3. TCRY is essentially the Port’s agent for the routine maintenance of the tracks, as the Port did not pay TCRY for such services. CP 1785-86 (“As a result of these lease arrangements with TCRY, the Port has provided for the maintenance of the Ruchland Trackage which the Port agreed to do in the Indenture with the United States.”). Rather, their agreement understood that TCRY would be paid by the railroads that actually used the tracks. Appellants br. at

---

months’ notice. CP 32, 42. *See also, BNSF Ry. Co. v. Tri-City & Olympia Ry. Co.*, 835 F. Supp. 2d 1056, 1062 (E.D. Wash. 2011).

<sup>4</sup> The Port was fully aware that upon the transfer of the tracks, use of the tracks was subject to Washington law and that it could not allow such public property to be used without compensation. CP 276 (“The Port, as a public entity, cannot allow its property to be occupied without compensation.”).

5-6. Without fees collected from the railroads at the Port's direction, the TCRY/Port agreement is economically unsustainable;

- BNSF and UP ended their respective fee relationships with TCRY in 2009 and 2017, conferring 10 years of no-cost track usage on BNSF and now 2 years of same for UP; there is no terminal date to such rent-free/cost-free usage by the railroads of the Port's publicly-owned tracks;
- TCRY does not pay for *all* track maintenance because the Port intends to seek *millions of dollars* in major capital expenditures to upgrade the tracks as part of a Master Plan. Appellants br. at 26-27;
- Modern locomotives and railroad cars cause wear and tear to the World War II era tracks, CP 1546-49, and Port taxpayers will be forced to pay for the railroads' wear and tear of the tracks. Appellants br. at 4-5, 26-27;
- In its 250 other leases of public property, the Port requires the payment of fair market value for the property it leases; no other for profit tenant gets use of public property rent-free. CP 435. The Port does not have a process by which a private entity can request to use the Port's property without paying monetary consideration. CP 438. If a private entity requested exemption from paying cash consideration for use of Port's property, the Port would not enter into such a lease. CP 435-36.

Division I's opinion reflected a fundamental misunderstanding of the relationship between the railroads and TCRY when it discusses access to competing Class I railroads. Op. at 8. If the Port chose to cancel the 1947 agreement, as it had the authority to do on 6 months' notice to the railroads, rail customers located off of the Port-owned rail line would still have competing Class 1 railroad access. TCRY would only be providing

the end service. Also, Division I acknowledged that BNSF terminated its relationship with TCRY in order to save roughly \$100-150 per car. Op. at 3-4. That is roughly the amount that TCRY would have applied to the maintenance and upkeep of the track. *Someone* will have to pay that track maintenance expense, and it will be the Port's taxpayers, or other public sources, rather than the railroads who make the necessary expense.

### C. ARGUMENT

Division I's interpretation of article VIII, § 7 contravenes this Court's analytical protocol. This Court should not condone the evisceration of article VIII, § 7.

- (1) BNSF/UP Rent-Free Usage of Public Tracks in Perpetuity Violated Article VIII, § 7
  - (a) Article VIII, § 7 Was Created to Prohibit Government Gifts or Loans to Railroads

The plain language of article VIII, §§ 5<sup>5</sup> and 7 evidences the Framers' unambiguous intent to broadly restrain the ability of public officials, state and local, to use public moneys to assist private individuals or business entities. By its terms (*see* Appendix), article VIII, § 7 bars

---

<sup>5</sup> The Port argued below that article VIII, § 5 authority was inapposite in analyzing § 7. RP 89-90. That is wrong because the analytical protocol is identical. In *Adams v. University of Washington*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986), albeit in the article VIII, § 5 setting, this Court stated: "Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration." *See also, CLEAN v. City of Spokane*, 133 Wn.2d 455, 469, 947 P.2d 1169 (1997), *cert. denied*, 525 U.S. 812 (1998); *In re Limited Tax General Obligation Bonds of City of Edmonds*, 162 Wn. App. 513, 530, 256 P.3d 1242 (2011).

either the gifting or loaning of public funds or property. § 7 is broad in scope, as explained by Justice Frank Hale in clear terms in his concurring opinion in *State ex rel. Graham v. City of Olympia*, 80 Wn.2d 672, 687, 497 P.2d 924 (1972):

...Const. art. 8, s. 7...was and is expressly aimed at the use of public money by any private entity for private purposes. It is directed against the use of public money for political favoritism, preferment and manipulation; it is aimed at preventing or curtailing the private economic enhancements of persons and corporations by the employment of public funds for private purposes. It is designed to protect the public purse from private spending. The prohibition in the constitution of the use of public funds for private purposes... is directly aimed at particular forms of graft, corruption, favoritism and special privilege in politics and government, for it lays down an inexorable principle that anyone standing for public office who openly or tacitly promises to make any part of the public treasury available for private profit, use, manipulation or investment will be unable to keep such promises lawfully.

The historical context of article VIII, § 7 is particularly significant to understand its broad scope. That constitutional provision was promulgated as the result of the undue political influence of railroads in late Nineteenth Century. The trial court agreed. RP 101.<sup>6</sup>

---

<sup>6</sup> *Accord*, Robert F. Utter, Hugh D. Spitzer, *The Washington Constitution: A Reference Guide* (Greenwood Press 2002) at 145-46; *Rauch v. Chapman*, 16 Wash. 568, 574, 48 Pac. 253 (1897) (noting that article VIII, § 7 was meant to foreclose loans and gifts of public funds to railroads that had bankrupted many local governments). The Utter/Spitzer treatise describes article XII, § 18 in particular. Its initial version called for the creation of a railroad commission by the Constitution itself. They describe railroad lobbyists descending on the delegates, exerting pressure that resulted in many delegates changing their votes, leading to the present version of § 18 conferring discretion upon the Legislature to create a commission. The Framers aggressively regulated railroad conduct

In sum, our Progressive Era Framers clearly intended to foreclose gifts or loans of public funds generally, but that intent was particularly pointed as to gifts or loans of public funds to railroads.

(b) This Court Applies a Two-Step Analysis in Gift Cases

In general terms, an unconstitutional gift is present if a public entity intends to make a gift of public funds or permits a private company to use public property without paying consideration for such use. *King Cty. v. Taxpayers of King Cty.*, 133 Wn.2d 584, 597, 949 P.2d 1260 (1997), *cert. denied*, 523 U.S. 1076 (1998) (*citing CLEAN v. State*, 130 Wn.2d 782, 800, 928 P.2d 1054 (1997)). This Court has developed a rich body of law on gifts or loans of public money within the meaning of article VIII, § 7.<sup>7</sup>

Perhaps the most recent comprehensive analysis of the gifting of public funds under article VIII, § 7 is this Court's opinion in *CLEAN*, a

---

elsewhere in our Constitution. They provided for regulation of common carriers (article XII, § 13); prohibited combinations of railroads (article XII, § 14 – later repealed); prohibited discriminatory charging practices by railroads (article XII, § 15); prohibited consolidation of competing lines (article XII, § 16); provided for taxation of railroad rolling stock (article XII, § 17); allowed for railroad rate regulation (article XII, § 18). They even banned free passes to legislators from railroads (article XII, § 20).

<sup>7</sup> *E.g.*, *Port of Longview, Cowlitz Cty. v. Taxpayers of Port of Longview, Cowlitz Cty.*, 85 Wn.2d 216, 527 P.2d 263, 533 P.2d 128 (1975) (complex scheme to provide loans to make pollution control facilities available to private concerns violated § 7); *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978) (scheme to redevelop downtown Wenatchee by purchase of properties for resale to private concerns violated § 7).

case involving Seattle’s professional baseball stadium. The Court there indicated the proper focus of article VIII, § 7 is that “public funds cannot be used to benefit private interests when the public interest is not primarily being served.” 130 Wn.2d at 792. Thus, in analyzing whether a gift of public funds is being made, the overarching purpose of § 7 must be kept firmly in mind. *Id.* at 797.

This Court applies a two-part test for determining if an unconstitutional gift of public funds has occurred:

First, the court asks if the funds are being expended to carry out a fundamental purpose of the government? If the answer to that question is yes, then no gift of public funds has been made. The second prong comes into play only when the expenditures are held to not serve fundamental purposes of government. The court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body in order to determine whether or not a gift has occurred.

*Id.* at 797-98. Donative intent on the government’s part is the central focus of the second prong of the *CLEAN* protocol. If a court determines that donative intent on the government’s part, either express or based on grossly inadequate consideration for a valuable public property that is tantamount to express donative intent, is present, then the court does not then look to the adequacy of consideration. *See also, City of Tacoma v.*

*Taxpayers of City of Tacoma*, 108 Wn.2d 679, 703, 743 P.2d 793 (1987); *Adams*, 106 Wn.2d 312 at 327.

With regard to donative intent, this Court was clear in *Adams*, *City of Tacoma*, and *CLEAN* that it may be proved either by direct evidence of a government's intent to gift public funds or resources or indirectly by evidence of consideration so gross inadequate as to be tantamount to a gift. Below, the Port/BNSF contended that this Court's decision in *King County* somehow eliminated grossly inadequate consideration from the donative intent analysis for an unconstitutional gift. That was wrong, as the *King County* court itself stated. *King County*, 133 Wn.2d at 601 ("In the absence of donative intent or grossly inadequate return, the Court's review is limited to the legal sufficiency of consideration for the lease."). Nevertheless, the trial court's oral ruling indicates that it adopted this erroneous analysis. RP 102.

But a proper analysis of *Adams*, *City of Tacoma*, *CLEAN* and *King County* makes clear that the trial court was wrong. The latter two baseball stadium cases are consistent. *CLEAN* involved more of a "facial challenge" to Seattle's baseball stadium, while *King County* was the "as-applied challenge." In *CLEAN*, the Court noted generally that the public retained ownership of the stadium and would receive rent from the Mariners for its use. 130 Wn.2d at 798-99. In *King County*, the plaintiffs

aggressively argued donative intent was present because the public received grossly inadequate consideration from the Mariners for the stadium's use. 133 Wn.2d at 598. But the Court's majority rejected that argument, determining that the consideration received by the Public Facilities District was far from "grossly inadequate" where the Mariners paid substantial annual rent, agreed to contribute \$45 million in construction costs, paid construction cost overruns, maintained the facility, made major repairs and capital improvements, and agreed to share profits with the new public stadium district. *Id.* at 598-601. The Port's disinclination to require *any* consideration from the railroads for use of its tracks stands in stark contrast.

Division I correctly applied *CLEAN*'s two-step gifting protocol, including the analysis of donative intent that looks either to express intent or consideration so inadequate as to be tantamount to a gift. *Op.* at 8-9. As will be noted *infra*, Division I erred, however, when it altered this Court's donative intent analysis to add a further requirement, *nowhere* present in *Adams/City of Tacoma/CLEAN* that the consideration must be so inadequate as to shock the conscience of the court, that is, it must include an element of fraudulent or unconscionable conduct on the government's part in making the gift or loan of public funds. *Op.* at 9.

That addition was error, eviscerating the constitutional protection of article VIII, §§ 5 or 7.

(2) The Only Issue for this Court Here Is Donative Intent

As noted *supra*, CLEAN's two-part protocol looks first to whether there is a governmental purpose to the provision of public funds to the private concern. The trial court correctly found no such governmental purpose to be present. RP 102. The parties agree no such interest is present. Op. at 7. In fact, the Port's counsel characterized this case as merely a "private business dispute between BN and TCRY." RP 87.

On the second portion of the *CLEAN* test, legal consideration must be addressed *only* if donative intent is not present. The adequacy of consideration is determined on the basis of legal sufficiency, whether there is value to support a promise, and is analyzed as a question of law. *King County*, 133 Wn.2d at 597-98.

While this Court need not reach the issue of legal consideration, given the Port's donative intent, if it does need to reach the issue, the Court should conclude that consideration for the Port's rent-free track usage by the railroads was legally insufficient. The Port has received *nothing* in the way of tangible consideration from BNSF/UP for their essentially perpetual rent-free use of the tracks. Payments made 70 years ago by the railroads' predecessors to a now defunct federal agency does

not inure to the Port's benefit, particularly where the Port received the tracks for free from the federal government. The railroads' wear and tear of the tracks will be borne by Port taxpayers. Vague promises to perhaps contribute to the upkeep of the tracks at BNSF's complete discretion, made for the first time in 2014 (UP has made no similar promise), similarly do not rise to the level of legally sufficient consideration.

Thus, as noted *supra*, the key question here is donative intent on the Port's part in providing public tracks to BNSF/UP rent-free, without any future terminal point to that rent-free usage.

(3) There Was a Question of Fact as to Donative Intent under Article VIII, § 7 under the Facts Here

Under the *Adams/City of Tacoma/CLEAN* protocol, this Court looks to whether the local government had express donative intent, *i.e.* the local government intended to make a gift of public funds or facilities to the recipient of them, or alternatively, if it received such grossly inadequate consideration as to be tantamount to a gift. The trial court erroneously *conflated* these distinct treatments of consideration in the case law. RP 102-03. Division I correctly treated both aspects of donative intent as distinct analytical matters, but, as noted *supra*, it erroneously determined that a fraudulent intent factor into the latter analysis never before found in Washington law.

Although no article VIII, § 7 case expressly addresses the issue, donative intent, whether manifested as actual intent or grossly inadequate consideration, has long been held to be a *question of fact* in other settings.<sup>8</sup> There is no reason for courts to depart from such precedents to determine such a factually-rich question as a matter of law. Division I here erred in affirming the trial court’s determination of donative intent as a matter of law.

(a) The Port Intended to Give the Railroads the Use of the Tracks Without Any Charge Forever

Division I affirmed the trial court’s determination as a matter of law that the Port had no donative intent. Op. at 7-8. But that court erred in making this factual determination as a matter of law<sup>9</sup> where there was substantial contrary evidence.

The Port had *express* donative intent by virtue of its decision to allow the railroads to use the tracks rent-free and to condone the railroads’ decision to refuse to pay TCRY track maintenance fees, BNSF since 2009,

---

<sup>8</sup> *E.g., Miebach v. Colasurdo*, 102 Wn.2d 170, 685 P.2d 1074 (1984) (sale of home at sheriff’s sale for \$1,340.02 when house’s fair market value was \$106,000 constituted grossly inadequate consideration); *Matter of Estate of Little*, 106 Wn.2d 269, 288, 721 P.2d 950 (1986) (“The existence or absence of donative intent is a factual issue to be resolved by the trier of fact.”). *Casa del Rey v. Hart*, 110 Wn.2d 65, 750 P.2d 261 (1988) (sheriff’s sale of property worth at least \$290,000 for \$14,125.85 constituted grossly inadequate consideration); *Buckerfield’s Ltd. v. B.C. Goose & Duck Farm Ltd.*, 9 Wn. App. 220, 511 P.2d 1360 (1973) (donative intent is a fact issue for the finder of fact).

<sup>9</sup> The court asserted it could do so, citing *King County*, 133 Wn.2d at 597-601. But it ignored the case law cited *supra* that this issue is a factual one for the jury.

and UP since 2017. The Port has never terminated the railroads' revocable permit to use the Port's tracks for free. Moreover, the Port knows that railroad track usage is contributing directly to track wear and tear, but it will have its taxpayers bear the cost of such wear and tear.

The Port *admitted* that BNSF used its tracks for private purposes, CP 441, and that the revenue that it generated using the Port's tracks is not shared with the Port. CP 438. The Port's donative intent is further reinforced by the fact that no other governmental entity in Washington allows railroads to use publicly-owned tracks without payment of monetary consideration, CP 438, and the Port allows no other for-profit tenant to use any other of its public property rent-free. CP 435-36, 438.

With regard to UP, the Port was actually insistent historically that UP pay for track usage, evidencing the fact that the Port knew it must not gift public facilities to private concerns. In 2000, the Port even directed that UP's permit to use the Port's tracks be terminated because UP was not paying. CP 1838-49; *BNSF*, 835 F. Supp. 2d at 1060. Nevertheless, as with BNSF, the Port has permitted UP to use its public tracks rent-free.

The Port/BNSF have closely coordinated their legal activities relating to their relationship, further evidencing the Port's intent to benefit BNSF. When the federal court action was filed by BNSF against TCRY, the Port intervened in support of BNSF's position. *BNSF*, 835 F. Supp. 2d

at 1060. BNSF intervened in this action and joined in the Port's arguments. The Port has claimed that correspondence by its executive director, Scott Keller, to BNSF is privileged. CP 1283-84, 1400-07. BNSF claims a "common interest agreement" with the Port. CP 1409-10. That "common interest agreement" with the Port was not disclosed by BNSF when it filed its motion to intervene in this case. CP 327-48. On appeal here, the Port/BNSF submitted a joint Court of Appeals brief and a joint answer to the taxpayers' petition for review in this Court, only further confirming that the Port intends to benefit BNSF.

Additionally, the Port's express donative intent is demonstrated by its deliberate hiding of its sweetheart arrangement with the railroads from the State Auditor. The Port was audited by the Auditor in 2012 and in 2015. CP 440-41. It never disclosed that BNSF was using Port property without paying either monetary consideration or the leasehold tax. CP 441.

A fact issue was present on the Port's express donative intent.

(b) The Actual Consideration Received by the Port from the Railroads for Their Perpetual Use of the Tracks Was Grossly Inadequate

While Division I correctly determined that donative intent could be demonstrated by grossly inadequate consideration, op. at 8, it erred in ruling *as a matter of law* that it could determine if the consideration

received from the railroads was not so grossly inadequate as to constitute a gift. Op. at 8-10. Rejecting what is a straightforward factual analysis, the court instead added a requirement to the constitutional analysis *nowhere* supported in this Court's article VIII, § 5 or § 7 jurisprudence that the grossly inadequate consideration must "shock the conscience" of the court, that is, it must "suggest fraud or other wrongdoing," or be "unconscionable." Op. at 9. In adopting this test, which is also *factual* in nature, Division I dramatically elevated the bar to establish an article VIII, § 5 or § 7 constitutional violation without this Court's imprimatur for doing so. This Court should reject Division I's approach.

But then, having raised the bar for a constitutional violation, Division I intruded upon the jury's function to determine if such a standard was met. And there was ample evidence adduced below upon which a jury could conclude not only that the "consideration" received by the Port for the use of its tracks from the railroads evidenced such a grossly disparate benefit that for all practical purposes the Port made a gift of public property to the railroads, a jury could even conclude that the Port's conduct had the requisite level of wrongdoing or unconscionability where the Port's manifest intention was to oust TCRY as its agent for track operation/maintenance.

As noted *supra*, the railroads have never paid any rent for track usage and, at least since 2009 (BNSF) and 2017 (UP), they have not paid maintenance fees to TCRY as the Port's agent. They will not pay for future track usage despite the fact that their trains cause substantial wear and tear on the tracks in question. While TCRY pays for some of the track maintenance cost, given the wear and tear caused by BNSF/UP trains, Port taxpayers will have to bear the expense of major improvements to the track to handle the railroads' modern railroad use.<sup>10</sup>

The Port/BNSF contended in their answer to the petition for review at 4-5 that because there was consideration, albeit *de minimis*, for their predecessors' arrangement in 1947 with DOE, and the Port was the successor in interest to DOE, any *de minimis* consideration for the 1947 deal benefitted the Port in the donative intent analysis. Their argument implies that article VIII, § 7 is somehow inapplicable in this case where the Port has succeeded to a federal property interest and that gifts or loans of public funds to the railroads by DOE should be condoned,

---

<sup>10</sup> The Port is involved in major track rehabilitation efforts. CP 1451-1539. The Port's own Master Plan, placed on its website in January 2017, proposes an expenditure of nearly \$8.5 million to upgrade the tracks to address the wear and tear to which the railroads' trains have substantially contributed. CP 1883-1974. The railroads' rent-free use of the tracks obviously results in a *substantial* expense to the taxpayers. The 2019 Legislature appropriated \$2.5 million for Port track improvements, according to the Port's May 8, 2019 Commission meeting minutes. [https://portofbenton.com/tricities/wp-content/uploads/2019/06/Minutes\\_5-8-19.pdf](https://portofbenton.com/tricities/wp-content/uploads/2019/06/Minutes_5-8-19.pdf) (last visited Nov. 13, 2019).

notwithstanding our constitutional prohibition on such actions. That is wrong.

When property is owned by the State or any of its political subdivisions, the Constitution applies to those publicly-owned properties. Upon statehood in 1889, Washington received lands from the federal government. In the century since, the State and its subdivisions have received additional property from the federal government. Under settled Washington law, once the State or political subdivision receives property, the administration and disposition of that property are subject to our Constitution. The trial court's conclusion, condoned by Division I, that *de minimis* consideration paid by commercial entities like the railroads' predecessors long ago to the federal government somehow binds the Port *never* to charge them rent or for future track wear and tear renders the "consideration" for track use here grossly inequitable, violating article VIII, § 7.

The trial court and Division I also conflated the consideration for the 1998 transfer of property by the federal government to the Port with the constitutionally-mandated consideration the Port must receive *from the railroads* for the tracks' use. The federal government could give the railroads rent-free track usage as it is unencumbered by constitutional restrictions like article VIII, § 7. For 21 years, from 1947 to 1998, that

arrangement remained in place. The railroads had years of rent-free track usage. But when DOE declared the tracks and other property to be surplus in 1998 and transferred that property to the Port, the Port received land, buildings, and the tracks, subject to prior federal agreements with the railroads. DOE received the benefit of relinquishing any obligation to maintain the buildings and the tracks, many of which were in need of significant public expenditures, as the Port/BNSF readily conceded when they noted the extensive costs that faced DOE, including clean up of contaminated properties. Resp'ts br. at 7. But this "consideration" received by the Port from DOE for receipt of surplus federal properties is *irrelevant* to the grossly inadequate consideration the Port received from *the railroads* for continued track usage after 1998.

What *is* critical to the Court's analysis is the fact that although the Port "inherited" DOE's contractual arrangements with BNSF/UP, which may be cancelled on six months notice, it is *undisputed* that the Port was subject to Washington constitutional obligations when it did so. The Port had to satisfy article VIII, § 7 in its contractual relationship with BNSF/UP. The Port and its railroad allies are obtuse to that constitutional obligation.

The taxpayers adduced substantial evidence below of the *substantial* benefit afforded the railroads by the Port's generosity in giving

them rent-free track usage. They offered *unrebutted* expert testimony of experienced experts on the valuation of the benefit the Port conferred on BNSF. Dr. Clarence Barnes, Ph.D., a professor of economics and Dean Emeritus of the Gonzaga University School of Business Administration, CP 1567, 1571-77, testified on the speculative nature of any alleged economic development benefit of the railroads' free use of the tracks. CP 1568. BNSF's use of the Port's publicly-owned property, without paying consideration and without paying for wear and tear it causes, did not fit with any economic model of which Professor Barnes was aware. *Id.*

Norman E. Hooper, a professional engineer and an expert in railroad construction, maintenance, and operations, CP 1541, 1653-64, concluded that BNSF received millions of dollars of benefit from its use of Port tracks without paying rent or a fee. Public rail owners usually recover costs in taxes and fees for funding on-going capital and maintenance of the tracks. CP 1561. Since 2009, the Port acted in a manner atypical of other public rail owners. *Id.* This is particularly true where the railroads' track usage added to the cost of track maintenance – the greater the traffic, the higher variable costs. CP 1561. For the lines in

question here, Hooper indicated the impact on the Port's tracks was very substantial.<sup>11</sup>

Hooper calculated the overall gift by the Port to BNSF alone from 2009-2016 to be between \$6,830,000 to \$10,254,000. CP 1562. If the BNSF volume of the traffic on the Port's track in 2017 was the same as it was in 2016 (4,212 railcars), the gift to BNSF in 2017 would be between \$2,106,000 to \$3,159,000. *Id.*<sup>12</sup>

In sum, the railroads will enjoy rent-free use of valuable public property with no future terminal point to that use; the *only* financial contribution made by them for the tracks for seventy years of track use was a single 1947 payment of \$50,000 each by their predecessors. They have no obligation to pay any rent to the Port or fee to TCRY for track usage indefinitely into the future. Moreover, their continued use of the tracks will result in added expense to Port taxpayers for the tracks' maintenance and upgrade; the railroads will not pay for that expense

---

<sup>11</sup> If the present circumstances continued, as to BNSF alone, the increase in rail traffic would increase maintenance cost – \$300,000 per mile for 5 miles of yard track; \$400,000 per mile on 4.5 miles of main track with modern rail and, \$800,000 per mile if the 6.5 miles of the 90 lb. rail must be changed, totaling in the range of \$8.5 million. CP 1561-62. Prior to 2009, BNSF paid a fee for interchange and switching of \$500 to \$750 per car load. CP 1562. That fee, whether collected by a track owner or that owner's agent, would normally be used for the maintenance and capital investment necessary to keep a rail line in service. *Id.* BNSF independently handled 13,660 carloads from 2009 to 2016. *Id.*

<sup>12</sup> Hooper did not calculate the comparable benefit to UP because UP's decision to stop paying maintenance expenses to TCRY in 2017 ended in the course of the appeal before a record could be developed in the trial court as to the precise benefits UP received from the Port.

caused by their trains to publicly-owned tracks. In the meanwhile, the railroads profit from their private use of the tracks and do not share a dime of that profit with Port taxpayers.

Below, the Port and the railroads attempted to overcome the vast benefit they received from the Port by arguing that the alleged economic benefit the Port's free use of Port tracks provides to the Tri-Cities community is consideration for purposes of the article VIII, § 7 analysis. CP 469, 470, 1023. They mentioned economic development as consideration in passing in their answer to the taxpayers' petition for review at 5-6. Washington law does not permit utilization of so amorphous a concept as "economic development" to substitute for actual, tangible financial consideration. Nor should it.<sup>13</sup>

The Port/BNSF have not cited to a single Washington case that introduced such a concept into the article VIII, § 7 donative intent calculus. Moreover, this Court has made it clear that such intangible benefits to the public are *not* to be utilized. For example, in *Port of Longview, supra*, this Court rejected a port's contention that a provision of pollution control facilities, financed by a governmental loan, for nonpublic entities were beneficial, tartly stating: "The loan of money or credit by a

---

<sup>13</sup> Indeed, the Port/BNSF have never offered a limiting principle for their analysis. If "economic development" suffices as consideration, why should airlines pay rent for use of public airport facilities, or shipping companies pay rent for public port facilities, just to name a few.

municipality to a private corporation is a violation of our state constitution regardless of whether or not it serves a laudable public purpose.” 85 Wn.2d at 231. *Accord, Lassila*, 89 Wn.2d at 810 (rejecting a loan of public funds to facilitate the redevelopment of a part of Wenatchee’s downtown, despite its laudable purpose of urban redevelopment or the city’s expectation “to reap future public benefits from the sale.”). It is no different for a gift of public facilities based on the putative receipt of “economic development.” Whether it is Washington tax credits for Boeing or Wisconsin’s corporate benefits for Foxconn, there are serious questions about whether such inducements to corporations, often described pejoratively as “corporate welfare,” benefit taxpayers.<sup>14</sup>

---

<sup>14</sup> See, e.g., Dominic Gates, *Tax incentives lucrative to job-slashing Boeing, annual filing shows*, *The News Tribune*, September 28, 2018, <https://www.thenewstribune.com/news/local/article219199605.html> (last visited Nov. 13, 2019) (tax breaks afforded Boeing on the rationale of “economic development” prove beneficial to company as reduction in state taxes, although cut 6,000 jobs in state in 2017 after cutting 7,500 jobs in 2016); Paul Shukovsky, *Boeing’s \$8.7 Billion Washington State Tax Break Under Scrutiny*, <https://news.bloombergtax.com/daily-tax-report-state/boeings-8-7-billion-washington-state-tax-break-under-scrutiny> (last visited Nov. 13, 2019) (Citizen Commission for Performance Measurement of Tax Preferences urges Legislature to reconsider Boeing tax breaks in light of legislative analysis by JLARC indicating the lack of sufficient job development/retention performance metrics); Patricia Cohen, Natalie Kitroeff, Monica Davey, *Foxconn Reconsidering Plans for a Wisconsin Factory Heralded by Trump*, *The New York Times*, January 30, 2019, <https://www.nytimes.com/2019/01/30/business/foxconn-factory-wisconsin.html> (last visited Nov. 13, 2019) (demonstrating unreliability of “economic development” as consideration for purposes of article VIII, § 7 gift analysis, Foxconn dramatically alters proposed Wisconsin development despite tax credits and other financial inducements given to it by the State of Wisconsin); Eric Boehm, *Wisconsin’s Massive Foxconn Boondoggle Is Getting Worse*, <https://reason.com/2019/10/24/wisconsins-massive-foxconn-boondoggle-is-getting-worse/> (last visited Nov. 13, 2019) (noting that Foxconn will not deliver on promised “innovation centers,” or the promised number of jobs in 2020 that were part of its deal for \$3 billion in state subsidies).

And if Division I is correct that an element of ill motive must accompany grossly disproportionate consideration to constitute donative intent, there was at least a fact question on that issue as well.<sup>15</sup> The Port's thinly disguised intent has always been to displace TCRY as its agent for track maintenance. Deprived of fee revenue from the railroads for track maintenance and upkeep, TCRY's contract with the Port was not viable economically. The Port wanted to take over track maintenance and charge the railroads fees directly for track usage. Appellants br. at 45 n.43.<sup>16</sup> In doing so, it asserted "we can eliminate the old contracts and charge for rail service." CP 1316. The Port even attempted to coerce Peterson into dropping this action by threatening heavy taxation against TCRY. After the filing of Peterson's first amended complaint, the Port's counsel sent an email to Peterson's counsel on September 28, 2016 in which he threatened Peterson with a claim that TCRY had underpaid the leasehold tax "by

---

<sup>15</sup> Such malevolent efforts to terminate TCRY's contract with the Port is the subject of a pending federal False Claims Act case in *United States ex rel. Peterson v. Port of Benton County, et al.*, No. 2:17-cv-191-TOR (E.D. Wash.).

<sup>16</sup> The Port has negotiated with BNSF concerning payments for track usage since 2009, and had internal discussions indicating that it was the Port's future intent to obtain fees or other compensation from BNSF for its track use. For example, in 2013, a Port consultant wrote that the "Port would like to talk to BNSF about an operating agreement and funding plan that addresses the use, maintenance and repair issues for the rail line." CP 1314. In 2016, the Port held meetings with its consultants regarding updating the 1947-48 contracts and charging UP and BNSF for direct access to the Port's track. CP 1320, 1322. On March 29, 2016, an email was sent by the Port's counsel, Tom Cowan, to staff setting forth a proposed letter to UP asking it for a contribution toward the "additional maintenance and improvements to the Port's railroad ... required to accommodate this traffic." CP 1318.

more than a million dollars,” unless Peterson dropped this case. CP 446. Ironically, the central thrust of the Port’s theory was that the TCRY lease was not based on fair market value, CP 875, 882, *something the Port ignored as to BNSF/UP*. The Port even attached a proposed third-party complaint against Peterson to the email. CP 447-66. The Port’s claim was spurious. Keller asserted that it was a “strategy.” CP 442. The Port decided not to pursue this baseless claim, CP 445, but reserved the right at some unspecified future point to again assert this spurious claim. CP 820.

In sum, fact questions abound here as to whether the Port had donative intent. The trial court erred in prematurely granting summary judgment to the Port.

#### D. CONCLUSION

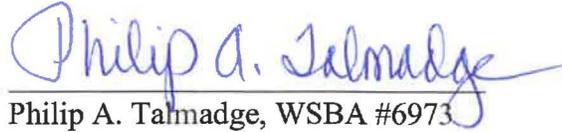
The Port has allowed the railroads to use its public facilities rent-free for years and intends to continue this gift of public facilities indefinitely into the future. The Port’s arrangement with those railroads is exactly the kind of gifting of public funds that our Progressive Era Framers intended to stop by promulgating article VIII, § 7. Ultimately, if this is not an article VIII, § 7 case, no case under that constitutional provision can succeed under the high bar established in Division I’s opinion. That court’s decision will embolden private entities to demand concessions from governments for doing business with those

governments. The effect will be particularly pernicious for small governments lacking the political clout to withstand the efforts of big corporations like BNSF or UP. This Court should not allow the undermining of article VIII, § 7's clear-cut purpose envisioned by our Progressive Era Framers.

The trial court erred in granting summary judgment to the Port/BNSF. Because there is a question of fact regarding the Port's donative intent and the grossly inadequate consideration received by the Port for the railroads' rent-free track usage, this Court should reverse the trial court's order. Costs on appeal should be awarded to the taxpayers.

DATED this 13<sup>th</sup> day of December, 2019.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Petitioners

# APPENDIX

Wash. Const. art. VIII, § 7:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RANDOLPH PETERSON, a taxpayer resident,	)	No. 79090-1-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
STATE OF WASHINGTON DEPARTMENT OF REVENUE, a state agency; PORT OF BENTON, a Washington port district,	)	PUBLISHED OPINION
	)	
Respondents.	)	FILED: June 17, 2019
	)	

---

MANN, A.C.J. — Randolph Peterson sued the Port of Benton (Port) alleging that the Port violated article VIII, section 7 and article I, section 12 of the Washington Constitution by allowing Burlington Northern Santa Fe Railway Co. (BNSF) the free use of public railroad tracks despite the wear and tear caused by BNSF's use of those tracks. Peterson appeals the trial court's order granting summary judgment and dismissing his case. We affirm.

I.

In 1947, the Atomic Energy Commission (AEC), and the predecessors to BNSF and the Union Pacific Railroad (UP) entered into a contract to establish rail service to

the Hanford Nuclear Reservation (Hanford).<sup>1</sup> The 1947 contract provided that the predecessors of BNSF and UP would each pay one half of \$100,000 to AEC, which equaled the cost to construct 5.4 miles of rail tracks between Hanford and the north bank of the Yakima River. In return, BNSF and UP would be entitled to use those tracks free of rental or any other charge. The 1947 contract was terminable upon six months' notice. The Interstate Commerce Commission (ICC) approved the 1947 contract and included in its report that "when full payment has been made, [BNSF and UP] should thereafter be permitted to operate over the tracks without further payments."<sup>2</sup>

In 1998, the Department of Energy (DOE) declared certain parts of its Hanford property to be surplus, and transferred 767.13 acres of industrial property to the Port by indenture. The conveyance was valued at \$5.1 million.<sup>3</sup> The conveyance included the 5.4 miles of railroad tracks built under the 1947 contract. The indenture assigned DOE's rights under the 1947 contract to the Port. As assignee, the Port agreed to be bound by the obligations and considerations in the 1947 contract.<sup>4</sup> The successor to the ICC, the Surface Transportation Board (STB), approved the transfer.

The same day that the indenture became effective, the Port entered into a maintenance and operation agreement with Livingston Rebuild Center, Inc. (LRC), where the Port paid LRC to maintain the track. Peterson controlled LRC.

---

<sup>1</sup> The parties to the original 1947 contract were the AEC, Northern Pacific Railway Company, the Oregon-Washington Railroad & Navigation Company, and its lessee the Union Pacific Railroad Company.

<sup>2</sup> A second agreement was entered between the railroads and AEC in 1961 addressing use of certain spur tracks. The 1961 agreement was converted to a permit in 1979. The 1961 agreement and 1979 permit did not change the relevant terms of the 1947 contract.

<sup>3</sup> The property today is valued in excess of \$50 million dollars.

<sup>4</sup> The Port also agreed to be bound by the terms of the 1961 agreement and 1979 permit.

Subsequently, Peterson formed the Tri-City Railroad Co. (TCRY) as a local, short-haul railroad company, and LRC assigned its rights and obligations under the maintenance agreement to TCRY.

In 2000, the Port entered an agreement with TCRY to interchange railroad cars. Under the interchange agreement, TCRY charged BNSF a per-car fee for exchanging cars for the benefit of BNSF's customers. The interchange agreement "specifically reserved BNSF's rights under the 1947 and 1961 Agreements."

In 2002, TCRY negotiated a lease agreement with the Port for the right to operate the track and use certain real and personal property. The lease obligated TCRY to "use the Property for the operation and maintenance of railroad transportation facilities." The lease was "subject to the restrictions contained in the Indenture between the United States of America and the Port, the amendments thereto, and the Quit Claim Deed from the United States of America." The lease also obligated TCRY's "use, operations, and maintenance of the tracks [to] comply with the provisions of the Quit Claim Deed and Indenture from the United States of America through which the Port acquired title to the property." Additionally, the lease indicated that TCRY was provided with copies of the indenture.

The lease indicated that TCRY, "at its sole cost and expense, shall maintain the Property and all improvements and fixtures then existing thereon in good condition and repair, subject to reasonable wear and tear." Until 2009, BNSF paid TCRY to interchange cars, on a per-car basis. The interchange fees were used to maintain the tracks. BNSF provided TCRY with a written termination notice because BNSF realized

it “could operate its own cars on the Richland Trackage at a savings of around \$100-150 per car” under the 1947 contract.

When BNSF ended its agreement with TCRY in 2009, TCRY did not believe that BNSF had a right to operate directly on the tracks and attempted to physically block BNSF’s use of the tracks. BNSF responded by filing a lawsuit in the United States District Court seeking declaratory and injunctive relief prohibiting TCRY from blocking BNSF’s access to the rail tracks. BNSF Ry. Co. v. Tri-City & Olympia Ry. Co. LLC, 835 F. Supp. 2d 1056, 1066 (E.D. Wash. 2011). The District Court declared that “for all of the historical complexity surrounding the Richland Trackage, the relative rights of the parties are actually quite simple: The United States granted BNSF and UP’s predecessors in interest full rights to operate on the Richland Trackage, and TCRY took possession of the Richland Trackage subject to these rights.” BNSF Ry. Co., 835 F. Supp. 2d at 1066-67. The District Court entered a permanent injunction requiring TCRY to allow BNSF and UP to directly serve customers on the tracks. BNSF Ry. Co., 835 F. Supp. 2d at 1066.<sup>5</sup>

Peterson filed this action on August 15, 2016, alleging the Port and the Washington Department of Revenue (DOR) violated their statutory taxing duties, article VIII, section 7, and article I, section 12 of the Washington Constitution. BNSF and UP successfully moved to intervene. Port taxpayers, Peggi Doggett, Jennifer Hartsfield, Jason Mount, Mandi Oukrop, and James Summey then successfully moved to intervene, objecting to the Port’s gift of public funds and property to BNSF.

---

<sup>5</sup> Currently BNSF and UP operate as Class I carriers, providing competitive interstate service to businesses in the Port.

All parties moved for summary judgment. The trial court granted the Port's and BNSF's motions for summary judgment and denied Peterson's motion for summary judgment. Peterson appeals.

II.

Peterson argues first that by allowing BNSF to use its tracks rent free, and without paying for the impact to the tracks from wear and tear, the Port has made an unconstitutional gift of public funds in violation of article VIII, section 7 of the Washington Constitution. Peterson contends that the trial court erred when it found that there was no issue of material fact as to whether the Port was receiving a grossly inadequate return. We disagree.

We review summary judgment de novo and consider the facts in a light most favorable to the nonmoving party. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “[S]ummary judgment is appropriate where there is ‘no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.’” Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012). “In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.” Young, 112 Wn.2d at 225. If the moving party is the defendant and meets this initial showing, “then the inquiry shifts to the party with the burden of proof at trial.” Young, 112 Wn.2d at 225. Constitutional issues are reviewed de novo. Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

A.

Article VIII, section 7 of the Washington Constitution provides:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

The purpose of this constitutional provision is “to prevent state funds from being used to benefit private interests where the public interest is not primarily served.” Japan Line, Ltd. v. McCaffree, 88 Wn.2d 93, 98, 558 P.2d 211 (1977).

To determine whether there has been a gift of state funds, courts apply a two-pronged analysis:

First, the court asks if the funds are being expended to carry out a fundamental purpose of the government? If the answer to that question is yes, then no gift of public funds has been made. The second prong comes into play only when the expenditures are held not to serve fundamental purposes of government. The court then focuses on the consideration received by the public for the expenditure of public funds and the donative intent of appropriating body in order to determine whether or not a gift has occurred.

CLEAN v. State, 130 Wn.2d 782, 797-98, 928 P.2d 1054 (1996). The court’s analysis focuses on consideration and donative intent. City of Tacoma v. Taxpayers of City of Tacoma, 108 Wn.2d 679, 702, 743 P.2d 793 (1987). To overcome the presumption that the indenture is constitutionally valid, Peterson must show that BNSF’s use of the railway amounts to a “transfer of property without consideration and with donative intent.” General Tel. Co. v. City of Bothell, 105 Wn.2d 579, 588, 716, P.2d 879 (1986); City of Tacoma, 108 Wn.2d at 702.

B.

The parties do not dispute that the answer to the first prong of the CLEAN analysis—whether BNSF’s use of the tracks rent free carries out a fundamental governmental purpose—is no. The focus thus turns to whether there was a donative intent and consideration. CLEAN, 130 Wn.2d at 797-98. “We use the donative intent element to determine how closely we scrutinize the sufficiency of the consideration, ‘the key factor.’” City of Tacoma, 108 Wn.2d at 703 (quoting Adams v. Univ. of Washington, 106 Wn.2d 312, 327, 722 P.2d 74 (1986)). “Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency, under which a bargained-for act or forbearance is considered sufficient consideration.” City of Tacoma, 108 Wn.2d at 703; King County v. Taxpayers of King County, 133 Wn.2d 584, 601, 949 P.2d 1260 (1997).

1.

Peterson argues that the Port had express donative intent when it allowed BNSF to use the railroad tracks rent free. Donative intent can be determined as a matter of law. King County, 133 Wn.2d at 597-601. Peterson makes several arguments in support of his contention that the Port had express donative intent.

Peterson first argues that the Port’s donative intent is evident because it has never terminated BNSF’s revocable permit, the Port allows no other tenant to use its public property rent free, and no other government entity in Washington allows BNSF to use publicly-owned tracks without monetary compensation. This evidence is not sufficient to show that the Port had donative intent when it began allowing BNSF to use the rail tracks rent free. To the contrary, under the indenture, the Port received property

valued in 1998 at \$5.1 million in exchange for agreeing to honor BNSF's operating rights under the 1947 contract.

Peterson next argues that the Port's donative intent is evident because UP continued to pay for its use of the railroad until 2017 while BNSF did not. Peterson contends that the Port required UP to begin paying monetary consideration in 2000, threatening to terminate UP's permit to use the tracks, while treating BNSF differently. It is unclear why UP continued to pay for its use of the track until 2017. However, UP's continued payment until 2017 does not demonstrate that the Port had donative intent when it allowed BNSF to continue to use the tracks rent free. Terminating BNSF's and UP's rights would leave the businesses the Port serves without Class I rail service.

Finally, Peterson argues donative intent is demonstrated because the Port hid BNSF's rent free use of the tracks from the State Auditor. Peterson argues that the Port was audited in 2012 and 2015 and never disclosed that BNSF was using Port property without paying monetary consideration or leasehold tax. Peterson fails, however, to offer a legal basis for why the Port was required to do so, where BNSF does not have a lease with the Port and thus does not pay leasehold taxes.

Peterson has failed to demonstrate express donative intent.

2.

Peterson next argues that, even if the Port did not have express donative intent, donative intent can also be demonstrated by the presence of grossly inadequate consideration. In general, we agree. See King County, 133 Wn.2d at 601 ("In the absence of donative intent or grossly inadequate return, the Court's review is limited to the legal sufficiency of the consideration for the lease."); City of Tacoma, 108 Wn.2d at

703. We disagree, however, with Peterson's position that this inquiry provides the court with an avenue to engage in "careful consideration of the 'consideration' received by the Port for the use of its tracks by BNSF." Peterson offers no legal support for such a detailed inquiry. To the contrary, in King County, our Supreme Court, over a vigorous dissent, made clear that reviewing courts "do not inquire into the adequacy of consideration, but employ a legal sufficiency test." 133 Wn.2d at 597. As the Court explained,

[w]e have been reluctant to engage in an in-depth analysis of the adequacy of consideration because such an analysis interferes unduly with governmental power to contract and would establish a "burdensome precedent" of judicial interference with government decision making.

King County, 133 Wn.2d at 597. Adopting Peterson's call for a careful inquiry into the consideration as part of our analysis of the donative intent element would result in the same judicial interference that King County cautioned against.

Instead, while a grossly inadequate return may be relevant to the donative intent inquiry, we conclude that our review for gross inadequacy is similar to the general equitable contract law principal under which courts may set aside a contract where the consideration is "so gross as to shock the conscience," and thus may suggest fraud or other wrongdoing. See Miebach v. Colasurdo, 102 Wn.2d 170, 178, 685 P.2d 1074 (1984); Binder v. Binder, 50 Wn.2d 142, 150, 309 P.2d 1050 (1957). Peterson, does not argue, nor is there any evidence to support, that the consideration for the 1947 contract and the indenture was unconscionable. Cf. King County, 133 Wn.2d at 599-601 (rejecting the Taxpayers' argument that the Mariners' lease was "unconscionable" because the "consideration for the lease . . . is so grossly inadequate").

Instead, the Port bargained for nearly 768 acres of land, worth \$5.1 million dollars in 1998, in exchange for assuming the obligations of the federal government in the 1947 contract. The Port has over 250 leases generating income. While it is clear from the indenture that the Port may terminate BNSF's and UP's rights to use the track on a six-month notice, doing so would leave the Port without any Class I railroads. "An incidental benefit to a private individual or organization will not invalidate an otherwise valid public transaction." King County, 133 Wn.2d at 596. The benefits to BNSF are incidental to acquiring \$5.1 million in property and having two Class I railroads competing. The consideration for the contract and indenture was not grossly inadequate.

C.

Peterson also fails to demonstrate that the 1947 contract and indenture were not supported by legally sufficient consideration. King County, 133 Wn.2d at 597. Legal sufficiency "is concerned not with comparative value but with that which will support a promise." King County, 133 Wn.2d at 597 (quoting Browning v. Johnson, 70 Wn.2d 145, 147, 422 P.2d 591 (1967)). The adequacy of consideration is a question of law and may be determined by a court on summary judgment. King County, 133 Wn.2d at 597.

The 1947 contract was supported by legally sufficient consideration. The 1947 contract provided that the predecessors of BNSF and UP would each pay one half of \$100,000 to the AEC, which equaled the cost to construct 5.4 miles of rail tracks between Hanford and the north bank of the Yakima River. In return, BNSF and UP would be entitled to use those tracks free of rental or any other charge. Similarly, the

indenture was supported by legally sufficient consideration. The Port received nearly 768 acres of land, worth \$5.1 million dollars in 1998, in exchange for assuming the obligations of the federal government in the 1947 contract.

Summary judgment and dismissal of Peterson's claims under article VIII, section 7, was appropriate.

### III.

Peterson next contends that the indenture violates the anti-favoritism provision of the privileges and immunities clause of the Washington Constitution. Because Peterson fails to identify any law that grants an unconstitutional privilege or immunity, and does not allege that this dispute implicates a fundamental right of state citizenship, we disagree.

Article I, section 12 of the Washington Constitution provides, "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." We analyze claims brought under article I, section 12 using a two-step analysis. Ockletree v. Franciscan Health Sys., 179 Wn.2d 769, 776, 317 P.3d 1009 (2014). First, we determine if the law in question involves a privilege or immunity, and second, if so, whether the legislature had a "reasonable ground" for granting the privilege or immunity. Ockletree, 179 Wn.2d at 776.

#### A.

As a threshold matter, the plain language of article I, section 12 applies to the passing of a "law." Peterson's claim is based on the 1947 contract and the indenture. Both are contracts, not laws and thus, on its face article I, section 12 is not applicable.

Peterson argues, however, that the Port's resolution allowing it to enter the indenture has the force of law.

RCW 53.12.245 indicates that “[a]ll proceedings of the port commission shall be by motion or resolution recorded in a book or books kept for such purpose, which shall be public records.” However, RCW 53.08.070 provides that “a port district may enter into any contract for warfage, dockage, warehousing, or port or terminal charges, with the United States or any government agency thereof . . . under such terms as the commission may, in its discretion, negotiate.” While the Port adopted a resolution to enter the indenture with the DOE, RCW 53.08.070 authorizes the Port to negotiate the contract, in its discretion. Thus—while resolutions may have the force of law when operating as a general law—here, the resolution allowed the Port to enter a private contract with DOE, which cannot be challenged as a “law” under article I, section 12. Peterson does not cite any authority where an appellant successfully challenged a government contract as violating the privileges and immunities clause.

B.

Moreover, even if the resolution approving the indenture can be characterized as a law, and therefore subject to article I, section 12 analysis, Peterson's argument fails because he has failed to identify a fundamental right at issue.

“The privileges and immunities clause is concerned both with avoiding favoritism and preventing discrimination.” Am. Legion Post #149 v. Wash. State Dep't. of Health, 164 Wn.2d 570, 606, 192 P.3d 306 (2008). But, “[a] privilege is not necessarily created every time a statute allows a particular group to do or obtain something.” Am. Legion Post #149, 164 Wn.2d at 606-07 (citation omitted). “Privileges and immunities ‘pertain

alone to those fundamental rights which belong to the citizens of this state by reason of such citizenship.” Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004) (quoting State v. Vance, 29 Wn. 435, 458, 70 P. 34 (1902) (emphasis added).

Peterson argues that the “government’s obligation to be properly compensated for use of public property” is the fundamental right at issue. He cites Grant County and Ockletree in support. Peterson asserts that Grant County stands for the proposition that “the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from” is a fundamental right. Grant County, 150 Wn.2d at 813. But Peterson does not argue that BNSF’s treatment is a result of its citizenship in another state. Similarly, Peterson cites Ockletree for the proposition that an exemption in Washington’s Law Against Discrimination for religious groups implicated a fundamental right. But Peterson fails to explain how Ockletree is analogous or relevant to this dispute.

Peterson failed to identify a law and a fundamental right belonging to the citizens of this state to which the privilege and immunities and clause applies. Summary judgment and dismissal of his claim under article I, section 12 of the Washington Constitution was appropriate.

No. 79090-1-I/14

We affirm.

*Mann, A.C.J.*

WE CONCUR:

*Smith, J.*

*Appelwick, C.J.*

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Petitioners' Supplemental Brief* in Supreme Court Cause No. 97410-1 to the following counsel of record:

Paul J. Lawrence  
Gregory J. Wong  
Alanna E. Peterson  
Pacifica Law Group LLP  
1191 Second Avenue, Suite 2000  
Seattle, WA 98101-3404

Rob J. Crichton  
Eric R. Laliberte  
Keller Rohrback L.L.P.  
1201 3rd Ave. #3200  
Seattle, WA 98101-3052

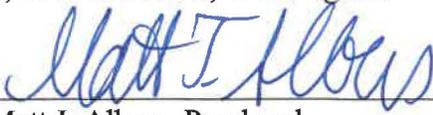
Tim Wackerbarth  
Andrew Yates  
Lane Powell PC  
1420 Fifth Avenue, Suite 4200  
Seattle, WA 98111

Thomas A. Cowan  
Gravis Law PLLC  
503 Knight Street, Suite A  
Richland, WA 99352-4257

Original e-filed with:  
Washington Supreme Court  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 13, 2019 at Seattle, Washington.

  
\_\_\_\_\_  
Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick

**TALMADGE/FITZPATRICK**

**December 13, 2019 - 3:37 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97410-1  
**Appellate Court Case Title:** Randolph Peterson et al. v. Port of Benton, et al.  
**Superior Court Case Number:** 16-2-03211-4

**The following documents have been uploaded:**

- 974101\_Briefs\_20191213144050SC200303\_7454.pdf  
This File Contains:  
Briefs - Petitioners Supplemental  
*The Original File Name was Petitioners Suppl Brief.pdf*
- 974101\_Motion\_20191213144050SC200303\_2126.pdf  
This File Contains:  
Motion 1 - Overlength Brief  
*The Original File Name was Mot for Overlength Petitioners Suppl Brief.pdf*

**A copy of the uploaded files will be sent to:**

- Dawn.taylor@pacificlawgroup.com
- WCS@KSBlit.legal
- YatesA@LanePowell.com
- alanna.peterson@pacificlawgroup.com
- aschroeder@Ksblit.legal
- elaliberte@kellerrohrback.com
- greg.wong@pacificlawgroup.com
- matt@tal-fitzlaw.com
- paul.lawrence@pacificlawgroup.com
- rrichton@kellerrohrback.com
- sarah@tal-fitzlaw.com
- tom@gravislaw.com
- tricia.okonek@pacificlawgroup.com
- wackerbarth@lanepowell.com
- william.schroeder@ksblit.legal

**Comments:**

Motion for Leave to File Over-Length Supplemental Brief of Petitioners; Supplemental Brief of Petitioners

---

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20191213144050SC200303**